

Second Circuit Takes Second Look At Sexual Orientation Discrimination Under Title VII

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**Koryn M.
McHone**

Of Counsel

The issue of whether Title VII prohibits discrimination on the basis of sexual orientation is in the hot seat once again, this time being considered by the U.S. Court of Appeals for the Second Circuit as part of an en banc rehearing granted in *Zarda v. Altitude Express, Inc. d/b/a Skydive Long Island*. The grant of the rehearing, to include all active judges and those senior judges involved in the original appeal, comes after the U.S. District Court for the Eastern District of New York dismissed a Title VII claim that Donald Zarda (who was represented by his estate due to his death) had been fired unlawfully under Title VII based on a customer's complaint about his sexuality. In dismissing the original claim, the District Court indicated that Second Circuit precedent held that sexual orientation discrimination did not fall within the purview of Title VII's prohibition against sex discrimination.

In April 2017, a [Second Circuit panel affirmed the dismissal](#) and explicitly declined a request to overturn prior precedent, advising it could not do so because a panel of the court alone could not overturn an earlier panel's decision. A petition for rehearing en banc quickly ensued. In granting the petition for rehearing, the Second Circuit ordered the parties to brief the question of "Does Title VII of the Civil Rights Act of 1964 prohibit discrimination on the basis of sexual orientation through its prohibition of discrimination 'because of . . . sex'?" Under the existing schedule, all briefing should be completed by early August, with oral argument to be held in late September.

This is an important case for employers to watch, and not only those doing business within the Second Circuit's jurisdiction (New York, Connecticut, and Vermont), but also those operating elsewhere in the U.S. This hot issue is likely to be confronting courts nationwide, with courts looking to one another's guidance when issuing their own findings.

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