Discriminatory Behaviours Towards Employees with Disabilities:
An Inductive Empirical Legal Research Approach to Ontario Human Rights Tribunal Cases

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Abstract

Researchers have devised various methods to gauge employers' perceptions of employees with disabilities. Most of these methods involve employer self-reports, with only a few studies examining the behaviour of employers. This study applied a unique, untapped data set—decisions from the Human Rights Tribunal of Ontario—that captures retrospective information on the behaviour of employers. Fourty-three decisions were analyzed, resulting in 16 cases with findings of discrimination, which were further coded and analyzed for iterative, emergent patterns of employer behaviour and for how employers socially construct disability.

The first objective of the research was to discern patterns of employer behaviours towards employees with disabilities. Six patterns emerged from the data. First, employers deployed ten different explanations to excuse their discriminatory behaviour: (1) the employee had a high incidence of absenteeism, (2) the employee had abandoned their job, (3) the employee's behaviour was inappropriate, (4) the employee was in the probationary period and could be fired at will, (5) the employee violated the employer's zero-tolerance policy, (6) the employer's decision to terminate was made before the disability was disclosed, (7) the employee's safety was at risk, (8) the medical documentation provided did not provide sufficient information, (9) the employee's performance was poor, and (10) employee had discipline issues. Second, all the accommodation requests ended with the ultimate employment penalty—termination of the employee's employment, constructive termination, or resignation. Third, it was found that a significant number of the employees experiencing discrimination had either a combination of mental health issues, hidden disabilities, or precarious employment. Fourth, contact theory (Allport 1954) posits that contact between different groups will lead to attitude change, diminish intergroup prejudice and improve intergroup harmony. Contrary to contact

theory, experience with an employee with a disability did not arrest the employers' discriminatory behaviours. Fifth, the experience in these cases is contrary to the theory that suggests that organisations with more flexible structures are more likely to accommodate employees with disabilities (Baumgärtner, Dwertmann, Boehm and Bruch 2015). Lastly, unlike Beatty et al. (2019) findings that large, public-sector and unionised organisations are more inclusive, in the cases here, the size of the organisation, the presence of a union or the presence of human resource capacity in the organisation did not mediate inclusion and responsiveness to disability needs.

The second objective of this research was to examine how employers socially construct employees with disabilities. Employers' excuses socially construct employees with disabilities in pejorative ways. Moreover, the workplace is comprised of layers of social constructions (constructive discrimination, harassment, denial of nonapparent disabilities, construction of organisational culture, construction of psychological safety and organisational justice climates, notions of the standard worker, leadership style, belief in a just world, trust).

The most significant conclusion is that discrimination was not driven by financial costs related to accommodations or other reasons employers typically give to explain their discriminatory behaviour. Most accommodation requests involved modifications of the scheduling but not financial outlays. When expense was required, none of the accommodations resulted in an undue hardship. However, it is hypothesised that discrimination of these employees results from managers' implicit presumption that managing employees with disabilities would consume inordinate amounts of managers' time. In reality, some accommodations might require additional manager time, such as flexible scheduling but no time commitment remotely approaching undue hardship.

The implication is that misinformation about managers' time commitments to manage employees with disabilities adds a layer of complication in creating disability confident employers, particularly as it likely operates at an unconscious level.

Dedication

It is ironic that human life takes nine months to make, but a doctorate takes years. I dedicate my dissertation to three remarkable women in my life who endured those years along with me: Selina, Remi, and Eden.

You have all been my greatest supporters through good and bad, joy and stress. I appreciate that you all endured my stress and anxiety with more grace than I wore them. There are certainly moments and choices I would like to have done differently, but I appreciate that you tolerated them mostly good-naturedly. I also lament all the times that I missed out on spending time together because I was engaged in work or the uncountable times I was disconnected because I was preoccupied with work. Words cannot adequately capture the arc of this journey. A doctorate is truly a single-minded venture that does not balance easily with other priorities, and it was much more time and focus consuming than I ever expected.

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Surprisingly, while Hallmark says the traditional 30th-anniversary gift is pearls, it is a little-known secret that the traditional 30th-anniversary gift is a dissertation defence. Just think, you will not have to listen to the interminable sound of a highlighter as I read in bed, nor the nonstop sound of my printer or the jarring sound of the stapler late at night. Nor will you have to suffer the never-ending “I just need to finish writing this thought” or “wait until I finish reading

this paragraph" anymore. I can truly never repay you for your patience and tolerance. I look forward to another 30 years of hopefully more ups than downs.

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Chapter 1 - Introduction

Research Question

Researchers have devised various methods to gage employers' perceptions of employees and employment applicants with disabilities, but few examine the actual behaviour of employers. Employment discrimination against persons with disabilities represents a significant number and proportion of the Human Rights Tribunal of Ontario (HRTO) cases every year. The cases in which employers have been found to violate the code offer a source of data on employers' discriminatory behaviours. The HRTO cases are a unique, untapped data source to examine patterns of employers' behaviours towards persons with disabilities. This dissertation used this data to explore:

- patterns of discriminatory employment behaviours, and
- whether the cases reveal doctrines, concepts, or practices that socially construct disablement.

In other words, this research examines what patterns of employer behaviour can be discerned from the HRTO cases, where employment discrimination occurs.

Research Gap

There is a gap in studying employer behaviours. Most of the existing research measured employers' intentions or perceptions (Hernandez et al., 2008) as a proxy for actual hiring (Araten-Bergman, 2016). Most of the methods deployed are surveys, interviews, focus groups, and experimental designs, (Hernandez et al., 2008), as will be discussed in Chapter five. Most of these methods, however, are susceptible to social desirability bias (Antonak & Livneh, 2000; Araten-Bergman, 2016; Wilson & Scior, 2015), which "is the tendency of individuals to deny

socially undesirable actions and behaviours and to admit to socially desirable ones" (Chung & Monroe, 2003, p. 291). In other words, what employers say they would do in respect to hiring persons with disabilities and what they actually do are not coincident. Employers' good intentions and political correctness may not translate into actual employment for persons with disabilities.

Context

Persons with disabilities in Canada are chronically underemployed and have significantly high levels of unemployment. In its *Concluding Observations on the Initial Report of Canada* to The United Nations Committee on the Rights of Persons with Disabilities, the committee identified a "persisting gap in the exercise and enjoyment of rights by persons with disabilities" in "work and employment and an adequate standard of living" (United Nations, 2017, section 13[a]). The report also stated that "The Committee is concerned at the high number of unemployed among the persons with disabilities" in Canada (United Nations, 2017, Section 47).

Yet, in Canada, 39% (645,000) of persons with disabilities aged 25 to 64 who are neither in school nor employed have work potential (Morris et al., 2018). An American study showed that 80% of unemployed persons with disabilities want to work (Ali et al., 2011). Yet, this persistent unemployment of persons with disabilities exists, even in periods of shortages in various labour market sectors. For example, in the last quarter of 2017, the Canadian Federation of Independent Business's *Help Wanted, Private Sector Job Vacancies, Q4 2017* reported a record high level of job vacancies, at 399,000 unfilled jobs or 3% vacancy rate (the percentage of unfilled jobs relative to all available jobs in the private sector; Mallett 2018). The employment rate for persons with disabilities in 2017 was only 59% compared to 80% for Canadians without

disabilities (Morris et al., 2018). The rate of unemployment was further exacerbated for persons with disabilities due to the COVID-19 shutdown (Statistics Canada, 2020).

Lynk (2007) celebrated that "the rise of human rights obligations, and, in particular, the emergence of the duty to accommodate, has become the most significant workplace law development in recent times" (p. 190). However, Lynk lamented, "Yet, between the law and the social reality it is meant to alleviate, there remains a yawning chasm. Discrimination and disparate treatment on the grounds of disability remain stubborn and pervasive features in Canada" (p. 193). For many Canadians with disabilities, this opportunity to actualise their identity is not a reality, even though the right to equal treatment in employment is set out in every human rights code in Canada (Canadian Human Rights Commission, 2012).

The Supreme Court of Canada recognised the absolute significance of employment to personal identity. Chief Justice Dickson held that:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and ... a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. (*Reference Re Public Service Employee Relations Act (Alta),* 1987, p. 368)

The United Nations *Convention on the Rights of Persons with Disabilities* (CRPD) enshrined the right for persons with disabilities to work and employment (Art. 27). The Convention, the highest expression of disability rights internationally, has been ratified by Canada and is therefore binding on Canadian employers and governments. More significantly, Article 27 "lies within an international instrument that posits ideas of equality and dignity" (Albin, 2015, p. 3). The right to work, therefore, is referential to the fulfilment of one's "inherent dignity", as set out in the CRPD's preamble. The United Nations recognises that the right to work is a fundamental right. "It is essential for realizing other human rights and forms an inseparable and inherent part

of human dignity. Every individual has the right to be able to work, allowing him/her to live in dignity" (Office of the High Commissioner of Human Rights, 2012).[1]

Persons with disabilities seeking employment retention or promotion face significant barriers from discrimination. One is employers' attitudes. Attitudes are defined as an overall evaluation of a person, object, idea, or event (Chan et al., 2009; Dunn, 2015). The barrier to employment for persons with disabilities is more engrained than just mere individual stigma because it is imbedded in corporate cultures (Kruse & Blank, 2005; Schur et al., 2009; Schur et al., 2017; Stone & Colella, 1996). The reported barriers to employment for this population are multifaceted in that it has to do with management perceptions of: (a) the ability of persons with disabilities to perform (Bengisu & Balta, 2011; Donnelly & Joseph, 2012; Gröschl, 2007; Houtenville & Kalargyrou, 2012; Jasper & Waldhart, 2012; Panel on Labour Market Opportunities for Persons with Disabilities, 2013); (b) coworker and management resistance to working with a person with disabilities (Donnelly & Joseph, 2012; Gröschl, 2007; Houtenville & Kalargyrou, 2012; Schur et al., 2005); (c) the cost of accommodations (Donnelly & Joseph, 2012; Frazer et al., 2009; Gröschl, 2007; Houtenville & Kalargyrou, 2012; Kalargyrou & Volis, 2014; Panel on Labour Market Opportunities for Persons with Disabilities, 2013); (d) trepidation to hire due to perceived liability and potential litigation (Frazer et al., 2009; Wooten & James, 2005); (e) belief that employees with disabilities pose a higher safety risk (Frazer et al., 2009; Panel on Labour Market Opportunities for Persons with Disabilities, 2013); and (f) beliefs that these employees lack mobility (Bengisu & Balta, 2011; Gröschl, 2007; Panel on Labour Market Opportunities for Persons with Disabilities, 2013).

[1] However, Canadian law does not actually recognize a right to work. See section 2.7 *infra*.

Clearly, certain stereotypes and myths about employees with disabilities still permeate the business environment and affect corporate behaviour. These behaviours and biases may be imbedded in a corporation's culture and, in turn, translate into the organisation's routines (Levitt & March, 1988). Corporate culture is created through the organisation's accumulated learning, which becomes its routines, and these cultures impact employers' intentions, attitudes, and behaviours in various situations (Samant et al., 2009), such as hiring and or managing an employee with a disability.

Public Policy Context

Disability unemployment persists despite the clarion call of the *Convention of Persons with Disabilities* (CRPD), to which Canada is a signatory. It persists despite active labour market programs. Disability unemployment persists even in the face of high-level business stakeholder reports, both at the federal level (Fredeen et al., 2013) and at the Ontario level (Partnership Council Opportunities for Persons with Disabilities, 2015, 2016) extolling the advantages of employing persons with disabilities. Moreover, this persistent unemployment of persons with disabilities has significant policy and financial consequences, with $31.7 billion spent in 2013 between the federal and provincial disability support and pension programs (Stapleton, 2018). As Rioux (2017) pointed out, the cost of exclusion is a significant loss to national gross domestic product (GDP). Yet, despite these recommendations, persons with disabilities have high numbers of underemployment and unemployment (Morris et al., 2018) and in general remain overrepresented in precarious employment (Schur et al., 2009; Shuey & Jovic, 2013; Tompa et al., 2006), at least amongst new workers and older aged workers (Jetha et al., 2021).

Human Rights Context

Chapter two is a discussion situating disability in the context of Ontario's human rights regime. The *Ontario Human Rights Code* (1990) governs discrimination in employment in Ontario, except for federally regulated employers who are governed by the *Canadian Human Rights Act* (1985) and Canadian federal and provincial governments that, in addition to the applicable human rights codes, are governed by the equality section (s.15) of the *Charter of Rights and Freedom* (1982).

Canadian human rights codes establish reasonable accommodations as the principal mechanism for persons with disabilities to achieve equality in employment (and other social domains). Employers are obliged to provide accommodation of an employee's disability up to the point of undue hardship. Discrimination is the failure to provide reasonable accommodation to employees in the examined research cases, when the employees with a disability requested them, or the employer's failure to inquire as to whether the employee required accommodation when the employer had a duty to do so. I used the research cases not for their legal import per se, but for their empirical value in revealing the patterns of employers' behaviours towards employees with disabilities.

