

No. 18-1104

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

---

MARK HORTON,  
Plaintiff-Appellant

v.

MIDWEST GERIATRIC MANAGEMENT, LLC,  
Defendant-Appellee

---

On Appeal from the United States District Court  
For the Eastern District of Missouri  
Hon. Jean C. Hamilton, Judge  
Case No.: 4:17CV2324 JCH

---

Brief of St. Louis and Kansas City Missouri Chapters of the  
National Employment Lawyers Association as Amicus Curiae in  
Support of Plaintiff-Appellant and in Favor of Reversal

---

Ferne P. Wolf  
Jill A. Silverstein  
Joshua M. Pierson  
SOWERS & WOLF, LLC  
530 Maryville Centre Dr., Suite 460  
St. Louis, MO 63141  
Phone: 314-744-4010  
Facsimile: 314-744-4026

*Counsel for Amicus Curiae St. Louis and Kansas City Missouri  
Chapters of the National Employment Lawyers Association*

## TABLE OF CONTENTS

Table of Contents .....	i
Table of Authorities .....	ii
Statement of Interest.....	1
Statement of the Case.....	1
Introduction and Summary of the Argument.....	1
Argument.....	2
I. Title VII prohibits discrimination because of sex, a question of the employer’s motivation .....	2
II. If the employee’s sex was a motivating factor in the employer’s adverse employment action, that action violates Title VII.....	3
A. A plaintiff must prove his sex was a motivating factor or played a part in the employer’s action.....	3
B. A jury could reasonably infer sex played a role in an adverse action when an employer considers the employee’s sexual orientation.....	4
1. The employer was motivated by its sex-based stereotype.....	4
2. The employer was motivated by the employee’s association with others.....	7
3. The employer was motivated by sex because sexual orientation discrimination <i>is</i> sex discrimination.....	9
Conclusion .....	9
Certificates .....	11

## TABLE OF AUTHORITIES

### Cases

<i>Christiansen v. Omnicron Grp., Inc.</i> , 852 F.3d 195 (2d Cir. 2017).....	5
<i>Deffenbaugh-Williams v. Wal-Mart Stores</i> , 156 F.3d 581(5 <sup>th</sup> Cir. 1998) .....	8
<i>EEOC v. Boh Bros. Const. Co., LLC</i> , 731 F.3d 444 (5 <sup>th</sup> Cir. 2013) .....	5
<i>EEOC v. R.G. &amp; G.R. Harris Funeral Homes, Inc.</i> , No. 16-2424, 2018 U.S.App. LEXIS 5720 (6 <sup>th</sup> Cir. March 7, 2018) .....	6, 7
<i>Franchina v. City of Providence</i> , 881 F.3d 32 (1 <sup>st</sup> Cir. 2018) .....	6
<i>Hively v. Ivy Tech Comm. Coll. of Ind.</i> , 853 F.3d 339 (7 <sup>th</sup> Cir. 2017) .....	6, 7, 8, 9
<i>Lewis v. Heartland Inns of Am., LLC</i> , 591 F.3d 1033, 1039 (8 <sup>th</sup> Cir. 2010) .....	7
<i>Loving v. Virginia</i> , 388 U.S. 1, 12 (1967). .....	7, 8
<i>Price Waterhouse v. Hopkins</i> , 491 U.S. 228 (1989).....	4, 5
<i>Pullman-Standard, Div. of Pullman v. Swint</i> , 456 U.S. 273 (1982) .....	3
<i>Smith v. City of Salem, Ohio</i> , 378 F.3d 566 (6 <sup>th</sup> Cir. 2004).....	5
<i>Williamson v. A.G. Edwards</i> , 876 F.2d 69 (8 <sup>th</sup> Cir. 1989) .....	2, 3
<i>Zarda v. Altitude Express, Inc.</i> , No. 15-3775, 2018 U.S.App. LEXIS 4608	

