TACKLING DISABILITY DISCRIMINATION AT WORK: TOWARD A SYSTEMIC APPROACH

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Approaching disability discrimination in systemic terms is the most fundamental challenge that disability human rights law currently faces. Achieving fundamental change in relation to disability at work necessitates challenging able-bodied norms. To that end, a social construction of disability entails adapting the environment to meet the needs of those with a variety of disabilities. Tackling disability discrimination requires contesting what is deemed "normal" because it is the way most able-bodied persons function, necessitating a thorough understanding of adverse effects discrimination, which looks behind purportedly neutral practices to uncover detrimental effects on those who do not function "normally".

The fact that some disabilities preclude some kinds of work should not be extended to create employment barriers beyond what is warranted, requiring stringent assessments of bona fide occupational requirements ("BFOR"). The duty to accommodate is now part of the BFOR defence. Accommodation is about making adjustments (exceptions) to rules. If the rule is wholly invalid, one does not reach the stage of adjustment, one simply invalidates the rule. The duty to accommodate in the BFOR test should be seen as subsidiary to the overarching concept of "reasonably necessary". In moving to the duty to accommodate, it is still important to think in both systemic as well as individualized terms. A systemic approach to accommodation anticipates the need for individualized accommodation, and builds in the necessary flexibility from the outset. Examples of innocent absenteeism are used to elaborate on the notion of systemic accommodation. In different settings, other recent examples blurring the distinction between the prima facie case of discrimination and the BFOR are problematic because such blurring weakens the scrutiny of respondents' justificatory arguments.

Full integration of disabled workers largely depends on the extent to which systemic approaches to disability discrimination can be incorporated into anti-discrimination law.

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INTRODUCTION

The last few decades have featured numerous developments in human rights law. Their impact on the workplace has been significant, especially in relation to disability. A quarter century ago, disability barely made the radar screen of anti-discrimination law in employment. Currently, it occupies centre stage.

Disability as a ground of prohibited discrimination is noteworthy for its immense diversity. Simplistic solutions to disability discrimination will not do. But it does not follow that disability is a purely individualized phenomenon requiring purely individualized solutions. Approaching disability discrimination in systemic terms is the most fundamental challenge that disability human rights law currently faces. Hence, the development of such an approach is the theme of this article.

Disability as a prohibited ground of discrimination in the workplace is also noteworthy for the fact that particular kinds of disabilities do preclude certain kinds of work. As someone who has never seen well enough to be able to drive, I could never aspire to be a bus driver. But the fact that some disabilities preclude some kinds of work should not be extended to create employment barriers beyond what is warranted. Thus, the development of stringent assessments of bona fide occupational requirements ("BFOR") has been especially important in relation to disability. Moreover, the development of the duty to accommodate has been crucial to the capacity of the workplace to respond to the diverse circumstances of disabled workers. However, the law has only just begun to tackle BFOR analyses and the duty to accommodate in systemic terms.

This article proceeds as follows. First is a brief historical overview of the incorporation of disability as a prohibited ground of discrimination into human rights law. Next are comments on the meaning of disability as a prohibited ground and elaboration on how a proper understanding of disability has the capacity to challenge able-bodied norms. Then follows a discussion of adverse effects discrimination and its importance to the identification of disability discrimination. The fourth section is an analysis of the scope of a systemic approach to BFOR standards and the duty to accommodate. Aspects of the law on innocent absenteeism are used as a specific example. Finally, concerns are raised about the stringency of the BFOR analysis being weakened by some recent examples where judges and adjudicators conflated the prima facie case of discrimination and the BFOR stages of analysis. The theme maintained throughout, and reiterated in the conclusion, is the need to move beyond an ad hoc approach to tackling disability discrimination.

I
DISABILITY AS A GROUND OF DISCRIMINATION

Disability as a ground of discrimination was a late addition to both the *Canadian Charter of Rights and Freedoms*[1] and to human rights legislation. Physical and mental disability were added as enumerated grounds to the section 15 equality rights provision of the *Charter* at the eleventh hour.[2] As regards to human rights legislation, New Brunswick, by virtue of a 1976 amendment to the *Human Rights Act*, became the first Canadian jurisdiction to add "physical disability" as a listed ground of prohibited discrimination.[3] However, it was not until 1985 that

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[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 [*Charter*].

[2] Physical and mental disability were added to the draft of the *Charter* on 13 February 1981: Anne. F. Bayefsky, "Defining Equality Rights" in Anne F. Bayefsky & Mary Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 1 at 10.

[3] *Human Rights Act*, R.S.N.B. 1973, c. H-11, as am. by S.N.B. 1976, c. 31, s.1. British Columbia's first human rights legislation, *Human Rights Code of British Columbia Act*, S.B.C. 1973, c. 119, had the potential to

New Brunswick added "mental disability".[4] At the federal level, "physical handicap" was included in "matters related to employment" when the *Canadian Human Rights Act* was first passed in 1977.[5] Although the more general term "disability" replaced "physical handicap" in 1983,[6] the remedial bar on mental disability complaints under the *Canadian Human Rights Act* was not removed until April 17, 1985 (the date of coming into force of section 15 of the *Charter*).[7] The incorporation of disability into human rights legislation was even slower in other provinces. For example, in what was then the *Individual's Rights Protection Act*, Alberta first introduced the term "physical characteristics" in 1980,[8] changing it to "physical disability" in 1985;[9] it was not until 1990 that mental disability was added.[10] In Nova Scotia, "physical handicap" was added to the *Human Rights Act* in 1980,[11] and then changed to "physical or mental disability" in 1986.[12]

Despite the slow start, over the last quarter century there has been a significant change in the legal landscape of workplace disability discrimination. Jurisprudence arising from both labour arbitration and human rights tribunals has advanced the rights of disabled workers.[13] Rulings from the Supreme Court of Canada prohibit the contracting out of human rights legislation[14] such that collective agreements must be interpreted so as to conform to human rights legislation.[15] These rulings have made labour arbitration a prominent forum for the development of anti-discrimination law. However an important limitation of labour arbitration that has significant consequences for disability law is that, by its very nature, labour arbitration deals solely with workers who are already employed; administration of collective agreements amounts to an ineffective means of dealing directly with those who, because of a disability, face barriers to getting hired in the first place. Only if labour arbitration produces systemic change can it be expected to have spill-over effects at the hiring stage. Furthermore, since most Canadian employ-

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cover disability discrimination because, uniquely in Canada, British Columbia did not initially have a closed list of prohibited grounds of discrimination. Instead, s. 8(1) prohibited, *inter alia*, employment discrimination without "reasonable cause". Section 8(2)(a) specified that listed grounds, not including disability, did not constitute reasonable cause. When British Columbia switched to the dominant mode of a closed list of prohibited grounds in replacement legislation "physical and mental disability" were included in the closed list: *Human Rights Act*, S.B.C. 1984, c. 22, s. 8.

4 *Human Rights Act*, R.S.N.B. 1973, c. H-11, as am. by S.N.B. 1985, c. 30, s. 7.

5 *Canadian Human Rights Act*, S.C. 1976-77, c. 33, s. 3; s. 41(4) of that statute nonetheless imposed severe limitations in respect of remedies for physical handicap complaints.

6 *Canadian Human Rights Act*, S.C. 1976-77, c. 33, as am. by S.C. 1980-81-82-83, c. 143, s. 2. By virtue of s. 25 of the 1983 amendment, the limitations on remedies for disability complaints in s. 41(4) were reduced. These special remedial limitations for disability (consolidated as s. 53(4) in *Canadian Human Rights Act*, R.S.C. 1985, c. H-6) were retained until S.C. 1998, c. 9, s. 27.

7 See *Canadian Human Rights Act*, S.C. 1976-77, c. 33, as am. by S.C. 1980-81-82-83, c. 143, s. 25.

8 *Individual's Rights Protection Amendment Act*, S.A. 1980, c. 27, s. 2.

9 *Individual's Rights Protection Act*, R.S.A. 1980, I-2, as am. by S.A. 1985, c. 33, s. 2.

10 *Individual's Rights Protection Act*, R.S.A. 1980, I-2, as am. by S.A. 1990, c. 23, s. 3.

11 *Human Rights Act*, S.N.S. 1969, c. 11, as am. by S.N.S. 1980, c. 51, s. 1.

12 *Human Rights Act*, S.N.S. 1969, c. 11, as am. by S.N.S. 1986, c. 49, s. 1.

