



Ontario
Human Rights Commission
Commission ontarienne des
droits de la personne

Policy on height and weight requirements

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Purpose of OHRC Policies

Section 30 of the Ontario *Human Rights Code* (*Code*) authorizes the Ontario Human Rights Commission (OHRC) to prepare, approve and publish human rights policies to provide guidance on interpreting provisions of the *Code*.^{*} The OHRC's policies and guidelines set standards for how individuals, employers, service providers and policy-makers should act to ensure compliance with the *Code*. They are important because they represent the OHRC's interpretation of the *Code* at the time of publication.^{**} Also, they advance a progressive understanding of the rights set out in the *Code*.

Section 45.5 of the *Code* states that the Human Rights Tribunal of Ontario (the Tribunal) may consider policies approved by the OHRC in a human rights proceeding before the Tribunal. Where a party or an intervenor in a proceeding requests it, the Tribunal *shall* consider an OHRC policy. Where an OHRC policy is relevant to the subject-matter of a human rights application, parties and intervenors are encouraged to bring the policy to the Tribunal's attention for consideration.

Section 45.6 of the *Code* states that if a final decision or order of the Tribunal is not consistent with an OHRC policy, in a case where the OHRC was either a party or an intervenor, the OHRC may apply to the Tribunal to have the Tribunal state a case to the Divisional Court to address this inconsistency.

OHRC policies are subject to decisions of the Superior Courts interpreting the *Code*. OHRC policies have been given great deference by the courts and Tribunal,^{***} applied to the facts of the case before the court or Tribunal, and quoted in the decisions of these bodies.^{****}

^{*} The OHRC's power under section 30 of the *Code* to develop policies is part of its broader responsibility under section 29 to promote, protect and advance respect for human rights in Ontario, to protect the public interest, and to eliminate discriminatory practices.

^{**} Note that case law developments, legislative amendments, and/or changes in the OHRC's own policy positions that took place after a document's publication date will not be reflected in that document. For more information, please contact the Ontario Human Rights Commission.

^{***} In *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 at para. 53 (Ont. Bd. Inq.), the tribunal applied the United States Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (4th Cir. 1971) to conclude that OHRC policy statements should be given "great deference" if they are consistent with *Code* values and are formed in a way that is consistent with the legislative history of the *Code* itself. This latter requirement was interpreted to mean that they were formed through a process of public consultation.

^{****} Recently, the Ontario Superior Court of Justice quoted at length excerpts from the OHRC's published policy work in the area of mandatory retirement and stated that the OHRC's efforts led to a "sea change" in the attitude towards mandatory retirement in Ontario. The OHRC's policy work on mandatory retirement heightened public awareness of this issue and was at least partially responsible for the Ontario government's decision to pass legislation amending the *Code* to prohibit age discrimination in employment after age 65, subject to limited exceptions. This amendment, which became effective December 2006, made mandatory retirement policies illegal for most employers in Ontario: *Assn. of Justices of the Peace of Ontario v. Ontario (Attorney General)* (2008), 92 O.R. (3d) 16 at para. 45. See also *Eagleson Co-Operative Homes, Inc. v. Théberge*, [2006] O.J. No. 4584 (Sup.Ct. (Div.Ct.)) in which the Court applied the OHRC's *Policy and*

Introduction

The *Code* states that it is public policy in Ontario to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The provisions of the *Code* are aimed at creating a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and feels able to contribute to the community.

Standards for height and weight are sometimes used to screen or evaluate job applicants. In the OHRC's experience, this tends to occur in recruitment for occupations that traditionally have been male dominated. These standards or selection criteria are based on the average physical stature of men in the majority population group. Women and members of racialized groups are, on the average, physically smaller than members of the majority population group. Consequently, these groups tend to be disadvantaged by height and weight criteria.

The policy of the OHRC with regard to such recruitment practices is set out below. This policy applies to all height and weight criteria used in the context of employment.

Background

Having two separate sets of height and weight criteria for men and women may reduce the discriminatory impact on women. However, individuals from racialized groups who are on average of smaller build may still be excluded. For example, persons of Asian descent or persons belonging to indigenous population groups from Latin America are, on average, of smaller physical stature than the majority population group in Ontario.

