

## Member's Quarterly

Summer 2023 Edition

## Feature

## Becoming Flu-ent in Human Rights

*Disability requires persistence*

Under human rights legislation, employers cannot discriminate against an employee because of their disability. Specifically in Alberta, under the *Alberta Human Rights Act* (the "Act"), no employer shall (a) refuse to employ or refuse to continue to employ any person, or (b) discriminate against any person with regard to employment or any term or condition of employment, because of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person.

Under the Act, "physical disability" means 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, service dog, wheelchair or other remedial appliance or device.

However, despite this definition of "physical disability", it is not always easy to determine whether an illness or injury is considered a "physical disability" under the Act.

### Temporary Injuries do not Belong with Disability?

In *Masters v. Willow Butte Cattle Co.*, 2002 CanLII 78200 (AB HRC), the Alberta Human Rights Panel assessed the definition of "physical disability" under the Act at the time, which was substantially similar to the current definition. The Panel concluded, "In this definition, there is no requirement that a person suffer from a severe or prolonged disability of any indefinite duration. It states any degree of physical disability caused, in this case, by an illness".

However, *Masters* appears to be the outlier. The British Columbia Council of Human Rights established in *Nahal v. Globe Foundry Ltd.*, 1993 CanLII 16468 (BC HRT) that "The condition must entail a certain measure of severity, permanence and persistence". For example, common ailments that are temporary in nature, including the flu, gastroenteritis, sinusitis, and strep throat, have previously been found not to be a "disability" for the purposes of human rights legislation. See *Ouimette v. Lily Cups Ltd.*, 1990 CanLII 12497 (ON HRT), *Burgess v. College of Massage Therapists of Ontario*, 2013 HRTO 1960, and *Valmassoi v. Canadian Electrocoating Inc.*, 2014 HRTO 701.

This "severity, permanence and persistence" test has been followed in Alberta. Recently, in *Smith v. Lafarge Canada Inc.*, 2021 AHRC 68, the Commission stated that, "While it is the case that a disability need not be permanent to meet the threshold, it must be more than a common ailment that lasts longer than a few days."

As a result, in *Chodkiewicz v Chief of Police of the Edmonton Police Service and Edmonton Police Association*, 2021 AHRC 131, the Commission found a sprained ankle to be a temporary injury, and that without more, it would generally not be viewed as a disability for the purposes of the Act.



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#### **Perception is Everything**

However, it is important to note that "perceived disability" is also recognized as a disability by the Supreme Court of Canada in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, 2000 SCC 27. This means, as the Alberta Court of Queen's Bench in *Syncrude Canada Ltd v. Saunders*, 2015 ABQB 237 stated, "[...] if Saunders was terminated or otherwise disadvantaged at work because Syncrude perceived him to be disabled, even though he is not, Saunders' rights may have been violated."

Furthermore, an employer also has a duty to inquire. If an employer is reasonably aware that there may be a disability requiring accommodation, it cannot ignore that fact and must inquire whether the employee suffers from a disability that requires accommodation.

#### **Employer Takeaways**

Although not all illnesses or injuries will be found to be a physical disability as defined by the Act, because of potential allegations of "perceived disability" and the employer's duty to inquire, if the employer suspects the employee suffers from a medical condition, even if it may not meet the "severity, permanence and persistence" threshold, the employer should initiate the accommodation discussion rather than take steps that may adversely impact the employee.

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