13 See generally Michael Lynk, "Disability and Work: The Transformation of the Legal Status of Employees with Disabilities in Canada" in The Hon. R.S. Echlin & C. Paliare, eds., *Law Society of Upper Canada Special Lectures 2007: Employment Law* (Toronto: Irwin Law, 2007) 189. At 244-254, Lynk states that wrongful dismissal actions have not been a fruitful source for the development of anti-discrimination law in relation to disability. I agree with Lynk, however, I do not think it is realistic to expect that a cause of action that accepts the right to fire, as long as enough money is paid, can be very helpful in detailing the conditions enabling persons with disabilities to continue to work.

14 *Ontario Human Rights Commission v. Etobicoke (Borough of)*, [1982] 1 S.C.R. 202, 95 D.L.R. (4th) 577 [*Etobicoke* cited to S.C.R.].

15 *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157.

ees are not unionized,[16] and thus not covered by a collective agreement, the majority of the workforce cannot benefit directly from labour arbitration decisions.

Moreover, it would be naïve to assume that legal changes are easily incorporated into the day-to-day reality of the world of work. Despite the impressive volume of human rights tribunal decisions and labour arbitration awards determining the rights of disabled workers, it is impossible to know how many such cases never even get off the ground. It is not an easy decision to seek legal redress against perceived discrimination even if—often a big if—a complainant anticipates being able to prove discrimination. Especially at the hiring stage, it is easy for an employer to mask a refusal to hire that is grounded in disability by rationalizing it as something entirely different.

The expectation of a negative reaction to disability is still pervasive enough that a recent Ontario human rights tribunal adjudicator, David Mullan, ruled that an employer could not justify a termination based on the fact that a complainant, before being hired, had been untruthful in concealing his bipolar disorder.

> I reject the argument that ADGA had the right to dismiss Mr. Lane once it discovered that he had lied about his bipolar condition in the course of the hiring process or, at the very least, had failed to reveal a factor that was critical to any determination that he was qualified to perform the job for which he was being considered. The expert evidence of Philip Upshall established why it was that those with bipolar disorder are extremely reluctant to reveal their disorder to prospective employers. In the particular case, this was manifest in the testimony of both Mr. Lane and Ms. Lane as they revealed the anguish that Mr. Lane had gone through in deciding if and when to reveal his condition to his employer both at ADGA and earlier at Siemens and Linmor. The perception, supported by the testimony of Mr. Upshall, was that to reveal this information at a job interview would trigger in most employers a stereotypical reaction to someone with a mental illness leading to a decision not to hire. In those circumstances, I am not prepared to find that ADGA could rely on Mr. Lane's lying as an independent basis for dismissal and thereby avoid having to account for its treatment of him as someone exhibiting the symptoms of bipolar disorder in the workplace.[17]

For those with visible disabilities, hiding the fact of a disability from potential employers is not an option.

Although it is important to retain some skepticism about the effectiveness of legal rights, the change in legal landscape has certainly altered the workplace environment. The remainder of this article will explore the extent of legal change brought about by prohibiting workplace disability discrimination. The underlying question is whether the change is marginal or fundamental.

II
MEANING OF DISABILITY

The most critical element in achieving fundamental change in relation to disability at work is challenging able-bodied norms. It is a trifling improvement if the prohibition against disability discrimination means nothing more than protecting the disabled so long as they perform like the able-bodied (i.e., if it means nothing more than formal equality). Substantive equality, which accounts for difference, is especially important in relation to disability equality because disability frequently requires a manner of job performance that differs from that of the able-bodied.[18]

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[16] Donald D. Carter *et al.*, *Labour Law in Canada*, 5th ed. (Markham, Ontario: Butterworths, 2002) at 60.

[17] *Lane v. ADGA Group Consultants Inc.*, 2007 HRTO 34, 61 C.H.R.R. 307 at para. 137 [*Lane*].

[18] See Richard Devlin & Dianne Pothier, "Introduction: Toward a Critical Theory of Dis-Citizenship" in Dianne Pothier & Richard Devlin, eds., *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (Vancouver: UBC Press, 2006) 1.

For the prohibition against disability discrimination to actually advance human rights, it is essential to move beyond a bio-medical model of disability. Using a bio-medical model means locating the disability within the individual, with a focus on "fixing" the individual to fit the environment. In contrast, a social model of disability entails a focus on changing or adapting the environment to meet the needs of those with a variety of disabilities.

> Policy from this [human rights] perspective constructs an analysis of how society marginalizes people and how society can be adjusted to respond more effectively to the presence and needs of those who have been systemically marginalized. Treating the disadvantage is postulated as being the reformulation of social and political policy. Prevention is effected through recognizing the condition of disability as inherent to society. It is presumed that people with disabilities are an inherent part of society, not some kind of anomaly to normalcy.[19]

Where the presence of a disability is not contested, it is frequently the case that decisions concerning workplace disability discrimination do not make the distinction between a bio-medical and a social construction of disability. Thus the implications of that distinction for understanding and remedying disability discrimination are often not explored.

Where the meaning of disability has been challenged, however, the Supreme Court of Canada has been prepared to at least partially incorporate a social model of disability by adopting a broad interpretation of disability that enables human rights legislation to offer significant job protection.[20] In *Montreal and Boisbriand* the Supreme Court of Canada ruled that "handicap" in Quebec human rights legislation did not require actual functional limitations and included perceptions of disability.[21] These holdings are crucial to the recognition that disability discrimination is about the social construction of disability (i.e., about assumptions related to the capacity to perform work based on non-disabled [able-bodied] norms). In *Montreal and Boisbriand* individuals with no current functional limitations were either fired or not hired because of anticipated problems; the employers in these cases were engaging in a pre-emptive strike to avoid future disability issues. In a previous article, I have commented in support of the Supreme Court of Canada's decision:

> What was especially objectionable was that the employees were fired or not hired because the employers had such an extreme pre-occupation with normalcy that they wanted to be rid of someone who *might* have a "real" disability in the future. One of the purposes of a prohibition against disability discrimination is to counter that pre-occupation with normalcy. Understanding the threat to equality for persons with disabilities entails recognizing that people who in some sense are not "normal" are more vulnerable to being excluded. In order to fulfil the purpose of challenging the premium on normalcy, "perception" of disability needs to be subsumed in the category of "disability" or "handicap."[22]

The jurisprudence is just starting to sort out the implications of a social model of disability.

Nonetheless, it is important that perceptions of disability not be so elastic as to lose the connection to challenging able-bodied norms. In a recent Ontario case, *Weyerhaeuser Co. v. Ontario (Human Rights Commission)*,[23] the Divisional Court set aside a human rights tribunal's ruling rejecting a preliminary objection from the employer. The complainant had his conditional offer of employment withdrawn after he tested positive for marijuana. He ultimately admitted to

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[19] Marcia H. Rioux & Fraser Valentine, "Does Theory Matter? Exploring the Nexus between Disability, Human Rights and Public Policy" in Dianne Pothier & Richard Devlin, eds., *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (Vancouver: UBC Press, 2006) 47 at 52.

[20] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, 2000 SCC 27, [2000] 1 S.C.R. 665 at paras. 72-81 [*Montreal and Boisbriand*].

[21] *Ibid.* at para. 71.

[22] Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 C.J.W.L. 37 at 48.

[23] 2007 C.L.L.C. 230-012, 279 D.L.R. (4th) 480.

occasional recreational use of marijuana,[24] but did not claim addiction so as to amount to a disability. The Divisional Court ruled that, even on a preliminary motion, there was no tenable basis on the facts to go to a hearing on a claim that the employer had discriminated based on a perceived disability. In a similar case from Alberta, the Court of Appeal ruled that a positive pre-employment drug test resulting in the termination of a recreational user of marijuana could not found a successful disability discrimination claim.[25] While it may be true that some recreational users of marijuana might have an addiction that they do not recognize, it would strain credulity to say that all persons who smoke marijuana are addicts and thus have a disability. To enable non-addicts to ride on the disability band-wagon would distort the objectives underlying the protections against disability discrimination. Irrespective of one's view on how occasional recreational use of marijuana might relate to job performance, such use is not pertinent to the issues of disability or discrimination on the basis of disability. To stretch the meaning of disability this far would undermine the purpose of prohibiting disability discrimination, which is to challenge able-bodied norms.

