

PUBLICATION

Second Circuit Sides with EEOC, Expands Title VII Protections to Sexual Orientation

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Courts continue to differ on whether Title VII offers protection against discrimination on the basis of sexual orientation. The most recent development came on February 26, 2018, when the Second Circuit Court of Appeals held that Title VII's protections do extend to sexual orientation. In so holding, the Second Circuit joins the Seventh Circuit expanding a split created when the Eleventh Circuit Court of Appeals declined to extend Title VII to sexual orientation bias last year. Although the plaintiff appealed the Eleventh Circuit's decision to the U.S. Supreme Court, the Court declined to grant certiorari in December 2017.

The case, *Melissa Zarda et al. v. Altitude Express, dba Skydive Long Island, et al.*, involved a skydiving instructor who alleged he was terminated for telling a client he was gay. Judge Robert A. Katzmann, in an en banc ruling, explained that "Title VII's prohibition on sex discrimination applies to any practice in which sex is a motivating factor." Therefore, "[s]exual orientation 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."

In addition to expanding a split among the federal courts, the case also triggered an unusual conflict between federal agencies. In 2015, the EEOC held that Title VII's prohibition against gender discrimination encompassed sexual orientation discrimination. Accordingly, it filed an amicus brief in support of the plaintiff's Second Circuit appeal. Conversely, the Department of Justice filed its own amicus brief, arguing against the EEOC's position.

With a growing number of federal appellate courts and agencies weighing in on such a hot-button issue, the question remains whether the U.S. Supreme Court will address the Circuit split or leave it to the lower courts to shape the bounds of the law. Regardless, employers located within the Second and Seventh Circuits should ensure their anti-discrimination policies include sexual orientation protections, and employers everywhere should prepare for a potential sea change in the scope of Title VII.