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# THE 2006 ANNUAL CHURCH & CHARITY LAW™ SEMINAR

Toronto – November 8, 2006

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## Discrimination in the Workplace

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By Mervyn F. White, B.A., LL.B.

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**Discrimination in the Workplace**

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**HIRING AND INTERVIEW SCREENING  
PROTOCOLS FOR EMPLOYERS**

**Introduction**

- A properly conducted hiring process is critical not merely as a means to finding a suitable candidate,  
  
but also
- For protecting employers from being held liable for transgressing any of the provisions existing in law

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**The Ontario Human Rights Code (“Code”) and the Ontario Human Rights Commission**

- The Ontario Human Rights Commission (OHRC) is the regulatory authority in charge of ensuring the implementation of the Code in Ontario
- The Code states that it is public policy to recognize the inherent dignity and worth of every person, and to provide for equal rights and opportunities without discrimination
- Generally speaking, the OHRC is of the view that the only legitimate consideration determining an applicant’s suitability for employment is his/her job qualifications

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- To facilitate this objective, the OHRC issues guidelines, including a sample application form, which is intended to guide employers in order to avoid breaching any of the provisions contained in the Code – available at [www.ohrc.on.ca](http://www.ohrc.on.ca)
- Please note that in different provinces, different legislation applies e.g. British Columbia Human Rights Code – specific reference should be made to the applicable provincial legislation

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**THE ONTARIO HUMAN RIGHTS CODE**

- Section 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, same-sex partnership status, family status or disability
- Section 23(1) The right under section 5 to equal treatment with respect to employment is infringed where an invitation to apply for employment or an advertisement in connection with employment is published or displayed that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination

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- Section 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
- Section 23(3) nothing in subsection (2) precludes the asking of questions at a personal employment interview concerning a prohibited ground of discrimination where discrimination of such ground is permitted under this Act

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- The Code makes a specific exemption to religious, philanthropic, educational, fraternal and social institutions engaged in serving the interests of people identified by one of the non-discrimination categories (Section 24 (1))

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**PROHIBITED GROUNDS OF DISCRIMINATION**

As of the time of this presentation, the following are prohibited grounds of discrimination for employment pursuant to the Code in Ontario:

- Race
- Ancestry
- Place of Origin
- Colour
- Ethnic Origin
- Citizenship
- Creed
- Sex
- Sexual Orientation
- Age
- Record of offences
- Marital status
- Same-sex partnership status
- Family status
- Disability

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**PROHIBITED QUESTIONS ON APPLICATIONS**

- A question is categorically prohibited if it concerns the following:
  - Race (e.g. physical characteristics or requests for pictures, etc)
  - Creed (e.g. religious affiliation, holidays and customs observed, etc)
  - Sex (e.g. Mr., Mrs., Miss., Ms.; insurance beneficiary, etc)
  - Sexual Orientation (e.g. marital status, insurance beneficiary, etc)

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– Marital Status (e.g. marital status, maiden/birth name, etc.)

– Family Status (e.g. marital status, children or dependents, etc)

– Disability (e.g. health, disability, medical history, medications, etc)

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**PERMISSIBLE QUESTIONS ON THE APPLICATION**

- The OHRC does, however, permit the following questions:
  - 1) Citizenship/Place of Origin/Ethnic Origin
    - Are you legally entitled to work in Canada?
  - 2) Record of Offences
    - Have you ever been convicted of a criminal offence for which a pardon has not been granted?

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3) Age

- Are you 18 years of age or older and less than 65 years of age?
- The above three examples demonstrate that discrimination based on legal inquiries does not constitute a contravention of the Code
- Requirements and duties of employment should be reasonable, genuine and directly related to the job advertised
- Some qualifications can unfairly prevent or discourage people from applying for a job
  - Example, it may be permissible to require a person with a specific religious worldview, if that person will be working in a church environment

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**PRACTICALLY SPEAKING:**

- In practice this means that:
  - 1) When advertising for employment, or when conducting interviews employers must ensure that they are in compliance with the Code
  - 2) Employers must be careful that they do not inadvertently breach the provisions of the Code
  - 3) Employers should have employment policies in place and established to assist human resources personnel to ensure that they are not engaging in hiring practices that are in violation of the Code

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**RELIGION AND HUMAN RIGHTS**

- Under the Code, discrimination because of religion is against the law
- Everyone is to have access to the same opportunities and benefits, and should be treated equally and with respect, regardless of their religion
- Religion includes the practices, beliefs and observances that form a part of a faith or religion but does not include personal, moral, ethical or political views, nor does it include religions that promote violence or hate towards others, or that violate the criminal law

