Human Rights at Work 2008 - Third Edition

I. Introduction

This is the third edition of *Human Rights at Work*. Since it was first launched in 2000, Human Rights at Work has been seen as an essential tool for employers and all partners in the workplace. This edition includes an expanded section on how to create a workplace that promotes the values of the *Ontario Human Rights Code* (the *Code*).[1]

The book has also been re-organized and expanded to guide employers in their efforts to proactively comply with the *Code* at all stages of employment, from advertising to discipline right through to retirement and termination. Human Rights at Work helps employers create an environment where each employee's rights are respected and human rights complaints are prevented or fairly resolved.

This kind of human rights compliance is not just a legal requirement. It is also a wise business practice.

First, this book is geared to the needs of employers, including executives, managers and supervisors, because they have the primary responsibility for making sure the rights of their employees, and people in the workplace, are upheld. But, this book is not only an "employer's resource." The Commission has heard that human resource professionals rely on this book as an authority when advising supervisors and managers on human rights. This book is also a valuable tool for people trying to implement enhanced human rights practices such as staff of internal human rights offices, accommodation specialists, unions and other employee representatives. Individual employees can refer to sections of the book when talking with their unions, managers or supervisors about their own rights and the corresponding duties in a specific situation.

Human Rights at Work is written by the Ontario Human Rights Commission (the Commission) and published by Carswell Thomson Publishing (Carswell), in partnership with the Human Resources Professionals Association of Ontario (HRPA of Ontario). HRPA is the premier human resources association in Canada, providing knowledge, innovation and leadership to 16,000 members in Ontario. HRPA and Carswell are included in the contact list in Appendix C.

This book does not replace the legal authority of the *Code*. The full text of the *Code* is available on the provincial government's "e-laws" website at: www.e-laws.gov.on.ca/navigation?file=home&lang=en

The Commission has developed policies and guidelines on many specific human rights issues, such as racism and racial discrimination, sexual and gender-based harassment, disability accommodation, pregnancy and breastfeeding, age discrimination, gender identity, sexual orientation, and family status. A list of the Commission's policies is included in Appendix A. This book highlights and expands on the main elements of these policies and guidelines. It does not replace them. We encourage you to carefully review the policies and guidelines that apply to your situation, to develop a deeper understanding of your human rights obligations.

The information in this book is not intended to replace legal advice. For help with a human rights matter, seek expert advice. If you have questions about the *Code* or the Commission's policies, contact the Commission at:

Phone: 416-326-9511 (Toronto area)
Local TTY: 416-326-0603
Toll Free: 1-800-387-9080
Toll Free TTY: 1-800-308-5561

Or visit us on the web at www.ohrc.on.ca, for more information about the *Code* and human rights law in Ontario, including Commission policies and plain language documents. You can also e-mail Commission staff through this site.

Written decisions of the Human Rights Tribunal of Ontario (the Tribunal) are available free of charge online from CanLii's website at www.canlii.org/en/on/onhrt/index.html. Paper copies are also available from the Ontario Workplace Tribunals Library, which is open to the public and located at 505 University Avenue, 7th floor, Toronto. The decisions provide information about the *Code* as it applies to specific fact scenarios, including remedies ordered by the Tribunal.

This book was written and published after amendments to the *Code* were passed that led to major changes in the human rights system in Ontario. At the time of writing (March 31, 2008), the details of the transition were just unfolding, and future editions will better reflect the new system. However, this will not affect the basic messages and information this book contains. The principles included here reflect the Commission's position on key human rights issues and will continue to apply even after the transition period is completed. The term "human rights claim" is used throughout this book to reflect the broad range of ways that human rights issues could be raised, both in the old system and in the new system:

- human rights complaints filed with the Commission up to June 30, 2008
- applications directly filed with the Tribunal on or after June 30, 2008
- human rights allegations raised before labour arbitrators or other administrative tribunals
- allegations of human rights violations made before the courts (where this is part of another claim – for example, a wrongful dismissal action).

For more information about the human rights system, see Section IV-12i) – "Dealing with formal human rights complaints or applications" and "Dealing with discrimination claims in courts and administrative tribunals."

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[1] R.S.O. 1990, c. H. 19, as amended ("the *Code*").

ISBN/ISSN:
Print: 978-0-7798-1698-9 | HTML: 978-1-4249-6382-9

II. Introducing the Ontario Human Rights Code

1. The context for interpreting the Code

a) Background and history

In 1962, many laws dealing with discrimination were brought together, along with additional protections, to create the *Code*. The *Code* has been amended at various times since then. The most recent amendments were passed in December 2006. The Ontario *Code* only provides protection against discrimination in Ontario. There are other pieces of human rights legislation in each of the other provinces and territories and federally.

b) Fundamental principles

When interpreting the *Code* or deciding what action to take in a specific circumstance, employers should always be guided by the fundamental principles of the *Code*:

- dignity and worth of every person
- understanding and mutual respect
- equal opportunity to participate in and contribute fully to the community.

c) The Canadian Charter of Rights and Freedoms

The *Canadian Charter of Rights and Freedoms* (the *Charter*)[2] is a constitutional document. It is described as the "supreme law" in Canada because it can be used in the courts to challenge or strike down unconstitutional laws or government practices. The *Charter* guarantees equal rights and treatment based on a number of grounds, including race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

The *Charter* only applies to the acts and conduct of government, and does not apply to the acts of, and conduct between, individuals. In comparison, the Ontario *Human Rights Code* applies to both private and public sectors, as well as to conduct between individuals within the listed social areas. Despite these differences, some of the general principles used to interpret the *Charter* can also be used in interpreting the *Code*, although it is not clear that the same legal tests used for the *Charter* should apply to the *Code*.[3]

d) International human rights documents

Canada has signed on to many international human rights Conventions, documents and treaties.
Examples include:

- Universal Declaration of Human Rights
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- International Convention on the Elimination of All Forms of Discrimination against Women.

In Canada, international documents are not part of domestic law unless the government passes a statute to put them into action. However, the values reflected in international human rights law may help us interpret human rights laws. This means that international documents may play an important role in interpreting the *Code*.

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[2] *Constitution Act*, 1982, Part I.
[3] See *Reference Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 and *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817; but see *Vancouver Rape Relief Society v. Nixon,* 2005 BCCA 601, leave to appeal refused [2006] S.C.C.A. No. 365.

2. The Code prevails over other laws

a) Other laws may apply along with the Code

In employment, several laws may apply at the same time as the *Code*, with overlapping or parallel responsibilities. Knowing which laws apply and why they apply will help you know how best to handle situations that may arise in your workplace. Appendix B summarizes the most common areas of overlap between human rights legislation and other laws.

b) Supremacy of the Code

The Supreme Court of Canada has said that human rights legislation such as the *Code* is not like other laws.[4] It should not be treated the same as other pieces of provincial legislation because it is almost as important as the constitution, or "quasi-constitutional." This means that you must comply with the *Code* before other laws, unless there is a specific exception. The requirements in other legislation may be considered to be minimum standards that can be exceeded to comply
with the *Code*.

Example: The Employment Standards Act allows employees to take eight weeks of "family medical

leave" to provide care to a dependent who is near death. A couple who work for the same employer request this time off to care for their child who is gravely ill. This request is granted based on medical documentation. They are both allowed to be off work for four weeks.

At the end of the four weeks, one spouse returns to the job and the other requests more time off to continue to care for the child who has recovered somewhat but is still very ill. The employer takes the position that it has met its obligations under the *Employment Standards Act* and therefore this request for additional time is denied. The employer may be vulnerable to a human rights claim, based on family status and marital status.

When there is a conflict between the *Code* and another Ontario law, the *Code* prevails unless that law specifically states it applies despite the *Code*. This is set out very clearly in subsection 47(2) of the *Code*.

> **Example:** The Workplace Safety Insurance Act (WSIA) imposes a duty on employers with more than 20 employees to re-employ a worker, if he or she had worked for the employer for a year before their injury. Under the Code, all employers have a duty to accommodate to the point of undue hardship, no matter how many employees they have or how long the employees have worked there. To comply with the Code, an employer might have to return an employee to his or her pre-injury job with accommodation, even if the employer has fewer than 20 employees and the person is a new employee. An employer who complies only with the lesser requirements of the WSIA would be vulnerable to human rights complaints.

The Supreme Court of Canada recently said that the *Code* applies when administrative bodies interpret legislation and make decisions.[5] Where there is an inconsistency between the *Code* and that administrative body's own statute, the *Code* has primacy and will prevail.

> **Example:** A man applies for social assistance benefits, but a tribunal decides that he is not eligible. The reason the tribunal gives is that alcoholism is specifically excluded from the list of disabilities under the applicable Act. But this interpretation does not comply with the Code. All the rights and obligations under the Code apply to persons with disabilities, including alcoholism. The Supreme Court tells the tribunal that if the language in its own Act is inconsistent with the Code, then its own Act should be ignored.

Because of the special nature of the *Code*, the protections it provides will need to be broadly interpreted. The aim is to give effect to the key principles of dignity, mutual respect and equal opportunity to contribute.

> **Example:** An employer argues that the protections in the Code do not apply because an employee is really an independent contractor. Technically, this person may not be considered to be an "employee" under tax or employment standards laws. But, the person would be an employee under the Code – the definition of "employee" would expand to include him or her.

On the other hand, any exceptions or defences in the *Code* are interpreted narrowly.

> **Example:** An employer argues that it is a religious organization and that it can discriminate based on religion when hiring staff. It seeks an exemption in the Code. The employer will be expected to have strong evidence to prove that they meet all the criteria in the Code for this defence to apply.

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[4] *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145. (*Heerspink*)
[5] *Tranchemontagne v. Ontario (Director, Disability Support Program),* [2006] 1 S.C.R. 513 (*Tranchemontagne*).

3. How the Code is set up

The *Code* is divided into an introductory section followed by five parts. Part I sets out basic rights. Part II explains

how to interpret and apply the *Code*. Part III explains the role and structure of the Commission, and Part IV explains how the *Code* is enforced, including remedies. Finally, Part V deals with general matters including the supremacy of the *Code*.

a) Social areas

Human Rights at Work focuses on employment, which is one of five social areas listed in the *Code*. The other social areas are:

- services, goods and facilities
- accommodation (housing)
- contracts
- membership in vocational associations (including trade unions).

The *Code* applies to all employees, in the broadest sense of the word, and all workplaces including those governed by a collective agreement. In many cases, there may be overlaps between employment and other social areas.

> **Example:** A non-profit group runs a drop-in centre for young people at risk of being homeless. Many of the young people are racialized. Some people visiting the centre use bad language that demeans both staff and other users of the drop-in centre based on race, gender and sexual orientation. The group would need to know the rights and responsibilities in the Code under the social area "services, goods and facilities" with regard to the young people using the drop-in centre, and the social area "employment" with regard to its staff.

b) Prohibited discrimination grounds

In the area of employment, the following grounds may apply:

- race
- ancestry
- place of origin
- colour
- ethnic origin
- citizenship
- creed *(religion)*
- sex *(includes gender identity and pregnancy)*
- sexual orientation
- age *(18 years or more)*
- record of offences
- marital status
- family status
- disability (includes perceived disability)

People are also protected from discrimination based on intersecting grounds; when they are associated with someone protected by one of the listed grounds; or when they are perceived to be a member of a group identified by the grounds listed above. See Section III-3 for more information on grounds.

III. Principles and concepts

1. Right to equal treatment without discrimination

Section 5 of the *Code* states:

> (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.
>
> (2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or disability.

The *Code* does not define "employment," but the Commission interprets this word in a broad way. Employment includes full-time and part-time work, contract work, work done by temporary staff from agencies, probationary periods and even includes volunteer work.

The right to "equal treatment with respect to employment" covers every aspect of the workplace environment and employment relationship, including job applications, recruitment, training, transfers, promotions, apprenticeship terms, dismissal and layoffs. It also covers rate of pay, overtime, hours of work, holidays, benefits, shift work, discipline and performance evaluations.

Human rights claims of discrimination and harassment can be made against employers, contractors, unions, and directors or other people in the workplace such as co-workers and supervisors. See Section III-4 – "Legal responsibility for human rights at work for more information on the duties of everyone in the workplace.

2. What is "discrimination"?

a) Defining discrimination

Discrimination is not defined in the *Code* but usually includes the following elements:

- not individually assessing the unique merits, capacities and circumstances of a person
- instead, making stereotypical assumptions based on a person's presumed traits
- having the impact of excluding persons, denying benefits or imposing burdens.

Many people wrongly think that discrimination does not exist if the impact was not intended, or if there were other factors that could explain a particular situation. In fact, discrimination often takes place without any intent to do harm. And in most cases, there are overlaps between discrimination and other legitimate factors.

> **Example:** An older man applies for a job at a trendy women's clothing store. The young woman who interviews him finds him pleasantly similar to her favourite grandfather and tells him this as a compliment. Later, the man is told that he does not have the right qualifications, and that the person hired had "more energy" and could relate better to the mainly female clients. This may be discrimination based on age and gender, even though it is clear the interviewer liked the man on a personal basis, and the person actually hired may have been more qualified for the job.

In many cases, discrimination results from a tendency to build society as though everyone is the same as the people in power – all young, one gender, one race, one religion or one level of ability. Failing to consider many perspectives, or not planning to include all people, may result in barriers to access for persons identified by the *Code*. Such barriers, even if unintended, are discrimination.

b) Negative attitudes, stereotypes and biases lead to discrimination

It is a principle of human rights that persons should be judged on their individual attributes, skills and capabilities, rather than on stereotypes, prejudice or assumptions. Prejudice is a strong dislike or negative feelings held by someone about another person or group. Negative attitudes and stereotypes may lead to harassment and

discrimination, and affect a person's ability to both get and succeed in a job.

These types of attitudes can be expressed as "isms" (ageism, sexism, racism, etc.) and refer to a way of thinking about other persons based on negative stereotypes about race, age, sex, etc. When people are stereotyped, all people in the group are given the same characteristics, regardless of their individual differences.

"Isms" refer mainly to attitudes, while discrimination involves actions. An example is treating someone in an unequal way due to one of the grounds listed in the *Code*. While racism, sexism, etc. will not always lead to discrimination under the *Code*, they are often the cause of discrimination and harassment. Therefore, it is important from a human rights perspective to address acts of discrimination and also ageist, sexist, racist, etc. attitudes that exist in a workplace.

c) There are many forms of discrimination

When asked to identify discrimination, many people think only of situations of open or "overt" harassment. As well as harassment, the *Code* prohibits many other kinds of discrimination, such as systemic discrimination or failing to accommodate *Code*-related needs.

Discrimination can take many forms. In some cases, discrimination may be direct and intentional (for example, if a person or group treats another person differently on purpose because of a *Code* ground). This type of discrimination generally arises from negative attitudes and biases relating to that ground.

> **Example:** An employer rejected a Black candidate for a job after meeting her. He was visibly shocked and turned her down flat, without asking about her credentials. When asked what was wrong, he said something about maintaining the company image.

Discrimination exists when rules, standards or requirements that appear to be neutral have a discriminatory impact on people identified by the *Code*. In some cases, direct discrimination takes place through another person or other means.

Discrimination can also occur when an employer adopts a practice or rule that, on its face, discriminates on a prohibited ground.

> **Example:** A workplace adopts a rule of not hiring women who wish to start a family. This would be direct discrimination based on sex and family status.

> **Example:** The head of a company instructs the organization's receptionist not to take applications from job seekers from a certain racial or ethnic background.

> **Example:** A placement agency refuses work to a bisexual, lesbian or gay person, because the company using their services told them to.

In these three examples, the people giving the instructions can be held responsible for discriminating. The persons who followed the instructions to discriminate have also engaged in discrimination – they cannot claim to have just been following orders.

d) Discrimination because of association

Section 12 of the *Code* states that a person cannot be discriminated against or harassed because of his or her association, relationship or dealings with another person identified by a ground in the *Code*. This protection exists whether or not the person being discriminated against is identified by the same ground in the *Code*.

> **Example:** A White employee is refused a promotion because she has a close friendship with a Black employee. The White employee has experienced discrimination because of association with a person

identified by the Code ground of "race."

Example: A parent of a child with a severe disability is fired after missing work too many times to deal with medical emergencies. The employee has experienced discrimination because of the intersection between "family status" and association with a person identified by the Code ground of "disability."

See also Section III – "Grounds of discrimination."

e) Subtle discrimination

In some cases, discrimination is 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 often only be detected after looking at all of the circumstances. Individual acts themselves may be ambiguous or explained away, but when viewed as part of the larger picture, may lead us to think that discrimination based on a ground in the *Code* was a factor in how the person was treated.

Example: A woman is one of four people granted job interviews, from a pool of several dozen people who sent in resumes by mail. When she appears in person, the interviewer seems surprised and uncomfortable, does not make eye contact, and seems to hurry through the interview. The woman feels that the interviewer assumed that she was a lesbian based on aspects of her gender presentation, such as her hairstyle and clothing. She later learns that she did not get the position, but the company does not explain its decision.

Example: A Black vice-principal repeatedly tried to get promoted to the position of principal. When she couldn't, she filed a human rights complaint. Altogether, the evidence showed that there were irrelevant references to her race during interviews and/or discussions about transfer opportunities. Black teachers who asked for equitable practices were told "not to expect things to change overnight." Transfer and promotion decisions were influenced by considerations of race.

It can be hard to determine if subtle discrimination is a factor in such situations. You may need to investigate and analyze the total context of the alleged behaviour, comment or conduct. This would include thinking about evidence that compares how others were treated in a similar situation, or evidence that a pattern of behaviour exists. Discrimination based on a *Code* ground may be found even if there were other legitimate reasons for decision or treatment, as long as it was one of the factors.

The following types of treatment in employment may indicate subtle discrimination based on the *Code*:

- being excluded from formal or informal networks, such as after-hours get-togethers or office parties
- being denied mentoring or developmental opportunities such as secondments and training that are available to other people
- differences in management practices, such as excessive monitoring and documentation or deviating from written policies or standard practices
- disproportionate blame for an incident
- being assigned less desirable jobs or duties.

The following actions may also be hints that racial discrimination is happening:

- treating normal differences of opinion as confrontational or insubordinate when racialized persons are involved
- characterizing normal communication from racialized persons as rude or aggressive
- penalizing a racialized person for failing to get along with someone else (such as a co-worker or manager), when one of the reasons for the tension is the co-worker or manager's racially discriminatory attitudes or behaviour.

Discrimination may be found to occur even when there has been no overt or implied reference to a *Code* ground. However, if comments linked to a *Code* ground are made, they can be further evidence that discrimination has been a factor in the way someone is treated. Similarly, a finding of discrimination may be made when someone makes negative comments about a person advocating for human rights protections or equitable treatment.

f) Systemic discrimination

One of the more complex forms of discrimination is systemic or institutional discrimination. Systemic discrimination refers to policies or practices that appear to be neutral on their surface but that may have discriminatory effects on individuals based on one or more *Code* grounds.

> **Example:** A small company is proud of its intensive team-building approach. Every other week, all staff are expected to attend gender-specific sporting activities such as wrestling and football with their "husbands and wives." Many of these events take place on evenings and weekends in places that are not fully accessible. People who do not attend these events are less successful at building the internal networks that lead to promotions. Employees who are female, single, gay or lesbian may not feel welcome at these events. People who have care-giving responsibilities after work or who use mobility aids, such as wheelchairs, would likely not be able to attend these events.

Systemic discrimination can overlap with other kinds of discrimination, such as harassment, and may arise from stereotypes and biases. The definition of systemic discrimination used by the Commission includes the following three elements:

- patterns of behaviour, policies or practices
- part of the social or administrative structures of an organization
- position of relative disadvantage created for persons identified by the *Code*.

People can experience systemic discrimination differently based on the intersection of various grounds of discrimination, such as gender, disability, place of origin, and so on. In the example above, a racialized or single woman with a disability would be at a triple disadvantage.

The following three considerations can be used to identify and address systemic discrimination:

- numerical data
- policies, practices and decision-making processes
- organizational culture.

Use these three elements as a basis for actively monitoring for systemic discrimination and measures to address it. This is discussed in more detail in Section IV-1e) – "More about how to proactively identify and address systemic discrimination."

g) Workplace rules that are not "bona fide"

Workplace rules, policies, procedures, requirements, qualifications or factors may not be openly discriminatory, but they may create barriers to achievement and opportunity. This kind of discrimination is specifically prohibited under section 11 of the *Code*. In the past, this type of discrimination was viewed as a specific category called "constructive discrimination" or "adverse effect discrimination." Now, the impact on an individual or group is no longer viewed as the only determining factor – the focus is equally on both the rule and its impact. If the rule is not inclusive and does not accommodate individual differences to the point of undue hardship, it is discriminatory.

> **Example:** A workplace introduces a new attendance management program that allows employees to take six days off per year. The program provides for disciplinary sanctions, up to and including termination, for each extra absence, regardless of the reason. Although this program is applied equally to all employees, it has not been inclusively designed and does not take into account the need to accommodate

differences between employees due to family status, disability or other Code grounds.

To be upheld as non-discriminatory, or a bona fide (*bona fide* means "good faith" or "genuine") occupational requirement, an employer must show that the standard, factor, requirement or rule:[6]

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 to fulfill the purpose or goal
3. is reasonably necessary to accomplish its purpose or goal, because it is not possible to accommodate the person without undue hardship.

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. It is not enough to keep discriminatory standards and supplement them by accommodating people 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.[7] For more general information, see Section III-2m) – "Failing to design inclusively, remove barriers and accommodate." See also Section IV-8 – "Meeting the accommodation needs of employees on the job."

h) Reprisal and threat of reprisal

Every person has a right to claim and enforce his or her rights under the *Code*, or start or take part in proceedings under the *Code* without reprisal or threat of reprisal. These protections are provided in sections 7(3) and 8 of the *Code*. Reprisals for (a) claiming or enforcing a human right, (b) refusing to discriminate directly or indirectly, or (c) rejecting sexual advances or solicitations are violations of the *Code*. The protections from reprisal apply to complainants, witnesses, advisors, representatives of complainants and witnesses, investigators and decision-makers or management who support a person raising human rights issues.

People are protected from reprisal when they file a formal human rights claim. They are also protected when a person exercises rights available under the *Code* or under an employer's internal human rights policies. Employees should be able to raise human rights issues and have them dealt with fairly. They should not be punished for having done so. Employees who seek accommodation related to grounds such as creed, disability or family status should not be treated as less valuable or less committed to their work as a result. The following situations would be viewed as reprisal contrary to the *Code*:

> **Example:** An employee believes that he was not promoted in his job because of his race. He tells his manager that he will contact a lawyer to see about filing a human rights claim. The next day he is fired.
>
> **Example:** An employee quits her job after finding a new one and making a sexual harassment complaint under the Code against her former employer. She discovers that her previous employer contacted her new employer and made negative comments about her because of her complaint.
>
> **Example:** An employee believes that he was given an unfair performance appraisal and passed over for skills upgrade training because he is older than other workers in his department. After he launches an internal complaint, he is demoted and transferred to another department.
>
> **Example:** A teacher gets part-time work to balance her caregiving responsibilities with her work. However, she finds that her employer will no longer approve her requests for training opportunities, because the employer perceives her to be "on the parent track."

It is also a contravention of the *Code* to take reprisal or retaliate against someone who refuses to follow instructions to discriminate against another person, or who helps someone to enforce their rights under the *Code*.

> **Example:** Women in a company approach a manager in the human resources department with allegations of sexual harassment by the president. The manager raises the allegations with the president and in response to his requests for information, is told "let it go, if you know what is good for you." The

manager investigates and verifies the allegations, and prepares a memo outlining the evidence uncovered for the Board of Directors. As a result of his involvement in the women's sexual harassment claims, the president suddenly fires him. This may be found to be reprisal.

i) Harassment

Subsection 5(2) of the *Code* states that:
Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or disability.

Harassment on any of the *Code* grounds can amount to discrimination. Although not directly mentioned in section 5(2), harassment because of sexual orientation has been found to be a form of discrimination based on sexual orientation that is a violation of the *Code*. Persons can file complaints alleging harassment because of gender identity under the ground of "sex." Harassment may arise from stereotypes based on the intersection of more than one *Code* ground.[8]

> **Example:** An employer makes many sexual comments to a female employee of mixed Métis and Black ancestry. She was exposed to harassment based on both race and sex because she was a young woman the employer could assert economic power and control over. His comments arose from racist assumptions about the sexuality of Black women.

"Harassment" refers to comments or actions that are unwelcome or should be known to be unwelcome. This definition, set out in subsection 10(1) of the *Code*, includes both subjective and objective elements:

- How the conduct would be viewed by a reasonable person, taking into account the perspective of the person being harassed (this is the objective element).
- The subjective views of the person being harassed. For example, a White male supervisor might not take issue with being referred to as "the Chief." To an Aboriginal person, however, the term may be very insensitive.
- The subjective views of a person who has harassed someone do not determine whether a finding of harassment will be made. Harassment can be found to exist even if the harasser is not aware of how his or her behaviour is being received. In some cases, it will be obvious that the conduct or comments are offensive or unwelcome. In other cases, conduct or comment may not on their face be offensive, but the harasser should still reasonably know that they are unwelcome because of how the other person reacts.

The person being harassed does not need to object to the harassment for there to be a violation of the *Code*. Some persons who are being harassed do not object because they are afraid of what will happen if they speak out. Sometimes people respond by becoming angry, using strong language or becoming emotional. Many people being harassed try to cope by playing along or responding the same way in return. These are all common ways for a harassed employee to keep some form of personal power in a vulnerable situation, to regain favour or just to get by. Tribunals have recognized that these types of responses are understandable and do not defeat a claim of harassment.

> **Example:** An employee is exposed to racial discrimination and harassment in the workplace. Knowing that the company's director does not take kindly to "tattle-tales," he does not complain right away. Instead, he copes by laughing it off and saying, "Yeah, that's a good one." If the comments ought to be known to be unwelcome, this would amount to harassment even though the employee has not objected.

To assess these situations accurately, you will need to apply the subjective and objective elements of the test and be aware of the power dynamics that are happening.

> **Example:** Bob, a senior manager, is well known for making racist and homophobic comments. These are indulgently referred to as "Bob-isms" by the president and other senior executives. In this workplace culture, it would be "career suicide" to object or show any sort of disapproval of such comments. Instead,

> Bob's staff respond by laughing and teasing him about his British heritage and receding hairline. Bob may still be liable for harassment, even though none of the employees objected. In effect, employees cannot disagree with his comments because of the workplace culture created by Bob, and condoned by the other senior executives.

Harassment requires a "course of conduct." This means that a pattern of behaviour or more than one incident is usually needed. However, one serious incident may create a poisoned work environment – see the next section for more details.

When a person is singled out and treated differently because of a *Code* ground, even if the differential treatment does not include clear reference to the *Code* ground, there may still be a *Code* violation.

> **Example:** In a workplace, the only gay employee is repeatedly made the brunt of practical jokes and is ridiculed by his co-workers for no apparent reason. The workplace has a history of homophobic attitudes. Even though the jokes or actions do not directly refer to the employee's sexual orientation, it may be inferred that the treatment is based on sexual orientation.

Employers, people acting for employers, co-workers and other persons in the workplace, such as clients, are prohibited from harassing employees at work.

Management has the responsibility to prevent and address situations that may allow harassment to develop or continue. Employers also may be liable in a human rights complaint if they knew of, or should have known of, harassment and could have taken steps to prevent or stop it. A person who has the authority to prevent or discourage harassment may be found responsible or "vicariously liable." For more information about organizational responsibility, see Section III-4 and Section IV-12 about dealing with human rights allegations in the workplace.

j) Poisoned work environment

Insulting or degrading comments or actions in a workplace based on *Code* grounds may cause employees to feel that the workplace is hostile or unwelcoming. When comments or conduct of this kind have an influence on others and how they are treated, this is known as a "poisoned environment." Even one comment, if serious enough, may cause a poisoned environment even if it does not amount to harassment, which requires a course of comment or conduct.

Members of a group protected under the *Code* who are not the specific targets of a discriminatory comment or action may also have a right to bring a complaint. Being exposed to negative or hostile treatment that is racially motivated has a negative impact on other employees, and may leave them wondering if they are also the target when they are not present.[9]

> **Example:** A Chinese woman works in a bakery where racial slurs and stereotypical language are common in the kitchen. Although these remarks are directed at her Black co-workers, she has been subjected to a racially "poisoned environment."

A poisoned environment cannot, however, be based only on subjective views. There should be objective facts to show that the comments or conduct result in unequal or unfair terms and conditions and an infringement of the *Code*.

Management has the responsibility to prevent and address situations that may create a poisoned work environment. A workplace that allows a poisoned environment to develop or continue may be the subject of a human rights claim. For more information about organizational responsibility, see Section III-4 – "Legal responsibility for human rights at work," Section IV-12 – "Resolving human rights issues in the workplace," and Section IV-12h) – "Dealing with formal human rights complaints and applications."

k) Sexual harassment

"Harassment because of sex" is prohibited in section 7(2) of the *Code*. Recent case law has indicated that sexual

harassment may also be a form of discriminatory treatment under section 5(1).

Sexual harassment refers to comments or actions based on sex or gender that are unwelcome or should be reasonably known to be unwelcome. Research has shown that sexual harassment often involves misuse of power and dominance, usually escalates over time, and is commonly known to exist within workplaces where it occurs. Women who are marginalized due to race, sexual orientation, disability or other *Code* grounds are particularly vulnerable to sexual harassment in the workplace.

> **Example:** A female graduate student has newly arrived as a refugee and is invited to discuss the possibility of working with a particular professor. Twice the meetings take place at the professor's home in a sexualized environment including wine, romantic music, intimate discussions of a personal nature, and compliments on the woman's attractiveness. She goes along with the situation to not jeopardize her chances of getting the academic job. A tribunal decides that it should have been obvious to the professor, given the woman's vulnerability and her dependence on the professor for the academic opportunity, that his actions were not welcome to her.

As with section 5(2), sexual harassment requires a "course of conduct" such as a pattern of behaviour or more than one incident. One significant incident may be offensive enough to be considered sexual harassment or create a poisoned environment (see above). There is no requirement that a person openly object to unwelcome comments or conduct.

> **Example:** An employee compliments his female co-worker on her appearance one morning as they stand beside the elevator. Objectively, the comment would not be known to be unwelcome. She thanks him and does not indicate any discomfort with this comment. If a human rights claim arose due to this one instance, it would not amount to sexual harassment or a poisoned environment.

> **Example:** A manager repeatedly comments on a female staff member's appearance during an important business meeting. Her ability to take part as an equal in the meeting is undermined, but she does not want to make a scene. She therefore runs the meeting while ignoring the manager's inappropriate comments. She later files a complaint. In this case, the comments were clearly unwelcome and would amount to sexual harassment even though the woman has not overtly objected.

The *Code* prohibits harassment in the workplace because of sex by an employer, agent of the employer or by another employee. Employers are also expected to prevent and address sexual harassment of employees by others they come into contact with in the course of doing their jobs.

> **Example:** A client repeatedly makes sexual jokes about one of the female trainers at a gym. When she complains to the gym manager, he tells her to "lighten up" and does not take any action to stop the harassment. Both the gym and the gym manager may be held responsible for failing to provide a workplace free of harassment, even though the person who harassed the employee did not work for the gym.

Comments or conduct may be found to be sexual harassment even if they are not sexual in nature. Harassment often occurs when a person deviates from established gender norms. Someone may tease a person because of gender-based ideas about how men or women "should" look, dress or behave.

> **Example:** A long-term employee is repeatedly asked by a restaurant's manager to go on a diet because she does not fit in with more recent hires and the image the restaurant is trying to project. She is expected to wear revealing clothing to bring in more business.

The following is not an exhaustive list, but it can help you identify what could be sexual harassment or inappropriate gender-related comments and conduct:

- gender-related comments about an individual's physical characteristics or mannerisms

- unwelcome physical contact
- suggestive or offensive remarks or innuendoes about members of a specific gender
- propositions of physical intimacy
- gender-related verbal abuse, threats or taunting
- leering or inappropriate staring
- bragging about sexual ability
- offensive jokes or comments of a sexual nature about an employee, client or tenant, including those sent by e-mail
- display of sexually offensive pictures, graffiti, or other materials, including on a computer
- questions or discussions about sexual activities
- paternalism based on gender, which a person feels undermines his or her self-respect or position of responsibility rough and vulgar humour or language related to gender.

i) Harassment because of gender identity:

A transgendered person is protected at work from degrading comments or insults because of gender identity (see also Section III-3m) – "Gender Identity"). Gender identity is not currently a prohibited ground, but related discrimination can be addressed as sex discrimination or sexual harassment.

> **Example:** A woman in an office transitions from female to male and is exposed to derogatory comments during this process. This employee is protected by the Code, which prohibits harassment and discrimination linked to gender identity.

l) Sexual solicitation and reprisal

Subsection 7(3) of the *Code* also prohibits sexual solicitation:
Every person has a right to be free from,

a. a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
b. a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

The right to be free from unwelcome advances or requests for sexual favours extends to actions made by a boss, supervisor or other persons in a position of power.

> **Example:** An employer threatens to fire an employee because the employee refused to go out on a date with him or her.

> **Example:** A supervisor makes unwanted sexual advances to an employee. In this situation, it may be implied, directly or indirectly, that a promotion is at risk if the advance is rejected.

Unwelcome sexual advances or solicitation from someone who is in a position to grant or deny a benefit to the person is another form of violating a person's right to equal treatment. Sexual solicitation or advances can also happen between co-workers where one person is in a position to grant or deny an employment-related benefit to the other.

> **Example:** A worker will only share important job-related information if he or she receives sexual favours from that co-worker.

Finally, a reprisal occurs when an employer, supervisor or other person in a position to grant or withhold a benefit or advancement punishes a person because he or she rejects the sexual request. This kind of "getting even" is against

subsection 7(3)(b) of the *Code*.

> **Example:** A male employee is denied a promotion because he refused a sexual proposition from his manager.

m) Failing to design inclusively, remove barriers and accommodate

The *Code* requires that the terms and conditions of the workplace, or the functions of a job, be created with a range of abilities and people in mind. This means that employers must do what is necessary to make sure that people protected by the *Code* are able to take part equally and with dignity in the workplace. Courts have clearly said that it is not enough to design systems that are not inclusive and then accommodate individual needs. Employers may be found to discriminate when they fail to design inclusively, permit barriers to be created or fail to remove existing barriers, or do not meet their duty to accommodate to the point of undue hardship. These concepts are discussed further in Section IV-8 – "Meeting the accommodation needs of employees on the job."

The *Code* also requires that workplace or job rules and conditions be modified as needed to meet the duty to accommodate, subject to the standard of undue hardship. Accommodation is a way of removing barriers preventing persons identified by *Code* grounds from fully taking part in the workplace in a way that responds to their individual circumstances. This duty to accommodate may arise in the context of any of the grounds of the *Code*. However, it has been addressed in most detail in Commission policies on disability, creed, age, sex (pregnancy and breastfeeding) and family status. The following are common examples of accommodations made by employers:

- providing equipment, services or devices so an employee can do the essential duties of his or her job (disability)
- implementing flex-time policies to help employees balance their work with care-giving obligations (family status)
- modifying uniforms or hours of work so they are compatible with employee's religious observances (creed)
- making a room available during working hours for an employee with a small baby to express breast milk (sex – pregnancy & breastfeeding)
- providing non-gendered washroom facilities for persons who are transsexual (gender identity).

Some kind of operating rules, policies and procedures may be needed for business reasons, such as to comply with heath and safety legislation. However, the provisions of the *Code* continue to apply and may take precedence, if there is a conflict. This is because of the supremacy of the *Code*. It is not usually a defence under the *Code* for an employer to say that it has complied with other legislation.

> **Example:** A company rule says that all people on site must wear a hard hat. A Sikh employee wears a turban and requests accommodation because of his creed. Without conducting an individual assessment of the accommodation request and the risks to the employee or other people in the workplace, the employer denies the request based only on the Occupational Health and Safety Act. Although the employer has complied with the other Act, it has failed to take into account the obligations under the Code.

The *Code* sets out only three factors for deciding whether accommodation would cause undue hardship: cost, outside sources of funding, and health and safety. A finding of discrimination may be made where appropriate accommodation has not been provided or the process for dealing with the accommodation request was flawed, if the employer does not have evidence to prove undue hardship.

> **Example:** An employee asks to use her sick days to care for her son as an accommodation because of her family status. Without assessing the feasibility of this, the employer says "No, because everyone else will want special treatment." This employer would be vulnerable to a human rights complaint.

For more information on how to meet the duty to accommodate in employment, refer to Section IV-8 – "Meeting the accommodation needs of employees on the job" and Section IV-9 – "More about disability-related accommodation."

n) Racial profiling

Racial profiling is a form of stereotyping based on preconceived ideas about a person's character. It is discriminatory for decisions to be based on presumed characteristics instead of unbiased assessments of a person's behaviour. The definition of racial profiling used by the Commission includes the following parts:

- any action taken for reasons of safety, security or public protection
  - that relies on stereotypes about race, colour, ethnicity, ancestry, religion, or place of origin rather than on reasonable suspicion
  - that singles out an individual for more scrutiny or different treatment.

While this form of discrimination most often arises in the context of services, claims of racial profiling may also arise in employment.

> **Example:** An employee's computer is monitored because he was born in Egypt and is therefore suspected to be a security risk. The computers of other employees are not monitored like this. The employee is fired because he was found to have been visiting non-work related sites during business hours. Although his actions may have broken a work rule about computer use, this only came to light as a result of racial profiling. Thus, this would be discriminatory.

> **Example:** A Black employee is accused of sexually harassing his female co-worker. Initial investigation suggests he may have forwarded sex jokes by e-mail that he received from another colleague. To protect the other employees from violence, the employer bans him from the workplace until the situation is fully investigated. The White employee who had initially sent around the e-mail was given a warning and allowed to continue working during the investigation. This employer may be seen to have engaged in racial profiling in the way he or she disciplined the Black man.

A finding of racial profiling may be made even where race or another race-related *Code* ground is only one factor in the alleged conduct. In the example directly above, it would have been legitimate for the employer to discipline both employees. If the employer took more severe action against the Black employee because this was his second time and because he was presumed to be more violent because of his race, this would still amount to discrimination. This is because race was one factor, among other legitimate factors, that affected how he was treated.

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[6] *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government Service Employees' Union* (B.C.G.S.E.U.) (*Meiorin*), [1999] 3 S.C.R 3. *Entrop v. Imperial Oil Ltd*. (2000), 50 O.R. 3d 18 (C.A.) at para 77 (*Entrop*).
[7] *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* [1999] 3 S.C.R. 868 (*Grismer*) at para. 20.
[8] See for example *Bayliss-Flannery v. DeWilde (Tri Community Physiotherapy)*, 2003 HRTO 28 (CanLII).
[9] *Lee v. T.J. Applebee's Food Conglomeration* (1988), 9 C.H.R.R. D/4781 (Ont. Bd. of Inq.).

3. Grounds of discrimination: definitions and scope of protection

This section describes specific parts of each of the grounds of the *Code*, and highlights points that are distinctive or particular to each of the grounds. The Commission has developed policies that outline in more detail how the *Code* applies to grounds such as family status, age (older persons), sexual orientation, race, disability, gender identify, sex (harassment, and also pregnancy and breastfeeding) and language (may be connected to ethnic origin, place of origin, race and ancestry). For a list of Commission policies, refer to Appendix A.

a) When grounds intersect

A person's experience of discrimination is often linked to the compounding effects of multiple grounds. Based on their unique combination of identities, people may be exposed to particular forms of discrimination and may experience significant personal pain and social harm that come from such acts of discrimination. For example, a Jewish lesbian with a child and same-sex spouse can be seen as a "mother of a child" or a "Jewish woman" and would be protected under the grounds of marital status, family status, creed and sexual orientation. As lesbians, this woman and her spouse may be exposed to forms of discrimination that other Jewish women with children are not.

Similarly, a young Black man can be seen as a "Black person," or as a "young person," or as a "man" and is protected under the grounds of race, age and gender. He may be exposed to discrimination based on any of the grounds of race and/or colour, age, and gender on their own. However, he may also be exposed to discrimination on intersecting grounds on the basis of being identified as a "young Black man" based on the various assumptions and/or stereotypes that are uniquely associated with this socially significant intersection.

> **Example:** A young Black man in a customer service position is denied a promotion. When he asks for an explanation, he is told that his approach is too "urban" and would not be a good fit with the existing client base. Most of the clients and other staff are White men over age 45.

A person identified by multiple grounds may experience disadvantage that is compounded by the presence of each of the grounds. For example, research confirms that older persons and persons with disabilities face higher unemployment rates. As well, members of racialized groups are more likely to be underemployed. Therefore, an older African Canadian person who is developing a disability will likely face compounded disadvantage when looking for work.

These are examples of how an intersectional approach based on the overlap of multiple grounds of discrimination is applied.

> **Example:** A 55-year-old woman alleges that she is refused a job as a waitress because she doesn't fit the image that the restaurant is trying to promote. The evidence reveals that the restaurant employs many younger women as waitresses as well as older men as waiters and maitre d's. The fact that older persons (men) are employed and younger women are employed does not necessarily defeat her claim of discrimination. There may be unique stereotypes attributed to older women in terms of image or attractiveness.

> **Example:** A man named Muhammad is screened from an employment competition on the basis of his name. It is appropriate in this case for him to cite as grounds for discrimination: race, ethnic origin, ancestry, place of origin, and creed. This is because his name in question is racialized precisely because it is stereotypically connected to a specific origin and creed.

b) Protecting persons "associated" with others protected by the Code

In some cases, the *Code* can protect people who are not personally identified by one of the grounds. People who are subject to discrimination because of their association with a person protected under the *Code* can file a complaint based on section 12. The protection in this section applies even if the person could not otherwise claim protection based on one of the grounds, or does not share the same *Code* grounds as the person they are associated with.

> **Example:** A woman fills out a job application form and goes back with a friend to drop it off. The hiring manager does not accept the form, because he says he does not like her friend who is a cross-dresser. Although the woman was not subjected to discrimination because of her own gender identity, she did face discrimination because of her relationship with a person who is a cross-dresser.

Racial discrimination because of association often arises in terms of inter-racial relationships. In the workplace, it may take the form of harassment or causing a poisoned environment for a woman dating a racialized man. Employees who are discriminated against because they provide care to persons with disabilities commonly file complaints citing "association with a person with a disability" as a ground. The ground of family status may also be cited if it applies.

Taking reprisal action against someone who has objected to discriminatory comments aimed at another group may be found to be discrimination because of association.

> **Example:** A woman who was a member of a club confronted other members about racist comments they made. Having spoken out against racism, the woman clearly associated herself with First Nations and racialized people. The negative actions taken by the club because she stood up to racist comments amounted to a breach of the Code.

See also Section III-2d) – "Discrimination because of association" under "What is discrimination?"

c) Perceived grounds

A person is protected under the *Code* if they are treated differently in a workplace because of negative characteristics that other people associate with one of the grounds. The question is whether the person is perceived to be a member of a protected group, even if this view is not accurate. This analysis looks at the perceptions, myths and stereotypes underneath a person's experience and considers the subjective impact of the treatment, rather than the intent behind the treatment.

> **Example:** A heterosexual employee is subjected to taunts based on sexual orientation that imply that he is gay. People who make the comments do not know for sure if he is gay or not. The employer knows that this employee is not gay and dismisses these kinds of comments as harmless jokes. In this case, the employee is protected by the Code and the employer may be found to have contravened the Code.

> **Example:** A man who is applying for an internal position had a heart condition that surgery fixed. He is not selected for the position, even though he has no functional limitations, because he is perceived as being at risk of developing a disability. This man is protected under the ground of disability.

d) Age

The *Code* prohibits discrimination because of age in all social areas including employment. "Age" is defined in section 10(1) as "an age that is 18 years or more."

Discrimination based on age can happen at any time in a person's life. Younger employees may experience discrimination because of negative attitudes and stereotypes about youth and experience. On the other hand, employees may be viewed as "older" and treated poorly in a particular context compared to others who are younger. When the allegation relates to negative attitudes and stereotypes about aging, it may be necessary to think about a person's age in the context of a particular situation, workplace or group of employees.

> **Example:** The average age of nurses at a private clinic is 40 when new owners buy it. The new owners want to reduce salary costs and attract new clients by hiring younger staff. They offer packages to all staff over age 45 and actively recruit employees under 30. One year later, the average age of nurses at the clinic is 30. The 50-year-old employee whose employment was terminated and the 32-year-old job applicant who was turned away because she did not fit the workplace culture could both file human rights claims based on age.

In many cases, age discrimination is caused by or linked to ageism. Ageism is a socially constructed way of thinking about persons based on negative stereotypes as well as a tendency to structure society as though everyone is the same age – all old or all young. For example, older persons may experience age discrimination in employment where they may be perceived to have less "career potential" than younger applicants or employees. Younger workers may be belittled and treated with less dignity because they are viewed as expendable resources.

i) Discrimination against older employees:

Most claims of age discrimination in employment relate to older employees. As a general principle, older workers should be treated as individuals. They should be assessed on their own merits instead of on presumed group characteristics and offered the same opportunities as everyone else in hiring, training and promotion. They should normally work under the same performance management practices as every other worker. Where, however, an older person has in fact slowed down due to age-related health or disability concerns, an employer may have to provide some form of accommodation to him or her, such as reduced work targets. Age, including assumptions based on stereotypes about age, should not be a factor in decisions about layoff or termination. The decision should be based on the person's actual merits, capacities and circumstances.

The following are a few of the many types of situations that might constitute age discrimination against older persons in employment:

- an older worker is not given a position he is qualified for because of a perception that he will not have enough "energy" and is said to be "over-qualified"
- older workers are most affected by an organization's policy requiring job applicants to be "recent graduates" of a program. The organization is unable to provide a reasonable justification for this requirement
- older workers are excluded from training opportunities because of a perception that it is not worth investing in their future careers and that they are too difficult to train
- an older worker requests but does not receive appropriate age-related accommodation and then faces discipline leading to termination for failure to perform
- comments and conduct in the workplace that are harassing or lead to a poisoned environment. For example, a manager tells new employees that they will be eligible for promotions as soon as the "geezers" in the branch retire
- older workers are targeted for early retirement or layoff because it is presumed that they won't mind because they are closer to retirement.

ii) Employees under age 18:

The *Code* previously provided for a maximum age limit of 65 in employment along with the existing minimum age requirement of 18 years for all social areas. Such age limits in human rights legislation across Canada have been challenged as offending section 15 of the *Canadian Charter of Rights and Freedoms* (the *Charter*), which guarantees the right to equal protection and benefit of the law without discrimination based on age and other grounds.
The *Code* was amended in December 2006 to extend protections for older persons by removing the maximum age limit in employment. However, the *Code* continues to define age by referring to a minimum age of 18.

This definition does not mean that employees have to turn 18 before they are protected under the *Code*. Employees under age 18 are protected under any of the other grounds in the *Code*, such as sex, race, disability and so on.

> **Example:** A 16-year-old employee files a complaint alleging that she has been harassed because of her age, sexual orientation and race during her summer internship. If the evidence supports this claim, the employee would, at a minimum, be entitled to remedies based on sexual orientation and race.

The courts have not yet decided whether employees under age 18 are entitled to remedies based on age discrimination alone, when no other grounds are present. However, there are strong indications that when this issue is litigated, the minimum age cut-off may be found to contravene the *Charter* and therefore be of no force or effect. For example, in Ontario, there has been one court decision and one interim decision of the Human Rights Tribunal of Ontario where minimum age restrictions for access to services were not applied because they were inconsistent with the *Charter*.[10] Courts and tribunals would probably do the same for the lower age limit in employment.

> **Example**: A 17-year-old full-time permanent employee is subjected to frequent comments about his age and insinuations that he should be in school rather than taking a job from someone who "really" needs it. These comments hurt his dignity and make it hard for him to fit into the workplace as a valued employee. In his case, the only Code ground that could apply is age. Before he could get a remedy, a tribunal or

court would need to find that the definition of "age" in the Code is contrary to section 15 of the Charter and of no force or effect.

As a best practice, employers should make sure to treat employees under age 18 with respect in the workplace, and deal with any age-related concerns as diligently as they would for employees over 18.

e) Disability

Almost one quarter of all human rights claims filed in employment cite disability as a ground. Because disability-related concerns arise so often, a best practice is for employers to plan for compliance with the *Code* through measures such as inclusive design, accessibility reviews and developing accommodation policies, as are discussed in Section IV-1a) and IV-1d) – "More about reviewing, preventing and removing barriers related to disability." These provide a framework for the employer to prevent and address disability-related issues and claims in a timely way.

The definition of disability in the *Code* is very broad. It includes any degree of physical, developmental, mental or learning disability.

While the *Code* sets out various types of conditions, the list does not refer to every type of disability that is covered. A person who is perceived to have a disability is also protected by the *Code*, even if that person does not have a disability. Section 10(3) of the *Code* specifically protects persons who have had a disability in the past, as well as people who are believed to have, or have had a disability.

The *Code* ground of disability also specifically protects persons with injuries or disabilities who claim or receive benefits under *Ontario's Workplace Safety and Insurance Act (WSIA)*. There is no need to prove that the condition itself is a disability, but only that such benefits have been claimed or received or that there is an intention to claim such benefits. The *Code* is violated if an employer tries to discourage an employee from filing a claim or fires an employee because it believes the employee will file a claim for benefits. This protection exists even if no claim for benefits has actually been made.[11]

> **Example:** An employee has a reaction to dust and chemicals at work and needs to take two days off work. The employee needs the company's address for the WSIB forms filled in by her doctor, but her supervisor refuses to give it to her. She is told there is no place for her to work at the company because they don't want her filing Workplace Safety and Insurance Board (WSIB) claims "every other day." The complainant is awarded damages for the violation of her rights under the Code.

> **Example:** An employee tells his supervisor that he got hurt on the job and will be filing a claim under the WSIA. The supervisor says, "Just get out of here." The employee takes this to mean that he has been fired. This employee is protected under the Code ground of disability, and such a termination would be viewed as discriminatory.

It is important to recognize that discrimination because of disability may be based as much on perceptions, myths and stereotypes, as on actual functional limitations.[12] When considering whether a person has been discriminated against because of disability, it is more important to consider how the person was treated than to prove that the person has physical limitations or an ailment. A disability may be the result of a physical limitation, an ailment, a perceived limitation or a combination of all these factors.

> **Example:** A plant specialist successfully applies for a job in her field. However, a pre-employment medical exam shows that her spine looks a bit different from the norm. The medical exam also indicates that she could perform the normal duties of the position in question and that she has no functional limitations. The employer perceives that she has a "disability" and does not hire her. This is discriminatory.

The nature or degree of certain disabilities might render them "non-evident" to others. Because these disabilities are not "seen," many of them are not well understood in society. This can lead to stereotypes, stigma and prejudice.

Examples might include:

- non-visible conditions such as chronic fatigue syndrome, migraines, back pain or a learning disability
- mental illnesses such as depression
- disabilities that are episodic or temporary in nature such as epilepsy, environmental sensitivities or bipolar disorder
- disabilities that do not actually result in any functional limitations, but cause others to believe that the person is less able (for example, an office worker who is colour blind)
- past conditions or disabilities the person has recovered from but that result in ongoing unfair treatment (for example, an employee who has had a stroke, heart attack or cancer).

Protection for persons with disabilities under section 10 of the *Code* clearly includes mental disabilities such as mental illness. The Canadian Psychiatric Association estimates that one in five Canadians will experience mental illness in their lifetime. They describe mental illness as "significant clinical patterns of behaviour or emotions associated with some level of distress, suffering (pain, death), or impairment in one or more areas of functioning (school, work, social and family interactions). At the root of this impairment are symptoms of biological, psychological or behavioural dysfunction, or a combination of these."[13]

Persons with mental disabilities face unique challenges – discriminatory barriers affect their ability to compete equally in a job market and result in them being excluded from the workplace. These effects may be magnified for persons identified by more than one *Code* ground. For example, due to discrimination, an Aboriginal woman with a mental disability may face additional employment obstacles compared to a White man with a mental disability.

Once employed, people with mental disabilities may not be able to fully take part in the workplace due to a lack of accommodation or stereotypes and prejudice. Stigma can make a person's workplace stressful and may trigger or worsen an employee's mental illness. It may also mean that someone who is having problems and needs help may not seek it, for fear of being labelled.

> **Example:** Employees in a workplace jokingly tell each other that they are "mental," "crazy" or "not quite all there." The supervisor does not intervene because, in her view, they are only jokes and the names don't really apply to anyone they work with. Neither the employees nor the supervisor realize that one of the people in their group has been diagnosed with a mental illness. Although he had been thinking about asking for accommodation to seek treatment, he doesn't want to risk being exposed to such comments, or worse. Over time, it becomes harder for him to cope with the demands of the job and his mental state worsens without treatment. Ultimately, he goes on long-term disability and does not return to the workplace. The employee has experienced discrimination and the workplace has lost a valuable employee.

For more information about disability accommodation, see Section IV-9 – "More about disability-related accommodation" and the Commission's Policy and Guidelines on Disability and the Duty to Accommodate. For information about mental illnesses in the workplace, see Section IV-9m).

f) Family status

"Family status" is defined in section 10(1) of the *Code* as being in a parent and child relationship. Men and women are equally protected under this ground. The ground of family status protects non-biological parent-and-child relationships, such as families formed through adoption, step-parent relationships, foster families, non-biological gay and lesbian parents and all persons who are in a "parent-and-child-type" relationship.

> **Example:** An employee's nephew moves in with him because his sister, a lone mother, is undergoing a lengthy medical treatment and is unable to meet her son's needs. The employee's request for accommodation at work is denied and he files a complaint of discrimination on the basis of family status.

The ground of family status also includes care relationships between adult children and people who stand in parental relationship to them. The protection extends to persons providing eldercare for aging parents, or others in a "parent-type" relationship with the caregiver. For example, a person providing eldercare to a grandparent who played a significant role in his or her upbringing may be protected under the ground of family status.

The *Code's* protection of family status may overlap with grounds such as marital status, sex (including pregnancy and gender identity) and sexual orientation. It covers a range of family forms, including lone-parent and blended families, and families where parents are in same-sex or common-law relationships. The Supreme Court has also stated that family status discrimination occurs when a person is negatively treated because of a relationship with a particular family member. This means that if an employee is fired from or denied a job because the employer dislikes the employee's parent or child, the employee has been discriminated against on the basis of family status.[14]

Whenever an issue relating to family status is raised, it is important to take into account the intersecting impact of the person's sex, marital status, sexual orientation, race and age, as well as whether the person or his or her family member has a disability. For more information about this concept, please refer to Section III-3a) – "When grounds intersect."

The *Code* prohibits treating an employee differently, either directly or unintentionally, because of family status. Employers have a duty to accommodate employees, short of undue hardship, because of their child-care and/or eldercare responsibilities. Employers share social responsibility for providing a workplace that is reasonably flexible to meet the needs of employees with family responsibilities. The Commission recommends that employers recognize and accommodate a broader range of family relationships than those described by the grounds of marital and family status.

> **Example:** When drafting its policy on accommodating caregiving needs, an employer includes siblings, extended family, and other persons who depend on the employee for care and assistance.

The following kinds of stereotypes and biases may give rise to discrimination based on family status:

- People who provide caregiving, or are perceived to be caregivers, may be assumed to be less competent, committed, intelligent and ambitious than others
- Female employees with caregiving responsibilities may be shunted onto the "mommy track" and passed over for promotions, learning opportunities and recognition because of biases, conscious or unconscious, about the attributes of mothers.
- Men who take on significant caregiving responsibilities may be seen as less "manly" because they do not conform to gender stereotypical roles.
- It may be assumed that lesbian, gay, bi-sexual and transgendered persons do not have "real" families, and that they have no caregiving responsibilities, when in fact stereotypical notions of the family are effectively making these families and their caregiving needs "invisible."
- Families formed by adoption may be viewed as if they are less "real" or valid than biological families.

There is a specific exception to the right to employment without discrimination because of family status. Subsection 24(1)(d) of the *Code* provides that an employer can withhold or grant employment or advancement in employment to the employer's or an employee's spouse, child or parent. This rule allows an employer to support or oppose a narrow range of nepotism in its hiring practices.

For more information about the *Code* and family status, refer to the Commission's Policy and Guidelines on Discrimination Because of Family Status.

g) Marital status

Marital status is defined in section 10(1) of the *Code* as the status of being married, single, widowed, divorced or separated and includes the status of living with a person in a conjugal relationship outside of marriage (that is, in a

"common-law relationship"). The courts have clearly stated that equal protections apply to common-law, same-sex and opposite-sex relationships.

This is to make sure that marital status is an irrelevant factor to consider in relation to any of the social areas in the *Code*. Take care to make sure that policies and actions are not based on, and do not perpetuate, the stereotype that a marriage between a man and woman is of greater value than other types of marital status.

> **Example:** An organization provides living quarters for its married employees but not for others. Such a policy discriminates on the basis of marital status.

Discrimination based on marital status may also be more subtle than distinctions between the different categories of status, such as married or single.

> **Example:** An employer differentiates between women who adopt their husbands' surnames and women who do not. This has been found to be discriminatory.

Marital status includes both the status of the relationship, as discussed above, and the particular identity of the person's partner or spouse.[15] The Supreme Court of Canada has spoken about focusing on the harm suffered by the individual regardless of whether that individual fits neatly into an identifiable category of persons similarly affected.

> **Example:** Mr. A. works for Mr. B. Mr. A.'s wife and daughter confront Mr. B., the employer, and accuse Mr. B. of having sexually assaulted the daughter when she was young. As a result, Mr. B. terminates the employment of Mr. A. This was discrimination based on family and marital status.

There is a specific exception to the right to employment without discrimination because of marital status in subsection 24(1)(d) of the *Code*. An employer can withhold or grant employment or advancement in employment to the employer's or an employee's spouse. This rule allows an employer to support or oppose a narrow range of nepotism in its hiring practices.

h) Race and race-related grounds

i) Race:

Race is a prohibited ground that is not specifically defined. Biological notions of race have been discredited, and there is no legitimate scientific basis for racial classification. Despite this, notions of race continue to exist in society and create differences among groups. This marginalizes some people in society. This social construction of race is termed "racialization" and it remains a potent force in society. Individuals may have prejudices related to people or characteristics that are racialized.

In addition to physical characteristics such as colour, the following characteristics are commonly racialized:

- language
- accent or manner of speech
- name
- clothing and grooming
- diet
- beliefs and practices
- leisure preferences
- places of origin
- citizenship.

The *Code* prohibits discrimination on several grounds related to race. These include mainly the grounds of colour, ethnic origin, ancestry, place of origin, citizenship and creed (religion). Depending on the circumstances, discrimination based on race may cite race alone or may include one or more related grounds. Each of these grounds

is also discussed separately below. The ground of race can encompass the meaning of all of the related grounds, and any other characteristic that is racialized and used to discriminate. In practice, all grounds that may have been factors in a person's experience should be cited if a human rights claim is made.

It is often hard to tell what the basis is for racial discrimination. A First Nations woman may be discriminated against based on the colour of her skin, stereotypes associated with her ethnic origin or her ancestry, or distaste for the practices of her creed, or based on some combination of these factors. All are possibilities and it is often hard to distinguish these in specific instances. In many cases, the discrimination arises only because of the particular combination of grounds. For example, stereotypical and racist views may be held about people's sexuality based on their ethno-racial identity.

> **Example:** A boss sexually harasses only staff who are racialized women. Men and White women are not the targets of this behaviour.

Racist ideology asserts either explicitly or implicitly that one racialized group is inherently superior to others. Racist ideology can be openly displayed in racial slurs, jokes or hate crimes, or it can be more deeply rooted in attitudes, values and stereotypical beliefs. In some cases, these beliefs are unconsciously maintained by individuals and have become deeply embedded in systems and institutions that have evolved over time.

Racial stereotypes are typically negative; for example, that racialized employees are lazy, not intelligent, unreliable, dirty, uncivilized, promiscuous, submissive, more likely to abuse drugs or alcohol, of questionable moral character, more likely to engage in criminal activity or do not fit into the workplace. However, in some cases, positive stereotypes may be at play (for example, generalizations that members of a particular group are dutiful employees).

There are a number of myths and misconceptions about racism and racial discrimination that make it harder for organizations to respond properly to racial inequality. When putting in place measures to prevent or address racial discrimination in the workplace, employers should take care not to rely on the myths that:

- people in Canada are "colour blind" and do not even notice race
- taking proactive action against racism is reverse racism against White people
- racialized people overreact about racism or manipulate by "playing the race card"
- immigration is bad for Canada as immigrants take jobs away, commit more crime or are a drain on our society.

For more information about the *Code* and racial discrimination, refer to the Commission's Policy and Guidelines on Racism and Racial Discrimination.

ii) Language:

Language itself is not a ground. However, it is a characteristic that may be racialized or connected to one of the race-related *Code* grounds such as ancestry, ethnic origin, place of origin, or in some situations race. There is usually also a link between the accent we speak with and these grounds.

> **Example:** A manager supervises a group of racially mixed workers, who all speak English as a second language. During one break, he orders four employees speaking Arabic to "act Canadian" on work premises and threatens to terminate their employment if they continue speaking Arabic. This poisons their work environment. Unless the manager can demonstrate that speaking English at all times at the workplace is reasonable and required in good faith in the circumstances, his behaviour would be discriminatory.

> **Example:** An African Canadian woman has a disagreement with a co-worker over the phone. Her manager tells her that her accent can be interpreted to be "hard and rude" on the ears. The woman is very offended by this statement and the fact that her accent is being blamed for causing the disagreement. When she asks the manager to say sorry, she is viewed as being "volatile," "difficult" and "aggressive" and singled out for performance management. This is an example of language-related discrimination and

reprisal.

Employers cannot discriminate against employees based on language or accent, unless these requirements can be established to be genuine and made in good faith. If proficiency in a particular language is a requirement for a position, the employer would need to be able to show that the requirement is linked to the essential duties of the position, is imposed in good faith and takes into account the duty to accommodate to the point of undue hardship.

