SEX AND SEXUAL ORIENTATION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964: SAME, SIMILAR, OR DISTINCT?

By Lauren Abrams

About the Author

Major: English ♦ **Minors**: Theology, Management & Leadership ♦ Graduation Year: 2022 ♦ **Activities**: Appa Volunteers, University Wind Ensemble, The Heights (Features/Magazine Section) ♦ **Career Goals**: Considering professions in law or the publishing industry

Summary of Submission

Abrams delineates the arguments both for and against interpreting Title VII of the Civil Rights Act of 1964's protection from sex-based discrimination in the workplace to include sexual orientation as well. Drawing on precedent established in several landmark LGBTQ+ cases, Abrams sheds light on the inconsistency of judicial rulings regarding this issue. While her essay thoroughly explores the incentives and ramifications for the Court to protect against sexual orientation discrimination in the pending SCOTUS cases of *Bostock v. Clayton County, Georgia* and *Altitude Express Inc. v. Zarda*, Abrams ultimately argues that there is no replacement for the legislative branch's direct and unambiguous modification of Title VII.

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Introduction

With every passing year, the dialogue surrounding sexual orientation and sexual identity has increased in scope within United States social culture, extending into the professional world as well. Inevitably, those who identify as LGBTQ+ and those who disagree with this lifestyle intersect at workplaces across the country. Despite the legal goals of promoting equity, laws are often ambiguous and movements for social change serve as a consistent hub for bitter conflict. Under *Bostock v. Clayton County*, the openly gay male plaintiff was fired for behavior considered "unbecoming" of an employee.[23] After beginning a new job at Child Welfare Services in Clayton County, Georgia as a coordinator in 2003, he alleges that negative criticism about his sexual orientation by figures of authority arose as a result of his involvement in a "gay, recreational softball league."[24] The plaintiff claims that he did not engage in any improper conduct, as evidenced by the County's internal audit of the funds he managed. Nevertheless, in June 2013 the "Clayton County terminated Plaintiff, allegedly for conduct unbecoming of one of its employees. The plaintiff alleges that this reason was the pretext for discrimination based on his sexual orientation."[25]

Another currently pending Supreme Court LGBTQ+ case brought under the Civil Rights Act is *Altitude Express Inc. v. Zarda*, in which the plaintiff, a gay male skydiving instructor, was terminated because he informed female clients, whom he was strapped to for skydiving purposes, that he was gay in an effort to reassure them. A female client's boyfriend reported this to the company, and Zarda was terminated as an employee because he "failed to conform to the straight male macho stereotype."[26] In the ruling of this case, the court asserted that the plaintiff failed to find enough correlation between his termination and Title VII for his case to be valid.

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[23] Bostock v. Clayton Cty., 2016 U.S. Dist. LEXIS 192898 (2016).
[24] Ibid.
[25] Ibid.
[26] Zarda v. Altitude Express, Inc., 2018 U.S. App. LEXIS 4608 (2018).

Broadly, Title VII outlaws employment discrimination "because of such individual's race, color, religion, sex, or national origin."[27] This essay will explore the potential legal controversies involved in these Title VII cases, should the Supreme Court decide to extend protections of discrimination to include sexual orientation.

History

Since 1964, there has been a patchwork of various case rulings and state-level legislation involving sexual orientation in the workplace. In the absence of a consistent federal statute, states have championed their own legislation specific to discrimination based on sexual orientation. As of 2012:

> '"Fifteen states and Washington, D.C. have passed laws that include protections against both sexual orientation and gender identity discrimination in the workplace. Some states first passed sexual orientation laws and then added gender identity language in subsequent legislation (e.g., California and Massachusetts). Others passed a single law that included both types of protections (e.g., Iowa and Oregon)."[28]

As of 2018, a total of twenty-two states out of fifty have non-discrimination protections specifically regarding sexual orientation, which offer varying levels of protection.[29] Stereotypically liberal states tend to have more legislation protecting LGBTQ+ employees than stereotypically conservative states, particularly in the South.[30] Changing social attitudes towards discrimination in the workplace are reflected in this increase in state legislation between 2012 and 2018 alone.

