

POLICY ON DISCRIMINATION BECAUSE OF PREGNANCY AND BREASTFEEDING

**ONTARIO
HUMAN RIGHTS
COMMISSION**

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Executive Summary

Child-bearing benefits society as a whole. International covenants recognize the social significance of motherhood, and require state parties, including Canada, to protect maternity as a social function. The Supreme Court of Canada has recognized the importance of child-bearing and stated that the financial and social burdens associated with having children should not rest entirely on women.

While women have made significant strides towards gender equality in many areas, discrimination because of pregnancy and breastfeeding continues to be a common occurrence, particularly in the workplace. Since only women have the capacity to become pregnant, discrimination on the basis of pregnancy is a form of sex discrimination.

The Ontario Human Rights Commission's *Policy on Discrimination Because of Pregnancy and Breastfeeding* contains the Ontario Human Rights Commission's interpretation of the provisions of the Ontario *Human Rights Code* relating to pregnancy and breastfeeding.

The Policy examines the different ways in which women experience discrimination on the basis of pregnancy and breastfeeding. Discrimination may take place in employment, in housing accommodation, or in the receipt of services, goods and facilities. Discriminatory behaviour may be rooted in negative attitudes and stereotypes. It may be direct, or it may be subtle. It may be systemic or institutional. It may arise out of a failure to accommodate the needs of a woman relating to pregnancy or breastfeeding. Women who are pregnant or breastfeeding may also experience harassment and poisoned environments where they work, live or where they receive services.

Discrimination on the basis of pregnancy often intersects with discrimination based on other grounds. The Policy discusses ways in which a woman's experience of discrimination based on pregnancy may differ based on other aspects of her identity. For example, there are unique and persistent stereotypes about pregnant women who are young, in receipt of social assistance, racialized and/or parenting on their own.

Employers, housing providers and service providers have a duty to accommodate, to the point of undue hardship, the needs of women during pregnancy, or when they are breastfeeding. For example, an employer may be required to provide a flexible work schedule to accommodate medical appointments or breastfeeding needs.

The Policy sets out the respective responsibilities of those involved in the accommodation process. For example, a pregnant or breastfeeding employee with accommodation needs has a responsibility to clearly inform her employer of

her need for accommodation and of the accommodation required, preferably in writing. Once the employer is aware of what accommodation is required, the employer has a duty to take the necessary steps to accommodate the special needs and circumstances of the pregnant employee, up to the point of undue hardship, in a timely manner.

In addition to examining the protections under the *Code*, the Policy looks at other relevant pregnancy-related legislation and protections. For example, pregnant women have rights and entitlements under Ontario's *Employment Standards Act* and the federal *Employment Insurance Act*.

I. Introduction

The Ontario *Human Rights Code* (the "*Code*") states that it is public policy in Ontario to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The provisions of the *Code* are aimed at creating a climate of understanding and mutual respect for the dignity and worth of each person, so that each person feels a part of the community and feels able to contribute to the community.

The *Code* prohibits discrimination because of sex. This includes the right to equal treatment without discrimination because a woman is, was, or may become pregnant or because she has had a baby.

Child-bearing benefits society as a whole. Thus, women should not be disadvantaged as a result of being pregnant. The Supreme Court of Canada has recognized that the financial and social burdens and cost associated with having children should not rest entirely on women, stating, "That those who bear children and benefit society as a whole should not be economically or socially disadvantaged seems to bespeak the obvious."¹

Several international agreements and conventions to which Canada is a party contain provisions with respect to the pre-natal and post-natal periods. Article 10(2) of the *International Covenant on Economic, Social and Cultural Rights* provides that special protection should be given to mothers during a reasonable period before and after childbirth. During such a period, working mothers should be accorded paid leave or leave with adequate social security benefits.² The *Convention on the Elimination of All Forms of Discrimination Against Women* states that women shall have appropriate services in connection with pregnancy and breastfeeding, including maternity leave and protections against loss of employment.³ These covenants recognize the social significance of motherhood, and require state parties to ensure a proper understanding of maternity as a social function and to take steps to ensure that women are not prevented from reaching their full potential, particularly in the workplace, because of caregiving responsibilities towards their children.

While there have been significant advances towards gender equality, unfortunately, discrimination against women because of pregnancy continues to be a common practice in society, particularly in employment. Many women who are, or may become, pregnant fear that their employers will respond negatively to their pregnancy. This often results in these women experiencing considerable stress and in many cases their fears are borne out and they lose their jobs. As well, women who are breastfeeding often face negative attitudes from employers, or when using services or facilities, and may experience difficulty in securing appropriate accommodation that will allow them to nurse their children. Pregnant women may be disadvantaged in their search for housing because landlords do not want children in their buildings, believing that children are noisy, destructive and disruptive. “Adult only” housing continues to be prevalent despite the clear prohibitions of the *Code*.

This *Policy* sets out the Ontario Human Rights Commission’s (the “Commission’s”) position on discrimination on the basis of pregnancy and breastfeeding at the time of publication, and replaces the version of the *Policy* approved by the Commission in 2001. This *Policy* deals primarily with issues that fall within the jurisdiction of the *Code*, and which can form the subject matter of a human rights claim.⁴ At the same time, the *Policy* interprets the protections of the *Code* in a broad and purposive manner, consistent with the principle that the quasi-constitutional status of the *Code* requires that it be given a liberal interpretation that best ensures its anti-discriminatory goals are attained.

Commission policy statements contribute to creating a culture of human rights in Ontario. This *Policy* is intended to help the public understand the *Code* protections against discrimination and harassment because of pregnancy and breastfeeding. It is also meant to assist individuals, employers, organizations, providers of services and housing, and policy-makers in understanding their responsibilities and acting appropriately to ensure compliance with the *Code*.

The analysis and examples used in the *Policy* are based on the Commission’s research, international standards, human rights claims, and tribunal and court decisions.

II. Purpose of OHRC’s Policies

In accordance with s. 30 of the *Code*, the Commission has the authority to prepare, approve and publish human rights policies to provide guidance on the interpretation of provisions of the *Code*. Commission policies and guidelines set standards for how individuals, employers, service providers and policy makers should act to ensure compliance with the *Code*. They also serve the important function of providing clarification to the public of the rights and responsibilities under the *Code*.

Pursuant to s. 45.5 of the *Code*, the Human Rights Tribunal of Ontario (the Tribunal) may consider policies approved by the Commission in a human rights proceeding before the Tribunal. Where a party or intervenor in a proceeding requests it, the Tribunal *shall* consider a Commission policy. Where a Commission policy is relevant to the subject-matter of a human rights application, parties and intervenors are encouraged to bring the policy to the Tribunal's attention for consideration. As per s. 45.6 of the *Code*, if a final decision or order of the Tribunal is inconsistent with a Commission policy, in a case where the Commission was either a party or an intervenor, the Commission may apply to the Tribunal to have the Tribunal state a case to the Divisional Court.

Commission policies are subject to decisions of the Superior Courts interpreting the *Code*. Commission policies have been given great deference by the courts and Tribunal⁵, applied to the facts of the case before the court or Tribunal, and quoted in the decisions of these bodies.

Commission policies are important because they represent the Commission's interpretation of the *Code* at the time of publication. Any questions regarding the *Policy* should be directed to the staff of the Commission.

III. Code Protections For Pregnancy and Breastfeeding

The Supreme Court of Canada has stated that pregnancy cannot be separated from gender. Pregnancy discrimination is a form of sex discrimination simply because of the basic biological fact that only women have the capacity to become pregnant.⁶ Section 10(2) of the *Code* 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."

"Pregnancy" includes the process of pregnancy from conception up to the period following childbirth and includes the post-delivery period and breastfeeding.⁷ It also includes discrimination against a woman because she is of childbearing age and may become pregnant.⁸ The term "pregnancy" takes into account all the special needs and circumstances of a pregnant woman and recognizes that the experiences of women will differ.

Special needs can be related to circumstances arising from:

- miscarriage or stillbirth;⁹
- abortion;
- complications because of pregnancy or childbirth;
- conditions which result directly or indirectly from an abortion/miscarriage or stillbirth;
- recovery from childbirth;¹⁰ or

- breastfeeding.