> **Example:** An employer is seeking an employee who speaks fluent Spanish to serve the employer's Hispanic clients, who are predominantly from Central America. It would be appropriate to seek an applicant who speaks Spanish fluently, but would not be permissible to include a requirement that the successful person must come from a Central American country (unless a specific exemption in the Code applies).

For more information about the *Code* and language, refer to the Commission's Policy on Discrimination and Language and the Policy and Guidelines on Racism and Racial Discrimination.

iii) Colour:

"Colour" is listed as a ground in the *Code* but is an undefined term. A person's skin colour can be seen as a physical feature that is commonly racialized. For the purposes of analysis, colour is a ground that may be encompassed by the concept of race and the principles described above.

iv) Ancestry and ethnic origin:

The *Code* provides protection from discrimination in employment because of "ancestry" and "ethnic origin." These terms are not defined in the *Code*. Complainants usually identify themselves as having a particular ancestry or ethnic origin in a complaint.

The terms "ethnic origin" and "ancestry" are sometimes used interchangeably. However, ancestry is closely related to "whom" you are descended from. An ancestor is someone a person is descended from, and is usually more distant than a grandparent. One's ancestry may originate from more than one cultural group. Statistics Canada states that "ethnic origin" refers to the cultural origins of a person's ancestors.[16]

Ethnic origin encompasses a wider range of characteristics than ancestry and also includes ancestry. Webster's Dictionary[17] defines "ethnic" as "of or relating to large groups of people classed according to common racial, national, tribal, religious, linguistic or cultural origin or background." Ancestry and ethnic origin should not be confused with citizenship, nationality or language spoken. In the *Code*, the ground of ethnic origin overlaps with a more commonly used term, "ethnicity," which refers to a shared cultural heritage or nationality. Ethnic groups might be distinguished on the basis of cultural traits such as language or shared customs around family, food, dance and music.

People who share an ethnic origin, ethnicity or ancestry may or may not share the same racial identity.[18]

> **Example:** A Black person from Barbados has a different ethnic identity from a Black person from Canada, although they may share the same racial identity.

> **Example:** A Black person from England and a White person from England would likely have different racial experiences, although they have the same ethnic origin.

v) Place of origin:

People should not be discriminated against or harassed because they are from outside Canada. The *Code* may even cover people from a particular place within Canada. A person's place of origin is often related to other grounds in

the *Code*, such as ethnic origin or race.

A job advertisement or hiring process may violate the *Code* if it limits the opportunity to people with "Canadian experience." Such a requirement can have an adverse impact on recent immigrants to Canada who may lack Canadian experience, even though they may be rich in non-Canadian experience and qualified to do the job.

i) Citizenship

Individuals should not be treated differently or harassed in employment because of their citizenship, whether Canadian or otherwise. It is illegal for employers to make distinctions between Canadian citizens, citizens from other countries, persons with dual citizenship, landed immigrants or permanent residents, refugees and non-permanent residents. Employers should only be concerned with whether a person has legal status to work in Canada, rather than whether the person is a Canadian citizen, except in the narrow exceptions provided by section 16 of the *Code*, discussed below.

People can either be Canadian citizens "by birth" or "by naturalization." "By birth" means that a person was either born in Canada or born outside Canada if, at the time of his or her birth, one or both parents were Canadian citizens and had retained Canadian citizenship. "Naturalization" means that a person was born in another country and immigrated to Canada, has become a Canadian citizen, and has been issued a Canadian citizenship certificate. Human rights law does not distinguish between the two categories.

"Permanent residents" or people with "landed immigrant" status have been granted the right to live in Canada permanently by immigration authorities, but have not yet got Canadian citizenship. Some are recent arrivals, while others have resided in Canada for many years. "Non-permanent residents" are people from another country who live in Canada and have work, student or Minister's permits, or who are claiming refugee status in Canada. Human rights law makes no distinction between permanent residents, non-permanent residents and Canadian citizens except in specific circumstances, noted below.

> **Example:** An employer's job advertisement lists "Canadian experience" as a requirement. This excludes a number of immigrants and refugees from consideration. Such a requirement may constitute discrimination because it has a negative impact on people who may lack "local" experience due to citizenship or other Code grounds such as race, place of origin or ethnic origin, although they are otherwise qualified to do the job.

Section 16 of the *Code* provides for exceptions to the general rule of non-discrimination in employment because of citizenship. An employer is allowed to discriminate based on citizenship in the following three specific situations:

- when Canadian citizenship is a requirement, qualification or consideration imposed or authorized by law
- when a requirement for Canadian citizenship or permanent residence in Canada has been adopted to foster and develop participation in cultural, educational, trade union or athletic activities by Canadian citizens or permanent residents
- when the employer imposes a preference that the chief or senior executive is, or intends to become, a Canadian citizen.

Canadian organizations operating in Ontario are bound by the *Code* and should not restrict access to employment based on citizenship. Human rights complaints have been filed in situations where citizenship has been used to deny or restrict access to employment in the defence contracting sector, where there is an opportunity to obtain a waiver or security clearance for all workers on a project.

> **Example:** A Canadian manufacturing company imposes security restrictions on employees who hold citizenships other than Canadian, even if they are also Canadian citizens. An engineer who holds Iranian and Canadian citizenship is no longer allowed to do all of his duties and is instead assigned to office work. The employer argues that this is done to comply with U.S. regulations and requirements that have become part of the law of Canada. The Commission has taken the position that the employer's failure to

apply for a security clearance, exemption or waiver under that law for its employees is discrimination under the Code.

j) Creed

Employees are entitled to the protections of the *Code* under the ground of creed, both as individuals and as members of a group. Religion or "creed" is not a defined term in the *Code*. The Commission interprets creed to mean "religious creed" or "religion." It includes faith, beliefs, observances or worship. A belief in a God or gods, or a single supreme being or deity is not a requisite. For example, the Human Rights Tribunal of Ontario has held that practitioners of Falun Gong are protected under the ground of creed.[19] Religion may be broadly interpreted to include non-deistic bodies of faith, such as the spiritual faiths/practices of Aboriginal cultures, as well as newer religions (assessed on a case by case basis).

The key test for the existence of a creed-based right is if the beliefs and practices are sincerely held and/or observed. The *Code* protects personal religious beliefs, practices or observances, even if they are not considered by others, even a majority of people of the same religion, to be essential elements of the creed. For example, mainstream Jewish organizations may indicate that it is not a basic tenet of Judaism that one must build a small hut or "succah" on one's property during the holiday of Sukkot. However, if one individual sincerely believes that this is a religious requirement, this person is protected under the ground of creed.[20]

Creed does not include secular, moral or ethical beliefs or political convictions.[21] It does not extend to religions that incite hatred or violence against other individuals or groups, or to practices and observances that claim to have a religious basis but which contravene international human rights standards or criminal law.

Atheists, who deny the existence of God, and agnostics, who believe that nothing is known or likely to be known about the existence of God, may have the *Code's* protection if an employer seeks to impose religious views or create a religious environment in the workplace that is incompatible with agnostic or atheist beliefs.

The right to equal treatment on the ground of creed under the *Code* has two important principles:

1. The law can require employers to take steps to facilitate the practice of religious observances.
2. No person can force another to accept or comply with religious beliefs or practices.

Everyone in the workplace has the right to have his or her religious beliefs and practices respected and accommodated. Employees must start this process by asking for accommodation. Employers must meet an employee's religious needs unless it would cause undue hardship. Undue hardship takes into consideration cost, outside sources of funding and health and safety.

For more discussion on accommodation and creed, refer to section IV-8f ii: "Creed – accommodating employees' religious needs".

There are exceptions to the general right of non-discrimination in employment because of creed:

- Roman Catholic Schools in Ontario have special rights guaranteed by the Constitution and by the Ontario *Education Act*. Section 19 of the *Code* states that this is not affected by the *Code*. On the other hand, the *Code* does not address the rights or privileges of any other religion-based schools and other religions do not, therefore, enjoy the same exemption from human rights laws.
- A religious institution or organization is allowed to employ only people from a certain faith group if it serves mostly the interests of people of that faith group. This is only permitted if being of a particular faith is reasonable and *bona fide*. This exception, available under subsection 24(1)(a) of the *Code*, applies to all religions.

Situations may arise where protecting rights related to creed may clash with protecting other rights such as, for example, the right to freedom from discrimination on the basis of sex or sexual orientation. The Supreme Court of

Canada has stated that the right to freedom of religion is not unlimited. It is subject to such limitations as are necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others.[22] Where such conflicts arise, the rights must be balanced: neither freedom of religion nor guarantees based on sexual orientation are absolute. In striking such a balance, the Supreme Court of Canada has noted that although the freedom of belief may be broad, the freedom to act upon those beliefs is considerably narrower. It is one thing for a person to hold negative beliefs about sexual orientation based on his or her creed; it is another thing for that person to act in a discriminatory way towards others because of those beliefs.

k) Record of offences

A person cannot be discriminated against in employment because of a "record of offences." Record of offences is narrowly defined in subsection 10(1) of the *Code* to mean a conviction for:

a. an offence in respect of which a pardon has been granted under the *Criminal Records Act* (Canada) and has not been revoked, or
b. an offence in respect of any provincial enactment.

Therefore, employment decisions cannot be based on whether a person has been convicted and pardoned for an offence under a federal law, such as the *Criminal Code*, or convicted under a provincial law, such as the *Highway Traffic Act*. This provision applies to convictions only, and not to situations where charges only have been laid.

Before refusing employment to a person or taking a conviction into account, the employer should take steps to determine if a pardon has been granted or if it is a provincial offence. If so, the prohibition in the *Code* applies.

Subsection 24(1)(b) of the *Code* states that an employer can refuse to hire someone based on a record of offences if they can show that this is a reasonable and *bona fide* qualification. As is discussed further in Section IV-2 – "Setting job requirements," to be a reasonable and *bona fide* qualification, the requirement must be rationally connected to, and necessary for, job performance. To get this exception, the employer must show that the circumstances of the individual cannot be accommodated without creating undue hardship, considering costs, funding and health and/or safety risks.

Before taking a record of offences into account in hiring decisions, the employer should conduct an individual assessment of the information before it and the requirements of the position. An employer may wish to consider the following types of questions:

- What were the circumstances of the conviction and the particulars of the offence involved?
  - How old was the individual when the events in question occurred?
  - Were there any extenuating circumstances?
- How long ago did the incidents leading to the conviction occur?
  - What has the individual done since then?
  - Has the person shown any tendencies to repeat the kind of behaviour he or she was convicted for?
  - Has the person shown a firm intention to rehabilitate him or herself?
- What is the risk to the employer, other staff, service-users or the employee if the behaviour that led to the conviction is repeated?
  - What is the likelihood that it will be repeated given the points above?
  - Is the employer sure that the risk is being assessed based on legitimate factors rather than stereotypes and assumptions?
  - What professionals or experts can be consulted to help perform this kind of risk assessment?

Each job situation and employee or potential employee must be assessed individually. An employer would likely be able to prove that not having a record of a pardoned offence or provincial offence is a *bona fide* requirement in the following cases:

Example: A bus driver has serious or repeated driving convictions.

Example: A daycare worker who works alone with children is convicted of child sexual abuse while employed at a daycare centre.

On the other hand, it would be more difficult for the employer to make the same argument in other cases.

Example: A person was convicted of marijuana possession in 1960 when he was 18, and received a pardon later. He applies for, but is not considered for, a position with a large manufacturing company in 2007. The company has a drug and alcohol policy that it applies to all staff. The applicant is willing to provide medical information that he is free of drugs or alcohol, if it is a legitimate requirement for the position, but the company is unwilling to consider his application because of his record of offences. The company may be vulnerable to a claim of discrimination.

l) Sex

The ground of "sex" is not specifically defined in the *Code*, although it is generally considered to be related to a person's biological sex, male or female. Men and women receive equal protection under this ground. The ground of "sex" also includes a broader notion of "gender," which can be described as the social characteristics attributed to each sex. The *Code* protects men and women from harassment and discrimination at work, including assumptions about their professional abilities that result from stereotypes about how men and women "should" behave, dress or interact.

The right to equal treatment without discrimination because of sex also applies to gender identity and pregnancy, both of which are the subjects of specific Commission policies and are discussed in more detail below.

As well, other prohibited grounds of discrimination such as race, creed, marital status or disability may be intertwined with issues of gender. For persons who are members of more than one protected group, some forms of behaviour could have a greater negative impact.

Example: Women with disabilities may feel very vulnerable to harassment and sexual assault. Inappropriate comments or conduct related to gender that may not necessarily be considered by some as problematic, may be viewed as particularly offensive or threatening to a woman with a disability.

The following kinds of situations may be found to be discrimination based on sex:

- an outspoken woman with high performance is denied partnership and told to learn how to be more feminine
- women are paid lower wages than men in similar positions doing equivalent work
- discriminatory work conditions have the effect of discouraging women from taking a job and constitute constructive refusal to hire women (for example, a requirement that female employees work topless)
- failing to deal with sexual harassment of female employees
- a requirement that women belong to sex-segregated unions, groups or clubs in the workplace
- excluding women of child-bearing potential from the workplace
- exposing women to pornography or other sexual representations (these create a poisoned environment)
- excluding pregnancy-related disability leave from employer sick leave plans
- asking a pregnant employee to sign a waiver and firing her if she does not sign it.

Systemic sex discrimination may be detected by looking at three elements:

- organizational culture – for example, are women respected and treated with dignity in the workplace?
- policies, practices and decision-making – for example, do existing policies on hours of work or productivity act as barriers to women fully taking part as equals in the workplace?
- numerical data – for example, are women well represented at all levels in the organization and across all occupational groupings, or are employees in positions of responsibility primarily male?

Example: A prominent law firm laments that female associates tend to leave the firm after three years, rather than pursue the lucrative career path of partnership. The organizational culture is one where female articling students are subjected to sexist comment and conduct on a regular basis, such as being asked to bring coffee to the meetings for more senior males. The pay and recognition policies in place set an expectation that all associates reach a set target of billable hours, regardless of any accommodation requirements (including those arising from pregnancy, breastfeeding or family status). Finally, although more than half of the articling students since 1985 have been women, only 5% of all partners are women. These facts indicate that this firm is vulnerable to a claim of systemic sex discrimination and that this is likely a factor contributing to its inability to retain female associates.

There are three specific exceptions to the general right to employment without discrimination because of sex:

- Subsection 24(1)(a) of the *Code* allows certain institutions or organizations to employ people of one sex if the organization serves mostly the interests of persons of that particular sex. This exception is only permitted if being a man or a woman is reasonable and *bona fide* because of the nature of the job. For example, under the *Code*, a women's shelter serving female victims of violence is allowed to hire only women.
- Under subsection 24(1)(b) of the *Code*, it is legal to hire someone based on sex only if an employer can show that the requirement is reasonable, bona fide and based on the nature of the job. However, to get this exception, the employer must also show that if a person of the opposite sex applies, the circumstances of the individual cannot be accommodated without creating excessive costs, or health and safety dangers (undue hardship).
- Subsection 24(1)(c) of the *Code* allows people to hire a medical or personal attendant of a particular sex for themselves or an ill family member. This does not, however, allow agencies or health care services to send nurses or personal attendants to clients based on discriminatory preferences, unless it is done following the direct instructions of the ill person or a family member of the ill person.

i) Pregnancy:

The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is, was or may become pregnant, or because she has had a baby. The Supreme Court of Canada has said that pregnancy is a characteristic that is linked to a woman's sex, and that discrimination because of pregnancy is discrimination based on sex. It has also said that pregnancy is fundamentally important to society, and the financial and social burdens of having children should not rest entirely on women.[23] Employers share in this social and economic responsibility.

Discrimination because of pregnancy is often based on common negative stereotypes and attitudes that:

- pregnant women will not be able to work productively and effectively during their pregnancies
- accommodating the needs of pregnant women will be onerous
- it will be excessively burdensome to deal with the pregnant employee's maternity leave
- pregnant women will generally not return to work after their maternity leaves
- if they do return from maternity leave, they will no longer be desirable employees.

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 or women who may become pregnant, fire them, or discourage them from remaining at or returning to the workplace.

The protections for "pregnancy" include pre-conception fertility treatments through to the period following childbirth, including breastfeeding. The term "pregnancy" takes into account all of the special needs and circumstances of a pregnant woman, and recognizes that the experiences of women will differ. Pregnancy-related needs can arise from:

- infertility treatments
- miscarriage
- abortion

- complications during pregnancy such as bed rest
- pre-term birth
- pregnancy or childbirth complications that continue after the child is born
- conditions that result directly or indirectly from an abortion/miscarriage
- recovery from childbirth
- breastfeeding.

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

> **Example:** A woman is offered an office position after attending an interview. The woman then tells the employer that she is pregnant and will need to take a maternity leave in six months. The employer says that he will call her back but does not. This is a discriminatory refusal to hire because of pregnancy.

Other work-related practices or behaviours set out in the examples below, may also be discrimination:

- relying on negative stereotypes and attitudes about pregnant women and their ability to work
- an employer limits or withholds promotion opportunities or training regardless of work performance or years of service. This may include failing to inform women who are away on pregnancy leave about major developments and workplace opportunities
- a pregnant woman is not assigned to a major project or team project
- a supervisor is overly critical of the work of a woman who is pregnant
- a manager docks a pregnant woman's time for using the washroom more frequently
- a pregnant woman is made the subject of inappropriate comments or jokes
- a woman is terminated with or without notice, because of her pregnancy
- a woman who is pregnant is subjected to unwanted transfers
- a woman who is pregnant is denied sick leave benefits
- an employer refuses to work with a female employee to find appropriate arrangements to permit her to continue breastfeeding her child after she returns to work
- dismissing an employee when it is time for her to return from pregnancy-related leave
- constructively dismissing a pregnant employee through harassment, demotions, unwanted transfers, excessive criticism of her work, or other negative treatment.

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. These laws have different purposes from the *Code*, and are aimed at providing minimum standards only. Where there is a conflict between rights under the *Code* and rights under other legislation, under section 47 of the *Code*, the *Code* has primacy unless the other legislation says that it does not. See also Section II-2: "The *Code* prevails over other laws."

m) Gender identity

Although "gender identity" is not currently listed as a distinct ground in the *Code*, complaints of discrimination may be filed under the ground of "sex."

Gender identity is linked to a person's intrinsic sense of self, particularly the sense of being male or female. Gender identity may not conform to a person's birth-assigned sex. A person's gender identity is different from and does not determine their sexual orientation.

The personal characteristics associated with gender identity include self-image, physical and biological appearance, expression, behaviour and conduct, as they relate to gender. A person's felt identity or core identity may differ in part or in whole from the sex they were assigned at birth. Persons whose birth-assigned sex does not conform to their gender identity include transsexuals, transgenderists, intersexed persons and cross-dressers.

The term "transgendered" refers to a range of behaviours linked to a person's sense of self, based on psychological, behavioural and cognitive factors. It is used by people who reject (or are not comfortable with) their birth-assigned sex. It is not related to a person's sexual orientation.

Complaints related to gender identity are made almost exclusively by transgenderists and transsexuals. Transgenderists are persons who self-identify and live as the opposite gender from their birth-assigned sex, but have decided not to undergo sex-reassignment surgery. Transsexuals are people who have a strong and persistent feeling that they are living in the wrong sex. This term is normally used to describe persons who have undergone sex reassignment surgery. Transgenderists and transsexuals are among the most disadvantaged groups in our society today. People who are transgenderists and transsexuals are vulnerable to harassment and discrimination in the workplace, often arising from hatred, fear and hostility.

Denying or restricting employment opportunities because of gender identity is a violation of the *Code*.

> **Example:** An employee is denied a promotion that he is qualified for because the hiring panel is not sure that he has the "leadership qualities" they are looking for. The fact that he is transgendered is commonly discussed around the office.
>
> **Example:** An employee takes time off work to have sex-reassignment surgery. The employer grants the employee the time off, but when the employee returns to work after the surgery, her employment is terminated.
>
> **Example:** An employee discloses to his manager that he cross-dresses. The manager then tells the employee that he will no longer qualify for promotions or further career training, because customers and co-workers will be uncomfortable with him.
>
> **Example:** A transgendered employee, who presents as a female, is not permitted to wear clothing typically worn by women at the workplace.

n) Sexual orientation

The *Code* prohibits discrimination in employment on the basis of sexual orientation. Provisions relating to same-sex partnership have been repealed because there are new definitions of "marital status" and "spouse." These definitions no longer require that parties to a marriage be of opposite sexes.

These changes flowed from the Ontario Court of Appeal's decision in *Halpern v. Attorney General of Canada*[24] in which the Court defined marriage as "the voluntary union for life of two persons to the exclusion of all others." The Government of Canada did not appeal this decision, and Ontario became the first jurisdiction in Canada where same-sex couples could legally marry. In 2005, a number of provincial statutes, including the *Code*, were amended to change the definitions of spouse and marriage, and remove other heterosexist bias. On July 20, 2005, the federal *Civil Marriage Act* was signed into law, legalizing same-sex marriage across Canada by defining civil marriage as "the lawful union of two persons to the exclusion of all others."

The *Code* does not specifically define the term "sexual orientation." However, the Commission recognizes that sexual orientation is more than simply a "status" that a person possesses – it is an immutable personal characteristic that forms part of an individual's core identity. This ground encompasses the range of human sexuality from gay and lesbian to bisexual and heterosexual orientations, including intimate emotional and romantic attachments and relationships.

Using inappropriate terminology may compound a person's experience of prejudice, harassment or discrimination. For example, many lesbian and gay people think the term "homosexual" is offensive, and bisexual people may also see it as exclusionary. It is generally best to use terms that individuals self-identify by, such as "bisexual," "gay," "lesbian" and "two-spirited."

Most human rights complaints citing the ground of “sexual orientation” are filed by gay and lesbian people. However, the protection of the *Code* extends to everyone who is denied equal treatment because of sexual orientation. The *Code* also prohibits discrimination because of gender identity, such as that faced by transsexual, transgendered and intersex persons. These protections are extended on the basis of sex, rather than sexual orientation, and are discussed in Section III-3m: “Gender identity.”

“Homophobia” and “heterosexism” are forms of prejudice relating to sexual orientation that imply that heterosexuality is superior or preferable, and is the only right, normal or moral expression of sexuality. “Homophobia” is often defined as the irrational aversion to, or fear or hatred of gay, lesbian or bisexual people and communities, or to behaviours stereotyped as “homosexual.” Homophobia is commonly used to mean a hostile psychological state in the context of open discrimination, harassment or violence against gay, lesbian or bisexual people. “Heterosexism” refers to the assumption that everyone is heterosexual and often gives rise to less open discrimination, which may be unintentional and unrecognized by the person or organization responsible.

Despite prohibitions on discrimination and harassment, unfair treatment based on homophobia and heterosexism is widespread and even socially accepted. The *Code* requires that the Commission and all organizations under its mandate take steps to prevent and appropriately respond to this unfair treatment, and develop a culture of rights that includes lesbian, bisexual and gay people.

The *Code* covers all types of unequal treatment, including differential treatment, the loss of employment, and comments, displays and jokes that may make a person uncomfortable because of sexual orientation.

> **Example:** An employee discloses to his manager that he is gay. The manager then tells the employee that he will no longer qualify for promotions, postings or further career training.

A person does not actually have to prove that he or she is has a particular orientation or is lesbian, gay, bisexual or heterosexual, as long as it can be shown that there was unequal treatment because of sexual orientation.

> **Example:** A female sales representative who shares a house with another woman is not included in a sales meeting employee spouses are invited to. The employee's manager has made the decision based on his concerns that the employee’s house-mate may in fact be her partner. The female sales representative can file a complaint with the Commission because she was subject to unequal treatment based on perceptions of her sexual orientation and marital status.

As with the other grounds, discrimination based on sexual orientation may be direct, indirect, subtle and/or systemic. Although not specifically mentioned, harassment because of sexual orientation is also prohibited as a form of discrimination. Homophobic name-calling, comments ridiculing people because of their sexual orientation, or singling out someone for humiliating or demeaning "teasing" or jokes related to sexual orientation, would in most cases be viewed as conduct or comments that "ought reasonably to be known to be unwelcome." Homophobic taunts are discriminatory, no matter what perceptions of the harassers or the sexual orientation of the person exposed to such comments.[25]

> **Example:** Demeaning remarks, jokes or innuendo about an employee's sexual orientation are told to other employees. These may deny the right of the persons who are the subject of the comments to be viewed as equals.

> **Example:** Demeaning comments, signs, caricatures or cartoons are displayed in a workplace. These may create a "poisoned environment" in violation of the Code.

> **Example:** The display of homophobic, derogatory or offensive pictures, graffiti or materials is humiliating and also impairs the rights of members of the targeted group to be viewed as equals.

Graffiti that is tolerated by an employer who does nothing to remove it may be creating a "poisoned environment.” Depending on the circumstances, some persons may be humiliated or may experience feelings of hurt, anger and

resentment because of their sexual orientation that are not experienced by others in the same setting.

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[10] *Arzem v. Ontario (Minister of Community & Social Services*), 2006 HRTO 17 (CanLII). See also *Dudnik v. York Condominium Corp. No. 216* (1990), 12 C.H.R.R. D/325 (Ont. Bd. of Inq.); affirmed (1991) 3 O.R. (3d) 360 (Div.Ct.).

[11] *Szabo v. Poley*, 2007 HRTO 37 (CanLII) at paras. 17 – 19.

[12] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City),* [2000] 1 S.C.R. 665.

[13] See Canadian Psychiatric Association, "Mental Illness and Work" (brochure), online: http://publications.cpa-apc.org/browse/documents/22

[14] In *B. v. Ontario Human Rights Commission*, [2002] 3 S.C.R. 403.

[15] *Ibid.*

[16] Statistics Canada's 2006 Census Dictionary, online: www12.statcan.ca/english/census06/reference/dictionary/pop030.cfm. Statistics Canada lists these examples of ethnic origin: Canadian, English, French, Chinese, Italian, German, Scottish, East Indian, Irish, Cree, Mi'kmaq, Métis, Inuit, Ukrainian, Dutch, Filipino, Polish, Portuguese, Jewish, Greek, Jamaican, Vietnamese, Lebanese, Chilean, Salvadoran, Somali.

[17] *Webster's Ninth New Collegiate Dictionary*, (Springfield, Mass.: Merriam-Webster Inc - 1989.

[18] Linda Mooney, David Knox, Caroline Schacht & Adie Nelson, *Understanding Social Problems*. (Toronto: Nelson-Thomson, 2001).

[19] *Huang v. 1233065 Ontario Inc. (Ottawa Senior Chinese Cultural Association),* 2006 HRTO 1 (CanLII) This case has been referred back to the Human Rights Tribunal of Ontario for a new hearing. *1233065 Ontario Inc. (Ottawa Senior Chinese Cultural Association) v. Ontario Human Rights Commission*, 2007 CanLII 44345 (ON S.C.D.C.).

[20] *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 (*Anselem*).

[21] *Jazairi v. Ontario (Human Rights Commission)* (1999), 175 D.L.R. (4th) 302 (C.A.); leave to appeal refused (2000), 256 N.R. 197 (S.C.C.).

[22] *Trinity Western University v. British Columbia College of Teachers*, [2001] S.C.R. 772.

[23] *Brooks v. Canada Safeway Ltd.,* [1989] 1 S.C.R. 1219.

[24] *Halpern v. Canada (Attorney General)* (2003), 65 O.R (3d) 161 (C.A.).

[25] *North Vancouver School District No. 44 v. Jubran* (2005), 39 B.C.L.R. (4th) 153 (B.C.C.A.).

4. Legal responsibility for human rights at work

a) Employers

Employers have the primary obligation to make sure their workplace is free from discrimination and harassment. Employers are expected to proactively provide a workplace where human rights are respected and employees afforded equal opportunities. This includes working with unions to negotiate collective agreements that are consistent with the *Code*.

Despite proactive measures to prevent human rights complaints, human rights issues will arise from time to time. Employers must respond to allegations of human rights violations in a timely and effective manner. For more information, see Section IV-1 – "Creating a workplace that complies with the *Code*" and Section IV-12 – "Resolving human rights issues in the workplace."

Employers violate the *Code* when they:

1. directly or indirectly, intentionally or unintentionally infringe the *Code*
2. constructively discriminate

3. do not directly infringe the *Code* but rather authorize, condone, adopt or ratify behaviour that is contrary to the *Code*.

When an employee contravenes the *Code* in the course of employment, the employer may be liable. Under section 46.3 of the *Code*, this only applies to discriminatory conduct and not to cases of harassment. Under this "vicarious liability" provision in the *Code*, the employer can be responsible even if it did not know of the discriminatory conduct or, did not condone it, and even if it actively discouraged that conduct. However, proactive steps on the part of an employer will be taken into account by a Tribunal when ordering remedies. This can result in the company having to pay less in damages even when it is deemed to be "vicariously liable." Also, an employer may be vicariously liable for the acts of third parties, such as consumers, visitors and customers, who discriminate against its employees.[26]

The employer is also liable for the acts of an employee who is a "directing mind" of a corporation, who discriminates against or harasses anyone in a way contrary to the *Code*, or who knew of the harassment and did not take steps to remedy the situation.

In general terms, an employee who performs management duties is part of the "directing mind" of a company. Even employees with only supervisory authority may be viewed as part of a company's "directing mind" if they function, or are seen to function, as representatives of the organization.

Non-supervisors may be considered part of the "directing mind" if they have assumed supervisory authority or have significant responsibility for guiding employees. For example, a member of the bargaining unit who acts as a lead-hand may be considered to be part of the "directing mind."

An employer's liability for harassment or discrimination committed by its employees and agents is not necessarily limited to the workplace or work hours. Human rights law includes the notion of the "extended workplace." Employers could be liable for behaviour or actions that occur away from the physical workplace, but that have implications or repercussions in the workplace. For example, staff may be held liable for discriminatory incidents taking place during business trips, company parties or other company-related functions. An organization providing services to the public may be found responsible for an employee's off-duty actions if they lead to a poisoned environment and a denial of the right to equal treatment in services.[27]

> **Example:** A school board does not discipline a teacher for public anti-Semitic comment and conduct during his free time. This was found to have poisoned the education environment for the Jewish students, given the teacher's position of trust and influence within the school. The infringement of the teacher's Charter right to freedom or religion was justified.

Employers cannot contract out of the protections in the *Code* with employees or with unions. An employer, jointly with employees and (if applicable) the union, is responsible for finding the most appropriate way to accommodate employees' needs that are protected by the *Code*. The fact that a union is not cooperating in providing accommodation does not relieve the employer of its own responsibility to accommodate. This obligation is limited only by undue hardship. See also Section III-4d) – "Unions" and Section IV-12f) – "Contracting out versus settling a complaint."

b) Senior managers

Senior managers are part of the "directing mind" of the employer, and their actions are considered to be those of the organization itself. Therefore, an employer is liable for any breach of the *Code* committed by a senior manager.

If a senior manager knew of workplace harassment or a "poisoned environment" and did not take steps to remedy the situation, the organization could also be held liable. Upon becoming aware of harassment, a senior manager should take prompt and appropriate steps to remedy the situation. This may involve arranging for an independent professional to mediate, to set up dialogue between the parties or to conduct an investigation and, if warranted, to suggest appropriate discipline. Having a clear and effective anti-discrimination policy that is regularly reinforced

through training can help a senior manager know what to do in these situations. See also the Commission's newly revised policy, "Guidelines on Developing Human Rights Policies and Procedures" and Section IV-12 – "Resolving human rights issues in the workplace."

c) Employees

Employees have a legal responsibility to treat fellow employees in a way that is consistent with the *Code*. A co-worker who infringes a right of another employee can be named as a personal respondent in a human rights complaint. This may include co-workers who are at the same level in the organization, and also discriminatory treatment by any employee against any other employee in the organization, regardless of their level.

An employee would also be expected to take part in good faith in human rights training and educational activities. Employees should also know that the Commission has recommended that organizations collect data as a means of proactively identifying, preventing and addressing racial discrimination. When they follow the principles set out in the Commission's policies, measures such as employee surveys can improve the workplace for all employees, and should not be opposed by employees without justification. Employees who have concerns about an employer's approach to data collection can refer the employer to the Commission's Guidelines for Collecting Data on Enumerated Grounds Under the Code. Inappropriate data collection could be the basis for a human rights complaint.

An employee who seeks accommodation for a need related to a ground in the *Code* must give enough information to the employer to verify the need, and must specify what accommodation is required. For example, an employee requesting accommodation for a disability or pregnancy-related need may be expected to provide information from a qualified professional confirming the existence of a need, and identifying the accommodation that would be appropriate. An employee with a caregiving need arising from family status may, in some cases, legitimately be asked to provide documentation about his or her needs.

> **Example:** An employee has a lengthy history of absenteeism, and has in the past been disciplined for failing to provide valid reasons for absences. When this employee requests flexible start and finish times to address a new eldercare responsibility, the employer asks for more information to verify that the need exists.

d) Unions

Unions are important partners in creating a non-discriminatory workplace. Unions and employers have a joint duty to make sure that workplaces are free of discrimination and harassment.

> **Example:** A pre-operative transsexual sought the union's assistance with a complaint to her employer about her use of the women's washroom. The union did not help her. The union was found to have discriminated against the complainant because it did not represent her interests as it would have done for other union members because of her gender identity.

As part of a "best practices" initiative, unions should work together with employers to develop internal policies and procedures. Unions should also take a proactive role in human rights training and education for their members, and also for the entire workplace.

A union and its representatives may have many different roles in the workplace. For example, a union that employs staff has to comply with the *Code* when making decisions about hiring or requests for days off because of *Code* needs. As a vocational association, the union is also required to treat its members equally and to take steps to prevent or address discrimination against union members. On a personal level, a union representative may be an employee who provides services to the public (such as working in a call centre) and to other employees (such as helping them file grievances). This employee will have to comply with duties under the *Code* related to all three of these roles – employee, service-provider and union representative. The actions a representative or employee of a

union takes when carrying out union duties may be considered to be the actions of the union. This could give rise to the union being liable for discrimination.

i) Collective agreements:

A union should try to make sure that collective agreements explicitly protect human rights, and avoid negotiating provisions that may have a discriminatory effect. More and more collective agreements and company policies include clauses specifically related to preventing and resolving incidents of discrimination and harassment in the workplace. However, even where such provisions are not clearly stated, the substantive rights and obligations in the *Code* are still incorporated into each collective agreement an arbitrator has jurisdiction over.[28] Parties to a collective agreement or other contract cannot contract out of the provisions of the *Code*.

> **Example:** A provision in a collective agreement states that probationary employees may be dismissed within three months for any reason, including disability. An employee is dismissed after he missed a week of work because of illness. Despite the provision in the collective agreement, this employee is protected by the Code.

ii) Duty to accommodate:

An employer and a union share responsibility for providing accommodation to the point of undue hardship. A union's duty to accommodate under the *Code* could arise in the following types of situations:

4. When making a rule, usually in the collective agreement, unions and employers must make sure that it does not have discriminatory effects. Although an employer who has charge of the workplace is in a better position to create accommodation measures, a union still must co-operate in working to find appropriate solutions. Unions share the obligation to remove or alleviate the source of the discriminatory effect.[29]

> **Example:** A school custodian complained that the school board and the union had failed to agree on how to modify his shift hours. As a Seventh Day Adventist, he was unable to work Friday afternoons. The Supreme Court of Canada determined that the union, together with the employer, had a duty to accommodate the school custodian, short of undue hardship.

5. A union must support an employer's efforts to comply with the *Code* and may be found to have discriminated for impeding the reasonable efforts of an employer to accommodate.

> **Example:** An employer agreed to accommodate an employee's religious beliefs by rescheduling a work-day from Saturday to Sunday, but only if she did not receive Sunday premium pay as required by the collective agreement. The employer's attempt to accommodate was blocked by the union who insisted on premium pay. The union infringed the Code by blocking the accommodation measure.

6. A union should consider its duty to accommodate when engaging in collective bargaining or otherwise representing members who are employed to provide services to persons identified by the *Code*. [30]

> **Example:** A union opposes the hiring of a specialized educational professional to help accommodate a student with a learning disability, because the person is not part of the bargaining unit. Unless the union can show that the hiring will cause undue hardship on the basis of one of the three elements set out above, disruption to the collective agreement will not be enough to establish undue hardship.

While there may be cases where the impact of an accommodation request on other union members is so large that it

becomes undue hardship, the Supreme Court of Canada has said that it is not permissible to hide behind a collective agreement to avoid human rights obligations. On their own, neither changes to a collective agreement nor the threat of a grievance amount to undue hardship. On the other hand, significant interference with the rights of others will justify a union's refusal to consent to certain accommodation measures.[31]

iii) Membership in a union:

It is discriminatory for employees to have to join a specific union group based on gender or another *Code* ground.

> **Example:** A teacher's union passed a by-law that made female teachers join a teacher's association for women. Male teachers had to be members of another association, even though one collective agreement applied to both organizations. A Tribunal found that requiring the complainants to belong to a women-only organization was discriminatory, because it violated their dignity and reinforced stereotypical views that men and women had different needs.

e) Employment agencies

Subsection 23(4) of the *Code* states that an employer cannot use an employment agency to hire people based on preferences related to age, race, sex, disability or other grounds.

> **Example:** A company cannot ask an agency to send only "persons of European background" to fill a receptionist position.

Employment agencies cannot screen applicants based on discriminatory grounds, and are not allowed to keep records of client "preferences" of this kind.

If a temporary employee is referred by an agency and then needs help to meet his or her special needs, it would be the joint responsibility of the agency and the employer to arrange accommodation.

Employment agencies must make sure that the staff they send on assignments are in a workplace that is free from discrimination and harassment. If they learn of a situation that may violate the *Code* and do not take action, they may be named in a complaint.

> **Example:** A company hires a woman from an employment agency on a temporary basis to file documents. Her supervisor makes jokes and derogatory comments about the woman's religious beliefs. This conduct is a form of harassment and the employee has the right to file a claim against the company. If the employment agency, learning of the harassment, does not take steps to remedy the situation, the person could also file a claim against the employment agency.

f) Franchisors

Franchisors may be held liable for discriminatory conduct or harassment by a franchisee depending on the nature of the franchise agreement. This is more likely to happen when the franchisor has significant control over the franchisee's operations, or when the franchisor contributes directly or indirectly to the discriminatory conduct or harassment. Franchisors are also responsible for their own actions and policies.

g) Non-employees

A non-employee, such as a client or a friend of an employee visiting the workplace, who acts in a discriminatory or harassing way, cannot personally be named as a respondent in a human rights complaint. However, an employer may be liable for the behaviour of non-employees, depending on the facts of the situation, including the employer's knowledge of and control over the situation, and what could have been done to prevent or stop the behaviour.

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[26] See, for example, *Laskowska v. Marineland of Canada Inc*., 2005 HRTO 30 (CanLII) (*Laskowska)*.

[27] *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825.

[28] *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157 (*Parry Sound*).

[29] *Central Okanagan School District No. 23 v. Renaud,* [1992] 2 S.C.R. 970 (*Renaud*).

[30] Ontario Human Rights Commission, "Equal Access to Education for Students with Disabilities During Strikes" Fact Sheet, online: www.ohrc.on.ca/en/resources/factsheets/disabilitystrike/view.

[31] *Renaud, supra* note 29.

5. Who is protected at work?

a) Broad protection for "employees"

"Every person" has a right to equal treatment in employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, disability, age, marital status, family status and record of offences.

The *Code* does not define "employee." However, because the *Code* is to be interpreted broadly, the Commission takes the position that the *Code's* protection extends to employees, temporary, casual and contract staff, and other persons in a work context, such as people who work to gain experience or for benefits. This broad interpretation is consistent with a number of Tribunal decisions from across Canada.

The protections in the *Code* also apply to employees after hours and when they are not at their workplace.

> **Example:** Two company employees work together on union business outside of work hours and outside of the workplace. One employee complains to the employer and the union that the other employee is harassing him when they travel to evening meetings together. Neither organization takes action to stop the harassment because they view it as a private matter between two individuals on their own personal time. Both the employer and the union may be held responsible for not meeting their duties under the Code.

People who are hired to work in or around a person's home, such as a nanny, cook, cleaner or gardener, are also protected under the *Code*.

> **Example:** A family employs a live-in caregiver from the Philippines. She is routinely subjected to racial and sexual harassment and sexual solicitation. She is entitled to file a complaint alleging discrimination in employment.

b) Temporary and casual staff

Case law and tribunal decisions recognize the power imbalance between an employer and a temporary employee, especially where the worker earns low wages in a relatively unskilled job.[32] The *Code* protects temporary and casual staff no matter how long the person has worked for the organization or the nature of the employment.

> **Example:** A woman was paid for a one-week period to strip at a club. A decision not to extend this casual arrangement for another week because of the woman's race was found to be discrimination in employment.

The protections in the *Code* apply even if a person is not actually an employee but was sent by an employment agency. See also Section III-4e) – "Employment agencies."

c) Personnel under contract

The definition of “employee” in the *Code* is interpreted broadly enough to include contractors, even if they would not be considered “employees” for the purposes of other legislation. A human rights tribunal may be skeptical of claims by an employer that a person doing work for them is not protected by the *Code* because he or she is a “contractor” rather than an “employee.”

> **Example:** A company says that a person is a “subcontractor” rather than an employee. The person is assigned particular cleaning tasks by the company through contracts the company obtains, she is supervised by the company, and she does not run a business in her own right. She is found to be an employee within the meaning of the Code and entitled to the protections in the Code.

Beyond this, contractual relationships are also protected as a distinct “social area” under the *Code*. A contract is an oral or written agreement that is legally enforceable. Employment arrangements are a form of contract. The *Code* covers all types of contracts, including those with independent contractors and subcontractors, and contracts that outline terms of employment. Under section 3 of the *Code*, anyone who is legally capable of entering into a contract has the right to do so equally with any other person without being discriminated against because of one of the grounds in the *Code*.

Similarly, subsection 26(1) of the *Code* states that it is a condition of every contract signed with an Ontario Government ministry or agency that no person may be discriminated against in carrying out that contract. This includes Ontario government loans and grants. The contract, loan, grant or guarantee can be cancelled if a human rights tribunal finds that a person employed under the contract has been discriminated against while it was in effect.

d) Volunteers and unpaid workers

In many cases, access to and the experience gained from volunteer opportunities are key parts of a strategy to get paid employment for people with disabilities, for caregivers who have been out of the workforce and for other people who are underemployed due to other *Code* grounds, such as age and race. Volunteer work is also a crucial way for newcomers to get the experience they need to overcome a common discriminatory obstacle: requiring “Canadian work experience.”

The *Code* does not refer specifically to volunteers, but the Commission takes the position that the phrase "equal treatment with respect to employment" in section 5 can be interpreted to protect anyone in a work-like context. This includes volunteer services and people who work without a salary to gain experience, such as people on a practicum or who are being mentored. It also covers persons who work for benefits. For example, the *Code* applies when a non-profit organization seeks volunteers to provide counselling or when volunteers are hired to conduct fundraising. While there have been no Ontario decisions on these issues, some British Columbia decisions found that the province's human rights law applied to discrimination against a volunteer, under the areas of employment and services.

When deciding which volunteers should have further opportunities, whether paid or unpaid, take care to make sure that *Code* grounds are not influencing such decisions.

> **Example:** Some volunteers at an after-school program will be selected for full-time employment as summer camp counsellors. Based on his observations over the year, the camp director chooses the volunteers he knows best and who can most easily perform the heaviest tasks around the camp, such as lifting canoes. This informal process tends to exclude racialized women and volunteers with disabilities. In the end, eight out of the 10 volunteers who are offered paid employment are young White men without disabilities. Even if none of the volunteers was ever guaranteed a job, this process would likely infringe the Code.

e) Probationary employees

Employees are protected from discrimination or termination contrary to the *Code* even during a probationary period. Employers must provide probationary employees with the same human rights protections as other employees, including accommodation, a healthy work environment and non-discriminatory discipline, up to and including termination.

The *Employment Standards Act* provides that written notice of termination is required if an employee has been continuously employed for three months or more. In comparison, there is no threshold date upon which the rights in the *Code* apply to new employees. All employees are protected under the *Code* at any point in their employment.

Even if there is a provision in a collective agreement that allows for termination within three months of the date of hire, the *Code* continues to apply. This means that if probationary employees are dismissed during a probationary period for reasons connected to a *Code* ground, they could claim discrimination.

> **Example:** An employee is hired on a 12-month contract and is subject to a three-month probationary period. On starting the job, the employee requests, but is not provided with, accommodation for her disability. Before the three-month period expires, the employee is fired because she did not perform as well as expected. The fact that the employee's employment was terminated during the probationary period would not provide the employer with a defence to a complaint of discrimination by this employee.

See also Section IV-11f) – "Extending probation" and Section IV-13b(i) – "Firing a probationary employee."

f) Medical and personal attendants

Persons hired as medical or personal attendants have a right to equal treatment under the *Code*. There are some exceptions about hiring that are discussed in Section III-3l) – "Sex" and Section IV-5d) –"Hiring based on *Code* grounds if a special employment exemption applies." However, once the person is hired, all the protections in the *Code* apply.

g) Union members

Members of vocational associations, including unions, are protected from discrimination. Although this is a distinct "social area" under the *Code*, the protections may overlap with those under the social area of "employment."

h) Non-employees

An employer has a duty to prevent discrimination and harassment against clients, vendors, service-users, friends and family members of employees and other non-employees who may be visiting the workplace or affiliated with the workplace. Workplace policies should set out standards for behaviour that apply to everyone in the workplace, including visitors and non-employees.

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[32] *Wallace v. United Grain Growers Ltd*., [1997] 3 S.C.R. 701 at para. 92. applied in *Szabo v. Poley*, 2007 HRTO

IV. Human rights issues at all stages in employment

The right to "equal treatment with respect to employment" protects persons in all aspects of employment, including applying for a job, recruitment, training, transfers, promotions, terms of apprenticeship, dismissals, layoffs and terminations. It also covers rate of pay, codes of conduct, overtime, hours of work, holidays, benefits, shift work, performance evaluations and discipline. A fundamental starting point for complying with the *Code* in relation to all of these is to have a workplace setting where human rights are respected and applied.

This part of *Human Rights at Work* sets out key principles and best practices relating to the human rights issues that

most commonly arise in the employment cycle. Key areas to consider include:

1. Creating a workplace that complies with the *Code*
2. Setting job requirements
3. Advertising
4. Designing application forms
5. Interviewing and making hiring decisions
6. Requesting job-related sensitive information
7. Pay, benefits, dress codes and other issues
8. Meeting and accommodating the needs of employees
9. More about disability-related accommodation
10. Training, promotions and advancement
11. Managing performance and discipline
12. Resolving human rights issues in the workplace
13. Ending an employment relationship

1. Creating a workplace that complies with the Code

In Ontario, about three-quarters of all human rights complaints come from the workplace. The best defence against these complaints is for employers to be fully informed and aware of the responsibilities and protections the *Code* includes. Organizations should also be proactive in creating fair and equitable workplaces where human rights are respected.

Organizations, including employers, have a number of legal obligations under the *Code*. They have the ultimate responsibility for making sure the work environment is healthy and inclusive, and for preventing and addressing discrimination and harassment. They must make sure that their workplaces are free from discriminatory or harassing behaviour. Meeting these responsibilities may lead to the following types of benefits:

- attracting, recruiting, promoting and keeping the best employees
- maximizing the potential and performance of those employees
- minimizing employee frustration, stress, burnout and turnover
- reducing conflicts between employees
- increasing employee loyalty
- building or maintaining a reputation as a fair and progressive employer.

Savvy employers will be planning ahead to make sure that their organizations are able to respond appropriately to changing demographics in the province and in the workplace. Based on government data and other research, the Conference Board of Canada makes the following predictions for the period between 2006 and 2030:[33]

- labour demand is predicted to exceed labour supply by 2014 with a shortfall of workers that increases year by year after that
- women make up 48% of the workforce, and the number of women in the workforce, including women over age 65, is expected to grow
- today, 12.9% of the population is 65 and over and by 2030, 20.6% of the population will be 65 and over
- Ontario has the highest proportion of people born outside the province
    - in 2005, 54% of Canada's total number of new immigrants settled in Ontario
    - it is expected that immigration will account for approximately 84% of the total annual increase in Ontario's population by 2030
- in 2001, Statistics Canada data showed that one in five Aboriginal Canadians lived in Ontario and estimates are that Ontario will continue to have the highest density of Aboriginal peoples of any province (with about 267,700 expected to live in Ontario in 2017)
- in 2001, there were 1.5 million people with disabilities in Ontario, or 13.5% of the province's population, according to Statistics Canada. In 2026, most people with disabilities in Canada (and Ontario) will be 65 or

older.

While discriminatory barriers to access to the workforce continue to exist for persons identified by the *Code,* organizations such as the Conference Board of Canada note that the nation's productivity and ability to compete require that such persons be included. It has called for action to tap into the population of youth, women, older persons, newcomers, Aboriginal people and people with disabilities that are underused in the provincial labour market.[34]

Given the demographics described above, human rights in employment are not a minor concern, of interest only to some employers in relation to a small percentage of employees and prospective employees. Rather, human rights in employment are a significant concern affecting all employees, prospective employees and employers at one point or another. Implementing the measures outlined in this section will help employers on the path to an inclusive and diverse workplace.

a) Strategy to prevent and address human rights issues

A complete strategy to prevent and address human rights issues should include the following parts:

1. A plan for preventing, reviewing and removing barriers
2. Anti-harassment and anti-discrimination policies
3. An internal complaints procedure
4. An accommodation policy and procedure
5. An education and training program.

An effective strategy will combine all of these parts, and will be based on commitment from senior levels of the organization and consultation with employees or, in some cases, community organizations. Policies, plans and procedures must be appropriate for the size, complexity and culture of an organization, and must be communicated effectively to employees and other people in the work environment. Policies, plans and procedures should be reviewed and revised periodically so they remain up-to-date and effective. In some cases, specialized assistance from lawyers or other experts may be needed when developing policies, plans and procedures.

For more information, see the Commission's newly revised policy statement, "Guidelines on Developing Human Rights Policies and Procedures." This policy provides practical guidance to help organizations develop effective and fair ways to prevent and respond to human rights issues. In particular, employers and other organizations may find the sample wording to be of help when discussing and developing their own internal policies and procedures.

i) Preventing, reviewing and removing barriers: Inclusive design:

Workplaces should be designed to include everyone who works there, regardless of sex, race, creed, family status, disability or other *Code* grounds. When setting up new rules, policies and procedures, buying new equipment or designing work stations, etc., employers should make choices and decisions that do not create barriers for persons protected under the *Code*. For example, break policies should take into account, where possible, the needs of pregnant or breastfeeding women, persons whose religion may require them to take time to worship during the work day, and the needs of persons with disabilities. This means that employers should take a proactive approach, incorporating a human rights mindset into all that they do.

> **Example:** The manager of a customer service department will be upgrading the department's computer and phone systems in the new year. The new computer and/or phone systems should include enhanced options for large fonts, brighter lighting and volume. All such options would give all existing and future workers the ability to adjust for visual or hearing impairments that exist or might develop.

Reviewing barriers: The methods used and type of barrier review done will depend on the size, nature and complexity of the organization. When reviewing for barriers, employers should examine:

- **Physical accessibility**
  - look for barriers to equal access for persons with disabilities, including persons with sensory, environmental or intellectual disabilities
  - comply with the *Code* and not just minimum standards under the *Building Code* or applicable standards under the *Accessibility for Ontarians with Disabilities Act* (AODA). Compliance with the *Building Code* or *AODA* standards does not ensure that facilities are barrier-free, or meet the accessibility requirements of the *Code*. Compliance with the *Building Code* or *AODA* standards is not a defence to a human rights complaint under the *Code*. See also Appendix B for information about the *Building Code* and the *AODA* and related standards.
- **Organizational policies, practices and decision-making processes:**
  - look for barriers in policies and practices on recruitment, selection, compensation, training, promotion and termination, etc. Are there areas in which decisions are made based on subjective views rather than objective considerations?
  - consider both informal and formal practices and processes.
- **Organizational culture:**
  - think about the culture of the workplace. Consider how people interact, and what kinds of traits and characteristics are valued
  - how might this exclude people who are not from the dominant culture?

Removing and preventing barriers: Where systems and structures already exist, organizations should be aware of the possibility of systemic barriers, and actively seek to identify and remove them.

Systemic barriers are obstacles of any kind that can prevent employers from identifying the best people for jobs, promotions and training opportunities, and prevent employees protected by the *Code* from maximizing the use of their abilities. A systemic barrier is often not just a single rule or policy, but a series of policies and/or procedures that, when combined, result in the exclusion of people identified by a *Code* ground.

Where barriers have been identified, employers must remove them rather than making "one-off" accommodations, unless to do so would cause undue hardship. Removing existing barriers maximizes integration with the environment, so that everyone is able to participate fully and with dignity. Identifying and removing systemic barriers in the workplace also makes good business sense. It may reduce and prevent human rights complaints from being filed, and can make facilities and procedures more comfortable for other groups such as seniors and for all people in general.

Plans for removing barriers should:

- set specific, measurable goals for the removal
- create clear timelines for achieving these goals
- allocate adequate resources towards meeting goals
- ensure accountability and responsibility for meeting goals
- include a way to regularly review and evaluate progress towards the identified goals.

ii) Anti-harassment and anti-discrimination policies:

Anti-harassment and anti-discrimination policies make it clear that harassment and discrimination will not be tolerated, and set standards and expectations for behaviour. Related complaint procedures set out how potential violations of these policies will be addressed in an employment context. Many organizations choose to combine their anti-harassment/anti-discrimination policies and procedures into a single document. The elements of each are discussed separately in this section and the one below.

While the primary focus of policy development may be on the organization as a workplace, it is also important to make sure that any human rights policies in place cover the organization's other roles. For example, human rights policies developed by a school board would be expected to protect the human rights of the teachers and staff employed by the school board as well as those of the students. Visitors to the workplace, such as clients and

contractors, need to be made aware of the employer's anti-discrimination and anti-harassment policies and understand that they will be expected to respect such policies.

Employees also need to be made aware that although they have rights in the workplace as employees, they also have responsibilities to the public. Employers and employees share a responsibility to provide equal treatment, including accommodation to the point of undue hardship, and an environment that is not poisoned by comment and conduct that are contrary to the *Code*.

Anti-harassment and anti-discrimination policies should include the following parts:

- state clearly the organization's commitment to creating and maintaining respect for human rights, and fostering equality and inclusion
- describe the objectives of the policy, such as promoting human rights within the organization, preventing harassment and discrimination, and setting out standards for appropriate workplace behaviour
- set out the activities and persons it applies to, noting that the protections for employees apply broadly (including probationary employees and volunteers) and in all contexts (such as when they are working off-site or outside of normal hours)
- list and explain the grounds protected in the *Code*
    - employers may choose to extend protection beyond that mandated by the *Code*. For example, they may choose to prohibit any form of psychological harassment, or prohibit discrimination and harassment based on political opinion
- define key elements of, and concepts relating to, harassment (for example, that it includes conduct that should be known to be unwelcome and that a finding of harassment could be made even if a victim has not overtly objected)
- define key elements of, and concepts relating to, discrimination (discrimination is not always overt – it may be systemic or subtle)
- introduce the concept of a poisoned environment (one comment may be enough)
- set out roles and responsibilities
    - all persons in the workplace are expected to uphold and abide by the policies
    - managers and supervisors must prevent or stop discrimination and harassment.

iii) Procedures for resolving complaints:

Employers who do not have effective complaint mechanisms in place may be found to have failed in their duty to address discrimination and harassment. At minimum:

- complaints must be taken seriously
- they must be acted upon promptly when received
- appropriate resources must be applied to resolve complaints
- a viable complaint mechanism must be in place and have been communicated throughout the organization.
- the complaint procedure must ensure a healthy work environment is created and maintained for the complainant
- decisions/actions taken by the organization must be communicated to the parties.

It is open to an employer to tailor the approach that works best for them. Some organizations will adopt very formal mechanisms; others may opt for a simpler approach. There is no one perfect complaint mechanism; each organization must tailor its own approach, taking into account such factors as its mandate, size, resources, and culture. The following elements could be included in an organization's complaint procedure and are discussed in more detail in the Commission's Guidelines on Developing Human Rights Policies and Procedures.

- provide access to expert information and advice for persons who have witnessed or been subjected to harassment and discrimination
    - the person providing such advice should not act as mediator, investigator or advocate for the

organization, and should not be pressured to suppress complaints
- make it clear to employees that using the internal complaint procedure does not affect their right to file a human rights complaint within the applicable time limit (effective July 1, 2008, extended to one year)
- set out a process for making an internal complaint (although complaints should be accepted any way they are filed)
    - an employee may be vulnerable or fear reprisal and should not be required to address the matter directly with the potential respondent before filing a complaint
- clearly state that it is wrong to penalize someone for asserting their human rights, helping someone do so or acting as a witness (this is called reprisal)
    - a person who is subject to reprisal should also be able to file a complaint under the complaint procedure
- provide for an objective investigation by a qualified person and a separate process of dispute resolution (for example, mediation, conciliation or arbitration)
    - the person should know human rights principles, the requirements in the *Code*, the complaint procedures and relevant techniques (for example, how to investigate or resolve conflict), and should not have direct authority over the people involved or be viewed as on one person's side
    - the process should be impartial, timely, fair and address all relevant issues. It should include a report summarizing the outcome of the investigation based on witness interviews, steps taken and recommendations
- indicate that people involved in an internal complaint resolution process are allowed to have someone with them during a mediation or investigation, or when speaking to management. Representatives may include a union steward, a colleague, family member or lawyer
- ask people to keep written notes about what happened, when it happened, where it happened and who saw it happen or knows of it (including witness names) and gather relevant documents
- protect confidentiality and privacy of the person bringing forward the complaint and the person(s) the complaint has been made against. Share information only with the people who need to know
- describe potential outcomes
- if harassment or discrimination is found to exist, the employer must take all steps needed to remedy the effects of discrimination and to make sure it stops. Consider what a complainant needs to be "made whole" and any broader issues that should be addressed across the whole workforce
    - if a complaint is unfounded, a complainant should not normally be penalized
    - include disciplinary consequences for people who have violated the policy, such as education, suspensions, transfers or termination of employment
- commit to communicate the outcomes to the parties.

iv) Accommodation policy and procedure:

A clear and effective accommodation policy and procedure makes sure that people feel comfortable raising their accommodation needs relating to any *Code* ground, and that accommodation requests are effectively dealt with. The process is as important as the accommodation itself. It must be effective and must respect the dignity of accommodation seekers. Some accommodations are very simple and straightforward and no formal process is needed. In other cases, the process and the accommodations themselves are more complex. The principles of dignity, individualization, inclusion and full participation apply to both the process and the actual accommodation. For more information on the principles and process of accommodation, see Section IV-8 – "Meeting the accommodation needs of employees on the job" and Appendix E – "Accommodation template for employers."

Content of the policy: An accommodation policy and procedure should include the following elements:

- a clear statement of the organization's commitment to providing an environment that is inclusive and barrier-free, and to providing accommodation to the point of undue hardship
- a clear set of objectives – for example, tell employees their rights and responsibilities under the *Code* related to accommodation, and give information on the accommodation process and who is responsible
- describe the scope – the policy should apply to all employees (including people on probation or who volunteer)

or, potential employees who may be applying for positions
- outline a process for accommodation requests to be made and dealt with(accommodation should be offered to persons who are clearly unwell, or who are perceived to have a disability)
- the request should identify the relevant *Code* ground, the reason why accommodation is needed (including enough information to confirm the existence of the need), and the specific needs related to the *Code* ground
- state that all accommodation requests will be taken seriously and that no employee or service user will be penalized for making a request.
- identify what information will be collected, under what circumstances, and how it will be kept. Make sure you keep this information private and confidential.
- refer to the shared responsibility for accommodation – must work together cooperatively, share information and avail themselves of potential accommodation solutions
- document the accommodation program and any accommodation plan including stating needs, expert assessments, goals, timelines and accountability
- highlight principles:
    - accommodation will be appropriate where it results in equal opportunity to attain the same level of performance or to
    - enjoy the same level of benefits and privileges as other workers
    - respects principles of dignity, inclusion and individualization
    - accommodation provided will be measured against a high standard (undue hardship) and the onus is on the employer to prove that undue hardship exists if a complaint is made
- if the most appropriate accommodation would result in undue hardship, the organization will consider other alternatives, such as phased-in or next-best accommodations
- the procedures for monitoring and improving the accommodation
- a statement explaining the right of employees to seek remedies under the *Code* by making a human rights claim within the applicable time limit.

v) Educate and train employees on policies and procedures:

Education and training are key parts of any organization's human rights strategy. However, they do not instantly "cure" a workplace of human rights issues. For example, education and training alone will not remove systemic barriers. Education works best along with a strong proactive strategy to prevent and remove barriers to equal participation, and effective policies and procedures for addressing human rights issues that do arise.

An effective human rights education program will include training on:

- organizational policies and procedures relating to human rights
- the principles and specific provisions of the *Code*
- general human rights issues such as racism, ableism, sexism, homophobia or ageism.

Training must be provided regularly and geared to meet the specific needs of employees who are responsible for:

- complying with policies (everyone)
- implementing policies (managers, supervisors)
- providing expert advice, ensuring compliance (human resources)
- overall human rights strategy (the board, senior management, president or CEO).

Education and training checklist

For top level managers (CEO, Board of Directors, president, senior managers):

- Are they aware of the *Code*, human rights issues and principles of discrimination and harassment?
- Are they clear on their personal and organizational responsibilities? For example, if they discriminate or do not stop discrimination they know about, do they know that they may have to pay damages out of their own

money?
- Do they understand they have ultimate responsibility for ensuring *Code* compliance and how to accomplish this? If not, external expert advice and training should be sought.
- Are there policy statements and reminders posted around the workplace to remind staff and visitors that the organization takes human rights seriously?
- Have they made sure that training has been provided to the other categories of employees as described below? If they do not have the expertise internally, external expert advice and training should be sought.
- How can they get information about new human rights developments such as changes to internal policies, Commission policies or new court decisions on an ongoing basis?

