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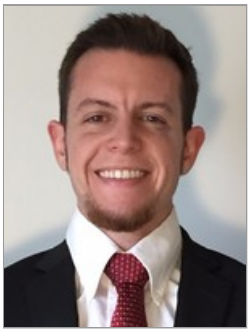
Why 2nd Circ. Review Of Sexual Orientation Claim Matters

By **Raymond Wendell and Katharine Fisher**



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Law360, New York (July 19, 2017, 12:27 PM EDT) -- Recently, in Zarda v. Altitude Express, the Second Circuit decided to reconsider en banc its position that Title VII does not prohibit sexual orientation discrimination. In light of the prevailing wisdom that the U.S. Supreme Court will settle this question in the near future, it may be tempting to view Zarda and its outcome as having little long-term consequence. But the history of this legal question and the interests at stake caution against underestimating Zarda's importance.

Gay skydiving instructor Donald Zarda was fired by Altitude Express shortly after he disclosed his sexuality to a customer who then lodged complaints about his behavior. He filed suit in 2010, alleging the company had violated New York's prohibition on sexual orientation discrimination and Title VII's protection against discrimination "because of ... sex."

In light of the Second Circuit's holding in Simonton v. Runyon,[1] reaffirmed in Dawson v. Bumble & Bumble,[2] that "Title VII does not proscribe discrimination because of sexual orientation," Zarda framed his Title VII claim to be consistent with the Supreme Court's 1989 Price Waterhouse holding that discrimination "because of ... sex" includes sex stereotyping.[3] He alleged he was fired for failing to conform to male stereotypes, including by wearing a pink shirt and having pink toenails. The district court permitted his state law claims to go to trial but granted summary judgment against Zarda on his Title VII claims, ruling that Zarda had failed to establish the requisite proximity between the sex-stereotyping incidents and his termination.

The jury found for Altitude Express on the state law sexual orientation discrimination claims, and Zarda appealed, asking the Second Circuit to reconsider its rule that sexual orientation discrimination is not actionable under Title VII. Zarda's appeal was not mooted by the jury verdict because he had been subjected to a higher standard of causation at trial than he would have been had his federal law claims survived: New York law requires but-for causation rather than Title VII's less stringent motivating-factor test.[4]

The Zarda panel declined to overturn Simonton and Dawson because only the full court sitting en banc could do so. And in his concurrence in a similar case decided earlier this year,[5] Chief Judge Robert Katzmann had already urged en banc review of this question. The concurrence outlines the three major arguments in support of Title VII encompassing sexual orientation discrimination, which will be central to whether the Second Circuit decides to overturn its precedent.

First, proponents argue that sexual orientation discrimination "is sex discrimination for the central reason that such discrimination treats otherwise similarly-situated people differently because of their sex."[6] Under the Supreme Court's "simple test" for proving sex discrimination, which asks whether the employee's treatment would have been different but for their sex, a man experiences sex discrimination if he is subject to adverse treatment because he is attracted to men, but a similarly situated female employee — who is the same in every detail, including her attraction to men, except for her sex — is not. In this way, "sexual orientation discrimination requires the employer to take the

employee's sex into account (in conjunction with the sex of that employee's actual or desired partner)"[7] which is impermissible under Title VII.

Second, sexual orientation discrimination treats people differently based on the sex of their associates. Courts throughout the country, including the Second Circuit, have found associational discrimination claims to be cognizable under Title VII in the race discrimination context, which analysis applies with equal force to sex discrimination claims.[8] Under this theory, if an employee is subject to discrimination because of his or her association with someone of another race (or the same sex), then the employee suffers discrimination because of how their own race or sex relates to the race or sex of their associate.

Third, proponents contend that sexual orientation discrimination is "inherently rooted" in the sex stereotype that men should only be attracted to women and women should only be attracted to men, such that it is "logically untenable for [courts] to insist that this particular gender stereotype is outside of the gender stereotype prohibition articulated in Price Waterhouse."[9] Indeed, courts have struggled to navigate the "gossamer-thin" line between sexual orientation discrimination and gender nonconformity claims.[10]

Opponents of this view argue that by its plain language Title VII does not cover sexual orientation discrimination, which is categorically different than discrimination "because ... of sex." They contend that the fact that Congress has rejected bills that would have added sexual orientation to Title VII's enumerated protected classes indicates "strong evidence of congressional intent" that Title VII not be expanded beyond traditional notions of sex discrimination.[11]

Despite its recent spotlight, this debate is not new. Title VII has prohibited sex discrimination in employment since 1964, and for decades, litigants have argued that adverse treatment based on sexual orientation is unlawful sex discrimination. In 1979, for example, the Ninth Circuit considered the claims of a group of lesbians and gay men who argued that the sexual orientation-based discrimination they had experienced at their workplaces violated Title VII.[12] They relied on all three of the arguments discussed above, plus an additional theory that sexual orientation discrimination disproportionately harms men.[13] The Ninth Circuit summarily rejected each argument as an improper attempt to "bootstrap" sexual orientation protections into Title VII.[14]

Since then, nearly all of the other circuits have considered the theory that Title VII's bar on sex discrimination extends to sexual orientation. Until very recently, they have uniformly rejected it.[15] The tide only began to turn within the last few years, when a few district courts openly questioned these precedents.[16] In 2015, the U.S. Equal Employment Opportunity Commission announced that "[s]exual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex."[17] That same year, the Supreme Court determined in Obergefell v. Hodges[18] that same-sex couples have a constitutional right to marriage. Then, earlier this year, in Hively v. Ivy Tech,[19] the Seventh Circuit issued a landmark en banc decision agreeing with the EEOC that sexual orientation discrimination violates Title VII. However, the Eleventh Circuit later declined the opportunity to reconsider its own precedent on this issue.

