

DUTY TO ACCOMMODATE



INTERPRETIVE BULLETIN

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This publication discusses Alberta Human Rights Commission policies and guidelines. Commission policies and guidelines reflect the Commission's interpretation of certain sections of the *Alberta Human Rights Act (AHR Act)* as well as the Commission's interpretation of relevant case law. Case law includes legal decisions made by human rights tribunals and the courts. As the case law evolves, so do the Commission's policies and guidelines.

Commission policies and guidelines:

- ◆ help individuals, employers, service providers and policy makers understand their rights and responsibilities under Alberta's human rights law, and
- ◆ set standards for behaviour that complies with human rights law.

The information in this publication was current at the time of publication. If you have questions related to Commission policies and guidelines, please contact the Commission.

Introduction

This interpretive bulletin provides information for people who:

- ◆ are required to accommodate individuals in accordance with human rights legislation; need accommodation; and
- ◆ are involved in the application of human rights law.

The information is intended to:

- ◆ increase understanding of what accommodation means;
- ◆ increase awareness about the duty to accommodate; and
- ◆ assist in the development of effective policies and procedures.

The situations described in this bulletin are examples only. If you require more detailed or individualized information on the topic of accommodation, please contact the Alberta Human Rights Commission.

Accommodation

The *AHR Act* recognizes that all people are equal in dignity, rights and responsibilities, regardless of race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation.

Accommodation means making changes to certain rules, standards, policies, workplace cultures and physical environments to ensure that they don't have a negative effect on a person because of the person's mental or physical disability, religion, gender or any other protected ground.



The goal of accommodation is to enable equitable participation in any of the areas protected by the *AHR Act*:

- ◆ employment practices
- ◆ employment applications and advertisements
- ◆ residential or commercial tenancy
- ◆ goods, services, accommodation or facilities customarily available to the public (for example, restaurants, stores, hotels or provincial government services)
- ◆ statements, publications, notices, signs, symbols, emblems or other representations that are published, issued or displayed before the public
- ◆ membership in trade unions, employers' organizations or occupational associations

In addition, the *AHR Act* protects Albertans in the area of equal pay. When employees of any sex – female, male or transgender – do the same or substantially similar work, they must be paid at the same rate.)

Accommodation is a way to balance the diverse needs of individuals and groups with the needs of organizations and businesses in our society. It may cause a degree of inconvenience, disruption and expense to the employer, union or service provider. However, accommodation to the point of undue hardship is required by law.

Duty to accommodate

The legal duty to accommodate a person's needs based on the protected grounds is well established in federal and provincial human rights law. Some examples of accommodations include time off for extended illness; use of a service dog for a person with visual impairment; use of a wheelchair for a person with mobility problems; and observance of religious practices at set times during the workday for followers of certain faiths.

Who can request accommodation?

People who need accommodation to overcome a disadvantage caused by the application of a rule or a practice may include employees, prospective employees, union members, tenants, students and customers, among others. The reason for the accommodation must be based on a need related to a ground that is protected under the *AHR Act*.

Who has a duty to accommodate?

The duty to accommodate applies to employers, landlords, business owners, public service providers, educational institutions, professional associations, trade unions and others. For ease of reference, this bulletin refers to those who have a duty to accommodate as employers and service providers.

To what extent is accommodation required?

The Supreme Court of Canada has ruled that employers and service providers have a legal duty to take reasonable steps to accommodate individual needs to the point of undue hardship. To substantiate a claim of undue hardship, an employer or service provider must show that they would experience more than a minor inconvenience. In many cases, accommodation measures are simple and affordable and do not create undue hardship.

What is undue hardship?

