Second Circuit Holds Sexual Orientation Protected Category Under Title VII

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On February 26, 2018, the Second Circuit Court of Appeals issued a long-awaited decision in *Zarda et al. v. Altitude Express, Inc. et al.* In *Zarda* the court ruled that discrimination based on sexual orientation is illegal under Title VII. The case marks a significant change to the federal rights of LGBT workers in Connecticut, New York, and Vermont.

FACTS OF THE CASE

Donald Zarda, a now-deceased skydiving instructor, filed a complaint with the United States District Court for the Eastern District of New York alleging sexual discrimination claims under Title VII and New York law against his employer, Altitude Express, Inc. Zarda alleged that Altitude unlawfully terminated his employment for failure to "conform to male sex stereotypes by referring to his sexual orientation" in front of customers. Zarda also claimed that workers routinely referenced his sexual orientation and made sexual jokes around clients. While the District Court permitted Zarda's claim under New York law to proceed to trial, the court dismissed the federal Title VII claim. The District Court held Title VII did not protect against discrimination based on sexual orientation.

THE COURT'S RULING

In reaching its decision, the Second Circuit focused heavily on Title VII's express language, which prohibits employment discrimination "because of . . . sex." The court emphasized that the critical inquiry of assessing whether an employment practice is "because of . . . sex" is whether sex was a "motivating factor."

Recognizing that sexual orientation discrimination is a function of sex, and is comparable to sexual harassment, gender stereotyping, and "other evils long recognized as violating Title VII," the court concluded that Title VII must similarly prohibit discrimination on the basis of sexual orientation.

The court further held that sexual orientation discrimination, which is based on an employer's opposition to association between particular sexes, constitutes discrimination "because of . . . sex."

This case conflicts with rulings from other federal courts, making it likely that the Supreme Court will eventually have to settle the question.

RECOMMENDATIONS

Employers in New York, Connecticut and Vermont should discuss with their counsel what policy, training and other steps they should take in light of this ruling. All employers should confirm that their policies comply with applicable state and local laws.

We will continue to monitor and provide updates on further developments. Please contact George Morrison (646.837.5776; morrisong@whiteandwilliams.com) or any member of our Labor and Employment Group for more information regarding this alert or any employment issue at your worksite.