15-3775

United States Court of Appeals

for the

Second Circuit

MELISSA ZARDA, co-independent executor of the estate of Donald Zarda, and WILLIAM ALLEN MOORE, JR., co-independent executor of the estate of Donald Zarda,

Plaintiffs-Appellants,

v.

ALTITUDE EXPRESS, INC., doing business as Skydive Long Island, and RAY MAYNARD,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

EN BANC BRIEF OF COURT-APPOINTED *AMICUS CURIAE*

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae counsel submits this brief in response to this Court's order of June 20, 2017 [Dkt. 290]. The Court's order invited briefing and argument "in support of the view that Title VII does not prohibit discrimination on the basis of sexual orientation." *Amicus curiae* counsel provides that briefing herein.

SUMMARY OF THE ARGUMENT

The Supreme Court insists that statutes be interpreted not by the ebbs and flows of modern language but by reference to the original public meaning of the enactment. *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) ("It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." (citation and internal quotation marks omitted)). The original public meaning of Title VII's prohibition of discrimination "because of … sex" does not include "because of … sexual orientation." *See Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 355 (7th Cir. 2017) (Posner, J., concurring) ("A broader understanding of the word 'sex' in Title VII than the original understanding is thus required in order to be able to classify the

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E) and LR 29.1(b), *amicus* counsel states that (i) no party's counsel authored this brief in whole or in part; (ii) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (iii) no person, other than *amicus curiae*, contributed money that was intended to fund preparing or submitting this brief.

discrimination of which Hively complains as a form of sex discrimination."). Judge Posner's candid and unassailable observation resolves this case.

Against the original public meaning of Title VII, Zarda and her *amici* supporters rely first on a "but for" locution—the idea that if one simply asks whether the conduct the employer objected to would be similarly objectionable if performed by the other sex, that will reveal whether Title VII covers discrimination on that basis. Yet the Supreme Court has never used such a "comparator" test to interpret Title VII. Using the comparator test as an interpretive device flies in the face of numerous cases from the Court instructing that, for disparate treatment claims, the "true reasons" the employer had for taking the adverse employment action are what matter.

> [W]e mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a *truthful* response, *one of those reasons would be that the applicant or employee was a woman*. In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.

Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) (plurality) (emphases added) (footnote omitted). Blind application of a flawed comparator test cannot substitute hypothetical reasons for those true ones—and "I fired him because he is gay" is the true reason in a sexual orientation discrimination case; not "I fired him because he is a man." Because men and women can have any sexual orientation discrimination on the basis of the latter is not discrimination on the basis of the former.

Nor is it so-called "associational discrimination." There is no such thing in Title VII as "associational discrimination," there is discrimination against an employee because of "such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (a)(1). Zarda, Lambda Legal, and *Hively* make much of the cases involving interracial relationships while ignoring the common sense difference between those facts and the facts of this case, and indeed most cases of discrimination on the basis of sexual orientation.

In the mine run case of sexual orientation discrimination, the true reason for the employer's conduct will not be "that the applicant or employee was a woman" or a man, it will be that the applicant or employee was homosexual, or bisexual.[2] The employer will not be "act[ing] on the basis of a belief that a *woman* cannot be [a homosexual], or that she must not be" as *Price Waterhouse* says, but on the basis of a belief that human beings should not be homosexual. *Hively*, 853 F.3d at 370 (Sykes, J., dissenting) (citation and internal quotation marks omitted) ("To put the matter plainly, heterosexuality is not a *female* stereotype; it is not a *male* stereotype; it is not a *sex-specific* stereotype at all."). Not all cases are mine runs, of course, and if an employer would truthfully answer the *Price Waterhouse* question with "because you are a woman and women should not be homosexuals" and indicate that for men it is just fine that could be sex discrimination that violates Title VII. Similarly, if an employer is

[2] This is, indeed, the mine run case. Zarda claimed that he was fired because he told a customer he was gay.

motivated by a belief that blacks should not be homosexual but whites can be, that could be race discrimination. Zarda and her *amici* supporters rely on a distortion of the "truthful response," putting words into the employer's mouth found nowhere in Zarda's complaint or in any plausible view of the facts—"I fired you because you are a man and men shouldn't be attracted to other men." *Compare* JA0031 at ¶ 32 ("Plaintiff mentioning the fact that he is gay to a passenger, however, got him fired.").

