



## PROBATIONARY EMPLOYEES: IS ACCOMMODATION NECESSARY?

A recent decision of the British Columbia Human Rights Tribunal provides an excellent reminder to employers that their accommodation obligations are applicable during the probationary period of employment and are not limited to circumstances where the employer has proof of the existence of a disability.

In *Bertrend v. Golder Associates* [2009 BCHRT 274], a probationary employee who was dismissed from her employment filed a discrimination complaint against the employer, alleging that she suffered from depression and that her disability was a factor in her dismissal. The employer said that its decision to terminate the employee was made prior to any knowledge that she suffered from depression.

When completing an employment equity questionnaire at the outset of her employment, the employee had answered “no” to a question about whether she had any form of mental or physical disability or impairment. Nevertheless, at the hearing, the employee claimed to have been struggling with depression for an extended period of time.

We note that if the employee had told the employer that she suffered from depression before she was even offered a job, the employer would have been required not to discriminate against her and to accommodate her disability. For example, if a job applicant is a paraplegic, the employer will be legally obliged to accommodate that disability if the person would have been offered the job but for the disability.

The tribunal found that the employee had cried at work on two occasions, and had disclosed her depression to a non-managerial colleague. In a meeting with management prior to her termination, the employee said that she felt depressed. Following her termination, the employee received a diagnosis of major depression. The physician

concluded she had suffered from a major depression for at least four weeks prior to her termination.

The tribunal noted that a bare assertion that one is “depressed,” on its own, is generally not sufficient to establish the existence of a mental disability requiring accommodation. The tribunal found, however, that the absence of medical documentation of a diagnosis or treatment prior to termination does not preclude a finding that a mental disability requiring accommodation existed at the time of termination.

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*An employer has a duty to make appropriate inquiries regarding an employee’s condition and need for accommodation once it has reason to suspect that the employee may have a disability.*”

With regard to the employer’s defence that it did not have knowledge of the employee’s depression, the tribunal found that the employer nonetheless had sufficient information to know that she might have been disabled by depression. The company knew that she had cried at work. Further, the tribunal found that the employee’s disclosure in the final meeting with management that she felt depressed was sufficient to trigger a duty on the part of the employer to inquire about the possibility of a disability. An employer has a duty to make appropriate inquiries regarding

an employee’s condition and need for accommodation once it has reason to suspect that the employee may have a disability.

The tribunal found that the employee’s disability was a factor in the loss of her employment. It awarded her 20 weeks pay from the date of termination and payment for her expenses. The tribunal also awarded the employee an additional \$12,500 in damages for injury to her dignity, feelings, and self-respect.

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If you have any questions, please contact any member of our Labour & Employment Group.

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