



In-Depth Discussion | March 21, 2017

DEAR LITTLER: HOW SHOULD I HANDLE CUSTOMER CONCERNS ABOUT A TRANSGENDER EMPLOYEE?

By: Denise M. Visconti

Dear Littler: We have a transgender employee at work, Sarah, who identifies and presents as a female. She is in the process of transitioning and still occasionally exhibits traditionally “male” physical attributes. A client of ours recently noticed that Sarah appeared to have a “five o’clock shadow” at the end of a long day and complained to me about Sarah working on that client’s account. What is the best way to respond?

-Troubled in Toledo

Dear Troubled in Toledo,

The situation you describe raises a host of delicate legal and practical issues, to be sure. But while this predicament may seem complicated at first glance, the answer is relatively straightforward. As you already probably know, discriminating against Sarah because of her gender identity or gender expression would be unlawful.¹ Moreover, you cannot allow your client’s complaint to affect the way you treat Sarah.

As a result, an appropriate response might begin by sincerely thanking the client for sharing its concerns and being open about your relationship. You should then explain your company’s

¹ “Gender identity” refers to an individual’s innate, deeply-felt psychological identification as male or female. In the case of transgender people, their gender identity does not match their body and/or designated sex at birth. “Gender expression” refers to all of the external characteristics and behaviors that are socially defined as masculine or feminine, *i.e.*, dress, grooming, mannerisms, etc. Gender identity, gender expression, and sexual orientation are distinct concepts. Neither gender identity, nor gender expression, are the same as sexual orientation, which refers to a person’s romantic, sexual attraction to another person.

commitment to maintaining a positive work environment for all employees, free of any discrimination. If appropriate, you could refer to your company's equal employment opportunity policies, particularly if a policy explicitly protects employees based on their gender identity and/or expression. Depending on the circumstances, you might also tout Sarah's track record or otherwise express your confidence in her abilities. You should reassure the client that your company will continue to conduct business in a positive, professional manner, with an unwavering focus on delivering results for the client.

Legal Implications

In speaking with your client (particularly if you receive any pushback), bear in mind that Toledo law specifically protects Sarah from discrimination in employment on the basis of her gender identity.² Indeed, many jurisdictions—including 20 states, the District of Columbia, and more than 200 cities and counties nationwide—prohibit discrimination based on gender identity or expression.³ By law, your loyalties in this scenario lay with your employee.

Federal agencies have also taken the position that Title VII's prohibition on sex discrimination extends to discrimination based on gender identity and/or expression. In 2012, for example, the Equal Employment Opportunity Commission (EEOC) held that discrimination against transgender employees because of their gender identity constitutes sex discrimination, by definition. Since adopting that interpretation, the EEOC has concluded that intentionally misusing a transgender employee's preferred name and gender-appropriate pronoun (*i.e.*, "he" versus "she") equates to unlawful sex discrimination. The agency also has declared it unlawful sex discrimination to prevent a transgender employee from using the common restroom that corresponds to his or her gender identity and expression.⁴

Following the EEOC's lead, the U.S. Occupational Health and Safety Administration (OSHA) similarly stated that all employees should be permitted to use the bathroom facilities that correspond with their gender identity. In its 2015 guidance on this topic, OSHA reviewed existing sanitation standards, discussed why restroom access concerns both health and safety for employees, and issued recommended practices for employers to consider when providing access to transgender employees. According to OSHA, employers should permit employees to elect which bathroom is appropriate and safe for their use and should not require transgender employees to use a restroom that is located away from their worksite.⁵

Practical Implications

Although your inquiry focuses on how to handle a client's concerns, you are presumably dealing with other practical matters related to Sarah's transition at work. You may not need detailed guidance at

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- ² Toledo, Ohio, Mun. Code §§ 554.01 (defining "sexual orientation" to include "actual or perceived ... gender identity, by orientation or practice"), 554.02 (stating that no employer may discriminate on grounds of sexual orientation, among other protected classifications). Note that the Toledo ordinance includes exemptions from these restrictions for employers with less than 12 employees, religious institutions under certain circumstances, and certain private organizations. Toledo, Ohio, Mun. Code § 554.02(b).
 - ³ American Civil Liberties Union, *Non-Discrimination Laws: State by State Information-Map*, <https://www.aclu.org/map/non-discrimination-laws-state-state-information-map> (last visited Feb. 26, 2017); *Human Rights Campaign, Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity*, <http://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender> (last visited Feb. 26, 2017) (identifying municipalities from Anchorage, Alaska to Orlando, Florida as protecting private-sector employees from discrimination on the basis of gender identity).
 - ⁴ See *Lusardi v. U.S. Dep't of Army*, EEOC Appeal No. 01201133395, 2015 WL 1607756 (Mar. 27, 2015), available at <https://www.eeoc.gov/decisions/01201333395.txt> (common restrooms); *Jameson v. U.S. Postal Serv.*, EEOC Appeal No. 0120130992, 2013 WL 2368729 (May 21, 2013), available at <https://www.eeoc.gov/decisions/0120130992.txt> (preferred name and pronoun); *Macy v. U.S. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012), available at <https://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATE.txt> (sex discrimination includes gender identity discrimination).
 - ⁵ See Denise M. Visconti, *OSHA Issues Guidelines for Providing Restroom Access to Transgender Employees*, Littler ASAP (June 2, 2015), available at <https://www.littler.com/publication-press/publication/osha-issues-guidelines-providing-restroom-access-transgender-employees>; see also U.S. Dep't of Labor, Occup. Safety & Health Admin., OSHA 3795-2015, *Best Practices: A Guide to Restroom Access for Transgender Workers*, available at <http://www.dol.gov/asp/policy-development/TransgenderBathroomAccessBestPractices.pdf>.

this point, but you should be aware of some issues that frequently arise when an employee undergoes a transition.

Depending on your worksite, for example, you may need to sort out arrangements for restrooms or other sex-segregated facilities, such as locker rooms, so that all employees are comfortable. There are many possible accommodations, including offering single-occupancy or unisex facilities to any employee who desires to use them. Transgender employees, like Sarah, should be permitted to dress based on their gender identity, as long as they comply with existing standards for dress and appearance that apply to all employees in the workplace with similar positions.

You may also find yourself fielding questions from Sarah's co-workers. Human Resources personnel may be able to host a training session or to help answer generic, individual questions about transgender individuals and their rights. Employees with particular concerns may be referred to relevant policies, if any, including anti-discrimination policies. Employers may need to remind employees to differentiate and separate their personal beliefs from appropriate workplace behavior, consistent with company policies and expectations.

Employers in your position commonly need to update records to reflect any changes in a transgender employee's identity. With a few exceptions, employment records and work-related documents (*i.e.*, e-mail addresses, identification cards, organizational charts, etc.) should be amended to reflect name or gender marker changes.⁶

Finally, a transgender employee may require leave time for any desired medical procedures. Employers should address any such leave requests following the company's usual procedures for leave time. In addition, employers must respect a transgender employee's right to privacy. Employers cannot request unnecessary disclosure of medical information, for example. Transitioning is a very personal process and is different for each transgender individual. Some may be very open with their progress and decisions, while others may be more hesitant to share details. Ultimately, transgender employees have the right to be who they are without unnecessary intrusion into their privacy, just like everyone else.

6 Some types of employment records—payroll or other documents connected with an employee's social security number, for example—may require evidence of a legal name or gender marker change before alterations can be made.