

# MANAGEMENT COUNSEL

Employment and Labour Law Update



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.

## A Weighty Issue: Discrimination on the Basis of Physical Size

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.



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### Proposal to Include "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.

*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. However, it may not be the last province, as various advocacy groups across Canada are calling for similar legislative change.*

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. However, 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.

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A *bona fide* occupational requirement might be, for example, the requirement 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 if needed.

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. Holtomi Spa*, heard before the Human Rights Tribunal of Ontario in 2013, 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 termination of the employee’s employment, were based on a view the employee’s pregnancy – and associated weight gain – made her a less desirable masseuse. This, the tribunal held, amounted to discrimination on the basis of sex.

*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.*

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. *Johnson v. D&B Traffic Control* was heard before the British Columbia Human Rights Tribunal in 2010. The employee, a flagger on construction sites, was denied a job assignment because his employer believed the employee’s weight would prevent him

## DID YOU KNOW?

In Ontario, when a worker is injured or disabled on the worksite as a result of workplace violence and seeks medical attention, the employer has an obligation to report the incident to the health and safety committee (or health and safety representative) and trade union, if any, within four (4) days. In addition, the employer could (if required by an Inspector from the Ministry of Labour) have a duty to report to the Ministry within the same timeframe.

To learn more refer to s.52 of the *Occupational Health and Safety Act*, or contact the health and safety experts at Sherrard Kuzz LLP.

from standing for long periods of time. The 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 the risk of human rights liability, most occupational health and safety legislation across Canada imposes a positive obligation on an employer to implement: (i) policies that prohibit generalized psychological harassment, and (ii) 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, for that matter.

*Boucher v. Walmart*, a wrongful dismissal case heard in 2014 before the Court of Appeal for Ontario, 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 having violated 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 so as 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 or collective agreement.
- **Take timely and appropriate corrective action** to deal with the root of any problem uncovered, and restore workplace balance.

*For more information and assistance, contact the employment law experts at Sherrard Kuzz LLP.*

## Workplace Fatality and the WSIB: In addition to the loss of human life, the financial implications may be considerable



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Since 2010, there has been an annual average of 73 traumatic workplace fatalities in Ontario. The most serious consequence is, of course, human loss. However, a workplace fatality can also trigger potentially massive Workplace Safety and Insurance Board (“WSIB”) cost implications.

Under the WSIB’s Fatal Claim Premium Adjustment Policy (“Policy”) an employer is ineligible to receive any refund to which it may otherwise be entitled in any year in which one of

the employer’s workers suffers a sudden and work-related fatality. Significantly, the Policy applies regardless whether the employer is at fault – in other words, regardless whether the fatality is the result of the employer’s failure to take sufficient precautions or provide a safe workplace.

For an employer with a strong health and safety record, a single fatality could mean the loss of considerable amounts of money.

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Fortunately, a 2016 decision by the Workplace Safety and Insurance Appeals Tribunal (“WSIAT”) provides some optimism relief may be on the way. In that decision the WSIAT held that the Policy was beyond the legal authority of the WSIB and therefore invalid, triggering a formal review, the results of which are expected later this year. Until the review is complete, the WSIB will continue to apply the Policy. Nevertheless, the WSIAT decision bears careful consideration.

### WSIAT Decision No. 2346/I214 - What happened?

On October 30, 2008, the employer (whose identity was anonymized by the WSIAT) experienced a workplace fatality resulting in the loss of more than \$1,000,000 in anticipated WSIB rebates in accordance with the Policy. Thereafter followed years of appeals and litigation over the legitimacy of the Policy.

The WSIB defended the Policy on the basis of section 82 of the *Workplace Safety and Insurance Act, 1997* (“WSIA”). Section 82 gives to the WSIB the power to decrease or increase premiums payable by an employer where, generally speaking, the employer has an accident record that is either consistently good or below industry average, respectively.

*Until the validity of the Policy is resolved, an employer at risk of losing its rebate by virtue of the Policy should consider commencing an appeal. There is little downside, and the employer may enjoy considerable upside in the event the Policy is either eliminated or replaced with something more favourable.*

On June 1, 2016, the WSIAT issued a fifty-page decision in which the majority of the panel found the Policy contrary to section 82 of the WSIA, for three key reasons:

1. The Policy ignores the intent of section 82 which is not only to create a disincentive for an employer with a worse than average accident frequency and cost record, but also to create an incentive for an employer with a good accident record. By simply denying a rebate, the Policy penalizes an employer with a good accident record but has no impact on an employer with a poor record (and therefore not eligible for a rebate in the first place).
2. Section 82 states that a premium may be increased where an “employer has not taken sufficient precautions to prevent accidents... or the working conditions are not safe for workers.” However, even if a single incident could justify losing a rebate, there appears to be no rational connection between the quantum of the lost rebate and any deficiency in the employer’s existing health and safety practices.
3. Section 82 is intended to ensure an employer with a below industry average health and safety record does not unduly burden other employers in the industry, financially. However, a single incident, no matter how severe, is not conclusive evidence an employer is a burden on the accident costs of other employers; to the contrary, the employer’s accident costs may, overall, be below the industry average.

### Tips for Employers

Until the validity of the Policy is resolved, an employer at risk of losing its rebate by virtue of the Policy should consider commencing an appeal. There is little downside, and the employer may enjoy considerable upside in the event the Policy is either eliminated or replaced with something more favourable.

Sherrard Kuzz LLP will continue to monitor the situation and advise readers when there are further developments from either the WSIB or WSIAT.

*To learn more and for assistance, contact the employment law experts at Sherrard Kuzz LLP.*

## HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

## MISSING IN ACTION: Managing Planned and Unplanned Workplace Absenteeism

Each year, the average full-time employee in Canada is absent from work approximately nine days. Some absences are for a day or two, while others last considerably longer. Left unmanaged, absenteeism can significantly and negatively impact the culture, morale and productivity of a workplace.

What are an employer's legal obligations in connection with workplace absence and what can be done to minimize unplanned time away from work?

### Legal Entitlements

- Protected leaves of absence under the *Employment Standards Act, 2000*.
- Human rights considerations when addressing absenteeism.
- Are there special rules in a unionized environment?

### Addressing Absenteeism

- Culpable vs. non-culpable absences – are they treated differently?
- Communicating with an absent employee, including obtaining appropriate medical information.
- When may an employer discipline or terminate for absenteeism?

### Tips to Reduce Absenteeism

- Attendance management policies – what to consider when preparing your own.
- Changes to schedules and work locations.
- Attendance awards and other incentives.

**DATE:** Tuesday, May 30, 2017, 7:30 – 9:30 a.m. (breakfast at 7:30 a.m.; program at 8:00 a.m.)

**VENUE:** Mississauga Convention Centre - 75 Derry Road West, Mississauga

**COST:** Complimentary

**RSVP:** By Monday, May 15, 2017 at [www.sherrardkuzz.com/seminars.php](http://www.sherrardkuzz.com/seminars.php)

**Law Society of Upper Canada CPD Hours:** This seminar may be applied toward general CPD hours.

HRPA/CHRP designated members should inquire at [www.hrpa.ca](http://www.hrpa.ca) for eligibility guidelines regarding this *HReview Seminar*.

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