For similar reasons, the Supreme Court of Canada concluded in *Montreal and Boisbriand*, in obiter, that "normal" ailments of the able-bodied "will generally not constitute" a handicap or disability.[26] Justice L'Heureux-Dubé reasoned that "[t]here is not normally a negative bias against these kinds of characteristics or ailments" and that under human rights legislation "the emphasis is on obstacles to full participation in society … "[27] In order for human rights legislation to have a transformative impact, there must be an emphasis on systemic barriers. On the rare occasion that a normal ailment has detrimental consequences, it is acceptable to invoke disability discrimination for an individual case.[28] However, such cases should not divert the focus of human rights protections against disability discrimination toward trivial examples.

The law needs to concentrate on the bigger picture and on determining the serious obstacles to inclusion. To do so requires integrating the social construction of disability into the analysis. The social construction of disability not only impacts the meaning of disability, but also the meaning of discrimination and the means of remedying discrimination. The manner in which individual and systemic elements of tackling disability discrimination intertwine has implications far beyond the definition of disability.

III
ADVERSE EFFECTS DISCRIMINATION

Intentional or direct discrimination on the basis of disability is certainly part of what human rights legislation is designed to combat.[29] Nonetheless, a substantial portion of disability dis-

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[24] *Ibid.* at para. 7 (Weyerhaeuser claimed that its withdrawal of the offer of employment was not due to the positive drug test itself, but rather because Chornyj initially lied about his use of marijuana).

[25] *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Co.*, 2007 ABCA 426, 425 A.R. 35, leave to appeal to S.C.C. refused, 460 A.R. 179 (The Human Rights Panel had rejected the discrimination claim, but the decision was set aside by the chambers judge. The Court of Appeal allowed the appeal, restoring the decision of the Human Rights Panel to dismiss the complaint. The Court of Appeal noted, at para. 43, that " … the issue of how the KBR drug testing policy affected drug addicted persons generally was not before the panel.").

[26] *Montreal and Boisbriand*, *supra* note 20 at para. 82.

[27] *Ibid.*

[28] See Walter S. Tarnopolsky & William Pentney, *Discrimination and the Law* looseleaf (Toronto: Thomson, 2004) at c. 7A-12-14. Although Pentney criticizes L'Heureux-Dubé J. as being "simplistic" for saying that those with normal ailments could "never" suffer from disability discrimination (at c. 7A-12), she did not actually say "never". She said that normal ailments "generally" do not constitute a handicap.

[29] Judith Mosoff, "Is the Human Rights Paradigm 'Able' to Include Disability: Who's In? Who Wins? What? Why?" (2000) 26:1 Queen's L.J. 225.

crimination is adverse effects discrimination, that is, discrimination without express reference to any disability, but still creating barriers for those with disabilities.

> A distinction must be made between what I would describe as direct discrimination and the concept already referred to as adverse effect discrimination in connection with employment. Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here." ... On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force. [30]

The fundamental challenge of tackling disability discrimination is to contest what is deemed "normal" because it is the way most able-bodied persons function. That is not possible without a thorough understanding of adverse effects discrimination, which requires looking behind purportedly neutral rules or practices to uncover detrimental effects on those who do not function "normally".

The initial recognition of adverse effects discrimination developed not in the context of disability discrimination, but rather religious discrimination. When the Supreme Court of Canada subsumed adverse effects discrimination within prohibited discrimination under Canadian human rights legislation in *O'Malley*,[31] however, the implications for disability discrimination were obvious. A challenge by religious minorities to dominant religious or secular norms has clear parallels with a challenge by the disabled to norms based on able-bodied modes of performance. It was not mere happenstance that the Canadian Association for the Mentally Retarded and the Coalition of Provincial Organizations of the Handicapped were interveners in *O'Malley*. Employment rules or expectations formulated in accordance with the able-bodied way of doing things are quite likely to exclude disabled workers, even if unintentionally.

Since *Meiorin*,[32] the analytical approach following a finding of a prima facie case of discrimination no longer differentiates between direct and adverse effects discrimination. Yet, the concept of adverse effects discrimination is still crucial to a comprehensive understanding of discrimination. One can no longer avoid a finding of a prima facie case of discrimination by claiming that one is relying on the normal way of doing things or applying typical expectations. Where there is no express reference to grounds so as to constitute direct discrimination, adverse and/or disproportionate effects must still be assessed as a means of challenging norms.

A key legal concept enabling norms to be challenged is the duty to accommodate up to the point of undue hardship, herein the duty to accommodate. Like adverse effects discrimination, the duty to accommodate, though initially recognized in the context of religious discrimination, is especially important in relation to disability discrimination. Although the duty to accommodate is no longer exclusively linked to adverse effects discrimination,[33] its conceptual underpinnings are heavily influenced by the fact that it emerged coincidentally with the recognition of

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[30] *Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536 at 551, 52 O.R. (2d) 799 [*O'Malley* cited to S.C.R.].

[31] *O'Malley*, *ibid.* (*O'Malley* involved an ultimately successful claim of religious discrimination arising from the requirement for full-time sales clerks of a retail store to work on Saturdays. Although the rule applied to all full-time sales clerks, it had a disproportionate impact on practicing Seventh Day Adventists, like O'Malley, whose religious tenets precluded work on Saturdays.).

[32] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3, 176 D.L.R. (4th) 1 [*Meiorin* cited to S.C.R.] (*Meiorin* involved a challenge to an aerobic fitness standard for forest firefighters. The standard was gender neutral on its face, and hence did not amount to direct discrimination, but because the standard disproportionately excluded women, it did amount to adverse effects discrimination.).

[33] *Ibid.*

adverse effects discrimination in *O'Malley*.[34] When the Supreme Court of Canada accepted that Canadian human rights legislation prohibited more than intentional or direct discrimination, it simultaneously recognized the need to put some implicit limits on adverse effects discrimination. Without an express link to the grounds of discrimination limiting the scope of prohibited discrimination, the incorporation of adverse effects discrimination substantially expanded what may amount to prima facie discrimination. Undue hardship, a respondent's defence to its duty to accommodate, ensured that not all disproportionate impact would be deemed illegal. As it initially emerged in *O'Malley* as an element of adverse effects discrimination, the duty to accommodate was a very individualized concept. In my assessment, which I develop below, an exclusively individualized understanding of the duty to accommodate is woefully inadequate.

IV
THE BFOR AND THE DUTY TO ACCOMMODATE

When the Supreme Court of Canada first incorporated the duty to accommodate into Canadian human rights law in *O'Malley*, it was expressly understood as involving individualized exceptions to rules, where the legitimacy of such rules was not seriously in doubt.[35] Although adverse effects discrimination was incorporated, its impact was assumed to be limited to ad hoc minor tinkering through the duty to accommodate.

In another religious discrimination case, *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, the majority judgment of Justice Wilson continued this exclusively individualized approach to the duty to accommodate.[36] A lot of attention has been paid to the difference between the majority judgment in *Central Alberta Dairy Pool*, which held that the duty to accommodate arose in adverse effects discrimination cases outside any bona fide occupational requirement/qualification ("BFOR/Q") defence, and the minority judgment of Justice Sopinka (Justices McLachlin and La Forest concurring), which subsumed the duty to accommodate within the BFOR/Q.[37] On that point, nine years later the minority ultimately carried the day in Justice McLachlin's unanimous judgment in *Meiorin,* adopting a unified approach to both direct and adverse effects discrimination.[38] However, there is another important distinction between the majority and minority judgments in *Central Alberta Dairy Pool* which remains pertinent and yet unresolved in *Meiorin*. While Justice Sopinka agreed in *Central Alberta Dairy Pool* that ad hoc accommodation was one way a respondent could avoid liability for discrimination, he also suggested an alternative:

> An employer with a large number of employees of many different religions may be able to discharge the duty inherent in the BFOQ by adopting a policy with respect to the accommodation of the religious beliefs of its employees. Such a policy may be a reasonable alternative to a practice that entails an *ad hoc* accommodation of individual employees.[39]

Although Justice Sopinka did not elaborate, there is at least a hint here that he was contemplating accommodation in more systemic terms.

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34 *Supra* note 30.

35 *Ibid.* at 552. In *O'Malley*, the general rule was that all full-time clerks were required to work some Saturdays. Given the propensity for shoppers to shop on Saturdays, no one was challenging the need for Simpsons-Sears to have sales clerks working on Saturdays.