(2d Cir. Feb. 26, 2018)(banc) .....6, 7, 8, 9

**Statutes**

**Federal**

42 U.S.C. § 2000e-2(a)(1) .....2, 3

42 U.S.C. § 2000e-2(m) ..... 3

**Rules**

Fed.R.App.P. 29 (a)(4)(E) ..... 1

**Jury Instructions**

8<sup>th</sup> CIR CIVIL JURY INSTR. §§ 5.40, 5.21 (2017) .....3, 4

## **Statement of Interest**

The St. Louis and Kansas City, Missouri Chapters of the National Employment Lawyers Association are jointly filing this Brief. The Missouri Chapters consist of over 200 attorneys. The NELA Chapters' focus is representing employees in employment-related disputes including claims under Title VII of the Civil Rights Act of 1964. The St. Louis Chapter in particular includes many attorneys licensed in both Missouri and Illinois who practice in both states and thus within both the Seventh and Eighth Circuits.

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting this brief; and no person other than *amicus curiae*, its members, or its counsel, contributed money intended to fund preparing or submitting this brief. *See* Fed.R.App.P. 29(a)(4)(E).

## **Statement of the Case**

The NELA Chapters of St. Louis and Kansas City, Missouri adopt the Statement of the Case set forth in the brief of Plaintiff-Appellant Mark Horton.

## **Introduction and Summary of the Argument**

At trial, a plaintiff who brings a Title VII case must prove his protected trait was a motivating factor in the adverse employment action at issue. This is the standard the jury considers in deciding whether the plaintiff has presented evidence entitling him to a verdict. There are three reasons why evidence that a plaintiff's sexual orientation would establish his sex was a motivating factor in the employer's decision. First, sex stereotyping is a form of sex discrimination. Second, association discrimination based on sex is a form of sex discrimination. Third, because sexual orientation is a function of sex, it *is* sex discrimination.

### **Argument**

The issue is whether an employee can prove his sex was a motivating factor when there is evidence the employer considered the employee's sexual orientation.

#### **I. Title VII prohibits discrimination because of sex, a question of the employer's motivation**

Under Title VII it is unlawful to discriminate against an individual "because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). In *Williamson v. A.G. Edwards*, 876 F.2d 69, 70 (8<sup>th</sup> Cir. 1989)(per

curiam), this court stated that “Title VII does not prohibit discrimination against homosexuals.”

*Williamson* is inconsistent with the fact-finder’s role in a Title VII case because the employer’s motive is a question of fact. *Pullman-Standard, Div. of Pullman v. Swint*, 456 U.S. 273, 289-90 (1982)(holding that discriminatory intent means the actual motive the trier of fact will decide, as a matter of fact, not law). A jury could conclude sexual orientation discrimination is “because of” sex.

**II. If the employee’s sex was a motivating factor in the employer’s adverse employment action, that action violates Title VII**

**A. A plaintiff must prove his sex was a motivating factor or played a part in the employer’s action**

If the employee can prove that his sex played a part in the decision, that is, was a motivating factor, a jury could render a verdict in the employee’s favor.

The Eighth Circuit Model Jury Instructions provide the framework for proving the factual issues, including the employer’s motive. A plaintiff must prove his sex was “a motivating factor” or “played a part” in the employer’s decision not to hire him. 42 U.S.C. § 2000e-2(a)(1), 2000e-2(m); 8<sup>th</sup> CIR CIVIL JURY INSTR. §§ 5.40, 5.21 (2017). And the court

can define “a motivating factor” to mean “a reason alone, or with other reasons, on which the defendant relied when it” refused to hire the plaintiff. 8<sup>th</sup> CIR CIVIL JURY INSTR. § 5.21, Notes on Use, ¶ 4.

**B. A jury could reasonably infer sex played a role in an adverse action when an employer considers the employee’s sexual orientation**

When an employer considers an employee’s—or applicant’s—sexual orientation in making an employment decision, a reasonable factfinder can find the employee’s sex played a part in the decision. That the decision was “because of” sex. There are three reasons. First, the employer was motivated by its own sex-based stereotypes. Second, the employer was motivated by the employee’s association with a person of the same sex. Third, the employer was motivated by sex because sexual orientation discrimination is sex discrimination.

