

Blog Post

Another Circuit Says Title VII Prohibits Sexual Orientation Discrimination

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A second federal appellate court has ruled that Title VII of the Civil Rights Act prohibits employers from discriminating against employees based on their sexual orientation. The ruling is in line with the EEOC's interpretation of the law, but at odds with the interpretation by the current administration's Department of Justice.

The case, *Zarda v. Altitude Express, Inc.*, involved a skydiving instructor who was fired after his employer received a complaint that he inappropriately touched a female client during a tandem skydive and then disclosed his sexual orientation to excuse his behavior. The skydiving instructor denied inappropriately touching the client, but admitted he told the client he was gay, simply to preempt any discomfort she may have felt being strapped to him for the tandem skydive. The skydiving instructor alleged he was fired solely because of his sexual orientation, which he maintained violated Title VII's prohibition on discrimination based on sex. The employer argued that Title VII does not cover, and was not intended to cover, sexual orientation discrimination because, among other things, it only refers to discrimination "because . . . of sex."

The Second Circuit disagreed with the employer, noting that even though Congress did not intend to address sexual orientation discrimination when it

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enacted Title VII in 1964, laws “often go beyond the principal evil to cover reasonably comparable evils.” Basing its conclusion on three different theories, the court held that sexual orientation is a subset of sex discrimination and is thus prohibited by Title VII.

First, the court held that sexual orientation is motivated, at least in part, by sex. The court noted, “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.” Thus, the court reasoned, “because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected.”

Second, the court held that sexual orientation discrimination is rooted in gender stereotypes about men and women, specifically to whom they should be attracted based on their sex, and the U.S. Supreme Court has held that gender stereotypes are an improper motive for adverse employment actions. The court expressly rejected the Department of Justice’s argument that negative views about homosexuality may be based not on gender stereotypes but on “moral beliefs about sexual, marital and familial relationships,” concluding that it is impossible to disassociate moral beliefs about sex from moral beliefs about sexual orientation.

Finally, the court also held that sexual orientation is a subset of sex discrimination because it constitutes a form of associational discrimination, which the U.S. Supreme Court has held is illegal in the context of race. In other words, the court said, just as an employer cannot terminate an employee for being married to someone of a particular race, employers cannot terminate an employee for associating within someone of a particular sex.

In holding sexual orientation discrimination is protected, the Second Circuit Court of Appeals, which covers New York, Connecticut and Vermont, joins the Seventh Circuit Court of Appeals, which covers Illinois, Indiana and Wisconsin. In March 2017, the Eleventh Circuit Court of Appeals, which covers Florida, Georgia and Alabama, expressly rejected that position.

Until the U.S. Supreme Court weighs in on the issue, employers across the country should remember that the EEOC maintains that Title VII prohibits sexual orientation discrimination and continues to process charges on that theory. In addition, employers should remember that Title VII is not the only law prohibiting employment discrimination, based on sexual orientation or otherwise; many state and local laws expressly prohibit sexual orientation discrimination.

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