

ECHO

The Ontario Municipal Human Resource Association Newsletter

PRESIDENT'S MESSAGE



Elizabeth Bourns, President, OMHRA

We have read books, attended seminars, completed assessments and profiles, experienced 360 degree feedback, reflected on our personal values, given and received performance appraisals and engaged in coaching *so that we can be really effective leaders.*

Have you taken the time to figure out what piece of leadership advice made the difference for you? When did you notice that it made a difference?

Was it when you moved from an adversarial to a cooperative (or at least cordial) conversation with your union leadership? When you stopped yourself from making the decision and chose to help others find a solution? When you spent more time planning a difficult conversation that took into account the

style, and preferred outcomes of the other person, rather than relying solely on your own? Or was it when you stood back and let others lead?

I have come to realize that the consistency of leadership behaviour is as important as its substance. Substance is absorbed through learning and authenticity and is built through practice. This is my take on authenticity. It is the hardest part of leadership and it is hard to sustain. It isn't like learning to ride a bike, at all. It can desert you in a moment. Leadership has talent at its foundation, but its effectiveness grows or diminishes in every single act that we undertake and in every single interaction that we have. Authenticity is never the result of a heroic or moment-in-time behaviour. It is also fragile: authenticity can be lost by a single act or interaction.

How do I know this? Because when things get tough for me, those around me, help me through it. What do they say? They say "because this is how you do it for us".

When you have a moment – no, take a moment – and think about what makes you an authentic and effective leader. What have you learned? What do you do? If you can't tell, ask someone else. Or better yet, see what the leadership behaviours are in your own team. Have you been effective and authentic?

Enjoy your summer. I look forward to seeing you at Fern, in September.

MESSAGE FROM THE EXECUTIVE DIRECTOR

Chrissy Shannon, Executive Director, OMHRA

It looks like the warm weather has finally arrived! It is great to see everything green and enjoy warm, sunny days again.

As you may have read in OMHRA's email release a couple of weeks ago, Shaping Organizational Solutions (SOS) is now responsible for the Executive Director role. Susan Shannon and I are excited about this opportunity and we would like to thank the OMHRA Board for their confidence and support. I would also like to thank Christine Ball for her support and encouragement. Christine has been very helpful in passing along her OMHRA knowledge. We couldn't have done it without her and we are delighted that she has agreed to remain on with OMHRA as an advisor for another year!

Over the summer we will be updating our homepage to include a Resources and Publications feature that will include a special link to the Public Services Health and Safety Association's tools and resources. They spoke at our Spring Workshop and have several great publications and tools available, so we are excited to connect Human Resources professionals to those resources through our website. Planning for the Fall Conference is well underway. The event will be held from September 16-18th at Fern Resort in Orillia. We begin with The Annual John Panunto Memorial Golf Tournament on Wednesday, September 16th in the afternoon. Then, the educational sessions will run the full day Thursday and again on Friday morning. We will also hold our Annual General Meeting at lunch on Thursday. Registration for the Conference will open in early July, however rooms are booking up fast so we recommend you book your room today if you plan on attending. Please call Sarah Morris at Fern Resort at 1-888-725-2256, or email her at sarahem@fernconference.com.

I hope you get a chance to enjoy the great weather and have a fabulous summer vacation!

See you at Fern Resort in September.



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OMHRA 2015 FALL CONFERENCE – FERN RESORT IN ORILLIA




September 16 - 18

Please contact Sarah Morris at Fern Resort to book your room at sarahem@fernconference.com, or call 1-888-725-2256. Registration for this event opens in early July.

The **Annual General Meeting** will be held at lunch on **Thursday September 17, 2015**

OMHRA'S NEW ADDRESS



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THE GHOMESHI AFFAIR – WHAT CAN EMPLOYERS LEARN?

Erin R. Kuzz, Sherrard Kuzz LLP

By now everyone has heard or read about the facts and recommendations contained in the investigation report prepared for the CBC concerning the actions of former Q radio host, Jian Ghomeshi (the “Report”).

While it may be tempting to write-off Ghomeshi’s actions as an extreme example of celebrity misconduct, an employer ignores the substance of the investigation’s findings at its peril.

The CBC is not the only workplace at which a high performing, high producing employee has been allowed to treat colleagues in a manner that is ‘deeply disrespectful’, ‘belittling’ and ‘abusive’. The question is, **what can we learn from all of this?**

If you have a policy, enforce it

The CBC opted to put into place a policy that exceeded its basic legal requirements. The corporation’s Code of Conduct (much like the *respectful workplace policy* found in many Canadian workplaces) goes well above its obligations under the *Canada Labour Code* and *Canadian Human Rights Act* (the corollary legislation in Ontario being the *Occupational Health and Safety Act* and *Human Rights Code*, respectively). It mandates that employees treat one another in a manner consistent with the law, but also ‘with respect and fairness’ and that they ‘work together in a spirit of openness, honesty and transparency that encourages engagement, collaboration and respectful communication.’

