Potential Changes to Protections for Gay Employees Under Federal Law

By Rolando C. Delacruz

Sexual orientation has never been a protected class under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq ("Title VII"). However, the Second Circuit Court of Appeals has changed this longstanding interpretation. In *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 131 (2d Cir. 2018), the Second Circuit, by way of an *en banc* decision, reversed nearly 50 years of precedent to hold sexual orientation to be a protected class as a subset of gender under Title VII.

The underlying case involves a skydive instructor, Donald Zarda ("Zarda"). Zarda was terminated from his position as a skydive instructor in 2010 after a customer complained that he touched her inappropriately during a tandem skydive. Zarda attempted to justify his behavior by telling her that he was homosexual. Zarda claimed he was trying to put the customer at ease during the experience by referring to his sexuality.

Following his termination, Zarda filed a claim with the Equal Employment Opportunity Commission prior to filing a lawsuit in the Eastern District of New York. The lawsuit alleged, *inter alia*, violations of the New York State Human Rights Law and, pertinent to the pending writ of certiorari currently before the Supreme Court, Title VII. The district court dismissed Zarda's Title VII claims, holding that the federal civil rights statute did not prohibit discrimination based on an individual's sexual orientation. Zarda's surviving claims were tried before a jury and dismissed.

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On appeal, the Second Circuit held that sexual orientation discrimination is motivated, at least in part, by gender and is thus protected by Title VII. The majority arrived at their decision on three grounds:

> [S]exual orientation discrimination is a subset of sex discrimination because sexual orientation is defined by one's sex in relation to the sex of those to whom one is attracted . . . Sexual orientation discrimination is also based on assumption of stereotypes about how members of a particular gender should be, including to whom they should be attracted. Finally, sexual orientation discrimination is associational discrimination because an adverse employment action that is motivated by the employer's opposition to association between members of particular sexes discriminates against an employee on the basis of sex.

Zarda v. Altitude Express, Inc., 883 F.3d 100, 131 (2d Cir. 2018). With this decision, the Second Circuit joined the Seventh Circuit as the only two federal circuits to hold that sexual orientation is protected from discrimination by Title VII.

The May 29, 2018 petition for writ of certiorari — filed by Ray Maynard and Altitude Express, Inc. — questions the efficacy of the Second Circuit and the methodology employed in reaching its decision. The petition argues that, in departing from the pre and post legislative history of Title VII — as well as the refusal of nearly every Congress to enact legislation amending the statute to prohibit sexual orientation discrimination — the Second Circuit essentially eschews the democratic and legislative process by reading into Title VII content that lawmakers excluded. The petition also calls into question the reasoning employed by the Second Circuit to reinforce its holding.

Zarda filed his brief in opposition on Aug. 16, 2018. Zarda aligns most of his position with the Second Circuit's decision, arguing that the case is a "bad vehicle" by which to seek review of the substantive issues, which must be allowed to "percolate" amongst the circuits before the Supreme Court weighs on the issue.

Maynard and Altitude Express, Inc. filed their reply brief on Sept. 4, 2018. In it, the need for the Supreme Court to provide clarity and to cure a nation split on the issue of sexual orientation as a protected class under Title VII are specific points of emphasis.

This matter comes before the Supreme Court at a time of heightened significance. The retirement of Justice Anthony Kennedy paves the way for President Trump to fill the vacancy with a justice with a conservative ideology. As was often the case on other issues, Justice Kennedy was likely to be the

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Divorce for Long Term Same-Sex Relationships that Became Short term Marriages Under the Marriage Equality Act

By Christopher J. Chimeri

This is part two of a three-part series.

Last month, I introduced this topic because many long term same-sex unions have functioned in a familial capacity long before the law recognized the relationship as a legal marriage. It is thus increasingly important to understand how to apply certain statutory factors relating to spousal maintenance and equitable distribution, together with broad equitable considerations in handling a divorce in this instance. In the first part of our series, we explored the example of a couple living together for 20 years whom had structured their household like a "traditional" marriage with children, in which one spouse was a primary earner and the other making his or her contributions in less fiscal, quantifiable ways, but instead, in valuable yet immeasurable ways as a homemaker and parent.

In this second section of a three-part series, we discuss spousal maintenance and the interplay between what is now a statutory presumptively correct formulaic amount and duration, together with the factors for deviation from such presumptively correct amount and duration.

