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Expert Analysis

High Court Affirms 2nd Circ. in Holding Title VII Prohibits Sexual Discrimination

By **Martin Flumenbaum** And **Brad S. Karp**

In *Zarda* v. *Altitude Express,* 883 F.3d 100, 109 (2d Cir. 2018), the U.S. Court of Appeals for the Second Circuit, sitting en banc, held that Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees on the basis of their sexual orientation. The U.S. Supreme Court took up this appeal, as well as two related appeals from the Sixth and Eleventh circuits, in *Bostock* v. *Clayton County*, and recently affirmed the Second Circuit's decision, holding that Title VII protects employees from discrimination based on sexual orientation and transgender status. Both the majority decision in *Bostock*, authored by Justice Neil Gorsuch, and the majority en banc decision in *Altitude Express*, authored by Chief Circuit Judge Robert Katzmann, focused on the broad statutory text of Title VII, which makes it unlawful for an employer to "refuse to hire or to discharge" or "otherwise to discriminate against" any individual "because of" that individual's "sex." These landmark decisions mark a significant shift in employment law, making clear that Title VII provides federal protection to gay and transgender employees.

Title VII

Title VII makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Title VII's coverage extends to all private employers that have at least fifteen employees on each working day in at least twenty weeks in the current or preceding calendar year; and are engaged in an industry affecting interstate commerce. An employer has engaged in "impermissible consideration of ... sex ... in employment practices" when "sex ... was a motivating factor for any employment practice," irrespective of whether the employer was also motivated by "other factors."

'Altitude Express'

The plaintiff Donald Zarda was terminated from his employment as a skydiving instructor with Altitude Express after he mentioned to a client that he was gay. Zarda sued his former employer, alleging gender-based discrimination in violation of Title VII, in addition to state law claims.

The district court granted summary judgment to the employer on Zarda's Title VII claim, relying on then-binding Second Circuit precedent that discrimination on the basis of sexual orientation is not cognizable under Title VII. A panel of the Second Circuit affirmed, noting that the Circuit's precedent could only be overturned by the entire court sitting en banc.

The Second Circuit then granted rehearing en banc, and, in a divided 10-3 opinion, reversed its prior precedent and held that sexual orientation discrimination is "motivated, at least in part, by sex and is thus a subset of sex discrimination." See *Zarda* v. *Altitude Express*, 883 F.3d 100, 112 (2d Cir. 2018) (en banc).

The court first focused on the operation of "because of" sex in Title VII: if sex is "a motivating factor"

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in discrimination based on sexual orientation, then sexual orientation discrimination constitutes sex discrimination in violation of Title VII. The court then reasoned that to identify an employee's sexual orientation, an employer must know both the sex of the employee and the sex of the people to whom that employee is attracted. Sexual orientation, the court reasoned, is "doubly delineated by sex because it is a function of both a person's sex and the sex of those to whom he or she is attracted." The court then concluded "because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected."

The court further supported this conclusion with the broad nature of but-for causation adopted by Title VII, in which an employer is liable under Title VII if it would have treated the employee at issue differently but for his sex. The court reasoned, "a woman who is subject to an adverse employment action because she is attracted to women would have been treated differently if she had been a man who was attracted to women," and vice versa. This too demonstrated that sexual orientation is a function of sex.

Expanding beyond this textual reasoning, the court noted that sexual orientation discrimination is "almost invariably rooted in stereotypes about men and women," for example, that "'real' men should date women, and not other men."

The court then addressed and rejected the employer's counterarguments. First, the court rejected the argument that Title VII liability could turn on whether an employee and employer might more naturally say that the employee was fired because of his sexual orientation, instead of his sex. The court responded that "Title VII instructs courts to examine employers' motives, not merely their choice of words" and an employer cannot "rebut a discrimination claim by merely characterizing their action using alternative terminology." Therefore, "the employer's failure to reference gender directly does not change the fact that a 'gay' employee is simply a man who is attracted to men."

Second, the court concluded that the Title VII liability does not turn on whether Congress anticipated this particular application of Title VII. Congress chose to word Title VII broadly such that it could capture forms of discrimination that it could not anticipate, and "it falls to courts to give effect to the broad language that Congress used." The Supreme Court had previously done so, interpreting Title VII to prohibit, for example, sexual harassment and hostile work environment claims.

