

Another Court Reverses Course: Second Circuit Holds Title VII Forbids Sexual Orientation Discrimination

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The U.S. Court of Appeals for the Second Circuit issued an opinion on Monday of this week and explicitly held that Title VII prohibits discrimination on the basis of sexual orientation. In the closely watched case, *Zarda v. Altitude Express, Inc.*, a full panel of the Second Circuit revisited the question of sexual orientation coverage under Title VII. In its decision, the Court cited the history and intent behind the passage of Title VII – namely, that it was intended to be a “broad rule of workplace equality” and a law that should be “interpreted broadly to achieve equal employment opportunity.” The Court recognized, however, that in order to broadly interpret Title VII to include sexual orientation, it would have to tie it to one of the law’s identified protected classes – sex. In other words, is sex necessarily a motivating factor in discrimination based on sexual orientation? The answer to that question – at least according to the Second Circuit Court – is yes. In no uncertain terms, the Court said that sex is necessarily a factor in sexual orientation. Moreover, relying on the EEOC’s interpretation, the Court said that sexual orientation discrimination can be premised on sex stereotyping – or “assumptions about how persons of a certain sex can or should be” Such discrimination, the Court said, could alternatively be associational discrimination motivated by the employer’s aversion to the employee’s association with someone of the same sex. The decision comes on the heels of the Seventh Circuit’s equivalent 2017 decision in *Hively*. As a result, claims alleging sexual orientation discrimination in federal courts within these circuits are viable and will no longer suffer an early and quick dismissal. The decision also bolsters an already existing circuit court split following a recent Eleventh Circuit decision holding that Title VII does not cover sexual orientation discrimination. The question remaining – Does this change the Supreme Court’s likelihood to weigh in? The answer could come in a potential petition for cert in *Zarda*.

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