

OREGON LAW UPDATE

Oregon Imposes Hefty Fine on Business that Excluded Transgender Group

case in point...

From the desk of John M. Kreutzer: Recent years have seen the legalization of gay marriage and the overruling of the Defense Against Marriage Act, which was found to discriminate based on sexual orientation. In many states, including Oregon, it is illegal to discriminate against someone on account of their sexual orientation or transgender status. But what are the consequences for violating such laws? As discussed below, one business recently discovered the high cost of excluding individuals because of their sexual orientation or transgender status.

Claims Pointer: Oregon requires all places of “public accommodation” to provide “full and equal accommodations” to persons regardless of sexual orientation or transgender status. In the following case, a Portland bar was fined more than \$400,000 by the Oregon Bureau of Labor and Industries for asking a group that included gay, lesbian, and transgender individuals to stop patronizing the bar because their presence was hurting business. On appeal, the Court of Appeals upheld the order imposing the fine, concluding that the bar’s statements that it was “not a gay bar” and “not a tranny bar” were not protected free speech. This case is a cautionary tale for any business that is open to the public to be mindful of how your words and actions based on sexual orientation or transgender status can lead to huge consequences to your bottom line.

Blachana, LLC v. BOLI, 273 Or App 806 (September 23, 2015)

The Rose City T-Girls (“the T-Girls”) is a social group of straight people, married couples, unmarried couples, males who identify as females, cross-dressers, transgender males, lesbians, and gay males. Starting around July 2010, the T-Girls met weekly on Friday nights at the “P Club,” a Portland bar owned by Blachana, LLC (“Blachana”) and managed by one of the owners, Christopher Penner (“Penner”). Between 8 and 54 members of the T-Girls met weekly at P Club from January 2011 to June 18, 2012.

On June 28, 2012, Penner called Cassandra Lynn (“Lynn,”) the founder of the T-Girls, and left the following voicemail:

“Hello, my name is Chris, I’m the owner of the P Club Bar and Grill on North Lombard. Um, unfortunately, uh due to circumstances beyond my control I am going to have to ask for you, Cass, and your group not to come back on Friday nights. Um, I really don’t like having to do that but unfortunately it’s the area we’re in and it’s hurting business a lot. If you have any questions, please feel free to give me a call ***. Again I’m really sorry about having to do this but yeah give me a call. Thanks, bye.’

Lynn called back and left a message asking what Penner’s “real reason” was for asking the T-Girls not to come back. Penner responded with another voicemail in which he stated that he reviewed his sales over the past two years and discovered that

they had steadily dropped on Fridays since the T-Girls started meeting at P Club. Penner said that “I’ve done some investigating as to why my sales are declining and there’s two things I keep hearing: People think that (a) we’re a tranny bar or (b) that we’re a gay bar. We are neither.”

The T-Girls stopped meeting at the bar. Lynn posted a transcription of the voicemails on the T-Girls’ website and later a copy of the voicemails. Eleven members of the T-Girls that heard the voicemails stopped visiting P Club. In November 2012, Oregon’s Bureau of Labor and Industry (“BOLI”) filed an administrative complaint against Blachana and Penner for violation of Oregon’s civil rights laws under ORS chapter 659A for denying equal accommodations. BOLI sought damages of at least \$50,000 per harmed person and a \$1,000 fine against Blachana and Penner. In their defense, Blachana and Penner argued that the civil rights laws violated their right of free speech under Article I, section 8, of the Oregon Constitution.

An administrative law judge (“ALJ”) disagreed with Blachana and Penner’s contention that they were being punished because of their speech, because in the ALJ’s opinion, the exclusion of the T-Girls was not speech, but conduct (which is not protected by the Oregon Constitution). Blachana and Penner also argued that they did not “coerce” the T-Girls because they did not issue threats or demands, but asked nicely out of an interest in preserving their business. BOLI ultimately issued an order finding that Blachana and Penner had denied the T-Girls equal



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accommodation under ORS 659A.403 and that it had “issued a notice and communication” by leaving voicemails for Lynn. BOLI ordered Blachana and Penner to pay \$400,000 in damages to the eleven harmed people, and imposed fines of \$3,000 against Blachana and \$2,000 against Penner personally. Blachana and Penner appealed.

The Oregon Court of Appeals upheld BOLI’s order in full. First, the Court agreed with BOLI that Blachana and Penner had violated ORS 659A.403 because Penner had refused to serve the T-Girls for the benefit of Blachana on account of sexual orientation. Second, the Court rejected the free speech argument. The Court explained that the Oregon Constitution protects free speech such as opinions, but in this case, Penner was doing more than simply stating an opinion—he was affirmatively asking the T-Girls to stay away. Because the Oregon Constitution did not protect Penner’s speech, both Blachana and Penner were responsible under Oregon civil rights statutes. The Court upheld BOLI’s order and award.



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