As noted above, pregnancy includes the post-natal period, which includes breastfeeding. Breastfeeding is a natural part of child-rearing, and so is integrally related to the ground of sex, as well as to family status. Numerous studies have demonstrated the benefits of breastfeeding for mothers, children, and their communities, in terms of physical and emotional health and development. Women should not be disadvantaged in services, accommodation or employment because they have chosen to breastfeed their children. Nor should women be harassed or subjected to negative treatment because they have chosen not to breastfeed their children. When this *Policy* refers to discrimination on the basis of pregnancy, it includes discrimination on the basis of breastfeeding.

Breastfeeding includes pumping or expressing milk, as well as nursing directly from the breast. Women choose to breastfeed their children for varying lengths of time, and should not be exposed to negative comments or treatment because, for example, they continue to breastfeed their toddlers.¹¹

Sometimes women are discouraged by others from breastfeeding in public places because of concerns that it is indecent. Breastfeeding is really a health issue, and not one of public decency. Women should have the choice to feed their babies in the way that they feel is most dignified, comfortable and healthy.

IV. Pregnancy and Other Grounds of Discrimination Under the Code

1. Pregnancy and Intersecting Code Grounds

A woman's experience of discrimination based on pregnancy may differ based on other aspects of her identity. There are unique and persistent negative stereotypes about pregnant women who are parenting on their own, or who are young, have a disability, are in receipt of social assistance, are racialized or Aboriginal, or are lesbian or bisexual. For example, young mothers, especially when they are parenting on their own, are often stereotyped as irresponsible and lacking parenting skills, and may therefore face discrimination in housing. Similarly, some women experience negative attitudes if they are pregnant or have had a child "out of wedlock", regardless of whether they are in a long-term, committed relationship.¹²

As well, some pregnant women may have unique needs and experience specific barriers related to other aspects of their identities. There may be, for example, a lack of appropriate and accessible services and supports for pregnant women who have disabilities.

Mothers who are young, parenting on their own, have a disability, or are racialized or Aboriginal are disproportionately poor, and therefore especially vulnerable to the effects of discrimination.

2. Pregnancy and Family Status

Human rights protections against discrimination based on pregnancy are related closely to those based on family status. Family status is defined in the *Code* as “the status of being in a parent and child relationship”.¹³ This ground extends protection to persons who are providing care within a parent-child “type” of relationship, including both eldercare and care for young children.¹⁴ Situations may arise where discrimination based on pregnancy overlaps with discrimination based on family status. For example, a new mother in the immediate post-natal period will be covered by the grounds of both pregnancy and family status.

Pregnancy discrimination and family status discrimination are often based on the same stereotypes and negative attitudes, such as the perception on the part of some employers that mothers are less capable, committed and competent than other employees, or negative attitudes towards children on the part of some landlords. Employers or housing providers sometimes discriminate on the basis of pregnancy in order to avoid dealing with a woman’s family status-related needs at a later date.

Many women who are pregnant also already have children; they may therefore simultaneously experience discrimination on the basis of pregnancy and family status.

3. Pregnancy and Domestic Abuse

There is research indicating that pregnant women may be at greater risk of domestic violence, and that women experiencing domestic violence may be subjected to higher levels of violence during a pregnancy.¹⁵

Women who are facing violence in the home can end up being disciplined, or even losing their jobs because of rigid absenteeism policies. As well, the fact that landlords do discriminate against single mothers with children can place women who are attempting to leave abusive relationships at serious risk. They may end up returning to an abusive relationship because they have literally nowhere else to go.¹⁶

V. Forms of Discrimination Based on Pregnancy and Breastfeeding

The *Code* provides that every person has the right to be treated equally without discrimination because of pregnancy in the areas of employment; housing accommodation; services, goods and facilities; contracts; and professional and vocational associations. The purpose of anti-discrimination laws is to prevent the violation of human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice.

There are several ways of defining and identifying discrimination. Discrimination includes any distinction, including any exclusion, restriction or preference based on pregnancy, that results in the impairment of the recognition of human rights and fundamental freedoms.¹⁷

The most important issue to determine is whether pregnancy was a *factor* in the discrimination. Even if pregnancy or being of child-bearing age is only one of the factors in a decision to restrict a woman's equal access to employment, housing or services, this may constitute a violation of the *Code*.¹⁸

1. Discrimination Based on Negative Attitudes and Stereotypes

Discrimination can take many forms. It may be direct and intentional, where an individual or organization deliberately treats a woman differently because she is, was or may become pregnant. This type of discrimination usually arises from negative attitudes and biases, and is a common form of discrimination based on pregnancy. For example, a service provider may ask a breastfeeding mother to either stop breastfeeding or leave the premises, because it prohibits breastfeeding in its public areas, or an employer may dismiss a pregnant employee in order to avoid any inconveniences associated with her maternity leave.

2. Subtle Discrimination

In other cases, discrimination may be more subtle or covert. Intent or motive to discriminate is not a necessary element for a finding of discrimination – it is sufficient if the conduct has a discriminatory effect. Subtle forms of discrimination can usually only be detected upon examining all of the circumstances, as individual acts may be ambiguous or explained away.

Example: After a highly successful and valued female employee announces her pregnancy, she finds that her manager begins to find fault with her work and to require her to account minutely for her time. Her request to attend a high-profile annual business conference is denied. Her manager tells her that she needs to “really start demonstrating that she’s committed to success”. She begins to wonder whether her workplace problems are linked to her pregnancy.

3. Harassment and Poisoned Environments

The *Code* prohibits harassment because of sex (which includes pregnancy) in the occupancy of accommodation, and in employment. While the *Code* contains no explicit provisions dealing with harassment in the areas of services, goods and facilities, contracts, and membership in trade and vocational associations, it is the position of the Commission that harassment because of sex (pregnancy) in such situations would constitute a violation of the right to equal treatment without discrimination with respect to services, goods, facilities, contracts, and membership in trade and vocational associations.

Harassment is defined in section 10(1) of the *Code* as “engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.” There is both a subjective and an objective component to harassment; that is, one must consider both the harasser’s own knowledge of how his or her behaviour is being received, as well as how a “reasonable” third party would generally view such behaviour. The determination of the point of view of a “reasonable” third party must take into account the perspective of the person who is harassed. It is important to note that there is no requirement that the individual have objected to the harassment at the time, in order for a violation of the *Code* to exist, or for a person to claim their rights under the *Code*. An individual who is the target of harassment may be in a vulnerable situation, and afraid of the consequences of speaking out. Employers, landlords, and service providers have an obligation to maintain an environment that is free of discrimination and harassment, whether or not anyone objects. Each situation must be assessed on its own merits.

In employment, for example, pregnancy-related harassment may take a variety of forms, including:

- Resentful comments about the fact of a woman’s pregnancy, or the impact of her impending maternity leave on the workplace, or the fact that she has been pregnant more than once while working at the same job.
- Repeated negative, demeaning, or paternalistic comments about a pregnant woman’s appearance, pregnancy symptoms, or capacity as a mother. Sometimes, a woman’s pregnancy is treated as license to make overly personal comments about her appearance or personal choices that would not otherwise be considered socially acceptable. For example, a pregnant woman may be subjected to frequent commentary about her weight, or her anticipated attitude towards work once she has had the baby.
- Unwanted touching, commonly of a pregnant woman’s stomach.

Example: Once a female employee discloses her first pregnancy to her manager and co-workers, she is frequently advised that “she will not want to come back to work” and that “she will no longer be as driven about her work” once she has had her baby. She begins to worry that she will not be

welcome back to work after her maternity leave, or that she will no longer be considered a valuable worker.

Harassment may not explicitly reference a woman's pregnancy. For example, if a woman who is pregnant is subjected to groundless and repeated criticism of her work performance, or becomes the brunt of demeaning practical jokes and teasing that is not directed at other employees, this may be harassment because of her pregnancy.