While it is laudable the CBC sought to exceed its basic legal obligations, having set this higher standard, the corporation was obligated to hold employees to it. Its failure to do so not only allowed Ghomeshi’s conduct to fester unchecked, it created a workplace culture in which other employees were either afraid to voice their concerns for fear of reprisal, or if they did, they were effectively ignored.

This lesson is simple: If you have a policy, you must enforce it, consistently and transparently - even more so when the ‘problem’ employee is high profile.

If any member of management knows, the company knows

A significant criticism of the CBC involved what the Report called ‘missed opportunities’ to have investigated and addressed Ghomeshi’s conduct. According to the Report, several managers were aware of some kind of misconduct on Ghomeshi’s part (whether from third parties or their own observation), yet chose to do nothing (or nothing meaningful). This *turning a blind eye* attracted the investigator’s harshest criticism, resulting in a finding the CBC *condoned* Ghomeshi’s conduct.

The lessons here are two-fold. First, turning a blind eye is never an acceptable management response to workplace bullying or harassment. It is simply not acceptable for any manager to suggest that because he or she didn’t know the full extent of an employee’s misconduct there arises no obligation to make further inquiries. Second, except in the rarest of circumstances, knowledge, action or inaction on the part of *management* will be deemed in law to be that of the *company*.

A complaint does not have to be in writing

One explanation offered by CBC was that while it had a complaint mechanism in place, no *formal* complaint was ever filed. The suggestion being that if a complaint is not in writing, it’s as if the complaint doesn’t exist and the employer has no obligation to inquire or investigate.

Nothing could be further from the truth.

While most workplace harassment and discrimination policies request (or even require) a written complaint to be filed as part of the process, an employer cannot hide behind an employee's failure or refusal to do so as a basis for failing to inquire or investigate. When facts come to light which would cause a reasonable employer to believe there may be the presence of harassment or discrimination (or other violation of a relevant code of conduct), the circumstances must be investigated. This includes where an employee claims only to want to 'vent' to a manager or 'get something off his or her chest'. Bottom line: Liability is created when an employer knows, or ought reasonably to know, there has been a breach.

Someone needs to be in charge

Perhaps the most surprising finding in the Report was that no one at CBC appeared to be 'in charge' of Ghomeshi and responsible for his workplace conduct or performance. Complicating this unusual absence of supervision was the fact that every member of the Q production staff, including Ghomeshi, was a unionized member of the same bargaining unit. The obligation for CBC employees to comply with its Code of Conduct was therefore virtually impossible to enforce because no one was responsible for doing so.

Lesson learned: *Someone* has to be in charge, and others need to know who this person is.

A union has obligations too

Although many of the relevant facts were redacted in the version of the Report released to the public, it is clear that at some point a member of the Canadian Media Guild (the union representing the relevant CBC staff) raised with the Guild allegations of sexual harassment against Ghomeshi. Unfortunately, despite having a stated 'zero tolerance policy' regarding sexual harassment, the Guild did nothing to escalate the complaint. Instead, just as the CBC had done, the Guild appears to have been unwilling or unable to investigate one of its golden boys.

Closing thoughts

While it may be tempting to dismiss the findings in the Report as merely the embarrassing fallout of a high profile personality abusing his perceived authority and power, any employer that fails to see the lessons to be taken from the Ghomeshi affair may be doomed to learn them in its own workplace.

As we noted at the very start - the CBC is not the only workplace at which a high performing, high producing employee has been allowed to treat colleagues in a manner that is 'deeply disrespectful', 'belittling' and 'abusive'.

While the devil is always in the details, and no single approach will apply in every workplace, at the very least employers must be mindful of the following lessons learned:

1. If the organization has a code of conduct (or equivalent), it must be enforced, consistently and transparently.
2. A complaint does not have to be in writing.
3. Liability is created when an employer knows, or ought reasonably to know, there has been a breach.
4. Willful blindness is never a winning strategy.
5. If any member of *management* knows, the *company* is deemed to know.
6. Someone needs to be in charge.
7. The union has obligations too.

To learn more or for assistance drafting, implementing and enforcing anti-harassment and bullying policies tailored to your specific workplace, contact a member of Sherrard Kuzz LLP.

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AGING WORKPLACE, CHRONIC CONDITIONS, UNWELCOME RETIREMENTS: RETIRING DUE TO POOR HEALTH MAY BE BAD FOR YOUR HEALTH

Bill Winegard, Executive Director, MROO

1. Chronic health conditions induce employees to retire earlier than they might like

2013 US Retirement Confidence Survey:

47% of retirees had retired earlier than they had planned; 55% of that 47% cited poor health as the reason.

