

The FRAME Routine

Key Topic

is about...

Main idea

Essential details

Main idea

Essential details

So What? (What's important to understand about this?)

Human Rights

Write a paragraph based on one of the two statements below:

- ① The affirmative action defense should not be a legitimate defense in a human rights case.
- ② The affirmative action defense should be a legitimate defense in a human rights case.

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DEFENCES AGAINST VIOLATIONS OF HUMAN RIGHTS CODES

Not all cases of discrimination will succeed before a board of inquiry. Insurance companies discriminate against sick people by making them pay more for their insurance. Universities and community col-

leges discriminate against people who get low grades by accepting only students with high grades. These general distinctions are not prohibited by human rights codes, nor would it be desirable that such distinctions be prohibited.

However, we have a general legal duty to accommodate others unless undue hardship results. For example, this means that if a person who uses a wheelchair is qualified for a job and an employer does not hire the person because the building is not wheelchair-accessible, then the employer may need to make the building wheelchair-accessible. It also means that retail stores that are open on Saturdays and Sundays cannot require persons of faith to work on those days if their religious day of rest falls on Saturday or Sunday.

Human rights codes, however, allow a number of general exceptions in situations that would otherwise be code violations. While some exceptions relate to certain types of discrimination listed in each human rights code, we will examine only three general exceptions or defences: bona fide occupational requirements, affirmative action, and association objectives.

BONA FIDE OCCUPATIONAL REQUIREMENTS

Employers may discriminate on a prohibited ground if it is a reasonable and necessary qualification because of the nature of the employment. This is sometimes referred to as a **bona fide occupational requirement**. For example, discrimination would be permitted if it would ensure public health and safety.

Blinder v. Canadian National Railway, [1985] 2 S.C.R. 561

Blinder is a Sikh. As part of their religion, Sikh men must wear nothing but a turban on their heads. For safety reasons, the Canadian National Railway (CNR) required

all workers on its railway lines to wear hard hats. Bhinder complained that this requirement made it impossible for Sikhs to be considered for this type of job with the CNR. A Canadian Human Rights Tribunal agreed that this was discrimination. The CNR claimed that this was a bona fide occupational requirement on the basis of safety. The Supreme Court of Canada agreed. A reasonable employer would require hard hats on a construction site. There is no duty to accommodate where there is a bona fide occupational requirement.

1. Did the CNR's policy restrict Sikhs from certain types of employment with the railway? What was the reason for this policy?
2. What is an essential difference between this case and *Wiens v. Inco Metals Co.*?
3. A similar issue came up about whether Sikh RCMP constables should be allowed to wear turbans. In this case, discrimination was not found to be a bona fide occupational requirement. Why is this issue not comparable to the issue in the *Bhinder* case?

AFFIRMATIVE ACTION

Human rights legislation does allow discrimination for affirmative action. In other words, one can discriminate for the purpose of bettering conditions for a disadvantaged group. Section 15(2) of the Canadian Charter of Rights and Freedoms also protects affirmative action programs. Under such programs, employers can hire people who might not be the best-qualified candidates, or organizations can discriminate against majority groups if in doing so they help certain disadvantaged groups, such as women or visible minorities. Thus, a Nova Scotia women's newspaper, *Pandora's Box*, refused to print a letter written by a man because it had a policy of publish-

ing only writings by women. A Nova Scotia board of inquiry decided that this was reasonable affirmative action (*Keyes v. Pandora Publishing Association (No. 2)*, (1992)).

ASSOCIATION OBJECTIVES

Another exception applies to associations and special interest groups. Groups or clubs that exist for the benefit of disadvantaged groups may discriminate on that basis. For example, an organization devoted to helping Aboriginal people get jobs in a city may legally hire only Aboriginal people. Similarly, religious or charitable organizations that serve a particular community may limit employment to that community if the organizations meet certain requirements, as shown in the case of *Parks v. Christian Horizons* (1991).

Parks v. Christian Horizons (1991) 16 C.H.R.R. D/40 (Ont. Bd. of Inq.)

Christian Horizons is an evangelical Christian organization that provides residential care for adults who are mentally disabled. It preferred to hire people who had beliefs consistent with the organization, and it had a policy that it would not hire people who had a lifestyle inconsistent with Christian beliefs. Many of the adults in its care were not Christian but were placed there because the organization had a good reputation for care.

The two complainants were living in common-law relationships. One was refused a full-time position because of her lifestyle, while the other was asked to consider finding other employment. Both professed to have some Christian beliefs. They complained that they had been discriminated against on the basis of marital status.

The board of inquiry found that there was discrimination, but that Christian Horizons was a religious organization. While the adults in its care were not all

Christian, the employer was an outreach organization. It could therefore be considered to be serving its Christian board of directors and supporters. The organization therefore had the right to discriminate on the basis of religious creed, but the requirements of the creed had to be made clear to all staff and consistently applied. Since these conditions were not met, the complainants won their cases.

1. Why do you think the complainants chose marital status as the basis of their complaint?
2. Why did the board attach certain conditions to its decision? Do you think these conditions were reasonable? Why or why not?

There is also a special provision that separate schools are permitted to discriminate on the basis of religious belief. Thus, a school board can impose lifestyle requirements consistent with religious beliefs on its teachers. In *Caldwell v. Stuart* (1984), when an unmarried, Catholic high school teacher became pregnant, she was legally fired by the school board. However, imposing lifestyle requirements consistent with religious beliefs has been limited to staff who have direct contact with the students, such as teachers. These requirements may not apply to secretarial or cleaning staff, for example.