CANADIAN HR Reporter
THE NATIONAL JOURNAL OF HUMAN RESOURCE MANAGEMENT www.hrreporter.com JUNE 16, 2008
A Carswell Business Publication

Accommodation goes beyond disability

Workplace rules may apply equally to all employees but could discriminate against those with pressing family obligations

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When employers think accommodation, they usually think disability. But there is another lesser-known angle when it comes to accommodating workers: Family status.

And family status is only going to become more important, with the rise in families in which both parents work and an aging population that is creating a growing need for elder care.

Ontario's human rights legislation, like similar laws across the country, prohibits certain types of workplace discrimination. Family status is one type of protected ground for which there has been little judicial guidance.

What is family status?

In Ontario, family status is defined as "the status of being in a parent and child relationship." Because human rights legislation is broadly worded, adopted children, stepchildren and foster children qualify, as do individuals who assume the role and obligations of a parent. Whether this definition will be applied to grandparents and other extended relationships is doubtful.

What constitutes unlawful discrimination?

Requiring all employees to start at 8:30 a.m. may not appear to discriminate because it applies to everyone. However, such a rule can adversely affect employees with family commitments. A parent may be unable to co-ordinate a daycare schedule with her work schedule. The question facing an employer is whether or not it is required to relax the work schedule.

The duty to accommodate has been expressly stipulated under the Ontario Human Rights Code with regard to accommodation of disabled employees, but there is no explicit reference to family status. While this might suggest there is no duty, the Supreme Court of Canada has made it clear that, whether mentioned in human rights legislation or not, a duty to accommodate can arise in the context of most prohibited grounds of discrimination.

The three-step test

When evaluating whether a workplace rule might run afoul of human rights legislation, employers should determine whether:

- the rule is rationally connected to the performance of the job;
- the rule was adopted in a good-faith belief it was necessary to the fulfilment of a legitimate work-related purpose; and
- it is impossible to accommodate an employee adversely affected by the rule without causing the employer undue hardship.

When is the need for accommodation triggered?

In *Campbell River & North Island Transition Society v. H.S.A.B.C.*, the British Columbia Court of Appeal found the duty to accommodate is triggered if a workplace rule "results in serious interference with a substantial parental or other family duty or obligation of the employee."

The court recognized family demands create many potential requests for accommodation, but only the more pressing ones will trigger a legal right. A parent's wish to leave work early to attend a child's soccer practice will not be sufficient. But a parent's need to accompany a severely handicapped child to school will likely meet the test.

Generally, when an obligation is one only the parent can fulfil, and one that can only be satisfied by revision of a workplace rule, a duty to accommodate will likely be triggered.

If an employer is asked to accommodate an employee on the basis of family status, it would be advisable to show an open mind. Failure to do so has been the trigger for many human rights complaints. The employer should collect all available information and allow the employee an opportunity to explain why her particular circumstances constitute a substantial obligation and in what manner the workplace rule seriously interferes.

Accommodation and undue hardship

An employee who requests accommodation has a duty to participate in exploring all solutions. As well, an employer is justified in limiting accommodation to the minimum of what is required to meet the employee's need. After all, the duty to accommodate is not a duty to provide perks to an employee.

However, the onus is on the employer to demonstrate accommodation will result in undue hardship and it will be held to a stringent level of proof.

There are several circumstances in which family status may have to be accommodated. If an employer has strict rules in terms of scheduling or changing shifts, these may have to be revisited. An attendance management program must be administered in a way that does not punish an employee for an absence caused by family obligations.

If family status or another protected ground for discrimination comes into play, an employer may be required to accommodate beyond the minimum standards provided under employment standards legislation, such as an employer failing to consider an employee with caregiving responsibilities for promotion.

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