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Another Federal Court Rules Title VII Prohibits Sexual Orientation Discrimination

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Highlights:

- Two federal courts have ruled that employers may not discriminate against individuals based on sexual orientation.
- The rulings are consistent with EEOC guidance but conflict with other federal court decisions.
- Several state laws also prohibit discrimination based on sexual orientation.

Important Dates:

February 26, 2018

- The U.S. Court of Appeals for the 2nd Circuit ruled that Title VII prohibits discrimination based on sexual orientation.

April 4, 2017

- The U.S. Court of Appeals for the 7th Circuit issued a similar ruling.

OVERVIEW

The U.S. Court of Appeals for the 2nd Circuit has ruled that Title VII of the Civil Rights Act (Title VII) prohibits employment discrimination based on sexual orientation. The court's decision in Zarda v. Altitude Express, issued on Feb. 26, 2018, makes it illegal for employers with 15 or more employees in Connecticut, New York and Vermont to use an individual's sexual orientation as a basis for employment decisions.

In 2017, the 7th Circuit issued a similar ruling that applies in Wisconsin, Illinois and Indiana. Both decisions conflict with law from other courts but align with guidance from the Equal Employment Opportunity Commission (EEOC), making U.S. Supreme Court review of the issue likely in the future.

ACTION STEPS

Affected employers should review their existing policies to ensure they do not allow discrimination based on sexual orientation or gender identity. Employers should also review any applicable state laws and the EEOC's enforcement guidance to ensure their policies are compliant.

Background

Title VII is a federal law that prohibits employers with 15 or more employees from discriminating against employees and job applicants on the basis of their race, color, religion, sex or national origin. Since Title VII was enacted in 1964, several federal courts (including the 2nd and 7th Circuits) have held that the law's inclusion of the word "sex" means that its protections only extend to traditional notions of gender.

Although the U.S. Supreme Court has never specifically addressed whether Title VII prohibits discrimination based on sexual orientation, its decisions in other cases have established that:

- The practice of "gender stereotyping" falls within Title VII's prohibition against sex discrimination; and
- Discrimination based on the race of a person with whom another individual associates is a form of racial discrimination under Title VII.

Relying on these and other Supreme Court opinions in an April 2017 decision, the 7th Circuit became the first federal court to rule that Title VII's prohibition against discrimination based on sex includes discrimination based on sexual orientation. The 2nd Circuit became the second federal court to do so when it issued its highly anticipated decision in Zarda v. Altitude Express on Feb. 26, 2018.

Zarda v. Altitude Express

While *Zarda* was pending before the 2nd Circuit, the U.S. Department of Justice (DOJ) injected an unusual twist by filing an uninvited amicus brief in opposition to the EEOC's position in the case. In its brief, the DOJ argued that the term "sex" in Title VII refers only to "membership in a class delineated by gender." The DOJ urged the 2nd Circuit to reaffirm two prior decisions, in which the court had held that Title VII does not reach sexual orientation discrimination.

In its *Zarda* decision, however, the 2nd Circuit specifically overturned its prior case law and held that sexual orientation is a subset of the term "sex" in Title VII.

"Sexual orientation is a subset of 'sex' in Title VII."

This case began in 2010, when Donald Zarda, an openly gay man who had worked as a skydiving instructor, filed a Title VII discrimination charge against his former employer, Altitude Express. Zarda alleged that Altitude Express terminated his employment because of his sexual orientation and argued that these actions constituted unlawful discrimination based on sex under Title VII. After a district court dismissed his case, Zarda appealed to the 2nd Circuit, which ruled in his favor.

The 2nd Circuit held that, because one cannot fully define a person's sexual orientation without identifying his or her sex, it is "impossible for an employer to discriminate on the basis of sexual orientation without taking sex into account." The court also compared Zarda's claims to Supreme Court decisions addressing Title VII issues and concluded that Altitude Express' actions constituted prohibited sex discrimination because they involved:

- Gender stereotyping discrimination, based on Zarda's failure to conform to a heterosexual male stereotype; and
- Associational discrimination, based on the sex of both Zarda and his associates.

Other Recent Sexual Orientation Discrimination Decisions

The *Zarda* court's decision relied, in part, on the 7th Circuit's opinion in Hively v. Ivy Tech, which broke ground in April 2017 by overturning prior federal case law to establish that sexual orientation discrimination is a form of sex discrimination under Title VII.

This case involved an openly gay woman, Kimberly Hively, who, like Zarda, alleged that her former employer violated Title VII by discriminating against her based on sexual orientation. According to the 7th Circuit, Hively's claim involved discrimination based on her failure to conform to a heterosexual female stereotype, making it "no different from the claims brought by women who were rejected for jobs in traditionally male workplaces." The court also compared Hively's claims to cases involving discrimination based on the race of an individual's associates. Noting that the Supreme Court has held

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that this type of discrimination affects both partners in an interracial marriage, the 7th Circuit applied that same reasoning to Hively's situation.

The court for the 1st Circuit (which includes Maine, Massachusetts, New Hampshire, Rhode Island and Puerto Rico) also recently held in favor of an openly gay women in a Title VII case, Franchina v. City of Providence. This court, however, did **not** overturn its prior case law that excludes sexual orientation from Title VII. Instead, the 1st Circuit held that, even though the woman's co-workers harassed her mainly because she was gay, some of the hostile language they used against her (such as "bitch") was inherently gender-specific. Therefore, the court held, all of the co-workers' actions "taken together" constituted sex discrimination under Title VII.

Considerations for Employers

While the 2nd and 7th Circuits' decisions in *Zarda* and *Hively* overturned prior cases to clarify how Title VII applies in the six states under their jurisdictions, all but one of those states (Indiana), along with 17 other states in the United States, have already passed laws outlawing sexual orientation discrimination in employment. In addition, the EEOC has taken a position that aligns with the 2nd and 7th Circuits' decisions since 2015. Specifically, the EEOC already interprets and enforces Title VII's prohibition against sex discrimination as forbidding any employment discrimination based on **sexual orientation** or **gender identity**.

Therefore, employers should be aware that the 2nd and 7th Circuits' decisions do not necessarily represent a radical shift in the law. Instead, the decisions merely reinforce the fact that employers may be penalized for discriminating against individuals based on sexual orientation or gender identity. The 1st Circuit's decision in *Franchina* also highlights how employer actions based on sexual orientation may overlap with or be interpreted as actions based on sex under Title VII.

Because the issues addressed in these cases may undergo review by the Supreme Court in the future, employers should continue to watch for legal developments affecting Title VII.

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