IT IS NOT MY FAULT, I'M SICK

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DISCERNING CULPABLE BEHAVIOUR

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I. Context

One in five Canadians will experience mental illness during their lifetime;[1] many others will experience addiction issues. Given these statistics, it is reasonable to assume that one or many of these individuals will be employed by your company and further, that during their tenure with the company that they will experience an episode of mental illness or addiction.

Unlike many other disabilities, mental health or addiction illnesses are often non-visual disabilities which manifest themselves in a variety of ways. For employers, it is often difficult to determine whether an employee is suffering from a mental illness or addiction and further difficult to determine if their conduct, which might warrant discipline or dismissal, is a result of or influenced by those issues. To what extent, if any, is the employer required to consider how the illness impacted the conduct. Employers have been wrestling with this issue for years but there seems to be a greater prevalence of these cases more recently. Despite this apparent increase, the approach of adjudicators in labour and employment have not left employers with a clear legal framework.

One arbitrator recently noted that there is a "distinction between an employee who exhibits poor behaviors and an employee who is compelled by a disability to perform in a particular way."[2] Employers and adjudicators in the labour relations, employment and human rights realms are increasingly being asked to determine whether behavior falls into one or the other category.

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[1] Public Health Agency of Canada, *A Report on Mental Illness in Canada (Ottawa: Health Canada, 2002)*, online: PHAC www.phac-aspc.gc.ca/publicat/miic-mmac/ at 15

[2] *Canada Bread Co. v. Bakery, Confectionery, Tobacco Workers, and Grain Millers International Union, Local 469 (Dismissal Greivance)*, [2011] B.C.C.A.A.A. No. 154

This can be particularly challenging where individuals fear the stigma associated with mental illness and addiction and choose not to disclose their illnesses to their employers or co-workers, even when faced with discipline leading to termination. In one recent employment law decision before the B.C. Provincial Court an employee who had been diagnosed by a psychiatrist with 'severe major depression' not only declined to apply for sick leave contrary to medical advice, but did not inform his employer of his illness until after termination, and further asked that the court not rely on his illness when determining his wrongful dismissal claim.[3] Ultimately the Court held that the employee was wrongly dismissed, finding both that the employer lacked just cause and implicitly finding that the employees misconduct was at least partially explained by his illness.

On the flip side, some individuals will seek to use a mental illness, whether real or not, in the hopes of taking advantage of accommodation or other leniencies associated with non-culpable behaviour. In a recent Alberta decision the arbitrator held that the employee had made 'constant and frantic pleas' to be labeled an alcoholic, which he was not.[4] That employee's termination was upheld because, based on medical evidence available, the arbitrator blamed the employee's misconduct on his immature life choices rather than a disability. This case and others like it make employers skeptical and can unfairly tarnish the very real difficulty faced by those with mental illness or addiction.

What about illnesses that are difficult to diagnose. When is a drinking problem an alcohol addiction, and when does the alcohol addiction give an employee an irresistible compulsion to consume alcohol at work. Is an irresistible compulsion to drink at work a requirement to trigger accommodation or protection under the *Human Rights Code* when faced with termination for drinking and driving on the job? One recent arbitrator thought so.[5]

What about a mental illness which only affects an employee part of the time? Is an adjudicator able to determine when an employee's conduct switches from voluntary to involuntary where the employee was suffering from a mild degree of depression which over the period of several months eventually worsened in to a manic phase requiring hospitalization in a psychiatric facility?[6] In 1990 the British Columbia Court of Appeal confirmed that a Judge could make this finding. Like many current cases, that determination was largely based on expert medical advice.