While the definition of harassment refers to more than one incident of comment or conduct, even a single statement or incident, if sufficiently serious and substantial, can create a "poisoned environment", in the sense that the individual is subjected to that environment experiences terms and conditions of employment, tenancy, services, *etc.*, that are quite different from those experienced by individuals who have not been subjected to such comments or conduct. Where an individual is subjected to a poisoned environment, a denial of equality under the *Code* has occurred.

4. Institutional or Systemic Discrimination

Discrimination based on pregnancy may be systemic or institutional. Systemic or institutional discrimination consists of patterns of behaviour, policies or practices that are part of the social and administrative structures of an organization, and which create or perpetuate a position of relative disadvantage for women who are, have been, or may become pregnant. These may appear neutral on the surface, but nevertheless have an exclusionary impact on the basis of pregnancy.

Example: A top-performing and highly valued female employee applied for a promotion to a management position. She had worked for the same employer for almost ten years and her performance evaluations were always exceptional. Five years into her employment, she took a one-year maternity leave when her son was born. The employer, in deciding workplace promotions, places significant weight on "continuous service" as a job requirement. Consequently, in the employer's view, the woman's time away from the workplace while on maternity leave broke her continuity of service. She ended up losing the promotion to a more junior and less experienced male employee who had worked for 6 consecutive years. While, on its face, this "continuous service" policy may appear to be neutral, it will have an adverse effect on women who, more frequently than men, will have gaps in their employment due to parental leaves and childcare responsibilities.

5. Failure to Accommodate

One of the most common forms of discrimination based on pregnancy is the failure to accommodate needs related to pregnancy or breastfeeding. This most

frequently arises with respect to employment, but may also occur in services or housing situations.

Example: Shortly after a woman started work as a sales associate, she became pregnant. She experienced nausea and fatigue. While she was able to complete her job duties, she needed to sit down to rest at times. She also experienced some problems with her pregnancy, which caused her some anxiety and required her to take some time off work, as well as reduce the length of her shifts. Her sales fell sharply during her pregnancy, and the employer terminated her employment, without considering the impact of her pregnancy and her reduced work hours on her performance. The Tribunal found that the employer had discriminated against the woman because of her pregnancy.¹⁹

There may be circumstances where a decision, policy, practice or process results in discrimination based on pregnancy, but is nonetheless justified because it is reasonable and *bona fide* in the circumstances. The Supreme Court of Canada has set out a framework for examining whether a *bona fide* requirement has been demonstrated.²⁰ If *prima facie* discrimination is found to exist, the person responsible for accommodation must establish on a balance of probabilities that the standard, factor, requirement or rule

1. was adopted for a purpose or goal that is rationally connected to the function being performed,
2. was adopted in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal, and
3. is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.²¹

As a result of this test, the rule or standard itself must be inclusive and must accommodate individual differences up to the point of undue hardship rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them. This ensures that each person is assessed according to his or her own personal abilities instead of being judged against presumed group characteristics.²²

The ultimate issue is whether the person responsible for accommodation has shown that accommodation has been provided up to the point of undue hardship. In this analysis, the procedure to assess accommodation is as important as the substantive content of the accommodation.²³

The following non-exhaustive factors should be considered in the course of the analysis:²⁴

- whether the person responsible for accommodation investigated alternative approaches that do not have a discriminatory effect;
- reasons why viable alternatives were not implemented;
- ability to have differing standards that reflect group or individual differences and capabilities;
- whether persons responsible for accommodation can meet their legitimate objectives in a less discriminatory manner;
- whether the standard is properly designed to ensure the desired qualification is met without placing undue burden on those to whom it applies; and
- whether other parties who are obliged to assist in the search for accommodation have fulfilled their roles.

VI. Employment

Protection against discrimination in employment extends to all aspects of the employment relationship, from the recruitment and selection process, through all the various aspects of the working relationship, to the termination of the employment.

1. Other Relevant Pregnancy-Related Legislation and Protections

Pregnant women have significant legislated rights other than those under the *Code*, most importantly under the Ontario *Employment Standards Act (ESA)* and the federal *Employment Insurance Act (EIA)*. These rights may overlap with *Code* protections, or may provide additional protections. It is important to remember that these pieces of legislation have purposes that differ from those of the *Code*, and are aimed at providing minimum standards only. Where there is a conflict between rights under the *Code* and rights under the other legislation, the *Code* has primacy unless the legislation specifically states otherwise.²⁵

1.1 Entitlements under the Employment Standards Act

For detailed information on entitlements under the ESA, please contact the Employment Standards Branch of the Ontario Ministry of Labour.

The *ESA* entitles pregnant employees who fall under that legislation to pregnancy leave, and sets minimum standards for that leave,²⁶ including:

- who is entitled to pregnancy leave;
- information that pregnant employees must provide to their employers when requesting pregnancy leave;
- timelines for beginning and ending pregnancy leave;
- length of a pregnancy leave; and
- entitlements where there has been a stillbirth or miscarriage.

The *ESA* also entitles parents to take parental leave upon the birth of a child or upon a child's coming into their care, control and custody for the first time. Both fathers and mothers may take parental leave.²⁷ The *ESA* sets out minimum standards for:

- who may take parental leave;
- notice that employees must provide to the employer regarding parental leave;
- when parental leave must begin and end; and
- the length of parental leave.

During pregnancy and parental leave, the *ESA* protects the employee's right to continue to participate in employer benefit plans. The employee's leave period is to be included in any calculation of the employee's length of employment, length of service, or seniority. At the conclusion of the leave, the employee must be reinstated to the position he or she most recently held with the employer, or, if that no longer exists, a comparable position, unless the employment of the employee has been terminated for reasons unrelated to the leave. Employees must be paid the greater of the rate that they were making prior to the leave, or the rate that they would have been making if they had worked throughout the period of leave.²⁸

Notably, the *ESA* prohibits employers from intimidating, dismissing, or otherwise penalizing an employee because he or she is or will become eligible to take a leave, intends to take a leave, or takes a leave under the Act.²⁹

1.2 Benefits Under the Employment Insurance Act

For detailed information on benefits under the EIA, please contact Service Canada (<http://www.servicecanada.gc.ca/>).

Eligible workers who are away from work due to pregnancy, childbirth or adoption may be entitled to pregnancy and parental benefits under the *EIA*. Employment insurance benefits may be payable for up to 15 weeks for pregnancy and up to 35 weeks for parental benefits, for a potential combined total of 50 weeks employment insurance benefits for women who give birth. In some cases, pregnant women may also be eligible for up to 15 weeks of sickness benefits.

1.3 Collective Agreements and Company Policies

Pregnant women may also have rights under company policies and collective agreements. Company policies and collective agreements cannot act as a bar to providing accommodation to pregnant women, subject to the undue hardship standard. Unions and employers are jointly responsible for negotiating collective agreements that comply with human rights laws, and should build conceptions of equality into collective agreements.

2. Hiring, Promotions, Transfers, Termination

Discrimination in employment on the basis of pregnancy is often based on common negative stereotypes and attitudes, such as that:

- a pregnant woman will not be able to work productively and effectively during her pregnancy and that accommodation of her needs will be onerous;
- a pregnant woman generally does not return to work following her maternity leave³⁰ ;
- if she does return from maternity leave, she will no longer be a desirable employee, as her priority will be her childcare responsibilities rather than her career.

These ideas are long-standing and persistent, even though they are not borne out by the facts. They may influence employers to refuse to hire pregnant women, to outright terminate their employment, or to discourage them from remaining at or returning to the workplace.

Subject to *bona fide* requirements, denying or restricting employment opportunities in hiring, or transferring, *etc.* a woman because she is, was or may become pregnant or because she has had a baby, is a violation of the *Code*.³¹

Example: A woman applied for an office position. After her interview, the employer called her and offered her a position. At that point, the woman told the employer that she was pregnant, and would be needing to take a maternity leave in about six month's time. The employer said that he would have to consult his business partner, and he would call her back, but the company never contacted her again. The Tribunal found that the employer had decided not to hire the woman based on her pregnancy.³²

Under section 23(2) of the *Code*, employers cannot make inquiries, whether written or oral, during the application stage of the hiring process, that directly or indirectly classify applicants based on a prohibited ground. That is, employers cannot request that female applicants provide information about whether they are, have been, or intend to become pregnant. Employers may ask questions related to pregnancy and breastfeeding at a personal interview, but only in the rare circumstance that the inquiry relates to a *bona fide* occupational requirement, as further described below.

