2ND CIRCUIT COURT OF APPEALS RULES THAT TITLE VII OF THE CIVIL RIGHT ACT OF 1964 PROTECTS AGAINST DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

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On Monday, the U.S. Court of Appeals for the 2nd Circuit issued a decision that discrimination on the basis of sexual orientation is a violation of Title VII of the Civil Rights Act of 1964, *Zanda v. Altitude Express, Inc.*, Docket No. 15-3775 (2d. Cir February 26, 2018).This decision, which will likely be appealed to the U.S. Supreme Court, indicates that sexual orientation discrimination in the workplace is actionable under federal law. The ruling overturned previous 2nd Circuit precedent from 2005 holding that sexual orientation claims, including claims that being gay or lesbian constitutes nonconformity with a gender stereotype, are not actionable under Title VII.

In overturning that precedent, the 2nd Circuit ruled this week that sexual orientation discrimination "constitutes a form of discrimination 'because of… sex' in violation of Title VII." The Court reasoned that:

Because one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex. Indeed sexual orientation is doubly delineated by sex because it is a function of both a person's sex and the sex of those to whom he or she is attracted. Logically, because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected.

The ruling is consistent with a shift at the U.S. Equal Employment Opportunity Commission. In July of 2015, the EEOC determined that the analysis under Title VII coverage of a sexual orientation claim "is the same as any other Title VII case involving allegations of sex discrimination – whether the [employer] has 'relied on sex-based considerations' or 'take[n] gender into account' when taking the challenged employment action.'"

In New York State, sexual orientation discrimination has been unlawful since 2002. At that time, the New York State Legislature amended the New York State Human Rights Law to prohibit discrimination based on sexual orientation commensurate with the protections applied to all other protected classes under the law, such as race,

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color and sex. Similar protections are also offered under the New York City Human Rights Law.

Even given the long standing recognition of sexual orientation claims under state law, this case will surely encourage a significant surge in the number of employment discrimination claims on the basis of sexual orientation. Moreover, there will likely be a wave of claims by employees and former employees who claim discrimination on the basis of a perception regarding their sexual orientation. It is important for employers to review and revise all of their policies and procedures to be inclusive of sexual orientation as a protected classification. Policies must be tailored to protect against and be prepared to defend these claims. To that end, employers should be sure all written employment policies and posters are up to date. Moreover, employer training related to anti-discrimination and anti-harassment – which should be undertaken on a regular basis – should specifically address sexual orientation.