Are Temporary Short-Term Medical Conditions Protected Under Alberta's Human Rights Legislation?

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In May 1990, an Ontario Human Rights Board of Inquiry rendered a decision in *Ouimette v. Lily Cups*, ("*Ouimette*"), which served to refine the definition of "disability" under the *Ontario Human Rights Code*. This case has resulted in fine-tuning the definition of physical "disability" or "handicap" in human rights legislation across Canada. In this decision, it was held that illnesses or ailments of short duration, which affect the majority of the population at one time or another and do not have lasting effects, are not considered "disabilities" under human rights legislation.

In 2000, the Supreme Court of Canada crystallized the *Ouimette* decision in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City) and Boisbriand (City)* ("*Boisbriand*"), in its finding that temporary ailments or illnesses do not qualify for protection under human rights legislation. It was held that there are no negative biases against "normal" ailments, such as the cold or flu, and accordingly such illnesses do not qualify as a "disability" for human rights protection purposes. The Court held that the purpose of human rights protection of physical disabilities is "to protect against discrimination and to guarantee rights and freedoms", and that their specific objective in the context of employment is to, "eliminate exclusion that is arbitrary and based on preconceived ideas concerning personal characteristics which, when the duty to accommodate is taken into account, do not affect a person's ability to do a job". The majority of courts across Canada continue to assert that the purpose of human rights legislation is to protect those illnesses or ailments of a more permanent or persistent nature, whether real or perceived, which are more susceptible to stereotyping or negative and differential treatment by employers than those which are temporary or transient in nature.

In Alberta, the definition of "physical disability", which is a protected ground in the employment context under the *Human Rights, Citizenship and Multiculturalism Act* (the "Alberta Act"), reads as follows:

> "**Any degree** of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes epilepsy, paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, and physical reliance on a guide dog, wheelchair or other remedial appliance or device."

In February 2002, there was an Alberta ruling in *Kathy Masters v. Willow Butte Cattle Co. Ltd.* ("*Willow Butte*"), where the Human Rights Panel held that a temporary lower back injury and hospitalization resulting from appendicitis,

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were disabilities under the Alberta Act despite their temporary nature. The Complainant was hired as a pen rider to process in-coming cattle, check and diagnose the health of the cattle, administer medications and to ensure the well-being of the cattle in the field. In the spring of 1998, with less than one year employment with the company, the Complainant suffered a workplace injury. Her horse tripped, fell and rolled on her, which resulted in a lower back injury. As a result of her injury, the Complainant was on short-term disability leave for a month, and the case was not clear as to whether the back problems persisted beyond her return to work. Although her employer did not threaten to dismiss her after the accident, it was made clear that the employer was upset about her absence, and considered her unreliable. In October 1998, the Complainant had symptoms of a bladder infection which required hospitalization, and it was eventually discovered that her appendix had burst. Again, the Complainant was absent from work for a period of time, during which time her father kept in close contact with her employer to keep it informed of her condition. However, the Complainant's relationship with her employer became strained as she was unable to provide an exact date of return to work and the employer was unsupportive regarding her hospitalization. She was unable to return to work until the end of December 1998 as a result of medical complications related to her antibiotics. According to the Complainant's employer, at no time did it understand her to have a "physical disability" as defined under the Alberta Act. In late December 1998, when the Complainant advised her employer that she was able to return to work, she was laid off as a result of a shortage of work, for which she subsequently filed a human rights complaint against her employer for discrimination on the basis of a physical disability. The Human Rights Panel ultimately found that the Complainant's medical problems constituted a "physical disability" under the Alberta Act, and ordered that she be compensated by her employer for the discrimination on that basis. In coming to this conclusion, the Panel interpreted the definition of disability under the Alberta Act as not containing "any requirement that a person suffer from a severe or prolonged disability of any indefinite duration", as the definition reads "**any degree** of physical disability..." Thus, the Panel held that a disability of any duration would be protected under the Alberta Act. In coming to this conclusion, the Panel went against the grain of the case law in Canada which has adopted *Ouimette* and *Boisbriand*, in following a maverick 1996 decision of the Newfoundland Board of Inquiry: *Clark v. Country Garden Florists*, ("*Clark*"), in its interpretation of "physical disability" under human rights legislation. *Clark* stands for the proposition that the phrase "without limiting the generality of the forgoing" within the definition of "disability" in the Newfoundland legislation suggests that it could include temporary ailments as there was "no requirement that a person suffer from a severe or prolonged disability of an indefinite duration". The decisions in *Clark* and *Willow Butte* clearly contradict the abundance of Canadian case law which follow the decision in *Ouimette* in finding that some degree of permanence is required to qualify as a "disability" for human rights protection.

