
ONTARIO HUMAN RIGHTS COMMISSION UPDATES POLICY ON PREGNANCY AND BREASTFEEDING

*By Barry W. Kwasniewski**

A. INTRODUCTION

The Ontario Human Rights Commission (“OHRC”) released on October 29, 2014, an updated policy on discrimination related to pregnancy and breastfeeding (the “Policy”).¹ This updated Policy emphasizes women’s rights under the Ontario *Human Rights Code* (the “Code”), and underscores that because “child-bearing benefits society as a whole” women should not be disadvantaged in the workplace because they are or have been pregnant. The Policy outlines how discrimination related to pregnancy and breastfeeding intersects with other forms of discrimination, and provides examples of how discrimination, based on pregnancy and breastfeeding, may occur in the workplace. The Policy also discusses an employer’s duty to accommodate and touches on how protections provided under the Code relate to other pregnancy-related employment legislation. It is important for employers, including charities and not-for-profits, to understand the scope of potential discrimination related to pregnancy and breastfeeding and to take proactive steps to ensure that their practices and policies create a work environment which meets Code standards. This *Charity Law Bulletin* discusses the details of the updated OHRC policy.

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¹ Ontario Human Rights Commission, “Policy on preventing discrimination because of pregnancy and breastfeeding” (29 October 2014), online: <<http://www.ohrc.on.ca/en/policy-preventing-discrimination-because-pregnancy-and-breastfeeding>>.

B. OHRC POLICIES AND GUIDELINES

Section 30 of the Code authorizes the OHRC to prepare, approve, and publish policies that provide guidance in interpreting the Code.² These policies are meant to set standards regarding how individuals, employers, and service-providers should act to comply with the Code. The policies articulate the OHRC's current interpretation of the Code. Additionally, section 45.5 of the Code states that the Human Rights Tribunal of Ontario ("HRTO") may consider OHRC policies in its proceedings, and further requires the HRTO to consider such policies in a proceeding when a party or an intervenor requests the HRTO to do so.³

C. CODE PROTECTIONS FOR PREGNANCY AND BREASTFEEDING

Section 5 of the Code relates to discrimination in employment. Section 5(1) provides for equal treatment without discrimination. It provides:

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, gender identity, gender expression, age, record of offences, marital status, family status or disability.⁴

Section 5(2) of the Code provides for freedom from workplace harassment, and provides:

Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

Section 10(1) of the Code defines "family status" as:

The status of being in a parent and child relationship.⁵

Section 10(2) of the Code refers to pregnancy. It states that:

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

² *Human Rights Code*, RSO 1990, CHAPTER H.19, s. 30.

³ *Ibid* at s. 45.5.

⁴ *Ibid* at s. 5(1).

⁵ *Ibid* at s. 10(1).

⁶ *Ibid* at s. 10(2).

D. DISCRIMINATION BECAUSE OF PREGNANCY AND BREASTFEEDING

Unlawful discrimination may take many forms; it can be overt or subtle, direct or indirect. For example, an employer that does not allow breastfeeding on the workplace premises, or who dismisses a pregnant employee because of stereotypes that pregnant women cannot do their jobs would be acting contrary to the Code. Additionally, an employer who screens out an applicant on the basis that she may become pregnant, or asks a prospective female employee in an interview whether she wants to have children, is also acting contrary to the Code. An employer would also be in violation of the Code should it terminate a pregnant employee because she may require additional time-off to attend medical appointments related to the pregnancy.

1. Discrimination Based on Sex and Family Status

Discrimination because of pregnancy and breastfeeding primarily stems from differential treatment related to “sex” and “family status,” both of which are prohibited grounds of discrimination pursuant to the Code.⁷ A key difference in the updated Policy is that the OHRC now recognizes an expanded definition of “pregnancy,” which includes women who are trying to become pregnant, as well as the post-natal period.

The Supreme Court of Canada has recognized that pregnancy cannot be separated from sex. It has stated that “discrimination on the basis of pregnancy is a form of sex discrimination because of the basic biological fact that only women have the capacity to become pregnant.”⁸ Situations may also arise where discrimination based on pregnancy overlaps with discrimination based on family status. For example, an employer’s negative perception that mothers are less committed and competent than other employees, and therefore are denied promotion opportunities available to men, would be regarded as unlawful discrimination

Discrimination because of pregnancy and breastfeeding can include discrimination because a woman:

- Is trying to get pregnant, was pregnant, or states she is intending to have a child;
- Will be taking a maternity leave;
- Has an abortion or experiences complications related to an abortion;

⁷ *Ibid* at s. 5(1).

⁸ *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219 at 1242.