Undue hardship occurs if accommodation would create onerous conditions for an employer or service provider, for example, intolerable financial costs or serious disruption to business. An employer or service provider must make considerable effort to find an appropriate accommodation for an employee. Some hardship may be necessary in making an accommodation; only when there is 'undue' hardship can the employer or service provider claim that they have tried all the accommodations available. To determine if undue hardship would occur, the employer or service provider should review factors such as:

- ◆ **Financial costs** – Financial costs must be substantial in order to be found to cause undue hardship. They must be so significant that they would substantially affect productivity or efficiency of the employer or service provider responsible for the accommodation. Accommodation measures could result in lost revenue, which should be taken into account when assessing undue hardship. However, if lost revenue due to accommodation would be offset by increased productivity, tax exemptions, grants, subsidies or other gains, then undue hardship may not be a factor. Financial costs do not include the expense of complying with other legislation or regulations, such as building codes (for example, providing wheelchair accessible washrooms or separate washroom facilities for men and women).
- ◆ **Size and resources of the employer or service provider** – The cost of modifying premises or equipment and the ability to amortize such costs will be taken into consideration when assessing if there is undue hardship. The larger the operation, the more likely it is that it can afford to support a wider range of accommodations without undue hardship.
- ◆ **Disruption of operations** – The extent to which the inconvenience would prevent the employer or service provider from carrying out essential business will be a factor when assessing undue hardship. For example, modifying a workspace in a way that substantially interferes with workflow may be considered too disruptive to the workplace. Also where there is no productive work available to offer to the employee, accommodation may be an undue hardship.
- ◆ **Morale problems of other employees brought about by the accommodation** – Morale problems could be due to the negative impact of increased workload on other employees and a requirement to work too much overtime. If other employees begin to experience sleep difficulties or other health issues brought about by the accommodation of a particular employee, then the accommodation may be an undue hardship.

- ◆ **Substantial interference with the rights of other individuals or groups** – A proposed accommodation should not interfere significantly with the rights of others or discriminate against them. For example, a substantial departure from the terms of a collective agreement could be a serious concern to other employees. However, the objections of other employees must be based on well-grounded concerns that their rights will be affected.
- ◆ **Interchangeability of work force and facilities** – Whether an employer or service provider could relocate employees to other positions on a temporary or permanent basis is a factor in determining undue hardship. This may be easier for a larger company.
- ◆ **Health and safety concerns** – Where safety is a concern, consider the level of risk and who bears that risk. For example, consider if the accommodation would violate health and safety regulations. There would be an undue hardship if accommodation sacrificed safety for either the employee or others. If there is an issue of drug or alcohol dependency, please see the Commission’s information sheet *Drug and alcohol dependencies in Alberta workplaces*.

In employment situations, the following expenses are not normally considered to constitute undue hardship:

- ◆ overtime or leave costs that the employer or service provider can tolerably bear; and
- ◆ expenses incurred to respond to a grievance or minor disruption to a collective agreement.

The Supreme Court of Canada also examined undue hardship in a case involving the duty to accommodate an employee who had significant absences over many years due to a disability.¹ The court found that situations of chronic absenteeism, where the employee is unable to resume work in the foreseeable future, may cause the employer an undue hardship to continue accommodation, depending on the facts of the case.

While certain accommodation measures may create an undue hardship for one employer or service provider, the same measures may not pose an undue hardship for a different employer or service provider. For example, the manager of a business with 3 employees may not be able to accommodate a request for revised work hours as easily as a manager who has 25 employees.

Keep in mind that measures that do not cause an employer or service provider undue hardship now, may do so in the future if its circumstances change. For example, a company that has recently laid off 50% of their staff due to an economic downturn may no longer be able to accommodate a new request for a change in job duties from an employee with a disability, although the company may have accommodated such requests in the past.

¹ *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d’Hydro Québec*, section locale 2000 (SCFP-FTQ) [2008] S.C.J. No. 44 | <http://csc.lexum.umontreal.ca/en/2008/2008scc43/2008scc43.html>
 For clauses in a collective agreement regarding maximum sick leave, see *McGill University Health Centre (Montreal General Hospital) c. Syndicat des employés de l’Hôpital général de Montréal*, 2007 SCC 4 | <http://csc.lexum.umontreal.ca/en/2007/2007scc4/2007scc4.html>

Accommodating people with disabilities

Many complaints about accommodation relate to the grounds of physical and mental disability.

