LGBT: THE SCOPE OF "SEX" DISCRIMINATION UNDER TITLE VII

Christopher V. Bacon

28th Annual labor and Employment Law Institute

August 26, 2017

LGBT: THE SCOPE OF "SEX" DISCRIMINATION UNDER TITLE VII

It is unlikely that the Congress will soon pass a federal law prohibiting discrimination based on sexual orientation, and given the Texas legislature's preoccupation about transgender people using public restrooms, it is even more unlikely that the Texas will join the minority of states that have outlawed sexual orientation discrimination in employment.[1]

Because of the lack of any statutes protecting GLBT employees from being discriminated against because of their sexual orientation or identity, some lawyers have attempted to frame claims of sexual orientation discrimination as gender discrimination claims instead. While early attempts at using sex and gender discrimination as a proxy for sexual orientation discrimination failed, since 2000, courts have increasingly have shown some willingness to entertain sex discrimination claims that in the past would have been dismissed as masquerading as sexual orientation claims.

A. Early Attempts.

For years, most courts rejected any attempt to use Title VII, the federal statute that prohibits discrimination based on sex, race, national origin, or religion, to protect GLBT employees from discrimination. The seminal case in this area was a 1979 Ninth Circuit decision, *DeSantis v. Pacific Telephone & Telegraph Co.,*[2] which held that Title VII could not be used to challenge employer decisions based on an employee's homosexuality. *DeSantis* was actually

[1] At the present time, twenty states, the District of Columbia, Guam, and Puerto Rico have statutes that protect against both *sexual orientation and gender identity* discrimination in employment in the public and private sector: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, and Vermont. An additional two states (New Hampshire and Wisconsin) have statutes that only prohibit *sexual orientation discrimination* in the public and private sector. Nine other states prohibit discrimination based on sexual orientation and gender identity only to employees in public employment, and four states provide such prohibit sexual orientation discrimination –but not gender identify—to employees in the public sector, but not the private sector.

[2] 608 F.2d 327 (9th Cir. 1979).

three separate cases that had been consolidated on appeal, One involved a male nursery school teacher (Donald Strailey) who had been terminated from the Happy Times Nursery School for wearing a small gold ear-loop to school. The second case involved three males, one who alleged he had not been hired the telephone company because of his sexual orientation, and two who claimed they were forced to quit because they had *been* continually harassed by their co-workers. The third case involved two lesbians who alleged they had been terminated because of their known lesbian relationship.

The *DeSantis* plaintiffs advanced several theories as to why they should be able to bring claims under Title VII for what was clearly discrimination based on sexual orientation discrimination. They began by arguing, that in prohibiting discrimination on the basis of "sex," Congress had intended to include sexual orientation. This argument was summarily dismissed, as it probably should have, given that there was nothing in the legislative history to suggest that Congress intended to protect gays and lesbians in 1964.[3]

The male plaintiffs also tried to argue that their employers' practice of discrimination against gays had a disparate impact on male employees, much as black employees had successfully argued that facially neutral tests had an adverse impact on them in *Griggs v Duke Power Co.,*[4] even though there was no evidence of intentional discrimination. Thus, while discrimination based on sexual orientation might be permissible, because there was a greater incidence of homosexuality in the male population, such a practice was likely to have an adverse impact on men, who were more likely to be gay than women.[5] The court, however, rejected this

[3] 608 F.2d at 329-330.
[4] 401 U.S. 424 (1971).
[5] 608 F.2d at 330; While Kinsey concluded that there were more male homosexuals than female lesbians, his methodology has been seriously criticized. *See* Edward Lauman, John Gagnon, Robert Michael and Stuart Michaels, "Homosexuality" in THE SOCIAL ORGANIZATION OF SEXUALITY 283, 287-301 (1994).

attempt to "bootstrap" Title VII protections for gay men under the pretext that it was actually discrimination against men when the plaintiffs were really complaining about sexual orientation discrimination.[6] The plaintiffs also argued unsuccessfully that they were being discriminated against because of their sex (and not their sexual orientation) because male employees who had male sexual partners were treated differently than female employees with male sexual partners.[7]

Finally, one of the plaintiffs, the male nursery school teacher, argued that he was terminated as a result of the school's reliance on a "stereotype that a male should have a virile rather than an effeminate appearance."[8] The court, however, held that discrimination because of "effeminacy" did not fall within the scope of Title VII.[9] Of all of the arguments raised by the *DeSantis* plaintiffs, this is the only one that has met with some success, albeit twenty years later.

