Update
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CANADIAN GUIDE TO PREGNANCY OR CHILD-RELATED WORKPLACE RIGHTS OF IAM&AW MEMBERS *

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A. INTRODUCTION

Canadian IAMAW members who are pregnant or have children have various workplace rights and protections through both federal and provincial human rights and employment standards laws.

*. This paper is based on a presentation to the International Association of Official Human Rights Agencies 53rd Annual Conference"Civil Rights in the Millennium: A Call to Action"Cincinnati, Ohio July 25, 2001.

B. HUMAN RIGHTS LAW PROTECTIONS

Pregnancy Discrimination is Sex Discrimination

- Under federal and provincial human rights laws, pregnancy discrimination is considered unlawful sex discrimination.

- Alberta, Quebec, Saskatchewan, Manitoba, Nova Scotia, New Brunswick, Ontario, and the federal jurisdiction specify in their human rights legislation that discrimination on the basis of "pregnancy" is discrimination on the basis of sex.

- For example, in Ontario, the *Human Rights Code* explicitly states that discrimination on the basis of pregnancy is discrimination on the basis of sex. Section 10(2) states:

  "The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant."

- Even in jurisdictions where human rights legislation does not contain a specific provision prohibiting pregnancy-based discrimination, the 1989 Supreme Court of Canada's *Brooks v. Canada Safeway* decision ruled that discrimination because of pregnancy is sex discrimination and this includes:\

  - discrimination on the basis of pregnancy;
  - the possibility of pregnancy; or
  - circumstances related to pregnancy.[1]

Brooks v. Canada Safeway Decision

- The *Brooks v. Canada Safeway* decision was the turning point in the protection of pregnant Canadian women's workplace rights. The Court stated:

  Combining paid work with motherhood and accommodating the child-bearing needs of working women are ever-increasing imperatives. That those who bear children and benefit from society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious. It is only women who bear children; no man can become pregnant. As I argued, it is unfair to impose all of the costs of pregnancy upon one-half of the population. It is difficult to conceive that distinctions or discriminations based

upon pregnancy could ever be regarded as other than discrimination based upon sex, or that restrictive statutory conditions applicable only to pregnant woman did not discriminate against them as women.

- The facts in that case are as follows:

    - three (3) part-time cashiers from Manitoba became disabled during their pregnancies. In accordance with the employer's benefits policy, all employees were entitled to income replacement benefits for any lost wages due to accident or sickness.
    - The benefits policy excluded pregnant employees from receiving any benefits during ten (10) weeks before the anticipated date of birth, the actual birth week, and six (6) weeks after the birth. During these periods, the exemption from coverage was absolute regardless of the reason an employee is unable to report to work.
    - Therefore, pregnant women suffering from non-pregnancy related afflictions were ineligible for benefits simply because they were pregnant.

- The employer relied on American jurisprudence to argue that the exclusion of pregnancy from the scope of the benefit plan was not a question of discrimination, but a question of deciding to compensate some risks and to exclude others.[2] The Court held that this approach did not fit in the Canadian context.

    ....the reasoning in those two cases does not fit well within the Canadian approach to issues of discrimination. In both General Electric and Geduldig the United States Supreme Court held that distinctions involving pregnancy were constitutionally permissible if made on a reasonable basis, unless the distinctions were designed to effect invidious discrimination against members of one sex or another. In Canada, as I have noted, discrimination does not depend on a finding of invidious intent. A further consideration militating against the application of the concept of underinclusiveness in this context, stems, in my view, from the effects of so-called "underinclusion". Underinclusion may be simply a backhanded way of permitting discrimination."[3]

Substantive Equality Approach

- The *Canada Safeway* decision is a good example of how Canadian courts apply their "substantive" approach to ensuring workplace equality. The Court respected the differences between men and women's child bearing capacity and recognised that

pregnancy can create distinct needs for women, and in some cases their partners, for which equal treatment should be available.[4]

- The "formal equality" approach used in some previous pregnancy discrimination cases was rejected. This approach said that a distinction to be discriminatory must affect all members of a group equally and at the same time in order to constitute discrimination against the group. Using that approach, pregnancy distinctions would by definition be non-discriminatory since not all women are pregnant at any one time, and thereby rejected the formal equality definition.

