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A weighty issue

Discrimination on the basis of physical size may become the next big human rights issue

BY ASHLEY BROWN

THE TERM "fat-shaming" is commonly used to describe an act of ridicule or humiliation based on a person's physical size. The scathing critiques Lady Gaga received after this year's Super Bowl performance provide one of the most recent high-profile examples. The numerous and varied public responses elicited by these critiques also illustrate it is an issue that triggers lively and heated debate.

Weight as a protected ground

While differential treatment on the basis of size is an issue that has garnered much attention in the news and social media, it is also a topic that has recently been presented for legislative deliberation. Bill 200 was recently tabled in Manitoba seeking to amend that province's Human Rights Code to include "physical size or weight" as a protected ground.

Bill 200 passed first reading in November of 2016. If the bill receives royal assent, Manitoba will be the first Canadian jurisdiction to explicitly prohibit discrimination on the basis of physical size or weight. It may not be the last province, as various advocacy groups across Canada are calling for similar legislative change. Should physical size or weight be included as an enumerated ground, an employer will be required to demonstrate any discrimination on this basis is justified as a bona fide occupational requirement, and the individual's personal characteristics cannot be accommodated to the point of undue hardship — a difficult threshold to meet. A bona fide occupational requirement might be, for example, the requirement for all flight attendants be able to reach to a certain height. This qualification, while it may have an adverse impact on applicants of shorter stature, is justified on health and safety grounds, as the applicant would be required to reach emergency equipment.

Regardless whether physical size or weight becomes an enumerated ground protected under Canadian human rights law, employers should know that adjudicators have already admonished this type of prejudicial treatment.

Decisions that carry weight

In *Shinozaki v. Hotlomi Spa*, a 2013 Ontario human rights case, the employer was found to have discriminated against the employee, a masseuse, in part because of comments made about her physical appearance. When the employee announced her pregnancy, the employer subjected her to a barrage of negative comments including that she was "looking heavier," was "fat," and her "body tone changed." The tribunal found the employer's comments, and subsequent dismissal of the employee, were based on a view the employee's pregnancy — and associated weight gain — made her a less desirable masseuse. This amounted to discrimination on the basis of sex.

Disparaging remarks or differential treatment based on a person's weight can also be evidence of discrimination or harassment on the basis of a real or perceived disability. In *Johnson v. D & B (Diane & Brenda) Traffic Control*, the employee, a flagger on construction sites, was denied a job assignment because his employer believed the employee's weight would prevent him from standing for long periods of time. The B.C. Human Rights Tribunal held the denial of the job assignment was a form of discrimination on the basis of a perception the employee was a person with a disability.

Protection against psychological harassment

In addition to human rights liability, most occupational health and safety legislation across Canada imposes a positive obligation on an employer to implement policies that prohibit generalized psychological harassment and detailed procedures to address occurrences that may arise in the workplace.

Harassment is commonly defined as "commentary or conduct that is known or ought to be known to be unwelcome." In some cases, this may include comments or differential treatment based on a person's weight, size…or any other physical attribute.

Boucher v. Wal-Mart, a 2014 Ontario wrongful dismissal case, saw the employer face hefty damage awards totalling upwards of $400,000 in large part because of its failure to properly investigate and address humiliating, demeaning and belittling comments by a supervisor toward one of his employees. The harassing commentary was not based on the employee's weight or size; rather on her level of intelligence. Nevertheless, the decision sounds a warning bell to employers.

Boucher predates the Bill 132 amendments to Ontario's Occupational Health and Safety Act (OHSA), which imposed a positive obligation on employers to conduct an investigation once aware of a complaint or occurrence of workplace harassment. Had Walmart's conduct taken place today, the retail giant may have also been charged with violating the OHSA and faced significant additional penalties.

Practical tips for employers

To minimize the risk associated with a complaint based on weight or physical size, consider the following practical tips:

- Implement clear policies and procedures that prohibit harassment on the basis of any protected ground, as well as generalized psychological harassment. Where possible, it is helpful to provide an example of prohibited conduct to avoid uncertainty.
- Regularly train and educate all staff (including workplace leaders) to ensure everyone is aware of the policies and procedures, as well as expected standards of behaviour.
- Address issues early and proactively. If and when you become aware of inappropriate commentary or conduct on the basis of weight or physical size, address it.
- Investigate complaints promptly and thoroughly, following the established procedures set out in any existing policy.
- Take timely and appropriate corrective action to deal with the root of any problem uncovered, and restore workplace balance.

For more information see:

- *Shinozaki v. Hotlomi Spa*, 2013 HRTO 1027 (Ont. Human Rights Trib.).
- *Johnson v. D & B (Diane & Brenda) Traffic Control*, 2010 CarswellBC 2988 (B.C. Human Rights Trib.).
- *Boucher v. Wal-Mart*, 2014 CarswellOnt 6646 (Ont. C.A.).