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LET'S TALK ABOUT SEX[UAL ORIENTATION DISCRIMINATION]: A DISCUSSION OF RECENT DEVELOPMENTS AND THEIR NATIONWIDE IMPLICATIONS

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Title VII of the Civil Rights Act of 1964 ("Title VII") is a federal law that prohibits employment discrimination against employees on the basis of several protected characteristics (42 U.S.C. § 2000e-2[a]). One of these protected characteristics is sex, and there has been an ongoing debate as to whether "sexual orientation" falls within the scope of "sex."

Circuit Split: US Supreme Court May Determine Whether Title VII Prohibits Sexual Orientation Discrimination this Term

There is currently a circuit split regarding whether Title VII's prohibition of sex discrimination extends to sexual orientation. A "circuit split" is when multiple appellate circuit courts have reached opposite conclusions regarding the same legal issue. Two cases involving this issue have filed petitions for certiorari or requests to be reviewed by the US Supreme Court. If the US Supreme Court grants the request, the Supreme Court could make a final decision and resolve the circuit split as early as this term.

There are currently two cases seeking certiorari from the US Supreme Court this term.[1] *Bostock v. Clayton Cty. Bd. of Comm'rs,* from the Eleventh Circuit Court of Appeals, concluded that Title VII does not forbid sexual orientation discrimination. In contrast, *Zarda v. Altitude Express, Inc,* from the Second Circuit Court of Appeals, found that Title VII *does* protect employees from discrimination based on sexual orientation. If the US Supreme Court grants certiorari on these cases, the impact of its decision could be widespread, as it would settle the differences in various appellate court decisions.

[1]The US Supreme Court's current term started on October 1, 2018 (the first Monday of October), and will continue through late June or early July of 2019. US Supreme Court, "The Court and its Procedures." https://www.supremecourt.gov/about/procedures.aspx (October 7, 2018).

Potential Impact of Decision

According to the Movement Advancement Project, "41% of the LGBT [lesbian, gay, bisexual, and transgender] population live in states prohibiting employment discrimination based on sexual orientation and gender identity." Put another way, 59 percent of the LGBT population could be fired by an employer because of their sexual orientation and/or gender identity, and it would not be illegal. If the Supreme Court grants review of these cases and holds that Title VII does not prohibit sexual orientation discrimination, then even fewer members of the LGBT population would be protected from sexual orientation discrimination. However, if the Supreme Court of the United States concludes that sexual orientation discrimination is a subset of sex discrimination and, therefore, prohibited under Title VII, sexual orientation discrimination would become illegal in every state in the country and cover 100 percent of the LGBT population. Obviously, the stakes are high.

The Turning Point: *Baldwin v. Foxx*

Before 2015, every federal court in the country had consistently found that Title VII did *not* protect against sexual orientation discrimination. That changed on July 15, 2015, when the Equal Employment Opportunity Commission (EEOC) was the first to conclude that Title VII's bar of sex discrimination included sexual orientation discrimination (*Baldwin v. Foxx,* EEOC Decision No. 0120133080, 2015 EEOPUB LEXIS 1905, 2015 WL 4397641 [July 15, 2015]).[2] In *Baldwin v. Foxx,* the EEOC found that "sexual orientation is inherently a 'sex-based consideration'"; accordingly, an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII (*Id.* at *6). The EEOC relied on two prior US Supreme Court cases in its analysis: *Price Waterhouse v. Hopkins* and *Oncale v. Sundowner Offshore Servs.*

In *Price Waterhouse,* the Supreme Court of the United States held that Title VII's prohibition of sex discrimination means that employers may not "rel[y] upon sex-based considerations" or take gender into account when making employment decisions (*Price Waterhouse v. Hopkins,* 490 U.S. 228 [1989]). *Price Waterhouse* held that the practice of gender stereotyping on gender nonconformity falls within Title VII's prohibition against sex discrimination (*Price Waterhouse,* 490 U.S. at 250–252). In *Price Waterhouse,* Ms. Hopkins was a senior manager who applied for partnership at Big Four accounting firm Price Waterhouse. During the consideration of her bid for partnership, other partners commented that she was "too aggressive" and should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have hair styled, and wear jewelry" (*Price Waterhouse,* 490 U.S. at 231–235). The Supreme Court reasoned that "[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind" (*Price Waterhouse,* 490 U.S. at 251).