Other Decisions

- The *Brooks* decision has been followed up in a number of cases:

- *Ontario Secondary School Teachers' Federation, District 34 v. Essex County Board of Education* [5]

    - denial for sick leave during labour and for a period of time after delivery of her child was found to be discriminatory.

- *Ontario Cancer Treatment and Research Foundation v. Ontario Human Rights Commission*[6]

    - a woman chose to have her child while on vacation and then was unable to return to work because of illness. She asked for sick leave and the employer placed her on maternity leave instead.

    - The Court held the employer's actions were discriminatory – a woman has the right to choose whether to apply for maternity benefits before or after birth in recognition of the right of an individual to choose how and whether benefit options will be utilized.

- *Parcels v. Red Deer General & Auxiliary Hospital and Nursing Home District No. 15* [7].

    - The human rights tribunal held that in light of the *Brooks* decision, the employer's benefit plan incorporated in the collective agreement was discriminatory where it required an employee absent on maternity leave to pay one hundred percent of the premiums for certain benefits while employees

absent on sick leave were only required to pay twenty-five percent of the premium to retain the same benefits.

Duty to Accommodate Pregnant Employees

Canadian human rights principles law puts a duty on an employer to accommodate employees falling under one of the enumerated grounds in human rights legislation, (eg. sex) unless the employer can demonstrate that accommodation will cause "undue hardship" or the requirement causing the discrimination is a *bona fide occupational requirement* ("*BFOR*").

- The Supreme Court in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)*[8]. establised a new three-part test for determining whether a *prima facie* discriminatory standard is a *BFOR*:

  An employer may justify the impugned standard by establishing on the balance of probabilities:

  1. That the employer adopted the standard for a purpose rationally connected to the performance of the job;

  2. That the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and

  3. That the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer."

Heincke v. Emrick Plastics[9]

The duty to accommodation pregnant workers is illustrated by the *Heincke v. Emrick Plastics*[10] decision.

- In this case, the employer refused to accommodate a pregnant employee's request to transfer out of her job as a spray painter and into another position. The request was the result of the employee's doctor's concerns that the employee not be exposed to paint fumes during her pregnancy. The company sought and received letters from the employee's doctor saying that she could work in an area where no fumes would be inhaled.

- The employer subsequently placed the employee on involuntary leave for the duration of her pregnancy taking the position that the doctor's letters were too vague to allow her to work in any area of the plant since the company could not guarantee the level of fumes in any area.

- The employer also demanded from the employee's doctor that a note be provided absolving the company and its management from any and all responsibility relating to the employee's health and her unborn child arising from the air quality in the workplace.

- The employee filed a complaint under the *Ontario Human Rights Code* claiming sex discrimination. The human rights tribunal, and later the court to which the tribunal decision was appealed, held that the employer did not meet its duty of reasonable accommodation. The court held:

  - that the employer's rule effectively excluded the employee from employment and constituted constructive or adverse effect discrimination on the basis of sex contrary to the Human Rights Code;

  - the employer had a duty to take reasonable steps to accommodate the employee by placing her in an alternate position and failed to do so; and

  - the court found that the employer was unreasonable to demand from the employee's doctor a standard of "scientific perfection".

- The court held:

  In essence the company told Ms. Heincke that she could not work because the company disagreed with her obstetrician. It is paternalistic, patronising, and unreasonable for a lay employer, without objective medical evidence, to sit in judgment of the reasonably informed medical opinion a woman receives from her own medical specialist.

