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As of: January 19, 2018 9:03 PM Z

[Zarda v. Altitude Express, Inc.](#)

United States Court of Appeals for the Second Circuit

May 25, 2017, Decided

15-3775

Reporter

2017 U.S. App. LEXIS 13127 *

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.

Prior History: [Zarda v. Altitude Express, 855 F.3d 76, 2017 U.S. App. LEXIS 6578 \(2d Cir. N.Y., Apr. 18, 2017\)](#)

Counsel: [*1] For Melissa Zarda, co-independent executors of the estate of Donald Zarda, Plaintiff - Appellant: Gregory Antollino, Gregory Antollino, Esq., New York, NY; Stephen Bergstein, Attorney, Bergstein & Ullrich, LLP, New Paltz, NY.

For William Allen Moore, Jr., co-independent executor of the estate of Donald Zarda, Plaintiff - Appellant: Gregory Antollino, Gregory Antollino, Esq., New York, NY.

For Altitude Express, Inc., doing business as: Skydive Long Island, Ray Maynard, Defendants - Appellees: Saul D. Zabell, Esq., Zabell & Associates, P.C., Bohemia, NY.

For New York Civil Liberties Union, American Civil Liberties Union, 9 to 5, National Association of Working Women, A Better Balance, Equal Rights Advocates, Gender Justice, Legal Voice, Southwest Women's Law Center, Women Employed, Women's Law Center of Maryland, Women's Law Project, Amicus Curiae: Erin B. Harrist, Esq., New York Civil Liberties Union, New York, NY; James D. Esseks, Esq., Lenora M. Lapidus, Esq., Ria Tabacco Mar, Esq., American Civil Liberties Union of New York, New York, NY.

For Coalition of Labor Union Women Amicus Curiae: Erin B. Harrist, Esq., New York Civil Liberties Union, New York, NY; Lenora M. Lapidus, Esq., American [*2] Civil Liberties Union of New York, New York, NY.

For National Women's Law Center, Amicus Curiae: Erin B. Harrist, Esq., New York Civil Liberties Union, New York, NY; Fatima Goss Graves, Esq., National Women's Law Center, Washington, DC.

For Lambda Legal Defense and Education Fund, Inc., Amicus Curiae: Michael Donald Barton Kavey, Esq., Supervising Attorney, Michael D.B. Kavey, Attorney at Law, Brooklyn, NY; Omar Gonzalez-Pagan, Esq., Lambda Legal Defense and Education, Fund, Inc., New York, NY; Gregory R. Nevins, Lambda Legal, Atlanta, GA.

For United States Equal Employment Opportunity, Commission, Amicus Curiae: Jeremy D. Horowitz, Esq., United States Equal Employment, Opportunity Commission, Office of General Counsel, Washington, DC.

For New York State United Teachers, Amicus Curiae: Robert T. Reilly Jr., Esq., New York State United Teachers, Latham, NY.

Adam K. Mortara, Amicus Curiae, Pro se, Chicago, IL.

For Legal Aid Society, Amicus Curiae: Richard Elliot Blum, Esq., Heidi Lee Cain, Esq., Staff Attorney, The Legal Aid Society, New York, NY; Michael Cottler, Esq., Tiffany Mahmood, Esq., Christopher Morten, Esq., Amanda Protes, Esq., Attorney, Frederick H. Rein, Esq., Goodwin Procter [*3] LLP, New York, NY; Nicole Tate-Naghi, Esq., Goodwin Procter LLP, Menlo Park, CA; Jonathan Whitney, Esq., Goodwin Procter LLP, Boston, MA.

For National Education Association, Amicus Curiae: Mary E. Deweese, National Education Association, Office of General Counsel, Washington DC, DC; Eric A. Harrington, Esq., Counsel, Alice O'Brien, Esq., National Education Association, Office of General Counsel, Washington, DC.

For GLBTQ Legal Advocates & Defenders, National Center for Lesbian Rights, Amicus Curiae: Christopher Stoll, Esq., National Center for Lesbian Rights, San Francisco, CA.

