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A SPECTATOR'S PRIMER ON

Altitude Express, Inc.
Petitioner
v.
Melissa Zarda and William Moore, Jr.,
Co-Independent Executors of the Estate of Donald Zarda
Respondent

INTRODUCTION

This hypothetical case is based on an actual case scheduled for argument during the United States Supreme Court's 2019 Term: *Altitude Express v. Zarda*, Docket No. 17-1623. At issue is whether Title VII of the Civil Rights Act, which bars employment discrimination based on an "individual's race, color, religion, sex, or national origin," encompasses a claim predicated on sexual orientation.

FACTUAL & PROCEDURAL BACKGROUND

A. Donald Zarda's Termination from Altitude Express

During the summer of 2010, Donald Zarda worked as an instructor for the company Skydive Long Island, operated by Altitude Express, Inc. In that capacity, he took customers on "tandem skydives," where the customer and instructor are strapped hip-to-hip and shoulder-to-shoulder. To break the ice, instructors frequently made jokes about the close physical proximity required for this jump including ones that were sexual in nature or that referenced sexual orientation. Mr. Zarda sometimes referred to his own sexual orientation – as a gay man – in order to assuage the concerns of his female clients.

In June 2010, Mr. Zarda mentioned to a customer that he was gay and had an ex-husband. After the jump, the customer alleged that Mr. Zarda touched her inappropriately and disclosed his sexual orientation to excuse his behavior. Although he denied misconduct, Mr. Zarda was fired shortly thereafter, with the company

citing a history of complaints. Altitude Express reported to the New York Department of Labor only that Mr. Zarda was discharged for sharing inappropriate information with customers about his personal life.

Mr. Zarda filed a charge with the EEOC, alleging that he had been discriminated against because of his gender, because he did not conform his appearance and behavior to sex stereotypes, and because he honestly referred to his sexual orientation.

B. Mr. Zarda's Federal Lawsuit & Trial

In September 2010, Mr. Zarda filed suit in federal court asserting that his firing by Altitude Express violated both Title VII's prohibition on discrimination because of sex and New York's state prohibition on discrimination because of sexual orientation, *see* N.Y. Exec. L. § 296.1(a).

The district court granted Altitude Express's motion for summary judgment as to the Title VII claim because Second Circuit precedent precluded claims based on sexual orientation. *See Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000) ("Because the term 'sex' in Title VII refers only to membership in a class delineated by gender, and not to sexual affiliation, Title VII does not proscribe discrimination because of sexual orientation."); *see also Dawson v. Bumble & Bumble*, 398 F.3d 211, 217–18 (2d Cir. 2005). The district court also found insufficient evidence to support Mr. Zarda's claims that Altitude Express's decision to terminate him relied on (1) the gender stereotype that a male must be guilty of harassment when alleged; and (2) the fact that Mr. Zarda did not dress or behave according to male stereotypes. However, the district court denied summary judgment with respect to the sexual orientation discrimination claim under New York state law.

Before trial began on the state-law claim, the EEOC decided *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641 (July 15, 2015), and held for the first time that "allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex." *Id.* at *10. Relying on this decision, Mr. Zarda filed a motion for reconsideration, which the district court denied.

At trial, the jury was instructed that, in order to prevail on his state-law claim, Mr. Zarda needed to prove that his sexual orientation was the but-for cause of his termination. The jury returned a verdict for Altitude Express, and Mr. Zarda appealed.

C. The Second Circuit Decisions

A three-judge panel of the Court of Appeals for the Second Circuit held that it

was "entirely possible that a jury thought that Zarda's sexual orientation was 'one of the employer's motives' (i.e. a motivating factor') in its termination decision" and, as a result, the jury's verdict did not foreclose Mr. Zarda's Title VII claim because the standard of causation under Title VII is whether sex was a "substantial" or "motivating" factor contributing to his termination. *Zarda v. Altitude Express*, 855 F.3d 76, 81–82 (2d Cir. 2017) (noting that jury could have found sexual orientation as motivating factor but not "but-for cause" of Mr. Zarda's discharge). Nevertheless, the panel acknowledged that the Second Circuit precedent of *Simonton* can only be overturned by the entire circuit court sitting *en banc*. *Id.* at 82. The panel, therefore, held that its only option was to affirm.

