



What's New in HR Law

Ontario Divisional Court Affirms Employer's Right to Request an Independent Medical Examination

July 27, 2017

BOTTOM LINE

Under the Ontario *Human Rights Code* (the “Code”), employers are entitled to request that an employee undergo an independent medical examination (“IME”) as part of the duty to accommodate, provided the medical information required by the employer cannot reasonably be obtained from the employee’s treating practitioner.

Facts: Employee refuses to undergo an IME and alleges employer discrimination

In 2010, the employee, a Superintendent of Schools with the respondent School Board, went on sick leave. As part of the proposed return to work plan, the employee’s psychiatrist made recommendations for accommodation.

The School Board was concerned that the psychiatrist’s recommendations did not reflect an objective understanding of the employee’s workplace or essential duties, so it requested that the employee undergo an IME. The employee refused to attend the IME, maintaining that the School Board’s request was improper.

The employee resigned from his job in 2012 and made an application under the *Code* alleging that his employer had discriminated against him by failing to accommodate his return to work.

The Tribunal found that the School Board's request was reasonable and dismissed the application. The employee then filed an application for judicial review of the Tribunal's decision with the Ontario Divisional Court.

The Determination: Tribunal's decision reasonable – employer had a reasonable and *bona fide* basis for requesting an IME

In dismissing the application and upholding the Tribunal's decision, the Divisional Court held that subsection 17(2) of the *Code*, which imposes a duty to accommodate an employee's disability to the point of undue hardship, brings with it the right to request an IME in certain circumstances.

The Court noted that the employee's psychiatrist had reversed his position as to whether the employee could resume his duties, after maintaining for a period of two years that the employee was unable to work. The timing of this reversal coincided with the end of the employee's paid sick leave. The Court found that this relatively abrupt reversal provided a reasonable and *bona fide* basis for the School Board to question the adequacy and reasonableness of the psychiatrist's medical opinion. Accordingly, the Court concluded that it was reasonable in the circumstances for the Tribunal to have found that the School Board was entitled to seek a second medical opinion.

The Court also accepted the Tribunal's conclusion that, although the School Board may have conferred with the applicant's psychiatrist prior to, or in lieu of requesting an IME, the availability of this alternative course of action did not diminish the reasonableness of the School Board's decision to immediately request an IME.

The Court cautioned that an employer is only entitled to request an IME where it cannot reasonably be expected to obtain the information it needs from the employee's medical expert as part of the duty to accommodate. The Court also noted that an employee will be justified in refusing to attend an IME if the employer provides information to the examiner that impairs the examiner's objectivity.

Check the Box

The Court's decision affirms the right of an employer under the *Code* to request an IME where there is reason to doubt the adequacy or reasonableness of recommendations for accommodation provided by an employee's treating medical practitioner. However:

- Employers should consider whether they may reasonably be expected to obtain the information they need from the employee's treating practitioner before requesting an IME; and
- When requesting an IME, employers should be careful not to provide any information to the examiner that may impair his or her objectivity.

Forum: Ontario Superior Court of Justice (Divisional Court)

Date: May 19, 2017

Citation: *Bottiglia v Ottawa Catholic School Board*, 2017 ONSC 2517

For further information, please contact Evan Daikov at 416-408-5502, or your regular lawyer at the firm.



Toronto

Bay Adelaide Centre
333 Bay Street, Suite 2500,
PO Box 44
Toronto, Ontario M5H 2R2
tel: 416.408.3221
fax: 416.408.4814
toronto@filion.on.ca

London

620A Richmond Street, 2nd Floor
London, Ontario N6A 5J9
tel: 519.433.7270
fax: 519.433.4453
london@filion.on.ca

Hamilton

1 King Street West, Suite 1201
Box 57030
Hamilton, Ontario L8P 4W9
tel: 905.526.8904
fax: 905.577.0805
hamilton@filion.on.ca