

Environmental and Electromagnetic Sensitivities: The Duty to Accommodate Recent Case Law Highlights

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The Basics

- Approximately 3% of Canadians have been diagnosed with environmental sensitivities.
- Environmental sensitivities may develop gradually after chronic exposure, or suddenly after a major exposure to an environmental disaster or a chemical spill.
- Examples of sensitivities include: allergies or sensitivities to perfume, chemicals, dust, latex, etc.

(Margaret E. Sears (M.Eng., Ph.D.), The Medical Perspective of Environmental Sensitivities, Canadian Human Rights Commission, May 2007.)

The Duty to Accommodate

- People who experience environmental and electromagnetic sensitivities *may* be considered to be suffering from a disability that requires accommodation
- Duty to accommodate to the point of “undue hardship”
 - High threshold
- Accommodation is a two-way street – employee must also co-operate in the accommodation process, and provide appropriate information in support of request
- Employee is entitled to receive “reasonable accommodation” – not perfect accommodation

Undetectable Scents: *Kovios v Inteleservices Canada Inc.*

- Ms. Kovios had a sensitivity to normally undetectable scents
- Manager attempted to accommodate during training: change of environment for training, move to room with increased ventilation, alternate duties
- Ms. Kovios quit after three days of training and filed HRTO complaint on ground of disability
- HRTO said Ms. Kovios should have made it clear she could not be exposed to scents that were undetectable, all she asked for was enforcement of the fragrance policy

Anaphylactic reactions at work: *Johnston v British Columbia (Ministry of Human Resources)*

- Medical note stating Ms. Johnston would be unable to attend at the office if certain aerosol scents were used due to severe asthma attacks
- Experienced multiple severe anaphylactic reactions at work
- Informed Ministry she was diagnosed with a severe latex allergy, but refused testing due to risks
- Placed on mandatory leave pending medical investigation
- Filed BCHRT complaint claiming that the mandatory leave of absence was discriminatory

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- BCHRT found that Ms. Johnston had established a prima facie case of discrimination
- **However**, the employer acted as a prudent and responsible employer would.
- If the employer had allowed Ms. Johnston to return and she experienced a more severe reaction it may have been negligent
- Employer needed objective, specialized medical evidence to determine nature of the condition and whether/how it could be accommodated
- BCHRT dismissed the complaint

Symptoms are “real”: *Toronto District School Board v OSSTF, District 12*

- Teacher with severe sensitivity and/or reactions to various materials
- Employer conceded that grievor was disabled and had not been accommodated to the point of undue hardship, but argued that she suffered from a psychological condition known as Idiopathic Environmental Intolerance.
- The arbitrator held that whether her symptoms are caused by a physical reaction to scents and chemicals or are as a result of a psychological reaction to her fear of toxic chemicals (that may or may not be there), the resulting symptoms are “**real**”.
- Therefore, the question is not why the grievor requires accommodation, but whether accommodation is possible

Sufficient accommodation efforts: *Andruski v Coquitlam School District and another*

- Teacher developed a severe allergy to dust and scents
- Employer took the following steps to accommodate Ms. Andruski's disability as part of an Exposure Control Plan:
 - Transferred her to new school
 - Removed carpet from her classroom
 - Provided her with computer equipment (to avoid the computer lab)
 - Spoke with staff and parents about being scent-free
 - Advised VP on how to accommodate
 - Communicated with Union about resolving scent issues as they arose

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- BCHRT found that the Ms. Andruski had established a *prima facie* case of discrimination
- However, the process of reaching an accommodation or working within it once agreed cannot constitute a breach of the Act
- The Tribunal found that the steps the employer took were sufficient accommodation efforts and therefore the employee had no reasonable prospect of success with her complaint

Lab Worker Allergic to Mice: *Wilcox v University of British Columbia and others*

- Lab employee worked with mice and developed a significant allergy to them
- Provided temporary accommodation in area with no mice but required her to wear a respirator
- Temporary work was finite; employee was put on unpaid leave
- The lab then closed and the employee was laid off
- Filed complaint with BCHRT for discrimination on the basis of disability