2012 EU study:

The employment rate among 50-70 year-olds reporting chronic disease is 40% lower than among that age group at large.

Several US studies in 1990s:

Poor health/chronic conditions are an even bigger predictor of early retirement than retirement income. Early retirees in ill health retire up to 2 years earlier than even early retirees generally.

Laurier Economics 2007:

Reporting poor health will increase the likelihood of retirement by roughly 25% among the 50-65 age group.

2. Involuntary early retirement is likely an unwelcome retirement/dissatisfied retiree

National Bureau of Economic Research (US) 2008 Report on Longitudinal study:

The health impacts of retirement noticed within 6 years of retirement were all exacerbated if retirement was involuntary.

US Longitudinal study reported in 1999 Journals of Gerontology:

The effects of late-life involuntary job loss on both physical functioning and mental health were negative and statistically significant.

Mount Saint Vincent University analysis of Canada's 2002 General Social Survey:

Those who felt they had to retire because of poor health were 14 x more likely to wish they could have kept working than those who retired voluntarily! Those for whom poor health was a contributing factor in their retirement decision were still 3 x more likely to wish they had kept working than those who had retired voluntarily.

3. Retiring because of your health may not be good for your health

Kim and Moen (2002)

Those who retire due to poor health show higher morale in the short run but more symptoms of depression in the long run.

2014 report on Irish longitudinal study:

Those who retired due to their ill health show even more depression symptoms than those who involuntarily retired due to job loss; both show statistically significantly more symptoms than those who retired voluntarily.

2013 US Retirement Confidence Survey:

69% of those who retired earlier than planned had expected to work for pay in retirement; only 25% did so (with consequences for both income and social isolation).

4. Part-time work/semi-retirement may be a better choice

Dave, Rahad, Spasojevic 2008 (US National Bureau of Economic Research: Health and Retirement study 1992-2005

Partial retirement generally has a much smaller negative effect on health outcomes, relative to full retirement. While the number of illness conditions and difficulties in daily activities are higher among partial retirees compared to full-time workers, they are significantly lower than for the fully-retired.

For other measures of physical and mental health, full retirement shows significant adverse effects compared to full-time employees, but partial retirement has no significant adverse effects at all.

Morissette et al. (2004)

Many retirees would have changed their decision to retire if they had been able to reduce their work schedule without their pensions being affected.

5. The so-what for HR professionals

When your older employees visit you to discuss retirement because of poor health or chronic pains, an early retirement may not be their best choice, particularly if they still like their jobs and workplace. Is there a part-time alternative or another way to help them to stay in the workforce awhile longer, for the sake of their health?



MROO

Municipal Retirees
ORGANIZATION ONTARIO

NEW ESA PROVISIONS NOW IN EFFECT (DON'T FORGET ABOUT THE POSTERS!)

Stephanie Jeronimo and Julia Nanos, Hicks Morley Hamilton Stewart Storie LLP

On May 20, 2015 amendments to the *Employment Standards Act, 2000* (“ESA”) came into force. These amendments include new poster requirements and new powers for employment standards officers to order employer “self-audits.” In this article we review the new rules and the impact they will have on municipal employers.

NEW POSTER REQUIREMENTS

One requirement employers must be mindful of is the new poster requirements. Effective May 20, employers are now required to provide *each employee* with a copy of the Ministry of Labour’s most recent *ESA* information poster. This requirement is *in addition to* the obligation for employers to post the *ESA* information poster in the workplace.

The key date to keep in mind is June 19, 2015. This is the date by which employers are required to provide *all existing employees* with a copy of the latest *ESA* information poster. New employees must be provided with a copy within 30 days of their first day of work.

Employers can provide employees with printed copies or can send the poster to employees by email. Employers can also provide the poster via a link to the document on an internet database, but only if the employer ensures the employee has reasonable access to that database and to a printer.

In addition, if an employee requests a translation of the poster into a language other than English, the employer is required to inquire as to whether the Minister of Labour has prepared a translation of the poster into that language, and if the Minister has done so, the employer must provide the employee with a copy of the translation.

Copies of the poster can be downloaded from: <http://www.labour.gov.on.ca/english/es/pdf/poster.pdf>

SELF-AUDITS

The other key change that came into force on May 20, 2015 is that Employment Standards Officers (“ESOs”) now have the authority to require an employer to conduct an examination of their records or practices, or both, to determine whether the employer is in compliance with one or more provisions of the *ESA* or the regulations. Employers subject to these audits will be required to provide the ESO with a report detailing the results of their self-audit. The new amendments specify that no employer shall provide a report that contains information the employer knows to be false or misleading.

In order to require an employer to engage in a self-audit, the ESO must provide the employer with written notice which *must* set out:

- the period to be covered by the examination;
- the provision or provisions of the *ESA* or the regulations to be covered by the examination; and
- the date by which the employer must provide a report of the results to the ESO.

