RubinFortunato

CLIENT ALERT

March 2018

SEXUAL ORIENTATION DISCRIMINATION IS ACTIONABLE UNDER TITLE VII
The Second Circuit's Holding Flies Tandem with the Seventh Circuit's in **Hively**

Candace D. Embry

The United States Court of Appeals for the Second Circuit held in Zarda v. Altitude Express, Inc.[1] that discrimination on the basis of sexual orientation is discrimination "because of . . . sex" and, therefore, is prohibited under Title VII of the Civil Rights Act of 1964 ("Title VII").

Title VII makes it unlawful for an employer to discriminate on the basis of an employee's race, color, religion, sex, or national origin. Prior to its decision in Zarda, the Second Circuit had long-held that sexual orientation claims were not cognizable under Title VII. In overruling its precedent, the Second Circuit determined that sexual orientation is inherently a sex-based consideration, and, therefore, sexual orientation discrimination is actionable under Title VII.

Zarda worked as a skydiving instructor and regularly participated in tandem skydives, which required that he strap himself to clients, hip-to-hip and shoulder-to-shoulder. Given the constant close contact, Zarda and his colleagues often referenced sexual orientation and made sexual jokes in the presence of clients, and Zarda often told female clients about his sexual orientation to assuage any discomfort they may have about being strapped to a man for a tandem skydive. A client reported to Altitude Express that Zarda had disclosed his sexual orientation to her to excuse his behavior after he allegedly touched her inappropriately. As a result of the client complaint, Altitude Express terminated Zarda.

Zarda believed that Altitude Express discriminated against him because of his sexual orientation and because of his gender. In particular, he filed a Charge of Discrimination with the Equal Employment Opportunity Commission and alleged that Altitude Express terminated his employment because he honestly referred to his sexual orientation and did not conform to the straight male macho stereotype. In September 2010, Zarda filed a lawsuit in the Eastern District of New York alleging sex stereotyping in violation of Title VII and sexual orientation discrimination under New York law. The court summarily dismissed Zarda's Title VII claim. The parties went to trial on Zarda's remaining claims and Altitude Express prevailed. Zarda appealed to the Second Circuit.

[1] 2018 U.S. App. LEXIS 4608 (2d Cir. Feb. 26, 2018).

Title VII states, in relevant part, "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge . . . or to otherwise discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ."[2]

In its opinion, the Second Circuit addressed whether, by the phrase "because of sex," sexual orientation discrimination is prohibited under Title VII. The Court explored sexual orientation as a subset of sex and concluded that Title VII "extends to all discrimination 'because of . . . sex'" and that "sexual orientation discrimination is an actionable subset of sex discrimination."

The Court's first basis for concluding that sexual orientation discrimination is a form of sex discrimination is that sexual orientation is necessarily a function of sex. The Court explained that sexual orientation is often categorized as heterosexuality, homosexuality, or bisexuality. Because these terms are used to demonstrate whether a person has an inclination toward sexual behavior with persons of the opposite sex, the same sex, or both sexes, respectively, "one cannot fully define a person's sexual orientation without identifying his or her sex." Therefore, sexual orientation is inherently sex-dependent.

The Court further explained that this conclusion is underscored by the Supreme Court's "but for" or "comparative" test that asks whether an employee's treatment would have been different "but for that person's sex." The Court referenced the Seventh Circuit Court of Appeal's decision in Hively v. Ivy Tech Community College of Indiana,[3] where that court compared the plaintiff, a female professor attracted to women (who was denied a promotion), to a hypothetical male professor who was attracted to women (and did receive a promotion), and determined that Hively would not have been denied a promotion "but for" her sex. Therefore, sexual orientation is a subset of sex, and it follows that sexual orientation discrimination is a subset of sex discrimination.

Next, the Court reviewed gender stereotyping as a means for concluding that sexual orientation discrimination is a form of sex discrimination and determined that sexual orientation discrimination is invariably rooted in stereotypes about men and women. The Court explained that, when evaluating gender stereotyping claims, the crucial question is, for example, whether an employer who evaluates an employee in sex-based terms would have criticized a woman as sharply (or at all) had she been a man. The Court concluded that when "'an employer . . . acts on the basis of a belief that [men] cannot be [attracted to men], or that [they] must not be,' but takes no such action against women who are attracted to men, the employer 'has acted on the basis of gender.'"

Finally, the Court determined that sexual orientation discrimination as a subset of sex discrimination is further reinforced by the theory of associational discrimination. Under this theory, the Second Circuit

---

[2] 42 U.S.C. § 2000e-2(a)(1).

[3] 2017 U.S. App. LEXIS 5839 (7th Cir. Apr. 4, 2017); see also Rubin, Fortunato & Harbison Client Alert, April 2017, RE-ORIENTING TITLE VII, Seventh Circuit Holds Sexual Orientation Discrimination Is Prohibited Under Title VII.

previously held that "an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race." In Zarda, the Second Circuit determined that this concept applies with equal force to discrimination on the basis of sex and held that "sexual orientation discrimination, which is based on an employer's opposition to association between particular sexes and thereby discriminations against an employee based on their own sex, constitutes discrimination "'because of . . . sex'" in violation of Title VII.

The Second Circuit is now the second federal appellate court to extend Title VII's protections to discrimination based on sexual orientation, joining the Seventh Circuit, which reached this conclusion in Hively. Employers within the Second Circuit (New York, Connecticut, and Vermont) must be mindful to eliminate practices that create or increase exposure to liability for federal claims of sexual orientation discrimination. The Second Circuit's decision deepens the split between the Circuit Courts of Appeal, and increases the likelihood that this issue will, at some point, be presented to the United States Supreme Court for final resolution.

Candace D. Embry is admitted to practice in Pennsylvania and New Jersey. She may be reached at 610-408-2058, or at cembry@rubinfortunato.com.