ENDING DISCRIMINATION

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How to Raise Awareness of Your Hidden Bias

Both conscious and unconscious factors impact the screening and hiring process. Hiring is a subjective process even if, by using screening tools, we strive to make it objective. Hidden biases remain in the screening process. If we become more aware of these biases, we are more capable of navigating the selection process fairly.

When PhD. candidate Rand Ghayad sent out 4800 fictitious resumes to 600 job openings he discovered an interesting pattern. By altering one piece of information on these resumes, he was able to reduce to almost nothing the odds that certain candidates were selected for an interview.

What factors do you believe had this impact? Gender? Age? Cultural background? While these do have an impact their impact was not as significant as one other factor.

The Long Term Unemployed Face Significant Barriers to Re-Employment

In Ghayad’s research, factors included level of experience, amount of job switching and time unemployed. All factors had an impact on the selection process but none as significant as that of being unemployed.

What do you think about the person looking for work for 12 or 24 months? Are there images or words that come to mind when you see a resume with a current gap of more than 6 months?

6 Months Out of Work and You Lose

It turns out that in Ghayad’s study that it only requires being out of work for 6 months to lose out on any real chance of being called into an interview. At 6 months of unemployment the odds of being interviewed plunged to 2%. In fact, candidates with less experience who had switched jobs frequently were more likely to be called in for an interview compared to the long-term unemployed.

First Impression Management

It is important to consider what you are thinking as you review a candidate’s application because your first thoughts have a significant impact on what actions you will take. Our ‘fast thinking’ (referred to by many psychologists as system 1 thinking) is highly influential on our daily decision making process. Unless we become consciously aware of these thoughts they will influence us in ways that may not always lead us to the best decisions and actions.

Unemployment Impacts the Community

The cost of being unable to return to the workforce when you desire is not only a cost to the individual and the family, it is a cost to the larger community. The cost is practical in terms of lost productivity, including the fact that some jobs go unfilled even when there are qualified candidates to fill them. The cost is also tangible in terms of the increased costs to the health care system as individuals who are out of work are more prone to both physical and mental health concerns.
including stress and depression. And the cost is also intangible, the cost of losing people who want to contribute but for lack of being provided with an opportunity.

The fact is that the vast majority of individuals out of work for over 6 months are not really different from those who are currently working or recently out of work. There may be many legitimate reasons a person has not been able to return to the workforce that do not reflect on the candidate’s ability to do the job.

In today’s economy 6 months of unemployment can easily become 12 and 24 because once someone has reached the 6 months mark finding that next job can become very difficult. Here are a few simple actions you could take to better enable the long-term unemployed to return to work in the near future.

**WHAT CAN YOU DO TO HELP THE LONG-TERM UNEMPLOYED?**

1. **Invite them into an interview.** Just being given a legitimate shot at an interview can boost confidence and esteem, but only if you are genuinely open to considering their candidacy.

2. **Respond to a phone call or request for information from someone who has been out of work for 6 months or more.** If you know someone in that situation reach out to them; offer them 15-20 minutes and 2 contact names and offer to make introductions.

3. **Create short-term contract jobs or contingent projects (3-6 months in length).** An experienced candidate might be able to quickly walk into a role and hit the ground running.

4. **Overlook gaps** and be open to those who have been self-employed or working at a staffing or temporary jobs agency.

5. **Partner with a local non-profit seeking placements for unemployed job seekers;** offer 6-8 week bridging jobs to help someone re-build their resume.

6. **Be open to an overqualified candidate.** This is not 2006, an overqualified, out of work job seeker may just turn out to be the combination of experience and skills you need.

Research on the brains ability to make decisions tells us that by becoming more aware of what is influencing our decision-making process we can enhance our thinking and decision-making. By ignoring the long-term unemployed you might miss out on finding candidates who could become loyal and hard working members of your team.
Here’s a quiz to test your understanding of employment discrimination law.

**SITUATION**

*Company A*, a cab company, fires a driver after he loses his vision in an accident.

*Company B*, a company that performs drug testing, advertises a position that involves collecting urine samples from male prison inmates as “male only.”

