



Ontario
Human Rights Commission
Commission ontarienne des
droits de la personne

Policy on employment related medical information

ISBN: 0-7778-5901-7

Approved by the OHRC: June 19, 1996

(Please note: minor revisions were made in December 2009 to address legislative amendments resulting from the *Human Rights Code Amendment Act, 2006*, which came into effect on June 30, 2008.)

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Purpose of OHRC Policies

Section 30 of the Ontario *Human Rights Code* (*Code*) authorizes the Ontario Human Rights Commission (OHRC) to prepare, approve and publish human rights policies to provide guidance on interpreting provisions of the *Code*.^{*} The OHRC's policies and guidelines set standards for how individuals, employers, service providers and policy-makers should act to ensure compliance with the *Code*. They are important because they represent the OHRC's interpretation of the *Code* at the time of publication.^{**} Also, they advance a progressive understanding of the rights set out in the *Code*.

Section 45.5 of the *Code* states that the Human Rights Tribunal of Ontario (the Tribunal) may consider policies approved by the OHRC in a human rights proceeding before the Tribunal. Where a party or an intervenor in a proceeding requests it, the Tribunal *shall* consider an OHRC policy. Where an OHRC policy is relevant to the subject-matter of a human rights application, parties and intervenors are encouraged to bring the policy to the Tribunal's attention for consideration.

Section 45.6 of the *Code* states that if a final decision or order of the Tribunal is not consistent with an OHRC policy, in a case where the OHRC was either a party or an intervenor, the OHRC may apply to the Tribunal to have the Tribunal state a case to the Divisional Court to address this inconsistency.

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

* The OHRC's power under section 30 of the *Code* to develop policies is part of its broader responsibility under section 29 to promote, protect and advance respect for human rights in Ontario, to protect the public interest, and to eliminate discriminatory practices.

** Note that case law developments, legislative amendments, and/or changes in the OHRC's own policy positions that took place after a document's publication date will not be reflected in that document. For more information, please contact the OHRC.

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

**** Recently, the Ontario Superior Court of Justice quoted at length excerpts from the OHRC's published policy work in the area of mandatory retirement and stated that the OHRC's efforts led to a "sea change" in the attitude to mandatory retirement in Ontario. The OHRC's policy work on mandatory retirement heightened public awareness of this issue and was at least partially responsible for the Ontario government's decision to pass legislation amending the *Code* to prohibit age discrimination in employment after age 65, subject to limited exceptions. This amendment, which became effective December 2006, made mandatory retirement policies illegal for most employers in Ontario: *Assn. of Justices of the Peace of Ontario v. Ontario (Attorney General)* (2008), 92 O.R. (3d) 16 at para. 45. See also *Eagleson Co-Operative Homes, Inc. v. Théberge*, [2006] O.J. No. 4584 (Sup.Ct. (Div.Ct.)) in which the Court applied the OHRC's

1. Introduction

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

The guidelines contained in this policy are intended to help applicants, employees and employers to understand their rights and responsibilities regarding employment-related medical information.

2. Employment applications

In the past, employers often screened out applicants with disabilities based on medical information requested on application forms or obtained through pre-employment medical examinations. The OHRC believes that such questions, asked as part of the application screening process, violate subsection 23(2) of the *Code*.

Any medical assessment to verify or determine an individual's ability to perform the essential duties of a job, 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.

The OHRC recognizes the fact that it would be advantageous to both the employer and prospective job applicants if the employer were to disclose information on any specific and *bona fide* medically related requirements of a position at an early stage of the recruitment process.

Example: A Police Services Board may stipulate in a recruitment advertisement that applicants must meet a minimum vision standard without corrective lenses to qualify for selection as long as it is a *bona fide* occupational requirement and accommodation is provided.

For more information about human rights issues relating to applications for employment and “*bona fide* occupational requirements,” see the OHRC’s 2008 publication, *Human Rights at Work*, 3rd Ed., online. at www.ohrc.on.ca/en/resources/Policies/atwork/ .

3. The personal interview

The prohibition contained in subsection 23(2) of the Code is qualified by subsection 23(3), which allows an employer to ask at a personal interview whether an applicant has any disability-related needs that would require accommodation to enable her or him to do the essential duties of the job. The duty to provide such accommodation is discussed in more detail in the following section.

It is not unusual for an employer to ask about, or for a job applicant or an employee to volunteer information about her/his specific medical condition in an interview. However, an employer or supervisor may be placed in a vulnerable position if he or she directly receives any information about the particular medical condition of an applicant or employee. This information leaves the way open for an allegation to be made that subsequent decisions relating to the hiring of the applicant or the promotion or termination of the employee were based on that information. For information about what measures can be put in place to protect the employer from allegations of discrimination and to ensure the confidentiality of employee medical-related information, see *Human Rights at Work*.

4. Duty to accommodate

In some circumstances, the nature or degree of a person's disability may preclude that individual from performing the essential duties of a job. Subsection 17(1) provides that the right to equal treatment in employment is not infringed if the individual is *incapable of performing or fulfilling the essential duties* of the position because of a disability.

However, subsection 17(2) provides that a job applicant or employee shall not be found incapable of performing the essential duties of a job, unless it can be demonstrated that it would cause undue hardship to accommodate her or his needs. The standard of undue hardship considers the cost of the required accommodation and any health and safety concerns that may be involved (see further the OHRC's *Policy and Guidelines on Disability and the Duty to Accommodate*, available at www.ohrc.on.ca).

A person who requires accommodation to perform the essential duties of a job has a responsibility to communicate her or his needs in sufficient detail and to cooperate in consultations to enable the person responsible for accommodation to respond to the request.

The duty to provide accommodation extends to all facets of the employment process: hiring, employment testing, on-the-job training, working conditions, transfer, promotions, *etc.* See also the section on disability-related accommodation in *Human Rights at Work*.

5. Relevant Code provisions

- Section 17 (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.
- (2) No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.
- (3) In determining for the purposes of subsection (2) whether there would be undue hardship, a tribunal or court shall consider any standards prescribed by the regulations.
- Section 23 (1) The right under s. 5 to equal treatment with respect to employment is infringed where an invitation to apply for employment or an advertisement in connection with employment is published or displayed that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination.
- (2) The right under s. 5 to equal treatment with respect to employment is infringed where a form of application for employment is used or a written or oral inquiry is made of an applicant that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination.
- (3) Nothing in subsection 2 precludes the asking of questions at a personal employment interview concerning a prohibited ground of discrimination where discrimination on such ground is permitted under this Act.

6. For more information

For more information about the OHRC or this policy statement, please visit our website at www.ohrc.on.ca.

Please visit www.ontario.ca/humanrights for more information on the human rights system in Ontario.

The Human Rights System can also be accessed by telephone at:

Local: 416-326-9511

Toll Free: 1-800-387-9080

TTY (Local): 416-326 0603

TTY (Toll Free) 1-800-308-5561

To file a human rights claim, please contact the Human Rights Tribunal of Ontario at:

Toll Free: 1-866-598-0322

TTY: 416-326-2027 or Toll Free: 1-866-607-1240

Website: www.hrto.ca

To talk about your rights or if you need legal help with a human rights claim, contact the Human Rights Legal Support Centre at:

Toll Free: 1-866-625-5179

TTY: 416-314-6651 or Toll Free: 1-866-612-8627

Website: www.hrlsc.on.ca