

Last Fridays “Lunch and Learn” Webinar

**Discrimination on The Basis of Sexual
Orientation**

What Employers Need To Know

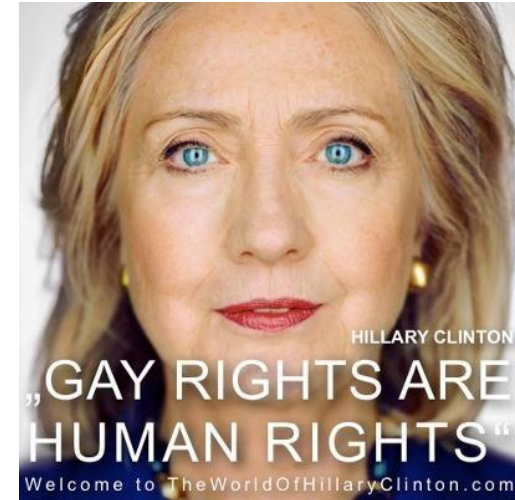
Presented by:

Christopher M. Valentino, Esq.

Christopher.Valentino@jacksonlewis.com

(631) 247-0404

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THE OLD

- Title VII of the Civil Rights Act of 1964 (“Title VII”) prohibits employment discrimination based on sex.
- **However, Title VII’s prohibition on sex discrimination does not include discrimination on the basis of sexual orientation.**

THE NEW

- **Hivley v Ivy Tech Community College of Indiana (7th Cir. 2017)** - Discrimination on the basis of sexual orientation is a form of sex discrimination for Title VII purposes.

Facts

- ❖ Openly lesbian adjunct professor applied for at least 6 full-time positions between 2009 and 2014, and all applications were denied.
- ❖ College did not renew her part-time contract.

THE NEW

- **Hivley v Ivy Tech Community College of Indiana** (7th Cir. 2017)
 - Basis for Court's Decision
 - ❖ **Comparative approach**
 - ❖ **Associational theory**
 - ❖ **Broader discrimination**

WHERE DOES NEW YORK STAND?

- New York State Human Rights Law prohibits discrimination on the basis of sexual orientation.

WHERE DOES NEW YORK STAND?

- **Christiansen v Omnicom Group (2nd Cir. 2017)** - overruled the lower court and found that supervisor comments implicated impermissible gender stereotyping.

Facts

- ❖ Christiansen, an openly gay HIV-positive associate creative director, alleged his supervisor drew a picture of him in tights and a low-cut shirt “prancing around”.
- ❖ Plaintiff also alleges supervisor circulated a poster depicting plaintiff’s head attached to a female body clad in a bikini, which resulted in one co-worker referring to plaintiff as a “submissive sissy.”
- ❖ In addition, the supervisor allegedly told other employees that plaintiff “was effeminate and gay so he must have AID[S].”

Where Does New York Stand?

- **Christiansen v Omnicom:**

- ❖ Concurring opinion noted, “when the appropriate occasion presents itself, it would make sense for the Court to **revisit** the central legal issue confronted.....especially in light of the changing legal landscape that has taken place shape in the nearly two decades” since its precedent...”

Where Does New York Stand?

- **Zarda v Attitude Express dba Skydive Long Island (2nd Cir. 2017)** - the Court again declined to revisit its precedent that Title VII's prohibition on sex discrimination does not include discrimination on the basis of sexual orientation.

Where Does New York Stand?

- **Zarda v Altitude Express d/b/a Skydive Long Island (2nd Cir. 2017)**

Facts:

- ❖ Zarda, a skydiver alleges he was fired after he told a customer he was gay and had just experienced a break-up with his boyfriend.
- ❖ The customer's boyfriend later called Altitude Express to complain about Zarda disclosing his sexual orientation to his girlfriend. Zarda was fired shortly thereafter.
- ❖ Zarda also alleges that his employer criticized him for wearing pink at work and polishing his nails pink.

What Should Long Island Employers Do?

- Ensure EEO and non-harassment policies include sexual orientation as a protected category
- Training for both employees and supervisors
- Document, Document, Document

THANK YOU

With 800 attorneys practicing in major locations throughout the U.S. and Puerto Rico, Jackson Lewis provides the resources to address every aspect of the employer/employee relationship.