Another recent Alberta case which considered the definition of "physical disability" under the Alberta Act is *Susan L'Archeveque v. City of Calgary* ("*L'Archeveque*"), which is a decision of the Human Rights Panel [affirmed by the Court of Queen's Bench in March 2003]. This case involved a full-time employee of the City of Calgary (the "City") who held a secretarial position and had been employed with the City for 22 years. In late 1996, the Complainant was diagnosed with bilateral repetitive strain syndrome in her arms and neck, caused in part by the set-up of her desk workstation. The disability caused her to take a leave of absence for several months, and the Workers Compensation Board ultimately determined that her injury was permanent and that she had to resume a modified position. Accordingly, the City found a modified position for the Complainant, with reduced hours. Although she applied for other part-time work with the City to maintain full-time hours, she was unsuccessful, in part due to a policy which existed that did not allow employees to hold two part-time jobs with the City. In October 1997, the Complainant was advised by the City that it could no longer accommodate her in her current part-time position. The City then explored the use of voice recognition technology to accommodate her, which was unsuccessful. In February 1998, the Complainant was unemployed. The Court of Queen's Bench upheld the Human Rights Panel's decision in finding that the complainant's injuries qualified as a "physical disability" due to the permanence of the injuries, which was sufficient for her to fall under the Alberta Act, and that she was indeed discriminated against on that basis in the circumstances.

It is also worthwhile to note that many Alberta courts have adopted another aspect of the Supreme Court of Canada's decision in *Boisbriand*, that the definition of "physical disability" under human rights legislation,

including the Alberta Act, includes both actual and perceived disabilities. In the recent March 2004 Alberta Court of Queen's Bench decision of *Vantage Contracting Inc. v. Marcil* ("*Vantage*"), the Court upheld the Human Rights Panel's finding that the Complainant's employer had improperly discriminated against him on the basis of his age and perceived disability. The Complainant was a 68-year-old custodian, who worked with the employer for 2 years before sustaining a work-related accident which required 11 days of hospitalization and a short-term disability leave. The Complainant did not return to work as his employer terminated his employment on the basis of lack of work. Although medical documentation indicated that the Complainant's disability was perceived, the Court followed the Supreme Court's finding that such disabilities are protected under human rights legislation in Alberta.

In conclusion, both *Ouimette* and *Boisbriand* have been cited as the authority for the proposition that an ailment or illness of short duration, which affects most of the population at one time or another and has no lasting effects, would not qualify as a "disability" as defined under human rights legislation across Canada. As noted by the Supreme Court of Canada in *Boisbriand*, this consensus results from the maintenance of the underlying principles of human rights legislation which is to protect against the arbitrary exclusion of employees that is based primarily on preconceived notions concerning personal characteristics which do not affect the ability to perform employment duties. However, although most Alberta courts appear to be following this line of cases, the recent decision in *Willow Butte* has gone against the grain in its interpretation of "physical disability" under the Alberta Act to include both temporary ailments as well. Thus, despite the line of cases in Alberta following *Ouimette* and *Boisbriand*, Alberta employers must be cautious in their treatment of employees with any degree of disability, whether **temporary or permanent, real or perceived.**