



Which Restroom? Employers Face Challenges With Gender Identity Issues

Insights

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(Labor Letter, April 2010)

Good Food Restaurant, Inc. runs a family restaurant in a state which prohibits discrimination in employment based upon gender identity and disability. Its employees are required to wear name-tags, and to dress the same (black pants and shirt, minimal jewelry, conservative make-up). It has men's and women's restrooms, used by customers and employees alike. An employee (George) tells the manager that he is in transition to becoming a woman, and wants:

- to be addressed as Gail,
- to change her name-tag to read "Gail," and
- to use the women's restroom.

Several of the restaurant's female employees have told the manager that they intend to quit if Gail is permitted to share the women's restroom with them, and management is concerned with the reaction of its female customers if Gail is permitted to use the women's restroom.

This hypothetical is not far fetched. Employers are increasingly being forced to grapple with issues involving employees who state that they have a Gender Identity Disorder, or are "transgendered." Such individuals may claim that they are protected against discrimination in employment and that their employer must accommodate their need to be treated as a member of the sex they identify with.

A Protected Class?

Typically, an employee claiming unlawful discrimination must prove: 1) membership in a protected class; 2) an adverse employment action; and 3) a causal connection between the two. Federal law does not yet prohibit employment discrimination based on gender identity, but a number of states have amended or interpreted their own employment laws to prohibit this. For example, Maine law prohibits discrimination on the basis of "sexual orientation," defined as "a person's actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression." The

Massachusetts Commission Against Discrimination has held that Massachusetts law prohibits employment discrimination against transsexuals on the basis of sex.

Accommodation

Employers are required to offer reasonable accommodation to qualified employees with disabilities, to enable them to perform the essential functions of their jobs. Although federal law (the Americans With Disabilities Act) continues to exclude transsexualism and other Gender Identity Disorders from the definition of "disability," they may constitute a disability as defined under state law, particularly if supported by a doctor's certification. Advocacy groups insist that employers should honor the transgendered individual's choices in matters of appearance and use of restroom.

Balancing The Legal Against The Practical

Going back to our hypothetical, in order to prove unlawful employment discrimination, Gail must show that she suffered a material "adverse employment action" because she is transgendered. It is doubtful that an employer's refusal to address an employee by other than his legal name and refusal to allow anything other than the employee's legal name to be displayed on his name-tag is a material adverse employment action. On the other hand, it is hard to see how it would interfere with or burden Good Food Restaurant's business interests to accede to these requests.

Harassment which is severe or pervasive may constitute a material adverse employment action. Good Food Restaurant should train its managers on the need to ensure that Gail is not subjected to jokes, innuendos, or disparaging comments by her co-workers. If harassment occurs, the offenders should be disciplined, just as they would be if they engaged in racial or sexual harassment, and Good Food Restaurant should require all employees to undergo training that spells out what is wrong with such conduct and the consequences for engaging in it.

The Restroom Problem

If Good Food Restaurant had only unisex restrooms (single occupant, may be used by either sex), there would be no "restroom problem." But its restrooms accommodate more than one user at a time, and are designated for use by men and women, separately. There have been relatively few cases addressing this issue. In one, the Minnesota Supreme Court held that although the state's Human Rights Act prohibited discrimination in employment against transgendered individuals, an employer could require a transgendered employee to use the restroom that corresponded to his biological gender. *Goins v. West Group*.

In another, a federal appeals court upheld the dismissal of a female employee's objection to a School District decision to permit a male employee who was transitioning to female to use the women's restroom. The employee argued that requiring her to share the women's restroom with someone who was biologically male constituted sexual harassment. The U.S. Court of Appeals for the 8th Circuit rejected this claim, *as a matter of law. Cruzan v. Special School District #1*.

But in other jurisdictions, such as Massachusetts and Maine, the courts are likely to treat this as an issue of fact which should be left to the jury to decide. Thus, the employer may be caught squarely in

issue of fact which should be left to the jury to decide. Thus, the employer may be caught squarely in the middle: sued by the transgendered individual if he or she is not permitted to use the desired restroom, and sued by other employees if it does. It is also not a stretch to imagine a female customer complaining to management – or worse – if she learns that she is sharing the restroom with a transgendered male employee.

Where We Are Now

Inevitably, there will be more cases addressing this issue, and hopefully a consensus will emerge as to what an employer's rights and obligations are when confronted with such requests from transgendered employees. In the meantime, employers should proceed with caution based upon careful analysis of the legal and practical implications of each situation.