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What's wrong with this picture: Exploring *Zarda v. Altitude Express*

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Remember that game, where the reader has to point out what is wrong with the picture? *Zarda v. Altitude Express Inc.*, 855 F.3d 76 (2d Cir. 2017), scheduled to be heard en banc in the 2nd U.S. Circuit Court of Appeals on Sept. 26, presents that kind of a puzzle.

To the undoctrinated observer, the *Zarda* case simply presents the human rights issue of whether gay individuals should be protected from workplace discrimination.

To the legal scholar, it presents the question of whether Title VII of the Civil Rights Act of 1964's gender protection provisions are properly interpreted to cover sexual orientation discrimination.

But, in reality, the posture of the case, the political context, the lack of legislative history, and other issues all have created a unique context that could well determine the result.

WHY IS THE CASE SO IMPORTANT?

By all accounts, Donald Zarda was a daredevil and an excellent skydiver. He was a pilot, a licensed tandem master and a skydiving instructor. He was also a member of an elite group of wingsuit BASE jumpers.

But in 2010, he was fired from his job as a skydiving instructor, allegedly because a woman with whom he had jumped in tandem claimed that he had groped her.

He denied engaging in any inappropriate conduct. He also filed a discrimination lawsuit against his employer, Altitude Express Inc., claiming that he was fired because of his sexual orientation and because he had told the female student, "Don't worry, I'm gay."

He explained that he routinely told female clients that he was gay to ease any concerns about the closeness they would experience when strapped together for the skydiving lesson. He claimed that a heterosexual employee who engaged in similar conduct by telling clients he was heterosexual was not fired.

The U.S. District Court for the Eastern District of New York granted summary judgment, dismissing his Title VII claim. However, there is some dispute about what legal rights he claimed at the district court level.

Altitude Express now claims that Zarda did not even contend that sexual orientation should be covered by Title VII, but instead tried to make out a claim of gender stereotyping. *Zarda v. Altitude Express Inc.*, No. 15-3775, *appellees' brief filed,* 2017 WL 3263598 (2d Cir. July 28, 2017).

Courts have recognized gender stereotyping as a form of gender discrimination under Title VII. After the District Court dismissed the Title VII claim, a jury rejected Zarda's claim of sexual orientation discrimination under the New York State Human Rights Law, N.Y. Exec. Law § 296. *Zarda v. Altitude Express Inc.*, No. 10-cv-4334, 2015 WL 8547638 (E.D.N.Y. Oct. 28, 2015).

Zarda died in a skydiving accident in October 2014, before the case went to trial. But his executors continued it, and his deposition testimony was introduced at trial.

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Now, the case has the potential to change the law and perhaps pave the way for the issue to be decided by the U.S. Supreme Court. It is supremely ironic that the person affected the most by the case will never see how it ends.

In April a panel of the 2nd Circuit denied the executors' appeal, determining as it had in the past that Title VII does not apply to sexual orientation discrimination.

The panel noted that its decision was important because gender discrimination under the federal Title VII statute might be easier to prove than sexual orientation discrimination under New York law.

For years, courts have held that Title VII does not cover sexual orientation discrimination, and the lower court relied on those cases in granting summary judgment.

The 2nd Circuit panel agreed, and further agreed with a separate panel of 2nd Circuit judges that its precedent of non-coverage can be overturned only by the whole court.

The movement to include sexual orientation in Title VII coverage received a big assist in April when the 7th Circuit boldly interpreted Title VII to cover sexual orientation discrimination. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017).

The 7th Circuit panel based its decision on a change in societal perceptions, as well as several cases holding that gender stereotyping and same-sex sexual harassment constitute gender discrimination — along with a series of cases interpreting the race-based protections of Title VII to include discrimination against interracial couples.

As a result, the 2nd Circuit agreed to rehear *Zarda* en banc, providing an opportunity to reassess and perhaps change the law in its jurisdiction.

So why continue the case — and why is it important — particularly when there are state statutes, like New York's, that specifically prohibit discrimination based on sexual orientation?

The 2nd Circuit panel gave us part of the answer in its decision in *Zarda*, when it rejected the argument that the jury verdict on the state law sexual orientation discrimination claim was relevant to the question about Title VII.

The 7th Circuit panel based its decision on a change in societal perceptions, as well as several cases holding that gender stereotyping and same-sex sexual harassment constitute gender discrimination.

It said the resolution of the question regarding Title VII's applicability to sexual orientation discrimination carries real consequences.

As pointed out in the appellate opinion, the standard of proof for determining sexual orientation discrimination under state law is often higher than it would be if such discrimination is covered under federal law.

To prove a violation under some state statutes, including New York's, the plaintiff has to show that "but for" his sexual orientation, he would not have suffered a discriminatory adverse employment action.

Under Title VII, by contrast, a plaintiff would need to show only that sexual orientation was a motivating factor driving the adverse action.

Moreover, the statutes differ in terms of remedies; punitive damages are theoretically available under federal law but not under state law.

