

# Being sensitive to environmental sensitivity

Human rights commission adds new disability employers must accommodate

BY RONALD MINKEN

In May 2007, the Canadian Human Rights Commission (CHRC) wrote two reports on the topic of environmental sensitivity. Based on these reports, it created a new policy in June 2007 establishing that environmental sensitivity is a disability which requires reasonable accommodation by the employer to the point of undue hardship. As with any disability, what will be classified as undue hardship will vary on a case by case basis, depending on many factors such as the scope of the employee's disability and the amount an employer is able to accommodate.

A list of criteria stating what must be fulfilled by an employer in order to meet its duty to accommodate an employee with an environmental sensitivity does not exist. Environmental sensitivities 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 can lead to both employers and employees asking whether the adjustments that have been made are adequate. An effort to reduce this uncertainty seems to have been made by the CHRC. In one of the reports, it created a list of reasonable accommodations that have been mentioned in jurisprudence, secondary literature and consultations, as well as recommendations based on their legal research.

Though the CHRC's list and recommendations may be helpful, employers and employees can still be left questioning whether sufficient accommodation has been made in their specific circumstances. The 2006 Alberta case of *Brewer v. Fraser Milner Casgrain LLP* addressed this question.

## Secretary sensitive to chemicals in office

Janice Brewer was a legal secretary in the Alberta office for the national law firm Fraser Milner Casgrain (FMC) for 20 years. In 1998, Brewer's family doctor suspected she had sensitivities to several chemicals. FMC made many accommodations for her at work, including asking staff to refrain from using perfumes and fragrances, permitting her to use the washroom in the office sick room 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. He 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 she left work on Nov. 14, 2001.

On Dec. 14, 2001, FMC notified Brewer her work assignment had been changed at the office as a further attempt to accommodate her. This accommodation, 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 to the Alberta Human Rights and Citizenship Commission on Oct. 17, 2002, claiming FMC had discriminated against her on the ground of a physical disability but after an inves-

tigation it was dismissed. These decisions lead Brewer to take her case to the Alberta Court of Appeal.

The Court of Appeal found Brewer had a legitimate complaint. The court said though FMC's efforts prior to 2001 were significant, it did not solve her situation. By agreeing to have a specialist make recommendations as to how they may 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.

Bearing in mind the possibility the appeal may be approved, the duty an employer has to reasonably accommodate is to be seen as an ongoing one. Simply providing some reasonable accommodations that do not satisfy the employee's disability will not be enough. The employer must reasonably accommodate, not to perfection, but to the extent that 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 that have been made are falling short of their intention or that other accommodations are more reasonable in aiding the employee. See *Brewer v. Fraser Milner Casgrain LLP*, 2006 CarswellAlta 666 (Alta. Q.B.).

## ACCOMMODATION



ABOUT THE AUTHOR

**Ronald S. Minken**

Ronald S. Minken is a senior lawyer at Minken & Associates P.C., an employment law boutique in Markham, Ont. He can be reached at (905) 477-7011 or [www.EmploymentLawIssues.ca](http://www.EmploymentLawIssues.ca). Minken gratefully acknowledges Kyle Burgis and Sara Kauder for their assistance.