*Company C*, a warehousing company, refuses to consider hiring a female for a job that requires manual lifting of heavy crates.

*Company D*, a telecommunications company, refuses to hire an immigrant who speaks English with a heavy accent as a customer sales receptionist.

Assume that in all 4 cases, it would be impossible to accommodate the person by hiring them for or reassigning them to another position.

**WHICH COMPANY COMMITTED EMPLOYMENT DISCRIMINATION?**

*Company C* is the one most likely to be found liable for discrimination.

**EXPLANATION**

Human Rights laws make it illegal to deny employment to a person because of certain personal characteristics such as race, religion, national origin, gender or disability. All 4 of the companies above did precisely that. The reason they wouldn’t all be liable is that it’s not discrimination to exclude a person from employment on the basis of a protected characteristic if the decision is based on what’s called a “bona fide occupational requirement” (BFOR).

The scenarios in this quiz, which are based on actual cases, illustrate what employers must do to use the BFOR rule to justify an otherwise discriminatory employment decision. Essentially, the employer must show that denying employment to the person
on the basis of the protected characteristic served an important, non-discriminatory purpose and that there was no other reasonable way to accomplish the purpose. Company C would have the weakest BFOR case. That’s because some women are physically capable of lifting heavy objects. Thus, refusing to even consider a woman for a warehouse job is based on gender-related stereotypes rather than an applicant’s actual ability.

**WHY WRONG ANSWERS ARE WRONG**

**Company A** wouldn’t be liable because even though vision impairment is a disability covered by human rights laws, drivers must be able to see to do their jobs. So, assuming he couldn’t be reassigned to another position for which sight isn’t essential, the decision to fire the driver would be a BFOR.

**Company B** wouldn’t be liable because having medical workers of the same sex as the patient collect urine sample and conduct other intimate operations is deemed essential to patient dignity. Stated simply, forcing employers to hire females to collect urine samples from male patients would be unreasonable and impose undue hardship on the employer.

**Company D** wouldn’t be liable if it could show that a person with a heavy accent couldn’t communicate with customers and that the ability to communicate clearly with customers is essential to the service representative position.

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**DISCRIMINATION FOR FAITH-BASED ORGANIZATION TO FIRE GAY EMPLOYEE**

The Human Rights Commission found a faith-based organization liable for discrimination by firing an employee after discovering she was gay. The Commission was wrong to deny the right of faith-based organizations who accept public money to have their own codes of conduct and hire like-minded individuals if they subjectively believe it necessary to maintain their mission. However, their belief must be not only sincere but reasonable, said the court. The organization in this case never considered whether the employee’s homosexuality made it impossible for her to do the job. So the firing was wrongful and discriminatory and not a BFOR [*Ontario Human Rights Commission v. Christian Horizons*, 2010 ONSC 2105, May 14, 2010].
Mandatory retirement is supposed to be a thing of the past. Only it’s not—at least not entirely. True, forcing employees to retire at 65 or any other pre-determined age is a form of age discrimination banned by human rights laws. But two significant exceptions remain that allow employers to treat older employees differently because of age: the bona fide occupational requirement (BFOR) and the bona fide pension plan (BFPP) rule.

The BFOR leaves the door open to otherwise discriminatory policies tied to vital qualifications of the job, e.g., refusing to hire applicants as cab drivers because they’re blind. The BFPP gives pension plans leeway to consider members’ ages in deciding how to allocate benefits. Theoretically, employers can use either defence to justify mandatory retirement policies. But in practice, it’s much harder to defend mandatory retirement as a BFOR. Here are two cases that illustrate why.

**MANDATORY RETIREMENT IS NOT BFOR**

**FACTS:** Air Canada’s collective agreement with its pilots provides for mandatory
retirement of pilots at age 60. Two pilots forced to hang up their wings claim that the policy is age discrimination and violates the airline’s duty to make reasonable accommodations. Air Canada says that the policy is a BFOR.