Also, attorney fees are not available for sexual orientation discrimination under New York law but are available if sexual orientation discrimination is gender discrimination under federal law.

So the stakes are high. The impact of the *Zarda* case will extend far beyond the original plaintiff.

HOW CAN 2 ARMS OF THE GOVERNMENT BE ON DIFFERENT SIDES?

The Equal Employment Opportunity Commission is the federal agency charged with the responsibility of investigating and prosecuting private discrimination, including discrimination under Title VII.

For a number of years, the EEOC took the positon that sexual orientation is not covered under Title VII. But as society has become more sophisticated about gender identity and sexual orientation, the EEOC has changed its view.

In fact, it submitted a friend-of-the-court brief in *Zarda* supporting the position that sexual orientation discrimination is a form of gender discrimination under Title VII. *Zarda v. Altitude Express Inc.*, No. 15-3775, *amicus brief filed*, 2017 WL 2730281 (2d Cir. June 23, 2017).

With the change in federal administration this year, though, there has been a new development.

The government, through the Justice Department, also submitted a friend-of-the-court brief that took the opposite position from that proffered by the EEOC. *Zarda v. Altitude Express Inc.*, No. 15-3775, *amicus brief filed*, 2017 WL 3277292 (2d Cir. July 26, 2017).

The Justice Department not only took the position that sexual orientation is not covered by Title VII; it also pointed out that not too long ago, the EEOC had taken that position as well.

Moreover, it presented itself as the true voice of the government, pointing out that unlike the EEOC, which is involved only with private employers, the U.S. attorney general enforces Title VII against state and local government employers.

In addition, the Justice Department noted that the U.S. government is the largest employer in the United States, and if that was not enough, asserted it is the only voice authorized to speak for the United States.

This competition for legitimacy is important because sometimes in interpreting a statute, courts will look to how the agencies in charge of enforcing it have interpreted it.

Here, two government agencies have expressed diametrically opposed viewpoints, and it is no surprise that the Justice Department is attempting to flex its muscles — or at least neutralize the EEOC's current position.

It remains to be seen how helpful it will be for courts to review the various government agencies' positions over the years with respect to sexual orientation discrimination.

WHY DOES THE GOVERNMENT'S VIEW MATTER?

Society in 1964 was very different than it is in 2017, over 50 years later. In the interim, the federal government has permitted gays in the military, upheld same-sex marriages,

and ruled that statutes that prohibit consensual sodomy are unconstitutional.

The case law has also evolved, holding that same-sex sexual harassment is discrimination based on gender and that discriminating against someone because they are not as feminine as some think a woman should be is gender stereotyping that constitutes illegal gender discrimination.

But the question here is not whether Title VII or some other federal law should cover sexual orientation. Instead, the question is whether Title VII's gender discrimination prohibition should be interpreted to cover sexual orientation discrimination.

Normally, the task would be easy. One would only have to look at the legislative history to determine what was intended. And clearly there were lengthy debates over Title VII in Congress. But in this case, there is a void in the legislative history dealing with gender coverage.

This void exists because gender was added as a protected category under Title VII at the last minute on the floor of the House of Representatives.

The U.S. Supreme Court recognized this scant legislative history when it struggled to define sexual harassment in *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986).

Courts "are left with little legislative history to guide us in interpreting the act's prohibition against discrimination based on 'sex'" because the bill passed quickly as amended, the high court said.

The Justice Department pointed out in its amicus brief that Congress has continuously and unsuccessfully introduced bills to prohibit sexual orientation discrimination. In fact, it included an appendix consisting of each such bill that Congress has refused to enact since 1964.

The Justice Department takes the position that in the absence of any other legislative history, this is powerful evidence that Congress did not intend to provide protection for sexual orientation discrimination.

Of course, one could make the argument that Congress did not see the need to enact separate legislation because sexual orientation was meant to be part of the gender coverage in Title VII from the start.

It is obvious that without a line in the sand from 1964, and in view of the vast changes in societal perception toward sexual orientation, the analysis will be a difficult one. Perhaps recognizing this, the 2nd Circuit in May invited interested parties to file amicus briefs in the case.

Both sides have presented excellent cogent arguments. It is likely, though, that the courts will have to continue to grapple with these difficult issues and issue these difficult decisions, because it is unlikely that this Congress will pass federal legislation that specifically adds sexual orientation as a category protected from discrimination.

WHERE DO WE GO FROM HERE?

One cannot imagine more unique circumstances than a case in which the plaintiff died before trial but the importance of the issue has pushed the case on, the government has lined up on opposite sides of the case, and there is no legislative history to help interpret the term "gender."

None of these factors necessarily impact the legal analysis; however, they make the case more difficult to decide.

But unlike Congress, which can refuse to enact a proffered bill, courts do not necessarily have the luxury of avoiding difficult cases. To its credit, in this case, the 2nd Circuit has agreed to take on the difficult task en banc.

Regardless of how the full 2nd Circuit resolves the *Zarda* case, it is likely that the debate will continue until either Congress or the Supreme Court resolves the issue definitively.

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