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The application of Ontario human rights legislation to the practice of occupational medicine

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Although human rights legislation has important implications for occupational physicians, these implications may be overlooked in the practice of occupational medicine in other countries where human rights legislation may be different. The potential for significant oversights becomes greater as organizations continue to centralize international business support functions, such as occupational health services, operating from a single site. Human rights legislation has important implications with respect to policy decisions upon which an occupational physician has influence. This includes decisions about whether to conduct drug and alcohol testing; the performance of medical examinations; evaluating issues related to health and safety concerns of pregnant employees; and the need to work accommodate those with handicaps as defined by human rights legislation. This article examines the application of the Ontario human rights legislation in these areas.

Key words: Clinical practices; human rights; legislation.

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INTRODUCTION

Occupational medicine encompasses a wide range of activities. These include the deployment of preventative measures to prevent illness and injury from occurring in the workplace, the facilitation of return to work for those with physical or mental impairment (whether or not these are workplace related), and the evaluation of workplace hazards to determine the health risk to those in the workplace. There are various interested parties involved, including management, labour, government, the publicly funded health care system, privately funded insurers, and various health professionals each with their own, sometimes conflicting objectives. The occupational physician will often find him- or herself in a position to decide, or greatly influence, organizational policy with respect to these issues. Member physicians in various professional occupational medical associations, ascribe to codes of ethics which have been developed to guide professional conduct. However, ethical codes do not provide country or region specific guidance with respect to the law for decision making.

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The practice of occupational medicine is complicated by the ongoing reorganization of businesses. Support operations, such as the medical department, are being centralized to service the entire organization beyond the borders of the country in which the head office is situated. In this context, it is important to be aware of the implications for occupational health programmes in countries with differing human rights legislation. In Canada, the human rights legislation, embodied by the Canadian Human Rights Act (the Act) and the provincial Human Rights Codes, has significant implications for the practice of occupational medicine. This article is intended to review how human rights legislation affects the practice of occupational medicine in Ontario. Many of the issues related to the interpretation are complex and evolving. This is therefore an overview only and cannot replace case-specific and jurisdiction-specific medico-legal advice. The intention is to describe development of occupational health practices consistent with regional human rights legislation.

There are three other pieces of legislation that are relevant to the practice of occupational medicine in Ontario, and should also be considered in the course of its practice. They are mentioned here for contextual purposes only and will not be described in detail. The Workplace Safety Insurance Act (in other jurisdictions this is more commonly called the Workers' Compensa-

tion Act) defines the right of workers to financial compensation following injury or illness that occurs during the course of employment, together with the right to be reinstated to their pre-injury position. The Occupational Safety and Health Act addresses the workers' right to a safe work environment, the right to know about hazards in the work environment and the right to refuse unsafe work. Finally, the Employment Standards Act of Ontario addresses issues that are not directly related to health, such as maximum hours in a working week, vacation and pregnancy leave entitlement.

APPLICABILITY OF HUMAN RIGHTS LEGISLATION

The areas of jurisdiction in the Canadian legal system are divided between the provinces and the federal government. With the exception of federal employees and federally regulated industries, such as railways, the jurisdiction for employment issues is with the provinces. Thus there are two sets of human rights legislation: one federal, the 'Act', with application to employees under federal jurisdiction; and the second provincial, embodied by the provincial 'Codes', with application to the remaining employees under provincial jurisdiction.

The various provincial Codes, along with the Federal Act, are similar but not identical. The focus of this paper is on the Ontario Human Rights Code (the Code). It should be noted that the basic concepts discussed in the paper will be generally applicable to all jurisdictions in Canada but the reader will need to consult the legislation in each jurisdiction for specific applications.

The Ontario Human Rights Commission (the Commission) is responsible for the administration of the Code and produces Guidelines and Policy documents that suggest application of the Code.[1] These Guidelines and Policy documents are not legislation nor are they court decisions, although legislation and court decisions will influence the Commission documents, thus legal consultation may be required when dealing with specific issues. Nonetheless, these documents can provide guidance in understanding the intent of the Code.

LEGAL CONCEPTS DEFINED

The intention of the Code is to guarantee that the members of the protected groups defined under the Code receive equal treatment in various aspects of participation in the community, including employment. With respect to the practice of occupational medicine, the relevant groups to consider are those protected on the basis of sex and handicap. The other protected groups, such as those defined by religion, or citizenship, are of no less importance of course, but the nature of their protected status does not raise immediate occupational medicine concerns.

Discrimination based on pregnancy is viewed as discrimination on the basis of sex, Section 10(2). This has implications that will be discussed later, in the paragraph concerning the evaluation of risk to the mother and foetus due to workplace hazards.

