

SECTION: Interpretation

Effective date: April 11, 2003
REVISED DATE: February 17, 2010

SUBJECT: PHYSICAL & MENTAL DISABILITY – s.9(2)(I)

Purpose:

This policy is intended to assist in the interpretation of the terms “physical or mental disability” referred to in section 9 of The Human Right Code (“*The Code*”). Where there is any conflict between this policy and *The Code*, *The Code* prevails.

Context:

The Human Rights Code recognizes the right of all individuals to be treated on the basis of their personal merits, and to be accorded equality of opportunity with all other individuals. In consequence, *The Code* prohibits discrimination against persons because of certain actual or perceived personal characteristics [generally enumerated in s. 9(2)], unless the differential treatment can be justified under the rigorous test set out in the legislation and in the *Meiorin*¹ decision. These characteristics include: “...physical or mental disability or related characteristics or circumstances, including reliance on an animal assistant, a wheelchair, or any other remedial appliance or device.”

The Commission will apply a purposive and contextual interpretation to the substantive protections set out in *The Code*, bearing in mind the broad purposes of *The Code* as reflected in its preamble, and in the interpretative approach to human rights reflected in Canadian jurisprudence generally. (See also Policies # G-1 and # G-2).

Defining Disability for Complaint Purposes:

1. The Commission recognizes that *disability* should be interpreted in broad and flexible terms, as established by the Supreme Court of Canada in *Mercier*².
2. The Commission further recognizes that in determining whether discrimination is based on *disability* the focus is on obstacles to full participation in society rather

¹ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (referred to as “*Meiorin*”)

² *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665 (referred to as “*Mercier*”)

than on the condition or state of an individual, since discrimination based on disability may be based as much on perceptions, stereotypes and social constructs as the existence of actual functional limitations. The Commission acknowledges, as a result, that *disability* is contextual. That is, a person need not have to demonstrate that they are disabled for all purposes or at all times in order to experience discrimination on the basis of disability in a given situation. For example, in *Mercier*, one person suffered from “Crohn’s disease”, a chronic inflammation of the intestine, which is a chronic disease which can be aggravated by stress and other factors, and the severity of which may vary from individual to individual. Other complainants in *Mercier* suffered from an anomaly of the spinal column, a condition which was asymptomatic, but which was perceived as increasing the risk for future incapacity.

3. The Commission also recognizes that a *disability* may not only be a condition that is visible (for example, a physical limitation), but can also be hidden from view (for example, learning disabilities). In some cases, these so-called invisible disabilities may be readily identified objectively (e.g. H.I.V./A.I.D.S., Hepatitis C, and other communicable or infectious conditions). Some medical conditions can also go through phases where symptoms are readily detectable, and through other phases where they are asymptomatic or in remission. Other disabilities may be more difficult to observe (for example, chronic fatigue syndrome or major depression). Because non-evident disabilities are not “seen”, many are not well understood by society. This can lead to reluctance to acknowledge the existence of the disability, stereotyping, stigma and prejudice.
4. Discrimination on the basis of a physical or mental condition will be considered discrimination on the basis of *disability* for the purpose of filing a complaint under *The Code* where:
 - (a) an individual’s condition (past or present) or
 - (b) the perception of an individual’s condition (past or present) or
 - (c) the actual or perceived possibility that an individual may develop a condition in the future

results in a loss or limit on that individual’s opportunities to take part in life’s important functions or activities on an equal level with others. As the Supreme Court noted in *Mercier*, however, this does not mean that to be successful a complainant must show an objective, functional limitation, because of the subjective component which often colours discrimination based on this ground. Disability must be given a purposive definition alive to both the functional effects of a condition and the perceptions that may be generated by it. “Thus, a

'handicap' may be the result of a physical [or mental] limitation, an ailment, a social construct, a perceived limitation, or a combination of all these factors" (*Mercier*, para 79).