**DECISION:** The Canadian Human Rights Tribunal rules that the policy is discriminatory.

**EXPLANATION:** International Civil Aviation Organization (ICAO) standards pose restrictions on pilots age 60 and older, e.g., they can’t fly certain kinds of aircraft or need to be accompanied by at least one younger co-pilot. Air Canada claimed that allowing pilots to keep flying after they turn 60 would be an undue hardship because it would force the airline to incur major expenses. The airline offered up data showing how many pilots would be ICAO-restricted and need accommodations if the mandatory retirement policy was lifted. But the Tribunal said the data was full of holes and inconclusive—with regard to both the number of pilots affected and costs involved.

**RESULT:** Air Canada didn’t meet its burden of proving that the mandatory retirement policy was a BFOR and had to be scrubbed.

**Vilven v. Air Canada,** (2009), CHRT 24 (CanLII), Aug. 28, 2009

**MANDATORY RETIREMENT IS BFOR**

**FACTS:** A New Brunswick miner is forced to retire at age 65 under the terms of his company’s pension plan. The miner claims the policy is illegal age discrimination and demands to be reinstated. The company claims the policy is justified under the section of the NB human rights law that says terminations based on age are okay if they’re part “of the terms or conditions of a bona fide retirement or pension plan.”

**DECISION:** The Supreme Court of Canada rules that the policy is not discriminatory.

**EXPLANATION:** In Air Canada, the focus was whether the policy itself was a BFOR. The airline’s purpose was legitimate, said the Tribunal. But the policy wasn’t a BFOR because it was overly restrictive, i.e., not “reasonably related” to the accomplishment of that purpose. In this case, by contrast, the Court didn’t even look at the terms of the policy. All it wanted to know was whether the pension plan that adopted the policy was bona fide and legitimate and not just a subterfuge to get around age discrimination restrictions. After all, by their very nature, pension plans have to consider members’ ages in making administrative and benefits decisions. And since this was a genuine plan, the Court concluded that the mandatory retirement policy was justified under the BFPP rule.


**CONCLUSION**

So you see, mandatory retirement is not necessarily illegal after all. In fact, it’s still alive and well, especially when the policy is adopted by a bona fide pension plan in order to carry out a legitimate administrative function.
In a split decision, the Supreme Court of Canada rules that K.S. Bhinder was not discriminated against when he was required by his employer, CN Rail, to wear a hard hat. K.S. Bhinder is a member of the Sikh religion which requires him to wear a turban and no other head covering. K.S. Bhinder’s employment was terminated when he refused to wear a hard hat. The Federal Court of Appeal ruled that the requirement of wearing a hard hat was a bona fide occupational requirement and did not amount to discrimination of the basis of religion. This is an appeal from that decision by K.S. Bhinder and the Canadian Human Rights Commission.

The majority of the Court finds that the hard hat requirement is a bona fide occupational requirement, and the special circumstances of an individual should not be taken into account once it is established that an employment rule is a bona fide occupational requirement. There is no duty to accommodate where there is a bona fide occupational requirement.

The Court repeats its finding in Ontario
(Human Rights Comm.) and O’Malley v. Simpsons-Sears Ltd. (1985), 7 C.H.R.R. D/3102 (S.C.C.) that it is not necessary to show an intention to discriminate in order for there to be a violation of human rights legislation. Although the hard hat rule was imposed in good faith and not in order to discriminate against members of the Sikh religion, the rule nonetheless has a discriminatory effect on members of the Sikh religion. The hard hat rule is saved, however, because it is a bona fide occupational requirement.

Dickson C.J. and Lamer J., dissenting, find that s. 14(a) of the Canadian Human Rights Act, the bona fide occupational requirement provision, was not intended to obliterate the duty to accommodate. A requirement which has the effect of discriminating against an individual is not bona fide within the meaning of s. 14(a) unless not imposing it would create an undue hardship on an employer.

In addition, Dickson and Lamer JJ. find that federal legislation is inoperative to the extent that it conflicts with the Canadian Human Rights Act. The fact that the wearing of safety helmets is provided for in the Canada Labour Code does not mean that the Labour Code provisions create an exception to the Canadian Human Rights Act. On the contrary, the wearing of hard hats by Sikhs, because of its discriminatory effect, is governed by the Canadian Human Rights Act.