- Has a miscarriage or experiences complications related to a miscarriage;
- Lacks energy due to pregnancy;
- Is unable to wear a form-fitting uniform because she appears “too big”;
- Is recovering from childbirth;
- Is receiving fertility treatments; or
- Is breastfeeding.

Men may also face discrimination based on family status because of accommodation needs related to caring for a newborn or because of their relationship with women who are pregnant.

Breastfeeding is part of the post-natal period, and is related to the Code protected grounds of sex and family status. Breastfeeding benefits both the physical and emotional health of mothers and children. Women, therefore, should not be disadvantaged or harassed because they have chosen to breastfeed their children. For example, women should not be exposed to negative comments if they choose to breastfeed their children or if they choose to breastfeed in public.

2. Discrimination Based on Intersecting Code Grounds

A woman’s experience of discrimination based on pregnancy or breastfeeding can differ because of other aspects of her identity, such as age, disability, sexual orientation, and racial identity. It is therefore important to understand the effect of additional intersecting Code grounds. For example, young or single mothers may be additionally stereotyped as irresponsible or lacking parenting skills, while a pregnant woman with disabilities may face a lack of accessible services or supports. Additionally, gender identity and gender expression are protected under the Code. This Policy therefore also applies to people who are trans or gender diverse and experience discrimination, including inappropriate comments or unwanted attention, based on pregnancy or breastfeeding.

E. HARASSMENT BECAUSE OF PREGNANCY AND BREASTFEEDING

The Code defines harassment as “engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome” related to a prohibited ground in the Code.⁹ Harassment occurs if the person carrying out the behavior knows or should have known that the behavior was

⁹ *Supra* note 2 at s. 10(1).

unwelcome. It will also occur if a “reasonable” person would know such behavior to be unwelcome. Employers have an obligation to maintain a work environment that is free from harassment.

Pregnancy-related harassment can include:

- Repeated negative or demeaning comments about a pregnant woman’s appearance, pregnancy symptoms, or capacity as a mother, such as comments about a woman’s weight or attitude towards work after having the baby;
- Negative comments about the impact of a woman’s impending maternity leave on the workplace;
- Unwanted touching, for example, of the woman’s stomach; and
- Negative comments about a pregnant woman’s capacity to work or be in the workplace.

A poisoned work environment can occur when comments and conduct are ongoing or widespread throughout an organization.

F. DUTY TO ACCOMMODATE

Under the Code, employers have a legal duty to accommodate the needs of women based on pregnancy, unless doing so would cause undue hardship. The goal of accommodation is to help everyone have equal opportunities, access, and benefits. Employers have both a procedural duty and a substantive duty. The procedural duty involves considerations, assessments and steps taken to respond to an accommodation needs, and the substantive duty refers to the reasonableness of the chosen accommodation measure. Accommodation measures should be individualized, respect a woman’s dignity, allow for full integration and participation, and promote inclusion.

When a pregnant or breastfeeding woman has accommodation needs, she is responsible for clearly informing her employer of these needs. The accommodation process should involve a cooperative and respectful dialogue.

Some examples of potential accommodation measures include:

- Temporarily relocating an employee to another work station or location with alternative duties;
- Developing a flexible work schedule to accommodate medical appointments;
- If required, providing a private environment for rest breaks;

- Allowing breaks as necessary (e.g., for pumping or breastfeeding); and
- Providing a supportive environment for a woman who is breastfeeding (i.e. allowing a baby into the workplace to feed, making scheduling changes, or providing an appropriate area so that a woman may breastfeed).

G. ADDITIONAL LEGISLATED PROTECTIONS

In addition to protected rights under the Code, the Policy also highlights the legislated rights of pregnant women including those under the *Ontario Employment Standards Act, 2000* and the federal *Employment Insurance Act*. Such legislation provides only minimum standards and these rights can overlap with Code protections. If there is a conflict between the Code and other provincial legislation, the Code will take precedence.

H. CONCLUSION

The OHRC Policy on preventing discrimination because of pregnancy and breastfeeding provides useful guidance to employers and employees as to their respective legal rights and responsibilities. Employers' practices have quite frequently been subject to legal challenge over the years. Therefore, it remains important for charities and not-for-profits, as employers, to be aware of these obligations, and apply their policies in accordance with the applicable human rights laws.

For more information on the legal responsibilities of employers towards pregnant employees please see: Barry W. Kwasniewski, "Pregnant Employees: Employers Need to Know Their Legal Responsibilities" *Charity Law Bulletin No. 183* (18 December 2009), online: Carters Professional Corporation <http://www.carters.ca/pub/bulletin/charity/2009/chylb183.pdf>