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Broadening the Scope of LGBT Rights Under Title VII: A Practitioner's Guide to *Zarda v. Altitude Express*

On Feb. 26, 2018, the U.S. Court of Appeals for the Second Circuit handed down an en banc ruling in the case of *Zarda v. Altitude Express*, holding in a 10-3 decision that Title VII prohibits discrimination on the basis of sexual orientation. Addressing a case in which a sky diving instructor was allegedly terminated for being gay, the Court employed three separate theories to reach the conclusion that sexual orientation discrimination constitutes a form of sex discrimination (which, of course, is explicitly banned by Title VII):

- **The "Because of Sex" Theory**: This theory takes a literal, textualist approach to interpreting Title VII, concluding that the statute's plain language—which prohibits discrimination "because of . . . sex"—is inclusive of sexual orientation discrimination. In particular, the Second Circuit examined Title VII's language from a "comparative" posture, reasoning that if an employer would not discriminate against a female employee who dated males (*i.e.*, a heterosexual employee), but would discriminate against a male employee who dated males (*i.e.*, a homosexual employee), then such discrimination is "because of . . . sex" and is duly outlawed by Title VII.
- **The "Sex Stereotype" Theory**: This theory was first recognized in *Price Waterhouse v. Hopkins*, a 1989 case in which the Supreme Court determined that Title VII's ban on sex discrimination prohibits employers from discriminating against employees who fail to adhere to gender stereotypes (*e.g.*, a female employee who does not wear makeup or maintain a "feminine" hairstyle). Here, the Second Circuit extended the theory to apply to sexual orientation, concluding that homosexuality "represents

the ultimate case of failure to conform to gender stereotypes," as our society's dominant heterosexual norms dictate that men are supposed to date women and women are supposed to date men.

- **The "Associational Discrimination" Theory**: This established theory—which was initially applied by the Supreme Court in *Loving v. Virginia* to outlaw interracial marriage bans—holds that Title VII prohibits discrimination that an employee suffers as a result of his/her association with another. The Second Circuit used the example of same-sex marriage to illustrate the application of this theory to sexual orientation discrimination, writing, "If a male employee married to a man is terminated because his employer disapproves of same-sex marriage, the employee has suffered associational discrimination based on his own sex," because "the fact that the employee is a man instead of a woman motivated the employer's discrimination against him."

In its reasoning, the Second Circuit closely tracked the rationale employed by the Seventh Circuit in *Hively v. Ivy Tech Community College*—the ground-breaking, April 2017 opinion in which the Seventh Circuit became the first federal appellate court to hold that Title VII prohibits sexual orientation discrimination—and the EEOC in *Baldwin v. Foxx*— the 2015 administrative ruling in which the Commission first recognized the aforementioned interpretative theories in the context of sexual orientation discrimination. But, the Eleventh Circuit reached a contrary conclusion in its March 2017 opinion in *Evans v. Georgia Regional Hospital*, setting up a circuit split that may soon be ripe for consideration by the Supreme Court. It goes without saying, then, that the Second Circuit's ruling is imbued with significant cultural, political, and constitutional implications, but it also begs the question: How should practitioners view *Zarda* from a practical legal standpoint?

Growing Federal Trend

First, practitioners should understand the Second Circuit's ruling as a signal that federal appellate courts are becoming more open to ruling that sexual orientation discrimination is encompassed by Title VII's bar on sex discrimination. In addition to the decisions of the Second and Seventh Circuits, other federal appellate rulings—such as the First Circuit's January 2018 decision in *Franchina v. City of Providence*—suggest that sexual orientation discrimination and sex discrimination are closely related, even if these opinions do not go so far as to explicitly equate sexual orientation discrimination with sex discrimination under Title VII. Moreover, additional federal appellate courts are in the process of taking up this issue or commenting on it, such as the Eighth Circuit in *Horton v. Midwest Geriatric Management*. As such, practitioners should be cognizant of the impact these decisions may have on their clients' litigation efforts, as well as their clients' internal policies and practices.

Substantial Web of State, Local, and Private Protection

Second, practitioners should view *Zarda* and other similar cases as complimentary to the substantial web of protections against sexual orientation and gender identity discrimination that presently exists in the state, local, and private context. Indeed, at the state level:

- 22 states (as well as the District of Columbia) include sexual orientation as a protected category in their employment non-discrimination statutes for private-sector employees; and
- 20 states (and the District of Columbia) include gender identity as a protected category in their employment non-discrimination statutes for private-sector employees.

Likewise, at the local level:

- The employment non-discrimination statutes of more than 200 municipalities include protections for sexual orientation, gender identity, or a combination of both.

Moreover, as demonstrated in a statistical analysis recently compiled by the Human Rights Campaign, many leading companies maintain non-discrimination policies that encompass sexual orientation and gender identity, with:

- 89% of Fortune 500 companies including sexual orientation as a protected class in their non-discrimination policies; and
- 66% of Fortune 500 companies including gender identity as a protected class in their non-discrimination policies.

In short, while *Zarda* and similar federal cases have garnered significant attention over the past year—which makes sense given the prominent role that federal law plays in policing employment discrimination—practitioners cannot ignore applicable state/local laws or internal company policies when called on by a client to litigate or provide counsel about an issue that touches upon sexual orientation and/or gender identity discrimination.

Roadmap for Practitioners

Finally, practitioners should regard the Second Circuit's decision as a roadmap, which not only provides notice that their clients may potentially face liability for sexual orientation discrimination that occurs in the employment setting, but also delivers valuable messaging tools to utilize when taking prophylactic steps to eradicate sexual orientation and gender identity discrimination from their clients' workplaces. To those ends, practitioners can take the following steps to protect their client's interests:

- Consider Amending Non-Discrimination Policies to Cover Not Only Sexual Orientation, But Also Expressed and Perceived Gender Identity—As highlighted in the statistics above, employers are less likely to include gender identity as a protected class in their non-discrimination policies than sexual orientation; however, by explaining the Second Circuit's "sex stereotype" theory in the context of gender identity, practitioners can caution their clients that gender identity discrimination may be viewed as a form of sex discrimination, such that it is worthy of protection under their non-discrimination policies.
- Consider Implementing Inclusive Respectful Workforce Training—Often times, HR training only goes as far as an employer's anti-discrimination policy, focusing solely on an explanation of what the policy means and how it should be applied. Such training is certainly valuable, but it may fail to fully address underlying discriminatory sentiments that can create workplace conflict. Instead, practitioners should encourage their clients to invest in inclusive respectful workforce training and to consider including in such training the rationale of the Second Circuit's decision in *Zarda*. It h analogized sexual orientation and gender identity discrimination to more readily recognized forms of discrimination (*e.g.*, race and sex) and concluded that sexual orientation and gender identity discrimination are similarly inappropriate.
- Consider Encouraging A Management Style That Is Sensitive To Sexual Orientation and/or Gender Identity—The notion that employees should not be fired because of their sexual orientation or gender identity is ingrained in the mind of the modern manager. However, more subtle forms of such discrimination persist— for example in a performance review that urges an effeminate gay man to be more aggressive in his job or a sex-based dress code policy that does not account for the sartorial sensibilities of a lesbian woman—which practitioners may wish to address through respectful workforce training and policy review.

- Consider Directing Litigation In A Manner That Is Mindful Of Internal Company Policies and External Public Relations Considerations—Even in those jurisdictions where there are no prohibitions on sexual orientation or gender identity discrimination, practitioners should consider whether they are taking a legal position that is based on this gap in discrimination law, which may conflict with their clients' internal non-discrimination policies, as well as engender negative publicity and risk reputational damage.

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