**EMPLOYEE SUING FOR WRONGFUL DISMISSAL CAN’T FILE SEPARATE DISCRIMINATION CASE, TOO**

The Ontario Human Rights Tribunal struck another blow against employee “forum shopping,” i.e., filing parallel lawsuits against employers essentially over the same basic beef in separate tribunals. In this case, the Tribunal wouldn’t let an employee bring a disability and sex discrimination claim related to her firing after she had already filed a wrongful dismissal lawsuit over the matter. Since the case was already in court, the Tribunal had no “jurisdiction” or legal authority, to adjudicate it [Jarrett v. Vance, 2012 HRTO 24, Jan. 5, 2012].
The Supreme Court of Canada rules that Central Alberta Dairy Pool discriminated against Jim Christie by failing to accommodate his need to be absent from work on April 4, 1983 (Easter Monday) in order to respect his faith in the tenets of the World Wide Church of God.

Mr. Christie was an employee of the Dairy Pool who became a prospective member of the World Wide Church of God in 1983. The Church recognizes a Saturday sabbath and ten other holy days throughout the year. Members of the Church are expected not to work on these days. Mr. Christie asked his employer for permission to take unpaid leave on Tuesday, March 29 and on Monday, April 4, 1983, because both of these days were holy days in his Church. He was granted leave for the Tuesday but denied leave for the Monday because Mondays were especially busy days at the Dairy Pool. Milk that arrives at the Dairy Pool on weekends must be processed promptly on Mondays to prevent spoilage. When Jim Christie was absent on Monday, April 4, without permission, his employment was terminated.

The Board of Inquiry ruled that Christie was discriminated against because his religious faith had not been accommodated. However, this decision was overturned by the Alberta Court of Queen’s Bench and the Alberta Court of Appeal. These courts, relying on the Supreme Court of Canada’s decision in Canadian National Railway Co. v. Canada (Human Rights Comm.) and Bhinder, decided that regular attendance at work was a bona fide occupational requirement and, consequently, that the employer had no duty to accommodate Mr. Christie.

In the majority decision of the Court, written by Wilson J., the Court repudiates its decision in Bhinder in part. It finds that the defence of bona fide occupational requirement must be approached differently depending on
whether the discrimination occurs directly or through adverse effect.

In the case of direct discrimination, the majority of the Court upholds Bhinder. It finds that where an employment rule discriminates directly, as, for example, in the case of firefighters who are required to retire at age 60, and where the rule is found to be a bona fide occupational requirement, there is no duty on the employer to accommodate. However, where an employment rule that is a bona fide requirement has an adverse effect on an individual because of his religion or some other ground, then the employer has a duty to accommodate that individual to the point of undue hardship.

The majority finds that Christie was discriminated against because of his religion and that the employer failed to accommodate him.

In a minority judgment authored by Sopinka J., three members of the Court agree with this disposition but provide different reasons for their finding.

The minority of the Court reasons that the duty to accommodate must be read into the defence of bona fide occupational requirement whether the bona fide occupational requirement discriminates directly or through adverse effect. To use the bona fide occupational requirement defence successfully, an employer must show that there was no reasonable alternative to the impugned rule which would not cause undue hardship to the employer. If an employer fails to provide an explanation as to why individual accommodation cannot be accomplished without undue hardship, this will ordinarily result in a finding that the duty to accommodate has not been discharged, and therefore that the bona fide occupational requirement has not been established.

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NOT DISCRIMINATION TO AXE EMPLOYEE ON DISABILITY LEAVE

A Bell Canada employee fired while on disability leave filed a discrimination complaint against her employer. The human rights commission dismissed the case and the appeals court upheld the decision. If an employee is fired while on disability leave, the presumption is that she was fired because of her disability. But the employer can refute this presumption, the court added. In this case, the employer showed that the employee initiated the termination by approaching the employer about a severance package. From there, the parties had reached a mutually agreeable settlement, the court ruled.

