OP-ED: Sexual orientation discrimination law has courts split

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Recent headlines may have employers wondering whether federal law prohibits discrimination based on sexual orientation. Many employers are already familiar with Title VII of the Civil Rights Act of 1964, which is the federal law prohibiting discrimination based on a number of factors, including an individual's "race, color, religion, sex or national origin." The term "sexual orientation" does not appear in the text of the federal statute, which has led to much debate as to whether Title VII covers sexual orientation discrimination.

The scope of the term "sex" under Title VII has been fiercely debated since its enactment. The "because of … sex" language in the statute was initially interpreted as Congress' intent to provide protection to women and prevent discrimination against them based on their gender. Early court decisions interpreted Title VII to include pregnancy discrimination as discrimination "because of … sex." Appellate courts subsequently interpreted "because of … sex" to include males as well, and all sexual harassment claims. In 1998, the U.S. Supreme Court even ruled that same-sex harassment was a cognizable claim under Title VII when lower appellate courts believed it fell outside the law's scope.

More recently, the Supreme Court expanded the definition of "because of … sex" to include gender stereotyping – treating people differently because they do not follow socially-constructed gender norms. For example, in the landmark Supreme Court decision in *Price Waterhouse v. Hopkins*, a female employee was passed over for partnership. Co-workers had described her as "macho" and instructed her to "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled and wear jewelry" in order to exhibit less masculine traits to boost her chances of making partner.

Nevertheless, cases based on sexual orientation discrimination have been a different debate. Cases alleging sexual orientation discrimination have survived when the discrimination is framed as "sex stereotyping." Meanwhile, claims based purely on "sexual orientation discrimination" have been denied by multiple courts as outside the scope of Title VII. Several appeals courts have held that Title VII does not cover sexual orientation discrimination.

However, on April 4, the U.S. Court of Appeals for the Seventh Circuit was the first federal circuit court to hold that Title VII does indeed cover sexual orientation discrimination. The case centered around a lesbian adjunct professor at a community college whose applications for a full-time

position with the school were rejected on at least six occasions. In overturning the lower court's dismissal and allowing the plaintiff to proceed with her claim, the Seventh Circuit reasoned that discrimination on the basis of sexual orientation is intrinsically the same as sex stereotyping, which the Supreme Court has already brought within the purview of Title VII.

Just a few weeks later, on April 18, the U.S. Court of Appeals for the Second Circuit re-examined its prior rulings on the issue in a case involving a skydiver who claimed he was terminated after disclosing his sexual orientation to a customer. In that case, the Second Circuit noted that it is bound by prior panel rulings of the Second Circuit, explaining that one panel of judges from the Second Circuit cannot overturn a panel decision by Second Circuit judges on another matter. In essence, the entire Second Circuit, referred to as "sitting en banc," would have to overturn the precedent established.

While it remains to be seen whether the Second Circuit will follow the Seventh Circuit's lead, it appears change is coming at the federal level, and with the circuit split, it is possible that the Supreme Court will agree to hear an appeal on this issue to settle the matter. Of course, since the judiciary's function is to interpret laws written by Congress, the legislative body can always add sexual orientation language into Title VII if that is its intent. But to date, attempts to do so (or to enact new legislation, such as the Employment Non-Discrimination Act, or ENDA) have failed.
So, what should Oregon employers do? Oregon, like many other states, explicitly prohibits discrimination based on sexual orientation in its state antidiscrimination laws. So, even if employees are not protected under federal law at this point, Oregon state law does provide them with protection from discrimination. As is true for other employment laws, employers must apply the law most beneficial to the employee (which, in this instance, would be Oregon state law). Oregon employers' policies should reflect those protections for employees, and employers should ensure that they investigate reports of sexual orientation discrimination or harassment promptly and never make decisions based on sexual orientation.

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