The *AHR Act* says that **physical disability** means “any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness.” Some disabilities that have been established as protected under human rights law are: epilepsy/seizures, heart attack/heart condition, cancer, severe seasonal allergies, shoulder or back injury, asthma, Crohn’s disease, hypertension, hysterectomy, spinal malformation, visual acuity, colour blindness, loss of body parts such as fingers, speech impediments, arthritis, muscular atrophy, cerebral palsy, alcoholism, and drug dependence.

Common conditions such as colds and flus that do not last long and have no long-term effects are not normally considered to be physical disabilities.

Mental disabilities are defined by the *AHR Act* as “any mental disorder, developmental disorder or learning disorder, regardless of the cause or duration of the disorder.” Some examples of mental disabilities include: dyslexia, depression, schizophrenia, obsessive compulsive disorder and panic attacks.

It is not possible to provide a complete list of conditions normally considered to be disabling under human rights law. The disabilities listed above are examples only.

Rights and responsibilities in the accommodation process

Both the person seeking accommodation and the employer or service provider have rights and responsibilities in the accommodation process. The most effective accommodation measures are a result of cooperation and clear communication between both parties. For more information on accommodations that require medical information, refer to the Commission’s interpretive bulletin *Obtaining and responding to medical information in the workplace*.

Rights and responsibilities of the person seeking accommodation

1. Ensure that a concern falls under any of the areas and grounds protected under the *AHR Act*.
2. Inform the employer or service provider about the need for accommodation.
3. Bring the situation to the attention of the employer or service provider, preferably in writing. Include the following information:
 - ◆ Explain why accommodation is required (for example, because of disability, religious belief, pregnancy, family status, etc.).

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- ◆ Support the request for accommodation with evidence or documents (for example, a written statement from a doctor or health care provider or written information about specific religious practices).
 - ◆ Provide medical information that explains the employee's functional limitations and necessary accommodations, for example, medical information that the employee cannot lift more than 20 pounds for the next three months.
 - ◆ Suggest appropriate accommodation measures.
 - ◆ Indicate how long accommodation will be required.
4. Allow a reasonable amount of time for the employer or service provider to reply to the request for accommodation.
 5. Listen to and consider any reasonable accommodation options that the employer or service provider proposes. A person seeking accommodation has a duty to accept a reasonable accommodation, even if it is not the one that the person suggested or prefers.
 6. Consult an expert such as a human resources consultant, union representative or lawyer if it is difficult to determine if the proposed options are reasonable.
 7. Request details of the cost or other factors creating undue hardship, if the employer or service provider indicates that accommodation would pose an undue hardship. Provide more details about your needs if such information is helpful.
 8. When an accommodation is provided, make a formal written agreement with the employer or service provider.
 9. Cooperate to make the agreement work.
 10. Advise the employer or service provider when accommodation needs have changed. Provide medical documentation to support these changes and assist the employer in the process of modifying the accommodation.
 11. Be willing to review and modify the accommodation agreement if circumstances or needs change and the agreement is no longer working.
 12. Tell the employer or service provider if the need for accommodation ends.

Rights and responsibilities of the employer or service provider

1. Determine if the request falls under any of the areas and grounds protected under the *AHR Act*.
2. Be aware that, once a request is received, the onus to accommodate is on the employer or service provider.
3. Respect the dignity of the person or group requesting accommodation.
4. Respect the privacy of the person requesting accommodation. Medical information is considered personal information, and employers must abide by applicable privacy legislation when they collect, use or disclose an employee's medical information.
5. Listen to and consider the needs of the person seeking accommodation and their suggestions for accommodation.
6. Review medical or other information that the person seeking accommodation provides to support the request for accommodation.

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7. Be willing to take substantial and meaningful measures to accommodate the needs of the person seeking accommodation.
 8. Consult an expert such as a human resources officer, or lawyer if more information is needed to assess the request.
 9. Be flexible and creative when considering and developing options.
 10. Discuss options with the person who needs accommodation.
 11. Take reasonable steps to accommodate the person seeking accommodation to the point of undue hardship. If full accommodation is not possible without undue hardship, try to suggest options that may partially meet the needs of the person seeking accommodation.
 12. Reply to the request for accommodation within a reasonable period of time.
 13. Make a formal written agreement with the person being accommodated and ensure that the accommodation is given a fair opportunity to work.
 14. Follow up to ensure that the accommodation meets the needs of the person seeking accommodation.
 15. Provide details that justify a refusal to accommodate, if accommodation is not possible because it poses undue hardship or because of a bona fide occupational requirement. (See page 9 for information about bona fide occupational requirements.)
 16. Be willing to review and modify the accommodation agreement if circumstances or needs change and the agreement is no longer working.