For internal trainers, advisors, conflict resolvers and investigators:

- Have employees responsible for training, resolving complaints, employee advice or investigation received specialized training on how to perform these tasks and the human rights principles that apply?
- Are they clear on their personal and organizational responsibilities?
- Is information about new human rights developments such as changes to internal policies, Commission policies or new court decisions provided on an ongoing basis?

For managers and supervisors:

- Are they aware of the *Code*, human rights issues and the principles of discrimination and harassment?
- Are they clear on their personal and organizational responsibilities? For example, if they discriminate or fail to stop discrimination they know about, do they know that they may have to pay damages out of their own money?
- Have they been clearly told that the Board of Directors, CEO or senior management expects them to actively work to create a culture of rights in their workplace?
- Have all managers received training on how to respect the *Code* in all stages of employment (for example, when drafting job duties, advertising, conducting interviews, assessing qualifications, disciplining or terminating employment)?
- Is information about new human rights developments such as changes to internal policies, Commission policies or new court decisions provided on an ongoing basis?

For new and existing employees:

- Are they aware of the *Code*, human rights issues and the principles of discrimination and harassment?
- Are they clear on their personal responsibilities? For example, if they harass or discriminate against another employee, do they know that they may have to pay damages out of their own money?
- Have all employees been informed of the internal policies and procedures on discrimination and harassment, complaint procedures and accommodation?
- Have many new employees joined the organization since the last orientation or training session when human rights issues were covered? If so, what is needed to bring them up to date?
- Is information about new human rights developments such as changes to internal policies, Commission policies or new court decisions provided on an ongoing basis?

For employees on health and safety committees, in internal human rights or diversity offices, or other people responsible for planning and implementing accommodation solutions in the workplace:

- Are they clear on their personal responsibilities? For example, if they fail to explore and implement accommodation options, do they know that they may have to pay damages out of their own money?
- Are they aware of the applicable *Code* principles? In particular, that:
    - Appropriate accommodation must be provided and that the standard of undue hardship is a high one;
    - Health and safety risks should only be assessed once accommodation has been provided;
    - Compliance with other legislation is not a defence to a breach of the *Code*?

Anti-racism training: While diversity is an important element of building an inclusive workforce, it is only one part. We also know that anyone, even a racialized person, can engage or take part in discrimination. It is therefore necessary to supplement efforts at increasing diversity with strong human rights and anti-racism training initiatives as part of an anti-racism organizational program. For more information on anti-racism organizational programs, refer to Section IV-1f) – "How to prevent and respond to racism and racial discrimination."

Anti-racism training should not emphasize "cultural sensitivity" or "tolerance" or seek to deal with issues by exclusively promoting the values of "diversity" and "multiculturalism." The goal of training should be to provide employees with the skills and knowledge to act in a way that is anti-racist, non-discriminatory, professional, respectful, inclusive, and ethno-culturally sensitive both towards each other and the people that they serve.

b) Make sure collective agreements comply with the Code

Employers can not contract out of the minimum standards in the *Code*. When negotiating provisions in collective agreements, unions and employers are both responsible for making sure that they comply with the *Code's* requirements. Employers and unions need to make sure that the collective agreement's provisions do not discriminate, and do not have any unintended discriminatory consequences.

In some cases, human rights complaints are filed because of job actions such as strikes and the withdrawal of services. The duty to accommodate the needs of persons who use services provided by the organization should be considered by both employers and unions in advance of job action affecting access to such services. For example, the Commission has recommended that school boards and unions representing educational assistants discuss options such as closing schools or contingency planning in advance of a strike. The employer and union are expected to work together to make sure that the collective bargaining process does not impact more severely on students with disabilities compared to students without disabilities.[35] Similar considerations may apply in other contexts where employees provide services to the public. See also Section III-4d) – "Unions."

c) Plan and implement a special program

Section 14 of the *Code* permits special programs in employment that would otherwise infringe the *Code*. Special programs help people who experience discrimination, economic hardship or disadvantage to achieve equality. Special programs counter the effects of discrimination through measures that create jobs, provide specialized services or other opportunities. The Commission's Guidelines on Special Programs provide detailed information on how a special program can be planned, implemented and monitored.

To be a "special program" under the *Code*, a program must satisfy one of the following goals:

- relieve hardship or economic disadvantage
- help disadvantaged persons or groups achieve equal opportunity
- contribute to eliminating the infringement of rights protected under the *Code*.

It is important to make sure that people know that a special program exists, and that there are restrictions or limits on who is eligible to apply for a job, or who is entitled under a special program to get certain services.

> **Example:** A job program for people under 25 is put into place to combat youth unemployment. The job ad for this program should clearly explain to potential applicants or to the public that the position is part of a special program designed to help youth under age 25.

i) Clearly define who is eligible:

The program should clearly identify who it is intended to help:

- identify the grounds under the *Code* (such as race, ancestry, place of origin, colour, ethnic origin, citizenship,

creed, sex, sexual orientation, age, marital status, family status, disability, record of offences)
- identify the persons or groups who are experiencing hardship or economic disadvantage.

Take care to make sure that the program is not unreasonably restrictive, especially when the restrictions might themselves be considered discrimination under the *Code*. You will need to have a rational connection between restrictions in eligibility and the purpose of the special program itself.

> **Example:** Based on information from Statistics Canada that shows children from low-income families are chronically unemployed, Sunny Times Community Services develops and implements a summer employment program only for high school students from low-income families. This would be an acceptable approach.

> **Example:** A program offering money to blind people who buy reading devices is limited to young people. This is found to discriminate against older people applying to the program because there is no logical connection between the age restriction and the purpose of the program.

ii) Reasons for the program:

The special program should also:

- state clearly the reasons why the identified persons or groups are considered to be experiencing hardship, disadvantage or discrimination
- explain how the proposed program will relieve this hardship, economic disadvantage or discrimination, or how it will help to achieve equal opportunity
- state that the special program is temporary, lasting for a set time.

Evidence of hardship or disadvantage should be objective and, where possible, quantifiable. It should not be subjective or based on personal impressions. When developing a special employment program, ask, “Is there a real problem and does this program address it?”

Collecting data for monitoring and evaluating special programs is allowed by the *Code*. Data can also be collected if the information is used to demonstrate under-representation of particular groups or other forms of hardship or disadvantage. Data collection of this type can, for example, help an employer learn the racial background of its workforce, to put a program in place.

> **Example:** An employer is planning to expand the company and hire new staff. The employer conducts a work survey to see whether the workforce make-up is like that of the community it serves. Employees are asked to voluntarily self-identify and submit the information anonymously to a third party consultant who is not involved in employment decisions.

Statistics collected regularly also provide a way to assess the results of special programs, and can serve as a tool for assessing the need for further measures.

The *Code* does not specify how or even if data should be collected. There are some standard ways to identify groups within or served by an organization:

- conduct voluntary self-identification
- have an employee conduct the survey
- use an external consultant or expert to collect the data.

Each method has advantages and disadvantages in terms of costs, rate of return, accuracy of results and protecting the privacy of the individual. Self-identification surveys are a commonly used way to collect such information. Employers should select the method that best suits the program goals and organizational culture.

Privacy and dignity should always be a concern when collecting this kind of data. Organizations subject to freedom of information and protection of privacy legislation should make sure that the identification method they choose complies with those laws.

Private sector employers should also collect data in a way that respects dignity and privacy. For example, organizations can develop internal policies on privacy, or codes of ethics.

Participants should be told how the information will be used. This assurance will help them feel more comfortable when asked to provide the information. Data collected for a special program must be used for special program purposes only. For this reason, storage and access should be carefully controlled.

iii) Follow a plan:

A special program should contain the following parts:

Consultation: appropriate steps should be taken to identify and consult with people who may be affected by the proposed special program.

Develop a plan: The program provider should prepare a plan that includes the following information:

- an outline of how the special program will be implemented, including terms and conditions of the program
- how long the program will run
- special measures to be taken
- goals, timetables and expected results.

iv) Monitoring and evaluation systems:

The program should include a way to monitor and evaluate the progress towards the desired results. It is important to:

- evaluate whether the program is effective
- designate who, within the organization, is accountable for the program
- communicate program results to the organization and/or its client groups.

d) More about reviewing, preventing and removing barriers related to disability

Many employees will have a disability at one point or another, or may be associated with someone with a disability. Given the real risks of human rights complaints in the workplace relating to disability, it makes good business sense to plan for accessibility. This section offers more detail on steps employers can take to make sure workplaces are designed inclusively and are accessible to persons with disabilities.

i) Reviewing barriers – accessibility for persons with disabilities:

Preventing and removing barriers means persons with disabilities should have access to their environment, and face the same duties and requirements as everyone else, with dignity and without impediment. Employers should consider developing accessibility review plans, making reviews and implementing the needed changes to make facilities, procedures and services accessible to employees with disabilities, as well as to clients or customers with disabilities.

The *Code's* guiding principles on accessibility for persons with disabilities are:

- Does the requirement allow the person with a disability access that ensures equality of outcome ("substantive accessibility")?
- Does the requirement result in approximately equal levels of convenience?
- Has the dignity of the person been respected?

ii) Tips for an accessibility review:

Conducting an accessibility review will show how accessible an organization is to persons with disabilities and what needs to be done to remove barriers. A comprehensive accessibility review plan should:

- state the purpose of the review along with the reasons, context and guidance for conducting a review
- state an organization's obligations under the *Code* to ensure accessibility for employees, clients or customers with disabilities
- identify internal and external resources that would provide guidance for conducting the review
- summarize current internal and external initiatives
- identify quality service measures
- outline the scope of the review and identify potential barriers as they may relate to procedures and practices, facilities, services and communication
- outline time frames and responsibilities for conducting an accessibility review of the organization
- outline a communication plan for the accessibility review, so that senior management, staff, members, clients, etc. know about and support the initiative and its purpose.

Results of an accessibility review should be documented in a Summary of Findings and Recommendations Report and submitted to senior management. Senior management should make the results available to everyone concerned, along with a plan for removing the barriers.

iii) Examples of barriers for persons with disabilities:

When considering barriers for persons with disabilities, it is important to keep in mind that there are many kinds of barriers that may prevent full participation. The Ministry of Community and Social Services lists the following as examples:[36]

- architectural and physical barriers (for example, the design of the building, the size of doorways). Objects added to the environment, such as furniture or bathroom hardware, may also be physical barriers
- information or communication barriers (for example, print materials with fonts that are too small)
- attitudinal barriers (for example, thinking that a person with a disability is inferior or cannot understand you)
- technology barriers (for example, websites that cannot be read with screen-reading software)
- systemic barriers (for example, hiring policies and practices that make it hard for a person with a disability to compete).

iv) Complying with the Building Code and AODA Standards is not enough:

Complying with the *Code* often requires that an employer exceed the minimum requirements in the *Ontario Building Code Act* (*Building Code*) and any applicable standards under the Accessibility for *Ontarians with Disabilities Act (“AODA”).*

The *Building Code* may not deal with the needs of persons with non-mobility-related disabilities, such as mental disabilities, learning disabilities, low vision or hearing disabilities. For example:

- directional indicators for elevators and exits may help persons with memory disorders
- tactile signage would help persons with low vision in matters as basic as finding the correct floor on an elevator and entering the right washroom
- alarm systems with visual as well as auditory signals can help alert persons who are deaf, deafened or hard of hearing in an emergency.

While the above are not required under the *Building Code*, it may be unacceptable from a human rights perspective to not include these features.

Similarly, standards under the *AODA* may state that the requirements do not apply until some date far in the future, or fail to refer to the standard of undue hardship. Employers are still responsible for accommodating the needs of people with disabilities to the point of undue hardship under the *Code* even if this is not required under the applicable *AODA* standard. See Appendix B for more information about the *Building Code* and the *AODA* and related standards.

e) More about how to proactively identify and address systemic discrimination

The Commission expects employers to be proactive in identifying and addressing systemic discrimination. This is a critical part of a barrier review and removal process, or of developing a special program, as are discussed earlier.

Systemic discrimination can be identified through three elements: organizational culture, numerical data, and policies, practices and decision-making processes. Employers can use the following principles to identify and address systemic discrimination:

i) Organizational culture:

This can be described as shared patterns of informal social behaviour, which are the evidence of deeply held and possibly unconscious values, assumptions and behavioural norms. Communication styles, interpersonal skills and leadership abilities are qualities that reflect dominant norms and an organization's culture. When persons protected by the *Code* are assessed against such subjective qualities, difficulties may arise.

> **Example:** A White man's straightforward communication style leads co-workers to appreciate him as a "straight talker." An African Canadian woman's similar style results in her being characterized as "abrupt."

> **Example:** A mother of small children finds that, although she completes her work efficiently and her manager considers her a good performer, her co-workers assume that she is not "pulling her weight" because she does not regularly stay late at the office, and she is therefore the subject of gossip and resentful comments.

A related issue can be an organization's tendency to undervalue the strengths and contributions of persons identified by *Code* grounds.

> **Example:** A Chinese Canadian teacher is placed on a surplus list because he lacked experience with a set list of extra-curricular activities. In making the list of "extra-curricular activities," the principal did not include activities that Chinese immigrants would be likely to take part in, and included activities that Chinese immigrants would be unlikely to take part in. As a result, his experience was not counted.

> **Example:** An older gay police officer relies on well-honed skills to de-escalate situations of violence. The officer is asked if he is still "up to the job," or "man enough" to use his weapons. The fact that this officer is applying advanced techniques developed through extensive training is not recognized.

Social relationships and networks are also an important part of organizational culture. Such networks can allow some people to know how to succeed in an organization, while other people are excluded from learning this critical information. Social relationships can result in perceptions about whether a person "fits" within an organization or is seen as an outsider.

> **Example:** A firm has a recruitment strategy that pays a bonus to any senior employee who refers a potential candidate to the HR manager, if that candidate is hired. Employees are asked to tell their friends and social networks, such as hockey teams. Applicants who are recommended this way are hired more often than people who answered a posted ad. After they are hired, recommended candidates are given a smoother introduction to the firm than other people who do not know anyone. This kind of informal process tends to advantage people who share the same characteristics as the recruiter and senior employees and has a negative impact on employees with disabilities, women and racialized people.

ii) Numerical data:

Numerical data that demonstrate that members of certain groups are disproportionately represented may indicate systemic or other forms of discrimination. On its own, numerical data does not usually prove systemic discrimination. However, such data may be strong circumstantial evidence that inequitable practices exist.

> **Example:** Data may show that women with young children are under-represented in senior positions and over-represented in entry-level positions. This may indicate inequitable practices in hiring, training, promoting and accommodating persons identified by sex and family status. The organization would also need to look at its culture and policies, practices and decision-making.

> **Example:** Data may show that the percentage of racialized employees in an organization is much lower than what would be expected based on the availability of qualified individuals in the population or in the applicant pool. This may mean that there is systemic discrimination in hiring or on-the-job discrimination resulting in a failure to retain racialized persons. The organization would also need to examine its culture and policies, practices and decision-making.

iii) Policies, practices and decision-making processes:

The Supreme Court of Canada has said that systems must be designed to include all persons.[37] Formal and informal systems should be structured so they meet the needs of everyone, rather than only people who are members of the dominant group. Policies, practices and decision-making processes that do not take into account the realities of persons identified by *Code* grounds may lead to exclusion, and result in systemic discrimination.

> **Example:** The language and content of questions on a standard test are based on mainstream White culture, and have the effect of screening out racialized persons and recent immigrants. Recognizing this, an organization uses other ways to assess candidates.

> **Example:** An employer's attendance policy states that any absence during a three-month probationary period is cause for termination. A new employee's mother has a serious fall. He takes two days off from work to help her at the hospital and to arrange supports for her return home. When he returns to work, he is dismissed because he violated the attendance policy.

iv) Context: historical disadvantage:

When assessing whether systemic discrimination may exist, employers should consider an individual or group's already disadvantaged position in Canadian society. For example, the economic disadvantage apparent in First Nations and African Canadian communities may be related to the past discriminatory practices that limited economic opportunities for members of these communities.

> **Example:** A large employer requires all employees to buy three uniforms and attend a two-week unpaid training session before starting paid employment. Out of every 20 people offered employment, more than one-quarter decline. Based on these numbers, the employer does some further checking to find out why people are turning down the job. Many of the people who did so were protected by Code grounds such as race and disability, and turned down the job because they could not afford the initial expenses. The employer realizes that their inability to pay may be linked to historical disadvantage. The employer changes the uniform and training requirements so that they do not pose a barrier to employment for people protected by the Code.

f) How to prevent and respond to racism and racial discrimination

Racism and racial discrimination can be very hard for an organization to address. A solid organizational anti-racism program recognizes that racism exists in society and within the specific organization. Such a program should contain

four parts:

- a comprehensive anti-racism vision statement and policy
- proactive, ongoing monitoring
- implementation strategies
- evaluation.

For more information about racism and how to develop anti-racism programs, refer to the Commission's Policy and Guidelines on Racism and Racial Discrimination.

i) Anti-racism vision statement and policy:

A clear, concrete and thorough anti-racism vision statement and policy is an important part of a successful anti-racism program. All key stakeholders must be part of developing a vision statement and policy with support from the company's leaders. A vision statement shaped by anti-racism principles and goals is a good framework for an anti-racism program. Refer to page 50 of the Commission's Policy and Guidelines on Racism and Racial Discrimination for an example of a vision statement and how to create an anti-racism policy. The principles set out in the Commission's updated policy Guidelines on Developing Human Rights Policies and Procedures will also continue to apply.

ii) Proactive, ongoing monitoring:

The Commission expects that an organization will take steps to assess whether there is a problem if concerns are expressed that policies or practices are having a discriminatory effect on racialized persons or groups. This kind of monitoring will often involve collecting data or producing and analyzing statistics. It may also include speaking to affected groups, reviewing systems and research. Steps must also be taken to change policies and practices that add to historical disadvantage. See also Section IV-1e) – "More about how to proactively identify and address systemic discrimination."

iii) Implementation strategies:

Anti-racist organizational change calls for major changes to the structures and systems of organizations. The steps that are taken based on an anti-racism vision statement and policy are called "implementation strategies." The company is expected to use all measures needed to address the problems that have been identified. Options include:

- organizational change initiatives (like changing reporting relationships, removing old practices or policies, using more formal processes with less discretion built in)
- special programs
- surveying to get feedback on issues of racism and racial discrimination (for example, exit interviews with departing staff)
- empowering racialized people, for example through formal mentoring programs
- planning for resistance to change and how to address it
- partnering with other organizations to come up with best practices
- having mandatory education and training for all staff
- giving out information on the anti-racism vision statement and policy
- getting help from an expert.

Many organizations tend to focus on training and forget about other implementation strategies. Training on its own is not enough to create an anti-racist work environment. Also, effective training needs to use anti-racism terms rather than generic terms like "diversity" or "cultural sensitivity." Training that reduces racial discrimination to cultural misunderstandings does not lead to meaningful change. The aim is to understand what racism is and how to challenge it in individuals and within the organization as a whole.

iv) Evaluation:

Ongoing evaluation of a company's anti-racism program is important to make sure that it continues to be effective. The vision statement and policy should be reviewed and revised from time to time. It is also prudent to review complaints that have been raised, how they were handled under the policy and ideas to improve the response to issues of racism and racial discrimination.

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[33] Conference Board of Canada, *Ontario's Looming Labour Shortage Challenges: Projections of Labour Shortages in Ontario and Possible Strategies to Engage Unused and Underutilized Human Resources* (September 25, 2007), online: www.workforcecoalition.ca at 20.
[34] *Ibid*. at 20.
[35] Ontario Human Rights Commission, *supra* note 30.
[36] Ministry of Community and Social Services, "Changing Attitudes: Understanding Barriers to Accessibility" online: www.mcss.gov.on.ca/mcss/english/pillars/accessibilityOntario/accesson/understand_barriers.
[37] *Meiorin*, *supra* note 6; see *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. at 3 (gender) and *Grismer, supra note 7.*

2. Setting job requirements

a) Make sure that job requirements are reasonable and made in good faith

All jobs include performing certain tasks that may be considered requirements. A requirement, qualification or factor that is neutral and non-discriminatory on its face, may nonetheless exclude, restrict or prefer some persons because of a ground set out in the *Code*. This is often called "adverse effect" or "constructive" discrimination and is prohibited under section 11 of the *Code*. See also Section III-2g) – "Workplace rules that are not *bona fide*".

> **Example:** An employer has a rule that male employees must be clean-shaven. This rule results in the employer refusing to hire a Sikh man. This rule is not intended to exclude Sikh men (who as a part of their religion are not allowed to shave) from employment, but it has this effect and therefore would be considered discriminatory.

If a person is prevented from meeting job requirements for a reason that is related to a ground in the *Code*, human rights law looks at whether these requirements are reasonable and *bona fide* (*bona fide* means "good faith" or "genuine"). This assessment includes determining whether the rule was designed inclusively and whether it would be possible to accommodate, without causing undue hardship.

> **Example:** Even if the rule requiring employees to be clean-shaven is shown to be reasonable and bona fide (the rule is rationally connected with performing the job, and the rule was established in good faith), the employer will only be able to insist that Sikh men observe the rule if creating an exception will cause undue hardship to the employer. In this example, the business objective may be to ensure hygiene when preparing food. However, Sikh men can easily be accommodated by allowing them to wear a net to cover their beard, which should not cause the employer undue hardship.

Some requirements may be directly discriminatory and yet not violate the *Code*, if the employer can show that it is a reasonable and *bona fide* occupational requirement.

> **Example:** A health club has a requirement that staff in a men's locker room must be men. This requirement would likely meet the test for a reasonable and bona fide occupational requirement.

i) Test for bona fide requirement:

Whether the discrimination is direct or by adverse effect, the Supreme Court of Canada has set out the same three-step test for justifying a discriminatory standard, factor, requirement or rule as a bona fide requirement.[38] The Commission applies this test for all grounds and discusses this in detail in many of its policies.

When a human rights claim alleging discrimination is filed, the respondent 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 performing the job
2. was adopted in good faith, in the belief that it is necessary to fulfill a legitimate work-related purpose
3. is reasonably necessary to accomplish the work-related purpose. To show that the standard is reasonably necessary, employers must show that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

As a result of this test, the rule or standard must be inclusive and must accommodate individual differences up to the point of undue hardship. It is not enough to maintain discriminatory standards and supplement them by accommodating people who cannot meet them. This means that each person must be assessed against his or her own personal abilities, instead of being judged against presumed group characteristics.

> **Example:** A manager must leave work at 5 p.m. to care for her young children. The employer often has senior managers' meetings after this time. Such a practice has a negative impact on managers with child-care responsibilities.

> **Example:** An employee's mother has developed Alzheimer disease and needs greater care and assistance. The employee needs to take time during normal business hours to arrange home care in the short term and nursing home placement for the longer term. While the employee only needs a few mornings a week to arrange for care, the employer's policy requires that personal leave must be taken in full days.

ii) Taking a proactive approach to bona fide requirements:

In some cases, differential treatment linked to a *Code* ground may be legitimate if the employer can show that it is a bona fide occupational requirement.

> **Example:** A woman who was seven months pregnant was denied a job as kitchen help in a restaurant. The human rights tribunal heard evidence that the job would be physically demanding. As the woman had never performed these kitchen duties before, she would not know the extent of the physical requirements expected for this job. The tribunal was satisfied in this case that it was likely that not being in the later stages of pregnancy was a reasonable occupational requirement.

Rather than wait for rules to be tested through human rights claims and allegations, a best practice is for new and existing job requirements to be assessed to make sure they will not have a discriminatory impact and are necessary for performing the essential duties of the job. This section provides tips to help employers proactively comply with the *Code* when putting in place new standards, factors, requirements or rules.

As a best practice, before implementing a standard, factor, requirement or rule, an employer will assess it according to the standards set out by the Supreme Court of Canada and reflected in the Commission's policies. Employers can consider the following questions and factors, among others:

- For what goal or purpose is this rule or standard being adopted?
    - Is the goal or purpose rationally connected to doing the job?
- Why is the rule or standard being adopted?
    - Is it being adopted in good faith?
    - Is it reasonably necessary to meet a legitimate work-related purpose? A standard will not be considered reasonably necessary unless the employer can show that it would be undue hardship to accommodate

individual employees sharing the characteristics of the claimant.

- What alternative approaches are there?
  - Have these been fully investigated?
  - Are there alternative approaches that do not have a discriminatory effect? Do these approaches meet the employer's purpose?
- Is there a less discriminatory way to meet the standard and accomplish the employer's legitimate purpose?
  - If alternative non-discriminatory approaches that fulfill the employer's purpose exist, why can they not be used?
- How can the standards be designed to comply with the *Code*?
  - Could standards that reflect group or individual differences and capabilities be set up?
  - Is the standard properly designed to make sure the desired qualification is met without placing undue burden on the people it applies to?
  - Does the standard incorporate the concept of accommodation?
- Is accommodation being provided to the point of undue hardship?
  - Have other parties who are obliged to assist in the search for accommodation fulfilled their roles?

Records on these types of assessments of rules and standards, including efforts to assess and achieve accommodation, should be retained. These records would be relevant when determining whether the rule and standards are discriminatory if any human rights concerns are raised.

It is also important to make sure that any *bona fide* requirements, policies or rules relevant to the selection criteria are kept up to date once they are put in place. For example, a policy that has been in place for so long that nobody remembers why it was created in the first place is vulnerable to challenge on the basis that the employer does not have a belief that it is connected to performing the job (the second part of the *bona fide* requirement test).

iii) Requirements that are not bona fide:

Some requirements will not be considered to be reasonable or bona fide. Examples include requirements that:

- relate to incidental duties instead of essential parts of the job
- are based on co-worker or customer preferences and exclude persons because of grounds protected in the *Code*
- rely on stereotypical assumptions linked to *Code* grounds, such as disability, race or sex, to assess an individual's ability to perform the job duties. For example, a position that requires child care workers to be women is unfair to men who are also qualified for the position
- state that the job must be performed only in a certain way even though reasonable alternatives may exist.

  Example: A human rights tribunal found that an employer discriminated against a female employee when it refused to employ her in a section of the company that processed certain gases. The employer defended its action on the basis that, from time to time, accidental emissions may be harmful to women of child-bearing age or to a fetus. The tribunal found that the risk of harm to a fetus from the accidental emission of the gas was minimal. As well, the scientific research did not support the company's concerns. The tribunal noted that any woman who knows she is pregnant, or who intends to become pregnant, could be transferred from this section until after she has given birth.

b) Identify and clearly describe essential requirements

Having a clearly defined job description and an understanding of the essential requirements of the job provides a solid basis for designing rules and standards, providing accommodation, assessing the performance of applicants and employees, and making decisions on hiring, promotions, discipline and termination. Organizations that have not defined the essential duties of a position, provided required accommodation and individually assessed ability to perform the essential duties will have difficulty defending themselves if a human rights complaint is filed.

This is because section 17 of the *Code* says that the right to equal treatment is not infringed when a person is treated

differently because she or he is incapable of carrying out the essential duties or requirements of the position because of disability, after the person has been accommodated short of undue hardship.

The employee has a duty to co-operate with the employer in investigating options for accommodation. The employer must go beyond determining the employee's limitations and focus on the duties that the employee is able to perform.

Employers are expected to re-assign non-essential tasks and to accommodate to the point of undue hardship related to the essential duties of the position. If, after being accommodated to the point of undue hardship, the person still cannot meet the essential requirements, it is not discriminatory for the employee to be re-assigned to another position that better meets his or her accommodation needs.

A job may contain many elements, some of which are essential to doing the job, and others that are ideal or preferable, but not essential. The best practice is to list essential duties in a job description, and clearly state them when advertising the job. When developing a job description, it is prudent to consider the necessary or essential physical requirements, including physical demands, and provide this information to job applicants. The essential requirements must be determined objectively and not be designed to avoid the principles contained in the *Code*. Employers should be able to show why a certain task is either essential or non-essential to a job.

With time, a job can change. This may result in adding new responsibilities that may be either essential or non-essential. When preparing for a hiring process, an employer may consider the following questions:

1. Is the job description current or does it need to be updated?
2. Does the job description accurately reflect the needs and expectations of the employer?
3. Which are essential requirements and which are non-essential?

When assessing whether a particular task or duty is essential, an employer can consider:

- How often is the duty performed?
- How much time is spent on each duty?
- How does the duty fit with the others performed in the job?
- How would the job change if the duty were removed?

c) Think about stress when designing jobs

Experts estimate that stress contributes to 19% of absences from work and costs Canadian employers $3.5 billion each year.[39] Experts and researchers have identified that certain types of jobs are associated with higher levels of stress. This, combined with other stresses, can lead to disabilities or heighten the need for major *Code*-related accommodations that could have been avoided in other circumstances.

> **Example:** An employee, whose mother is in a long-term care home, has difficulty balancing her care-giving responsibilities with her job. She has little control over her work tasks and is constantly being given rush assignments at the end of the day. Almost daily, she works a full day, goes to visit her mother and then works from home until late in the evening to finish her task assignments for the next day.

The employer's position is that the office is too busy to allow her to cut back her hours. Employees are also discouraged from claiming overtime – the employer's view is that employees who are doing overtime are just not productive enough during regular hours. The employee is a top performer but feels that her contributions are not valued and that she is not meeting expectations. She becomes increasingly stressed by the rising workload and lack of accommodation. This is magnified by the total absence of recognition or appreciation. She goes off on an extended sick leave.

While some jobs are necessarily more stressful than others, an employer can take steps to eliminate unnecessary stresses when designing a job, or put in place measures to help employees deal with stresses caused by the job – see Section IV-8e(viii) – "Stress-related accommodation requests."

Research summarized by Mental Health Works shows that excessive stress may arise in jobs with the following work conditions:[40]

- high demand/low control jobs
  - the employee has constant imposed deadlines over a long period
  - the employee has limited control over how their day-to-day work is organized
  - deadlines and limited control can lead to increased disability claims due to double the rate of heart and cardiovascular problems, higher rates of anxiety, depression and poor morale, higher drug and alcohol use, and increased vulnerability to infectious diseases
- high effort/low reward jobs
  - require high physical or mental effort.
  - offer little pay, status, financial gain or career enhancement
  - can lead to triple the rate of cardiovascular problems, higher rates of depression, anxiety and conflict-related problems
- jobs that are both high demand/low control and high effort/low reward can lead to:
  - double the risk of death from heart disease
  - high cholesterol and body mass index
  - higher incidence of back pain (three times that of high control/high reward conditions)
  - higher incidence of repetitive stress injuries (could be up to 150%)
  - over five times the normal rate of colorectal cancer (when combined with other workplace stressors)
  - accidents on the job (directly or indirectly)
  - increased conflict between co-workers.

d) Potentially discriminatory requirements

This section shows requirements that could lead to discrimination claims, and that should not be included in a hiring process without careful thought:

Functional fitness assessments: Applicants should not have to undergo a fitness assessment unless:

- the requirement is made in good faith and inclusively designed
- it is rationally connected to performing the essential duties of a job
- accommodation is built into the assessment.

Testing and simulations: Any tests and simulations should be reasonable and bona fide to be reliable indicators of job performance. For example, psychometric and psychological testing may favour the dominant culture. A written test for a job that does not need writing skills may screen out persons who speak English or French as a second language.

Non-essential physical demands: No matter what the job, every job has a physical aspect to it. Activity may range from something sedentary, like sitting at a desk and looking at a computer screen, to something very physically active, like driving a delivery truck and lifting heavy packages. Physical demands that are not essential should not be included in a job description or used as a basis for evaluating applicants.

> **Example:** A company is looking for computer salespersons. The job description states that the person who fills the position must be able to lift 20 kilograms, the weight of the computers and related equipment. If the person is being hired as a computer salesperson, knowledge of computers and information technology is essential, but the ability to lift and deliver computers would likely not be essential and should not be included in the job description or used to screen out applicants.

Requirement to have a driver's licence: A driver's licence contains personal information about a person such as age or disability. This could allow the employer to assess applicants according to a prohibited ground of discrimination. Employers should identify the jobs where driving is an essential requirement and make sure this is included in the job

description.

Language and fluency: A job description that requires a certain level of fluency in English or any another language, or prohibits an accent, may be discriminatory if these are not bona fide requirements for performing the job.

When an employer identifies "proficiency" in a language as a requirement, it must be reasonable and *bona fide*. It must meet the test set out above. The requirement must focus on the particular language needed in the job, and not on the place of origin, ancestry, ethnic origin or race of candidates for the job.

> Example: An immigrant settlement agency that serves persons from South Asian countries needs support workers. Most of its clients have recently arrived in Canada. Fluency in one or more South Asian languages as well as English or French would likely be considered a bona fide job requirement.

There may be an exception under subsection 24(1)(a) of the *Code* if the employer is a special interest organization.

"Canadian experience:" A requirement for Canadian experience may limit applications from recent immigrants, and could result in discrimination on the basis of race, place of origin or ethnic origin. All prior experience should be assessed, regardless of where it was obtained. In many cases, there are easy ways to assess a person's skills and abilities without having to contact a Canadian reference or insist on Canadian experience.

> **Example:** An employer is looking for a typist/receptionist. Even if the person received their training in another country, there are several options available to verify skills, including standardized testing (typing tests, for example), letters of reference or probationary periods.

Inflated job requirements: Inflated job requirements pose discriminatory barriers for racialized applicants and others such as people with disabilities. An example is requiring a university degree when a high school diploma would do.

Specifying desirable personality traits: This approach can screen out or discourage persons identified by the *Code*. In some cases, the terms used may be seen as euphemisms for criteria that would be prohibited under the *Code*. For example, stating that sales people must be "aggressive" could screen out racialized women, and saying people must demonstrate "career potential" could screen out older applicants.

The employer should avoid stating that an applicant has to be in "good physical condition" to be successful, even if there is a *bona fide* requirement that an applicant take a fitness assessment.

Frequent travel: If employees have major caregiving responsibilities, their ability to travel regularly or extensively may be limited. When travel is included in a job description, it must be an essential duty that is a bona fide requirement. When it is not, employees should not be denied opportunities because their caregiving responsibilities prevent them from regular or extensive travel. When travel is an essential job duty, the employer would be expected to accommodate the family-status needs of employees.

Recent graduates or students: A requirement that an applicant be a recent graduate or a student may limit applications from older workers. This may amount to discrimination on the basis of age, unless such requirements are *bona fide*, connected to a special program or a *Code* exemption applies.

Citizenship requirements: Section 16 of the *Code* allows an employer to discriminate based on citizenship in three very specific situations:

- when citizenship is a qualification or requirement imposed or authorized by law
- when the requirement for Canadian citizenship or permanent residency in Canada has been adopted to foster and develop participation in cultural, educational, trade union or athletic activities by Canadian citizens or permanent residents
- when the employer imposes a preference that the chief or senior executives be, or intend to become, Canadian citizens.

The employer should include any of these citizenship requirements in the job description to avoid any misunderstandings by applicants. But see "Citizenship" in the section on grounds.

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[38] In *Meiorin*, *supra* note 6, the Court considered whether a fitness test, which was found to indirectly discriminate against women, was a *bona fide* occupational requirement for a forest firefighter.
[39] Statistics summarized by Joan Burton, Industrial Accident Prevention Association, *The Business Case for a Healthy Workplace*, online: www.iapa.ca/pdf/fd_business_case_healthy_workplace.pdf.
[40] Mental Health Works, online: www.mentalhealthworks.ca/employers/faq/question3.asp

3. Advertising

Under section 23(1) of the *Code*, the right to equal treatment in employment is infringed when a job posting or advertisement directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination.

Section 23(2) of the *Code* sets out what questions employers can ask on application forms or other inquiries relating to prohibited grounds of discrimination. This is discussed in the section below – "Designing application forms" and Section IV-5 – "Interviewing and making hiring decisions."

a) Make sure that job ads and postings comply with the Code

Job ads and postings should not contain statements, qualifications or references that relate either directly or indirectly to race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, record of offences, age, marital status, family status or disability.

Some ads may not mention a ground of the *Code* directly, but may unfairly prevent or discourage people from applying for a job. As was noted above in relation to job descriptions, advertisements for jobs should not include neutral requirements that may be discriminatory barriers and result in human rights complaints. For example, it may be a *bona fide* requirement that a receptionist speak clear, intelligible English, but it is not acceptable to require "unaccented English." If it is essential and *bona* that the person must drive for the job, the ad may state that a valid driver's licence (with the required class) is required. See also Section IV-2d) – "Potentially Discriminatory Requirements" for more examples of what to avoid in ads.

The following checklist provides general guidelines to follow when preparing a job ad.

Job ad checklist:

- Is non-discriminatory wording used to describe the job?
- Are the essential duties of the job clearly explained?
- Has neutral language such as "sales clerk" rather than "salesman" been used wherever possible?
- Is there a statement that the employer is an equal opportunity employer and that accommodation will be provided during the hiring process?

b) Advertise widely using diverse means

Employers should avoid using word-of mouth referrals, personal networks, such as the recruiter's hockey team, or social relationships. These kinds of informal processes tend to exclude people who do not share the same characteristics and background as the recruiter, and may create discriminatory barriers to employment.

Also, advertising only on the Internet or on mainstream media may adversely exclude some groups under the *Code*. On the other hand, online ads can be an effective way to make sure that persons with print disabilities have access to the information.

The best practice is to widely circulate formal job postings, which clearly describe the position and qualifications (see Section IV-2 – "Setting job requirements" for more information about job descriptions). For example, employers can place ads in newspapers, on websites and through employment agencies so postings are readily available to persons identified by *Code* grounds.

Some employers who are actively seeking to increase their diversity advertise in ethno/racial or community newspapers. Others do outreach and go to places with a high representation of racialized persons or persons with disabilities.

4. Designing application forms

a) General principles

This section outlines key considerations for application forms and parts of application forms that raise concerns about *Code* violations. Employers can use this information to make sure that the application forms they use are non-discriminatory and relate only to qualifications and requirements relevant to the job and the hiring decision. When application forms include inappropriate questions relating to *Code* grounds, an inference can be made that such questions may have influenced a decision not to hire.

Although there are exceptions in the *Code* that allow for some questions that would otherwise be discriminatory, these only apply to the interview stage. For information on questions at the interview stage, see Section IV-5d – "Make sure interview questions comply with the *Code*."

The sample application form in Appendix D provides guidance to employers in designing individualized employment application forms that are consistent with the provisions of the *Code* and the principles outlined in this section. Employers are welcome to add to or modify this application form to suit individual needs, while making sure that the final application form reflects the considerations below.

Do not ask for information related to Code grounds
Section 23(2) of the *Code* prohibits the use of any application form or written or oral inquiry that directly or indirectly classifies an applicant as being a member of a group that is protected from discrimination. Application forms should not have questions that ask directly or indirectly about race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, record of offences, age, marital status, family status or disability. There are limited situations where questions relating to *Code* grounds may be asked in an interview or taken into account when hiring. These are discussed in Section IV-5d(i) – "Hiring based on *Code* grounds for a special program" and Section IV-5d(ii) – "Hiring based on *Code* grounds if special employment exemption applies."

> **Example:** A social service agency's application form asks applicants to provide their date of birth. It states that it needs to use this information to perform criminal record checks. Collecting age-related information on the application form could lead to concerns that age is a factor if an applicant is screened out at an early stage. Instead, the employer can make an offer of employment conditional on confirming that the person does not have a record of an unpardoned criminal offence. The person's date of birth can be asked for at this stage.

Photos: Sometimes employers ask applicants to submit a photo along with their applications. It has long been the Commission's position that employers should not request photos of potential employees, since they may provide information related to a number of *Code*-related grounds, such as race, colour, sex or age.

While information related to race, colour, sex or age might be relevant to a special program intended to address hardship or disadvantage related to Code grounds, photos are not reliable sources of such information. Employers attempting to put a special program in place to increase the diversity of their workforce would be better served by asking employees to self-identify, while putting appropriate safeguards in place for using this type of information.

Driver's licence: A driver's licence contains personal information that could lead to the applicant being classified according to disability or another prohibited ground. An application form should not include a request to provide a copy of a driver's licence or any questions about a person's eligibility for a driver's licence. If driving is an essential requirement of the job, the employer should only request a copy of a driver's licence after making a conditional offer of employment.

The next section describes other requirements that should not be included on application forms because they may be discriminatory barriers.

b) Specific concerns about individual Code grounds

i) Age:

No questions about age are permitted on an application form, other than whether an applicant is 18 years or over. Employers should not ask for the date of birth or a birth certificate, or for other documents that indicate age (such as baptismal records, driver's licence, etc.).

When age or date of birth is relevant to an essential duty of a position or for enrolling in company benefit and pension plans, this information should only be requested after a conditional offer of employment.

> **Example:** An application form for the job of driver may ask whether the employee has a drivers' licence, if driving is an essential duty of the job. An application form for that position should not ask for a copy of the applicant's driver's licence because it contains personal information that could lead to the person being classified according to age. If the person is not offered the job, such a request could also lead to a suspicion that the decision was based on inappropriate factors such as age.

ii) Citizenship, place of origin or ethnic origin:

Employers can ask, "Are you legally entitled to work in Canada?" on an application form. No other questions about these grounds are permitted. Also prohibited at the application stage are questions about:

- landed immigrant status, permanent residency, naturalization or refugee status
- place of birth
- Social Insurance Number, which may contain information about an applicant's place of origin or immigration status. A Social Insurance Number may be requested after a candidate has received a conditional offer of employment
- questions about which "community" a person belongs to
- membership in organizations such as cultural or ethnic associations.

Information about a person's education at this stage should be limited to information about the degree or level of education, professional credentials, diplomas, etc. received. Asking applicants to provide the names of schools or copies of diplomas, certificates and professional credentials may indicate place of origin. Therefore, it is advisable not to collect such information until after making a conditional offer of employment.

iii) Creed/religion:

There are no permissible questions on an application form related to religion or creed. Prohibited questions at the application stage include those about:

- religious affiliations, churches, temples or other religious institutions attended
- whether religious holidays are observed
- whether particular religious customs are observed
- willingness to work on a day of the week that is usually a Sabbath or other religious day of rest, such as Friday

afternoons, Saturdays or Sundays
- character references that would indicate religious affiliation, such as a request for references from a person's religious or spiritual leader
- questions about the name and location of schools, diplomas, certificates and professional credentials, as these may indicate religious affiliation.

If an employer is concerned about a person's availability for work because of shifts or other scheduling reasons, it is advisable to wait until a conditional offer of employment has been made before asking about how the person's religious needs may be met. Also keep in mind the duty to accommodate.

iv) Disability:

Aside from responding to a request for accommodation in the hiring process, there are no permissible questions about disabilities at the application stage, including those related to:

- general health and medical history
- illnesses
- mental disorders or illnesses
- physical or intellectual limitations
- developmental disabilities or intellectual impairment or learning disabilities
- injuries
- number of sick days taken
- Workplace Safety and Insurance Board claims
- medication
- membership in medical or patient associations (such as Alcoholics Anonymous)
- predisposition to medical conditions
- insurability or eligibility for benefit plans
- substance abuse or treatment for substance abuse
- possession of a valid driver's licence
- pre-employment medical examinations or drug tests
- the need for accommodation on the job.

v) Family status:

No questions about family status are permitted at the application stage. This includes questions about:

- whether a person has or may have children
- whether a person has family responsibilities
- whether family responsibilities limit the person's availability (including potential availability for overtime hours).

Instead of asking whether a person's family responsibilities limit his or her availability, it is advisable to ask if the person is free to travel or relocate. An employer may only ask this if being able to travel is a *bona fide* requirement. If so, all applicants should be asked this question. Employers should not assume that a person with young children or other significant caregiving responsibilities will not be interested in work that involves some travel.

vi) Marital status:

No questions about marital status are permitted. This includes questions about:

- whether the candidate is single, married, separated, divorced, or living in a common-law relationship
- the candidate's spouse (for example, "Is your spouse willing to transfer?")
- maiden or birth name

- form of address (Mr., Mrs., Miss, Ms.)
- emergency contact or insurance beneficiary.

Instead of asking whether an applicant's spouse is willing to transfer, it is advisable to ask, when relevant to the job, if the applicant is free to travel or relocate.

vii) Race-related grounds:

There are no permissible questions about race-related grounds at the application stage. The following kinds of questions are prohibited:

- inquiries about physical characteristics such as eye colour, hair, height, and weight
- requests for photos
- questions about which “community” a person belongs to.

viii) Record of offences:

It is permissible to ask: "Have you ever been convicted of a criminal offence for which a pardon has not been granted?" Prohibited questions are those relating to whether an applicant has ever:

- been convicted of any offence (this may elicit information on pardoned offences)
- spent time in jail
- been convicted under a provincial statute (for example, the Highway Traffic Act)
- been convicted of an offence for which a pardon has been granted.

ix) Sex and pregnancy:

There are no permissible questions related to sex and pregnancy. Prohibited questions at the application stage include questions about:

- forms of address (Mr., Mrs., Miss, Ms.)
- the last name before marriage (maiden or birth name)
- the candidate's relationship to the person listed as an insurance beneficiary or to be notified in case of an emergency
- plans to start a family
- whether the applicant is, has been, or intends to become pregnant.

Instead of asking whether an applicant has or plans to have children, it is advisable to ask, where essential to the job and a *bona fide* requirement, if the applicant is free to travel or relocate.

x) Sexual orientation:

No questions about sexual orientation are permitted. This includes questions relating to:

- forms of address (Mr., Mrs., Miss, Ms)
- categories on application forms or inquiries such as married, common-law relationship or divorced
- attendance at the Pride parade
- membership in community groups or advocacy
- questions about a spouse/partner such as "Is your spouse willing to transfer?" Instead, if availability to travel is a *bona fide* requirement, ask if the applicant is free to travel or relocate.

5. Interviewing and making hiring decisions

This section describes the human rights issues that commonly arise in interviews, some of the types of questions that may or may not be asked, and how to make hiring decisions that do not contravene the *Code*. Supervisors, managers and human resources staff who are responsible for making hiring decisions must be trained and educated to identify and eliminate discrimination, harassment and barriers to advancement for persons protected by the *Code*.

a) Employment agencies/search firms

An employer cannot use an employment agency to hire people based on preferences related to race, sex, disability or other *Code* grounds. This is specifically prohibited in section 23(4) of the *Code*. Employment agencies cannot screen applicants based on discriminatory grounds, and are not allowed to keep a record of client "preferences" of this kind. When using an employment agency or search firm, employers should make sure that the agency or firm is aware that they are an equal opportunity employer and wish to see a broad range of candidates.

b) The hiring process must be fair

An employer should aim for a fair process that focuses on each candidate's ability to perform the essential job duties. A best practice is to have a multi-person panel conduct formal interviews. Ideally, the interview panel should reflect the diversity available in the organization. They should develop set questions in advance, and ask all applicants the same questions. The questions should be based on the job's essential duties and bona fide requirements. Before interviews start, create an answer guide showing the desired answers and a marking scheme. Then, each member of the interview panel can record and score each candidate's answers against this guide.

This kind of approach will help employers avoid making decisions based on subjective considerations such as whether the person exhibits "confidence" or is viewed as "suitable." Employers who rely on these kinds of subjective assessments are vulnerable to claims of discrimination, Without objective criteria, an employer will have trouble explaining why some candidates were or were not qualified for the job if a human rights complaint is filed.

> **Example:** A woman is denied access to a job normally held by men. Even though she has previously done the job, she is viewed as not having the skills to do the job. The employer did not develop or rely on objective assessment criteria, so it was unable to show that its decision was not based on discriminatory stereotypes.

Similar considerations apply to written tests that applicants are asked to complete during a hiring process. The tests given to all applicants should be identical and scoring should be done based on an objective marking scheme determined before answers are graded. Any written test should also be based on the job's essential duties and *bona fide* requirements.

For both interviews and written tests, the process should be the same for all candidates and determined in advance, subject to accommodation needs. For example, a hiring panel may decide that all candidates can be prompted if their answers in an interview do not correspond to the question asked. Or, in a written test, the employer may indicate that answers will be assessed based only on the information the candidates provide. If so, the candidates should be told to make sure that they address all parts of each question. Employers cannot ask some candidates questions they do not ask other candidates.

> **Example:** An employer asks racialized candidates whether they would be able to deal with racial slurs while it does not ask this of other applicants. This was found to be discriminatory. Instead, the employer might have asked all candidates how they would deal with difficult clients or challenging customers.

How far an applicant goes in a hiring process should not depend on informal assessments by individual interviewers. Staffing decisions based on informal processes are much more likely to lead to subconsciously biased decision-making. For example, conducting an interview by chatting with the applicant to see if he or she shares similar interests and will "fit" into the organizational culture may present a barrier for persons who are or appear to be different than the dominant norm in the workplace. If this is used as a starting point for deciding whether candidates

will be seen by senior decision-makers, this creates a major barrier to persons protected by the *Code*.

> **Example:** A firm's hiring process for students is to have them all interviewed individually by a number of associates and partners. Interviewers are not given a set list of questions or hiring criteria. Instead, each candidate's resume is used as a starting point for a free-flowing discussion of topics of interest to the interviewer, such as which school the person studies at and where they play golf. At the end of the interview, candidates are ranked based on how well they "fit" the firm's image. Ultimately, access to the senior decision-makers depends on the candidate being assessed as a good fit by the previous interviewers. This type of process is extremely vulnerable to claims of discrimination.

Deviating from the usual hiring process can indicate discrimination even if a person excluded because of a *Code* ground would not have been the successful applicant in the absence of discrimination.

> **Example:** A person shows up for an interview in a wheelchair and is told that she need not attend the interview. The failure to individually assess this applicant is discriminatory even if she could not perform the essential duties of the position with accommodation and is less qualified than the successful candidate.

c) Offer and provide accommodation for the interview or test

Employers must accommodate applicants' needs related to Code grounds for any part of the interview or hiring process, including tests. The employer must provide appropriate accommodation subject to the test of undue hardship. See also Section IV-8 – "Meeting the accommodation needs of employees on the job" for more information on the principles involved.

The Commission recommends that employers offer accommodation to all candidates who need it when inviting them for an interview or test. A person who needs accommodation to take part in an interview is responsible for advising of this need in enough detail, and co-operating in consultations to enable the employer to respond to the request before the interview or testing. There is no set formula for accommodation. Each person's needs are unique and must be considered individually.

> **Example:** A government employer invites 30 candidates to come in to write a written test for a position in the Communications department. Candidates are told in advance that they will have one hour to read some materials and write two short documents similar to those they would be asked to do on the job, such as a brief or a press release. They are asked to identify any needs for accommodation. One person identifies a need for a computer with screen-reading software, and another asks for more time to do the tasks. The employer has enough time to ask for more information, if needed, and to plan to meet these needs so candidates can be fairly assessed on their abilities.

> **Example:** An employer has scheduled candidates for interviews. When one person is told of her interview time, she says she is unavailable due to caregiving responsibilities, and asks for another time. The manager in charge of hiring then says that if she cannot attend, she will no longer be considered for the job, as there are many other candidates who are interested. Although the applicant has not specifically requested "accommodation because of family status," if a complaint was filed, this employer would be seen to have failed in its duty to accommodate to the point of undue hardship.

> **Example:** A person applies for a position online and is asked to take part in a telephone interview. The person sends an e-mail asking that the interviewer call via TTY or the Bell Relay Service as an accommodation in the interview process. In response, she is told that she is unsuitable for the position because the position involves making telephone calls to customers. The employer may be found to have failed in its duty to accommodate. Also, the applicant has been denied an opportunity to demonstrate her ability to meet the essential duties of the position. This is discriminatory.

d) Make sure interview questions comply with the Code

When inappropriate questions relating to *Code* grounds are asked in an interview, an inference may be made that a decision not to hire was influenced by such questions. Employers could face a finding of discrimination even if there is no intention to discriminate. The fact that improper questions have been asked is sufficient to prove discrimination, even if the applicant is ultimately given the job.

> **Example:** A hiring manager interviewing a female applicant starts off by casually discussing his family and asking if she has any children of her own. Throughout the interview, the applicant is distracted, wondering if her family status is going to be an issue for the employer. This may be a violation of the Code, even if this information is not taken into account and the applicant is offered the job.

Take care to make sure that interviews are only to get information about qualifications and job requirements needed for the hiring decision.

Section 23(2) prohibits employers from asking questions that directly or indirectly classify or indicate qualifications by a prohibited ground of discrimination. On the other hand, section 23(3) permits asking questions at a personal interview about a prohibited ground of discrimination when discrimination on such ground is permitted under the *Code*. This means that at the interview stage, the employer has more flexibility to ask questions about prohibited areas of discrimination, provided that the questions relate to exceptions and defences that are provided for in the *Code*. These exceptions relate to special service organizations, special programs and jobs whose requirements are linked to specific *Code* grounds.

i) Hiring based on Code grounds for a special program:

When an employer meets the requirements of a special program, they will be able to target and hire persons based on specific *Code* grounds. For more information on special programs, see Section IV-1c) – "Plan and implement a special program."

At the interview stage, an employer can ask questions related to *Code* grounds to assess the applicant's eligibility for a special program under section 14 of the *Code*. If a special program exists, it would be appropriate to ask relevant questions on a job application or in an interview to determine the candidate's eligibility for participation in the special program. For example, an employer can ask questions relating to membership in a group experiencing hardship or disadvantage to determine if the person meets the provisions of a special program. Make sure to provide the person with information about the special program when asking these kinds of questions.

ii) Hiring based on Code grounds if a special employment exemption applies:

When an exemption under section 24 applies, an employer can hire persons based on specific *Code* grounds, as long as the requirement is reasonable and bona fide based on the nature of the job. In such situations, it would be appropriate to ask relevant questions on a job application or in an interview.

> **Example:** A social service organization serving people who are deaf, deafened or hard of hearing may be allowed to prefer a community liaison officer who has a hearing disability.

The employer is allowed to ask questions relating to *Code* grounds in an interview, and to rely on them in making hiring decisions, if it meets the criteria for one of the following exemptions:

Special interest organization: Subsection 24(1)(a) allows certain special interest organizations to prefer hiring people based on their membership in certain groups. Special interest organizations might include:

- religious organizations that follow a particular system of faith and worship, such as a church or religious order
- philanthropic organizations that perform acts of benevolence, including man organizations that are registered as

charities under the federal Income *Tax Act*
- educational organizations such as schools, colleges and other institutions that offer instruction and training of a moral, religious, vocational, intellectual or physical nature
- fraternal organizations formed for mutual aid or benefit but not for profit
- social organizations providing social or cultural benefits (for example, a cultural club serving a particular ethnic group).

For an organization to qualify for the exemption, it must also meet the following conditions:

- be primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability
- employs only, or gives preference in employment to, persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability
- the qualification must be reasonable and *bona fide* because of the nature of the job.

If these conditions are met, it may be permissible to hire someone who is identified or preferred based on a ground in the *Code*.

> **Example:** A denominational school is hiring teachers and caretaking staff. Questions about religious membership would be permitted if the job involves teaching religious values to students. So such questions would be allowed for teachers, but not for the caretaking staff.

Reasonable and bona fide link to *Code* grounds such as age or sex: Subsection 24(1)(b) allows discrimination in employment when the grounds of age, sex, record of offences or marital status are reasonable and *bona fide* qualifications because of the nature of the job.

> **Example:** A women's shelter advertises for support counsellors to women experiencing violence and states that applications will only be accepted from women. In this situation, the nature of the work would mean that gender could be a reasonable and bona fide requirement of the job.

Individual hiring for self, spouse or child who is "ill, aged or infirm": Subsection 24(1)(c) allows an individual to discriminate based on all prohibited grounds listed in section 5, if the primary duty of the job is to attend to the medical or personal needs of the person, of an ill child or an aged, infirm or ill spouse or other relative.

> **Example:** A man hires a male live-in caregiver for his father who has severe disabilities. Despite receiving applications from several qualified women, his father would prefer a male attendant and this has been taken into account in the hiring process. This is permissible.

Nepotism or anti-nepotism policies: Subsection 24(1)(d) allows an employer to grant or withhold employment or advancement to a person who is the spouse, child or parent of the employer or an employee.

iii) Asking about the applicant's ability to do essential duties of a job:

In an interview, the employer can expand the scope of job-related questions to determine the applicant's qualifications or ability to perform the essential job duties. If, during an interview, the applicant asks for on-the-job accommodation for needs such as those relating to religion or pregnancy, these kinds of needs may be discussed at the interview stage. If the person identifies disability-related needs as an issue in an interview, disability and accommodation measures related to the essential job duties can be discussed. Other than at an applicant's request, only discuss on-the-job accommodation after making a conditional offer of employment.

e) Making non-discriminatory hiring decisions

The decision-making process should be uniform, consistent, transparent, fair, unbiased, comprehensive and objective. Answers provided in an interview or written test should be scored against pre-set criteria that are based on the

essential job requirements. Once a hiring decision is made, an organization should be able to document non-discriminatory reasons for hiring or not hiring each candidate.

Written records from the interview and the entire job competition should be kept for at least six months if no complaint about the process is made, and longer if a human rights claim is made (until the claim is resolved in the courts or before the Human Rights Tribunal). Unless there is a specific reason to destroy competition records, it is in an employer's interests to retain these documents as it will be better able to respond if a human rights claim is filed. Employees often choose not to "rock the boat" by filing a human rights complaint challenging hiring processes until after they have found another job or the final incident of discrimination, such as being fired.

> **Example:** A Black employee with a disability applies for promotions in 2002, 2005 and 2006. When he returns from a disability leave in 2007, he is fired. The reason given is that he does not have management potential and cannot continue in his current position due to a company re-organization. He files a human rights complaint alleging discrimination in all three job competitions and his termination from employment. As long as his complaint is filed within the applicable deadline, all of his allegations would be examined.

Employers must make sure that only information about qualifications and job requirements is considered when making hiring decisions. If an applicant has volunteered information relating to *Code* grounds during the hiring process, decision-makers should not consider this information. In these cases, employers should be very careful about assessing the candidates based on legitimate factors. The only time an employer can consider information related to *Code* grounds is when one of the *Code* exceptions applies.

When deciding whether to offer someone a job, employers should not take into account the fact that a candidate will not be able to start work on an anticipated start date due to a maternity, parental or disability leave. If the most qualified candidate is not immediately available, make alternate arrangements to fill the position in the interim. As with other forms of accommodation, this would be subject to the undue hardship standard.

> **Example:** A school board has a permanent vice-principal position available as of September. The top candidate is on a parental leave until January of the following year. Unless there is evidence of undue hardship, it would be discriminatory for the school board to decide not to offer this candidate the permanent position for this reason.

A decision-making process must not have the effect of excluding any group identified by *Code* grounds, whether overtly or covertly.

> **Example:** An employer rejected a Black candidate for a job after meeting her. He was visibly shocked and turned her down flat, without even asking about her credentials. When asked what was wrong, he said something about maintaining the company image.

> **Example:** An employer narrows down the pool of applicants from 10 to three who have Canadian experience. One of these candidates is awarded the job. The seven who were screened out because they did not have Canadian experience could file human rights claims alleging discrimination based on race and race-related grounds.

While required qualifications may legitimately change from time to time, take care to make sure that any changes to the decision-making criteria will not have discriminatory impacts on applicants.

> **Example:** Applicants for tenure track positions at a university are normally assessed according to their history of publications, research grants and teaching evaluations. When assessing candidates, a selection committee decides not to apply these requirements and instead relies on the subjective assessment of "potential." Ultimately, a new graduate who is White is hired for a tenure track position over a more accomplished racialized candidate who has been recognized internationally for his work at the university. This raises an inference of discrimination.

An organization should be able to provide a non-discriminatory reason for not hiring a person. Employers should avoid telling an untruth to spare an applicant's feelings, as this may lead him or her to suspect that discrimination is in fact behind the decision not to hire. Even if a complainant is not the most qualified, discrimination may be found when he or she is given a discriminatory reason for the employer's decision.

> **Example:** An applicant scores 19th out of 20 in a fair job competition, and positions are awarded to the top 14 candidates. The employer tells the applicant that he was not a "good fit" to spare him from knowing that he actually scored second lowest on the competition. The applicant is led to believe that he scored well on the test but that he was not hired because of subjective considerations such as age or race. Even if the documents and other evidence support the employer's case, the employer may need to spend time and resources defending against this complaint.

i) Discrimination in the hiring process:

In general, discrimination in hiring may be identified when a qualified person is turned down for a job that is then given to another person who is not similarly protected under the *Code*. However, discrimination in the hiring process may also be established even if a particular person protected by the *Code* would not have been the successful candidate without the discrimination. For example, if two candidates are equally qualified and the non-racialized person is selected, the organization will need to provide a non-discriminatory explanation for not hiring the racialized person if a human rights claim is filed. As well, discrimination may be found when a qualified candidate is protected under the *Code*.

Bias or stereotypes in the decision-making process may lead to eliminating candidates on the basis of grounds protected under the *Code*. The following list provides a few examples of hiring decisions that may be tainted by discriminatory considerations:

- **Rejecting applicants because they do not match the "company image" or "fit" the organization's culture:** This could disadvantage persons identified by race and race-related grounds, older applicants, persons with disabilities or other people who are easily identified as not belonging to the dominant group.
- **Not hiring someone due to a perceived lack of "career potential":** This requirement tends to adversely affect older applicants, especially where they are applying for "entry-level" type jobs.
- **Refusing an applicant who has "too much experience" or who is "overqualified":** Turning away candidates who are "overqualified" may sometimes have an adverse effect on older candidates, people who are seeking to re-enter the workforce after lengthy absences (such as people with disabilities or who have caregiving responsibilities), and newcomers to Canada.
- **Assuming that a person is not suitable without fully assessing their qualifications:** Persons with disabilities may be affected by "social handicapping" when they are presumed to be unable to do the job, even though their disabilities are not relevant. This may also affect older candidates, women and racialized persons.
- **Eliminating applicants because their backgrounds contain gaps:** This can be a particular problem for older women who have re-entered the workforce after childrearing and have had to retrain. This may also be a barrier for persons with disabilities who were out of the workforce for an extended time for medical reasons.
- **Viewing an applicant as unsuitable because they needed accommodation in the hiring process:** When making hiring decisions, employers should not take into account whether a person has requested accommodation during the hiring process.
- **Perceiving that an applicant is trouble or will somehow be disruptive because they have objected to discriminatory comment or conduct in the interview:** It is reprisal for a qualified applicant to be penalized for reacting to discriminatory comment or conduct related to a *Code* ground in an interview. For example, an employer asks an applicant whether she is single. She says that this is not relevant and asks that the interview focus on her qualifications. As a result, she is viewed as not having "people skills" and is no longer considered for the job.
- **Taking into account discriminatory customer preferences:** If an employer believes that customers would object to a person being hired due to their membership in a group protected by the *Code*, it is not allowed to take this into account in a hiring process. For example, it would be discriminatory for a manager of a small

business office serving mostly White clientele to reject a Black candidate because he believes that customers would be uncomfortable being greeted by a racialized receptionist.