Pregnant women and women of childbearing years are vulnerable to subtle forms of marginalization in the workplace. Employers sometimes withhold or withdraw projects or opportunities from pregnant women or women of childbearing age because they question the woman's commitment, competence or capacity, or because they believe that "she will be gone on leave soon anyway". Employers cannot refuse to provide training or promotions to women because of the mere fact that they are pregnant or that they will be taking a pregnancy-related leave of

absence. The fact that a woman will be taking a pregnancy-related leave of absence should not be taken into account in determining access to workplace opportunities, unless there is a *bona fide* requirement involved. Where possible, employers should ensure that women who are away from work due to pregnancy-related leaves are informed about major developments and workplace opportunities. A woman loses more than just a project or a promotion when she is discriminated against because of pregnancy; she experiences a “missed opportunity”, which may have long-term consequences for her employment prospects.

Example: When a one-year position as a Vice Principal became vacant, the complainant, a highly regarded teacher with previous positive experience as a Vice Principal applied. The School Board refused to consider her application because she would be on maternity leave for the first part of the term. The Alberta Court of Queen’s Bench found that the complainant had been discriminated against on the basis of sex. While the School Board expressed concerns about the continuity and disruption to the system, the Court found that the inconvenience that would have been caused by accommodating the complainant’s maternity leave would not have caused undue hardship.³³

Discriminatory termination of employment due to pregnancy may take a variety of forms, including:

- terminating the employment of a woman at the time she announces her pregnancy;
- dismissing or harassing a pregnant employee who requests accommodation for pregnancy-related needs;
- dismissing an employee when it is time for her to return from pregnancy-related leave; or
- constructively dismissing a pregnant employee through harassment, demotions, unwanted transfers, excessive criticism of her work, failure to accommodate her pregnancy-related needs, or other negative treatment.

Example: Prior to her maternity leave, the complainant worked at a private school as a Program Coordinator. She had previously worked as an Instructor. When she was ready to return to work, her employer informed her that she could not return to her position because it had been “closed” due to declining enrolment and financial problems. The Tribunal found that an employer is not prevented from reorganizing and shrinking its workforce while an employee is away on maternity leave; however, human rights legislation requires that a woman not be penalized for such an absence. In this case, since the complainant had been a valued employee who taught complex courses, she could have been returned to an Instructor position, even if the Program Coordinator position had been eliminated, and the employer had no legitimate business-related reason for not offering the complainant that opportunity.³⁴

Example: The complainant worked as a bartender. After her employer learned of her pregnancy, the employer repeatedly questioned the complainant about whether she would continue to work, discussed the need to find a new bartender, tried to persuade her to leave her job early, attempted to change her shifts, and accused her of stealing beer as a pretext for firing her. The Tribunal found the employer liable for discrimination against the complainant on the basis of pregnancy.³⁵

3. Reasonable and *Bona Fide* Requirements and the Duty to Accommodate

3.1 *Providing Appropriate Accommodation*

Employers have a duty to accommodate the needs of women during pregnancy, or when they are breastfeeding. Women should not have to choose between their own health, or the health of their baby, and their jobs. As a Human Rights Tribunal has stated in relation to breastfeeding:

In their working lives, women face particular challenges and obstacles that men do not. A woman who opts to breastfeed her baby takes on a child-rearing responsibility which no man will ever truly face. In order for a working mother to bestow on her child the benefits that nursing can provide, she may require a degree of accommodation. Otherwise, she may end up facing a difficult choice that a man will never have to address. On the one hand, stop nursing your child in order to continue working and making a living for yourself and your family. On the other hand, abandon your job to ensure that your child will be breastfed.³⁶

The same analysis applies during a woman's pregnancy.

Special needs during the pre-natal and post-natal period can be accommodated, short of undue hardship, in a variety of ways. It is the Commission's position that the duty to accommodate requires that the most appropriate accommodation be determined and undertaken, short of undue hardship. The most appropriate accommodation is one that most respects the dignity of the individual, meets the individual's needs, promotes inclusion, and ensures confidentiality. Accommodation should result in equal opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges enjoyed by others, or it may be proposed and adopted for the purpose of achieving equal opportunity. Persons should not experience disadvantage owing to needs related to prohibited grounds of discrimination. Where the most appropriate accommodation would result in undue hardship, the accommodation provider should consider next-best, phased-in, or interim accommodation.

Example: A police officer requested light duties for the last stages of her pregnancy. The Police Service had a policy that it did not provide a modified work program and her request for light duties was denied. Instead, she was told that she could take a part-time civilian position at a much lower salary. This meant that the officer would have to retire from the force. The Board of Inquiry stated that the rule of “no modified duties” was applied to all officers but it clearly excluded “pregnant women from consideration of the fact that they are at higher risk during the latter stages of their pregnancy”. It found that the accommodation offered was unreasonable because other male officers who were injured were given lighter duties. The Board of Inquiry concluded that the Police Service policy of “no modified duties” discriminated against the police officer because of her sex.³⁷

It is important to keep in mind that each woman's experience of pregnancy is unique, and symptoms and needs will vary. Employers should not expect a pregnant woman to “tough it out” because others in similar positions have not in the past requested accommodation; nor should they impose accommodations on pregnant women who are not requesting it, because of assumptions about pregnancy.

Some accommodation examples are provided below:

- An employee may be temporarily relocated to another work station or location or re-assigned to alternative duties;
- A flexible work schedule can be provided to accommodate medical appointments, including treatment for infertility, as well as breastfeeding needs;³⁸
- Where required, a quiet environment can be provided for pregnant employees to rest during breaks;
- Breaks can be allowed as necessary. Employees who require breaks, such as for pumping or breastfeeding, or for more frequent eating to counteract pregnancy-related nausea, should normally be accorded those breaks, and not be asked to forgo normal meal breaks as a result, or work additional time to make up for the breaks, unless the employer can show undue hardship. Similarly, pregnant women should not have their time docked or be otherwise penalized for using the washroom more frequently.
- A supportive environment can be provided for a woman who is breastfeeding. Accommodation may mean allowing a care-giver to bring the baby into the workplace to be breastfed, making scheduling changes to permit time to express milk or breastfeed at work or to reach home in

time to breastfeed, and providing a comfortable, dignified and appropriate area so that a woman can breastfeed, or express and store breast milk at work. In some special cases, it may involve permitting a leave of absence.³⁹ A supportive environment can generally be created with minimum disruption.

It is important to note that an employer cannot arbitrarily decide that a pregnant employee should take a leave of absence as an accommodation measure, without considering other options for dealing with a situation requiring accommodation, in consultation with the affected employee.

Example: When an employee who worked as a spray painter became pregnant, her doctor advised her to work away from paint fumes for health reasons. Her doctor concluded that she could work safely in the packing area of the plant. The employer refused to accept the judgment of the doctor, and put the employee on involuntary leave for the period of her pregnancy. The Ontario Divisional Court found that the employer had discriminated against the woman, calling the employer's behaviour "paternalistic, patronizing and unreasonable".⁴⁰

Accommodation providers are not required to implement accommodations that would amount to undue hardship. The test for undue hardship is set out fully in the Commission's *Policy and Guidelines on Disability and the Duty to Accommodate*.⁴¹ The same standard applies to all grounds of the *Code*, including pregnancy.

The *Code* prescribes three considerations in assessing whether an accommodation would cause undue hardship. No other considerations, other than those that can be brought into these three, can properly be considered. For example, customer preference for receiving service from non-pregnant women will not justify discrimination.⁴² The three factors are:

- cost
- outside sources of funding, if any; and
- health and safety requirements, if any.

