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NEWS ALERT

LABOR & EMPLOYMENT

Second Circuit Prohibits Sexual Orientation Discrimination

By Patricia E. Reilly | March 8, 2018

In a significant decision reflecting the evolution of Title VII of the Civil Rights Act of 1964, the United States Court of Appeals for the Second Circuit, which covers Connecticut, New York and Vermont, has ruled in Zarda v. Altitude Express, No. 15-3775, *en banc*, (2d Cir. 2018) that Title VII protects individuals on the basis of sexual orientation, even though Title VII itself does not expressly state that it applies to sexual orientation discrimination. The case provides fascinating insight into how courts' interpretations of statutes may change over time in light of changing social mores and developing doctrine. The issue is likely to make its way to the Supreme Court because although the Seventh Circuit (Illinois, Indiana and Wisconsin) agrees that Title VII prohibits sexual orientation discrimination, the Eleventh Circuit (Alabama, Florida and Georgia) has held that it does not.

The Plaintiff, Donald Zarda, a skydiving instructor at Altitude Express, alleged that he was terminated because he was gay. The trial court granted summary judgment on Plaintiff's Title VII claim, following existing Second Circuit precedent holding that Title VII's prohibition against sex discrimination did not extend to sexual orientation. The Plaintiff appealed, and the Second Circuit reversed the trial court, thereby overturning its precedent.

The Second Circuit relied on long-standing Title VII doctrine to find that sexual orientation discrimination is prohibited under Title VII. First, relying on Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) the Second Circuit reasoned that sexual orientation discrimination is discrimination that is "because of" sex and impermissibly motivated by considerations of sex. The court analyzed sex stereotyping as articulated in Price Waterhouse and merged the concept of sex stereotyping with gender non-conformity to find that sexual orientation discrimination is a form of prohibited sex stereotyping. The Court also relied on the Supreme Court cases of Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986), which established that sexual harassment is a form of illegal sex discrimination under Title VII, and Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998), which established that same-sex sexual harassment is prohibited by Title VII. Finally, the Court applied the concept of associational discrimination, which has long been prohibited under Title VII, to sexual orientation, and found that sexual orientation discrimination is a form of associational discrimination because individuals are being discriminated against by virtue of their association with a sexual partner of the same sex. In this analysis, the court referenced, although it did not rely on, Loving v. Virginia, 388 U.S. 1 (1967), which held that anti-miscegenation laws are unconstitutional under the Fourteenth Amendment right to equal protection.

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On a national level, the decision underscores the federal appellate court split on the question of whether sexual orientation is a protected class under Title VII. Although the court explicitly stated that it was addressing sexual orientation only and not discrimination on the basis of transgender status, the reasoning in the decision could also apply to transgender status, and it will be interesting to watch how Title VII evolves with respect to claims of discrimination on the basis of transgender status.

As a practical matter, this decision will not have a significant impact on employment practices in the states comprising the Second Circuit--Connecticut, New York, and Vermont—because those states already have laws that prohibit discrimination based on sexual orientation. In fact, the Attorneys General in these states filed an amicus brief in support of the Plaintiff-Appellants. The decision would, however, provide additional avenues for the recovery of damages available under Title VII but not available under some state laws. Employers in these states should already be in compliance with state law and maintaining workplaces that are free of sexual orientation discrimination.

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