In addition, the notice *may* include the following:

- the method to be used by the employer in carrying out the examination;
- the format of the report to be provided by the employer;

- such information to be included in the employer's report as the ESO considers appropriate;
- a requirement that the employer include in the report an assessment of whether the employer has complied with the *ESA* or the regulations;
- a requirement that the employer include in the report an assessment of whether one or more employees are owed wages; and/or
- a requirement that the employer pay wages owed if the employer assesses that one or more employees are owed wages.

The information included in the employer's report will differ depending on whether or not the audit finds that wages are owing to one or more employees. If the audit determines that wages are owing, the report must include the following:

- The name of every employee who is owed wages and the amount of wages owed to the employee;
- An explanation of how the amount of wages owed to the employee was determined; and,
- If the notice requires payment, proof of payment to the amount owed to the employee.

If the results of the audit are that the employer is not in compliance but no wages are owing, the report must describe the measures the employer has taken or will take to ensure that the *ESA* or regulations will be complied with.

Finally, even if the audit finds that the employer is in compliance with the *ESA* and/or the regulations, the ESO retains jurisdiction to conduct an investigation or inspection. This means that the ESO will still have jurisdiction to order such enforcement measures under the *ESA* as the ESO considers appropriate, including issuing an order under section 103 (Order to pay wages) or 108 (Compliance order) of the *ESA*. Significantly, section 103 was amended on February 20, 2015 to remove the \$10,000 maximum cap on orders made for unpaid wages on a go-forward basis.

IMPLICATIONS FOR MUNICIPAL EMPLOYERS

If you haven't done so already, municipal employers should take immediate steps to ensure that all employees are provided with a copy of the *ESA* information poster by June 19, 2015 (or as soon as you possibly can if you've already missed the deadline!). Remember that the posters can be distributed by email and must also be posted in the workplace.

With the new enforcement powers given to ESOs, municipal employers will also want to ensure that their scheduling and payroll practices are *ESA*-compliant. This will ensure that you are prepared to respond in a timely manner should the Ministry require a self-audit to be performed.



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Stephanie Jeronimo and Julia Nanos specialize in labour and employment issues facing municipalities. If you have questions about any workplace issue, please contact Stephanie at 416.864.7350, or Julia at 416.864.7341, either of whom would be pleased to assist you.

ACCOUNTABILITY IS KEY TO ORGANIZATIONAL AND PERSONAL SUCCESS

Audie McCarthy, President and CEO of Mohawk College Enterprise

Accountability is one of the most important principles of governance, both in the private and public sectors.

As former Alberta MP John G. Williams defined it, “accountability is doing the right thing consistently, day in and day out, in tasks and relationships to fulfill or further the mission of the organization.”

It is doing what you say you are going to do – always. It means eliminating blame, excuses, complaining and procrastination.

An organization that lacks accountability does not perform to its potential. This can result in conflict, inefficiency, having to re-do work, defective products or unsatisfied customers. For a company, this can lead to reduced profits and a damaged public image. In the public sector, it causes citizens to lose confidence and trust in their government.

While a lack of accountability can be disastrous, an accountable organization produces improved employee performance, increased employee commitment, more innovation and creativity, increased morale and job satisfaction.

For this to happen, leaders must create a system that encourages accountability:

- State your expectations and make sure employees know their roles.
- Implement a follow-up system of accountability with regular meetings to measure and track performance and results.
- Put clear consequences in place, as well as rewards and recognition.
- Lead by example. Show you are holding yourself to the same standards. Follow through on your promises and own up to your mistakes.

In the end though, accountability starts with each individual. Each of us is accountable for the choices we make. And when you are accountable, your friends, family members, colleagues and bosses know they can trust and depend on you. Personal accountability is also good for your career. It shows managers in your organization that you are someone with leadership potential.

To become more accountable:

- Be sure you are clear about your role and responsibilities so you know what is expected of you.
- If you are wrong, admit your mistakes, apologize and move on
- Manage your time carefully so you don't take on too much and let someone down.
- Learn from the times when you did not take responsibility and look for ways to do things differently next time.



MOHAWK COLLEGE ENTERPRISE Mohawk College Enterprise is a business-to-business corporation established by Mohawk College to prepare people and companies with the skills and expertise required to succeed in today's fast-paced world. Through our expert trainers, we provide training and customized solutions with the latest techniques and technology. Teaching performance management principles is part of our Future Ready Leadership Program, a series of customized leadership training sessions held one day each month, over eight months. This highly sought after program will help develop emerging leaders and provides; critical thinking skills and valuable insight that will prepare and address organizational change management. Audie McCarthy is president and CEO of MCE. For information, please contact Audie at 905-575-2525 or amccarthy@mcecor.com.

