LEGALLY SPEAKING

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Skill and Fitness Tests as a Criteria for Employment

Editor's Note: The purpose of this article is to furnish lifeguards, instructors and pool operators with some general information on the law which might bear some relevance to aquatics programming and facilities. This is not to be construed as legal advice or opinion, but rather to show trends and principles of the law as they might affect aquatic personnel, through the use of recent cases decided throughout Canada.

Many employers are concerned about hiring the best possible employees and to that end, design a practical interview, requiring the candidates to perform various physical, written, and other skill demonstrations, to try to select the best possible candidate for the position. The issue has been raised as to the legitimate standards against which employers may measure prospective employees and how an employer may ensure that such standards do not become the subject of a court challenge.

There is much case law in Canada discussing the issue of how one measures a legitimate standard in an occupational field, as well as what dangers exist for employers in setting such standards. The Supreme Court of Canada has stated in Ontario Human Rights Commission v. Etobicoke, [1982] 1 S.C.R. 202 ("Etobicoke") that: "...in certain types of employment, particularly in those affecting public safety such as that of airline pilots, train and bus drivers, police and firemen, [the employer must] consider ...the risk of unpredictable individual human failure involved." To such an end, these employers require certain minimum levels of fitness in order for the applicants to manage in their job duties. Arguably, the job of a lifeguard would fit into the same category as those mentioned above, as, at any moment, there could be the need for a lifeguard to respond in an emergency situation, and the lifeguard must have a minimum level of physical fitness in order to respond successfully to such an emergency.

However, imposing standards on employees cannot be done in an arbitrary nor capricious manner, as has been discussed in several decisions from the Supreme Court of Canada and Appeal Courts across the country. In most of the cases, the employee alleges discrimination in that they were unable to meet a particular standard adopted by the employer leading to the employee's rejection for hiring or termination. In these cases, the employee argues that an arbitrary standard that has been set is inapplicable to them, or the standard does not measure adequately whether they can perform the tasks required of their occupation. For example, in the Etobicoke case cited above, a police officer brought an application to the Court challenging the collective agreement provision that he was forced to retire at the age of 60. The Court, through McIntyre J. states that "a mandatory retirement at age 60, provided for in a collective agreement, contravenes the provision of the Code [the Ontario Human Rights Code, R.S.O. 1970, c.318, s.4(6), as amended] by discriminating against certain employees on the basis of age."

In order for a successful discrimination argument to be advanced, the employee may argue that the occupational standard violates a prohibited ground enumerated in human rights legislation. Human rights is governed provincially, and each province in Canada has adopted its own legislation, substantially the same in all provinces. The courts in all cases were asked to review whether by imposing certain standards

on employees, the employer violated their human rights by discriminating against them on certain prohibited grounds. It is commonly understood that the prohibited grounds include discrimination based on age, gender, sexual orientation, race, creed, colour, marital status, nationality, ancestry or place of origin.

Notwithstanding the human rights legislation in each province, it is acknowledged that there are also certain occupations that require a physical standard where certain minimum thresholds must be set in order to maintain public safety. In those occupations, such discrimination may be warranted if the employer can show that there is a bona fide occupational requirement that justifies the particular type of discrimination. For example, in Ontario, section 4(6) of the Code states that "the provisions of the section relating to any discrimination, limitation, specification or preference for a position or employment based on age, sex or marital status do not apply where age, sex or marital status is a bona fide occupational qualification and requirement for the position or employment."

A Supreme Court of Canada decision, British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U., [1999] 3 S.C.R. 3, discusses the issue in relation to a forest firefighter. A female firefighter, who had been employed by the Province of British Columbia for three years, lost her job when the government adopted a new series of fitness tests which all forest firefighters were required to pass. Despite repeated attempts, she was unable to pass one of the fitness requirements, being a 2 kilometer run wearing full fire gear in less than 11 minutes. She was able to complete it in 11 minutes, 49.4 seconds. On the basis that she was unable to meet the fitness standards, she was terminated. The Courts looked at the evidence on both sides of the case. One interesting factor in this case was that the Government of British Columbia commissioned a team of researchers from the University of Victoria to undertake an independent review of the Government's existing fitness standards with a view to protecting the safety of firefighters while still meeting human rights norms. The researchers developed a series of tests that were ultimately implemented by the Government, all of which were designed to identify the essential components of forest firefighting, measuring the physiological demands of those components, selecting fitness tests to measure those demands and, finally, assessing the validity of those tests. The tests did not specify different standards for men and women. The evidence before the Court showed that approximately 65 to 70% of male applicants were able to pass the particular fitness test on their initial attempt while only 35% of the female applicants had similar success. Further, evidence before the Court showed that owing to physiological differences, most women have lower aerobic capacity than most men. Even with training, most women could not increase their aerobic capacity to the level required by the aerobic standard, although training allowed most men to meet the standard. As a result, the implementation of these tests had the unforeseen effect of discriminating between men and women based on the fact that the majority of women could not meet this test.

The Court found that "there was no credible evidence showing that the prescribed aerobic capacity was necessary for either men or women to perform the work of a forest firefighter satisfactorily." Further, the Court found that while "there is generally a reasonable relationship between aerobic fitness and the ability to perform the job of [forest firefighting]," this fell short, of "an affirmative finding that the ability to meet the aerobic standard chosen by the Government is necessary to the safe and efficient performance of the job."

This case sets out the test for an employer to show there is a bona fide occupational requirement that justifies discrimination between employees consequentially arising as a result of implementing the standards. In this case, the Court held there was adverse effect discrimination, meaning that an unintended consequence of the requirements imposed on the employees creates an effect of discrimination, as opposed to direct discrimination where an employer may set out certain requirements that on their face discriminate on the basis of prohibited grounds. In this case, given that there was adverse effect discrimination, the bona fide occupational requirement is met if "(1) there is a rational connection between the job and the particular standard, and (2) the employer cannot further accommodate the claimant without incurring undue hardship."

Therefore, it is clear that in order for an employer to ensure that they do not inadvertently discriminate, they must be sure that the fitness test is rationally connected to the job and to the particular standard, that is a measure of rational physical fitness expectations that would be required in the course of the ordinary duties of the employee, and that such a test in fact measures the ability of the employee to perform that function. While none of the cases considered an aquatic context, it is reasonable that the same issue may arise with respect to setting standards over and above the minimum requirements necessary to apply for the job position. Employers may wish to consult their legal counsel or the Lifesaving Society to review their potential guidelines for the desired demonstrated skills.