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Major Companies Call for Second Circuit to Declare Discrimination Based on Sexual Orientation Unlawful Under Title VII

BY TIMOTHY P. VAN DYCK • JULY 24, 2017

On May 25, 2017, the Second Circuit Court of Appeals agreed to rehear the case of *Zarda v. Altitude Express Inc.* to determine whether Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sexual orientation. Briefing is scheduled to conclude on August 9, 2017, and oral argument is scheduled to occur on September 26, 2017. Notable among the briefs filed is one endorsed by fifty employers and organizations, including Microsoft, Google, CBS, and Viacom. Those employers assert in their brief that declaring discrimination on the basis of sexual orientation unlawful will benefit the "bottom line" of companies, stating that the "U.S. economy could save as much as $8.9 billion by protecting and welcoming LGBT employees in the workplace."

The relevant facts of the Zarda case are straightforward: the plaintiff, Donald Zarda, alleged that he was fired from his job as a skydiving instructor because of his sexual orientation. The issue in the case turns on an interpretation of the language in Title VII. Title VII provides, among other things, that employers may not discriminate against employees or applicants for employment on the basis of "sex." Zarda argues that to discriminate on the basis of sexual orientation is to discriminate on the basis of sex within the meaning of Title VII.

Should the Second Circuit declare discrimination based on sexual orientation unlawful under Title VII, it will not be the first federal court of appeals to do so. In April 2017, the Seventh Circuit declared discrimination based on sexual orientation unlawful in the landmark case of *Hively v. Ivy Tech Community College*. Additionally, since 2015, the United States Equal Employment Opportunity Commission (EEOC) has maintained that discrimination on the basis of sexual orientation is unlawful under Title VII.

While employment discrimination on the basis of sexual orientation (and gender identity) is prohibited under Massachusetts state law, the First Circuit currently takes the position that Title VII (the federal counterpart to the Massachusetts anti-discrimination statute) does not proscribe discrimination based on sexual orientation. However, it is quite possible that the First Circuit, following the lead of the Second and Seventh Circuits, will revisit the issue. Further, the current split amongst the federal circuits may attract the attention of the Supreme Court.

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