

## Illinois Appellate Court Affirms Transgender Access to Restroom Facilities, Largest Ever Emotional Distress Award Made By Human Rights Commission

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Affirming the largest emotional distress award ever made by the Illinois Human Rights Commission, the Illinois Appellate Court for the Second District has handed down the first Illinois state court decision affirming a transgender individual's right to use the restroom congruent with their gender, rather than their gender assigned at birth. The decision in ***Hobby Lobby Stores, Inc. v. Sommerville***, issued August 13, 2021, affirmed an award of \$220,000 in purely emotional distress damages, which is more than double the largest prior award.

The award came in the context of a case brought by a transgender female employee of Hobby Lobby. The employee began transitioning a few years after starting with the company and completed hormone and other treatments in 2010. While the employee never underwent gender re-assignment surgery, she expressed as a woman including a legal name change, change of gender designation on official documents such as her driver's license, and her manner of dress and comportment. The employee kept Hobby Lobby informed of these developments, and Hobby Lobby adjusted gender identifiers in its records and benefit plans. When the employee expressed her intention to start using the women's restroom, however, Hobby Lobby informed her that she could not do so and in fact issued discipline on an occasion when she did so. Eventually the company installed a unisex bathroom that could be used by anyone. The employee continued to work at Hobby Lobby, adjusting to the situation in a variety of ways throughout the litigation.

Hobby Lobby sought to justify its position by arguing that "sex" was an "immutable characteristic" dictated by one's reproductive organs, and that because the complainant had not had reassignment surgery, treating her as a man was not sex discrimination. The company further argued that as the Illinois Human Rights Act specifically permits restroom and other "distinctly private" areas to be sex segregated, its treatment of the employee was consistent with the law. The court rejected both aspects of the argument, finding that, as defined by Illinois law, sex was a status which was capable of change, as shown by complainant's redesignated gender indicators on official and company records. The court then held that the "bathroom exception" could not rescue Hobby Lobby first because it applied only to public accommodation cases, and also because the allowance of sex-segregated restrooms did not permit discrimination against those whose gender was not aligned with their gender assigned at birth. Finally, the court rejected the notion that provision of the unisex bathroom solved the issue as the employee remained unable to use the restroom aligned with her gender solely because it was different than that which had been assigned to her at birth.

The Court acknowledged that the damage award was the largest emotional distress award granted by the Commission but held that the employee had been forced to endure several years of indignities and difficulties while she continued working at Hobby Lobby during the pendency of the suit. The Appellate Court remanded the matter to the Commission to consider whether the damage award should be augmented to compensate the complainant for emotion harm and attorney's fees incurred between the time of the original ALJ decision and the Court's order.

For employers and places of public accommodation in Illinois, the decision will likely encourage further claims of this nature. As a practical matter, employers and places of public accommodation should be clear that they do not regulate use of restrooms on the basis of gender assigned at birth, when different from a person's lived gender. Second, they should likely consider in advance how they will respond to complaints from other employees or customers who may object to the policy.

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To further discuss how to address these issues in your workplace, please contact the authors or your Miller Canfield Employment and Labor attorney.