Foetal Rights as *a Bona Fide Occupational Requirement*

- The employer's duty to accommodate is qualified if the employer can demonstrate that it is impossible to accommodate the employee without "undue hardship".[11]

- In the *Emrick Plastics* case reviewed above, the employer attempted to argue that it was unreasonable to expect it to accommodate the employee when it could not guarantee safe air quality for the foetus. The tribunal and the court rejected this

position because the employer failed to produce any objective evidence to support the concerns it had for the safety of the unborn child.

- In *Wiens v. Inco Metals Co.*[12], the tribunal considered the question of whether the avoidance of risk to the unborn child of a pregnant employee can amount to a "bfor".

(a) The employer had a workplace policy which disallowed women "of child-bearing potential" the opportunity to work in certain workplaces. The policy was established to prevent such women from exposure to gas which would potentially harm an unborn child, but not the woman herself.

(b) The employer acknowledged that once a woman realized she was pregnant, and if she was working in an unsafe area, the employer was able to accommodate the employee for the term of her pregnancy.

(c) The employer's concern was that a woman might be exposed to harmful gas before realizing she was pregnant and thereby harming the foetus.

(d) The employee filed a complaint against her employer claiming sex discrimination by not allowing potential child-bearing women in the workplace. The employer attempted to argue that its policy was a "reasonable and *bona fide* qualification".

(e) The tribunal reviewed extensive evidence of the company's metal processing operation and concluded that the risk was minimal to the mother and the unborn child.

The tribunal held:

> ..."reasonableness" ... dictates a balancing of the interests between fetal protection and a female employee's right to equality of opportunity in employment, in favour of the complainant and not the employer.
>
> It is more in keeping with equality objectives to allow the individual the informed choice of accepting the very slight risk or rejecting the very slight risk in favour of alternative employment.

Recent Decision that Unborn Child has no Rights

- Since these cases have been decided, the Supreme Court of Canada has held that the law in Canada does not recognize the unborn child as a legal person possessing rights.[13] This is a general proposition made by the court which is applicable to all aspects of the law. In Canada, it is only once a child is born, alive and viable, that the

law may recognize that its existence began before the birth for certain limited purposes. The only right recognized is that of the born person. Any right or interest the foetus may have remains inchoate and incomplete until the child's birth.

- Therefore, in light of this recent decision on foetal rights, the weighing of interests of the mother versus the unborn child in the context of human rights analysis is no longer proper. Only the mother has "rights" at the workplace and risk to the foetus will unlikely be a viable *bona fide occupational requirement*.

Accommodation of Family and Child Care Needs

- Human rights law in Canada is evolving to recognize that accommodation of working women includes not only protection from discrimination when a woman is or plans to be pregnant, but these protections continue after childbirth. Women continue to be the primary caregivers in the home. The law recognizes that in order for a woman to successfully return to work after childbirth, workplaces must reasonably accommodate women so they may address family and child care needs.

- For example, the employer may have the duty to accommodate employees on the basis of childcare needs.[14] If a mother is having difficulty finding appropriate childcare at the time she is expected to return to work from maternity leave, an employer may be obliged to extend her leave or provide a flexible work schedule until she secures full-time childcare.[15] One human rights tribunal recognized the dilemma that women have in balancing career and family obligations:

> A parent must therefore carefully weigh and evaluate how they are best able to discharge their obligations as well as their duties and obligations within the family. They are therefore under an obligation to seek accommodation from the employer so that they can best serve those interests.
>
> We can therefore understand the obvious dilemma facing the modern family wherein the present socio-economic trends finds both parents in the work environment, often with different rules and requirements. More often then not, we find the natural nurturing demands upon the female parent place her invariably in the position wherein she is required to strike a fine balance between family needs and employment requirements.[16]

- Similarly, employers may also have to accommodate nursing mothers returning to work. This may include allowing mothers to nurse her baby at the workplace[17] or providing extended leave of absence or reduced work hours.[18]

C. EMPLOYMENT INSURANCE BENEFITS

- As reviewed in Part D below, there are federal and provincial employment standards laws which provide for the right to pregnancy\parental leaves Only biological mothers are entitled to both pregnancy leave and parental benefits whereas biological and adoptive parents are entitled to parental leave or benefits.

