

GENDER IDENTITY DISCRIMINATION

## Transgender employee sues Barnes & Noble for discrimination

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*Former employee Victoria Ramirez has accused the nation's largest bookstore of denying her the right to use the restroom consistent with her gender identity, forbidding her from discussing her gender transition with her coworkers because such discussions might make them feel sexually harassed, forbidding her from wearing skirts to work, and delaying her transition from male to female.*

### Summary of Ramirez's allegations

In her complaint, Ramirez alleges that she began working for the retail giant in 2007 as a bookseller. She continued to work for the retailer while she attended and graduated from college. In 2010, she was promoted to the position of merchandise manager. Between 2007 and 2010, Ramirez presented as a man and went by her legal name, Tyson Ramirez.

Ramirez claims that her employment took a turn for the worse after she requested a leave of absence to care for her terminally ill father and after she began taking female hormones and wearing light makeup and nail polish to work. She complains that her direct supervisor chastised her for wearing makeup, nail polish, and acrylic nails to work. She also alleges that her supervisor continued to refer to her by the male pronoun "he" after she asked to be referred to by the female pronoun "she." Ramirez claims that her supervisor told her that her appearance was "upsetting" to the store's customers and that she should "think of the children" because the bookstore is a "neighborhood place."

Ramirez states that her supervisor's conduct caused her to experience severe panic attacks, which necessitated two medical leaves of absence. According to her, following her return to work, her supervisor's conduct continued to escalate, causing her to suffer debilitating anxiety attacks.

Ramirez says she notified Barnes & Noble's regional HR representative of her intention to transition from male to female in mid-2013 and requested that she be allowed to present as a woman and use the store's female restroom. After waiting two months for a company response, she allegedly was told she could present as a female at work under the following restrictions:

- She couldn't use the female restroom;
- She could wear eye makeup only if no one could tell she was wearing it;

- She couldn't wear skirts to work; and
- She couldn't discuss her transition with her coworkers because it might make the store's employees feel uncomfortable.

Thereafter, Ramirez allegedly experienced additional panic attacks, and her supervisor ultimately terminated her employment.

In her complaint, Ramirez alleges that Barnes & Noble discriminated against and harassed her based on her gender identity and gender expression in violation of California's Fair Employment and Housing Act (FEHA), which explicitly includes gender expression and gender identity as protected groups. Her claims are notable because Barnes & Noble has earned the top rating of 100 percent for the past seven years on the Corporate Equality Index, an annual survey administered by the Human Rights Campaign Foundation, the nation's largest LGBT civil rights organization. By doing so, the company is part of an elite group of U.S. businesses that have received top honors for their treatment of LGBT employees and consumers.

### History of gender expression, gender identity claims

The FEHA has included "gender identity" and "gender expression" as protected groups since 2011. However, the federal courts haven't uniformly extended the same protections until just recently.

In the landmark decision in *Price Waterhouse v. Hopkins*, the U.S. Supreme Court considered allegations that a senior manager at Price Waterhouse was denied partnership in the firm because she was considered "macho" and "over compensated for a woman." The Court concluded that such comments were indicative of gender discrimination and held that Title VII of the Civil Rights Act of 1964 bars not just discrimination based on biological sex but also gender stereotyping (i.e., failing to act and appear according to expectations defined by gender). While the manager in *Price Waterhouse* isn't transgender, this decision opened the door for transgender employees to seek federal redress for discrimination under the theory that discrimination based on an employee's nonconformity with gender-based stereotypes constitutes discrimination based on sex.

Since then, the federal courts have addressed this issue with differing results. Some courts have adopted the *Price Waterhouse* holding, such as the 6th Circuit in *Smith v. City of Salem*, which held that a transsexual firefighter couldn't be suspended because of his "transsexualism and its manifestations because to do so was discrimination against him based on his failure to conform to sex stereotypes by expressing less masculine, and more feminine mannerisms and appearance." But others have declined to extend those protections to the transgender community. For example, in *Creed v. Family*

*Express Corp.*, a federal district court in Indiana upheld the termination of a transgender employee based on his failure to conform to the employer's dress code and grooming policy.

In July 2014, however, President Barack Obama signed an Executive Order prohibiting federal contractors from discriminating on the basis of sexual orientation or gender identity. And in December 2014, Attorney General Eric Holder issued a memorandum expressly stating that Title VII covers discrimination based on gender identity, which includes transgender people.

Following those announcements, claims by transgender employees have continued to rise. Indeed, earlier this year, another retailer, Saks Fifth Avenue, was sued by a transgender employee who alleged she was discriminated against because of her failure to conform to stereotypical male behavior in the workplace. Although the upscale retailer initially asked the court to dismiss the dispute by arguing that transgender employees aren't entitled to protection under Title VII, it has since settled the lawsuit.

### ***Bottom line***

These recent cases underscore the importance of maintaining a workplace environment that is tolerant and sensitive to transgender issues. To reduce the risk of gender identity or gender expression liability, you should take the following steps.

- (1) Management must set a tone of tolerance, sensitivity, and mutual respect toward transgender employees by promptly and effectively addressing any negative reactions toward them in the workplace.
- (2) Train management on the obligation to accommodate transgender employees. In California, you must allow employees to use restrooms and locker facilities that match their current gender presentation.
- (3) Train management on how to appropriately respond to an employee who is transitioning. Dress codes should be applied to employees transitioning to a different gender in the same way they apply to other employees of the same gender. Dress codes may not be used as a mechanism for denying transitioning employees the right to dress in the gender to which they identify. Insensitive or discourteous comments from other employees based on a transitioning employee's choice of clothing shouldn't be tolerated.
- (4) Managers and coworkers should use the new name and gender pronouns appropriate to the employee's new gender.
- (5) Review and update any policies to ensure they clearly prohibit all forms of discrimination and harassment, including discrimination and harassment based on gender identity or gender stereotyping.

- (6) Consult with employment counsel, and stay current on local laws on transgender issues as this area continues to evolve.

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