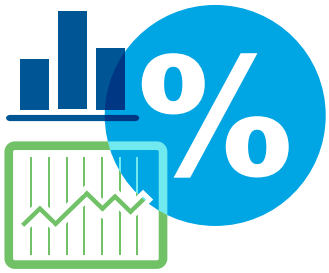
SEYFARTH SHAW



Financial Services Employment Blog

Second Circuit Holds That Title VII Bars Sexual Orientation Discrimination

By Scott Rabe and Sam Schwartz-Fenwick

Seyfarth Synopsis: *In landmark decision, the Second Circuit joins the Seventh Circuit in holding that Title VII prohibits discrimination on the basis of sexual orientation as a subset of sex discrimination.*

In a landmark decision today in *Zarda v. Altitude Express, Inc.*, No. 15-3775, the Second Circuit ruled *en banc* that Title VII prohibits discrimination on the basis of sexual orientation as a subset of discrimination on the basis of sex. The Second Circuit now joins the Seventh Circuit, the EEOC, and a number of district and administrative courts across the country that have interpreted Title VII to extend its prohibition of sex discrimination to sexual orientation. Chief Judge Katzmann authored the decision for the plurality, in which four judges joined in full, five judges joined in part, and to which three judges dissented. In total, eight of the thirteen judges issued an opinion.

The Appellant in *Zarda*, a former skydiving instructor, sued his employer, alleging that he was terminated from his job after he revealed to a customer that he was gay. Specifically, he alleged sex discrimination under Title VII asserting that his employment was terminated because he failed to conform to male sex stereotypes because he was gay. The district court dismissed Zarda's Title VII claim at summary judgment, holding that, although there was sufficient evidence to permit his claim for sexual orientation discrimination to proceed under New York law, which explicitly prohibits discrimination on the basis of sexual orientation, plaintiff had failed to establish a *prima facie* case of gender stereotyping under Title VII based on his sexual orientation. The district court explained that in reaching this decision it was constrained by Second Circuit precedent in *Simonton v. Runyon* and *Dawson v. Bumble & Bumble*, which held that Title VII did not prohibit discrimination on the basis of sexual orientation. Today the Second Circuit reversed, and in doing so, explicitly stated that it was overturning its prior opinions in *Simonton and Dawson*.

In the plurality opinion, Judge Katzmann explained that sexual orientation discrimination should be treated as a subset of sex discrimination for several reasons. He observed that "sexual orientation is defined by one's sex in relation to the sex of those to whom one is attracted," that "sexual orientation discrimination is . . . based on assumptions or stereotypes about how members of a particular gender should be, including to whom they should be attracted," and that "sexual orientation discrimination is associational discrimination because an adverse employment action that is motivated by the employer's opposition to association between members of particular sexes discriminates against an employee on the basis of sex." The plurality also found compelling that, while the consensus among Circuits and the EEOC in 2000 at the time of *Simonton* was that Title VII did not protect against discrimination on the basis of sexual orientation, the EEOC and the Seventh Circuit both changed their stance on this issue and courts across the country continue to explore this issue.

The main dissent, written by Judge Lynch and joined in part by two justices, argued primarily that under a strict textual interpretation of Title VII, the statute did not protect against discrimination on the basis of sexual orientation, as it is clear Congress could have but did not include sexual orientation as a protected class. This is the same rationale employed in 2017 by the Eleventh Circuit in *Evans v. Georgia Regional Hospital*, which recently held in a divided opinion that Title VII's prohibition on sex discrimination does not encompass discrimination on the basis of sexual orientation.

Today's decision widens the Circuit split on this issue. Further, the diverse array of opinions among the judges on the Second Circuit mirrors the nationwide divergence in views regarding the protections that Title VII affords employees based on their sexual orientation. While the EEOC has now taken the clear position that discrimination against workers because they are lesbian, gay or bisexual is sex discrimination under Title VII, the Department of Justice has issued guidance and sought to enforce an interpretation of Title VII that discrimination on the basis of sexual orientation is not prohibited under Title VII as sex discrimination. Circuit, district, and administrative courts are also split. With the Circuit divide, complicated by vastly divergent interpretations of Title VII by the very agencies entrusted to enforce Title VII, the issue is poised for a Supreme Court ruling.

In light of the current uncertainty regarding the ultimate interpretation of Title VII as it applies to sexual orientation, as well as gender identity, see our prior post, and because numerous state and local laws already explicitly prohibit discrimination on the basis of sexual orientation, employers should regularly review their policies to ensure that adequate protections are provided to employees on the basis of their sexual orientation or gender identity.

For more information on this topic, please contact the authors, your Seyfarth Attorney, or any member of Seyfarth Shaw's Workplace Policies and Handbooks Team or the Labor & Employment Team.

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