36 [1990] 2 S.C.R. 489 at 516, 72 D.L.R. (4th) 417 [*Central Alberta Dairy Pool* cited to S.C.R.] (The case involved the dismissal of an employee because of his absence from work on one particular day of religious significance to the employee. The employer did not accept that non-attendance at work for religious reasons was a legitimate excuse for absence.).

37 Brian Etherington, "Central Alberta Dairy Pool: The Supreme Court of Canada's Latest Word on the Duty to Accommodate" (1993) 1 Canadian Labour Law Journal 311 at 320-24.

38 *Supra* note 32 at para. 50.

39 *Central Alberta Dairy Pool, supra* note 36 at 529. See also Etherington, *supra* note 37 at 322.

That hint is also picked up in *Meiorin* where the Court critiqued an approach to accommodation that does not acknowledge systemic discrimination.[40] However, that focus is not sustained throughout the entire judgment. *Meiorin* identifies the need to investigate alternative standards,[41] and to build accommodation into the workplace standard, but the judgment still labels these responses as individual accommodation.[42] The link between individualized accommodation and combating systemic discrimination is not further developed. In what follows, I explore that link, after laying some preliminary groundwork.

Meiorin is still the leading authority on the issue of where the duty to accommodate fits into a discrimination analysis. *Meiorin* adopts a unified approach to a BFOR, equally applicable to both direct and adverse effects discrimination, and articulates a stringent BFOR test. The duty to accommodate is incorporated into the third step of the

> … three-step test for determining whether a prima facie discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:
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> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
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> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
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> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.[43]

Donald Carter, shortly after *Meiorin* was released, drew the following implications:

> The emphasis in *Meiorin* on the content of workplace standards has important implications for grievance arbitration. Longstanding rules and practices established pursuant to a collective agreement may be vulnerable to challenge. Even more important, perhaps, is the fact that arbitrators no longer have the option of upholding a collective agreement provision while allowing an exception as a vehicle for accommodating an employee who has suffered adverse-effect discrimination.[44]

Although Carter is technically accurate, I am not persuaded there is a substantive difference between upholding a collective agreement provision, while allowing an exception not provided in the agreement, compared to invalidating the agreement to the extent of reading in an exception. The more fundamental implications of *Meiorin* stem from the question of where, and in what ways, BFORs are founded on exceptions. *Meiorin* itself is somewhat obscure on these issues.

There are passages in *Meiorin* which suggest that consideration of the duty to accommodate short of undue hardship is always part of a BFOR analysis.[45] However, these passages are inconsistent with both the remainder of the *Meiorin* judgment and its underlying principle.[46] Although it is clear that employers will fail the third step of the test if they have not accommodated up to the point of undue hardship, the full analysis in *Meiorin* leads to the conclusion that employers could fail the third step of the test even before consideration of accommodation arises. Accommodation is about making adjustments (exceptions) to rules or standards. If the rule or standard is wholly invalid, one does not reach the stage of adjustment, one simply invalidates the rule. Before *Meiorin*, invalidation had been the assumed result in cases of direct discrimina-

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40 *Supra* note 32 at para. 41.
41 *Ibid.* at para. 65.
42 *Ibid.* at para. 68.
43 *Ibid.* at para. 54.
44 Donald Carter, "The Arbitrator as Human Rights Adjudicator: Has *Meiorin* Made a Difference?" in Kevin Whitaker *et al.*, eds., *Labour Arbitration Yearbook 2001-2002* (Toronto: Lancaster House, 2002) 1 at 6.
45 *Supra* note 32 at paras. 62, 67.
46 *Ibid.* at paras. 40-41.

tion.[47] After *Meiorin*, wholly invalidating the standard can result from assessing either direct or adverse effects discrimination.[48] Thus the duty to accommodate in step three of the BFOR test should be seen as subsidiary to the overarching concept of "reasonably necessary."

"Reasonably necessary" in *Meiorin* should be understood as a stringent test of justification that starts with an overall assessment of the challenged rule or practice.[49] One should not jump to tinkering around the edges without first subjecting the general rule and its underlying premises to careful scrutiny. If the rule or practice reflects dominant and discriminatory norms, and is applied merely because it reflects "the way things have always been done", without any underlying justification, then it will fail the "reasonably necessary" test before any consideration of accommodation.

Take for example an employment rule that says the job must be performed while standing. The rule is challenged by someone using a wheelchair. Assume there is actually nothing about the workplace or the job that hinges on whether the job is performed from a standing or seated position. In other words, there is no sense at all in which the standing rule is reasonably necessary. In such a scenario, the rule should simply be struck down, without any need to canvass the duty to accommodate. That would leave all employees with the choice of performing the job standing or seated, irrespective of whether they have a disability which either precludes standing or makes it difficult to stand. Since a primary purpose of prohibiting disability discrimination is to challenge able-bodied norms, the first line of inquiry should be whether the norm can be disregarded altogether, without any need to consider exceptions. That is an essential first inquiry if systemic discrimination is to be challenged. Moreover, if a contemplated exception challenges the logic of the rule, it is the rule itself that should be under scrutiny. As I have argued elsewhere, that was the situation in *Meiorin*, though that point was not highlighted in the judgment.[50]

Nonetheless, given the variety of disabling conditions, it is often the case that the same rules, standards, or practices do not and cannot work for everyone. As such, accommodation, in the sense of adjustments or exceptions, must be considered in cases of alleged disability discrimination. In moving to the consideration of the duty to accommodate, however, it is still important to think in both systemic as well as individualized terms. That is precisely the point of assessing building codes and design standards based on universal design principles. The Canadian Human Rights Commission has elaborated: "Universal Design, Design for All and Inclusive Design all provide guiding principles that promote design that considers the needs of everyone. These principles seek to create an environment that is usable by the greatest number of users ... "[51]

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[47] *O'Malley*, *supra* note 30 at 552; *Meiorin*, *supra* note 32 at para. 30.

[48] *Meiorin*, *supra* note 32 at para. 31.

[49] See Colleen Sheppard, "Of Forest Fires and Systemic Discrimination: A Review of *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*" (2001) 46 McGill L.J. 533 at 550-53; Ravi Malhotra, "The Legal Genealogy of the Duty to Accommodate American and Canadian Workers With Disabilities: A Comparative Perspective" (2007) 23 Wash. U.J.L. & Pol'y 1 at 16.

[50] Dianne Pothier, "BCGSEU: Turning a Page in Canadian Human Rights Law" (1999) 11 Const. Forum Const. 19 at 23:

> If the logic of the rule and the logic of the challenge to the rule directly contradict each other, an exception to the rule makes no sense because any exception undermines the basis of the rule. That was precisely the situation in *BCGSEU* [*Meiorin*]. The employer's rationale for the aerobic fitness test was safety. The basis for the union's challenge to Tawney Meiorin's dismissal was that she could safely perform the job in spite of having failed the aerobic fitness test, i.e. that the test was not an accurate gauge of safety.

[51] Canadian Human Rights Commission, *International Best Practices in Universal Design: A Global Review* (Ottawa: Government of Canada, Revised Edition August 2007) at 1, online: CHRC <www.chrc-ccdp.ca/pdf/bestpractices_en.pdf>.

Consider a revised version of the previous example. Assume the reason for the standing rule is that the job involves operating equipment that is designed to be used while standing. Thus the rule makes some sense in general, but not in a way that can be conclusive overall. The accommodation question is whether the equipment can be modified or adjusted so as to be operated from a seated position. *When* one asks that question matters a great deal. If accommodation is merely ad hoc and individualized, that question is asked after the fact, at which point equipment modification may be very difficult, potentially invoking undue hardship. In contrast, a systemic approach to accommodation would ask the question before the fact, and build into the initial design of the equipment a relatively easy means of adjusting the mode of operation from a standing to a seated position. Similarly, the ease of generating alternate format versions of printed documents (such as large print or Braille, or compatibility with a voice synthesizer) depends on the way in which the document was first created. Wendy Bailey describes a design method that envisages disability concerns throughout:

> Universal design is a revolutionary method of design process that fully supports the social model of disability. Universal design … seeks to design all products, buildings and interiors to be used by all people to the greatest extent possible regardless of their physical abilities. The result of this method of design is the seamless incorporation of accommodations that do not call attention to impairment as being a unique experience.[52]

Thus a systemic approach to accommodation anticipates the need for individualized accommodation, and builds in the necessary flexibility from the outset. "There is no claim to universal design's ability to eliminate 'design for special needs' entirely but rather: eliminate it to a greater extent than if the needs of impairment are excluded from design process entirely … "[53] The broader implications of a systemic approach to accommodation include the recognition that individual employers alone cannot comprehensively transform the work environment. Human rights adjudication and labour arbitration based on complaints and grievances—even systemic ones—against individual employers have significant limits. But even within the confines of individual employers, much still remains to be done in order to move toward a more systemic approach to accommodation.