Adjudicators across the labour and employment spectrum are struggling to come to terms with the very difficult balance between behaviour that is the result of or contributed to by an illness and behaviour that is not attributable to any disease. These challenging decisions make it difficult for employers, especially since the stakes can be high for an incorrect call. If the wrong call is made, the employer can be liable for significant back pay or damage awards. In an

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[3] *Arasteh v. Best Buy Canada Ltd*. 2009 BCPC 420 affirmed on appeal, 2010 BCSC 48

[4] Teck Coal (Cardinal River Operations) v. United Mine Workers of America, Local 1656 (Norman Grievance) [2010] A.G.A.A. No. 37

[5] Saputo Foods Ltd. v. Teamsters Local Union No., 464 (Arthurs Greivance) [2009] B.C.C.A.A.A. No. 133

[6] Elliot v. Parksville (City) (B.C.C.A.) [1990] B.C.J. No. 4

admittedly unusual recent Ontario Human Rights decision, the employee was awarded 10 years back pay over a duty to accommodate claim.[7]

II. Test for Arbitrators – Labour Law

An employer's approach to addiction or mental illness where there is no misconduct is fairly straight forward. When you add misconduct of the employee, the analysis becomes more challenging. These cases involve misconduct that was the reason for discipline or termination but where the misconduct may be linked to an addiction or mental illness. In an effort to address this rather complex area, in 2002 the Labour Relations Board established the Hybrid Test. [8]

In the *Fraser Lake Sawmills* case, the Labour Relations Board stated that an employee's misconduct, when combined with addiction, can often present itself in a mix of culpable and non-culpable elements, ranging in a spectrum from where the conduct is completely involuntary to where the addiction or disability plays no relationship to the misconduct. As a result, adjudicators and by extension employers are required to treat culpable and non-culpable behaviour different, both in assessing the behaviour and in assessing the remedy. In 2006 the Hybrid Test was approved by the British Columbia Court of Appeal[9].

Where the adjudicator finds that the conduct is fully culpable and not attributable to a disability, the arbitrator must determine if the employer had just cause to discipline or terminate the employee. In this case, the tradition *Wm. Scott* test[10] for just cause is applied. The *Wm. Scott* test provides that an arbitrator must consider the following factors:

1. does the conduct warrant some form of discipline;
2. if so, was the employer's decision to discipline or dismiss the employee an excessive response in all the circumstances of the case; and
3. if the arbitrator does consider the discipline or discharge excessive, what alternative measure should be substituted.

If the arbitrator finds that the misconduct was non-culpable - that it is involuntary and caused by a disability - the duty to accommodate under the *Human Rights Code* is triggered. No discipline may be warranted in these circumstances because there was no blameworthy conduct.

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[7] *Fair v. Hamilton-Wentworth District School Board*, 2012 HRTO 350

[8] *Fraser Lake Sawmills Ltd. v. Industrial Wood and Allied Workers of Canada, Local 1-424*, BCLRB No. B390/2002, leave for reconsideration of BCLRB No. B213/2002

[9] *Kemess Mines Ltd*., 2006 BCCA 58

[10] *Wm. Scott and Company*, 1977 1 Can L.R.B.R. 1

Where, however, there is an illness, and misconduct, and the illness may have contributed to the misconduct, the issue is whether and to what extent the duty to accommodate is engaged. The application of this last principle is the most contentious area of the test. Unfortunately, at this time the law is unclear.

In 2008 British Columbia Court of Appeal decision, referred to as the *Gooding* decision, the majority of the Court held that when determining whether an employee's termination was motivated by discrimination, the arbitrator must consider whether the employee has proven a *prima facie* claim for discrimination.[11] If discrimination is proven the adjudicator must then determine whether the employer has a *bona fide* occupational requirement for the decision.

Mr. Gooding suffered from an alcohol addiction and was terminated for stealing alcohol. His union grieved the termination on his behalf. In considering an appeal from the arbitration award, the majority noted that the theft attracted no greater prejudice to Mr. Gooding in comparison to other employees who commit theft and as the dismissal was not based on any stereotypical or preconceived notions of alcoholism, the termination was upheld, overturning the arbitrator's decision.

After its release, many employers felt that *Gooding* clarified this area of the law. In particular, some observers felt that the *Gooding* decision modified the *prima facie* analysis in two important ways. The first way was by removing indirect discrimination as a ground for finding discrimination. Indirect discrimination involves the argument that where an individual is terminated, and the termination is the result of misconduct, and the misconduct was a result of a disability, the termination amounts to adverse treatment based on the disability. The decision to terminate employees who steal alcohol has an indirect effect on employees with alcoholism and therefore is discriminatory. The Court of Appeal decision opens up the argument that the adjudicator should not address whether the misconduct is partially attributable to mental illness or addiction or has a disproportionate effect on employees with such illnesses. If the employee received the same treatment as other employees engaged in the same conduct there is no discrimination and no duty to accommodate.

