New Brunswick Human Rights Commission

Guideline on Pregnancy Discrimination
Adopted on September 15, 2004

Please Note
This policy statement embodies the New Brunswick Human Rights Commission's interpretation of the provisions of the New Brunswick *Human Rights Code* relating to pregnancy discrimination. It is subject to decisions by Boards of Inquiry and the courts, and should be read in conjunction with those decisions and with the specific language of the *Code.* If there is any conflict between these guidelines and the *Code*, the *Code* prevails. Any questions regarding this policy should be directed to the Commission's staff; additionally, this policy is not a substitute for legal advice.

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Summary

This guideline sets out the Commission's position on pregnancy discrimination as it relates to the *New Brunswick Human Rights Act*, referred to here as the *Code*.

Under the *Code,* employers, owners and service providers are prohibited from discriminating on the basis of sex. This applies to any aspect of employment, as well as to housing, public services and membership in labour unions and professional associations. Section 2 of the *Code* defines sex as including pregnancy, the possibility of pregnancy, or circumstances related to pregnancy.

Such circumstances include, but are not limited to:

- Medical complications due to pregnancy or childbirth;
- Abortion or conditions arising as a result of abortion;
- Miscarriage or conditions arising as a result of miscarriage;
- Fertility treatment/family planning;
- Reasonable recovery time after childbirth;
- Breastfeeding.

Specific examples of prohibited behaviour that may be considered discriminatory are:

- Not hiring a woman based in whole or in part on her pregnancy or intended pregnancy;
- Withholding an employee's promotion because the employee is, or is planning to become, pregnant;
- Denial of sick leave benefits for the duration of the health related absence caused by pregnancy;
- To fire, constructively dismiss, or lay off an employee because she is or may become pregnant;
- Failure to accommodate a pregnant woman or a woman returning to work short of undue hardship to the employer, owner or service provider;
- Refusing a woman access to a service because she is breastfeeding;
- Expelling a student from school because she is pregnant.

However, a limitation, specification or preference may be allowed if it meets the stringent requirements of the "Meiorin Test," one of which is that the limitation, specification or preference is necessary in order to avoid causing undue hardship. What constitutes undue hardship depends on different factors, some of which may be safety and cost. Courts require objective, quantitative information on this.

1.0 Introduction

The *New Brunswick Human Rights Act*, referred to below as the *Code*, states that all persons are equal in dignity and human rights. According to sections 11 and 12 of the *Code*, the role of the Commission is to enforce the *Code* and the principles underlying it. In order to fulfill this objective, the Commission produces guidelines that reflect its interpretation of the *Code.*[1]

Courts have recognized that human rights statutes have a quasi-constitutional nature and that their provisions take precedence over those of every other statute in case of conflict.[2] However, the Commission interprets the *Code's* provisions in light of the *Ca-*

[1] The Commission would like to acknowledge and thank the human rights commissions from various jurisdictions across Canada for the opportunity to study and draw from their policies and documents on pregnancy.
[2] *Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre)*, [1996] 2 S.C.R. 3, at para. 20.

nadian Charter of Human Rights and Freedoms [3] and in particular in keeping with court decisions under the equality provisions of section 15 of the *Charter*.

The Commission is also guided by international human rights case law and the treaty obligations imposed on New Brunswick as a result of international human rights treaties that have been ratified by Canada. Article 10 (2) of the *International Covenant on Economic, Social and Cultural Rights,*[4] which Canada ratified in 1976, recognizes the right of states to adopt measures that will help to protect childhood and motherhood. *The Universal Declaration of Human Rights,*[5] adopted by Canada in 1948, states in article 25(1) and (2), that everyone has the right to a standard of living for health and well being and that childhood and motherhood is entitled to special care and assistance.

Please note that this guideline does not apply to activities that fall under federal jurisdiction[6], such as:

- Inter-provincial and international services such as: railways; highway transport; telephone, telegraph, and cable systems; pipelines; canals; ferries, tunnels, and bridges; shipping and shipping services;
- Radio and television broadcasting, including cablevision;
- Air transport, aircraft operations, and aerodromes;
- Banks;
- Protection and preservation of fisheries as a natural resource;
- Grain elevators; flour and seed mills, feed warehouses and grain-seed cleaning plants;
- Uranium mining and processing.

2.0 Discrimination on the Basis of Pregnancy

Discrimination is differential treatment of, or failure to accommodate, an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons as set out the *Code*, rather than on the basis of personal merit.[7]

Discrimination on the basis of pregnancy is sexual discrimination, which is prohibited under sections 3 through 7 of the *Code*. [8] This applies to employment, housing, public

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[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[4] *International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), UN GAOR, 16 Dec 1966, U.N.T.S. entered into force 3 January 1976, U. N. Doc. HRI/GEN/1/Rev. 1, 5th Sess., 1990 (1994).*

[5] *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No 13, UN Doc. A/810 (1948) 71.