Compared to sexual orientation discrimination, in the context of race relations, the mine run and the outlier cases are inverted. To wit, the ugly truth is that in the most common scenarios of adverse employment actions motivated by interracial relationships the true motive is not be a race-neutral opposition to such relationships—*e.g.* the belief that it is equally immoral and inadvisable for whites to consort with blacks as it is for blacks to consort with whites. No, what lies behind these cases is the belief that one race is superior to another, and so it is uniquely wrong for one race (whites) to associate with another (blacks). That is not a race-neutral motive, it is a racist one. The truthful answer to the *Price Waterhouse* question is an answer sourced in racism—"you are white and a white person should not associate with blacks." Title VII prohibits adverse employment actions that are in fact racist, and these cases fall into that category. But while we can call discrimination on the basis of sexual orientation wrong, or bigoted, or worse, we cannot call it "sexist" and be speaking English. To the extent that the interracial "association" cases have failed

to explicitly make their results turn on the racist origins of these viewpoints, that is forgivable because that which is well-known does not bear repeating.

That leaves "sex stereotyping," a subject on which numerous courts of appeals appear to have far outstripped the narrow holding of *Price Waterhouse*. Sex stereotyping is evidence that may support a claim of sex discrimination; it is not, by itself, always sex discrimination. If this Court has to overrule any its precedents confusing the two, it should do so to avoid flouting the plain language of Title VII or mis-reading the Supreme Court as already having done so. *Hively*, 853 F.3d at 371 ("If the lower-court decisions involving 'sex stereotyping' are a confusing hodgepodge—and I agree that they are—the confusion stems from an unfortunate tendency to read *Hopkins* for more than it's worth." (Sykes, J., dissenting)).

Zarda advances a broad interpretation of Title VII that untethers liability from the Supreme Court's requirement that only unlawful actual motives are relevant. Thus, Zarda is free to redefine an employer's truthful response to the *Price Waterhouse* question into something more susceptible to a mechanistic and opportunistic "but for" analysis—turning evaluation of alleged sex discrimination into an alien motive-free inquiry. This broader view permits a Title VII claim even where the *Price Waterhouse* question would be answered honestly without reference to the plaintiff's sex, but rather with reference to a sex-neutral motive. To read *Price Waterhouse* to open the door to status discrimination claims such as these is to even further rewrite Title

VII. *See Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1260 (11th Cir. 2017) (William Pryor, J., concurring).

Zarda and her *amici* supporters are asking this Court to upend decades of universal (prior to *Hively*) appellate precedent in statutory interpretation. This Court should stay the course.

ARGUMENT

I. The Original Public Meaning Of "Because Of … Sex" Does Not Include "Because Of … Sexual Orientation"

When interpreting Title VII, fundamental canons of statutory construction are perhaps a better place to start than some comparator test never before deployed for that purpose. The Supreme Court has told us to use the original public meaning of a statute to interpret it. *Sandifer*, 134 S. Ct. at 876; *Bilski v. Kappos*, 561 U.S. 593, 603 (2010) ("In patent law, as in all statutory construction, [u]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." (alteration in original) (citation and internal quotation marks omitted)); *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014) (repeating canon and using 1934 dictionary to interpret words in statute enacted in 1952); *Perrin v. United States*, 444 U.S. 37, 42 (1979) ("[W]e look to the ordinary meaning of the term 'bribery' at the time Congress enacted the statute in 1961.").