The onus of proving that an accommodation would cause undue hardship lies on the accommodation provider. The evidence required to demonstrate undue hardship must be real, direct, objective, and in the case of costs, quantifiable. A mere claim, without supporting evidence, that the cost or risk is "too high" based on impressionistic views, paternalistic attitudes, or stereotypes will not be sufficient.⁴³

Example: When a female restaurant server reached the later stages of her pregnancy, her employer asked her to switch over to bartending, a lower paid role, for the remainder of her pregnancy, because they were

concerned about the safety of her fetus. She refused, and offered to provide a doctor's note concerning her fitness to continue as a server. In response, the employer asked the employee to sign a waiver of any liability on the part of the employer if she was injured at work during her pregnancy. A Human Rights Tribunal found that the employer had discriminated on the basis of sex and pregnancy.⁴⁴

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.

3.2 The Accommodation Process

Accommodation is a multi-party process and everyone should work together cooperatively and respectfully to develop and implement appropriate accommodation solutions. There is a duty to enter into a cooperative and respectful dialogue in order to develop, implement and maintain appropriate accommodation. In the workplace, this involves the employer, the employee, and the workplace bargaining agent, if any.

- Where a pregnant or breastfeeding employee has accommodation needs, she is responsible for clearly informing the employer of her need for accommodation and of the accommodation required, preferably in writing.
- Where necessary, the pregnant employee should provide documentation from professionals to support and detail her accommodation needs. Pregnant women should not be required to provide documentation of changes that are normal and natural to any pregnancy, such as the need for more frequent washroom breaks, or a reduction in the ability to stand for lengthy periods of time in the later stages of pregnancy, or the need to attend regular medical appointments. Breastfeeding women should not be required to provide medical documentation to substantiate the need to breastfeed their children.⁴⁵
- Employers should accept accommodation requests in good faith, unless there are legitimate reasons for acting otherwise. The employer is entitled to request sufficient information from the employee in order to make the accommodation, and may seek expert advice or opinion where required.
- The employer should bear the cost of any medical information or documentation required in the accommodation process.

- The employee should participate in discussions regarding possible accommodation solutions, and cooperate with any experts whose assistance is required to manage the accommodation process.
- The employer is required to take an active role in ensuring that alternative approaches and possible accommodation solutions are investigated and canvass various forms of possible accommodation and alternative solutions.
- Once the employer is aware of what accommodation is required, the employer has a duty to take the necessary steps to accommodate the special needs and circumstances of the pregnant employee, short of undue hardship, and to do so in a timely manner.⁴⁶

The procedure to assess accommodation is as important as the substantive content of the accommodation.⁴⁷

Example: A woman was hired as a live-in caregiver for two young children. When her employment commenced, the woman informed her employer that she was unexpectedly pregnant, and that she was suffering from nausea, but emphasized that she still wanted the job. The next day, the employer decided not to proceed with the employment, citing concerns about how the caregiver would deal with the physical demands of the job, given that she was experiencing significant nausea. The Human Rights Tribunal found that the employer did not initiate an adequate process for determining whether accommodation was possible without undue hardship.⁴⁸

4. Health-Related Absences and Benefit Plans

What follows below is a discussion of the human rights aspects of pregnancy related leaves. For information about employment standards and employment insurance requirements and entitlements, readers should consult with the provincial Ministry of Labour and the federal Services Canada.

Health-related absences from work and benefit plans are the subject of employment standards and employment insurance legislation, as well as human rights law. Section 25(2) of the *Code* states that contracts of group insurance between employers and insurers do not violate the equal treatment provisions of the *Code* with respect to age, sex, marital status or family status, so long as they comply with the *ESA* and its Regulations. However, no provisions permitting differential treatment of health-related absences because of pregnancy during maternity leave have been included in the Regulations under the current *ESA*, and the current Regulations require employers to provide the same benefit entitlements to employees on pregnancy or parental leave as are provided to employees who are on other types of leave.⁴⁹

As a general principle, once an employer decides to provide an employee benefit package, the employer is required to do so in a non-discriminatory manner. Exclusions from benefit plans that disproportionately impact on a group identified under the *Code* will contravene human rights law, unless there is a *bona fide* justification.

The courts have recognized that pregnancy and childbirth place unique demands on women. The provision of special maternity benefits to pregnant women that are not available to other parents has been upheld by the courts as non-discriminatory, insofar as these benefits exist to recognize the unique physical and psychological needs and demands on pregnant women, including the physical changes and risks associated with pregnancy; the profound physical demands of childbirth; the recovery requirements of the post-partum period; and the demands associated with breastfeeding.⁵⁰ However, leave programs or benefit policies that are based on stereotypical gender roles or assumptions based on family status will be subject to human rights challenges.⁵¹

The Supreme Court of Canada has held that, while pregnancy is not an illness or disability, it is a valid health-related reason for absence from work.⁵² Therefore, pregnant employees with health-related needs may not be treated less favourably than employees who are absent from work for other health-related reasons, such as illness, accident, or disability. This applies at any stage of a pregnancy.

“Health” is defined broadly to include:

- the physical and psychological health of the woman;
- the health, well-being, growth and development of the fetus; and
- a woman’s ability to function as a social being, interacting with her family, employer and significant others.

A “health-related absence from work” can therefore mean any absence that is related to a woman’s health, or the health and well-being of the fetus.

Specifically, where an employer has a benefit plan that compensates health-related absences or provides disability benefits to its employees, a woman should be entitled to disability benefits during that portion of the pregnancy or parental leave that she is unable to work for health reasons related to the pregnancy and childbirth. Payment must begin as soon as the pregnant woman is away from the workplace for a health-related reason.⁵³ Any health-related portion of maternity leave is to be treated the same as other health-related leaves such as a sick leave or disability leave. The employee should be compensated at substantially the same level and should be subject to the same conditions as

an employee who becomes ill, such as the requirement to provide a medical confirmation for the absence.⁵⁴ Pregnant employees are to be compensated for the full period of their health-related absence, whether it occurs during the pre-natal or post-natal period, and including recovery from childbirth.

Different women have different medical and physiological needs related to pregnancy and childbirth depending on their circumstances. For example, the time required to recover from childbirth varies. Because women respond differently to pregnancy, requests for health-related absences should generally be assessed and granted on an individual basis. Pregnant employees who require leave for health-related pregnancy concerns should follow the proof-of-claim procedures of the employer's benefit plan to establish that the health-related absence is valid.

A Divisional Court decision, *Crook v. Ontario Cancer Treatment and Research Foundation*, confirmed a Board of Inquiry's decision that sick leave benefits should be available, for health-related reasons, to a woman who has recently given birth when she has chosen not to go on maternity leave under the *ESA*.⁵⁵

Finally, a woman may have health problems related to her pregnancy that force her to be away from work *before* or *after* her pregnancy leave or parental leave. She can access health benefits under a workplace sick or disability plan in this situation. However, she should check with the Employment Standards Branch at the Ministry of Labour since her decision to take short or long term disability leave may affect her right to take pregnancy and/or parental leave. There are strict rules about when she is entitled to take pregnancy or parental leave and when she must notify her employer. The duty to accommodate under the *Code* operates concurrently with employment standards entitlement. For example, the *Code* may require employers to provide leaves of absence greater than those outlined in the *ESA*, where there is a valid pregnancy-related reason.

Women on maternity leave continue to be entitled to other benefits under employment-related benefit plans including pension plans, life insurance plans, accidental death plans, extended health plans and dental plans.⁵⁶ Employers are also required to continue to make contributions to such plans, so long as employees continue to make their contributions, as required.⁵⁷

VII. Housing

Section 2 of the *Code* protects a woman who is, was or may become pregnant, or has had a baby against discrimination in housing. This right applies to renting, being evicted, building rules and regulations, repairs, harassment, and use of services and facilities.

While discrimination in housing on the basis of pregnancy and breastfeeding occurs more frequently in rental housing arrangements, the *Code* also protects against such discrimination in other housing situations, including the purchase of property, the negotiation of mortgages, and the occupancy of condominium living arrangements (for example, discriminatory restrictions on the use of shared spaces).

