

What Is Needed For You To Have A "Disability" That Is Protected By Human Rights Legislation?



A decision rendered a few months ago by the Alberta Court of Queen's Bench has provided some helpful guidance on a question that frequently arises from our employer clients. Does a relatively minor ailment or series of medical problems amount to a "physical disability" that deserves human rights protection?

In quashing an Alberta Human Rights Commission Tribunal decision, the judge's reasons contain a scathing attack on the reasoning of the tribunal. In doing so, amongst other conclusions, it makes the following points that would apply to future tribunals and also to future adjudicators, like arbitrators, who are sometimes called upon to decide the same issue (in fact the human rights adjudicator in this case is also a labour arbitrator):

1. If you are going to try to prove a disability then you ought to call a doctor to testify about your condition. In this case, the Commission (which represented the complainant) did not and therefore failed to meet its onus of proof to establish that there was a "disability" and also failed to provide the employer with a reasonable opportunity to cross-examine the doctor on his reports.
2. Contrary to the conclusion of the adjudicator, the judge was of the view that the series of unrelated episodes of temporary but disabling injuries did not constitute a "disability". The reasoning of the judge was as follows:

"to meet the 'disability threshold', a complainant's condition must entail 'a certain measure of severity, permanence, and persistence'. A person must have a substantial limiting and ongoing physical condition to invoke the statutory protection against discrimination. In contrast, a 'disparate, unrelated and temporary episode of injury' is not a disability under the Act..."

"A transient illness which may result in an employee accessing available sick leave will not ordinarily constitute a disability, though it may be possible that use of sick leave demonstrates a frailty of health which may result in a disability. ..."

There are individuals in our society whose disadvantages entitle them to societal protection through human rights legislation. It is encouraging to see a decision which refuses to permit dilution of the protection by protecting those who do not fit into a disadvantaged category but have a problem attending work with regularity. Regular attendance is, after all, a reasonable expectation.

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