The Research Context

Perspectives, context, and definitions affect what researchers measure. Generally, what is not measured doesn't count—that is, by operation of how a concept is defined, saliant elements can become opaque and if not seen that element cannot inform research outcomes, and conclusions derived from those outcomes and potentially any policy prescriptions may be inadequate. What is or isn't counted as disability depends on how disability is defined, and how

it is defined stems from what perspective or model is used to inform the definition. Below is a description of the perspective and definitions that informed this research.

The Social Model of Disability

Defining disability is complex and controversial. "Definitions of 'impairment', 'disability', 'illness', 'disease', 'disorder', and 'chronic illnesses' are constantly shifting in terms of how they are linked to what is understood as 'disabling'" (Berghs et al., 2016, p. 25). Disability has been a fluid concept, evolving as society changes (MacKenzie et al., 2009).

The predominant conception of disability from a critical disability studies perspective is the social model of disability. The social model is the view that disability stems from how society constructs attitudes and environments. It is the concept that impairments do not cause disability, but that disability arises from the interaction of impairment with barriers in the physical, attitudinal, social, cultural, and economic environments (Barnes, 1996; Barnes et al., 1999; Barnes & Mercer, 2003, 2010; Oliver, 1996; Oliver & Mercer, 2004;). Barnes (2012) heralded the social model as "the 'big idea' (p. 13), and it has had a significant impact on the field of disability studies. However, it is recognised that the social model has had several critiques (Gabel & Peters, 2004; Samaha, 2007) and may not be a complete answer to understanding disability. However, as Samaha, one of the model's more critical examiners said, "it is not a devastating objection that the model has limits" (p. 15).

Defining Disability

The term disability captures too much and says too little. There is no agreed upon definition of disability. In fact, Canada's *Charter of Rights and Freedoms* (1982) and the United Nations *Convention of the Rights of Persons with Disabilities (CRPD,* United Nations 2007), do not define disability. On the other hand, the *International Classification of Functioning,*

Disability and Health (World Health Organization 2001), runs some 270 pages of classifications and subclassifications of body functions, body structures, activities and participation, and environmental factors. The choice of how to define disability can lead to different results (Dwertmann, 2015).

The community of persons with disabilities is not homogeneous. It encompasses physical, cognitive, psychological, and sensory impairments. Some disabilities are immediately obvious, while others are invisible. This means that any two persons who are disabled or perceived disabled have different needs and abilities. Further, there is variegation within any category of disability. As Supreme Court of Canada stated in *Eaton v. Brant County Board of Education* (1997):

> Disability, as a prohibited ground, differs from other enumerated grounds such as race or sex because there is no individual variation with respect to these grounds. Disability means vastly different things, however, depending upon the individual and the context. (para. 69, per. Sopinka J.)

In fact, employment rates, employment retention, income levels, and educational attainment vary, with severity of disability, type of disability and age at disability onset (Arim, 2015; Crawford, 2012; Morris et al., 2018, Prince, 2016; Turcot, 2014).

In respect to a definition of disability, to the extent it is necessary for this research, it makes most sense to rely on the definition the HRTO applies in their adjudication of these cases. Section 10 of the *Ontario Human Rights Code* (1990) defines disability as:

> (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
> (b) a condition of mental impairment or a developmental disability,
> € a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,

> (d) a mental disorder, €(e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*; ("handicap")

The Ontario Human Rights Commission (OHRC) advised that the *Code* defines disability as including past, present, and perceived disabilities (OHRC, 2016, s. 2). The definition is a relatively comprehensive definition of disability. Regardless, salience is not whether the cases meet some definition or other of discrimination per se, but what pattern of employer behaviour emerges from coding the cases, where discrimination has been found to have occurred. Therefore, for the purpose of this research, the Tribunal's findings of discrimination on account of disability are accepted, as operational based on the sufficiency of the Code's definition of disability.

Contemporaneous with the rise of the social model of disability, the human rights model of disability developed. This model is based on its proponents' perception that persons with impairments lack civil, political, social, or cultural rights, which injures their inherent human dignity and affects their right to equality. The human rights model of disability is aimed at the fullest possible inclusion and participation of persons with a disability in society. It is this conception of disability that informs the *CRPD* and the *Charter of Rights and Freedoms* (1982) and our human rights statues.

Tension exists regarding how the social model of disability and civil rights[2] in American parlance can coexist. Human rights are part of the social-legal apparatus of capitalist societies

[2] There is a distinction between human rights and civil rights. On one level, human rights are rights that all people have inherently from being human. These rights are recognized for persons with disabilities in paramount international documents, such as the *Convention on the Rights of Persons with Disabilities.* Civil rights are rights accorded citizens of a jurisdiction, by grant of legislative authority, such as provincial human rights statues. On another level, "encompasses both moral and legal rights in Canadian legal discourse, depending on the context. It can refer to the right to be free from discrimination contained in human rights legislation or Charter Rights in relation to government action, or it can refer to moral rights that are not. Generally human rights in Canada fit the individualistic/civil rights model, but there is some scope for collective and social rights, which are not typical of civil rights frameworks" (F. Bhabha, personal correspondence, November 15, 2021).

and represents an approach rooted in liberalism and individuality, all of which is exacerbated by the current environment of neoliberalism; whereas the major proponents of the social model are characterised as materialist (Barnes, 1996, 2012; Barnes et al., 1999; Barnes & Mercer, 2003, 2010; Oliver, 1996; Oliver & Mercer, 2004). However, key disability human rights documents, such as the *Convention on the Rights of Persons with Disabilities,* are modeled on the social model of disability (Bickenbach, 2000; Stein & Stein, 2007*)*. On the other hand, Samaha (2007) argued that the social model is not a justification for any policy prescription; it is merely "a causal account of disadvantage" (p. 63), and any choice of policy solution in response is based on normative judgments (Samaha, 2007). Justice Binnie, in the *Granovsky v. Canada (Minister of Employment and Immigration,* 2000) stated, "Exclusion and marginalization are generally not created by the individual with disabilities but are created by the economic and social environment and, unfortunately, by the state itself" (para. 30). The HRTO, under the legal principal of *stare decisis,* is bound by Supreme Court's precedents, meaning that the HRTO also defines disability as socially constructed.

A Note on Studying Disability and Employment

Studying disability in the workplace necessarily requires an interdisciplinary approach. Stone and Colella (1996) and Beatty et al. (2019) pointed out the study of disability and employment involves human resource management, organisational behaviour, and industrial and organisational psychology and can learn from social psychology, sociology, and rehabilitation psychology. The research approach here is interdisciplinary, using lenses from, human resource practices, organisational psychology, human rights law and critical management, legal and critical disability studies.

The research is principally western and global north centric, necessarily because the context is Canadian and secondly because the substantial volume of relevant research is from developed countries (Beatty et al., 2019). This is not to negate that there are significant developments in the global south in respect to disability employment (Rioux, 2017; Rioux et. al. 2019).

Lastly, as mentioned earlier, disability is heterogeneous; however, no effort was made to disaggregate findings by disability characteristics, except for a discussion on findings on mental health issues. This runs the risk of conflating and generalizing, at the cost of specificity and uniqueness of the disability workplace experiences of some employees with a disability (Beatty et al., 2019). Further, as Mertz (2014) stated:

> Of course, legal categorization is in a sense not that different from any form of social categorization; every act of dividing people up into "types" or "categories" involves some degree of reification, of noticing only some aspects of those people while ignoring their complexity, ambiguity, and uniqueness. (p. 179)

No doubt, a disaggregated analysis would provide greater nuance (Beatty et. al. 2019; Dwertmann, 2015). However, as Colella and Stone (2005) said, "It is not useful to treat discrimination as a special case for each type of existing disability" (p. 232). In this research, it is less about specificity in respect to types of disability, as much as the random sample of disability discrimination that is generated from the cases in the sample.

Data

I attempted to fill a lacuna in the literature by looking at employer behaviours as discerned from Ontario Human Rights Tribunal cases. The cases examined were those in which the employer was found in breach of the *Ontario Human Rights Code* on the ground of disability discrimination in employment. These cases were an untapped source of retrospective data from which employers' behaviours could be studied. Moreover, given the way the human rights

system works, the cases as a data set constitute a random sample. There was no way to predict or control which cases would meet the established search criteria. HRTO cases provided a rich source, as 69% of them dealt with employment, and 56% dealt with disability claims (Tribunals Ontario, 2019). Given that the behaviour has already occurred, the cases presented data that are less susceptible to social desirability bias (Potter, 2004; Silverman, 2006). A case as data could be relied on as an interpretation of a "meaningful, typical or stable attitude" (Antonak & Liveneh, 2000, p.215). Documents can form an entire study (Charmaz, 2014; Glasser & Straus, 1967; Pandit, 1996; Turner, 1983). Legal decisions are valid source for empirical document analysis (Darcy et al., 2011, 2016; Darcy & Taylor, 2009; Hall & Write, 2008).

I examined all the Ontario Human Rights Tribunal Cases for 2017 where discrimination in employment on account of disability was found. The cases are referred to throughout this dissertation as the "research cases".

Methodology

The general inductive approach is utilised here to allow themes about employers' attitudes towards the disabled to emerge from the "frequent, dominant or significant themes" (Thomas, 2006, p. 238) present in the data. Inductive research allows for the development of the most salient (Lui, 2016) "concepts, themes and models, through the researcher's interpretation of raw data" (Jebreen, 2012, p.170). As these data are unexplored from the perspective of disability employer behaviour, induction is an appropriate methodology, as it does not necessitate the testing of a priori hypothesis but is geared to uncharted phenomena such as employers' attitudes towards the disabled as revealed in the cases. The cases were coded and analysed for salient themes. The methodology applied is further expounded on in Chapter five.

Induction as a form of qualitative research is compatiable with social justice research. Qualitative research can facilitate emancipatory or critical inquiry to uncover inequitable power distribution (Charmaz, 2016, 2017; O'conner & O'neil, 2004). Such research unearths how employers construct disability and construct their understanding of their obligation under Ontario's human rights laws.

Analytical & Theoretical Lenses

As will be seen in the findings, employers' behaviours encompass excuses, acts of commission, and acts of omission. In Chapter three, theoretical context is provided around excuses as distinguished from justifications; acts of omissions in respect to constructive discrimination and procedural accommodation are introduced; and lastly, employers' acts of commission with theoretical background on harassment, poisoned work environment, failure to substantially accommodate and reprisal are discussed.

In addition to inductive coding of the research cases, the research cases were examined through theoretical lenses, which are also introduced in Chapters three and four. Principally, Stone and Colella's (1996) formative article, *A model of factors affecting the treatment of disabled individuals in organisations*, as updated by Beatty et al. (2019), was used as the basis to organise the analysis of the cases. Utilizing factors identified by Stone and Colella (1996) the data was examined for further trends to discern the characteristics of employees with disabilities who experienced discrimination, the treatment of employees with disabilities by observers (supervisors), and the characteristics of the discriminating organisations, including organisational culture, values, and beliefs.

Stone and Colella (1996) identified organisational culture and climate as factors contributing to discrimination. Building on Stone and Colella, additional elements of corporate

culture are applied, such as valuing employees and leader-employee relationships, and how the organisation is structured in respect to indicia of flexibility *á la* (Baumgärtner et al., 2015). Similarly, a more in-depth analysis of organisational climates, including psychological, disability, and organisational justice climates, was undertaken to broaden the understanding of organisational characteristics in the research cases. In particular, employees perceive the presence of organisational justice where the distribution of resources is equitable (distributive justice; Balser & Harris 2008; Heuer, 2011), where procedures with respect to decisions that impact them are fair (procedural justice; Balser & Harris, 2008; Heuer, 2011, Snyder et al., 2010), and where they are treated respectfully by supervisors (interpersonal justice; Balser & Harris, 2008, Tyler & Bies, 1990). Accommodations are such a resource, subject to employees' perceptions of organisational fairness.

The research cases involve a range of sectors and sizes of corporations. Previous research has shown that small businesses are less likely to employ people with disabilities (Domzal et al., 2008; Houtenville & Kalargyrou, 2012; Jasper & Waldhart, 2011) and that larger corporations, corporations with human resource departments, and corporations that are unionised are less likely to discriminate (Beatty et al., 2019). For this research Statistics Canada's typology is applied to determine size categorisation of the organisations in the research cases. Statistics Canada classifies small companies as being 0-99 employees, medium-sized companies as 100-499 employees, and large companies having 500 or more employees (Leung et al., 2015). Research has shown that persons with disabilities tend to be clustered in retail, transportation and warehousing and manufacturing (Turcott, 2014). Canada, Mexico, and the United States developed the North American Industry Classification System to provide common definitions of sectors and a common framework for comparative economic analysis (Statistics Canada, 2018).

These classifications will be applied to the research cases when considering trends in discrimination by sector.

Stone and Colella (1996) noted the importance of observers in how employees with disabilities are treated in organisations. From the perspective of this research, managers and supervisors are of particular interest. To this, additional lenses were applied. The theory of planned behaviour (Ajzen, 1991) was used to assess managers' beliefs, as beliefs are predictive of the likelihood of a given behaviour. Leader-member exchange, leadership style, orientation towards time, and explanations of managers' organisational justice violations (belief in a just world [Learner 1980], identity maintenance and effecting employee compliance) are utilised to understand managers' discriminatory treatment of employees with disabilities more thoroughly.