What are the potential consequences of failing to accommodate?

If the employer or service provider fails to provide accommodation to the point of undue hardship, then the employer or service provider may be in contravention of the *AHR Act*, and the person seeking accommodation may file a complaint with the Human Rights Commission. If, on the other hand, the person seeking accommodation refuses a reasonable and appropriate accommodation, the employer or service provider has likely met their legal responsibilities.

For more information about the human rights complaint process and remedies, see the Commission information sheets *Complaint process* and *Remedy*, which are available on the Commission website or from the Commission.

Duty to accommodate in employment

The duty to accommodate in employment refers to an employer's obligation to take appropriate steps to eliminate discrimination against employees and potential employees. Discrimination may result from a rule, practice or barrier that has a negative effect on a person with a need for accommodation based on the grounds protected under the *AHR Act*. An employer's duty to accommodate employees or potential employees is far reaching. It can begin when a job is first advertised and finish when the employee requiring accommodation leaves the job.

Accommodation in employment most often involves the protected grounds of physical or mental disability. It may also involve the other protected grounds, including religious beliefs, gender (including pregnancy), family status, and marital status.

Some things to consider when accommodating employees include:

- ◆ purchasing or modifying tools, equipment or aids, as necessary
- ◆ altering the premises to make them accessible
- ◆ altering aspects of the job, such as job duties
- ◆ offering flexible work schedules
- ◆ offering rehabilitation programs
- ◆ allowing time off for recuperation
- ◆ transferring employees to different jobs
- ◆ hiring an assistant
- ◆ using temporary employees
- ◆ adjusting policies (for example, relaxing the requirement to wear a uniform)

Large employers may be required to look for reasonable accommodations in other departments or locations. However, an organization need only look at accommodating the employee within the areas it has ownership over.

Bona fide occupational requirement

The law recognizes that, in certain circumstances, a limitation on individual rights may be reasonable and justifiable. Discrimination or exclusion may be allowed if an employer can show that a discriminatory standard, policy or rule is a necessary requirement of a job. For example, in order to perform their jobs safely, people employed as drivers require acceptable vision and an appropriate driver's licence. A legally blind person would be legitimately excluded from a position as a driver since it is a bona fide occupational requirement to be able to see and to obtain a driver's licence.

Thus an employer may claim that a particular policy, such as obtaining a driver's licence, is a bona fide occupational requirement and therefore justifies discrimination.

The *Meiorin* test helps employers determine if particular occupational requirements are reasonable and justifiable

In 1999, the Supreme Court of Canada released a decision that provides direction to employers as to whether a particular occupational requirement is reasonable and justifiable.² The Government of British Columbia had brought in minimum fitness standards that applied to forest firefighters. A female firefighter did not meet the requirements of a running test designed to measure aerobic fitness. Consequently, even though she had worked as a forest firefighter for three years, her employment was terminated. In grieving her dismissal, the firefighter argued that the aerobic standard discriminated against women because women generally have lower aerobic capacity than men.

In its decision, the Supreme Court outlined a three-part test. The *Meiorin* test, named after the female firefighter, sets out an analysis for determining if an occupational requirement is justified. Once the complainant has shown the standard or requirement is prima facie (at first view) discriminatory, the employer must prove that, on a balance of probabilities, the standard:

1. was adopted for a purpose that is rationally connected to job performance;
2. was adopted in an honest and good faith belief that the standard is necessary for the fulfillment of that legitimate purpose;
3. is reasonably necessary to accomplish that legitimate purpose – To show that the standard is reasonably necessary, the employer must demonstrate that it is impossible to accommodate the employee without the employer suffering undue hardship.