RELIGION

EMPLOYEES’ RELIGIOUS NEEDS: ACCOMMODATE THEM OR FACE COSTLY CONSEQUENCES

In many cases, the BC Human Rights Tribunal has awarded individual employees thousands of dollars in lost pay and damages when an employer did not accommodate their religious (not spiritual) needs. **Know your legal obligations.**

Employers might be surprised to learn that companies must accommodate their employees' religious needs to the point of undue hardship or face costly consequences. In most cases, accommodation might be as simple as substituting another day off, with pay, to allow the employee to observe his or her religious holiday.

Meanwhile, how does the law view an employee’s need for spiritual practices, not deemed religious, such as daily meditation or wiccan prayers or blessings? The law applies only to those who hold a sincere belief that falls within the broad definition of religion.

For example, a person who believes she should meditate every day is not the same as a person who needs every 29th day off to observe the new moon. The latter is a valid religious need, as shown by a case included later in this article. Author Russell Zinn says in The Law of Human Rights in Canada: Practice and Procedure (Aurora, Ont. 2004): "[S]o long as a complainant’s beliefs are sincerely held and fall within the rubric of ‘religion’ broadly defined, the proceedings will move on to the next stage of inquiry. The ‘sincerely held’ component ensures that complaints are not made for ulterior reasons, such as a desire to procure more
favourable working conditions.”

**GROUND FOR JOB DISCRIMINATION FOUND IN CODE**

An employer’s obligation to accommodate employees’ religious needs is founded in section 13(1) of the B.C. Human Rights Code (“Code”), which reads as follows:

13. (1) A person must not
(a) refuse to employ or refuse to continue to employ a person, or
(b) discriminate against a person regarding employment or any term or condition of employment because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

Employers should recognize that the Code requires a complainant, such as an employee or former employee, to establish that a prohibited ground, such as religion, was only a single factor in the discrimination; not the sole or even the most significant factor. Further, the tribunal has the power to award significant remedies that include, but are not limited to, the following:

- reinstatement of the complainant;
- lost wages, back pay, and interest;
- damages for injury to dignity (such damages have reached as high as about $10,000); and
- ordering training and monitoring of the workforce/workplace, supervised by the tribunal for a certain period of time.

**IMPORTANCE OF RELIGIOUS ACCOMMODATION**

In Derksen v. Myert Corps Inc. (No. 2), 2004

**DISCRIMINATION CLAIM ALLOWED WHEN EMPLOYER ALLEGEDLY CONDITIONED ACCOMMODATION ON LOSS OF BENEFITS**

A long term care worker claimed discrimination by her employer on the basis of disability, age, race and colour. She alleged that the employer made demeaning comments about her injury and refused to accommodate her with modified duties. She also claimed she was treated differently than other employees because of her race and was told she should retire. The employer claimed the worker declined a modified work assignment. She alleged the employer offered modified work on the condition that she give up seniority and benefits. As to age and colour and race, she stated her perceptions that she was discriminated, but offered no details or facts evidencing discriminatory acts by the employer. So, the tribunal dismissed the discrimination claims relating to age, race and colour, but allowed the more detailed and specific claims regarding disability discrimination and conditional accommodations to proceed [Abrego v. St. Joseph’s Health Care London, 2013 HRTO 2116 (CanLII), Dec. 24, 2013].
BCHRT 60, the BC Human Rights Tribunal ruled that the employer discriminated against Myert for failing to allow him to take a day off work to observe the new moon. As a member of the Christian Churches of God, he observes five holy days each year as well as lunar new moons every 29 days. Shortly after he was hired, Myert took one day off work to observe a religious holiday. His employer then wrote a memo advising him that it would not permit him to take any further days off for religious reasons. The employer dismissed Myert during his probation period after he took another day off work, unauthorized by his employer, for religious observance.