Lastly, Stone and Colella (1996) noted characteristics of the employees with disabilities as factors contributing to discrimination in organisations. Stone and Colella identified the nature of the disability, aesthetic qualities, origin of the disability, course (temporary or reversible or progressive or irreversible), concealability, disruptiveness, danger, or peril (perceived level of threat, danger, or contagion), previous performance level, gender, interpersonal style, race, and status or social power. To that are added income and precarity. Looking at these factors helps identify characteristics of employees who experience discrimination in the research cases.

Findings, Discussion, and Conclusions

Chapter seven presents the findings. These centre around discerning employers' behaviours. These behaviours take several forms ranging from deploying excuses; to acts of commission such as harassment and poisoned work environment and resistance to sick leave; to acts of omission including constructive discrimination and failure to inquire (or failure to provide procedural accommodation).

Data meet theory in Chapter eight. The data was examined through the various analytical lenses to discern trends in employers' discriminatory behaviour towards employees with disabilities. The chapter provides an extensive discussion of what reflecting on the data through these lenses yields and reveals employer discriminatory behaviours.

In Chapter nine, conclusions are drawn in respect to patterns of employers' practices and behaviours and how these employers socially construct disability in organisations. Iterative research is intended to derive an emergent theory (Thomas, 2006). Based on analyzing the cases through a combination of coding and refracting the data through the theoretical lenses, it is hypothesised that employment discrimination of employees with disabilities may be derived from mangers' implicitly biased and misconceived concern that these employees will require an inordinate commitment of managers' time, which is a manager's most valuable and perishable commodity.

Chapter nine also enumerates several areas for future research, as gleaned from exploration of the research cases and the surrounding literature on employment, organisations, and disability.

Chapter 2 - Situating Disability in Canadian Human Rights

Human rights are society's highest expression of human dignity. Human rights codify normative expectations, the contravention of which society deems to be unacceptable and for which the aggrieved can seek restitution. Discrimination has sociological and psychological antecedents. Society's corrective is the codification in law, which is both a recognition of marginalised groups that have historically experienced discrimination largely for categories of immutable human characteristics and to signal the unacceptability of the continuation of such behaviour.

The premise of this research was that mandated behaviour and actual behaviour are not always coincident. Fully understanding discrimination at work necessitates understanding the regime that governs it, particularly in a study such as this, which utilised Ontario Human Rights Tribunal cases as data. This chapter provides an overview of Ontario's human rights regime and the judicial understanding of disability in the context of employment discrimination.

Overview of the Human Rights Regime

The highest expressions of policy in respect to the treatment of prescribed minority groups in Canadian society is the protection of their equality inscribed in constitutional and quasi-constitutional law instruments. Disability is enumerated both in Canada's constitution and in provincial and territorial human rights codes. Day and Kelly (2017) stated, "It is well established that human rights legislation serves an important public policy objective and forms a central Canadian value" (p. 7).

In respect to disability employment policy, the principal engine is the employee's right to be reasonably accommodated. "Accommodation has now become the principle legal tool for application of human rights in the Canadian workplace" (Lynk, 2007, p. 208). Accommodation

is an important component of Canadian disability policy. “Canadian public policy operates within a model that strives for equality; and equality in the workplace for people with disabilities operates through the accommodation process” (Shuey & Jovic, 2013, p. 198). Human rights legislation is both foundational and paramount; however, a considerable amount of how Ontario human rights law is understood and applied is judicially determined.

Canada’s constitution, the *Charter of Rights and Freedoms* (Charter; 1982), prohibits discrimination based on disability (s. 15). The Charter governs rights-bearing relationships between citizens and their governments and government entities. However, most employers are in the private sector and therefore are not governed by the Charter. Individual rights in respect to these employers are subject to provincial codes of rights and the *Canadian Human Rights Act* **(**, 1985) for federally regulated employers.

The Ontario Human Rights Code (1990, the “Code”) has primacy over other legislation (s.47). A summary of the history of human rights legislation development relevant to Ontario is presented in Table 1. the protected characteristic was a factor in the adverse impact [*Stewart v. Elk Valley Coal Corp*., 2017; see also *Ontario (Human Rights Commission) v Simpsons-Sears Ltd*, 1985; *Moore v. BC (Education)*, 2012].

Table 1

Summary of Human Rights Legislative History in Ontario

1944	*Racial Discrimination Act*	First legislation in Canada prohibiting discrimination based on race or creed
1948	*Universal Declaration of Human Rights*	United Nations: All persons are recognised as having inherent dignity and inalienable rights
1951	*Fair Employment Practices Act*	Prohibited discriminatory employment practices
1951	*Female Employees Fair Remuneration Act*	Prohibited unequal pay based on gender
1954	*Fair Accommodation Practices Act*	Prohibits discrimination in services, facilities and accommodations in public spaces
1962	*Ontario Human Rights Code*	First Provincial codification of rights into a single document
1976	*The Canadian Human Rights Act*	Pertains to federally regulated entities and includes disability
1982	*Ontario Human Rights Code*	Prohibited grounds of handicap, citizenship, family status, receipt of public assistance, record of offence added to the code
1982	*Charter of Rights and Freedoms*	First country to entrench disability in a national constitution
1986	*Employment Equity Act*	Includes disability
1986	*The Ontario Spousal Relationships Statute Law Amendment Act*	Prohibited grounds of sexual orientation added to the OHRC
1995	*Ontario Human Rights Code*	Permeant stand-alone tribunal established
2002	*Ontario Human Rights Code*	Tribunal renamed Human Rights Tribunal of Ontario
2006	*Tranchemotague v. Ontario (Director, Disability Support Program)*	The Supreme Court held that any administrative tribunal with jurisdiction to deal with questions of law has authority to hear human rights claims, so that claimants need not seek redress in multiple venues.
2006 (effective 2008)	*Human Rights Code Amendment Act 2006*	Reorganised the administrative apparatus: complainants can file claims directly with the tribunal, The Commission now focuses on systemic discrimination. Human Rights Legal Support Services created
2006 (ratified by Canada, 2010)	*Convention on the Rights of Persons with Disabilities*	Article 27 recognises the equal right of persons with disabilities to work and employment.

Section 5 of the Code requires all persons to be treated equally, without discrimination, based amongst other things, on disability. The Code does not define discrimination; however, case law has resolved that a prima facie case of discrimination exists if the claimant: (a) has a

characteristic protected from discrimination; and (b) has experienced an adverse impact within a social area protected by the Code (*Moore v. British Columbia (Education)*, 2012).

Section 17 of the Code provides that a person's rights are not affected if, because of disability, they are not capable of "performing or fulfilling the essential duties or requirements" associated with employment. However, s. 17 requires accommodation only up to the point of undue hardship. Section 11 prohibits adverse effect discrimination unless the employer can demonstrate "the requirement, qualification or factor is reasonable and *bona fide* in the circumstances" (s.11[1][a]), but they must also demonstrate accommodation is not possible without undue hardship.

Human rights legislation "recognizes that workplaces are not neutral in their treatment of people with disabilities" (Shuey & Jovic, 2013, p. 198); however, seeking accommodations remains by and large an individual process, to request and negotiate accommodations and when needs go unmet to enforce one's rights. It is a process typically where the employee lacks equal bargaining power with the employer, and outcomes are impacted by corporate culture, union representation, precarity, and the economy and labour market conditions.

In contrast to reasonable accommodation as a remedy for discrimination is the movement to implement universal design. Universal design is defined as "composition of an environment so that it can be accessed, understood and used to the greatest extent possible by all people regardless of their age, size, ability or disability" (Centre in Excellence in Universal Design, n.d.) or "the design of products and environments to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design" (Mace, 1985, as cited in Universal Design Project, n.d.). To a certain extent those ideas are incorporated in Canadian accessibility acts. To date, Ontario, Manitoba, Nova Scotia, and the federal government have

enacted accessibility legislation. The employment standard (Ontario Legislature, 2016) under the *Accessibility for Ontarians with Disabilities Act, 2005* (AODA; 2005) requires business and not-for-profit employers with 50 or more employees to (a) notify all job applicants that accommodations are available upon request, (b) advise employees of their policies for supporting employees with disabilities, (c) provide the employee with accessible formats and communications supports if requested, (d) create written accommodation plans for each employee with a disability of which they are aware, (e) provide career development and advancement opportunities performance management (where used), (f) take into account accessibility needs for redeployment and have a return to work process for employees who have been off due to disability, and (g) provide individualised workplace emergency response information to employees with disabilities. While an improvement in that it explicitly entitles employees with disabilities to accessibility in certain circumstances, it is still largely anchored by accommodations rather than universal design. Moreover, compliance with AODA is quite low, and there is no complaint mechanism for AODA violations (Onley, 2019).

Principles of Interpretation

Lynk (2007) described the following principles the Supreme Court of Canada set out for interpreting human rights statues:

> …the Court stated that human rights statutes are a unique form of remedial legislation, and they are therefore to be given a particularly broad and purposive interpretation by legal decision-makers such as to enable these laws to achieve their indispensable social objectives. Conversely, exceptions to human rights legislation must be drawn narrowly and precisely, so as not to dilute their fundamental place in Canadian society, and these exceptions ordinarily must be sanctioned by explicit legislation. Many of the leading Supreme Court rulings on human rights have arisen out of the work - place, and the Court has repeatedly stated that anti-discrimination laws prevail over inconsistent employment contracts, practices, policies and collective agreements. (p. 206)

Thus, courts and tribunals are to give a broad reading of what constitutes discrimination on account of disability (and other enumerated grounds).

Judicial Defining of Disability and Discrimination

Furthermore, the Supreme Court has recognised that discrimination can arise as a result of socially constructed factors, thus adopting a social model of disability approach. In *Granovsky v. Canada (Minister of Employment and Immigration* (2000, per. Binnie J.) the Court stated, "Exclusion and marginalization are generally not created by the individual with disabilities but are created by the economic and social environment and, unfortunately, by the state itself" (para. 30). In *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City;* 2000; referred to herein as the Montreal City case), the Court defined disability as:

> A "handicap" may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors. Indeed, it is the combined effect of all of these circumstances that determines whether the individual has a "handicap" for the purposes of the Quebec *Charte.* (para. 79 per L'Heureeux-Dubé J)

Lynk (2007) explained the impact:

> In doing so [adopting the social model of disability], it [the Supreme Court] directed employers and legal decision-makers to think constructively about which aspects of a person's disability are truly immutable limitations within the particular setting, and which aspects of the disability can be accommodated by dismantling or altering the social barrier that effectively, but unnecessarily, obstructs the person's capacity to perform the work or take advantage of the opportunities available to others. (p. 214)

In the Montreal City case the Court also set out an expansive view of the definition of disability, as including not only actual disability but also potential and perceived disability (para. 81). Further, Canadian case law has established that there does not need to be a direct or causal connection between the impugned action and the discrimination but only that there be some connection (Montreal City, 2015, p. 789).

The Court also recognised adverse effects discrimination, in which a neutral rule, policy, procedure, requirement, or qualification (Sheldon, 2011) in its application "results in exclusion,

restriction or preference" that has an adverse discriminatory effect on a protected group (Keene, 2001, p. 189). The Supreme Court recognised that this is the type of discrimination that is most often experienced by persons with disabilities (Sheldon, 2011).

Human Rights, Disability and Employment – A Balance of Competing Interests

Employees' Rights - Reasonable Accommodation

Reasonable accommodation is essentially the balancing of competing interests between the employee's right to equal treatment and the employer's right to a productive organisation (Barnett et al., 2012; Lanyon, 2014). The Supreme Court held that the "purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship" [*Hydro-Québec v. Syndicat des Employées de Techniques Professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ),* 2008, p. 14]. Further, the Court acknowledged that accommodations of individuals with disabilities require individualisation [*Nova Scotia (Workers' Compensation Boar) v Martin; Nova Scotia (Workers Compensation Board) v. Laseur,* 2003].

Employers' Rights – Exceptions to the Requirement to Accommodate

Bona Fide Occupational Requirement (BFOR). The employees' rights are limited, where the employer can show that provision of accommodation would be an undue hardship on the business or meeting a certain standard of performance is a bona fide occupational requirement to perform the work required.

In a landmark ruling, in the *Meiorin* case [*British Columbia (PSERC) v. British Columbia Government and Service Employees' Union,* 1999; *Meiorin*], the Supreme Court set out a three-part test to determine whether a claim of a bona fide occupational requirement (BFOR) is reasonable. The test is as follows:

- Has the employer adopted the challenged standard or practice for a purpose rationally connected to the performance of the job;
- Has the employer adopted the standard in an honest and good faith belief that it is necessary to fulfill the work-related purpose; and
- Is the standard reasonably necessary, in that it would be impossible to accommodate an individual employee without imposing undue hardship upon the employer (para. 54).

The Court asserted that:

> Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, in so far as this is reasonably possible. (para. 68)

Further, in *Meiorin*, the Court significantly created a unified test for both direct discrimination and adverse effects discrimination and ruled that both types of discrimination require accommodation up to undue hardship. In *Grismer [British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights) 1999],* the Court ruled that the *Meiorin* test applies to discrimination on account of disability.

