EMPLOYMENT

Must New York Employers Pay Accrued, Unused Vacation and or Sick Time to Employees Who Resign or are Terminated?

By Peter J. Famighetti

If you work in New York and you are terminated, quit or resign from your employment, it is important to understand your rights with regard to your accrued but unused vacation and sick time. Generally, with the exception of New York City's Earned Sick Time Act, New York state and federal law do not require an employer to compensate an employee for accrued vacation and sick time upon their separation from employment, *i.e.*, for time not actually worked.

Questions an outgoing employee should ask themselves are: Has your employer established a written policy or agreed to make such payments at the end of your employment? If so, what restrictions, if any, exist in paying out vacation and sick time at the end of your employment? And, did the employer provide its employees with notice of the policy or agreement?


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Is there a written policy or agreement?

New York courts have held that "[A]n employee has no inherent right to paid vacation and sick days, or payment for unused vacation and sick days, in the absence of an agreement, express or implied."[1] In an action to recover vacation pay under the N.Y. Labor Law "[t]he primary and dispositive issue . . . is whether there was any basis for the accrual of vacation benefits," and looking to the employer's policy for terms of accrual,[2] which is a "…matter of agreement to provide such benefits."[3] Likewise, under the federal, Fair Labor Standards Act "[e]mployees do not have a statutory entitlement to accrued vacation pay"[4] nor does the "FLSA . . . provide recovery for accrued vacation and sick time."[5]

Section 198-c (1) of the N.Y. Labor Law states, in pertinent part, that "any employer who is a party to an agreement to pay or provide benefits or wage supplements to employees" pay the amounts owed within 30 days of the due date.[6] N.Y. courts have held that § 198-c "codifies the general understanding that vacation and sick pay are purely matters of contract between employer and employee.[7] Further, § 198-c (3) of the Labor Law provides that § 198-c (1) is not applicable "to any person in a bona fide executive, administrative, or professional capacity whose earnings are in excess of [$900.00] a week."[8]

The agreement to pay out vacation or sick pay need not be in writing

In *Demay v. Wheatley Hills Golf Club, Inc.*[9] the plaintiff testified that defendant had a policy that employees with over 10 years of service received four weeks of vacation pay . . . and the amount of the vacation pay was paid out at the end of the year. Despite the lack of a written agreement, Justice Marber held that a triable issue of fact existed solely because of plaintiff's testimony. The Second Department has also held that a former employee may be entitled to be paid his accrued unused vacation and sick time based on the express, oral assurance of his employer, if the terminated employee can show that he reasonably relied on the assurance that he would be paid for the time at issue.[10]

Restrictions of vacation and sick pay

If the employer decides, at its own discretion, to create a vacation and sick leave policy they are generally free to decide what conditions to impose. Therefore, the agreement or policy must be

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LGBT

Workplace Discrimination Update: Second Circuit Holds Sexual Orientation Claims are Viable Under Title VII

By Christopher J. Chimeri

Last October's column discussed the status of the law under Title VII as it relates to workplace discrimination claims on the basis of sexual orientation. By way of reminder, Title VII of the Civil Rights Act of 1964 is a federal law that prohibits employers from discriminating against employees based on sex, race, color, national origin, and religion. It generally applies to employers with 15 or more employees, including federal, state, and local governments. Title VII has been legislatively expanded to also protect against discrimination due to pregnancy (Pregnancy Discrimination Act of 1978), age (Age Discrimination in Employment Act) and disability (Americans with Disabilities Act of 1990).

At the time of the October article, the Seventh Circuit, sitting *en banc*, took "a fresh look at [its] position in light of developments at the Supreme Court extending over two decades" and held that "discrimination on the basis of sexual orientation as a form of sex discrimination." *Hively v. Ivy Tech Comm. Coll.*, 853 F.3d 339, 340-41 (7th Cir. 2017). The Seventh Circuit, geographically, covers Illinois, Indiana, and Wisconsin. Contrarily, the Eleventh Circuit (covering Alabama, Florida and Georgia) declined to recognize such a claim, concluding that prior precedent in the circuit had not been "overruled by a clearly contrary opinion of the Supreme Court or of [the Eleventh Circuit] sitting *en banc*. *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1257 (11th Cir. 2017). In December of 2017, the Supreme Court denied certiorari despite the clear circuit split on the exact same question of law. *Id.*, *cert denied*, 138 S.Ct. 557 (2017).


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The Second Circuit has now weighed in, and in a decision of particular relevance (the Second Circuit being the Federal Court of Appeals in which we reside and practice), decided *en banc* in *Zarda v. Altitude Express, Inc.*, 883 F. 3d 100 (2d Cir. 2018) that sexual orientation is motivated, at least in part, by sex and is thus a subset of sex discrimination for purposes of Title VII.

