CANADIAN HR Reporter

THE NATIONAL JOURNAL OF HUMAN RESOURCE MANAGEMENT www.hrreporter.com SEPTEMBER 22, 2008

Published by Carswell, a Thomson Reuters business

Being sensitive to employees' environmental sensitivities

New disability added by Canadian Human Rights Commission poses challenges in workplace

LEGAL VIEW

RONALD MINKEN

In May 2007, the Canadian Human Rights Commission (CHRC) wrote two reports on the topic of environmental sensitivity. Based on these reports, the commission created a policy in June 2007 establishing environmental sensitivity as a disability that requires reasonable accommodation by an employer to the point of undue hardship.

As with any disability, what is classified as undue hardship varies on a case-by-case basis, depending on many factors including the scope of the employee's disability and the extent to which an employer is able to accommodate.

Similar to other disabilities, there is no list of criteria stating what must be fulfilled by an employer to meet its duty to accommodate an employee with environmental sensitivities. These can be activated by numerous triggers in the workplace, none of which are automatically shared by all individuals with the disability. Therefore, the accommodations required for one employee may not be the same for another.

Accommodating environmental sensitivity

This subjectivity in accommodation can lead both employers and employees to question the adequacy of the adjustments. The CHRC has attempted to reduce this uncertainty. In one of its reports, the commission created a list of reasonable accommodations that have been mentioned in jurisprudence, secondary literature and the researchers' consultations, as well as best practices and medical evidence and recommendations based on legal research.

Though the list and recommendations can be helpful, it can still leave employers and employees questioning whether sufficient accommodation has been made in specific circumstances.

This very question was posed on judicial review in the 2006 Alberta Court of Queen's Bench case of *Brewer v. Fraser Milner Casgrain LLP*.

Secretary sensitive to chemicals in office

Janice Brewer was a legal secretary in the Alberta office of the law firm Fraser Milner Casgrain (FMC) for 20 years. In 1998, Brewer's family doctor suspected she had sensitivities to several chemicals. So FMC made many accommodations for her at work, including asking staff to refrain from using perfumes and fragrances, permitting her to use an alternate washroom instead of the main ladies' washroom, providing air cleaners in her work area, allowing her to use charcoal-filtered masks when necessary and altering her work hours so she could avoid large crowds at the office.

Despite all of FMC's efforts to accommodate Brewer, her disability continued to be triggered at work.

In 2001, Tom Wakeling, a partner at FMC's Edmonton office, was contacted by Brewer's lawyer. Wakeling agreed to the lawyer's suggestion that a specialist be permitted to inspect the office and provide recommendations on how to accommodate her. The recommendations were made in October 2001, yet none were enacted by FMC.

Instead, FMC moved her to a newly renovated floor in the building. Chemicals associated with the renovations caused her environmental sensitivities to be triggered and Brewer left work on Nov. 14, 2001.

On Dec. 14, 2001, FMC notified Brewer her work assignment had been changed at the office in another attempt to accommodate her sensitivities. This change, however, was not in accordance with any of the specialist's recommendations.

Brewer did not return to work to assume this new assignment, but rather went on short-term disability and unsuccessfully applied for long-term disability. She then filed a complaint with the Alberta Human Rights and Citizenship Commission on Oct. 17, 2002, claiming FMC had discriminated against her on the ground of a physical disability.

After an investigation, the complaint was dismissed. These decisions led Brewer to take her case to the Alberta Court of Appeal.

The Court of Appeal found Brewer had a legitimate complaint. Though FMC's efforts prior to 2001 were significant, it did not solve her situation, said the court. By agreeing to have a specialist make recommendations as to how it could accommodate Brewer, FMC agreed to make these alterations. Since none were enacted and different adjustments were attempted, the court ruled FMC's efforts to accommodate Brewer were inadequate.

FMC appealed the decision and the issue is waiting to be heard.

Employer has ongoing responsibility

Bearing in mind the possibility the appeal may be approved, an employer has an ongoing duty to reasonably accommodate an employee with a disability. Simply providing some reasonable accommodations that do not satisfy the employee's disability is not enough. The employer must reasonably accommodate to the extent the employee is able to function in the workplace.

Also, the employer must continue to reasonably accommodate the employee when it is known the adjustments made are falling short of their intention or other accommodations are more reasonable in aiding the employee.

For more information see:

• *Brewer v. Fraser Milner Casgrain LLP*, 2008 CarswellAlta 554 (Alta. C.A.).

Ronald S. Minken is a senior lawyer at Minken & Associates, an employment law firm in Markham, Ont. He gratefully acknowledges Kyle Burgis and Sara Kauder for their assistance in preparation of this article. He can be reached at (905) 477-7011 or www.employmentlawissues.ca.

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