**1. The employer was motivated by its sex-based stereotype**

In the seminal case, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court held that an employer violates Title VII when it treats an employee differently based on the employee’s failure to conform to the employer’s sex-based stereotypes. The Court held that in enacting Title VII, “Congress intended to strike at the entire spectrum



of disparate treatment of men and women resulting from sex stereotypes.” *Id.*, at 251. In *Price Waterhouse*, the plaintiff’s walk, talk, clothing, and even make-up choices were insufficiently feminine for her to be partnership material. *Id.*, at 235. The Price Waterhouse partners’ ideas of what a woman should be in the 1980’s, their stereotypes, were evidence of a Title VII violation.

Since then, other stereotyping cases have included evidence that the plaintiff was transgendered or possibly gay. For example, in *EEOC v. Boh Bros. Const. Co., LLC* the harasser viewed the plaintiff as not manly enough and admitted saying the victim’s use of Wet Ones “seemed kind of gay.” *EEOC v. Boh Bros. Const. Co., LLC*, 731 F.3d 444, 456-57 (5<sup>th</sup> Cir. 2013). The Court of Appeals found this type of evidence sufficient to establish sex discrimination; the plaintiff “fell outside of [the harasser’s] manly-man stereotype.” *Id.*, at 459. See also, *Christiansen v. Omnicron Grp., Inc.*, 852 F.3d 195, 199 (2d Cir. 2017)(finding a Title VII violation with evidence that plaintiff did not conform to employer’s sex stereotype); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 573 (6<sup>th</sup> Cir. 2004)(finding a Title VII violation when

transgender plaintiff's appearance and behavior was not "masculine enough" for employer and coworkers).

Recently, two Courts of Appeal held that Title VII prohibits sexual orientation discrimination. *Zarda v. Altitude Express, Inc.*, No. 15-3775, 2018 U.S.App. LEXIS 4608 (2d Cir. Feb. 26, 2018); *Hively v. Ivy Tech*, 853 F.3d 339, 340-341 (7<sup>th</sup> Cir. 2017). And the Sixth Circuit recently held that discrimination against a transgender person was unlawful under Title VII. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 16-2424, 2018 U.S.App. LEXIS 5720 (6<sup>th</sup> Cir. March 7, 2018). The First Circuit, acknowledged the trend without reaching the issue. *Franchina v. City of Providence*, 881 F.3d 32, 54 n.19, (1<sup>st</sup> Cir. 2018).

In *Hively*, *Zarda*, and *R.G.*, the Courts of Appeals found plaintiffs could establish sex discrimination through their nonconformity to the employers' stereotypes about gender norm. For example, in *Hively*, when the plaintiff was denied promotions based on her sexual orientation, the court found that "viewed through the lens of the gender non-conformity line of cases, *Hively* represents the ultimate case of failure to conform to the female stereotype . . . which views heterosexuality as the norm." *Hively*, 853 F.3d at 346. See also, *Zarda*,

2018 U.S.App. LEXIS 4608 \*36 (holding that sexual orientation discrimination violated Title VII “through the lens of gender stereotyping”). And in *R.G.*, the Sixth Circuit held discrimination based on transgender status or transitioning identity is based on stereotyping and gender nonconformity, violating Title VII. 2018 U.S. App. LEXIS 5720, \*26-27.

This Court has also recognized that *Price Waterhouse* prohibits an employer from basing adverse employment actions on “gender nonconforming behavior and appearance.” *Lewis v. Heartland Inns of Am., LLC*, 591 F.3d 1033, 1039 (8<sup>th</sup> Cir. 2010).

Here, a trier of fact could infer that Midwest Geriatric withdrew its offer to Horton because of its stereotype about the plaintiff’s gender-nonconforming behavior. Who he loved.

**2. The employer was motivated by the employee’s association with others**

A Title VII plaintiff can show his sex was a motivating factor when his employer based its decision on the employee’s association with a person of the same sex. *Zarda*, 2018 U.S.App. LEXIS 4608, \*43-53; *Hively*, 853 F.3d at 347. Associational discrimination, as a violation of discrimination law, has its underpinnings in *Loving v. Virginia*, 388

U.S. 1, 12 (1967). In *Loving*, the Supreme Court held that discriminating against a person because of the protected trait of someone with whom that person associates violates the Equal Protection Clause.