The Code's definition of handicap is expansive and includes physical, psychological and mental conditions. It includes drug and alcohol dependency as a mental condition. This inclusion of drug dependency is one of the most significant differences between the Code and the corresponding United States legislation. The Americans with Disabilities Act of 1990 specifically excludes drug dependency as a handicap. The implications of this exclusion in United States legislation has important ramifications in the US, essentially allowing for much greater use of drug and alcohol testing in the workplace,[2] which can act as a deterrent against those who continue to use illicit drugs.[3]

The use of the legal term *handicap* corresponds to the medical term *disability* as generally described in the medical literature.[4] That is, in the legislation, the term handicap denotes the inability to carry out specific task(s) because of an existing physical or mental impairment.

Whenever it has been identified that a person is unable to satisfy the essential requirements of the 'work due to a handicap', as defined by the Code, the employer must attempt to provide accommodation for that individual, up to the point of undue hardship, as described in Section 11 and 17 of the Code. Accommodation refers to steps that may be required to allow an individual with a handicap to perform the work, including altering the work design, physical structures or changing the organization of the work environment. *Undue hardship* has been interpreted by the Commissions to mean a cost that would significantly alter the nature or viability of the business, although this definition has never been specifically supported by the Courts. The definition of 'undue hardship' is open to interpretation in the courts and legal advice should be sought before denying an individual access to a particular role due to an identified handicap.

If accommodation is not possible up to the point of undue hardship, for a worker with a handicap who is not able to perform his or her essential work requirements, then under Section 17 of the Code, infringement of rights is not considered if an employee is not granted access to that role.

There are two types of discrimination that might affect a member of a protected group. The first is prohibitive or direct discrimination. This consists of explicitly barring a member of a protected group, such as refusing to hire pregnant women. Prohibitive or direct discrimination is easier to identify than constructive discrimination. Constructive or indirect discrimination occurs when a workplace policy does not explicitly exclude a member of a protected group, but the result of the application of the policy is that members of a protected group might be disadvantaged or excluded. For example, an overly stringent requirement of workers to be able to perform physical demands that are not a necessary requirement of the work, thus effectively discriminating against women, on the basis of sex. Constructive discrimination may not be obvious or even intentional, nonetheless, it is prohibited by the Code.

DRUG AND ALCOHOL TESTING

As stated, persons with drug and alcohol dependencies, as well as perceived dependencies, are considered to have a handicap within the Code, Section 10(1) and are thus protected from discrimination. Additionally, persons with a past history of alcohol dependency, who are no longer suffering from such, are also protected by the Code. Discrimination on the basis of handicap is prohibited by Section 5(1) of the Code. Drug and alcohol testing may be viewed as constructive discrimination in that it may adversely impact the protected group by identifying them as having a substance dependency problem.

The Code does allow for discriminative practices when there is a reasonable and bona fide requirement to do so, Section 11(1). Recent court decisions, however, have suggested that drug and alcohol testing on health and safety grounds will only be upheld by a court if an employer can show there is a serious safety issue and that there is a rational connection between a positive drug test and an employee's inability to adequately perform their job. The literature offers little support for a rational connection.[5] Thus, drug and alcohol testing may be acceptable in the Ontario (and the Canadian) workplace only under very narrow circumstances. Examples might include post-accident where there is strong reason to suspect that drugs or alcohol are involved and/or if the position is clearly safety sensitive. However, courts have recently disallowed attempts to perform general drug and alcohol screening on newly hired employees or to take action to remove employees from their work roles where there is no demonstrable lack of ability to perform the work. One of the factors influencing these recent court decisions is the difficulty in making a connection between a positive drug and alcohol test and impairment.[6]

Drug and alcohol testing is an area of the law which is currently in a state of evolution and legal advice should be obtained before implementing any drug testing programme in Canada.

Drug and alcohol application

The following four conditions apply in the application of drug and alcohol testing.

1. Drug and alcohol testing may be permitted by the courts under only very narrow circumstances, as outlined above. This position is supported by the Canadian Medical Association[7] and the Commission.[8] The following set of questions should be asked before considering the implementation of a drug and alcohol testing programme.
   - Is there clear and demonstrable evidence that drug and alcohol use is a problem at the workplace that could result in serious safety and/or security issues?
   - Will drug and alcohol screening determine ability to carry out the essential requirements of the work?
   - Are no other less intrusive functional tests available that would determine ability to perform essential duties?
2. Assuming that the criteria in (1) are met, the testing must not be conducted arbitrarily. For example, testing only some workers but not others may not be acceptable.
3. Assuming that the criteria in (1) are met, and drug testing proceeds and a positive drug test results, there now arises the need to accommodate the identified employee. This would include:
   - treatment and assessment for that individual, such as participation in an employee assistance programme;
   - finding accommodation that would allow the employee to work and still preserve dignity;
   - finding accommodation that does not pose health risks to others.
4. Note that an employee cannot be forced to submit to a drug or alcohol test. Consent is required, as for all other medical procedures. However, failure to consent to such testing, assuming that the testing is legally justifiable, may be a cause for discipline of the employee.