In *Oncale,* the Supreme Court determined that Title VII included sexual harassment inflicted by a man on a male victim.

> 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

[2]On June 26, 2015, the US Supreme Court struck down all state bans on same-sex marriage, legalized it in all 50 states, and required states to honor out-of-state same-sex marriage licenses in the case *Obergefell v. Hodges. See Obergefell v. Hodges,* 135 S. Ct. 2584 (2015). This case is not cited or discussed in the Baldwin case but is discussed by subsequent cases and may be part of the motivation behind the opinion.

> ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discriminat[ion] … because of … sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

(*Oncale v. Sundowner Offshore Servs.,* 523 U.S. 75 [1998].) Ultimately, the Court determined that the fact that the legislature did not predict a particular application of the law cannot foreclose the application of the provisions to an unforeseen factual scenario.

Seventh Circuit Weighs in: *Hively v. Ivy Tech. Cmty. College of Ind.*

In *Hively,* an openly lesbian part-time adjunct professor at Ivy Tech Community College unsuccessfully applied for at least six full-time positions (*Hively v. Ivy Tech. Cmty. College of Ind.,* 853 F.3d 339 [7th Cir. 2017]). In July 2014, after 14 years of teaching, her part-time contract was not renewed (*Id.*). The plaintiff claimed that she was not hired on a full-time basis, and her contract was not renewed, because of her sexual orientation. Her employer contended that sexual orientation discrimination is not covered by Title VII.

The Seventh Circuit, sitting en banc (i.e., a case which is heard by all of the judges on a court, not just by a smaller panel of judges), held that Title VII's prohibition of sex discrimination includes a bar on sexual orientation discrimination. Like the EEOC's *Baldwin* decision, the *Hively* court relied on *Price Waterhouse* and *Oncale* in its analysis. Relying on *Price Waterhouse,* the *Hively* court rejected the panel description of the paper-thin line between a gender nonconformity claim and one based on sexual orientation and, instead, concluded that the line does not exist at all (*Hively,* 853 F.3d at 346). Using the theory of comparative discrimination, the *Hively* plaintiff claimed that, if she had been a man married to a woman instead of a woman married to a woman, she would have obtained a full-time job with the community college (*Id.* at 347).

The *Hively* court also found that an adverse employment action based on sexual orientation is sex discrimination under the associational theory. *Id.* at 347–349. For example, a Second Circuit case involved a white basketball coach whose employment was terminated because he was married to a black woman, and that court held "that an employer may violate Title VII if it takes an action against an employee because of the employee's association with a person of another race" (*Holcomb v. Iona Coll.,* 521 F.3d 130 [2d Cir. 2008]). Associational sex discrimination for sexual orientation discrimination involving same-sex romantic relationships is a natural extension of *Holcomb*. *Hively,* 853 F.3d at 349. The court also noted the bizarre results if Title VII does not cover sexual orientation discrimination after the Supreme Court recognized the fundamental constitutional right of same-sex couples to marry (*Id.* at 342). The *Hively* court noted that it would create "a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act" (*Id.*). For all of these reasons, the Seventh Court held that sexual orientation discrimination is a subset of sex discrimination in Title VII.

