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Labor and Employment Alert: Second Circuit Holds That Title VII Protects Sexual Orientation

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On February 26, 2018, the Second Circuit Court of Appeals held that discrimination on the basis of sexual orientation is a form of sex discrimination prohibited by Title VII of the Civil Rights Act. *Zarda v. Altitude Express* becomes the second decision by a federal appellate court holding that sexual orientation discrimination is actionable under Title VII. As such, it follows last year's decision from the Seventh Circuit (*Hively v. Ivy Tech Community College*), and directly conflicts with a decision by the Eleventh Circuit Court of Appeals in 2017 as well as holdings by the First, Third, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth Circuit Courts of Appeal – all of which held that Title VII does not prohibit discrimination based on sexual orientation.

In the lawsuit, Donald Zarda claimed that Altitude Express terminated his employment because he is gay and that his termination violates Title VII. Title VII prohibits discrimination because of sex and doesn't mention sexual orientation. The trial court dismissed his case, finding there was no cause of action under Title VII for sexual orientation discrimination. Last year, the Second Circuit affirmed this dismissal. But the Court later agreed to rehear the case en banc (before the entire 13-judge panel).

In its new 10-3 majority opinion, the Court noted that “the legal framework for evaluating Title VII claims has evolved substantially” and gave three justifications for concluding that Title VII now prohibits sexual orientation discrimination. First, “sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination.” The Court said that “the most natural reading” of Title VII’s prohibition on discrimination “because of . . . sex” is that “it extends to sexual orientation discrimination because sex is necessarily a factor in sexual orientation.” Second, “sexual orientation discrimination is predicated on assumptions about how persons of a certain sex can or should be, which is an impermissible basis for adverse employment actions.” Title VII prohibits discrimination predicated upon sexual stereotypes. And third, sexual orientation discrimination is a form of prohibited “associational discrimination” “because an adverse employment action that is motivated by the

employer's opposition to association between members of particular sexes discriminates against an employee on the basis of sex."

The Second Circuit covers Connecticut, New York, and Vermont, each of which already prohibit sexual orientation discrimination under state law. The Second Circuit's ruling expands that protection as a matter of federal law. In doing so, it deepens the conflict with the other federal circuits, setting the stage for a potential review by the Supreme Court. Contact your Vorys lawyer if you have questions about discrimination or harassment in the workplace.