[6] For a fuller explanation, see http://www.hrsdc.gc.ca/en/lp/spila/clli/eslc/02Division_of_Legislative_Powers.shtml

[7] See also *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

[8] *Brooks v. Canada Safeway Ltd*,. [1989] 1 S.C. R. 1219. Dickson C.J.C (as he then was), writing for the Courts at 1243 – 1244: "It is difficult to conceive that distinctions or discrimination based upon pregnancy could ever be re-

services (for example schools, hospitals and insurance), and membership in labour unions and professional associations.

"Sex" is defined by the *Code* in section 2 as follows: pregnancy, the possibility of pregnancy or circumstances related to pregnancy.

Pregnancy includes the process of pregnancy from conception up to the period following childbirth and includes the post-delivery period[9] and breastfeeding.

Circumstances related to pregnancy include but are not limited to:

- Medical complications due to pregnancy or childbirth;
- Abortion or conditions arising as a result of abortion;
- Miscarriage or conditions arising as a result of miscarriage;
- Fertility treatment/family planning;
- Reasonable recovery time after childbirth;
- Breastfeeding.

Once a complaint is filed, it is the complainant who must prove a *prima facie* case of discrimination. Following that, the onus shifts to the respondent to establish a *bona fide* occupational qualification or *bona fide* qualification. Human rights tribunals have recognized that, to prove a *prima facie* case of discrimination, it is sufficient that the alleged conduct be a factor among others leading to the conduct being complained of, such as job termination or refusal of service. For further discussion of these defences, see section 7.0 of this guideline.

3.0 Duty to Accommodate

Employers, owners and service providers must avoid policies that have a discriminatory effect related to pregnancy. In order to do so they must accommodate pregnant women provided they can do so without incurring undue hardship or sacrificing their objectives. If the employer, owner or service provider fails to fulfil this duty they have violated the *Code*.[10]

Example

A police officer requested light duties for the last stages of her pregnancy. The Police Service had a policy that did not provide a modified work program; her request for light duties was denied. Instead, she was told that she could take a part-time ci-

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garded as other than discrimination based upon sex, or that restrictive statutory conditions applicable only to pregnant women did not discriminate against them as women."

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

[10] *Yap v. The Brick Warehouse Corp*. (2004) C.H.R.R. Doc. 04-049, 2004 BCHRT 22.

vilian position at a much lower salary. This meant that the officer would have to resign from the force. The Board of Inquiry stated that the rule of "no modified duties" was applied to all officers, but it nevertheless adversely affects pregnant women because it fails to recognize their special needs. The Board of Inquiry concluded that the Police Service discriminated against the police officer because of her sex.[11]

In some cases, accommodations may include:

- A temporary change of work location;
- Assignment to alternate or light duties;
- A flexible work schedule to allow the employee to take medical appointments, tests and infertility treatments;
- A change in work or shift schedule;
- Breaks during the work day;
- Time off for special health needs because of a difficult delivery, miscarriage or abortion;
- Allowing the employee to refuse overtime;
- Leave of absence without pay at the employee's request;[12]
- Allowing for the reasonable noise that a newborn infant may cause in a rental situation;
- Not refusing rental accommodation to tenants who are pregnant, breastfeeding or who have newborns;
- Allowing customers to breastfeed;
- Setting up a day care in a school, university or workplace.

4.0 Employment

The *Code* prohibits discrimination in all aspects of employment. This applies to job ads, applications, interviews and selection. This also applies to hiring, termination, terms and conditions of employment and membership in labour unions and professional associations. The relevant legislation is cited in section 3 and 7 of the *Code*.

4.1 Pre-Employment

It is a violation of the *Code* for an employer to discriminate against an employee or potential employee based on pregnancy. This includes:

- Asking a potential employee in an application or during an interview whether or not she is, or is planning to become, pregnant;
- Asking an applicant if she is using birth control;

[11] *Julie Lord* v. *Haldimand-Norfolk Police Services Board* (June 14, 1995), 23 C.H.R.R. D/500 at 513. Mikus, L. (Ont. Bd. of Inq.). See also, *Emrick Plastics* v. *Ontario* (Human Rights Commission) (1992), 16 C.H.R.R. 300 (Div. Ct.), *Hiencke* v. *Brownell* (1991), 14 C.H.R.R. D/68/ (Ont. Bd. of Inq.); *Re Orangeville Police Services Board and Orangeville Police Assn* (1994) 40 L.A.C. (4th) 269.

[12] *Quebec (Comm. Des droits de la personne) c. Lingerie Roxana Ltee* (1995), 25 C.H.R.R. D/487 (Trib.Que.).