- Cash benefits are available to women while on pregnancy or parental leave which are provided federally through the *Employment Insurance Act*. The *EI* Act recently extended pregnancy and parental leave benefits from six months to one year.[19] Employees are now entitled to fifteen (15) weeks pregnancy benefits and thirty-five (35) weeks parental benefits, following a two-week unpaid waiting period.

- An employee must have six hundred (600) insured hours of work in the last fifty-two (52) weeks to be eligible for maternity and parental benefits. While the government reduced the number of hours required to be eligible for benefits from seven hundred (700) hours to six hundred (600) hours, achieving the eligible hours may be difficult for part-time or contingency employees, a workforce predominated by women.

- The benefit received is 55% of an employee's average weekly insured earnings up to a maximum of $413.00 per week. Low income families (a net annual income of less than $25,921.00) may receive a higher benefit rate.

- Biological mothers can start collecting pregnancy benefits up to eight (8) weeks before she is scheduled to give birth. Parental benefits for biological parents and their partners are payable from the child's birth date and for adoptive parents and their partners from the date the child is placed with the family.

- The parental benefits can be claimed by one parent or shared between the two partners. If shared, only one parent is required to serve the two week waiting period. If a new mother works while on pregnancy leave, these earnings will be deducted dollar for dollar from her pregnancy benefits.

- Parents receiving parental benefits may work while receiving benefits, however, any monies earned above 25% of the weekly benefits or $50.00, whichever is higher, will be deducted dollar for dollar from the parental benefits.

D. EMPLOYMENT STANDARDS PROTECTIONS

Pregnancy/Parental Leave of Absence

- Every province in Canada has maternity leave provisions which are found in legislation governing labour relations or employment standards.

- The recent *EI Act* amendments have led to changes in both federal and provincial employment standards legislation to correspond with the extended pregnancy and parental EI benefits.[20]

- In Ontario, the current *Employment Standards Act* allows a pregnant employee to take an *unpaid* pregnancy leave of seventeen (17) weeks if she started employment with her employer at least thirteen (13) weeks before her due date. An employee may begin the leave no earlier than seventeen (17) weeks before the expected birth date and, amendments will come into force whereby pregnancy leave may begin on the date the employee gives birth if it is earlier than seventeen (17) weeks before the due date.

- A woman in Ontario who takes both pregnancy and parental leave is entitled to fifty-two (52) weeks leave which corresponds to the maximum benefit period for pregnancy and parental benefits under the *EI Act*. Both parents in Ontario are entitled to take the entire parental leave from their respective workplaces regardless of whether they are able to collect EI benefits.[21]

Rights of Women During Pregnancy/Parental Leaves

- Women in Canada who are on pregnancy or parental leave have the right to certain protections and continued benefits which are set out in federal and provincial employment standards legislation. For example, Ontario' s *Employment Standards Act* provides at Section 42 to 44 that:

  (a) employers cannot discontinue pension, life insurance, accidental death, extended health, dental and any other prescribed benefit plans, unless the employee elects in writing to have these benefits discontinued. Therefore, an employer is required to continue employer's contributions to these plans unless the employee gives written notice to the employer that she does not intend to pay the employee's contribution, if any;

(b) the calculation of the employee's seniority, length of employment, or length of service includes any period an employee is on pregnancy or parental leave;

(c) an employer must reinstate an employee who takes pregnancy or parental leave to the position the employee held prior to taking the leave, if the position still exists, or to a comparable position if it does not exist ;

(d) currently, if the employer's operations were suspended or discontinued while the employee was on leave, the employer is required to reinstate the employee when the operations resume, in accordance with the employer's seniority system or practice, if any. However this provision has been removed from the new *Employment Standards Act, 2000* which will be brought into force in the near future;

(e) employers must pay a reinstated employee wages that are at least the greater of the wages most recently paid to the employee or the wages the employee would be earning had the employee worked throughout the leave.

