

Title VII Prohibits Employment Discrimination Based on Sexual Orientation - So Says the 2nd Circuit

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On February 26, 2018, the full Second Circuit Court of Appeals held that Title VII of the Civil Rights Act of 1964 prohibits discrimination based on an employee's "sexual orientation." This decision, [*Zarda v. Altitude Express, Inc.*](#), makes the Second Circuit the second federal appellate court to reverse its precedent that Title VII's prohibition against sex discrimination does not encompass employees' "sexual orientation." The Seventh Circuit was the first to break the mold with its 2017 decision, [*Hively v. Ivy Technical Community College of Indiana*](#).

In *Zarda*, a skydiving instructor claimed his former employer, Altitude Express Inc., discharged him for being homosexual after he revealed his sexual orientation to a client. Zarda filed suit in 2010, arguing Altitude terminated him because he "failed to conform to male sex stereotypes by referring to his sexual orientation." Altitude argued that Zarda was not fired for being homosexual and that, regardless, Title VII does not prohibit orientation discrimination. The district court agreed with Altitude and dismissed the case.

The Second Circuit disagreed with Altitude because "sex is necessarily a factor in sexual orientation." The Second Circuit relied on a 2015 EEOC decision that held for the first time that "sexual orientation is inherently a 'sex-based consideration' accordingly, an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." The Court recognized its rejection of such arguments in the past but explained that "legal doctrine evolves" and expressly overruled its own 2005 decision.

Zarda, in conjunction with *Hively*, forms a split among the federal circuit courts, with the other ten circuits either holding that Title VII's prohibition against "sex" discrimination does not include "sexual orientation," or remaining silent on the issue. The Eleventh Circuit also recently revisited this issue in March 2017, *Blum v. Gulf Oil Corp.*, where a divided court, decided Title VII does not prohibit sexual orientation discrimination. Although the Supreme Court denied review of the issue in *Hively* last December, *Zarda* may prompt the Court to revisit the issue.

Twenty states, including the District of Columbia, and many municipalities currently have statutes prohibiting employment discrimination based on sexual orientation in the private sector. All employers should consider contacting legal counsel to review whether their employment policies and procedures comply with current federal, state, and local laws. To speak with a Benesch attorney about reviewing your company's policies and procedures, please contact an attorney in Benesch's [Labor and Employment Practice Group](#).

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