

No. 19-5123

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

NICHOLAS BREINER,

Plaintiff-Appellant

v.

BOARD OF EDUCATION
OF MONTGOMERY COUNTY,

Defendant-Appellee

MOTION TO HOLD CASE IN ABEYANCE

Plaintiff-appellant (hereinafter, “Breiner”) respectfully moves the Court to hold in abeyance all proceedings in the above-captioned appeal, including the briefing schedule, pending the Supreme Court’s consideration of *Altitude Express, Inc. v. Zarda*, 883 F.3d 100 (2d Cir. 2018), *cert. granted*, – S.Ct. –, (April 22, 2019) and *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Opportunity Emp’t Comm’n*, 884 F.3d 560 (6th Cir. 2018), *cert. granted*, – S.Ct. –, (April 22, 2019) upon which Breiner relies for relief in the instant matter. Breiner hereby certifies

that, at the time of filing, he has sought but has not obtained defendant-appellee's consent as to this motion.

The instant appeal concerns whether Title VII of the Civil Rights Act of 1964,¹ which proscribes employment discrimination "because of ... sex," provides a remedy for an employee who suffers discrimination by his employer on the basis of the employee's sexual orientation. Further, this appeal concerns whether Title VII also covers discrimination arising, *inter alia*, from the employee's non-conformity with sex stereotypes. The Supreme Court has announced it has granted review of the aforementioned cases to consider the following issues:

1. Whether the prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), against employment discrimination "because of . . . sex" encompasses discrimination based on an individual's sexual orientation.²
2. Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*.³

Here, the district court found Breiner's claims unactionable under Sixth Circuit jurisprudence and granted defendant-appellee's motion to dismiss pursuant to F.R.C.P. 12(b)(6).⁴

¹ 42 U.S.C. § 2000e, *et seq.*

"Altitude Express v. Zarda." *Oyez*, www.oyez.org/cases/2019/17-1623. Accessed 23 Apr. 2019.

³ "R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission." *Oyez*, www.oyez.org/cases/2019/18-107. Accessed 23 Apr. 2019.

⁴ *Nicholas Charles Breiner v. Board of Education of Montgomery County*, Case No.: 5:18-cv-00351-KKC, ECF No. 11 (January 25, 2019).

An appellate court is inherently empowered to hold matters in abeyance⁵ as “traditional equipment for the administration of justice.”⁶ Factors the Court may consider in granting an abeyance include: whether the mover has shown a likelihood to prevail on the merits; whether absence of abeyance will irreparably injure the mover; whether abeyance will “substantially injure” other interest parties; and “where the public interest lies.”⁷

Breiner’s complaint has alleged facts sufficient to prevail on the merits of his case, should the Supreme Court affirm the findings of the lower courts in *Zarda* and *R.G. & G.R. Harris*. Likewise, should the Supreme Court affirm, an adverse decision in this Court would prove injurious to Breiner who would then be forced to begin his complaint anew, having lost significant time and resources and having to expend even more. To the contrary, granting Breiner’s motion will work no injury on defendant-appellees as an abeyance would simply maintain the *status quo*. Finally, holding this appeal in abeyance supports the public policy of avoiding unnecessary judicial expense and resources, regardless of the outcome above. Because the issues soon to be addressed by the Supreme Court will be dispositive

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Nken v. Holder, 556 U.S. 418, 419 (2009)(citing *Scripps-Howard Radio, Inc. v. Federal Communications Comm’n*, 316 U.S. 4, 9 (1942)(“... [A]n appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong.” *Id.* at 9-10)).

⁶ *Id.* (citing *Scripps-Howard* at 10).

⁷ *Id.* at 426 (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

in the instant appeal, it is appropriate to hold this appeal in abeyance pending the Supreme Court's decisions in *Zarda* and *R.G. & G.R. Harris*.

For the foregoing reasons, Breiner respectfully requests his appeal be held in abeyance, and the briefing schedule be suspended, pending the Supreme Court's ruling in *Zarda* and *R.G. & G.R. Harris*. Breiner further requests the Court direct the parties to notify the Court within thirty (30) days of the Supreme Court's decisions in *Zarda* and *R.G. & G.R. Harris* whether any issues remain pending in this appeal.

Respectfully submitted,

/s/ Edward E. Dove

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[CERTIFICATES OF SERVICE AND COMPLIANCE FOLLOW]

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Hold Case in Abeyance was served on counsel for defendant-appellee, on this, the 25th day of April, 2019, via delivery through the CM/ECF system.

/s/ Edward E. Dove

Edward E. Dove

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion to Hold Case in Abeyance complies in all respects with all F.R.A.P. requirements and all Sixth Circuit Rules.

/s/ Edward E. Dove

Edward E. Dove