Blaney McMurtry LLP

PUBLICATION

Gender Identity and Gender Expression Under the Human Rights Code: One Year Later

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In the July 2012 edition of the Blaney's Employment Update, we reported on Bill 33, an Act to amend the *Human Rights Code* (the "*Code*"), which expanded the list of enumerated grounds to include gender identity and gender expression. While the amendment did not define these terms, its stated purpose was to protect transgendered individuals.

So where are we one year later?

Vanderputten v. Seydaco Packaging Corp., 2012 HRTO 1977 (CanLII) is one of the first decisions from the Human Rights Tribunal of Ontario to discuss gender identity and gender expression since the amendment to the *Code*. However, because the Tribunal was dealing with the pre-2012 *Code*, the applicable enumerated ground at issue was sex and the Tribunal followed other cases confirming that discrimination due to sex includes gender identity and expression.

Facts

The applicant was hired in 2003 as a general labourer. At that time, the applicant lived as a man. Due to a number of interpersonal conflicts with co-workers the applicant's employment was terminated. The applicant asked for her job back and was rehired shortly thereafter. Upon her return to work, the applicant continued to have disciplinary problems related to aggressive behaviour and the occasional failure to follow plant policies.

In 2008, the applicant began the transition from living as a man to living as a woman, and was accepted into the gender identity clinic at the Centre for Addiction and Mental Health.

The employer became aware of the applicant's transition when the applicant began to attend work wearing women's clothing. The employer advised that until the applicant provided legal or medical documentation establishing that she was a woman, she would continue to be treated as

a man; this included requiring her to use the men's change room despite the applicant's complaints of harassment.

The applicant also complained that she was experiencing general harassment from other employees through derogatory comments as well as notes and pictures posted on the plant's bulletin board. The employer responded to the material posted on the bulletin board by introducing a workplace code of conduct. With respect to the incidents of interpersonal conflict with co-workers, the employer took the position that the incidents the applicant described as harassment were, in fact, instigated by the applicant. The applicant was dismissed from employment following one such incident.

Decision

GENDER IDENTITY DISCRIMINATION

The Tribunal adopted the following passage from the Ontario Human Rights Commission's *Policy on discrimination and harassment because of gender identity*:

Gender identity is linked to an individual's intrinsic sense of self and, particularly the sense of being male or female. Gender identity may or may not conform to a person's birth-assigned sex. The personal characteristics that are associated with gender identity include self-image, physical and biological appearance, expression, behaviour and conduct, as they relate to gender.

At birth, a child is assigned a gender by a health care professional based on observation of the child's genitalia. Society makes the assumption that based on this medical assessment a child will grow up to exhibit correspondingly masculine or feminine behaviours and appearances. However, this is not always the case. A person's felt identity or core identity may differ in part or in whole from their birth assigned sex. Individuals whose birth-assigned sex does not conform to their gender identity include transsexuals, transgenderists, intersexed persons and cross-dressers.

A person's gender identity is fundamentally different from and not determinative of their sexual orientation.

The Tribunal ultimately held that the employer's position that the applicant be treated as a man until she provided medical or legal proof that she was a woman constituted discrimination as it failed to consider the applicant's needs and identity. Once the applicant advised the employer about the problems she was experiencing, the employer should have explored alternate solutions with the applicant. The Tribunal also found that the employer's investigations were one-sided. The Tribunal acknowledged that while the applicant may have been a difficult employee with a history of workplace misconduct, "it is not an answer to the allegations of harassment to suggest that the applicant had committed other workplace misconduct or that she was sometimes aggressive with other employees".

In concluding that the applicant's gender identity was a factor in her dismissal from employment, the applicant was awarded $22,000 in recognition of the serious violations of the *Code* as well as 8 months lost wages. The employer was ordered to implement a human rights policy with a mechanism to address complaints. The applicant did not seek reinstatement.

Important Points

This case illustrates the need for employers to take steps to inform themselves about transgenderists and their corresponding human rights obligations.

It also affirms again the importance of fulsome investigations addressed in an impartial manner.