Second, the Court of Appeal appears to focus on the intent of the decision maker rather than the impact of the decision. If the decision is impartial with regards to mental illness or addiction, it should not matter that the penalty may disproportionally impact those individuals with disabilities if the treatment is applied universally.

However, regrettably *Gooding* has not clarified this area of the law. Adjudicators have increasingly expressed their difficulty in reconciling the traditional three part test for *prima facie* discrimination with the approach of the majority in *Gooding*.[12] Further, in *Gooding*, the majority did not address the Hybrid Test, which arbitrators continue to apply.

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[11] *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees' Union,* 2008 BCCA 357

[12] See *British Columbia v. British Columbia Crown Counsel Assn. (Termination grievance*), [2012] B.C.C.A.A.A. No. 80 among others.

A recent Court of Appeal case which was not in the employment context confirmed that the traditional three factor test remains relevant and good law in British Columbia.[13] Further the decision held that *Gooding* did not alter or amend the traditional *prima facie* test which provides that employee must establish on a balance of probabilities that:

1. the employee had or was perceived to have a disability;
2. the employee received adverse treatment; and
3. the disability was a factor in the adverse treatment.

The challenge for employers is that while the *Gooding* decision is out there, the Hybrid Test continues to be applied by arbitrators. Until the Supreme Court of Canada or a five member panel of the British Columbia Court of Appeal makes a decision, this area of the law will remain uncertain.

The conservative approach for employers would be to apply the Hybrid Test and try to determine the extent to which the conduct was influenced by the illness.

III. Test for the Tribunal – Human Rights Law

In the leading Human Rights Tribunal decision, *Ryan v. Canada Safeway and Ramponi* (No. 2), the Tribunal followed the traditional three part *prima facie* test on discrimination .[14] At issue was the termination of an employee for theft of $12.00. The employee had been heavily drinking the night before. The next day at work she took the money from her employer and did not return it for several days. When confronted with the allegation, she did not immediately inform the employer of her alcohol issues. Before the Tribunal she alleged that she was an alcoholic and that it was discriminatory to terminate her for conduct that was caused or contributed to by her illness. Ultimately the complaint was because the complainant had failed to establish that there was a 'link' or 'nexus' between the employee's alcoholism and her misconduct.

The employer sought to have the complaint dismissed on a preliminary basis. In considering this application and unlike in the *Gooding* decision, the Tribunal focused on the 'link' or 'nexus' between the misconduct and the employees behaviour. In other interim application to dismiss decisions,[15] the Tribunal had found that it was unable to determine an application to dismiss relating to culpable conduct where an employee claimed discrimination on the basis of discrimination, schizophrenia and addiction respectively. In those cases the Tribunal found that a full hearing was required to determine whether the employee's disabilities influenced, in whole or in part, the employer's decision to terminate the employee for the alleged culpable behaviour.

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[13] *Armstrong v. British Columbia (Ministry of Health*), 2010 BCCA 56

[14] *Ryan v. Canada Safeway and Ramponi (No. 2),* [2008] B.C.H.R.T.D. No. 12

[15] *Morris v. Jordan Development Corp. (c.o.b. Econolodge, Fort St. John, B.C.) (No. 2)*, 2010] B.C.H.R.T.D. No. 214; *McIntosh v. Corp. of Delta*, [2010] B.C.H.R.T.D. No. 232

The difference between these decisions may be the extensive expert evidence presented in the *Ryan v. Canada Safeway and Ramponi (No. 2)* decision. In that decision, two experts in the fields of addictions, Dr. Baker and Dr. Hedges, submitted expert reports addressing the connection between the employee's misconduct and her addictions. While both experts agreed that the employee suffered from alcohol addiction, they disagreed whether and to what extent the employees misconduct, specifically, theft, delayed return of money, and failure to admit to an alcohol addiction when confronted, were the result of or influenced by the employee's addiction. With the benefit of the expert opinions, Tribunal held that the complainant had not demonstrated a sufficient nexus between her termination and disability.