For AdRoll, Inc., Ben & Jerry's, Betterment, Boston Community Capital, Brandwatch, CBS Corporation, Citrix Systems, Inc., City Winery, Davis Steadman Ford & Mace, LLC, DoorDash Inc., Dropbox, Inc., Eastern Bank, Edelman, FiftyThree, Inc., Freedom for All Americans Education Fund, Google Inc., Greater Burlington Industrial Corporation, Gusto, Harvard Pilgrim Health Care, Inc., IAC/InterActiveCorp, HIS Markit Ltd., Indiegogo, INUS Group LLC, Johnston, Kinney & Zulaica LLP, Kargo, KEO Marketing Inc., Kickstarter, PBC, Levi Strauss & Co. Inc., Linden Lab, Lyft, Inc., Mapbox, Inc., National Gay & Lesbian Chamber of **[*4]** Commerce, On 3 Public Relations, Physician's Computer Company, Pinterest, Puma Springs Vineyards, Quora Inc., S&P Global Inc., Salesforce, Shutterstock, Inc., Spotify, Thumbtack, TodayTix, Trust Company of Vermont, Vermont Gynecology, Viacom, Inc., Wealthfront Inc., OBOX Soutlions, Amicus Curiae: Todd Anten, Esq., Cory Daniel Struble, Esq., Quinn Emanuel Urquhart & Sullivan, LLP, New York, NY; Justin T. Reinheimer, Esq., Quinn Emanuel Urquhart & Sullivan, LLP, San Francisco, CA.

For State of New York, State of Connecticut, State of Vermont, Amicus Curiae: Andrew W. Amend, New York State Office of the Attorney, General, New York, NY.

For The LGBT Bar Association of Greater New York, Anti-Defamation League, Asian American Bar Association of New York, Association of the Bar of the City of New York, Bay Area Lawyers for Individual Freedom, Hispanic National Bar Association, Legal Aid at Work, National Queer Asian Pacific Islander Alliance, New York County Lawyers' Association, Women's Bar Association of the State of New York, Amicus Curiae: Matthew Jared Skinner, Esq., Executive Director, The LGBT Bar Association of Greater, New York (LeGaL), New York, NY.

For GLBTQ Legal Advocates & Defenders, **[*5]** ("GLAD"), Amicus Curiae: Mary Lisa Bonauto, Esq., Gay & Lesbian Advocates & Defenders, Boston, MA; Christopher D. Dodge, Esq., Wilmer Cutler Pickering Hale and Dorr LLP, Boston, MA; David M. Lehn, Esq., Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; Alan E. Schoenfeld, Wilmer Cutler Pickering Hale and Dorr LLP, New York, NY.

For National Center for Lesbian Rights, ("NCLR"), Amicus Curiae: Christopher D. Dodge, Esq., Wilmer Cutler Pickering Hale and Dorr, LLP, Boston, MA; David M. Lehn, Esq., Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; Alan E. Schoenfeld, Wilmer Cutler Pickering Hale and Dorr LLP, New York, NY.

For California Women's Law Center, Feminist Majority Foundation, National Organization for Women (NOW) Foundation, National Partnership for Women & Families, Amicus Curiae: James D. Esseks, Esq., Ria Tabacco Mar, Esq., American Civil Liberties Union of New York, New York, NY.

For Sun Life Financial, Matthew Christiansen, Professor Anthony Kreis, Amicus Curiae: Sigismund L. Sapinski, Esq., Sun Life Financial, Windsor, CT.

For Senator Jeffrey A. Merkley, Senator Tammy Baldwin, Senator Cory A. Booker, Representative David N. Cicilline, Amicus Curiae: Peter **[*6]** T. Barbur, Cravath, Swaine & Moore LLP, New York, NY.

For Microsoft Corporation, Amicus Curiae: Thomas W. Burt, Esq., Microsoft Corporation, Redmond, WA.

Opinion

ORDER

Following disposition of this appeal on April 18, 2017, a judge of the Court requested a poll on whether to rehear the case *en banc*. A poll having been conducted and a majority of the active judges of the Court having voted in favor of rehearing this appeal *en banc*, IT IS HEREBY ORDERED that this appeal be heard *en banc*. See *Fed. R. App. P.*

35(a). The *en banc* panel will consist of the active judges of the Court, as well as those senior judges who sat on the panel that heard the initial appeal. See 28 U.S.C. § 46(c).

The parties are instructed to brief only the following question: "Does *Title VII of the Civil Rights Act of 1964* prohibit discrimination on the basis of sexual orientation through its prohibition of discrimination 'because of . . . sex'?"

We invite amicus curiae briefs from interested parties. Appellants' brief and appendix, and any amicus curiae briefs in support thereof, shall be filed by June 26, 2017. Appellees' brief and appendix, and any amicus curiae briefs in support thereof, shall be filed by July 26, 2017. Appellants' reply brief shall be filed [*7] by August 9, 2017.

Oral argument will be held on September 26, 2017 at 2:00 p.m. at the Thurgood Marshall United States Courthouse, 40 Foley Square, New York, NY.