Law catching up on sexual orientation discrimination

By Ann Fromholz

Donald Zarda was a skydiving instructor who, while preparing for a tandem sky dive with a female student, told her that he was "100 percent gay." Zarda alleged that he was fired after revealing his sexual orientation to the client and that his termination amounted to discrimination on the basis of sexual orientation. On Feb. 26, the 2nd U.S. Circuit Court of Appeals, sitting en banc, came down on the correct side of history. In *Zarda v. Altitude Express, Inc.*, the court overruled its own precedent and held, by a vote of 10-3, that discrimination based on sexual orientation is a form of sex discrimination prohibited under Title VII of the Civil Rights Act of 1964.

In the opinion for the court, Chief Judge Robert Katzmann explained that, "sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination." To "identify the sexual orientation of a particular person," an employer must "know the sex of the person and that of the people to whom he or she is attracted."

Judge Katzmann went on to say: "Because one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex. Indeed sexual orientation 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. Logically, 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 good news is that 22 states have taken it upon themselves to create laws that prohibit discrimination on the basis of sexual orientation.

In *Zarda*, the 2nd Circuit sided with the U.S. Equal Employment Opportunity Commission, which has for some years taken the position that Title VII's protections against sex discrimination extend to sexual orientation. In 2015, the EEOC decided *Baldwin v. Foxx*, holding that sex discrimination includes sexual orientation discrimination. With the *Zarda* decision, the 2nd Circuit joined the 7th Circuit (*Hively v. Ivy Tech Community College* (2017)) in adopting the position the EEOC has taken. Only the 11th Circuit has rejected that position.

The issue of protection against sexual orientation discrimination also has created a split between the EEOC and the Department of Justice. The agencies filed opposing amicus briefs in the *Zarda* case. The Justice Department, in its brief, said that the EEOC was "not speaking for the United States." Attorney General Jeff Sessions was less than pleased by the *Zarda* decision. He was speaking to a group of state attorneys general when he said, "We believe we're on the right principle there. And I guess maybe the judges woke up that morning, read the New York Times or something, and decided their previous ruling was wrong."

The issue likely will be resolved by the U.S. Supreme Court if another circuit rejects the EEOC's position and deepens the split among circuits. The Supreme Court declined to consider an appeal of the 11th Circuit case in December 2017.

The question, of course, could also be resolved by legislation. The Employment Non-Discrimination Act, which would have modified Title VII to explicitly prohibit sexual orientation discrimination, has been introduced multiple times in Congress. One version passed the House in 2007 and another version passed the Senate in 2013, but the bill has not passed both houses of Congress. There is no hope for such a bill passing the current Congress, but the act likely will be re-introduced if the composition of the House and Senate change.

The good news is that 22 states have taken it upon themselves to create laws that prohibit discrimination on the basis of sexual orientation. California's Fair Employment and Housing Act was changed in 1999 to prohibit both harassment and discrimination based on sexual orientation. In 2003, the definition of "sex" in FEHA was expanded to include discrimination on the basis of a person's gender identity or gender-related appearance and behavior. The California Legislature further amended FEHA in 2011 to expressly include "gender identity" and "gender expression" as protected classes. In addition to California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Washington and Wisconsin prohibit discrimination on the basis of sexual orientation. There are laws pending in several other states to prohibit such discrimination. It may be, therefore, that most states do what the federal government will not.

Although the 2nd Circuit's decision in *Zarda* is important, it will not change the way most employers that operate within the 2nd Circuit do business, because Connecticut, New York, and Vermont — as noted above — already have state laws prohibiting sexual orientation discrimination. The *Zarda* decision does, of course, give individuals the ability to bring a federal Title VII lawsuit alleging sexual orientation discrimination.

Most employers in the rest of the country — at least large and mid-sized companies — include sexual orientation in the list of protected characteristics in their anti-discrimination and anti-harassment policies. In this way, these employers — like the 22 states listed above — are keeping up with the public consensus that sexual orientation discrimination is wholly unacceptable. Federal law needs to catch up. The question is, when will it?

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