IV. Test for Courts – Employment Law

In the employment context Courts continue to apply the just cause analysis and determine whether the evidence demonstrated that the employee engaged in misconduct and whether, in the circumstances, such misconduct is sufficient to justify the employee's termination without notice. This test is sometimes simply stated as whether there is a breakdown or irreparable harm to the employment relationship.

There are fewer Court decisions involving non- union employees who are terminated for conduct that may have been caused or contributed to by an illness. Often these employees do not have the resources to take a case to trial or the economics of their case does not justify the expense. Also, employees in these situations will often elect to proceed with a human rights complaint as the process is less costly and quicker. Therefore, the case law in the area is less robust.

While Courts are willing to find the employees have been wrongful dismissed where the misconduct alleged was largely non-culpable, increasingly Courts are reluctant to accept a claim relating to non-culpable behavior without clear evidence. In a 2007 decision from the B.C. Supreme Court[16] an employee with 24 years of service was terminated from her position for creating an atmosphere of stress in the workplace and informing staff members that her husband would harm her supervisor. While the employee testified that she was under a great deal of stress and that there were numerous times that she would go home vomiting, the Court noted that none of the staff attributed her behaviour to her underlying disorders and that a letter from her family physician stating she was known to suffer from chronic depression and an anxiety disorder was not sufficient to establish that her disabilities were the underlying reason for her behaviour.

Further, even where an employee is successful in mitigating their actions by establishing their connection to a disability, the employee is usually only entitled to damages for wrongful dismissal. Unless presented with a flagrant violation of an employee's rights, it is unlikely that the Courts will award an aggravated or punitive damage award. Further, where aggravated or punitive damages awards are made by the Courts, these are often small.

[16] *Dilg v. Dr. D. Sarca Inc.,* 2007 BCSC 1716

V. Employer Issues

a. Duty to Inquire

Where an employee raises the issue of addiction or mental illness with an employer during an investigation into culpable behaviour, or there are reasonable grounds to suspect that the employee may suffer from an illness, human rights law dictates that the employer has a duty to inquire into the issue, and if the disability to proven, seek to reasonably accommodate the individual. This duty can extend to determinations on culpable conduct. In a recent Human Rights Tribunal decision, the Tribunal member held that in light of the employee's disclosure regarding his addictions during an investigation into misconduct, the employer had a responsibility to consider whether the employee's drug dependency affected the employee's conduct and to consider whether there were steps, other than termination, that could have accommodated the employee.[17]

Even a late or delayed admission from an employee can trigger a duty to inquire. In a recent Ontario decision, an employee, when initially confronted, denied that he had a drinking problem that required accommodation.[18] At a later meeting, he stated that he was an alcoholic. The employer treated that admission as too late and terminated the employee. The Tribunal held that the employer did not sufficiently fulfill its duty to inquire.

The difficulty for many employers is to determine what level of knowledge triggers a duty to inquire. How would you have dealt with a manager who refuses to attend mandatory management training classes because he is 'sick' and would not attend despite the threat of losing his employment?[19] In 1987 the B.C. Supreme Court found the employee was wrongfully dismissed as the employer had knowledge which ought to have led them to inquire into the employee's behavior. Had they inquired, the employer would have realized that the employee's disobedience was not willful but the result of a severe phobia of public speaking, and therefore not just cause for termination. In that case the employer was aware of the employee's stress associated with group meeting, that the employee had had an earlier panic attack during a meeting, and that the misconduct was illogical in the circumstances of the employment relationship.

Where the employee makes a clear statement, or the employee has a history of mental health or addictions issues, in the face of misconduct, an employer should very likely inquire. Where an employee has disclosed a mental illness as part of accommodation or a return to work program, the employer should consider requesting additional medical advice outlining identifying features or other ways in which the employer may be able to proactively identify whether or not the illness has resumed.