A systemic approach to accommodation challenges able-bodied norms by contemplating diversity from the start. Ad hoc individualized accommodation contemplates "disability specific needs as a segregated thought rather than an inclusive thought".[54] In contrast, systemic accommodation is founded on "inclusive thought". Such contemplation gives the duty to accommodate the potential to be genuinely transformative in challenging able-bodied norms, instead of limiting it to ad hoc minor modifications. Although this distinction is not inconsistent with *Meiorin*, it is not clearly drawn out in the judgment.

Nor has the notion of systemic accommodation been significantly developed since *Meiorin*. The thrust of the duty to accommodate and the remedies flowing from a failure to accommodate up to the point of undue hardship, remain focused on the individual claimant. Progress toward a systemic approach has been modest. For example, in *Lane*, where an employer's "rush to judgment"[55] concluded that Lane's bipolar disorder could not be accommodated, Adjudicator Mullan found a breach of the procedural aspect of the duty to accommodate. This ruling provided financial compensation for Lane.[56] Mullan then turned to "public interest remedies" for the em-

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[52] Wendy Bailey, *Disability and Universal Design*, online: SNOW: Special Needs Ontario Window <http://snow.utoronto.ca/index.php?option=com_content&task=view&id=409&Itemid=380>.

[53] *Ibid.*

[54] *Ibid.*

[55] *Supra* note 17 at para. 145.

[56] *Ibid.* at paras. 153-163, 165 (neither the Commission nor Lane sought reinstatement).

ployer's "egregious"[57] lack of attention to its legal obligations under human rights legislation. In light of the absence of workplace policies, Mullan ordered the following:

> (6) The Respondent shall retain at its own expense a qualified consultant (approved by the Commission) to provide training to all employees, supervisors, and managers on the obligation of employers under the Code and, in particular, the accommodation of persons with disabilities with a special focus on mental health issues.
>
> (7) The Respondent shall within three months of this Order establish a comprehensive written anti-discrimination policy that conforms with the requirements of the Code, and that addresses discrimination on the ground of disability.
>
> (8) The Respondent shall post the policy ordered under (7) in plain and obvious locations at all places where the Respondent does business and will include the policy in the orientation materials that it provides to new employees.
>
> (9) The Respondent shall also provide copies of the policy ordered under (7) as part of any request for proposal.[58]

There was no further discussion regarding public interest remedies. These orders are clearly boiler plate terms. The absence of any elaboration suggests that, although systemic accommodation is acknowledged, there is no real follow-through.

A. Innocent Absenteeism

I want to further explore the connections among individualized accommodation, systemic accommodation, and challenging able-bodied norms by reference to some aspects of "innocent absenteeism". The concept of innocent absenteeism long pre-dates statutory prohibitions on disability discrimination. Thus, in 1993, Innis Christie was able to write an extensive article about arbitral jurisprudence concerning innocent absenteeism, while leaving disability discrimination issues to another author in the same volume.[59] It is now clear that the law of innocent absenteeism has been affected significantly by prohibitions in human rights legislation against disability discrimination. Michael Lynk has summarized the change as follows:

> In traditional employment law, an employer had just cause to terminate an employee for innocent absenteeism when two standards were met: (1) the employee's past record of absenteeism was excessive; and (2) there was no reasonable prognosis for improvement. In the classical language of employment law, the employment contract was frustrated for non-blameworthy reasons. The arrival of the accommodation duty has expanded and transformed the test in the labour arbitration arena. Now, in addition to these two traditional standards, an employer must also establish two further criteria: (3) the employee had been warned that her absenteeism was excessive, and that failure to improve could result in dismissal; and (4) if the absenteeism is the result of a disability, then accommodation efforts to the point of undue hardship have to be extended to the employee.[60]

What does the duty to accommodate up to the point of undue hardship mean in the context of innocent absenteeism? The following briefly explores that question under two circumstances: last chance agreements and automatic termination clauses.

B. Last Chance Agreements

In instances of innocent absenteeism, it is frequently the case that an employee is retained in his or her job or reinstated to his or her job on individualized terms and conditions related to future attendance at work. Such situations may arise by agreement as a means of avoiding arbi-

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57 *Ibid.* at para. 164.

58 *Ibid.* at para. 165.

59 Innis Christie, "The Right to Dismiss for Innocent Absenteeism: An Arbitrator's Perspective" in William Kaplan, Jeffrey Sack, & Morley Gunderson, eds., *Labour Arbitration Yearbook 1993* (Toronto: Lancaster House, 1993) 201.

60 Lynk, *supra* note 13 at 240.

tration. They may also arise from the arbitration of a dismissal and the ensuing award of the arbitrator. In either case, such terms and conditions are commonly referred to as last chance agreements.[61] There are numerous issues surrounding last chance agreements; only one will be discussed here.

It is common practice in last chance agreements to specify future attendance requirements by reference to some average attendance record of co-workers. Arguments have been made about the proper way of calculating such an average.[62] However, there is a more fundamental issue in referencing averages at all. Unless the distribution is absolutely flat, there will always be employees whose attendance records fall below average, but that does not necessarily mean there is any actual problem with below average attendance. Even if everyone's attendance record is unproblematic, there will almost inevitably be some who fall below average. Why should below average attendance be accorded such particular significance?

More fundamentally, the measurement of average attendance represents an attempt to identify a single norm for the workplace, which is at odds with the premise of prohibiting disability discrimination. If the point is to challenge norms, a statistical means of establishing a single norm is inconsistent. There is no reason to assume any connection between below average attendance records and undue hardship. Thus, to be valid, future attendance requirements in last chance agreements need to be geared instead to absenteeism that creates an operational disruption to the workplace sufficient to constitute undue hardship. That is not a statistical measure; it is a qualitative judgment necessarily dependent on the specific circumstances of that particular workplace. The attendance records of others may need to be factored into the analysis to enable determination of how operational needs can be covered, but in a qualitative rather than a statistical assessment.

C. Automatic Termination Clauses

McGill University Health Centre[63] is a recent decision of the Supreme Court of Canada about disability discrimination at work. The case involved arbitration of a dismissal where the collective agreement had an automatic termination clause. This particular clause stipulated that an employee was liable for dismissal after a three-year absence, with the further stipulation that attempted returns to work did not interrupt the three-year period. The particular grievor, who had been employed full-time as a medical secretary, was dismissed after a three-year absence. Her initial leave was for mental health reasons. Her attempts at a graduated return through part-time work were unsuccessful, despite extensions beyond what the collective agreement had mandated for rehabilitation periods. Shortly before her last scheduled return to full-time work, the grievor was in a car accident causing extensive injuries, rendering her incapable of returning to work. At the end of the arbitration hearing into her termination, more than three and a half years after her initial leave, her doctor could not determine a prospective return to work date. The arbitrator dismissed the union's grievance, and the Quebec Superior Court dismissed the application for judicial review. The Quebec Court of Appeal overturned that decision on the basis "that the arbitrator had not assessed the reasonable accommodation issue on an individualized basis but had instead merely applied the provision of the collective agreement mechani-

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[61] See generally Donald J.M. Brown & David M. Beatty, *Canadian Labour Arbitration*, 4th ed., Vol. 1 looseleaf (Aurora: Canada Law Book, 2009) at s. 7:6122; Morton Mitchnick & Brian Etherington, *Labour Arbitration in Canada* (Toronto: Lancaster House, 2006) at 265-68.

[62] Ronald Pink & Lori-Ann Veinotte, "Attendance Management and 'Last Chance' Agreements: A Union Perspective" in Kevin Whitaker *et al.*, eds., *Labour Arbitration Yearbook 1999-2000* (Toronto: Lancaster House, 2000) 217 at 221.

