

## IOWA WOMAN FIRED FOR BEING TOO 'TOMBOYISH' CAN CHALLENGE FIRING UNDER TITLE VII

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**E**mployers know Title VII of the Civil Rights Act prohibits sex discrimination; however, many employers may not realize that sex stereotyping can be a form of sex discrimination. On January 21, 2010, the United States Court of Appeals for the Eighth Circuit (which covers Nebraska) held that employment decisions based on sexual stereotypes violates Title VII. *Lewis v. Heartland Inns of America, L.L.C.*, (8<sup>th</sup> Cir. 2010).

Heartland Inns of America hired Brenna Lewis as a night auditor in July 2005. Lewis was successful in that position receiving pay raises and compliments from customers. In December 2006, Lewis' manager, Lori Stifel, promoted her to a day shift hotel clerk position. Director of Operations, Barbara Cullinan, initially approved the promotion over the phone, but after seeing Lewis told Stifel that she felt Lewis was not a "good fit" for the front desk position.

Lewis describes herself as "slightly more masculine" and "tomboyish." Lewis does not wear make-up, wears loose fitting clothing, including men's button down shirts and slacks, and keeps her hair short. Stifel characterized Lewis's appearance as "an Ellen DeGeneres kind of look" and other employees described Lewis as "tomboyish."

After Lewis worked at the front desk for a month, Cullinan directed Stifel to return her to the overnight shift. Cullinan felt that Lewis lacked the pretty, "Midwestern girl" look needed to work the front desk. Stifel refused because Lewis had been doing "a phenomenal job at the front desk." When Stifel refused to transfer Lewis, Cullinan demanded Stifel's resignation. At the time Lewis had a spotless performance record, received praise from her immediate supervisors, had received merit pay raises throughout her employment with Heartland, and had received no customer complaints.

Although the front desk job description in Heartland's personnel manual did not mention appearance and only stated that a guest service representative create "a warm, inviting atmosphere" Cullinan required Lewis to interview for the front desk position because "hotels have to have a certain personification and appearance." The company subsequently purchased video equipment so remote executives, like Cullinan, could see job candidates before they were hired.

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Lewis met with Cullinan in January 2007 for a second interview, despite the fact that Lewis had already held the front desk job for nearly a month after Cullinan's initial approval of her hire for the position. Cullinan informed Lewis that she had to undergo an interview to "confirm/endorse" her day-shift front desk job. Lewis was aware from Stifel of what had been said about her lack of the "Midwestern girl look" and that other staff members had not been required to have second interviews. Three days after her second interview, Lewis was fired. In its termination letter to Lewis, Heartland asserted that Lewis had "thwarted the proposed interview procedure" and "exhibited hostility toward Heartland's most recent policies."

Lewis asserted that Heartland's reasons for her firing were pretext, and that the real reason for her firing was because she did not conform to sex stereotypes in violation of Title VII. The court relied on a 1989 case, *Price Waterhouse v. Hopkins*, in which the U.S. Supreme Court decided that sex stereotyping can violate Title VII when it influences employment decisions, and the court did not require Lewis to produce evidence that she was treated differently than similarly situated males. The focus of Title VII "is the protection of the individual employee, rather than the protection of the minority group as a whole." Ultimately, the court concluded that Lewis offered sufficient evidence from which a reasonable fact finder could conclude that Lewis was discriminated against because of her sex since an employer who discriminates "against women because . . . they do not wear dresses or makeup" engages "in sex discrimination because the discrimination would not occur but for the victim's sex."

### **Lesson:**

Title VII prohibits discrimination based upon sex. In this case, Lewis provided evidence that Heartland found her unsuited for her front desk job based, not upon her work performance, but upon an appearance that was inconsistent with the company's preferred feminine stereotype. At the summary judgment phase of a case, the question is whether a plaintiff has offered sufficient evidence from which a reasonable fact finder could find that the individual was discriminated against because of her sex. Here, the Eighth Circuit found that Cullinan's remarks, along with her discharge of Stifel for not taking Lewis off the front desk, and her imposition of a second interview even after Lewis performed successfully in the position, clearly provided such evidence.

The line between sexual discrimination based on orientation, which is not yet prohibited by federal or Nebraska law, and discrimination "because of sex" can be difficult to draw. However, employers must recognize that an employer who takes an adverse action against an individual because he or she does not fit within sexual stereotypes is engaging in sex discrimination because that discrimination would not have occurred but for the individual's sex. Employers desiring to require specific appearance standards are encouraged to work with employment law counsel before doing so.

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