The facts of *Zarda*, for purposes of the Title VII question, are straightforward: "In the summer of 2010, Donald Zarda, a gay man, worked as a sky-diving instructor at Altitude Express. As part of his job, he regularly participated in tandem skydives, strapped hip-to-hip and shoulder-to-shoulder with clients. In an environment where close physical proximity was common, Zarda's co-workers routinely referenced sexual orientation or made sexual jokes around clients, and Zarda sometimes told female clients about his sexual orientation to assuage any concern they might have about being strapped to a man for a tandem skydive. That June, Zarda told a female client with whom he was preparing for a tandem skydive that he was gay 'and ha[d] an ex-husband to prove it.' Although he later said this disclosure was intended simply to preempt any discomfort the client may have felt in being strapped to the body of an unfamiliar man, the client alleged that Zarda inappropriately touched her and disclosed his sexual orientation to excuse his behavior. After the jump was successfully completed, the client told her boyfriend about Zarda's alleged behavior and reference to his sexual orientation; the boyfriend in turn told Zarda's boss, who fired Zarda shortly thereafter. Zarda denied inappropriately touching the client and insisted he was fired solely because of his reference to his sexual orientation. One month later, Zarda filed a discrimination charge with the EEOC concerning his termination. Zarda claimed that 'in addition to being discriminated against because of [his] sexual orientation, [he] was also discriminated against because of [his] gender.' In particular, he claimed that '[a]ll of the men at [his workplace] made light of the intimate nature of being strapped to a member of the opposite sex,' but that he was fired because he 'honestly referred to [his] sexual orientation and did not conform to the straight male macho stereotype.'

In a concurring opinion, Justice Cabranes analyzed the case in whole as follows: "This is a straightforward case of statutory construction. Title VII of the Civil Rights Act of 1964 prohibits discrimination "because of . . . sex." [citation omitted]. Zarda's sexual orientation is a function of his sex. Discrimination against Zarda because of his sexual orientation therefore *is* discrimination because of his sex and is prohibited by Title VII. That should be the end of the analysis." *Zarda*, 883 F.3d at 135.

However, the majority Opinion of the Court ultimately reached its decision on three separate grounds. Foremost, as pointed out by Justice Jacobs in a separate concurring opinion, the court applied existing recognized "associational discrimination" as a Title VII violation and extended association on the basis of race to association on the basis of sex, as here. See, *Holcomb v. Iona Coll.*, 521 F.3d 130 (2d Cir. 2008) when a white man was fired because of his marriage to a black woman (holding "an employer

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President's Message (Continued from page 1)

lawyers. There are very few challenges faced by young lawyers that have not already been tackled by the attorneys who came before them. In the past, many attorneys joined the bar association while still in law school because not only was it the right thing to do, but it gave the new attorney the opportunity to build relationships with other lawyers, make connections through personal contacts and provided camaraderie with lawyers in different specialties, many times leading to a source of referrals.

During the past few years, state and local bar associations have noticed a gradual decline in membership among young lawyers. This decline is caused by a variety of reasons, ranging from young professionals showing little inclination to joining an organized group to the perception that bar associations are not relevant in this age of technological advances. For bar associations to stay relevant, they must provide content that keeps their young members involved, providing a culture of engagement and value that appeal to the newest generation in the legal profession.

The SCBA is a community that provides many levels of support to its members, yet like all bar associations, must embark on exploring how we can remain relevant in this ever-changing world and profession. Basically, the relevant issues in the administration of justice and protecting the rule of law remain paramount to all practitioners. This basic premise enables us to move forward for all our members and to explore how we can grow professionally in this new age of technology while remaining relevant to our young members.

Membership for the newly admitted and younger lawyer provides many intangibles that improve the practice and professionalism of attorneys and, in turn, benefit the clients we serve. The main intangible is the connection bar association involvement fosters between and among attorneys. When attorneys are connected, they have colleagues to discuss ideas, improve skills through excellent CLE programs provided by the Suffolk Academy of Law, celebrate victories and to empathize with during the difficult times. Interaction with committees, and social activities involving other attorneys both young and those more experienced, are opportunities that are not superficial interactions but instead, are substantive opportunities, driven by the guiding principles of the SCBA that offer young lawyers unique opportunities to elevate their profile within the legal and business community.

The SCBA has created an environment that makes our new members welcome, providing attorneys with a chance to see and interact with each other face-to-face. While we have all experienced the feeling of walking into a place for the first time, not knowing anyone, feeling uncomfortable, here at SCBA it is a goal that everyone who walks into a function in the Great Hall is made to feel welcome and hopefully will leave having made a new friend or professional contact. The hope is that once young lawyers are engaged in bar association activities, they will continue their involvement for years to come.

Our very active Young Lawyers Committee, co-chaired by Paul Devlin and Jon-Paul Gabriele provides truly meaningful opportunities for early involvement in the SCBA, for networking opportunities and mentorship prospects. The Young Lawyer Committee events are fun, refreshing and a great place to interact with members and SCBA leaders.

I can speak from personal experience that through my involvement with the SCBA, I have been given a wealth of opportunities, meeting some of my best friends, making professional connections, learning to be a leader and to become a better lawyer, both by gaining substantive knowledge and by connections with more experienced attorneys who provided invaluable mentoring.