Pregnant women who are seeking housing may face a range of negative and discriminatory attitudes and stereotypes. Some landlords prefer not to have children in their premises because they believe that children are noisy, disruptive, and will damage the property. The normal noise and behaviour associated with babies and children should not be a reason for denial of housing, eviction, or harassment of pregnant women.

Similarly, lone mothers face powerful negative stereotypes, particularly if they are racialized, Aboriginal, young, or in receipt of social assistance, including stereotypes that they are less responsible, less reliable, inadequate parents, and more likely to default on their rent.⁵⁸

In some cases, landlords directly refuse applications because a woman is expecting a child.⁵⁹ For example, a landlord may refuse to accept an application from a pregnant woman because the apartment is “not childproof”. They may also use a number of euphemisms to discourage or deny applications from families that are expecting children. Statements that a building is:

- A “quiet building”;
- An “adult lifestyle” building;
- “not soundproof; or
- “geared to young professionals”

may, when coupled to a refusal to rent to a pregnant woman, indicate that discriminatory attitudes related to pregnancy played a role in the refusal. Section 13 of the *Code* prohibits the publication or display before the public of any notice, sign, symbol, emblem or other representation that indicates the intent to discriminate. Use of such phrases in advertisements may be considered an announcement of an intent to discriminate.

Example: Over time, a young woman shared a two-bedroom apartment with various roommates. The owners were aware of the arrangement, and she received their approval for each co-tenant. She was later involved with one of these co-tenants and became pregnant. When the superintendent found out she was pregnant, he asked her if she was “intending to give the baby up for adoption” and said that the owners “didn’t want kids in the building”. The Board of Inquiry found that the complainant had been discriminated against because of her sex and family status. In the Board’s view, one of the main reasons she was evicted “was her pending motherhood”.⁶⁰

There is no defence under the *Code* that permits “adult lifestyle” housing that results in the exclusion of children.⁶¹ However, the *Code* does permit age restrictions in housing under some circumstances.

- Section 15 of the *Code* permits preferential treatment of persons aged 65 and over, and therefore permits housing that is limited to persons over the age of 64.
- Section 14 of the *Code* permits special programs to alleviate hardship and disadvantage, such as specially designed barrier-free housing projects aimed at older persons with disabilities.
- Section 18 creates a defence for religious, philanthropic, educational, fraternal or social institutions or organizations that primarily serve the interests of older persons and that provide housing as part of their services.⁶²

As well as direct discrimination, pregnant women may also face systemic barriers in accessing and maintaining housing. For example, as children join a family, housing needs will change and additional space will be required. Families expecting children are therefore more likely to request transfers between rental units in the same building, and to be disproportionately negatively impacted where such transfers are denied. An Ontario Board of Inquiry ruled that rules prohibiting transfers between rental units are discriminatory.⁶³

Occupancy policies must be based on *bona fide* requirements. Landlords are not obliged to permit overcrowding of their units. However, arbitrary rules regarding occupants per room or per bedroom may have an adverse impact on pregnant women. For example, landlords should not deny apartments to pregnant women on the basis of arbitrary rules regarding the sharing of bedrooms by children of the opposite sex.

Landlords must address any discrimination or harassment related to pregnancy that may arise within their rental housing environment, whether between tenants, or involving agents of the landlord, or others who are part of the housing environment, such as contracted maintenance workers. If landlords become aware of discrimination or harassment, either through a complaint or other means, they must respond appropriately. Landlords who fail to take steps to address a poisoned environment or a complaint of discrimination may be found liable.

VIII. Services, Goods and Facilities

Section 1 of the *Code* prohibits discrimination in “services, goods and facilities” against women who are pregnant and breastfeeding. This includes educational institutions, hospitals and health services, insurance providers, public places like malls and parks, public transit, and stores and restaurants. This means that

women who are pregnant, or who are accompanied by their babies to a restaurant or a theatre, cannot be denied service or access unless there is a *bona fide* reason for doing so. This also means that women have a right to nurse undisturbed, and cannot be prevented from breastfeeding a child in, for example, a public area or restaurant. They also cannot be asked to move to a more “discreet” area to breastfeed a child, or to “cover up”. Complaints from other persons will not justify interfering with a woman’s right to breastfeed.

Example: While a mother was waiting in a courtroom to contest a parking ticket, she began to nurse her infant son. The security guard asked her to leave the courtroom and nurse her son where she would not be seen. The Tribunal ruled that this was discriminatory.⁶⁴

Education providers have the same type of obligation as employers to accommodate women who are pregnant or breastfeeding, including the obligation to cooperatively discuss options and create a supportive environment.

Example: An educational program requires all of its students to complete a co-op placement as a condition of graduation. These placements last several weeks, and are in locations across the province. A student who has a young baby who is still breastfeeding frequently asks to be accommodated in a placement within a reasonable commute of her home, so that she can go home in the evening to nurse her baby, and more easily transport the breastmilk she will be pumping during the day. The program explores accommodation options with her.

Service providers should take steps to design their services in a way that is inclusive of pregnant and breastfeeding women.

Example: The City of Toronto has approved a policy on Breastfeeding in Public that supports women who live, work in or visit Toronto to breastfeed anytime and anywhere in public spaces controlled by the City. The City also promotes positive attitudes towards breastfeeding through public events such as annual Breastfeeding Challenges.⁶⁵

Access to services may be affected by negative attitudes and stereotypes. For example, lone mothers are heavily stigmatized, especially if they are young, racialized or Aboriginal, or in receipt of social assistance, and these women may find themselves subjected to unwarranted scrutiny, denied services, or subjected to harassment when seeking services.

Example: A young Aboriginal lone mother in receipt of social assistance is told by her caseworker that she “is just having babies to get benefits” and that she “should have her tubes tied”.

The *Code* allows for an exception for certain types of insurance policies, under section 22. This section permits individual and group insurance policies, which are offered as a service, to make distinctions based on sex if the distinctions are made on *reasonable and bona fide* grounds. In *Bates v. Zurich*,⁶⁶ the Supreme Court of Canada stated that a discriminatory practice in the insurance industry is “reasonable” if:

- a) it is based on a sound and accepted insurance practice; and
- b) there is no practical alternative.

Example: A professional association offers as a service to its members an optional insurance policy. The policy has a specific provision requiring a 30-day pre-existing condition restriction that applies only to women who are pregnant. This means that a woman who is pregnant at the time she applies for the policy is not eligible for coverage. If a pregnant woman challenges this requirement, the insurance provider, and possibly the professional association, would have to show that this requirement meets the test of a sound and accepted insurance practice and that there is no practical alternative.

FOR FURTHER INFORMATION

For more information about the Ontario Human Rights Commission or this policy statement, please call 1-800-387-9080 (toll free) or in Toronto (416) 326-9511 (TTD (416) 314-4535), during regular office hours from Monday to Friday. You can also visit our Web site at www.ohrc.on.ca.

¹ *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 at para. 40 [hereinafter *Brooks*].

² 16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 (entered into force 03 September 1981, accession by Canada 19 May 1976).

³ 18 December 1979, 1249 U.N.T.S. 13, Can. T.S. 1982 No. 31 (entered into force 03 September 1981, accession by Canada 09 January 1982).

⁴ Bill 107, *An Act to amend the Human Rights Code*, was passed in December 2006. Since June 30, 2008, human rights claims are filed directly with the Human Rights Tribunal of Ontario. Prior to this time, complaints were filed with the Ontario Human Rights Commission.

⁵ In *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 at para. 53 (Ont. Bd. Inq.), the Board of Inquiry applied the United States Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (4th Cir. 1971) to conclude that Commission policy statements should be given "great deference" if they are consistent with *Code* values and are formed in a way that is consistent with the legislative history of the *Code* itself. This latter requirement was interpreted to mean that they were formed through a process of public consultation.

⁶ *Brooks, supra*, note 1 at para 38.

⁷ The length of the post-delivery period covered by human rights protections is dependent on the circumstances of the mother: *Alberta Hospital Association v. Parcels* (1992), 17 C.H.R.R. D/167 (Alta. Q.B.); *Parcels v. Red Deer General & Auxiliary Hospital Nursing Home (Dist. No. 15)* (1991), 15 C.H.R.R. D/257 (Alta. Bd. of Inq.) [hereinafter *Parcels*].

