Meeting The Duty To Accommodate – A Success Story

The duty to accommodate is a difficult process because it is uncertain. Whether an employer has met its duty to accommodate under human rights law requires an individualized assessment on a case-by-case basis. In addition, the standard of "undue hardship" is a high and moving target, and will depend on the employer's size, nature of operations, resources and other relevant factors. A recent decision, however, may have moved the target closer to "reasonableness" than "the point of undue hardship".

In *Wilcox v. University of British Columbia*, the British Columbia Human Rights Tribunal dismissed a human rights complaint from a former research assistant who had developed a severe mouse allergy and was unable to perform the duties of her position. Dr. Wilcox was employed as a research assistant at the University's Rederivation Facility and Animal Care Services. A core part of her duties (about 50%-70%) was to perform daily work with live mice, including maintaining colonies, administering hormone treatments, and testing blood samples. Unfortunately, Dr. Wilcox developed a severe allergy to mice and could no longer work with or around mice. The University was initially able to accommodate her in a temporary assignment which did involve any work with mice; but when that work, and subsequently her paid sick leave, ran out, she was placed on an unpaid leave of absence.

While Dr. Wilcox was on leave, the University searched for alternate vacant positions for which she was qualified and which did not involve working with or close to mice, including positions which would have been considered a promotion. The University only identified two positions during Dr. Wilcox's leave that met these criteria, and provided these job postings to her. However, Dr. Wilcox did not apply for either one because she felt she was not qualified.

The University eventually decided to close the Rederivation Facility for financial reasons. It provided affected employees with notice of termination

and, since Dr. Wilcox was on a leave of absence, she was provided with pay in lieu of notice of termination.

Dr. Wilcox alleged that she had been discriminated against on the basis of a disability when she was placed on an unpaid leave of absence and also alleged that the University did not meet its duty to accommodate because it conducted an unduly restrictive search for alternate positions. Dr. Wilcox also took the position that it was discriminatory for the University to provide her with pay in lieu of notice rather than working notice, as other employees were provided.

The Tribunal disagreed with Dr. WIlcox and dismissed the complaint. It found that Dr. Wilcox had no reasonable prospect of success in showing that she had suffered discrimination by being placed on an unpaid leave of absence after the end of her temporary accommodation. Since she was unable to work (and not otherwise eligible for any other paid leave of absence), continuing her employment on an unpaid leave of absence was not adverse treatment. The Tribunal also found that the University conducted a reasonable search for accommodations and was not obliged to displace another employee to create a vacancy for Dr. Wilcox or to create a tailor-made job for her. Simply put, an employer does not breach the *Human Rights Code* because it seeks to accommodate an employee with an available job. Further, the Tribunal found there was no reasonable prospect of Dr. Wilcox showing that the termination of her employment was related to her disability. The Rederivation Facility closed for financial reasons and all employees were affected. There was no adverse treatment in providing Dr. Wilcox with pay in lieu of notice instead of working notice, since she was unable to work at the facility at the time of the closure.

The most valuable part of the Tribunal's decision, for employers, is the emphasis on "reasonableness" over "undue hardship". In paragraph 83, the Tribunal went to some length to explain that the duty to accommodate does not extend, technically, "to the point of undue hardship". Rather, the Supreme Court of Canada in *Ont. Human Rights Comm. v. Simpsons-Sears,* [1985] 2 S.C.R. 536 ("*O'Malley*") actually expressed the duty as a requirement for reasonableness "short of undue hardship". In other words, the employer is obliged to accommodate within a range of reasonableness, which may well involve a measure of hardship, but not "undue" hardship. As stated by the Tribunal, "[t]o state the duty to accommodate extends 'to the point of undue hardship' implies a precision of measurement incongruous with the reasonableness standard expressed in *O'Malley*."

This decision should give some hope to employers who make good faith and comprehensive attempts to accommodate employees with disabilities. While each case must be assessed individually and taking into account all relevant factors, an employer may meet its duty to accommodate if, after a comprehensive search, there are simply no available positions for which an employee is qualified and which fit with his or her medical limitations.

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