

Employment & Labour Seminar

How to Support Transgender Employees

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Agenda

- Transgender Discrimination
- Definitions
- Ontario Human Rights Commission Policy on Gender Identity and Gender Expression
- Duty to Accommodate
- Hiring
- Transitioning Employees
- Workplace Policies
- Identity Documents
- Washrooms and Change Rooms
- Dress Codes
- Customers

Where are we now

A lot has happened in the last few years



Ontario
Human Rights Commission
Commission ontarienne des
droits de la personne

April 2014:
The Ontario Human Rights Commission publishes its *Policy on preventing discrimination because of gender identity/expression*



June 2014:
A transgender actress makes it onto the cover of *Time* magazine

March 2015:
Saks Fifth Avenue settled a transgender discrimination lawsuit in Texas. Utah became the 19th state to prohibit discrimination based on gender identity.



April 2015:
Caitlyn Jenner comes out

March 2016:
North Carolina signs into law the *Public Facilities Privacy & Security Act*

March 2016:
Obama issues federal bathroom directive

May 17, 2016:
The Liberal government introduces legislation which would make it illegal under the CHRA to discriminate based on gender identity and gender expression. It would also update the Criminal Code hate speech laws to extend to gender identity and expression.

2014

2015

Now

Transgender Discrimination

- In Ontario, the Trans PULSE Project found:
 - 18% of respondents said they were turned down for a job because of their trans identity
 - 13% said they were fired from their job or constructively dismissed because they were trans
 - 98% reported at least one experience of transphobia
 - over 25% experienced physical violence because they were trans
 - almost 75% had been made fun of for being trans

Definitions

- **Gender Identity** – a person's internal and individual experience of gender; a person's sense of being a woman, man, both, neither or anywhere along the gender spectrum (gender identity may be the same as or different from birth-assigned sex)
- **Gender Expression** – how a person publicly expresses or presents their gender including dress, hair, makeup, voice and body language, chosen name and pronoun
- **Trans or Transgender** – umbrella term referring to people with diverse gender identities and expressions that differ from stereotypical gender norms; it can include trans woman, transgender, trans man, transsexual, gender non-conforming, cross-dressers
- **Lived Gender Identity** – the gender a person feels internally and expresses publicly in their daily life, including at work and when accessing services, such as shopping

The Law

Ontario Human Rights Code

- Prohibited grounds include sex, sexual orientation, gender identity, gender expression

Bill C-16 will amend the Canadian Human Rights Act and Criminal Code hate crimes provisions

- CHRA currently prohibits discrimination on the basis of sex, sexual orientation
- Bill C-16 adds gender identity and gender expression
- Bill C-16 had First Reading on May 17, 2016

Ontario Human Rights Commission

Policy on Preventing Discrimination because of Gender Identity and Gender Expression (2014)

The Policy in a Nutshell:

- The policy accepts that transgender people are among the most disadvantaged groups in society who routinely experience discrimination, harassment and even violence.
- The Human Rights Code was amended in 2012 to add gender identity and gender expression to prohibited grounds of discrimination and harassment in employment (as well as facilities, services, contracts, etc.).

Key:

- For legal and social purposes, a person whose gender identity is different from their birth-assigned sex should be treated according to their lived gender identity

Duty to Accommodate

- Usual duty to accommodate, short of undue hardship, applies
- Person seeking accommodation needs to cooperate in process and provide relevant information
- Many accommodations will relate to physical design
- Best achieved upfront through inclusive, universal design
- Accommodations need to promote person's integration, respect for dignity, individualization and full participation
- Many trans employees will not require any accommodation
- Keeping information about trans identity confidential is critical

Hiring

- Avoid discrimination at the hiring stage against gender non-conforming applicants which may be caused by appearance, dress or the gender stated on an identity document or prior work experience

Micheline Montreuil v. National Bank of Canada (2004)

- transgendered applicant progressed through 3 levels of job interviews
- seriously over-qualified for the part-time call centre role in question
- her driver's license and passport, which had been submitted with her resume, showed her gender as male
- pursuant to the employer's employment equity policy, she also filled in a self-identification questionnaire and self identified as transgendered
- at interview, applicant was frank about her trans status and provided a document called "Firms that Officially Accept Transgendered"

Hiring(cont'd)

- interviewers at third stage recommended that it would be “risky” to hire the applicant
- three weeks after the final interview media reported on a court decision confirming that her driver’s license would not be corrected
- employer had an annual turnover of 20%-30% in the call centre and ran an ongoing search for call centre employees
- employer believed applicant was willing to take an entry level position because she wanted to be a “pioneer” and was looking for a “platform”
- Tribunal concluded that complainant’s sex was a factor in the decision to refuse to hire her

The Transitioning Employee

- Trans employees are particularly vulnerable as they begin to transition to the felt gender identity
- This is a stressful situation in any event, partly due to their experience and fear of harassment
- Accommodations at this point can include time off for surgery or to prepare to return to work presenting in their new gender, changing one's name in company directories, arrangements for washroom use, providing education and training for other employees

The Transitioning Employee

Maria Vanderputten v. Seydaco Packaging Corp. and Gerry Sanvido
(2012)

- complaint filed at HRT0 against employer and lead land
- employee was harassed, experienced poisoned work environment and was dismissed while transitioning from living as a man to living as a woman
- the applicant had anger management issues and had been disciplined (both previously as a man and as a trans man to woman) for anger and interpersonal conflicts
- after she was accepted at the gender identity clinic at CAMH and qualified for reconstruction surgery following hormone treatment, she began dressing as a woman before changing into the gender-neutral jumpsuit that employees wore on the plant floor and often wore make-up

