

Client Alert **Employment & Labor**

Second Circuit Rules Sexual Orientation Is Protected under Title VII

This week, the Second Circuit overruled its prior circuit precedent and held Title VII prohibits discrimination in employment on the basis of sexual orientation. In reaching its conclusion, the Second Circuit aligned itself with the Seventh Circuit and the Equal Employment Opportunity Commission and affirmed the growing consensus in the judiciary that sexual orientation discrimination constitutes discrimination “because of sex.” This interpretation was previously rejected by the Eleventh Circuit, and with the Second Circuit’s ruling, there now exists a greater federal court of appeals circuit split on the issue

The plaintiff in this case – Donald Zarda – worked as a skydiving instructor at Altitude Express and would sometimes inform his female clients that he was gay to mitigate any concern they might have about being strapped to a man for a tandem skydive. The boyfriend of one of Zarda’s female clients complained to Zarda’s boss that Zarda had inappropriately touched her and informed the client he was gay to excuse his behavior. Altitude Express then fired Zarda. Zarda asserted he acted appropriately at all times and he was fired solely because he informed his client about his sexuality. Although Zarda later died in a skydiving accident before the case went to trial, his estate continued the case, arguing that Zarda’s termination constituted discrimination under Title VII.

In its ruling, the Second Circuit emphasized: “Title VII’s prohibition on sex discrimination applies to any practice in which sex is a motivating factor. . . . [S]exual orientation

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discrimination is a subset of sex discrimination because sexual orientation is *defined* by one's sex in relation to the sex of those to whom one is attracted, making it impossible for an employer to discriminate on the basis of sexual orientation without taking sex into account.”

This decision is important for three reasons

As we discussed in our [2017 March Client Alert](#), the Second Circuit previously held that employees, regardless of sexual orientation, can sue under Title VII to seek relief for harassment, discrimination and retaliation, but only if the discrimination is related to alleged gender nonconformity. Therefore, to survive dismissal, LGBTQ employees previously have been constrained to characterize sexual orientation discrimination claims as legally valid gender non-conforming claims under Title VII. Reversing its prior ruling, the Second Circuit in *Zarda* essentially held that such a back door pleading is no longer necessary.

Practically, if an employee lives in New York, Connecticut, Vermont, Indiana, Illinois or Wisconsin (states within the Second and Seventh Circuits), then federal law protects the employee from being fired based on sexual orientation. There is no such protection for employees working in Georgia, Alabama and Florida (states within the Eleventh Circuit).

Because the Second Circuit's ruling broadens the circuit split on the issue of Title VII protection based on sexual orientation, the Supreme Court will have to eventually resolve the scope of Title VII protections, although not for the foreseeable future as the defendants in *Zarda* have indicated they will not appeal the ruling.

Employer Tip

The *Zarda* decision establishes that discrimination based on sexual orientation may be deemed a violation of Title VII in the Second Circuit. In New York and New Jersey, discrimination on the basis of sexual orientation is already prohibited on the state and city level, so the Second Circuit decision is only relevant to federal claims in the Second Circuit, not claims under state/city law in our area. However, employers should still analyze their current policies and practices and ensure that they protect against discrimination and harassment based on sexual orientation. Employers should also be diligent in training their managers to avoid subjective employment decisions on the basis of sexual orientation.

The following attorneys in our Employment and Labor Law Practice Group can assist employers in drafting policies and answering questions about Title VII.

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