Each of you have your own reasons which draw you to the SCBA. To be able to provide the programs, services, technology and social activities that keep you active and involved, I would like to hear from you as to how our Association can continue to serve our members, to carry on our great tradition of professionalism in this age of technological advances. What can we offer to better serve you, our members, to continue to move forward, to connect with our young lawyers and to continue to bring our Association's benefits to all members?

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carefully reviewed, prior to bringing an action, to determine whether vacation and or sick leave is owed under its terms.

For example, in *Bradley v. Pride Technologies of N.Y. LLC*,[11] the terms of the agreement did not provide for the payment of accrued but unused vacation time. Further, the employee failed to allege that he received express verbal assurances that he would be paid for this time, nor did the employee provide any evidence that it was the employer's regular practice of paying its employees upon termination of employment for accrued but unused vacation time. The court also found unavailing the employee's argument that he was entitled to be paid because the employment agreement contained no provision requiring forfeiture of accrued unused vacation time upon separation from employment.

In *Tubo v. Orange Reg'l Med. Ctr.*, the court dismissed plaintiff's claim for vacation pay upon her termination, and rejected her attempt to "read into the vacation policy a requirement that the employee must 'have done something wrong' to not be entitled to accrued benefits," reasoning that the employer's vacation policy's "language is clear that absent a termination under certain circumstances (economic layoff, retrenchment or a departmental reorganization), an employee is not entitled to accrued benefits—no further misconduct is required."[12]

Notice

Lastly, Section 195(5) of the New York Labor Law requires employers to notify their "employees in writing or by publicly posting the employer's policy on sick leave, vacation, personal leave, holidays and hours."[13]

In conclusion, whether your employer is required to compensate you for any unused vacation or sick time depends on the terms of your employer's vacation, sick and/or resignation policy. In order to be valid, the employer must have told employees, in writing, of the conditions that nullify the benefit. In other words, if an employee has earned vacation or sick time and has not used it and the employer has no written forfeit policy, then the employer must pay the employee for the accrued but unused vacation and sick time.

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[1] *Sosnowy v. A. Perri Farms, Inc.*, 764 F. Supp. 2d 457, 475 (E.D.N.Y. 2011).
[2] *See, e.g. Gennes v. Yellow Book of N.Y., Inc.*, 23 A.D.3d 520, 521-22 (2d Dep't 2005).
[3] *Glenville Gage Co., Inc. v. Indus. Bd. of Appeals of N.Y., Dep't of Labor,* 70 A.D.2d 283, 284 (3d Dep't 1979).
[4] *Isaacs v. Cent. Parking Sys. of N.Y., Inc.*, 10-CV-56362012 U.S. Dist. LEXIS 38103 (E.D.N.Y. Feb. 27, 2012).
[5] *Sosnowy* 764 F. Supp. 2d 457, 462-63(E.D.N.Y. 2011).
[6] NY Labor Law § 198-c(1).
[7] *Sosnowy*, 764 F. Supp.2d at 476.
[8] NY Labor Law § 198-c(1) and (3).
[9] 983 N.Y.S. 2d 202 (Sup. Ct. Nassau Cty. 2013).
[10] *Colton v. Sperry Assoc. Fed. Credit Union*, 50 Misc.3d 129(A) (2nd Dep't 2015).
[11] 2017 N.Y. Misc, LEXIS 1492 *18 (Sup. Ct. NY County 2015).
[12] 2015 U.S.Dist. LEXIS 139254 36 (S.D.N.Y. Oct. 13, 2015) *aff'd* 690 Fed. Appx. 736, 740 (2d Cir. 2017).
[13] NY Labor Law § 195(5).

Sexual Orientation Claim Viable Under Title VII (Continued from page 16)

may violate Title VII if it takes action against an employee because of the employee's association with a person of another race . . . The reason is simple: Where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race."). *Id*. At 133.

The court also utilized a definitional approach and held that "the most natural reading of Title VII" demonstrates that sexual orientation discrimination is a mere extension of sex discrimination, which is clearly prohibited in the textual mandates of Title VII. *Zarda* 883 F.3d at 112.

Finally, the court engaged in a lengthy "comparator test," asking whether the employee would have been treated differently "but for" the employee's sex. The application of a "but for" test is an interesting one, and perhaps, for plaintiff's attorneys, a questionable strategy as it may lead to setting up a higher-than-necessary burden of proof. This writer, although admittedly not personally a practitioner in the labor and employment field, is of the opinion that "but-for" tests can foreclose otherwise valid claims where a defendant simply raises cognizable, and often manufactured, reasons for termination.

Given the now 2-1 circuit split in favor of recognizing Title VII claims for LGBTQ workers, and that the EEOC recognizes sexual orientation discrimination claims since 2015, it remains to be seen when SCOTUS will take up the question to resolve the timely issue.

Note: Christopher J. Chimeri is a partner with Quatela Chimeri PLLC, with offices in Hauppauge and Mineola, and he focuses on complex trial and appellate work in the matrimonial and family arena. He sits on the Board of Directors of the Suffolk County Matrimonial Bar Association and is a co-founder and co-chair of the Suffolk County Bar Association's LGBT Law Committee. From 2014-2018, he has been peer-selected as a Thomson Reuters Super Lawyers® "Rising Star."