The test requires employers to accommodate or consider the capabilities of different members of society before adopting a bona fide occupational requirement. For example, some women have lower aerobic capacity than men. Before setting a fitness standard so high that many women would be unable to achieve it, an employer must be certain that such a high level of fitness is necessary to do the job. This does not mean that the employer cannot set standards, but it does mean that the standards should reflect the requirements of the job.

Evaluation of a bona fide occupational requirement

To determine whether a policy or standard is discriminatory, the Commission will first ask:

- ◆ Has the person making the complaint been treated in a differential manner that results in a negative situation?
- ◆ Is the differential treatment based on a prohibited ground under the *AHR Act*?

If the answer to both questions is yes, then a prima facie case of discrimination is established. It is the responsibility of the employer to provide evidence that the standard or policy is a bona fide occupational requirement.

² *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)* (1999) 35 C.H.R.R. D/257 (S.C.C.) | <http://csc.lexum.umontreal.ca/en/1999/1999scr3-3/1999scr3-3.html>



In order for a defence of an occupational requirement to be accepted as valid, the employer must prove that the requirement has all three characteristics described in the *Meiorin* test.

The Commission will normally consider the following criteria for each characteristic.

1. Rational connection to the performance of the job

- ◆ What is the purpose of the policy or standard – safety, efficiency, other? Evidence may include public statements or documents and internal documents that provide information about the work.
- ◆ What are the objective requirements of the job? Evidence may involve identifying the jobs to which the policy or standard applies and identifying the duties involved in these jobs.
- ◆ Is there a rational connection between the general purpose of the policy or standard and the objective requirements of the job? The Commission will examine whether the requirements of the job support having a particular policy or standard in place.

2. Honest and good faith belief that the standard is necessary

- ◆ What are the circumstances surrounding the adoption of the policy or standard?
- ◆ When was the policy or standard created, by whom, and why?
- ◆ What other considerations were included in the development of the policy or standard?

3. Reasonable necessity

- ◆ Was the standard or policy based on assumptions about a particular group?
- ◆ Is there evidence that the standard or policy treats a particular group more harshly than another without apparent justification?
- ◆ Were alternate approaches considered before the standard or policy was adopted?
- ◆ Is there any evidence the policy or standard was designed to minimize the burden on those required to comply?
- ◆ Is there accommodation to the point of undue hardship?
- ◆ Is it necessary for all employees to meet the standard or comply with the policy for the employer to accomplish its legitimate purpose?
- ◆ Is there any evidence that the legitimate purpose could be accomplished through a less discriminatory approach?

An employer who makes a successful defence based on the *Meiorin* test in one instance may not necessarily be able to rely on the defence in similar future situations. Each situation is considered based on the facts of the individual case.

Employee privacy

While the person seeking accommodation has a right to privacy, the employer or service provider has a right to, and a need for, information that can help determine appropriate accommodation measures. The privacy issue most often arises when an employee with a disability requests accommodation from an employer. See Related resources in this bulletin for more information on privacy.



Employers seeking medical information about an employee with a disability are rarely entitled to a diagnosis of the employee's illness or disability or to information about the employee's specific medical treatment. Employers may request information about:

- ◆ the expected length of disability and absence (prognosis for recovery);
- ◆ the employee's fitness to return to work;
- ◆ the employee's fitness to perform specific components of the pre-injury job and ability to perform modified work; and
- ◆ the likely duration of any physical or mental restrictions or limitations following the employee's return to work.

It is the employee's responsibility to provide information that will help the employer or service provider assess an accommodation request.

Do changes to an employee's duties affect rate of pay?

An employee should continue to receive the same rate of pay they received before the accommodation, unless:

- ◆ their duties have changed significantly, or
- ◆ the employer would experience undue hardship to maintain their rate of pay.

Questions about the duty to accommodate employees

Physical disability

Q: An employee of a large moving company has developed seizures as a result of a car accident. His doctor has diagnosed mild epilepsy and has recommended that the employee take at least one month of leave from work to stabilize on medication.

