

Preventing Wrongs with Rights:

Balancing Human Rights with
the Right to Health and Safety

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**IF A HUMAN RIGHT
CONFLICTS WITH
SAFETY, SAFETY WINS.**

SCENARIO 1

SCENARIO 2

Grounds for Discrimination

- 1) race
- 2) religious beliefs
- 3) colour
- 4) gender
- 5) physical disability
- 6) mental disability
- 7) age
- 8) ancestry
- 9) place of origin
- 10) marital status
- 11) source of income
- 12) family status
- 13) sexual orientation

WARNING #1

Make sure the complaint actually is a human rights complaint.

Section 7: ***Alberta Human Right Act***

7(1) No employer shall

- (a) refuse to employ or refuse to continue to employ any person, or
- (b) discriminate against any person with regard to employment or any term or condition of employment,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person.

WARNING #2

Discrimination can occur:

- 1) at the time of hiring; and
- 2) during employment.

WARNING #3

Discrimination can be:

- 1) Direct
- 2) Indirect

Discrimination Impacting OHS

1. PHYSICAL DISABILITY

41(1)(l) “physical disability” means any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes epilepsy, paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, and physical reliance on a guide dog, service dog, wheelchair or other remedial appliance or device;

WARNING #4

- Does not include common, transitory conditions, such as colds and flus, which have no long term, lasting effects.

2. MENTAL DISABILITY

41(1)(h) “mental disability” means any mental disorder, developmental disorder or learning disorder, regardless of the cause or duration of the disorder;

WARNING #5

- Part of mental illness may include an unwillingness on the part of the inflicted person to admit that he/she has a problem. Handle accordingly.

3. RELIGION

41(1)(m) “religious beliefs” includes native spirituality;

MARKISM

- Wine, Women, and Song
- Holy High Holidays:
 - Two weeks leading up to Super Bowl and Grey Cup;
 - Markism respects all religions; therefore, all holidays of all religions are observed; and
 - Every Monday and Friday.
- Noon Hour Hot Tub Ritual

WARNING #6

It is offensive and unacceptable to question the validity of a person's religion or religious beliefs.

4. AGE

41(1)(a) “age” means 18 years of age or older;

5. GENDER

6. RACE

- a group of persons related by common descent or heredity.

Bona Fide Occupational Requirement?

The *Bona Fide Occupational Requirement* exemption is codified in s.11 of the *Act*:

A contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances.

The *Meiorin* Test

- was the requirement “adopted for a purpose rationally connected to job performance”;
- was the requirement “adopted in an honest and good faith belief that the standard is necessary for the fulfillment of that legitimate purpose”; and
- the requirement “is reasonably necessary to accomplish that legitimate purpose”.

WARNING #7

Don't go one iota too far!

Duty to Accommodate

“Accommodation means making changes to certain rules, standards, policies, workplace cultures and physical environments to ensure that they don’t have a negative effect on a person because of the person’s mental or physical disability, religion, gender or any other protected ground...”

WARNING #8

Always accommodate to the point of undue hardship.

Undue Hardship

- financial costs;
- size and resources of the employer;
- disruption to operations;
- morale problems of other employees brought about by accommodation;
- substantial interference with the rights of other individuals or groups;
- interchangeability of work force and facilities; and
- health and safety concerns.

WARNING #9

Hardship now does not necessarily mean hardship later.

DRUGS AND ALCOHOL

Is drug and alcohol abuse recognized under human rights law?

- Yes, if it is a dependency.
- No, if recreational.

WARNING #10

When dealing with a potential drug or alcohol problem, offer to send the person for a professional assessment.

WARNING #11

Never, ever indicate that you think a person has a problem with drugs or alcohol until an assessment is performed by a qualified professional..

Grounds for making a Complaint

- employer/union refuses to accommodate a worker who has a drug or alcohol dependency;
- employer/union take disciplinary action against a person whom the employer/union believes has a drug or alcohol dependency;
- the employers/unions drug and alcohol policy is discriminatory (e.g. automatic termination); or
- a drug or alcohol dependent worker fails a drug or alcohol test.

How to Accommodate

- offer to send employee to qualified professional for assessment;
- offer a leave of absence for the worker to seek assessment and rehabilitation;
- allowing rehabilitated worker to return to work;
- addressing issues of lateness and absenteeism without strictly adhering to policy; and
- accommodating relapses.

Drug and Alcohol test?

- Yes, if it complies with law.
 - Privacy
 - Human Rights
 - Labour

Can an employer require random testing?

Yes... but...

WARNING #12

Must be safety sensitive position.

WARNING #13

You cannot absolutely treat a refusal as indicia of impairment.

Factors for Random Testing

- the policy passes the Meiorin Test;
- the policy is implemented only in safety sensitive positions;
- there is evidence that drugs and alcohol are a problem at the worksite;
- the Unions or non-unionized workers voluntarily agree to the policy;
- there is an employee assistance program in place that is available to all workers;
- accommodation by rehabilitation is available to all those workers who can establish that they have a substance-related disability.

Components of a good drug and alcohol policy

- provide for professional assessment of the worker to determine if there is a dependency;
- set out the responsibilities of the employer and the worker regarding accommodation;
- ensure that there is no automatic termination component of the policy;
- define the difference between “recreational use” and “dependency; and
- refer complaints to a department that is trained in accommodating disabilities.

The *Canadian Model*

The Canadian Model for Providing a Safe Workplace (the Canadian Model) is a best-practice alcohol and drug policy that all stakeholders within the construction industry across Canada can adopt and follow. The purpose of the *Canadian Model* is to ensure a safe workplace for all workers by reducing the risks associated with the use of alcohol and drugs.

Components:

- educating;
- encouraging “self help”;
- ensuring that supervisors and management are diligent in observing worker conduct;
- setting out alcohol and drug testing procedures;
- establishing confidentiality and privacy procedures; and
- establishing professional assessment, treatment, rehabilitation, and subsequent accommodation procedures.

What happens if I am
found to have violated
someone's human rights?

What is the objective of remedies in human rights cases?

The objective of remedies is to put the aggrieved party back in the position they would have been in if the human rights violation had not occurred. It is not meant to punish the offender. Also, it is not meant to create a windfall for the complainant by putting them in a better position due to the violation (e.g: large cash award).

What are some of the remedies available?

1. apologize;
2. provide a positive job reference;
3. commit to not repeating the human rights violation in question;
4. reinstating the employment;
5. make financial compensation;
6. ceasing the contravention
7. put on, or attend, educational sessions on human rights;
8. introduce new non-discrimination policy.

QUESTIONS?