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# PREGNANT EMPLOYEES: EMPLOYERS NEED TO KNOW THEIR LEGAL RESPONSIBILITIES

***By Barry W. Kwasniewski****

## A. INTRODUCTION

On October 28, 2009, the Human Rights Tribunal of Ontario released its decision in *Maciel v. Fashion Coiffures*[1]. The tribunal found the employer hair salon liable for breaching the Ontario *Human Rights Code*, (the "Code") for dismissing a newly hired pregnant employee, ordering it to pay her over $35,000.00 in damages and requiring that it implement an "accommodation of pregnant employees program". This Bulletin will discuss the decision and outline the duties of employers (including charities and not-for-profit organizations) with respect to pregnant employees under Ontario law.

## B. THE FACTS

After successfully completing the interview process, twenty year old Jessica Maciel was hired as a receptionist to work in two related hair salons operated by the Fashion Coiffures. The position was full-time and was to be her first job after graduating from college with her business diploma. She was excited about the opportunity because she had been advised that there was the possibility of advancement in the salons. However, her employment was terminated on her very first day. The parties differed significantly over the reasons for the termination.

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[1] *Maciel v. Fashion Coiffures*, HRTO File Number 2008-00308-I

Ms. Maciel alleged she had been terminated from her new position after revealing her pregnancy to her manager. At the time, she was 4.5 months pregnant. She had not disclosed her pregnancy during the interview process. She testified that she had experienced nausea during her first shift while being trained by a fellow employee. She then told her co-worker that she was pregnant. The co-worker advised her to disclose her pregnancy to their manager as soon as possible, before the manager found out from someone else. According to Ms. Maciel, the co-worker told her that there had been a problem with another employee who had disclosed her pregnancy previously.

Ms. Maciel testified that she immediately met with the manager to discuss her pregnancy, who expressed concerns about her long-term availability. In an effort to calm her manager's concerns, she offered to work part-time to see how things worked out. The manager told her she would speak with "head office" and get back to her. Fifteen minutes later, the manager phoned Ms. Maciel telling her to pack her belongings and leave. The manager advised her that she would phone her the next day with the decision.

Ultimately, Ms. Maciel was advised that her employment was terminated, ostensibly because she was only available to work part-time, while the job required a full-time commitment. Ms. Maciel alleged that this explanation was merely a pretext, as she was willing and available to work full-time. According to her, she was actually terminated because of her pregnancy.

The employer contended that Ms. Maciel had never revealed her pregnancy. The manager testified that she had no knowledge of the employee's pregnancy until the application was filed with the Human Rights Tribunal. According to the employer's version of events, Ms. Maciel told the manager that she no longer wanted a full-time position and asked for a part-time position, but there was no position available to accommodate the employee's request. The employer denied that the employee's pregnancy played any role in their decision.

### C. THE DECISION

The employee's version of events would amount to discrimination on the basis of pregnancy. On the other hand, the employer' version would amount to a non-discriminatory explanation for the termination of the employee's employment. However, the adjudicator did not find the employer's explanation to be credible and found in favour of the employee. The adjudicator found that "on the balance of probabilities, the

applicant's pregnancy was a factor, likely the only factor, in the respondents' decision to terminate her employment."[2]

The adjudicator stated that there was no credible reason why Ms. Maciel would propose on her first day of employment that she work part-time, after having applied for and accepted a full-time position. In addition, working part-time would not have allowed her to accumulate enough hours of work to become eligible for Employment Insurance maternity benefits. The adjudicator also took issue with the fact that by her own testimony, the manager made no inquiries about how many hours the employee was willing to work or whether she was willing to work weekdays.

The adjudicator found that the employee had made out a *prima facie* case of discrimination on the basis of sex (pregnancy), contrary to sections 5(1), 10(2) and 9 of the Code, and that the employer had failed to prove a non-discriminatory explanation for the termination of the employee's employment.[3]

## D. THE REMEDIES

Ms. Maciel was awarded a total of $20,719.00 for lost wages and benefits. She attempted to find new work following her termination. However, her increasingly obvious pregnancy made her job search difficult. Therefore, Ms. Maciel was awarded $9,060.00 in lost wages for the period of time she would have worked for the employer up until her due date. In addition, Ms. Maciel was awarded $11,659.00 to compensate for lost benefits. The employee had been unable to collect maternity and parental benefits because she had accumulated no insurable hours. She would have become eligible for these benefits had she continued to work for the employer until her due date.

Ms. Maciel was also awarded $15,000 for injury to her dignity, feelings and self-respect. She testified that she suffered depression after she was terminated, which was compounded by her unsuccessful job search. Her financial difficulties also caused her distress and tempered her enjoyment of her newborn son. With respect to this damages award, the adjudicator stated, "I am mindful of the vulnerability of the employee. She was young, just out of school, and coping with an unplanned pregnancy. This was to have been her first

[2] *Ibid* at para. 46.
[3] *Ibid.*

full-time job, which she testified she was very excited about, making the experience that followed that much more distressing."[4] The employer was also ordered to pay applicable pre-judgment interest.

On the suggestion of the employee, the adjudicator also ordered the employer to prepare and distribute a written policy on the accommodation of pregnant employees and maternity/parental leave practices. The adjudicator considered the employee's suggestion to be appropriate given the overwhelming number of women employed in the salons.

## E. PREGNANCY AND THE ONTARIO HUMAN RIGHTS CODE

Under the Code, every person has the right to equal treatment with respect to employment without discrimination on the basis of several enumerated grounds, including sex.[5] Discrimination on the basis of pregnancy is a form of sex discrimination. Pursuant to Subsection 10(2) of the Code, "the right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant."[6]

According to the Ontario Human Rights Commission's *Policy on Discrimination Because of Pregnancy and Breastfeeding*, discrimination in employment on the basis of pregnancy is often based on common negative stereotypes and attitudes about pregnant women. Subject to *bona fide* job requirements, an employer cannot make decisions regarding hiring, promotions, transfers or termination, etc. because a woman is, was or may become pregnant. Therefore, the adjudicator found that the employer had violated the Code, because the employee's pregnancy was likely the only factor in the decision to terminate her employment.

