

Walmart Subsidiary Discriminated Against Transgender Worker, EEOC Finds

The transgender Sam's Club employee said she was denied employment opportunities and access to health care



Shoppers leave a Sam's Club store on January 12, 2010 in Rolling Meadows, Illinois. Scott Olson / Getty Images

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By Julie Moreau

The U.S. Equal Employment Opportunity Commission (EEOC), an independent federal agency tasked with enforcing federal anti-discrimination law, issued a finding in favor of Jessica Robison, a transgender woman who says she was denied employment opportunities and access to health care while working for Sam's Club, a subsidiary of Walmart.

The EEOC's letter of determination states that Sam's Club violated Title VII of the Civil Rights Act of 1964. "There is reasonable cause to believe [Sam's Club] discriminated against [Jessica Robison] due to her sex (transgender status/gender identity) and retaliated against [Robinson] for engaging in protected activity, by subjecting her to harassment, adverse terms and conditions of employment, discipline, a forced demotion and hostile working environment, in violation of Title VII," the letter states.

Further, the letter maintains Robison was denied medical coverage because she is transgender, and that Walmart's health care policy "categorically excluded coverage of any services for 'transgender treatment/sex therapy,' denying [Robison] medically necessary care that would have been covered if not for her transgender status."

According to the letter, Walmart has since removed this exclusionary provision as of January 1, 2017.

A "Very Positive Development"

Jillian Weiss, executive director of the Transgender Legal Defense and Education Fund (TLDEF), which provided legal support to Robison, called the EEOC's decision a "very, very positive development."

"[This] means the U.S. government recognizes that transgender people are human beings entitled to civil rights, and discrimination against transgender people will not be tolerated," Weiss said.

Weiss noted that Walmart received a perfect score this year on the Human Rights Campaign's Corporate Equality Index, which rates companies based on their policies and practices regarding their LGBTQ employees. However, she said, the EEOC's finding indicates their "policies don't reach the shop floor."

Weiss said the next step with Sam's Club is a process of conciliation where the parties attempt to reach an agreement. If that fails, Weiss said TLDEF would take the issue to court.

EEOC "Reaffirms" Its Position

Anthony Kreis, a professor at Chicago-Kent College of Law, said he expects Walmart to comply in the conciliation process rather than contest the EEOC's finding.

"[From] a pure business model perspective ... it's better for them to remedy the discrimination than take the hit on their brand," he said, noting in late 2016 Walmart settled a case of discrimination against lesbian and gay employees after denying their partners access to health coverage.

More broadly, Kreis said, the EEOC's decision "reaffirms" its position that "gender identity discrimination is a form of sex discrimination."

"The EEOC has been very strong on this particular issue and reinforcing that position," he added.

The Meaning of 'Sex'

Title VII of the Civil Rights Act of 1964 "prohibits employment discrimination based on race, color, religion, sex and national origin." The question of whether the word "sex" applies to gender identity and sexual orientation has been making its way through the court system.

Recently, the EEOC submitted a brief in a case before the U.S. Court of Appeals for the Second Circuit arguing in favor of an expansive understanding of Title VII's prohibition of sex discrimination to encompass sexual orientation. The Department of Justice also submitted a brief in the case, *Zarda v. Altitude Express*, but to argue the contrary — "that Title VII does not reach discrimination based on sexual orientation."

In April, the Seven Circuit Court of Appeals ruled in favor of educator Kimberly Hively, arguing that her employment termination due to her sexual orientation is in fact covered by Title VII protections. The Eleventh Circuit, by contrast, failed to reconsider the case of another woman, Jameka Evans, who also alleges employment discrimination on the basis of her sexuality and gender non-conformity. Lambda Legal is challenging this ruling, and it may be headed for the Supreme Court.

According to Kreis, a case such as Robison's — where Title VII is invoked to protect against gender identity discrimination — is less contentious legally than the Second and Eleventh Circuit cases, where coverage of sexual orientation is at issue.

“In terms of Title VII, gender-nonconformity claims have been recognized since 1989, and while not initially applied to transgender persons, the courts pretty rapidly recognized that transgender people have the right to action under Title VII and the courts have been consistent on this point,” Kreis explained.

In terms of the legal significance of the EEOC's finding against Walmart subsidiary Sam's Club, Kreis said "we might not get a landmark legal ruling, because Walmart would be inclined to settle." However, he noted, that does not necessarily limit the impact of this decision.

“What's important here is that you're dealing with one of the nation's largest employers. Depending on how this unfolds, that could guide a lot of other corporations who say, ‘I need to fall in line with this,’” he said.

A Walmart spokesperson emailed a statement to NBC News saying the company maintains "a strong anti-discrimination policy."

"We support diversity and inclusion in our workforce and do not tolerate discrimination or retaliation of any kind. Our health benefits include coverage for the medically necessary treatment of Gender Dysphoria or Gender Identity Disorder," the statement reads. "While we disagree with the EEOC's findings, we have attempted to resolve this issue with Ms. Robison and remain open to further discussions."