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[17] *McIntosh v. Corp. of Delta*, [2010] B.C.H.R.T.D. No. 232

[18] *Domtar Inc v. Communications, Energy and Paperworkers Union of Canada Local 74 (Turpin Grievance*), [2011] O.L.A.A. No. 394

[19] *Barkley v. Weyerhaeuser Canada Ltd.* [1987] B.C.J. No. 1731

Where there is no reason to assume that the employee's behaviour is the result of an illness, the employer does not have a duty to inquire. The difficulty is determining how much secondary evidence is required before the employer is put on notice that the behaviour may be the result a disability. This presents a challenge for employers and for human resource practitioners in particular who are not doctors and are not expected to be able to diagnose an illness. No adjudicator has set out a test, but we suspect that the most likely approach will be to consider what a reasonable person in the circumstances would consider as adequate grounds to suspect an illness.

From a practical perspective, where an employee is behaving in a very unusual or uncharacteristic manner, it may be prudent for the employer to inquire as to the whether the employee is experiencing any health issues. While getting this information may complicate how the issues are addressed, having more information will better allow you to protect the interests of the employer. The information will serve as a guide for any discipline decision, accommodation considerations and will position the employer well in the event the employee decides to challenge the imposed discipline.

b. Evidence of Disability

Across all three forums for employee disputes, adjudicators are increasingly requesting compelling evidence, both of the employee's disability and of the link or nexus between the misconduct and the disability.

While there is case law which supports that an adjudicator is able to make a determination on the presence of a disability without expert testimony, these cases are rare. In the area of mental illness and addictions, adjudicators are requiring medical evidence to identify and assess an individual's disability.

Further, an expert in the field of the illness may be needed. In a recent decision under the Canada Labour Code, an arbitrator held that a medical opinion from a doctor not trained to deal with addiction and largely based on information provided from the employee was insufficient grounds for a finding that the employee suffered from alcohol addiction.[20] Similarly, an employee who routinely showed up to work intoxicated but provided no medical evidence of an alcohol dependency was not found to have provided sufficient proof of disability.[21]

Those employees who have been successful in establishing a disability have often provided an expert opinion from a medical professional in that field, most often relying on the Diagnostic and Statistical Manual of Mental Disorders, or DSM as a guide.[22] A recent change to WorkSafe BC provisions now require a DSM diagnosis for recoverable mental illness claims.

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[20] *Royal Canadian Mint v. Public Service Alliance of Canada, Local 50057 (Izzard Grievance*), [2011] C.L.A.D. No. 427

[21] *Re Air Canada and Canadian Union of Public Employees (Airline Division) (Young Grievance*), [2001] C.L.A.D. No. 472

[22] See *Rio Tinto Alcan Primary Mental (Kitimat/Kemano Operations) v. National Automobile, aerospace Transportation and General Workers of Canada (CAW – Canada) Local 2301 (Grant Grievance*) [2008] B.C.C.A.A.A. No. 170

c. Link or nexus

As highlighted by the *Safeway* decision before the Human Rights Tribunal, in addition to medical opinions on the disability, employers and employees are increasingly presenting expert opinions to establish or refute a link or nexus between the employee's misconduct and the mental illness or addiction. The expert opinions essentially attempt to draw a line between culpable behavior and non-culpable behavior.

Recently an arbitrator has stated that without expert or medical evidence, most adjudicators would be incapable of concluding that a mental illness, specifically those other than addictions, were causally connected to the misconduct.[23] Further, the medical evidence must be persuasive and specifically addressing the link or nexus between the behavior and the illness. In a recent arbitration decision a letter from the employee's doctor, which stated that the employee suffered from alcoholism and the associated medical consequences, combined with testimony from the employee was insufficient evidence to establish that the employee's drinking problem resulted in the specific conduct at issue, in that case, drinking and driving.[24]

