

Misgendering Employees Can Result in Damages Against Employers

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Gender identity is a protected characteristic under *The Human Rights Code* in Manitoba, and was clearly defined and explained in the 2019 decision, *T.A. v Manitoba*, 2019 MBHR 12:

"Gender identity" is a concept that is central to personhood. It is a psychological self-awareness of one's conscious self in relation to gender. An individual's gender identity may align with their birth sex, or it may not. It also may change. "Gender expression" is the way an individual presents and communicates their gender identity. It can be expressed through clothing, speech, body language, hairstyle, or voice. Other examples of gender expression are choice of name and personal pronouns (para. 22).

Two recent decisions of Human Rights Tribunals in Ontario (*EN v Gallagher's Bar and Lounge*, 2021 HRT0 240) and British Columbia (*Nelson v Goodberry Restaurant Group Ltd. dba Buono Osteria and others*, 2021 BCHRT 137) highlight the importance of employers respecting the preferred pronouns of their employees, and the potential consequences should an employer fail to show such respect.

In *EN v Gallagher's Bar and Lounge*, three employees filed applications alleging discrimination against their employer. All three applicants identified as either gender queer or as non-binary transgender persons, and all used the pronouns "they/them". Each of the employees asked the owner to refer to them by their preferred pronouns, but the owner refused to do so. Additionally, the owner was overheard speaking to customers and referring to the applicants using a transphobic slur. The applicants raised these issues with the owner, but he did not take any action. The applicants took the position that they had been constructively dismissed. They indicated that they did not want to experience a recurrence of the owner's conduct or the consequences of his disregard for their privacy and safety.

The respondent did not file a response to the application, and as a result, the Tribunal based its decision on the sworn affidavits and written submissions of the applicants. The Tribunal held that the employer discriminated against the applicants on the basis of their gender identity and gender expression, and that the comment made to customers was made in a public setting in the workplace, effectively outing the applicants in a derogatory and non-consensual way that caused them to fear for their safety. As such, the Tribunal ordered that the employer pay each of the applicants \$10,000.00 for injury to their dignity, feelings and self-respect, in addition to any lost wages.

In *Nelson v Goodberry Restaurant Group Ltd. dba Buono Osteria and others*, the complainant, a non-binary, gender fluid, transgender person who uses the pronouns “they/them”, filed a complaint alleging their employer and the bar manager, as well as others, had discriminated against them on the basis of their gender identity and gender expression. The complainant had worked at the restaurant for four weeks as a server and had informed the general manager of their preferred pronouns and had discussed how important it was to them to be properly gendered in the workplace. While the general manager was diligent in using their preferred pronouns and correcting themselves when making a mistake, the bar manager continued to refer to the complainant with she/her pronouns and used gendered nicknames, despite being asked to stop by the complainant and others. The general manager had spoken to the bar manager about his conduct, but he persisted. A heated dispute ensued when the complainant tried to address the behaviour with the bar manager, which resulted in the complainant’s termination. When asked why they were terminated, the complainant was told they came off “too strong too fast”, were too “militant”, and that they had made people uncomfortable.

The Tribunal held that the bar manager’s deliberate and persistent misgendering of the complainant was a breach of the *Human Rights Code (British Columbia)*. Furthermore, the Tribunal held that the employer had engaged in discrimination because, despite being committed to an inclusive workplace and taking steps to properly gender the complainant, the employer’s response to the complainant’s concerns fell short of what was reasonable and appropriate. The employer failed to take action when the bar manager continued to misgender the complainant, and in failing to do so, failed to ensure a healthy work environment. The Tribunal ordered the employer to pay the complainant \$30,000.00 in damages, and ordered the employer to implement a pronoun policy and mandatory diversity, equity and inclusion training.

These decisions serve as an important reminder that employers need to respect the gender identities and expressions that their employees communicate to them, including their preferred pronouns. Further, employers should promptly investigate and address any concerns brought to their attention regarding misgendering in the workplace, as a failure to do so may result in significant liability.

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