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# **THE 2005 ANNUAL CHURCH & CHARITY LAW™ SEMINAR**

**Toronto – November 9, 2005**

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## **Update on Recent Employment Issues Including Duty to Accommodate**

**(Powerpoint Presentation)**

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## OVERVIEW

- **Legislation and Policies on Duty to Accommodate**
- **Influential Case Law on Duty to Accommodate**
- **Practical Suggestions for Employers**
- **Other Recent Employment Law Developments**

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## LEGISLATION AND POLICIES ON DUTY TO ACCOMMODATE

- **S. 2(a) of *Charter of Rights and Freedoms*:**

Everyone has the right to the following fundamental freedoms:

- a) freedom of conscience and religion
- b) freedom of thought, belief, opinion and conscience including freedom of the press and other media of communication.

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- **Ontario *Human Rights Code* Provisions:**

- **General prohibition against discrimination in employment:**

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.

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– **Constructive/adverse effect discrimination:**

11.(1) A right of a person ... 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; ...

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– **Can't use application form to classify applicants according to prohibited ground:**

23(2) The right under section 5 to equal treatment with respect to employment is infringed where a form of application for employment is used or a written or oral inquiry is made of an applicant that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination.

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– **Employment agencies can't be used to discriminate:**

23(4) The right under section 5 to equal treatment with respect to employment is infringed where an employment agency ... in receiving, classifying, disposing of or otherwise acting upon applications for its services or in referring an applicant or applicants to an employer or agent of an employer.

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– **Exemption for some organizations:**

24.(1) The right under section 5 to equal treatment with respect to employment is not infringed where,

- (a) a religious [or] philanthropic... organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment;

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**Policy on Creed and the Accommodation of Religious Observance published by OHRC in 1996**

- Code protects “personal religious beliefs, practices or observances, even if they are not essential elements of the creed”
- Does not protect “personal moral ethical or political views”
- Applies to employer’s interaction with all employees:
  - Full-time/part-time
  - Contract/temporary staff
  - Probationary employees
  - Unionized employees

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• **Policy/Code applies to all stages of employment relationship including:**

- Advertising:
  - Should not mention religion as a requirement unless it is reasonable, genuine and directly related to the performance of the job
- Application process:
  - Cannot ask questions about :
    - Religious affiliation/membership
    - Religious institutions attended
    - Frequency of attendance
    - Religious holidays

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- Customs observed
- Willingness to work on a specific day which may conflict with requirements of a particular faith
- Request for character reference that would indicate religious affiliation
- Interviewing:
  - Can ask questions about religious beliefs if organization falls into s.24 and questions are related to job requirements
  - For example: questions by denomination school as to religious membership if job involves communicating religious values to students

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- Promotions/Dress Requirements/Scheduling
  - Beware of constructive discrimination, which is a neutral requirement, qualification or factor that has an adverse impact on members of a group of persons who are identified by a prohibited ground of discrimination under the Code

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- Examples:
  - Requirement that all employees work on Saturday or Sunday
  - Requirement that all employees wear a certain hat
  - Requirement that all employees take breaks at certain times
- Religious leave: employers must accommodate requests for time off to observe holy days unless to do so would constitute “undue hardship”

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- Exception for “religious, philanthropic, educational, fraternal or social institutions” in s.24
  - Can give preference to those who are “similarly identified” in some circumstances
  - Must be rationally connected to the nature of the employment
- Example: denominational school :
  - Can hire a teacher that is of the same denomination
  - Would not be justified in only hiring janitors of same denomination

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#### **Duty to Accommodate Disabled Employees**

- What is a Disability?
  - Physical/Mental limitations that interferes with the person’s ability to perform their essential job functions.
- “Socially Constructed Disability”
- Caused by perceptions of others.
- Example
  - person infected with HIV but no symptoms
  - Person who is obese
- Must accommodate disabled employees to point of “undue hardship”

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#### **Undue Hardship**

- Employer has onus to show that accommodating the employee results in “undue hardship”
- Some factors courts will consider
  - Cost of accommodation
  - Health and Safety concerns
  - Type of work
  - Size of workforce
  - Financial ability to accommodate
- Some factors the courts won’t consider
  - customer/public perception based on stereotypes
  - Other employees objections based on stereotypes

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**INFLUENTIAL CASE LAW ON DUTY TO ACCOMMODATE**

- *Ontario Human Rights Commission v. Simpson-Sears Ltd.* #(1985), 23 D.L.R. (4th) 321.
  - Full-time sales clerk at Sears
  - All clerks required to work Friday evenings
  - Became member of Seventh Day Adventist Church and observed Sabbath from sundown Friday to sundown Saturday
  - Not allowed to work on Sabbath

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- Employer refused to accommodate Sabbath
- She complained to Human Rights Commission – employer discriminating on religious grounds
- “adverse effect discrimination”
- SCC concluded:
  - Employer must make reasonable efforts to accommodate the religious needs of the employee, short of undue hardship or undue interference in the operation of the employer’s business. The onus to show that reasonable efforts to accommodate have been made rests on the employer.