(f) employers do not have to include pregnancy or parental leave period as part of an employee probationary period.

- The new Ontario *Employment Standards Act, 2000*[22], will include an exemption to the reinstatement right where the employment of the employee is terminated "solely for reasons unrelated to the leave".[23] This provision diminishes the current absolute rights of employees to reinstatement after pregnancy or parental leave and can facilitate employers disguising their reason for terminating employees behind an alleged legitimate reason. For example, an employer may rely on this provision once it is enforced to argue that an employee on pregnancy or parental leave does not have the right to return to the position she held prior to the leave, or one which is comparable, because the employee would have been terminated regardless of the leave due to restructuring or discovered misconduct of the employee prior to the leave.[24]

Right to No Reprisal Because of Pregnancy

- Provincial and federal employment standards legislation prohibits employers from intimidating, disciplining, suspending, laying off, dismissing or imposing a penalty on an employee because the employee is or will become eligible to take, intends to take or takes pregnancy or parental leave.[25]

- In Ontario, enforcement of this provision is outlined in Part E below. There are broad remedial powers to order the employer to take any action or refrain from any action. This includes the power to reinstate dismissed employees. Damages for violation of

the pregnancy and parental leave provisions are exempted from the usual $10,000.00 limit.[26]

E. ENFORCEMENT PROCEDURES

Employment Standards Laws

- Federal and provincial employment standard laws provide complaint-based enforcement procedures.

- In Ontario, if a woman is denied any of the protections outlined above while on pregnancy or parental leave, she may file a complaint with the Ontario Ministry of Labour. Once the complaint is processed, an employment standards officer is appointed to review the submissions of the employee and employer; to interview the parties and investigate the claim; to attempt to mediate a resolution; if no resolution is achieved, to issue an order with written reasons. An employment standards officer may order what action, if any, the employer shall take or what the employer shall refrain from doing in order to constitute compliance with the Act and may order what compensation shall be paid by the employer to the Director of Employment Standards in trust for the employee.[27]

- Either party may appeal this order. The appeal results in the appointment of a Labour Relations Officer who attempts to mediate the case. If mediation is unsuccessful, then the matter proceeds to a full hearing before an appointed adjudicator. If the employer is appealing, it must first pay the damages ordered by the Employment Standards Officer in trust to be held by the Ministry pending a decision from the hearing.

Human Rights Laws

- If a woman is discriminated against because of pregnancy or marital/family status, in addition to a possible complaint under the employment standards legislation where appropriate, she may also file a complaint with the provincial or federal human rights commission.

- The procedure following the filing of a complaint is similar in all jurisdictions: an investigator is appointed to investigate the claim and make a recommendation to the Commission whether the Tribunal should hear the case. In some jurisdictions, there may be the option of mediation if both parties are agreeable. The Commission makes the ultimate decision of whether the complaint is worthy of a hearing and the complainant has little recourse if the ultimate decision of the Commission is to refuse the hearing since the human rights commissions and tribunals have exclusive jurisdiction to consider human rights complaints.[28]

F. ROLE OF CANADIAN TRADE UNIONS

Within the framework of the above-noted Canadian legislative protections, unions have been able to negotiate a number of workplace protections into collective agreements with employers:

- The majority of workers covered by major collective agreement have access to pregnancy leave which will compensate women up to 76% to 100% of normal pay during the leave. This is contrasted with the pregnancy/parental leave benefits which non-unionized employees access through the *EI Act* which is only 55% of an employee's regular wages.[29]

