

Two US Federal Agencies Disagree as to Whether Title VII as a Matter of Law, Reaches Sexual Orientation Discrimination

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This past May, 2017, The US Court of Appeals for the Second Circuit granted en banc (meaning all the judges on the Second Circuit will hear the case instead of a three-judge panel) a review in *Zarda v. Altitude Express*, the case of a New York skydiving instructor who was fired from his job because he was gay. The full court will hear the employment discrimination appeal on behalf of Donald Zarda's estate. The Equal Employment Opportunity Commission last month told the court in an amicus brief (filed at the Second Circuit's invitation) that sexual orientation discrimination is inextricably linked to gender, involves gender-based discrimination regarding whom a person associates with, and is linked to gender stereotypes and non-conformity. "That would put such bias directly in the crosshairs of the Civil Rights Act's Title VII", the EEOC had argued. The Justice Department then filed an amicus brief on July 26th, 2017 (without an invitation from the Second Circuit), saying that Title VII of the Civil Rights Act of 1964 does not cover employment "discrimination based on sexual orientation". The department's move to insert itself into a federal case court case is unusual as this is essentially a private dispute between a worker and his boss over gay rights issues.

However, at stake in the case is whether Title VII protects gay and lesbian people from discrimination for their sexual orientation as a form of sex discrimination. In September 2010, Zarda, a skydiver, filed a lawsuit in the Eastern District of New York against his former employer, Altitude Express, Inc., alleging the company violated Title VII of the Civil Rights Act by discriminating against him because of his sexual orientation. Before taking a female client on a tandem dive, Mr. Zarda told the woman he was gay to mitigate any awkwardness she might feel from being tightly strapped to him during the jump. The woman's husband complained afterwards, and the company fired Mr. Zarda. The district court ruled against Mr. Zarda. Tragically, in October 2014, Mr. Zarda died before his trial in a base jumping accident in Switzerland.

The EEOC had argued in its brief, citing the Seventh Circuit's ruling in *Hively v. Ivy Tech Community College*, that Title VII does prohibit sexual orientation discrimination. The *Hively* ruling made the Seventh Circuit the highest federal court to reach the conclusion that workplace discrimination based on sexual orientation is a violation of the sex discrimination protections of Title VII. The DOJ argued that firing a man because he is gay isn't the same as firing him because he is a man, as Title VII bans. Nor, is it the same as firing him because he fails to conform to his gender's stereotype, as the

US Supreme Court has held.

Federal appeals courts have issued contradictory rulings on this matter, so it's likely this battle may end up at the U.S. Supreme Court as several sexual orientation discrimination claims are currently working their way through appeals courts. Notably, the Eleventh Circuit in mid-March issued a decision counter to the Seventh Circuit's groundbreaking decision in *Hively* affirming dismissal of a lesbian hospital security guard's claim she was fired because of her sexual orientation while letting her re-plead a gender nonconformity claim. The Court held Title VII does not prohibit sexual orientation discrimination in the workplace (see *Evans v. Georgia Regional Hospital*). Evans alleged she was denied equal pay, harassed, physically assaulted, targeted for termination and retaliated against because she did not behave in a "traditional womanly manner".

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