The word "sex" in Title VII refers to male and female human beings, biologically. Contemporary dictionaries confirm that this was the only common

definition of the word that could have been deployed. *Hively*, 853 F.3d at 362-63 (Sykes, J., dissenting); *see also* Webster's New World Dictionary of the American Language (1969), at 1335 (defining the word as "1. either of the two divisions of organisms distinguished as male or female; males or females (especially men or women) collectively 2. the character of being male or female; all of the things which distinguish a male from a female").[3] The term "homosexuality" was not unknown in the 1960s. *See id.* at 696 (defining it as "sexual desire for those of the same sex"). Nor was "bisexual." *Id.* at 150 (defining it as "a person who is sexually attracted by both sexes"). The appearance of the word "sex" both within the words, "homosexual" and "bisexual" and the phrase "sexual orientation" as well as in the definitions of these terms, appears to be the basis for the *Hively* majority's remark that "[i]t would require considerable calisthenics to remove the 'sex' from 'sexual orientation.'" *Hively*, 853 F.3d at 350. Wordplay aside, no calisthenics are required to say that homosexuals can be male or female, and thus discriminating against them is not discrimination against males or females—*i.e.* not discrimination "because of … sex."

[3] The last definition provided here is "anything connected with sexual gratification or reproduction or the urge for these, especially the attraction of individuals of one sex for those of the other." The case would surely be easy if anyone argued or thought that Title VII's phrase "because of … sex" could refer to this third definition, but the statutory text does not make grammatical sense if such a definition is substituted, and also makes the category "sex" stand out from "race, color, religion" and "national origin."

This is perhaps why the *Hively* majority, Judge Posner's concurrence, Lambda Legal, and Zarda never seriously dispute the proposition that in 1964 discrimination "because of … sex" did not encompass the decision, for example, to fire someone because they are gay—Zarda's precise complaint in this case. The *Hively* majority plays Scrabble and over-reads *Price Waterhouse* to get where it wants to go. Lambda Legal, for its part, takes the time to respond in a footnote, where it derides the *Hively* dissent for "employing a phrase popular among some professors but wholly absent from the Supreme Court's voluminous Title VII jurisprudence." Lambda Legal En Banc Br. [Dkt. 312], at 13 n.10 ("Lambda Br."). Well, there is not a Title VII exception to the law of statutory interpretation, and the Supreme Court has said it is the contemporaneous (*original*), common (*public*), meaning (*meaning*) that is to be used in statutory interpretation. *Sandifer*, 134 S. Ct. at 876.[4]

It is no answer to cite *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) as some sort of license to depart from that original public meaning of Title VII.

[4] Lambda Legal then has the cheek, having just made fun of law professor talk, to cite a law review article for the vague, wrong, and irrelevant proposition that discerning Title VII's original public meaning is hard work. *Id.* (citing Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307 (2012)). Failing to provide a pincite means never having to admit that the authority in question nowhere supports the proposition. Franklin actually offers no affirmative case for what "because of … sex" even means (as if the words, "because" and "sex" were impossibly complex and vague in 1964), and then expresses a strange worry with courts using dictionary definitions to figure that out, an act absolutely in accordance with *Sandifer* and the "fundamental canon of statutory construction" it repeats. Franklin, 125 HARV. L. REV. at 1337 n.147.

Before *Oncale*, the Court had already held that harassment "because of … sex" constituted a violation of Title VII. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). These earlier cases interpret "terms" and "conditions" to encompass workplace harassment. *Meritor*, 477 U.S. at 64; 42 U.S.C. § 2000e-2 (a)(1). After that, the idea that who does the discriminating somehow affects whether it was "because of" one of the listed protected categories is textually absurd, and rightfully rejected. *Oncale*, 523 U.S. at 79 ("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."). The fact that "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII," *id.*, is of no moment because what Congress thought should be irrelevant. What matters is the original public meaning of Title VII.

And that original public meaning either embraces all sex-based harassment, irrespective of who commits it, or the real source of the generational statutory shock in *Oncale*, assuming there is any, is that the original public meaning of "terms" and "conditions" does not include workplace harassment—*i.e.* that *Meritor* is wrongly decided. It follows that musing on the "principal evil" sentence in *Oncale* will be no help in interpreting "because of … sex." *Oncale* is certainly not a license for this Court to depart from settled canons of statutory interpretation as if generational statutory shock has some independent value. Such a shock is, if anything, some evidence that

those pushing for that holding have got it wrong. Combined with the suggestion that this Court overturn decades of consistent precedent on statutory interpretation, it is powerful evidence that Zarda, her *amici* supporters, and the *Hively* majority have gotten it very wrong.