The *DeSantis* holding that Title VII does not prohibit discrimination based on sexual orientation was widely accepted by courts everywhere, and its broadest holding (that Title VII does not prohibit discrimination based on sexual orientation) was widely cited by other cases[10]

In recent years, courts have been more amenable to consider arguments that discrimination against GLBTs may sometimes be discrimination based on gender or sex. There are two types of cases where this happened: cases where employees have alleged that they were sexually harassed by employees of the same sex; and, cases where gays or lesbians have been able to show that they were discriminated against because they failed to conform to gender stereotypes.

---

[6] 608 F.2d at 330.
[7] 608 F.2d at 331.
[8] *Id*.
[9] 608 F.3d at 332.
[10] *See, e.g.*, Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979) (per curiam) ("Discharge for homosexuality is not prohibited by Title VII or Section 1981."); Williams v. A.G. Edwards & Sons, 876 F.2d 69, 70 (8th Cir. 1989), *cert. denied*, 493 U.S, 1089 (1990); DeCintio v. Westchester County Medical Ctr., 807 F.2d 304 (2d Cir. 1986), *cent. denied*, 484 U.S. 825 (1987); Klein v. MeGowan, 36 F.Supp.2d 885 (D. Minn. 1999); *aff'd*, 198 F.3d 705 (8th Cir. 1999); Higgins v. New Balance Athletic Shoe, Inc., 21 F. Supp.2d 66 (D. Me. 1998), *aff'd*, 194 F.3d 252 (1st Cir. 1999).

B. Sexual Harassment.

Although several of the plaintiffs in *DeSantis* claimed that they were harassed by their coworkers, the theory of sexual harassment (as a form of sex discrimination) had not yet *been* widely recognized by the courts at that time, except in cases were the harassment had resulted in a direct financial injury to the Plaintiff, typically cases where an employee's employment or promotion had been contingent on the employee "putting out" for the supervisor. None of the *DeSantis* plaintiffs, however, had alleged what is now commonly referred to as a *qui pro quo* claim of sexual harassment.

It was not until 1986, in *Mentor Savings Bank v. Vinson,*[11] seven years after *DeSantis,* when the Supreme Court held that sexual harassment, if sufficiently severe or pervasive to alter the terms and conditions of employment, could violate Title VII, even when no economic job detriment had occurred. Because *Mentor* involved the classic case of the female employee who had been harassed by her male supervisor, it left unanswered the question of whether same-sex sexual harassment could be actionable under Title VII. In other words, what would have happened had the supervisor in *Meritor* been female?

For several years, courts were divided on whether Title VII protected against same-gender sexual harassment, with some courts refusing to recognize the claims because of cases like *DeSantis,* while others recognized that such discrimination was actually based on sex, and hence actionable.[12] It was not until 1998, that the Supreme Court finally resolved the issue and held that same-sex sexual harassment could be actionable under Title VII in *Oncale v. Sundowner*

[11] 477 U.S. 57 (1986).

[12] [14] *Compare Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994) ("Harassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones"), *with* Joyner v. AAA Cooper Transp., 597 F. Supp. 537, 541 (M.D. Ala. 1993) ("[U]nwelcome homosexual harassment also states a violation of Title VII."), *aff'd mem,* 749 F.2d 732 (11th Cir. 1984).

Offshore Services, Inc.[13] The facts in *Oncale* were particularly egregious, to the extent that Oncale claimed that two of his coworkers restrained him while his supervisor "placed his penis on Oncale's neck, on one occasion, and on Oncale's arm, on another occasion," and that his supervisor had used force to push a bar of soap into Oncale's anus as he was showering.[14] While Justice Scalia spared his readers the details "in the interest of both brevity and dignity," he did agree that same-sex sexual harassment could be actionable under Title VII where the perpetrator harassed the victim because of his or her sex.[15]