[63] *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 S.C.R.161 [*McGill University Health Centre*].

cally."[64] The hospital was granted leave to appeal to the Supreme Court of Canada. The essence of the respondent union's argument was that it is "contradictory to argue, on the one hand, that accommodation must be individualized and, on the other, that the duty of accommodation can be discharged by mechanically applying a general clause."[65] The essence of the Supreme Court of Canada's majority judgment is that, as long as one removes the word "mechanically" from the union's position, there need be no contradiction between individualized accommodation and an automatic termination clause. The majority judgment of Justice Deschamps makes it clear that an automatic termination clause is not immune from challenge pursuant to human rights legislation, but her assessment is a nuanced one.

The essence of Justice Deschamps' majority judgment is an explanation of why an automatic termination clause is a relevant consideration. This particular automatic termination provision, with its three-year limit, is an especially long one. On the one hand, as Justice Deschamps properly notes, lengthy termination clauses would often provide more protection than an individualized assessment based on human rights legislation: in particular circumstances, the needs of the disabled employee would frequently be satisfied well before the specified limit.[66] On the other hand, she reiterates that it is not permissible to contract out of human rights legislation, which demands an individualized assessment of the circumstances of the disabled employee. If an automatic termination provision provides a shorter period than human rights legislation would dictate in an individual case, it is legally ineffective.[67]

Still, the automatic termination clause is relevant to a determination of what human rights legislation demands. An automatic termination clause is "negotiated accommodation".[68] Especially given that the negotiation is between parties familiar with the workplace but with different interests, the clause is relevant evidence as to what the employer and union consider, in general, to be undue hardship in that employment context.[69] The clause may be inconclusive with respect to what generally constitutes undue hardship or with respect to the exceptional nature of the particular case. However, the clause is a "factor to consider".[70] Justice Deschamps goes on to say the following:

> Reasonable accommodation is thus incompatible with the mechanical application of a general standard. In this sense, the Union is correct in saying that the accommodation measure cannot be decided on by blindly applying a clause of the collective agreement. The arbitrator can review the standard provided for in the collective agreement to ensure that applying it would be consistent with the employer's duty to accommodate.[71]

Justice Deschamps concludes that the arbitrator properly decided the hospital had established undue hardship in this case. She held that he had applied the automatic termination clause, but not "mechanically". He applied it "only after having reviewed and analysed the evidence."[72]

Although she does not precisely describe it in such terms, Justice Deschamps' approach should be commended as a move toward a systemic assessment of undue hardship. Rather than an ad hoc process that treats every case as an isolated instance, it is preferable to think generally about what kind of long-term absenteeism would constitute undue hardship. Employers and unions are thus encouraged to negotiate automatic termination clauses, and to negotiate generous ones, so as not to leave themselves vulnerable to human rights challenges. Any case within the

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64 *Ibid.* at para. 8.
65 *Ibid.* at para. 9.
66 *Ibid.* at para. 25.
67 *Ibid.* at paras. 20-25.
68 *Ibid.* at para. 18.
69 *Ibid.* at para. 19.
70 *Ibid.* at para. 20.
71 *Ibid.* at para. 22.
72 *Ibid.* at para. 30.

termination clause is automatically resolved. Any case outside the termination clause could possibly give rise to a challenge, but there will be a heavy evidentiary burden to succeed in such a challenge.[73]

Ron Pink and Lori-Ann Veinotte have argued that "[i]f a workplace does not have problems with respect to absenteeism, it is unnecessary to implement such a[n attendance] policy."[74] I disagree. Confronting the issue in an ad hoc manner, responding to particular cases in crisis-management mode, presents the risk of making mistakes. Assessing undue hardship in an anticipatory manner, outside an often-charged atmosphere of a specific case, is generally preferable. It can take the pressure off individual disabled employees who may already feel vulnerable. Approaching accommodation up to the point of undue hardship in a systemic fashion, while still accounting for individual circumstances, will be less marginalizing to individual disabled employees.

V
CONFLATING THE PRIMA FACIE CASE AND THE BFOR

Wherever there is a BFOR provision, the Supreme Court of Canada has been careful to clearly separate the analysis of the prima facie case from the BFOR. The onus is on the complainant to establish the prima facie case of discrimination, and on the respondent to establish the BFOR.[75] Even in *O'Malley* where the defence fell outside the scope of the BFOR, the analytical split between the prima facie case and the respondent's defence was maintained.[76] The analytical separation not only distinguishes the onus of proof but also ensures that issues of justification are stringently scrutinized. The unified approach from *Meiorin*, whereby the BFOR analysis applies equally to direct and adverse effects discrimination, reinforces the separation of the BFOR analysis from the prior establishment of the prima facie case of discrimination.[77] Any blurring of that distinction risks weakening the scrutiny of respondents' justification arguments.[78] Such blurring has recently occurred, both at the Supreme Court of Canada level and at the human rights tribunal level.

The previous section included a detailed discussion of the majority judgment of Justice Deschamps in *McGill University Health Centre* where she quickly assumed a prima facie breach and concentrated her analysis on the BFOR defence.[79] Thus, Justice Deschamps continued the analytical separation between the prima facie case and the BFOR. In contrast, the minority judgment of Justice Abella (with Chief Justice McLachlin and Justice Bastarache in agreement) concurring only in result, blurs this distinction. Justice Abella concluded there was not even a prima facie case of discrimination, such that the duty to accommodate never arose. She reasoned that "[t]he essence of discrimination is in the arbitrariness of its negative impact".[80] Yet, since the 1982 decision in *Etobicoke*,[81] it has been clear that issues of arbitrariness are only to be assessed in the BFOR/Q part of the analysis.

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73 *Ibid.* at para. 38.

74 Pink & Veinotte, *supra* note 62 at 218.

75 *Etobicoke*, *supra* note 14 at 208.

76 *Supra* note 30 at 558-59.

77 *Supra* note 32 at para. 54.

78 In *Charter* analysis, similar issues arise in the relationship between s. 1 and s. 15. For a discussion of this relationship in disability cases, see Dianne Pothier, "Reconsideration of *Eaton v. Brandt County Board of Education* by the Women's Court of Canada" (2006) 18 C.J.W.L. 121 at 142.

79 *Supra* note 63 at para. 9. Deschamps J. notes that leave to appeal to the S.C.C. was granted on the issue of the scope of the accommodation duty.

80 *Ibid.* at para. 48.

81 *Supra* note 14.

While I agree with Justice Abella that parties should be encouraged to negotiate generous automatic termination clauses,[82] such agreed-upon clauses do not mean that there is no prima facie case of discrimination. The employees most likely to lose their jobs because of the automatic termination clause are those who have been off work because of a disability.[83] Not all disabled employees would be vulnerable, but those with particular kinds of disabilities would be especially vulnerable—a classic case of adverse effects discrimination. The link to the ground of disability, though not universal, is clear, and makes out the prima facie case. The rejoinder that a bare minimum requirement of being able to perform the job is to be able to show up for work goes to justification. Determining how much absence from work is incompatible with one's status as employee is clearly a BFOR issue. Some absence from work for health reasons is to be expected for most, if not all employees, without detracting from their basic qualifications for their jobs. When Justice Abella zeroes in on questions of arbitrariness and unfairness, she conflates the prima facie case and BFOR analysis. She jumps too quickly to the conclusion that arbitrariness and unfairness are absent.

> This [automatic termination clause] does not target individuals arbitrarily and unfairly because they are disabled; it balances an employer's legitimate expectation that employees will perform the work they are paid to do with the legitimate expectations of employees with disabilities that those disabilities will not cause arbitrary disadvantage. If the employee is able to return to work, the same or an analogous job remains available. If not, he or she lacks, and has lacked for three years, the ability to perform the job. This, it seems to me, is precisely what is protected by s. 20 of the *Quebec Charter* which states, in part, that "[a] distinction, exclusion or preference based on the aptitudes or qualifications required for an employment ... is deemed non-discriminatory."
>
> On the facts and the findings of the arbitrator, the claimant did not establish prima facie discrimination. Absent this, the employer is not called upon to justify the standard or its conduct.[84]

Justice Abella's reliance on section 20 contradicts her conclusion that there is no prima facie discrimination, because section 20 *is itself* the BFOR defence. By not addressing accommodation at all, Justice Abella cannot contemplate accommodation in systemic terms. Nor is there much room in this conflated analysis for challenging able-bodied norms.