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- Religious protection against discrimination includes the employment field
- It does not matter whether discrimination is intentional; it is the effect that counts – “adverse effect discrimination” [O’Malley decision]
- Where an employment rule or obligation conflicts with a religious requirement, then there is a duty placed on the employer to ensure that individuals are able to observe their religion in the work environment, unless they would cause undue hardship either of cost or health and safety reasons

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- This means, that employers will have to make exceptions to dress code to recognize religious dress requirement
- Employers may have to allow persons to observe periods of prayer at particular times of the day
- Employers may be required to provide flexibility in staffing during religious holidays
- Employers may have to provide exemptions for matters of conscience

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**GENDER ISSUES AND EMPLOYMENT**

- Women are protected from discrimination based on sex. This protection includes pregnancy and breastfeeding
- It is illegal to discriminate because a woman is pregnant, has had a baby or may become pregnant
- A nursing mother has a right to breast feed a child in public
- In an interview it is illegal for an employer to ask if a woman:
  - Is pregnant
  - Has a family
  - Plans to have a family

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- It is illegal to fire, demote or lay a woman off because of pregnancy or family
- Employers are obliged to make a mother's work environment free of harassment or discrimination
- An employer should provide a woman with sufficient time to breastfeed or express milk
- If a woman has special needs because of pregnancy an employer must attempt to accommodate these needs

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- Special needs can include:
  - Difficulties from pregnancy or childbirth
  - Miscarriage
  - Abortion
  - Fertility treatments
  - Reasonable time for recovery from childbirth
  - Breastfeeding
  - Bereavement

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- SEXUAL HARASSMENT**
- Sexual harassment means unwanted or unwelcome conduct of a sexual or gender related nature
  - Such conduct may include but is not be limited to:
    - Inappropriate touching
    - Offensive jokes or remarks about men or women
    - Making sexual requests or suggestions
    - Staring at or making unwelcome comments about someone's body

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- Being verbally abusive because of gender
- Sexual harassment does not have to be sexual in nature. It can include making stereotypical statements about a gender
- Sexual harassment can happen to both men and women
- Sexual harassment can lead to a poisoned work environment, such that even if sexual harassment is not directed at a particular individual, it can still affect them
- Employers are obliged to make sure sexual harassment does not occur at work – their obligation is to make a work environment free of sexual harassment

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**DUTY TO ACCOMMODATE DISABLED EMPLOYEES**

- **The employer has a duty to accommodate disabled employees**
- **Only arises if the disability is interfering in some way with the employee’s ability to work.**
- **Test that the court uses is:**
  - **Underlying physical condition or impairment**
  - **Corresponding physical limitation**
  - **Socially constructed disability**

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- **Disability can include:**
  - **Physical disabilities such as diabetes, brain injuries, lack of physical coordination, etc..**
  - **Mental health issues**
  - **Learning or developmental disabilities**
  - **Chronic illnesses such as diabetes, fibromyalgia, chronic pain, cancer, etc..**
  - **Conditions which cause social stigma such as obesity, alcoholism and HIV+**

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**THE DUTY TO ACCOMMODATE**

- **The duty to accommodate employees with disabilities means accommodation must be provided in a manner that most respects the dignity of the employee, if to do so does not create undue hardship**
- **The employer should consider different ways of accommodating a disabled employee along a continuum taking into account the ways which are most respectful of privacy, autonomy, integration and other human values, to those which are least respectful of those values**

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**INDIVIDUALIZED ACCOMMODATION**

- **The key to accommodating employees with disabilities is individualization. The courts have held that each person with a disability must be considered, assessed and accommodated individually**
- **There is no set formula for accommodating people with disabilities. Each person's needs are unique and must be considered when an accommodation request is made. A particular solution may meet one person's requirements but fail to meet another's**

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**DUTIES AND RESPONSIBILITIES IN THE ACCOMMODATION PROCESS**

- **The person with a disability is required to**
  - **Advise the accommodation provider of the disability**
  - **Make her or his needs known to the best of his or her ability, preferably in writing, in order that the person responsible for accommodation may make the requested accommodation**
  - **Answer questions or provide information regarding relevant restrictions or limitations, including information from health care professionals, where appropriate, and as needed**

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- **Participate in a discussion regarding possible accommodation solutions**
- **Co-operate with any experts whose assistance is required to manage the accommodation process**
- **Meet agreed upon performance and job standards once accommodation is provided**
- **Work with the accommodation provider on an ongoing basis to manage the accommodation process**
- **Discuss his or her disability only with persons who need to know. This may include the supervisor, a union representative or human rights staff**

