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Protection Against Sexual Orientation Continues to Broaden

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In 2017, the U.S. Court of Appeals for the Seventh Circuit was the first Circuit to hold that Title VII discrimination prohibition extends to discriminating on the basis of sexual orientation. See *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017). Previously, other Circuit Courts, including the Eighth Circuit which governs Missouri, had rejected this interpretation. However, the *Hively* decision may have begun a trend as the Second Circuit recently decided to follow suit, also holding Title VII covers sexual orientation. *Zarda v. Altitude Express*, No. 15-3775, 2018 WL 1040820 (2d Cir. 2018). Of note, the Second Circuit had previously considered this issue and held sexual orientation was not within the scope of Title VII. See *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); see also *Dawson v Bumble & Bumble*, 398 F.3d 211, 217-23 (2d Cir. 2005). We may see other Circuits do the same.

In *Zarda*, the Plaintiff worked at Altitude Express as a skydiving instructor. *Zarda*, 2018 WL 1040820 at *1. Upon being fired, Zarda sued Altitude Express for sexual orientation discrimination under Title VII. *Id.* at *2. After the District Court found for Altitude Express, Plaintiff appealed which was ultimately heard by all Second Circuit Court Judges collectively. *Id.* at *3. The Court noted that Title VII prohibits discrimination "because of...sex...when sex...[is] a motivating factor," making the question before them "whether an employee's sex is necessarily a motivating factor in discrimination based on sexual orientation." *Id.* at *4-5. The Court reasoned and held "Because one cannot fully define a person's sexual orientation without

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identifying his or her sex, sexual orientation is a function of sex...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." *Id.* at *5. This was the same logic utilized by the Seventh Circuit. *Hively*, 853 F.3d at 351-52.

Although the Seventh and Second Circuits' decisions are not currently binding on federal courts in Missouri, they could mark the beginning of an expanded interpretation of "sex" by courts across the country in Title VII and Title IX cases. The Eighth Circuit (which governs Missouri), in addition to other Circuit Courts, have looked to interpretations of Title VII in analyzing Title IX. Title IX prohibits any education institution receiving federal financial assistance from discriminating against an individual, including a student, "on the basis of sex." Given the history of interpreting Title IX consistently with Title VII, it is possible that courts may use the Seventh and Second Circuits' recent holdings to extend Title IX protections to sexual orientation discrimination, expanding the claims which may be raised under Title IX. As a result, there may be an increase of individuals who attempt to raise sexual orientation discrimination claims under Title VII or Title IX.