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- The Tribunal agreed that Ms. Wilcox established a disability on the basis of medical evidence presented
- **However**, the Tribunal found that there was no evidence that Ms. Wilcox was terminated as a result of her disability; rather her lab was closing and the other employees received notice as well
- The employer had not failed to accommodate her

Light Sensitivity: *Roberts v T MacRae Family Sales and MacRae*

- Mr. Roberts injured his eye at work and began suffering sensitivity to light
- His duties required him to go outside to carry items to vehicles and collect the carts
- Mr. Roberts and was accommodated with work indoors for approximately one month
- After one month, the employer requested that Mr. Roberts resume his outside duties but Mr. Roberts claimed it hurt his eye
- Employer reduced Mr. Roberts' hours, and eventually removed him from the schedule and deemed that he quit (there was no evidence to support this)

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- The Tribunal found that the employer failed to satisfy the two procedural requirements for the duty to accommodate:
 1. they did not inquire into the extent or duration of Mr. Roberts inability to work outdoors
 2. there was no evidence of what consideration the employer gave to temporary alternative work or reorganized work to continue inside work or alternative accommodations
- The Tribunal also found that the employer did not meet its substantive burden of showing that they could not have accommodated Mr. Roberts' disability without undue hardship.

Reckless comments: *Cyr c Canada (Conseil du Trésor – ministère des Ressources humaines & du Développement des compétences)*

- Ms. Cyr had hyper sensitivity caused by the ambient air quality in her office building. She received permission to telework.
- A new manager took over and commented to Ms. Cyr that she didn't agree with her teleworking
- Manager reorganized all of the employees' duties so that Ms. Cyr could no longer telework
- Ms. Cyr filed a grievance alleging her employer failed to put in place and maintain the accommodations necessary to address her physical limitations

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- The PSLRB found that environmental hypersensitivity is a disability within the meaning of subsection 3(1) of the *Canadian Human Rights Act*
- Employer failed in its duty to accommodate
- The PSLRB found that the manager's comments to Ms. Cyr that she disagreed with the telework policy were akin to telling a sight-impaired person that they are opposed to guide dogs
- The manager's conduct was reckless and a serious violation of the duties of the employer
- The PSLRB awarded Ms. Cyr \$8,000 for pain and suffering, \$10,000 as a special award pursuant to s. 53(3) of *Canadian Human Rights Act* and \$300 for the cost of the additional medical certificate

Workplace Safety: *WCAT-2015-01075*

- A teacher alleged he suffered sensitivity to the Wi-Fi signal in his school
- He had previously been struck by lightning and claimed that ever since then he experienced adverse symptoms around various wireless devices
- His claim was for compensation for an injury he said occurred when the school's Wi-Fi signal was turned on
- The issue on appeal was whether the Wi-Fi signal was of causative significance in producing the worker's symptoms on the day in question (i.e. Did the symptoms arise "out of the employment"?)

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- Both sides submitted extensive medical evidence to the Tribunal
- In particular, the Board referred to the World Health Organization's *Electromagnetic Hypersensitivity Factsheet No. 296* which states in part:
 - *EHS (Electromagnetic hypersensitivity) has no clear diagnostic criteria and there is no scientific basis to link EHS symptoms to EMF (electromagnetic field) exposure. Further, EHS is not a medical diagnosis, nor is it clear that it represents a single medical problem.*
- The Board found that the weight of the evidence failed to establish that the worker's exposure was of causative significance and therefore did not arise "out of his employment"

Practical Considerations

- Have a scent-free policy and train employees on scent sensitivity.
- When you get an accommodation request, seek opinions from medical practitioners regarding what kinds of accommodations are appropriate.
- Keep a record of all efforts made to accommodate.
- Work with the employee to find accommodation that works for both parties.
- If an employee rejects an accommodation proposal, ask why.
- Document when an employee is uncooperative in the process.

Thank you

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