Human Rights and Medical Education

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Ottawa
March 7, 2012
The Definition of Discrimination

The *Human Rights Code* of Ontario

No Discrimination in the Provision of Services

**s. 1** Every Person has a right to *equal treatment with respect to services*, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.

Education is a service, but some students may also be employed.

Employment

**s. 5(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.
Grounds of Discrimination

- Race
- Ancestry
- Place of origin
- Colour
- Ethnic origin
- Citizenship
- Creed
- Sex
- Sexual orientation
- Age
- Marital status
- Family status
- Disability
- Receipt of public assistance
- Record of Offences (employment only)
Discrimination

1. A distinction (intentional or unintentional)

2. Based on enumerated grounds

3. That imposes burdens / obligations / disadvantages or withholds benefits

Discrimination can be direct or indirect, the most common of which is indirect or constructive discrimination.
Constructive Discrimination

Discrimination can occur when everyone is treated the same, without appropriate recognition of individual circumstances (where those individual circumstances are related to a prohibited ground of discrimination).

- *McDonald v. Mid-Huron Roofing*, 2009 HRTO 1306

- *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (“Meiorin”)
The Definition of Discrimination in the University of Ottawa Prevention of Harassment and Discrimination Policy

a) A distinction — intentional or unintentional, direct or indirect — because of a person’s race, ancestry, ethnic origin, creed, place of origin, colour, citizenship, sex, sexual orientation, gender identity and expression, age, pregnancy, marital status, family status, record of offences, political affiliation, religious belief, disability or means to accommodate the disability; and

b) That has the effect of erecting barriers, or creating obligations, disadvantages or situations of unequal treatment that withhold or limit access to privileges, advantages or political, social or economic rights available to other members of society.
Harassment
Under the Ontario *Human Rights Code*

**s. 5(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.

**s. 7(2)** Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.
Harassment

Definition of Harassment

s. 10(1) “harassment” means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome; (harcèlement”)

The Ontario Human Rights Code does not prevent harassment in the provision of services.
University of Ottawa

Discrimination and Harassment Prevention Policy

“The University is committed to maintaining a learning and work environment that promotes the understanding and respect for dignity of the person as part of the University community and one that is free from harassment and discrimination.” (Clause 2, Policy 67a, Prevention of Harassment and Discrimination)

The University of Ottawa’s definition of Harassment is broader than the Human Rights Code of Ontario:

**Harassment** means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome. A single unwelcome incident, if serious enough, can be sufficient to support an instance of harassment. Harassment includes comments or conduct that intimidates, humiliates, undermines or dominates the other person by belittling, embarrassing or demeaning them or involves the use of abusive or threatening language.
Workplace harassment means engaging in a course of vexatious comment or conduct against a worker in a workplace, conduct that is known or ought reasonably to be known to be unwelcome. Workplace harassment does not include legitimate performance management of an employee.
The University of Ottawa’s Policy

**Sexual harassment** is a form of harassment and consists of:

a) Sexual solicitation or unwanted sexual attention from a person who knows or ought reasonably to know that such attention is unwanted;

b) Implied or expressed promise of reward for complying with a sexually oriented request;

c) Implied or expressed threat of reprisal or actual reprisal for refusing to comply with a sexually oriented request;

d) A sexual relationship that constitutes an abuse of power in a relationship of authority; or

e) A sexually oriented comment or behaviour that may reasonably be perceived to create a negative psychological and emotional environment for work or study (“poisoned environment”).
Discrimination Complaint Processes

Options:
1. Filing a Grievance under the appropriate collective agreement.
2. Filing a complaint under the University’s complaint process:
   - Informal process;
   - Formal complaint process.
3. Filing a complaint with the Human Rights Tribunal of Ontario (HRTO).
4. Commencing a civil action in the courts.

