GRAY REED®
ATTORNEYS & COUNSELORS

GAME CHANGER? NEW SEX DISCRIMINATION CASE REGARDING SEXUAL ORIENTATION

by Michael Kelsheimer, Marcus Fettinger and Fred Gaona
Gray Reed & McGraw LLP
February 28, 2018

Discrimination based on sex is illegal. Does that include sexual orientation? It depends on where you live. In Texas, discrimination based on sexual orientation may be inappropriate, but it is not illegal. Elsewhere in the U.S. that is changing, and Texas could soon be impacted as well.

On February 26, 2018, the United States Court of Appeals for the Second Circuit, which has jurisdiction over Vermont, New York and Connecticut, ruled that discrimination based on sexual orientation can be sex discrimination. This differs from the view of the Federal Court of Appeals over Texas, creating a division, or "split" across the country. Citizens of different states can now be treated differently under the same federal law and the U.S. Supreme Court does not like it when that happens. For reasons that are easy to understand, the Supreme Court would like the law applied the same across the whole country.

If the new decision is appealed to the Supreme Court, the Court is likely to take the case and resolve the division. If the view of the Second Circuit prevails, the law in Texas will change and sexual orientation discrimination will become illegal.

We have been warning employers in Texas for years that this issue has been percolating. The Equal Employment Opportunity Commission (EEOC) has been pushing to make discrimination based on sexual orientation illegal for a long time. The decision from the Second Circuit has made the issue ripe for resolution by the Supreme Court. Employers should watch this issue to see how it plays out.

The Facts of the Case

In *Zarda v. Altitude Express, Inc.*, the Plaintiff, a tandem sky-diving instructor, alleged that he was fired after he revealed his sexual orientation to a female client. According to the Plaintiff, he told the female client that he was gay and "had an ex-husband to prove it." The Plaintiff claimed that he made this disclosure to the female client to preempt any discomfort that she may have felt in being strapped to the front of an unfamiliar man. In contrast, the client alleged that the Plaintiff inappropriately touched her and disclosed his sexual orientation only to excuse his behavior. After the successful jump, the client told her boyfriend about the exchange, and the boyfriend reported the incident to the Plaintiff's boss. Shortly thereafter, the Plaintiff was terminated. The Plaintiff denied inappropriately touching the female client and insisted he was fired only because of his reference to his sexual orientation.

The Law of the Case

In *Zarda*, the Second Circuit joined the Seventh Circuit (Appellate Court for Illinois, Indiana and Wisconsin) in recognizing that a claim of sexual orientation discrimination was protected under Title VII of the Civil Rights Act of 1964. In reaching its decision, the Second Circuit relied heavily on the Seventh Circuit's decision in *Hively v. Ivy Tech Community College* that

similarly held that sexual orientation was protected under Title VII. In its opinion, the Court also recognized the contrary conclusion reached by the Eleventh Circuit (Appellate Court for Alabama, Florida and Georgia) in *Evans v. Ga. Reg'l Hosp.* that held that there was no opinion in the Eleventh Circuit or the U.S. Supreme Court that recognized sexual orientation as a protected category under Title VII.

Considerations for Texas Employers

Here in Texas, terminations and other employment actions based on an individual's sexual orientation is still not a protected category under Title VII – for now. Based on the *Zarda* case and the cases cited therein, there is a split between the Courts as to whether sexual orientation may be treated as a protected category. This issue is one that the U.S. Supreme Court will likely consider in the future. Until that time, employers should proceed with caution and remember that sexual orientation may be treated as a subset of sex discrimination in certain jurisdictions (including New York, Vermont, Connecticut, Indiana, Illinois and Wisconsin), and perhaps even in Texas in the future.

ABOUT THE AUTHORS

Michael Kelsheimer - Partner, Employment Law - mkelsheimer@grayreed.com
Michael focuses his practice on the employment law needs of Texas businesses and executive employees. He recognizes that the cost and expense of litigation make resolving employment disputes challenging. To help avoid these concerns, he utilizes his experience in and out of the courtroom to prevent or quickly resolve employment disputes through proactive employer planning and timely advice. When a dispute cannot be avoided, Michael relies upon his prior experience as a briefing attorney for the U.S. District Court and his extensive experience in employment and commercial lawsuits to secure favorable resolutions for his clients. He earned his B.A. from Texas Tech University and his J.D. from Baylor University School of Law.

Marcus Fettinger - Associate, Employment Law - mfettinger@grayreed.com
Marcus Fettinger's practice focuses on labor and employment litigation representing employers and executives in trade secret, noncompetition, and nonsolicitation litigation. He has experience in all aspects of labor and employment litigation, including drafting and responding to discovery requests, taking and defending depositions, briefing and arguing motions and hearings, evidentiary arbitration hearings, trials, and appellate briefing. Marcus earned his B.B.A. from The University Texas in Austin and his J.D., *cum laude*, from Southern Methodist University Dedman School of Law.

Fred Gaona - Counsel, Employment Law - fgaona@grayreed.com
Fred Gaona practices Labor and Employment law. He has extensive litigation experience with all types of employment disputes, including claims under Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family Medical Leave Act, the Fair Labor Standards Act and numerous state statutes. Fred also handles general litigation matters, resolves non-competition agreement disputes and has experience defending class action and collective action lawsuits and cases in arbitration. He earned his B.A., *cum laude*, from the University of Notre Dame and his J.D. from Ohio State University College of Law.