The employee was under no obligation to disclose her pregnancy to her prospective employer prior to being hired. Pursuant to Subsection 23(2) of the Code, employers cannot request that female employees provide information about whether they are, have been, or intend to become pregnant.[7]

Employers have a duty to accommodate the needs of women during pregnancy and breastfeeding, up to the point of undue hardship. Examples of such accommodation include establishing a flexible work schedule,

[4] *Ibid.*, at para. 57.
[5] *Human Rights Code*, R.S.O. 1990, c. H.19, subsection 5(1).
[6] *Human Rights Code*, R.S.O. 1990, c. H.19, subsection 10(2).
[7] Ontario Human Rights Commission's *Policy on Discrimination Because of Pregnancy and Breastfeeding*, online: Ontario Human Rights Commission <http://www.ohrc.on.ca/en/resources/Policies/PolicyPregBreastfeedEN>.

temporary reassignment or providing a quiet area for rest during breaks.[8] Any accommodations provided must suit the needs of the individual pregnant woman, what may have been appropriate for one woman might not be suitable for another. The employer has the burden of proving whether an accommodation would present an undue hardship. However, as noted in the *Policy on Discrimination Because of Pregnancy and Breastfeeding*, "In most cases, accommodations for needs related to pregnancy will not require significant expenditures; rather, they involve increasing the flexibility of policies, rules and requirements. This may involve some administrative inconvenience, but inconvenience by itself is not a factor for assessing undue hardship."[9]

## F. PREGNANCY AND THE *EMPLOYMENT STANDARDS ACT*, 2000

In addition to the Code, the *Employment Standards Act,* 2000 (the "ESA") also provides certain entitlements to pregnant women and new parents. Under Section 46 of the ESA, a pregnant employee is entitled to take an unpaid pregnancy leave, unless her due date falls fewer than 13 weeks after she commenced employment.[10] The employee does not need to have been actively working for those 13 weeks, just that she was hired 13 weeks prior to her due date.[11] An employee's pregnancy leave may begin no earlier than the earlier of 17 weeks before her due date and the day on which she gives birth and no later than the earlier of her due date and the day on which she gives birth.[12] Generally, a pregnancy leave can last for a maximum of 17 weeks, but in some cases may be longer.[13] An employee must provide her employer with at least two weeks written notice prior to commencing her pregnancy leave and must provide a certificate from a certified medical practitioner stating the due date, if requested by the employer.[14]

Under Section 48 of the ESA, an employee is entitled to take an unpaid parental leave following the birth of a child or the coming of a child into the employee's custody, care and control for the first time, if he or she has been employed by the employer for at least 13 weeks.[15] The parental leave may begin no later than 52

[8] *Ibid.*
[9] *Ibid*.
[10] *Employment Standards Act*, S.O. 2000, c. 41, subsection 46(1).
[11] Ontario Ministry of Labour, "Pregnancy and Parental Leave", online: <http://www.labour.gov.on.ca/english/es/pubs/guide/pregnancy.php#pregnancy>.
[12] *Employment Standards Act*, (2000) subsection 46(2)&(3).
[13] *Ibid*., subsection 47(1).
[14] *Ibid*., subsection 46(4).
[15] *Ibid.*, subsection 48(1).

weeks after the child is born or comes into the employee's custody, care and control.[16] A parental leave usually lasts a maximum of 37 weeks, or 35 weeks if the employee has also taken a pregnancy leave.[17] Generally, an employee who has taken pregnancy leave must begin her parental leave when her pregnancy leave ends unless the child has not yet come into her custody, care and control for the first time.[18] Two weeks written notice must be provided to the employer by an employee wishing to take parental leave, except where the child arrives earlier than expected.[19]

After a pregnancy or parental leave is completed, an employer must reinstate the employee to the position the employee most recently held, if it still exists, or to a comparable position.[20] An exception to the right of reinstatement is provided if the employment "is ended solely for reasons unrelated to the leave."[21] Upon their return from leave, an employee must be paid a wage that is equal to the greater of the rate most recently earned or the rate the employee would be earning if they had worked throughout the leave.[22] Also, an employee is still entitled to participate in employment benefit plans while on leave.[23] The period of leave must be included in the calculation of length of employment, length of service and seniority, except for the purposes of determining whether the employee has completed a probationary period.[24]

The ESA provides eligible employees with the right to take an unpaid pregnancy or parental leave. However, the federal *Employment Insurance Act* governs the payment of benefits to employees during their time off. Employees considering taking a pregnancy or parental leave should determine their eligibility for Employment Insurance benefits.

[16] *Ibid.*, subsection 48(2).
[17] *Ibid.*, subsection 49(1).
[18] *Ibid*., subsection 48(3).
[19] *Ibid.*, subsection 48(4).
[20] *Ibid.*, subsection 53(1).
[21] *Ibid.,* subsection 53(2)
[22] *Ibid.*, subsection 53(3).
[23] *Ibid.*, subsection 51(1).
[24] *Ibid.*, section 52.

## G. CONCLUSION

Pregnant employees often suffer discrimination in the workplace. The *Maciel* decision provides an example where a termination in violation of the Code proved to be costly to the employer. Any decisions affecting the employment of pregnant employees, or those on parental leave, need to be made with caution. If your charitable or not-for-profit organization has any doubts as to its responsibilities, your lawyer should be consulted prior to any actions being taken.

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