Some of these are incompatible with one another (e.g.: grievance and civil action; HRTO complaint and civil action; possibly internal complaint and HRTO complaint)
The University’s Complaint Process

1. Informal Complaint:
   – Complaint is filed with the Office of the Prevention of Discrimination and Harassment
   – Mediation may result

2. Formal Complaint:
   – Response
   – Assessment
   – Mediation
   – Investigation
   – Outcome
The Ontario Human Rights Tribunal

1. Complaint - filed directly with the Tribunal
2. Response
3. Mediation
4. Interim Requests
5. Production of documents, will-says and books of documents
6. Hearing
7. Decision

Process usually takes approximately 3 years. The Ontario Human Rights Commission no longer investigates complaints. Complaints go directly to the Tribunal and will result in a hearing unless summarily dismissed or resolved through mediation.
Prima Facie Discrimination

The complainant has the initial burden to make out a *prima facie* case of discrimination. She/he must bring evidence of:

1. A Difference in treatment
2. Connected to ground of discrimination
3. That imposes a burden / withholds a benefit (detrimental treatment)

- No intent required
- Threshold is low
- Burden shifts if the complainant succeeds in making out a *pf* case.
Defences to Discrimination

1. Reasonable, non-discriminatory explanation
   • Discrimination was not a factor in the negative treatment received
     - Ogunyankin v. Queen’s University, 2011 HRTO 1910

2. *Bona fide* Occupational Requirement or Justification
   • The job cannot be done or the service offered unless the standard in question is met. All accommodations short of undue hardship have been provided.
Bona Fide Justification

1. The purpose of standard is rationally connected to function being performed

2. Standard adopted in honest, good faith belief it’s necessary to fulfill goal

3. Reasonably necessary in sense that respondent cannot accommodate individual’s needs without experiencing undue hardship
Accommodation Example

**Standard:**
All Ph.D. students must defend their theses by means of an oral examination.

**Accommodation:**
Permit students, on a case-by-case basis, to defend their theses in writing or one-on-one with an examiner.
Accommodation Measures that may be Required

• Assistance in obtaining special equipment to permit student to participate in program
• Differential application of program policies and procedures
• Special exam-writing conditions
• Coaching and counselling
• Leaves of absence
• Accommodations for mobility challenged persons

Student Academic Success Service provides assistance with accommodation, and students should always be referred to SASS.
Accommodation of Mental Illness

• Constructive knowledge – where there are signs of mental illness, service providers may be found liable for discrimination, if they knew or ought to have known there was a disabling condition.

• When in doubt, ask the person if he/she is unwell.

• Physician/Faculty Wellness Program.
Reprisal

Section 8 of the *Ontario Human Rights Code*

Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.

- Intent to punish / retaliate is required
- Section 8 applies when other complaint processes have been engaged (e.g. the uOttawa internal complaint process)
- Being upset or angry about a complaint is not enough; there must be action taken or a threat of action
- Adequacy of investigation is crucial

Ways to Avoid Human Rights Complaints

• Avoid statements, comments, jokes, questions, allusions and references based on any of the prohibited grounds of discrimination

• Take all allegations of discrimination, harassment, reprisal and requests for accommodation seriously; make the appropriate referral to the Office of the Prevention of Harassment and Discrimination (Students) or the Health Wellness, and Leave Office (Faculty)

• Respect accommodation measures and restrictions even if they seem unnecessary

• Protect the confidentiality / privacy of complainants
Ways to Avoid Human Rights Complaints (cont’d)

• Be very circumspect in communicating through e-mail; assume all e-mail correspondence will be publicly accessible except those communications made with legal counsel or in the preparation of litigation

• Document all difficult conversations, interactions, etc. in neutral way – report only the facts, not your editorial comments

• Do not destroy any documentation with students, residents, colleagues, members of public

• Follow evaluation procedures rigorously; do not take shortcuts or deviate from standard procedure
Ways to Avoid a Human Rights Complaint (cont’d)

• Provide fact-based, honest feedback immediately, if possible

• Fill out ITERs honestly and accurately (even if you’re worried about the repercussions)

• Do not react when angry

• Treat everyone with the respect you think you deserve, including after you’ve made a mistake, or done something stupid

• Seek University legal counsel – Alain Roussy or Kathryn Prud’homme
QUESTIONS?
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