5. As the Court noted in *Mercier*, however, differential treatment based on 'normal ailments' (or the failure to make reasonable accommodation for them) will not usually be considered discrimination when applying a purposive and contextual interpretation of *The Code*. 'Normal ailments' include commonplace and transitory conditions that last for a short period of time, have no ongoing or long-term effects, and have minimal or no impact on an individual's opportunities to take part in life's important functions or activities on an equal level with others. The flu and common cold would usually fall in this category. Exceptions might include cases where the **individual** has an underlying condition such as **H.I.V./A.I.D.S.** which may increase his/her susceptibilities to such illnesses **and magnify the consequences of these**. In such cases, the disability is the underlying condition. Note, however, that some seemingly minor impairments may be of a permanent nature, and may be considered a disability even if corrected for most purposes by remedial devices. For instance, in some circumstances 20/30 – 20/40 uncorrected vision (even when fully corrected by glasses), minor red-green color blindness, slight scoliosis and other minor but long-term, if not permanent, impairments may fall within *The Code's* protection. The distinction lies in the fact that negative stereotyping may be applied to the impairment or perceived impairment, and it may be given a false or exaggerated importance in the mind of employers, etc.
6. In determining whether the characteristics or circumstances relating to a physical or mental disability that involve "reliance on a[n] animal assistant, wheelchair, or any other remedial appliance or device" are present, the Commission will normally apply the following:
 - (a) "Animal assistant" means an animal that is trained to provide assistance to a person who has a physical or mental disability;
 - (b) A "remedial appliance or device" supports the abilities of a person which are otherwise limited by a physical or mental disability.
7. Related characteristics or circumstances of disability include impairments such as scarring or disfigurement.
8. Related characteristics or circumstances of disability may include an injury or disability for which benefits were claimed or received under *The Workers Compensation Act*, where the allegation is that the discrimination is on the basis

of a disability or perceived disability. Note, however, that the meaning attributed to “disability” in that Act (or other legislation) is not binding on the Commission.

9. “Physical or mental disability” may include actual or perceived previous or existing or potential dependence on alcohol, drugs, or addictive substances, and may include addiction to gambling.
10. With respect to sick leave and long-term disability benefits, *The Code* prohibits any variation in eligibility, rate or duration of benefits, or contribution rates on the basis of physical or mental disability (including distinctions between psychotic and non-psychotic disabilities) unless the discrimination can be justified as *bona fide* and reasonable. However, it may not be unreasonable to refuse to extend benefits under a long-term disability plan to an employee disabled due to a known pre-existing condition for a reasonable and defined period of time.
11. In its approach to disability complaints, the Commission will also be mindful of the social context of discrimination, i.e., the fact that each individual possesses many personal characteristics, and that often more than one of these characteristics may be engaged in the background circumstances informing the complaint, or may need to be considered properly to assess the impacts of discriminatory behaviour.

Defining Disability for Special Programs:

Although *The Code* focuses primarily upon preventing differential treatment which is unreasonably based upon personal characteristics of an individual, including physical or mental disability, its preamble also acknowledges that in some circumstances, certain groups have suffered such serious disadvantage that affirmative action and other special programs may be required. Section 11 of *The Code* states that it is not discrimination, a contravention of *The Code*, or an offence under *The Code* to make reasonable accommodation for the special needs of an individual or group if those needs are based on a characteristic set out in s. 9. Nor is it a contravention to plan, advertise, adopt or implement an affirmative action program or other special program that has as its object the amelioration of conditions of disadvantaged individuals or groups, including those who are disadvantaged because of any characteristic listed in s. 9, provided the program is reasonably likely to achieve that objective. As a result, “persons with disabilities” may be an appropriate target group for affirmative action or other special programs in employment, or with respect to other activities to which *The Code* applies.

However, human rights legislation is always to be given a purposive interpretation, and it is necessary to be mindful of the different purposes of the general non-discrimination sections of *The Code* and s. 11. The purpose of special programs and affirmative action programs under the latter section is to ameliorate the historical disadvantage or

marginalization experienced, amongst others, by persons with disabilities. It is therefore possible that a person may have an actual or perceived impairment which amounts to a disability for purposes of ss. 9, 4-19 of The Code (including the duty to reasonably accommodate) but may not have a disability for the purposes of s. 11. Some persons may have minor disabilities (e.g. a minor visual acuity condition) that may require accommodation in a given workplace, but do not exclude them from equal participation in society. As such, they may not be eligible to take advantage of affirmative action programs generally, or special programs such as training programs designed to assist people with serious visual impairments.

See also Policy # I-7 on Special Programs.

APPROVED BY:

“Yvonne Peters”
Vice Chairperson

February 17, 2010
Date