Government agencies are now expected to take a very specific standpoint with respect to the Civil Rights Act. In terms of its interpretation, the United States Equal Employment Opportunity Commission released a statement in 2015 ordering that "federal agencies should ordinarily process a complaint of

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[27] "Title VII of the Civil Rights Act of 1964," U.S. Equal Employment Opportunity Commission.
[28] Jerome Hunt, "A State-by-State Examination of Nondiscrimination Laws and Policies," Center for American Progress, 2012.
[29] Sarah Warbelow et al., "2018 State Equality Index," Human Rights Campaign Foundation (2018): 45.
[30] Ibid.

discrimination on the basis of sexual orientation as claims of sex discrimination under Title VII of the Civil Rights Act of 1964."[31]

Analysis

In ruling to extend Title VII, the Court risks extrapolating the terminology of the legislation for the sake of matching modern social norms: it is fairly unlikely that discrimination based on sexual orientation would have been accounted for or implied by legislators in 1964, as the concept of non-traditional sexuality was still extremely controversial.[32] While the legislators were primarily concerned with racial discrimination, protections for sex discrimination "were added to the Civil Rights Act of 1964 at a late stage in the legislative process and lack a background of debate or legislative history."[33] Judicial involvement with "congressional intent"[34] involves the risk of legislating from the bench—allowing one pillar of government to step within the bounds of another. Additionally, the law exists to create equity, but requires the authority to do so. If the law becomes diluted and flexible to match the social views of changing times, the language of the law risks losing some of its potency and integrity.

A new ruling in favor of extending Title VII to encompass sexual orientation would also challenge decades worth of precedent. Following the passing of the Civil Rights Act of 1964, courts largely ruled against interpreting sexual orientation under "sex."[35] In *DeSantis v. Pacific Telephone and Telegraph Co.*(1979), a California District Appeals Court rejected a case from multiple appellants who claimed that the workplace discrimination they were experiencing as a result of their sexual orientation was unlawful under Title VII. The appellants in *DeSantis* argued that Congress had indeed meant to include sexual orientation under sex, because homosexual discrimination has a disproportionate effect on men, which in effect, amounts to gender or

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[31] "Title VII of the Civil Rights Act of 1964," U.S. Equal Employment Opportunity Commission.
[32] Jeffrey T. Spoeri, "Pennsylvania Avenue Tug-of-War: The President Versus Congress over the Ban on Homosexuals in the Military," *Washington University Journal of Urban and Contemporary Law* 45 (1994): 175-218, HeinOnline.
[33] David A. Landau, "Employment Discrimination Against Lesbians and Gays: The Incomplete Legal Responses of the United States and the European Union," *Duke Journal of Comparative and International Law* (1994).
[34] "Title VII of the Civil Rights Act of 1964," U.S. Equal Employment Opportunity Commission.
[35] Ibid.

sex-based discrimination. However, the Courts rejected this argument and claimed there was no intent behind the term "sex"[36] aside from its literal meaning of gender, and did not extend it to sexual orientation.[37]

Although social change is inevitable, precedents remain important, and the *DeSantis* case is fairly proximal to the drafting of Title VII. If courts in 1979 were interpreting Title VII without including sexual orientation, it is highly probable that lawmakers of the social mindset from almost two decades before were doing the same. More recently, in the early 1990s, the plaintiff in *Carreno v. IBEW* (1996) experienced relentless and demeaning sexual harassment at his workplace as a result of his sexual orientation. After bringing suit for a violation of Title VII, the courts decided that verbal and physical assaults on the plaintiff were not a result of his sex, but rather because he was a perceived homosexual, rendering a clear line between the two identifications.[38] According to the Court, if he had been discriminated against specifically because he was male, this would have been protected under Title VII; however, the discrimination against him was based on his sexual orientation, which Title VII does not explicitly include—reiterating the distinction between the two. Even the original courts in *Hively v. Ivy Tech Community College of Indiana* (2017) held this precedent until it was overturned by an appeals court.[39]

Only recently have courts begun to overturn these precedents, reasoning for an inseparable link between sex and sexual orientation. As mentioned previously, the United States Equal Employment Commission concluded after *Baldwin v. Foxx* in 2015 that sexual orientation was a sex-based concept and should be dealt with under Title VII as such. The plaintiff was ruled to have been unlawfully fired from his job as an air traffic controller for his sexual orientation: "The reasoning, in short, is that if a man marries a man and gets fired as a result, the outcome would've been different than if he were a woman (who likely wouldn't have been fired for marrying a man)."[40] A similar argument was made in one of the cases at hand; the plaintiff in *Zarda v. Altitude*

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[36] "Title VII of the Civil Rights Act of 1964," U.S. Equal Employment Opportunity Commission.
[37] De Santis v. Pacific Tel. & Tel. Co., 1979 U.S. App. LEXIS 14335 (1979).
[38] Samuel A. Marcosson, "Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII," *Georgetown Law Journal* 81 (1992).
[39] Bridget Brazil, "You Better Work: Employment Discrimination, Title VII, and Sexual Orientation," *The University of Kansas Law Review* 67 (2019): 631.
[40] Joe Pinsker, "A Quiet Triumph for Gay Workers," *Atlantic Online* (2015).