- Collective agreements have been negotiated where workers are allowed to take time off work to attend parental responsibilities and family care, although in most cases such leave has been provided on an unpaid basis. Several unions have also been able to bargain significant funds for childcare. For example, the Canadian Auto Workers have bargained 4.5 cents per hour for childcare which has been used to establish programs which accommodate the needs of shift workers. The Canadian Union of Postal Workers has also bargained funds to be used to develop community based childcare services.[30]

- Unions allow women access to employment protection, recall rights and grievance procedures where unjust dismissals can be challenged as well as lack of promotions or job opportunities, discipline, and other workplace problems. For example, unions have challenged the failure to recognize maternity leave as service which is credited towards pension benefits.[31]

Endnotes

1. *Brooks v. Canada Safeway Ltd.* [1989] 1 S.C.R. 1219 overturning the earlier Supreme Court decision, *Bliss v. Attorney General of Canada* [1979] 1 S.C.R. 183 where the Court held that discrimination against pregnant women did not constitute discrimination on the basis of sex because "any inequality between the sexes in this area is not created by legislation but by nature".

2. The Respondent employer relied on *Geduldig v. Aiello*, 417 U.S. 484 (1974) where the Supreme Court of the United States held that a disability insurance system which did not provide compensation for pregnancy did not violate the equal protection clause of the Fourteenth Amendment, and *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) where the Supreme Court of the United States affirmed this conclusion in the context of Title VII of the Civil Rights Act of 1964. In both cases the Court held the group insurance plans to be underinclusive of the risks they chose to insure but held that underinclusiveness did not necessarily amount to discrimination.

3. *Brooks v. Canada Safeway Ltd, supra*

4. For a further discussion of this issue, see Mary Cornish and Karen Schucher, "Human Rights and Administrative Justice Going into the Year 2000". Prepared for the Annual Conference of Ontario Boards and Agencies, November 18-19, 1999.

5. [1998] O.J. No. 3368 (O.C.A.; application for leave to appeal to the Supreme Court of Canada dismissed without reasons on March 4, 1999 at [1998] O.J. S.C.C.A. No. 519

6. (1998), 38 O.R. (3rd) 72 (Div. Ct.)

7. (1991), 15 C.H.R.R. D/257 (revd in part (1992), 129 A.R. 241 (Q.B.)

8. (1999), 176 D.L.R. (4th) 1 (S.C.C.)

9. (1990), 14 C.H.R.R. D/68; affd (1992), 16 C.H.R.R. D/300 (Ont. Div.Ct.)

10. (1990), 14 C.H.R.R. D/68; affd (1992), 16 C.H.R.R. D/300 (Ont. Div.Ct.)

11. *Bonetti v. Escada Canada Inc.* (1995), 25 C.H.R.R. D/148: revocation of employee's promotion after she became pregnant was adverse effect discrimination but she was reasonably accommodated by placing her in her previous position – it is incumbent on the employee to accept reasonable alternatives; *Jodoin v. Ciro's Jewellers (Mayfair) Inc.* (1996), 25 C.H.R.R. D/39: employer failed to accommodate employee when it demoted her and then abruptly terminated her

12. (1988), 9 C.H.R.R. D/4795

13. *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.*, [1997] S.C.R. 925: Supreme Court overturning lower courts' decision to detain a pregnant woman addicted to glue sniffing in order to prevent harm to unborn child; see also: *Tremblay v. Daigle*, [1989] 2 S.C.R. 530 and *Martin v. Mineral Spring Hospital*, [2001] A.J. No. 78 (Q.B.)