While *Oncale* recognized same-sex harassment claims, it is doubtful that Justice Scalia was especially concerned about protecting gays and lesbians in the workplace. More likely, he was thinking about rogue gay or lesbian supervisors who might harass innocent heterosexual subordinates. On the other hand, and to his credit, Scalia recognized that a same-sex harassment claim would not necessarily need to be motivated by sexual desire, noting that a woman might be harassed by a non-lesbian woman who had a "general hostility to the presence of women in the workplace."[16] Of course, in order to show this, one would need comparative evidence showing how the alleged harasser treated members of both sexes in a mixed workplace. For Mr. Oncale, this would have been difficult because there had been no women on the rig where he worked. As for whether his harassers had been motivated by sexual desire, they all denied that they were gay, and there was no contrary evidence. To the extent that they had any homosexual desire, it was certainly repressed. Accordingly, the Court never resolved the issue for Mr. Oncale and remanded his case back for a determination as to whether he could bring a claim in the first

[13] 523 U.S. 75 (1998).
[14] *Id*.
[15] 523 U.S. at 77, 81.
[16] 523 U.S. at 80.

instance. However, *Oncale* made it clear that same-sex sexual harassment could be actionable. Because of Texas Commission on Human Rights Act is modeled on federal law, same-sex sexual harassment is also actionable under that statute.[17]

Oncale left some questions unanswered. What about the bisexual harasser who sexually harasses both men and women? While several courts have held that harassment claims will not succeed where employees of both sexes are subjected to requests for sexual favors,[18] some courts have held that one can assert a viable Title VII claim if the harasser's conduct is of a sexual nature, without necessarily having to prove that the harasser was motivated by sexual desire or even the sex of the victim.[19]

In an *en banc* consideration, the Ninth Circuit recently held in *Rene v. MGM Grand Hotel*,[20] that a gay man could bring a Title VII claim when his presumably heterosexual coworkers subjected him to physical conduct "of a sexual nature." The facts in *Rene* were remarkably similar to those presented in *Oncale.* Rene worked in a luxury hotel, where butler service as offered on one floor for wealthy or high profile clients. All of the butlers on the floor were men as was their supervisor. Thus, as in *Oncale*, there were no women in the department to compare to Rene. The harassment suffered by Rene was also similar to the harassment in *Oncale:*

> Rene provided extensive evidence that, over the course of a two-year period, his supervisor and several of his fellow butlers subjected him to a hostile work environment on almost a daily basis. The harassers' conduct included whistling and blowing kisses at Rene, calling him "sweetheart" and "mufieca" (Spanish for "doll"), telling crude jokes and giving sexually oriented "joke" gifts, and

[17] Dillard Department Stores, Inc. v. Gonzalez, 72 S.W.3d 398, 406-07 (Tex. App. — El Paso, 2002, pet denied) ("We conclude that same-sex sexual harassment is actionable under TCHRA.").
[18] See, e.g., Holman v. Indiana, 211 F.3d 399, 403-04 (7th Cir.), *cert. denied,* 531 U.S. 880 (2000); Brown v. Henderson, 115 F. Supp. 2d 445, 450 (S.D.N.Y. 2000).
[19] Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1065 (9th Cir. 1995), *cert. denied*, 123 S.Q. 1573 (2003); Doe v. City of Belleville, 119 F.3d 563, 580 (7th Cir. 1997), *vacated*, 523 U.S. 1001(1998).
[20] 305 F.3d 1061, 1065 (9th Cir. 2002), *cert. denied*, 123 S.Ct. 1573 (2003).

> forcing Rene to look at pictures of naked men having sex. On "more times that [Rene said he] could possible count," the harassment involved offensive physical conduct of a physical nature. Rene gave deposition testimony that he was caressed and hugged and that his coworkers would "touch [his] body like they would to a woman." On numerous occasions, he said, they grabbed him in the crotch and poked their fingers in his anus through his clothing.[21]

As in *Oncale*, there was no evidence that any of the harassers had been motivated by sexual desire, and because there were no women in the department, there was no evidence in the record that Rene had been treated differently from any women. Moreover, when Rene was asked why he thought he had been harassed, he responded that he believed he had been harassed because he was gay. In short, there was overwhelming evidence that Rene had been singled out because of his sexual orientation and not because of his gender which ordinarily would have defeated his Title VII claim. However, because the harassment was of a "sexual nature" the Ninth Circuit held that Rene could bring a claim under Title VII.

One doubts that Justice Scalia would have agreed with this result. In fact, four judges on the panel dissented, arguing that Title VII only addressed discrimination based on sex and that it was irrelevant that a person was harassed "in a sexual manner," unless he had been singled out because of his "race, color, religion, gender, or national origin."[22] Whether other circuits are likely to adopt this more expansive interpretation of *Oncale* is yet to be seen. However, the fact that the Supreme Court chose not to grant certiorari in this case may cause other circuits to adopt this interpretation.