EMPLOYEE HANDBOOK TIPS

Megan Burkett, Employment and Labour Law, Keyser Mason Ball, LLP

Implementing an Employee Handbook can provide numerous benefits for an organization. An Employee Handbook is a communication tool through which workplace rules and procedures can be set out for employees to follow. It is also an effective way to clearly provide expectations to employees in a consistent manner. An Employee Handbook can also provide legal protection, as the policies can be relied upon as a contractual term with consequences for an employee failing to meet those terms.

To ensure that your organization's Employee Handbook is effective and legal, here are some tips to follow:

Tip # 1 – Ensure policies do not conflict with legislation

When preparing policies, legislation should be reviewed to confirm whether the language in the policy is in line with current legislation. Legislation varies by province in Canada and what may be required in one province may be different in another. As well, legislation is constantly changing and as a result, certain policies within an Employee Handbook can become out of date. It is especially important to confirm with legislation when sample policies from the Internet or other resources are relied upon.

Tip # 2 – Include a Disclaimer

Include a general policy at the beginning of the Employee Handbook which covers how the Employee Handbook will be enforced. In this general policy, an organization should confirm its commitment to complying with applicable laws and regulations and that in the event any part of the Employee Handbook violates legislation, it is the legislation that will be relied upon. Other terms in the general policy should include that the organization has the right to add to or amend the policies and that it is within the organization's discretion to interpret and enforce policies.

Tip # 3 – Conflicting Version

The Employee Handbook should be reviewed to confirm that sections of one policy do not conflict with another policy. This can happen where there are different timelines or procedures that conflict from one policy to another. Further, when an Employee Handbook is updated, all employees should be made aware of the new version.

Tip # 4 - Language that does not allow flexibility

Including language of "may" or "shall" instead of "must" will allow an organization some flexibility in enforcing policies. There are some situations where an organization will need to take different actions and enforce policies differently depending on the circumstances.

Tip # 5 – Include an Internal Complaint Mechanism

If an internal complaint process is available for employees, then there is an avenue for employees to raise issues before a situation escalates. It is generally less expensive and time consuming to deal with issues as they arise internally instead of having to deal with a human rights tribunal or a government ministry in the event an employee has filed a formal complaint. In some cases, a complaint mechanism is required by law. This is the case under the Ontario *Occupational Health and Safety Act*, which requires a company to implement procedures for workers to report incidents of workplace violence.

Tip # 6 - Failing to Regularly Update the Employee Handbook

Organizations should try to update their Employee Handbook on an annual basis. If an Employee Handbook is not updated for many years, then it becomes out of date as new issues arise. In addition, an out of date Employee Handbook may conflict with legislation as it changes from time to time.

Tip # 7 - Proper Implementation

If an organization has failed to properly implement the Employee Handbook, then it may lose its ability to rely on it. For instance, if an organization is relying on a particular policy where there is discipline, just cause, or an absenteeism issue, the employee must have been aware of the policy.

To implement the Employee Handbook, employees should be given a copy of the Employee Handbook to review, time should be given for them to ask questions and the employee should be asked to sign an acknowledgment form. The organization should consider holding a meeting on the Employee Handbook to review the policies and answer questions.

With new employees, the Employee Handbook can be provided at the same time as an employment contract. Employees should be asked to review the Employee Handbook and sign the acknowledgment form prior to starting their new job. If this is not possible, then any employment contract should reference the Employee Handbook and the requirement of the employee to agree to it as a term of employment. With existing employees, the employees should be given advanced notice of the new Employee Handbook or an update version that will be implemented. Consideration should be provided to existing employees when asked to sign a new Employee Handbook or a revised version where there are significant changes. While consideration is often thought of as a monetary payment, it can include some of the benefits that are provided in the Employee Handbook, such as additional vacation days or sick days.



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Megan Burkett provides her clients with support and proactive advice on all aspects of employment law and labour relations. Megan's areas of expertise include: employment contracts, workplace policies, terminations, employment standards, human rights, litigation and grievances. Megan also conducts workplace investigations in the areas of harassment, discrimination, and bullying.

KNOCKING ON THE 'PRIVATE' DOOR IN DISABILITY ACCOMMODATION

Diane Laranja, Fillion Wakely Thorup Angeletti, LLP

An employer's rights and limitations in obtaining confidential medical information in its accommodation efforts

Disability accommodation continues to be a difficult process to navigate, particularly for employers of unionized employees. Although most employers have now realized the significant costs of not appropriately accommodating those with disabilities, whether in terms of lost productivity or increasing damage awards, many employers continue to struggle with the challenges of disability accommodation. A large part of the difficulty in developing an appropriate accommodation plan is, what am I required to accommodate?

Before an employer can answer it is vital to have the reasonably necessary information from the employee and their treating medical practitioner. But what happens when an employee does not unlock the private door to their confidential medical information?