Express argued a violation of Title VII under the claim that "sexual orientation was defined by one's sex in relation to the sex of those to whom one is attracted, making such discrimination impossible without considering sex."[41] At its core, this ruling and argument imply that the nature of sexual orientation is so fundamentally connected to the concept of sex that these ideas cannot be reasonably separated from each other.

In the arguments for *Bostock* and *Zarda*, the Justices refer to a "test" from *Manhart v. Madison Memorial Hospital* in 2014, in which the plaintiff, who was a nurse, was allegedly discriminated against because she was not rehired after taking time off for pregnancy.[42] This case produced a test to identify instances of gender discrimination: a plaintiff is discriminated against if "similarly-situated individuals outside of her protected class received more favorable treatment."[43] In essence, if a person of the opposite sex of this plaintiff would have experienced a different outcome in the same situation, discrimination can be proven.

The Counsel in defense of the plaintiffs in the *Bostock* and *Zarda* cases argue that sexual orientation is inherently tied to sex under this very test. In a quasi-reiteration of the reasoning from the Baldwin case, it was argued that "Title VII was intended to make sure that men were not disadvantaged relative to women and women were not disadvantaged relative to men."[44] Therefore, when a man is discriminated against for his homosexual orientation, for romantically preferring males whereas a woman would not be, or when a woman is discriminated against for her homosexual orientation preferring other females whereas a man would not be, there is an inherent disadvantage to which sex is inherently linked. She further argues that interpreting sexual orientation discrimination as related to sex in this way actually requires no extrapolation of the original meaning of Title VII at all.[45]

By interpreting Title VII in this manner, there would be more protections for a minority group who, based on the vast number of cases of workplace discrimination and evident need for state legislation, has endured decades of hardship within the workplace. Conversely, this interpretation gives employers even more

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[41] Zarda v. Altitude Express, Inc., 2018 U.S. App. LEXIS 4608 (2018).
[42] Manhart v. Madison Mem. Hosp., 2014 U.S. Dist. LEXIS 22101 (2014).
[43] Ibid.
[44] Zarda v. Altitude Express, Inc., 2018 U.S. App. LEXIS 4608 (2018).
[45] Bostock v. Clayton County, 2019 Geor. App., Oyez (2019).

elements to consider in their treatment of their employees and potential hires, which may be seen as a business inconvenience.

Conclusion

It appears that the source of this controversy is a lack of clear, federal legislation defining protections for sexual orientation within the workplace. Different geographic areas and their courts are likely to rule differently depending on the ideological standpoints that govern the region, despite the call to remain impartial; there is also a sense of freedom in this interpretative relativism. Conversely, these inconsistencies create personal hardships and complex litigation. The Supreme Court could create an entirely new precedent, but in either case, no judicial action can replace a concrete instruction from the legislative branch.

Based on the tone and content of recent oral arguments from the Supreme Court, counsels arguing in defense of allowing sexual orientation discrimination to be covered by Title VII make compelling arguments, and the Justices seem to be revealing that they are moved by such arguments. However, these interpretations seem increasingly complex, not necessarily leading to an obvious ruling. Even by modern standards, extending "sex" to sexual orientation requires a lengthy explanation. In terms of precedent, the more formalist judges will most likely rule in light of *Carreno* or *DeSantis*, and rule with business owners and the original bedrock meaning of the document in mind. Meanwhile, the more realist judges may capitalize on the opportunity to use the implicit connotations of the language in a way that supports a marginalized group and expands the government's ability to protect them. Because the Court has a majority of conservative appointed judges, the ruling may likely align with the formalist view.

To approach this issue from a federal and structural view of the U.S. government, the most effective solution would be for the legislative branch to directly amend Title VII in a manner that would clearly display support or rejection. This could include passing the Equality Act, which would directly expand the language of Title VII to protect more specific categories of LGBTQ+ employees in the workplace, or even an amendment

expressly concluding that the federal government does not provide protections of sexual orientation discrimination.[46] In either case, and with moral values aside, the judicial branch would not be put in the position to be the voice denying protection to victims of sexual orientation discrimination, or the voice expanding the meaning of the law on a national stage. As shown by the inconsistencies in state legislation and unpredictable rulings, there is a clear need for a definitive conclusion.

As of November 2019, the Equality Act is still in committee in the Senate after passing through the House, pending further review.[47] Without federal legislation outlining clear protections, it may be more advantageous to rule against including sexual orientation under Title VII and allow the legislative branch itself to enumerate the parameters of discrimination. Although this would ultimately injure the plaintiffs in *Bostock v. Clayton County* and *Altitude Express Inc. v. Zarda*, any future cases would be protected by explicit legislation, and the Court would not have to create a precedent solely for the purposes of accommodation. There are moral consequences and implications regardless of which direction the court decides to go, and one can only hope resolutions and relief from discrimination against our nation's employees are on the horizon.