C. Gender Stereotyping.

Beginning in 2000, a few courts have shown a willingness to consider gender discrimination claims brought by gay men where there has been evidence that the gay man was discriminated against because of gender stereotypes. In other words, the gay man or lesbian do

[21] 305 F.3d at 1064.
[22] 305 F.3d at 1072 (dissenting opinion).

not claim that they have been discriminated against because they are gay or lesbian, but because they have failed to conform to gender stereotypes. (Obviously, the same argument could made on behalf of a transgendered employee). While some may argue that this is another legal artifice to "bootstrap" sexual orientation claims onto gender discrimination claims, it is reasonable to presume that many gay men and lesbians are discriminated against because they appear to be gay and not because of what they do in the privacy of their bedroom. In fact, a "straight acting" gay man or lesbian may encounter less discrimination in corporate America than a straight man or woman who are perceived to be gay or lesbian.[23] The discrimination they suffer is not a result of who they have sex with, but their failure to conform to the employer's gender stereotypes.

The seeds of this kind of reasoning are found in *Price Waterhouse v. Hopkins*,[24] a 1989 Supreme Court decision where the Court held that an employer who relies on sexual stereotypes may violate Title VII. Hopkins was a highly successful senior manager at Price Waterhouse. There was no question about her abilities or her performance, when she was proposed as a candidate for Price Waterhouse's partnership . When she did not make partner, the explanation given was that she was too aggressive and abrasive or, as one partner put it, too "macho."[25] One partner even suggested that Hopkins "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her styled, and wear jewelry.[26] In light of these comments, the Court stated:

> As for the legal relevance of sex stereotyping we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "'[I]n forbidding employers to discriminate against

[23] For a more detailed discussion, *see* James Woods and Jay Lucas, THE CORPORATE CLOSET: THE PROFESSIONAL LIVES OF GAY MEN IN AMERICA. (1993).
[24] 490 U.S. 228 (1989).
[25] 490 U.S. at 234.
[26] *Id*. at 235.

> individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[27]

The argument here is not too different from the argument raised by the nursery school teacher in *DeSantis,* a decade before *Price Waterhouse.* Hopkins was criticized for behaviors that would have been considered positives for her male counterparts. The male nursery school teacher was also defying stereotypes by working in a profession that has few men.

Despite the similarities between the nursery school teacher in *DeSantis* and Hopkins, early attempts apply *Price Waterhouse* to gay men were unsuccessful. In *Dillon v. Frank,* for example, the Sixth Circuit considered the case of a post office employee who was taunted and physically beaten by his coworkers because they thought he was gay.[28] In the trial court and in their appellate briefs, Dillon's lawyers had argued that Dillon had been a victim of same-sex sexual harassment. However, at oral argument, they argued for the first time that Dillon had been subjected to harassment because he was not "macho" enough much like Hopkins had been discriminated against in *Price Waterhouse* for being too "macho."

The Sixth Circuit distinguished *Price Waterhouse* on several grounds. First, it noted that *Price Waterhouse* had not been a harassment case, suggesting that sex stereotyping arguments could only be applied to management decisions (i.e., failure to promote, hire, etc.) and not to coworker harassment. The court also pointed out that there had been no evidence of "sex stereotyped" remarks as there had been in *Price Waterhouse*. Finally, the Court stated that "sex stereotyping" arguments could only succeed when someone is treated differently from people of the opposite gender who exhibit the same traits in that particular workplace. Hopkins, for

[27] 490 U.S. at 251.
[28] 952 F.2d 403, 58 Fair Emp. Prac. Cas. (BNA) 144 (6th Cir. 1992) (Table, Text in Westlaw, No. 90-2290).

example, had been penalized for exhibiting a trait (aggressiveness) that was desirable in men. Thus, while the male nurse or teacher who is discriminated against because he exhibits good nurturing skills might have a claim because he is being penalized for possessing a stereotypically female trait that is deemed desirable in those professions, the effeminate man who works on an oil rig would not, because such a trait would not be favored in a woman working on the rig.