Employers should make sure that persons assessing or rating candidates are trained to identify and correct for bias based on age, social class, life experience and other personal factors that may affect how they view, and ultimately score, candidates.

Example: In an airline's hiring process, all candidates were assessed on criteria such as "assertiveness," "teamwork" and "ability to have fun." Although these were age-neutral on their face, bias was introduced through the subjective views of the assessors, many of whom were under age 35. The assessors tended to choose candidates with the same age, social class and life experience as they did. Thus, workers over 35 years of age were disadvantaged compared to workers under age 35.

Employers should also make sure to review and assess the qualifications of all candidates equally. When a decision-making process is cut short, take care to make sure this is not linked to *Code* grounds, and it will not have a more severe impact on persons protected under the *Code*.

Example: Some candidates are viewed as undesirable because of their perceived race, ethnic origin, disability, sexual orientation, family status or other Code ground. The employer does not review their qualifications in as much detail as other candidates. The employer also decides to skip the reference check that is normally done. If proven, these changes from the normal process would lead to a finding of discrimination regardless of whether these candidates ultimately would have been successful if their qualifications were assessed fairly.

f) Specific concerns based on individual Code grounds

i) Age:

Under subsection 24(1)(a) of the *Code*, questions about age are allowed if the employer is a special service organization that serves a particular age group. Special service organizations are defined as religious, philanthropic, educational, fraternal or social in nature, serving mostly the interests of certain age groups. Employers can hire persons based on their age if age is a reasonable and *bona fide* job requirement.

Example: A youth group is hiring a social coordinator and the organization wishes to hire a person under age 25. The group may be able to do so, if it can show that this is a bona fide job requirement.

Even if an employer is not considered to be a "special service organization," it can still make distinctions based on age if age is a reasonable and *bona fide* qualification because of the nature of the job. If so, then the exemption under subsection 24(1)(b) of the *Code* may apply. No other questions or statements related to age are allowed.

Comments on the applicant's appearance and/or health or suggesting that the person may not fit into a youthful work culture may indicate discrimination on the basis of age and should always be avoided. The following types of statements can be reasonably be interpreted as euphemisms for age, or indirect ways of making inappropriate age-related comments:

- "Do you think you can handle this job?"
- "It takes a person who is full of vim and vigour."
- "We are looking to rejuvenate the workforce."

ii) Citizenship:

Employers can ask if a person is legally entitled to work in Canada. Avoid asking for information on nationality, place of birth or ethnic origin, even if these are required by the organization responsible for licensing the applicant's

occupation. Other than three specific situations described below, employers cannot ask for information about citizenship.

- Citizenship requirements imposed or authorized by law
  Section 16(1) of the *Code* indicates that questions about citizenship are allowed if a citizenship requirement is imposed or authorized by law for the particular job. If there is a legal requirement for citizenship, or other qualifications that have to be certified or acquired in this country, the law would have to be reasonable and non-discriminatory. Employers should note that compliance with laws from another jurisdiction does not entitle an employer to rely on section 16(1). See also i) – "Citizenship" in Section III-3 – "Grounds of discrimination: definitions and scope of protection."

  Example: A Canadian employer requires all employees to hold only Canadian or American citizenship and asks about this in interviews. As this requirement arises only under U.S. laws, these types of questions would be viewed as being contrary to the Code.

- Promoting participation of citizens and permanent residents
  Questions about citizenship or permanent resident status are also allowed in some cases under subsection 16(2) of the *Code*. An example is when a requirement of Canadian citizenship or permanent residence has been adopted to promote participation in cultural, educational, trade union or athletic activities to other citizens or permanent residents.

- Senior executives
  Employers can also ask candidates for the chief or senior executive positions questions about their Canadian citizenship or residence. Subsection 16(3) of the *Code* allows these questions to be asked if the organization has adopted a requirement that such senior executives be Canadian citizens or live in Canada with the intention to get Canadian citizenship.

iii) Race and race-related grounds:

Questions about "Canadian experience" sometimes pose particular problems for recent immigrants, and may have an adverse impact on persons based on their place of origin, ethnic origin or race. Employers should ask questions to assess whether candidates have trade or professional qualifications without asking about Canadian experience or stating that Canadian experience is preferred.

In an interview, employers should avoid asking questions or otherwise commenting on the applicant's:

- presence or absence of Canadian experience
- landed immigrant status, permanent residency, naturalization or refugee status
- place of birth
- affiliation with a particular "community" or where the applicant "comes from"
- membership in organizations such as cultural or ethnic associations
- name and/or the applicant's appearance
- name and location of schools attended.

Special service organizations that are religious, philanthropic, educational, fraternal or social may employ only people from certain racialized groups, if the organization serves mostly their interests. In these cases, employers can hire persons based on race, place of origin, ethnic origin. This exception does not, however, extend to citizenship and is only permitted if membership in the protected group is reasonable and *bona fide* because of the nature of the job.

> **Example:** Recruiters for a social organization that mainly serves Aboriginal communities and seeks to hire an employment counsellor may prefer a person who is of Aboriginal ancestry. The organization may be able to do so, provided that it can show that this is a bona fide job requirement.

In an interview, questions may be asked about language abilities, even if those requirements might be indirectly linked to a person's racial background, as long as the language abilities relate to a *bona fide* job requirement.

> **Example:** A financial institution is filling a customer service job for one of its branches located in an ethnically diverse area of the city. The position requires fluency in one or more of the languages the local population uses. Asking what languages the applicant speaks would be allowed if this is a bona fide job requirement.

One of the most common forms of discrimination that racialized candidates are exposed to in an interview situation is being asked “Where are you from?” or “What nationality is your name?” These questions single out the candidate based on race, place of origin or ethnic origin and would not likely be asked of a Caucasian candidate. They are therefore discriminatory. While an interviewer might intend no harm, or even be seeking to put a candidate at ease, these questions should always be avoided. Racialized applicants and tribunals routinely find these types of questions to be discriminatory. Where having knowledge of a particular country or language is a *bona fide* occupational qualification, the questions asked should clearly relate to the qualification.

> **Example:** Instead of asking “Where are you from,” the employer might refer back to the job description and state, “We are an Ontario-based NGO recruiting workers to provide services in Zambia. As a field worker, knowledge and experience in local geography, politics or languages are essential given the short length of the contract. Please describe what knowledge and experience you would bring to the position.”

iv) Creed/religion:

In an interview, if an applicant requests accommodation for religious requirements in the workplace, the accommodation needs may be discussed. Otherwise, employers should discuss accommodation of religious needs in the workplace after making a conditional offer of employment.

> **Example:** An observant Muslim who applies for a job that requires wearing a uniform may request accommodation for her religious requirement of wearing a hijab (a head covering).

Special service organizations that are religious, philanthropic, educational, fraternal or social may prefer to employ persons of a particular religion if the organization serves mostly the interests of that group. If the exemption in subsection 24(1)(a) applies, the organization would be permitted to ask questions about an applicant’s creed or religion.

Note that under section 19 of the *Code*, the constitutional rights and protections given to Roman Catholic schools are not affected by the *Code*.

v) Disability:

When an applicant’s disability becomes an issue during an interview, an employer is expected to canvas the need for accommodation measures. If this is not done and the applicant is not successful, this could lead to a complaint on the ground of disability.

If a person chooses to talk about his/her disability at an interview, an employer can ask about their accommodation needs and ability to perform the essential duties of the job with accommodation. Any questions beyond this scope should be made with great caution and vigilance as they may lead to a complaint on the ground of disability if the person is not hired. Avoid asking gratuitous questions such as “How did you end up in a wheelchair?” or “Have you been blind all your life?”

Questions about disability may be allowed by religious, philanthropic, educational, fraternal or social organizations that serve persons with disabilities. The exception in subsection 24(1)(a) of the *Code* applies provided that that having a particular disability is a reasonable and *bona fide* requirement because of the nature of the job.

Requests for a driver's licence number or a copy of the licence, when relevant to the job, should only be made following a conditional offer of employment. Other disability-related issues should not be raised until after a conditional offer of employment has been made. All other questions about an applicant's disability are prohibited.

vi) Family status:

Where employees have significant caregiving responsibilities, their ability to travel regularly may be limited. Avoid assuming that an employee or applicant with children will not be interested in work that involves travel.

If travel is not a *bona fide* requirement, employees should not be denied opportunities because their caregiving responsibilities prevent them from traveling regularly or extensively. If travel is a *bona fide* requirement, and an applicant has said that he or she cannot travel often because of family status, this person should not automatically be screened out. If the person is otherwise qualified and suitable for the job, the employer may be expected to offer the person the job and provide accommodation to the point of undue hardship (for example, by recognizing related dependent-care expenses or providing appropriate supports).

An employer may grant or withhold employment or promotions from a person who is a child or parent of the employer or an employee. When an employer has a policy on this issue, inquiries about whether an applicant is a child or parent of a current employee would be allowed. However, such a policy must be applied consistently and without regard to the personal characteristics of the person being interviewed.

vii) Marital status:

Questions based on marital status may be asked if the organization serves a particular group of persons identified by their marital status. Questions about marital status are allowed if the employer is a religious, philanthropic, educational, fraternal or social organization that serves a particular group of persons such as single, divorced or other persons identified by their marital status. The *Code* permits giving preference to persons based on their marital status, as long as marital status is a reasonable and *bona fide* requirement because of the nature of the job.

For other employers, marital status may also be a reasonable and bona fide requirement for a particular job. In these cases, questions about the particular qualification can be asked at the employment interview stage. No other questions about marital status are allowed.

An employer may grant or withhold employment or promotions to a person who is a spouse of the employer or an employee. When an employer has a policy on this issue, questions about whether an applicant is a spouse of a current employee or the employer would be allowed. However, such a policy must be applied consistently and without regard to the personal characteristics of the person being interviewed.

> **Example:** A husband applies for a job with the company his wife works at. He passes the initial screening based on his application form, resume and a written test. He is invited to an interview. During his interview, he states that he would need accommodation related to disability to perform the essential duties of the position. The interviewer then asks him to confirm that he is in fact the spouse of an employee (information that was known even during the initial screening phase). When the applicant does so, he is told that he is not eligible for the position because of an unwritten nepotism policy. This scenario raises an inference of discriminatory treatment based on the intersection of disability and marital status.

No other questions about marital status are allowed.

viii) Record of offences:

Employers are allowed to ask about and consider unpardoned Criminal *Code* convictions when hiring. It is discriminatory to consider information about pardoned *Criminal Code* convictions and provincial offences unless an

exemption applies.

Where an employer can show that the requirement is reasonable and *bona fide* because of the nature of the job, the exemption in subsection 24(1)(b) applies, and an employer can choose not to hire based on record of offences.

> **Example:** A school board has hired as school bus drivers only people who do not have convictions for careless driving. This requirement is reasonable and bona fide.

Questions to determine if an applicant is bondable are also allowed, if being bondable is a reasonable and *bona fide* requirement given the nature of the job. All other questions are prohibited.

ix) Sex (and pregnancy):

In some cases, because of the nature of the job, being a man or a woman may be a reasonable and *bona fide* qualification. In interviews, an employer can discuss this with the applicant. To hire based on sex, employers must be able to show that such a requirement is reasonable and *bona fide*, and that accommodation would cause undue hardship.

> **Example:** An employer hired only male attendants for night shifts providing care to elderly residents with disabilities that make them aggressive. This is found to be discriminatory because it is based on a stereotype that women would be less able to deal with aggression. There are less discriminatory alternatives, such as providing female attendants with the needed training.

Organizations that are religious, philanthropic, educational, fraternal or social are allowed to prefer to employ only men or only women, if the organization serves mostly their interests and being a man or a woman is reasonable and bona fide based on the nature of the job.

The right to equal treatment in employment because of sex prohibits pregnancy-related questions during a job interview. For example, an employer cannot ask an applicant whether she is pregnant or whether she has or plans to have a family, unless it relates to a reasonable and *bona fide* job requirement. If the applicant raises the issue of accommodation for pregnancy-related needs, the accommodation needs may be discussed at the interview stage. At the interview stage, the employer may expand the scope of job-related questions, if needed, to learn the applicant's qualifications or ability to perform the essential duties with accommodation. However, it may suffice for an employer to indicate that the accommodation process will be discussed following a conditional offer of employment.

Employers can refuse to hire someone based on pregnancy if they can show that this is reasonable, done in good faith and based on the nature of the job. However, to benefit from this exception, employers must show that the essential qualifications or requirements of the job cannot be changed or accommodated without creating undue hardship, considering excessive costs or health and/or safety risks. See also Section IV-2a) – Make sure that job requirements are reasonable and made in good faith."

x) Sexual orientation:

Questions about sexual orientation are not allowed during an interview, even if the employer is a religious, philanthropic, educational, fraternal or social organization. This is because the ground of sexual orientation is not listed in subsection 24(1)(a). Questions relating to sexual orientation may be asked to determine eligibility for a special program. Otherwise, no questions about sexual orientation are permitted.

6. Requesting job-related sensitive information

The following types of information should only be requested if they are *bona fide* requirements because of the nature of the job. Due to the sensitive nature of this information, only request it after making an offer (preferably in writing)

of employment:

- driver's licence (may reveal disability, age, sex and gender identity)
- birth certificate (may reveal age, sex and gender identity)
- work authorization issued by Immigration Canada (contains information on date of arrival in Canada)
- educational or professional credentials (may reveal information on place of origin)
- Social Insurance Number (may contain information on date of arrival in Canada and residency status)
- information about health or age necessary for pension, disability, superannuation, life insurance and benefit plans [may reveal disability, age, sex (pregnancy) or gender identity]
- police record checks (may reveal information about a person's mental health)
- psychological testing, if legitimately required for assessing ability to do the job
- next-of-kin or person to be notified in case of emergency (may reveal family status, marital status, sexual orientation)
- insurance beneficiary (may reveal family status, marital status, sexual orientation)
- accommodation needs.

Keep any such information confidential.

a) Accommodation in terms of physical demands and other essential duties

Once a conditional offer of employment is made, a person can be asked to review the essential duties of the job and tell you if they need accommodation to perform the essential job duties. The employee does not have to disclose disability-related or other needs or medical information that do not relate to the essential duties of the job.

Employees should not be singled out for questioning based on their appearance – instead, ask all employees the same questions about accommodation. Link the request for information to the employer's accommodation policy, and indicate that accommodation requests may be related to one or more *Code* grounds. Clearly advise employees why this information is being collected – such as to help you accommodate any identified *Code*-related needs to the point of undue hardship.

> **Example:** An employer has a form that it asks its employees to fill out after being hired. On this form, it asks, "Do you consider yourself to be disadvantaged in employment by reason of any persistent physical, mental, psychiatric, sensory or learning impairment?" While it is not inappropriate to ask for this kind of information after hiring, the question itself is hard to understand, the words used seem negative and it is not clear why such a question is being asked, as there is no mention of accommodation. The end result is that employees who do have disabilities tend to answer "no" to this question, and start their jobs without appropriate accommodation.

Some employees may need accommodation to meet the job's essential physical demands. The employer is entitled to expect that, with accommodation, an employee will be able to do the essential job duties, as long as these duties are *bona fide*. Employers sometimes use physical demands analyses to assess an employee's ability to perform the physical requirements of the job. These should, however, be used with care since they are often developed with an able-bodied person in mind. Analyses should be designed or re-designed so that they are not exclusionary, and accommodation should be built into the analyses themselves.

b) Medical tests

In the past, employers often screened out applicants with disabilities based on medical information on application forms, or from pre-employment medical exams. The Commission takes the position that requiring such information as part of the application screening process violates subsection 23(2) of the *Code*.

Medical assessments to verify or determine a person's ability to perform essential job duties should only take place after a conditional offer of employment is made, preferably in writing. This allows an applicant with a disability the

right to be considered exclusively on her or his merits during the selection process.

Information on medical tests may have an adverse impact on people with disabilities. Therefore, employers should only get information from medical testing on the applicant's ability to perform the essential job duties and any restrictions that may limit this ability. The applicant must give the employer enough information to help them provide accommodation.

The employer may be placed in a vulnerable position if he or she directly receives any information about an applicant's medical condition. This information leaves open the possibility for an allegation to be made that later decisions made by the employer, such as to hire someone else, or to discipline or terminate the employee, were based on that information.

Therefore, it is the view of the Commission that to protect the employer from allegations of discrimination, as well as the applicant or employee from discriminatory practices, medical information should remain with the physician and away from an employee's personnel file. When needed by the employer, the employee's physician can share relevant information (for example, restrictions in the ability to perform essential duties), while excluding information that may identify a disability.

Some companies make sure that such information is kept separate from employment decisions by having designated staff, such as nurses, responsible for safeguarding any medical information that may be provided by an employee's doctor and facilitating accommodation. Requirements under privacy legislation may apply to receiving, storing and disposing of employee medical information. For information on privacy legislation, see Appendix B - "Human rights in the workplace: which laws?"

The following checklist sets out an employer's obligations when putting medical testing in place:

1. **Have job applicants been notified of testing before they start the job?**
   Where medical testing is appropriate, the employer should notify job applicants of this requirement at the time the job offer is made. Make clear to the applicant when and why such testing might be needed.

2. **Is there an objective basis for testing?**
   The employer should make sure that the medical testing is needed and appropriate. To decide when testing is needed, employers, where applicable, should consider the following questions, among others:

   a) Is the testing justified objectively in terms of job performance? Is there a rational connection between testing and job performance?
   b) Is there an objective basis to believe that the degree, nature, scope and probability of risk caused by the disability will adversely affect the safety of co-workers or members of the public?

3. **Have arrangements been made for competent handling of test samples?**
   Medical testing must be performed by qualified professionals and the results analyzed in a competent laboratory. Also, employers are responsible for making sure the samples taken are properly labelled and protected at all times.

4. **Have the results of the test been reviewed with the employee?**
   Procedures should be put in place for the physician to review the test results with the employee concerned.

5. **Are the test results kept confidential?**
   To protect the confidentiality of test results, all health assessment information should remain exclusively with

the examining physician and away from the employee's personnel file. Such information should be safeguarded in accordance with applicable privacy legislation and practices.

For more information, see the discussion of bona fide occupational requirements in Section IV-2 – "Setting job requirements."

c) Psychometric and psychological testing

Employers sometimes use tests that assess psychological or personality profiles of job applicants. The use of these and other behaviour profiles as part of a screening process before hiring raises concerns about human rights violations. Such tests should never be administered before a conditional offer of employment, and even then should be approached with caution.

Subsection 23(2) of the *Code* prohibits the use of an employment application form or a written or oral inquiry that directly or indirectly classifies an applicant on the basis of a prohibited ground of discrimination. This also applies to psychological profiles and testing. The validity of behavioural testing as a tool to predict on-the-job performance may be subject to a complaint under the *Code*.

There are two major issues with the use of behavioural profiles. The first is whether using such a screening tool directly discriminates based on any of the *Code* grounds. Direct discrimination could happen if the behavioural profile test directly identifies or classifies an applicant on the basis of a prohibited ground of discrimination. A test, for example, that asks about a person's religious beliefs is directly discriminatory and is not allowed.

The second issue concerns reasonable and bona fide behaviour profiles that might infringe the *Code* if they exclude a group of persons who are identified by a prohibited ground – for example, if members of certain ethnic groups are accidentally yet consistently screened out by a test that favours other cultures.

Any test should be a reasonable and bona fide method of assessing an applicant's ability to do the job. Otherwise it should not be used. Tests should be tailored to actual job duties. Take care to make sure that tests take into account the diverse ways people can successfully perform jobs and that appropriate accommodation is provided. There is an obligation to accommodate the needs of the group the person is a member of to the point of undue hardship, while considering the cost, outside sources of funding and any health and safety requirements.

Avoid testing that seeks to assess personal interests, attitudes and values. If these tests are legitimately needed to assess ability to perform a job, use them with great care to make sure they do not favour certain cultures or genders. Many such tests are outdated and may have been created based on stereotypes or biases relating to *Code* grounds. Before giving a test to current or potential employees, research how the test has been created and assess whether it is reliable, up-to-date, valid and complies with the *Code* and any guidelines or practices established by professional organizations such as the Canadian Psychological Association. This will be relevant if a complaint is filed. Even if a test is fair, an employer will need to put in place measures to minimize the impact of unintentional bias on the part of persons scoring candidates' answers. One option is to have more than one person score each candidate.

d) Pre-employment drug and alcohol testing

It is a legitimate goal for employers to have a safe workplace. One method sometimes used by employers to achieve that goal is drug and alcohol testing. In recent years, human rights issues related to drug and alcohol testing have become increasingly prevalent in Canadian workplaces, especially those affiliated with companies operating in other jurisdictions such as the U.S. However, such testing is controversial and often gives rise to claims of discrimination.

Drug or alcohol dependency as a disability
Under the *Code*, drug and alcohol dependencies - as well as perceived dependencies - are a form of disability. Persons with disabilities, or persons who have had disabilities, are protected against discrimination in the workplace or in a hiring process.

Example: An employer refuses to promote an employee because of the perception that the employee has an alcohol dependency. Because of this perception and resulting action by the employer, the person's right to equal treatment under the Code may have been infringed.

Example: A person who had a drug or alcohol dependency in the past, but who no longer suffers from an ongoing disability, is still protected by the Code.

i) Basic principles:

Drug and alcohol testing is at first glance discriminatory under Canadian human rights law. Employers can, however, justify discriminatory rules if they can meet the three-part test discussed earlier under Section IV-2 – "Setting job requirements – Make sure that job requirements are reasonable and made in good faith"

Applying the three-part test to drug and alcohol testing, consider the following questions, where applicable:

1. Is there an objective basis for believing that job performance would be impaired by drug or alcohol dependency? In other words, is there a rational connection between testing and job performance?
2. Is there an objective basis for believing a specific employee's unscheduled or recurring absences from work, or habitual lateness for work, or inappropriate or erratic behaviour at work are related to alcoholism or drug addiction/dependency? These factors could demonstrate a basis for "for cause" or "post incident" testing provided there is a reasonable basis for drawing these conclusions.
3. Is there an objective basis to believe that the degree, nature, scope and probability of risk caused by alcohol or drug abuse or dependency will adversely affect the safety of co-workers or the public?

Drug and alcohol testing that has no proven relationship to job safety and performance has been found to be a violation of employee rights.[41] A relationship or rational connection between drug or alcohol testing and job performance is an important component of any lawful drug or alcohol testing policy. The policy must not be arbitrary in terms of which groups of employees are subject to testing.

Example: An employer operating a shipping company only tests new or returning employees for alcohol but not other employees. This would not be justifiable. At the same time, testing employees in safety sensitive positions only (for example, truck drivers and fork-lift operators) may be justifiable.

ii) Pre-employment testing is a form of medical examination:

Testing for alcohol or drug use is a form of medical examination. In general, employment-related medical examinations or inquiries, conducted as part of the applicant screening process, are prohibited. Alcohol or drug testing is allowed in restricted circumstances on the job. See Section IV-9k) – "On-the-job drug and alcohol testing." Before employment, such testing must comply with the following principles:

1. Pre-employment medical examinations or inquiries at the interview stage should be limited to determining a person's ability to perform the essential job duties.
2. To use a testing program before hiring, the employer must be able to show that pre-employment testing provides an effective assessment of the applicant. It has long been the Commission's view that employers should not do pre-employment testing that does not actually measure impairment. Recent court decisions state that pre-employment safety-certification drug testing by urinalysis may be acceptable in some cases, as long as accommodation is provided following positive test results. The extent to which pre-employment testing is acceptable is a matter before the courts. Employers should proceed with caution.
3. Where drug or alcohol testing is a valid requirement relating to essential job duties, the employer should notify job applicants of the need to undergo this testing when they make an offer of employment. Employers should make clear to applicants the reasons why such medical testing is needed.
4. The employer's drug and alcohol policy should allow for accommodating people who receive positive test results.

5. If applicants or employees request accommodation to enable them to perform the essential job duties, the employer must provide individual accommodation unless it is impossible to do so without causing undue hardship.

e) Gender identity-related information

Gender identity is a personal characteristic that may or may not be known to others. While most people are not concerned about others knowing their gender identity, this may not be the case for transsexuals and transgenderists.

An employer or service provider who legitimately requires and collects personal information that either directly or indirectly identifies a person's sex must ensure the maximum degree of privacy and confidentiality of the information. This is because the designation of sex on documents such as a birth certificate or driver's licence may be different from a person's gender identity. This applies in all situations and cases including employment records and files, insurance company records and medical information. The information might be needed to enable an employee or individual to claim or register for benefits or for other purposes.

To protect the person's privacy, all such information should remain exclusively with designated staff and be locked in a filing system. An employer or service provider who fails to properly safeguard information about a person's sex or gender identity may be found to have infringed the *Code* if the employee is subjected to discrimination because of his or her gender identity.

f) Police record checks

Persons with mental illness, or who have had a mental health crisis in their lives, may have been taken to hospital by the police under the authority of Ontario's *Mental Health Ac*t. The records resulting from these non-criminal police contacts may have a lifelong impact when people apply for employment or a volunteer position.

The Commission recognizes that organizations and police forces have a responsibility to protect the public and maintain safety. However, if not conducted and used properly, police background checks can lead to human rights concerns.

Organizations are increasingly asking job applicants and volunteers to consent to police background checks. In some cases, these are necessary to protect people who may be vulnerable, such as for positions that involve working with children, elderly people or persons with certain types of disabilities. In other cases, the checks may not be needed, but rather preferred as an additional screening tool. Either way, the provisions of the *Code* apply if the check has an adverse impact on persons with mental disabilities who have had prior non-criminal police contact. It is therefore very important for individuals and organizations requesting background checks to understand the human rights implications of this information.

Section 23 indicates that a person's suitability for a job or a volunteer position should not be based on assumptions related to *Code* grounds, such as mental illness. A key human rights concern arising from police background checks is that information about contacts related to the Ontario *Mental Health Act* are stored, including voluntary and involuntary transfers to medical facilities.

Also, sections 11 and 17 of the *Code* make it clear that even neutral requirements that do not appear to target any individual or group may still have an unintended discriminatory effect. Police background checks may have an adverse impact on racialized persons or persons with mental illness who may disproportionately have encounters with police because of racial profiling or discrimination.

> **Example:** A racialized man is charged with causing a disturbance, even though other White youths engaged in worse behaviour are not. He cannot afford a lawyer, so he pleads guilty without raising his allegations of racial profiling. When he applies for a job that requires a criminal records check, this incident will be flagged and he may be viewed as ineligible for the job.

Because of the potential for an adverse human rights impact, police background checks should only be requested of individuals where it is a reasonable and *bona fide* requirement because of the job or volunteer position being applied for. While an organization may prefer to have as much information as possible about someone, human rights concerns prevail.

An organization that wants to run a background check must be prepared to justify the need using the test set out by the Supreme Court of Canada for assessing whether a policy, practice or requirement is reasonable and *bona fide*. See Section IV-2a(i) – "Test for *bona fide* requirement." An organization that can show a legitimate need for conducting a background check should only request a check after it has made a decision to offer a candidate the job, conditional on a satisfactory outcome of the background check. In other words, such checks should be the last step in a recruitment process. They should be a final measure to make sure a candidate is suitable. See also the Commission's Draft Policy on Mental Health Discrimination and Police Record Checks, posted on the Commission's website for consultation as of February 11, 2008, and any final version that may be later approved by the Commission.

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[41] Entrop, supra note 6.

7. Pay, benefits, dress codes and other issues

a) Human rights training and education for employees

As is noted in Section IV-1a(v) – "Educate and train employees on policies and procedures," it is expected that all employees will receive human rights training so that they can know and understand their obligations in the workplace. It is very important that this be done for employees providing services to the public and senior staff responsible for hiring, managing performance, accommodations, discipline and handling human rights concerns. Failing to train these key staff may lead to human rights claims.

b) Protect Code-related personal information

An employer or service provider who legitimately requires and collects personal information that either directly or indirectly identifies a person by one of the prohibited grounds of discrimination listed in the *Code* must maintain the maximum degree of privacy and confidentiality of the information. This applies in all situations, including employment records and files, insurance company records and medical information. The information might be needed to enable an employee or individual to claim or register for benefits, pensions or for other purposes. To protect the person's privacy, all information should remain exclusively with designated staff (such as the human resources person) in a secure filing system.

For example, documentation that requires employees to identify next-of-kin, or a beneficiary for insurance purposes or benefits claims forms, may contain information that identifies employees by sexual orientation. If this information is not treated confidentially, employees who are gay, lesbian or bisexual, or who are in a same-sex relationship, may feel vulnerable to subtle or overt discrimination or harassment.

As well, employees making accommodation requests may legitimately be concerned that details about, for example, their creed, disability or pregnancy will be revealed.

> **Example:** An employee with HIV has provided documentation to show her need for a flexible schedule and rest periods to manage periods of fatigue, as well as time for health care appointments. However, the employee does not have to disclose that she is HIV-positive. The employer is entitled to know that the employee has a disability and that she needs certain accommodations to stay productive at work. Maintaining confidentiality for persons with mental illness may be especially important, because of the strong social stigmas and stereotyping that still persist about such disabilities.

Documentation supporting the need for particular accommodation (for example, flexible hours, or a technical aid) should be provided only to people who need to know the information. In some cases, it may be preferable for information to be provided to the company's health department or human resources staff rather than directly to the supervisor, to further protect privacy. Keep medical documents separate from the person's corporate file.

An employer or service provider who does not properly safeguard the personal information about an employee may infringe the *Code*. A complaint can be made where this results in a person being subjected to discrimination and/or harassment.

Practice tips:

- **Information needed for benefit plans:** Information relating to an employee's religion, disabilities or sexual orientation may be needed in some cases. For example, information related to *Code* grounds may be needed for enrolment in employer pension and benefit plans. Employers should only collect information that they really need. While benefit information about an employee would likely include age, sex, marital status and family status, an employer would not likely need to collect information about an employee's race, religion, ethnic origin or sexual orientation. Disclosing such information for any purpose not related to the benefits would be contrary to the *Code*,
- **Information needed for accommodation:** Sub. 17(2) of the *Code* requires employers to accommodate an employee's needs related to prohibited grounds of discrimination. To accommodate employee needs related to religious beliefs, disabilities or other *Code* grounds, an employer would need to collect and use that data. Disclosing such information for any purpose not related to such accommodation would be contrary to the *Code*.
- **Disclosing information to third parties:** Information may be disclosed to the government agencies that require the information to be collected. Examples of this would be Revenue Canada, or the Employment Standards Branch of the Ministry of Labour. These agencies administer legislation that requires employers to collect and retain various types of information, permits the agencies to request information and requires employers to provide such information on an inspection or audit.
- **Separating employee records:** Only disclose information that is required. For example, the Canada Customs and Revenue Agency would not need information about an employee's race, disabilities or sexual orientation. In other words, do not just provide a general employee file that might include information about the grounds set out in the *Code*. Instead, store data in a form that allows you to retrieve and disclose only the parts that are needed.

c) Codes of conduct (including dress codes)

Where an employer chooses to institute a policy requiring new and existing employees to follow a code of conduct, including a dress code, or to sign an agreement not to perform certain kinds of behaviours, steps must be taken to make sure that the expectations do not contravene the *Code*.

i) Codes of conduct:

A code of conduct should not rely on stereotypes connected to *Code* grounds. Nor should it apply relatively more often to any group protected by the *Code* than it would to anyone else. Accommodation that is required by an employee should also be provided to the point of undue hardship.

> **Example:** An employer has a code of conduct prohibiting swearing in the workplace. As a result of his mental disability, an employee cannot comply with the rules and requests accommodation when he is threatened with discipline. Despite this, the employer suspends him. In the context of the employee's disability-related needs, the discipline would be viewed as discriminatory.

Morality statements: Human rights complaints may arise from an employer's policy requiring new and existing employees to comply with a "morality statement." In these statements, employees are usually asked to agree not to engage in certain listed behaviours. This kind of approach may contravene the *Code* if the listed behaviours relate

to *Code* grounds such as sexual orientation or marital status and are not bona fide occupational requirements.

> **Example:** An organization has a policy stating that employees must not engage in a same-sex relationship and that disciplinary sanctions, up to and including termination, apply for breaking this policy. Putting such a policy in place would amount to discrimination on the basis of sexual orientation, subject to the availability of any defence under the Code.

While an employer may seek to identify itself as a religious organization to qualify for a defence under the *Code*, this complex factual determination can only be made by a tribunal. As was noted earlier, defences in the *Code* are interpreted narrowly, and an employer must be able to prove that such an exemption applies. There is a real risk that a tribunal may find that the exemption does not apply, and that the requirement may be discriminatory.

ii) Dress codes:

Employers can have a dress code or rules about dress that meet the business needs of the organization, as long as they comply with the *Code*. Rules about dress may include having to wear a uniform or having to wear protective gear. Design such rules to be inclusive of all employees, including men and women, people with disabilities, and anyone who needs accommodation for religious reasons. Make sure that any requirements are made in good faith and are genuinely required to do the job.

> **Example:** All employees are expected to wear blue clothing with the company logo when on duty. The options are shorts or pants, shirts with either short or long sleeves and skirts at either knee or ankle length. The dress code states that religious head coverings of any type may be worn with the uniform. Women are not required to wear skirts and, in fact, most choose to wear pants. Female employees who wish to dress modestly for religious reasons appreciate the option of being able to wear ankle-length skirts without needing to make an accommodation request.

While it is acceptable for men and women to have different uniforms, employers must make sure that any uniform policy does not undermine the dignity and right to full participation in the workplace of employees of either sex. An employer should be prepared to prove that any sex-linked differences in the dress code are bona fide occupational requirements. Do not subject female employees to more difficult requirements than male employees, and do not expect them to dress provocatively to attract clients. It is discrimination based on sex to require female employees to wear high heels, short skirts and tight tops.

Where employees are providing services to the public, a requirement that employees wear name badges can be a part of preventing or tackling racism and racial discrimination. For example, police officers or security guards who may be involved in racial profiling during their shifts can be more easily identified if they wear name badges.

Employers will need to provide accommodation to the point of undue hardship for dress code issues that cannot be addressed through inclusive design. See also Section IV-8f(ii) – "Creed – accommodating employees' religious needs" and Section IV-8e(vi) – "Dress codes and accommodation requests."

d) Hours of work and breaks

Sometimes decisions about schedules, hours of work and break times lead to complaints of discrimination by employees protected under the *Code*. In some cases, these can be traced back to a lack of inclusive design and in other cases, a failure to accommodate.

For example, an inclusively designed shift policy would take into account that some employees will not, as a result of a *Code* ground, be able to work a night shift or a rotating shift:

- experts estimate that 4 to 5% of the general population have bipolar disorder. This disability is often successfully managed through a combination of regular sleep and medication with follow-up

- similarly, families with small children may be unable to find a caregiver to provide care overnight, given that most daycare centres only run during regular office hours.

There are many situations where employers would be expected to accommodate based on *Code* needs relating to hours of work and break times. For example, an employer might also be expected to allow an employee to change from a night shift or a rotating shift to a day shift as one of a range of accommodations. Failing to accommodate in the following situations amounts to discrimination:

- an employee is scheduled for Friday evening shifts despite his religious observances and related accommodation request to work an alternate shift (creed)
- an employee is disciplined for trading shifts with a colleague to meet a caregiving need – there is a blanket rule against this kind of informal shift change (family status)
- an employee with a disability is not allowed to adjust her shifts to coincide with the timing of Wheel-Trans transportation (7:30 a.m. drop-off and 4 p.m. pick-up). This means that she cannot work full-time hours even though she could easily do her work in these hours (disability)
- an employee who is pumping breast-milk for her infant is told that she is not allowed to extend her break-times without being docked pay for every minute she is late (sex)
- a Muslim employee requests flex time to be able to pray at specific times throughout the day. The employer says no on the basis that if he grants this accommodation request, other employees will ask for flex time too (creed)

An employee should not be forced to accept part-time hours as an accommodation without having assessed other alternatives. Where an employee's hours are significantly reduced after he or she has made an accommodation request, this may be viewed as a reprisal or a failure to meet the duty to accommodate.

Flexible scheduling is a part of inclusive design that can address needs relating to multiple *Code* grounds. This can help employees who are pregnant, older or who have disabilities, when they have medical appointments. These employees may be able to use flexible scheduling so they are at work during their most productive periods in the day, if their symptoms or needs vary according to the time of day. People who are responsible for providing care or support to their children, a dependent with a disability, or parents, who may have age or disability-related needs, will also benefit from flexible work arrangements. Flexible scheduling also provides a way for employees with creed-based needs to balance their religious beliefs and work life.

Flexible scheduling may include:

- flexibility on break times
- alternative start and end times on the days when the person cannot work for the entire period
- part-time hours
- use of lunch times in exchange for early departure or staggered work hours
- where the person has already used up paid holy days, vacation days or other days he or she is entitled to, the employer should also consider allowing the employee to make up time lost, use floating days off or use other flexible work arrangements to compensate. See also Section IV-8(f)ii(a) – "Requests for paid days off for religious observance."

When considering accommodation requests, keep in mind that the *Code* has primacy over legislated requirements, unless the law specifically says that it is to apply regardless of the *Code*.

> **Example:** An employee asks for time off for religious observance and offers to make up his time over his lunch hour. The employer is aware of the Employment Standards Act (ESA) rules about eating periods and hours of work, but understands that he has to first meet the duty to accommodate under the Code.

e) Assigning tasks

Assign tasks and duties fairly and consistently, taking into account employees' accommodation needs. The following types of situations may lead to discrimination claims:

- A police officer is re-assigned to office duties soon after she notifies her supervisor of her pregnancy, although she has not asked for accommodation and is able to continue with her usual tasks.
- Employees with disabilities are assigned to light duties in the only area of an organization where such duties are assigned. There is tremendous stigma associated with this unit – all staff refer to it by a nasty wordplay on the unit's real name.
- A racialized employee states that he is assigned the dreaded night shift more often than others and often asked to clean the washrooms, although this is not normally part of the job.
- An employee is on part-time work as a medically documented accommodation. Although her doctor says she is only allowed to work 20 hours per week, she is routinely assigned tasks that would fill a full-time work week. If she does not finish the work, she is disciplined.
- An employee has medical restrictions and cannot lift heavy objects. These tasks are re-assigned to his co-workers who openly complain and make fun of him. The employer does not stop them from doing this.

f) Pay and bonuses

Employee compensation may take on different forms, such as pay and bonuses, contributions to benefit premiums or accruing vacation credits. Where employers, as a matter of course, pay a certain form of compensation to other employees who are away from work, employees absent due to disability are also entitled to such compensation.[42] Pay and bonuses should be given without regard to *Code* grounds such as sex or race. It is discriminatory to pay women, racialized persons or other people protected by *Code* grounds less than other employees, when doing equivalent work.

> **Example:** Although most of the workers in a unit are performing the same tasks, employees who are racialized or newcomers whose first language is not English are paid less than White employees. The difference in salary is even greater where the employee is racialized and a woman or a person with a disability. Unless the employer can prove that the differences in salary are based on legitimate factors such as date of hire or the tasks performed, this would be discriminatory.

Linking how bonuses, salary pay scales or eligibility for salary increases are determined to attendance may be a problem since employees with disabilities, caregiving responsibilities or other *Code*-related issues may be disproportionately affected by such steps. In effect, such an approach could create salary inequities for persons with disabilities or other *Code* needs compared to employees not similarly identified by *Code* grounds.

> **Example:** An employer has a policy that states that any employee who is absent more than four times in four months is not entitled to a raise or bonus. An employee with a chronic illness is absent more often than this. Although her absences are linked to documented medical needs, she is denied her yearly raise. She requests that her absence rate be calculated based on absences not linked to her medical needs or other Code grounds. This request is denied. This policy is discriminatory as it is not inclusively designed and does not take accommodation requirements into account. The employer has not met its duty to accommodate and may be found to have discriminated against the employee.

In some cases, discrimination may be identified in differences in pay between occupational groupings (for example, pay equity cases compare pay for jobs usually held by women against jobs requiring similar skills that are usually held by men) or between individuals in the same position.

> **Example:** Although wages are calculated based on seniority, a male with low seniority is paid higher than would be warranted based on his seniority. It turns out that he has been allowed to claim overtime unofficially while women in the same position must get approval based on an overtime policy. This amounts to sex discrimination.

g) Vacation

Code-related time off should not affect decisions about vacation entitlement. For example, if an employer considers or is influenced by an employee's disability in making decisions relating to vacation this may be discriminatory.

> **Example:** An employee missed two months of work due to multiple sclerosis, returned to work for three months and then was off work for two months due to a different illness. Her employment was terminated after she took vacation. She was fired because she was viewed as having been absent from work too often in the preceding months. In reaching this conclusion, the employer took into account disability-related absences the employer would be expected to accommodate to the point of undue hardship. Thus, the employer may be seen to have breached the Code.

An employee on a *Code*-related leave of absence is still entitled to accrue vacation time. The entitlement to vacation pay depends on the terms of the employee's contract or the collective agreement in place. If vacation pay and time are linked to service, the employee continues to accumulate both during a leave. On the other hand, if pay is based on earnings and a person is receiving benefits under Employment Insurance or the Workplace Safety and Insurance Act only during the leave, it is not discriminatory for the employee to accrue only vacation time but not vacation pay. If the employer normally provides a top-up for employees receiving benefits during a *Code*-related leave, these employees would be entitled to receive vacation pay based on those earnings.

> **Example:** An employee is off work on maternity and parental leave for one year. She receives the maximum amount of benefits under EI for 50 weeks. The employer provides a top-up to 95% of her salary for the first two weeks (for which she receives no benefits from EI) and for the following 35 weeks. She is entitled to 4% of these earnings as vacation pay and accrues two weeks of vacation time, as she would have had she continued to work full-time.

h) Earning seniority

Seniority directly affects the ability of employees to get, stay in and thrive in the workplace. Seniority is generally considered when promoting, advancing, laying off or recalling an employee, and may be a deciding factor between employees.

Employees who are absent due to disability or pregnancy or other *Code* grounds, such as family status, should not be treated differently from other employees in earning seniority. For example, in one workplace, all nurses on unpaid leave of absence due to disability did not accumulate seniority. The Ontario Court of Appeal said that the treatment of employees with disabilities should be compared to the treatment of all employees and not simply employees absent for other reasons. Since nurses absent due to disability were being treated differently from other employees, there was a contravention of the *Code*.[43]

> **Example:** A collective agreement says that any employee on a leave does not accrue seniority while off work. After returning to work from maternity leave, an employee is selected for layoff because she has the least seniority. This scenario raises human rights concerns.

Assignments of seniority that are based on or affected by factors listed in the *Code* may give rise to claims of discrimination. For example, seniority should not be assigned on the basis of age when more than one employee is hired on the same day.

i) Enrolment in group insurance plans:

Discrimination may take place where a term or condition of employment requires enrolment in a group insurance contract, and an applicant does not qualify for the insurance plan because of a disability (or other *Code* ground). Under subsection 25(1) of the *Code*, the term or condition of employment itself would be viewed as a violation of the *Code*.

Subsection 25(2) of the *Code* permits group insurance contracts between employers and insurers to allow for different treatment based on sex, as long as they comply with the *Employment Standards Act (ESA)* and regulations. No provisions permitting different treatment of health-related absences because of pregnancy or during maternity leave have been included in the regulations under the *ESA*. Under the *ESA* and its regulations, employers must provide the same benefit entitlements to employees on pregnancy leave or parental leave as they provide to employees on other types of leave.

Discrimination may also arise where an employee is treated differently from other employees in practices relating to insurance plans because of *Code* grounds.

> **Example:** A female employee is asked to pre-pay for her medical insurance plan before leaving for maternity leave, while her male colleagues on medical leave are not asked to do this. This would be discriminatory.

j) Benefit and pension plans

Issues with pensions and benefits are often challenging, as they are governed by a complex statutory regime as well as actuarial factors.

The protections in the *Code* extend to benefit and pension plans. Benefit plans that provide benefits to dependants must also respect the protections afforded to persons identified by *Code* grounds such as family status, sex or disability. Human rights concerns on the grounds of age, disability, sex (pregnancy), marital status and family status arise most often.

Pension plans take effect once persons reach a certain age and are, therefore, of particular concern to older persons. As well, other grounds of discrimination such as disability, marital status and family status may be relevant when considering pension benefits.

Discrimination complaints in pension and benefit schemes must be considered on a case-by-case basis. In general, employers must justify a pension or benefits regime as a bona fide occupational requirement. For example, using length of service as a benchmark for decisions relating to eligibility for workplace benefits or pensions must be a *bona fide* requirement. Otherwise, it may amount to discrimination against young people, women who are re-entering the workforce or persons with disabilities who may have changed jobs.

Section 25 of the *Code* contains specific rules for pension and benefit plans. Under section 25(1), it is a violation of the *Code* to deny employment or make employment conditional on enrolling in an employee benefit, pension or retirement plan or fund or a contract of group insurance between an insurer and an employer that makes a distinction, preference or exclusion on a prohibited ground of discrimination.

However, some distinctions within pension and benefit plans may not be discriminatory within the meaning of human rights law. The following actions do not infringe the *Code*:

- an employee retirement, pension plan, fund or contract of group insurance between an insurer and an employer that complies with the ESA and regulations under it [section 25(2)]. The relevant grounds are sex, marital status or family status
- an employee benefit, pension, retirement or group insurance plan or fund that complies with the ESA and regulations under it [section 25(2.1)]. The relevant ground is age, and this provision applies whether or not a plan or fund is the subject of a contract of insurance between an insurer and an employer
- a reasonable and *bona fide* distinction, exclusion or preference made in an employee disability or life insurance plan or benefit because of a pre-existing disability that substantially increases the risk [section 25(3)(a)]
- a reasonable and *bona fide* distinction, exclusion or preference based on an employee's pre-existing disability in an employee-pay-all or a participant-pay-all benefit plan, pension, group insurance contract or in a plan, fund or policy offered by an employer with less than 25 employees (section 25(3)(b)].

O. Reg. 286/01 under the ESA regulates employment-related disability, medical, dental, drug, life insurance and pension plans. See also section ii) "Age" below.

i) Disability:

Subsection 25(4) of the *Code* states that if an employee is excluded because of a disability from a benefit, pension or retirement plan or fund or a contract of group insurance, an employer must compensate the employee. The employer must give the employee an amount equivalent to the contribution that the employer would otherwise make on behalf of an employee who does not have a disability.

Employee disability plans should not draw distinctions based on the degree or nature of a disability. For example, a disability plan that limits benefits for mental but not physical disability would infringe the *Code*.[44] As well, excluding employees receiving workers' compensation benefits from long-term benefits may be found to violate the *Code* if they are treated differently than other disabled employees.

ii) Age:

If distinctions in benefit entitlements are being made on the basis of age, employers should take care to make sure that the plan meets the test of a *bona fide* requirement. Sick leave plans that make benefits available based on age have been found to be discriminatory.[45]

> **Example:** A collective agreement provides that eligibility for sick benefits ends at age 55, no matter how long the employee had received such benefits before the cut-off. After collecting sick benefits for two years, an employee is found to be ineligible for further benefits due to this rule. The plan is found to be discriminatory since younger employees could continue to collect benefits for up to 15 years and the employer is unable to show that the cut-off is a bona fide requirement.

Reduced pension benefits for early retirees may not be discriminatory where the actuarial present value of reduced pensions for early retirees is at least equal to the present value of the deferred pension for people who wait until the age of eligibility for full pensions. Also, basing eligibility for pension benefits on reaching a certain age will not likely be considered discriminatory. An example is a Factor 80 retirement scheme.

However, *Code* protections against discrimination in benefits because of age do not apply over age 65. This is because the *Code* specifically defers to the ESA. Section 4 of Reg. 286/01 under the ESA permits different treatment because of age based on actuarial factors and if the legislation governing pensions permits. This regulation defines "age" as "any age of 18 years or more and less than 65 years." This means that pension and benefit plans that differentiate based on age 65 cannot be challenged under the *Code*. The Commission would encourage employers and unions to nevertheless develop and maintain pension and benefit policies and programs that comply with the spirit of the *Code*, do not use age-based criteria, and are based on *bona fide* requirements.

iii) Marital status and family status:

Section 25(2) of the *Code* permits group insurance and pension contracts between employers and insurers to allow for different treatment based on marital and family status, as long as they comply with the *ESA* and its regulations.

iv) Sexual orientation:

Denying benefits to same-sex partners or spouses of employees is discriminatory based on sexual orientation. Group insurance and pension contracts between employers and insurers must treat same-sex couples the same as opposite-sex couples. This applies to employee retirement or pension plans or funds, or a contract of group insurance between an insurer and an employer that complies with relevant legislation and regulations.

> **Example:** An employer must provide persons in same-sex relationships with the same spousal benefits provided to people in opposite-sex relationships under their pension benefits plan and insured health benefits plan.
>
> **Example:** An employer must provide the same survivor benefits to its gay and lesbian employees as it does to its heterosexual employees.
>
> **Example:** An insurance company's refusal to pay survivor benefits to a person whose same-sex spouse or partner dies is a violation of the Code.

Also, distinctions should not be drawn based on sexual orientation when assessing requests for parental leave or benefit top-ups made by gay or lesbian parents. For the purposes of the ESA, "parent" includes a birth parent, an adopting parent (whether or not the adoption has been legally finalized) and a person who is in a relationship of some permanence with a parent of a child and who plans on treating the child as his or her own. This means that a gay or lesbian parent may be entitled to 35 to 37 weeks of parental leave, in addition to 17 weeks of pregnancy leave for the birth parent.

> **Example:** A lesbian woman asks for 15 weeks parental leave to care for her child after her spouse, the birth parent, has returned to work. Such requests are normally approved. However, the employer denies this request because he does not recognize the woman as a parent (due to her sexual orientation and the fact that she was not the birth parent). This would be discriminatory.

When a child is adopted, under the *ESA* both parents are entitled to a maximum of 37 weeks of parental leave only. However, where a benefits plan provides for extra benefits to be paid to the non-birth parent to encourage bonding in the early days after a child is introduced into the home, these should be available regardless of sexual orientation or adoption.

> **Example:** An employer's benefits plan provides for 3 – 5 paid days off for the non-birth parent (regardless of gender) during the first month after the child's birth or adoption. A gay employee is able to claim these benefits when he and his same-sex spouse adopt a child.

v) Pregnancy-related benefits (sex and/or disability):

Employee benefit plans or employment practices that result in disadvantage because of pregnancy are discrimination under the *Code* on the basis of sex and pregnancy. For example, discrimination may be found in the following circumstances:

- an employee is denied sick leave benefits that she has requested for health-related reasons relating to the birth of her child (she chose not to go on maternity leave yet under the *Employment Standards Act*).
- Pregnant employees on unpaid leaves of absence receive different benefits from other employees on unpaid leave (including vacation pay).

Section 25(2) of the *Code* permits group insurance contracts between employers and insurers to allow for differential treatment based on sex, as long as they comply with the ESA and regulations. The Act and regulations require employers to provide the same benefit entitlements to employees on pregnancy leave or parental leave that are provided to employees on other types of leave.

The Supreme Court of Canada has also said that, while pregnancy is not an illness or disability, it is a valid health-related reason for being absent from work.[46] So, pregnant employees with health-related needs cannot be treated worse than employees who are absent from work for other health-related reasons, such as illness, accident or disability.

Where an employer has a benefit plan that compensates for health-related absences or provides disability benefits to its employees, a woman should be entitled to disability benefits during that part 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. Treat any health-related portion of maternity leave 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 having to provide a medical confirmation for the absence.

Pregnant employees must be compensated for the full period of their health-related absence, whether it occurs during the pre-natal or post-natal period, including recovery from childbirth. Because women respond differently to pregnancy, requests for health-related absences need to be assessed and granted on an individual basis.

Section 25(2) of the *Code* permits group insurance contracts between employers and insurers to allow for differential treatment based on sex, as long as they comply with the *ESA* and regulations. The Act and regulations require employers to provide the same benefit entitlements to employees on pregnancy leave or parental leave that are provided to employees who are on other types of leave.

Under the *ESA,* women on maternity leave continue to be entitled to other benefits under employment-related benefit plans including pension, life insurance, accidental death, extended health and dental plans. Also, if eligible, an employee can claim "maternity benefits" under the federal *Employment Insurance Act*.

A woman may have health problems related to her pregnancy that force her to be away from work *before* or *after* her pregnancy or parental leave. She has access to health benefits under a workplace sick or disability plan in this situation. In some cases, the start of maternity or parental benefits under the *ESA* may be deferred until after a sick leave and receipt of workplace health benefits. This must be worked out between the employee and the Employment Standards Branch, which has set rules on when a pregnant woman is entitled to leave and benefits. Where an employee is entitled to sick leave benefits on top of maternity and parental benefits and has an extended leave, the duty to accommodate may require that the employer hold open the employee's position, subject to the undue hardship standard.

Where an employer provides a top-up for maternity and parental leave benefits, it should be uniformly provided to all employees including people who have newly joined the organization, subject to the undue hardship standard.

The courts have recognized that pregnancy and childbirth place unique demands on women. Providing 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.[47] 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.

> **Example:** A male doctor applied for benefits because he was staying at home to care for his newborn child after his wife returned to work. His application was denied because the applicable program only granted benefits to female doctors. He filed a complaint alleging discrimination based on sex.
>
> **Example:** A plan provides that a biological mother is entitled to 15 weeks of maternity benefits on top of 35 weeks of parental benefits. At the same time, a mother who adopts a child is only entitled to 35 weeks of parental benefits. This is most likely not discriminatory.

Courts have indicated that the purpose of maternity benefits is to replace the income and protect the employment of biological mothers during the time they are giving, and recovering from, birth. These provisions were not created to encourage bonding or attachment with the child. For example, they are available to mothers who have given up their children for adoption. On the other hand, the employer should take care not to give the impression that an adoptive parent is less valued than a biological parent, and may provide a top-up for a portion of parental leave if this is done for biological parents.

> **Example:** An employer tops up salary to 95% of the employee's regular salary for 17 weeks of maternity leave for biological parents. Its benefits plan provides a top-up to 95% for the first 17 weeks of parental leave for adoptive parents.

If an employee is denied employment because of pregnancy, this may lead to ineligibility for employment insurance benefits. In general, a woman in this situation would be entitled to compensation for the loss of the benefits she would have qualified for, had she not been denied the opportunity to work.

> **Example:** A pregnant woman was offered a position as a clerk, but the offer was withdrawn when the employer learned that she was pregnant. If the employer had hired her as agreed, she would have received wages from which the appropriate deductions would have been made and she would have been eligible for insurance benefits. She would be entitled to claim lost wages and insurance benefits in a human rights claim.

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[42] Conversely, in *Ontario Nurses' Association* v. *Orillia Soldiers' Memorial Hospital* (1999), 42 O.R. (3d) 692 (C.A.), leave to appeal to S.C.C. refused (December 10, 1999), S.C.C. Bulletin 27176 (*Ontario Nurses*), nurses on unpaid leaves of absence due to disability did not accumulate service after periods set out in the collective agreement. Also, the employer did not have to contribute premiums to employee benefit plans after the employees had received long-term disability payments for a specified time. The Ontario Court of Appeal held that there was no contravention of the *Code* because these nurses were not treated differently from people in the comparator group, namely employees who were not working for other reasons.

[43] *Ibid.*

[44] *Gibbs v Battlefords & District Co-operative Ltd.* [1996], 3 S.C.R. 566.

[45] *Heidt v. Saskatoon (City)* (1998), 9 C.H.R.R. D/5380 (Sask. Bd. Inq.), affirmed 10 C.H.R.R. D/5808 (Sask. Q.B.), reversed 12 C.H.R.R. D/387 (C.A.), leave to appeal refused 74 D.L.R. (4th) vii (S.C.C.). The Saskatchewan *Human Rights Code* contained a provision that prohibiting age discrimination in employment does not prevent operating any term of a *bona fide* group or employee insurance plan. The Court of Appeal held that the defence had not been made, as no evidence established that the discrimination was reasonably necessary to allow the employer to put into place a viable and cost-effective sick plan.

[46] *Brooks, supra* note 23.

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

8. Meeting the accommodation needs of employees on the job

a) Duty to accommodate to the point of undue hardship

The *Code* requires an effort, short of undue hardship, to accommodate the needs of persons who are protected by the *Code*. It would be unfair to exclude someone from the workplace or activities in the workplace because their *Code*-protected needs are different from the majority. The principle of accommodation applies to all grounds of the *Code*, but accommodation issues in employment most often relate to the needs of:

- employees with disabilities (disability)
- older workers (age)
- employees with religious needs (creed)

- pregnant women (sex)
- employees with caregiving responsibilities (family status).

This section will discuss the principle of accommodation, duties and responsibilities in the accommodation process, and limits to the duty to accommodate. Then, specifics will be outlined relating to the discrimination grounds set out above.

b) The principle of accommodation

The right to be accommodated and the duties of the employer and union are now well-established in statute and case law. The applicable principles are set out in the most detail in the Commission's Policy and Guidelines on Disability and the Duty to Accommodate and are summarized here.

Accommodation is a fundamental and integral part of the right to equal treatment. The principle of accommodation involves three factors: dignity, individualization and inclusion.

- **Dignity:** Persons must be accommodated in a way that most respects their dignity, including their privacy, confidentiality, comfort and autonomy.
- **Individualization:** There is no set formula for accommodation. Each person's needs are unique and must be considered afresh when an accommodation request is made. A solution may meet one person's requirements but not another's, although many accommodations will benefit many other people with similar needs.
- **Inclusion:** Achieving integration and full participation requires barrier-free and inclusive design and removing existing barriers. Preventing and removing barriers means all persons should have access to their environment and face the same duties and requirements with dignity and without impediment. See also Section IV-1a(i) – "Preventing, reviewing and removing barriers."

The most appropriate accommodation must be identified and implemented short of undue hardship. Deciding what is and is not an appropriate accommodation is a separate analysis from an undue hardship analysis. An accommodation will be considered appropriate if it will result in equal opportunity to attain the same level of performance or to enjoy the same level of benefits and privileges experienced by others, or if it is proposed or adopted to achieve opportunity and meets the individual's needs related to the relevant *Code* ground. The most appropriate accommodation will be the one that most promotes inclusion and full participation, and effectively addresses any systemic issues.

> **Example:** Instead of making a one-time exemption for an employee with major caregiving responsibilities, an employer re-examines whether the need for staff to work 10-hour shifts full-time is a bona fide requirement. When it decides that it is not, it alters the rule, and provides for eight-hour shifts and part-time work.

Accommodation may take one of two forms. It may involve meeting the needs of someone based on the needs of the group he or she belongs to (see for example, subsection 11(2) of the *Code*). Or, it may involve meeting the needs of a person (such as a person with disabilities) assessed on an individual basis (see for example, subsections 17(2) and 24(2) of the *Code*).

Accommodation may be possible by modifying the terms and conditions of employment or by making adjustments in the workplace. For example, in a job where driving is an essential duty, an employer can accommodate an applicant with a disability by modifying a company car to meet the person's individual needs unless doing so would cause undue hardship. Accommodation may range from modifications that completely respect an individual's right to privacy, autonomy and dignity on one end of the spectrum, to those that least respect them on the other end of the spectrum. Accommodations that do not respect the person's privacy, autonomy and dignity are not acceptable.

A one-time expenditure for some forms of accommodation may be too onerous on an employer. Therefore, in certain situations, accommodation may be provided on an interim basis or may be phased in, as long as the timeframe is reasonable. This approach could protect the employer from potential complaints that it failed to accommodate. However, the appropriateness of an interim or phased-in accommodation depends on an undue hardship analysis of

the particular case.

Collective agreements or other contract arrangements cannot act as a bar to providing accommodation. The courts have determined that collective agreements and contracts must give way to the requirements of human rights law.[48] To allow otherwise would be to permit the parties to contract out of their *Code* rights under a private agreement. Subject to the undue hardship standard, the terms of a collective agreement or other contract cannot justify discrimination that is prohibited by the *Code*.

Employers and unions have a joint responsibility to find a solution when accommodation conflicts with the collective agreement. The Supreme Court of Canada has noted, however, that although the principle of equal liability applies, the employer has charge of the workplace and is in a better position to create measures of accommodation.[49] Therefore, the employer can be expected to start the process of accommodating an employee. But, the Supreme Court also noted that it will not absolve a union of its duty if the union fails to suggest available alternatives. When the union and the employer discriminate, they share an obligation to remove or alleviate the source of discrimination.

If an employer and a union cannot agree on how to solve an accommodation issue, the employer must make the accommodation in spite of the collective agreement, unless it would cause undue hardship. If the union opposes the accommodation, or does not co-operate in the accommodation process, then the union may be named as a respondent in a human rights complaint.

Unions have to meet the same requirements of demonstrating undue hardship. For example, if the disruption to a collective agreement can be shown to create direct financial costs, this can be taken into account under the cost standard.

The procedure to assess accommodation is as important as the substantive content of the accommodation.[50] If an employer fails to appropriately explore and individually assess accommodation options, this can be viewed as a separate breach of the *Code*.