- A job ad that excludes pregnant women;
- Not hiring a candidate because she is, or is planning to become, pregnant.

The decision as to whether or not to hire a particular candidate for a position must not be influenced by that candidate's pregnancy or intended pregnancy, even if this is only a factor.[13] This includes withdrawing an employment offer upon finding out that the candidate is, or may become pregnant. [14] It also applies to contracts of fixed duration. [15]

Example

A woman applies for a temporary nurse position with a term of approximately nine months. During the interview, the woman informs the health care facility manager that she is expecting to go on maternity leave approximately four months into the nine-month term of the position. In light of the fact that she will not be available for the entire term, the manager decides not to hire her for the position. The Court of Appeal in this case held that, although availability is an implied condition in an offer of employment, the condition is outweighed by the protected ground of discrimination.[16]

In addition, an employer cannot withhold an employee's promotion because the employee is, or is planning to become, pregnant.

4.2 Refusal to Renew and Termination of Employment

It is discriminatory to refuse the renewal of an employment contract on the basis of pregnancy unless it is based on a *bona fide* occupational requirement. The employer must be able to show that the refusal to renew employment is based on other factors, such as unsatisfactory performance not due to pregnancy.

It is also a violation of the *Code* to fire, constructively dismiss (force an employee to resign by changing working conditions unacceptably) or lay off (even with notice) an employee because she is or may become pregnant. In order to avoid penalizing the employee, the employer must accommodate the employee to the furthest point possible short of undue hardship. In order to justify terminating a pregnant employee because of undue hardship, the employer must meet the stringent requirements of the Meiorin Test. See section 7 of this guideline for an explanation of this test.

Example

A pregnant full-time worker at a nursery had presented her employer with a note, written by her physician, which stipulates that she should not be spraying pesti-

[13] *Magee v. Warner Lambert Canada* (1990), 12 C.H.R.R. D/208 (B.C.H.R.C.).
[14] *Century Oils (Canada) Inc. V. Davies*, [1988] B.C.J. No. 118 (B.C.S.C.).
[15] *United Nurses of Alberta, Local 115 and Calgary Health Authority*, [2004] A.J. No. 8 (C.A.).
[16] *United Nurses of Alberta, Local 115 and Calgary Health Authority*, [2004] A.J. No. 8 (C.A.).

cides because of her pregnancy. Her employer offered her a reduced work schedule of two days per week, involving light work. The employee presented further notes from her physician stating she was able to work full-time at light duties. The employer refused to give the employee full time work despite the availability of numerous jobs suitable to her levels of skill. When the employee did not show up for the two days offered, her employer construed her absence to mean that the employee had quit. The employer would not be justified in constructively dismissing an employee in this manner and could be found to be in violation of the *Code*.[17]

4.3 Disability and Sick Leave Benefits

It is a violation of the *Code* for employee benefit plans to disadvantage pregnant women. When a pregnant woman takes leave from her employment, she should continue to have sick leave benefits for the duration of her health related absence caused by the pregnancy[18] This applies throughout the pregnancy; during pre-delivery, child birth and the recovery from child birth period.

In the *Brooks* decision, the Supreme Court of Canada said that maternity leave should be included in employee benefit plans without having to be categorized as an illness, accident or a disability. Under the *Brooks*[19] doctrine, if a pregnant employee produces proof that she must be absent 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 absent from work for other "health-related reasons".

Example

An employee notified her superintendent that she intended to take maternity leave and parental leave after the birth of her child. She also requested to apply some of her accrued sick leave for the time after the delivery that she was unable to work for medical reasons. The employer denied her request for sick leave. Since pregnancy was the only reason for denying her sick leave benefits, the employer's action constituted sex discrimination. [20]

Whether or not it is related to the pregnancy, illness during pregnancy is a valid reason to be absent from work. A woman may develop a pregnancy-related health condition such as high blood pressure or gestational diabetes, or may need treatment for a rea-

[17] *Sidhu v. Broadway Gallery* (2002), 42 C.H.R.R. D/215 (B.C.H.R.T.). Stefanyshyn v. *4 Seasons Management Ltd.* (1986), 8 C.H.R.R. D/3934 (B.C.C.H.R.); *Hurd* v. *Cho* (1990), 12 C.H.R.R. D/247 (B.C.C.H.R.)
[18] *Ontario Cancer Treatment & Research Foundation et al. v. Ontario Human Rights Commission* (1998), 38 O.R. (3d) 72. Per Swinton J.
[19] *Brooks v. Canada Safeway Ltd*. (1989), 10 C.H.H.R. D/6183 (S.C.C.).
[20] *Alberta Hospital Assn. V. Parcels* (1992), 90 D.L.R. (4th) 703. In Parcels, the Alberta Court of Queen's Bench ruled that an employer's stipulation that employees on maternity leave be required to pay "up front" 100% for certain benefits that employees on sick leave were required only to pay 25% constituted discrimination on the basis of pregnancy.

son unrelated to the pregnancy. In either case, she should be compensated in the normal fashion according to her health plan.

