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Second Circuit finds Title VII protects against Sexual Orientation Discrimination

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Last week, the Second Circuit held that Title VII, which protects against discrimination in the workplace on the basis of sex, includes discrimination on the basis of sexual orientation. Notably, the Second Circuit is only the second court in the country to do so.

While Title VII forbids discrimination in the workplace based on "race, color, sex, religion, and national origin," the statute does not expressly prohibit discrimination on the basis of sexual orientation. While some states, such as New York, have laws in place that protect employees from discrimination on the basis of sexual orientation, no federal law explicitly forbids discrimination on the basis of sexual orientation in the workplace.

Recently, however, the Seventh Circuit found that discrimination based on sexual orientation was in fact "a form of sex discrimination." Conversely, in March 2017, the Eleventh Circuit held that Title VII did not protect against sexual orientation discrimination. Thus the Second Circuit is the third federal appeals court to weigh in on this matter, setting the stage for the U.S. Supreme Court to resolve the split in the Circuits.

By way of background, in 2010, Long Island skydiving instructor, Donald Zarda, brought a Title VII claim alleging discrimination based on his sexual orientation against his former employer, Altitude Express. The claim stemmed from his efforts to calm a female student who seemed uncomfortable being strapped to him during the dive. When Zarda informed a female student that he was "100 percent gay," the student complained to the sky diving school about the comment and also alleged that Zarda inappropriately touched her. Consequently, Zarda's employment was terminated. Mr. Zarda brought a lawsuit against his employer claiming that his termination violated Title VII. The District Court for the Eastern District of New York granted summary judgment to Altitude, holding that Zarda failed to show that he had been discriminated against "because of sex." In 2014, Mr. Zarda died in a sky-diving accident, but his appeal continued.

In 2015, the Equal Employment Opportunity Commission ("EEOC") issued a ruling in a separate case, finding for the first time that "sexual orientation is inherently a 'sex-based consideration'" and should be protected by Title VII. That same year, the Supreme Court found same-sex marriage to be constitutional. In 2017, however, the Justice Department, under a new administration, filed a friend of the court brief in Mr. Zarda's case, arguing that Title VII did not extend to sexual orientation, and the EEOC was "not speaking for the United States."

The Second Circuit's recent ruling rejected the Justice Department's position. In a majority opinion joined in part by eight other judges, Chief Judge Robert A. Katzman wrote, "[s]ince 1964, the legal framework for evaluating Title

VII claims has evolved substantially. . . and the law should be understood to include sexual orientation." Katzman further wrote, "Title VII's prohibition on sex discrimination applies to any practice in which sex is a motivating factor." Accordingly, discriminating against someone based on their sexual orientation is sex discrimination "because sexual orientation is defined by one's sex in relation to the sex of those to whom one is attracted, making it impossible for an employer to discriminate on the basis of sexual orientation without taking sex into account." The court also found that sexual orientation discrimination is a form of sex stereotyping since it is "predicated on assumptions about how persons of a certain sex can or should be, which is an impermissible basis for adverse employment actions." Discrimination based on sexual orientation inherently involves sex stereotyping because it is based on gendered norms regarding what genders someone "should" be attracted to.

In a dissenting opinion, in which he held that a plain reading of Title VII indicates that it does not offer, and Congress did not intend that it offer, the protections found by the majority, Judge Gerard E. Lynch said that he came to his decision "regretfully," however, "we need to respect the choices made by Congress about which social problems to address, and how to address them." He further noted, "I hope that one day soon Congress will join them and adopt that principle on a national basis."

In December 2017, the Supreme Court denied a request to hear an appeal filed by the plaintiff in the Eleventh Circuit case. However, since the circuit courts are now clearly split on this issue, this may be enough to prompt Supreme Court review. At this time, employers are reminded to review their policies and procedures to ensure compliance with their circuit's governing standard. In New York, employees now have federal, state and city level protections against sexual orientation discrimination. We encourage employers to provide regular training to employees on how to properly recognize, prevent, and respond to claims of sexual orientation discrimination.

If you have any questions or concerns regarding employment or education-related issues, please contact James G. Ryan at jryan@cullenanddykman.com or at 516-357-3750.

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