> **Example:** A woman is hired as a live-in caregiver for two young children. When her employment started, she tells her employer that she is pregnant and experiencing nausea but still wants the job. The employer decides not to proceed with the employment because of concerns about how the woman would deal with the physical demands of the job, given her pregnancy symptoms. The employer has not met its procedural duty to accommodate.
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> **Example:** A man discloses his disability, bipolar disorder, shortly after he is hired. Rather than assessing the nature of his accommodation requirements against the essential duties of the position and the undue hardship standard, the employer uses discriminatory stereotypes and leaps to the conclusion that the employee cannot fulfill his position. The employee is fired eight days into his probationary period. The employer has not met its procedural duty to accommodate.

Human rights tribunals found discrimination existed in both of these examples. A key element of this finding in both cases was that the employer did not start an adequate process for determining whether accommodation was possible without undue hardship. See also Section IV-8d) – "What is undue hardship?" and Appendix E – "Accommodation template for employers."

c) Overview of duties and responsibilities

Workplaces are expected to have accommodation policies and procedures in place. Unions and employers should work together to make sure that policies are developed and advertised so that employees know their rights. Managers and supervisors also need to know the process to follow when an accommodation request is made. For more information about how to develop an accommodation policy, see Section IV-1a(iv) – "Accommodation policy and procedure."

It is also expected that the appropriate accommodation to meet an employee's *Code*-related needs might change over time. Thus, accommodation requests and steps taken must be monitored and adjusted as needed, based on changes in the circumstances of the employee, employer and the workplace.

Employees, employers and unions all have duties and responsibilities during accommodation.

i) Employees:

- request accommodation
- explain why accommodation is required, so that needs are known
- make his or her needs known to the best of his or her ability, preferably in writing
- answer questions or provide information about relevant restrictions or limitations, including information from health care professionals, where appropriate and as needed
- take part in discussions on possible accommodation solutions
- co-operate with any experts whose assistance is required
- meet agreed-upon performance and job standards once accommodation is provided
- work with the employer on an ongoing basis to manage the accommodation process
- discuss his or her accommodation needs only with persons who need to know. This may include the supervisor, a union representative or human rights staff.

Many claims of discrimination arise from an employer cutting short an accommodation process because of a perception than an employee is not fulfilling his or her requirements. There are certainly cases where, despite an employer's best efforts to provide accommodation, this cannot be done because of an employee's unwillingness to co-operate.

> **Example:** An employee has a terrible attendance record. The employer offers accommodation and requests information relating to any Code grounds that may be affecting her ability to be at work regularly. The employee is informed of the employer's accommodation policies and procedures and yet makes no request for accommodation other than to say that she has a disability. The employer refers her to an employee assistance program (EAP) and offers her paid time off to consult with professionals or seek medical evaluation. The employee declines both of these.

When the attendance concerns continue over a long time, the employer starts a process of progressive discipline leading to termination, all the while noting that it is prepared to accommodate any needs to the point of undue hardship. Because she did not co-operate in the process, the employee will have a tough time showing that she has been subjected to discrimination.

On the other hand, out of fear of stigma or discrimination, employees may, quite understandably, hide accommodation requirements until it is absolutely necessary to disclose them. The fact that an employee has lied about accommodation requirements in an early stage of a job screening or application process is not relevant to the analysis of whether the employer met the duty to accommodate once an accommodation need has been identified on the job.

Similarly, employees may disengage from a flawed process of accommodation conducted by an employer. An assessment of an allegation that an employee's lack of cooperation undermined an accommodation process will always include a critical assessment of the sequence of events that preceded the breakdown in the accommodation process. If the accommodation process is inflexible, punitive, or not carried out in good faith by an employer, a tribunal might find that the employee's actions are reasonable in the circumstances and that it is the employer who has failed in its duty to accommodate.

ii) Unions:

- take an active role as partners in the accommodation process

- share responsibility with the employer to facilitate accommodation, including taking an active role in suggesting and testing alternative approaches, and cooperating fully when solutions are proposed
- respect the privacy of the person requesting accommodation
- support accommodation measures no matter what collective agreements say, unless to do so would create undue hardship.

See also Section III-4d) – "Unions."

iii) Employers:

- accept the employee's request for accommodation in good faith, unless there are legitimate reasons for acting
- otherwise
- get expert opinions or advice where needed
- take an active role in making sure that alternative approaches and possible accommodation solutions are investigated, and research various forms of possible accommodation and alternative solutions as part of the duty to accommodate
- keep a record of the accommodation request and action taken
- maintain confidentiality
- limit requests for information to those reasonably related to the nature of the limitation or restriction, to be able to respond to the accommodation request
- grant accommodation requests in a timely way, to the point of undue hardship, even when the request for accommodation does not use any specific formal language
- pay the cost of any required medical information or documentation. For example, employers should pay for doctors' notes and letters setting out accommodation needs
- where accommodation would cause undue hardship, explain this clearly to the employee and be prepared to show why this is the case.

iv) Role of an insurance provider – employer is still responsible for accommodation

Human rights issues may arise when an employer outsources all or part of its accommodation process to an insurance provider. The insurance provider has an interest in returning an employee to work and keeping costs low. Sometimes these goals conflict with implementing appropriate accommodation and the undue hardship standard. The insurance provider may be named as a respondent in a human rights claim along with the employer.

> **Example:** An employee's doctor's note says that he is unable to return to work due to his disability and sets out a return to work date three months in the future. The insurance provider challenges the prognosis without a legitimate basis and ultimately takes the position that the employee is no longer disabled, does not qualify for benefits and must report to work immediately. The employer, on the advice of the insurance provider, progressively disciplines the employee for his failure to attend at work. He is terminated from employment for having "abandoned his position." This employer has failed in its own duties under the Code even though it was relying on the advice and expertise of the insurance provider. The insurance provider has also contravened the Code.

Although the insurance company would also have obligations as a service-provider, the employer bears the primary responsibility to accommodate its employee's needs to the point of undue hardship. The insurance company does not itself have the ability to modify the job, the workplace or workplace rules and policies – these are within the control of the employer.[51]

An employer is not relieved of its obligations under the *Code* even if an insurer is the primary point of contact in planning an employee's accommodation or return to work after a short-term or long-term disability leave. The employer would be expected to take an active role in working with the insurer and employee to make sure that any return to work is appropriate based on the medical information. The assessment of undue hardship for an insurance

company providing services would be separate from the assessment of undue hardship for the employer.

d) What is undue hardship?

Undue hardship is a defence under the *Code*. The employer has to prove that this defence applies, otherwise a finding of discrimination may be made. It is not up to the person requesting accommodation to prove that the accommodation can be accomplished without undue hardship.

The *Code* sets out only three items that may be considered in assessing whether an accommodation would cause undue hardship. These are set out in sections 11(2), 17(2) and 24(2) and are:

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

This means that the employer must present evidence showing that the financial cost of the accommodation (even with outside sources of funding) or health and safety risks would create undue hardship.

There is no doubt that an employer will likely have to spend some effort to accommodate its employees' needs. However, some degree of hardship is to be expected – hence the test in the *Code* is "*undue* hardship" rather than "mild hardship" or "reasonable hardship." An employer should only conclude that an accommodation request will amount to undue hardship after careful and rigorous consideration of all elements of the request and the organization's ability to meet it. This should never be a first response to a request for accommodation. See Appendix E – "Accommodation template for employers" for guidance on the accommodation process.

> **Example:** An employee requests a week off to attend to a family member's mental illness. The employer says, "Sorry, but if I let you go off then everyone else will want time off – this would be an undue hardship for the company."

In this case, the employer would be seen to have failed both in terms of the process, having not fully considered the accommodation request, and the substance of it, having failed to provide any accommodation. While the employer may have stated that undue hardship existed, this would not be sufficient to prove that undue hardship actually exists.

The evidence needed to prove undue hardship must be objective, real, direct, and, in the case of cost, quantifiable. The employer must provide facts, figures and scientific data or opinion to support a claim that the proposed accommodation causes undue hardship. A mere statement, without supporting evidence, that the cost or risk is "too high" based on impressions or stereotypes will not be enough.

Factors that are excluded from consideration and cannot be used to justify undue hardship include business inconvenience, employee morale and customer preference. Collective agreements cannot act as a bar to accommodation requests.

Only existing circumstances can be taken into account when considering undue hardship. Speculative risks and conditions that may arise in the future are not considered. For example, when a person with a disability has a condition that may deteriorate over time, the unpredictability and extent of future disability cannot be used as a basis for assessing present accommodation needs. A person with multiple sclerosis may, over time, become more easily tired – but it is not possible to accurately predict when, for how long, or in what way this will happen.

The fact that the employer has accommodated the needs of other employees or has accommodated the needs of the same employee in the past does not relieve it of its obligation to meet present and future accommodation needs. On the other hand, there may be circumstances where the total accommodation needs of many employees may amount to undue hardship. This too will be subject to assessment against the criteria noted below.

i) Cost of providing accommodation (including outside sources of funding):

An employer may be able to show that the costs of accommodation will cause undue hardship. 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.

Quantifiable costs related to accommodation include all projected costs that can be quantified and shown to be related to the proposed accommodation. However, mere speculation, for example, about monetary losses that may follow the accommodation of the person will not generally be acceptable. The financial costs of the accommodation may include:

- capital costs, such as installing a ramp or buying screen magnification software
- operating costs, such as sign language interpreters, personal attendants or extra staff time
- costs incurred through restructuring that are made necessary by the accommodation
- any other quantifiable costs incurred directly because of the accommodation.

The availability of outside sources of funding and other business considerations and practices that may alleviate any accommodation costs must first be considered.

Outside sources of funding include grants, subsidies or loans from government and non-government sources to improve building accessibility, tax credits or tax incentives for making such changes, and grants and services available directly to the person with disabilities.

Business considerations/practices include:

- The size of the organization – what might prove to be a cost amounting to undue hardship for a small employer will
- not likely be one for a large employer
- Can the costs be recovered in the normal course of business?
- Can other divisions, plants, etc. of the business help to absorb part of the costs?
- Can the costs be phased in – so much per year or financed through loans?
- Can the employer set aside a certain percentage of money per year to be placed in a reserve fund to be used for accommodation?

Both phasing in and setting up a reserve fund should be considered only after the person responsible for accommodation has shown that the most appropriate accommodation could not be accomplished right now.

ii) Health and safety risks:

Health and safety requirements may be set by law, regulation, rule, practice or procedure. They could also be set by the company itself or together with other companies in the same or similar kinds of business. Where a health and safety requirement creates a barrier for a person identified by a *Code* ground, the employer should assess whether it can be waived or modified.

If waiving the health and safety requirement is likely to violate the *Occupational Health and Safety Act (OHSA)*, the employer should come up with alternative steps based on the equivalency clauses of the *OHSA*. These clauses allow for the use of alternative steps to those specified in its regulations, provided the alternative steps offer equal or better protection to
workers. Any such steps taken should be documented.

Modifying or waiving the health and safety requirement may create risks that have to be weighed against the employee's right to equality. Where the risk after accommodation is big enough to outweigh the benefits of enhancing

equality, it will be considered to create undue hardship.

An employer can decide whether modifying or waiving a health or safety requirement creates a significant risk by assessing the following:

- Is the employee willing to assume the risk in cases where the risk is solely to his or her own health or safety?
- Has the risk been evaluated after all accommodations have been made to reduce it (as is expected)?
- Would changing or waiving the requirement be reasonably likely to result in a serious risk to the health or safety of other persons?
- What other types of risks are assumed within the enterprise?
- What types of risks are tolerated within society as a whole, reflected in legislated standards such as licensing standards, or in similar types of enterprises?

Risk to an employee's own health and safety: An employer may believe that accommodation that would result in modifying or waiving a health or safety requirement could place the person at risk. The employer must explain the potential risk to the employee. The employee is usually the person who is best able to assess the risk. This applies only if the potential risk is to the employee's health or safety alone. Where the risk that remains after considering alternatives and after accommodation is big enough to outweigh the benefits of enhancing equality, it will be considered to be undue hardship.

Risk to health and safety of others: Where modification or waiver of a health or safety requirement is believed to result in a risk to the health or safety of other people, the degree of risk must be evaluated. The employer must consider other types of risks assumed within the company. A potential risk created by accommodation should be assessed in light of those other more common sources of risk in the workplace.

The seriousness of the risk should be judged after the employer takes suitable precautions to reduce it. In evaluating the seriousness of risk, consider the following factors:

- The nature of the risk: What could happen that would be harmful?
- The severity of the risk: How serious would the harm be if it occurred?
- The probability of the risk: How likely is it that the potential harm will actually happen? Is it a real risk, or
- merely hypothetical or speculative? Could it occur often?
- The scope of the risk: Who will be affected if it occurs?

If the potential harm is minor and not very likely to occur, the risk should not be considered serious. If there is a risk to public safety, consideration will be given to the increased numbers of people potentially affected and the likelihood that the harmful event may occur.

iii) What about factors other than those listed in the Code?

Some court decisions and decisions of arbitrators in grievance proceedings suggest that factors such as seniority or impact on other union members may be considered in assessing undue hardship. However, the Commission's position is that the *Code* only lists three factors to be assessed when considering undue hardship (cost, outside sources of funding, and health and safety). The other factors are not relevant, other than to the extent that they can be slotted into those three considerations.

> **Example:** An employer and union are united in the position that providing a requested accommodation will cause undue hardship because of seniority and employee morale. If there is no objective evidence that the impact on other employees or seniority will cause undue hardship considering costs, funding and health and safety, the Commission's position would be that tribunals should not consider these other factors.

e) The duty to accommodate – practical issues

This section addresses some of the common issues that employers grapple with when faced with accommodation requests from employees. For example, how much information is the employer entitled to and what happens when accommodation requests conflict with someone else's rights?

i) What information is the employer entitled to?

Requests for accommodation may involve disclosing private or highly sensitive information. Persons requesting accommodation should be asked only for information needed to set the groundwork and respond appropriately to the accommodation request.

In some cases, the need for accommodation is obvious and there is no need for special documentation. For example, persons who use wheelchairs will have difficulty entering buildings that have steps, and pregnant employees will often need more bathroom breaks. Even where some documentation is required, this does not justify a "fishing expedition." For example, a request for adjustments to computer equipment related to diminishing eyesight would not usually justify a request to review the accommodation seeker's complete medical file. A careful approach to collecting documentation protects the privacy of the accommodation seeker, and protects the accommodation provider from potential complaints. All parties must exercise good faith
in seeking and giving information.

Employers can ask for more information about an accommodation request in the following cases:

- where the accommodation request does not clearly show a need related to a *Code* ground
- where more information on the employee's limitations or restrictions is needed to find an appropriate accommodation
- where there is an objective reason to question whether the request for accommodation is legitimate.

ii) What records should the employer keep and for how long? An employer should keep and safeguard the following kinds of information:

- the accommodation request
- any documents provided by the accommodation seeker or by experts
- notes from any meetings
- any accommodation alternatives explored
- any accommodation provided.

For people to feel comfortable to make accommodation requests, they must feel confident that the information they provide will be treated confidentially, and shared only as needed for accommodation. Personal information should be kept in a secure place, separate from the person's personnel file. It should only be shared with people who need the information to provide
the accommodation or to investigate any human rights allegations that may arise from the accommodation request and the employer's response. These measures should be explained to employees in an accommodation policy and procedure. See Section IV-1a(iv) – "Accommodation policy and procedure."

Subject to applicable privacy legislation and rules under the Employment Standards Act, these records should be kept until they can no longer serve one of the following purposes:

- help the accommodation provider take appropriate accommodation steps (a past accommodation plan may need to be updated as needs change)
- document the employer's response to the employee's human rights concerns and requests for accommodation for any court action or tribunal hearing. These documents should not be destroyed until any limitation periods have expired or, where an action or claim has been started, until it has ended.

The *Employment Standards Act* provides that employee records about a leave should be kept until three years after

the leave has ended, and that other types of records should be kept for three years after employment ends. These are minimum requirements and should be extended where a human rights claim may be filed. The employer is expected to keep all records where a human rights claim has been initiated, and could be held liable if relevant documents are destroyed. An employer who prematurely destroys accommodation records may be unable to show that the process and substance of the accommodation were appropriate and to establish the existence of undue hardship.

> **Example:** In 2002, an employer provided an employee with accommodation, including a leave. This employee returned to work in spring 2003 and was fired in the fall of 2005. At the termination meeting, he said that he intended to file a human rights complaint. Before receiving the complaint and in accordance with company policies, all the employment records on this employee's accommodation and leave were destroyed in early 2006.

A human rights complaint is received in the summer of 2006, alleging that the employer failed to accommodate his disability in 2002 and 2003 and that this was a factor in terminating his employment in 2005. Proceedings before a human rights tribunal do not start until much later. The employer may have met its duties under the *Code* and the termination may have been non-discriminatory. However, when the case is heard, the employer will have a hard time proving this without documents created at the time the incidents occurred.

iii) What if an employee cannot meet a standard even with accommodation?

If an employee seems to be unable to meet a standard, even with accommodation, the employer should step back and make sure that any such requirements are *bona fide*. Refer to Section IV-2 – "Setting job requirements" for guidance on how to assess job requirements.

iv) Accommodating when rights appear to conflict:

From time to time, employers may have to deal with cases where an employee's request for accommodation seems to conflict with another right under the *Code*. These may be rights of other employees or those of the people the organization serves.

> **Example:** A hospital provides a wide range of services including performing abortions, consistent with its responsibility to provide equal treatment in services under the Code. However, it also has a duty to accommodate creed-related needs of the doctors and nurses, who may ask to be excused from providing such services based on religious grounds.

This is different from cases where accommodation of one person's or group's *Code*-related needs is challenged by others who are not themselves asserting a *Code*-protected right or a right under the Charter. *Code* rights must be respected regardless of other considerations, such as customer preference or conflict with a collective agreement.

> **Example:** Female Muslim employees ask for the accommodation of being allowed to wear headscarves with their uniforms. The non-Muslim male employees complain that they are not allowed to wear baseball caps so why should these employees get special treatment. There is no conflict here between the duty to accommodate and another Code right.

Employers are expected to plan ahead to make sure they can meet the needs of service users and employees who have accommodation requirements. If an organization provides services to the public, services must be provided equally and without discrimination. This is an issue separate and apart from the organization's obligations to its employees. The fact that an employer has provided accommodation to its employees is not necessarily a defence to a claim of discrimination by a service-user who has received a sub-standard level of service or been denied a service.

> **Example:** A driver employed by an organization is sent to pick up a blind man with a dog. The driver, who is Muslim, does not allow the dog into the car. The driver states that his Muslim faith prevents him from associating with dogs and therefore he refuses to give the man the ride. This results in a denial of

service and a human rights complaint is filed based on disability. The employer cannot rely only on the Muslim employee's religious needs as a defence to this complaint. It will need to show that it has taken steps to make sure the service will not be denied, even though some of its drivers may need accommodation, subject to the undue hardship standard.

These kinds of situations of competing rights raise complex issues, and are currently the subject of further research and policy development by the Commission. Before taking an action that would effectively deny either an employee or a service-user the ability to exercise their rights under the *Code*, an employer should make sure it has fully explored whether there are any creative solutions that would enable it to meet both needs. Employers who find themselves in this situation are welcome to call the Commission for advice.

v) Facilitating a return to work after a Code-related leave:

People who return to work after a *Code*-related absence, such as disability leave, maternity leave or leave to deal with a family member's medical emergency, are protected by the *Code*. They generally have the right to return to their jobs or a similar job, subject to undue hardship. This will often require that the employee only be replaced on a temporary basis and the position be held until the employee returns. Where the employee is replaced permanently and is denied an opportunity to return to work, the employer will be seen as not having met the duty to accommodate.

> **Example:** An employee tells her employer that she will be away from the workplace for one year due to maternity and parental leave. The employer fills her position on a permanent basis, and when she returns, she is told that she needs to apply for another vacancy as her job has been filled. This employee's rights under the Code have not been respected.

Accommodation is a fundamental and integral part of the right to equal treatment in returning to work. When notified that an employee intends to return to work, the employer should determine whether there are any accommodation requirements, either in the short or long term. Both employers and unions must co-operate in accommodating employees who are returning to work after a *Code*-related absence. All parties to the accommodation process need to be aware of their duties and responsibilities. See Section IV-8c) – "Overview of duties and responsibilities."

Even if changes have been made to the position or the workplace for legitimate business reasons during the employee's absence, the employer is expected to explore other options to make sure that the employee is not penalized because of his or her *Code*-related absence from the workplace.

> **Example:** An employee works as a program co-ordinator for a private school when she goes off on a leave. When she returns to work, she is told that her position has been "closed" due to declining enrolment and financial problems. The woman could have worked as an instructor as she had taught complex courses in the past, but this was not considered. This was viewed as discriminatory because the employer had no legitimate business reason for not offering her this opportunity in light of eliminating the position she previously held.

vi) Dress codes and accommodation requests:

If the nature of the job raises valid health and safety concerns, an employer may legitimately impose certain dress codes. For example, restaurant workers may be asked to keep their hair with a net or other appropriate head covering, or workers on a construction site may be asked to wear protective gear. When dealing with requests for *Code*-related accommodation related to dress codes, employers should consider:

- the exact nature of the request
- which ground in the *Code* applies
- the reason for the uniform, dress code or safety equipment
- the steps, including alternatives, that can be taken to accommodate the person
- health or safety hazards for either the person seeking the accommodation or for other employees, and the

evidence that such hazards would be undue hardship for the employer.

Sex: Accommodation should be provided with regard to pregnancy-related needs.

Creed: As a rule, work uniforms imposed without a health or safety rationale should be modified to permit a person to wear items of clothing required by his or her religion.

> **Example:** An employer requires counter staff to wear a uniform that includes a hat. A Muslim employee covers her head with a scarf because of her religious beliefs. The employer has a duty to accommodate the employee and to let her wear the head covering instead of the uniform hat.

Although some types of clothing are a reasonable occupational necessity, the employer, subject to the limit of undue hardship, is obliged to accommodate. For example, an employer should try to modify the required apparel so that the person can wear religious items safely.

An employer should be wary about prohibiting any Sikh employee from wearing a ceremonial dagger, or kirpan, in the workplace. In most cases, any health and safety risks can be lessened by steps such as requiring it to be safely concealed. See also Section IV-8f(ii) – "Creed – accommodating employees' religious needs."

vii) Flexible work arrangements – break times and days off:

Traditionally, being in the workforce has been seen as an "all or nothing" option: people either work full-time, are retired or are off on leave. For older employees, moving from full-time work spanning a lifetime to the complete absence of work on retirement is a major change. This change has social, psychological and financial implications. As well, there is a major impact when employees with caregiving needs or disabilities are asked to stop work entirely when they may be able to continue to contribute to the organization's productivity on a part-time basis.

The preferred approach is to inclusively design measures such as flexible work hours, mentoring arrangements, part-time work and phased-in retirement. This would allow all employees, including people with disabilities or caregiving needs, to be included in the workplace. Any remaining needs should then be accommodated.

Some employees observe periods of prayer throughout the day or take part in religious observances on a specific day. Other employees may have appointments or needs that they have to attend to for all or part of a day. For example, an employee with a disability may need to go to an appointment with her family doctor, or a worker whose son has a severe disability may need to leave early to provide after-school care. An older worker may need extra rest periods throughout the day.

When these types of *Code*-needs conflict with the employer's regular work hours or daily routines, an employer has a duty to accommodate the needs, short of undue hardship. Accommodations might include modifying the policy on breaks, offering flexible hours, and/or providing a private area for prayer or breastfeeding. Employees who need breaks for *Code*-related reasons should normally be given those breaks, and not be asked to forgo normal meal breaks or work extra time to make up for the breaks, unless the employer can show undue hardship.

A common accommodation is to allow for flexible work scheduling for employees, or to allow employees to substitute or reschedule days when their religious beliefs or other *Code* needs do not permit them to work certain hours. Employers can satisfy their duty to accommodate the *Code* needs of employees by providing appropriate scheduling changes. In some cases, scheduling changes may provide the fairest and most reasonable form of accommodation.

> **Example:** Seventh Day Adventists and members of the Jewish faith observe a Sabbath from sundown Friday to sundown Saturday. Observant members of these religions cannot work at these times. The employer introduces flexible scheduling to accommodate these employees.

See also Section IV-8f(ii) – "Creed – accommodating employees' religious needs," which includes a subsection on

requests for paid days off for religious observance.

viii) Stress-related accommodation requests:

Stress by itself is not a *Code* ground, although it may arise from or be connected to *Code* grounds such as disability, family status or sex (pregnancy). People experience stress related to positive events, such as weddings, a new home, or a new job. An employee may experience negative stress related to events such as illness, the death of a loved one, domestic problems, or discrimination and harassment at work.

The term "stress" is used by some as a "plain language" way to refer to actual medical conditions, whether physical (such as hypertension) or psychological (such as anxiety or depression). Sometimes stigma about illness or unfamiliarity with particular medical terms may cause people to refer to "stress" instead of disability. These conditions may or may not amount
to disabilities requiring accommodation. In other cases, stress can be a symptom of a disability. It can also lead to a disability or serious health problems, including mental illness or addictions, over time.

In some cases, although stress may not amount to a disability, it may still have to be accommodated because it relates to another *Code* ground. For example, a woman who is experiencing high levels of stress during pregnancy may be told by her doctor to seek accommodation due to concerns about the effect of the stress on the pregnancy.

Stress commonly arises as a side effect of an inflexible or punitive approach to accommodating an employee's disability or other *Code* need. In some cases, this can add to the length of an employee's absence from work.[52]

> **Example:** An employee is required to bring in doctor's notes for each absence, even though his employer already has a doctor's note to support periodic absences each month. This frustration causes stress. This aggravates his symptoms and increases his absences.

If someone requests accommodation due to "stress," it would make sense for an organization to consider:

- Is there a disability-related need for accommodation?
  - What are the nature of limitations and restrictions?
- Is there another situation requiring accommodation?
  - For example, do the stresses relate to pregnancy, care-giving responsibilities or difficulty balancing religious needs with workplace rules?
  - How can the employee's accommodation needs be met?
  - What outside supports can the employee also be referred to?
- Is further action needed due to another workplace cause of the stress?
  - What workplace conditions may be adding to the stress?
  - Has the employee been exposed to discrimination and harassment? If so, how have these been handled?

In addition to accommodating individual needs, an inclusive design approach may help an employer revise job requirements to increase job satisfaction and reduce stress for all employees. Section IV-2c) – "Think about stress when designing jobs" describes types of work conditions that have been associated with elevated levels of stress for employees.

The World Health Organization (WHO) indicates that work stress can be reduced through interventions aimed at either increasing an employee's ability to cope with workplace stressors or reducing the stressors in the workplace.[53] Stress management programs have been shown to be effective in improving employees' mental health and ability to cope. The WHO notes that stress can be reduced by:

- changing job tasks or work conditions, for example by providing job enrichment, lower workloads or improvements to work stations such as better ergonomics or reducing noise
- clarifying roles and improving social relationships through conflict resolution or communication further reduce

stress
- a combination of both strategies, targeted to employees and the workplace.

f) Specific concerns related to Code grounds

i) Age (older workers):

Older workers may need accommodation for reasons such as disability and leave related to family status and marital status (for example, the need to care for a family member or an ailing spouse). These obligations exist regardless of the age of the employee. However, due to a relationship between age and disability, these needs may become more apparent as workers, and members of their family, age.

As an older worker makes the transition to retirement, employers may be called on to provide accommodation in the form of flexible hours and conditions of work, part-time arrangements and job sharing. In some cases, retirees may be rehired as consultants or on short-term contracts. There may also be a need for changes to workstations, additional training or other steps to help older workers meet essential job duties. Older workers should be assessed individually to make sure that the accommodation meets their changing needs and capacities.

> **Example:** An older worker finds a physically demanding task challenging. The employer should either assign it to someone else if it is not one of the essential duties of the position, or, if it is an essential duty, seek other ways to accommodate the worker to the point of undue hardship.

ii) Creed – accommodating employees' religious needs:

A person's religious beliefs may conflict with an onthejob requirement, qualification or practice. Accommodation may mean changing a rule or making an exception to all or part of it for the person concerned. Most commonly, accommodation requests relate to:

- dress codes
- break policies
- recruitment and job applications
- flexible scheduling of shifts and work hours
- rescheduling and religious leave.

The employer has to accommodate an employee's religious needs when workplace rules or practices have an adverse impact or create conditions that the employee cannot comply with because of a *Code* ground.

> **Example:** An employer prefers to hire men with short hair. However, certain creeds do not permit men to cut their hair. This would be a discriminatory rule, unless the workplace falls under a legal exception under the Code.

In assessing creed-related accommodation requests, avoid second-guessing the validity of the accommodation request based on personal views of the employee's religion or the views of others, even experts. This is because the test is whether the exercise of the belief by the employee is sincere and consistent with the religion, rather than whether the employee's interpretation of the tenets of his or her creed is accurate or shared by others.[54] See also Section III-3j) – Creed" in the section "Grounds of discrimination: definitions and scope of protection."

> **Example:** An employee asks for time off work for religious observance. The employer asks around and finds out from expert sources that this is not a requirement of the employee's faith or creed. It would likely be discriminatory for the employer to deny the accommodation request on this basis.

The right of Sikhs to wear a ceremonial dagger, called a kirpan, is protected under human rights legislation and will not, in most cases, be found to constitute a health and safety risk amounting to undue hardship. In one case, an

employer suggested that the complainant wear a plastic replica or stitch the kirpan into its sheath. However, neither of these were viewed as acceptable accommodations by a court. Rather, it was appropriate to expect that the kirpan be hidden, secured and of a reasonable size.

As well, the right to wear religious headgear, such as yarmulkes or turbans, is protected under the *Code*, subject to the tests for *bona fide* occupational requirements and the undue hardship standard. Employers should be prepared to design inclusively, accommodate and individually assess health and safety risks against the undue hardship standard where an employee is requesting an exemption from a hard-hat requirement to wear a religious head-covering. It is best to avoid attempts to restrict the wearing of religious headgear based on concerns about image or customer preferences. See also Section IV-7c(ii) – "Dress codes."

Discrimination may also be found where an employer does not take steps to provide creed-related accommodation, even though it provides accommodation relating to other grounds such as disability.

Requests for paid days off for religious observance: Where employees request days off for religious observance or other *Code*-related absences, it may be discriminatory for employees to be required to take such days without pay. Many human rights complaints arise from requests for paid days off for days of religious observance other than those provided for as public holidays. Employees are now entitled to eight mandatory public holidays in Ontario under the *Employment Standards Act* (New Year's, Good Friday, Victoria Day, Canada Day, Labour Day, Thanksgiving Day, Christmas Day and Boxing Day). An additional day off in February called "Family Day" began in 2008. This schedule is traditionally based on a Christian calendar and two of these days happen to fall on days of Christian religious observance, Good Friday and Christmas. Some employers also provide for a paid day off on a third day of Christian religious observance – Easter Monday.

The Supreme Court of Canada has said that the modern calendar is now to be viewed as secular – in that the statutory public holidays are set as "days of rest" that do not have any particular religious purpose. However, the Supreme Court has also said that this secular calendar has a discriminatory effect on non-Christians. This is because, without accommodation from an employer, non-Christians have to take a day off work and lose a day's pay to observe their holy day. In contrast, the majority of their Christian colleagues have their religious holy days recognized as statutory holidays.[55]

In the case referred to above, three Jewish teachers needed the day off for Yom Kippur. The employer agreed to give them the day off without pay. They grieved this, arguing that this was discriminatory because it required them to forfeit one day's pay to observe their religious practices. The Supreme Court of Canada agreed. While the loss of a day's pay would have been
significant for the teachers, who were paid based on 200 days of work per year, there was no evidence that having to pay for the day off would impose an unreasonable financial burden on the employer.

The Commission's position is that employees should receive paid religious days to the extent of the religious Christian days that are also statutory holidays, unless the employer can show undue hardship. [56] The employee would be entitled to two paid holidays if the workplace only observes the Christian holidays of Good Friday and Christmas. The employee would be entitled to one additional paid day off if the workplace provides paid time off on Easter Monday.

The question is then what employers are expected to do to handle requests for additional days off from employees based on creed. It is clear that the employer must accommodate to the point of undue hardship. This being said, there is not only one right way that this can be done. The approach must be individualized to the circumstances and needs of both the employer and employee, but there are some options that could be considered. Measures might include additional paid leave days such as floating days or compassionate leave days, if these exist under company policy or collective agreements. Other options include unpaid leave or scheduling changes.

The *Employment Standards Act* states that where an employee agrees in writing, the employee can work through a statutory public holiday at regular rates (that is, without receiving the statutory holiday premium) and then receive

another paid day off in lieu.

Another option might be to have an employee work an equal number of hours on another day that is not regularly scheduled (for example, a Saturday or Sunday) and then receive a paid day off in lieu. Again, this could work provided there is productive work for the employee to do on the day that was not regularly scheduled.

It may be possible for the employee to accrue "banked" time by making changes to his or her existing schedule, and to allow the employee to use that "banked" time to take paid days for religious observances. For example, the employee could work a "compressed work week" (by taking longer days, shorter lunches, and so on) and then use the extra time to take paid days off.
In one case, the Court of Appeal stated that an employer had met its duty to accommodate when it allowed its employee to bank the time accumulated through a compressed work week schedule and to use this for his additional holy days.[57]

> **Example:** An employer's policy provided for two paid days and allowed for a compressed work week – normally, an employee would work a half hour extra and take a day off within the three weeks in which it was earned. The employee, a member of the Worldwide Church of God, needed 11 holy days and the employer agreed that he could bank his compressed work-week hours and use them at will. The employer has met its duty to accommodate.

In summary, a good practice is for an employer to give two or three paid days off for religious observances, and to be practical and flexible in looking for solutions when employees request additional days off, subject to the undue hardship standard.

In some cases, scheduling changes may trigger issues in a unionized workplace and a union may take the position that this interferes with seniority. As was noted earlier, the *Code* takes priority over collective agreements and a union can be liable for impeding an employer's attempt to be flexible and accommodate.[58]

iii) Sex – accommodating the needs of pregnant women:

Accommodation needs may arise from a woman's pregnancy, including fertility treatments, miscarriage and abortion, pregnancy complications, recovery from childbirth and breastfeeding. It is discriminatory for an employer not to accommodate pregnancy-related needs.[59]

> **Example:** Shortly after an employee starts work as a sales associate, she becomes pregnant. She experiences nausea and fatigue. While she is able to complete her job duties, she needs to sit down to rest at times. Because of problems with her pregnancy, she takes some time off work and reduces the length of her shift. The employee's sales fall sharply and the employer fires her. This is viewed as a discriminatory termination because the employer has not considered the potential impact of her pregnancy and her reduced hours on her performance.

Special needs during pre-natal and post-natal periods, including breastfeeding, can be accommodated, short of undue hardship, in a variety of ways, including:

- a requested temporary relocation to another work station or location
- re-assignment of duties
- providing a flexible work schedule to accommodate medical appointments, including pre-natal and post-natal checkups and treatment for infertility
- allowing breaks as necessary – employees who need breaks for pumping or breastfeeding or for more frequent use of the washroom while pregnant should not have their time docked, be penalized, or be expected to make up the time unless the employer can show undue hardship
- providing a supportive environment for a woman who is breast-feeding. This may mean allowing an employee's caregiver to bring the baby into the workplace to be fed, making scheduling changes to permit time

to express milk or breastfeed at work, and providing a comfortable, dignified and appropriate area so that a woman can breastfeed, or express and store breast milk at work (for example, an area that assures a degree of privacy). In some special cases, it may involve permitting a leave of absence.

When a rule has an adverse impact on women who are or may become pregnant, the rule may violate their rights under the *Code*. Accommodation must be provided, short of undue hardship.

Example: A police officer requested light duties for the last stages of her pregnancy. The police force had a policy of not providing a modified work program and so the employee's 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 resign from the force. The rule of "no modified duties" was applied to all officers but it clearly impacted on pregnant women who are at higher risk during the latter stages of their pregnancy. The accommodation offered was unreasonable because a male officer who was unable to work because of pending charges was given lighter duties. This was found to be discrimination because of sex.

In this example, the policy was applied to all police officers and, on its face, did not discriminate. However, when the policy was applied, it negatively affected pregnant police officers and amounted to discrimination based on sex.

Refusing to assign alternate duties to pregnant employees when male employees are given opportunities to do alternate duties because of health and other reasons may be found to be discriminatory.

Pregnancy-related leave: Making a pregnant employee take a leave of absence, without any objective evidence of risk to that employee, may be discriminatory. An employer cannot arbitrarily decide that a pregnant employee should take a leave of absence as an accommodation measure, without considering, and consulting with the employee on, other options for dealing with a situation requiring accommodation. The most appropriate accommodation should be implemented, subject to the undue hardship standard.

If a pregnant employee produces proof that she must be away from work for health-related reasons, at whatever stage this might be during the pregnancy, she cannot be treated differently or adversely from other employees who are also away from work for other "health-related reasons."

"Health" includes:

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

Pregnancy leave is used for bonding and nurturing. As well, different women have different medical and physiological needs after childbirth, depending on their circumstances, and the time needed to recover from childbirth varies. Because women respond differently to pregnancy, requests for health-related absences should be assessed and granted on an individual basis. Pregnant employees who need leave for health-related pregnancy concerns should follow the proof-of-claim procedures of the employer's benefit plan to show that the health-related absence is valid.

An employee may need time off before or after her pregnancy, and/or parental leave for pregnancy-related health reasons. In such cases, the employee has access to health benefits under a workplace sick or disability plan. However, the decision to take short- or long-term disability leave may affect the right to take pregnancy and/or parental leave. See also Section IV-7j(iv) – "Pregnancy-related benefits (sex and/or disability)." If there is no workplace sick plan or personal insurance plan, an employee may go on an unpaid leave of absence or use vacation time for health-related reasons, including the employee's physical and mental health or the health and well-being of the fetus or child.

When an employee is on sick leave, either while pregnant or while a premature infant is in the hospital, before starting maternity and parental leave an employer must take this into account when determining how long to hold open the employee's position. It is not acceptable for the employer to rely on an arbitrary cut-off date of one year

from the date the employee left the workplace. The employer is expected to provide accommodation to the point of undue hardship as it would for an employee who is off work for a lengthy period of time due to disability.

> **Example:** An employee with an expected due date of January 1, 2006 goes off work on September 1, 2005 because of pregnancy complications. She receives workplace health benefits while she is on bed-rest for one month and for the three months that her baby is in hospital following his premature birth in October 2005. She starts her maternity leave, and receipt of Employment Insurance (EI) benefits, on February 1, 2006. She contacts her employer to arrange her return to work for February 1, 2007 when her EI benefits and parental leave will stop. Her employer says that she no longer has a job as she has been off for more than a year. The employee files a complaint alleging discrimination based on sex and family status. The employer would need to show that
> filling the job on a temporary basis and giving the job back to this employee on her return would amount to undue hardship.

iv) Accommodating the needs of employees with family responsibilities:

The duty to accommodate will only arise where a genuine case of discrimination on the basis of family status has been shown. In terms of family status, accommodation is usually associated with caregiving needs.

In employment, accommodation is central to overcoming the disadvantages experienced by caregivers and is usually neither burdensome nor costly; it is instead a matter of flexibility. A flexible and accommodating approach is ultimately a significant advantage to employers in attracting and keeping good employees.

Generally, the duty to accommodate will only become an issue in cases where rules, policies, practices, or institutional structures, assumptions or culture are adding to, or leading to, the disadvantage of persons identified by a particular family status. In these cases, the employer will need to show that the requirement is *bona fide* and that accommodation has been incorporated into the test and provided to the point of undue hardship.

To determine whether a duty to accommodate has arisen, consider the following:

- the nature of the caregiving responsibility, and the conflict between that responsibility and the organization's rules, requirements, standards, processes or other factors
    - the more major the caregiving obligation at stake and the more serious the interference of that rule, requirement or factor, the more likely it is that a duty to accommodate will arise
- the systemic barriers faced by caregivers, including effects based on overlapping grounds like disability, age, gender, sexual orientation, race and race-related grounds, and marital status
    - consider what systemic barriers exist in the workplace, including the representation of persons with significant caregiving responsibilities, the organizational culture, and the inclusiveness of its policies, procedures and decision-making practices
- the availability and adequacy of social supports for caregiving needs
    - caregivers should not have to place their loved ones into situations of significant risk of physical, emotional or psychological harm to meet the needs of their employer.

An employer does not need to provide more than the person needs to meet the actual needs related to family status. For example, if rescheduling work hours would enable an employee to take care of an important caregiving responsibility, the employer does not need to provide a paid day off.

It will be harder for an organization to justify not accommodating individual requests for flexibility if it has not taken steps to investigate and implement polices and practices that support and include caregivers. Employers should take steps to make sure that the workplace is "family friendly," has a positive work-life culture and is inclusive of persons who have caregiving responsibilities. Consider:

- a visible, senior-level statement of continuing support for an inclusive, family-friendly workplace
- education and training programs for management and staff on the requirements of the *Code* related to family

status
- developing an organizational strategy for creating an inclusive workplace
- programs and policies that recognize and support the range and diversity of contemporary Canadian families
- providing for flexibility and options available to all workers such as flexible hours, compressed work weeks, reduced hours, job sharing, leaves of absence, childcare and/or eldercare services, employee assistance programs and telework programs.

For more information on accommodation and family status, see the Commission's Policy and Guidelines on Discrimination because of Family Status.

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[48] *Parry Sound, supra* note 28.

[49] *Renaud*, *supra* note 29.

[50] *Meiorin*, *supra* note 6 at para. 65 and *Grismer*, *supra* note 7.

[51] See for example, *Datt v. McDonald's Restaurants* (No. 3), 2007 B.C.H.R.T. 324 (*Datt*).

[52] This example is based, in part, on the trial and appeal decisions in *Keays v. Honda Canada Inc.* (2006), 274 D.L.R. (4th) 107 at para. 8 (Ont. C.A.), leave to appeal to S.C.C. granted, [2006] S.C.C.A. No. 470 (Keays) at para. 8. It should be noted, however, that the Court of Appeal decision, and the discussion of the "note policy" was overturned by the Supreme Court of Canada which found that on the facts of that case the requirement to provide notes was part of a specific program to maintain regular contact with the family doctor in order to support treatment, which was itself a form of accommodation being determined in consultation with doctors: *Honda Canada Inc. v. Keays,* 2008 SCC 39 at para 71. The Supreme Court of Canada's decision is available online at http://scc.lexum.umontreal.ca/en/index.html.

[53] World Health Organization, "Prevention of Mental Disorders: Effective Interventions and Policy Options, Summary Report," online: www.who.int/mental_health/evidence/en/prevention_of_mental_disorders_sr.pdf

[54] *Amselem*, *supra* note 20.

[55] *Commission scolaire régionale de Chambly* v. *Bergevin*, [1994] 2 S.C.R. 525 (*Chambly*).

[56] Ontario Human Rights Commission, *Policy and Guidelines on Creed and the Accommodation of Religious Observance*, section 7.4.

[57] This approach was used in *Ontario* (*Ministry of Community and Social Services) v. Grievance Settlement Board* (2000), 50 O.R. (3d) 560 (Ont. C.A.).

[58] *Renaud*, *supra* note 29.

[59] *Brooks, supra* note 23.

9. More about disability-related accommodation

Accommodating the needs of persons with disabilities is one of the most common human rights issues in the workplace. While the principles and concepts described above also apply here, this section highlights specific issues that employers may face when responding to requests for accommodation made by employees with disabilities.

a) General principles

Section 17 of the *Code* provides that people with disabilities have the right to have their individual needs accommodated short of undue hardship, to allow them to perform the essential duties of their job. Where a person cannot perform the essential duties, even with accommodation, or where accommodation would amount to undue hardship, a decision not to employ the person would not be discriminatory. Once employers are aware of employee needs, they must take steps to meet the duty to accommodate.

b) Identify essential duties and provide accommodation

The first step is to separate essential from nonessential job duties. See Section IV-2b) – "Identify and clearly describe essential requirements" for more information about essential job duties. If the person cannot carry out the non-essential job duties, he or she must be accommodated to do so, or these duties must be re-assigned. Accommodation must be provided to enable a person with a disability to perform the essential duties of the job, to the point of undue hardship.

Do not reach conclusions about inability to perform essential duties without actually testing the person's ability. It is not enough to assume that the person cannot perform an essential requirement. Instead, there must be an objective determination of that fact.

> **Example:** An employee who works in a copy shop has limited arm movement due to a shoulder injury. The employee's job is to operate the copying equipment to fill customers' orders. Various types of copy paper are delivered by truck every week and need to be stacked and stored. Operating the copy equipment to fill orders would be an essential duty. Lifting, stacking and storing the weekly paper order is less likely to be an essential duty, since the paper delivery could be moved to a different time in the week and/or the stacking duties could be assigned to a co-worker.

If essential duties cannot be performed in different ways, the employer must explore other accommodation resources that may enable the person to do the essential duties. This accommodation may include adjusting the performance standard as long as doing so does not result in undue hardship.

c) Non-evident disabilities

The duty to accommodate a disability exists for needs that are known. Organizations and persons responsible for accommodation are not, as a rule, expected to accommodate disabilities they are unaware of. However, some people may not be able to disclose or communicate their needs because of the nature of their disability. In such cases, employers should try to help a person who is clearly unwell or perceived to have a disability, by offering help and accommodation. This is very important if an employee is suspected of having a mental illness. On the other hand, employers are not expected to diagnose illness or "second-guess" the health status of an employee.

> **Example:** An employer is not aware of an employee's drug addiction, but perceives that a disability might exist. The employer sees that the employee is having difficulty performing, and is showing signs of distress. If the employer imposes serious sanctions or fires the employee for poor performance, without any progressive performance management and attempts to accommodate, these actions may be found to have violated the Code.

d) How much medical information is an employer entitled to?

Everyone is required to take part co-operatively in the accommodation process. The employer must accept accommodation requests in good faith unless there are legitimate reasons for acting otherwise. The employee must answer questions or provide information about relevant restrictions. Employers should limit requests for information to those reasonably related to the nature of limitation or restriction, to respond to accommodation requests. See also Section IV-8c) – "Overview of duties and responsibilities."

The purpose of the questions must be carefully considered and be limited to the information that is reasonably required to assess needs and make the accommodation. The amount of information needed will depend on the circumstances. For example, it may be appropriate to ask for more information on a first absence after a sudden unexpected departure, than in the case of an absence related to an existing and known disability where the employer has already received medical information. Do not ask generally for "medical information" about the employee or for a copy of the employee's medical file.

Ideally, the employer will clearly identify what information is needed and why. For example, the employer could provide a list of questions for the doctor to answer:

- Must Susan be totally off work for six weeks, or is there some way she can continue to work with accommodation such as part-time work, flex hours, working from home, job modification, or workspace modification?
- Can Susan take part in a gradual return to work program? If so, when and how?
- Here is a physical demands analysis. Please indicate what, if anything Susan can continue to do.

Do not design the questions in such a way that the answers will reveal the person's diagnosis. For example, an employer can ask whether accommodation is needed related to any side effects of prescribed medication, but should not ask what medications the person has been prescribed. This could, in some cases, reveal the diagnosis and is not necessary for accommodation. If the doctor provides a diagnosis or information that has not been requested, proceed very carefully and make sure that any decisions made relate to restrictions and accommodation needs rather than assumptions based on the diagnosis or other information provided.

The employer should then accept the information provided and make the accommodation. If the doctor's note is not clear or detailed enough to allow for this, the employer is expected to make further reasonable inquiries. For example, if a doctor's note only says that the employee is fit to return to work, follow up to clarify what accommodation, if any, is necessary.

e) Make sure requests for doctor's notes are reasonable

Policies regarding doctor's notes must be reasonable and take into account that an employee may not be able to see a doctor on the same day as they are absent. In the past, the Commission has taken the position that a policy of only accepting doctor's notes dated on the date of the employee's disability-related absence is discriminatory.[60] There are also some disabilities for which there are no diagnostic tests and that can only be identified through an employee's self-report, such as chronic fatigue syndrome. In these cases, the value of having an employee obtain a doctor's note in such cases may be questionable.[61]

Where an employee has provided medical documentation to support future absences, a judicious and consistently applied approach to requesting doctor's notes for specific absences will serve an employer well. In cases of extended chronic illness, the employer should accept more general notes and should not require a note for each absence. If requests for doctor's notes are not necessary, are imposed differently depending on the type of disability, or have the effect of prolonging an employee's absence, such requests may be viewed as discriminatory.[62]

> **Example:** An employee's doctor fills in a form stating his diagnosis, chronic fatigue syndrome, and that he will need to miss four days of work per month. The employer requires the employee to get a doctor's note validating each absence before he can return to work. This is discriminatory because a doctor would only be able to repeat the employee's own views due to the nature of his disability, the requirement is not applied to employees with "mainstream" disabilities, and has the effect of lengthening the employee's absences.

f) When is it appropriate to ask for a second opinion?

While the employer is entitled to get all the information needed to make the accommodation, it must also accept accommodation requests in good faith and respect the dignity of employees. A request for a second opinion, an opinion from a specialist or an independent medical examination (IME) must be necessary to provide accommodation. Such a request should not be made to refute whether the employee has the disability in the first place or to avoid providing the accommodation.

> **Example:** An employee provides a doctor's note that asks for accommodation but does not state any particular diagnosis. The employee shows no observable symptoms of illness in the workplace, and the

> employer suspects that the employee is making up a disability to get more flexibility in her work arrangements. The employer wants to prove this by having the employee take an independent medical examination. Such an approach would not be consistent with the Code.

It is not normally advisable for an employer to second-guess the validity of an employee's doctor's advice, only on a suspicion that it is not objective because it is based on the employee's own perceptions. Avoid challenging a medical note or requiring a second opinion unless there is evidence that the doctor's recommendations are based on something other than his or her best opinion as to what is needed to make sure the patient recovers.

The legitimacy of a request for more medical information will depend on the information already received. A request for more medical information will be appropriate if there is a reasonable and objective basis for seeing the initial information as inadequate or inaccurate. Examples might be if there appears to be a problem with the degree of expertise or type of expertise of the doctor who provided the initial medical opinion, or if there is some reasonable basis to believe that the employee is not fit to do the job despite the existence of a medical report to the contrary. Document reasons for requesting more medical evidence.

> **Example:** After a serious car accident, an employee is cleared by her doctor to return to work. On more than one occasion, she becomes dizzy at the end of her 12-hour night shift operating a machine and narrowly misses hurting herself. The employer asks for more information from her doctor about possible accommodations. Once again, the doctor's note indicates that the employee is fit to work and that no accommodation steps are needed. The employer then asks the employee to attend an assessment by a doctor of her choosing, with expertise in workplace accommodations.

If a second opinion or independent medical exam (IME) is warranted, a good approach is to select a doctor who is acceptable to both the employee and the employer, and the union (if there is one) rather than insisting that an employee meet with a doctor that the employer has chosen. Give the employee enough information to understand the purpose of such an examination, who will conduct it and what assessments will be used.

g) How to deal with conflicting medical reports or recommendations

Employers should accept medical reports in good faith. In some cases, there may be conflicting information provided by two medical experts. For example, an employee's own doctor or specialist's report may outline different accommodation needs than an independent medical examiner's report.

Deciding which report to follow will depend on the facts of the particular situation and the following kinds of factors:

- What are the qualifications and degree of expertise of the two experts – which expert has more relevant experience?
- What is the degree of interaction with the employee?
    - Were medical conclusions drawn based on lengthy visits over a number of months or was there only a 15-minute assessment?
- What methods were used for the assessment(s)?
- How far apart are the experts' opinions?
- Do both reports equally respect the dignity and autonomy of the employee?
- What are the consequences of choosing one over the other?
- If there are serious risks associated with a disability, it may be better to go with the "safer" accommodation. For example, one expert says the employee may have a heart attack if accommodation is not made and the other says accommodation is not necessary. It may be prudent to rely on the first opinion.
- What are the employee's views about the accuracy of each of the opinions based on his or her own lived experience of the disability?

h) Considerations when contacting an employee on leave

Employers are entitled to contact employees on leave if it is reasonably required. For example, contact may be needed to assess accommodation requirements, the length of absence, changes in the prognosis or to find out whether there may be a potential return to work date. If an employee is off work for an "undetermined" amount of time, the employer can contact the employee after a reasonable length of time (for example, every 3 – 6 months) to see if the prognosis has changed and whether a return to work date has been identified.

Contacts could be used to show the employee that they are missed and valued by the organization. Such contacts may show the employee that they continue to be a part of the organization and could help with a smooth return to work. On the other hand, repeated contacts requesting information, saying that the workplace needs the employee, or asking for a premature return to work (whether implicit or explicit), especially over a short period of time, may constitute harassment.

Ideally, if possible, employers should identify early on how often and how the employee wants to be contacted. This may depend on the nature of leave requirement. For example, an employer might be asked not to contact an employee who is off due to work-related clinical depression and wants to keep this private, but may be asked to keep in touch regularly with an employee who is off for cancer treatment and wants to know about workplace events. Stigma and stereotypes, for example relating to mental illness, should not play a factor in decisions about how often to contact an employee.

In determining whether to contact an employee on leave, consider the following factors:

- What is the nature and length of the disability leave?
- What level of contact has the employee asked for?
- How much time had passed since the last contact?
- What is the reason for the contact?
- Is more information really needed or has enough information already been provided?
- How would a reasonable person view a further contact in light of the information above?

i) Return to work after an extended absence due to disability

Accommodation is a fundamental and integral part of the right to equal treatment in returning to work. Both employers and unions must co-operate in accommodating employees who are returning to work after a disability-related absence. Occupational Health and Safety committees, which include representatives of both management and labour, can help work out individual accommodations for employees with disabilities who are returning to the workplace.

Section 17 of the *Code* states that the right to return to work for persons with disabilities only exists if the worker can fulfill the essential job duties after accommodation short of undue hardship. If a person cannot do the essential job duties, despite the employer's effort to accommodate short of undue hardship, there is no right to return to work. This right under the *Code* applies regardless of the size of the workplace or the length of time the employee has worked for the company. This is different from the corresponding provisions in the *Workplace Safety and Insurance Act.* See also Section II-2b) – "Supremacy of the *Code*" and Appendix B – "Human rights in the workplace: which laws?"

For disability leave, there is no fixed rule about how long an employee with a disability may be absent before the duty to accommodate has been met. This depends on the ability of the employee to perform the essential job duties, considering the unique circumstances of every absence and the nature of the employee's condition. Also important are the predictability of absence, both in terms of when it will end and if it may recur, and the frequency of the absence. The employee's prognosis and length of absence are also important considerations. It is more likely that the duty to accommodate will continue with a better prognosis, regardless of the length of absence.

The duty to accommodate does not necessarily guarantee a limitless right to return to work. On the other hand, a return to work program that relies on arbitrarily selected cut-offs or requires an inflexible return date may be challenged as a violation of the *Code*.

While an employer may be anxious to have an employee return to his or her job as soon as possible, forcing an employee to return too soon can jeopardize the successful re-integration of that employee into the workplace.[63]

> **Example:** An employee is told that his long-term disability benefits are ending as he has been assessed by the insurer's doctors as being able to work. Despite medical documentation from the employee's doctors showing otherwise, he is pushed back to work. This aggravates his medical condition leading to a patchy attendance record, and setting in motion a discriminatory sequence of events ending in his termination from employment.

j) Alternative work

The term "alternative work" means different work or work that does not necessarily involve similar skills, responsibilities and compensation. Although accommodation in the pre-disability job is always preferable, it may not always be possible. The Commission has taken the position that accommodation in a job other than the pre-disability job may be appropriate in some cases.

Consider the following questions:

- Is alternative work possible and available now 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?
- Does the alternative work policy contravene the collective agreement?
- What are the terms of the collective agreement or individual contract of employment?
- What are the past practices of the workplace?
- How interchangeable are workers? Do employees often change positions either permanently or temporarily for reasons other than accommodating disability?

Alternative work may be either temporary or permanent:

- *Temporary Alternative Work:* This may be appropriate either for a return to work or where a disability leaves an employee temporarily unable to perform the pre-disability job. This can also be an appropriate accommodation where the nature of the employee's disability and its limitations are temporary or episodic.
- *Permanent Alternative Work:* As outlined above, permanent assignment to alternative work may be appropriate in some cases. Reassignment to a vacant job should be considered an appropriate accommodation only when accommodation in the current job would cause undue hardship. The vacant position must be vacant within a reasonable amount of time. The employer does not have to "promote" the employee. If reassignment creates a conflict because of a collective agreement, accommodation needs should prevail over the collective agreement. When reassignment takes place, the person must be qualified for the reassigned position. The vacant position must be equivalent to the current position. If no equivalent one exists, a lower position would be acceptable. Reassignment is not available to job applicants.

k) On-the-job drug and alcohol testing

i) May be allowed in certain circumstances:

The *Code*'s definition of "disability" includes physical, psychological and mental conditions. Severe substance abuse, such as alcoholism and the abuse of legal and illicit drugs, is classified as a form of substance dependence and is a disability within the meaning of the *Code.* When a person's use of drugs or alcohol reaches the stage of severe abuse, addiction or dependency there may be significant impairment or distress.

When a person, including a recreational alcohol or drug user, is perceived to have an addiction or dependency on drugs or alcohol, the *Code* operates to protect that person in the workplace. The person who had a drug or alcohol problem in the past but no longer suffers from an ongoing disability is also protected.

The Commission's position is that pre-employment drug and alcohol testing is generally not permitted. However, the Ontario Divisional Court has held there was no breach of the *Code* where an offer of safety-sensitive employment was made conditional on passing a urinalysis drug test, and the employer's policy did not provide for automatic termination on a positive drug test, but instead allowed for accommodation to the point of undue hardship.[64] See also Section IV-6d) – "Pre-employment drug and alcohol testing."

Drug and alcohol testing on the job may be justifiable in certain cases. To decide whether testing is necessary, consider the following questions:

- Is there an objective basis for believing that job performance would be impaired by drug or alcohol dependency? In other words, is there a rational connection between testing and job performance?
- Is there an objective basis for believing that a specific employee's unscheduled or recurring absences from work, or habitual lateness, or inappropriate or erratic behaviour at work are related to alcoholism or drug addiction/dependency?
- Is there reason to believe that the degree, nature, scope and probability of risk resulting from alcohol or drug dependency will adversely affect the safety of other people?

Drug and alcohol testing that is not related to job performance has been found to violate employee rights. Therefore, policies on drug and alcohol testing must not arbitrarily target groups of employees.

> **Example:** An employer requires only new or returning employees to be tested. This might not be justifiable in terms of the stated objectives of the testing policy.

As drug tests by means of urinalysis do not actually measure impairment but rather simply show the presence of drugs in the body, random drug testing of employees by urinalysis is an unjustifiable intrusion into the rights of the individual. Further, even random drug testing of oral fluid, which arguably does a better job of measuring current impairment from drugs, has been found to violate the terms of a collective agreement. As an Ontario arbitrator recently held, "Arbitrators have concluded that to subject employees to an alcohol or drug test when there is no reasonable cause to do so, or in the absence of an accident or near miss and outside of the context of a rehabilitation plan for an employee with an acknowledged problem, is an unjustified affront to the dignity and privacy of employees which falls beyond the balancing of any legitimate employer interest, including deterrence and the enforcement of safe practices." [65]

In the case of random alcohol testing, the use of breathalysers is a minimally intrusive yet highly accurate measure of both consumption and actual impairment. As a result, the Commission supports the view that random alcohol testing is acceptable in safety sensitive positions, especially where staff supervision is minimal or non-existent, but only if the employer meets its duty to accommodate the needs of people who test positive.

"For cause" and "post-incident" testing for either alcohol or drugs may be acceptable in specific cases. For example, after accidents or reports of dangerous behaviour, an employer will have a legitimate interest in assessing whether the employee in question had consumed substances that may have contributed to the incident. The results of the assessment may explain the cause of the accident. Such testing should only be conducted as part of a larger assessment of drug or alcohol abuse (for example, employee assistance programs (EAP), direct medical assessment and peer and supervisor reviews).

Employers who have determined the need for on-the-job testing should consider the following when developing on-the-job testing criteria:

1. Have arrangements been made for competent handling of test samples? Qualified professionals must perform drug and alcohol testing and a competent laboratory must analyze the results. As well, the employer must make sure the samples taken are properly labelled and protected at all times.
2. Are the test results kept confidential? To protect the confidentiality of test results, all health assessment information should stay with the examining physician and away from the employee's personnel file.
3. Have the test results been reviewed with the employee? Procedures should be put in place for the doctor to

review the test results with the employee concerned.

4. Where mandatory self-disclosure is part of the policy, have reasonable time periods been included? Where mandatory self-disclosure is a part of a workplace drug or alcohol policy, there must be a reasonable time period within which previous substance abuse will be considered relevant to assessing current ability to perform the essential duties. The reasonable time period is based on whether the risk of relapse or recurrence is greater than the risk that a member of the general population will suffer a substance abuse problem. Mandatory self-disclosure of all previous substance dependencies, without any reasonable limitation on how long ago these conditions took place, has been found to be a *prima facie* violation of employee rights.[66]
5. Have alternative methods such as functional performance testing been used? The Commission encourages employers to use methods other than drug and alcohol testing (for example, functional performance testing) where such methods exist, or develop such tests, where feasible, to assess impairment. The Commission also encourages employers to develop and put in place EAPs and peer monitoring.

ii) Duty to accommodate:

Where an employee tests positive, the *Code* requires individualized or personalized accommodation measures. Therefore, policies that result in automatic loss of employment or reassignment or that impose inflexible reinstatement conditions without regard for personal and individual circumstances are not likely to meet this requirement.[67]

iii) The employee must co-operate with the employer:

A person who needs accommodation to perform essential job duties must make his or her needs known in enough detail and must co-operate enough to enable the person responsible to respond to the request. However, this obligation does not eliminate the employer's obligation to treat the person equally even if the employer believes or perceives (even with good reason) that the employee has a substance abuse problem.

> **Example:** An employee in a clerical position appears to be inebriated frequently in work hours, and the employer has a conversation with him to address the problem. The employee refuses to acknowledge the problem or seek counselling at the employer's expense. Shortly after, the employee is fired without formal warning.