If an employer's sick leave plan says that it will pay benefit premiums while employees are away sick, then they must also pay them while an employee is away on maternity leave.[21] If an employer self-funds an employee's sick leave plan, the pregnant employee should have access to all sick leave benefits for health-related reasons during a pregnancy-related leave.

Difficulties in pregnancy may force an employee to be away from work before she goes on the standard seventeen week maternity leave. Alternatively, she may need additional time off work after her pregnancy leave ends. If this happens, the employee can still use her health benefits from work if the employer has a sick plan.

If the employee does not have a sick leave plan or the employee has not accumulated enough sick leave days, she may go on a leave without pay or use vacation time if requiring more time than what is given by the maternity leave for health-related reasons.

5.0 Maternity Leave and Employment Standards

The New Brunswick *Employment Standards Act* guarantees an employee's right to unpaid maternity leave.[22] Maternity leave is a leave of absence from work of up to 17 weeks or shorter which the employee requests. Under the New Brunswick *Employment Standards Act,* the pregnant employee has the right to take this leave, but her employer does not have to pay her any wages while she is on leave.[23] However, during this period, a pregnant employee can apply for "maternity benefits" from the federal Employment Insurance Program. Also, an employee can use any earned overtime, vacation time or any other earned time before her baby is born, so long as it does not create undue hardship for the employer.[24]

During pregnancy, an employee's seniority accrues and she continues to participate in any benefit plans, unless stated otherwise by the employee in writing.[25] Upon return from pregnancy leave, the employee should return to her most recent job or a similar one if that job no longer exists. Also, the employer must not intimidate or penalize the employee because she is eligible for or takes pregnancy leave.

The standards set out in the *New Brunswick Employment Standards Act* are only the minimum standards that must be met at all times. Under the *Code* the employer still has duty to accommodate pregnant employees to the furthest point possible without incurring undue hardship.

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[21] *Alberta Hospital Assn. V. Parcels* (1992), 90 D.L.R. (4th) 703.
[22] New Brunswick Employment Standards Act ss 42 –44.
[23] New Brunswick Employment Standards Act ss 42 –44.
[24] Becoming a Parent in Alberta. Government of Alberta, Human Resources and Development, 2004.
[25] *O.N.A. v. Orillia Soldiers Memorial Hospital* (1999), 36 C.H.H.R. D/202 (Ont C.A.).

6.0 Services, Goods and Facilities

The *Code* prohibits discrimination against pregnant women in "services, goods and facilities." This includes educational institutions, hospitals and health services, insurance providers, public places like malls and parks, public transit, and stores and restaurants. This means that pregnant women, or women who have newborn babies with them, must not be denied service or access unless there is a *bona fide* reason for doing so.

7.0 Bona Fide Occupational Qualifications/Bona Fide Qualifications (BFOQ's/BFQ's)

The *Code*, in sections 3(5), 4(4) and 5(2), states that a limitation, specification or preference on the basis of sex shall be permitted only if such limitation, specification or preference is based upon a *bona fide* occupational qualification or a *bona fide* qualification as determined by the Commission.

In order to be *bona fide,* the organization's standards must pass the "Meiorin Test." This stringent three part test requires that the standard be

1. Adopted for a purpose or goal that is rationally connected to the function being performed;
2. Adopted in good faith and in the belief that it was necessary to fulfil that purpose or goal;
3. In fact reasonably necessary to accomplish that purpose or goal, in the sense that the employer, owner or service provider cannot accommodate affected individuals without incurring undue hardship.[26]

Example

A Board of Inquiry found that an employer had discriminated against a female employee when the employer 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, there are accidental emissions of a gas that may be harmful to women of childbearing age or to a fetus. The Board of Inquiry 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 Board of Inquiry 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.[27]

[26] New Brunswick Human Rights Commission Annual Report 2002-2003, pp. 13-14.
[27] *Wiens* v. *Inco Metals Co.* (1988), 9 C.H.R.R. D/4795 (Ont. Bd. of Inq.).

Please see the New Brunswick Human Rights Commission Guideline entitled *Guideline for BFOQ's and BFQ's and the Duty to Accommodate* for more information on how the Commission determines whether or not a *bona fide* occupational qualification/*bona fide* qualification exists as a defense in a particular case.

8.0 For More Information

For further information about the *Code* or this policy, please contact the Commission toll-free (in New Brunswick) at 1-888-471-2233, or 506-453-2301. TTD users can reach the Commission at 506-453-2911. You can also visit the Commission's website at www.gnb.ca/hrc-cdp or e-mail hrc.cdp@gnb.ca.