Eleventh Circuit Disagrees: *Bostock v. Clayton Cnty. Bd. of Comm'rs*

Gerald Lynn Bostock alleged that Clayton County discriminated against him based on sexual orientation and gender stereotyping (*Bostock v. Clayton Cnty. Bd. of Comm'rs,* 723 Fed. Appx. 964 [11th Cir. 2018]). In a two-page opinion, the Eleventh Circuit, sitting in panel, relied on its own precedence from 1979 to conclude that "discharge for homosexuality is not prohibited by Title VII" (*Id.*). The appellate court noted that the 1979 *Blum* case had recently been confirmed by *Evans v. Georgia Reg'l Hosp. See Evans v. Georgia Reg'l Hosp,* 950 F.3d 1248 (11th Cir. 2017); *see also Blum v. Gulf Oil. Corp.,* 597 F.2d 936 (5th Cir. 1979). *Blum* remains binding precedent unless and

until the appellate court overrules the case en banc or the Supreme Court overturns the case. While a rehearing en banc was requested, it was denied. *See Bostock v. Clayton Cnty. Bd. of Comm'rs,* 894 F.3d 1335 (11th Cir. 2018). A petition for certiorari was filed with the US Supreme Court in May 2018.

In its decision, the Eleventh Circuit panel simply deferred to precedent as opposed to analyzing the legal issue on the merits. As legal reasoning is absent from the *Bostock* case, we look to the analysis from the appellate court's 2017 opinion in *Evans v. Georgia Reg'l Hosp.* In *Evans,* an employee alleged that she was discriminated against in the workplace because of her sexual orientation (*Evans v. Georgia Reg'l Hosp,* 950 F.3d 1248 [11th Cir. 2017]). In *Evans,* the Eleventh Circuit also followed the *Blum* case, its precedent from 1979 (*Id.* at 1256). The appellate court reasoned that neither *Price Waterhouse* nor *Oncale* is directly on point nor contrary to its prior holding in *Blum* (*Id.*). As a result, the Eleventh Circuit contended that *Blum* has not been overturned and remains good law (*Id.*). *T*he Eleventh Circuit also emphasizes that other circuits had previously found that Title VII did not protect against sexual orientation discrimination (*Id.*). While a number of the circuit decisions holding that Title VII's prohibition of sex discrimination does not extend to sexual orientation discrimination predate *Price Waterhouse* and *Oncale,* the Eleventh Circuit stressed that *Blum* remained valid (*Id.* at 1257). Relying on congressional intent, the Eleventh Circuit noted that Congress has repeatedly rejected legislation that would include sexual orientation as a protected class in Title VII (*Id.*).

Second Circuit Finds Protection for Sexual Orientation Discrimination: *Zarda v. Altitude Express, Inc.*

In 2010, Donald Zarda, a gay man, worked as a skydiving instructor (*Zarda v. Altitude Express, Inc.,* 883 F.3d 100 [2018]). In a tandem dive, clients would be strapped to him hip-to-hip and shoulder-to-shoulder (*Id.*). Because he was in close proximity to clients, Zarda sometimes told female clients about his sexual orientation to alleviate their concerns about being strapped to a man. *Id.* Before a particular tandem skydive, Zarda had informed a female client that he was gay and "had an ex-husband to prove it" (*Id.*). After the jump was completed, the female client told her boyfriend that Zarda had touched her inappropriately and disclosed his sexual orientation to excuse his misconduct (*Id.*). The boyfriend reported Zarda's behavior and commented to his boss (*Id.*). Zarda was fired shortly after and denied that he had inappropriately touched the client (*Id.* at 108–109). Zarda contends that his employment was terminated because of his sexual orientation (*Id.* at 109).

The Second Circuit, sitting en banc, held that sexual orientation discrimination is a subset of sex discrimination covered by Title VII based on three different legal rationales (*Zarda,* 883 F.3d at 100–132).

First, the *Zarda* court discussed the plain language of Title VII, which forbade adverse employment actions "because of … sex" (*Id.* at 111–112). The appellate court concluded that sexual orientation is a logical function of sex: "One cannot consider a person's homosexuality without also accounting for their sex—doing so would render 'same' sex meaningless" (*Id.* at 113). "For purposes of Title VII, firing a man because he is attracted to men is a decision motivated, at least in part, by sex" (*Id.*).

Second, consistent with *Price Waterhouse,* "employment decisions cannot be predicated on mere 'stereotyped' impression about the characteristics of males or females" (*Id.* at 120). In this case, *Zarda* does not fit the traditional male stereotype in which men should date women and not other men (*Id.* at 121).