In this case, the employer clearly “perceived” the person to have a substance abuse problem, and therefore the protection of the *Code* is engaged. The fact that a person refuses treatment or accommodation does not by itself justify immediate dismissal. The employer has to show, through progressive discipline, that the employee has been warned and is unable to perform the essential job duties. If the employee refuses offered accommodation and if progressive discipline and performance management have been implemented, then disciplinary steps can be taken.

An employer must provide the support needed for an employee with a drug or alcohol addiction/dependency to take part in a rehabilitation program, unless providing such accommodation would cause undue hardship. If there are objective health and safety risks associated with an employee’s presence in the workplace, an employer may give the employee a paid leave to explore treatment options.

iv) Alternative programs:

Employers are encouraged to consider setting up such alternatives as an employee assistance program (EAP), including offsite counselling and referral services. These can be helpful, both for persons with drug or alcohol addiction/dependency, and for helping employees cope with stresses that may lead to an addiction or dependency. See also Section IV-8e(viii) – “Stress-related accommodation requests.” Other alternatives include performance tests for safetysensitive positions where physical and/or mental coordination are essential.

v) Last chance agreements:

Last chance agreements are often put in place where an employee has a substance addiction and is returning to work after attending a rehabilitation program. A common element of such an agreement is that it says that employment can be terminated if there is a further relapse. This kind of agreement raises human rights concerns from a number of perspectives.

Employers should make sure that attempts to have employees enter into a last chance agreement do not amount to coercion or duress, as this could be a form of disability-related harassment or discrimination. Some last chance agreements may require the employee to waive any rights under human rights legislation if they breach the agreement. This type of provision could be viewed as a form of contracting out of the provisions in the *Code* that is not allowed. For more information about this issue, refer to Section IV-12e) – "Considerations when settling complaints internally."

Even if all parties in a workplace, employer, union and employee, have agreed to the terms of a last chance agreement, this does not relieve the employer and union from fulfilling the *Code*'s duty to accommodate to the point of undue hardship. The fact that an employee has not upheld his or her end of a last chance agreement is not necessarily a "green light" for termination. The employer or union would need to be sure that providing further accommodation would amount to undue hardship relating to costs, outside sources of funding and health and safety. This assessment must be done on a case-by-case basis.

l) Harassment because of disability-related accommodation

The courts have clearly stated that when providing on-the-job accommodations, employees with disabilities must be treated with dignity and respect. Employees with disabilities have a right to be free from harassment. This precludes name calling and other vexatious comments, and also prohibits employers from imposing onerous or arbitrary requirements on an employee with a disability.[68]

> **Example:** An employee provides documentation about his disability, and yet faces a number of obstacles related to his requests for accommodation. The employer scrutinizes him for his disability-related conduct.

m) Mental illnesses in the workplace

Mental disabilities, such as depression or schizophrenia, pose particular challenges for employers. Employees may be reluctant to seek a diagnosis and treatment or accommodation in the workplace due to stigma. Also, discrimination in the workplace may, in some cases, make existing mental illnesses worse or lead to mental disabilities such as depression or post-traumatic stress disorder.

As rates of mental illness increase worldwide, the impact of mental illnesses in the workplace is also growing. For example, the World Health Organization estimates that by 2020, depression will be the second-most common cause of disability in the world, after heart disease.[69] Despite this, mental illness still continues to be a taboo subject in society and in many workplaces. In this environment of silence and discomfort, stereotypes flourish unchecked and employees with mental illnesses are exposed to extreme levels of stigma and irrational fear. Employees with mental health issues often find themselves isolated and marginalized in the workplace – impacts that may be made worse by racial and cultural barriers.

People with mental illnesses have the right to be employed and to receive accommodation in the workplace to the point of undue hardship. Unfortunately, it is not uncommon for employees with mental disabilities to be unlawfully excluded from a hiring process, treated differently in the workplace or terminated from employment when they make a request for accommodation.

This is not acceptable. Under the *Code*, the employer must go through the same process of finding appropriate accommodation and assessing undue hardship for an employee with a mental illness as it would for an employee with any other kind of disability. A recent Ontario tribunal decision, *Lane v. ADGA Group Consultants Inc*[70] makes it

clear that employers who do not properly accommodate the needs of employees with mental illness contravene the *Code* and are liable for significant damages.

i) Case Study – How not to treat an employee with a mental illness:

Once he was hired, Mr. Lane told his employer of his need for accommodation and made suggestions: that his behaviour should be monitored and that if it appeared that he was going into a pre-manic phase, he might need a short time off to recover so he would not have a full manic episode (which would require him to be off for much longer). Based on the response received, he felt he had made a mistake by disclosing this information.

Soon afterwards, the employer noted some behaviours linked to his disability as Mr. Lane was going into a pre-manic phase. Relying on stereotypes and assumptions, they leapt to the conclusion that he could not do his job, which required stability and reliability. The employer did not have any accommodation policies or procedures in place and did not assess whether it could accommodate Mr. Lane. Even if he could not be in the workplace for legitimate reasons, they didn't consider options like placing Mr. Lane on a leave while sorting out whether they could accommodate him in his position without undue hardship.

Instead, the employer fired Mr. Lane eight days into his probationary period. No one called Mr. Lane's wife or doctor to provide support even though there were indications that he was likely in a pre-manic phase. This contributed to serious consequences – Mr. Lane developed full blown mania and depression, was hospitalized on a couple of occasions, separated from his wife (and daughter) and lost his home.

The complainant was awarded $80,000 (including $10,000 for mental anguish), and the employer was required to establish a comprehensive anti-discrimination policy and hire a consultant to provide training.

ii) Tips for respecting the rights of employees with mental disabilities:

- Include input of staff and/or mental health organizations in setting organizational policy.
    - Any policies developed should take into account the lived reality of people who have experienced mental health issues in the workplace.
- Remember that an employee with a mental disability is valued and can continue to contribute to the workplace.
    - Focus on the person's strength, resiliency, accomplishments, and views about what he or she needs.
    - Look at individual circumstances and don't rely on stereotypes.
    - Recognize and take steps to alleviate stigma and vulnerability of an employee with a mental disability.
- Treat the employee the same way as employees with other kinds of disabilities, such as heart problems.
    - Communicate professionally and responsibly as would be done for employees without mental illness.
    - Maintain confidentiality.
- Have an open dialogue with the employee.
    - Consider the employee's views on what will work for him or her.
    - Find out how employee views things in the future and what they see the employer's role to be.
    - Take instructions from the person, not third parties who claim to represent their best interests (unless there is a power of attorney).
    - Make sure communications are clear if the employee has diagnosed or undiagnosed mental health issues.
    - Be careful not to use language that implies negative judgements about the employee (both when speaking with the employee and when speaking about him or her to others).
- Inform yourself about accommodation needs.
    - Ask for consent and speak with the employee's doctor about accommodation needs.
    - Don't request a diagnosis – focus on accommodation requirements.
    - If a doctor provides a diagnosis anyway, follow up and find out what accommodation is necessary.
    - Keep in mind that mental illnesses may be misdiagnosed and that people with mental disabilities are stigmatized.
        - Don't focus on labels.

- Don’t leap to the conclusion that undue hardship exists.
  - Follow the same process as for employees with other disabilities.
  - Assess health and safety risks based on objective evidence following implementation of accommodation.
  - Make sure decisions are not being made based on stereotypes that people with mental illness are dangerous or violent.
- Look at the big picture
  - Try to understand barriers, such as systemic racism, experienced by the employee that are aggravated by mental illness.
  - Get information about community resources and supports.
- Work in a team to support the employee.
  - Find out about the employee's personal support system, especially if employee is not able to fully participate in accommodation planning.
  - Show a willingness to work together to come up with creative accommodation solutions.

iii) Availability of appropriate mental health services:

Employees with mental disabilities have the right to seek and get health care services targeted to their individual needs. Biased or uninformed assessments of behaviour could lead to culturally appropriate behaviour being misinterpreted as a sign of mental illness. For example, an employee may be guarded about providing personal information for reasons linked to trauma experienced in his place of origin, but this could be misinterpreted as a symptom of mental illness, such as paranoia.

However, a reality is that there may not be enough service providers and health care practitioners in the region to help persons with mental health issues in languages other than English or French. This may be a barrier to an employee getting an accurate diagnosis and treatment in a timely way. An employer would need to take into account an employee’s efforts to get appropriate services before concluding that an employee is not taking part in the accommodation process.

> **Example:** An employer asks an employee with a mental disability to attend a medical examination to identify accommodation requirements. The employee, a permanent resident from Sri Lanka, has difficulty finding a doctor, psychiatrist or psychologist who can assess him in his native language. While the employee is on the waiting list for such services, the employer provides interim accommodation based on information provided by the employee and a community organization that is assisting him. The employer relieves stress on the employee by affirming the employee's right to choose a culturally appropriate assessment and by confirming that it will wait until this can be obtained.

iv) How to support an employee’s return to work after disability leave for a mental health problem:

To successfully support the return to work of an employee with a mental illness, Mental Health Works suggests that three fundamentals be in place:[71]

1. The work itself, and the employee’s presence in the workplace, should not pose a risk to the employee or co-workers.
2. The employee must be able to perform the tasks of his or her job at a level where meaningful work is possible with appropriate accommodations.
3. The workplace must be welcoming and free from harassment and other pressures that might delay recovery.

To evaluate these, Mental Health Works recommends that an employer look at the demands of the job, and at the employee’s progress, including:

1. The employee’s symptoms, and the severity of those symptoms
2. The effectiveness of treatment
3. The employee’s resilience

4. The employee's ability to prevent a relapse (by identifying and avoiding issues that lead to relapses)
5. The level of mental acuity and stamina the job requires.

As with other forms of disability accommodation, an employer is expected to first consult with the employee and to also seek input, where necessary, from his or her doctors and community resources. For more practical suggestions on reintegrating an employee into the workplace after a mental health absence, refer to the Mental Health Works website at www.mentalhealthworks.ca.

v) Compliance with medical treatments:

An employee's ability to cope at work may depend on his or her compliance with a medical regime. However, an employer should be wary about acting based only on an assumption that an employee has been non-compliant or may not respond well to treatments for mental illness.

> **Example:** An employee provides a doctor's note that indicates that she has schizophrenia, and that she does not need any accommodation as her medical treatment has been effective to date. The employer had suspected that the employee might have depression and is shocked to hear the diagnosis (the employer is not normally entitled to know the diagnosis). The employer decides that the company cannot take the risk that the employee might not take her medicine and lets her go. This decision would likely prove to be problematic for the employer, as there was no basis to think the employee would not take her medicine, nor was there any information to suggest that there were health and safety risks to justify termination.
>
> **Example:** An employer notices that an employee's work performance is slipping. The employer writes a letter stating that it appears that he has not taken his medication and that he should not report to work until he is prepared to do so. The employer has not met its duty to accommodate.
>
> **Example:** An employer notices that an employee's work performance is slipping. The employer speaks with the employee and, with his consent, contacts his doctor to find out what accommodation needs to be provided in both the short-term and the long-term. This employer is off to a good start.

vi) Act to overcome stigma and harassment:

An employer is also expected to take steps to ensure that the stigma associated with mental illness does not give rise to human rights violations. For example, discriminatory attitudes of other employees should not prevent the successful accommodation of an employee with a mental disability, nor should they be allowed to give rise to harassment or a poisoned environment. See also Section IV-12a(iv) – "Mobbing and Bullying."

> **Example:** To accommodate an employee's mental disability, an employer bundles together tasks and creates a new position in another unit. The other employees in this unit have heard this employee has a mental illness and say they are scared to work with her. The employer does not back down from implementing the most appropriate accommodation because of the discriminatory stereotypes and fears initially expressed by other staff. The employer gives them training about the duty to accommodate and the Code's protections against harassment and a poisoned environment. The employer takes steps to respond to any remaining concerns while maintaining confidentiality. The employer makes it clear that further discriminatory comment or conduct may lead to discipline. The situation is closely monitored.

vii) Objectively assess alleged health and safety risks:

Where other employees claim that an employee with a mental disability poses a health and safety risk, the employer should make sure that it is able to meet the test for undue hardship before taking any action. This means that there must be objective evidence of actual risk after accommodation has been provided. Health and safety risks must not be presumed based on the stereotype that persons with mental disabilities are violent or dangerous. Without medical or other expert evidence, it would be difficult for an employer to show that the risks cannot be reduced through

accommodation. When assessing risks based on medical evidence, employers should not jump to conclusions based on a diagnosis if one is provided.

viii) Performance managing an employee who is suspected to have a mental health problem:

An employee with a mental health problem or disability can be successful in work given appropriate support and accommodation. While the employer is entitled to manage performance of its employees, it is to the employer's advantage to do this in a way that maintains an employee's self-esteem and encourages wellness. Mental Health Works suggests a collaborative approach to coaching distressed employees:[72]

- acknowledge the strengths that the employee brings to the team and the workplace – this sets the tone for discussions about performance
- be clear about the changes in performance and their impacts on the organization – the employee must know what is expected
- collaborate with the employee to set goals, objectives and timeframes
- regularly monitor the situation and evaluate progress, including by employee self-assessment, and be clear about consequences for any performance issues that remain
- recognize and encourage the employee when goals are met, and hold the employee accountable when they are not
- both employee and manager should be involved in determining next steps when goals have not been met.

When dealing with employees who may have mental illness, employers should make sure that these employees understand the options available and the implications of any decisions they are making, in particular relating to layoffs or terminations. Employers should also be wary about rushing to terminate based on medical documentation without exploring accommodation alternatives.

> **Example:** An employee is acting strangely and the employer asks for a medical assessment. The doctor says that the employee is experiencing psychotic episodes. Based only on this information, the employer warns other employees to be on the alert and gives him two weeks notice of termination indicating that the employee poses a health and safety risk. The employer has not assessed the extent of any risks that may exist, has not offered or explored accommodation and may be seen to have poisoned the person's work environment.

ix) More help for employers dealing with mental health situations:

In the Commission's experience, employers struggle with mental health situations more than any other situation of workplace accommodation of *Code*-needs. The Commission recommends that employers who suspect or are aware of an employee's mental illness and are unsure about how to proceed with accommodation consult Mental Health Works. Their website address is www.www.mentalhealthworks.ca.

Mental Health Works is an organization whose mandate is to help organizations manage their duty to accommodate employees experiencing mental disabilities such as depression or anxiety in the workplace. They provide services to organizations, including workshops and presentations, and their website is an excellent online resource to help employers prevent mental health problems and support employees with mental illness. Guidance is provided on how to discuss work performance issues when an employee is suspected of having a mental illness, ways to accommodate an employee with a mental illness and how to successfully reintegrate an employee who has been on a leave as a result of a mental health problem. The website also offers a self-assessment tool called an "emotional wellness survey," mental health fact sheets and information for employees.

n) Environmental sensitivities and nut allergies

An emerging issue in many workplaces involves accommodating the needs of employees with environmental

sensitivities and serious allergies, for example to nuts. The Commission has previously stated that these may be considered disabilities. For example, if a person with asthma, environmental sensitivity or allergies found themselves disadvantaged in the workplace as a result, that person could be considered a person with a disability under the *Code*. Employers may therefore have a duty to accommodate these kinds of needs.

This may include limiting, where possible, opportunities for workplace exposure to common substances that trigger asthma or allergies. For example, an employer may institute a "scent-sensitive" or "scent-free" workplace policy or designate the workplace as a "peanut-free zone." Depending on the workplace and the particular situation of the persons in question, there may be other appropriate accommodations. An accommodation will be appropriate to the extent that it respects the dignity of a person with a disability, takes into account individual needs, and promotes integration and inclusion of persons with disabilities. The Canadian Human Rights Commission has recently posted materials on environmental sensitivities on their website at www.chrc-ccdp.ca.

o) Learning disabilities

The Learning Disabilities Association of Ontario (LDAO) states that as many as 10% of people in Ontario have learning disabilities. These are invisible disabilities that affect how people process information. In the workplace, they may affect an employee's visual, auditory or organizational abilities. There is a range of accommodation steps that can be put in place to help people with learning disabilities contribute fully to the workplace.

For example, LDAO lists the following steps that can be taken:[73]

- give written material or a tape recording to employees who have difficulty processing what they hear
- give extra time and voice-recognition software to employees who have trouble writing
- break down tasks into smaller parts and give guidance on time frames for employees with difficulties organizing information.

LDAO is included in the list of resources in Appendix C.

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[60] Ontario Human Rights Commission, "Human Rights Settlements Reached with Ontario Gaming and Lottery Corporation on Disability Policy," online: www.ohrc.on.ca/en/resources/news/olg_settlement.

[61] *Keays, supra* note 52 *(*overturned on appeal to the Supreme Court of Canada).

[62] *Ibid.* (overturned on appeal to the Supreme Court of Canada). In that case the Court found that the note policy was a part of a specific program designed to accommodate disabled employees.

[63] Note however: *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, [2007] 1 S.C.R. 161 finding that an employer is not required to keep a job open indefinitely for an employee who may remain disabled for an indeterminate period.

[64] *Weyerhaeuser v. Ontario Human Rights Commission*, [2007] O.J. No. 640 (Div. Ct.), leave to appeal refused (August 21, 2007) (unreported) Court of Appeal File No. M34351.

[65] *Imperial Oil v. Communications, Energy and Paperworkers Union of Canada, Local 900* [2006] O.L.A.A. No. 721 (per Arbitrator Picher).

[66] *Entro*p, *supra* note 6.

[67] *Ibid*.

[68] *Moore v. Canada (Attorney General)*, 2005 CarswellNat 2498, 267 F.T.R. 209 (F.C.); Zettel Manufacturing Ltd. v. CAW-Canada, Local 1524, 2005 CarswellOnt 7877, 140 L.A.C. (4th) 377 (Ont. Arb. Bd.)

[69] See for example Mental Health Works, "Cubicle bullies: Mobbing at Work," online: www.mentalhealthworks.ca/articles/mobbing_at_work.asp.

[70] *Lane v ADGA*, 2007 HRTO 34 (CanLII) (*Lane*). At the time of publication, this decision was under appeal.

[71] Mental Health Works, "Accommodations", online: www.mentalhealthworks.ca/employers/faq/question11.asp

[72] Mental Health Works, "Coaching Distressed Employees", online: www.mentalhealthworks.ca/articles/coaching_distressed_employees.asp.

[73] For more ideas, see Learning Disabilities Association of Ontario and Ministry of Citizenship and Immigration, *"Learning Disabilities on the Job!" (*brochure) (Toronto: Queen's Printer for Ontario, 2004*),* online: www.ldao.ca/what_helps/helping_at_work.php.

10. Training, promotions and advancement

a) Training and mentoring

Organizations benefit from having a workforce where all employees are motivated to learn, enhance their skills and make greater contributions to the organization's success. The costs of not providing equal access to training or other learning opportunities can be significant. In addition to potential liability under the *Code*, affected employees fall farther behind over time and may be less able to advance compared to colleagues who have had training opportunities.

> **Example:** An employer assumes that an older worker is too hard to train and is "riding it out" to retirement. She is not sent for training and is given performance reviews that do not meaningfully identify strengths and areas where there is room for improvement. Her skills do not remain current, and she cannot work on improving her weaker areas. She is less motivated to work hard because she feels she is not a valued worker, is not expected to perform and will never be recognized for her contribution.

The *Code* provides that every employee should be treated equally for internal and external training opportunities in the organization. This means that all decisions made related to training opportunities should be made using a non-discriminatory process.

> **Example:** An employee tells his manager that he cross-dresses. The manager then tells the employee that he will no longer qualify for further promotions or career training because customers and co-workers will be uncomfortable with him.

An organization that provides education opportunities to staff based on the discretionary decisions of management could risk having a complaint made against them if an employee believes that he or she is being denied educational opportunities because of a *Code* ground. An example of a program that may avoid such problems would be one that allows all employees to go to one educational activity per year, as long as it is identified in their performance goals and objectives and not more than a set dollar amount.

Training opportunities that are limited to senior employees may exclude racialized persons, women and younger persons who may tend to be concentrated in the lower-level jobs. In other cases, training for people at lower levels may be focused on current job skills, while training for more senior employees may prepare them for promotion. A best practice is for organizations to make appropriate training available to all employees. Training should enhance current job skills as well as prepare employees for different or more advanced jobs.

Discrimination may occur where employees are informed about training opportunities in an informal way, such as word of mouth, or being selected based on the discretion of supervisors. All employees should have equal access to information about training opportunities. This information should be sent out widely through formal means such as e-mails, memos and posting on bulletin boards. Employers should allow employees to volunteer for training or encourage all employees to seek out training rather than selecting some for these opportunities (unless this is linked to a special program). The employer should use fair, objective and clearly stated guidelines for deciding who should get training.

Lack of appropriate mentoring has also been identified as a major barrier to training and development on the job for

many people identified by *Code* grounds. Informal mentoring that has managers selecting employees to "take under their wing" can result in racialized persons being left out. Formal mentoring programs can make sure that all employees receive mentorship and that other employees are able to act as role models.

b) Advancement opportunities

Employment equity studies consistently show that racialized persons, women and people with disabilities are still largely concentrated in the lower levels of organizations, and that upward mobility continues to be a problem. It is important for organizations to be aware of how systems for promotion and advancement may result in obstacles for career progression. The principles, barriers and best practices discussed in Section IV-5 – "Interviewing and making hiring decisions" also apply to promoting and advancing internal candidates.

This section highlights considerations that arise related to opportunities for employees to move up within the hierarchy of a workplace. The *Code* provides that every employee should be treated equally in terms of advancing within the organization. This means that decisions made about acting assignments, secondments or promotions should be made based on objective evidence related to job performance and abilities, and not on subjective assessments that are based on stereotypes or unfounded assumptions related to a ground protected by the *Code*.

> **Example:** An organization was concerned about the aging of its employees and that there could be a number of managers retiring within a 15-year period. Recruitment practices were modified to meet the "long-term professional needs of the department." Statistical evidence on age distribution of employees following a hiring process showed that most employees were under age 40 and the vast majority of new employees were under 30. A tribunal found that the organization had set about recruiting a younger work force and that the 43-year-old complainant who had been with the organization for seven years was not offered a promotion into a particular position. This was in part because he did not fit the profile for the organization's recruits into that position.

The following kinds of advancement practices raise human rights concerns and may exclude persons protected by the *Code*:

- acting assignments are awarded informally and used as a stepping-stone to promotion
- there is a formal process in place for awarding acting assignments, but not all employees are aware of these opportunities
- management identifies people as "promotable" and then asks these employees to bid for higher-level jobs
- a manager helps a favourite employee prepare for a selection process.

The best practice is for acting assignments to be awarded through a formal process that includes circulating information about acting opportunities to all eligible staff, using a clearly set out selection process that is based on objective criteria such as a written test, a formal interview and written performance appraisals. It is best not to encourage only certain employees to apply unless this is done as part of a special program or a mentoring program designed to overcome historical disadvantage. Provide any help with the process, such as mock interviews or background reading materials, on an equal basis to all candidates, subject to any accommodation requirements and any special program that may be in place.

11. Managing performance and discipline

The Commission recognizes the right of the employer to manage its workforce, including relying on discipline when necessary. A progressive performance management approach that takes into account accommodation needs, and is consistently applied and documented, is a best practice.

a) Evaluating and managing performance

It is in an organization's best interest to follow good human resources practices, such as regular performance appraisals and documented progressive performance management of all employees.

i) Performance appraisals:

Performance appraisals and evaluations provide a tool for employees to know whether or not they are meeting expectations and to have an opportunity to improve. Such evaluations must be conducted regularly, consistently and fairly. The process for, and frequency of, performance evaluation should be set out clearly so that all managers, supervisors and employees know what to expect. This is for the benefit of both the employee and the employer.

When employers do not have good practices in place or do not follow the normal practice of performance evaluations, they leave themselves open to allegations of discrimination within their organization.

> **Example:** An employer rarely does performance evaluations and is somewhat lax about performance management – usually relying only on undocumented verbal warnings. A racialized employee raises concerns about discrimination and shortly afterwards his supervisor begins a process of performance evaluation. He is asked to meet with his supervisor every month to discuss his performance. Although objectively, the employee's performance is no worse than it has always been, and no different than that of his colleagues, his personnel file suddenly becomes filled with reports of issues with his performance. Ultimately, he receives a letter of termination based on his negative performance evaluations over the previous six months. The employee alleges reprisal. Despite the existence of this "paper-trail," the employer's actions will be closely scrutinized in the event of a human rights complaint.

Some performance evaluation systems may have an adverse impact on persons identified by the *Code*. One example is if an employee is asked to rate him or herself and then discuss this with the manager. This may affect some racialized persons, newcomers, older persons, women or persons with disabilities who may have had past experiences of discrimination or cultural differences that make it more difficult for them to "sell themselves."

ii) Progressive discipline:

A best practice is for an organization to have clearly defined policies relating to disciplinary processes and outcomes. Discipline should range from verbal warnings to written warnings to termination and be based on objective criteria. The discipline applied in a particular situation should be consistent with the organization's established policies and history of disciplining employees.

> **Example:** A pregnant employee is not provided with a written evaluation of her performance, is given less time than other employees to meet performance objectives and is demoted before leaving for maternity leave. This could be viewed as sex discrimination.

b) Principles behind discrimination-free discipline

Employers should make sure that performance management, and other forms of discipline, are carried out in a way that is non-discriminatory and is not based on stereotypes or discriminatory criteria. For example, an employer may have breached the *Code* if an older worker is not given opportunities to improve through performance management because of a perception that the performance is linked to age, or if a worker is subjected to a higher level of scrutiny because of another *Code* ground, such as sex or sexual orientation.

At the same time, discipline should not be based on or linked to discriminatory assessments or criteria.

> **Example:** A young female account manager is given a written warning and denied a bonus because her performance is not on par with her colleagues. A contributing factor is that she has only been assigned individual accounts rather than the corporate accounts that yield much larger commissions. This is because the company believes that the clients, many of whom refer to her as "the young lady," would not

take her as seriously as her older male co-workers. The disciplinary action could be challenged as discrimination based on age and gender.

Take care to make sure that employees with similar performance problems are subjected to similar types of discipline. Human rights cases before tribunals and boards of inquiry often include situations where individuals identified by *Code* grounds are treated more harshly than others, and are disciplined or terminated from employment in circumstances where others who were not similarly identified were not disciplined or only received verbal warnings in the past.

Example: Mr. Smith, a white male, is constantly late for work, but his supervisor has never warned him about this inappropriate behaviour. A co-worker, Mr. Lyn, a Chinese male, was late twice and received a warning letter from the supervisor. There may be a perception on the part of Mr. Lyn that the supervisor is treating him unfairly, because Mr. Smith never received a similar letter.

c) Consider whether reasons for discipline or termination are linked to disability

Before terminating or sanctioning an employee for "unacceptable behaviour," an employer might first consider whether the actions of the employee are caused by a disability, especially where the employer is aware or perceives that the employee has a disability. For example, a severe change in an employee's behaviour could signal that the situation warrants further examination. Progressive performance management and discipline and referrals to employee assistance programs should be used before sanctions or termination are considered.

Mental illness should be addressed and accommodated in the workplace in the same way as other disabilities. A recent decision of the Human Rights Tribunal of Ontario has confirmed that an employer is liable if it does not accommodate the needs of an employee with a mental illness, such as bipolar disorder. The employer must go through the process of determining and implementing accommodation options before making the decision that an employee cannot fulfill the essential duties of the position.[74] The remedies for the breach of these rights can be substantial. See also Section 13b(i) – “Firing a probationary employee” and Section 9m (viii) – “Performance managing an employee who is suspected to have a mental health problem.”

In some cases, an employer may need to pay special attention to situations that could be linked to mental disability. Even if an employer has not been formally advised of a mental disability, the perception of such a disability will engage the protection of the *Code*. Prudent employers should try to offer help and support to employees before imposing severe sanctions. Also, consider that some mental illnesses may make the employee incapable of identifying his or her needs.

Example: John has severe anxiety and depression, which he has chosen not to disclose to his employer because he is concerned about how he would be treated at work if it were known that he had a mental disability. He experiences a crisis at work and then does not appear at work for several days. The employer is concerned about John's absence and recognizes that termination for failure to report to work may be premature. The employer offers John an opportunity to explain the situation after treatment has been received and the situation has stabilized. Upon learning that a medical issue exists, the employer offers assistance and accommodation.

d) Attendance management programs and policies

Employers need to make sure that any absenteeism policy or attendance management programs in place or contemplated will not have a discriminatory impact on people identified by *Code* grounds. Such policies and programs must be applied in a way that meets the requirement to accommodate to the point of undue hardship, including individual assessment where appropriate.

A policy or program that provides for counselling, automatic discipline, enrolment in a punitive attendance management program or termination based on a set number of absences may give rise to claims of discrimination

based on grounds such as disability, family status, sex and creed.[75] For example, rigidly applying absenteeism policies to a pregnant woman who is experiencing domestic violence could result in disciplinary action that raises human rights concerns.

The Commission has heard that a number of employers have policies that state that any employee who takes more than six sick days off in a year will be enrolled in an attendance management program and performance managed with consequences up to and including termination. Rigidly applying these kinds of policies gives rise to human rights concerns. It would be discriminatory for this policy to be applied equally to all employees, including persons whose absences are linked to *Code* grounds.

> **Example:** An employer has an absence management policy that is based on the average number of sick days used by employees. Employees who take more than the average number of sick days face disciplinary measures such as interviews, warnings and requests for detailed medical information. An employee with a disability who submitted medical notes justifying each of her absences from work is then subjected to this disciplinary process, and her disability is not taken into account as a mitigating factor. This policy may be found to be discriminatory and requests for medical information as part of a disciplinary process could constitute harassment.

While the employer is entitled to expect that employees attend at work, it is also required to provide accommodation, including individual assessment, in applying its absenteeism policy. Case law has indicated that it is discriminatory to take disability-related absences into account in deciding to terminate an individual's employment for excessive absenteeism.

> **Example:** Over nine years of employment, an employee misses more than 365 days of work due to various health problems. The employer implements a new attendance management policy that requires the top 25% of employees ranked by number of days absent to attend for an interview. The employee is interviewed by the employer and asked to provide a medical certificate, which she does. Her absences continue over the following month and her employment is ultimately terminated on the basis that there is a poor prognosis for future attendance. A tribunal finds this to be discriminatory, since the employer failed to consider that a number of the absences were disability-related.

At the same time, a rule that employees must bring in a doctor's note for every absence or face discipline may have a disproportionate impact on employees with disabilities. A policy that does not allow for individualized assessment and accommodation is problematic and may be the basis for a human rights claim.

Policies that provide incentives such as monetary rewards and bonuses may disadvantage persons who may need to be absent from the workplace due to *Code*-related accommodation requirements.

Employers are not required to indefinitely maintain employees in the workforce who are permanently unable to work or have a record of excessive absences that are not related to *Code* grounds. An employer should not decide to discipline or terminate an employee because of past attendance or poor prospects of future attendance related to a *Code* ground, without providing accommodation to the point of undue hardship.

Even where an employee has had a high number of absences in the past, the question is whether the employee's future rate of *Code*-related absences would be at a level that the employer could accommodate without undue hardship. This is a judgment call that depends on an objective and individualized assessment of the three factors: cost, outside sources of funding and health and safety. Employers are often too hasty in claiming undue hardship based on an employee's *Code*-related absences.

> **Example:** An employee had over 300 full days, and a number of partial days, of disability-related absences over nine years of employment. A termination in this case was viewed as discriminatory.

> **Example:** An employee had been absent for over 160 full days and more than 30 part days in 12 years of employment. The employer was successful in proving undue hardship and the termination of an

employee because of his record of absences was upheld.

For information on how to make decisions about undue hardship, see Section IV-8d) – "What is undue hardship?" and Appendix E – "Accommodation Template for Employers."

i) Accommodate before disciplining for absenteeism:

Before warning or disciplining an employee about the consequences of "excessive absenteeism," the employer should make sure that it has accommodated *Code*-related needs that are known, or ought to be known, to the point of undue hardship. Failing this, any letters or discussions suggesting that disciplinary consequences may be applied could be seen to be discriminatory.

> **Example:** An employee asks to use flex-time as an accommodation of her family status – this will help her meet her mother's age and disability-related needs. This request is granted. Some months later, the employer suspects that the employee is abusing this "privilege" because the employee is increasingly absent from the office during working hours. The employer sends a letter warning that further absences will result in discipline and possibly termination. The employer has taken no steps to determine whether there are legitimate Code-related reasons for the extra absences, nor has it indicated an intention to provide accommodation to the point of undue hardship in relation to such absences. This approach is not consistent with the objectives of the Code and should be avoided.

A best practice is for employers to clearly refer to their willingness to accommodate *Code*-related needs to the point of undue hardship, and to request relevant information to allow them to provide such accommodation where they have concerns about an employee's absences. If the employee fails to provide such information and yet the absences continue, the employer may be entitled to take appropriate disciplinary steps.

> **Example:** An employer becomes suspicious about an office worker's pattern of absences because she often calls in "sick" on Fridays, particularly over the summer and before holiday Mondays. The employer knows that there may be valid health or other Code-related reasons for such absences, and asks the employee whether these absences are linked to a need for accommodation under the Code. The employer makes it clear to the employee that it will provide accommodation for any Code-related needs that may exist. The employee states that she has no accommodation needs and provides various excuses for her absences. The pattern of absences continues and the employer proceeds with progressive discipline. Such an approach likely would not raise concerns about potential violations of the Code.

Employers should make sure they take into account the possibility of undiagnosed mental illness before firing an employee for attendance issues. See also Section IV-9m) – "Mental illness in the workplace."

> **Example:** An employee with a good attendance record suddenly starts missing whole or partial days of work. The employee quite obviously appears to be unstable when he is at work, and co-workers have said they no longer wish to work with him. The employee has provided no medical information and none has been requested. The manager sends a letter to the worker detailing the dates he was absent and indicating that disciplinary consequences will apply up to and including termination, if such absences continue. The letter does not indicate that the employer is willing to provide accommodation to the point of undue hardship for any Code-related health needs, nor does it request documentation relevant to providing such accommodation. The employee is later terminated due to an escalation in the rate of absences. This scenario could raise an inference of discrimination.

e) Discriminatory treatment leading to performance issues

Employees who face discriminatory treatment may legitimately object to such treatment – a person's behaviour may itself be a reaction to the experience of discrimination or the existence of a poisoned environment. In some cases, employees who challenge discriminatory treatment are subjected to discipline or other forms of management scrutiny

for having engaged in conflicts with their co-workers or supervisors.

If an employee states that his or her behaviour was caused by or linked to discriminatory treatment, an employer needs to investigate the underlying allegations. If the employee's behaviour can be seen as a response that is linked to discriminatory behaviour that has not been addressed by the company, this should be taken into account in determining what action to take. A decision to proceed with discipline, including termination, without having considered the impact of the poisoned environment may be found to be discriminatory.[76]

f) Extending probation

Extending a probationary period is a common element of claims of discrimination based on race, disability and other *Code* grounds. When an employer extends an employee's probation, it must make sure that its reasons for doing so are not influenced by discriminatory considerations. One way to make sure of this is to have clear and objective criteria about what performance is expected of an employee, and to inform the employee of this at the start of the probationary period. A best practice is for the employer to provide feedback during the probationary period to allow the employee an opportunity to work on any areas where their performance appears to be falling short of the stated objectives.

Employers should also be aware that extending a probationary period could either be an indication of discrimination or an appropriate accommodation, depending on the circumstances and the context. Where an employer is considering extending a probationary period, it should be consistent with human rights principles and the duty to accommodate.

> **Example:** An employee is absent from the workplace for one month due to a pregnancy-related illness during her three-month probationary period. Contrary to standard practice, her probationary period is extended for a period of an additional three months even though she was only absent one month. The deviation from standard practice in this case raises concerns about sex discrimination.
>
> **Example:** An employee with a disability is often absent from work, and although he does not ask for accommodation, it is obvious that his disability is interfering with his ability to do the job. He is told that his employment will end at the end of the probationary period. The employee requests accommodation and extension of the probationary period to prove that he can do the job. In these circumstances, the employer should consider providing the extension unless it can prove that doing so would amount to undue hardship.

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[74] *Lane, supra* note 70

[75] See for example *O.P.S.E.U. v. Ontario (Ministry of Community and Social Services)*, 1996 CarswellOnt 545, 89 O.A.C. 161 (Div. Ct.) leave to appeal refused 1996 CarswellOnt 4378 (C.A.)

[76] See *Naraine v. Ford Motor Co. of Canada* (1996), 27 C.H.R.R. D/230, [1996] O.H.R.B.I.D. No. 23 (Ont. Bd. of Inquiry); affirmed (1999), 34 C.H.R.R. D/405, 124 O.A.C. 39 (Ont. Div. Ct.); reversed on other grounds, [2001] O.J. No. 4937, 41 C.H.R.R. D/349 (Ont. C.A.); leave to appeal refused [2002] S.C.C.A. No. 69 (*Naraine*).

12. Resolving human rights issues in the workplace

This section addresses the many practical issues that arise when an employer is called on to resolve human rights issues using existing human rights policies and complaint resolution procedures. For more information about proactively establishing a human rights strategy to prevent and address discrimination, refer to Section IV-1a) – "Strategy to prevent and address human rights issues."

a) The employer is responsible for stopping and addressing discrimination

All employers are responsible for dealing effectively, quickly and fairly with situations involving claims of harassment or discrimination. At a minimum, employers must respond to internal discrimination complaints by:

- having a complaint mechanism in place
- having a corporate awareness of what constitutes discrimination
- taking the matter seriously once an internal complaint is received
- acting promptly (including investigating the internal complaint)
- providing the complainant with a healthy work environment
- communicating to the complainant its actions in response to the complaint.

i) Lack of complaints does not mean there is no problem to address:

In some cases, employees may come forward to raise allegations of harassment or discrimination as soon as they happen. More commonly, especially in cases of sexual harassment, employees may decide to cope with the situation using a range of strategies that may or may not include reporting it. In choosing how to deal with harassment and discrimination, employees may be influenced by factors such as the tone set by senior management, what response they can expect to get if they raise the issue, and what their alternatives would be if they lost their job because of "rocking the boat." The combination of these may be a barrier to reporting for employees, in particular for persons identified by multiple grounds who may face significant obstacles in the job market.

> **Example:** An Aboriginal woman is repeatedly, and openly, exposed to incidents of discrimination and harassment in a male-dominated work environment. She copes by keeping to herself at work and getting support from her family at home. She does not follow the company's internal procedure for filing complaints because she has seen what has happened to others viewed as "troublemakers," and there is not much point because management doesn't seem to mind the workplace culture. She also remembers how hard it was to find a job with steady hours and good benefits. Ultimately, the harassment leads to termination of her employment and at that time she takes action under the Code. The company may be held liable for not addressing harassment and discrimination that it knew of or ought to have known about, even though she did not raise her allegations while she was employed.

Employers may be surprised to hear that women who have experienced sexual harassment in the workplace often note that the experience of reporting the harassment may be as bad or worse than the initial harassment. In many cases, people who raise allegations of human rights violations in the workplace experience negative impacts on their work life, personal life and health on top of the immediate problem of discrimination or harassment. For example, they may not be believed or may be viewed as having caused the problems. In the worst cases, these views might lead to reprisals that prevent the employee from being fully productive, and that may serve as the basis for further human rights claims. People who work with someone exposed to discrimination in the workplace, who may be called upon to give information as a witness, may also have concerns about reprisal. See Section III-2h) – "Reprisal and threat of reprisal."

In many cases, an employee may put up with a discriminatory work environment while actively job searching, and may leave once they have found another job. The fact that an employee may choose to quit instead of raising allegations of discrimination does not relieve the employer of its obligation to prevent and address discrimination.

> **Example:** Two women suddenly quit. It is common knowledge that they left because of sexual harassment by their manager. The employer does not investigate the potential existence of sexual harassment and takes no steps to ensure future compliance with the Code or address the situation between the women and manager. If either of the women files a human rights claim, or if other employees later face discriminatory treatment, the lack of action by the organization and its senior employees would be considered.

The best course of action is for an employer to create an environment where discrimination and harassment are discouraged, and where employees are able to raise concerns promptly when they arise rather than silently enduring or ignoring troubling situations. It can be expected that successfully introducing human rights policies and procedures may result in an increased number of complaints in the short term, as employees become aware of their rights and their ability to enforce them effectively.

Be alert to possible inequities, misuses of power or other indications that discrimination or harassment may be happening even if no complaint has formally been made. In some cases, it may be necessary to investigate proactively rather than waiting for someone to come forward with allegations.

> **Example:** All the women in a group are assigned to work outdoors in the parking lot during the cold winter months, a task that is not normally part of the duties of that position. Most of the women are racialized and speak English as a second language. There are high rates of absences and turnover for the women in that group compared to women supervised by other managers. Whenever a posting for a temporary assignment in any branch of the organization comes up, all the female members of this group apply even if the hourly pay is much less. Although no complaints of harassment have yet been filed, these circumstances warrant further inquiry.

ii) Ensure the personal safety of employees in cases of harassment:

Workplace harassment has the potential to cause risks to personal safety and may lead to serious health problems, such as depression, anxiety, headaches, fatigue, sleeplessness and increased blood pressure. Harassment fundamentally affects an employee's self-esteem, integrity and well-being, both in and out of the workplace. In some cases, it may involve violence – real or implied – against an employee. In rare circumstances, the harasser may resort to physical violence, resulting in tragedy. If there is reasonable cause to fear violence, employers should do everything possible to minimize the threat of violence to all their staff and, where appropriate, make sure that the police are informed.

When removing an alleged harasser from the workplace or calling the police, take care to make sure that these types of judgments are not inappropriately influenced by racial or other stereotypes and bias. A best practice is to identify in advance the types of situations where the police will be called, and to apply this policy fairly and consistently.

Employees who fear, or are experiencing harassment may stay away from work to avoid the stress. Chronic stress-related illnesses frequently result from workplace harassment. Sometimes victims reluctantly quit their jobs to avoid a difficult situation, or seek other ways to avoid the person. In the worst scenarios, victims of harassment are injured or killed. To avoid these types of serious situations, and potential liability under the *Code*, employers should develop, train employees on, and use workplace policies and procedures to prevent and address harassment. Respect, support and information are also essential for persons who have experienced workplace harassment. Referrals to rape crisis or sexual assault centres may be of some help in some situations of workplace harassment but are not always appropriate.

When a person alleging harassment and the alleged harasser work together or near one another, the employer should consider moving one of the parties to another location. In some cases it may be necessary to place one or the other on a paid leave of absence until the matter has been resolved. Employers should be cautious about removing a person who has alleged harassment in the workplace, unless this is done at their explicit request, as this may be seen as a form of reprisal.

> **Example:** A secretary alleges that her boss, the VP of Finance, has sexually harassed her. She states that her environment is poisoned and she no longer feels safe working with him. While there is objective evidence to confirm that harassment likely occurred, the decision is made to put her on a leave until an investigation is concluded. This is because there are other secretaries who can fill in for her, whereas the VP Finance is viewed as essential to the operation of the business. Also, the company is concerned about minimizing the impact of the allegations on the VP's reputation and feels that it cannot afford to have the

employee around. The company would not be seen to have met its obligations under the Code, and is vulnerable to allegations of reprisal and exposure of other employees to a poisoned environment.

Recent recommendations from a coroner's jury emphasize the need for workplace violence policies, education around domestic violence, screening tools that do not rely on a person's own assessment of the risks they pose to the workplace, and an awareness of the power imbalances that may exist, for example between physicians and other staff in a hospital setting.[77] See also Section III-2k) – "Sexual harassment" for more information about the *Code* and sexual harassment and Section IV-12a(iv) – "Mobbing and bullying."

iii) Poisoned environment:

Tribunals have held that the atmosphere, including the emotional and psychological circumstances, of a workplace is a condition of employment just as much as hours of work or rate of pay. Employers, including managers, are expected to take steps to address a poisoned environment that they know of or ought to know of. This obligation exists even if:

- they personally did not do or say anything to poison someone's work environment
- they have not personally experienced the discriminatory environment (for example, all staff know that Sam makes racial jokes but the supervisor has never heard them)
- no one has formally complained
- the discriminatory acts have been carried out by clients or other third parties who are not employees of the organization
- the harassment is done anonymously, by a group or is not directed against a specific person (for example, graffiti appears on a racialized employee's locker and no-one knows who did it).

iv) Mobbing and bullying:

Mobbing is the ongoing, systematic bullying of an individual by his or her colleagues. Mobbing in the workplace arises from peer pressure and typically involves many co-workers, similar to bullying among children in schools. It has been said to be more prevalent than other destructive behaviours, such as sexual harassment and racial discrimination.

Mobbing could be overt behaviours such as rudeness and physical intimidation. More often, it takes subtle forms such as ignoring someone or excluding them from social situations and meetings. Mobbing could be intentional or unintentional. Either way, the cumulative impact of such incidents on an employee can be significant. Research shows that victims of mobbing spend up to 50% of their time at work defending themselves and trying to deal with the mobbing.[78]

Although mobbing is not specifically prohibited in the *Code*, such behaviour clearly affects a person's ability to take part with dignity in the workplace, and should be addressed by the employer even where no *Code* ground appears to be at play. There is clearly a business incentive to do this, as mobbing and bullying behaviours prevent employees from achieving their maximal productivity. Also, mobbing and bullying create a workplace culture where human dignity is not respected and discrimination under the *Code* may thrive – leaving an employer vulnerable to claims of human rights violations.

Employees protected by the *Code* may be particularly vulnerable to bullying and mobbing by people in the dominant culture because they may not share the same creed, sexual orientation, gender or level of ability. Persons with mental disabilities are often subjected to mobbing due to stigma and stereotypes.

In many cases, the mobbing behaviour or bullying itself may amount to harassment or create a poisoned environment under the *Code* that an employer will be liable for if it does not recognize and address it. When an employee is mobbed and the employer does not respond appropriately, this may discourage other employees from advocating for their own human rights. For example, an employee may not raise accommodation needs until a crisis point is reached. This kind of feeling that human rights are not respected in that workplace hinders an effective response by the

employer, and unaddressed problems continue to grow.

In some cases, mobbing can lead to symptoms such as back pain, muscle pain, headaches, digestive problems, anxiety, depression or other mental disabilities for which accommodation will be needed. When combined with everyday work stresses, pre-existing disabilities or family obligations, mobbing and bullying can make the work environment intolerable – perhaps even leading to a lengthy leave of absence from the workplace.

> **Example:** A gay employee is routinely talked about as if he is not present. When birthdays of everyone in his group are celebrated, he is not invited, and his birthday is the only one not celebrated. His work is quite demanding and requires working often with colleagues. His colleagues don't respond to his requests for input in a timely way, and joke about leaving him hanging. Although his mental health had been stable for many years before joining this group, within months, his symptoms flare up.

b) Advise employees of their right to file a human rights complaint or grieve

i) Human rights claim may be filed at the same time as internal processes:

Internal anti-harassment and anti-discrimination policies are not alternatives to filing a complaint under the *Code*. If the in-house process or policy does not resolve the dispute, the person has the option of filing a human rights claim under the *Code* as described in more detail below. It is important to tell employees that having an internal procedure for resolving complaints does not in any way stop them from going to the Commission, Tribunal or courts if they want to. The applicable time limitations should be pointed out to employees with human rights concerns.

ii) Grievance procedures under collective agreements:

Some employees may also have rights under employee collective agreements that will give them other choices for dealing with a complaint, such as filing a grievance. The rights and obligations of the *Code* are incorporated into collective agreements, and alleged violations of the *Code* are alleged violations of a collective agreement. The Supreme Court of Canada has confirmed that grievance arbitrators in Ontario must implement and enforce the substantive rights and obligations of the *Code* and other employment-related statutes as if they were part of the collective agreement.[79]

iii) Don't wait for outcomes of other processes to resolve issues:

Employers should avoid using a "wait and see" strategy where efforts to resolve or address allegations are postponed pending the outcome of an employee's efforts to get redress under the *Code* from grievance procedures or formal human rights claims. While there is a possibility that the person may be unable to prove that discrimination occurred, there are significant risks associated with waiting to take action:

- there may be continuing disruption, rumours and unrest in the workplace with corresponding effects on productivity, work performance and employee satisfaction;
- an employer's reputation may be affected by outstanding allegations of human rights violations;
- the organization may experience increased employee absences, turnover and a loss of experienced staff as employees choose to work elsewhere;
- the organization is exposed to the real possibility of further complaints arising until steps are taken to prevent or address discrimination;
- any failure to act by the organization and its senior staff will be taken into account by the Tribunal when assessing corporate and personal liability;
- an organization's best chance of resolving a complaint on terms that it finds satisfactory is to do so early in the process
- the employer may be required to make significant payments to the claimant along with public interest remedies that usually far exceed what might have been agreed to at an early stage in the process;

- the employer may have to compensate the claimant for losses that accumulate between the date the *Code* infringement;
- took place and the date a Tribunal orders a remedy, which could be years later.

Example: In early 2005, an employee complains that she was denied a promotion in 2004 and has been exposed to harassment at work. The employer knows there are problems but takes no action to address the concerns. Instead, it decides to wait for the outcome of a formal human rights complaint the woman has filed under the Code. After many failed internal job applications and continuing harassment, the person develops depression in 2006 and becomes unable to return to the workplace. The evidence shows that in the same time period, others who held the same position as the woman in 2004 received two promotions, even though they had less experience and fewer qualifications. In 2007, a tribunal finds that she experienced discrimination and orders compensation for the difference in salary from 2004 to 2007, significant monetary compensation to reflect the fact that the woman is no longer able to work, and public interest remedies such as training and policy development. The employer could have avoided this outcome by taking steps in 2005 to remove the discriminatory policy, prevent further harassment and work out a solution for the impact on the employee of both of these.

c) Apply internal policies and procedures

If a human rights issue arises, having pre-determined internal policies and procedures will help everyone involved by providing a structured and transparent process for resolving the concerns in a timely way. For more information about developing policies and procedures, see Section IV-1a – "Strategy to prevent and address human rights issues." See also the Commission's newly revised policy Guidelines on Developing Human Rights Policies and Procedures.

To ensure a just resolution of a human rights issue, it is extremely important that the people involved understand and are able to identify discrimination. Without this information, organizations remain open to liability for conducting a flawed investigation or failing to otherwise address discrimination. Refer to Section IV-12d) – "Apply human rights principles when investigating allegations" on relevant principles and common errors in investigations.

Example: A racialized employee with a disability alleges that he was subjected to inappropriate comments because of his race and disability. A manager investigates and writes a report indicating that the Code was not violated because none of the alleged comments explicitly referred to the employee's race or disability and because he never objected. The manager concludes that there was no discrimination, because although there was evidence that one serious comment was made, harassment requires a course of comment or conduct. The outcome of this process would likely be flawed because the investigation did not correctly apply human rights principles. This manager was not aware that even one comment, if serious enough, can poison the work environment and that this is a violation of the Code.

In some cases, representatives of the organization may have enough expertise and objectivity to resolve the issues without outside help. In other cases, the organization will need to hire a third party with expertise in resolving or investigating human rights issues in the workplace to fully resolve an issue. This will depend on the complexity of the issue, the depth of the problem and the knowledge, skill and impartiality of the organization's representatives. For example, a human resources manager normally involved in disciplinary decisions may not be seen as being objective and impartial in investigating the human rights allegations an employee has made against another manager.

Although there may be costs associated with hiring a third party to thoroughly investigate or otherwise resolve human rights issues in the workplace, such costs are a small price to pay for an early and satisfactory resolution of a complaint. Expert help can be extremely valuable where there are subtle allegations of discrimination.

Example: An employee complains to the company's senior executive that he was disciplined more harshly than other employees because of his race, and then subjected to reprisal by his manager when he raised his concerns. This issue was raised in the past but the employee's views were dismissed because it

was assumed that the discipline was legitimate. The company decides to hire a human rights expert to investigate. The investigation shows that discipline is not being uniformly applied, and that this seems to have a systemic impact on racialized staff, a number of whom have been terminated from employment in the past year. There also seems to be a pattern of reprisals for raising human rights concerns and, more generally, a workplace culture where employees are directly and indirectly warned not to "rock the boat."

Based on the expert's recommendations, the organization removes the record of discipline from the employee's file, puts in place standardized job descriptions and performance measures, a progressive performance management scheme, human rights policies, a formal process for raising concerns and a system to track the impact of these changes. The employee is satisfied with these measures and seeks no further action, and the employer is better able to attract and keep a diverse workforce.

d) Apply human rights principles when investigating allegations

There is a general obligation on people in positions of power within organizations to make sure they take allegations of discrimination seriously. The Human Rights Tribunal of Ontario has recognized that in the workplace, and other social areas, this includes the duty not to condone discriminatory acts and to investigate complaints of discrimination.[80]

A human rights investigation must meet certain basic requirements of objectivity and a proper application of human rights principles. The Commission's Guidelines on Developing Human Rights Policies and Procedures describes the requirements in more detail. See also Section IV 1a(iii) – "Procedures for resolving complaints," which summarizes key parts of this policy. In the Commission's experience, workplace investigations conducted by employers often include flaws that make it difficult for organizations to identify and address discrimination. This section highlights the key principles to keep in mind when conducting investigations.

Proof of intent to discriminate is not necessary for a finding of discrimination. The key question is whether there was a discriminatory result.[81]

If a person is subjected to discriminatory treatment because he or she is perceived to be a member of a group protected by the *Code*, this behaviour is discriminatory even if that person is not actually a member of the protected group.

Even if there is a plausible explanation for a sequence of events, a solid investigation will include efforts to find out whether a *Code* ground also played a factor in the decisions or events. A key question in investigating allegations of unequal treatment, such as racial profiling, will be to determine whether the events would have unfolded differently if the person were not identified by a *Code* ground.

A finding of discrimination can be made even if discrimination is not the sole factor, or even the primary factor, in explaining how the employee was treated.[82]

> **Example:** A racialized employee is responsible for double-checking that the store is locked at the end of his evening shift. His co-worker, a more senior White person, holds the keys and is primarily responsible for locking the doors. The next morning, a manager discovers that the back door was left unlocked and the alarm not activated, which contravenes company procedures. This is the first disciplinary matter for both employees. The White employee is given a verbal warning while the racialized employee is given a written warning and a three-day unpaid suspension. The disparity in the discipline may be seen to be discriminatory, as it does not correspond to legitimate factors, such as their job duties, disciplinary records or employment status.

Where employees are disciplined or fired for insubordination, verbal outbursts or other inappropriate behaviour in the workplace, consider any evidence that such behaviour was linked to unresolved instances of harassment or discrimination.

> **Example:** An employee refuses to work with one particular co-worker and alleges that this co-worker is sexually harassing her. These allegations are not addressed and instead, the employee is given a series of written warnings for her escalating conduct in relation to this co-worker. The last straw is when the employee threatens to have a family member come in and beat up the co-worker. An internal investigation confirms that these acts did occur, which contravened existing company policies, and a decision is made to fire the employee. The company fires the employee despite her protests that she was responding to escalating sexual harassment and a poisoned environment. The investigation and firing in this case are both flawed, because they have failed to examine and account for the discrimination endured by the employee.

In situations of harassment, evidence of discrimination may also be found through repeated patterns of similar behaviour on the part of the person accused of having violated the *Code*, serious inconsistencies in either party's story or through careful and credible record-keeping of the person raising the allegations.

It is important not to discount an employee's version of events, even if there are no witnesses, because harassment often takes place out of the view of any potential witnesses.

> **Example:** An employee alleges she was sexually harassed and subjected to sexual solicitation by her manager when they were scheduled to work alone. An investigation might include interviewing other employees about their own experiences and observations at times when they worked with the manager. While this information may be useful as background, as there were no witnesses around when the discrimination allegedly occurred, this would not be sufficient to resolve the issue.

In other cases, the discrimination may be subtle or systemic, and these forms of discrimination may be extremely hard for uninformed witnesses to identify. For many people, "discrimination" means the same as "harassment" and this may be reflected in witness statements they provide.

> **Example:** A witness is asked if he has any knowledge of discrimination against the complainant, a Black man with a disability who recently immigrated to Canada. He says no, because he has never seen anyone call him a name because of his race or disability. This witness may not realize that the inflated job requirements in the recent job competition could be viewed as discriminatory barriers to access, that it was discriminatory for the manager to cancel the competition when he realized that the complainant was going to win the position, or that it was discriminatory for the man to have to work through his lunch break despite his medically supported accommodation needs.

Before relying on such witness statements, an employer should take steps to make sure that all employees know about and can identify the types of discrimination. A best practice is for this to be done for all employees through training and education provided as part of the human rights strategy and on an ongoing basis. See also Section III-2 – "What is discrimination?"

In an effective human rights investigation, the questions asked in witness interviews will draw out information relating to specific incidents and facts rather than general opinions about whether or not discrimination is thought to exist. Rather than asking, "Do you think Raj was discriminated against?" an investigator might provide some background information about the relevant human rights principles and then ask specific questions relating to the allegations raised by the complainant.

For example, an investigator inquiring into allegations of a failure to accommodate, might first tell employee witnesses that under the *Code* the employer is expected to provide accommodation to the point of undue hardship for needs relating to family status, religion, disability and other grounds; that accommodation should be individualized; and that accommodation could include things like paid time off, extended breaks or changes to work duties. The investigator might then ask the witness questions like:

- Have you ever requested accommodation for a *Code* need?
- How did the employer deal with your request?

- Do you know of other employees who requested accommodation?
- How were they treated?

Even where all employees are informed about the types of discrimination, witness evidence may not always help determine if discrimination exists. The fact that another employee did not experience or is unable to identify discrimination may be irrelevant if the other employee does not share all of the *Code* grounds identified by the complainant. Persons identified by a particular *Code* ground, or combination of grounds and other factors, may face repeated incidents of discrimination and are attuned to the dynamics, insinuations and assumptions that may be at play, in a way that other people are not.

> **Example:** A 60-year-old Aboriginal employee with a vision impairment alleges the existence of systemic barriers including a non-inclusive organizational culture, strict rules about computer use and a failure to accommodate. An investigation is conducted in which all the racialized staff are asked whether they have experienced discrimination because of race, and all staff with disabilities are questioned about their experiences. All these witnesses indicate that they have not observed discrimination nor have they personally experienced discriminatory treatment. This type of witness evidence is of limited relevance to the specific allegations being investigated in this case. Given that none of the witnesses share the same characteristics as the person alleging discrimination, this witness evidence does not help determine whether the complainant, as an Aboriginal person with a disability, was discriminated against.

Unequal treatment can be assessed by comparing the experiences of individuals identified by a particular *Code* ground against those of an appropriate comparator group of persons in similar situations. However, the fact that not all people in a group identified by an enumerated ground are subjected to the same level of poor treatment should not necessarily discourage a finding of differential treatment.[83]

> **Example:** Two racialized single women in their mid-thirties work with a senior executive. When one woman files a complaint alleging sexual harassment, the president investigates. The fact that the other woman, who shares the same Code grounds, has not also experienced sexual harassment does not mean that the complaint is unfounded.

It is important to make sure the following common myths about racism do not interfere with the impartial investigation of allegations of racial discrimination:

- people in Canada are “colour blind” and do not even notice race
- racism does not exist in Canada
- racialized people are less credible and their assertions need to be corroborated or more carefully investigated
- racialized people are too sensitive, are overreacting or “have a chip on their shoulder”
- racialized people are to blame for the racism or racial discrimination
- if a racialized person has been treated acceptably in the past, then discriminatory treatment cannot take place in the future (for example, “I hired him, so obviously I would not discriminate against him”).

An investigator should not assume that employees who both share the same racial or ethnic identity could not be harassing or discriminating against each other.

> **Example:** Two Egyptian employees are in a conflict. One employee, a Christian woman who has been in Canada for 10 years, claims that she is being harassed by the other, a Muslim man who recently immigrated from Egypt. The employer declines to investigate on the basis that there could not be discrimination because they are both Egyptian and that this must just be a dispute about “back-home politics.” The employer has failed in its duty.

Similarly, a complaint against a racialized manager or supervisor should be investigated and dealt with as thoroughly as would be done if the manager were White.

> **Example:** A female manager is harder on the Black female staff than other employees. One of the

employees tries to submit an internal complaint of discrimination based on race and sex. She is told that discrimination could not exist because her manager is an Asian woman, who knows personally how it is to experience discrimination.

i) Common errors in investigations:

- Not identifying discrimination because of a lack of awareness of the relevant human rights principles before starting the investigation. For example, an investigation may wrongly conclude that discrimination did not occur because there was no intent
- Not being impartial or having pre-conceived ideas about what the outcome of the investigation will be. For example, an investigation that seeks to justify a termination as non-discriminatory, despite evidence to the contrary, will be seen to be flawed.
- Discounting the perspective of the person who has raised the allegations because of an assumption that they must be lying, despite the absence of a reasonable basis for such an assumption. An example is relying on the myth that racialized people cannot be believed without corroboration, while the White witnesses' evidence is taken as the truth.
- Relying on irrelevant factors to undermine the credibility of the person who has raised the allegations. For example:
    - taking into account the past sexual history of a woman who has alleged sexual harassment
    - viewing racialized witnesses as less credible and in need of corroboration compared to White witnesses.
- Being overly sympathetic to the feelings of "victimization" and "impact on reputation" raised by the person accused of discriminatory conduct. This may lead to a failure to appropriately address discriminatory conduct.
- Concluding that a person was not harassed because they appeared to be going along with or participating in the comments or conduct. Many people who are experiencing harassment do not object because they are in a vulnerable situation.
- Concluding that a racialized person was equally responsible in an altercation, without considering whether that person was objecting to discrimination because of race or another ground. Some people may respond with outbursts or become angry and emotional in response to discrimination.
- Starting a full investigation based on preliminary evidence of discrimination, and yet failing to act to prevent further discrimination until the conclusion of the investigation. There is a duty to act in the short term to address any concerns identified in the investigation, along with longer-term initiatives.
- Excluding the person who has raised the allegations from the workplace during the investigation, with or without pay. This may be seen to be a reprisal.
- Concluding that there was no sexual harassment because a person was a willing participant or had consented to sexual activity in the past. There must be evidence of consent to the specific acts that are complained about.
- Preparing identical witness statements denying the existence of discrimination and requiring employees to sign them – statements provided under this kind of duress will be closely scrutinized and likely given little weight should the case be heard by a tribunal or court.

e) Considerations when settling complaints internally

When complaints are resolved internally, organizations should take care to make sure that the settlement agreement and any release signed are reasonable, understood by the parties and do not reflect any power imbalance. Employees should be given an opportunity to get legal advice before signing any settlement or release. A settlement agreement should reasonably reflect an appreciation of the evidence in support of an employee's allegations, the impact of the infringement on the complainant and an understanding of potential remedies if the Tribunal upholds the claim.