Courts have applied associational discrimination to Title VII, including in the context of sex discrimination. *Zarda*, 2018 U.S.App. LEXIS 4608, \*46 (holding that associational discrimination applies to all classes protected by Title VII); *Hively*, 853 F.3d at 347-49 (finding a Title VII violation when, based on her association, plaintiff would not be suffering the adverse action had her sex been different). See also, *Deffenbaugh-Williams v. Wal-Mart Stores*, 156 F.3d 581, 588-89 (5<sup>th</sup> Cir. 1998)(finding a reasonable juror could find discrimination based on the plaintiff's relationship with a person of different race), *vacated in part on other grounds by* 182 F.3d 333 (1999).

A jury could find that Horton's association with his male partner was a motivating factor in Midwest Geriatric's adverse employment action.

### **3. The employer was motivated by sex because sexual orientation discrimination *is* sex discrimination**

Courts of Appeals and district courts have held that discrimination based on sexual orientation is sex discrimination under Title VII. As discussed above, in *Zarda* and *Hively*, the Second and Seventh Circuits respectively held that sexual orientation discrimination violated Title VII. As the Second Circuit reasoned, “Because one cannot fully define a person’s sexual orientation without identifying his or her sex, sexual orientation is a function of sex. Indeed sexual orientation is doubly delineated by sex because it is a function of both a person’s sex and the sex of those to whom he or she is attracted.” *Zarda*, 2018 U.S.App. LEXIS 4608, \*21. “Because sexual orientation is a function of sex” and Title VII protects against sex discrimination, it follows that Title VII also protects against sexual orientation discrimination. *Id.*, at 22.

Thus, a jury could find that an employer who discriminated against the plaintiff because of his sexual orientation discriminated against him because of his sex.

### **Conclusion**

The St. Louis and Kansas City, Missouri Chapters of the National Employment Lawyers Association submit this *amicus curiae* brief in

support of Plaintiff-Appellant Mark Horton, and request reversal of the U.S. District Court's judgment.

Respectfully submitted,

/s/ Ferne P. Wolf

SOWERS & WOLF, LLC

Ferne P. Wolf, 29326

fw@sowerswolf.com

Jill A. Silverstein, 34433

js@sowerswolf.com

Joshua M. Pierson, 65105

jp@sowerswolf.com

530 Maryville Centre Dr., Suite  
460

St. Louis, MO 63141

Phone: (314) 744-4010

Facsimile: (314) 744-4026

*Counsel for Amicus Curiae St. Louis and Kansas City Missouri  
Chapters of the National Employment Lawyers Association*

### **Certificate of Virus Scan**

I certify pursuant to 8<sup>th</sup> Circuit Rule 28A(h)(2) that this brief has been scanned for viruses and that the brief is virus-free.

/s/ Ferne P. Wolf  
SOWERS & WOLF, LLC

### **Certificate of Compliance**

I certify this brief complies with the type-volume limitations of Fed.R.App.P. 32(a)(7)(B) because it contains 2,392 words. I further certify 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 it has been prepared in a proportionally spaced typeface using Microsoft Office Word with 14-point Century Schoolbook serif font.

/s/ Ferne P. Wolf  
SOWERS & WOLF, LLC

## Certificate of Service

I certify that on the 14<sup>th</sup> day of March 2018 I submitted the foregoing brief in PDF format through this Court's CM/ECF system to all counsel of record registered with the CM/ECF system.

/s/ Ferne P. Wolf  
SOWERS & WOLF, LLC  
Ferne P. Wolf  
fw@sowerswolf.com  
Jill A. Silverstein  
js@sowerswolf.com  
Joshua M. Pierson  
jp@sowerswolf.com  
530 Maryville Centre Dr., St 460  
St. Louis, MO 63141  
Phone: (314) 744-4010  
Facsimile: (314) 744-4026