In respect to *Meiorin,* Lanyon (2014) touted it as "a remarkable and somewhat unique decision. It has a strong moral vision of equality and a vigorous legal policy design to achieve it" (p. 88). Lanyon argued that the court, by requiring accommodation to be up to impossible, infused substantive equality in the accommodation process. Lanyon explained the rationale of the test stating:

> In terms of conceptual coherence, one would want a low prima facie standard so as to address any potential discrimination, and a high standard of accommodation to ensure that all discrimination, including systemic discrimination, is effectively dealt with at the second stage of analysis. (p. 102)

By moving in *Meiorin* to substantive equality the court was more concerned about equality of results. The Supreme Court said that "the interest of true equality may well require differentiation in treatment" (*R. v. Big M Drug Mart Ltd.*, 1985, para. 347, per. Dickeson J.). However, in *Meiorin* the Court said it is the discriminatory standard that must change. "Accommodation is not only tinkering, for individuals it is systemic" (Broadsky et al., 2012, p. 10).

> Before the decision, employers had only to consider accommodation of an individual by assisting those who did not fit the existing standard. …[now] an employer must consider whether the standard itself can be changed so as to be more inclusive and promote substantive equality in the workplace. (Bukley & Brewin 2004, p. 22)

The Court further amplified this in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* (1999) stating, "'Accommodation' refers to what is required in the circumstances to avoid discrimination. Standards must be as inclusive as possible" (para. 22). The BFOR exemption to the duty to accommodate is expressly referred to in the *Canadian Human Rights Act* [1985 s.15 1(a)]. Similarly, the *Ontario Human Rights Code* (1990) provides a BFOR exception to constructive discrimination [s.11 (1)(a)]. The result is that it is not enough that the employer has established its preferred standard, even if it is innocently discriminatory. Rather, any employment standard must be shown to be a BFOR for it to be allowed to disadvantage an employee with a disability.

Undue Hardship. The Supreme Court identified, in respect to determining undue hardship, the following factors: safety, cost, effect on the collective agreement, size of the employer, employee morale, and interchangeability of the workforce and facilities [*Central Alberta Dairy Pool* v. Alberta (Human Rights Commission), 1990]. On the other hand, evidence

of the employee's work history, past accommodations, medical evidence, and misconduct may be considered (Lanyon, 2014).

The Court stated, "In order to decide that it had no other choice, it had at least to consider what those other choices were" [*Moore v. British Columbia (Ministry of Education),* 2012, p. 52]. In other words, the entity with the duty to accommodate, such as an employer, must do an individual analysis of what is possible before it concludes it cannot accommodate due to undue hardship (Lattanzio, 2014). The Court has held that the term "undue" means that it is acceptable for the employer to endure some hardship in satisfying the duty to accommodate (*Central Okanagan v. Renaud,* 1992).

After *Meiorin*, in the *McGill* case *[McGill University Health Centre (Montreal General Hospital) v. Syndicat des Employés de l'Hôpital Général de Montréal* 2007; *McGill*], the Supreme Court appears to have narrowed the duty to accommodate in stating that the factors to be considered in determining undue hardship are not entrenched, must be applied with flexibility, and that there is no absolute right to accommodation (para. 15). The court spoke again in the *Hydro Quebec* case [*Hydro-Québec v. Syndicat des Employées de Techniques Professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ),* 2008] to clarify the application of the BFOR and undue hardship. The decision delineated the limits of the employer's duty to accommodate (Sheldon, 2011). The Court stated that "what is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances" (*Hydro Quebec*, para. 12, per. Deschamps J.). The Court went on to say that the employer must accommodate the employee in a way that allows the employee to work but does not cause the employer undue hardship (para. 14); that while the employer has a duty to accommodate, the employer does not

have a duty to alter the workplace in a fundamental way (para. 16); and that "the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration" (para. 15, per. Deschamps J). The Court stated that "the employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future" (para. 19 per., Deschamps J) and that it is less the employee's disability, than the lack of being able to perform the fundamental requirements of employment, that constitutes grounds for dismissal (para. 18).

While the decision clarified the test in *Meiorin* and the confusion over the term "impossible" in step three of the *Meiorin* test, it has led scholars to suggest that the Supreme Court has rebalanced the employee's and the employer's interests. On the one hand, Peters (2008) claimed that "the decision goes a considerable distance towards restoring the balance between employer and employee interests in the accommodation analysis—balance some feared had shifted permanently in the employees' favor after Supreme Court's 1999 decision in *Meiorin.*" Sheldon (2011) argued, "The decision focuses on the limits of the employer's duty, rather than the scope, meaning, and worth of the duty itself" (p. 169). On the other hand, Bird (2008) and Irving (2009) maintained the decision restored the initial intent of *Meiorin*.

Prima Facie Discrimination

Brodsky et al. (2014) argued that systemic discrimination cannot be resolved if the claimant cannot get past the prima facie[3] discrimination stage of the discrimination analysis.

> The issue of what constitutes a *prima facie* case of discrimination is important because insistence on either a too-limited conception of discrimination, or a misallocation of the burden of proof, may mean that the respondent's obligation to rigorously justify systemic obstacles to substantive equality, against the standard of undue hardship, is never reached. More particularly, if the complainant cannot discharge the burden of

[3] *Prima Facie* discrimination refers to discrimination being evident on its face.

> establishing a *prima facie* case, the respondent is able to avoid having to answer the question: is there a way that the adverse effect could be avoided, without causing undue hardship for the respondent? (Broadsky et al., n.d., p. 8)

Prima facie discrimination need only be proven on the balance of probabilities—that is, on the evidence presented to the tribunal/court is more probable than not that discrimination occurred. Once the claimant meets that threshold the employer then must justify that the standard is essential or that to accommodate the employee would be so onerous as to constitute undue hardship. This requires employers to examine and address discriminatory standards, thus moving workplaces towards substantive equality.

The Supreme Court has recognised three indicia for determining a prima facie case of discrimination.

> ...to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. [Moore *v.* British Columbia (Education), 2012, para. 33, per. Abella J.]

The Supreme Court reiterated this test in the employment context in *British Columbia Human Rights Tribunal v. Schrenk* (2017) and in *Stewart v. Elk Valley Coal Corp*. (2017).

The Supreme Court in *Stewart v. Elk Valley Coal Corp*. (2017) finally put to rest the notion that a claimant had to show stereotype or arbitrariness to establish a prima facie case of discrimination. McLachlin C.J. cited *Quebec (Attorney General) v. A*. (2013) where the court said, “Requiring otherwise would improperly focus on ‘whether a discriminatory *attitude* exists, not a discriminatory impact’, the focus of the discrimination inquiry” (para. 45). This should arrest respondents’ efforts to read a stereotype requirement into the law, which would make a claimant’s burden much more difficult to prove a prima facie case and would essentially eliminate adverse effects discrimination. As Brodsky et al. (2014) said:

> The central objection to making stereotyping an essential element of a *prima facie* case of discrimination is that stereotyping is grounded in an insufficient understanding of discrimination. In particular, discrimination as stereotyping does not work for adverse effects discrimination: it simply misses the mark.… a lot of disability discrimination takes the form of facially neutral standards that simply fail to take people with disabilities into account. (pp. 8-9)

The Court thus has disavowed the idea of adding a fourth component to the test to establish a prima facie test to the benefit of employees with a human rights claim (CanLII Connect, 2018).

The most recent pronouncement from the Supreme Court on disability and employment is *Stewart v. Elk Valley Coal Corp*. (2017). This case involved whether the employer's policy against drug use was discriminatory. The employer's policy was that if the employee disclosed their addiction prior to an accident occurring, the employee would be offered treatment, but if the drug use was not disclosed, an accident occurred, and the employee tested positive they would be terminated. The employee in this case disclosed his addiction after an incident and was subsequently terminated. The employee claimed he was discriminated against due to his addiction.

Most judges found the Tribunal's decision reasonable. They found that the employee was not terminated due to addiction but for breach of the policy. The Court held that "the mere existence of addiction does not establish prima facie discrimination" (para. 42).

> Whether a protected characteristic is a factor in the adverse impact will depend on the facts and must be assessed on a case-by-case basis. The connection between an addiction and adverse treatment cannot be assumed and must be based on evidence. (par. 39)

In this case the court concluded that the employee could have disclosed his drug use before the accident.

It is notable that a minority of the court (Moldaver J. and Wagner J.) found that a prima facie case was made in a concurring decision. They found that the employee's control over his drug use did not eliminate his disability. However, they held that the employer discharged its

duty to accommodate up to undue hardship by its policy, which would offer rehabilitation to those who made early disclosure. Moldaver J. and Wagner J. held that otherwise the deterrent value of the policy to promote workplace safety would be undermined.

Gascon J., in a dissenting decision, found that a prima facie case was made and that there was insufficient accommodation. Gascon J. dissent is based on the well-established principal that accommodations are to be provided on an individual basis. In this case, the employer did not undertake an independent assessment of the necessary accommodation (Bhabha, 2018; CanLII Connects, 2018).

The multiple opinions in *Stewart* suggest that there is room for disagreement on what is sufficient connection between addiction and a prima facie case of discrimination (Bhabha, 2018; CanLII Connects, 2018). The majority's opinion lightens the employer's burden, if in an addiction case they can depend on a blanket policy. The majority's decision makes it easier on employers to justify their zero-tolerance policies and harder on employees to establish that the employer's policy is discriminatory. The Court held that the employee made a choice in respect to his drug use, rather than acting out of being in denial of his addiction (Bakerlaw, 2017, CanLII Connects, 2018).

The majority judgment means that a terminated employee will have a higher evidentiary burden to establish a prima facie case of discrimination when their disability is substance addiction. Gascon J. pointed out, adding choice to the test switches the "burden on complaints to avoid discrimination, rather than on the employer not to discriminate" (para. 99). The employee now has to prove more than the existence of an addiction but also that the employee's ability to comply with the policy was affected by the addiction (CanLII Connects, 2018). This may require even more extensive medical evidence (Bhabha 2018; CanLII Connects, 2018) and further

medicalises accommodations, moving away from the social context of disability (Bhabha, 2018). Bhabha suggested that the decision may lead to a presumption that most addicts have sufficient choice over their drug use, such that it makes human rights for addicts nugatory. Further, importing consideration of the claimant's personal choices, in an addiction case, adds an additional burden that is not applicable to persons with other types of disabilities (Bhabha, 2018; CanLII Connects, 2018).

The Supreme Court's decision on narrowing of what constitutes prima facie discrimination in *Stewart* is likely applicable only in addiction cases where the employer has a zero-tolerance policy. Generally, disability need only be one factor in the discrimination by the employer to constitute prima facie discrimination. Other than in addiction cases, the employee only needs to establish they have a disability, not how relatively severe the impairment is in proving prima facie discrimination. The employer's lack of intent to discriminate is not a factor that is required in establishing prima facie discrimination. All that is required is that the employer's actions or policies are discriminatory. In fact, the discrimination may be indirect or a result of adverse effects. Prima facie discrimination may be established based on a potential or perceived disability as well. The employer is obliged to consider each employee's disability and what is required to accommodate it individually. Once prima facie discrimination is established the burden is on the employer to prove it was not discriminatory, as a BFOR or that they accommodated the employee up to undue hardship. Collectively, these considerations provide opportunity for persons with disabilities to obtain corrective justice when discrimination occurs and to use the normative power of constitutional/quasi-constitutional law to move employment towards greater substantive equality.

Right to Work

The Canadian government ratified the *Convention on the Rights of Persons with Disabilities* (CRPD) in 2010 and gave accession to the Optional Protocol[4] in November 2018. The CRPD codifies a right to work for persons with a disability. Section 27 says:

> States Parties recognize the right of persons with disabilities to work on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. (United Nations 2006)[5]

Mundlak (2007) delineated three elements to the right to work that are required to have a complete right to work: (a) liberty—the freedom to work without government intrusion, (b) noncoerced work, and (c) the right to have work.

Despite the high mindedness of these intentions, a right to work does not actually exist in Canada. Little has been done to translate this portion of the CRPD into domestic law or policy. This was noted by the United Nations Committee on the Rights of Persons with Disabilities in their report, *Concluding observations on the Initial Report of Canada,* by (United Nations, 2017). Mantouvalou (2015) and Kavka (2000) pointed out that the right to work is paradoxical in that on this account full employment is unsustainable as providing jobs to everyone is inefficient.

> The phrase "right to work" can be misleading. Just as the "right to health" cannot guarantee that a person will be healthy, the "right to work" cannot guarantee a job to all people of working age. No government can realistically guarantee such a right. Instead, the "right to work" encompasses the right of all people to the opportunity to earn a living by freely choosing or accepting work and to undertake that work in safe and favorable working conditions. (Lord et al., 2012, p. 116).

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[4] The Optional Protocol is side agreement of the CRPD, for countries who opt into the Protocol. The Optional Protocol allows individuals in countries that have ratified it to bring complaints to the United Nations Committee on the Rights of Persons with Disabilities.

[5] The right to work is also recognized in Article 23 of the *Universal Declaration of Human Rights,* Article 6 of the *International Covenant on Economic, Social and Cultural Rights* and Article 3 of the International Labour Organisation's *Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159*; International Labour Office) calls for "promoting employment opportunities for disabled persons in the open labour market."