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- **How can employer's accommodate?**
  - **Workplace modifications**
  - **Absences for medical reasons**
  - **Stress reduction in the workplace**
  - **Workplace attitudes- provide education to other employees**
- **Actions to take upon receiving request for accommodation:**
  - **Confidentiality**
  - **Request only info required to accommodate employee appropriately**

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- **Take active role in reaching solutions**
- **Act quickly**
- **Be open to various alternatives**
- **Record everything that is done to accommodate employee**
- **Do testing (FAE or PDA) to determine what employee can do and not do**
- **Consider developing HR policies about accommodation**
- **If unionized work environment - get union involved in accommodation process - they too have duty to accommodate**

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- **Essential duties of the current job**
  - **The Code guarantees equal treatment to all persons capable of performing the essential duties or requirements of the job**
  - **No one can be determined to be incapable of performing those duties until efforts have been made to accommodate the individual up to the point of undue hardship**
  - **The first task is to separate the essential duties of the job from the non essential duties. The employee with the disability should then be assessed in terms of his or her ability to perform the essential duties and, on that basis, accommodation should be considered**

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- An employer should not draw conclusions about an employee’s ability to perform the essential duties of a particular job without actually testing the ability of the person
- It is not enough for the employer to assume that the person cannot perform an essential requirement. Rather, there must be an objective determination of that fact
- The duty to accommodate may require employers to consider modifying performance standards or productivity targets

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**ALTERNATIVE WORK**

- Although accommodation in the pre-disability job is always preferable, it may not always be possible due to the disability of the employee
  - The issue of whether an employee is required to provide an employee with an alternative job is not clear
  - However, in light of the broad and purposive interpretation afforded to human rights legislation, it is the view of the OHRC that accommodation in a job other than a pre disability job may be appropriate in some circumstances

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- The following questions should be considered:
  - Is alternative work possible and available, at present or in the near future?
  - If it is not available, can a new position be created without causing undue hardship?
  - Does it require additional training and does the training impose undue hardship?
  - Do the tasks performed match the job description, or is there flexibility in the workplace with regard to an employee’s responsibilities?

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- What are the past practices of the workplace?
- How interchangeable are workers?
- Do employees frequently change positions either permanently or temporarily for reasons other than disability accommodation?

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**Undue Hardship**

- Business inconvenience, resentment, hostility of co-workers, collective bargaining agreements and customer preferences cannot be considered in the accommodation process
- The Code describes three considerations in assessing whether an accommodation would cause undue hardship. These are:
  - Cost
  - Outside sources of funding, if any
  - Health and safety requirements, if any

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**COST**

- The SCC in British Columbia (*Public Service Employee Relations Commission*) v. BCGSEU stated that “one must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased costs as a reason for refusing to accord the disabled equal treatment”
- Costs will amount to undue hardship if they are:
  - Quantifiable
  - Shown to be related to the accommodation
  - So substantial that they would alter the essential nature of the enterprise, or so significant that they would substantially affect its viability

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**Outside Sources of Funding**

- The availability of outside sources of funding may alleviate accommodation costs
- Organizations must make use of outside resources in order to meet their duty to accommodate before claiming undue hardship
- Three potential sources of funding

**1) Funds that may be available to the individual only, provided through government programs and that are linked to the individual’s disability**

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**2) Funds that would assist employers and services providers defray the cost of accommodation. For example “a lawyer who is deaf, receives real-time captioning or sign language interpreter accommodation funded and provided by a court. While a lawyer is acting in court, the court takes responsibility for the duty to accommodate, relieving the lawyer’s employer or its responsibility during this time period only**

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**3) Funding programs to improve accessibility for persons with disabilities is a corporate or organization responsibility. Governments have a positive duty to ensure that services generally available to the public are also available to persons with disabilities. (OHRC “Policy and Guideline on Disability and the Duty to Accommodate”)**

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**HEALTH AND SAFETY**

- Where a health and safety requirement creates a barrier for a person with a disability, the accommodation providers should assess whether the requirement can be waived or modified
- The employer is required to show an objective assessment of the risk as well as demonstrate how the alternative measure provides equal opportunity to the person with a disability
- The employer might be able to claim undue hardship after these measures were undertaken and a significant risk still remains (OHRC “Policy and Guidelines on Disability and the Duty to Accommodate”)

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**OVERVIEW**

- The duty to accommodate is a complex area of law. Each case is different and each turns on its own facts
- It is prudent to draw upon different kinds of expertise in order to manage and accommodate disabled employees, including where necessary retaining legal expertise
- This area of law is developing rapidly, and human resources personnel must ensure that they are familiar with their obligations imposed upon them pursuant to the law or risk facing a complaint filed by an employee to the OHRC

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