Constructive or indirect discrimination

Human rights claims arising from the use of height and weight criteria tend to raise issues of constructive or indirect discrimination. Constructive or indirect discrimination is defined as a disadvantage or adverse impact that may result from the uniform application of a requirement, factor or rule. It is the OHRC's opinion that height and weight criteria in employment, which on their face appear to be neutral, may in some circumstances contravene section 11 of the *Code* which states:

- (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

Guidelines on Disability and the Duty to Accommodate, available at:
www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2

- a. the requirement, qualification or factor is reasonable and *bona fide* in the circumstances[.]

Height and weight as bona fide occupational requirements

The test for determining whether an occupational requirement is *bona fide* was established by the Supreme Court of Canada in *Ontario (Human Rights Commission) v. Etobicoke (Borough)* [1982] 1 S.C.R. 202. The Court established that for a requirement to be considered as *bona fide*, two conditions must be met. First, there must be an objective relationship between the standards required and the job in question. Second, the standards must have been imposed in good faith.

Except in limited circumstances, there is little evidence to demonstrate that height and weight criteria are a *bona fide* occupational requirement, according to decisions from human rights tribunals in Ontario and other Canadian provinces.¹ Empirical research indicates that physical stature alone is not determinative of an individual's ability to perform the essential duties of a job, even if significant physical exertion is required. As a result, minimum standards for height and weight will not necessarily meet the reasonable and *bona fide* standard. If so, the defence provided by section 11(1) of the *Code* cannot be used to justify the requirement, qualification or factor.

Duty to accommodate

It should be noted that section 11 of the *Code* states that a requirement, qualification or factor will not be considered to be a reasonable and *bona fide* requirement unless the employer has tried to accommodate persons who are adversely affected. If height and weight criteria are used to recruit for a particular job, the employer must attempt to accommodate women and members of ethnic or racialized groups who are adversely affected by the requirement, qualification or factor. The employer can, however, demonstrate that such an attempt to accommodate these applicants would cause undue hardship² or would substantially change the essential nature of the job. In those circumstances, the employer is not required to provide accommodation.

The OHRC's position

The OHRC urges employers who still use height and weight criteria in the employment recruitment process to discontinue the practice. However, if such criteria are maintained on the basis of demonstrated necessity for the performance of essential duties, accommodation of women and members of protected groups, short of undue hardship, is a requirement under the *Code*.

Relevant Ontario *Human Rights Code* provisions

- Section 5 (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.
- Section 11 (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
- a. the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
 - b. it is declared in this Act, other than in s. 17, that to discriminate because of such ground is not an infringement of a right.
- (2) The Commission, the Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.
- (3) The Commission, the Tribunal or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship.

For more information

Please visit www.ontario.ca/humanrights for more information on the human rights system in Ontario.

The Human Rights System can also be accessed by telephone at:

Local: 416-326-9511

Toll Free: 1-800-387-9080

TTY (Local): 416-326 0603

TTY (Toll Free) 1-800-308-5561

To file a human rights claim, please contact the Human Rights Tribunal of Ontario at:

Toll Free: 1-866-598-0322

TTY: 416-326-2027 or Toll Free: 1-866-607-1240

Website: www.hrto.ca

To talk about your rights or if you need legal help with a human rights claim, contact the Human Rights Legal Support Centre at:

Toll Free: 1-866-625-5179

TTY: 416-314-6651 or Toll Free: 1-866-612-8627

Website: www.hrlsc.on.ca

Endnotes

¹ *Colfer v. Ottawa Board of Commissioners of Police* (1979), unreported (Ont. Bd. of Inquiry); *Hartling v. Timmins (Municipality) Commissioners of Police* (1981), 2 C.H.R.R. D/487 (Ont. Bd. of Inquiry). See also *Lewington, Moran and Leuszler v. Vancouver Fire Department*, 6 C.H.R.R. D/2599 (B.C. Board of Inquiry).

² In assessing undue hardship, consideration will be given to the cost, any outside sources of funding and any health and safety requirements. The OHRC's *Policy and Guidelines on Disability and the Duty to Accommodate* are available on the OHRC's website: www.ohrc.on.ca .