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In actions for divorce commenced Jan. 27, 2016 and after, the DRL provides a mathematical formula to determine maintenance, the application of which yields a "presumptively correct guideline amount," subject to the court's discretion to deviate therefrom if the guideline amount is unjust or inappropriate. Duration is also part of the non-mandatory statutory scheme, providing: in a marriage of 0 to 15 years: 15 to 30 percent of the length of marriage; in a marriage over 15 years to 20 years: 30 to 40 percent of the length of marriage; and, in a marriage over 20 years: 35 to 50 percent of the length of marriage. The court is required to state if it used the advisory schedule and to set forth its application of any deviation factors on which it relies for the final determination.

Germane to this topic, such deviation factors may be important as: (a) the age/health of parties; (b) their present and future earning capacity; (c) the need of one party to incur education or training expenses; (f) the existence and duration of a pre-marital joint household or a pre-divorce separate household; (k) the standard of living of the parties; (l) reduced or lost earning capacity as a result of having forgone or delayed education, training, employment or career opportunities; (m) equitable distribution of marital property and the income or imputed income on the assets distributed; (n) the contributions and services of the payee as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; and (o) any other factor which the court shall expressly find to be just and proper.

Age and health of parties is somewhat obvious. If one party is not self-supporting due to age or infirmity, or there is a significant age gap affecting earning ability, the court should consider this and give it great weight. Likewise, items (b), (c), (l), and (n) often apply together. Where one spouse was a homemaker, raising the children and otherwise contributing in less quantifiable ways because of the inability to affix a dollar figure to same, the court should be encouraged to give great weight to these factors. Again, this is extremely fact-specific. The attorney should also argue, with proof, for a duration based on the beginning of the economic partnership, which may not necessarily be the date on which the marriage solemnized. The (f) factor now statutorily authorizes the court to explicitly consider the duration of the relationship and proof that the parties lived in a pre-marital joint household. This is not to say that New York is recognizing a common law marriage; but, simply that if the family was a family long before the law recognized it as one, the court can and should consider this in

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President's Message (Continued from page 1)

joining us in our call for higher rates for 18-B lawyers and more manageable caseloads. Rest assured that we will make known our positions that our lawyers deserve a raise, which they haven't had in nearly 20 years, and that while we fully support publicly-funded lawyers for people in true need, we also fully support appropriate financial guidelines to ensure that the people who obtain publicly-funded counsel are the ones who truly need it.

Speaking of which, our written response to the commission was a collaboration with the Nassau County Bar Association and the Suffolk County Matrimonial Bar. This level of cooperation is not commo, although it should be, and I think it is a portent of good (and even better) things to come. Kudos to Lynn Poster Zimmerman and Jen Rosenkrantz from Nassau County for yeoman (yeoperson?) work on this very important initiative. And I extend my sincere thanks to President Elena Karabatos of Nassau County for her enthusiastic support of this joint effort.

And we have completed filming *Another Night*, a public service project of the bar and the Academy. This video is an update of *One Night*, a 1993 production of the Bar Association which dramatized an underage DWI with a fatality which followed the story of a young woman from party to trial. Our new project traces the journey of two siblings from legitimate painkillers to opioid and heroin addition, their arrests and court proceedings, focusing not only on the effect on the two main characters, but also on the impacts (financial, emotional and otherwise) on their family.

This was a truly collaborative effort among the bar, the Academy, the courts (including Justice C. Randal Hinrichs, Judge Theresa Whelan, Judge Karen Kerr, Judge Derrick Robinson, and Major David Santiago of the Court Officers), the Suffolk County Police Department, the Suffolk County Sheriff's Office, the Suffolk County District Attorney's Office, the Legal Aid Society, the Children's Legal Bureau and the Huntington Volunteer First Aid Squad. Of course, none of this would be possible without the generous support of our sponsors: The Claire Friedlander Family Foundation, Inc.; the Posillico Group Foundation, Inc.; the Suffolk County Bar Charitable Foundation; and the Huntington Townwide Fund.

It is our fervent hope that this video will be shown in every middle school and high school throughout Suffolk County (and anywhere else people might be interested) and make an impact on the opioid epidemic which is rampant not only in Suffolk County, but nearly everywhere.

We also started branching out into the community and bringing fun back to our lives.