Thereafter, in a decision that included eight different opinions, the Second Circuit, sitting *en banc*, overturned its prior precedents and held:

> Title VII's prohibition on sex discrimination applies to any practice in which sex is a motivating factor. 42 U.S.C. § 2000e-2(m). As explained above, sexual orientation discrimination is a subset of sex discrimination because sexual orientation is defined by one's sex in relation to the sex of those to whom one is attracted, making it impossible for an employer to discriminate on the basis of sexual orientation without taking sex into account. Sexual orientation discrimination is also based on assumptions or stereotypes about how members of a particular gender should be, including to whom they should be attracted. Finally, sexual orientation discrimination is associational discrimination because an adverse employment action that is motivated by the employer's opposition to association between members of particular sexes discriminates against an employee on the basis of sex. Each of these three perspectives is sufficient to support this Court's conclusion and together they amply demonstrate that sexual orientation discrimination is a form of sex discrimination.

Zarda v. Altitude Express, Inc., 883 F.3d 100, 131–32 (2d Cir. 2018).

The lead dissent contended that the ordinary, public meaning of the term "sex" in 1964 did not and could not have contemplated sexual orientation. *Id.* at 137–48 (Lynch, J., dissenting). It asserted that Title VII only prohibits discrimination that treats men and women differently, and characterized "the majority's arguments [as] attempt[s] to . . . find ways to reconceptualize discrimination on the basis of sexual orientation as discrimination on the basis of sex." *Id.* at 156, 162. Indeed, the dissent stated that "[t]he simplistic argument that discrimination against gay men and women is sex discrimination because targeting persons sexually attracted to others of the same sex requires *noticing* the gender of the person in question is not a fair reading of the text." *Id.* at 156. Instead, the dissent explained that sexual orientation is not a gender-based stereotype particular to one of the sexes and that any opposition

to associations between members of the same sex is not rooted in sexism. *Id.* at 158–62. The rationale for the Second Circuit opinions are discussed more fully below in the arguments of the parties.

APPLICABLE LAW

A. Relevant Statute

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, provides in relevant part:

> (a) *Employer Practices*
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .
>
> (m) *Impermissible consideration of race, color, religion, sex, or national origin in employment practices*
>
> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

B. Relevant Supreme Court Title VII Cases

In *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), the Supreme Court addressed a Title VII claim brought by Ida Phillips, who was refused a job by a company that refused to hire "women with pre-school-age children," even though it employed men with similarly young children. *Id.* at 543. The company argued that this policy did not constitute discrimination on the basis of sex because 75-80% of its hires for the position were women. *Id.* The Fifth Circuit ruled that discrimination on the basis of an additional criteria (pre-school-age children) meant that it fell outside Title VII's "because of sex" protection. *Phillips v. Martin Marietta Corp.*, 411 F.2d 1, 3–4 (5th Cir. 1969). The Supreme Court disagreed, explaining that Title VII does not permit "one hiring policy for women and another for men—each having pre-school-age children." *Phillips*, 400 U.S. at 544.

In *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978), the Supreme Court concluded that a Los Angeles Department of Water and Power policy requiring female employees to make larger contributions to the pension fund because women, on average, live longer than men violated Title VII. *Id.* at 704. The Court explained that even if the stereotype at issue was undisputed, the intent of Title VII is to protect individuals from "[p]ractices that classify employees in terms of . . . sex [which] tend to preserve traditional assumptions about groups . . . ." *Id.* at 709; *see also id.* at 707 n.13 ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." (internal quotation marks omitted)).