As the original public meaning does not embrace sexual orientation as a protected class in Title VII, the case should end there. Sexual orientation discrimination is not traditional discrimination on the basis of sex nor is it so-called "associational discrimination" (which is really just traditional discrimination and not a separate category). And it is not sexual discrimination in the form of "sex stereotyping," though it can be associated with such a claim.

II. Discrimination On The Basis Of Sexual Orientation Is Not Direct Sex Discrimination

The Supreme Court has, at times, deployed a "but for" locution to describe how a plaintiff might prove liability for intentional discrimination under Title VII. *See, e.g.*, *City of L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (if "the evidence shows treatment of a person in a manner which but for that person's sex would be different" that "constitutes discrimination" (citation and internal quotation marks omitted)). However, that is just shorthand for what actually matters—the true reason or reasons for the adverse employment action. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (at third step of inquiry, plaintiff must prove by a preponderance that "the legitimate reasons offered by the defendant were not its true

reasons"); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 517 (1993) (plaintiff must prove "that the real reason was intentional discrimination"); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) ("[T]he employer is in the best position to put forth the actual reason for its decision."). The Court has never once endorsed using a comparative or "but for" test to interpret the text of Title VII and, in effect, to supply an alternative motive to the actual and true reasons that the evidence shows motivated the employment decision.

Creative legal reasoning and the application of a "but for" hypothetical that the employer never even considered do not make firing an employee for being a homosexual into firing that employee for being a man. Deploying the comparative test to interpret Title VII so as to supplant an employer's opposition to homosexuality (or bisexuality) with another motive loses the plot entirely. It substitutes the useless results of a thought experiment—an artificial and counterfactual motive—for what the Supreme Court has said really matters.

> [T]he point of 'looking at comparators' in Title VII cases is to see if the evidentiary record permits a *factual* inference of *actual* discriminatory motive; the comparative method has no *interpretive* function.

Hively, 853 F.3d at 367 (Sykes, J., dissenting).

This observation is what makes worthless both the *Hively* majority's invocation of the "but for" test and the dissent's. The former seeks to test whether all sexual orientation discrimination is sex discrimination by altering the plaintiff's sex *and* his sexual orientation. *Hively*, 853 F.3d at 345. The latter keeps sexual orientation

constant. *Id.* at 365 (Sykes, J., dissenting). Both presume their opposite conclusions—if the law does not disaggregate intentional treatment of the basis of sex from treatment on the basis of sexual orientation then the *Hively* majority test is fine. But if it does, then the dissent's test is right. Of course, Judge Sykes pointed out that this case should be an exercise in statutory interpretation. In that exercise—asking what Title VII's original public meaning is—the Supreme Court has never used this vastly overrated comparative test and the *Hively* majority, Lambda Legal, and Zarda, have yet to actually enter an argument. The comparator discussion is a rigged game. The statutory interpretation discussion, the one that matters, is a game that should be abandoned because one side—Judge Sykes'—has run up the score so high. *See also Hively*, 853 F.3d at 353 (Posner, J., concurring) ("[W]hat is certain is that the word 'sex' in Title VII had no immediate reference to homosexuality; many years would elapse before it could be understood to include homosexuality."); *id.* at 354-55 (Posner, J., concurring) (conceding that an originalist approach to statutory interpretation provides only one answer and then proceeding to equate interpretation of Title VII to a slew of constitutional decisions regarding the First Amendment, the Tenth Amendment, and the Due Process Clause).