The required 'nexus' has been described as proving or disproving, in whole, or in part, that the disability caused the conduct in question, or in other words, did the disability contribute to the misconduct.[25] This test, as phrased, is a quite minimal test. In the *Safeway* decision, the Tribunal described the nexus between the misconduct and disability as requiring proof that the "misconduct was sufficiently relating to her alcoholism."[26]This statement of the test as least qualifies the effect by requiring that it be "sufficient" but it does not provide much guidance for an employer. Further, in the minority decision of the Court of Appeal in *Gooding* Justice Kirkpatrick stated that the evidentiary burden to prove a nexus is "significant, for it cannot be assumed that addiction is always a causal factor in an addicted employee's misconduct."[27]

d. Conflicting medical reports

An expert report or medical opinion can be a useful tool for employers navigating the murky waters between culpable and non-culpable behaviour. However, like all medical evidence, employers should ensure that they fully consider all of the circumstances of the case, especially when faced with conflicting medical reports.

In a recent application to dismiss, the Human Rights Tribunal considered the duties of an employer when faced with conflicting medical advice regarding the nature and scope of an

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[23] *British Columbia (Ministry of Housing and Social Development) v. British Columbia Government and Services Employees Union (Brekelmans Grievance*), [2010] B.C.C.A.A.A. No. 86

[24] *Saputo Foods Ltd. v. Teamsters Local Union No. 464,* [2009] B.C.C.A.A.A. No. 133

[25] McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital general de Montréal, [2007] S.C.J. No. 4, *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115, 2006 BCCA 58*

[26] Ryan v. Canada Safeway Ltd. , [2008] B.C.H.R.T.D. No. 12 at para 45

[27] British Columbia (Public Service Agency) v. British Columbia Government and Service Employees' Union, 2008 BCCA 357 at para 55

employee's physical disability.[28] The employee initially presented a medical evaluation to the employer and insurer that she was totally disabled. When the employee was turned down for long term disability, a second medical opinion was conducted which found that the employee was able to return to work. A third medical evaluation was conducted which provided inconclusive results. In most cases the employer will satisfy its duty to inquire by receiving a medical opinion regarding the employee's disabilities and required accommodation measures from the employee's physician. A challenge may arise if the employer has reason to believe that the employee's physician is not being sufficiently objective and this can be a more significant concern where the illness is own on which the physician has to rely on the employee's own account of the symptoms.

Additionally, where the medical evidence is inconclusive or conflicting, the B.C. Human Rights Tribunal has stated that in some cases the employer may need to offer the employee a graduated return to work or a work trial. While this decision was made on an interim application to dismiss, and dealt with an employee who was not in a safety sensitive position, it highlights the potentially board scope of an employer's duty to accommodate when faced with conflicting medical evaluations.

e. Continued assessment

Accommodation is a duty on the employee as well as the employer. In the case of addictions, accommodation includes requiring that employees suffering from addiction seek rehabilitation.[29] Failure by an employee to respond to an accommodation request including requiring up to date medical evaluations or monitoring may justify progressive discipline and eventually termination.

Where the employer has specific concerns regarding the mental health of an employee, the employer may be entitled to temporarily suspend the employee pending medical assessment. In 2010 the Yukon Court of Appeal upheld a decision from the Yukon Human Rights Commission that the employer did not discriminate against an employee who was diagnosed with bipolar disorder.[30] The Court held that the employer's preliminary decision to suspend the employee pending medication evidence was within the employer's duty to inquire into the cause of the employee's inappropriate behaviour to determine if it was due to his medical condition or if it otherwise warranted discipline. Provided that the decision to temporarily suspend pending a medical evaluation is not motivated by bad faith or a stereotypical reaction, such action will likely be upheld.

VI. Conclusion

This is a difficult area for employers and we have seen an increase in these types of claims in recent years so it is not likely to get easier. Employers face difficult challenges – when to ask

[28] *Meek v. H.Y. Louie Co.,* [2011] B.C.H.R.T.D. No. 160
[29] *Re Alcan Rolled Products and U.S.W.A., Loc. 343,* (1996) 56 L.A.C. (4th) 187.
[30] *Yukon (Human Rights Commission) v. Yukon (Human Rights Board of Adjudication)* 2010 YKCA 3

about disability, whether to suspend pending investigation, how to weigh non-culpable factors in determining discipline, when to involve an expert, etc. The employment tribunals have yet to provide a lot of helpful guidance on these issues.