Medical Information To Which An Employer Is Entitled

Arbitrators have recognized there is certain information an employer is entitled to ask for, and indeed requires, from an employee who is seeking accommodation. This includes:

- The duration of the disability.
- The restrictions or limitations.
- The prognosis for recovery.
- The basis for the treating medical practitioner's conclusions, which includes the examinations or tests performed.
- Whether any treatment (e.g. medication) impacts the employee's ability to perform his or her job or interact with others.

A few arbitrators have even suggested that an employer may be entitled to know the nature of the illness (but not diagnosis), though this remains controversial.

The difficulty arises when an employee is not willing to provide the necessary information to develop an appropriate accommodation plan. An employer may be concerned about the legitimacy of the request or simply needs more to adequately respond. An employee, for a number of reasons, may be loath to disclose his or her personal health information. In these circumstances, an employer may be tempted to consider discipline for the employee's failure to co-operate.

However, the recent arbitral decision of *Veridian Corp. and International Brotherhood of Electrical Workers, Local 636 (Raininger)*¹ highlights the dangers of an employer disciplining or terminating a unionized employee for refusing to provide medical information.

The Facts

Fred Raininger, an engineering technician, went on a medical leave of absence after alleging there was a mysterious substance put on his desk that caused tingling in his hands, headaches, and a loss of concentration. The employer investigated only to find no evidence of wrongdoing. The employer nonetheless offered Mr. Raininger modified duties and a change in his workspace location. Mr. Raininger did not return to work and insisted on a psychological evaluation before doing so.

¹ 2014 CanLII 52179 (ON LA)

One month later, Mr. Raininger was suddenly prepared to return to work. The employer asked for written confirmation from his doctor that he was fit to return to work with no restrictions, and that he was being treated by a psychologist.

Mr. Raininger returned a medical note stating he was under a doctor's care for "stress related discomforts" related to the workplace, but that he was ready to return to work. He did not require any accommodation. The employer was not satisfied this adequately addressed Mr. Raininger's ability to return to work given his concerns about workplace stressors. The employer asked for Mr. Raininger to consent to a broadly defined "doctor-to-doctor consultation" where the employer's medical representative would discuss the medical file with Mr. Raininger's doctor. Mr. Raininger refused. He suggested the employer put its specific concerns in writing to have his psychologist review the questions. The employer insisted on having the doctor-to-doctor consultation, and ultimately terminated Mr. Raininger for failure to co-operate in the return to work process.

The Refusal to Provide Medical Information Is Not Disciplinary

The challenge with the employer's approach was that labour arbitrators have consistently recognized the refusal to provide medical information is not a disciplinary offence. This is premised on the idea that personal health information belongs to the employee and may only be disclosed with consent. An employer cannot coerce an employee to involuntarily consent to produce such information by imposing, or threatening to impose, discipline.

However, this privacy is not absolute. An employee who seeks to receive a benefit, such as sick pay, or to return to the workplace after an absence, is nonetheless required to provide information reasonably necessary to receive such benefit or to return to work. Otherwise the employee may be denied the benefit. The employer may also be able to place the employee on an unpaid administrative leave until he or she cooperates with its accommodation efforts.

In other words, the employee may suffer consequences for his or her refusal to provide medical information but discipline or termination for cause is not one of them.

In *Veridian*, the arbitrator found it was the employer, and not Mr. Raininger, who frustrated the return to work process. Mr. Raininger had not requested accommodation and yet the employer escalated its request for a medical consultation without justifying why. The arbitrator also found Mr. Raininger's concerns were reasonable considering the broad wording of the consent form. Mr. Raininger was entitled to satisfy the employer's concerns regarding his medical capability to return to work in a manner that respected his privacy concerns. He was reinstated to his position as an engineering technician with full compensation subject to his duty to mitigate his losses.

Best Practices for Employers

Unfortunately there are no "hard-and-fast" rules when it comes to disability accommodation. However, we have set out some helpful tips to consider when dealing with an employee who refuses to provide medical information:

- **Assess why you need the information:** Determine the purpose for which you require the medical information. Has the employee requested accommodation? Are there warning signs requiring a response? Or is the employee returning from a leave of absence? *Why* you need the medical information will largely dictate *what* you are looking for, and *how* you should get it.
- **Clearly outline your request:** Don't leave the employee, and their medical practitioner, to guess what you reasonably need and why you are looking for it. Your request should focus on the restrictions and limitations, and the prognosis for recovery and explain why you are making the request (*i.e.* the information to date is insufficient or contradictory). In appropriate

circumstances, seek confirmation that any treatment the employee is getting does not impact their ability to perform their work safely.