In *General Electric v. Gilbert*, 429 U.S. 125, 135–40 (1976), the Supreme Court upheld a plan denying pregnancy benefits under Title VII because the group of "nonpregnant persons" includes members of both sexes; thus, the plan was not discriminatory "because of sex." In response, Congress passed the Pregnancy Discrimination Act, an amendment to Title VII, to overrule the *Gilbert* decision. 42 U.S.C. § 2000e(k). Then, in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983), the Supreme Court concluded that a company health insurance plan that provided its female employees with pregnancy-related benefits, but denied such benefits to the spouses of male employees, "unlawfully gives married male employees a benefit package for their dependents that is less inclusive than the dependency coverage provided to married female employees." 462 U.S. at 684. The Court held that because the pregnancy limitation discriminated against male employees, it violated Title VII.

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), addressed the fact that Ann Hopkins was told that her chances at a partnership with Price Waterhouse would increase if she was less "macho" and if she walked, talked, and dressed "more femininely." *Id.* at 235. The Court found that this constituted prohibited sex stereotyping because "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250–51. The Court asserted that "we are beyond the day where an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Id.* at 251.

And in *Oncale v. Sundowner Offshore Servs., Inc.*, the Court acknowledged that its precedent has applied Title VII to claims of hostile working conditions targeted at one sex, and that Title VII protects men as well as women. 523 U.S. 75, 78 (1998). Joseph Oncale was subjected to physical and verbal sexual harassment while on the job, including threats of rape and being called "a name suggesting homosexuality." *Id.* at 76. In concluding that this conduct was prohibited by Title VII, the Court wrote:

> We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.

Id. at 80. The Court went on to state that the "critical issue" for Title VII "is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Id.* It concluded that "sex discrimination consisting of same-sex sexual harassment is actionable under Title VII." *Id.* at 82.

C. Relevant Decisions of Other Circuit Courts of Appeal

Prior to 2015, the circuit courts were in consensus that "Title VII does not prohibit harassment or discrimination because of sexual orientation." *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000). However, the EEOC's decision in *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641 (July 15, 2015), led to a circuit split on this issue. In *Baldwin*, the EEOC provided three reasons for its decision that claims of sexual orientation discrimination are complaints of sex discrimination under Title VII:

> We apply the words of the statute Congress has charged us with enforcing. We therefore conclude that Complainant's allegations of discrimination on the basis of sexual orientation state a claim of discrimination on the basis of sex. We further conclude that allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex. An employee could show that the sexual orientation discrimination he or she experienced was sex discrimination because it involved treatment that would not have occurred but for the individual's sex; because it was based on the sex of the person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm, or expectation that individuals should be attracted only to those of the opposite sex.

Id. at *10.

The Seventh Circuit was the first to follow the EEOC's ruling after en banc review. *Hively v. Ivy Tech Cmty. College of Indiana*, 853 F.3d 339 (7th Cir. 2017). Relying on canons of statutory interpretation, a majority of the *Hively* Court found that its duty was "to consider what the correct rule of law is now in light of the

Supreme Court's authoritative interpretations, not what someone thought it meant one, ten, or twenty years ago." *Id.* at 350. As a result, it held that an allegation of employment discrimination on the basis of sexual orientation is a case of sex discrimination under Title VII. *Id.* at 351–52.

Three judges dissented, arguing that statutory interpretation does not allow the court to amend the statute and circumvent the legislative process. *Id.* at 360 (Sykes, J., dissenting). Because the dissent contended that the ordinary meaning of sex is not synonymous with sexual orientation, it reasoned that, regardless of any comparative analysis, Title VII was not drafted to prohibit the motivation behind sexual orientation discrimination:

> Sexism (misandry and misogyny) and homophobia are separate kinds of prejudice that classify people in distinct ways based on different immutable characteristics. Simply put, sexual-orientation discrimination doesn't classify people by sex; it doesn't draw male/female distinctions but instead targets homosexual men and women for harsher treatment than heterosexual men and women.

Id. at 365.

The Eleventh Circuit, on the other hand, denied en banc review of the issue in *Bostock v. Clayton Cty. Bd. of Comm'rs*, 894 F.3d 1335 (11th Cir. 2018), the case consolidated with *Zarda* at the Supreme Court. As a result, the circuit is still governed by its prior precedent, *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979), which states that "[d]ischarge for homosexuality is not prohibited by Title VII." *Bostock*, 894 F.3d at 1337 (Rosenbaum, J., dissenting from denial of en banc review).