Recent Human Rights Tribunal of Ontario Decision Recognizes Miscarriage as a "Disability": What does this mean for Employers?

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In its recently released interim decision, *Mou v. MHPM Project Leaders,* 2016 HRTO 327, the Human Rights Tribunal of Ontario considered whether a woman's miscarriage constituted a "disability" within the meaning of the Ontario *Human Rights Code* ("Code").

Ms. Mou was an employee of MHPM Project Leaders. In 2013, she had a difficult year, experiencing both a slip and fall and a miscarriage, both of which caused her to have to take time off of work. As a result, she did not meet her 1,800 hour annual target and in both her interim and annual performance evaluations for 2013, Ms. Mou's supervisor specifically identified a need for her to improve on her ability to meet scheduled delivery objectives. Her employment was ultimately terminated in February 2014.

Ms. Mou commenced a human rights application alleging discrimination on the basis of disability. She alleged that her absences from work — caused by the slip and fall and her miscarriage — were factors in her employer's decision to terminate her employment. The employer brought a preliminary request to have Ms. Mou's application dismissed on the basis that both the slip and fall injury and her miscarriage did not constitute disabilities pursuant to the Code. The employer argued that in order for an injury or illness to constitute a disability, there must be an aspect of permanence and persistence to the condition. The employer further argued that the health issues experienced by Ms. Mou in 2013 were temporary in nature and she fully recovered from them. As such, they did not affect her participation in the workplace or in society.

In her decision, which ultimately found that a miscarriage is a "disability" within the meaning of the Code, Vice Chair Jennifer Scott reviewed the definition of "disability", noting that section 10(3) of the Code provides that a disability does not have to be permanent. While the Tribunal has consistently held that commonplace, temporary illnesses such as a cold or the flu are not disabilities because this would have the effect of trivializing the Code's protections, miscarriage is not a common ailment and it certainly is not transitory. Vice Chair Scott further relied on Ms. Mou's testimony that she

continued to experience significant emotional distress from the miscarriage even to this day.

It is important to note that this is only an interim decision of the Tribunal and it has not yet been decided whether the employer MHPM Project Leaders violated the Code when it dismissed Ms. Mou. However, the decision makes it clear that if Ms. Mou's absences from work, which were caused by her miscarriage, were a factor in MHPM's decision to terminate her, even though the termination came approximately eight months following the absences, then this would breach the Code.

For employers, this decision will serve as confirmation that, if made aware that an employee is suffering from either physical or emotional complications arising from a miscarriage, this will trigger a duty to accommodate the employee's issues to the point of undue hardship and will require the employer not to discriminate against the employee on the basis of such issues. In most instances, accommodation will be in the form of providing time off work to heal or grieve. Certainly any adverse decisions that may be linked to the miscarriage or time off due to a miscarriage would constitute a violation of the Code.

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