In addition, the right to work has been criticised as being imprecise, inconsistent, instrumental, and incoherent (Collins, 2015; Mundlak, 2007). “At the heart of the right to work is its most controversial component: the right to have work and the corresponding duty of the State or of employers to provide work to individuals” (Mundlak, 2007, p. 193). One argument against a right to work has been that it defies “jurisprudential classifications”, as, “the depth and scope of the right, and what is the threshold of state action or inaction that triggers an infringement of the human right” (Mundlak, 2007, p. 195). To date, Article 27 has not been litigated in a Canadian court or tribunal (ARCH, 2017; Malhotra, 2015). One can envisage the use of Article 27 to support and bolster discrimination claims under existing sections of Canadian human rights acts, but it is harder to imagine that an unemployed person with a disability could use Article 27 to base a case against the government to enforce their general right to work or against an organisation or company to provide them employment.

Despite the foregoing critique, it is not to say that Article 27 is not important. By being imbedded in an internationally endorsed document that espouses the dignity, equality, and inclusion of persons with disabilities, Article 27 establishes a general right to work (Albin, 2015). Thus, employment is recognised as a way to “realize other economic rights” (Waddington et al., 2016, p. 75) and a path to economic independence, social inclusion, self-actualisation and esteem, and family formation (Ferraina, 2012; Mantouvalou, 2015: Waddington et al., 2016). In sum, as Collins (2015) stated, “The central point of acknowledging the human right to work is that guaranteed income through welfare benefits is not an adequate substitute” for (dignified) work (p. 37).

The import of Article 27 is not that it might bolster an individual’s human rights case but that the CRPD is a legal document that helps legislatures and adjudicators “in expressing how to

draw the line between the mandate of human rights and general policy preferences" (Mundlak, 2008, p. 196). Moreover, Article 27 is a charge to government to create the conditions in which persons with disabilities are more likely to be employed (Waddington et al., 2016). Firstly, the Article specifies "state parties". As Waddington et al. pointed out, the Article establishes 11 steps that government needs to take to create a labour market where persons with disabilities work on an equal basis. The Article requires prohibition "of discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions" [CRPD Article 27 (a)]. It is a recognition that "…as long as there is lingering prejudice against the disabled, we cannot rely on the free market alone to provide appropriate employment opportunities for the handicapped" (Kavka, 2000, p. 179; see also Waddington et al., 2016).

Article 27 charges government to go beyond the usual active labour measures. A great many of what are enumerated in Article 27 to be promoted and ensured is dependent on enlightened employers. However, there is information asymmetry in employer aversion to largely phantom risks in respect to persons with disabilities. It must be that Article 27 requires government to reach beyond the usual tools and address these information failures to achieve the tasks set out in the Article. No doubt this is an unusual premise for a human rights document. "The potential for law and policy reform to address such inequality is contingent not only on framing and enforcing (new) legislation, but on understanding the social causes and consequences of labour market marginalization" (Waddington et al., 2016, p. 72). Not only is Article 27 a human rights legislation but also an employment policy proscription. It suggests that human rights legislation on its own cannot overcome prejudice in the marketplace. Article 27 is

about establishing the conditions that may make the right to work systemic. Article 27, read along with other sections of the CRPD, requires governments "to take affirmative steps to actually change society by challenging stereotypes and promoting the inherent dignity, worth, and 'equal and inalienable rights' proclaimed in the Preamble" (Kanter, 2015, p. 78). The requirement for affirmative action is also reflected in the CRPD's adoption of the social model of disability as the premises of the Convention. Other sections of the CRPD oblige state parties to provide for reasonable accommodate of persons with a disabilities (Article 5). The aim of the CRPD and specifically Article 27 is to create substantial equality (Kanter, 2015). In some ways, Article 27 is both the right to work and a precursor to the right to work in that it obligates the state to take certain actions to make public and private entities comply with the Convention.

To date, Canada has not fulfilled its Convention obligations *vis à vis* employment. Consultations held by the federal government revealed that the number one concern of Canadians with disabilities was in respect to employment discrimination (Employment and Social Development Canada, 2017). Yet, the Government of Canada has not translated the CRPD's requirements into any new employment programs or laws. Without domestic execution the CRPD is essentially nothing more than a collection of good intentions.

Conclusion

"The arc of the moral universe is long, but it bends towards justice", Martin Luther King (1965) famously said.[6] Like the Civil Rights Movement that King led, persons with disabilities have been advocating for substantive justice. Over the last 50 years, the arch of Canadian human rights law has bent towards the realisation of greater equality rights for persons with disabilities. The enshrining of reasonable accommodation to the limit of undue hardship has been a rights

[6] This aphorism is generally credited to Dr. King; however, its origins are with Theodore Parker (1853) in *Ten Sermons of Religion*.

revolution for persons with disabilities. The right to accommodation, allows many persons with disabilities to apply their abilities, avoid a life that likely would lead to poverty and to seek to actualise their lives through the dignity of work.

Over time, workplace rights have been drawn more liberally, as human rights legislation is interpreted broadly and purposively. Discrimination has been interpreted broadly, understood to be socially constructed, includes potential and perceived disability, and can arise constructively. The courts require employers to provide individual consideration of each claim for accommodation and that the employer endure some hardship in providing accommodation. Further the Supreme Court has put to rest the notion that prima facie discrimination requires stereotype or arbitrariness. *Meiorin* has been the highwater mark of the Supreme Court of Canada's consideration of the duty to accommodate. The test for adverse effects discrimination that the decision in *Meiorin* established has been an instrument of systemic change, in that it requires discriminatory rules to change, rather than the employee merely being fit into the rule if possible. These, then, are the general principles that establish the parameters under which the Ontario Human Rights Tribunal makes decisions and interprets employers' behaviours—the subject matter of this research. These principles by and large work in favour of persons with disabilities claiming discrimination.

The zenith of the arc is the adoption of the CRPD as the highest expression of rights for persons with disabilities. Particularly important is the enumeration of an express right to work for persons with disabilities and the imposition of an obligation on states to act to promote and ensure these rights.

The arc is not always smooth. The Court does seem to have retrenched (Irving, 2009; Peters, 2008) the broad understanding of *Meiorin* or at least rebalanced *(*Bird, 2008; Irving,

2009) employers' duties and employees' rights. The *McGill* and *Hydro Quebec* cases, taken together, concluded that

(1) the criteria to determine undue hardship are not entrenched and must be applied with flexibility.

(2) there is no absolute right to accommodation.

(3) the duty to accommodate does not requiring a fundamental change to the workplace and that the duty to accommodate ends if the employee is no longer able to fulfill the basic obligations associated with the employment relationship.

In *Stewart,* the Court increased the evidentiary burden on employees to prove an addiction is a factor in their dismissal. It will be interesting to observe whether this rebalancing of employee rights and employer obligations is temporary turbulence or a burgeoning trend.

As beneficial as human rights are, they have not yet lifted a great deal of persons with disabilities into employment, and as the volume of human rights claims attests, many employers do not yet appreciate their responsibility to accommodate or are unaware of their duty. Many employees with disabilities still experience stigma associated with disability and avoid disclosing it. While it is essential that persons with disabilities have a forum of redress, as will be seen in the research findings and conclusions chapters, the HRTO cases do not seem to have a systemic impact on employers as a deterrent, let alone a more positive impetuous to revise their corporate cultures and routines.

Chapter 3 - Theoretical Lenses Part I: Legal Perspective

Inductive research typically does not start with a theory, but rather seeks to derive a theory from the data. However, data on their own are opaque, noisy, and lack context. Data do not come with a ready explanation of what it means for social life. Green (2014) noted, "The development of theoretical or conceptual frameworks can be undertaken as an outcome of the research" (p. 35), as was the case with this research.

To assess and contextualise the data, it is necessary to understand the relevant legal and academic theory in each area the data give rise to. As Kiunja (2018) stated:

> A theoretical framework comprises the theories expressed by experts in the field into which you plan to research, which you draw upon to provide a theoretical coat hanger for your data analysis and interpretation of results. Put differently, the theoretical framework is a structure that summarizes concepts and theories, which you develop from previously tested and published knowledge which you synthesize to help you have a theoretical background, or basis for your data analysis and interpretation of the meaning contained in your research data. (p. 46)

Kiunja (2018) further stated:

> The theoretical framework provides a structure for what to look for in the data, for how you think of how what you see in the data fits together, and helps you to discuss your findings more clearly, in light of what existing theories say. (p. 47)

Theory helps connect this research to existing scholarship (Colins & Stockton, 2018).

> By linking the specific research questions to the larger theoretical constructs or to important policy issues, the writer shows that the particulars of this study serve to illuminate larger issues and therefore hold potential significance for the field. (Marshall & Rossman, 2011 p. 7)

Kiunja (2018, as cited in Guba 1981) argued that a theoretical framework adds to credibility, transferability, confirmability, and dependability.

Theory in this and the next chapter does not refer to research paradigms or research methods but to disciplines. A discipline represents a unique perspective or world view (Repko & Szostak, 2021). Disciplines are "lenses through which we look at the world and interpret it"

(Repko & Szostak, 2021, p. 34). A discipline is a perspective from which to views reality. Perspective is a standpoint from which to assess problems, issues, behaviours, or phenomenon (Repko & Szostak, 2021). Each discipline "filters out certain phenomenon so that it can focus exclusively on the phenomenon that interest it" (Repko & Szostak, 2021, p. 34). Obviously, each discipline presents an important but incomplete version of reality. An interdisciplinary approach provides a more comprehensive view. Propper (1963) noted, "We are not students of some subject matter, but students of problems. And problems may cut across any subject matter or discipline" (p. 88). Disability studies is inherently interdisciplinary. An interdisciplinary study of disability in organisations can only provide a more complete understanding.

In this chapter various analytical lenses are applied to studying the research cases and the various themes that arose in the data. Excuses and justifications are discussed drawing on legal and psychological scholarship, followed by theoretical contextualisation of each of the excuses employers in the research cases deployed, from legal, organisational, and disability perspectives. Acts of discrimination that arise by employers' omissions (constructive discrimination and procedural discrimination) are examined through the legal and disability human rights literature. This is followed by employers' acts of commission. Harassment/bullying is informed by literature from social psychology, management and organisational studies, and industrial and organisational psychology. Poisoned work environment, failure to substantially accommodate, and reprisal are examined is through the legal literature.

Excuses

Justification vs. Excuse

As will be discussed in detail in the presentation of findings in Chapter seven, themes emerged in respect to excuses by employers who were found to have discriminated against

employees with disabilities in the research cases. The excuses that arose consist of absenteeism, employee's abandonment of their job, the employee's behaviour, job performance, probationary period, breach of the employer's zero-tolerance policies, termination before disclosure of the disability, termination for the employee's personal safety, and medical note provided not specific enough.

Initially, in this project the terms "justification" and "excuse" were used interchangeably, as one would in normal parlance. Even in criminal law, a delineation between the terms is not clear. Botterell (2009) said, "In particular, the value of the distinction is contested and there is no general consensus about how best to delineate its contours" (p. 172). A great deal has been written by legal scholars (Berman, 2003; Botterell, 2009; Enker, 2009; Eser, 1976; Fletcher, 1974; Greenawalt, 1986; Robinson, 1975) and in psychology (Montada, 2001; Shaw et al., 2003) and yet this morass continues.

In very general terms a justification is used when the defendant explains their actions in the form of accepting responsibility but claim that the action was not inappropriate due to some superordinate goal; whereas an excuse is a claim that the actor admits the action but asserts that they are not to fully responsible due to mitigating circumstances or external causes (Montada, 2001; Shaw et al., 2003). Greenawalt (1986) explained, "When something is fully justified, it is warranted…When something is fully excused, it is not warranted, but the person involved is not blameworthy" (p. 91). Berman (2003) stated it as:

> According to the standard account in ethics, justified action is not wrongful whereas excused action is wrongful conduct for which the actor is not "morally responsible," in the particular sense of not being blameworthy. It is not surprising therefore that the standard account among criminal law theorists follows identical lines: A defense is a justification if it renders the actor's conduct not morally wrongful, whereas it is an excuse if it renders morally wrongful conduct not blameworthy (pp. 7-8).

So, in at least criminal law there is a general distinction between justification and excuse.

This distinction is clearer in Canadian human rights law for two reasons. First, the only justification accepted for the duty to accommodate is that accommodating the employee would cause undue hardship. In Ontario that limitation is established by statute in the *Human Rights Code* and sets out only three factors to establish whether undue hardship has arisen: cost, sources of outside funding, and health and safety (1990). The Supreme Court of Canada stated:

> The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work. (*Hydro-Quebec v. Syndicat des employé-e-s de techniques professionelles et de beureau d'Hydro-Quebec, section local 2000 (SCFP_FT)*, 2008, para. 14)

Case law has established that employers can exclude employees who do not meet discriminatory occupational standards if the employer can show that the standard is a bona fide occupational requirement that cannot reasonably be accommodated for (*British Columbia (Public Service Employee Relations Commission) v. British Columbia Government Service Employees' Union* (BCGSEU); *Meiorin*, 1999)[7] or if the contract of employment has been frustrated (*Hydro-Quebec v. Syndicat des employé-e-s de techniques professionelles et de beureau d'Hydro-Quebec*, *section local 2000 (SCFP_FTQ)*, 2008). Thus, permitted justifications for not accommodating an employee are prescribed and limited.

