

# HOW LONG IS "TRANSITORY"? HOW ORDINARY IS "COMMON"? MISCARRIAGE AND DEEP TISSUE INJURY ARE DISABILITIES UNDER HUMAN RIGHTS CODE

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In a [recent interim decision](#), the Human Rights Tribunal of Ontario (the "Tribunal") found a miscarriage and an unrelated deep tissue injury to be disabilities within the meaning of Ontario's *Human Rights Code* (the "Code"). This decision is significant both for the Tribunal's recognition of a miscarriage as a disability and for the analysis the Tribunal uses to arrive at that conclusion.

## The Facts

The applicant, Ms. Mou alleged that she was discriminated against by her former employer, MHPM Project Leaders ("MHPM"), when she was dismissed in early 2014 as a result of absences from work that caused her to fail to reach her 1800-hour annual target. Specifically, Ms. Mou was absent from work for three weeks in January of 2013, recovering from a deep tissue injury that resulted from a slip-and-fall, and for two-days in June related to a miscarriage. Ms. Mou alleged that these events, followed by the death of her mother-in-law, "profoundly affected her health and well-being."

In respect of the deep tissue injury, Ms. Mou testified that she could not move the left side of her body, could not type, and was put on heavy pain medication. She attempted to return to work twice within three-weeks of the fall but was asked to leave because she was not well. Ms. Mou was advised by MHPM to contact Human Resources to initiate a short term disability application only to discover that there was no short term disability available to her with MHPM.

In respect of her miscarriage, Ms. Mou testified that she became pregnant with her first child in May of 2013 and that she had a miscarriage on June 12, 2013. She testified that, having exhausted her sick-leave in January, she took two vacation days following the miscarriage and did not take more time off due to an impending work deadline. Ms. Mou testified that although she physically recovered, she continues to experience "significant emotional distress from the miscarriage even today."

Ms. Mou was advised at her mid-year review that she needed to improve on her ability to meet scheduled

delivery objectives and was dismissed following her annual 2013 performance review.

### **Positions of the Parties**

Ms. Mou alleged that given the timing and circumstances of her dismissal, MHPM's reliance on performance concerns directly related to her disabilities and its failure to accommodate her disability-related needs.

While MHPM acknowledged that 2013 was a "bad year" for Ms. Mou, it argued that neither her deep tissue injury nor her miscarriage were disabilities protected by the Code and that Ms. Mou's application should be dismissed on an interim basis for having no prospect of success.

### **What is a Disability?**

The Tribunal reviewed the well-established jurisprudence affirming that the definition of disability should be interpreted broadly, but that common, transitory ailments are not disabilities protected by the Code. The Tribunal reiterated that finding commonplace, transitory ailments as disabilities would have the effect of trivializing the Code's protections. Accordingly, as stated in previous decisions, strep throat, the flu, flu-like symptoms, gastroenteritis, and sinusitis are not protected by the Code.

The Tribunal also made clear that a disability need not be permanent to be protected by the Code. A person can fully recover from a disability and either experience discrimination related to that disability while he or she has the disability or after he or she has recovered from the disability based on the perception that he or she is disabled.

### **The Decision**

The Tribunal's conclusion that both the miscarriage and the deep tissue injury are disabilities protected by the Code appears to be premised on the factual finding that both conditions are not transitory or common.

The Tribunal compared the recovery time for the flu or a cold (a few days) with the recovery time for the deep tissue injury (three weeks), and found the latter to be "an extended period of time", and consequently not transitory.

Similarly, although the Tribunal found that the physical event of a miscarriage may constitute a disability, the Tribunal considered the "significant emotional distress" that Ms. Mou continues to experience as a result of the miscarriage in finding the miscarriage to be "certainly not transitory". This analysis is significant as Ms. Mou did not assert a mental health disability in seeking to establish her claim.

The Tribunal further noted that a miscarriage may also be protected under the ground of sex or as an intersection of sex and disability.

The Tribunal found that both the miscarriage and the deep tissue injury were not common, but provided no discussion or analysis of how common or prevalent either ailment is in Ontario or Canada.

### **Procedural Next Steps**

It is worth noting that this is an interim decision. At a hearing on the merits, Ms. Mou must establish a prima facie case of discrimination by demonstrating a nexus between the negative treatment she experienced and one or both of her disabilities.

It is not clear from the interim decision whether Ms. Mou told MHPM that she had a miscarriage. If Ms. Mou did not tell MHPM that she had a miscarriage, she will have to connect her disability (the miscarriage) to her adverse treatment (her dismissal) in some other way, perhaps by suggesting that MHPM had a duty to inquire as to whether personal circumstances played any role in her failure to meet her performance targets.

### **Employer Take-Aways**

This decision is a good reminder for employers of the broad definition of disability under the Code and the broad scope of disability protection proffered by the Code. A disability can be both a physical event, like a miscarriage, and can also include the physical and mental time required to recover from that event. When an employer has performance concerns and is considering dismissing an employee, it should be mindful of its legal obligations under the Code and, as a best practice, should inquire as to whether any disabilities are a cause of the poor performance. All such inquiries should be made with great care and sensitivity. Employers should respond to all disability-related disclosures on an individual basis, and inquire further into the employee's specific needs to ascertain whether accommodation is appropriate in the circumstances.

by Stefanie Di Francesco

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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