The real end game here is a jettisoning of intent from intentional discrimination[5] and judicial imposition of unconscious bias truffle-hunting in Title VII

[5] Considerable calisthenics may be required.

disparate treatment cases. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164, 1172 (1995) (criticizing Title VII jurisprudence for a failure to address unconscious bias, because *Price Waterhouse* did not do it, stating "the plurality opinion in Price Waterhouse frames causation not simply as an attempt to discern what actuated an employer's decision, but as an inquiry into the employer's conscious state of mind at the moment a decision was made"); *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 990 (1988) (noting that "disparate treatment analysis" does not address "problem[s] of subconscious stereotypes and prejudices"); *cf. also Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2511-12 (2015) ("Recognition of disparate-impact liability under the FHA plays an important role in uncovering discriminatory intent: it permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."). That may well be a slippery slope Zarda and Lambda Legal embrace. It is not one the Supreme Court has.[6]

[6] Speaking of slippery slopes, it is not difficult to see how the *Hively* majority's comparator test would deal with the firing of an employee who desired to use certain traditionally sex-segregated facilities in the company of the opposite sex. A woman who is fired for habitually using the men's toilet or locker room would not have been fired had she been a man, after all. *See Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 325 F. App'x 492, 493-94 (9th Cir. 2009) (Title VII *prima facie* case based on refusal to allow biological male transsexual to use women's restroom—dismissal affirmed on ground that true reason for ban was "safety"). The result in *Kastl* (and any case like it) cannot be squared with the *Hively* but-for test—when the but-for test is satisfied discrimination exists as a matter of law (it being elevated to an interpretation of a

III. The So-Called Associational Race Discrimination Cases Do Not Resolve This One

It is here that the subject turns to cases dealing with so-called associational race discrimination. Adverse employment action that results from opposition to interracial relationships is race discrimination not because of some "but for" thought experiment but because it is the result of racist motives and ideology. The same cannot be said for opposition to homosexual relationships and sexism.[7]

A brief tour through the associational race discrimination cases shows what should not require repeating—whites are punished for being in interracial relationships not because of some race-neutral ethos but because of a toxic and sadly persistent philosophy of white superiority. In *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir. 2008), one will search in vain for a neutral opposition to interracial relationships divorced from the worst kind of anti-black racism. The Vice President of the college is alleged to have told the plaintiff, *inter alia*, "[Y]ou're really going to marry that Aunt Jemima? You really are a nigger lover," and that the basketball program plaintiff coached needed to "keep [its] niggers in line." *Id.* at 134 (alteration in original).

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statute and all). *Hively* permits no room for the real reason when the hypothetical one does all the work.

[7] Even if they were the same in this sense, being homosexual would still not be the equivalent of being in an interracial marriage. It is the equivalent of having the desire, not necessarily acted upon, to date outside of one's race. Has anyone found the Title VII case where someone is fired for the status of being an "interracialist"?

Lambda Legal and the *Hively* majority quote the conclusion of *Holcomb* but miss the facts that provided the basis. *See* Lambda Br. at 7 (quoting *Holcomb* without noting that anti-black prejudice pervaded plaintiff's allegations); *Hively*, 853 F.3d at 348 (same). There's nothing wrong with that, as no one has identified any case of so-called "associational" racial discrimination that did not involve explicit or implicit racism, as opposed to studied race neutrality. *See Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 891 (11th Cir. 1986) (case of white man refused employment because married to a black woman, collecting further cases including *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975) (white plaintiff discharged because "the defendant disapproved of a social relationship between a white woman and a black man"); *Reiter v. Ctr. Consol. Sch. Dist. No. 26-JT*, 618 F. Supp. 1458, 1459 (D. Colo. 1985) (nun, race not identified, alleged discrimination based on her association with those of Hispanic national origin)); *Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 882 (7th Cir. 1998) (white plaintiffs advancing claim that they were discriminated against because of their friendships with black co-workers, including alleging that co-worker commented "Why don't you take your nose and put it up the black's ass like you have always got it and keep it there?"). Cases in this vein raising meritorious or plausible claims are best analogized to a "racial stereotyping" version of *Price Waterhouse*. The employer discriminates against a white employee because he is white and evidence for that is that the employer has an invidious, racist view of how a white person should behave—*e.g.* not consort with blacks.