Second, unlike criminal law, intention is not an element of a breach of human rights. It is the mere fact that the employer has discriminated, not whether they intended to discriminate. The Supreme Court stated, "The proof of intent, …should not be a governing factor in construing human rights legislation aimed at the elimination of discrimination" (*Ont. Human Rights Comm. v. Simpsons-Sears*, 1985, para. 14). Even if part of the reason to terminate is legitimate, if part of the reason is due to the employee's disability, it will still be found to contravene the code and

[7] The bona fide occupational requirement nowcodified in section 11 of the *Code.*

this applies to reorganisations, restructuring and downsizing (Ontario Human Rights Commission, 2008).

Many employer excuses are mere pretexts and post-hoc rationalisations. The Canadian Human Rights Tribunal noted that once an employer provides a reasonable explanation for the alleged discriminatory behaviour, "The burden shifts back to the complainant to prove that this explanation was merely a pretext and that the true motivation behind the employer's actions was in fact discriminatory" (*Israeli v. Canada (Canadian Human Rights Commission*), 1983 s. II, part A). An American study noted in respect to employment discrimination cases under the Americans with Disabilities Act, "Given that attempted reliance on purported policy violations or other performance deficiencies were often found to be potentially pretextual" (Malos, 2015, p. 278). My analysis suggests it is no different in Canada. Malos further noted of the American experience, "Some of these cases appear to involve attempted post-hoc justification of such decisions where the organization might have been better served by admitting its errors and correcting them or attempting to settle disputed matters in advance" (p. 218). The research cases presented a similar experience of attempts at posthoc rationalisation.

Wooten and James (2005) pointed out, "Most organizations have difficulties with modifying policies and routines that become salient when organizations confront crisis such as discrimination lawsuits" (p. 126). They found that employers tend to deploy defensive routines to justify their discriminatory behaviour. They also stated, "Moreover, our content analysis of the cases discovered workplace safety concerns were employed as a defensive routine for organisations to justify their discriminatory practices against workers with disabilities" (p. 133).

Lastly, organisational learning is a kind of resource that benefits both the employer and the employee. It enhances the management of the enterprise and protects the organisation's

reputation and ability to attract talent and customers. However, one can conjecture at how realistic it is that a small business will operate in a sophisticated manner. However, all organisations regardless of size can learn and adjust their behaviours and all organisations regardless of size or sophistication are expected to operate in a nondiscriminatory way.

Excuses. ***Absenteeism.*** Concern over absenteeism has been a standard concern of employers' *vis*-à-*vis* hiring persons with disabilities. They are concerned that employees with disabilities will present issues with illness and absenteeism, require sick leaves, and cause interruptions to attend medical appointments, which are viewed as impacting productivity (Fraser et al., 2010; Fraser et al., 2011; Heera & Devi, 2016; Ju et al., 2012; Kaye et al., 2011). Absenteeism may increase labour costs if the company incurs overtime costs to have other employees cover absent employees' shifts (Kalagyrou, 2012). In general, absenteeism results in lost days and can affect an organisation's productivity and service delivery, as well as be a burdensome to colleagues (MacLean, 2008). The concern over absenteeism has been one of the persistent ongoing employer stereotypes of persons with disabilities and a persistent negative employer bias (Hernandez et al., 2008).

With increasing awareness of mental health related issues, absenteeism is on the rise in Canada. Canadian companies lost $16.6 billion in productivity in 2012 to mental health related absenteeism, and this does not account for indirect costs associated with absences (Stewart, 2013). In 2011 the average absentee rate was 9.3 days away from work for full-time workers (Stewart, 2013). In any given week, 500,000 Canadian workers are away from work due to mental health issues (Centre for Addiction and Mental Health, 2019).

However, studies indicate that persons with disabilities have low absentee rates (Dupont, 1993; Graffam et al., 2002; Hernandez et al., 2008; Kalargyrou, 2012; Kalargyrou & Volis,

2014; Lengnick-Hall et al., 2008). Hernandez and McDonald's (2010) compared workers with disabilities and workers without disabilities and found that workers with disabilities had 1.24 fewer scheduled days absent and slightly higher (1.13) days of unscheduled absenteeism than workers without a disability.

While generally an employer has a duty to accommodate a disability related absence, it is not without reasonable parameters. The Supreme Court held "the duty to accommodate is neither absolute nor unlimited" (*McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal,* 2007, para. 38, per. Deschamps J.). The Supreme Court further stated, "However, the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration" (*Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ;* 2008)*,* para. 15, per. Deschamps J.). The Supreme Court also held that the employer has the right to monitor employees who are frequently absent from work to ensure fulfillment of the employment relationship and to be able to manage its labour force (*Honda Canada Inc. v. Keays,* 2008). These cases involve extreme amounts of absenteeism, but they establish the limits to the duty.

Presenteeism. As absenteeism in the workplace is increasingly policed and has increased consequences for employees, the incidence of presenteeism tends to increase (Aronsson & Gustafsson, 2005; Miraglia & Johns, 2016). A national study found that 53% of employees see presenteeism as a serious problem and 81% of employees surveyed indicated over the prior six months attending work when their performance was less than past performance (Allen & Bourgeois, 2015). Presenteeism is attending work even though the employee is sick (Johns,

2010). It is defined as the loss of productivity resulting from the employee's health condition while in attendance at work (Lohaus, & Habermann 2018).

Presenteeism tends to increase with job insecurity (Miraglia & Johns, 2016) and financial difficulty (Aronsson & Gustafsson, 2005; Gustafsson & Marklund, 2014), two circumstances that are more prevalent for persons with disabilities. "Those in the lowest paying jobs are least likely to have access to fair sick pay, and those in financial straits will be disinclined to incur disapproval for absence" (Miraglia & Johns, 2016, p. 8). Further, "having both high SP [sick presence] and high SA [sick absence] was more common among women and those with financial instability, low education, poor health and who often used vacation time when sick" (Gustafsson & Marklund, 2014, p. 53). Reports indicate high levels of p presenteeism for major chronic conditions (Aronsson & Gustafsson, 2005; Bergström et al., 2009; Collins et al., 2005). Aronsson and Gustafsson noted, "Having a health problem is a strong determinant of sickness presenteeism" (p. 958), for chronic health issues (Aronsson & Gustafsson, 2005; Collins et al., 2005; Esposito et al., 2007; Shafer et al., 2019). Munir et al. (2007) found "that strict and inflexible attendance management policies may have a detrimental impact on employees managing a chronic illness" (p. 1471). Employees with chronic disabilities are more at risk of having to work while sick.

Working while sick may increase symptoms of stress (Munir et al., 2007). It has been found to impact subsequent physical and mental health, lead to exhaustion, and diminish job satisfaction (Lu et al., 2013; Munir et al., 2007). Further, "the stress related to lack of ability to fully perform work tasks can aggravate several chronic disease conditions" (Silva-Costa et al., 2020, p. 1). Presenteeism may exacerbate an employee's condition, being at work means the employee is not managing their condition (Miraglia & Johns, 2016; Munir et al., 2007). There is

a relationship between inadequate recuperation, stress, and ill health (Aronsson & Gustafsson, 2005; Silva-Costa et al., 2020; Munir et al., 2007). Presenteeism has also been found to be associated with later occurrence of long-term sickness (Andersen 2009; Bergström et al., 2009; Skagen & Collins, 2016), an increased risk of depression (Conway et al., 2014; Skagen & Collins, 2016) and burnout (Dellve et al., 2011; Lu et al., 2013).

Employers may prefer some productivity over none (Lohaus & Habermann, 2018), despite claims that presenteeism causes more aggregate productivity loss than absenteeism. In a U.K. study, Taylor et al. (2010) found that absence management is becoming increasingly coercive and interventionist, as a way to control labour cost and due to lean staffing. As a result, many employees work sick out of fear of being disciplined up to termination (Taylor et al., 2010).

There is, however, evidence that presenteeism can have positive impacts on employee wellbeing (Ruhle et al., 2020). “If managed correctly and supported with adequate resources, attending work during illness has the potential to benefit health and performance” (Ruhle et al., 2020, p. 347). Hadjisolomou (2016) argued that there are alternative, flexible absence policies that are improving attendance by “nurturing cooperation to regulate attendance through accommodating and being flexible to personal circumstances” (p. 425). Other studies have also commented on the efficacy of flexibility to reduce absenteeism (MacLean, 2008).

While there may be increasingly more enlightened workplaces, the previous statement is a significant exception, and not all employees with a disability are lucky enough to work in such an environment. On the contrary it seems that employers’ increasing fixation on managing absenteeism has an inverse relationship with presenteeism, which appears to be generally detrimental for employees with chronic conditions. As mentioned previously employers have a

reluctance towards workers with disabilities out of concern about absenteeism. However, it seems as if employers have a concern about absenteeism in respect to the entire workforce, which likely makes their misconception about employees with a disability all the more insurmountable.

Abandonment. In two research cases the employer alleged employee abandonment of their job as a reason to terminate the employee. From a legal perspective the standard for determining abandonment is, "do the statements or actions of the employee, viewed objectively by a reasonable person, clearly and unequivocally indicate an intention to no longer be bound by the employment contract" (*Betts v. IBM Canada Ltd.,* 2015, para. 57). In the research cases, the employee's actions were not consistent with abandonment. Moreover, in general, abandonment of employment is atypical for employees with disabilities.

The disability employment literature is replete with references to employees with disabilities being loyal employees. The business case for hiring persons with disabilities (Accenture, 2018; Donovan, 2016; Fredeen et al., 2013; International Labour Organisation 2014; Lindsay et al., 2018; Mental Health Commission of Canada, 2018; Waxman, 2017; Wright, 2001) is premised on the concept that a person with a disability provides the employer a sustained competitive advantage (Houtenville & Kalargyrou, 2015; Kalargyrou, 2012, 2014). That advantage is premised in part on higher attendance and lower turnover for employees with disabilities, resulting in reduced recruitment and training costs (Bengsiu & Balta, 2011; Hernandez et al., 2008, Houtenville & Kalargyrou, 2012; Kalargyrou, 2014; Kalargyrou & Volis, 2014).

Case studies confirm the propensity towards lower job turnover by employees with disabilities (Deloitte, 2010; Hernandez & McDonald, 2010; Kalargyrou & Volis, 2014; Kaletta et

al., 2012; Lengnick-Hall et al., 2008). At Walgreens, for example, 37% of their distribution centres' workforce has disclosed a disability. Analysis of Walgreens's three-year average turnover rate shows persons with disabilities have a significantly lower turnover rate than nondisabled employees (Kaletta et al., 2012). Hernandez and McDonald found employees, in two out of three sectors they surveyed, had longer tenures than employees without disabilities. In Canada retention of employees with disabilities is 72% higher than nondisabled employees (Deloitte, 2010).

Lack of job satisfaction is associated with job turnover (Hann et al., 2011). Intention to quit is considered a proxy indicator for actual quitting behaviour (Firth et al., 2004). Extrinsic factors identified as impacting job satisfaction are remuneration, working conditions, and hours of work (Hann et al., 2011). Intrinsic factors include the inherent nature of the work, the opportunity to use and develop one's skills, and recognition of achievements (Hann et al., 2011). Several factors have been consistently identified as being related to intention to quit, including job-related stress, stressors that lead to job-related stress, lack of commitment to the organisation, and job dissatisfaction (Firth et al., 2004). Personal factors that mediate stressors are personal agency, self-esteem, and social support (Firth et al., 2004). Therefore, the more personal agency, the less powerlessness, and the more locus of control an employee perceives themselves to have, the less likely will be their intention to leave their current employment. Higher self-esteem is associated with job satisfaction (Firth et al., 2004). Thus, greater job engagement is associated with reduced intention to quit. Some studies have shown supervisory support reduces intention to quit (Firth et al., 2004).

Intention to quit is mitigated by good employer practices. It is no different for employees with disabilities. Job satisfaction of employees with disabilities is impacted by support from the

organisation (Pèrez et al., 2015), decentralised work environments (Baumgärtner et al., 2015), perceptions of higher levels of respect (Brooks, 2019; Schur et al., 2009), perceived higher levels of company fairness (Schur et al., 2009), and participation in further training (Pagán-Rodrígues, 2015).

Uppal (2005) found that work conditions (discrimination, harassment, threat of layoff, poor interpersonal relations, risk of injury, and too many demands) affected job satisfaction of employees with disabilities. On the other hand, Págan and Malo (2009) found that persons with disabilities have lower expectations of their jobs than nondisabled workers, and that may mediate job satisfaction. Págan and Malo found that persons with disabilities had higher returns on satisfaction from job characteristics such as wages, tenure, and job matching. A study found that despite various disparities in pay, benefits, training, and involvement in workplace decisions, persons with disabilities exhibit similar turnover intention and organisational commitment but lower job satisfaction (Schur et al., 2017). Schur et al. found that the lower job satisfaction is attributable to lower job security, perceptions of treatment by management, and less job flexibility (Schur et al., 2017). In short, employees with disabilities have the same job preferences in respect to job attributes and types of employers as everyone else (Ali et al., 2011; Schur et al., 2017). The point being that even though employees with disabilities enjoy lower job satisfaction, they are not likely to quit their employment and therefore are very unlikely to abandon their employment.

