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# Recent Cases Leave Status of Title VII Protection for Sexual Orientation Murky

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**Summary:** The extent of Title VII protection against discrimination based on an employee's sexual orientation remains a gray area after two recent federal appellate cases, and employers should be aware of state laws offering greater protection.

One of the bigger debates in employment law in recent years is whether one of the key federal employment discrimination statutes, Title VII of the Civil Rights Act of 1964, protects employees against discrimination. Title VII explicitly prohibits discrimination based on an employee's or applicant's race, color, national origin, religion, and, most critically in this analysis, sex. In the 1989 case of *Price Waterhouse v. Hopkins*, the U.S. Supreme Court ruled that Title VII's protection against discrimination based on "sex" protected an employee from discrimination based on the employee's failure to comply with gender stereotypes, i.e., the female employee was perceived as being too masculine because she did not wear makeup or dresses or display other traditionally feminine traits. However, *Hopkins* did not discuss the employee's sexual orientation and the Supreme Court has never held that Title VII covers sexual orientation in and of itself. Congress has considered legislation, such as the Employment Non-Discrimination Act, which would explicitly add sexual orientation as a protected class under Title VII, but those measures have never been enacted.

This legal landscape has led to uncertainty as to the scope of Title VII's protections. While it is clear under the *Hopkins* decision that an employer violates Title VII by disciplining a female employee for acting too masculine or a male employee for acting too feminine, courts and commentators disagree how Title VII would apply to, for instance, a male homosexual employee who otherwise conforms to traditional stereotypes of masculinity. The Equal Employment Opportunity Commission (EEOC) takes the position that such an employee can maintain a sex discrimination claim under Title VII. First, the EEOC argues that such an employee is discriminated against on the basis of sex because, as a man who is romantically interested in men, he is treated less favorably than a woman who is romantically interested in men. Alternatively, the EEOC asserts that such an employee has a viable *Hopkins* gender stereotype claim because the employee is being discriminated against for not complying with the stereotype that men should be romantically interested in women.

Federal appellate courts have not yet widely embraced the EEOC's position that discrimination based on sexual orientation is, in and of itself, sex discrimination. In March 2017, two federal circuit courts of appeals – the Second Circuit (covering New York, Vermont, and Connecticut) in *Christiansen v. Omnicom Group, Inc.* and the Eleventh Circuit (covering Florida, Georgia, and Alabama) in *Evans v. Georgia Regional Hospital* – issued similar opinions considering the scope of Title VII's protection of LGBT employees. In each case, the court found itself bound by prior precedent holding that sexual orientation is not a Title VII protected class. However, also in each case, there were allegations that the employee had been disciplined for his or her failure to comply with gender stereotypes *in addition to* his or her sexual orientation. Both courts held that, even though Title VII does not recognize a claim based solely on sexual orientation, an LGBT employee is not prohibited from raising a gender stereotyping claim based on evidence of non-compliance with stereotypes beyond the fact of the employee's sexual orientation (for example, in these cases, a male acting in an effeminate or submissive manner or a female wearing pants or short hair). In both cases, individual judges authored non-binding concurring and dissenting opinions expressing their views on the merits of the EEOC's position that discrimination based on sexual orientation (without additional evidence of gender stereotyping) is actionable under Title VII.

Until the Supreme Court decides to entertain a case involving an issue of sexual orientation discrimination under Title VII, the status of such claims under federal law remains murky, at least where there is no evidence that the employee otherwise defied conventional gender stereotypes. Employers should note, however, that many state and local jurisdictions have directly outlawed discrimination based on sexual orientation. In the Washington. D.C. area, both Maryland and the District of Columbia prohibit discrimination based on an employee's sexual orientation and gender identity, providing arguably greater

protection to employees than federal law. Accordingly, employees in these jurisdictions could bring a claim of sexual orientation discrimination under state or local law without having to navigate the ambiguity in the federal law.

This area is rapidly developing and it is possible that federal appellate courts could overrule their prior precedents finding that sexual orientation is not a Title VII protected class or that the Supreme Court could weigh in on the issue. In the meantime, particularly in light of state and local laws and the potential for gender stereotyping claims, employers should take the same actions to prevent and avoid discrimination based on sexual orientation that they take to prevent discrimination based on Title VII's other protected classes.

 