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DOJ brief opposing Title VII protection for gay workers is significant, attorneys say

By Tricia Gorman

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The U.S. Justice Department's recent friend-of-the-court brief opposing Title VII coverage of sexual orientation discrimination claims could mark a significant change in the government's stance on the issue, influence the U.S. Supreme Court and hamper employees' litigation options, employment attorneys say.

In the brief submitted July 26 to the 2nd U.S. Circuit Court of Appeals in a private lawsuit, the DOJ seemingly addressed every argument in favor of coverage for LGBT employees under the federal anti-discrimination law, according to attorneys who offered their perspectives on the move. *Zarda v. Altitude Express Inc.*, No. 15-3775, *amicus brief filed*, 2017 WL 3277292 (2d Cir. July 26, 2017).

The Justice Department's amicus brief even counters the position taken by another governmental agency in the same lawsuit, the Equal Employment Opportunity Commission, the attorneys noted.

SKYDIVING INSTRUCTOR'S BIAS SUIT

The Justice Department submitted the brief in support of Altitude Express Inc. in a suit filed against it by a terminated employee. Donald Zarda, a skydiving instructor for Altitude, said he was fired after telling a customer he was gay and she complained. Zarda has since died, and his estate is continuing the case.

In April a three-judge appellate panel affirmed a lower court's dismissal of Zarda's claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e, ruling that discrimination against a gay worker is not a form of sex bias barred by the law. *Zarda v. Altitude Express Inc.*, 855 F.3d 76 (2d Cir. 2017).

The 2nd Circuit granted en banc review of the case in May and invited the EEOC to weigh in as a friend of the court.

In its own brief in June, the commission urged the full appeals court to overturn its precedent in *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), which was the basis for the panel's decision against Zarda. *Zarda v. Altitude Express Inc.*, No. 15-3775, *amicus brief filed*, 2017 WL 2730281 (2d Cir. June 23, 2017).

In *Simonton,* the 2nd Circuit held that discriminating against a gay worker is not discrimination "because of sex," as required for protection under Title VII.

DOJ STANCE

The Justice Department in its brief told the appeals court that Congress did not intend Title VII's ban on sex discrimination to apply to gay workers.

Congress has amended Title VII a few times but has never enacted any of the bills proposed in every Congress since 1974 that attempted to expand Title VII to cover discrimination based on sexual orientation, the department said. The DOJ's amicus brief included an extensive list of the proposals as an addendum.

The department also said the appeals court owes no deference to the EEOC, which enforces Title VII against private employers and has come out in favor of protection for gay workers.

Employment attorneys from a number of firms offered their thoughts on the significance of the Justice Department's position and how it could affect the future of Title VII litigation.

A MORE LEGITIMATE VOICE?

Abrams Fensterman partner **Sharon Stiller** was struck by the Justice Department's posturing over the EEOC's position.

"The department immediately attempted in its brief to establish itself as the government's more legitimate voice over the EEOC," Stiller said in a phone interview.

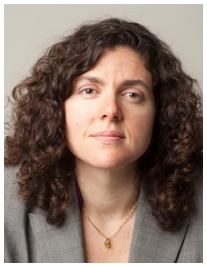
Stiller, who serves as the firm's director of employment law practices in Rochester, New York, remarked that the brief was extensive in its attempt to refute a wide range of Title VII arguments. The department's use of the addendum of failed legislative proposals visually supports its position that changes to the law are in Congress' hands, she said.

Another key point the DOJ made in its brief, according to Stiller, was its note that sex discrimination was a last-minute addition to Title VII when it passed in 1964, which results in a scant legislative history to point to when considering legislative intent.

The issue of sexual orientation discrimination is likely headed to the U.S. Supreme Court, Stiller said.

A circuit split exists on the question of whether Title VII coverage applies to gay workers. Ten circuits have said no, while in April the 7th Circuit ruled en banc that anti-gay bias is a form of gender discrimination in *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017).

SHIFTING POSITION



Shannon Farmer, a partner with **Ballard Spahr LLP** in Philadelphia who represents both public and private employers, noted the unusual step the Justice Department took in submitting its brief to the appeals court.

"The real significance of the filing is the fact that the DOJ went out of its way to file an amicus brief in a case where it had no need to weigh in, to take a position opposite of that taken by the EEOC in this and other cases," Farmer said in a statement.

The Trump administration's apparent change from the government's previous position under President Barack Obama also suggests the EEOC's position will shift or be overridden by the DOJ, according to Farmer.

She said the change could significantly affect litigation the EEOC has filed on behalf of gay employees if the Justice Department opposes the commission's position in those cases or forces the EEOC to withdraw.

"The DOJ's change of position could impact both the Supreme Court's willingness to weigh in on the issue and the Supreme Court's ultimate view of the cases, assuming it takes up the issue," Farmer said.

She noted that LGBT workers can still bring cases under Title VII if they can show they were discriminated against because they did not fit traditional gender stereotypes. The high court has consistently ruled that Title VII bars gender stereotyping of anyone, not only LGBTQ individuals, she said.

EMPLOYERS ON WATCH

Littler Mendelson PC associate **Emily Haigh** and shareholder **Kevin Kraham** discuss the Justice Department's "surprise" brief and position change, and the potential effect on employers in a July 31 blog post on the firm's website.

"The question many employers are asking now is whether or not the DOJ's position should affect how they operate their businesses and/or their litigation strategy when faced with employee complaints of sexual orientation discrimination," the attorneys said.

Haigh and Kraham noted the department's interest as a nonparty in *Zarda*, as explained in the amicus brief, stems from the government's position as the "nation's largest employer," subject to Title VII itself.

Employers must watch to see if the EEOC "falls in line" with the Justice Department's new position in direct opposition to the commission's current stance, the article said.

If Title VII is ultimately determined to not protect workers against discrimination based on sexual orientation, employers will still be liable under the many state and local anti-discrimination laws throughout the country that protect LGBT workers, the attorneys warned.

"Although it is important to keep an eye on changing policies in the EEOC and DOJ, it is equally important to know the laws of your jurisdiction," Haigh and Kraham said. "Almost half of all states and many counties and municipalities prohibit discrimination on the basis of sexual orientation."

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