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The Eighth Circuit Set to Grapple with Sexual Orientation Discrimination

By Kenny Bohannan*

The Eighth Circuit is set to weigh in on a topic of recent interest to many of her sister circuits: whether Title VII's bar on employer discrimination "because of … sex" encompasses a bar on discrimination based upon sexual orientation as well. Slated for oral arguments en banc this term, Horton v. Midwest Geriatric Management is poised to definitively answer this question in the Eighth Circuit.

In Horton v. Midwest Geriatric Management, Mark Horton alleged that Midwest Geriatric Management withdrew an offer of employment after he disclosed he was married to a same-sex partner.[1] This claim was dismissed with the District Court largely relying upon the Eighth Circuit's 1989 holding in Williamson v. A.G. Edwards and Sons, Inc. that "Title VII does not prohibit discrimination against homosexuals."[2]

The Second and Seventh Circuits have recently found that Title VII bars discrimination based upon sexual orientation. The Second and Seventh Circuits in Zarda v. Altitude Express and Hively v. Ivey Tech Community College, respectively, revisited and overturned longstanding circuit precedents accepting three different legal theories that sexual orientation discrimination is barred by Title VII: (1) discrimination based upon sexual orientation is necessarily discrimination "because of … sex," (2) sexual orientation discrimination is a form of "associational discrimination," and (3) sexual orientation discrimination is a form of impermissible "sex stereotyping."[3]

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[1] *Horton v. Midwest Geriatric Management*, No. 4:17CV2324 JCH, 2017 WL 6536576, at *2 (E.D. Mo. Dec. 21, 2017).

[2] *Id.* at *3 (quoting *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989)).

[3] See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018); *Hively v. Ivy Tech Cmty. Coll. Of Ind.*, 853 F.3d 339 (7th Cir. 2017).

Conversely, in Evans v. Georgia Regional Hospital, the Eleventh Circuit has recently reaffirmed a longstanding precedent that "[d]ischarge for homosexuality is not prohibited by Title VII..."[4]

This is not a question of first impression for the Eighth Circuit. In Williamson v. A.G. Edwards and Sons, Inc., a gay male alleged he was terminated for being openly homosexual in violation of Title VII.[5] In a brief opinion, the Eighth Circuit held that "Title VII does not prohibit discrimination against homosexuals."[6] This single sentence served as the beginning and end of any legal analysis of Title VII's applicability to sexual orientation discrimination in Williamson. Although Horton may provide the same legal conclusion as Williamson, legal spectators should expect a much more thorough analysis of the issue.

Williamson did not grapple with the Supreme Court's holding in Price Waterhouse that discrimination based upon "sex stereotypes" were impermissible under Title VII.[7] Lower courts have had "difficulty in drawing a line between sex stereotypes, which are actionable under Title VII, and notions of heterosexuality and homosexuality, which are not."[8] Such line-drawing can result in odd results where an openly homosexual man would be able to pursue a "sex stereotyping" theory if he faced discrimination for being perceived as "effeminate," but not if he were discriminated against for merely being homosexual, as in that case he would still be conforming to the male stereotype.[9] This line drawing has led some courts, such as the Seventh Circuit in Hively, to call this line between sexual orientation discrimination and sex stereotype discrimination so

[4] 850 F.3d 1248, 1256 (11th Cir. 2017) (quoting *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979)).
[5] 876 F.2d 69, 70 (8th Cir. 1989).
[6] *Id.*
[7] It should be noted that *Williamson* was decided after *Price Waterhouse*, but only within a few months.
[8] *Pambianchi v. Ark. Tech Univ.*, 95 F.Supp.3d 1101, 1114 (E.D. Ark. 2015).
[9] Bre Wexler, *Let's Call It What It Is: Sexual Orientation Discrimination Is Sex Discrimination Under Title VII*, 63 St. Louis U. L.J. 1, 12 (2018) ("In other words, employees who experience discrimination based on apparent gender nonconforming behaviors may be successful on their Title VII sex discrimination claim, whereas those who experience discrimination as a result of purely being homosexual would not.").

"gossamer-thin" that it does not exist at all.[10] The Eighth Circuit should be expected to address these arguments in Horton, either clearing the confusion for how these lines should be drawn or following the Seventh Circuit's conclusion that they do not exist at all.

The precedent upon which Williamson relied only reinforce the need for the Eighth Circuit to address Price Waterhouse's applicability to sexual orientation discrimination claims. The only brief citation provided for Williamson's conclusion that "Title VII does not prohibit discrimination against homosexuals," is to the Ninth Circuit's 1979 abrogated opinion in DeSantis v. Pacific Tel. & Tel. Co.[11] In DeSantis, three male employees alleged sex-based discrimination by their employer because they were homosexuals.[12] In rejecting their Title VII claim the Ninth Circuit "conclude[d] that Congress had only the traditional notions of 'sex' in mind," holding that "sex" for the purposes of Title VII was meant to be construed narrowly.[13] Further, in DeSantis, an additional plaintiff alleged he was terminated for wearing an earring to work as a school teacher.[14] This plaintiff alleged that "the school's reliance on a stereotype that a male should have a virile rather than an effeminate appearance violate[d] Title VII."[15] The Ninth Circuit disagreed, holding "that discrimination because of effeminacy, like discrimination because of homosexuality. . . does not fall within the purview of Title VII."[16]

However, in 2001 the Ninth Circuit largely abrogated this holding in Nichols v. Azteca Restaurant Enterprises, Inc. to conform to the mandates of Price Waterhouse.[17] In Nichols, the Ninth Circuit expressly overturned DeSantis' holding regarding discrimination based upon a male employee's effeminacy.[18] The Ninth Circuit held that effeminacy was indeed a sex stereotype prohibited as described in Price Waterhouse and that insofar as DeSantis can be read to conflict with Price Waterhouse, it is no longer good

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[10] *Hively v. Ivey Tech Community College*, 853F.3d 339, 346 (7th Cir. 2017).
[11] *Williamson*, 876 F.2d at 70.
[12] *DeSantis v. Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327, 328-29 (9th Cir. 1979).
[13] *Id*. at 329.
[14] *Id*. at 328.
[15] *Id*.
[16] *Id*. at 331-32.
[17] 256 F.3d 864, 875 (9th Cir. 2001).
[18] *Id*.

law.[19] However, Nichols did not go so far as to say that sexual orientation discrimination is sex-stereotyping in and of itself.

Williamson's brief analysis relied solely upon now-abrogated DeSantis. The Eighth Circuit's revisiting of this issue is appropriate to now explain how much (if any) of Williamson's holding remains good law.

Regardless of the Eighth Circuit's holding in Horton, a circuit split will still exist, leaving eventual resolution of this legal question at the Supreme Court's doorstep.

Edited by Carter Gage

[19] *Id*. at 874-75.