- **Allow the employee to get the information:** Do not contact the employee's doctor directly unless you have the express consent to do so. Generally speaking, the request for medical information should be made to the employee. Provide the employee with a reasonable and meaningful opportunity to address your concerns. If an employee fails to respond before your requested deadline, follow up with him or her before taking further action.
- **Respond as necessary:** If an employee continues to refuse to provide reasonably necessary medical information, consider whether it is appropriate to place the employee on an unpaid administrative leave. This depends on a number of factors, including the employee's restrictions, the applicable collective agreement, and the policies in place, so we recommend consulting your labour and employment lawyer to discuss the available options.



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BEYOND POP CULTURE: GENDER IDENTITY AND EXPRESSION IN THE WORKPLACE

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Gender identity and gender expression have received a lot of attention lately, particularly in pop culture, thanks to stars such as *Orange is the New Black*'s Laverne Cox and Olympic athlete Bruce Jenner, both of whom are boldly paving the way for a new generation of acceptance and understanding of trans persons. While Time Magazine called 2014 the transgender "tipping point", gender expression and gender identity are not new issues. On the contrary, gender expression and gender identity have been protected grounds under the Ontario *Human Rights Code* ("Code") since 2012, and of course gave rise to human rights issues long before such protection was recognized by lawmakers.

In 2014, the Ontario Human Rights Commission ("Commission") released its *Policy on preventing discrimination because of Gender Identity and Gender Expression* ("Policy"). The Policy does not create freestanding legal obligations. However, as with all Commission policies, it can be considered by the Human Rights Tribunal of Ontario in any proceeding. Accordingly, employers ought to be aware of the Policy and the clarification it brings to this rapidly developing area of law. In this article, we review the Policy's guidelines, and provide our best practices for employers seeking to understand and appropriately respond to gender identity and gender expression issues in the workplace.

Understanding Gender Identity and Gender Expression

The *Code* does not define "gender identity" or "gender expression". However, the Policy provides helpful guidance on the subject, including the following definitions:

Sex is the anatomical classification of people as male, female or intersex, usually assigned at birth.

Gender Identity is each person's internal and individual experience of gender. It is their sense of being a woman, a man, both, neither or anywhere in between. A person's gender identity may be the same or different than their birth-assigned sex. Gender identity is fundamentally different from a person's sexual orientation.

Gender Expression is how a person publicly presents their gender. This can include behaviour and outward appearance such as dress, hair, make-up, body language and voice. A person's name and chosen pronoun are common ways of expressing gender.

Trans or **transgender** is an umbrella term referring to people with diverse gender identities and expressions that differ from stereotypical gender norms. It includes but is not limited to people who identify as transgender, trans woman (male-to-female), trans man (female-to-male), transsexual, cross-dresser, gender non-conforming, gender variant or gender queer.

Gender non-conforming individuals do not follow gender stereotypes based on the sex they were assigned at birth, and may or may not identify as trans.

"Lived" gender identity is the gender a person feels internally ("gender identity" along the gender spectrum) and expresses publicly ("gender expression") in their daily life including at work, while shopping or accessing other services, in their housing environment or in the broader community.

Accommodating Gender Expression and Gender Identity in the Workplace

As the above suggests, gender identity is highly personal in nature and can vary significantly from person-to-person. As a result, employers must be sure to address employees' lived gender identities on a case-by-case basis. There is no "one-size fits all" response to gender identity in the workplace. Notwithstanding this, we have comprised a list of our "best practices", so that employers may take steps towards becoming *Code* compliant:

- **Review human rights policies.** In order to comply with the *Code*, gender identity and gender expression ought to be included as protected grounds within your harassment and discrimination policies.
- **Review workplace violence and harassment policies.** Your workplace violence and harassment policies should clarify that gender-based violence, which includes violence against trans persons, is prohibited in your workplace. You may want to clarify in your policies that gender-based violence and harassment include the following prohibited behaviours:
 - comments that ridicule or demean people because of their gender identity or expression;
 - behaviours that are designed to reinforce traditional gender norms;
 - a refusal to use someone's self-identified name or pronoun;
 - "outing" or threatening to expose someone as trans; and
 - jokes or commentary about a person's physical characteristics.
- **Review your dress code.** Assess existing dress codes to eliminate gender specificity. Absent a *bona fide* occupational requirement, dress codes should be uniform as between males and females so that employees can dress in a manner that conforms with their personal gender identities.
- **Be proactive.** All employees, including managers and supervisors, should receive training on workplace violence, harassment and discrimination. This training should include training on gender identity issues, even if there are no trans persons currently employed at your workplace. There is no time like the present to create awareness, and to do what is necessary to provide a workplace that is a tolerant and respectful for all persons.
- **Accommodate.** The Commission's Policy provides that trans people have the right to use washrooms and changing facilities that match their lived gender identity. Consider accommodations that would permit trans employees to access corresponding gender-specific washrooms and change rooms. In certain circumstances, it may be appropriate to offer gender non-specific, single-stall, or single-occupant facilities.