The employee has heard the owner of the company expressing negative views about employing people who have seizures. The employee is concerned that he will be laid off or fired. Can the employer lay off the employee because the employee has epilepsy?

A: Epilepsy is a physical disability. Physical disability is a protected ground under the *AHR Act*. If the employee requests time off work, the employer must try to accommodate him to the point of undue hardship. The employer should not make decisions about the employee's future capabilities based on assumptions about epilepsy or on stereotypic views of people with epilepsy.

Initially, the employer could accommodate the employee by agreeing to the recommended time off. If the employer feels that the employee's absence will cause undue hardship by interfering with operations, the onus is on the employer to prove undue hardship. Options such as having other employees work more hours with overtime pay or hiring a temporary employee could be considered.

Until the requested time off has passed and the employee has returned to work, the employer should not assume that the employee will need further accommodation. If the employee returns to work with medical restrictions or limitations, the employer and employee need to discuss further accommodation requests. For more information, see the Commission's interpretive bulletin *Obtaining and responding to medical information in the workplace*,

which includes two sample medical information forms, a *Medical Absence Form* and a *Medical Ability to Work Form*.

Q: Following a heart attack, an employee of a small business asked her employer to install a stair lift because she was no longer able to climb the stairs that join the three floors on the business premises. The employer feels that she should not have to accommodate the employee because of the small size of the business. Does the employer have a duty to accommodate the employee?

A: Every employer, large or small, must make real efforts to accommodate to the point of undue hardship. Even though a business is small, it may have the financial or other resources to accommodate an individual's needs. In some cases, the costs of accommodating an employee are not significant when compared with offsetting costs such as hiring and training a new employee. Ensuring access for other employees and clients with mobility problems may also pay dividends to the company by increasing staff retention and business.

Mental disability

Q: Following his return to work after a stress leave, an employee was dismissed. The employer indicated dissatisfaction with the employee's performance as the reason for dismissal. Can the employer dismiss the employee?

A: There must be information showing that the dismissal was based on reasons other than mental disability. If the employer takes the stress leave or mental disability into consideration, even as part of the reason for a dismissal, it would be a violation of human rights law. However, if the employee has an unsatisfactory work record that is not related to the disability, the employer could show, for example, written job performance evaluations or documents outlining previous performance discussions with the employee. The onus is then on the employee to demonstrate that the reports of poor work performance are untrue.

Gender

Q: After an employee told her employer that she was pregnant, the employer advised her that the company was restructuring and that she would be laid off. Can an employer lay off a pregnant employee?

A: An employee cannot be arbitrarily fired or laid off simply because she is pregnant. Further, if pregnancy is a factor in the decision to lay off or terminate an employee, the employer is in contravention of the *AHR Act*. Discrimination on the basis of pregnancy is prohibited because gender, which includes pregnancy, is one of the protected grounds under the *AHR Act*. Employees who are breastfeeding are also covered under this ground.

An employer must accommodate to the point of undue hardship a pregnant employee who needs accommodation for medical reasons. Depending on the circumstances of the case, some ways to accommodate needs based on pregnancy include:

- ◆ altering work and break schedules;
- ◆ reassigning jobs or duties;
- ◆ providing protective clothing; or
- ◆ allowing the employee to work while seated if duties are normally performed while standing.

Religious beliefs

Q: An employee's religious practice requires the employee to pray at set times during the day. Does the employee have a right to accommodation?

A: Religious beliefs are one of the grounds protected under the *AHR Act*. Although religious belief is not defined in the *AHR Act*, it has been the subject of case law. Religious belief refers to a system of belief, worship and conduct. Religion has been defined as being “about freely and deeply held personal convictions or beliefs connected to an individual’s spiritual faith and integrally linked to his or her self-definition and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.”³ When the Commission receives an inquiry or complaint that involves a religious belief, the Commission reviews information concerning the faith on a case-by-case basis.

For the employee who needs to pray at set times, break schedules may be modified to coincide with prayer times or to accommodate religious fasting. When requesting accommodation, the employee should provide information about the guidelines and rules of their faith or religion so that the employer can assess and respond to the request.