Since *Dillon*, several appellate courts have recognized gender stereotyping claims brought by gay employees, without requiring that the employee show that he is penalized for having a trait that is generally considered desirable in members of the opposite sex in that same job. In *Nichols v. Azteca Restaurant Enterprises*,[29] the Ninth Circuit held that a gay man who was discriminated against for acting too feminine, could assert a cause of action under Title VII, thus abrogating in part, the twenty-one year old *DeSantis* decision. The Plaintiff in *Nichols* had worked as a host and food server at several restaurants owned by the Defendant. Throughout his tenure, he had been teased because of his effeminacy. His coworkers and supervisor had referred to him as "she" and "her," and mocked him for walking and carrying his trays "like a woman." He was also called a "faggot" and a "fucking female whore." Following a bench trial, the district court concluded that the harassment suffered by the Plaintiff had not been "because of sex." The Ninth Circuit disagreed noting that "[alt its essence, the systematic abuse directed at [the employee] reflected a belief that [he] did not act as a man should act."[30] While *Nichols* was harassment case, there is nothing in the opinion to suggest that a gay man could not allege that he was not promoted

[29] 256 F.3d 864 (9th Cir. 2001).
[30] 256 F.3d at 874.

because he failed to conform to gender stereotypes. The Seventh Circuit has similarly recognized gender stereotyping arguments brought by gay men in the harassment context.[31]

While it did not rule in favor of the gay employee, the Third Circuit has indicated that it too would recognize gender stereotyping claims brought by gay employees. In *Bibby v. Phila. Coca-Cola Bottling Co.*,[32] it recognized that a claim for same-sex sexual harassment could be proved by showing that the "harasser was acting to punish the victim's non-compliance with gender stereotypes."[33] Only because the plaintiff in that case offered no evidence to support such a claim, did the Third Circuit ruled against him. However, the court made it clear that it was irrelevant that the harassers might have been motivated by anti-gay animus so long as the plaintiff could show that the harassment was directed at him or her because of his or her sex." [Once it has been shown that the harassment was motivated by the victim's sex, it is no defense that the harassment may have also been partially motivated by anti-gay or anti-lesbian animus."[34]

If a Plaintiff wants to rely on a gender stereotyping argument, it is important that a factual record be developed and that the issue be raised with the trial court. At least two appellate courts have refused to consider the issue because the plaintiff failed to raise the issue in the first instance.[35] It is also clear that courts will not entertain gender stereotyping arguments when there is nothing in the record showing that the employee was discriminated against because he failed to conform to gender stereotyping.[36]

---

[31] *Doe v. City of Bellville*, 119 F.3d 563 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998).
[32] 260 F.3d 257 (3d Cir. 2001).
[33] 260 F.3d at 264.
[34] 260 F, 3d at 265.
[35] *See, e.g. Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999); *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000).
[36] *Id*.

The cases suggest that an employee who is called a "girl" by his co-workers will have a better chance of bringing a Title VII claim than the employee who is called a "faggot," because he is being singled out for failing to conform to gender stereotypes. Of course, one could argue that calling someone a "faggot" may be evidence of gender discrimination. This suggests that, in context of Title VII litigation, arguments that sexual orientation is immutable or "hard wired" may be less useful than they have been in constitutional litigation. Here, advocates may well want emphasize the interrelationship between gender identity and sexual attraction as well as the social construction of homosexuality.

D. Applying Title VII to Sexual Orientation Discrimination that Does Not Involve Sexual Stereotyping.

So can gay or lesbian who conforms to sexual stereotypes, bring a claim under Title VII simply because they are being discriminated because of their sexual orientation? The Seventh Circuit's en banc decision in *Hively v. Ivy Tech Community College of Indiana*[37] recently held that a person who alleges employment discrimination based on sexual orientation has put forth a case of sex discrimination for Title VII purposes.

Kimberly Hively began teaching as a part-time, adjunct professor at Ivy Tech Community College's South Bend campus in 2009. She applied for at least six full-time positions between 2009 and 2014. She did not obtain any of these positions, and in July 2014 her part-time contract was not renewed. Kimberly believed this was due to her being an openly lesbian woman. She filed a pro se charge with the Equal Employment Opportunity Commission that she was being discriminated against due to her sexual orientation in violation of Title VII. She received a right-

[37] 853 F.3d 339 (7th Cir. 2017).

to-sue letter, filed in the district court, again pro se, and the case was dismissed for failure to state a claim on which relief can be granted.

Kimberly's appeal was brought on her behalf by the Lambda Legal Defense & Education Fund. The three-judge panel was sympathetic to her arguments but held that it was unable to overrule clear circuit precedent that Title VII does not address claims of sexual-orientation discrimination. A majority of judges then agreed to rehear the case en banc.