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- *Meiorin Grievance - British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees’ Union (B.C.G.S.E.U.)*
  - Female forest firefighter
  - Could not meet aerobic standard
  - Argued that the standard was higher than necessary for the job
  - Women almost automatically excluded because could not meet standard

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- Established three step test for Bona Fide Occupational Requirement (BFOR) - test that is applied for s.24 exemption
  - purpose of standard is rationally connected to performance of the job
  - employer adopted standard in honest and good faith that its purpose was work related
  - standard is reasonably necessary to the accomplishment of the legitimate work purpose

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- Questions an employer should ask:
  1. Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?
  2. If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?
  3. Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?

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4. Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?
5. Is the standard properly designed to ensure the desired qualification is met without placing an undue burden on those to whom the standard applies?
6. Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles?

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- ***Derksen v. Myert Corps Inc.* [2004]  
B.C.H.R.T.D. No. 57**
  - Project co-ordinator in youth job directions program
  - Member of the Christian Churches of God
  - Observes Sabbath from Friday to Saturday at sundown, 5 holy days and lunar new moons (every 29 ½ days) – must not work on any of these days
  - Terminated for having taken an unapproved day off for religious observance

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- BC Human Rights Tribunal found that:
  - The denial of the right to his religious days off, establishes a prima facie case of discrimination.
  - A complainant need not establish that a prohibited ground was the sole or even the most significant factor, only that it was a factor that contributed to the discrimination.
  - Employer must assess the individual request as against the standard and determine that a request could not be accommodated without undue hardship.

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- ***Moore v. British Columbia (Ministry of Social Services)***
  - Auxiliary financial assistance worker for Province of BC
  - Practicing Catholic – believes that abortion is morally wrong because fetus is human person
  - Denied client financial assistance under the *GAIN Act* for the purposes of having an abortion
  - Employment was terminated for “insubordination”

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- British Columbia Human Rights Tribunal found that:
  - Volunteer disqualification would have been the appropriate course of action in this type of situation.
- Employer found liable as had not established defence of accommodation

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- Case Law Re: Disabled Employees**  
*Sauder v. Kentville: Police Constable*
- Pregnant and requested light duties
  - Employer did not give her any work to do after that
  - Employer failed to accommodate

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- Mental Health Issues**
- Costs employers 8 billion dollars per year
  - 3% GDP and 13% of corporate profits.
- Most Common Issues**
- 62% Depression
  - 11% Anxiety
  - 11% Chemical Dependency

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**PRACTICAL SUGGESTIONS FOR EMPLOYERS**

- When an employee is requesting accommodation, an employer is responsible for:
  - Respecting the dignity of the person seeking religious accommodation
  - Assessing the need for accommodation based on the needs of the religious group of which the person is a member
  - Replying to requests for accommodation in a reasonable amount of time

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- Granting requests related to the observance of religious practices if this is possible without creating undue hardship
- Dealing with the employee in good faith;
- Considering alternatives and if accommodation is not possible, explaining this clearly to the employee and being prepared to provide evidence as to why this is so.

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- The employee's responsibilities include:
  - Taking the initiative to request accommodation
  - Explaining to the employer why the accommodation is required and how the employee's needs could be accommodated
  - Dealing with the employer in good faith
  - Being flexible and realistic

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- When dealing with scheduling conflicts, some of the options the employer should consider are:

- A modified break policy
- Flexible work hours
- Providing an area where employees can worship privately
- Granting paid leave for religious holidays that do not fall on the traditional days
- Rescheduling employees so days off fall on days of religious observance

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- Other ways of accommodating include:
- Exemptions
- Referring matter to another employee
- Alternative dress codes
- Transferring employees to other position - but must not be demotion

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#### **OTHER RECENT EMPLOYMENT LAW DEVELOPMENTS**

##### **Employment Insurance Compassionate Care Benefits:**

Provides maximum 6 weeks of compassionate care benefits for person who has to be absent from work to provide care or support to a gravely ill family member who is at risk of dying within 26 weeks

Family member includes: child, spouse, parent and common-law partner

Care or support means providing psychological or emotional support, arranging for care by a third party, or directly providing or participating in the care

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**S. 58(5)(c) of *Employment Standards Act* found unconstitutional:**

The provision, which operated to deny severance pay to employees who were terminated in circumstances in which their employment contract had “become impossible of performance or frustrated” by illness or injury, singled out the severely disabled to deny them an employment benefit to which they would have been entitled but for their disability

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- Good resources on this topic include:
  - Church Law Bulletin #13 “The Employer’s Duty to Accommodate: Religious Observances and Beliefs” available at [www.carters.ca](http://www.carters.ca)
  - OHRC website: <http://www.ohrc.on.ca>

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