

## Illinois Appellate Court Affirms the Rights of Transgender Employees in the Workplace

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The Illinois Appellate Court (Second District) recently issued an **opinion** deciding an issue of first impression here in Illinois: whether an employer violates the **Illinois Human Rights Act (Act)** by denying a transgender woman the use of the women’s bathroom. The Appellate Court affirmed the decision of the Illinois Human Rights Commission. The decision held that the employer, Hobby Lobby, violated Article 2 of the Act by discriminating against its long-time employee, Meggan Sommerville (Sommerville), based on her gender identity in a term and condition of her employment by denying her the use of the women’s bathroom in the store, and violated Article 5 of the Act prohibiting discrimination in a place of public accommodation.

Hobby Lobby’s primary argument was that its policy for bathroom access was based upon a user’s “sex” – which it contended meant the user’s reproductive organs and structures. Throughout the lawsuit, Hobby Lobby changed positions of what it would consider as satisfactory in order to permit Sommerville to utilize the women’s bathrooms, including requiring gender reassignment surgery or production of a birth certificate reflecting her sex as female.

In issuing its opinion, the Appellate Court looked to the definition of “sex” contained in the Act itself, meaning “the status of being male or female,” and the definition of “unlawful discrimination,” meaning discrimination against a person because of his or her actual or perceived sex or sexual orientation. Analyzing the Act’s definitions, the Appellate Court found that

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“Hobby Lobby’s conduct thus falls squarely within the definition of unlawful discrimination under the Act, as it treats Sommerville differently from all other women who work or shop at its store, solely on the basis that her gender identity is not ‘traditionally associated with’ her ‘designated sex at birth.’” The Appellate Court specifically rejected Hobby Lobby’s definition of “sex” which engrafted additional criteria to the Act’s broad definition of “sex,” finding that “status” within the definition of sex implies a state of being that may be subject to change, citing the examples of marital status or resident status. Therefore, there was no basis to treat “status” as it pertains to sex as “eternally fixed,” as Hobby Lobby suggested.

Significantly, the Court rejected Hobby Lobby’s argument that Sommerville could use the unisex bathroom it had installed in the store Sommerville worked at in 2013 as an excuse for refusing her access to the women’s bathroom. The Appellate Court determined that the mere existence of the unisex bathroom was “irrelevant to the main issue in this case, which is whether Hobby Lobby violated Sommerville’s civil rights in denying her, but not other women, access to the women’s bathroom.” Ultimately, the Appellate Court upheld the Commission’s award of \$220,000 in damages for Sommerville’s emotional distress, and injunctive relief ordering Hobby Lobby to allow Sommerville to use the women’s bathroom.

The lawsuit represented an over ten-year battle, and within that period of time there have been a significant number of state and federal opinions affirming the rights of transgender persons to be free from discrimination in employment, and to have access to bathrooms matching their gender identity. For example, in ***Bostock v. Clayton County***, the United States Supreme Court held, in part, that Title VII protected transgender employees from workplace discrimination. On June 28, 2021, the United States Supreme Court declined to hear another appeal in the case ***Grimm v. Gloucester County School Board***, permitting the rulings a student won in earlier lower courts, to allow use of the bathroom consistent with the student’s gender identification, to remain. A similar **opinion** was issued in the Seventh Circuit providing that a “policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.

The Appellate Court’s opinion – along with the trend of recent decisions affirming the rights of transgender persons in employment and in places of public accommodation – instructs that an employer should not be distinguishing between transgender and non-transgender persons in determining the terms and conditions of their employment, including the use of bathrooms, without violating the Act, Title VII, Title IX and potentially other laws.

Employers who have questions about best policies and practices in complying with the Act, Title VII and Title IX, and in defending suits brought under these and other statutes or common laws should contact their Laner Muchin servicing attorney for more details.