In addition to physical accommodations, employers should accommodate employees' chosen names and pronouns (they/their, he/she, him/her, or zhe/ze/hir) in all communications, including work records, identification cards, email accounts, and office directories. Mistakes happen. However, be sure not to intentionally or carelessly misidentify a trans person, or to condone such misidentification by others.

- **Ask for input.** Gender identity is extremely personal and dynamic. In many circumstances, it will be necessary and appropriate to ask for input from the employee so that the employer can better understand the nature of the need(s), including how the individual would like to be addressed, and other accommodations that may be required. Be sensitive and employ respect in these discussions. However, do not avoid the topic where discussions are necessary in order for you to appropriately accommodate.
- **Protect privacy of personal information.** Information that relates to a trans person's sex, gender identity or medical history should only be collected where relevant and necessary, and must be stored in secure filing systems and kept confidential and private. Review your document retention and access policies to ensure they protect sensitive and confidential records of trans persons.

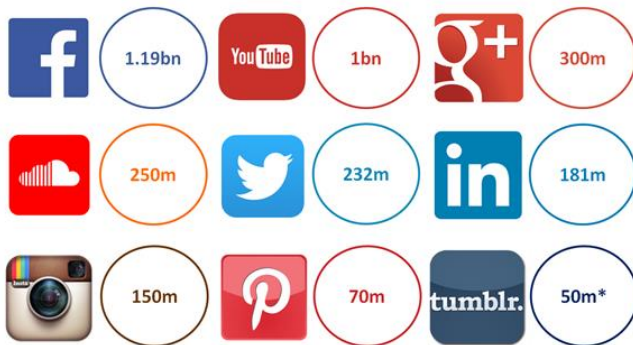
Gender identity and expression can pose unique challenges for employers seeking to comply with the Code. The key to successful outcomes is to ensure that all persons, including trans persons, are treated with dignity and respect, in accordance with their lived gender identity. Sensitivity must be employed in addressing the topic of gender identity and expression in the workplace. However, in most circumstances communication and awareness will be key to creating workplaces that are tolerant and accommodating to persons from all gender identities.



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OPEN TERRITORY WITH OPEN SOURCE SOCIAL MEDIA?



Craig D'Souza, Senior Director of Corporate Investigations, AFIMAC

I recently attended a HR & Security Forum event in Toronto and 'open source intelligence', often referred to as 'OSINT', was topical throughout the seminars. I was fortunate enough to present twice: my first presentation was with KPMG regarding internal investigations in a cyber-age and my second

presentation was with Aird & Berlis LLP, on social media investigations. We fielded a number of questions on what is fair-game or can be utilized from OSINT in the context of an investigation. It is helpful to first understand exactly what OSINT is and the web mediums that fall under this the umbrella. BrightPlanet defines the term very well:

OSINT stands for "Open-Source INTelligence", which refers to any unclassified information and includes anything freely available on the web. OSINT is the opposite of close-source intelligence or classified information. Common OSINT sources include social networks, forums, business websites, blogs, videos and news sources.

The definition clearly highlights that OSINT is not classified, freely available and the users have no expectation of privacy. However, various privacy acts – namely, PIPEDA in Canada and the Patriot Act in the United States – vary greatly in what is considered 'open territory' from an investigative perspective. In Canada the barriers of privacy are higher, based on additional governing acts – Freedom of Information and Protection of Privacy Act (FIPPA), Municipal Freedom of Information and Protection of Privacy Act (MFIPPA), Bill 168 and the Human Rights Legislation. The issue is further complicated by how freely one can access social media channels on mobile devices and company policy governing usage. If an employee is active on social media during work hours, is that permissible? Is an employee permitted to post information related to the company outside of work hours – is there an expectation of privacy at that point?

In a nutshell, it is imperative that corporations enlist the services of an expert in the field to build a robust social media policy, which would define parameters of use in accordance with organizational policy, without violating the acts above. In the short-term and in absence of a social media policy, Aird and Berlis explained that the following is permissible in the context of an investigation:

"If the comments pose a threat to the employer's business interests, then they become the employer's business, opening up the employee to the threat of discipline or discharge."

AFIMAC, in partnership with their legal partners, have developed tools to mine social media for the above situations. The technology automates the harvesting and enriching of information available on OSINT against search parameters, resulting in a comprehensive curated report. The information can be used to initiate an investigation and has proven to be highly beneficial, in saving corporations valuable time and money. The internet will increasingly become more complex and OSINT channels will continue to multiply exponentially. Organizations will inevitably have to keep up with the times and align with experts in the field to navigate through the ever-changing landscape.

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The Ins and Outs of Accommodating Mental Illness in the Workplace

September 16, 2015

9 am to 4 pm

20 Adelaide Street East, 11th Floor, Toronto

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