Pre-placement medical examinations

Section 23 of the Code addresses the issue of medical inquiries prior to an offer of employment. Such inquiries are viewed as infringing on the rights of protected handicap groups. Following a job offer, however, pre-placement medicals would be allowed in order to determine a person's ability to perform essential duties of the job. Section 17 recognizes that a right of a protected group is not infringed if an individual is unable to perform the essential requirements of the work, after the issue of accommodation to the point of undue hardship has been addressed.

Pre-placement medical examinations application

The following conditions apply.

1. No inquiry may be made with respect to medical issues prior to a conditional employment offer.
2. The requirements of the work must be explicitly defined.
3. Medical examinations and tests following the employment offer must be based on reasonable and bona fide requirements to assume the anticipated work role. These tests and the results must be carefully documented.
4. Only current physical impairments can be considered, not possible future impairments due to progression of a chronic disease, when making an evaluation of fitness for the considered work role.
5. No communication is allowed outside the medical department other than specifying if an applicant is fit, fit with restrictions, or unfit.
6. In the event that there are restrictions, work accommodation must be investigated.

7. In the event that the applicant is not able to perform the essential requirements of the work and accommodation is not possible then the conditional offer of employment can be withdrawn. Given the importance of the decision whether or not an individual is fit, the entire process must be well documented.

Medical examinations

Medical examinations are an important component of the ongoing care of employees both while working and while recovering from an illness or injury. If an employee is off work following an injury or illness, whether or not related to work, there may arise the need of having a medical examination performed by request of the occupational physician. From the employee's viewpoint, even medically justifiable medical examinations and tests may be perceived as harassment, as defined under Section 5(2) of the Code. Thus, these requests for medical examinations should always be based on medical need.

Medical examinations application The following conditions apply.

1. Medical examinations should not be requested of employees who are off work, regardless of whether or not they are receiving benefits, unless medically indicated.
2. The indication must be documented and clearly communicated to the employee.

Employee assumption of risk

The Commission's *Guidelines for Assessing Accommodation Requirements for Persons With Disabilities* suggests that, if after accommodation, there exists a risk to the employee's health, they may choose to assume the risk in some circumstances. However, this must be balanced against the need to provide a safe work environment for other workers as well as consideration of the types of risk tolerated by society.

Employee assumption of risk application The following conditions apply.

1. There must be an attempt to accommodate that worker to make the workplace safe for that individual, through engineering controls, hygiene practices, administrative controls, flexible scheduling or modification of job duties.
2. In the event that the accommodation is not possible, the risks of continued employment in the current role must be discussed with the worker.
3. In general the worker may assume these risks and the employment contract continue, provided:
   - no other employees or individuals are adversely affected,
   - the type of risk is tolerated by society.

It is important to note that although the Commission's Guidelines suggest that the employee may have the right to assume some risk, the Workers Compensation Acts in the various provinces (the Workplace Safety Insurance Act in Ontario) do not allow the worker to waive the right to inclusion under the provincial insurance plan. Thus, although a worker may choose to assume the risk to his or her health the employer assumes the additional costs through potentially higher provincial compensation insurance rates.

Pregnancy

Section 10 of the Code defines discrimination on the basis of pregnancy as equivalent to discrimination on the basis of sex. Thus, when a workplace situation arises where hazards in the workplace have been identified which may pose a health risk to the woman or her unborn foetus, accommodation must be provided to ameliorate the risks. In the event that accommodation is not possible, to the point of undue hardship, then exclusion on the basis of bona fide work requirement may be justified. However, the exclusion criteria must not be overly broad to justify prohibitive discrimination (e.g. excluding all women of child-bearing age). Additionally, it is not clear legally what the employer's course of action should be in the event that the mother wishes to assume risk to herself or her foetus after accommodation has failed to ameliorate all risks.

Pregnancy application The following conditions apply.

1. Once a health concern has been identified it is the responsibility of the employer to act with due diligence to determine the extent of the health risk to the unborn and the mother. This might require the consultation of the occupational physician or toxicologist.
2. Once the risk has been defined as clearly as possible there must be an attempt to accommodate as for employee assumption of risk described above.
3. It is possible that if accommodation fails, the woman will insist on working in an environment that is potentially unsafe for her unborn child. This creates a morally difficult issue for the employer, without clear legal guidance, and highlights the importance of clear communication between the employer and employee. At issue is whether the risk accepted by the mother for herself and the unborn are greater than those that would be accepted by society. This issue would need to be considered carefully on an individual case basis.

CONCLUSION

Human rights legislation has significant implications for the practice of occupational medicine in Ontario, particularly with respect to issues related to discrimination on the basis of handicap and sex and the requirement to accommodate these protected groups. This area of law is evolving, thus it is impossible to define a guide to deal with all possible future situations. This

article identifies the areas within occupational medicine that are most affected by the Ontario human rights legislation and suggests how the legislation may be applied in practice.

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