Third, sexual orientation is a subset of sex discrimination because it is associational discrimination as a result of a relationship with a same-sex partner (*Id.* at 124–128). Like the Seventh Circuit, the Second Circuit considered associational sexual orientation discrimination to be analogous to associational racial discrimination (*Id.*).

The Second Circuit also considered the "paradoxical legal landscape" following the legalization of gay marriage in which a man can exercise his constitutional right to marry his same-sex partner over the weekend but be legally fired for getting married on Monday (*Id.* at 131, note 33). The appellate court noted that considering sexual orientation to be a subset of sex discrimination in *Zarda* would free the Circuit from this paradox (*Id.*). The Second Circuit therefore concluded that Zarda was entitled to bring a Title VII claim for discrimination based on sexual orientation (*Id.* at 132).

Despite the majority ruling, the dissent opined that Title VII was not intended to cover sexual orientation based on its legislative history and that Congress is the proper branch of government to extend the protection of Title VII (*Id.* at 137–143). It cautioned that the prohibition of employment discrimination "because of sex" does not protect members of the LGBT community because the ordinary meaning of the word "sex" does not fairly include the concept of "sexual orientation" (*Id.* at 148). The dissent also relies on Congress's multiple failed attempts to add sexual orientation as a protected class in Title VII to evidence legislative intent (*Id.* at 154–156). The dissent also distinguishes sex-based stereotyping from sexual orientation discrimination as difference between identity and behavior and contended that the associational discrimination theory is not persuasive because LGBT individuals are not a "protected group" (*Id.* at 156–158, 160). A petition for certiorari was filed with the US Supreme Court in May 2018.

The Retirement of US Supreme Court Justice Anthony Kennedy: Its Potential Effect

Justice Anthony Kennedy announced that he would retire from the bench on June 27, 2018 (Robert Barnes, *Washington Post,* "Justice Kennedy, the pivotal swing vote on the Supreme Court, announces his retirement," June 27, 2018). The *Bostock* and *Zarda* cases had filed petitions for certiorari to the US Supreme Court on May 25 and May 29, 2018, respectively, before the announcement of Justice Kennedy's retirement. The retirement of Justice Kennedy could have a dispositive change in the decisions of these two cases, as Justice Kennedy had consistently been a pivotal, swing vote in cases that expanded the rights of the LGBT community.

- In 1996, Kennedy authored the Court's 6–3 majority opinion in *Romer v. Evans* in which the justices struck down a Colorado law that prevented gay people from being recognized as a protected class (*Romer v. Evans,* 517 U.S. 620 [1996]).
- In 2003, Kennedy wrote the 6–3 majority opinion in *Lawrence v. Texas,* which legalized consensual sexual acts between gay couples nationwide (*Lawrence v. Texas,* 539 U.S. 558 [2003]).
- In 2013, Kennedy wrote the Court's 5–4 majority opinion in *United States v. Windsor,* which held that the exclusion of same-sex partner from the definition of spouse in the Defense of Marriage Act was unconstitutional (*United States v. Windsor,* 570 U.S. 744 [2013]).
- In 2015, in *Obergefell v. Hodges,* laws barring same-sex marriage were stricken by the Court, and Kennedy authored the 5–4 majority opinion that legalized gay marriage in all 50 states (*Obergefell v. Hodges,* 135 S. Ct. 2584 [2015]).

Justice Brett Kavanaugh was appointed to fill the vacant seat of Justice Kennedy on October 6, 2018. Justice Kavanaugh had previously served as a law clerk to Justice Anthony Kennedy during the 1993–1994 term of the Supreme Court. This was several years before Justice Kennedy's first opinion expanding the rights and protections of members of the LGBT community in 1996. Judge Kavanaugh's opinions during his tenure as a judge of the renowned District of Columbia Circuit offer little guidance regarding his possible jurisprudential view regarding

LGBT rights,[3] though some jurisprudence scholars surmise that Justice Kavanaugh's proclivity toward textualism and originalism will result in siding with conservative justices and overturning *Zarda*. Whether Justice Kavanaugh will continue Justice Kennedy's legacy to expand LGBT rights is unknown. Certainly, a number of justices have voted in surprising and unexpected ways in the past, especially Justice Kennedy.

