

Sexual Orientation: DOJ And EEOC Take Opposite Positions In Amicus Briefs Filed In Same Case

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In a bizarre twist, the Equal Employment Opportunity Commission (EEOC) and Department of Justice (DOJ) have each filed *amicus briefs* on opposite sides of a sexual orientation discrimination case involving Title VII. Since 2013, the EEOC has consistently taken the position that Title VII prohibits sexual orientation discrimination. As we have covered in [past posts](#), there have been a number of recent decisions regarding whether Title VII's prohibition against sex discrimination also prohibits discrimination on the basis of sexual orientation. In particular, the U.S. Court of Appeals for the Second Circuit granted a recent request for an *en banc* rehearing of the plaintiff's claim holding that sexual orientation discrimination claims are not covered by Title VII, after originally affirmed a district court's decision to dismiss. The case is [Zarda v. Altitude Express, Inc. d/b/a Skydive Long Island](#). However, prior to a recent U.S. Court of Appeals for the Seventh Circuit decision, no federal court of appeals had found that sexual orientation discrimination claims were covered by Title VII.

The DOJ filed its *Zarda* brief in late July, which directly contradicts the EEOC's position, stating that Title VII's prohibition against sex discrimination does not extend to sexual orientation discrimination. The DOJ even took a direct shot at the EEOC, saying that "the EEOC is not speaking for the United States and its position about the scope of Title VII is entitled to no deference beyond its power to persuade." The DOJ's amicus brief emphasized that the essential element of "sex discrimination under Title VII is that employees of one sex must be treated worse than similarly situated employees of the other sex, and sexual orientation discrimination simply does not have that effect." While the DOJ admitted that sexual stereotyping claims would state a claim for relief, they asserted that "sexual orientation discrimination per se applies to both sexes alike."

Currently, the federal appeals courts are split on this issue and it likely will have to be decided by the U.S. Supreme Court. In the meantime, employers are well-advised to take claims of sexual orientation discrimination and/or harassment seriously since the EEOC, not DOJ, will be the administrative agency investigating charges against it.

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