⁸ *Wiens v. Inco Metals Co.* (1988), 9 C.H.R.R. D/4795 (Ont. Bd Inq.). The employer refused to employ women of childbearing age in an area of its plant where there was a risk of accidental emissions of nickel carbonyl gas, which could harm a fetus. The Board of Inquiry found that this policy was discriminatory; it restricted opportunities for all women who had the potential to become pregnant, and a fetus could be adequately protected in other ways.

⁹ In a British Columbia Human Rights Tribunal decision, *Tilsley v. Subway Sandwiches* (2001), 39 C.H.R.R. D/102 (B.C.H.R.T.), a woman was fired for not showing up at work when she was in hospital because of a miscarriage. The Tribunal ruled that discrimination because of a miscarriage is one form of discrimination because of sex, and that the employer had a duty to accommodate the employee's pregnancy, which included her miscarriage, to the point of undue hardship.

¹⁰ "Pregnancy" is understood to extend beyond the date of delivery and post-delivery recovery, which is included in the definition of "pregnancy". The length of time is dependent on the circumstances of the mother. See further *Parcels, supra*, note 7.

¹¹ It is worth noting that the World Health Organization recommends that infants be exclusively breastfed for the first six months of their lives, and continue breastfeeding together with receiving complementary foods until two years of age, or beyond. For more information, see <http://www.who.int/topics/breastfeeding/en>. The full text of the *Innocenti Declaration on the Promotion, Protection and Support of Breastfeeding* can be located at <http://www.unicef.org/programme/breastfeeding/innocenti.htm>.

¹² In *Johnston v. Poloskey* (2008), CHRR Doc. 08-079, 2008 BCHRT 55, a case in which a British Columbia Human Rights Tribunal found that a woman had been discriminated against on the basis of pregnancy, the Tribunal found that one of the reasons that the employer (a husband and wife) decided not to continue the woman's employment was because they disapproved of the fact that she was pregnant and unmarried, even though they knew and were friendly with the man who was her long-term common-law companion and the father of her child.

¹³ Ontario *Human Rights Code*, R.S.O. 1990, c. H-19, s. 10(1).

¹⁴ See further, Ontario Human Rights Commission, *Policy and Guidelines on Discrimination on the Basis of Family Status*, (March 28, 2007) available online at www.ohrc.on.ca.

¹⁵ See Health Canada, "Physical Abuse During Pregnancy", (February 2004), available online at www.phac-aspc.gc.ca/fhs-ssg/factsheets/abuseprg-e.html. While Canadian data on physical abuse during pregnancy is limited, the 1993 Violence Against Women Survey indicated that forty percent of the surveyed women who were abused during pregnancy reported that the abuse began during their pregnancy, and women abused during pregnancy were four times as likely as

other abused women to report having experienced very serious violence. In another study, 64% of surveyed women who were physically abused during their pregnancies reported that the abuse increased during the pregnancy.

¹⁶ These issues were raised during the Commission's 2005 public consultations on Discrimination on the Basis of Family Status. See Ontario Human Rights Commission, *The Cost of Caring, Report on the Consultation on Discrimination on the Basis of Family Status* (November 29, 2006) at page 10, available online at www.ohrc.on.ca.

¹⁷ In keeping with the decision of the Supreme Court of Canada in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 174, discrimination based on pregnancy may be described as any distinction, conduct or action, whether intentional or not, but based on a woman's pregnancy, which has the effect of either imposing burdens on an individual or group that are not imposed upon others, or withholding or limiting access to opportunity, benefits, and advantages available to other members of society. In the context of equality claims under s. 15 of the Canadian Charter of Rights and Freedoms, the Supreme Court of Canada offered the following three inquiries as a tool for determining whether discrimination has occurred:

1) Differential Treatment

Was there substantively differential treatment, either because of a distinction, exclusion or preference, or because of a failure to take into account the individual's already disadvantaged position within Canadian society?

2) An Enumerated Ground

Was the differential treatment based on an enumerated ground, in this case pregnancy?

3) Discrimination in a Substantive Sense

Finally, does the differential treatment discriminate by imposing a burden upon, or withholding a benefit from, an individual? The discrimination might be based on stereotypes of a presumed group or personal characteristics, or might perpetuate or promote the view that an individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society who is equally deserving of concern, respect and consideration. Does the differential treatment amount to discrimination because it makes distinctions that are offensive to human dignity?

However, whether this test is appropriately applied to human rights legislation has not yet been settled in the caselaw.

¹⁸ *Riggio v. Sheppard Coiffures Ltd.* (1988), 9 C.H.R.R. D/4520 (Ont. Bd. Inq.); *Stefanyshyn v. 4 Seasons Management Ltd. (4 Seasons Racquet Club)* (1986), 8 C.H.R.R. D/3934 (B.C.C.H.R.).

¹⁹ *Yap v. The Brick Warehouse*, 2004 BCHRT 22, CHRR Doc. 04-049. See also *Stackhouse v. Stack Trucking Inc. (No. 2)*, (2007), 60 C.H.R.R. D/119, 2007 BCHRT 161, in which a British Columbia Human Rights Tribunal found that a woman was discriminated against on the basis of pregnancy when her employer refused to accommodate her request, as per the advice of her physician, to work a 10 hour day (instead of her regular 11 ½ hour day).

²⁰ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3, at para. 54, [hereinafter *Meoirin*].

²¹ See *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000*, (2008) SCC 43 for the Supreme Court of Canada's recent comments on what the third part of this test means, in a practical sense, in the context of a disability accommodation in the workplace.

²² *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 at para. 20, [hereinafter *Grismer*].

²³ *Meoirin*, *supra*, note 20 at para. 66.

²⁴ *Ibid.*, at para. 65.

²⁵ *Human Rights Code*, *supra*, note 13, s. 47(2).

²⁶ *Employment Standards Act 2000*, S.O. 2000, c.41, ss.46-4 [ESA].

²⁷ *Ibid.*, ss. 48-49.

²⁸ *Ibid.*, ss. 51-53.

²⁹ *Ibid.*, s. 74.

³⁰ In *Phillips v. Distinctive Vertical Venetians Mfg. Ltd.* (2006), CHRR Doc. 06-853 (Sask. H.R.T.), a Tribunal ruled that the onus is on the employer to clarify if there is any confusion about whether an employee intends to come back to work after a maternity leave.

³¹ In *McAlpine v. Canada (Canadian Forces)* (1988), 9 C.H.R.R. D/5190 (CHRT), a pregnant woman was offered a position as a clerk, but when the employer learned that she was pregnant, the offer was withdrawn. A Board of Inquiry found that she was denied employment because she was pregnant and this constituted discrimination. It also found that the woman was entitled to compensation for lost employment insurance benefits for which she would have qualified had she not been denied the opportunity to work. If the employer had hired her as agreed, she would have received wages. "But for the discrimination", her employer would have made the appropriate deductions and therefore she would have been entitled to employment insurance benefits.

³² *Dorvault v. Ital Décor Ltd. (No. 3)*, 2005 BCHRT 148, 52 C.H.R.R. D/136.

³³ *Woo v. Alberta (Human Rights and Citizenship Commission)*, 2003 ABQB 632, 49 C.H.R.R. D/510.

³⁴ *Parry v. Vanwest College Ltd.*, 2005 BCHRT 310, 53 C.H.R.R. D/178.

³⁵ *Dodds v. Sharks Sports Pub*, 2007 HRTO 17, CHRR Doc. 07-329.

³⁶ *Cole v. Bell Canada*, 2007 CHRT 7, CHRR Doc 07-206 at para 61 [hereinafter *Cole*].

