



## Title VII Evolution Continues: Another Appeals Court Finds Sexual Orientation Discrimination Actionable

Insights

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Another federal court of appeals decided today that Title VII covers claims of sexual orientation discrimination, continuing the evolution of workplace discrimination law that has begun to sweep over the country in recent years. With today's ruling by the 2nd Circuit Court of Appeals—covering federal claims arising in New York, Connecticut, and Vermont—employers across the country have been put on notice that Title VII is increasingly being interpreted more expansively than it had been just a few short years ago (*Zarda v. Altitude Express, Inc.*).

### Skydiving Instructor Leaps Into Legal History

Donald Zarda worked as a sky-diving instructor for Altitude Express on New York's Long Island over the summer of 2010. He would often participate in tandem skydives, where he would be strapped hip-to-hip with clients. Zarda said he found it best to inform his female clients that he was gay in order to ease any concerns that they might have had about being strapped in close physical proximity to a man.

During one jump, he attempted to lightheartedly comfort his female client by telling her that he was gay "and had an ex-husband to prove it." The client did not see it that way. Instead, she claimed that Zarda inappropriately touched her and only disclosed his sexual orientation to excuse his behavior. She complained to the company, which in turn fired Zarda for violating company policy. Zarda, however, believed his termination was motivated by his sexual orientation and brought suit against his former employer, including a claim for gender discrimination under Title VII in his lawsuit.

After several years of litigation, the trial court dismissed Zarda's Title VII claim in 2014 because there existed scant precedent to support his claims. But soon thereafter, the legal landscape began to shift. In June 2015, the Supreme Court decided that same-sex marriage should be legal across the country. A month later, the Equal Employment Opportunity Commission (EEOC) ruled that an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII (*Baldwin v. Foxx*). Encouraged by these developments, Zarda appealed his case to the 2nd Circuit Court of Appeals.

In April 2017, the 7th Circuit Court of Appeals (hearing federal cases from Illinois, Indiana, and Wisconsin) became the first federal court of appeals in the nation to rule that sexual orientation claims are actionable under Title VII. But just days later, the 2nd Circuit Court of Appeals ruled that it would not reverse prior circuit precedent and rule in his favor. Instead inviting the full collection of

appellate judges to re-hear the case *en banc* (which means all the full panel of 2d Circuit judges would hear the case together). After another year of litigation, the *en banc* panel has now issued its decision, ruling in Zarda's favor by a 10-3 margin.

## **2nd Circuit: "Legal Doctrine Evolves"**

The court began by acknowledging that it had prior ruled that LGBT discrimination was not cognizable under Title VII, pointing out that its rulings were consistent with the consensus of all other sister circuits and even the EEOC. But, the court acknowledged, times change, and the law needs to change with it.

The full panel concluded that sexual orientation is motivated, at least in part, by sex, and is therefore a subset of sex discrimination. And because Title VII explicitly outlaws sex discrimination, it naturally follows that sexual orientation discrimination should be outlawed under the statute. The court based its decision on three main factors:

- **"Sex" Is Necessarily A Factor In Sexual Orientation** – The court first noted that, in order to identify the sexual orientation of particular person, you need to know the sex of that person and to whom they are attracted. Logically, then, the court said that "because one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex," and therefore should be considered a protected characteristic under Title VII.
- **Gender Stereotyping Is Prohibited By Title VII** – Second, the court pointed out the U.S. Supreme Court has long read Title VII to prohibit employment decisions predicated on "stereotyped impressions" about the characteristics of males or females. In the court's view, a person's same-sex orientation represents the ultimate case of "failure to conform" to gender stereotypes; as it stated: "Stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women...The gender stereotype at work here is that 'real' men should date women, and not other men." Because the court concluded that sexual orientation discrimination is rooted in gender stereotypes, it ruled that it is thus a subset of sex discrimination and therefore covered by Title VII.
- **Associational Discrimination Is Also Illegal** – Finally, the 2nd Circuit judges reminded the parties that it has long recognized "associational" discrimination as a violation of Title VII; that is, when an employer's decision is improperly predicated on an employee's relations with a third party who happens to be in a protected class (often represented by a case where an employee is mistreated because of their interracial marriage). The court said this same theory is equally applicable in the context of sex. And because sexual orientation discrimination is based on an employer's opposition to an employee's association with someone of the same sex, it also constitutes discrimination against an employee based on their own sex. "Therefore," the court concluded, sexual orientation discrimination "is no less repugnant to Title VII than anti-miscegenation policies."

## **What Does This Mean For Employers?**

Employers in New York, of course, are already subject to local laws protecting private workers based on sexual orientation. For example, the New York State Human Rights Law has explicitly protected employees from discrimination and harassment based on their sexual orientation since 2003, and the New York City Human Rights law has done the same since comprehensive amendments in 1991. While these state and city laws differ from Title VII in various respects regarding procedures and remedies, suffice it to say that New York employees had already received broad legal protections based on their sexual orientation. The same holds true in both Connecticut and Vermont. Today's decision should serve as a reminder to employers in these three states to fully respect the rights granted by their powerful state and local laws, especially now that employees have another tool in their toolbox in the form of a potential Title VII claim.

As for employers in the rest of the country, it would not be surprising if, over time, other circuit courts similarly extended Title VII protections to cover sexual orientation. At present, there remains a patchwork of differing standards depending on where your business is located. While today's decision may very well someday be viewed as the second domino to fall to bring about a new day for Title VII litigation across the country, other circuit courts like the 11th Circuit remain firmly entrenched in concluding that Title VII does not extend to cover claims of sexual orientation discrimination.

It now seems increasingly likely that the Supreme Court will step in and eventually address this issue at some point. While it is always dangerous to predict how the Court would rule in such a case, especially given that we cannot forecast the identities of the justices who would take part in such a future potential decision or the underlying facts of such a case, employers should proceed with caution while the state of the law remains in flux.

You should take heed and prepare for this possible trend to extend workplace protection rights for LGBT workers based on sexual orientation. This includes a review of workplace policies and practices, managerial training materials, employee antidiscrimination and anti-harassment training sessions, interview and hiring protocols, benefits offerings, and any other practice which may otherwise unfairly target workers because of their sexual orientation.

If you have any questions about this decision, or how it may affect your business, please contact any attorney in our New York City office at 212.899.9960 or your Fisher Phillips attorney.

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