

HR STORIES FROM THE FRONT LINES*

SCOTT BECOMING SALLY

TREATMENT OF TRANSGENDER EMPLOYEES IN TODAY'S WORKPALCE



Becky is the HR manager for a large distribution center. Monday morning one of her warehouse employees comes to her to discuss his/her transition from a man to a woman. He explains that he would like to use the name Sally (instead of his legal name, Scott), beginning immediately. Additionally, he will begin to dress in feminine clothing at work. He would also like Becky to have a conversation with his supervisor Kyle about his transition. He goes on to explain that he will require two weeks off from work next month for medical reasons related to his transition. He also explains that he plans to use the female restroom when he returns from leave, and he's concerned over how his colleagues will react to the transition.

Becky stares blankly back at Scott/Sally and attempts to process what he has just told her. Scott has worked as a shift-lead in the warehouse for 10 years. He works exclusively with men and performs labor intensive work. Becky is speechless. Maybe because she's nervous or maybe because she's insensitive, she breaks out in laughter. She looks at Scott and says, "Very funny! Which one of the guys put you up to this?" Scott/Sally lowers his head and tells you this is no joke, he has always felt like a women and he is finally going to become one. He then storms out of Becky's office.

Question: Do I have to accommodate gender transition?

Answer: Yes.

Not knowing what to do or what she has to do, Becky jumps online to do some research. She visits the Equal Employment Opportunity Commission's (EEOC) website. The EEOC is the federal agency in charge of enforcing the majority of federal discrimination and harassment laws.

The EEOC indicates that employers are obligated to avoid discriminating against, harassing or retaliating against employees due to their gender identity or expression, change of sex and/or transgender status. In this case, it would be unlawful to terminate Scott's employment due to his transgender status.

Similarly, transgender employees must be treated the same as any other employee in a similar circumstance. Therefore, if you would normally approve a non-transgender employee to take a two week medical leave of absence, then it would be discriminatory to deny Scott's request.

Becky should grant Scott/Sally's request. Applicable state or local laws may also require a reasonable accommodation, including a leave of absence.

Question: Who should be notified?

Answer: Keep the information confidential, unless the transitioning employee asks otherwise.

This information should be kept confidential and treated the same as you would any medical information. The personal preference and privacy of the transitioning employee should also be considered.

Here, Scott/Sally has asked that Becky tell his immediate supervisor, Kyle. Becky should ask Scott/Sally what he would like Kyle to know and also encourage him to talk to Kyle. During the discussion with Kyle, Becky should make sure that he understands that discrimination, harassment or retaliation will not be tolerated. Furthermore, the company expects that Kyle will set the example for the other employees.

The transitioning employee may prefer to take an active role in informing co-workers, while some may ask the HR professional to take the lead. Some transgender employees feel comfortable sharing with colleagues while some may not. Becky will also want to consider a transitioning worker's privacy in determining who to notify and the details to provide. It will be important to discuss with Scott/Sally about if and when he would like Becky to inform other employees about his transition and what information he wants to provide.

Questions: Do I have to let Scott/Sally use the female restroom?

Answer: Best practice, yes!

The EEOC has determined that failing to allow Scott/Sally to use the female restroom may be considered discriminatory or harassment based on his/her transgender status.

The best practice would be to allow a transgender employee to use the restroom that corresponds with the person's gender identity and gender presentation. Some state laws may require this as a matter of law.

If however, Scott/Sally expresses that he/she is more comfortable using a gender neutral restroom, you may want to consider making one accessible. Caveat! Becky should not require Scott/Sally to use a gender-neutral restroom because a colleague complains about having to share with a transgender person.

Question: Can the transgender employee be disciplined for violating the dress code policy?

Answer: It depends.

Generally, you would not want to discipline a transgender employee for dressing based on his or her gender identity. It may be considered discriminatory according to EEOC and state or local EEO laws.

Kyle should not discipline Scott/Sally for dressing in female clothing.

However, an employer is still within his rights to have standards of professional appearance regarding all employees. Therefore, if the company dress code does not allow employees to wear tank tops, but Scott/Sally does, it would be appropriate to discipline him/her for violation of the dress code policy, as long as your past practices dictates such. The key is to treat all employees the same.

Becky will want to emphasize with Kyle that consistent treatment with gender identity will be important. If your company's dress code is gender specific you may want to update it to be gender neutral to minimize your risk.

Question: What policy or practice changes are recommended?

Answer: Review your company's nondiscrimination and anti-harassment policies. Make sure these policies specifically address gender identity and expression. Additionally, review other policies and practices to ensure they are consistent with gender identity and expression, for example appearance and dress code policies.

Also, train new and existing employees on gender identity and expression policies in the workplace, emphasizing the company's zero-tolerance policy for transphobic behavior.