Some other examples of accommodation of religious beliefs include:

- ◆ **Dress code** – An employer may exempt the employee from wearing standard headgear for the job and permitting certain head or facial hair or dress that are part of the religious observance, even though the hair or dress conflict with uniform requirements or dress codes for the job.
- ◆ **Religious leave** – An employee who requests a paid day off to observe a religious holiday may be granted such leave.
- ◆ **Work schedule** – By modifying a shift or work schedule, an employer may be able to accommodate an employee who cannot work on a particular day of the week for religious reasons.

³ *Syndicat Northcrest v. Amselem* (2004), 241 D.L.R. (4th) 1, Supreme Court of Canada | <http://csc.lexum.umontreal.ca/en/2004/2004scc47/2004scc47.html>

Duty to accommodate in services, accommodation, facilities and tenancy

The *Grismer* case helps service providers determine if policies and standards are reasonable and justifiable

While the *Meiorin* decision set out a new test for assessing policies or standards in employment, questions remained as to whether the test would apply equally in non-employment areas such as services, accommodation, facilities and tenancy. (For ease of reference in the remainder of this bulletin, the areas of services, accommodation, facilities and tenancy will be collectively referred to as services.) These questions were answered when the Supreme Court of Canada decided the *Grismer* case in December 1999.⁴ The *Grismer* case clarified that the tests used in the *Meiorin* case do apply when evaluating discriminatory practices in the area of services.

Mr. Grismer had homonymous hemianopia (commonly known as HH), which affected his peripheral vision. The British Columbia Superintendent of Motor Vehicles cancelled Mr. Grismer's driver's licence because his vision no longer met the standard of a minimum field of 120 degrees. Certain exceptions to the 120-degree standard were allowed by Motor Vehicles, but individuals with HH were never permitted to drive in British Columbia.

Mr. Grismer reapplied for his licence several times, passing all the tests except field of vision. Motor Vehicles did not allow Mr. Grismer to be individually assessed to establish that he was able to compensate for his limited peripheral vision.

Mr. Grismer filed a complaint with the British Columbia Council of Human Rights, alleging discrimination on the grounds of physical disability in the area of services. The tribunal ruled that Motor Vehicles had not proven that there was justification for the rigid vision standard applied to people with HH. In fact, other people with less peripheral vision were granted licences.

On appeal, the Supreme Court of Canada made it clear that the approach that it had outlined in the *Meiorin* case applied to service provision cases too. The Court concluded that the Superintendent of Motor Vehicles had not provided the Court with sufficient evidence that Mr. Grismer could not be assessed individually. The *Grismer* case clarified that the tests used in the *Meiorin* case apply when evaluating discriminatory practices in the area of services.

A reasonable and justifiable qualification will not be recognized as a defence to a complaint regarding services if the service provider can modify conditions or practices without undue hardship. In the case of *Grismer*, the Superintendent of Motor Vehicles failed to show that individual testing of applicants with HH imposed undue hardship on Motor Vehicles.

⁴ *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* | <http://csc.lexum.umontreal.ca/en/1999/1999scr3-868/1999scr3-868.html>

The duty to accommodate

The duty to accommodate in the area of services is important if all members of society are to enjoy full and equal participation in society. Discrimination may result from the outright refusal to rent premises or provide a service, or it may result from the imposition of unreasonable or unnecessary requirements based on criteria such as customer or staff preferences.

In order to fulfill the requirement to accommodate to the point of undue hardship, an employer or service provider in non-employment situations may be required to modify premises or equipment or the manner in which a service is delivered.

The duty to accommodate in the area of services may arise in a variety of circumstances. Some examples of accommodation follow:

- ◆ a recreational complex making changes to the building entrance so that individuals with reduced mobility can enter
- ◆ a service provider allowing an individual with a service animal access to a restaurant or rental premises
- ◆ a service provider changing a requirement that people who want to rent a hall, costume or a video need to provide a driver's licence as identification – For various reasons, many individuals do not have a driver's licence. The service provider could consider accepting other forms of identification.