[46] Sue Ashtiany, "The Equality Act 2010: Main Concepts," *International Journal of Discrimination and the Law* 11 (2011): 29-42.
[47] David N. Cicilline, "H.R.3185 - 114th Congress (2015-2016): Equality Act," Congress.gov (Sept. 8 2015).

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Ashtiany, Sue. "The Equality Act 2010: Main Concepts." *International Journal of Discrimination and the Law* 11, no. 1-2 (March 2011): 29-42, HeinOnline. https://heinonline-org.proxy.bc.edu/HOL/P?h=hein.journals/ijdisclw11&i=31

Brazil, Bridget. "You Better Work: Employment Discrimination, Title VII, and Sexual Orientation." *The University of Kansas Law Review,* 67 (March 2019): 631. https://advance-lexis-com.proxy.bc.edu/api/document?collection=analytical-materials&id=urn:contentItem:5VX2-CT00-00CV-N0YH-00000-00&context=1516831

Bostock v. Clayton Cty., 2016 U.S. Dist. LEXIS 192898 (United States District Court for the Northern District of Georgia, Atlanta Division November 3, 2016, Filed). https://advance-lexis-com.proxy.bc.edu/api/document?collection=cases&id=urn:contentItem:5RNG-VW71-FGJR-20FY-00000-00&context=1516831

"Bostock v. Clayton County." *Oyez.* Accessed 14 Nov. 2019. www.oyez.org/cases/2019/17-1618

Cicilline, David N. "H.R.3185 - 114th Congress (2015-2016): Equality Act." Congress.gov (Sept. 8 2015). www.congress.gov/bill/114th-congress/house-bill/3185

De Santis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 1979 U.S. App. LEXIS 14335, 19 Fair Empl. Prac. Cas. (BNA) 1493, 19 Empl. Prac. Dec. (CCH) P9271 (United States Court of Appeals for the Ninth Circuit May 31, 1979). https://advance-lexis-com.proxy.bc.edu/api/document?collection=cases&id=urn:contentItem:3S4W-VXY0-0039-M1KN-00000-00&context=1516831

Hunt, Jerome. "A State-by-State Examination of Nondiscrimination Laws and Policies." Center for American Progress, 2012. https://www.americanprogress.org/issues/lgbt/reports/2012/06/11/11696/a-state-by-state-examination-of-nondiscrimination-laws-and-policies/

Landau, David A. "Employment Discrimination Against Lesbians and Gays: The Incomplete Legal Responses of the United States and the European Union." *Duke Journal of Comparative and International Law* (1994). https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1340&context=djcil

Manhart v. Madison Mem. Hosp., 2014 U.S. Dist. LEXIS 22101 (United States District Court for the District of Idaho February 19, 2014, Filed). https://advance-lexis-com.proxy.bc.edu/api/document?collection=cases&id=urn:contentItem:5BJJ-MTH1-F04D-6105-00000-00&context=1516831

Marcosson, Samuel A. "Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII." *Georgetown Law Journal* 81, no. 1 (November 1992). https://advance-lexis-com.proxy.bc.edu/api/document?collection=analytical-materials&id=urn:contentItem:3S41-3YN0-00CV-54XW-00000-00&context=1516831

Pinsker, Joe. "A Quiet Triumph for Gay Workers." *Atlantic Online,* July 22, 2015. https://advance-lexis-com.proxy.bc.edu/api/document?collection=news&id=urn:contentItem:5GH6-BC61-JCG7-V42X-00000-00&context=1516831

"Title VII of the Civil Rights Act of 1964." U.S. Equal Employment Opportunity Commission.

https://www.eeoc.gov/laws/statutes/titlevii.cfm

Spoeri, Jeffrey T. "Pennsylvania Avenue Tug-of-War: The President Versus Congress over the Ban on Homosexuals in the Military, The." *Washington University Journal of Urban and Contemporary Law,* 45 (1994): 175-218. HeinOnline. https://heinonline-org.proxy.bc.edu/HOL/P?h=hein.journals/waucl45&i=183

Warbelow, Sarah, et al. "2018 State Equality Index." Human Rights Campaign Foundation, 2018: 45. https://assets2.hrc.org/files/assets/resources/SEI-2018-Report.pdf

Zarda v. Altitude Express, Inc., 883 F.3d 100, 2018 U.S. App. LEXIS 4608, 130 Fair Empl. Prac. Cas. (BNA) 1245, 102 Empl. Prac. Dec. (CCH) P45,990, 2018 WL 1040820 (United States Court of Appeals for the Second Circuit February 26, 2018, Decided). https://advance-lexis-com.proxy.bc.edu/api/document?collection=cases&id=urn:contentItem:5RRK-FB71-FCSB-S000-00000-00&context=1516831