Current Protection Against Sexual Orientation Discrimination

The Second and Seventh Circuits are currently the only appellate courts that have recognized Title VII protection against sexual orientation discrimination. Six states comprise the Second and Seventh Circuits: Connecticut, New York, Vermont, Illinois, Indiana, and Wisconsin. Twenty-two states have their own legislation to prohibit sexual orientation discrimination, and two others have issued interpretation guidelines that interpret "sex" protections to include sexual orientation. A chart at the end of the article illustrates the current protection against discrimination on the basis of sexual orientation in each of the 50 states, as well as the District of Columbia.

Conclusion

Sexual orientation discrimination will remain illegal in states that have already prohibited such conduct. Employers in states located in the Second and Seventh Court of Appeals should take special care to ensure that employees are not subjected to adverse actions because of their sexual orientation. Other employers should watch these cases closely and think twice before subjecting an employee to an adverse action while these cases are pending before the Supreme Court. Regardless of whether terminating an employee because of his or her sexual orientation is legal, employers should consider potential consequences of these decisions, as there is a fine line between sexual orientation discrimination and discrimination based on gendered stereotypes, which are already prohibited under Title VII across the board. For this reason, the best practice is to refrain from committing adverse employment actions against members of the LGBT community because of their sexual orientation, regardless of the Supreme Court's decision.

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[3]Sexual orientation discrimination by private employers is already prohibited conduct in the District of Columbia, where Judge Kavanaugh previously sat on the bench (D.C. Code § 2–1402.11).

SEXUAL ORIENTATION DISCRIMINATION: THE CURRENT LEGAL LANDSCAPE			
State	**Title VII Protection**	**State Protection**	**State Law**
Alabama			
Alaska			
Arizona			
Arkansas			
California		✔	Cal. Code § 12940
Colorado		✔	C.R.S. 24–34–402
Connecticut	✔	✔	Conn. Gen. Stat. § 46a-60
Delaware		✔	Del. S.B. 121, 145th Gen. Assem. (2009)
District of Columbia		✔	D.C. Code § 2–1402.11
Florida			
Georgia			
Hawaii		✔	Hawaii Rev. Stat. § 378–2 and H.B. 546 (2011)
Idaho			
Illinois	✔	✔	775 ILCS 5/2–102
Indiana	✔		
Iowa		✔	Iowa Code § 216.86 and § 216.6a
Kansas			
Kentucky			
Louisiana			
Maine		✔	Me. Rev. Stat. Tit. 5, § 4571 and § 4572
Maryland		✔	S.B. 212
Massachusetts		✔	Mass. Gen. Laws, Chapter 151B, § 4
Michigan		✔	Michigan Civil Rights Commission Interpretive Statement
Minnesota		✔	Minn. Stat. § 363A.08
Mississippi			
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SEXUAL ORIENTATION DISCRIMINATION: THE CURRENT LEGAL LANDSCAPE *(cont.)*			
State	**Title VII Protection**	**State Protection**	**State Law**
Missouri			
Montana			
Nebraska			
Nevada		✔	A.B. 311
New Hampshire		✔	H.B. 421
New Jersey		✔	N.J. Stat. § 10:5–4 and § 10:5–12
New Mexico		✔	H.B. 314
New York	✔	✔	S.B. 720
North Carolina			
North Dakota			
Ohio			
Oklahoma			
Oregon		✔	S.B. 2
Pennsylvania		✔	Pennsylvania's Human Relations Commission interprets sex protections to include sexual orientation
Rhode Island		✔	Rhode Island Stat. § 28–5–7
South Carolina			
South Dakota			
Tennessee			
Texas			
Utah		✔	S.B. 296
Vermont	✔	✔	Vt. Stat. Tit. 21, § 495
Virginia			
Washington		✔	Wash. Rev. Code § 49–60–180
West Virginia			
Wisconsin	✔	✔	Wis. Stat. § 111.321, § 111.322, and § 111.36
Wyoming			