US Appeals Court Ruling Highlights ‘Evolving Nature’ of Title VII Protections

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By Erin Mulvaney

The New York federal appeals court ruling Monday that said sexual orientation should be protected under federal civil rights laws sharpened the divide among courts and set the stage for a U.S. Supreme Court fight.

The U.S. Court of Appeals for the Second Circuit’s decision added to momentum for the re-examination of interpretations of Title VII of the Civil Rights Act. The court, sitting en banc, largely embraced the view of the U.S. Equal Employment Opportunity Commission that workplace sexual orientation is protected under anti-discrimination laws.

The Second Circuit’s decision noted a “changing legal landscape” and the “persuasive force” of new decisions, including a ruling in the Seventh Circuit last year. The Second Circuit case was closely watched, in part, because the Trump administration’s U.S. Justice Department lined up against the EEOC’s push for broad protections. Current EEOC chair Victoria Lipnic said the Second Circuit’s ruling was a “generous view of the law of employment protections, and a needed one.”

The ruling immediately triggered the possibility of a showdown in the U.S. Supreme Court, which in December turned down a sexual orientation case from the Eleventh Circuit. Still, it’s not clear if the Long Island, New York, skydiving company Altitude Express Inc.—accused of firing a worker for being gay—will push the case to the Supreme Court.

Saul Zabell, the New York-based attorney for Altitude Express, issued a statement that applauded the Second Circuit for "curing this glaring fundamental legislative gap in human rights." He said the panel, however, ignored the facts of the underlying matter in the case by issuing the "predetermined conclusion."

Zabell, in an interview, said his client will consider the appeals court's decision, the dissenting and concurring opinions, as well as the potential cost, to determine whether to file a petition in the Supreme Court.

"Our position has always been that Title VII should cover the rights of LGBT workers, but it doesn't and it hasn't," Zabell told The National Law Journal. "The Second Circuit is now rewriting the law. That is inappropriate."

Over the decades, courts around the country have had an evolving view of sex discrimination under Title VII and the momentum appears to be on the new perspective to include LGBT workers, said Greg Nevins of Lambda Legal, who argued on behalf of the late Don Zarda. Nevins said the Second Circuit judges considered a fresh perspective in overturning the court's past precedents.

"It's important for people to have a right to address discrimination when it happens," Nevins said. "It's the best way to have a clear and national answer on the scope of what employers can and cannot do. It's not helping anyone to have fragments around the country."

The 'Evolving' Title VII

The Second Circuit heard the case, *Zarda v. Altitude Express*, en banc in September, facing a divide among other circuits over the question of whether sexual orientation should be protected under federal civil rights law. The Civil Rights Act protects workers based on race, sex, national origin and religion.

U.S. Attorney General Jeff Sessions reversed the Justice Department's stance in the case and argued sexual orientation should not be protected. The EEOC has strongly favored including sexual orientation under the umbrella of Title VII in recent years, and its views have been essential in framing arguments in favor of inclusion.

The Chicago-based Seventh Circuit was the first appeals court to declare that existing federal civil rights laws should cover gay workers. A three-panel decision from the Eleventh Circuit came to the opposite conclusion. The Eight Circuit, in the case *Horton v. Midwest Geriatric Management*, is considering the same issue.

Former Jones Day partner Hashim Mooppan, a top lawyer at Main Justice, argued for the department in the Second Circuit. He said that most circuit courts have "expressly rejected" the argument that Title VII offers protection on the basis of sexual orientation and that Congress has repeatedly failed to pass bills to clarify the statute's language.

The Trump administration's friend-of-the-court brief in July, presenting a clash with the EEOC, argued Congress should change the law, not the courts. Mooppan did not respond to request for comment Monday.

Sharon Stiller, director of the employment law practice at Abrams Fensterman, LLP, said the Second Circuit's decision appears written as if to prepare the Supreme Court to consider the arguments, addressing the myriad of issues in play, including those from friend-of-the-court filings.

“A lot of the majority’s decision deals with the evolving nature of Title VII,” Stiller said. “As society evolves, the interpretation that the courts are called upon to make becomes more sophisticated.”

The Second Circuit acknowledged theories of past and current precedent, which suggest the court positioned the decision for consideration at the Supreme Court, said Mark Phillis, a shareholder at Littler Mendelson, who focuses on unlawful discrimination and harassment. He called the decision a wholehearted endorsement of the EEOC’s position.

“This type of theoretical review on how to interpret the law, whether it’s this case or a case like it, is something the Supreme Court would take up,” Phillis said. “There are certainly some meaty discussions of statutory interpretations in both of these decisions.”

Guidance for Employers

Management attorneys recommend that employers err toward protections for all workers. Dozens of companies filed briefs in the Zarda case, arguing that securing sexual orientation protections was good for their bottom lines.

“In conducting business during this period of legal uncertainty, employers must be aware that gay, lesbian and bisexual individuals may be protected under federal law in addition to relevant state or local laws, and that any allegations concerning sexual orientation discrimination require the same analysis, investigation and response as a traditional sex discrimination complaint,” said Seyfarth Shaw partner Sam Schwartz-Fenwick.

Most Fortune 100 companies have adopted policies to protect workers of all sexual orientations, according to the Human Rights Campaign**.** State and local governments have also passed protections for sexual orientation in recent years.

In the Seventh Circuit sexual orientation case, *Hively v. Ivy Tech Community College*, the college did not immediately race to the Supreme Court after it lost in April 2017. Rather, the college said in a statement it would defend itself in the trial court. “Ivy Tech respects and appreciates the opinions rendered by the judges of the Seventh Circuit Court of Appeals and does not intend to seek Supreme Court review,” the statement said. “The college denies that it discriminated against the plaintiff on the basis of her sex or sexual orientation and will defend the plaintiff’s claims on the merits in the trial court.”

Zabell, the lawyer for Altitude Express, said there was no concern about any public scrutiny on the stance the business had taken. “That bullet is out of the gun.”

The EEOC has filed at least six lawsuits alleging sexual orientation discrimination. Since 2013, when the EEOC began tracking such cases, there have been 5,088 LGBT discrimination charges filed with the agency. Of those, 3,985 of them, including 638 charges that resulted in some relief for the charging party, were resolved.

New Republican leadership at the EEOC—President Donald Trump has nominated longtime Burlington Stores Inc. general counsel Janet Dhillon and Iraq veteran Daniel Gade to the commission—could affect whether and in what cases the commission to file briefs.