The Transitioning Employee (cont'd)

- she asked the company a number of times to modify her shift time so that she could change alone in the change room to avoid comments and harassment from male employees
- she was subject to a number of comments, name-calling and harassment by male employees including being called faggot, fruitcake, being pushed, shoved and having things thrown at her
- a newspaper clipping was posted on the bulletin board of a transvestite with her name written on it
- the company held a staff meeting and had all employees sign a Code of Business and Conduct Ethics and meetings were held to discuss the Code with all employees
- company insisted that she be treated as a man in all respects until she completed her surgery

The Transitioning Employee (cont'd)

- the Tribunal found that employer failed to listen to her side when investigating incidents
- the Tribunal noted the extremely vulnerability and general prejudice in society that transgendered people face
- she was not allowed to change her shift time to avoid changing with men
- she was required to continue to use the men's change room during her transition
- a poisoned work environment was found to exist

The Transitioning Employee (cont'd)

- insisting that a person be treated in accordance with the gender assigned at birth for all employment purposes is discrimination because it fails to treat that person in accordance with their lived and felt gender identity
- the employer failed to consider or explore any solutions that would have allowed her privacy while changing
- discrimination was also found due to the company's failure to ensure a safe work environment for the employee and to respond adequately to her complaints of harassment, including the failure to properly investigate
- Tribunal noted that despite having an openly transgendered employee in their plant for several years, management made little or no attempt to inform itself about the issue

The Transitioning Employee (cont'd)

- the company was ordered to pay \$21,000 in damages
- lead hand was personally required to pay \$1,000 in damages
- lost wages were ordered
- the employer was ordered to retain an expert in human rights to assist in the development and implementation of an anti-harassment policy
- training to be provided by an expert to all management employees

Organizational Policies

- Employers should have an accommodation policy and procedure
- Anti harassment and anti discrimination policies
- An internal complaints procedure
- An education and training program
- Ongoing monitoring and evaluation
- In addition, employers should consider developing policy/procedure to deal with the specific needs of transitioning employees relating to transition, identity documents, washrooms and change facilities, privacy and confidentiality
- Accommodation may require temporary access to private single-user washrooms and change rooms, time away from work for medical procedures or other activities to support their transition

Identity Documents

- Employers need a valid reason for collecting and using personal information that identifies a person's gender and should keep this information confidential
- an employer should be willing to recognize a person's chosen name and lived gender identify (including with or without surgery)
- OHRC policy states that an organization “would need a serious reason to doubt someone's self-identified gender”

Washrooms and Change Rooms

- OHRC policy is that trans people have the right to access segregated washrooms, change rooms and locker rooms based on their lived gender identity
- Policy also states that a trans person should not be required to use a separate washroom or separate change room because others are expressing transphobia or discomfort; instead education and awareness will be required
- However, during the transition process, a trans employee may request access to a single-user gender neutral accessibility washroom
- With AODA and changes to Ontario Building Code we will see more single-user gender neutral washrooms in Ontario
- Inclusive washrooms and change rooms need to be accessible and safe for everyone and can include accommodations such as individual shower and changing stalls with curtains or doors; gender neutral single-user washroom; gender neutral multi-stall washrooms; universal washrooms

Dress Codes

- Dress codes and dress requirements should not negatively affect trans people
- Specific dress requirements including uniforms need to be genuine and reasonably necessary and not based solely on gender stereotypes
- Dress code policies need to be inclusive
- Employers must allow trans employees and other gender non-conforming employees to dress according to their expressed gender
- The best solution is a dress code that is gender-inclusive and flexible

A Few Words about Customers

- Long standing Ontario case law
- Negative reactions of customers is not a defense to discrimination

Jenny's Bridal Boutique (Sask. mediated settlement, 2013)

- transgendered shopper wished to try on wedding gowns
- staff refused to serve her and she was asked to leave
- store owner said customers would feel uncomfortable
- considered a denial of service under Saskatchewan Human Rights Code
- store owner agreed to make charitable donations as a settlement

London Sales Arena Corp. (HRTO, 2014)

- applicant had rented a retail sales booth at a market for a number of years where she sold candles
- one day she had her booth staffed by friends who were openly trans

A Few Words about Customers (cont'd)

London Sales Arena Corp. (2014) – cont'd

- another vendor claimed she lost sales because people walked away from her booth due to discomfort in the presence of a trans person looking at items in her booth
- owner of the market publicly stated that it was a family market, he did not have washroom facilities for “these people” and referred to the applicants as “people like that”
- renter of booth had been told to either remove the transgendered employees from her booth or take her business elsewhere
- discrimination found
- damage awards of \$5,000, \$10,000 and \$20,000 were issued to the four applicants, Human Rights Code cards must be posted throughout the market, owner must have management staff take Commission’s training program

Resources

- Policy on preventing discrimination because of Gender Identity and Gender Expression – Ontario Human Rights Commission (<http://www.ohrc.on.ca/sites/default/files/Policy%20on%20preventing%20discrimination%20because%20of%20gender%20identity%20and%20gender%20expression.pdf>)
- Creating Authentic Spaces – The 519 (<http://www.the519.org/education-training/training-resources/trans-inclusion-matters/creating-authentic-spaces>)

QUESTIONS?

Thank you

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