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Finally, the court reasoned that legislative history and "the zeitgeist of the 1960s" concerning sexual orientation discrimination have no role in limiting the broad language of a clearly worded statute. Supreme Court precedent interpreting Title VII "instructs that the text is the lodestar of statutory interpretation." Here, the court concluded, that text banned sexual orientation discrimination, as a subset of sex discrimination.

'Bostock'

The Supreme Court largely agreed with the Second Circuit en banc majority. Justice Neil Gorsuch, writing for a 6-3 majority, similarly focused on the statute's text, particularly the broad nature of but-for causation under Title VII; rejected any role of legislative history in limiting clear statutory text; and concluded that "an employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex," as "sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids." See *Bostock* v. *Clayton County,* No. 17-1618, Slip Op. at 2 (U.S. Jun. 15, 2020).

The court focused on the "the ordinary public meaning of [Title VII's] terms at the time of its enactment." It first accepted, for argument's sake, the employers' contention that, at the time of Title VII's enactment, "sex" referred to "biological" sex, rather than "norms concerning gender identity and sexual orientation." Nevertheless, the court concluded, the clear language of the statute prohibits discrimination on the basis of sexual orientation or transgender status.

First, given the broad nature of but-for causation adopted by the statute, a plaintiff need only demonstrate that "a particular outcome would not have happened 'but for' the purported cause." Next, the court defined the term "discriminate" in the statute to mean, "to make a difference in treatment or favor." Finally, the court noted the statute's three references to "individuals," indicating that the discrimination prohibited by Title VII is discrimination against individuals, rather than groups. These references, the court reasoned, indicated that Title VII allows any individual to sue an employer who has treated them differently "because of" their sex, regardless of whether the employer similarly discriminates against

other employees. "Taken together," the court interpreted these terms to mean that "an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII."

Applying this standard to the question presented, the court concluded that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." The court pointed to the example of two employees, one male and one female, both of whom are attracted to men: "If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague." Likewise, an employer who fires an employee who was born biologically male but identifies as female—but does not fire employees who were born biologically female and identify as female—discriminates against the transgender employee "because of" their sex. Thus, "homosexuality and transgender status are inextricably bound up with sex," "not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex."

Gorsuch, like the en banc Second Circuit, rejected the employers' argument that they were immune from liability under Title VII because the conduct at issue was better understood as sexual preference or identity discrimination, and not discrimination based on sex. Such "reframing" could not "insulate the employers from liability" because the employee's sex "plays an unmistakable and impermissible role" in the employer's decision, whether or not "other factors besides the plaintiff 's sex contributed to the decision" to terminate the employee. The court noted that this holding was consistent with its prior precedent, which held that Title VII prohibits employers from taking adverse actions against employees motivated in part by sex, even on the basis of purportedly neutral criteria, (citing *Phillips* v. *Martin Marietta*, 400 U.S. 542 (1971) (per curiam), *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), and *Oncale* v. *Sundowner Offshore Services,* 523 U.S. 75 (1998)).

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Gorsuch, like the *Altitude Express* opinion, reasoned that "the limits of the drafters' imagination supply no reason to ignore" the clear language of the statute: "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."

Finally, the employers argued that expanding Title VII liability could yield unintended policy consequences, such as the elimination of single-sex bathrooms or locker rooms. The court rejected these "naked policy appeals" and responded that "none of these contentions about what the employers think the law was meant to do, or should do, allow us to ignore the law as it is." In response to employers' argument that prohibiting discrimination on the basis of sexual orientation or transgender status could "require some employers to violate their religious convictions," the court emphasized that while it is "deeply concerned with preserving the promise of the free exercise of religion," Title VII contains exemptions for religious organizations, and both the First Amendment and the Religious Freedom Restoration Act, 42 U. S. C. Section 2000bb *et seq.*, prohibit Congress from unduly burdening an individual's exercise of religion. The interaction between its holding and claims of religious freedom presented questions that were not yet properly before the Court.

Conclusion

The *Altitude Express* and *Bostock* decisions affirm that Title VII provides federal protection to gay and transgender employees. The Second Circuit, in departing from its general reluctance to take cases en banc, published an opinion that may have had significant impact on a landmark Supreme Court opinion.

Though these rulings have significant implications for employers, they also leave undecided exactly how religious exemptions to this protection may apply and whether forms of sexual orientation and identity discrimination other than employment termination are actionable under other federal statutes.