

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

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## Case overview Comment

On February 26 2018 the US Court of Appeals for the Second Circuit in *Zarda v Altitude Express* reversed its prior precedent and joined the Seventh Circuit in holding that Title VII's prohibition on sex discrimination includes a prohibition on sexual orientation discrimination.

### Case overview

The plaintiff (through his estate) had sued his former employer under both Title VII and New York State's Human Rights Law, alleging that he had been fired because of his sexual orientation. The district court had granted summary judgment to the employer on the Title VII claim, relying on the Second Circuit's prior holding in *Simonton v Runyon*<sup>(1)</sup> that Title VII does not cover sexual orientation discrimination. After a Second Circuit panel initially upheld the district court's ruling, the full Second Circuit overruled the decision in *Simonton* and held that, under Title VII, 'sex discrimination' includes discrimination based on sexual orientation.

### Comment

For years, states and municipalities have been adding laws prohibiting discrimination based on sexual orientation. However, whether Title VII prohibits discrimination based on sexual orientation under federal sex discrimination prohibitions has been actively debated in both courts and administrative agencies.

In 2015 the Equal Employment Opportunity Commission, which filed an amicus brief in support of the plaintiff in *Zarda*, took the position that sexual orientation discrimination is a form of sex stereotyping, and the courts have consistently held that sex stereotyping constitutes sex discrimination. By contrast, the Department of Justice filed an amicus brief in *Zarda* taking the opposite view. Among the circuit courts, the Eleventh Circuit has held that Title VII's prohibition on sex discrimination does not prohibit sexual orientation discrimination, a view that the Second Circuit shared until recently, when it joined the Seventh Circuit. District courts have likewise been split on the issue. If the split in the circuits continues, the issue is likely to reach the Supreme Court.

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### Endnotes

(1) 232 F3d 33 (2d Cir 2000)

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