Patterson Belknap Webb & Tyler LLP

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Second Circuit Breaks Ground: Federal Protection Against Sexual Orientation Discrimination

On February 26, 2018, the Second Circuit ruled for the first time that discrimination based on sexual orientation is unlawful under Title VII of the Civil Rights Act of 1964. The question at issue in *Zarda v. Altitude Express*, No. 15-3775 (2d Cir. Feb. 26, 2018) – whether Title VII covers sexual orientation discrimination – has created a circuit split within the appellate courts. Currently, the Second and Seventh Circuits have ruled that Title VII prohibits sexual orientation bias, and the Eleventh Circuit has held that Title VII does not encompass sexual orientation discrimination.[1] In making its ruling, the Second Circuit overturned its previous precedent dating back to 2000 and 2005. It is likely that the Supreme Court will take up this issue.

The Opinion

The case before the Second Circuit stemmed from the 2010 termination of a Long Island sky-diving instructor, Donald Zarda. Mr. Zarda told a female student as they prepared for a sky-diving jump that he was "100 percent gay," and her boyfriend complained to the school about the encounter. Mr. Zarda said that he had made the statement to the woman because she had seemed uncomfortable with the close physical contact involved in her being tightly strapped to her instructor. Following the complaint, Mr. Zarda was fired, and he claimed it was due to his sexual orientation.

Sitting en banc, the court held that "Title VII prohibits discrimination on the basis of sexual orientation as discrimination 'because of . . . sex.'" The court explained "sexual 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." The majority opinion was joined by nine other judges (four in full, and five in part). Three judges dissented.

The majority opinion recognized that at the time Title VII was passed, Congress likely did not intend to include discrimination on the basis of sexual orientation. However, the decision concluded that the reach of the law had expanded since then to cover sexual harassment and discrimination on the basis of gender stereotypes. The majority relied on Supreme Court cases concluding that discrimination on the basis of sex stereotypes is prohibited by Title VII, and reasoned that discrimination on the basis of sexual orientation rests on a foundation of discrimination due to sex stereotypes.

This case was particularly noteworthy because while the case was pending before the Second Circuit, the EEOC and the Trump Justice Department took opposing positions. The EEOC argued that Title VII protected gay employees from discrimination on the basis of sexual orientation, while the Justice Department took the position that the law did not reach sexual orientation and stated that the EEOC was "not speaking for the United States."

Practical Takeaways

In practice, the *Zarda* decision does not change a great deal for New York employers. For some time now, both the New York State and City Human Rights Laws have specifically prohibited discrimination on the basis of sexual orientation. But the ruling does create a new cause of action for New York employees and changes the law throughout the Second Circuit.

1 *See Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017); *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017).

Employers in New York should take this opportunity to ensure that they are disseminating and enforcing strong policies that prohibit discrimination on the basis of sexual orientation, as well as the other protected classes under New York State and local laws. Employers should develop specific, job-related expectations for each position that reflect the duties of the position and minimize the potential for discrimination on the basis of sexual orientation and other protected classes. Employers should also make sure adverse employment decisions are well-documented.

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