Reasonable and justifiable contravention

In certain areas such as services, the law recognizes a limitation on individual rights if the reasons for the limitation are reasonable and justifiable. Discrimination against, or exclusion of, a person or select groups of people may be allowed in some cases.

Evaluation of “reasonable and justifiable”

To determine if discrimination is reasonable and justifiable, the Commission must explore the answers to questions such as these:

- ◆ Is the service provider applying a standard or policy?
- ◆ Does the standard or policy discriminate on the basis of a prohibited ground?
- ◆ Is the standard or policy rationally connected to the provision of the service? The specific services to which the standard or policy applies must be identified.
- ◆ Did the service provider adopt the particular standard with an honest and good-faith belief that the standard was necessary to accomplish its service-related purpose? What were the circumstances surrounding the adoption of the policy or standard?
- ◆ Is the standard reasonably necessary for the service provider to accomplish its service-related purpose?
- ◆ What evidence exists of the standard's actual effect on the service users?
- ◆ What evidence shows that the service provider has considered alternatives, such as individual assessment?
- ◆ Is imposition of the standard the least discriminatory means of accomplishing the purpose?
- ◆ What hardship would result from alternative standards?

Conclusion

In order for the accommodation process to work effectively, individuals seeking accommodation and employers or service providers must work together. Effective accommodation is most often the result of good communication, creativity and flexibility. While the accommodation process may involve challenges and costs, it helps to create an inclusive society that respects diversity and human rights.

Related resources

Commission interpretive bulletins

- ◆ *When is discrimination not a contravention of the law?*
- ◆ *Obtaining and responding to medical information in the workplace, which includes the sample medical information forms, *Medical Absence Form* and *Medical Ability to Work Form**
- ◆ *Duty to accommodate students with disabilities in post-secondary educational institutions*

Commission information sheets

- ◆ *Employment: Duty to accommodate*
- ◆ *Drug and alcohol dependencies in Alberta workplaces*
- ◆ *Obtaining and responding to medical information in the workplace: A summary for employers*
- ◆ *Obtaining and responding to medical information in the workplace: A summary for employees*
- ◆ *Obtaining and responding to medical information in the workplace: A summary for doctors*

You can access Commission interpretive bulletins and information sheets online at www.albertahumanrights.ab.ca. Choose the “interpretive bulletins” or “information sheets” quick link.

Privacy resources

Contact the Office of the Information and Privacy Commissioner
www.oipc.ab.ca/pages/home

Contact us

The Alberta Human Rights Commission is an independent commission of the Government of Alberta. Our mandate is to foster equality and reduce discrimination. We provide public information and education programs, and help Albertans resolve human rights complaints.

Northern Regional Office

800 Standard Life Centre
10405 Jasper Avenue
Edmonton, Alberta T5J 4R7
780-427-7661 Confidential Inquiry Line
780-427-6013 Fax

Southern Regional Office

Suite 310, 525 – 11 Avenue SW
Calgary, Alberta T2R 0C9
403-297-6571 Confidential Inquiry Line
403-297-6567 Fax

To call toll-free within Alberta, dial 310-0000 and then enter the area code and phone number.

For province-wide free access from a cellular phone, enter *310 (for Rogers Wireless) or #310 (for Telus and Bell), followed by the area code and phone number. Public and government callers can phone without paying long distance or airtime charges.

TTY service for persons who are deaf or hard of hearing

780-427-1597 Edmonton
403-297-5639 Calgary
Toll-free within Alberta 1-800-232-7215
E-mail humanrights@gov.ab.ca
Website www.albertahumanrights.ab.ca

Please note: A complaint must be made to the Alberta Human Rights Commission within one year after the alleged incident of discrimination. The one-year period starts the day after the date on which the incident occurred. For help calculating the one-year period, contact the Commission.

The website links in this publication are provided as a service and were accurate at the time of publication. The Commission is not responsible for content of websites other than its own. If you have questions about website links or their content, please contact the administrator of the website in question.

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Upon request, the Commission will make this publication available in accessible multiple formats. Multiple formats provide access for people with disabilities who do not read conventional print.

Duty to accommodate – Reader survey

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