Example: An employee raises allegations of sexual solicitation and harassment and has a stack of e-mails as proof. The solution offered is for the employee to be moved to another work station and to cease working overtime so she will not be alone with her boss. The employee protests but cannot afford to lose any days of pay, so she signs the minutes of settlement and a release. This settlement would prove to be problematic for the organization if a human rights claim is later filed.

i) Practical reasons to resolve complaints early:

In the Commission's experience, there are many cases that give rise to costly litigation because an employer was not willing to provide any form of redress to an employee who has most likely experienced discrimination in the workplace and is seeking modest compensation. Many employers have expressed the feeling that an employee's requests for compensation are equivalent to "black-mail." Also, employers often say that as a matter of "principle" they will not pay any amount of money to an employee based on a violation of human rights, because this would open the "floodgates" to a stream of human rights claims that have no merit.

While this is an understandable position, it is not normally in an employer's interests to take this approach. In most cases, the costs of such posturing far exceed the benefits. If a human rights claim is resolved early on, there is usually a recognition by both sides that neither party knows whether or not the claim would ultimately be successful. Thus, a claimant may accept much less than he or she would otherwise be entitled to. The costs of defending against a claim all the way to the end of proceedings before a court or tribunal may be major if the employer uses lawyers.

On the other hand, employers who represent themselves may have difficulty making out a defence to the allegations and end up having significant orders made against them. Also, if a claimant is finally successful, he or she would normally be entitled to interest on any monetary amount dating back to the date the human rights issue arose. After a number of years, this could amount to thousands of dollars. The employer could also be ordered to make serious changes to their policies and procedures.

> **Example:** An internal investigation shows that as a result of discriminatory treatment at work, an employee likely was unfairly disciplined, was demoted for three months and then resigned to accept a job elsewhere. To resolve the matter without litigation, the employee asks to be compensated for a portion of the income she lost while demoted and to have the letters of warning in her personnel file removed. Despite the evidence in support of the employee's claims, the employer agrees to provide the complainant only with a letter confirming employment. The employer refuses to make a monetary payment, on principle.
>
> The employee declines this offer, starts and is successful in litigation and an order is made a number of years later. The employer has to pay general damages of $10,000, special damages of $5,000 and interest on the $15,000, and has to put in place a new disciplinary process and human rights policies and procedures. On top of this, the employer pays $30,000 to its lawyer for countless hours to prepare for the hearing.

Along with the monetary costs of litigation and the impact on the company and its reputation, there are personal and social costs for respondents as a result of outstanding human rights claims. Many respondents, including employers, have told the Commission about the negative impact and stress of human rights allegations and lengthy litigation on their reputation, ability to work and family life.

ii) Base settlements on human rights remedies that may be available:

Any remedy mutually agreed on by the parties should take into account the actual losses experienced by the claimant, remedies available under human rights legislation and the interests of all the parties in a fair and speedy resolution of the matter.

The principle behind human rights remedies is to put the claimant in the position they would have been in had they not been exposed to discrimination, as long as they have taken steps to minimize their losses (this is called "mitigation of damages"). A further goal of human rights remedies is to protect the public interest and make sure that measures are put in place to prevent further discrimination. If a claimant is successful in proving discrimination and entitlement to a remedy, the Human Rights Tribunal of Ontario could order the company, and any people personally named in the complaint, to do any of the following:

- pay monetary compensation to the claimant for loss of earnings or job opportunities (if the claimant can prove that he or she acted to minimize losses)
- pay interest to the claimant on the money awarded dating back to the date the *Code* was violated
- pay damages to the claimant for the mental anguish suffered because of the violation
- pay general damages to the claimant for the infringement of the right and impact on his or her dignity and self-worth
- put the claimant on a paid leave of absence until compliance with the Tribunal's order has been achieved
- promote or re-instate the claimant to the position he or she would have held except for the discrimination
- change policies that have been found to be discriminatory or have a discriminatory impact
- put in place training initiatives (this may include requirements to hire a consultant, involve the claimant in designing such training and/or make such sessions mandatory for employees)
- set up a process for resolving internal human rights complaints. This could include a requirement to have complaints of workplace harassment and discrimination investigated or mediated by an external third party
- develop and introduce effective anti-discrimination and harassment policies. An employer may be required to hire a consultant to help with this. Employers could also have to include compliance with such policies as an element of the performance appraisals for supervisors and managers
- monitor of compliance with the terms of an order or settlement (for example, reporting to the Tribunal or a third party designated by the Tribunal) on an ongoing basis
- make available the Tribunal's decision, or a summary of it, in the workplace and bring it to the attention of employees.

f) Considerations when asking an employee to sign a release

i) What is a release?

A release is a form of contract in which a person agrees not to make any further claims against the other person. The courts have said that for such a contract to exist, the parties must share an understanding that no further claim will be made, there must be "consideration" – something of value that is given up in exchange for the right – and the terms of the agreement must be carried out by both parties. If any of these three elements is missing, the contract cannot be enforced.

> **Example:** An employer says that an employee who was fired has to sign a release to get money that she is owed under the Employment Standards Act, such as severance payments and vacation pay. The element of consideration is missing because the employee is already entitled to the money that the employer will give her for signing the release. Thus, even if she signs the release to get the money, no contract exists and the release has no effect.

ii) Contracting out versus settling a complaint:

Under the existing *Code*, section 32 guarantees a right to file a complaint to any person who believes that their rights under the *Code* have been infringed. Similarly, section 34(1) of the recently amended *Code* provides that a person may apply to the Human Rights Tribunal of Ontario for a remedial order under section 45.2. This protection means that nobody can be required to "contract out" of his or her human rights and their right to enforce them. The Supreme Court has clearly stated that human rights legislation is a "floor beneath which the parties cannot contract out" and that any contract having this effect is void.[84]

On the other hand, it is permissible to settle a human rights issue, concern, claim or complaint. To do so, the human rights at stake must be known to both parties and something of value must be received by the employee, in recognition of those rights. The "something" that is received is called "consideration" in legal terms, and could be money or something else of value such as a letter of reference or an apology.

> **Example:** On advising an employee that his employment will be terminated, effective immediately, the

employer indicates that severance pay and termination pay will be withheld unless the employee signs a full and final release of all outstanding claims, including human rights complaints. The employee signs the forms, although he does not understand the "legalese," and leaves the office in a daze wondering if he should have mentioned that he was in the process of filing a human rights complaint. This kind of situation would likely be viewed as an impermissible contracting out of human rights protections.

Example: On termination of employment, an employee and employer meet to negotiate a settlement. Having received legal advice, the employee indicates that there are no human rights issues or concerns and a settlement is negotiated on that basis. The settlement and signing of a release in this situation would not be considered to be contracting out.

Example: An employee and employer negotiate a settlement agreement. The intent of both parties is that the settlement will conclude ongoing proceedings under both the Employment Standards Act and the Code and this is clearly reflected in the terms of the settlement. The parties are aware of the full extent of the claims and entitlements under both Acts. The employee, having received independent legal advice, signs a release indicating that the employer will be free from further liability on the basis of the agreement reached in good faith between the parties. This would likely be viewed as a settlement and not contracting out.

iii) Tips for employers preparing and asking employees to sign a release:

On the issue of contracting out versus settlement, the Commission provides the following tips for employers involved in preparing a release of a human rights claim for signature by an employee or former employee:

- An employer should, at the time of termination, ask the employee, preferably in writing, whether there are any outstanding human rights issues or concerns.
- It is important to give the employee a reasonable opportunity to consult with independent counsel or an advisor before having to answer this question and before signing a release
- Where the answer is "yes," the employer should ask for details, to fairly assess what would be a reasonable offer for settling the human rights issues.
- Where the answer is "yes," it is best to also prepare minutes of settlement, along with the release, which will expressly deal with the human rights issue.
- Also, where the answer is "yes," the text of the standard form of release should be altered to include a clause that separately recognizes that there is a human rights issue, complaint or claim that has been fully and finally resolved between the parties.
- Where the answer is "no," and the employee has got or had the opportunity to get independent advice, it is appropriate for the release to state that the employee has obtained independent legal advice, is aware of his or her rights under the *Code*, and warrants that he or she is not asserting such rights or advancing any human rights claim or complaint.

Appendix G includes more tips for employees and employers and sample proposed text for a release of a human rights claim.

iv) Section 34(1)(b) and releases:

Until recently, under the *Code* (which came into effect on June 30, 2008), the Commission had the discretion to not deal with complaints under section 34(1)(b) if the complaint was made in bad faith. Those provisions were affected by recent *Code* amendments. Under the amended *Code*, section 34(11) bars an application where the matter has been settled. See also Section IV-12h) – "Dealing with formal human rights complaints or applications". The discussion below relates to the Commission's existing practices in analyzing requests under section 34 of the existing *Code*, which will continue to take place for six months after June 30, 2008. This discussion is also based on general principles that apply when analyzing if a settlement contravenes human rights principles.

Under section 34 of the former *Code*, respondents, such as employers, could assert that complainants were acting in bad faith where they have signed a release and later filed or continued with a human rights claim under the *Code*.

In considering such claims, the Commission looked at the circumstances surrounding the signing of the release, and considered whether there was an intention to mislead on the part of the complainant. The Commission applied the following four factors in deciding whether a release actually reflects a settlement of a human rights complaint, so that proceeding with a human rights complaint would amount to bad faith:[85]

1. Did the complainant understand the significance of the release? This will usually turn on whether or not they were given enough time, and enough opportunity to get advice.
2. Did the complainant receive compensation for the alleged breach of the human rights issue? If, for example, the complainant only received an amount similar to what they would have been entitled to under statute (for example, severance and termination pay under the *Employment Standards Act*), then it may be implied that they did not also receive compensation for the human rights violation.
3. Was the complainant subject to such significant economic pressure that his or her consent was negated due to duress?
4. Was the complainant subject to such significant psychological or emotional pressure that his or her consent was negated due to duress?

Refer to the Commission's Guide to Releases with Respect to Human Rights Complaints for more information on settlements and releases and the former application of section 34(1)(b) by the Commission.

h) Dealing with formal human rights complaints or applications

The section "Old system" describes the recently existing complaint-handling processes at the Commission and the Human Rights Tribunal of Ontario ("Tribunal"). These measures were in place for all complaints in the system until the transitional provisions set out in the recently amended *Code* took effect on June 30, 2008. For the ensuing six months, the measures described below will apply to complaints filed with the Commission on or before June 30, 2008 that continue to be in the Commission's caseload.

The section "Amended system" describes the framework set out in the amended *Code* for a substantially revised human rights system that includes the three organizations provided for in the amended legislation: the Commission, the Tribunal and the Human Rights Legal Support Centre. At the time of publication, the exact details of how the human rights system will function during and after the transition are not known. See Appendix C for the contact information of the Ontario Human Rights Commission, Human Rights Tribunal of Ontario and the Human Rights Legal Support Centre.

i) Old system:

The old system provided for all complaints to be handled by two organizations: the Commission and the Tribunal.

The Ontario Human Rights Commission: The Commission's complaint handling process is described in detail in its Internal Guide for Processing Human Rights Complaints, which is available on the Commission's website at www.ohrc.on.ca.

All human rights complaints must be filed with the Commission within six months of the date of the last infringement of rights. If a person feels his or her rights under the *Code* have been infringed, he or she may contact the Commission. A Commission staff person will advise as to whether the issue is covered by the *Code*.

The Commission is neutral and does not take sides in the complaint. Commission staff will provide information to both parties about the *Code* and complaint procedure. However, if either party needs legal advice, they should contact a lawyer.

The *Code* does not require the Commission to deal with all complaints. Under section 34, the respondent can ask the Commission not to deal with the complaint or the Commission will choose to not become involved if it is of the opinion that the complaint:

- could be more appropriately dealt with under another piece of legislation
- is trivial, frivolous, vexatious or made in bad faith
- is not within its jurisdiction
- is based on occurrences that are more than six months old (unless the Commission is satisfied that the delay was incurred in good faith and that no substantial prejudice will result to any person affected by the delay).

Unless the Commission decides not to deal with the complaint, Commission staff will work with both parties to try to settle the dispute if possible. Voluntary and confidential mediation services are offered to both parties. If mediation is unsuccessful, or one of the parties declines to take part, the next step is for the parties to provide the Commission with documents in response to a production request and attend a Fact Finding Meeting. In some cases, the mediation and Fact Finding Meeting may be combined.

The Fact Finding Meeting is part of the investigation to gather evidence and help the parties to resolve the complaint through conciliation. If the case is still not resolved, the Investigation Officer completes the investigation and gives a "case analysis report" or a "disclosure letter" to the parties. These documents set out the relevant evidence, analysis and a recommendation to refer the complaint to the Tribunal for a hearing or not. The parties will then have an opportunity to make submissions to the case analysis report or disclosure letter and the Commission (the appointed Commissioners) will consider these when it decides whether to send the case on to the Tribunal. A copy of the Commission's decision in writing is forwarded to both the respondent and the complainant.

If a case is not referred to the Tribunal, the complainant can ask the Commission to reconsider its decision through an application for reconsideration within 15 days of the date that appears on the decision letter. The respondent has an opportunity to comment on the complainant's application. In complex cases, a reconsideration report is prepared and the respondent would also have an opportunity to provide submissions in response to the report. The Commissioners make the final decision on whether to reverse the Commission's original decision.

If the case is referred to a hearing before the Tribunal, the Commission takes carriage of the complaint. This means that the Commission will attempt to prove discrimination and seek a remedy in the public interest. A complainant may choose to rely on the Commission's advocacy at this stage or they may get separate legal counsel.

Human Rights Tribunal of Ontario: The Tribunal is the body that hears evidence and decides whether discrimination occurred and what remedies are needed to address the discrimination. The Tribunal is independent from the Commission. The complainant, respondent(s) and the Commission are parties in Tribunal proceedings. The hearing is a public proceeding.

Before starting a hearing, parties have a chance to resolve the matter through a mediation held by a Tribunal adjudicator. If there is no resolution, the case moves forward to a hearing. In a Tribunal hearing, a complainant is expected to prove that there is a case of discrimination. The respondent must answer the complainant's case by showing a believable non-discriminatory explanation for the actions taken. If the respondent can do this, the complainant is then required to "poke a hole" in the respondent's case, for example by showing that the explanation is false or is just a pretext to cover the discrimination.

Overall, the onus is on the complainant to prove that more likely than not discrimination occurred and that he or she is entitled to remedies. The legal name of the burden on the complainant is the "balance of probabilities." This is a much lower standard than in a criminal setting, where the Crown must prove the case "beyond a reasonable doubt."

If the Tribunal finds that discrimination took place, it can order a wide range of remedies. See also Section IV-12e(ii) – "Base settlements on human rights remedies that may be available" for more information about remedies. The general principle behind Tribunal orders under the *Code* is to restore the complainant to how she or he would have been had the *Code* not been violated (individual remedies) and ensure full compliance with the *Code* in the future

(public interest remedies). An order made by the Tribunal is legally binding, subject to any appeals or judicial reviews – both of which are possible in the current system.

ii) Amended system:

Bill 107, *An Act to Amend the Human Rights Code* was passed in December 2006. Most significantly, the amended *Code* provides that human rights claims be filed directly with the Human Rights Tribunal of Ontario ("Tribunal") instead of with the Ontario Human Rights Commission as of June 30, 2008. The amended *Code* also creates a new organization, the Human Rights Legal Support Centre, to provide legal support to complainants. The following discussion highlights the legislative framework behind the new system with respect to the powers of each of the organizations, how claims will be processed and transition measures.

The Ontario Human Rights Commission: The Commission received and processed new complaints until June 30, 2008, after which time applications are filed directly with the Tribunal. After that date, the Commission will no longer accept new claims. The Commission will continue to process existing complaints for a further six months.

Until the end of December 2008, the Commission will continue to mediate, investigate, conciliate and make decisions under sections 34, 36 and 37 as is described in more detail in the section on the old system above. At any point in this six-month period, a complainant can make a request to abandon the complaint and make an application to the Tribunal in an expedited process [(subsection 53(3)]. Under subsection 53(5), complainants have a further six months to apply to the Tribunal with respect to the subject matter of the complaint, if the complaint has not been settled, withdrawn or otherwise dealt with. Tribunal *Rules of Practice*, dated January 31, 2008, apply to all complaints referred to the Tribunal by the Commission.

At the end of the first six-month period, the Commission will no longer mediate, investigate, conciliate or make decisions under sections 34, 36 and 37.

The amended *Code* provides that a Commission-approved policy may be considered by the Tribunal and that it shall consider such a policy if a party or an intervenor requests that this be done (section 45.5). The Commission may intervene or take part in particular cases of interest (section 37) and can initiate inquiries or take other actions in situations of discrimination that come to its attention (section 29). This means that employers will need to continue to be aware of and try to comply with Commission policies, even though the Commission will no longer be responsible for handling individual human rights complaints.

Human Rights Tribunal of Ontario: As of June 30, 2008, all new human rights claims are known as "applications" and filed directly with the Human Rights Tribunal of Ontario ("Tribunal"). The Tribunal's *Rules of Practice*, effective January 31, 2008, apply to all complaints referred to the Tribunal by the Commission.

The final version of the Rules of Procedure, proposed by the Tribunal and consulted on between February 1 and March 14, 2008, will apply to all applications filed directly with the Tribunal after June 30, 2008.

It is important to note that the amendments say that an "application" may be made to the Tribunal within one year of the date of the incident the application relates to. Late applications may be accepted by the Tribunal if it is satisfied that the delay was incurred in good faith and that no substantial prejudice will result to any person affected by the delay. The amendments also provide that applications may be made by a person or organization on behalf of another person with their consent [section 34(5)].

The amended *Code* bans applications if a civil proceeding seeking the same remedies is outstanding, if a court has finally determined whether a right has been infringed, or if the matter has been settled. Notably, the Tribunal is not allowed to finally dispose of an application that is within its jurisdiction without giving the parties a chance to make oral submissions in accordance with its rules and providing written reasons [section 43(2.2)].

Under the amended *Code*, the Tribunal is permitted to simplify its practices and procedures in an effort to resolve matters fairly and quickly. The Tribunal also has the ability to create rules that allow it to control its proceedings (for

example, by narrowing issues and limiting evidence and submissions to those issues).

Contact the Human Rights Tribunal of Ontario directly for more information about the rules that may apply to applications and hearings in the amended system. See also Part IV of the *Code*, online at www.e-laws.gov.on.ca.

The Human Rights Legal Support Centre: The amendments provide for a Human Rights Legal Support Centre. The Centre will provide advice and assistance, legal and otherwise, on the infringement of rights set out in Part I of the *Code*. It will also provide legal services related to:

- making applications to the Tribunal under Part IV
- proceedings before the Tribunal under Part IV
- applications for judicial review arising from Tribunal proceedings
- stated case proceedings
- enforcing Tribunal orders.

For more information, refer to Part IV.1 of the *Code* or e-mail HRLSC@Ontario.ca.

i) Dealing with discrimination claims in courts and administrative tribunals

Beyond the process as set out above for handling human rights claims by the Commission and/or the Tribunal, there are some circumstances where allegations of discrimination may be raised before courts and other administrative tribunals.

i) Old system:

Administrative tribunals in Ontario have the jurisdiction to deal with human rights issues, unless they have explicitly been granted power by the legislature to decline to hear them. A recent Supreme Court of Canada decision has clarified that administrative tribunals may decline to apply parts of their defining legislation that are inconsistent with the *Code*. [86]

Although a breach of the *Code* cannot be the sole basis for a claim in the courts, a claim for constructive or wrongful dismissal can be based on allegations of discrimination.[87] In some cases, significant monetary amounts might be awarded for punitive damages in wrongful dismissal cases where there have been violations of the *Code*. For example, in *Keays v. Honda Canada Inc*,[88] the trial judge found harassment because of disability leading to a termination of employment and ordered punitive damages of $500,000. This amount was reduced to $100,000 by the Court of Appeal. Both parties further appealed to the Supreme Court of Canada, which held on the facts that there had been no discrimination and no cause for punitive damages.

ii) The amended system:

The amendments to the *Code* have expanded on a trend in case law where courts order remedies for human rights violations in the context of litigating other matters. Subsection 46.1(1) of the *Code* empowers a court to award monetary damages and other human rights remedies available under the *Code* if it finds that a violation of the *Code* has taken place. Subsection 46.1(2) confirms that a human rights violation still cannot be the sole basis for initiating a claim in the courts. In other words, this section is not creating a new "cause of action" or ground for litigation before the courts.

These amendments clarify that an employee does not need to file an application with the Human Rights Tribunal of Ontario to get human rights remedies, if his or her human rights are infringed in the course of employment. Instead, human rights remedies can be granted by a court along with other employment law remedies such as termination pay, severance, or pay in lieu of a notice period.

Example: An employee is disciplined, subjected to harassment and fired because of age and disability.

> The employee starts a court action alleging that he was wrongfully dismissed and raises his allegations of discrimination in the context of that action. The employee is successful and receives damages both for the lack of notice and also to compensate for his human rights being violated.

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[77] See the Verdict of Coroner's Jury regarding the homicide of Lori Dupont by Marc Daniel, online: www.mcscs.jus.gov.on.ca/english/pub_safety/office_coroner/verdicts_and_recs.html. Also note that a private member's bill, *Bill 29, an Act to amend the Occupational Health and Safety Act to protect workers from harassment and violence in the workplace* received first reading on December 13, 2007.

[78] For more information about mobbing and bullying, see Mental Health Works, "Cubicle Bullies: "Mobbing at Work," online: www.mentalhealthworks.ca/articles/mobbing_at_work.asp.

[79] *Laskowska, supra* note 26.

[80] See for example, *Laskowska, supra* note 26.

[81] *Robichaud v. Brennan* (1987), 8 C.H.R.R. D/4326 (S.C.C.); *Ontario (Human Rights Comm.) v. Simpson-Sears Ltd.* (1985), 7 C.H.R.R. D/3012 (S.C.C.); *Nishimura v. Ontario (Human Rights Comm.)* (1989), 1 C.H.R.R. D/246 (Ont. Div. Ct.).

[82] See *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Montréal (Communauté urbaine),* [2004] 1 S.C.R. 789. and *I.U.E.C. Local 50 v. Otis Canada Inc.,* 2004 CarswellOnt 6340, 112 C.L.R.B.R. (2d) 252, [2004] O.L.R.B. Rep 1174, 135 L.A.C. (4th) 193 (Ont. L.R.B.).

[83] *Martin v. Nova Scotia (Workers' Compensation Board),* [2003] 2 S.C.R. 504.

[84] *Heerspink, supra* note 4. at 158.

[85] See *Pritchard v. Ontario Human Rights Commission* (1999), 45 O.R. (3d) 97 (Div. Ct.).

[86] *Tranchemontagne, supra* note 5.

[87] See for example *L'Attiboudeaire v. Royal Bank* (1996), 88 O.A.C. 70 (C.A.). In addition, section 46.1 of the *Human Rights Code* now specifically permits a party to allege a violation of the *Code* in a claim for damages where that allegation is combined with another claim.

[88] *Keays, supra* note 52 (overturned on appeal to the Supreme Court of Canada).

13. Ending the employment relationship

There are many instances when it will be appropriate and non-discriminatory for an employment relationship to end, whether through termination, layoffs, surplus decisions, early retirement or an employee's resignation. In all of these, a key consideration is to make sure that the end of the employment relationship is not linked to, based on or tainted by discrimination. This consideration applies even if employees are dismissed during a probationary period or are not retained at the end of a probationary period.

> **Example:** An employee asks for time off as an accommodation of her family status and disability-related needs during her three-month probation period. It would not be acceptable for the employer to take this into account and decide not to keep her on staff when her probation ends.

A best practice is for employers to use anonymous exit surveys or exit interviews to get feedback from employees who leave, resign, are laid off or whose employment is terminated. They can help employers determine whether discrimination, harassment or a failure to accommodate were factors in an employee leaving.

a) Resignation and constructive dismissal

The fact that an employee has resigned does not shield an employer from liability for any discrimination that person

may have experienced in the workplace. If a person resigns because of discriminatory practices, the employer needs to take steps to address and prevent such practices. A court or tribunal may find that employees who quit because they refuse to endure a poisoned work environment have been constructively dismissed.

The Commission has heard of cases where employees are given the opportunity to avoid termination by choosing to voluntarily leave employment. If there are any *Code*-related reasons for the suggestion that the employee should leave, this would be discriminatory even though it might be argued that the employee left voluntarily.

Where an employee resigns suddenly in circumstances that indicate the employee's decision may be affected by a mental illness or other disability, the employer should take steps to determine whether any accommodation is needed before accepting such a resignation. Even if no accommodation is sought, the employer should make sure that the employee understands the implications of the decision, has time to reflect, and is able to rescind the resignation within a reasonable period of time.

> **Example:** An intern at an investment company announces her intention to drop out of the program mid-year and to forgo a lucrative opportunity to join the company on a permanent basis the following year. The HR manager suspects that the intern may be depressed or experiencing some sort of mental illness, because of recent performance problems and illogical statements about preferring a job picking up litter on the street. Despite this, the company acts to quickly finalize the paperwork and confirm the employee's resignation before she changes her mind. When the intern realizes she has acted rashly, she asks to rescind the resignation and is told it is too late. The company would be vulnerable if the employee filed a human rights claim.

In some cases, an employee's resignation or an employer's actions may be viewed as amounting to "constructive dismissal." If a tribunal or court makes this finding, an employee would be entitled to all the remedies available if they had actually been terminated from employment.

> **Example:** An employee returning to work after a disability-related absence is told that his position of VP Finance has been given to another employee. He is told that if he wants to return, he must accept a junior management position, with less pay and responsibility. The employee resigns and files a human rights claim. The employer may be viewed as having failed in its duty to accommodate and the employee would be entitled to both damages for the loss of dignity (general damages) and the loss of employment (specific damages).

> **Example:** A female employee is the victim of a sexual assault in the workplace by a male customer. Her employment is suspended pending the outcome of the investigation and criminal proceedings. This process takes over two years. This would be considered a discriminatory termination of employment.

> **Example:** When leaving for maternity leave, a female employee is asked to pay for her medical insurance. When she returns, she is given a position at a lower pay rate and classification and so she resigns. Male employees who have been off for medical leaves of similar length were not treated the same. The employee would likely be seen to have been constructively dismissed and would be entitled to compensation under the Code on that basis.

b) Terminations

Discriminatory termination from employment is alleged by a large percentage of people who have filed employment-related human rights claims based on employment. Some employees may assert their rights while employed. More often, employees cope with workplace discrimination and harassment until the employment relationship ends, and then file a claim seeking compensation for a range of discriminatory situations that occurred during the course of employment. In other cases, employees may feel that they have been treated fairly in employment until the actual event of their termination from employment or the later steps of re-filling the position are complete. For some, the way the termination is done is viewed as discriminatory.

Where an employee, identified by *Code* grounds, is let go and that position is filled by another employee who is not similarly identified by *Code* grounds, an inference of discrimination is raised. This inference may be stronger if the employer provides a neutral excuse for termination such as a branch-wide reorganization, but the evidence shows that no such reorganization has taken place.

> **Example:** A 69-year-old salesperson with excellent performance is terminated from employment. Although he is told that his position is being made redundant, he finds out through the "grapevine" that he has been replaced by a younger single man who is viewed as having greater career potential.

> **Example:** A woman asks for and receives accommodation of her family status in the form of flexible work hours to provide care for her mother and her son, both of whom have severe medical needs. After several months of this arrangement, the employee is fired because her productivity is lower than the other staff and she is told that this is part of a larger staff re-organization. No other staff are let go, and a man, who is known in the office as a workaholic, is appointed to fill the same position.

As was noted earlier in relation to discipline, many human rights claims arise from situations where disciplinary measures, including termination, are applied unevenly or disproportionately to persons identified by the *Code*.

> **Example:** Two daycare employees are responsible for looking after 10 preschoolers. An accident takes place and neither of the staff fills in the required incident reports. The racialized employee is fired while her White co-worker, who has the same spotless disciplinary record and level of responsibility, receives a written warning.

The actual termination of employment must be done in a way that is consistent with the *Code* and that respects the employee's dignity. Acts such as refusing to complete termination documents or withholding an employee's access to statutory entitlements, such as severance pay or termination pay because of *Code* grounds, constitute breaches of the *Code*. See also Section IV-13b(viii) – "Manner of termination."

i) Firing a probationary employee:

Many employers wrongly believe that they are allowed to let an employee go for any reason, including those relating to *Code* grounds, during a probationary period. Similarly, they expect that any compensation owing to such an employee under human rights legislation would be minimal. This is not the case.

It is not a defence to a claim of discrimination that an employee is on probation. A person who is let go or terminated from employment either during or at the end of a probationary period, as a result of discrimination or the consideration of discriminatory factors, is entitled to file a human rights claim and seek remedies, including damages.

A recent decision of the Human Rights Tribunal of Ontario shows the significant consequences that could result from the discriminatory treatment and termination of a newly hired probationary employee. In *Lane v. ADGA Group Consultants Inc.*,[89] a probationary employee was fired after only eight days of work for reasons linked to his mental disability. The order required the respondent to:

- pay the employee $35,000 for infringement of his rights under the *Code* (general damages), damages for mental anguish (amounting to $10,000), and almost $35,000 in special damages for the loss of salary that resulted from the violation of his rights
- pay pre-judgment interest on these amounts from the date Mr. Lane filed his human rights complaint, and post-judgment interest on the entire award from 30 days after the date of the award;
- retain a qualified consultant at its own cost to train employees, supervisors and managers on the *Code* and mental health accommodation;
- establish a comprehensive written anti-discrimination policy within three months, post it in plain and obvious locations where it does business, and include it in employee orientation materials. The respondent is also required to provide copies of the policy with any request for proposal response that it submits.

ii) Behaviour and links to Code grounds:

Where a poisoned environment exists, and a person's employment is terminated, that termination will be considered in the context of the poisoned environment.[90] Before terminating employment for behaviour including insubordination or outbursts in a workplace, an employer should exercise due diligence in determining whether a poisoned environment or unresolved discrimination may have contributed to the situation. A tribunal will take into account the existence of a poisoned environment when assessing whether the termination was discriminatory or not.

> **Example:** An employee is fired because of a disciplinary record of conflict with other employees, despite evidence to suggest that such behaviour was a response to discriminatory treatment by other employees. A dismissal in these circumstances has been found to be discriminatory.

Employees with mental disabilities are particularly vulnerable to termination. In many cases, an undiagnosed mental disability may affect a person's work performance. An employer is entitled to expect that work performance standards will be maintained and that a safe work environment exists for all employees. However, accommodation must be provided before an employee can be assessed as being able or unable to meet such standards. The employee's performance expectations should be addressed as part of the accommodation dialogue.

iii) Mental disability and perceived risks to other employees:

In some cases, an employer may feel that there are risks to other employees relating to an employee's mental disability that are so severe that termination is warranted. The employer may, in some cases, legitimately take action to protect employees, but any actions must take into account the duties and obligations to the employee with the mental disability.

> **Example:** An employee has made bizarre statements to a number of female staff and leaves letters expressing love for them outside their lockers. These women have complained to management. The employer asks the employee to attend a medical exam with its doctor because they fear that a mental disability may be causing the recent behaviour. Medical documents show that the employee has a serious mental disability that is made worse by stress, and that he has obsessive compulsive thoughts about the female staff. The employer warns all female staff about the employee and terminates his employment one week later to prevent the risk of escalating sexual harassment. This employer may be seen to have contravened the Code (poisoned environment and termination without having accommodated).

> **Example:** Another employer dealing with the same situation notes that the employee has recently been performing extra tasks, and wonders whether this may be adding to the employee's stress. This employer quickly gets consent and speaks with the employee's doctor, to get a realistic assessment of the risks to the female employees and to work out appropriate accommodation. In consultation with the doctor and the employee, the employer arranges for the man to have paid time off to rest and receive treatment. On his return, accommodations are put in place to enable him to successfully manage his workload and his disability. The rights of all staff are respected.

If the employer has followed the advice of the employee's doctor and expert opinions (where necessary) and provided the recommended accommodations and yet, objectively, significant risks to other employees remain, it will likely not be discriminatory for the employer to act to lower those risks. However, the employer would still be expected to accommodate and the least discriminatory alternative should be used. For example, the employee may be put on short-term or long-term disability leave with regular assessments of his ability to safely return to the workplace.

If the employee's prognosis does not change and it appears, based on medical evidence, that he will be unable to return to his job even after a long absence, the point of undue hardship may be met. However, an employer should be patient and prudent when letting go an employee with a mental disability who is on an extended leave. Many employers move to terminate far sooner than they should, and well in advance of reaching the point at which a human rights tribunal would find undue hardship. See sectionvi) "Automatic termination provisions" and section vii)

"Termination during or after a *Code*-related leave" below.

iv) Absenteeism:

It is contrary to the *Code* for an employer to fire an employee because of accumulated absences unless the duty to accommodate has been met. When deciding to terminate an individual's employment, it is discriminatory to take into account *Code*-related absences unless the employer can show that accommodating the employee by allowing for additional absences would amount to undue hardship. See also Section IV-11d(i) – "Accommodate before disciplining for absenteeism," Section IV-13b(vi) – "Automatic termination provisions" and Section IV-13b(vii) – "Termination during or after a *Code*-related leave."

v) Poor performance that may be linked to Code grounds:

Employers should not terminate employment for poor performance that may be linked to a *Code* ground, unless they have provided *Code*-related accommodation to the point of undue hardship (see Section IV-8 – "Meeting the accommodation needs of employees on the job"), and have provided a non-discriminatory work environment.

> **Example:** After six years of stellar performance, a female employee from Portugal starts making numerous mistakes causing major production delays. It is common knowledge in the workplace that the new manager hired three months ago has a bad temper and that he "takes it out on" female employees who speak English as a second language. The employee is told that her employment will be terminated and in response she raises the discriminatory work environment as the reason for the decline in her performance. The employer would be expected to take steps to investigate, address the discrimination and prevent further discrimination instead of proceeding with the termination.

Employees with mental disabilities are particularly vulnerable to termination. In many cases, an undiagnosed mental disability may affect a person's work performance. An employer is entitled to expect that work performance standards will be maintained and that a safe work environment exists for all employees. However, accommodation must be provided before an employee can be assessed as being able or unable to meet such standards. The employee's performance expectations should be addressed as part of the accommodation dialogue.

vi) Automatic termination provisions:

Some employers and unions may put in place agreements that provide that after a specified length of absence from the workplace, an employee will lose his or her seniority and/or employment. The Supreme Court of Canada has said that having such a provision in a collective agreement or other agreement is not discriminatory, and that such a provision applies only if it meets the duty to accommodate in the particular circumstances.[91] In that case, a 15-year employee had been off work for three years and there was no indication that she could return to work in the foreseeable future.

In each case, whether or not there is an automatic termination provision in place, the employer and the union will be expected to assess each employee individually and to evaluate the circumstances against the standard of undue hardship.

> **Example:** A workplace agreement provides that an employee who is absent from work for three years may be terminated from employment. Bob has been off work due to surgeries and treatments for two years and 11 months. He has just been given full clearance to return to his regular position, shortly after the three-year anniversary of the start of his leave. The duty to accommodate Bob will likely require that the employer not apply the three-year cut-off, subject to evidence of undue hardship.
>
> **Example:** Bob's co-worker Ellen went off on a disability leave around the same time as Bob. Her specialist's opinion is that she will be unable to return to any position at the company at any point in the future, even with accommodation. The provision in the collective agreement is applied and Ellen's

employment ends at the three-year mark. This would likely be viewed as non-discriminatory.

An employer is not expected to retain an employee in the workforce for an indefinite period, if there is no expectation that the employee will be able to return to work in the future. On the other hand, even if an employee has been absent for a long time, if the costs associated with that absence are not unreasonable, the employer will not be able to show undue hardship.

> **Example:** A long-term employee is absent from work for two years due to kidney failure. There is an estimated one-to five-year wait for a kidney transplant but the potential for complete recovery following the transplant. The employer sought to end the employment relationship alleging undue hardship based on a provision in the collective agreement allowing for termination after two years. A labour arbitrator found that the requested accommodation did not amount to undue hardship, as the cost to the employer was only that of maintaining the employee's health benefits, a sum of approximately $300 per month.[92]

See also Section IV-13b(iv) – "Absenteeism," Section IV-11d(i) – "Accommodate before disciplining for absenteeism" and Section IV-11d) – "Attendance management programs and policies."

vii) Termination during or after a Code-related leave:

An employer should be cautious about terminating the employment of a person who is on a *Code*-related leave. While there may be legitimate reasons for making such a decision, the onus will be on the employer to prove that discrimination was not a factor if a human rights claim is filed.

> **Example:** An employee suddenly begins a disability leave after a work-related car accident. Four days later, he receives a letter of termination. The employer states that the decision was made based on poor performance before the employee's injury and that he decided to go ahead with it despite the turn of events. This scenario raises an inference of discrimination that the employer will need to overcome.

Even if there are legitimate reasons for a termination, a finding of discrimination may be made if the fact that the person was on leave was taken into account in any way. For example, a department re-organizes and positions are assigned to people who show the most enthusiasm and interest. Even if consulted over the phone or in writing, employees who are on leave will be disadvantaged in this process. These kinds of concerns are discussed further in relation to restructuring and downsizing in Section IV-13c) – "Restructuring, downsizing and layoffs."

An employee cannot be terminated, demoted or laid off because she was pregnant or has taken a maternity leave. As well, an employee, male or female, who has taken parental leave or disability leave has the right to return to his or her job, receive benefits and not be passed over for opportunities such as training and assignment projects. The fact that the position had to be refilled during the employee's absence is not a full defence to a claim of discrimination, and this kind of scenario rarely amounts to undue hardship. An employer is expected to back-fill the position on a temporary basis.

> **Example:** An employee is off work for 14 months due to a combination of disability leave and pregnancy leave. The employer posts and fills this vacancy as an internal position of a year with possible month-by-month extensions. The successful candidate is told that the position "belongs" to another employee and that this is only a short-term contract. When the first employee gives notice that she is returning to work, the employer tells the employee the date on which the short-term secondment will end. The employer has fulfilled its obligations under the Code and its legitimate workplace needs.

Employees returning from leave related to *Code* grounds such as family status, marital status, disability and sex (including pregnancy and gender identity) are often vulnerable to discriminatory actions. Employers should be careful when considering terminating the employment of employees returning from leave, as there are many cases where such terminations have been successfully challenged as discriminatory.

> **Example:** An employee advised her employer that she was taking time off work to undergo

sex-reassignment surgery. The employer granted the employee the time off but when the employee returned to work after the surgery, she was fired. A link was found between the firing and the employee's transition, which was protected under the Code ground of sex.

viii) Manner of termination:

Human rights complaints may also arise from the manner of termination. It is wise for an employer to make sure that an employee is treated with dignity, respect and access to necessary supports when ending the employment relationship.[93]

Example: An employee requested modified duties or an alternate work assignment as an accommodation of her disability-related needs. The employer did not consider accommodation. In response to her request for an appointment to discuss modified duties, a meeting is set up and her employment is terminated by a person that she barely knew, had never worked with, and who did not investigate any job opportunities that might have been available. A tribunal orders $25,000 for the loss of dignity arising from this termination.

Where the employer suspects that an employee may be displaying symptoms of mental illness, it is particularly important that appropriate supports be put in place before firing the employee (if the employer has accommodated the employee and there are legitimate non-discriminatory reasons for the termination). This is in the interests of both the employee and the employer. On the other hand, if the reasons for termination are discriminatory, the employer may be ordered to compensate the employee for the losses that resulted from the manner of termination, along with any other discrimination that may have been found.[94]

Example: An employee with a mental illness is fired. Even though the employer is aware that he is having difficulties linked to his disability, the employer does not notify the employee's doctor or wife that he is being fired. The employee experiences significant distress and ends up being hospitalized. Ultimately, he is unable to work for many months. In awarding remedies, the impact on the employee is taken into account and the employer is required to pay a substantial amount in damages to the employee, including damages for mental anguish.

c) Restructuring, downsizing and layoffs

While organizations may have a legitimate need to reorganize, restructure or downsize their operations, they need to ensure compliance with the *Code* when moving ahead with such business plans. Persons identified by *Code* grounds should not be singled out for layoffs or otherwise treated differently when deciding which employees should be retained and which should be laid off.

Example: In a reorganization, a company dismissed a number of women who had recently returned from maternity leave. This decision was driven by a desire to create a core workforce for the future and based on a perception that women with young children were more likely to leave. This was found to be a genuine case of discrimination.

Example: Due to an economic downturn, a company was forced to lay off staff. Two foremen, one 56 and the other 57 with over 32 years service were selected for termination. Both were offered a generous retirement package. The two foremen who remained were younger than the two released. The vice-president had prepared a note indicating that the two older workers who were terminated were told of the need to reduce people and that they "hoped to keep people with career potential." This was age discrimination because of the good employment record of the complainant, the ages of the people selected for layoff compared to the persons retained, and the employer's statement, which was found to refer indirectly to age.

Example: As a cost-cutting measure, a company's restructuring plan provides for all employees on any

kind of medical leave to be terminated from employment while other employees are retained. This would contravene the Code, even if this is done in accordance with other legislative requirements (such as under the Employment Standards Act or the Companies Creditors Arrangement Act).

Subjective and informal systems for ranking employees for layoffs may disadvantage persons identified by the *Code* and result in discrimination claims. A better approach is to clearly set out a process and criteria for making layoff decisions, and to apply this consistently. Criteria should be objective and not based on subjective impressions about the particular worker's enthusiasm, flexibility, willingness to adapt or career potential. They should be related to the goals of the reorganization or the needs that have been identified by the company. Ideally, positions, rather than people, should be chosen for elimination and those positions should not later be refilled.

Example: A company decides that due to decreased profits and the need to be more competitive in the marketplace, it will introduce a new, more automated production system. It identifies the number of positions that will need to be staffed and what the duties of each will be. It also identifies the current positions that will no longer be needed and why. It advises each person whose position has been declared redundant of this fact and how this decision was reached. It then invites all of these persons to compete for the new positions. It runs the competition using objective, neutral criteria unrelated to Code grounds, and uses a scoring system that measures each candidate against the same stated criteria. Accommodation is provided when necessary. Past performance reviews are taken into account. The candidates with the best scores are selected and sent for training.

If qualifications are taken into account in making decisions about layoffs, they should be objectively evaluated. Concern about lay-off decisions may arise when an objective evaluation shows that employees identified by *Code* grounds are laid off while others with fewer qualifications are retained. This may be linked to a tendency to undervalue the strengths and contributions of racialized employees[95] or people identified by other *Code* grounds.

Example: A Chinese Canadian teacher is placed on a surplus list because the school principal takes a narrow view of what types of activities qualify as "extra-curricular." Activities that Chinese immigrants would be unlikely to do are included, while other activities that they would be more likely to do are not. This is found to amount to discrimination.

Where employees are recalled to work following layoffs, work should be offered to all qualified employees without regard to whether they are temporarily unavailable due to a *Code*-related leave.

Example: An employer does not recall an employee for work because she is on maternity leave. The employer takes the position that all employees on leave were not recalled and therefore there is no discrimination. This rule has an adverse impact on women who are unavailable due to pregnancy, and on employees who are on leave for other Code-related reasons such as disability. It is not found to be a bona fide occupational requirement.

When an organization is planning for restructuring, possible human rights implications may be identified by considering the following questions:

- What is the purpose of the restructuring and how can this be achieved without having a discriminatory impact on staff?
    - What criteria will be used to identify which staff will be laid off?
    - How will the restructuring affect staff?
    - How can the principles of inclusion and accommodation be built into the process?
    - Will there be any negative impact on staff who may be protected by a ground under the *Code*?
    - What measures can be put in place to address this?
- Are any employees away from work because of pregnancy, disability or other *Code* grounds?
    - Has the impact of restructuring on them been considered?
    - Will these employees have the same opportunity as other employees to be retained on staff?
    - What measures can be put in place to make sure that employees on leave are not disadvantaged in the

process?

- Is the workplace unionized?
  - What is the union's role?
  - Are there any human rights protections in the collective agreement that should be taken into account?

Exploring the answers to these questions may reduce the likelihood of an unintended discriminatory outcome and related human rights claims. See also Section IV-2a(ii) – "Taking a proactive approach to *bona fide* requirements."

d) Retirement

i) Early retirement incentives and packages:

Organizations will often offer employees "early retirement" packages in the course of restructuring and/or downsizing, as an incentive to promote voluntary exits from the workforce. This can have many benefits to all workers: older workers may be offered a lucrative incentive that will allow them to pursue other interests or ambitions while at the same time making sure that fewer workers will involuntarily lose their jobs.

When designed properly, early retirement schemes are appropriate and will not raise human rights concerns. However, as early retirement schemes by definition target older workers, great care must be taken in using them to meet downsizing objectives.

The fact that a generous retirement package is offered will not defeat a claim of age discrimination if the early retirement option was not truly voluntary (in other words, if there is direct or implicit pressure being applied to accept retirement).

> **Example:** A company decides that it needs to reduce its workforce by 10%. Human Resources reviews all employee files and identifies all workers over the age of 60. Each of them is called in for a meeting with management and told that they are nearing retirement age, and should accept an early retirement package so that younger persons won't lose their jobs. They are warned that if they do not do so, their position may be selected for elimination, in which case they will simply receive severance and lose the opportunity to receive the early retirement package. Under these circumstances, some older workers feel compelled to accept the offer, even though they were planning to work longer. This may result in a human rights complaint.

Employers can take steps to make sure that an offer of early retirement is not coercive:

- Define the eligibility criteria for the voluntary retirement program and share them with all staff, no matter what their age, through a neutral medium such as a written document. A response deadline and a contact who can provide information should be provided so that people who qualify and are interested can decide if they wish to follow up on the offer, without any pressure from management. Some employers even choose to offer similar voluntary exit incentive packages to persons who are not near retirement age.
- Do not make any link between accepting the package and job loss. If the workforce is being downsized, indicate what the criteria will be for selecting the jobs that will be eliminated. Employees can even be assured that eligibility for the voluntary exit program will not influence decisions about job loss.

On the other hand, an employee cannot claim age discrimination if the employer does not offer him or her access to the voluntary exit program because the employer still requires his or her services.

ii) Mandatory retirement:

Before December 12, 2006, the *Code* did not prohibit age discrimination in employment against persons aged 65 or older. As a result, policies requiring mandatory retirement at age 65 could not be challenged under the *Code*. This is now no longer the case. Persons aged 65 and older who believe that they have been discriminated against on the basis

of age, including through mandatory retirement policies, can file a complaint of discrimination on the basis of age.

This does not mean that employers cannot have retirement programs based on a certain age. Instead, it means that such programs cannot be mandatory, except for judges, masters and justices of the peace under the *Courts of Justice Act*. These jobs have a specific exemption under the *Code*.

In some occupations, employers may wish to impose mandatory retirement on workers who reach a certain age. For this not to contravene the *Code*, the employer must be able to prove that being less than that age is a *bona fide* or genuine requirement. For example, mandatory retirement policies relating to age have been found to be *bona fide* requirements in the following
circumstances:

- age 60 for police officers, fire fighters and a Chief Fire Prevention officer
- age 65 for a school bus driver, where expert medical evidence indicated that, as a group, people over 65 are more likely to have accidents, and that it is impossible to test individually to determine who is likely to have health problems or create risks for others.

In light of the Supreme Court of Canada's three-step test, discussed in detail in Section IV-2a(i) – "Test for *bona fide* requirement," it is not acceptable to rely on presumed group characteristics associated with aging. An employer seeking to justify mandatory retirement at a certain age must show that individual assessment, as a form of accommodation, is not possible. The evidence must show that there is no method to do so, or that individual assessment represents an undue hardship. The employer bears the onus of establishing that its policy is justifiable in the circumstances of its workplace.

Except in circumstances where mandatory retirement can be shown to be a *bona fide* requirement, collective agreements containing mandatory retirement provisions can no longer be enforced.

iii) Equal treatment for persons on leaves:

When making offers of early retirement, buy-out packages or making changes to employment related benefits, such as retirement health care benefits and pension benefits, employers must make sure that employees are not denied equal treatment because of *Code* grounds, and that all employees are fully advised of their rights and entitlements. This obligation applies even to employees who are off on leaves due to *Code* grounds such as sex (pregnancy), family status or disability (including sick leave, WSIB, long-term insurance plan benefits and /or any other disability related paid or unpaid leave).[96]

> **Example:** Before a plant closure, an employer and a union reached an agreement setting out a scheme for claiming and receiving pension benefits for three classes of employees: (1) people who had more than 30 years of service, regardless of age; (2) were between 60 and 64 and had 10 years or more of service, and (3) were either permanently or totally disabled and had 10 years or more of service. Specific provisions were negotiated for each of these classes. Most of the workers with disabilities were off work on extended disability benefits and/or workplace safety and insurance benefits. They were not aware they needed to apply for early retirement before the plant closed. As a result, they applied after the plant closed and no extension was granted, even though extensions had been granted for some of the employees in Class 2. This scenario gave rise to claims of discrimination that were settled during litigation at a human rights tribunal.

When offering buy-out packages or incentives to employees to reduce labour costs, take care to make sure that employees with disabilities, including persons on leave, are not excluded from eligibility and that the duty to accommodate such employees has been met. Policies that decide eligibility for a buy-out package based on hours worked in the past year have been found to be discriminatory.[97]

> **Example:** An employer offers a buy-out package of a lump-sum payment and an option to terminate

employment or continue employment as a newly hired employee with a lower salary. This package is only available to employees who had worked a set number of hours in the past 52 weeks. A number of employees on long-term disability are ineligible because they have not worked the needed number of hours. The union and employer have not met their duty to accommodate, because extending the plan to include employees with disabilities would not have amounted to undue hardship.

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[89] *Lane, supra* note 70.
[90] See *Naraine, supra* note 76. Followed in *Smith v. Mardana Ltd.* (2005), 52 C.H.R.R. 89 (Div. Ct.). See also *Moffatt v. Kinark Child & Family Services* (1988), 35 C.H.R.R. D/205, 52 C.H.R.R. 89.
[91] *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal)* [2007] S.C.R. 161.
[92] *Masonite International Corp. v. U.B.C.J.A., Loc. 1072 (Ganeshamoorthy, Re,* (2007). 161 L.A.C. (4th) 426.
[93] See for example, *Datt, supra* note 51.
[94] *Lane, supra* note 70.
[95] Ontario Human Rights Commission, *Policy and Guidelines on Racism and Racial Discrimination* (2005). See also *Wong v. Ottawa (City) Bd. of Education (No. 3)* (1994), 23 C.H.R.R. D/37 (Ont. Bd. of Inquiry).
[96] See *Kimberly Altenburg et al. v. Johnson Controls Limited (Partnership) and Johnson Control Inc. (*Tribunal Settlement), described in Ontario Human Rights Commission "Settlements and Tribunal Decisions" (News Release: 2006-2007 fiscal year), online: www.ohrc.on.ca/en/resources/news/settle/view.
[97] See for example, *United Food and Commercial Workers, Local 401 v Alberta Human Rights and Citizenship Commission* (2003), 231 D.L.R. (4th) 285. (Alta. C.A.), leave to appeal to S.C.C. refused 236 D.L.R. (4th) viii.

V. Conclusion

Even without the legal requirement not to discriminate, providing a fair work environment that respects the dignity of all employees is in an organization's best interests. Today's global economy, multicultural society and highly competitive corporate environment place greater demands on all organizations. Employers need to recruit and retain the best employees for their organizations, and part of that process involves selecting and keeping employees with diverse backgrounds and talents from the widest possible pool of candidates.

Given that around 75% of all human rights complaints arise in the workplace, it makes good business sense to take proactive action to ensure compliance with the *Code*. Taking prompt steps to address human rights allegations internally will minimize the costs of unresolved human rights complaints: low employee morale, high stress, employee absences and turnover, damaged professional and organizational reputations, and costly hours of litigation before tribunals and courts. Under the new *Code* amendments, employers face significant human rights damage awards and other remedies from the courts as well as from the Human Rights Tribunal of Ontario. This heightens the importance of employers being diligent and proactive in addressing and preventing *Code* violations.

Knowing your rights and obligations is the start of the process. Putting policies and practices in place that create and maintain a fair work environment is the desired result of that process.

VII. Appendices and Other resources

Appendix A – other OHRC publications

The Commission website (www.ohrc.on.ca) is the most current and exhaustive source of information about the work of the Commission. All Commission publications are available on the website. This includes approved policies and

guidelines, consultation documents, and plain language publications. Information can also be found on current Commission activities. Bound copies of Commission documents are available through Publications Ontario at 1-800-668-9938.

Policies and guidelines

Commission policies and guidelines are approved statements setting out the Commission's interpretation of specific *Code* provisions. They are important because the public has a right to expect that the Commission will deal with cases in a way that is consistent with its published policies.

Also, the Commission's website at www.ohrc.on.ca contains many plain language documents relating to these policies.

Guide To Releases With Respect to Human Rights Complaints
Guidelines on Accessible Education
Guidelines for Collecting Data on Enumerated Grounds Under the Code
Guidelines on Developing Human Rights Policies and Procedures
Guidelines on Special Programs
Policy and Guidelines on Disability and the Duty to Accommodate
Policy and Guidelines on Discrimination Because of Family Status
Policy and Guidelines on Racism and Racial Discrimination
Policy on Creed and the Accommodation of Religious Observances
Policy on Discrimination Against Older Persons Because of Age
Policy on Discrimination and Harassment Because of Gender Identity
Policy on Discrimination and Harassment Because of Sexual Orientation
Policy on Discrimination and Language
Policy on Discrimination Because of Pregnancy and Breastfeeding
Policy on Drug and Alcohol Testing
Policy on Employment-Related Medical Information
Policy on Female Genital Mutilation (FGM)
Policy on Height and Weight Requirements
Policy on HIV/AIDS Related Discrimination
Policy on Requiring a Driver's Licence as a Condition of Employment
Policy on Scholarships and Awards
Policy on Sexual Harassment & Inappropriate Gender-Related Comments and Conduct

Appendix B – Human rights in the workplace: which laws?

a) Federal legislation

i) Canadian Human Rights Act

The *Canadian Human Rights Act ("CHRA")* applies to workplaces in federal organizations or industries that are regulated by the federal government. The Ontario *Human Rights Code* does not apply to such organizations. Both of these laws cannot apply at the same time. If one applies, the other does not.

The choice of incorporating statute does not determine whether a company is provincially or federally regulated. The *CHRA* covers workplaces such as:

- federal departments and agencies
- Crown corporations
- the post office
- chartered banks
- airlines
- television and radio stations
- inter-provincial communications and telephone companies
- buses and railways that travel between provinces
- places of business where labour issues are governed by the *Canada Labour Code*
- other federally-regulated industries, such as certain mining operations.

ii) Canada Labour Code

The *Canada Labour Code* covers labour relations in federal workplaces in a way similar to the Ontario *Labour Relations Act,* discussed below. The *CHRA* applies in situations where the *Canada Labour Code* is the appropriate legislation for labour purposes. For example, Canada Post Corporation is covered by the *Canada Labour Code*.

iii) Employment Equity Act

Since 1996, the *Employment Equity Act* has required employers to take progressive measures, including reviewing barriers, collecting data and planning to achieve equity for four designated groups: women, Aboriginal peoples, members of "visible minorities" and persons with disabilities. In general, the *Employment Equity Act* applies to federally regulated employers with more than 100 employees. The *Employment Equity Act* may also apply to certain Ontario companies that have contracts with the federal government. These companies would be bound by the Ontario *Human Rights Code* as well.

iv) Privacy legislation

The federal *Personal Information Protection and Electronic Documents Act ("PIPEDA")* applies to all organizations that collect, use or disclose personal information when doing business. It also applies to the personal information of an employee of a federal work, undertaking and business (but not the personal information of other private sector employers).

PIPEDA applies when organizations collect, use and disclose personal information during commercial activities. Personal information is any information about an identifiable individual, whether recorded or not. Organizations can only collect personal information that is appropriate for the specific transaction. They must explain why they need the information, what it will be used for, and whether they plan to share it with anyone else. They must also obtain consent for this use and disclosure.

When collecting, using and disclosing employees' personal information, employers should consider the requirements of the *Code*, as well as the requirements of privacy laws. For example, in collecting information needed for benefit plans or required by other legislation, or giving information to third parties, only collect or disclose information that is really needed.

b) Provincial legislation

i) Accessibility for Ontarians with Disabilities Act

The *Accessibility for Ontarians with Disabilities Act ("AODA")* talks about developing, implementing and enforcing accessibility standards. Standards are developed through a process of public consultation and will become regulations under the *AODA*. The aim of the *Act* and the standards is to make sure Ontarians with disabilities have access to services, goods, facilities, accommodation, employment, building structures and premises by January 1, 2025.

There will be standards in five areas: customer service (complete), transportation (ongoing at the time of publication), information and communications, built environment and employment. As of spring 2008, a draft employment standard has not yet been released for public comment and consultation. Once the standard is finalized and made into regulation, the rights and obligations in the Ontario *Human Rights Code* will continue to apply. If relevant, employers also need to comply with the accessibility requirements in the *Building Code* and the *Ontarians with Disabilities Act*, until it is repealed.

If these different Acts and standards are not consistent with the *Code*, employers should remember that the *Code* takes precedence over other provincial acts and regulations because of its almost constitutional nature. See also Section II-2b) – "Supremacy of the *Code*."

ii) Building Code

Workplaces must be accessible for persons with disabilities and other people identified by *Code* grounds. The Ontario *Building Code* Act *("OBC")* and the regulations under it govern the construction of new buildings, as well as renovating and maintaining existing buildings. The OBC is designed to make sure uniform general standards are used to create and protect healthy and safe buildings.

In terms of accessibility, *OBC*'s objective is to "limit the probability that, as a result of the design or *construction* of a *building*, a person with a physical or sensory disability will be unacceptably impeded from accessing the building or circulating within it." [98] The Commission's position is that the accessibility requirements in the OBC and regulations fall short of the requirements of the *Code*.

The *Code* takes precedence over the *OBC* and applies to the *OBC* itself. The fact that a facility complies with the *OBC* is not a defence to a claim of discrimination under the *Code*. Persons involved in designing, building or renovating buildings should consider the *Code* requirements to design inclusively for, and accommodate, persons with *Code*-related needs instead of only relying on the minimum standards in the OBC. See also Section II-2b) – "Supremacy of the *Code*."

iii) Employment Standards Act

The *Employment Standards Act (ESA)* sets out specific minimum obligations employers must meet, such as hours of work, minimum wage, overtime, vacation, pregnancy and parental leave, termination, layoff and severance. In general, allegations of discrimination and harassment cannot be dealt with under the *ESA,* although there are some areas of overlap. For example, the *ESA* provides protections to pregnant employees and requires employers to pay equal pay for work of equal value. Both of these issues are also covered under the *Code* under sex discrimination. There are also common situations in which an employee may have a right to a remedy under both Acts.

> **Example:** An employee requests her Record of Employment (ROE) because she has started maternity leave. The employer withholds it because she is upset that the employee has had to go off work earlier than expected due to sudden pregnancy complications. The employee is also harassed. The employee may take action under the ESA to compel the employer to give her the ROE. She may also file a human rights claim alleging discrimination based on sex because she was not given her ROE due to her pregnancy and was harassed.

As was noted earlier, where the provisions of the ESA conflict with those of the *Code*, the *Code* takes precedence. See also Section II-2b) – "Supremacy of the *Code*."

iv) Labour Relations Act

The Ontario *Labour Relations Act* covers unionized workplaces. Its purpose is to ensure the right to organize, encourage collective bargaining, promote harmonious labour relations and provide for effective and fair dispute resolution. Arbitrators appointed under this Act can interpret and apply the *Code* when resolving grievances, despite

any conflict between the *Code* and the terms of the collective agreement. The substantive rights and obligations of the *Code* are deemed to be, or taken to be, part of each collective agreement that an arbitrator has jurisdiction over.[99] Both the Ontario *Labour Relations Act* and the *Code* may apply to a particular situation as the two laws are not mutually exclusive.

v) Occupational Health and Safety Act

The *Occupational Health and Safety Act* outlines requirements and responsibilities related to workplace occupational health and safety. Both the *Occupational Health and Safety Act* and the *Code* may apply to a particular situation as the two laws are not mutually exclusive. This overlap can arise most often when assessing health and safety risks as part of the undue hardship test. See Section IV-8 – "Meeting the accommodation needs of employees on the job" and Section II-2b) – "Supremacy of the *Code*."

vi) Ontarians with Disabilities Act

The purpose of the *Ontarians with Disabilities Act*, 2001 ("ODA") is to develop, implement and enforce accessibility standards to enable people with disabilities to take part fully in society. The *ODA* sets annual accessibility planning requirements for certain public organizations such as hospitals, schools, municipalities and public transportation. These organizations must identify, remove and prevent barriers to people with disabilities. Employers must do the same under the *Code*. Thus, organizations with obligations to prepare annual accessibility plans should consider the *Code* requirements to accommodate persons with disabilities. Refer also to Section IV-1a(i) – "Preventing, reviewing and removing barriers" and Section IV-1d) – "More about preventing, reviewing and removing barriers related to disability."

Until it is repealed, ODA applies along with the AODA and the *Code*. The *Code* takes precedence over both the ODA and the AODA. See also Section II-2b) – "Supremacy of the *Code*."

vii) Pay Equity Act

The objective of the *Pay Equity Act* is to make sure that female and male employees receive equal pay for work of equal value. This Act applies to all employers and employees in Ontario except for those that fall under federal jurisdiction and private employers with fewer than 10 employees and summer students.

