

Insights: Alerts

Second Circuit Becomes the Second Federal Appeals Court to Hold That Title VII Prohibits Sexual Orientation Discrimination

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Written by **Thomas H. Christopher, Craig A. McDougal, Susan W. Pangborn and Kendra C. Chapman**

On February 26, 2018, the U.S. Court of Appeals for the Second Circuit became the second federal appeals court to rule that Title VII of the 1964 Civil Rights Act ("Title VII") bars employers from discriminating on the basis of sexual orientation. The Second Circuit's decision in *Zarda v. Altitude Express, Inc.* thus establishes a federal remedy for individuals claiming employment discrimination based on sexual orientation in the states comprising the Second Circuit – New York, Connecticut, and Vermont – and widens the split among the federal judicial circuits over the issue of whether Title VII applies to sexual orientation discrimination.

Zarda v. Altitude Express, Inc.

Title VII does not expressly address sexual orientation discrimination but does prohibit employment discrimination because of sex. The lawsuit in *Zarda v. Altitude Express, Inc.* was filed by a gay male alleging that he was fired due to his sexual orientation, which he characterized as violating Title VII's prohibition against discrimination on the basis of sex. A panel of three Second Circuit judges initially ruled against the discharged employee on the grounds that Title VII does not explicitly prohibit discrimination based on sexual orientation. On reconsideration of the case with 13 judges participating, the Second Circuit changed course and held that Title VII's prohibition against sex discrimination does encompass discrimination based on sexual orientation.

Writing for the court, Chief Judge Robert Katzmann offered several reasons for the conclusion that Title VII extends to sexual orientation discrimination. First, Chief Judge Katzmann noted that sexual orientation discrimination is inherently a subset of sex discrimination because the differential treatment is due, at least in part, to a consideration of the employee's sex. For example, if a female employee is denied a promotion because of her attraction to women, but a male employee who is attracted to women is offered the promotion, the female employee has been discriminated against on the basis of her status as a female. From this, according to the court's decision, it reasonably follows that sex is necessarily a factor in sexual orientation discrimination.

Second, Chief Judge Katzmann reasoned that employees who are discriminated against on the basis of their sexual orientation are necessarily subject to discrimination because they do not conform to a sex stereotype – namely, that a man should form intimate relationships with a woman, and a woman should form intimate

relationships with a man. The U.S. Supreme Court has previously recognized that discrimination based on failure to conform to sex stereotypes is a form of unlawful sex discrimination under Title VII, and because sexual orientation discrimination is necessarily rooted in gender stereotypes about the proper roles of men and women, according to the court's ruling, sexual orientation discrimination is another form of prohibited discrimination based on sex stereotypes.

Finally, the decision reasons that sexual orientation discrimination is prohibited by Title VII because it is associational discrimination based on sex. According to the opinion, it is inherent in the nature of sexual orientation discrimination that, when an employer discriminates against an employee based on sexual orientation, the employer's decision is predicated on opposition to romantic association between members of the same sex. The court's opinion found no difference between this type of associational discrimination and discrimination based on an employer's opposition to an employee's romantic or other relationship with a member of a different race. In both situations, the employee's protected status – whether race or sex – is necessarily involved in the employer's action. Because the Second Circuit, like courts in many other jurisdictions, has previously held that Title VII prohibits race-based associational discrimination, it concluded that Title VII prohibits sex-based associational discrimination as well.

A Split Among the Circuits

The *Zarda* decision makes the Second Circuit the second federal appeals court in the country to hold that Title VII prohibits sexual orientation discrimination, following the Seventh Circuit's 2017 decision in *Hively v. Ivy Tech Community College of Indiana* (which we discussed in an earlier [Legal Alert](#)). However, the question of whether sexual orientation is protected under Title VII in every jurisdiction is far from settled. Last March, one month before the Seventh Circuit's decision in *Hively*, a divided three-judge panel of the Eleventh Circuit Court of Appeals (which encompasses Georgia, Florida, Alabama, and the U.S. Virgin Islands) ruled that Title VII's reference to sex did *not* encompass discrimination based on sexual orientation. Thus, there is an emerging circuit split on the issue that may ultimately have to be resolved by Supreme Court review.

Practical Implications

Although the Second Circuit's *Zarda* decision is notable and may influence courts in other jurisdictions addressing protection against sexual orientation discrimination under Title VII and state sex-discrimination laws, the decision does not necessarily change the law for employers within the Second Circuit's jurisdiction. While the decision gives employees in that circuit the ability to bring a Title VII lawsuit alleging sexual orientation discrimination, all three states in the Second Circuit (New York, Connecticut, and Vermont) already have anti-discrimination laws that expressly include sexual orientation as a protected category. However, the *Zarda* ruling does reinforce the need for employers in this jurisdiction to review their equal employment opportunity and harassment policies to ensure that sexual orientation is expressly included as a protected category.

Moreover, employers in all jurisdictions should be aware that discrimination based on sexual orientation is already unlawful in numerous states and municipalities throughout the country. The *Zarda* decision serves as a good reminder to all employers to review employee handbooks to ensure that their policies are consistent with the applicable law and to consider including information about sexual orientation discrimination in workplace discrimination and harassment training provided to managers and supervisors.

Footnotes

Consumer Financial Protection Bureau, Amendments to the 2016 Amendments to the 2013 Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (Oct. 4, 2017).

Related People



Thomas H. Christopher

t 404.815.6385

tchristopher@ktslaw.com



Craig A. McDougal

t 214.922.7157

cmcdougal@ktslaw.com



Susan W. Pangborn

t 404.815.6305

spangborn@ktslaw.com



Kendra C. Chapman

t 415.273.4386

kchapman@ktslaw.com