14. In addition to sex discrimination, accommodation may be based on the right to be free from discrimination because of "family status" – a ground enumerated in several human rights statute

15. *Brown v. Canada (Department of National Revenue, Customs and Excise)*, [1993] C.H.R.D. No. 7 where the tribunal had to consider whether the complainant's right to be free from discrimination on the ground of family status was infringed by her employer because it failed to accommodate her work schedule and, in particular, her request for day shift duty to permit her to arrange for adequate day care for her child following maternity leave. The Tribunal found that that the employer had the ability to accommodate the complainant's request for day shift duty and failed to do so. See also: *Wight v. Ontario (Office of the Legislative Assembly)*, [1998] O.H.R.B.I.D. No. 13 where the complaint alleged that her human rights were violated when she was dismissed from her employment for refusing to return to work when ordered until she had secured adequate daycare for her child.

16. *Brown v. Canada*, ibid. at 15-16

17. *Poirier v. British Columbia (Min. of Municipal Affairs, Recreation and Housing* (1997), 29 C.H.R.R. D/87

18. *Carewest v. Health Sciences Assn of Alberta (Degagne Grievance)* [2001] A.G.A.A. No. 2 (Moreau)

19. Prior to the recent amendments, an employee was entitled to fifteen (15) weeks pregnancy benefits and ten (10) weeks parental benefits, for a total of to twenty-five (25) weeks, following a two week unpaid waiting period. Recent amendments were enacted which extended benefits for all employees with children born on or after December 31, 2000 or if an adopted child is placed with a parent on or after this date.

20. The Ontario Government introduced major changes to employment standards with Bill 147, the *Employment Standards Act, 2000* which received Royal Assent on December 21, 2000. Changes include extension of the parental leave provisions and will come into force on a date not yet proclaimed. Section 143 of the new Act, a transitional section, came into force on December 30, 2000 and allows employees whose child was born or came into the custody, care and control of the employee for the first time on or after December 31, 2000 to extend parental leave without notice to his or her employer.

21. The Ontario *Employment Standards Act* had previously only allowed for eighteen (18) weeks of parental leave. However, changes were made in light of the *EI Act* amendments to extend parental leave to thirty-five (35) weeks for employees who took pregnancy leave and thirty-seven (37) weeks for those who did not.

22. which is not yet in force

23. *Medical Arts Dispensary of Ottawa (1990) Ltd.* (September 21, 1992, E.S.C. 3088); *Northern Radiological Services Ltd.* (November 17, 1992, ES 196/92); *169809 Canada Ltd. v. Ontario (Ministry of Labour)* (1993) 16 C.C.E.L. (2d) 16 (Ont. Referee), revd in part on the issue of damages (*sub nom 169809 Canada Ltd. v. Alter*) (1995) 22 O.R. (3d) 53 (Div. Ct.)

24. See *Ontario Blue Cross* [1994] O.E.S.A.D. No. 23 (Muir) where an employer argued that under the current language that reinstatement did not apply because the termination of an employee was related to restructuring. The referee rejected this argument and held that reinstatement under the current language is absolute and requiring a woman on pregnancy leave to compete for new positions in the restructured company is a violation of the *Employment Standards Act*.

25. See, for example, Ontario's Employment Standards Act, section 44.

26. Section 65(1.3) and (1.4) of the current *ESA*

27. Ontario *Employment Standards Act*, section 45

28. *Bhadauria v. Seneca College* (S.C.C.) In this case, the Supreme Court of Canada held that individuals do not have the option of pursuing discrimination complaints through the courts where government has legislated an administrative procedure for reviewing human rights complaints.

29. Andrew Jackson and Grant Schellenberg, Unions, Collective Bargaining, and Labour Market Outcomes for Canadian Working Women: Past Gains and Future Challenges (Canadian Labour Congress, Research Paper #11, 1999) at 18-19.

30. Ibid.

31. Penni Richmond, Kate Hughes, Karen Schucher, “The Role of Unions in Furthering Women’s Equality”, prepared for the LEAF National Forum on Equality Rights, Transforming Women’s Future: Equality Rights in the New Century, 4-7 November 1999, Vancouver, B.C.. This article also *cites Newfoundland Association of Public Employees v. The Queen* (1996) 134 D.L.R. (4th) 1.