Discrimination Ombudsperson

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What do medical or physical disability, depression, pregnancy or religious beliefs have to do with the practice of law? Consider this scenario:

You are a promising lawyer — bright and enthusiastic. You have a career track position with a respected law firm, are dedicated, enjoy your work and receive good feedback. Everything seems to be going fine until one or more of the following occur: *1) You are diagnosed as suffering from a permanent but "invisible" medical condition; 2) you are about to become a parent; 3) your aging parent needs your personal attention and care; 4) your religious beliefs change and preclude you from working on specific days; 5) you develop a physical disability and need modifications to your office; 6) you realize that disclosing your "invisible" disability would improve your performance.*

You can be productive but need adjustments to your work schedule or workplace. Consider this person's dilemma: *"If I disclose my need for accommodation, I may be stereotyped as incapable or viewed as an economic burden. If I do not disclose my needs, my fluctuations in productivity may be perceived as resulting from non-performance. I am afraid I will lose my job."*

What can employees and employers expect from one another to reconcile an employee's interests in accomodation and job security with the employer's interest in productivity? The duty to accommodate will change how lawyers manage their practices. Lawyers risk discrimination complaints by requiring all associates to look, act and perform according to one traditional norm. The duty to accomodate also extends to how lawyers manage their staff. Staff are particularly vulnerable to employers who do not appreciate how the duty to accommodate is changing the "norms" associated with the practice of law.

Lack of understanding about medical conditions, discomfort with a person with a disability, fear of being taken advantage of by a "special case" and an unwillingness to pay the economic costs of a diversified workforce contribute to employer refusals to accommodate. The result is terminated employees, lost productivity, resentment, formal human rights complaints and actions for constructive dismissal.

Legal employers must address the realities of the '90s and balance their economic needs with their legal duty to accommodate. I can help employers and employees with this task.

Consider the legal reality:

Diversity is a valuable and protected cornerstone of Canadian society. The B.C. *Human Rights Act* enshrines a person's right to workplace opportunities regardless of sex, religion, family status, and physical or mental disability (subject only to *bona fide* occupational requirements).

Human rights law recognizes that society is enriched when every person has an equal opportunity to contribute meaningfully to the workplace. The courts acknowledge that certain individuals are disadvantaged because of their personal characteristics.

In 1989, the Supreme Court of Canada recognized that having children is a socially worthwhile endeavour, that bearing children is no longer a mere "lifestyle choice" and that balancing work with parental duties is an "ever-increasing" imperative. The courts are looking to employers to help achieve this balance. The need for balance is illustrated by these discrimination complaints: 1) lawyers concerned that they must "justify" requests for parental leave, and 2) women complaining of termination due to pregnancy.

An individual's need for reasonable accommodation is now considered an acceptable price for an employer to pay to ensure that "opportunity" and diversity are fostered. The onus is now on the employer to prove that the accommodation requested creates an "undue hardship." The financial impact must be real, quantifiable by financial experts and more than *de minimus* as is accepted in the United States. The duty to accommodate ceases when the level of hardship meets the onerous standard of "undue severity." These factors will also count: the size of the law firm, the ability of other personnel to adjust or modify their workload, flexibility of the office design, the impact upon morale, safety issues and comparisons with equivalent law firms.

Canadian employers unable to meet the "undue hardship" test have been required to modify job duties, alter work schedules, refrain from firing or demoting employees, provide equitable compensation, purchase equipment, build facilities or provide a new job. The duty to accommodate is continuous and may require recurring costs after initial accommodation attempts.

If a request for accommodation arises, an employer has an obligation to enter into a good-faith and thorough exploration of its options for resolution. There is a corresponding duty on the employee to cooperate with efforts to accommodate and to communicate specific needs, unless those needs are obvious to the employer.

The opportunity to retain talented and committed employees multiplies with a diverse workforce. The long-term advantages of accommodating a valued employee may be greater than you realize. For more information, I highly recommend Dr. Sheilah Martin's CBA background paper "The Legal Duty to Accommodate Lawyers with Family Responsibilities," February, 1995. Note: there is a recently formed Disability Action Committee for lawyers; the chair is Mr. Halldor Bjarnason.❐