

Title VII Bars Discrimination Based on Sexual Orientation, Second Circuit Rules

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In a much-anticipated decision, the federal appeals court in New York has held that Title VII of the Civil Rights Act of 1964 prohibits discrimination based on an individual's sexual orientation. *Zarda v. Altitude Express*, No. 15-3775 (2d Cir. Feb. 26, 2018).

In its 10-3 decision, the full U.S. Court of Appeals for the Second Circuit reversed an April 2017 decision in which a three-judge panel of the Court declined to recognize sexual orientation discrimination under Title VII.

The latest decision deepens a circuit court split on the issue. The Second and Seventh Circuits have held Title VII prohibits sexual orientation discrimination, but the Eleventh Circuit has held it does not. This circuit split most likely will set up the issue for U.S. Supreme Court's review.

In the case, a skydiving instructor, Donald Zarda, claimed he was fired by his employer, Altitude Express, because he was gay. In 2010, Zarda filed suit in federal district court in New York arguing, among other things, that the firing violated Title VII. According to Zarda, Title VII's prohibition against workplace discrimination on the basis of "sex" also prohibits sexual orientation discrimination.

A district court judge ruled against Zarda, applying the Second Circuit's then-current precedent. *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000). The Second Circuit in *Simonton* declined to hold that discrimination based on sexual orientation was prohibited under Title VII.

Zarda moved the district court to reconsider its opinion when, during the pendency of the district court action, the Equal Employment Opportunity Commission reached its decision in *Baldwin v. Foxx*, No. 01220133080 (July 16, 2015). There, the agency decided that discrimination based on sexual orientation is prohibited by Title VII.

The district court denied Zarda's motion, holding *Simonton* was binding precedent. Zarda appealed to the Second Circuit. Zarda died in 2014, during the pendency of the appeal. His estate carried on the action, arguing *Simonton* should be reversed.

When Zarda initially raised his Title VII argument, his position had little direct support in the courts. Courts tended to interpret Title VII's prohibition on "sex" discrimination somewhat narrowly. It was only in 1986 that the U.S. Supreme Court ruled Title VII prohibits workplace sexual harassment, *see Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), and in 1989 held employers violate Title VII when using sexual stereotyping in making employment decisions. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

Among the circuit courts, the Seventh Circuit was the first to endorse the EEOC's position on sexual orientation discrimination. *Hively v. Ivy Tech Cmty. College of Ind.*,

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853 F.3d 339, 362 (7th Cir. 2017) (en banc). (See our article, [Sexual Orientation Discrimination Prohibited by Title VII, 7th Circuit Finds.](#)) That decision came after a divided Eleventh Circuit panel declined to recognize sexual orientation discrimination under Title VII. *See Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 125 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 557 (2017).

Siding with the Seventh Circuit in its decision, the Second Circuit reversed *Simonton*, holding that “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.” The Court’s decision effectively holds that Title VII covers lesbian, gay, and bisexual employees who claim they were discriminated against because of their sexual orientation. The Court, however, specifically stated that discrimination against transgender individuals is a “distinct question” and not at issue in Zarda’s case. It remains to be seen whether that question, and whether the circuit split on sexual orientation discrimination, will be addressed by the Supreme Court.

Employers should review their equal employment opportunity and harassment policies to ensure that sexual orientation is not only included as a protected group, but also that sexual orientation discrimination, along with other forms of harassment and discrimination, are addressed in harassment prevention training. This case is a stark reminder that even in jurisdictions where sexual orientation is protected under state law (*e.g.*, New York), HR professionals and supervisors must be vigilant in ensuring that all employees will be respected for who they are, regardless of their sexual orientation, gender identity, race, color, age, disability, religion, national origin, ethnicity, or any other protected characteristic.

Please consult with the Jackson Lewis attorney with whom you work for compliance and follow-up actions stemming from this important Second Circuit decision.

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