Both the *Code* and the *Pay Equity Act* may apply to a particular case. For example, a woman may file a complaint of systemic sex discrimination under the *Code* and also seek remedies for differences in pay under the *Pay Equity Act*. Both the protections and the remedies in the *Code* are broader than those in the *Pay Equity Act* since the *Code* applies to all provincially regulated employers including those with fewer than 10 employees and summer students.

viii) Privacy laws

Ontario has passed the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act*. These privacy laws are limited to the public sector, including Ontario government ministries, agencies, cities and towns, but not the private or not-for-profit/non-governmental organization (NGO) sectors. Government organizations are, with limited exceptions, prohibited from disclosing personal information in their control to third parties. Private sector employers cannot get personal information, such as a medical history, from a government agency without the employee's consent.

The *Personal Health Information Protection Act* sets out rules for collecting, storing and disclosing personal health information. The *Act* applies to specific listed organizations and persons, such as hospitals and medical professionals, who fit the *Act*'s definition of "health information custodians." The *Act* also applies to organizations, such as employers or insurance companies that receive this information from health information custodians.

When requesting or getting personal health information for employment purposes, employers must take care to comply with both this *Act* and the *Code*. If there is a conflict, the provisions of the *Code* take precedence.

ix) Workplace Safety and Insurance Act

Injuries in job-related accidents are covered by the *Workplace Safety and Insurance Act* (WSIA) (formerly the *Workers' Compensation Act*). This Act provides an insurance plan to protect injured workers and allows employers to limit their financial exposure through a funding system based on payroll.

Under subsection 10(1) of the *Code*, a person who claims or receives benefits under the *WSIA* is deemed to have a disability for the purposes of the *Code*, and is entitled to file a human rights complaint resulting from unequal treatment on the ground of disability. Therefore, it is appropriate and indeed likely that claims under the *WSIA* and the *Code* may go on at the same time. Unless it relates to age, if there is an inconsistency between the *Code* and the *WSIA*, the *Code* applies. For example, under the *WSIA* the duty to re-employ only arises if the worker had been employed continuously for one year before the injury and the employer regularly employs 20 or more workers. In comparison, under the *Code*, the duty to accommodate arises even if the employee is injured during his or her first year with the employer, and even if fewer than 20 workers are regularly employed. This may include a requirement to return a worker with a disability to work, subject to the standard of undue hardship.

On the other hand, section 2.1(1) of the *WSIA* specifically states that provisions of that Act that authorize a distinction based on age apply despite the *Code*. This means, for example, that the restriction on the duty to accommodate workers over age 65 in the WSIA applies despite the *Code*. While this provision would apply in a claim under the *WSIA*, it does not affect the worker's rights under the *Code* – a worker over age 65 would still be entitled to file a human rights claim under the *Code* alleging a failure to accommodate.

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[98] *Building Code Act,* 1992. O. Reg. 350/06, Section 2.2.1.1.
[99] *Parry Sound, supra* note 28.

Appendix C – Resource list

This resource list is not exhaustive – please let us know if there are other resources that we can add. This list was compiled by Commission staff and identifies groups and publications that may deal with human rights issues. The Commission does not endorse, promote or vouch for any of the resources. Please consult with the resource directly for more information.

a) Human Rights at Work partners

Ontario Human Rights Commission
180 Dundas Street West, 7th Floor
Toronto, ON M7A 2R9
Phone: 416-326-9511
Fax: 416-326-9520
Toll Free: 1-800-387-9080
TTY: 416-326-0603
TTY Toll Free: 1-800-308-5561
E-mail: info@ohrc.on.ca
Internet: www.ohrc.on.ca

Carswell
One Corporate Plaza, 2075 Kennedy Road
Toronto, ON M1T 3V4

Phone: 416-609-3800
Toll Free: 1-800-387-5164
Fax: 416-298-5094
E-mail: carswell.orders@thompson.com
Internet: www.carswell.com

Human Resources Professionals Association (HRPA of Ontario)
2 Bloor Street West, Suite 1902
Toronto, ON M4N 3E2
Phone: 416-923-2324
Toll free: 1-800-387-1311
Fax: 416-923-7264
E-mail: info@hrpao.org
Internet: www.hrpao.org

b) Organizations providing human rights services to Ontarians

Ontario Human Rights Commission
180 Dundas Street West, 7th Floor
Toronto, ON M7A 2R9
Phone: 416-326-9511
Fax: 416-326-9520
Toll Free: 1-800-387-9080
TTY: 416-326-0603
TTY Toll Free: 1-800-308-5561
E-mail: info@ohrc.on.ca
Internet: www.ohrc.on.ca

Human Rights Tribunal of Ontario
Ms Patricia M. Grenier, Registrar
Human Rights Tribunal of Ontario
400 University Ave., 7th Floor (One block south of Dundas Street W.)
Toronto, ON M7A 1T7
Tel: 416-314-8419
Toll Free: 1-800-668-3946
TTY: 416-314-2379
TTY Toll Free: 1-800-424-1168
Fax: 416-314-8743
E-mail: hrto.registrar@ontario.ca
Internet: www.hrto.ca

Human Rights Legal Support Centre
E-mail: HRLSC@Ontario.ca
Internet: http//www.hrlsc.on.ca

c) Creating a workplace that complies with the Code

Building Inclusive Communities
www.healthycommunities.on.ca
A project by the Ethno Racial Coalition of Ontario, this website offers tips to promote diversity and improve communication in the workplace.

Canadian Auto Workers Union

Human Rights Department
E-mail: humanrights@caw.ca
Phone: 416-495-3762
Fax: 416-495-6552
Internet: http://www.caw.ca/whatwedo/humanrights
Offers training programs on workplace human rights for union members.

Canadian Automotive Repair and Service (CARS) Council
Phone: 613-798-0500
Internet: www.cars-council.ca
E-mail: jennifer@carscouncil.ca
See CARS Inventory – research project on internationally trained professionals and labour shortage and links to other resources online at:
www.cars-council.ca/documents/Reports/English-CARS_Inventory.pdf

Canadian Human Rights Commission
344 Slater Street, 8th Floor
Ottawa, ON K1A 1E1
Phone: 613-995-1151
Toll Free: 1-888-214-1090
TTY: 1-888-643-3304
Fax: 613-996-9661
Internet: www.chrc.ccdp.ca
See publication: *A Place for All: A Guide to Creating an Inclusive Workplace* online at
www.chrc-ccdp.ca/discrimination/APFA_UPPT/toc_tdm-en.asp

Canadian Information Centre for International Credentials
Internet: www.cicic.ca
Services to support recognition of international credentials.

Career Edge
Phone: 416-977-3343
Toll Free: 1-888-507-3343
Fax:: 416-977-4090
Internet: http://overview.careeredge.ca/
E-mail: info@careeredge.ca
Internship programs for people with disabilities, recent graduates and internationally qualified professionals.

Centre for Canadian Language Benchmarks (CCLB)
200 Elgin Street, Suite 803
Ottawa, ON K2P 1L5
Phone: 613-230-7729
Fax: 613-230-9305
E-mail: info@language.ca
Internet: www.language.ca
See Resource Kit for Counselling and Hiring Immigrants
Practical supports for hiring and training newcomers.

City of Toronto – Human Rights Office
55 John Street, 5th floor, Metro Hall
Toronto ON M5V 3C6
Phone: 416-392-8383
Fax: 416-392-3920 or 416-392-4686

TTY: 416-397-7332
E-mail: humanrights@toronto.ca
Internet: www.toronto.ca

Employment Ontario
Ministry of Training, Colleges and Universities
Toll free in Ontario: 1-800-387-5656
TTY: 416-325-4084
Fax: 416-325-6348
Internet: www.edu.gov.on.ca
Provides services to employers such as Adjustment Advisory Program for times of restructuring and downsizing, apprenticeship programs and employer bonuses.

Hireimmigrants.ca
170 Bloor Street West, Suite 901
Toronto, ON M5S1T9
Phone: 416-944-1946 ext. 271
E-mail cdeveale@triec.ca.
Internet: www.hireimmigrants.ca
Links to other resources for employers seeking to hire skilled immigrants. Provides a four-month to one-year internship program to bridge the gap between skilled immigrants and industry. Eligible employers can apply for awards relating to implementation of measures to remove barriers to hiring immigrants or improving hiring processes.

Industrial Accident Prevention Association (IAPA) – Information Centre
Phone: 905-614-4272 ext. 2298 or ext. 2387
Toll free in Ontario: 1-800-406-4272 ext. 2298 or ext. 2387
Fax: 905-614-1414
E-mail: infocentre@iapa.ca
Internet: www.IAPA.ca
Website features wide variety of resources on occupational health and safety, and on creating and maintaining healthy workplaces, including resources on workplace violence.

Job Start – The Centre for Advancement in Work and Living
41 Chauncey Avenue
Etobicoke, ON M8Z 2Z2
Phone: 416-231-2295
TTY: 416-253-2726
Fax: 416-253-2700
E-mail: info@jobstart-cawl.org
Internet: www.jobstart-cawl.org
Community-based, not-for-profit agency helping experienced workers, newcomers to Canada and youth overcome challenges to reach their employment goals. Services for employers such as access to free in-depth job matching, pre-screening service, wage or training subsidies, follow up service.

Labour Community Services
15 Gervais Drive, Suite 603
Toronto, ON M3C 1Y8
Phone: 416-445-5819
Fax: 416-445-5146
Internet: www.labourcommunityservices.ca
Provides supports to unions in meeting their members' needs.

Law Society of Upper Canada
Equity Initiatives Department
Osgoode Hall, 130 Queen Street West
Toronto, ON M5H 2N6
Phone: 416-947-3300 ext. 2153
Toll Free: 1-800-668-7380 ext. 2153
Fax: 416-947-3983
Internet: www.lsuc.on.ca
Has number of resources for law firms that may be useful for other employers, including model policies (for example, on accommodation, equity, gender identity and sexual orientation).

Ministry of Citizenship and Immigration
6th floor, 400 University Avenue
Toronto, Ontario M7A 2R9
Phone: 416-327-2422 or
Toll free: 1-800-267-7329
TDD/TTY: 416-326-0148
Toll free TTY: 1-888-335-6611
Fax: 416-314-4965
Internet: www.citizenship.gov.on.ca/english/working/employers/
Information about recruiting and hiring internationally-trained professionals

Office of the Employer Advisor (Ministry of Labour)
151 Bloor Street West, Suite 704
Toronto, ON M5S 1S4
Phone: 416-327-0020
Toll Free: 1-800-387-0774
Fax: 416-327-0726
E-mail: weboea@mol.gov.on.ca
Internet: www.employeradviser.ca
Helps Ontario's employers manage workplace safety and insurance issues.

Office of the Worker Adviser (Ministry of Labour)
123 Edward Street, Suite 1300
Toronto, ON M5G 1E2
Phone: 416-325-8570
Toll Free: 1-800-660-6769
Fax: 416-325-4830
Internet: www.owa.gov.on.ca
Free services for non-unionized injured workers.

Skilled Trades Alliance
Phone: 905-529-4660
E-mail: alliance@skilledtrades.ca
Internet: www.skilledtrades.ca
Offers employers the tools and resources they need to recruit and retain qualified help.

d) Race and creed-related issues

Canadian Council for Aboriginal Business
204A St. George Street
Coach House, Main Floor
Toronto, ON M5R 2N5

Phone: 416-961-8663
Fax: 416-961-3995
E-mail: info@ccab.com
Internet: www.ccab-Canada.com

Canadian Heritage – Multiculturalism Program
150 John Street, Suite 400
Toronto, ON M5V 3T6
Phone: 416-954-0395
E-mail: reception-toronto@pch.gc.ca
Internet: www.canadianheritage.gc.ca
Provides information and resources on diversity and multiculturalism.

COSTI Immigrant Services
1710 Dufferin Street
Toronto, ON M6E 3P2
Phone: 416.658.1600
Fax: 416.658.8537
E-mail: info@costi.org
Internet: www.costi.org
Offers employment, educational, settlement and social services to all immigrant communities, new Canadians and individuals in need of assistance.

League for Human Rights of B'nai Brith Canada
15 Hove Street
Toronto, ON M3H 4Y8
Phone: 416-633-6224
Toll Free: 1-800-892-2624
Fax: 416-630-2159
E-mail: bnb@bnaibrith.ca
Internet: www.bnaibrith.ca

Metropolis Project
c/o Citizenship and Immigration Canada
219 Laurier Avenue West
Ottawa, ON K1A 1L1
Phone: 613-957-5983
Fax: 613-957-5968
Internet: Canada.metropolis.net
An international forum for comparative research and policy development about migration, immigration and cultural diversity. A wide variety of resources on many topics is available online –including statistics and information on trends.

Miziwe Biik Aboriginal Employment Training
167 Gerrard Street East
Toronto, ON M5A 2E4
Phone: 416-591-2310
Fax: 416-591-3602
E-mail: info@miziwebiik.com
Internet: www.miziwebiik.com
Offers employer services including targeted wage subsidies.

National Anti-Racism Council of Canada

122 - 215 Spadina Ave.
Toronto, ON M5T 2C7
Phone: 416-979-3909
Fax: 416-946-1983
Internet: www.narcc.ca
A national community-based network acting against racism. Employment-related resources are available online.

Ocasi
110 Eglinton Avenue West, Suite 200
Toronto, ON M4R 1A3
Phone: 416-322-4950
Fax: 416-322-8084
E-mail: generalmail@ocasi.org
Internet: www.ocasi.org
A council of over 170 community-based agencies which serve the immigrant communities of Ontario.

Ontario Federation of Indian Friendship Centres
219 Front Street East
Toronto, ON M5A 1E8
Phone: 416-956-7575
Toll Free: 1-800-772-9291
Fax: 416-956-7577
E-mail: ofifc@ofifc.org
Internet: www.ofifc.org
Has an Employment Unit that delivers programs aimed at linking Aboriginal people with employment opportunities. Programs include employment supports, on-the-job training, job-creation partnerships, targeted wage subsidies and more.

Ontario Healthy Communities Coalition
2 Carlton Street, Suite 1810
Toronto, ON M5B 1J3
Phone: 416-408-4841
Toll Free: 1-800-766-3418
Fax: 416-408-4843
Provides resources relating to inclusion, equity and diversity such as “Inclusive Community Organizations: A Tool Kit.” available online at: atwork.settlement.org/sys/atwork_offsite_frame.asp?doc_id=1003789.
The Tool Kit aims to help community organizations become more equitable, diverse and inclusive through a self-assessment tool, a step-by-step process and an action plan for organizational change process to increase inclusion.

Ontario Multifaith Council on Spiritual and Religious Care
789 Don Mills Road, Suite 208
Toronto, ON M3C 1T5
Phone: 416-422-1490
Toll Free: 1-888-837-0923
Fax: 416-422-4359
E-mail: omcsrc@omc.ca
Internet: www.omc.ca/
This website provides information about many of the faiths that are practiced by persons living in Ontario. It also includes a list of holidays and observances that can be used to determine dates of significance to each faith.

Urban Alliance on Race Relations
302 Spadina Avenue, Suite 507

Toronto, ON M5T 2E7
Phone: 416-703-6607
Fax: 416-703-4415
E-mail: uarr@uarr.org
Internet: www.urbanalliance.ca

e) Sex-related issues

A Commitment to Training and Employment for Women (ACETW)
215 Spadina Avenue, Suite 350
Toronto, ON M5T 2C7
Tel: 416-599-3590
Fax: 416-599-2043
E-mail: info@actew.org
Internet: www.actew.org

Employment Standards Information Centre
Ministry of Labour
Phone: 416-326-7160
Toll Free: 1-800-531-5551
TTY: 1-866-567-8893
Internet: www.labour.gov.on.ca
Information on pregnancy and parental leave under the Employment Standards Act.

National Association of Women and the Law
251, Bank Street, Suite 305
Ottawa, ON K2P 1X3
Phone: 613-241-7570
Fax: 613-241-4657
E-mail: info@nawl.ca
Internet: www.nawl.ca
Non-profit organization working to promote equality rights of all women in Canada.

Ontario Women's Directorate
777 Bay Street, 6th Floor
Toronto, ON M7A 2J4
Phone: 416-314-0300
Toll Free: 1-866-510-5902
TTY: 416-314-0258
Fax: 416- 314-0247
Email: info.mci@ontario.ca
Internet: www.citizenship.gov.on.ca/owd
Has grants and funding available for organizations including employers.

Service Canada
Human Resources and Social Development Canada
Toll Free: 1-800-206-7218
TTY: 1-800-529-3742
Information on applying for employment insurance benefits, online:
www.hrsdc.gc.ca

Status of Women Canada
National Office

MacDonald Building
123 Slater Street, 10th Floor
Ottawa, ON K1P 1H9
Phone: 613-995-7835
TTY: 613-996-1322
Fax: 613-957-3359
E-mail: information@swc-cfc.gc.ca
Internet: www.swc-cfc.gc.ca
See Gender-Based Analysis: A Guide for Policy-Making (revised 1998), which sets out techniques for assessing the impact of policies and programs on men and women and integrating gender analysis into new policies and programs.

Women's Human Rights Resources Programme
Bora Laskin Law Library
University of Toronto Faculty of Law
78 Queen's Park,
Toronto, ON M5S 2C5
Phone: 416-978-0944
Internet: www.law-lib.utoronto.ca/diana/
Online resource for information on women's human rights law

f) Sexual orientation and gender identity issues

barbara findlay
Internet: www.barbarafindlay.com
This website has number of resources and articles on equality, oppression and GLBT issues.

Canadian Auto Workers Union
Phone: 416-495-3762
Fax: 416-495-6552
Human Rights Department
E-mail: humanrights@caw.ca or
cawpride@caw.ca
Internet: www.caw.ca/en/services-departments-pride.htm
Online resources, including a booklet called "To Our Allies: Everything you ever wanted to know about Lesbian, Gay, Bisexual and Trans Issues... Well maybe not everything." This resource includes answers to frequently asked questions.

Canadian Gay & Lesbian Chamber of Commerce (CGLCC)
39 River Street
Toronto, ON M5A 3P1
Phone: 416-761-5151
Toll Free: 1-866-300-7556
Fax: 416-761-5161
Internet: www.cglcc.ca
Coalition of GLBT owned and GLBT-friendly businesses, and clearinghouse of information for and between organizations and businesses.

Contact Point – Proud Practitioners Website
Internet: www.contactpoint.ca
Source of gay, lesbian, bi-sexual and transgendered resources and links from Proud Practitioners Website now hosted on Contact Point's website. Includes links to Canadian campus organizations and print resources.

Egale Canada

1 Nicholas St, Suite 430
Ottawa, ON K1N B7
Phone: 613-230-1043
Toll Free: 1-888-204-7777
Fax: 416-642-6435
E-mail: egale.canada@egale.ca
Internet: www.egale.ca

Human Rights Campaign
Internet: www.hrc.org
Has a number of comprehensive resources specific to trans people, including transitioning at work. For example, *Transgender Americans: A Handbook for Understanding and Transgender Issues in the Workplace: A Tool for Managers and Coming Out As Transgender.* Please note, however, that this is a US organization, so their legal information is not relevant, and their recommendations do not all comply with the Commission's Gender Identity policy.

Human Rights Program – Heritage Canada
Internet: www.pch.gc.ca/progs/pdp-hrp/index_e.cfm
See brochure: "Out and About – Towards a Better Understanding of Gay, Lesbian, Bisexual, and Transgendered Persons in the Workplace."

Out and Equal Workplace Advocates
155 Sansome Street, Suite 450
San Francisco, CA 94104
Phone: 415-694-6500
Fax: 415-694-6530
E-mail: info@outandequal.org
Internet: www.outandequal.org
U.S. organization that champions safe and equitable workplaces for lesbian, gay, bisexual and transgender people. Has some online resources that may be modified for use by Canadian employers. See "15 Steps to an Out and Equal Workplace."

Supporting Our Youth (SOY)
333 Sherbourne Street, 2nd Floor
Toronto, ON M5A 2S5
Phone: (416) 324-5077
Fax: 416-324-4188
e-mail: soy@sherbourne.on.ca.
In partnership with Teens Educating and Confronting Homophobia (T.E.A.C.H) and with the support of Canadian Auto Workers (CAW) and Lesbian and Gay Community Appeal, SOY has produced an employment brochure/handbook for LGBT youth and employers entitled "Out to Work: Lesbian, gay, bisexual, transgender and transsexual youth and work". This resource can be obtained by calling SOY.

University of Toronto
The Office of LGBTQ Resources & Programs
21 Sussex Avenue, Suites 416 & 417
Toronto, ON M5S 1J6
Phone: 416-946-5624
Fax: 416-946-7745
Internet: www.lgbtq.utoronto.ca/Office.htm
Has a resource on gender-neutral washrooms at www.lgbtq.utoronto.ca/Gender_Neutral.htm

g) Age-related issues (includes youth and older Ontarians)

AARP
601 E Street NW
Washington, DC 20049
Toll Free: 1-888-OUR-AARP (1-888-687-2277)
Internet: www.aarp.org
U.S. resource on age discrimination under the Age Discrimination in Employment Act (ADEA).

Canadian Centre for Elder Law Studies
1822 East Mall, The University of British Columbia
Vancouver, BC V6T 1Z1
Phone: 604-822-0633
Fax: 604-822-0144
E-mail: ccels@bcli.org
Internet: www.ccels.ca

CARP – Canada's Association for the Fifty-Plus
27 Queen Street East, Suite 1304
Toronto, ON M5C 2M6
Phone: 416-363-8748
Fax: 416-363-8747
E-mail: carp@50plus.com
Internet: www.carp.ca
Extensive resources and links on issues affecting older workers.

Justice for Children and Youth
Canadian Foundation for Children, Youth and the Law
415 Yonge Street, Suite 1203
Toronto, ON M5B 2E7
Phone 416-920-1633
Ontario Toll Free: 1-866-999-JFCY (5329)
Fax: 416-920-5855
E-mail: info@jfcy.org
Internet: www.jfcy.org
Legal representation to low-income youth and children.

Ontario Association of Youth Employment Centres
Internet: www.oayec.org/youth/resources
Links to online resources.

Ontario Seniors' Secretariat
777 Bay Street, Suite 601C
Toronto ON M7A 2J4
Seniors' InfoLine (Toll Free): 1-888-910-1999
TTY: 1-800-387-5559
Internet: www.culture.gov.on.ca/seniors/
Resources and links for seniors.

Retirement Planning Association of Canada (RPAC)
289 Greenwood Drive
Stratford, ON N5A 7K6
Phone:519-273-5616
Fax: 519-273-6097
Internet: www.retirementplanners.ca

St. Stephen's Employment and Training Centre
1415 Bathurst Street, 2nd Floor
Toronto, ON M5R 3H8
Phone: 416-531-4631
Fax: 416-531-2680
Internet: www.ststephenshouse.com
Provides services to employers such as free job postings, hosting a job fair on an employer's behalf, or wage subsidies as part of its youth employment program.

Seniors.ca Directory
Internet: www.seniors.ca/age-discrimination.html
Online resource offering articles and links on aging and age discrimination.

h) Disability issues (excluding mental health)

Accessibility Directorate of Ontario
777 Bay Street, 6th Floor, Suite 601
Toronto, ON M7A 2J4
E-mail: accessibility@css.gov.on.ca

Accessibility For Ontarians With Disabilities Act (AODA)
Service Ontario, Contact Centre
Toll free: 1-866-515-2025
TTY: 416-325-3408
Toll free TTY: 1-800-268-7095
Fax: 416-325-3407

Adaptive Technology Resource Centre
Faculty of Information Studies, University of Toronto
130 St. George Street
Toronto, ON M5S 1A5
Phone: 416-978-4360
Fax: 416-971-2629
E-mail: general.atrc@utoronto.ca
Internet: www.atrc.utoronto.ca
Online resources, consultation and accommodation support for employers hiring, retraining, advancing and retaining persons with disabilities.

ALDERCENTRE (Adult Learning Disabilities Employment Resource Centre)
120 Front Street East, Suite 208
Toronto, ON M5A 4L9
Phone: 416-693-2922
Fax: 416-698-0038
E-mail: ld@aldercentre.org
Internet: www.aldercentre.org

ARCH: A Legal Resource Centre for Persons with Disabilities
425 Bloor Street East, Suite 110
Toronto, ON M4W 3R5
Phone: 416-482-8255
Outside Toronto: 1-866-482-2724
TTY: 416-482-1254
Fax: 416-482-2981

E-mail: archlib@lao.on.ca
Internet: www.archlegalclinic.ca

Assistive Devices Industry Office
Industry Canada
P.O. Box 11490 Station H
Ottawa, ON K2H 8S2
Phone: 613-990-4316 or
613-990-4297
TTY: 613-998-3288
Fax: 613-998-5923
E-mail: adio@crc.ca
Internet: www.at-links.gc.ca/as
Information on assistive technologies and programs and services related to technical accommodations.

Canadian Association of the Deaf
251 Bank Street, Suite 203
Ottawa, ON K2P 1X3
Phone: 613-565-2882
TTY: 613-565-8882
Fax: 613-565-1207
E-mail: cad@cad.ca
Internet: www.cad.ca

Canadian Council on Rehabilitation and Work
111 Richmond Street West, Suite 401
Toronto, ON M5H 2G4
Phone: 416-260-3060
Toll free: 1-800-664-0925
TTY: 416-260-9223
Internet: www.ccrw.org
CCRW is a "one-stop shop" for disability and employment resources. The CCRW provides a number of hands-on services to employers, including partnerships, workplace assessments and training on a number of disability-related subjects including return to work processes for injured workers and how to implement an accommodation process in the workplace.

Disability WebLinks
www.disabilityweblinks.ca
Provides links to disability and accessibility resources.

EnableLink Website
E-mail: info@enablelink.org
Internet: www.enablelink.org
Links to online resources on disability-related issues. For example, see Canadian Abilities Foundation, "Neglected or Hidden: Connecting Employers and People with Disabilities in Canada" (May 2004).

IBM Canada
Human Ability and Accessibility Centre
3600 Steeles Avenue East
Markham, ON L3R 9Z7
Toll free: 1-800-426-4968
Internet: www.ibm.com/able
Resources on accessible technology.

The Job Accommodation Network
Phone (V/TTY): 1-304-293-7186
E-mail: jan@jan.wvu.edu
Internet: www.jan.wvu.edu
Practical approaches to accommodation strategies for persons with disabilities.

Learning Disabilities Association of Canada (National Office)
250 City Centre Avenue, Suite 616
Ottawa, ON K1R 6K7
Phone: 613-238-5721
Fax: 613-235-5391
Toll Free: 1-877-238-5322
E-mail: information@ldac-taac.ca
Internet: www.ldac-taac.ca

Learning Disabilities Association of Ontario
365 Bloor Street East, Suite 1004
Toronto, ON M4W 3L4
Phone: 416-929-4311
Fax: 416-929-3905
Internet: www.ldao.ca
Information on learning disabilities including a brochure for employers called “Learning Disabilities on the Job.”

Link Up Employment Services
55 Eglinton Avenue E., Suite 502
Toronto, ON, M4P 1G8
Phone: 416-413-4922
Fax: 416-413-4927
TTY: 416-413-4926
E-mail: info@linkup.ca
Internet: www.linkup.ca
This charitable, not-for-profit employment services agency assesses and provides supports to persons with disabilities. It also offers services aimed at helping employers hire persons with disabilities. For example, they make accommodation-related assessments, arrange for a variety of accommodations such as modifications to workstations and assistive devices. They also provide job coaching, may be able to offset training costs, and act as a resource for employers.

Ministry of Community and Social Services
900 Bay Street, M1-57 Macdonald Block
Toronto ON M7A 1N3
Tel: 416-325-5666
Toll Free: 1-888-789-4199
TTY: 1-800-387-5559
Internet: www.mcss.gov.on.ca/mcss/english/pillars/accessibilityOntario/
Provides access to information on the Accessibility for Ontarians with Disabilities Act. This site also includes resources to help employers create inclusive workplaces and remove barriers preventing full independence and opportunity for persons with disabilities.

Office of Disability Issues
Human Resources and Social Development Canada (HRSDC)
Internet: www.hrsdc.gc.ca/en/disability_issues/index.shtml
See report, Advancing the inclusion of people with disabilities (2005).

Service Canada
Human Resources and Social Development Canada
Toll Free: 1-800-206-7218
TTY: 1-800-529-3742
Information on sickness benefits and compassionate care benefits

Workers' Action Centre
720 Spadina Avenue, Suite 223
Toronto, ON M5S 2S9
Phone: 416-531-0778
Fax: 416-533-0107
E-mail: info@workersactioncentre.org
Internet: www.workersactioncentre.org

WORKink
(Canadian Council on Rehabilitation and Work)
E-mail: workink@ccrw.org
Internet: www.workink.com
Offers services for employers to post jobs and review resumes from qualified candidates with disabilities.

Workplace Safety and Insurance Board
200 Front Street West
Toronto, ON M5V 3J1
Phone: 416-344-1000
Toll Free: 1-800-387-0750
TTY: 1-800-387-0050
Fax: 416-344-4684
Toll Free Fax: 1-888-313-7373
Internet: www.wsib.on.ca
Note: Employers must comply with the *Code* in the case of a conflict between WSIA and the *Code*.

i) Disability issues – mental health

Across Boundaries, An Ethnoracial Mental Health Organization
51 Clarkson Avenue
Toronto, ON M6E 2T5
Phone: 416-787-3007
Fax: 416-787-4421
E-mail: info@acrossboundaries.ca
Internet: www.acrossboundaries.ca

Canadian Mental Health Association (CMHA), Ontario
180 Dundas Street West, Suite 2301
Toronto, ON M5G 1Z8
Phone: 416-977-5580
Toll Free: 1-800-875-6213
Fax 416-977-2813
E-mail info@ontario.cmha.ca
Internet: www.ontario.cmha.ca
Comprehensive resource on mental health. Can link an employer to services such as counselling or support for employees with mental illness. See "Stigma and Discrimination" available online at http://www.ontario.cmha.ca/about_mental_health.asp?cID=7599

The Canadian Psychiatric Association
141 Laurier Avenue W., Suite 701
Ottawa, ON K1P 5J3
Phone: 613-234-2815
Fax: 613-234-9857
E-mail: cpa@cpa-apc.org
Internet: www.cpa-apc.org

Canadian Psychiatric Research Foundation
133 Richmond Street West, Suite 200
Toronto, ON M5H 1L3
Phone: 416-351-7757
Toll Free: 1-800-915-2773
Fax: 416-351-7765
E-mail: admin@cprf.ca
Internet: www.cprf.ca

Centre for Applied Research in Mental Health and Addiction (CARMHA)
SFU Faculty of Health Sciences
Suite 7200, 515 W. Hastings Street
Vancouver, BC V6B 5K3
E-mail: info@carmha.ca
Internet: www.carmha.ca
See online manual and worksheets – Antidepressant Skills at Work: Dealing with Mood Problems in the Workplace.

Centre for Addiction and Mental Health
R. Samuel McLaughlin Addiction and Mental Health Information Centre
Phone: 416-595-6111
Toll free: 1-800-463-6273
E-mail: mmclaughlininformation@camh.net
Internet: www.camh.net
This information centre serves as a central source of reliable information, and provides active assistance for people seeking information, services or support about mental health and addictions. The CAMH website also has a wide range of information and resources, such as the Mental Health and Addiction 101 Series of free online tutorials on topics like depression and addiction.

Community Resource Connections of Toronto
366 Adelaide St. East, Suite 230
Toronto, Ontario M5A 3X9
Phone: 416-482-4103
Fax: 416-482-5237
E-mail: crct@crct.org
Internet: www.crct.org
See *Navigating Mental Health Services in Toronto: A Guide for Newcomer Communities*, a useful resource for employees who are newcomers to understand mental health issues and access services. Also useful for employers seeking a better understanding of barriers and challenges experienced by newcomers with mental illness.

Mental Health Services Information Ontario
Toll Free:1-866-531-2600
Internet: www.mhsio.on.ca
Free information about mental health services and supports.

Mental Health Works

180 Dundas Street West, Suite 2301
Toronto, ON M5G 1Z8
Phone: 416-977-5580 ext. 4120
Toll Free: 1-800-875-6213 ext. 4120
Fax: 416-977-2813
Internet: www.mentalhealthworks.ca
E-mail: info@mentalhealthworks.ca
This is an excellent resource for employers. For answers to common mental health issues, see www.mentalhealthworks.ca/employers/all_questions.asp

Schizophrenia: A handbook for families
www.mentalhealth.com

k) Funding sources

Canada Revenue Agency
Toll Free: 1-800-959-5525
Internet: www.cra-arc.gc.ca
Can provide information about tax deductions for renovations that enhance accessibility.

Canadian Heritage – Human Rights Program
Ontario Regional Office
150 John Street, Suite 400
Toronto, ON M5V 3T6
Phone: 416-973-5400
Fax: 416-954-2909
E-mail: pch-ontario@pch.gc.ca
Internet: www.canadianheritage.gc.ca
Its Human Rights Program provides some grants and contributions towards projects that increase "awareness, knowledge, and practical enjoyment of human rights in Canada." Canadian non-profit organizations, professional organizations, universities and post-secondary institutions can apply for this funding.

Charity Village
230 Sandalwood Pkwy East
P.O. Box 41559
Brampton, ON L6Z 4R1
E-mail: help@charityvillage.com
Internet: www.charityvillage.com
Provides links to many organizations that provide funding to non-profit organizations.

Industry Canada – FedNor Program
Internet: strategis.ic.gc.ca/epic/internet/infednor-fednor.nsf/en/Home
This program funds services and programs that bring economic benefit to northern and rural Ontario communities. Funding is delivered through three key initiatives: (1) Northern Ontario Development Program; (2) Community Futures Program; and (3) the Eastern Ontario Development Program. Contact information for FedNor Community Economic Development Officers is available on the website.

The Maytree Foundation
170 Bloor Street West, Suite 804
Toronto, ON M5S 1T9
Phone: 416-944-2627
Internet: www.maytree.com
Provides loans of up to $5000 to recent immigrants for training, examination and tool costs. The loans are distributed

nationally but the foundation is located in Toronto. Other grants are also available.

Ministry of Northern Development and Mines – The Northern Ontario Heritage Fund Corporation (NOHFC)
Roberta Bondar Place
70 Foster Drive, Suite 200
Sault Ste. Marie, ON P6A 6V8
Phone: 705-945-6700
Toll free: 1-800-461-8329
Fax: 705-945-6701
Internet: www.mndm.gov.on.ca/nohfc
Provides funding for projects in 10 districts in Northern Ontario. Eligible applicants may include private/public partnerships, government-related agencies, municipalities, First Nations, Local Service Boards and not-for-profit corporations.

Ministry of Public Infrastructure Renewal
6th Floor, Mowat Block
900 Bay Street
Toronto, ON M7A 1L2
Tel: 416-325-0424
Fax: 416-325-8440
Website: www.pir.gov.on.ca
Invests in public infrastructure to renew and expand colleges, hospitals, universities, cultural facilities and community centres in Ontario.

l) Other sources of information about human rights

The 2008 Annotated Ontario *Human Rights Code*
Published by Carswell
One Corporate Plaza, 2075 Kennedy Road
Toronto, ON M1T 3V4
ISBN 978-0-7798-1184-7 (2008 Edition)
Phone: 416-609-3800
Toll Free: 1-800-387-5164
Fax: 416-298-5082
E-mail: carswell.orders@thomson.com
Internet: www.carswell.com

Canadian Human Rights Reporter
1662 West 75th Avenue
Vancouver, BC V6P 6G1
Phone: 604-266-5322
Fax: 604-266-4475
E-mail: chrr@cdn-hr-reporter.ca
Internet: www.cdn-hr-reporter.ca

Canadian Legal Information Institute (CanLII)
360 Albert Street, Suite 1700
Ottawa, ON, K1R 7X7
Internet: www.canlii.org
Free source of Canadian cases in an on-line searchable database.

Publications Ontario
880 Bay Street, 5th floor

Toronto, ON M7A 1N8
Phone: 416-326-5300
Toll Free: 1-800-668-9938
TTY: 416-965-5130
Toll Free TTY: 1-800-268-7095
Fax: 416-326-5317

POOL – Publications Ontario On-Line
Internet: www.publications.serviceontario.ca

Appendix D – Sample application for employment

Position being applied for_____Date available to begin work_____

PERSONAL DATA

Last name_____Given name(s)_____

Address_____Street_____Apt. No. _____Home Telephone Number_____

City_____Province_____Postal Code_____Business Telephone Number_____

Are you legally eligible to work in Canada? ☐ Yes ☐ No

Are you 18 years or more? ☐ Yes ☐ No

Are you willing to relocate in Ontario? ☐ Yes ☐ No
Preferred Location_____

To determine your qualification for employment, please provide below and on the reverse, information about your academic and other achievements including volunteer work, as well as employment history. Attach any additional information on a separate sheet.

EDUCATION

☐ SECONDARY SCHOOL
☐ BUSINESS OR TRADE SCHOOL

Highest grade or level completed_____Name of program_____
Length of program_____

Licence, certificate or diploma awarded? ☐ Yes ☐ No
Type:_____

COMMUNITY COLLEGE ☐ UNIVERSITY ☐

Name of Program_____Length of Program_____
Diploma/Degree awarded ☐ Yes ☐ No ☐ Honours
Major subject_____

Other courses, workshops, seminars_____
Licences, Certificates, Degrees_____

WORK-RELATED SKILLS

Describe any of your work-related skills, experience or training that relates to the position being applied for.

_____
_____
_____
_____

EMPLOYMENT

Name of present/last employer_____Job title_____
Period of employment (includes time spent away from work due to disability or maternity/parental leave but it is not necessary to refer to this)
From_____To_____

Type of Business_____
Reason for leaving (do not refer to issues related to maternity/parental leave, Workers' Compensation claims, handicap/disability, or human rights complaints)_____
_____

Functions/Responsibilities_____
_____

Name of previous employer_____Job title_____
Period of employment (includes time spent away from work due to disability or maternity/parental leave but it is not necessary to refer to this)
From_____To_____

Type of Business_____
Reason for leaving (do not refer to issues related to maternity/parental leave, Workers' Compensation claims, handicap/disability, or human rights complaints)_____
_____

Functions/Responsibilities_____
_____

Name of previous employer_____Job title_____
Period of employment (includes time spent away from work due to disability or maternity/parental leave but it is not

necessary to refer to this)
From_____To_____

Type of Business_____
Reason for leaving (do not refer to issues related to maternity/parental leave, Workers' Compensation claims, handicap/disability, or human rights complaints)_____
_____

Functions/Responsibilities_____
_____

For employment references we may approach:

Your present/last employer? ☐ Yes ☐ No
Your former employer(s)? ☐ Yes ☐ No

List references if different than above on a separate sheet.

PERSONAL INTERESTS AND ACTIVITIES (civic, athletic etc.)
_____
_____
_____

I hereby declare that the foregoing information is true and complete to my knowledge. I understand that a false statement may disqualify me from employment, or cause my dismissal.

Have you attached an additional sheet? ☐ Yes ☐ No

Signature_____Date_____

Appendix E – Accommodation template for employers

This template may be used by an employer to meet Code-related accommodation needs, in consultation and collaboration with the employee. This form is a starting point for discussion and will need to be modified to address the specific issues that arise in individual situations. Additional pages can be added if needed. Electronic copies of this form are available online for download at www.ohrc.on.ca.

An employee may be requested to initial the forms as a means of confirming for both employee and employer that this is a collaborative process. If an employee does not want to initial the forms, this may be an indication that there is a problem with the process or substance of accommodation that needs to be addressed by the employer before proceeding further. An employee should not be required to initial the forms to receive accommodation.

The template and any information on it should be made available in its entirety to the employee, or his or her designates, on request but otherwise kept confidential.

Name of employee:_____
Department or branch:_____
Position:_____

Accommodation principles, policies and procedures

The employer is required to accommodate Code-related needs [such as creed/religion, disability, family status and sex (including pregnancy and gender identity)] to the point of undue hardship.

Has the employee been advised of this or otherwise made aware, for example through an accommodation policy?

YES ☐

- Date:_____
- By whom?_____
- Employee's initials (optional):_____

NO ☐

- Reasons:_____

Organizations are expected to have measures in place to prevent and address discrimination. An accommodation policy and procedure is a key element of such a strategy.

Does the organization have an accommodation policy and procedure?

NO ☐

- Who is responsible for developing an accommodation policy and procedure?
  _____
  _____
- Has this person(s) been advised that an accommodation policy and procedure are lacking?
  YES ☐ Date:_____
  NO ☐ Why not?_____
- What are the steps and timelines for developing an accommodation policy and procedure?
  _____
  _____
  _____

YES ☐

- When was the employee told about the accommodation policy & procedure?
  Date:_____
  Employee's initials (optional):_____

About the job

A preparatory step is to identify the essential duties of the position, non-essential duties and performance goals. Essential duties are fundamental to the existence of a job and how it is classified. Non-essential duties are those that would not detract from the job if they were not done, or those that could be re-assigned or removed. This provides background information that will be relevant to selecting accommodation options.

What are the essential duties of the employee's position? Add a page or job description if needed.

_____
_____
_____
_____
_____
_____
_____

What are the non-essential duties of the employee's position?

_____
_____
_____

Performance goals:

_____
_____
_____
_____

About the accommodation need

An employee may come forward with an accommodation request in some cases. In other cases, an employer might start the discussion about accommodation, for example where an employee appears to be having a difficulty coping with the job but has not yet requested accommodation.

Date need(s) identified:_____

How was/were the need(s) identified:_____

What accommodation need(s) have been identified? Specify whether the needs relate to essential or non-essential job duties.

_____
_____
_____
_____
_____
_____

Accommodation requests may relate to more than one Code ground. For example, an employee providing care to a child with a disability could require accommodation based on association and family status. An older employee with a heart condition may require accommodation based on disability and age. Check if any Commission policies apply.

Applicable Code grounds:_____
_____
_____
_____
_____

Applicable Commission policies:_____
_____
_____

The extent of documentation required will depend on the nature of the need. The information requested should relate to restrictions and/or accommodations needed. The employer should not request detailed medical records or information. The documentation should tell the employer what accommodation the employee needs to meet his or her bona fide occupational duties. It will be used to help the employer determine how to meet the employee's needs (rather than to challenge the existence of a need). An employee should not be required to provide expert confirmation of a need for accommodation in all cases. For example, a pregnant employee should not have to provide documentation to support a need for increased washroom breaks. An employee's expert's notes should be accepted unless there is some reason to question their validity (for example, don't require a note from a specialist or company doctor unless there is some reason to suspect that there is a problem with the information submitted).

Supporting documentation requested:_____

Date & type of documentation received:_____
_____
_____

Further documentation or assessment requested:_____

Objective reasons supporting the request for further information:
_____
_____

Inclusive design of standards, rules, policies or practices

If the need for accommodation arises from an organizational rule, practice, standard or policy – this should be assessed to make sure that it is a bona fide requirement (BFR). This means that it must be inclusively designed and incorporate the concept of accommodation – this is in addition to the expectation that accommodation will be provided for individual needs that remain. Attach additional pages if necessary.

Rule or standard to be evaluated:_____
_____

BFR analysis performed by:_____
Date:_____

Elements of the BFR Analysis

- Purpose of rule or standard:
  _____
  _____
- Connection of the goal or purpose to the performance of the job:
  _____
  _____
- How are the needs of individual employees accommodated in relation to this standard?
  _____
  _____
- What alternative approaches are there?
  _____
  _____
- Have these been fully investigated?

_____
_____

- Do these alternative approaches have a less discriminatory impact and also fulfill the employer's purpose?
  _____
  _____
  - If so, can these alternatives be implemented instead?
    _____
    _____
  - If not, describe the reasons and add supporting documentation.
    _____
    _____

In light of all of the above, how can the rule or standard be re-designed to better comply with the *Code* - for example, to reflect individual differences and not place an undue burden on those to whom it applies?

_____
_____
_____

Next steps:_____
_____
_____

Identify partners, resources or supports in providing accommodation

Accommodation is a shared responsibility. Managers, supervisors, executives and unions need to work together with the employee to come up with and implement creative accommodation solutions.

Names and titles of person(s) potentially involved in meeting accommodation needs:

_____
_____
_____
_____
_____
_____

It is expected that someone will be accountable for making sure that the accommodation process is timely and that accommodation decisions are made and implemented. The person(s) responsible for providing accommodation should be aware of the relevant principles and have appropriate training in accommodation planning. Additional training needs should be identified.

Name of person immediately responsible for accommodation planning and implementation:

_____
_____

Accommodation training, skills development or information received:

_____
_____

Needs for further accommodation training identified:

_____
_____

Request for training:_____
To whom?_____
Date:_____

Community organizations, medical professionals, counselling services, family members or other third parties may be able to help find and implement accommodation solutions.

Which third parties have been identified by both employee and employer to support the accommodation?

_____
_____
_____
_____
_____
_____

Create an individual accommodation plan

Accommodation must be provided in a timely manner. An accommodation plan should allow the employer to meet the employee's individualized accommodation needs relating to both process and substance. The employee should be an active participant in the search for accommodation solutions. The most appropriate accommodation must be implemented, subject to a claim of undue hardship. Undue hardship should not be claimed without objective evidence. Even if undue hardship exists in relation to the most appropriate accommodation or a one-time expenditure, the next-best accommodation or phased-in accommodation should be provided in the meantime. Accommodations should be evaluated periodically and tailored to meet the employee's needs as they change over time or as organizational changes take place.

Accommodation process

The process of choosing, implementing and monitoring accommodations is as important as the substance of the accommodation provided. The process may need to be revised from time to time. Ideally, the employer has an accommodation procedure in place that can be modified to address specific situations.

Describe the procedure for accommodation that will apply in this case – include timelines, goals, assessments and information gathering, monitoring and dealing with issues that may be raised by co-workers. Add another page if needed.

_____
_____
_____
_____
_____

The employee has been consulted in developing this process.

YES ☐

- Date:_____
- Employee's initials (optional):_____

NO ☐

- Why not?_____

Substance of accommodation

A range of options, including those suggested by the employee, third party consultants or union representatives, should be identified and assessed. An employee's suggestions should never be dismissed without consideration.

Accommodation objectives:

_____
_____
_____

List all possible accommodation options that could address the individual needs and meet the goals set out above.

_____
_____
_____
_____
_____
_____
_____

Identify the most appropriate accommodation(s) that will be implemented. Add another page if necessary. If an appropriate accommodation is not going to be implemented because of "undue hardship," this must be fully documented in the last section.

Accommodation #1:_____
_____

Reasons why this is most appropriate:_____
_____

Date accommodation selected:_____
_____

The employee was actively involved in choosing this accommodation.

YES ☐

- Date:_____
- Employee's initials (optional):_____

NO ☐

- Why not?_____

Accommodation #2:_____
_____

Reasons why this is most appropriate:_____
_____

Date accommodation selected:_____

The employee was actively involved in choosing this accommodation.

YES ☐

- Date:_____
- Employee's initials (optional):_____

NO ☐

- Why not?_____

To implement accommodation solutions, an employer may need more expert information, the agreement of a third party or to place an order for equipment – these may take time. In other cases, it is as simple as waiving a policy or allowing an employee to switch shifts – these could be done right away. Any accommodation or part of accommodations that can be implemented right away should be. If an accommodation cannot be implemented due to "undue hardship," whether in the short-term or the long-term, this must be fully documented below.

Accommodation #1:_____
Steps for implementation:_____
_____

Person(s) responsible:_____
_____

Accountable to:_____
Accountable for:_____
_____

Deadline for completion:_____

Accommodation #2:_____
Steps for implementation:_____
_____
_____

Person(s) responsible:_____
_____

Accountable to:_____
Accountable for:_____
_____

Deadline for completion:_____
Actual implementation date:_____

The employee was actively involved in planning and implementation:

YES ☐

- Date:_____
- Employee's initials (optional):_____

NO ☐

- Why not?_____

Training is often a critical element of a successful accommodation plan – either for the person receiving accommodation or co-workers who may need to take on additional duties (such as when an employee is accommodated because of physical restriction) or who may otherwise contribute to a poisoned environment (for example, joking because they are uncomfortable about a co-worker's transition from one gender to another).

The following needs for training have been identified:

_____
_____

Person responsible:_____
Topic of training:_____
Date completed:_____

Once accommodations have been implemented, they will need to be monitored and revised from time to time to make sure they continue to meet changing needs. This can be done informally, but it is also a good idea to plan for this so that it is not forgotten. Remember to evaluate the impact of organizational changes on individual employee's accommodation arrangements. Add additional pages if needed.

Accommodation #1:_____
Deadline for evaluation:_____
Date of evaluation:_____
Evaluation of accommodation done by:_____
Outcome of evaluation and follow up:_____
_____
_____

Date of next evaluation:_____

The employee was actively involved in evaluating the accommodation.

YES ☐

- Date:_____
- Employee's initials (optional):_____

NO ☐

- Why not?_____

Undue hardship

The Code and Commission policy lists three factors that may be considered in assessing whether undue hardship exists: cost, outside sources of funding and health and safety. This assessment is based on objective evidence. An employer who declines to provide accommodation based on an unsupported claim of undue hardship is vulnerable to human rights complaints. All sections below should be filled in for each accommodation for which undue hardship is being claimed. Add extra pages if needed.

Description of accommodation for which undue hardship is being claimed:
_____
_____
_____

Cost

How much would the accommodation cost?_____

On what evidence is this assessment based? Attach supporting documents.
_____
_____

What impact would this cost have on the organization's overall budget, viability or ability to meet operational needs?

_____
_____
_____
_____

On what evidence is this assessment based? Attach supporting documents such as financial statements or accounting records.

_____
_____
_____
_____

Funding sources

The employer is expected to explore and exhaust all available funding options before concluding that undue hardship exists. For example, applying for government grants or funds from a head office. Add extra pages if needed.

What outside sources of funding may be available?

Possible Source of funding #1:_____
Date of contact:_____
Letter, e-mail or phone call:_____
Name of person contacted:_____
Date application submitted:_____
Outcome:_____

Possible source of funding #2:_____
Date of contact:_____
Letter, e-mail or phone call:_____
Name of person contacted:_____
Date application submitted:_____
Outcome:_____

Health and safety

Evaluate health and safety risks only AFTER providing appropriate accommodation. Base risks on evidence and facts, not speculation. Keep in mind that other legislative requirements must give way to the Code unless the Code is specifically said not to apply, subject to the undue hardship standard. In some cases, health and safety risks that remain after accommodation amount to undue hardship, but this cannot be assumed.

Add more pages if there is more than one health and safety risk to be evaluated, or if additional agencies are contacted. Attach copies of all relevant documents or reports prepared relating to the assessment of risks.

Possible health and safety risk #1:_____

Accommodation in place at time of risk assessment:

_____
_____

Other options explored to minimize risk before assessment:

_____
_____
_____

_____

Name of person(s) assessing risk:_____
Title of person(s) assessing risk:_____
Qualifications of person(s) assessing risk:_____
_____

Date of risk assessment:_____

Nature of risk:_____
_____
_____

Probability of risk:_____
_____
_____

Severity or consequences of risk:_____
_____
_____

Comparison of this risk to other risks in the organization:_____
_____
_____

Comparison of this risk to other risks in society as a whole:_____
_____
_____

Persons affected by risk:
_____
_____
_____

- Date employee asked to assume risk
  (if risk only to self):_____
- Employee's initials (optional):_____

Where health and safety requirements imposed under other rules, regulations or legislation conflict with the duty to accommodate, the employer is expected to take steps to comply with the Code and mitigate remaining risks by addressing this with the relevant agencies or other third parties, such as insurance agencies.

Applicable legislation or rules:
_____
_____

Relevant regulatory bodies, enforcement agencies or other third parties:
_____
_____
_____
_____

Name of agency contacted:_____
Name of person contacted:_____
Title of person contacted:_____

Date of contact with agency:_____
Date of expert assessment or agency input:_____
Response or advice received (attach relevant documentation):
_____
_____
_____

Does the agency's response reflect the primacy of the *Code*?

YES ☐

- How does this affect intended accommodation?
  _____

NO ☐

- The other agency says we have to comply with their rules regardless of what the Code says.
- Has the other agency said that there is specific exemption from the application of the Code? If not, how does the other agency explain its
  position?_____
  _____
  _____
  _____
- Steps taken to reconcile the employer's duty to accommodate with these conflicting requirements (Consider contacting the Commission for advice):
  _____
  _____
  _____

Documenting a decision that undue hardship exists

The decision that an accommodation cannot be provided because of undue hardship is a very serious one that carries with it the risk of significant liability (financial and otherwise). This decision should only be made by the most senior person in the organization based on documents and evidence gathered in each of the sections above.

Description of accommodation declined on basis of "undue hardship":
_____
_____
_____
_____
_____

Date of decision:_____
Name of decision-maker:_____
Title:_____
Signature:_____

Summary of reasons for decision:
_____
_____
_____
_____

Date employee told:_____

Next-best, interim or phased-in accommodation that will be provided instead:

_____
_____
_____

Long-term plan to meet outstanding accommodation needs:

_____
_____
_____

Additional comments:

_____
_____
_____

Appendix F – Investigation template

This template may be used by an employer or an external investigator hired by an employer to investigate human rights concerns in the workplace. This form is a starting point for planning and conducting an investigation, and should be modified to address the specific issues that arise in individual situations. Additional pages can be added if needed. See also Section IV-12d) – "Apply human rights principles when investigating allegations."

Electronic copies of this form are available online for download at www.ohrc.on.ca.

Name of investigator:_____
Date of investigation:_____
Qualifications of investigator:_____

Gather background information:

Who are the parties involved or potentially involved? Keep in mind that even if the person raising the concerns is doing so on behalf of another person, he or she may also have rights under the Code (association or poisoned environment).

Name of person raising concerns:_____
Department or branch:_____
Position:_____
Date concerns raised:_____

Name of potential complainant:_____
Department or branch:_____
Position:_____

Name of potential respondent(s):_____
_____

Department or branch:_____
Position:_____

List the main concerns. Which ones might be human rights issues? Add an extra page if needed.

Summary of concerns:

_____
_____
_____
_____
_____

Identify relevant Code principles and Commission policies:

When did the issues arise? Keep an open mind about the last incident – for example, it could be a letter confirming a conversation that took place long ago.

Date of first incident:_____
Date of last incident:_____
Frequency of concerns:_____

What social area do the issues relate to (for example, employment, services or contracts)? Does it relate to more than one social area?

Social area #1_____
Social area #2:_____

What are all the grounds that might apply? Could the discrimination be linked to the overlap of two grounds such as race and sex or disability and age ("intersectionality")?

Ground(s):_____
_____

Intersectionality:_____

What types of discrimination do the concerns relate to (for example, harassment, poisoned environment, subtle discrimination or systemic discrimination)? Are there problems with the process and/or substance of accommodation?

Types of discrimination:_____
_____
_____
_____
_____

What principles should be kept in mind when interviewing witnesses or reviewing documents (for example, that discrimination need only be one factor or that rules need to be designed inclusively and include the concept of accommodation)?

Code principles that may apply:

_____
_____
_____
_____

Commission policies that may apply:

_____
_____

_____
_____

Plan and conduct the investigation:

Before interviewing witnesses or reviewing documents, an investigator needs to plan each step and understand what evidence would show discrimination. Rather than asking witnesses if they think discrimination exists, witnesses should be asked specific questions about what they have observed, are aware of or have personally experienced.

An investigator should keep in mind that for many people discrimination means the same thing as harassment. Uninformed witnesses may not be able to identify a failure to accommodate or an unfair job competition process as discriminatory, but they would be able to say what happened. So, questions must be specific enough to allow the investigator to understand the facts and analyze at the end of the investigation whether all the facts uncovered amount to a violation of the Code.

Take detailed notes of the questions asked and answers provided by each witness, and give that witness a copy of the notes relating to his or her interview. Attach notes from all witness interviews to the investigation template.

Witness #1:_____
Reason for interview:_____
Specific information sought:_____

Witness #2:_____
Reason for interview:_____
Specific information sought:_____

Witness #3:_____
Reason for interview:_____
Specific information sought:_____

Document #1:_____
Relevance:_____

Document #2:_____
Relevance:_____

Document #3:_____
Relevance:_____

Report conclusions and outcomes:

The investigator's summary report should set out what evidence was obtained and any further evidence needed, an analysis of the evidence consistent with human rights principles, and conclusions and recommendations for action. Do not make comments about character.

Add extra pages if needed.

Summary of key evidence:

_____
_____
_____

_____
_____

Further evidence needed:

_____
_____

When analyzing the evidence, ask yourself a question and provide an answer based on human rights principles applied to the evidence you have uncovered. For example, "could race have been a factor in the decision to suspend the employee, when considered in the context of discipline received by White employees in similar cases?" Or, "did the employer have objective reasons for asking the employee to attend at an independent medical examination instead of following the employee's doctor's accommodation plan?"

Analysis of evidence based on human rights principles:

_____
_____
_____
_____
_____
_____

What actions are recommended? Should an outside investigator be called in? What internal policies or procedures need to be changed and how? Would a mediation solve the issues (if so, what remedies may be appropriate)?

Recommended next steps:

_____
_____

Recommendations should be made to a person with responsibility to act on them – for example, implementing a policy, changing a process or offering a remedy.

Name of person responsible:_____
Position:_____
Date recommendations made:_____
Date for follow-up:_____
Date recommendations acted on:_____

Actions taken:

_____
_____
_____

Appendix G – Releases

For more information, see Section IV-12f) – "Considerations when asking an employee to sign a release."

Tips for parties to a release

i) For employers

- At the time of termination, ask the employee verbally or in writing whether there are any outstanding human rights issues or concerns.
- It is important to give the employee a reasonable opportunity to consult with independent counsel or an advisor

before being required to answer the above question or to sign a legal release.
- Reasonable requests for an extension of time should be granted.
- Where the answer is "yes," ask for details, to help you fairly assess what would be a reasonable offer for settling the human rights issues.
- Where the answer is "yes," it is best to also prepare Minutes of Settlement, in addition to the release, which will expressly deal with the human rights issue.
- Also, where the answer is "yes," the text of the standard form of release should be altered to include a clause that separately recognizes that there is a human rights issue or complaint that has been fully and finally resolved between the parties.
- Where the answer is "no," and the employee has got, or had the opportunity to get, independent advice, it is appropriate for the release to state that the employee has got independent legal advice, is aware of his or her rights under the Code, and promises that he or she is not asserting such rights or advancing any human rights claim or complaint.
- To avoid claims of unwarranted pressure or duress, it is best that an employer not accept a signed release on the same day as termination (even where the employee offers to sign it on that day).
- Employers wishing to guard against a claim that they have not compensated a complainant for the human rights issue should consider clearly stating in the settlement specific sums for each “head” of damages, such as severance, termination, vacation pay and wages, as well as a set amount in compensation for any alleged human rights concern.
- The employer should state that the employee will receive his or her statutory entitlements (wages owed, vacation pay, statutory termination or severance payments) regardless of whether he or she signs the release.
- The release itself should contain a clause that makes it clear that signing the release was not a precondition for being paid these statutory entitlements.
- Termination meetings should be conducted with dignity, ensuring privacy, and with the employer exhibiting professionalism.
- If an employee has allegedly engaged in criminal wrongdoing, such as theft or fraud, the employer should not promise to refrain from contacting the police in exchange for a release.
- Where an employee has a disability that could affect their ability to properly agree to the terms (for example, severe depression or anxiety, drug dependency) or is otherwise incapable (for example, on strong medication), the signing of the release may have to be postponed or may not be possible.
- In such cases, where the employer has a reasonable basis to believe that an employee is experiencing a mental disability that could impair his or her judgment, he or she should ask the employee to get medical clearance before signing the release.

ii) For employees

- Seek outside independent advice before signing a release, or answering a question about whether a human rights issue exists.
- Speak with your advisor about the full range of remedies that may be available at common law, under the Employment Standards Act, the Human Rights Code, or other statutes.
- To avoid unwarranted pressure or duress, it is best that an employee never accepts or signs a release on the same day as termination.
- After consulting with independent counsel or an advisor, separately negotiate each head of damages or remedy when negotiating the terms of the settlement.
- First request a calculation or breakdown of your statutory entitlements and other entitlements before negotiating the terms and conditions of any settlement of an outstanding human rights issue or complaint.
- Ask that the settlement set out specific sums for each “head” of damages, such as severance, termination, vacation pay and wages, as well as a set amount in compensation for any alleged human rights concern.
- Ask for statutory entitlements.

iii) Sample wording for releases

It is not enough just to use the words suggested below. The parties to a release should also deal with each other in a way that is consistent with the principles and procedures set out in Section IV-12f) – "Considerations when asking an employee to sign a release." For more information, refer to the Ontario Human Rights Commission's Guide to Releases with Respect to Human Rights Complaints (May 2006).

1. The parties agree that they have discussed or otherwise canvassed any and all human rights complaints, concerns or issues, arising out of or in respect to the employee's employment at Company "A"
2. The parties agree that this agreement constitutes a full and final settlement of any existing, planned, or possible complaint or complaints against the employer under the Human Rights Code up to the date of this agreement, arising out of or in respect to the employee's employment at Company "A."
3. The parties agree that the employee has received a separate sum in the amount of $X as compensation for settling and resolving the outstanding human rights complaint, concern or issue.
   Where the employee agrees that that there are no human rights issues or concerns, the following can be included instead of paragraphs 2 and 3]:
   The employee agrees that he or she is aware of his or her rights under the Human Rights Code, and confirms that he or she is not asserting such rights or advancing a human rights claim or complaint.
4. The parties further agree that signing this agreement is not a condition for the employee to first receive money he would otherwise be entitled to by operation of law. Such moneys include the separate sum of $X for wages, $Y for statutory severance pay, and $Z for statutory termination pay.
5. The employee agrees that he (or she) has been given enough time and opportunity to get independent legal advice before signing this settlement agreement and
   (a) He [or she] has done so, or
   (b) He [or she] has freely chosen not to do so.