Our first community membership meeting is scheduled for Oct. 17, at 6 p.m. at Polish Hall in Riverhead. A purely social evening, members are invited to bring their best war stories (proper nouns and current cases are excluded), to enjoy great food and camaraderie, and even to head down to the alley and bowl a few frames. It looks to be a good time, and we anticipate a great turnout for a fun, laughter-filled evening.

Your Bar Association has also created some new member benefits, including a discounted language course from JP Language Institute in Melville to allow easier communication with clients and others for whom English is not their first language. It also doesn't hurt to at least be able to converse in another language. Who knows where our travels might take us?

For those of us who face the weekly bills for storage of our old files, there is a new member benefit.

Do More Shredding in Port Jefferson Station will give you a discount on shredding, whether it is a one-time project or monthly service. It's another way that paying your bar dues actually saves you money.

Oh, and the parking lot got repaved, so we can all save money on tires and suspension systems.

So, in sum, it has been a good first 100 days. We have accomplished a number of things, but there is plenty left to do. Please tell your colleagues who either have not renewed, or have not joined, what we have done over just the past few months, with the promise of more to come, and encourage them to join us. We are moving forward and advancing the interests of our members. I pledge to you that we will continue to do so.

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vote needed to tip the scales regarding the issue of sexual orientation as a protected class under Title VII.

President Trump has nominated federal circuit judge Brett Kavanaugh who, prior to nomination, presided over the United States Court of Appeals for the District of Columbia Circuit. His nomination, and likely confirmation to the Supreme Court, will invite more conservative analysis to the high court's future decisions. In the aftermath of such a scenario, Chief Justice Roberts would, by default, become the court's proverbial swing vote — the position previously held by Justice Kennedy. Justice Kennedy was a Republican appointment (via President Reagan) with demonstrated moderate leanings. However, temperance alone did not govern his standing as a moderate. Justice Kennedy was moderate because he could be reliably counted upon to weigh the individual merits of the case, rather than reach a decision along rigid party lines.

Justice Kennedy's view on sexual orientation as a protected class under Title VII was not clear, but there were indications that he could have found such a class to be protected. In *Romer v. Evans*, 517 U.S. 620 (1996), Justice Kennedy, writing the majority opinion, invalidated a state constitutional amendment precluding government action designed to protect persons from discrimination based on their homosexual or bisexual orientation. Moreover, in *Hollingsworth v. Perry*, 570 U.S. 693 (2013), during oral argument, Justice Kennedy was asked whether sexual orientation discrimination can be treated as a gender-based classification, to which he responded, "It's a difficult question. I've been trying to wrestle with it." Most recently, in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the court, with Justice Kennedy writing the majority opinion, held that the Fourteenth Amendment protected the right of same-sex couples to marry.

With respect to the Zarda case, Justice Kavanaugh's confirmation will have no effect on the decision on the writ of certiorari. Should the writ ultimately be granted, the Supreme Court's replacement of Justice Kennedy with Kavanaugh will not have any effect on the outcome of the case.

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ordering a duration that far exceeds the guideline duration based on a marriage of comparatively few years. Together with this is the family's standard of living. If the homemaker of 20 years has been raising children and the other spouse has provided for that homemaker and children a very comfortable life, it is appropriate to deviate upward from the guideline duration based, in part, on the lifestyle to which the family was accustomed, to enable both spouses to live comfortably post-divorce. The catchall (o) – "any other factor," is often ignored by practitioners but the bench undoubtedly welcomes careful, fact-specific arguments based on a balancing of the equities in the family at bar. The more expansive and creative the lawyer's due diligence and contemplation of the case, the more likely a court will consider other factors not specifically set forth in the statute to the benefit of the client.

The above are overviews and intended to guide the practitioner in issue-spotting when analyzing a case. One should carefully understand the many different family dynamics specifically applicable to same-sex relationships before agreeing to take on a case; and prior to assuming positions in a case on behalf of a client in need.

In the final part of this series, we will discuss the (m) factor of equitable distribution, both as it relates to maintenance and ways in which a court may achieve an equitable result in a marriage of short duration despite a lengthy economic partnership/joint household, such as deviating from the unwritten rules of 50/50 distribution of marital assets (acquired during the marriage only).

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 and holds an executive position in the Suffolk County Matrimonial Bar Association and is a co-founder and co-chair of the Suffolk County Bar Association's LGBTQ Law Committee. From 2014-2018, he has been peer-selected as a Thomson Reuters Super Lawyers® "Rising Star."