OK, now it's a trend . . . .

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When you see something once you may just write it off as, well, as one of those things. Twice, maybe a coincidence? Three time, now we have a trend. Remember when we talked about the 3rdCircuit finding that a man who "pushed his buttons with pizzazz" (I told you then, I will tell you again, those were the plaintiff's words, not mine) could sue for sex discrimination based on his failure to "conform to gender stereotypes"? And remember how we talked about *Price Waterhouse v. Hopkins*, which had previously found this type of claim to be valid for a woman who was not feminine enough? You don't remember, well look here http://negotiumlex.wnj.com/?p=50 (I love linking to my own blog).

Well, here is number three and now we have a trend. Last week, the Eight Circuit in a case titled *Lewis v. Heartland Inns of America, L.L.C. et al*. held that Ms. Lewis, who claimed she was fired from her job as a front desk clerk "because of unlawful sex stereotyping" could proceed with her trial. It seems Ms. Lewis did a pretty good job for the hotel when she started as a part time employee and she was offered a full time job at one of the hotel's properties. It also seems that the Director of Operations approved this hiring without ever actually meeting Ms. Lewis.

According to the court: "Lewis' positive experience at Heartland changed only after Barbara Cullinan saw her working at the Ankeny desk. As the Director of Operations, Cullinan had responsibility for personnel decisions and reported directly to the general partner of Heartland. She had approved the hiring of Lewis for the Ankeny A shift after receiving Stifel's positive recommendation. After seeing Lewis, however, Cullinan told Stifel that she was not sure Lewis was a "good fit" for the front desk." The court went on to note: "Lewis describes her own appearance as "slightly more masculine," and Stifel has characterized it as "an Ellen DeGeneres kind of look."" Well this makes sense to me because we all know that Ellen DeGeneres has had no success at all (that's sarcasm in case you missed it).

The court went on with a bunch of other legal mumbo jumbo about shifting burdens of proof and prima facie cases, cited *Price Waterhouse*, and some other cases and held that Ms. Lewis was entitled to a trial on her Title VII claim that she was fired for not conforming to sexual stereotypes.

So what does all of this mean? I don't hire people without at least looking at them first? WAIT, I WAS ONLY KIDDING. How about this, remember, at least for now, sexual orientation is not a protected category under federal (or Michigan) law. But the line between what is a sexual orientation case and what is a sex discrimination case is getting fuzzier. So what's the lesson, the real lesson? Here is the lesson. If you want to be sure to stay

out of trouble, hire and fire people based on what they do and how they do it and worry a little less about what they look like doing it.