Another reason employees exit employment is because of injury or illness. Exiting work for disability benefits is rarely an attractive choice, as benefits are modest compared to employment. In Canada the average benefit level was 20% of the average gross wage of fulltime

equivalent employment in 2006 (OECD, 2010a). It is more likely that a job abandons a sick or injured worker. The OECD (2010a) reported:

> A neglected area of disability policy in Canada therefore concerns the role of employers who are uniquely well placed to help prevent and manage sickness and injury absences that lead to a slippery slope of long-term disability…. Under the current system, the labour market incentive typically is for an employer to facilitate such a person's exit (so they can be replaced by a fully fit and able worker) rather than prevent them from leaving work. (p. 9)

It is more likely that a disabled employee's exit will be instigated by the employer than it is that the employee will abandon their employment on their own initiative.

In the gig economy, characterised by its job churn, abandoning employees, rather than employees abandoning jobs, is increasingly prevalent. Gig work is work arrangements where the employer by design has no intention of retaining the employee. In fact, these workers are not employees but independent contractors and consultants (Raso, 2018). Moreover, contractual employment status avoids the employer having to provide accommodations (Raso, 2018).

A great deal of the likelihood that an employee will leave their job has to do with job satisfaction and a great deal of that has to do with the work culture the employer creates (Schur et al., 2009; Kalargyrou, 2014). Retention of employees with disabilities is more likely in a decentralised, supportive, respectful, and just work culture with human capital development opportunities and good conditions of work. For many persons with disabilities, their work experience is quite the opposite. Persons with disabilities often have low pay, lack benefits, have little autonomy over their work, have little input in decisions impacting their work, lack training opportunities (Schur et al. 2009), and are often in low skilled occupations with poor job matches (Págan & Malo, 2009).

Probation. Probationary periods "allow firms to obtain information that is unavailable before hiring and that serves as a check on the quality of the match between workers and jobs"

(Loh, 1994, p. 472). Employees often have private information about their abilities and productivity that firms need to assess (Wang & Weiss, 1998). Probationary periods allow employers to assess an employee's productivity early at a lower cost (Marinescu, 2009). "Since a high ability worker usually performs better than a low ability worker during the probation period, a firm can reward good performance, while penalise bad performance to attract high ability workers and deter low ability workers" (Wang & Weiss, 1998, p. 360).

Faced with imperfect information about employees, employers often use a screening device, which has been described as "essentially a rule of thumb, [that] takes some set of observable characteristics, which are correlated with the parameter of interest, and ranks an applicant's prospective job performance on the basis of his endowment of these characteristics" (Salop & Salop, 1976, p. 619). Because certain characteristics are imperfectly observable, employers may rely on the average characteristic of the group to which the employee belongs, to infer the likelihood of the employee's success in respect to that characteristic (Sattinger, 1998), which is referred to as "statistical discrimination"[8] (Arrow, 1972; Phelps, 1972).

Employers who practice statistical discrimination are said to be motivated to hire employees who pose the least risk and who will be most productive (Baumle & Fosset, 2005). Employers who use protected grounds, such as disability, as a proxy for unobservable characteristics, such as expected productivity and absenteeism, engage in statistical discrimination (Leblanc, 1995). Statistical discrimination is screening employees based on the average characteristics of the demographic group the applicant is associated with (Harcourt et al., 2005). Sattinger (1998) noted, "The existence of statistical discrimination shows that the

[8] Statistical discrimination can certainly apply to other of the excuses proffered by the employers in the research cases. However, probation seemed like an apt place to discuss this concept as it is associated more with the hiring process than with accommodation refusal or termination.

tendency of a market system is instead to divide the labor market into groups that are treated separately and experience unequal conditions" (p. 230). Hegan (2006) argued that the probable nexus between ability and successfully being hired beyond the probationary period leaves vulnerable populations of workers at risk. "In some circumstances, statistical discrimination can lead to total exclusion of a group from the labor market" (Sattinger, 1998, p. 207). Screening in this manner may unjustly exclude persons with disabilities who could match the job requirements.

From economists' perspective, statistical discrimination is considered rational behaviour of "maximizing actors who are guided by empirical information assessment of productivity and risk" (Baumle & Fossett, 2005, p. 1250). This is sometimes referred to as nonanimus-based discrimination and is conscious (Bertrand et al., 2005) intentional (Reskin, 2011). However, that does not mean that statistical discrimination cannot be influenced by unconscious psychological processes as well. Reskin (2018) advised, "the theory of statistical discrimination ignore another important source of employment discrimination: automatic, nonconscious cognitive processes" (p. 379). Thus, statistical discrimination can stem from implicit bias.

If employers perceive employees with disabilities as a performance risk, the employee with a disability may not be able to progress beyond probation, regardless of how well they perform. Statistical discrimination is problematic for employees with disabilities. Sattinger (1998) stated, "Information on group membership is not a property of the individual, even though it is the basis of a firm's inferences about the individual" (pp. 227-228). "As individuals, they are 'unjustly' penalized for belonging to a group with generally lower skills or higher risk. In this regard, statistical discrimination is no different from prejudice-based discrimination" (Baumle & Fossett, 2005, p. 1254).

Employers who statistically discriminate in respect to employees with disabilities draw their inferences from imperfect information about the employee in question, that is compounded by being premised on inaccurate information about the work characteristics generally of persons with disabilities. Beilby and Baron (1986) stated, "The model of statistical discrimination avoids invoking bias, prejudice, or 'tastes' for discrimination, so long as employers' perceptions of group differences are accurate" (p. 762). More specifically, "In the case of workers with disabilities, estimates of indicators that are meant to signal appraisals of productivity and accommodation cost are swayed by existing misconceptions about disabled workers that substitute for less easily obtainable, accurate information" (Stein, 2003, p. 128). In other words, many employers' expectations about average work characteristics of persons with disabilities is likely based on erroneous and outdated assumptions.[9]

Further, human rights law requires the employer to look at an employee's characteristics, not the group's characteristics (Baumle & Fossett, 2005), and in Ontario human rights law it does not matter how the discrimination arose. "It is a principle of human rights that persons should be judged on their individual attributes, skills, and capacities, rather than on stereotypes and assumptions based on the groups to which they belong" (Ontario Human Rights Commission, 2007, p. 17). Further, the premise leading to discrimination is not relevant to establishing liability; it is the mere discriminatory effect that is relevant (*Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, 1985; *Bhinder v. Canadian National Railway Co.*, 1985; *Canada (Human Rights Commissio) v. Taylor*, 1990). When it comes to employment, persons with disabilities in Canada need not be further unjustly penalised.

[9] Interestingly, on the other hand, the "business case for employing persons with disabilities" is the obverse of statistical discrimination based on loyalty and lack of absenteeism.

Discriminatory termination of employees with disabilities in the probationary period might have a chilling effect on other employees disclosing their disability. Such terminations may also become a barrier to employed person with a disability seeking promotions that have a new probationary period (Hernandez et al., 2008). More generally, probation periods may be a mechanism that invokes employees to self-select. “A self-selection device is a pricing scheme that causes the applicant to reveal truthful information about himself by his market behaviour” (Salop & Salop, 1976, p. 620). An employee who knows their poor productivity will be detected may not bother applying (Groshen & Loh, 1993). Hegan (2006) argued that probationary periods will affect vulnerable groups “through further marginalizing them and making it easier for employers to distinguish the productivity differences between potential employees” (p. 41). Of more concern is that a qualified, capable employee with a disability may errantly assume they will not survive the probationary period on account of their disability and decide not to apply.

If probation is intended to judge the likelihood of good attendance, it may be an ineffective tool. It may not be a good barometer of good attendance. It has been shown that the incentive inherent in probation periods causes workers to adjust their behaviours to “mimic good workers” (Riphahn & Thalmaier, 1999, p. 1). Studies have found significant increases in the predicted probability of employee absence after the conclusion of probationary periods (Riphahn & Thalmaier, 1999). Ironically, signals employers use to assess likely good attendance may mislead them about employees with disabilities who have been shown to have lower rates of absenteeism (Dupont, 1993; Graffam et al., 2002; Hernandez et al., 2008; Hernandez & McDonald, 2010), while it is actually nondisabled employees whose absentee behaviour can not accurately be gauged by probation periods (Riphahn & Thalmaier, 1999).

Probation also has an aspect of being surveilled. Probationary periods often involve extensive monitoring and a lack of organisational justice (Hegan, 2006). Wang and Wiess (1998) found that excessive monitoring is sometime required "to deter applications from low productivity worker" (p. 359). Hegan (2006) stated that probation means "a fixed-length monitoring and testing period imposed on newly hired or newly promoted employees" (p. 39). Hegan (2006) questioned, "How fair is it to excessively monitor an individual in order to unearth his/her deficiencies and the fire them for it?" (p. 41). Many persons with disabilities already have experiences with monitoring in other domains such as in the social welfare system. Employment monitoring may just reinforce people with disabilities being perceived as deviant.

Productivity. An extensive body of literature concerns employers' views of persons with disabilities as lacking ability to work at the level of productivity employers expect (Bengsiu & Balta, 2011; Domzal et al., 2008; Donnelly & Joseph, 2012; Fraser et al., 2010; Fredeen et al., 2013; Gröschl, 2007; Heera, 2016; Houtenville & Kalargyrou, 2012; Ju et al., 2013; Lengnick-Hall et al., 2008), and this perception continues to persist (Bonaccio et al., 2019). Some employers still associate, even when not justified, disability with the likelihood of poor performance. "The label, disabled, has tarred people with disabilities as 'un(der) productive'" (Procknow & Rocco, 2016, p. 382).

However, the research does not bear out that employees with disabilities are less productive workers. Kalett et al. (2012) reported that the rates of difference in productivity of employees at Walgreens was either statistically insignificant or actually more productive than employees without disabilities, at 28 of 31 district locations. A 2007, DuPont study, in Australia, stated "that 90 percent of people with disabilities rated average or better on job performance" (as cited by Fredeen et al. 2013). Other studies attest to a high percentage of employees with

disabilities as average or above average (Dupont, 1993; Hernandez & McDonald, 2010; Kalargyrou & Volis, 2014; Lee & Newman, 1995).

Zero-Tolerance Policies. While zero-tolerance policies are claimed to be good deterrence[10] of unsafe and dangerous practices, they are detrimental in other ways. These policies often involve automatic dismissal. Employees with a disability, like all employees, expect a certain amount of procedural justice and the opportunity to explain, as opposed to strict liability (Fisher & Phillips, 2018). It was stated in one Ontario case that, "Just cause is the 'capital punishment crime of employment law'" (*Tong v. Home Depot of Canada Inc*., 2004, para. 1, per. Echlin J.).

Courts are recognizing the possibility of zero-tolerance policies being used as a tool to remove undesirable employees. "Termination resulting from such a policy can actually led to more litigation, as employees will often allege wrongful termination. The claims may include allegations that the alleged violation was a pretext for discrimination" (Frisch, 2016). In the United States, courts are allowing challenges to zero-tolerance cases where there are allegations that the application of the policy to an employee with a disability is discriminatory. Stoutt and Kulpa (2016) noted, "courts have similarly permitted disability discrimination cases to go

[10] There is limited research on the effectiveness of zero-tolerance policies (Mehay & Webb, 2007), and it seems indeterminant. A Canadian survey of six safety-sensitive industries substance use policies found that "64% of respondents indicated that policies had been either somewhat or very effective in reducing alcohol use in the workplace, and 58% of respondents indicated that policies had been either somewhat or very effective in reducing illegal drug use" in self-reports (Canadian Centre on Substance Use and Addiction, 2018, p. 54). Only 35% of the respondent organisations assess that their policy increases productivity (Canadian Centre on Substance Use and Addiction, 2018). Policies were effective at identifying personnel with substance use issues, improving assistance, absenteeism, injury, and damage (Canadian Centre on Substance Use and Addiction, 2018). However, only 18% of key informants indicated their organisations terminate confirmed instances of substance use. Mehay and Pacula (1999) found that, "find that a strict employer anti-drug program [zero-tolerance] is a highly effective means of deterring illicit drug use both among current users as well as potential users" in the United States military (p. 22). However, in economic terms the net benefits measuring deterrent effect, replacement cost and productivity loss was negative in the American Navy (Mehay & Webb, 2007).

forward when the employee argued that an adverse action based on the employee's medical marijuana use was pretext for disability discrimination" (para. 7).

The Supreme Court has said "that blanket or zero-tolerance rules in the workplace may have to be revised, or at least applied in a flexible manner, in order to comply with the duty" (Lynk, 2007, p. 211). In an Ontario case, *Barton v. Rona Ontario Inc*. (2012), the Ontario Superior Court of Justice ruled that despite a breach of the company's policy requiring strict adherence to safety rules, breach of which was cause for immediate dismissal, under the terms of employment, the company did not have just cause and should have applied proportionate discipline. The Court looked at the severity of the breach, the employee's record, and the possibility of progressive discipline. Justice Lauwers held, "The 'principle of proportionality' requires me to consider whether the termination was the 'effective balance' to 'be struck between the severity of an employee's misconduct and the sanction imposed" (para. 55.). The Court said that the company may have had legitimate business reasons for the termination but that the reasons may not amount to just cause. Campbell and Magee (2012) stated:

> Zero-tolerance clauses are not universally applicable. When considering whether to terminate an employee for failing to comply with an employment policy or procedure, the employer must use a contextual approach to balance the severity of the incident with the sanction imposed. (para. 19)

Granted this was a wrongful termination case before the Ontario Superior Court of Justice considering just cause to terminate, as opposed to a human rights case considering discrimination, but it is potentially instructive of the nuanced approach to be taken in assessing zero-tolerance cases. Either way, proper reliance on a zero-tolerance policy application is contextual and not beyond judicial review.