The tribunal held that the employer’s memo was *prima facie* (based on first impression) discriminatory and breached the BC Human Rights Code. As a result, the employer then bore the reverse onus to prove that Myert’s dismissal was not tainted by religious discrimination. The company could not prove that religion did not play a role in Myert’s dismissal. However, it did tender evidence to prove that it would have dismissed Myert by the end of his probationary period due to poor performance, which reduced the damages awarded to Myert. The tribunal awarded Myert lost wages of about $6,000 for the rest of his probationary period, $770 in lost wages for attending the hearing, and $2,000 in damages for injury to dignity.

In another case, Dairyland Foods and its union discriminated against Daniel Drager by dismissing him from employment for failing to work on his sabbath (*Drager v. I.A.M. and A.W.*, (1993), B.C.C.H.R.D. No. 42). As a Seventh Day Adventist, he could not work from sundown Friday to sundown Saturday. The council found that the union had discriminated against him by agreeing to shift schedules and rules in the collective agreement that were discriminatory to Drager. It ordered Dairyland to pay Drager one year’s worth of lost wages ($48,000) and $2,000 for distress.

### RELIGIOUS BELIEFS AFFECT ASSIGNMENT OF DUTIES

Although an employer can fairly easily accommodate days off for religious observance, it proves more difficult to consider an employee’s religious beliefs when assigning duties. The latter was at issue in the case *Moore v. B.C. (Ministry of Social Services)* (1992), 17 C.H.R.R. D/426 (B.C.C.H.R.). In this case, Moore, a Roman Catholic probationary employee, refused to authorize medical coverage for a Ministry client who needed an abortion because of Moore’s religious beliefs. The Human Rights Council determined that the Ministry failed to prove that accommodation was impossible by either exempting her from dealing with such situations or by assigning other files to her. As a result, the council awarded her $7,700 for lost wages and $1,000 in damages for humiliation.

### DISCRIMINATION AGAINST TRANSGENDER

Proposed amendments to the Human Rights Code will expressly include transgender people within its protection from discrimination, adding gender identity as a prohibited ground of discrimination. This revision confirms that discrimination against transgender people has been and continues to be illegal. Other changes increase maximum fines.
Readers might recall a Victoria, BC case that drew media attention in early 2001: Raymond Jones v. CHE Pharmacy, 2001 BCHRT 1. In this case, the tribunal held that the employer had discriminated against Jones because of his religion. As a Jehovah’s witness, Jones does not celebrate Christmas. The previous owner of the pharmacy had always accommodated Jones’ religious beliefs by never requiring him to help with Christmas decorations. However, once store ownership changed in 1988, the new store owner gave Jones an ultimatum: either help decorate the store for Christmas by setting out poinsettias or be fired. Jones cleared out his locker and left.

The tribunal found that the new owner, clearly aware of Jones’ religious beliefs, failed to attempt to accommodate them. The ultimatum constituted a constructive dismissal. The tribunal ordered the employer to pay Jones about $21,000 for lost wages, $4,700 for lost vacation pay, $1,100 for expenses and $3,500 for injury to dignity and self-respect.

RELIGIOUS ACCOMMODATION AND SAFETY CONCERNS

The tribunal, however, does not decide in favour of the complainant in all religious discrimination complaints, especially when safety is an overriding concern. In Toor v. Finlay Forest Industries (1984), 6 C.H.R.R. D/2873 (B.C. Bd. Inquiry), Toor, a Sikh employee, complained that his employer discriminated against him on the basis of religion when it required him to wear a hard hat, in accordance with Workers’ Compensation Board (WCB) requirements. (Toor’s religion requires him to wear a turban.) The Board of Inquiry found that the requirement to wear a hard hat is a legitimate safety concern and no accommodation was possible, thus the complaint was dismissed.

In a more recent case of Pannu v. Skeena Cellulose Inc. (2000), BCHRT 56, an employee claimed that the WCB regulation and company rule requiring that he and certain other pulp mill employees be clean-shaven to wear a breathing apparatus discriminated against his religion. (As a Sikh, Pannu wears a beard as a tenet of his faith.)

The tribunal held that accommodating Pannu would cause undue hardship to the employer. For example, other less experienced employees would otherwise have to carry out emergency procedures, increasing the magnitude of risk to them and the employer. Accordingly, the tribunal dismissed the complaint.