Of course, that is not what is at work in this case, or indeed in many if not most cases of sexual orientation discrimination. Zarda alleges only that he was fired because he told a customer he was gay, not because Altitude Express had (or perceived its customers to have) some sex specific theory about how men, as opposed to women, should behave. JA0031 at ¶ 32. His case is hardly unusual. *See, e.g.*, *Velazquez v. State Dep't of Corr.*, No. CV156051925S, 2016 WL 3265950, at *3 (Conn. Super. Ct. May 18, 2016) (describing sex neutral derogatory terms typically used by those harboring animus towards homosexuals). In short there's nothing race-neutral about the so-called interracial association cases but there is nothing sex-specific about most cases of sexual orientation discrimination.[8] Viewed through the lens of common sense and experience, they produce radically different distributions. There may be counterexamples—*i.e.* the truly bizarre non-racist opposition to interracial relationships or the perhaps somewhat less bizarre sexist distinction between lesbians

[8] Lambda Legal at least gestures at a hard connection between opposition to homosexuality and sexism. Lambda Br. at 18 (citing Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994)). But it should take more than the musings of the academy to connect two distinct biases when the Supreme Court has commanded that disparate treatment cases focus on the "true reason" for the adverse employment action.

and gay men.[9] That latter possibility is not a reason to classify all sexual orientation discrimination as sex discrimination.[10]

There is one last reason to distinguish the racial "associational discrimination" cases from this one. None of the former involve a plaintiff fired or subjected to some other adverse employment action for the simple state of mind of enjoying the company of people of all races or even preferring the company of those of a different race. *Holcomb* was in a marriage, for example, not just interested in dating black women as an abstract matter. Sexual orientation is a status, and while relationships and acts can be homosexual in nature, homosexual acts and relationships are distinct from the status of being a homosexual—to say it any other way is to define homosexuality using the very same stereotyping the Court condemned in *Price Waterhouse*. *See Evans*, 850 F.3d 1259-60 (William Pryor, J., concurring).

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[9] Jay Michaelson, *Chaos, Law, and God: The Religious Meanings of Homosexuality*, 15 MICH. J. GENDER & L. 41, 63, 63 n.83 (2008) (discussing the distinction from the perspective of Jewish scholars, including Maimonides).

[10] Here is as good a place as any to dispose of *Loving v. Virginia*, 388 U.S. 1 (1967). Notwithstanding that *Loving* is a case about the Constitution, it addressed a state law that prohibited only whites from marrying other races while permitting intermarriage among nonwhite races. *Id.* at 11. Many have made far too much of its footnote 11, wherein the Court tells us that it would be exactly the same case if no one had heard of white supremacy—easy for the Court to resolve a hypothetical not presented and so outlandish. That is not meaningful legal reasoning or a holding, it is what could only be charitably described as a throwaway. In all events, *Loving* is not about Title VII and is of little use in this context. *Hively*, 853 F.3d at 356 (Posner, J., concurring).

With interracial association cases on one end of a spectrum—nearly always racist—and sexual orientation cases on the other—frequently not sexist—that leaves the thorny issue of "sex stereotyping" and *Price Waterhouse*. It is the fact finder's responsibility in these cases to sort the prohibited, sex discrimination, from the permitted (under Title VII), sexual orientation discrimination. The latter cannot, of itself, state a claim for which Title VII relief can be granted. Discrimination on the basis of sexual orientation is not always sex discrimination provable via evidence of sex stereotyping.

IV. Discrimination On The Basis Of Sexual Orientation Is Not, *Ipso Facto*, Actionable Sex Stereotyping Under *Price Waterhouse*

