

## **Second Circuit Rules That Title VII Prohibits Discrimination On The Basis Of Sexual Orientation**

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### Working Together

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By Melinda Kaufmann

The Second Circuit Court of Appeals (the federal appellate court covering Connecticut, New York and Vermont), on Monday, February 26, 2018, issued a decision overturning its prior rulings and holding definitively that Title VII's ban on "discrimination on the basis of sex" prohibits discrimination because of an employee's sexual orientation. Connecticut state law has since 1991 explicitly prohibited discrimination against employees on the basis of sexual orientation, but Title VII – the fundamental federal law against employment discrimination, enacted in 1964 – does not include an explicit ban on discrimination based on an employee's sexual orientation. Nevertheless, as of today, the Second Circuit joins a growing list of federal courts extending this protection under federal law as well. In a footnote, the Court definitively stated that "Lest there be any doubt, this Court's holding that sexual orientation discrimination is a subset of sex discrimination encompasses discrimination based on a person's attraction to people of the opposite sex, same sex, or both."

The case, *Zarda v. Altitude Express, Inc.*, involves Zarda, a skydiving instructor who identifies as a gay man. During a tandem jump, a female client alleged that Zarda had touched her inappropriately and reported it to the company. The company then fired Zarda. He filed a law suit claiming that he was fired for being gay. He stated that his co-workers routinely made reference to his sexual orientation and made sexual jokes around clients. The District Court dismissed his claims under Title VII and his claims under New York's anti-discrimination statutes went to trial, where his employer prevailed. Zarda then appealed the dismissal of his Title VII claims.

The Second Circuit, issuing an *en banc* decision (*i.e.*, a decision by the entire court of thirteen judges, rather than by a three-judge panel as is usually the case), expressly overruled its prior decisions holding that sexual orientation was not a form of sex discrimination under Title VII. The Court found that sexual orientation discrimination implicates "sex" in three different ways: (1) sexual orientation is defined by one's sex and the sex of one's partner making it impossible to separate sex from sexual orientation, (2) sexual orientation discrimination is based on sexual stereotypes about how a person of a specific gender should behave, and (3) sexual orientation discrimination is based on an employer's opposition to association between individuals of particular sexes, and therefore is discrimination based on the employee's sex.

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**pullcom.com**  @pullmancomley

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The Court noted that a person's sexuality cannot be defined without reference to both the person's sex and the sex of those to whom he/she is attracted. In the situation where a trait operates as a proxy for sex, the proper question is whether the employee would have been treated differently "but for" his/her sex. Thus, in the context of sexual orientation, a woman who is subject to an adverse employment action because she is attracted to women would have been treated differently if she had been a man attracted to women, and therefore, the adverse employment action was taken because of her sex.

Next, the Court noted that gender stereotyping has long been recognized as a basis for finding sex discrimination. Thus, for example, the Court has previously recognized sex discrimination complaints based on claims that a man acted effeminately or a woman acted too masculine. The Court found that sexual orientation discrimination is almost always rooted in stereotypes about how men and women should act, including to whom they are attracted, and therefore, constitutes sex discrimination under Title VII.

Finally, the Court found sexual orientation discrimination may be based on an employer's opposition to association between particular sexes. The Court analogized it to the line of cases recognizing the existence of race discrimination where an employer discriminates on the basis of an employee's interracial relationship. The Court found that the same analysis applied to sex, thus finding that discrimination against an employee based on the gender of his/her partner was also sex discrimination under Title VII.

Since there is a "Circuit split" on this issue – different federal courts of appeals have reached conflicting conclusions on the question of whether Title VII prohibits discrimination on the basis of sexual orientation – the issue is likely to go the U.S. Supreme Court, perhaps in the near future. It seems likely that the question whether Title VII prohibits discrimination on the basis of gender identity or expression will also percolate through the federal courts.

What is the practical implication for Connecticut employers? Probably, not much. Connecticut already has a comprehensive law expressly protecting employees against employment discrimination on the basis of sexual orientation, as well as gender identity and expression. Employees in Connecticut, however, will now be able to pursue claims of sexual orientation discrimination under both state and federal law, and in both state and federal courts.

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