EMPLOYERS BEWARE

Do not make enquiries about an employee’s religious beliefs during a job interview (the Code applies not only during employment, but also during employment interviews, job postings, and advertisements).

Make all reasonable efforts short of undue hardship to accommodate an employee’s religious request/limitation.

Ensure that all employees dealing with scheduling and assignment of job duties realize the aforementioned obligations of the B.C. Human Rights Code.

Additional information provided by Ryan Anderson, an employment lawyer with Mathews Dinsdale & Clark LLP (December 2014). The information provided in this article is necessarily of a general nature and must not be regarded as legal advice. For more information about Mathews Dinsdale & Clark LLP, please visit mathewsdinsdale.com. Original content was reprinted with permission from Jennifer A. Scott of Urban Law.
A female employee claims she was discriminated against because she was pregnant. The employer’s response: We didn’t even know you were pregnant. The denial carries credibility when the alleged discrimination takes place in the early months of a pregnancy before the employee’s condition becomes physically apparent. And that raises a question. Must the employee prove the employer knew she was pregnant? Or does the employer have to prove that it didn’t know she was pregnant? Who bears the burden of proof on this crucial issue can determine whether the employee wins or loses her sex discrimination case. Here’s how an Alberta court ruled on this important question.

**WHAT HAPPENED**

A dental assistant fired 3 months into her pregnancy claimed that she was the victim of gender discrimination. The employer said the termination was for poor performance and denied knowing she was pregnant. *I didn’t tell the doctor or office manager I was pregnant*, the assistant admitted. *But it was totally obvious*, she insisted. The Alberta
human rights tribunal threw out the case because the assistant didn’t prove the employer knew she was pregnant. She appealed, claiming it was up to the employer to prove it didn’t know of her pregnancy.

WHAT THE COURT DECIDED

The Alberta Court of Queen’s Bench rejected the appeal.

HOW THE COURT JUSTIFIED ITS DECISION

In a discrimination case, employees must make out what’s called a prima facie case. A prima facie case isn’t enough to prove the employer committed discrimination, but it is enough to get the case to a jury (or court or arbitrator) to decide on the merits. Stated differently, if the employee can’t make out a prima facie case, the case will be dismissed without a trial.

Knowledge of pregnancy is part of the prima facie case the employee must make out in a pregnancy discrimination case, the court ruled. The employee can do this by showing the employee actually knew or reasonably should have known of the pregnancy. The assistant failed to do this. The evidence showed she was fired for poor sanitation practices—a no-no for any dental assistant—and unexcused absences. So the human rights tribunal was right to rule that the assistant didn’t make out a prima facie case and dismiss the complaint, the court concluded.


CONCLUSION

While it might sound like so much legal mumbo jumbo, this stuff about prima facie has a direct practical impact on HR. The harder it is for employees to make out a prima facie case, the less vulnerable you’ll be to discrimination complaints. Knocking out a complaint at the prima facie stage can result in a relatively swift and inexpensive victory. But when and if the prima facie case is made out, you face a dilemma: Pay the employee to settle or risk a trial and the prospect of even greater damages down the road.

Making the Burgess case even more significant—assuming, of course, that it stands up on appeal—is the difficulty of proving what an employer knew or didn’t know about whether an employee was pregnant. Believe you me, you’re way better off when the employee is the one that bears that burden.

NOT DISCRIMINATION TO DENY ADOPTIVE MOTHER MATERNITY LEAVE

The mother of an adopted child was granted parental but denied maternity benefits. She appealed the denial, claiming that it discriminated against adoptive mothers. The court ruled that the mother wasn’t entitled to maternity benefits. Biological mothers must go through pregnancy and childbirth; adoptive mothers don’t. So adoptive mothers shouldn’t get the same time off that biological mothers do, the court reasoned. In addition, if adoptive mothers were allowed maternity benefits, adoptive and biological fathers would claim them, too [Plant v. Canada (Minister of National Revenue), (2007), T.C.J. No. 291 (Aug. 3, 2007)].