The view that "sex stereotyping" is its own standalone claim of sex discrimination rather than just possible evidence of sex discrimination, permeates the argument of the *Hively* majority, Zarda, and her supporters. *See, e.g.*, *Hively*, 853 F.3d at 345 (citing *Price Waterhouse* and alleging that Title VII reaches "discrimination based on a person's failure to conform to a certain set of gender stereotypes"); Lambda Br. at 8-9 (same). *Price Waterhouse* does not support such a free-standing claim because it holds only that sex stereotyping is possible evidence of sex discrimination. Hopkins was aggressive and the managers did not like aggressive women. The stereotypical statement alone was not enough for a claim. But the stereotypical statement about aggressive women together with evidence that Hopkins's job "require[d] this trait"—*i.e.*, aggressiveness—was enough. *Price Waterhouse*, 490 U.S. at 251 ("An 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." (emphasis added)).[11] Some courts have read *Price Waterhouse* as establishing a separate actionable claim of "sex stereotyping," and this en banc Court has the opportunity to wipe the slate clean and put an end to much of this confusion right now. "'Sex stereotyping' should not be regarded as a form of sex discrimination, though it will sometimes, as in the *Hopkins* case, be evidence of sex discrimination." *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1068 (7th Cir. 2003) (Posner, J., concurring).

To put this into perspective, imagine an employer who thinks black nail polish on women is unacceptable. If she fires the plaintiff because she wears black nail polish, that looks like sex stereotyping, but is it sex discrimination? One way it might be sex discrimination under *Price Waterhouse* if wearing black nail polish is a job requirement—*i.e.* men are permitted to do so and in fact have to do so in order to get that promotion. But just having an idea of how one sex should act is not, standing alone, actionable sex discrimination under *Price Waterhouse*, which is quite a bit more narrow than it is being read. *Hively*, 853 F.3d at 371 (Sykes, J., dissenting).

Or take a sex-neutral employer policy of prohibiting cross-dressing. Is this sex discrimination? Men have to dress "like men," and women have to dress "like

[11] It is quite telling that this Court has only even mentioned this passage once, in *Dawson v. Bumble & Bumble*, 398 F.3d 211, 220-21 (2d Cir. 2005).

women." According to *Hively* it absolutely is sex discrimination because if a woman wants to wear a skirt that is ok but if a man does it is not. Under *Price Waterhouse* it is not automatically sex discrimination even though there has been sex stereotyping. Men are not told they should not wear skirts and then the wearing of skirts made necessary to the job, for example. Put simply, if the true motive is sex neutral (as the motives behind many dress policies may be), that is not sex discrimination.

With *Price Waterhouse* considered for all that it says and not just half of it, that leaves its relevance to Title VII claims for discrimination brought by homosexuals. Sometimes these may be successful—because the plaintiff can prove sex discrimination and support that with evidence of sex stereotyping. An example would be an employer holding the view that men should not be effeminate but requiring such a disposition for promotion to management. A man (whether or not homosexual) put in that catch 22 has an actionable claim of sex discrimination. Supportive evidence could be statements stereotyping men as masculine and women as feminine. But if instead the employer fires effeminate male and female homosexuals, and masculine male and female homosexuals, that looks like permitted (under Title VII) discrimination on the basis of sexual orientation.[12]

[12] The net result is that "I fired him because he is gay" is a complete defense to Title VII liability while it is also an admission of liability under the laws of the three states in this Circuit.

Turning to this case. Zarda claims he was fired for being gay. Does any proffered evidence of sex stereotyping tend to show discrimination against Zarda as a man? For example, was sexual attraction to men made necessary to being promoted? Was there evidence of misandry? Evidently not. Therefore it was not unlawful sex discrimination to fire him under *Price Waterhouse*. Case closed.

CONCLUSION

For this Court to depart from the original public meaning of Title VII would not only constitute disobedience to the law of statutory interpretation, but would also upend our political order. Yet again the judiciary is being called upon to take away from the people their right of self-determination—to short circuit the political process and decide winners and losers. It is not an act of judicial courage to absolve Congress from the responsibility to cast votes, perhaps difficult for some members, on this issue. Liberty dies to thunderous applause, and no doubt a decision by this Court in favor of Zarda will be met with such a response. That is not a reason for acquiescence; it is a reason for skepticism.

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Respectfully Submitted,

By: /s/ Adam K. Mortara

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5), LR 29.1(c), and this Court's Order dated June 19, 2017 [Dkt. 289] because it contains **5,699** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word version 2016 in 14-point Garamond.

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