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Authors:
[Katie M. Collier](#)
[Neal Shah](#)

Second Circuit Court of Appeals Joins the Seventh Circuit in Recognizing Sexual Orientation Discrimination Under Title VII

In 2017, in *Hively v. Ivy Tech Community College of Indiana*, the Seventh Circuit Court of Appeals became the first federal court of appeals to hold that discrimination on the basis of sexual orientation was prohibited under Title VII of the Civil Rights Act. This week, in *Zarda v. Altitude Express, Inc.*, the Second Circuit Court of Appeals joined the Seventh Circuit and became the second court of appeals to recognize sexual orientation discrimination as a cause of action under Title VII.

Prior to 2015, the majority of courts refused to recognize sexual orientation discrimination claims under Title VII. In 2015, the Equal Employment Opportunity Commission (EEOC) recognized sexual orientation as a protected class. Since then, three circuits have revisited the question of whether sexual orientation discrimination is prohibited under Title VII. In March 2017, the Eleventh Circuit Court of Appeals declined to recognize a sexual orientation discrimination claim in *Evans v. Georgia Regional Hospital*. One month later, the Seventh Circuit, sitting *en banc*, held that discrimination on the basis of sexual orientation was a form of sex discrimination and prohibited under Title VII. On February 26, 2018, the Second Circuit joined the Seventh Circuit in recognizing sexual orientation discrimination claims under Title VII.

In *Zarda*, a homosexual skydiving instructor brought a sex discrimination claim under Title VII. Zarda alleged he was terminated because he failed to conform to male gender stereotypes by being homosexual. The Second Circuit Court of Appeals explicitly held that "Title VII prohibits discrimination on the basis of sexual orientation as discrimination 'because of ... sex.'" The Court reasoned that Congress intended to make sex irrelevant to employment decisions. Indeed, the Supreme Court previously held discrimination based on sex prohibits discrimination based on traits

that are a function of sex, such as life expectancy and non-conformity with gender norms. The Court thus held “sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination.” The Court concluded “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,” as one cannot fully define another’s sexual orientation without knowing the sex of that person and the person to whom he or she is attracted. The Court reasoned sexual orientation is a subset of sex discrimination because sexual orientation discrimination “is predicated on assumptions about how persons of a certain sex can or should be,” which constitutes sex stereotyping. The Court further reinforced its holding by viewing sexual orientation discrimination through the lens of associational discrimination. The Court held sexual orientation discrimination is motivated by “an employer’s opposition to romantic association between particular sexes” and thus is based on the employee’s own sex.

While only the Seventh and Second Circuit Courts of Appeals have explicitly held that sexual orientation discrimination is a form of sex discrimination under Title VII, employers nationwide should be aware that the EEOC also recognizes sexual orientation as a protected class under Title VII. Moreover, many lower courts are beginning to follow the direction of the Seventh and Second Circuit Courts of Appeals. Because the *Evans*, *Zarda* and *Hively* decisions create a split among the federal courts of appeals, it is likely the Supreme Court will eventually have to resolve the issue. However, the employer in *Zarda* recently indicated that it likely will not appeal the Second Circuit Court of Appeals’ decision to the Supreme Court.

For more information about the *Zarda* decision and how it impacts your workplace, please contact [Neal Shah](#), [Katie M. Collier](#), or any other member of Frost Brown Todd’s [Labor and Employment Practice Group](#).

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