³⁷ *Julie Lord v. Haldimand-Norfolk Police Services Board* (1995), 23 C.H.R.R. D/500 (Ont. Bd. of Inq.). See also *Emrick Plastics v. Ontario (Human Rights Commission)* (1992), 16 C.H.R.R. D/300 (Ont. Div. Ct.) appeal from (1990), 14 C.H.R.R. D/68 (Ont. Bd. of Inq.) [hereinafter *Emrick*]; *Hienke v. Brownell* (1991), 14 C.H.R.R. D/68 (Ont. Bd. of Inq.); *Re Orangeville Police Services Board and Orangeville Police Assn* (1994) 40 L.A.C. (4th) 269.

³⁸ *Cole*, *supra*, note 36. The Canadian Human Rights Tribunal found that an employer violated the *Canadian Human Rights Act* when it failed to respond appropriately to an employee's request for schedule adjustments that would allow her to continue to breastfeed her son.

³⁹ See *Carewest v. Health Sciences Association of Alberta (Degagne Grievance)* (8 January 2001), [2001] A.G.A.A. No.2 (J.C. Moreau). A labour arbitrator found that a woman had been discriminated against when her employer did not accommodate her breastfeeding needs to the point of undue hardship. The grievor, who was on maternity leave, requested an extension of her leave in order to meet her breastfeeding needs. The Employer was willing to have the grievor express or pump milk during her scheduled breaks or lunch hour; however this was not practical for the grievor because of her particular breastfeeding history. The arbitrator ruled that the employer had failed to make a sufficient effort to seek solutions to accommodate the grievor, and that it had not accommodated her to the point of undue hardship.

⁴⁰ See *Emrick*, *supra* note 37.

⁴¹ Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodation* (November 23, 2000), available online at www.ohrc.on.ca.

⁴² *Middleton v. 491465 Ontario Ltd.* (1991), 15 C.H.R.R. D/317 (Ont. Bd. of Inq.). The complainant, a waitress at a strip bar, was fired from her position when she was four months pregnant. The Tribunal dismissed the argument that it might be a *bona fide* requirement for a waitress at such a restaurant to not be pregnant, as it might impair the enjoyment of the patrons.

⁴³ *Gareau v. Sandpiper Pub*, 2001 BCHRT 11, CHRR Doc. 01-040e. The Tribunal stated at para. 49 that:

It was not appropriate for the Respondents to impose their views of the risks associated with working as a server while pregnant on the Complainant in the absence of any objective basis for that assessment. That was an assessment more appropriately made by the Complainant. Nor was it appropriate for the Respondent to impose on her a requirement that she waive rights enjoyed by other employees merely because they disagreed with her assessment.

⁴⁴ *Ibid.*

⁴⁵ *Cole*, *supra* note 36 at para 77.

⁴⁶ In an unreported decision, *Tammy Turnbull v. 539821 Ontario Ltd – Andre's Restaurant* (June 21, 1996) McKellar, M.A. (Ont. Bd. of Inq.), the Board of Inquiry decided that because the

employer knew the employee was pregnant, the employer was responsible for accommodating her even if she did not specifically request accommodation.

⁴⁷ In *ADGA Group Consultants Inc. v. Lane* (2008), CHRR Doc. 08-524 (Ont. Div.Ct.), the Ontario Superior Court of Justice Divisional Court upheld a decision of the Human Rights Tribunal of Ontario (61 C.H.R.R. D/307) which ruled that an employee was discriminated against because of a disability when he was fired shortly after he disclosed that he had bipolar disorder. The Court upheld the Tribunal's finding that the employer failed to fulfill the procedural dimensions of the obligation to accommodate because they did not conduct an appropriate assessment of the employee's condition or of the employer's ability to accommodate him. The Tribunal held that failure to meet the procedural dimensions of the duty to accommodate — the duty to inquire and assess — is a form of discrimination in itself because it denies the affected person the benefit of the prohibition against discrimination, and a proper search for accommodation. The Ontario Court of Appeal refused leave to appeal this decision on November 17, 2008.

⁴⁸ *Mazuelos v. Clark*, 2000 BCHRT 1, 36 C.H.R.R. D/385.

⁴⁹ O. Reg. 286/01, s. 10.

⁵⁰ See *Schafer v. Canada (Attorney General)* 1997, 149 D.L.R. (4th) 705, (Ont. C.A.), (leave to appeal to the Supreme Court of Canada denied on January 29, 1998), and *Tomasson v. Canada (Attorney General)*, 2007 FCA 265.

⁵¹ In 2000, a male doctor practicing in Ontario applied to receive benefits under the Ontario Medical Association's Maternity Leave Benefit Program ("MBLP"), funded by the Ministry of Health, as he was staying at home to care for his newborn child while his wife returned to work. His application was denied, as the program only granted benefits to female doctors. Complaints were filed against the Ontario Medical Association and the Ministry of Health shortly thereafter, citing discrimination based on sex. A stated purpose of the MBLP was to give female doctors the opportunity to "bond" and spend time with their newborn babies by reducing the financial hardship of being away from their practice. The Commission argued that this bonding opportunity should also be made available to male doctors. An agreement was reached to replace the MBLP with the Pregnancy and Parental Leave Benefits Program ("PPLBP"), under which female doctors continue to be entitled to receive benefits for pregnancy leave, but where both male and female doctors are now entitled to apply for parental leave benefits in order to spend time with their newborn or newly adopted children. See Ontario Human Rights Commission News Release, October 19, 2006, available online at www.ohrc.on.ca.

⁵² *Brooks*, *supra* note 1.

⁵³ *Parcels*, *supra* note 7.

⁵⁴ See *Further Stagg v. Intercontinental Packers Ltd.* (1992), 18 C.H.R.R. D/392 (Sask. Bd. of Inq.).

⁵⁵ *Ontario Cancer Treatment & Research Foundation v. Ontario (Human Rights Commission)* (1998), 34 C.C.E.L. (2d) 56, 108 O.A.C. 289 (Ont. Div. Ct.); upholding *Crook v. Ontario Cancer Treatment & Research Foundation (No. 3)* (1996), 30 C.H.R.R. D/104 (Ont. Bd. of Inq.).

⁵⁶ *ESA*, *supra* note 26, ss. 51(1)-(2).

⁵⁷ *ESA*, *supra* note 26, s. 51(3).

⁵⁸ See, for example, Humewood House, Submission to the Ontario Human Rights Commission Public Consultation on Human Rights and Rental Housing, July 2007. Also see *The Cost of Caring*, *supra*, note 16 at 47-50.

⁵⁹ For example, in *Segin v. Chung*, 2002 BCHRT 42, CHRR Doc. 02-0223, the Tribunal found that a landlord discriminated on the basis of sex when it refused to rent an apartment to a pregnant woman because of concerns about liability should the complainant's baby fall down the stairs.

⁶⁰ *Peterson v. Anderson* (1992), 15 C.H.R.R. D/1 (Ont. Bd. of Inq.).

⁶¹ See further *Dudnik v. York Condominium Corp. No. 216* (1990), 12 C.H.R.R. D/325 (Ont. Bd. of Inq.), reversed in part (1991) (sub nom. *York Condominium Corp. No. 216 v. Dudnik* 79 D.L.R. (4th) 161 (Div. Ct.))

⁶² In some instances, these housing arrangements will be geared toward older persons who are protected by other *Code* grounds as well, for example, persons from specific ethnic origins.

⁶³ *Ward v. Godina* (1994), CHRR Doc. 94-130 (Ont. Bd. of Inq.).

⁶⁴ *Quebec (Commission des droits de la personne et des droits de la jeunesse) et Giguère c. Montréal (Ville)*, 2003 QCTDP 88, 47 C.H.R.R. D/67.

⁶⁵ Information about the City of Toronto Policy, and other municipal breastfeeding supports can be found on the website of the City of Toronto's Public Health Department, at www.toronto.ca/health/breastfeedingsupport/index.htm.

⁶⁶ *Zurich Insurance Co. v. Ontario (Human Rights Commission)* (1985) 6 C.H.R.R. D/2948 (Ont. Bd. of Inq.); rev'd 8 C.H.R.R. D/4069; 10 O.A.C. 220 (Div. Ct.), aff'd (1989), 70 O.R. (2d) 639; aff'd [1992] 2 S.C.R. 321.