THE DAILY RECORD

Monday, March 19, 2018 / Volume 110 / Number 53 / $2.00 • Western New York's trusted source for legal and real estate news

Civil LITIGATION

Second Circuit holds that sexual orientation discrimination is sex discrimination under Title VII

By JENNIFER A. SHOEMAKER
Daily Record Columnist

On Feb. 26, 2018, the U.S. Court of Appeals for the Second Circuit overruled its own precedent and became only the second Court of Appeals in the nation to extend Title VII protection to gay workers. *Zarda v. Altitude Express, Inc.*, was argued before a rare en banc (before the entire panel of judges) session last year. This is the second time in less than a year that a federal appeals court ruled that Title VII forbids sexual orientation discrimination because it is a form of sex discrimination.

Donald Zarda, a gay man, was a tandem skydiving instructor for defendant Altitude Express. A female customer claimed Zarda inappropriately touched her and "disclosed his sexual orientation to excuse his behavior." The customer's boyfriend complained to Zarda's supervisor, and Zarda was terminated. Zarda denied inappropriately touching the customer and claimed he was fired for failing to conform to male sex stereotypes by referring to his sexual orientation. Altitude said it was his behavior, not his sexual orientation that led to Zarda's dismissal.

The Second Circuit had previously held that sexual orientation discrimination claims, including claims that being gay or lesbian constitutes non-conformity with a gender stereotype, are not cognizable under Title VII.[1] The lower court in *Zarda*, following precedent, rejected Zarda's Title VII claims because they were based on sexual orientation.

In deciding to take the case en banc (the only way to overrule its' own precedent), the Second Circuit took note of the evolution of legal doctrine, including a 2015 EEOC decision[2] finding that sexual orientation is inherently a "sex based consideration" and that accordingly an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII. The en banc majority overruled prior decisions rejecting Title VII protection on the basis of sexual orientation.

The court set forth three justifications for its ruling. First, the court concluded that "Title VII's prohibition on sex discrimination applies to any practice in which sex is a motivating factor. … 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." By way of example, the court asked whether "a woman who is subject to an adverse employment action because she is attracted to women would have been treated differently if she had been a man who was attracted to women." If the answer is yes, then this constitutes discrimination because of sex.

> "The court noted that sexual orientation discrimination is also invariably based on assumptions or stereotypes about how members of a particular gender should be, including to whom they should be attracted.

Next, the court noted that sexual orientation discrimination is also invariably based on assumptions or stereotypes about how members of a particular gender should be, including to whom they should be attracted. The court cited to *Price Waterhouse v. Hopkins*,[3] which paved the way for gender stereotyping claims, where an employee alleged discrimination because of her nonconformity with stereotypes about how a woman should act. The United States Supreme Court in *Price* determined that gender must be irrelevant to employment decisions and employers may not discriminate against women or men who do not conform to conventional gender norms. The Second Circuit thus concluded that discriminating based upon assumptions about the gender to which an individual should be attracted is prohibited discrimination.

Finally, the court found that sexual orientation discrimination is "associational

Continued on next page

Continued from previous page

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. In other words, an employee has been subjected to associational discrimination where the employee's protected characteristic (i.e., sex), becomes a motivating factor for an adverse employment action.

The Court noted that at the time that Congress passed Title VII, it likely did not intend that the law would apply to sexual orientation discrimination, but that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils" (internal citations omitted).

Although there is a clear split between the circuits, it is likely that other circuit courts will soon follow suit and that the issue will ultimately be decided by the United States Supreme Court. New York State already includes sexual orientation as a protected class under its Human Rights Law, so company policies and handbooks should already prohibit sexual orientation discrimination. However, many courts in other jurisdictions have found that Title VII does not prohibit discrimination based on sexual orientation.

As with every type of workplace sexual harassment, there continues to be an increase in the number of claims since the #metoo movement has continued to take this country by storm.

Jennifer A. Shoemaker is a partner in Underberg & Kessler's Labor & Employment and Litigation Practice Groups. She concentrates her practice in the areas of employment and family law.

[1] *Simonton v. Runyon*, 232 F.3d 33, 35 (2d. Cir. 2000).

[2] *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641.

[3] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).