

# The Fight for Restroom Rights – Illinois Courts Follow National Trend in Prohibiting Sex Discrimination of Transgender Employees and Requiring Equal Access to Bathrooms

## Labor & Employment Law Update

on August 19, 2021



On August 13, 2021, the Illinois Second District Appellate Court upheld the Illinois Human Rights Commission's determination that Hobby Lobby violated the Illinois Human Rights Act (IHRA) by refusing to allow a transgender employee to use the restroom that matched her gender identity and awarded \$220,000 in emotional distress damages against Hobby Lobby.

In this case, Hobby Lobby's policy was to limit employees and customers to using the restroom that matched their designated sex at birth. The plaintiff was born a male, but during her employment with Hobby Lobby transitioned to a female. She underwent medical treatment to transition and began using a female name and coming to work in feminine dress and makeup. She also obtained a court order legally changing her name to her female name and obtained an Illinois drivers' license and social security card which identified her by her female name and as being a female.

Hobby Lobby changed her personnel records and benefits information to reflect that the plaintiff was a female, rather than a male. However, Hobby Lobby continued to refuse to allow her to use the women's restroom. When the plaintiff used the women's restroom, Hobby Lobby disciplined her by issuing her a written warning and ordering other employees to report her if she tried using the women's restroom.

While the case was being litigated, Hobby Lobby did install a unisex restroom, and allowed employees and customers to use either the bathroom corresponding to their sex or the unisex bathroom. However, Hobby Lobby continued to prohibit the plaintiff from using the women's restroom that matched her gender identity.

The court found that the IHRA's definition of "sex" as "status of being male or female," is not limited to an individual's sex at birth or genitalia. Rather, the use of the term "status" indicates a "state of being that may be subject to change." The court further held that by defining "sex" broadly as a status, without any reference to anatomy, birth certificates, or genetics, the Act allows for the consideration of gender identity as one of the factors that may be used to determine sex. Based on that reasoning, the court upheld the determination that Hobby Lobby's actions had discriminated against the plaintiff based on her "sex," as well as gender identity.

In making this finding the court rejected a number of arguments made by Hobby Lobby including that its bathroom ban was necessary to protect other women from the plaintiff. While Hobby Lobby made assertions regarding a complaint by a woman against the plaintiff for verbal disparagement and unwanted touching, such as side hugging and touches on the arm, back and leg, and alleged complaints by two female employees that they would feel uncomfortable with the plaintiff using the women's restroom, the court held that Hobby Lobby failed to provide any evidence to support those assertions, such as discipline or written statements, or any evidence that the plaintiff's use of the women's restroom would pose a safety risk to other women. Indeed, the court held that if Hobby Lobby were employing someone who genuinely posed a safety threat to others, its employees and customers would certainly demand a more effective safeguard than preventing that person from using the restroom. The court further recognized that courts have firmly rejected the argument that the fears or discomfort of others may serve as adequate justification for a discrimination policy (i.e. the presence of a transgender person in a bathroom poses no greater inherent risk to privacy or safety than that posed by anyone else who uses the restroom).

While the court's decision could be appealed and argued along the line of Hobby Lobby's religious beliefs, the 2020 United States Supreme Court decision that transgender employees are protected from workplace discrimination and 2021 United States Supreme Court decision to decline to hear a case in which lower courts had upheld an employee's right to use the restroom matching their

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gender identity would likely support the Appellate Court's decision.

It is noteworthy that in upholding the Illinois Human Rights Commission's award of \$220,000 for emotional distress damages, the court also remanded the matter back to the Commission for a determination of any additional damages and attorneys' fees that may be due – thus potentially increasing the plaintiff's damage award.

This ruling makes clear to Illinois employers that the IHRA requires employees be allowed to use the restroom that matches their current gender identity. Additionally, it makes clear that providing a unisex restroom does not excuse an employer from still allowing an employee to use other restrooms matching their current gender identity.

It also serves as a reminder to review and consider the following actions:

- Revising anti-discrimination policies to make clear it prohibits discrimination based on sex, gender identity (including transgender and transitioning), and sexual orientation;
- Ensuring dress code and restroom policies are not discriminatory;
- Implementing procedures to address when an employee discloses they are transitioning or have a different gender identity, including changing an employee's gender on personnel records and benefit information, maintaining confidentiality of personal medical information, recognition of different pronouns, and working with the employee on what, if any, communication is made to other employees regarding the employee's transition or gender identity;
- Ensuring that diversity and inclusion training addresses sex, gender identity (including transgender and transitioning), and sexual orientation.

To avoid potential missteps and pitfalls, it is advised that employers consult with experienced legal counsel in addressing these issues.

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