

Second Circuit Rules that Sexual Orientation is Protected Under Title VII

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On February 26, the Second Circuit ruled that discrimination based on sexual orientation is discrimination based on sex and, therefore, covered under the protection of Title VII of the Civil Rights Act of 1964. In *Melissa Zarda et al. v. Altitude Express, dba Skydive Long Island*, a 10-3 en banc decision, the U.S. Court of Appeals for the Second Circuit overturned its own precedent in holding that Title VII encompasses discrimination based on sexual orientation. In doing so, it joins the position held by the Seventh Circuit and the Equal Employment Opportunity Commission. The Eleventh Circuit and the U.S. Department of Justice, however, hold the opposite view. The divide on this issue ultimately will need to be resolved by the Supreme Court, which, thus far, has declined to address this issue.

In 2010, Donald Zarda, a skydiving instructor, filed suit alleging wrongful termination under Title VII, against his employer, Altitude Express. Zarda claimed he was unlawfully terminated after he mentioned to a client he was gay. Zarda alleged that clients were tied physically close to him during jumps and he told female clients he was gay to help them feel more comfortable. After Zarda died in a base jumping incident, the case was pursued by his estate. The federal district court for the Eastern District of New York granted summary judgment for Altitude Express finding that Title VII did not provide protections for sexual orientation. Zarda's estate appealed and a panel for the Second Circuit affirmed the district court's ruling. The Second Circuit revived Zarda's case, granting a rehearing en banc.

In reversing its previous holding, the court acknowledged that when Title VII was passed in 1964 it was unlikely meant to include discrimination based on sexual orientation. It explained, however, that other courts have interpreted the law to include sexual orientation in order to cover "comparable evils." The court also pointed to the Supreme Court's previous ruling that gender stereotypes cannot be the basis for employment decisions, connecting sexual orientation and gender stereotypes. In the majority opinion, the court stated that sexual orientation is protected through "the lens of associational discrimination" and reasoned that "[b]ecause Congress could not anticipate the full spectrum of employment discrimination that would be directed at protected categories, it falls to courts to give effect to the broad language that Congress used."

The Second Circuit's decision, in *Altitude Express*, should not have a significant impact on employers operating in the states covered by the Second Circuit, which include Connecticut, New York, and Vermont, as each of these states has long prohibited discrimination and harassment based upon sexual orientation. Nevertheless, employers should review their policies and training materials to ensure prohibited conduct based on sexual orientation is expressly included.

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