The court's ruling that Hively had indeed stated a valid claim under Title VII and that discrimination due to one's sexual orientation is discrimination "because of . . . sex" was joined by a concurrence by Judge Posner, who focused mostly on justifying the expansive statutory interpretation steps the court was making ("We should not leave the impression that we are merely the obedient servants of the 88th Congress (1963-1965), carrying out their wishes. We are not. We are taking advantage of what the last half century has taught."); and a brief concurrence by Judge Flaum that strongly embraces the "but-for" sex argument. Judges Sykes, Bauer, and Kanne dissented in the case, decrying the court's "circumvention of the legislative process by which the people govern themselves" before offering many of the aforementioned arguments against the three primary theories of sexual-orientation discrimination under Title VII.

The *Hively* case created a circuit split, but a so-called "stale" one. The opposing precedent was well-settled and somewhat dated. To increase the likelihood of Supreme Court review, another circuit needed to hear a similar case, rule that sexual orientation was not covered by Title VII, then either affirm the ruling en banc or refuse to rehear the case. On July 6th, that happened, when the Eleventh Circuit denied an en banc review of *Evans v. Georgia Regional Hospital*.[38]

[38] 850 F.3d 1248 (11th Cir. 2017).

Jamika Evans worked at the Hospital as a security officer between August 2012 and October 2013. Like Ann Hopkins, she was discriminated against for failing to carry herself in "a traditional woman[ly] manner." Jamika cited extreme mistreatment, including being denied equal pay or work, being harassed and physically assaulted, and a litany of smaller injustices that created a hostile work environment. While she was not openly gay at work, Jamika was asked about her sexuality by the senior human resources manager and her co-workers assumed that she was a lesbian.

Jamika filed a pro se complaint claiming discrimination due to sexual orientation and gender non-conformity. A magistrate judge recommended dismissing all Jamika's claims on the grounds that Title VII "was not intended to cover discrimination against homosexuals" and that her gender non-conformity claims were "just another way to claim discrimination based on sexual orientation." The district court reviewed the record, adopted the magistrate judge's recommendations without further comment, and dismissed the case with prejudice, appointing council from Lambda Legal to represent Jamika on appeal.

The three-judge appellate panel ruled that the gender non-conformity claim, if amended, could be cognizable under Title VII, but that Jamika's sexual orientation claim was not. The majority opinion relied heavily on the 1979 Fifth Circuit case *Blum v. Gulf Oil Corporation* and cited similar findings that sexual orientation discrimination was not covered under Title VII in every other circuit (*Hively*'s en banc opinion would be issued month later). Not surprisingly in light of Jamika's claim of explicit gender non-conformity discrimination, the judges mostly debated the "gender stereotyping" theory of discrimination.

As mentioned earlier, the Eleventh Circuit denied Lambda Legal's petition for an en banc rehearing, creating a fresh circuit split and the ideal environment for the Supreme Court to settle the debate. Lambda Legal has stated that it intends to file an petition for certiorari.

A third case, *Zarda v. Altitude Express*[39], is currently awaiting en banc review before the Second Circuit. Donald Zarda was a skydiving instructor in New York. Whenever Zarda was assigned a tandem jump with a female client, he made a point to mention his sexual orientation as a gay man. He did this not for any personal gratification or to advance an agenda, but because he believed it dispelled some of the awkwardness of being strapped tightly to his clients and provided them with a more-enjoyable overall experience. And it probably did, until one day in 2010: a client informed her boyfriend that Zarda had discussed a recent breakup with his partner, the boyfriend complained, and Donald was fired, according to his company, Altitude Express, for "failing to provide an enjoyable experience for a customer."

Zarda filed a suit in the Eastern District of New York claiming discrimination due to sexual orientation in violation of state law and Title VII of the Civil Rights Act of 1964.[40] The district court's dismissal of the Title VII claim on summary judgment was upheld by the Second Circuit Court of Appeals, which noted that a three-judge panel could not overrule 17-year old circuit precedent stating that Title VII's prohibition against "discrimination . . . because of . . . sex" did not encompass discrimination due to one's sexual orientation. But this past May the Second Circuit granted an *en banc* review of the verdict – which it does more rarely than any other circuit. Oral arguments are scheduled for September.

[39] 855 F.3d 76 (2nd Cir. 2017).
[40] Tragically, Zarda died in a skydiving accident before his case went to trial.