



Maine Human Rights Commission
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Memo

Date: September 10, 2013

To: Jill C. Duson, Compliance Manager

From: John P. Gause, Commission Counsel 

Re: Advisory Opinion – Employee Bathroom Access

We have been asked the following question:

We have an employee who is legally male. He has decided in the past month or so to present himself to society as a female and has come to work dressed as such. Our employees have been supportive with very few concerns. Any questions or concerns raised were easily resolved with no residual issues. This employee was continuing to use the male restroom with no issues. Recently, however, he started to use the female restroom a couple of times. At this point there were concerns raised by other female employees who were not comfortable with this. We did not tell him to cease, however, he did resume using the men's room.

My question is, what are our obligations for an employee who is cross-dressing, with no intent to go into transition as stated by him, with regard to restroom use? I understand that States can support various directions and in some cases there are laws associated with what is required. Unfortunately, I'm not sure what the State of Maine's position is on this subject.

Would you please take some time and provide some guidance on how we can address this so that we can create an environment that is not discriminatory for this employee but yet not uncomfortable for the others?

Answer:

An employer has an obligation to make a "reasonable accommodation" for an employee's "gender identity" or "gender expression." Our employment regulations

define “gender identity” and “gender expression” as follows:

The term “gender identity” means an individual’s gender-related identity, whether or not that identity is different from that traditionally associated with that individual’s assigned sex at birth, including, but not limited to, a gender identity that is transgender or androgynous.

The term “gender expression” means the manner in which an individual’s gender identity is expressed, including, but not limited to, through dress, appearance, manner, speech, or lifestyle, whether or not that expression is different from that traditionally associated with that individual’s assigned sex at birth.

MHRC Employment Regulation § 3.02(C)(2, 3). Available online at

<http://www.maine.gov/mhrc/laws/index.htm>. It is not necessary that a person who is legally male have gender-reassignment surgery or other medical intervention in order to have a female “gender identity.” Rather, what is important is a person’s internal sense of being male or female. The term “gender expression” is limited to the manner in which a person’s “gender identity” is expressed; it does not include the expression of a gender that is different from a person’s “gender identity.”

The “reasonable accommodation” obligation is as follows:

F. Obligation to Make Reasonable Accommodations

(1) It is an unlawful employment practice for an employer, employment agency, or labor organization to fail or refuse to make reasonable accommodations in rules, policies, practices, or services that apply directly or indirectly to gender identity or gender expression, unless the covered entity can demonstrate that the accommodations would impose an undue hardship on the conduct of the business of the covered entity. . . .

(3) [T]he burden of proof on the issue of whether the accommodations would impose an undue hardship is on the employer, employment agency, or labor organization. Resolution of such cases depends on the specific factual circumstances and involves a balancing of the needs of the applicant, employee, or labor organization member with the degree of hardship imposed on the covered entity’s business operation.

MHRC Employment Regulation § 3.12(F).

Here, whether the employer would have an obligation to allow the employee to access the women’s restroom would first depend on whether the employee has a female “gender identity” or is transitioning to a female “gender identity.” If the employee has a female “gender identity” or is transitioning to one, the employer would need to provide a “reasonable accommodation,” which would probably mean allowing the employee to use the women’s restroom. Each “reasonable accommodation,” however, should be dealt with individually. If the employee does not have a female “gender identity” and is not transitioning—meaning the employee is legally male and has a male “gender identity”—the employer would not have to provide a “reasonable accommodation” and could permissibly refuse to allow the employee access to the women’s bathroom.

Cc: Amy M. Sneirson, Executive Director