REID AND RIEGE P.C.
COUNSELLORS AT LAW

EMPLOYMENT LAW ALERT

March 2018

Federal Appellate Court Changes Course on Sexual Orientation

Until recently, federal courts in Connecticut took the position that discrimination based on sexual orientation was not prohibited by federal law. That will change following a February decision by the federal appeals court responsible for Connecticut, New York and Vermont holding that discrimination based on sexual orientation violates a federal law known as Title VII of the Civil Rights Act of 1964. In a case called *Zarda v. Altitude Express*, the United States Court of Appeals for the Second Circuit held that employees who believe their sexual orientation was a motivating factor in an adverse employment action they experienced may now sue their employers for sex discrimination under Title VII.

In *Zarda*, the plaintiff was employed as a skydiving instructor by the defendant, Altitude Express. The defendant claimed it terminated Zarda because of customer complaints. Zarda alleged he was terminated because of his sexual orientation – he had frequently disclosed to business patrons that he was homosexual. The district court ruled in favor of the employer and held that sexual orientation discrimination does not amount to sex discrimination under Title VII.

On appeal, the 2nd Circuit held that sexual orientation discrimination does fall within the scope of Title VII's protections. "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 Court held. The Court explained that sexual orientation discrimination is a subset of sex discrimination because sex discrimination applies to any practice in which sex is a motivating factor in an adverse employment decision. In addition, the Court stated that this type of discrimination may be based on assumptions, stereotypes and "associational discrimination," and that unlawful employment action may be motivated by an employer's opposition to association between members of particular sexes.

In changing its position on this issue, the 2nd Circuit acknowledged that "legal doctrine evolves" and referred to a 2015 EEOC decision that, for the first time, held "sexual orientation is inherently a sex based consideration." The 2nd Circuit also pointed to a 2017 decision by a federal appellate court in the mid-West, which "took a fresh look at [its] position . . . and held that discrimination on the basis of sexual orientation is a form of sex discrimination." *See Hively v. Ivy Tech. Cmty. Coll. of Indiana*, 853 F.3d 339 (7th Cir. 2017). Although the specific issue of whether sexual orientation discrimination constitutes discrimination under Title VII has not yet been considered by the United States Supreme Court, the 2nd Circuit relied on Supreme Court decisions holding, for example, that "employment decisions cannot be predicated on mere stereotyped impressions about the characteristics of males or females." *See, e.g., City of Los Angeles v. Manhart*, 435 U.S. 702 (1978).

Connecticut state law already prohibited discrimination on the basis of sexual orientation prior to *Zarda*. After *Zarda*, employees can also assert sexual orientation premised federal Title VII claims in Connecticut. Expect more litigation related to this issue. Employers are encouraged to revisit and, if needed, update their employee handbooks, training materials and training, and to consult with employment counsel regarding any issues that may touch on this, or other discrimination issues.

For information or additional copies of this Alert, or to be placed on our mailing list, please contact a member of the Employment Matters Practice Area: Karen L. Brand (860-240-1089 or kbrand@rrlawpc.com), Peter K. Rydel (860-240-1007 or prydel@rrlawpc.com), Agnes Romanowska (860-240-1088 or aromanowska@rrlawpc.com) or Brittany L. Christensen (860-240-1018 or bchristensen@rrlawpc.com), or the Reid and Riege attorney with whom you regularly work.

For other information regarding Reid and Riege, P.C., please visit our website at www.rrlawpc.com or contact us at Reid and Riege, P.C., One Financial Plaza, Hartford, CT 06103, or 234 Church Street, New Haven, CT 06510.