If there were no express BFOR provision,[85] Justice Abella's analysis might be appropriate. If there were simply a general prohibition of discrimination on a list of prohibited grounds, it would be necessary to read in some implicit limitations such as unfairness or arbitrariness. I disagree with Chief Justice Lamer's comment in *Berg* that, in the then absence of an express BFOR provision, "it was not open to the respondent School to argue that the treatment of the complainant, although based on a prohibited ground of discrimination, was nevertheless reasonably justified."[86] If a defence could be read in for adverse effects discrimination in *O'Malley*,[87] it could also be read in for direct discrimination in *Berg*.[88] Otherwise, absurd results would follow—such as giving the right to drive to someone who is blind. Yet even in *O'Malley*, where the Court recognized an implicit defence available to respondents,[89] it analytically separated the

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82 *McGill University Health Centre*, *supra* note 63 at paras. 62-63.

83 *Ibid.* at para. 12

84 *Ibid.* at paras. 63-64.

85 There are now express BFOR provisions in human rights legislation in all Canadian jurisdictions.

86 *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, 102 D.L.R. (4th) 665 at 363 [*Berg* cited to S.C.R.] (Berg, who had a mental disability, was a graduate student at the University of British Columbia who had been denied a rating sheet [a type of transcript] and a key to the building in which her program's offices were located. These denials followed an incident in which Berg tried to jump through a plate glass window. Her doctor subsequently advised a university official that her depression was under control, and that such behaviour was not likely to be repeated.).

87 *Supra* note 30 at 554-55.

88 Although I would say any justification defence should have failed in *Berg*, *supra* note 86, it should have at least been arguable.

89 Even though the defence criteria were not satisfied by Simpsons-Sears in the particular case.

prima facie case and the respondent's implicit defence. Especially where there is an explicit BFOR provision, as there clearly is in the *McGill University Health Centre* case, it is crucial not to confuse BFOR issues with prima facie case issues.[90] To conflate the two absolves the respondent's conduct from critical scrutiny, and makes it hard to even recognize the impact of dominant norms.

There is another situation where conflation of the prima facie case and the BFOR emerges—as a result of comparator group assessment. The Supreme Court of Canada's reliance on the absence of a proper comparator as fatal to a section 15 *Charter* claim[91] has prompted questions about the necessity of comparators in human rights cases. Comparators are potentially problematic in disability cases where the disability raises issues that are specific to the particular disability, and requires accommodation that has no parallel for able-bodied employees.

In *Lane*,[92] an employee with bipolar disorder was dismissed upon manifesting symptoms soon after he started a job with ADGA. Counsel for the respondent employer argued that no prima facie case of discrimination had been made out because no comparator group had been treated differently:

> … Mr. Bird went on to argue that the appropriate comparator group in this case was other probationary employees at ADGA. If the Tribunal accepted that proposition, according to Mr. Bird, it was clear that ADGA would have dismissed any probationary employee working on a project of the kind for which ADGA had hired Mr. Lane if the company had any doubts as to that person's reliability, ability to work under pressure, and, most importantly, where there was a risk that the employee would require significant periods of leave at unpredictable times. According to Mr. Bird, the company would have dismissed any employee in that situation on the basis of inability to perform the essential functions of the position for which ADGA had hired that person, whether or not that incapacity was the result of disability or some other cause. As a consequence, Mr. Bird submitted that the Commission had failed to establish a critical element of the threshold to its case - that, in terms of section 5, ADGA had treated Mr. Lane differentially from the appropriate comparator group of all other probationary employees.[93]

Adjudicator Mullan rejected the argument that the claim about "inability to perform the essential requirements of the position" could be assessed without canvassing the duty to accommodate up to the point of undue hardship.[94] To do otherwise would "violate the structure of the legislation."[95] Mullan went on to question the requirement of comparator groups in human rights cases, reviewing recent authorities.[96] He went further to give the following analysis of comparators in the event that they were indeed necessary:

> However, in the alternative, if the correct interpretation is that it is legally necessary for the Tribunal to select a comparator, as argued by ADGA, for the purposes of determining whether Mr. Lane was treated differentially, I would identify the comparator as all probationary employees who could possibly need to take unpredictable periods of sick leave and even [short-term disability] and [long-term disability]. How ADGA would treat such employees is peculiarly within the knowledge of ADGA. Certainly, the primary onus of establishing differential treatment as a component of discrimination rests with the Commission. Nonetheless, I accept that, with respect to questions such as this, once the Commission has established that disability was a factor in the decision to dismiss, it is incumbent on

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[90] Moreover, it is alarming that the confusion is coming from Abella J., a former Chair of the Ontario Human Rights Commission and author of *Equality in Employment: The Report of the Royal Commission on Equality in Employment* (Ottawa: Supply and Services Canada, 1984). Furthermore, it is disconcerting that Abella J.'s judgment was supported by McLachlin C.J.C., the author of the leading Supreme Court of Canada BFOR decision (*Meiorin*, *supra* note 32).

[91] *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65, [2004] 3 S.C.R. 357; *Auton (Guardian ad litem of) v. British Columbia (Attorney General),* 2004 SCC 78, [2004] 3 S.C.R. 657.

[92] *Supra* note 17.

[93] *Ibid.* at para. 123.

[94] *Ibid.* at paras. 125-126.

[95] *Ibid.* at para. 125.

[96] *Ibid.* at paras. 127-131.

> the Respondent to lead evidence to the effect that this is the way in which it would have dealt with any probationary employee about which it had doubts on the score of reliability.[97]

Mullan ultimately rejected the employer's argument for lack of evidence regarding the treatment of other probationary employees "about which [the employer] had doubts on the score of reliability":[98]

> Indeed, it may be that, as a matter of precedent within the ADGA workplace, this is a totally theoretical question and that the dismissal of Mr. Lane was a one-off or unique occurrence in terms of the chosen comparator group. Furthermore, ADGA certainly did not produce any workplace policy to this effect. This too raises questions of the relevance of the identification of a comparator group in Code cases based on specific, individualized situations as opposed to section 15 *Charter* challenges to particular government policies.[99]

Mullan's comparator analysis improperly conflated the prima facie case and the BFOR analysis, and improperly reverted to a formal equality analysis. Mullan's analysis would mean that an employer would escape a discrimination finding as long as it could adduce evidence that it would fire all those whose attendance was unreliable, even if all such instances were disability cases. Moreover such analysis excludes any assessment of the ability to manage attendance issues. This approach contradicts Mullan's earlier analysis.

Identifying comparator groups for human rights disability cases is only a problem if one looks for formal inequality alone, and ignores adverse effects discrimination. By framing the comparison amongst those raising reliability of attendance issues, Mullan is assuming there could be no redress if all such persons were fired. That would amount to identical treatment—formal equality—of all, without accounting for the difference attributable to disability. The disability question is whether, with proper accommodation, the concerns about reliability of attendance can be adequately addressed without undue hardship. In order to get to that question, the analysis needs to reach the BFOR stage of analysis. So how does one frame the comparison at the prima facie case stage in order to get to the BFOR analysis?

At the prima facie stage, the pertinent fact is that Lane was fired under circumstances linked to his disability, whereas other probationary employees were not fired. This entails a comparison between the disabled and the non-disabled (able-bodied). The argument that there is good reason to fire Lane because his disability results in an inability to perform the essential requirements of the position is a BFOR defence—a defence necessitating consideration of the duty to accommodate up to the point of undue hardship.

Mullan notes that in *Meiorin* there is no discussion of the appropriate comparator group.[100] While that is technically accurate, I would not, as Mullan does, take that as questioning the requirement of comparators. Rather, I would take that as an indication that the comparator group in *Meiorin* was so obvious as to not require comment. The challenged aerobic fitness test in *Meiorin* was disproportionately passed by men and failed by women, owing to physiological differences between the sexes. The relevant comparator group was women being compared to men. That comparison holds notwithstanding the fact that some men failed the test and some women passed it. To suggest otherwise would be to preclude disproportionate impact qualifying as adverse effects discrimination, gutting the concept. *Meiorin* clearly affirms disproportionate impact as adverse effects discrimination,[101] and affirms that any claimed justification for relying on

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97 *Ibid.* at para. 132.
98 *Ibid.* at para. 133.
99 *Ibid.*
100 *Ibid.* at para. 127.
101 *Meiorin*, *supra* note 32 at paras. 39-42.

the disproportionate impact is a BFOR issue.[102] To be able to challenge systemic discrimination and dominant norms, a clear focus on any justification claim is essential.

Thus, in *Lane*, it does not benefit ADGA at the prima facie case stage to say that all probationary employees who raised attendance reliability concerns were or would be fired any more than it avails the British Columbia government in *Meiorin* to say that all who failed the aerobic fitness test were terminated. Similarly, there was no advantage at the prima facie case stage in *O'Malley* for Simpsons-Sears to say that all employees who were unavailable to work on Saturdays were disentitled to full-time status.