The Supreme Court will likely take up this issue at some point in the future no matter the outcome in the Second Circuit. In some sense, the fact that the more-conservative Seventh Circuit originally created the circuit split by overturning its precedent may be more likely to influence the Supreme Court than the more-progressive Second Circuit later following suit. Moreover, the laws of the states in the Second Circuit already extend to discrimination based on sexual orientation and gender identity, such that the citizens of those states have some recourse whether or not the Second Circuit overturns Simonton/Dawson.[20]

Nonetheless, there are reasons to believe that the outcome of the Second Circuit's en banc review in Zarda could ultimately prove a turning point in employment discrimination law. First, the immediate aftermath will likely be felt outside the Second Circuit, especially in places without state-level protections against sexual orientation discrimination. A ruling in Zarda's favor would strengthen the federal claims of employees in those states, who would have two circuit opinions to rely on instead of one. The Second Circuit's reasoning could also be applied in other contexts, such as to challenge sexual orientation bias outside of the employment arena, or to protect transgender rights.[21] Similarly, the Supreme Court often refers to lower courts' reasoning in resolving circuit splits.

Second, neither Hively nor Obergefell, nor the probability that the Supreme Court will hear this issue in the near future, make the Second Circuit's grant of en banc review any less remarkable from a historical perspective. As logically sound as the arguments in Zarda's favor may be in 2017, they were no less so in 1979, when the Ninth Circuit rejected them out of hand. Likewise, they were no less cogent in 2000 or 2005, when the Second Circuit decided Simonton and Dawson. Yet, some of the judges who decided those two cases remain active — including Chief Judge Katzmann, who joined the opinion in Simonton but recently outlined the reasons to overturn it. Judicial changes of heart on the interpretation of a 1964 statute undoubtedly reflect shifting societal attitudes toward the LGBT community, and perhaps also evolving understandings of sex discrimination.

Finally, while it may be inevitable that the Supreme Court will soon address this issue, the timing of that consideration could make all the difference. The departure of any member of the Obergefell majority[22] is likely to make the court less receptive to LGBT rights. Thus, LGBT advocates hope that the court will address this question sooner rather than later, and a favorable Second Circuit opinion could help precipitate review by widening the current circuit split.

Thus, although Zarda may appear to be simply the latest in a procession of falling dominos, the Second Circuit's ruling and reasoning may prove pivotal to the rights of LGBT people under Title VII.

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[1] 232 F.3d 33 (2d Cir. 2000).

[2] 398 F.3d 211 (2d Cir. 2005).

[3] Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

[4] Zarda v. Altitude Express, 855 F.3d at 82.

[5] Christiansen v. Omnicom Group, 852 F.3d 195 (2d Cir. 2017).

[6] Id. at 202-203 (Katzmann, C.J., concurring); see also Brief of Amicus Curiae Equal Employment Opportunity Commission in support of Plaintiffs/Appellants and in favor of reversal ("EEOC Zarda Amicus"), Zarda v. Altitude Express, No. 15-3775, 2017 WL 2730281, at *5-9 (June 23, 2017).

[7] EEOC Zarda Amicus at *7.

[8] See e.g., Holcomb v. Iona College, 521 F.3d 130, 138 (2d Cir. 2008).

[9] Christiansen, 852 F.3d at 205-206 (Katzmann, C.J., concurring).

[10] EEOC Zarda Amicus at *20.

[11] See, e.g., Simonton, 232 F.3d at 35-36.

[12] DeSantis v. Pacific Telephone & Telegraph Co. Inc., 608 F.2d 327, 328 (9th Cir. 1979).

[13] See id. at 330-32.

[14] Id. at 330-31.

[15] See Higgins v. New Balance Athletic Shoe Inc., 194 F.3d 252, 259 (1st Cir. 1999); Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001); Wrightson v. Pizza Hut of

America, 99 F.3d 138, 143 (4th Cir. 1996); Smith v. Liberty Mutual Insurance Co., 569 F.2d 325 (5th Cir. 1978); Vickers v. Fairfield Medical Center, 453 F.3d 757, 762 (6th Cir. 2006); Hamner v. St. Vincent Hospital & Health Care Center Inc., 224 F.3d 701, 704 (7th Cir. 2000); Williamson v. A.G. Edwards & Sons Inc., 876 F.2d 69, 70 (8th Cir. 1989); Medina v. Income Support Division, 413 F.3d 1131, 1135 (10th Cir. 2005).

[16] See, e.g., Terveer v. Billington, 34 F. Supp. 3d 100, 116 (D.D.C. 2014).

[17] Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5 (July 15, 2015).

[18] 135 S. Ct. 2584, 2607 (2015).

[19] 853 F.3d 339, 349 (7th Cir. 2017).

[20] However, Zarda does show that Title VII may provide greater protection than these state laws in some instances.

[21] For example, the Seventh Circuit recently relied on its decision in Hively to uphold an injunction protecting a transgender boy's right to use boys' restrooms at his school. See Whitaker v. Kenosha Unified School District, 858 F.3d 1034, 1048 (7th Cir. 2017).

[22] U.S. Supreme Court Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan joined Justice Kennedy's majority opinion.
