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Reorienting Title VII - Although The Second Circuit Expands Sexual Orientation Protections Under Federal Law, State Laws Remain More Favorable to Plaintiffs

On February 26, 2018, the Second Circuit Court of Appeals joined the Seventh Circuit in ruling that Title VII of the 1964 Civil Rights Act prohibits discrimination on the basis of sexual orientation. "Title VII's prohibition on sex discrimination applies to any practice in which sex is a motivating factor," Judge Robert A. Katzmann wrote for the majority in *Zarda v. Altitude Express, Inc.* He continued, "sexual orientation discrimination is a subset of 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."

This case piqued the interest of both employment attorneys and legal scholars because the Equal Employment Opportunity Commission and the Department of Justice, two federal agencies, supported opposing positions. With the Second and Seventh Circuit Courts' decisions creating a split in the circuit courts with the Eleventh Circuit Court of Appeals, it is likely that the U.S. Supreme Court may hear this case to issue a singular interpretation of the scope of Title VII.

Although this decision appears to be a progressive step by the Second Circuit, its practical effect is fairly limited. The Second Circuit has only three states within its jurisdiction: New York, Connecticut and Vermont, and these states, as well as many jurisdictions including New Jersey, Massachusetts and the District of Columbia, have already enacted laws prohibiting sexual orientation discrimination in the workplace. Although plaintiffs may now bring sexual orientation claims in federal court in the jurisdictions within the Second Circuit, they would still want to bring their claims in state court and/or under state law for several reasons:

- Plaintiffs may be able to get to court quicker. Although Title VII requires exhaustion of administrative remedies prior to filing a lawsuit in federal court, certain states' laws, including those of New York, New Jersey and Massachusetts, do not require plaintiffs to exhaust any state administrative remedies prior to filing a lawsuit.
- Plaintiffs may be able to get a bigger payout. Although Title VII caps compensatory and punitive damages, anti-discrimination laws in New York City, New Jersey and Massachusetts do not. Although New York State and Connecticut anti-discrimination laws do not provide for punitive damages, they do not cap compensatory damages.
- Plaintiffs may have a better chance of getting a verdict in their favor. Although juries must return unanimous verdicts in federal court, New York, New Jersey and Massachusetts courts generally accept a five-sixths verdict.

Given the above, although the Second Circuit's case is garnering much attention, employers must remain mindful of the more expansive rights state or local laws may already provide. Further, given the increased attention on sexual orientation discrimination, now is a good time for employers to review their anti-discrimination and anti-harassment policies and training to ensure they cover sexual orientation and, as always, to ensure such conduct does not occur.

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