Although they are both instances of adverse effects discrimination, there is a difference between *O'Malley* as a categorical exclusion case (all observant Seventh Day Adventists were unable to work on Saturdays) and *Meiorin* as a disproportionate impact case (although women disproportionately failed the test compared to men, some women passed the test). In the disproportionate impact cases, it cannot be that the comparison is with those who face the same consequences as the claimant(s)—in *Meiorin* men who failed the aerobic fitness test—because that would preclude ever finding discrimination in disproportionate impact cases.

In a recent case, the Nova Scotia Court of Appeal fell into this error, though outside the employment context, and dealing with the *Charter* rather than human rights legislation. *Boulter v. Nova Scotia Power Inc.*[103] involved a challenge to a statutory provision requiring all the residential customers to have the same power rates.[104] The challenge claimed discrimination against those under the poverty line in not taking account of their inability to pay. The claim was framed as either direct discrimination against the poor, or discrimination against those identified by enumerated grounds, constituting groups that were disproportionately poor. The Nova Scotia Court of Appeal rejected poverty as an analogous ground of discrimination.[105] It also rejected claims of adverse effects discrimination based on, *inter alia*, disability.[106] The latter claims were founded on evidence that the disabled are disproportionately poor compared to the non-disabled. Justice Fichaud, speaking for a unanimous Court of Appeal, said there was no discrimination based on, *inter alia,* disability, because for those below the poverty line, whether disabled or non-disabled, the inability to pay was never taken into account.[107] On this analysis, only in adverse effects cases of categorical exclusion (where *only* the claimants faced the consequences) could a comparator be identified so as to successfully claim discrimination. In *O'Malley*, all those, and only those, with a Saturday Sabbath that precluded work faced loss of full-time employment; they were compared with those without a Saturday Sabbath precluding

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[102] *Ibid.* at paras. 75-82.

[103] (2009), 275 N.S.R. (2d) 214 (C.A.), leave to appeal to the S.C.C. refused, [2009] S.C.C.A. No. 172.

[104] S. 67(1) of the *Public Utilities Act*, R.S.N.S. 1989, c. 380 provides as follows:

> All tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate, and the Board may by regulation declare what shall constitute substantially similar circumstances and conditions.

In an earlier case, as a matter of statutory interpretation, the Nova Scotia Court of Appeal had ruled:

> Section 67(1) is not ambiguous: "rates … shall always … be charged equally to all persons and at the same rate" in substantially similar "circumstances and conditions in respect of service of the same description." The Board cannot reduce the rate to a low income customer who receives the same service as a high income customer.

Dalhousie Legal Aid Service v. Nova Scotia Power Inc., 2006 NSCA 74, 245 N.S.R. (2d) 206 at para. 39. The *Boulter* case challenged the statute, so interpreted, as a violation of s. 15 of the *Charter*.

[105] *Supra* note 103 at para. 43.

[106] *Ibid.* at paras. 71-81.

[107] *Ibid.* at para. 67. Because of this conclusion, Fichaud J.A. did not discuss the degree of disproportionate impact needed to establish a prima facie case of discrimination.

work on Saturdays.[108] In a categorical exclusion case, all of those not in the claimants' category do not face the consequences the claimants are challenging. However, in a disproportionate impact case, there are, by definition, some outside the claimants' category who face the same consequences as the claimants. If, in *Boulter*, there is no discrimination because both disabled and non-disabled persons face inability to pay because of poverty, then *Meiorin* was wrongly decided; both men and women who failed the aerobic fitness test were subject to termination of employment, meaning no discrimination. To recognize that *Meiorin* was correctly decided means the comparison must be made instead between those fired for failing the test (disproportionately women) and those who kept their job upon passing the test (disproportionately men).

In assessing disability claims in employment, the comparison must similarly be made between the disabled individuals who face adverse job consequences and the non-disabled individuals who do not face job consequences. In such a framework, the unique needs and/or limitations of particular disabilities do not yet factor into the analysis. In the employment context, these unique circumstances attributable to disability enter the analysis as part of the BFOR justification, subsequent to the establishment of the prima facie case of discrimination, made on the basis of a proper comparison with the able-bodied. Such a split between the prima facie case and the BFOR stages of the analysis is critical to identifying, and challenging able-bodied norms.

Thus, the fact that bipolar disorder raises unique issues about monitoring employees[109] does not deny the relevant comparison in *Lane* between the disabled and the non-disabled. As Justice McLachlin (as she then was) said in *Canadian Egg Marketing Agency v. Richardson*:

> As in any discrimination analysis, the key is determining who the appropriate comparators are—who are the "others" with whom the individual is entitled to be equal, in relation to whom the individual is entitled not to be disadvantaged? Artificial differences which place the individual in a class of her own must be avoided: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. The reality or "substance" of the individual's situation, as compared with others in relation to the purpose and goal of the anti-discrimination provision, must be seized.[110]

Similarly, the fact that pregnancy is unique to one sex does not detract from the claim that pregnancy discrimination amounts to sex discrimination[111] even though one cannot claim that pregnant men were treated differently from pregnant women. In relation to sex and disability, respectively, the comparison is not across the effects of pregnancy or the effects of bipolar disorder, but concerns the job-related consequences resulting from the pregnancy or bipolar disorder. If job consequences flow from a prohibited ground of discrimination, the comparator group is comprised of those individuals with different characteristics within that prohibited ground who do not face those job consequences.

Thus the comparator analysis must focus on the existence of job consequences, not their underlying rationale. Any argument justifying the job consequences is a BFOR issue. Mullan's comparator analysis improperly conflates the existence and justification of the job consequences.

Although Justice Abella in *McGill University Health Centre* and Adjudicator Mullan in *Lane* came to what I would consider the proper conclusions, their analytical method is worrisome. Historically, the analytical separation between the prima facie case and the BFOR has enabled the BFOR to be a stringent test. I have argued above that the *Meiorin* approach to the BFOR needs further development to increase its systemic impact. Conflating the prima facie case and the BFOR is counterproductive in that respect.

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[108] *Supra* note 30 at 555-56.

[109] The main accommodation sought by Lane was that he be monitored for early signs of the onset of a manic episode to enable intervention to ward off the onset of a full-blown manic episode (*supra* note 17 at paras. 2-3).

[110] [1998] 3 S.C.R. 157 at para. 125, 166 D.L.R. (4th) 1.

[111] *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, 59 D.L.R. (4th) 321.

CONCLUSION

Equality for disabled workers requires workplaces that are responsive to their diverse needs. The social model of disability places the emphasis on fixing the environment, not on fixing the disabled worker. That has implications for the meaning of disability, the meaning of discrimination, and the responsibilities of employers in compliance with non-discrimination obligations.

The Supreme Court of Canada has interpreted disability purposefully in recognition of the importance of challenging barriers to inclusion. The incorporation of adverse effects discrimination into prohibited discrimination enables identifying and challenging non-disabled norms. A stringent BFOR test, including a respondent's duty to accommodate up to the point of undue hardship, places a significant legal onus on a respondent to justify its claim that a particular disability precludes performance of the position's essential requirements.

Still, the prevailing approach to issues of disability discrimination has been carried out in an ad hoc fashion. Ad hoc responses have a limited capacity to challenge dominant able-bodied norms and, therefore, a limited capacity to truly integrate disabled workers. In contrast, a systemic approach contemplates diverse norms from the outset. The importance of individualizing the response to disability is not inconsistent with a systemic approach, because a systemic approach facilitates any required tailoring. Building in flexibility at the outset typically makes adjustments easier compared to an ad hoc attempt to counteract initial rigidity.

Canadian law has yet to clearly embrace a systemic approach to disability discrimination. There are some hopeful signs, especially in assessments of the duty to accommodate. But there are also some worrying signs, for example in instances where the distinction between the prima facie case and the BFOR is blurred. Such blurring inhibits consideration of differential needs owing to disability.

Canadian human rights law has gone through considerable evolution over the last few decades. Minority judgments have become majority holdings in fairly short order. Disabled workers have made significant gains, but these are far short of a fundamental transformation of the workplace. The future potential for fundamental transformation will largely depend on the extent to which systemic approaches to disability discrimination can be incorporated into anti-discrimination law.