

CANADIAN Employment Law Today

Disability in the workplace: Perception matters

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Employers in all jurisdictions across Canada have a legal obligation to protect their employees from discrimination against various grounds under human rights legislation. Disability is one of those protected grounds. But discrimination is not limited to whether or not an employee actually has a disability.

Courts have found that the act of discrimination is something that can happen regardless of the circumstances. An employer may think it's acting proactively when it takes action to deal with an employee it thinks has a disability, but if that employee doesn't actually have one, look out. Employment lawyer Ashley Brown discusses the difference between perception and

reality when it comes to accommodation and discrimination.

Disability is a prohibited ground of discrimination under human rights legislation across Canada. However, a lesser known fact is that differential treatment on the basis of a perceived disability — regardless whether the disability actually exists — may also land an employer in hot water.

Human rights legislation in Ontario, Manitoba, Nova Scotia, Newfoundland and Labrador, the Northwest Territories and Nunavut explicitly provides that “perceived,” “presumed,” or “believed” disabilities are included among the prohibited grounds of discrimination.

Even in jurisdictions without such explicit statutory language, human rights tribunals, arbitrators and courts have acknowledged that a failure to recognize perceived disability as a prohibited ground undermines the objectives and protections afforded by human rights legislation. As early as the mid-1980s, the Supreme Court of Canada recognized discriminatory treatment is not limited to the drawing of distinctions based on a person's actual characteristics, but also distinctions drawn on characteristics that are either knowingly or unwittingly attributed to an individual — which may be equally as reprehensible.

That a perceived disability can provide the basis for a discrimination complaint is therefore not a new legal concept. Yet, understanding how one's perception of another can translate into legal liability can be a difficult concept to grasp. A handful of recent decisions from various jurisdictions across Canada illustrate why and how perception matters in the context of disability in the workplace.

Perceived alcohol addiction: C.R. v. Canadian Mental Health Association

In this Manitoba decision, the employee had worked for the Canadian Mental Health Association (CMHA) for a number of years. At the time of her hire, she advised CMHA that she suffered from depression and was undergoing radiation treatment for cancer.

Over the course of her employment, CMHA also became aware of the employee's periodic bouts of excessive alcohol consumption or "binge drinking." However, there was no indication these issues affected her work performance.

To the contrary, by all accounts the employee was well-liked by her peers, good at her job and had never been given negative feedback about her work or her conduct.

Around the time the employee was scheduled to attend a CMHA national conference, she encountered a number of significant stressors, of which her employer was aware. Both of her daughters passed away, the basement of her apartment flooded, she was working 50-hour weeks and was on-call 24 hours a day.

The day before she was set to travel to the conference, she phoned in sick. Although there was nothing to suggest she had been on a drinking binge, her employer suspected as much and proceeded to cancel her flight and travel arrangements for the conference.

Thereafter, the employee went on a combination of sick leave and vacation for about two weeks. Upon her return, she was asked about a \$500 float she had been given to pay for her conference expenses. She acknowledged having forgotten about the money and repaid it the same day. Nevertheless, the CMHA terminated her employment on the basis she had misappropriated funds.

The Manitoba Human Rights Board of Adjudication ruled the employee had been treated adversely in her employment as a result of a perceived disability, namely the perception she was an alcoholic. This treatment, the board found, left the complainant feeling harassed, intimidated and, ultimately, out of a job. She was awarded damages of nearly \$6,000 for lost wages and compensation for injury to her dignity.

Perceived limitations due to obesity: *Johnson v. DeB Traffic Control*

In this British Columbia decision, the employee was a flagger on construction sites.

When he asked his employer why he had not been assigned to a new worksite, he was told it was because of "his disability." The employee was overweight at the time of his hire and continued to struggle with obesity. Yet his weight had not limited his ability to perform his assigned duties and responsibilities, nor had he provided his employer medical documentation to suggest he had a disability requiring accommodation.

The B.C. Human Rights Tribunal ruled that although the complainant did not have a disability, his employer perceived that he did and, as a result, subjected him to differential treatment on this basis. As in the Manitoba decision, the tribunal awarded the employee \$2,000 in damages for injury to dignity, feelings and self-respect.

Perceived risk of liability: *Judd v. Stangl's Enviro Lawn Care*

Unlike the Manitoba and B.C. decisions, in this Ontario decision the employee did in fact have a number of diagnosed disabilities. Yet it was the employer's unsupported concern for the potential risk of liability resulting from those disabilities that ultimately got it into trouble.

The employee was born with several congenital disabilities. He had six fingers, one short leg and one short arm, he was missing an ACL joint and had a malformed ankle. Despite these disabilities, he worked for the employer as a member of its landscaping crew for about one month, fulfilling his assigned duties and responsibilities ably and safely. One day his immediate supervisor approached him and asked: "With the way you are, can you do the job?" The employee assured his supervisor he could do the job and, in fact, there was no evidence to suggest otherwise. Nevertheless, his employment was terminated the following day.

The Human Rights Tribunal of Ontario found the termination was motivated by the employer's admitted — though unsubstantiated — concern that the employee's continued employment could result in a workplace injury and associated worker's compensation claims. The employee was awarded \$14,000 in lost wages and as compensation for injury to his dignity.

Practical tips

That a perceived disability can provide the basis for a human rights discrimination complaint can present challenges for employers.

On the one hand, most employers appreciate the range of relevant human rights issues and want to do right by their employees, while at the same time manage a productive and profitable operation. On the other hand, where an employee appears to have a disability but has not sought accommodation in the workplace, an employer can find itself in a difficult situation. To minimize the risk of liability associated with discrimination on the basis of perceived disability, consider the following tips:

Do not assume: If an employee's work is being done satisfactorily, and there is no other reason to believe he requires accommodation, there is generally no basis to inquire further. Presupposing an employee is limited or restricted by his personal characteristics and treating him differently on the basis of such assumption — however well-intentioned — is a recipe for a human rights complaint.

Do not act unilaterally: In any accommodation process, the employee has a positive responsibility to participate. Unilaterally imposing accommodation or modified work conditions without involving the employee

in the process should therefore be avoided.

Make inquiries where appropriate: In most cases, it is the employee's duty to request accommodation where he needs it. That said, where legitimate and objectively-based concerns exist with respect to an employee's ability to safely fulfill his job duties, the employer may have a separate and distinct legal obligation to inquire as to whether the employee has a disability and, if so, if he requires accommodation. These are often sensitive discussions and, in most cases, it is advisable to seek legal advice before acting.

Training: The fact that perception matters in the overall landscape of human rights is one that is often overlooked. Your management team should receive human rights training, including how to accommodate persons with disabilities, and how to avoid issues associated with discriminatory perceptions, views and opinions.

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