In dealing with addiction, labour arbitrators have stated that employers may have to tolerate some disruption of production to properly accommodate persons with addictions or

mental health issues due to their episodic nature (Lynk, 2008). Further, zero-tolerance of violence policies may disproportionately affect employees with mental health issues (Ontario Human Rights Commission, 2014a; Sheldon, 2011).

Given Canada's legalisation of recreational cannabis use and the increased prevalence of medical marijuana, the friction between the employer's legal duty to maintain a safe workplace and the right of an employee with an addiction to be accommodated. Drug dependency has been recognised as a disability (*Stewart v Elk Valley Coal Corp*, 2017; *Entrop v Imperial Oil Ltd.,* 2000). Once an employee establishes that they have experienced prima facie discrimination because of the employer enforcing the policy, the employer must establish the requirement is a bona fide occupational requirement. The more safety sensitive the position, the more likely it will be considered a bona fide occupational requirement (Wolch et al., 2018). "…employers must consider whether the policy has the potential to result in discrimination or failure to accommodate an employee with a dependency. Accordingly, zero-tolerance testing policies are only likely to withstand judicial review in limited higher risk circumstances" (Wolch et al., 2018, p. 360). However, it should be noted that the Supreme Court of Canada held that an employee can be terminated for breaching the requirement to disclose substance use to the employer in a zero-tolerance policy, where there is a disclosure requirement, rather than for the actual substance use (*Stewart v Elk Valley Coal Corp*, 2017).

> Medical marijuana raises issues of accommodation.
>
> However, a prescription from a physician for medical marijuana – or a marijuana addiction – does not give an employee the right to be impaired at work when the employee's impairment could put the employee's health and safety at risk or threaten that of their co-workers or the general public. (Verlint & Levy, 2018)

The employer may have to accommodate the employee where the employee uses cannabis in accordance with proper medical documentation but is found unfit for duty. The employee may be

entitled to accommodation in a less risky position (Wolch et al., 2018). On the other hand, a decision of the HRTO found, "The applicant does not have an absolute right to smoke marijuana at work regardless of whether it is used for medicinal purposes" (*Aitchison v. L & L Painting and Decorating Ltd.*, 2018, para. 145)[11] and upheld the employer's zero-tolerance policy on safety grounds. The law in respect to zero-tolerance policies and recreational use is likely to continue to evolve. Employers' reliance on a breach of their zero-tolerance policy, even for safety sensitive work, may no longer be a convenient way to get around the need for just cause to terminate an employee with a disability.

Wolsh et al. (2018) advised that as law and/or technology evolves, so may the view as to what is acceptable nonperformance impacting off-duty use of recreational drugs. This "can result in privacy challenges, grievances, or wrongful dismissal claims, unless the employer's policies, practices, and testing standards shift as well" (Wolsh et al., 2018, p. 125). It remains to be seen how these evolutions will impact persons with disabilities.

Timing of the Decision to Terminate. Tribunals have held the temporal connection between the circumstances that suggest a disability and termination of the employee do not necessarily indicate discrimination (DeVries, 2018). However, the timing of the decision to terminate the employee is a factor to be considered in the decision. In *Morris v. BC Rail* (2003), the employer made the decision to terminate the employee while the employee was on medical leave, with the intention of dismissing the employee as soon as the employee's transition back to work reached full-time employment. The British Columbia Human Rights Tribunal stated, in response to the employee's submission, that the timing creates no presumption that the disability was a factor in the decision to terminate:

[11] *Aitchison* was reviewed but not coded in this project due to a finding of non-discrimination.

> I decline to recognize such a presumption or legal reversal of onus, as to do so would serve to complicate this area of the law unduly. That said, the fact that an employer makes the decision to terminate a disabled employee's employment while that employee is on a leave related to disability should be taken into account in determining whether one can infer that the employee's disability was a factor in the employer's decision-making. (para. 231, per. Lyster)

This suggests that the timing of the decision to terminate is a relevant factor in determining if the decision is discriminatory.

Mou v. MHPM Project Leaders (2017) also dealt with a timing issue. The employer raising the issue of the employee's absences, some of which were due to disability and terminated her two months after the absences, without giving a reason. The HRTO held that given the proximity of the two events, the temporal connection required the employer to provide the employee with an explanation for the termination. However, the Tribunal also found that "the temporal connection alone does not establish discrimination" (para. 35).

Similarly, in *Whitmore v. Dr. J. T. Kelsall Inc. and another* (2017) the British Columbia Human Rights Tribunal considered the timing of dismissal. In this case, the employee was on medical leave when she was terminated. The Tribunal allowed the respondent's application for dismissal on the basis the case had no prospect of success. The Tribunal found, "The only piece that seems to support the complainant's assertion is the timing of her dismissal. In the circumstances of this case, timing alone is insufficient in my view to raise the complainant's complaint above conjecture and speculation" (para. 81). In this case the evidence of performance issues was substantial. As well, the employer provided accommodations. The timing of the termination of an employee with a disability alone will not establish discrimination without other supporting evidence.

In cases where the decision to terminate was made before the disability was disclosed, there are precedents that suggest this would not be discrimination. In B*ellehumeur v. Windsor*

Factory Supply Ltd. (2015) the Ontario Court of Appeal affirmed the trial judge's decision, that termination of the employment for significant workplace misconduct (violent threats) was not discriminatory, where the employee disclosed his mental health condition only after termination. However, the court found in this case that the serious employee misconduct outweighed the right to accommodation. The trial judge stated, "Although they [the employer] have a duty to accommodate in disability situations, that duty to accommodate did not pre-empt their right to discipline and discharge for a major employment offence being the threats to other employees" (B*ellehumeur v. Windsor Factory Supply Ltd*., 2013, para. 109). This decision is consistent with the judgment in *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees Union* (2008) where an employee disclosed his alcoholism only after being confronted about his ongoing thefts at work. His termination was upheld as not discriminatory by the British Columbia Court of Appeal. These cases turn significantly on the presence of serious employee misconduct of a criminal nature, more so than on the duty to accommodate.

Insufficient Disclosure. An employer is expected to accept the employee's request for accommodations in good faith (*Yeats v. Commissionaires Great Lakes*, 2010). The Ontario Human Rights Commission (2016) advised, "A person with a disability does not have to meet an onerous standard for initially communicating that a disability exists to trigger the organization's duty to accommodate" (S. 8.7).

> Most authority indicates that the claimant will not be held to a high standard of clarity in communication. This approach is in keeping with the principles enunciated by the Supreme Court of Canada in respect of the need to interpret human rights legislation generously and purposively. (*McLean v DY 4 Systems Inc (cob Curtiss Wright Controls*), 2010)

If the employer found the information provided by the employee inadequate, they are obliged to make further inquiries (The Ontario Human Rights Commission, 2016, s 8.7). The

employer cannot rely on its failure to inquire to avoid its obligation to accommodate an employee (*Alberta (Human Rights and Citizenship Comm.) v. Federated Co-operatives Ltd,* 2005). The employer is obliged to obtain sufficient information to understand the employee's current medical condition, prognosis for recovery, ability to perform job duties, and capabilities for alternate work (*Wall v. Lippé Group*, 2008).

The employer has a procedural duty to engage in the accommodation process, and failure to do so constitutes a procedural breach of the code. The Ontario Divisional Court in *ADGA Group Consultants Inc v. Lane* (2008) stated, "A failure to give any thought or consideration to the issue of accommodation, including what, if any, steps could be taken constitutes a failure to satisfy the 'procedural' duty to accommodate" (para. 107). The HRTO stated:

> The failure to meet the procedural dimensions of the duty to accommodate is a form of discrimination. It denies the affected person the benefit of what the law requires: a recognition of the obligation not to discriminate and to act in such a way as to ensure that discrimination does not take place. (*Lane v. ADGA Group Consultants Inc*., 2007, para. 150)

Employee Behaviour. An employer may discipline an employee whose behaviour is contemptuous or abusive. Insolence is derisive, contemptuous, or abusive language or conduct directed towards a superior (Bowal & Bowal, 2016; Whitten & Lublin, 2017a). In disciplining for insolence, the common law requires that the discipline be proportionate to the insolence and aimed at correcting the behaviour, not punishing the employee (Whitten & Lublin, 2017a). Similarly, the Ontario Human Rights Commission (2008) calls for progressive performance management and discipline (s. c 11).

The New Brunswick Court of Appeal established a proportionality requirement in the test for insolence, in requiring that the misconduct to warrant dismissal must be of the nature and degree that "it gave rise to a breakdown in the employment relationship" (*Henry v. Foxco Ltd.,*

2004, para.16, per. Turnbull J.A.). The breakdown in the employment relationship was not so grave in the research cases.

Acts of Omission

Constructive Discrimination/Adverse Effects Discrimination

Intention to discriminate is not a necessary element to prove discrimination, for the purposes of the *Ontario Human Rights Code* (Ontario Human Rights Commission, 2008a). If discrimination occurs the employer's actions count, not their intentions. The Supreme Court of Canada defined constructive discrimination as:

> It arises where an employer…adopts a rule or standard…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. (*Ontario (Human Rights Commission) and* O'Malley *v. Simpsons Sears Ltd*., 1985)

The Supreme Court recognised:

> …a modern employer with a discriminatory intention would rarely frame the rule in directly discriminatory terms when the same effect – or even a broader effect – could easily be realized by couching it in neutral language. … Dickson C.J., for one, recognized that this more subtle type of discrimination, which arises in the aggregate to the level of systemic discrimination, is now much more prevalent than the cruder brand of openly direct discrimination. *(Meiorin*, 1999, para. 29, per. McLachlin J.)

Thus, employers cannot rely on the neutral application of their policy and procedures, where doing so will adversely affect an employee with a disability.

The only defence to an employee establishing prima facie discrimination is that the discriminatory requirement is a bona fide occupational requirement (BFOR). The Supreme Court of Canada established in a three-part test to determine whether a BFOR exists:

(1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;

> (2) that the employer adopted the standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
>
> (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. (para. 54)

Neutral application of their policy and procedures is not a defence to a discriminatory result.

The court emphasised in *Meiorin*, "the standard, if it is to be justified under the human rights legislation, must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship" (para. 62, per. McLachlin J.). Malhotra (2007) observed:

> There is a remarkable shift in the ruling from the idea of accommodation as an exception to a sensible norm made for specific atypical individuals to challenging the legitimacy of the entire rule or standard in a given workplace in order to include … people with disabilities as a welcome part of the community on an equal basis. (p. 16)

"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" (Pothier, 2010, p. 23). A neutral rule is insidious because it hides discrimination. *Meiorin* is intended to eliminate "employers with a discriminatory intention and the forethought to draft the rule in neutral language an undeserved cloak of legitimacy" (*Meiorin,* para. 29, per. McLachlin J). The undue hardship requirement creates a high bar for employers to justify a neutral but discriminatory rule (Malhotra, 2007).

Constructively discriminating ignores that equity requires instances of differential treatment to provide equal opportunities. This is the raison d'etre of the Supreme Court's

decision in *Meiorin* (1999*).* McLachlin J. stated, "Interpreting human rights legislation primarily in terms of formal equality undermines its promise of substantive equality and prevents consideration of the effects of systemic discrimination" (para. 41). McLachlin J. further stated that if constructive discrimination is merely just accommodated, it is rooted in formal equality, leaves the concept of normal in place and does not create an inclusive society. McLachlin J. stated:

> The difficulty with this paradigm is that it does not challenge the imbalances of power, or the discourses of dominance, such as racism, able-bodyism and sexism, which result in a society being designed well for some and not for others. It allows those who consider themselves "normal" to continue to construct institutions and relations in their image, as long as others, when they challenge this construction are "accommodated". (para. 41).

Disallowing neutral but adverse rules and policies is intended to systemically change the workplace to make it inclusive for all employees. "The fundamental challenge of tackling disability discrimination is to contest what is deemed 'normal' because it is the way most able-bodied persons function" (Pothier, 2010, p. 23).

> Within the broad principles of the Meiorin approach, this obligation should be interpreted to require employers to review existing standards and structures to determine whether they produce employment inequality by failing to include the distinct needs, abilities and realities of groups and individuals on prohibited grounds of discrimination. (Schucher, 2000, p. 351)

Justice McLachlin stated:

> Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human rights statues and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, in so far as this is reasonably possible (*Meiorin,* para. 68).

Employers are required to make their policies and practices inclusive and do this up to undue hardship. The Supreme Court defined undue hardship as more than minor inconvenience,

and it must be shown before the complainant's right to accommodation can be defeated. The employer must establish that actual interference with the rights of other employees, which is not trivial but substantial, will result from accommodating measures. Minor interference or inconvenience is the price to be paid (*Central Okanagan School District No. 23 v. Renaud*, 1992). This standard to establish undue hardship arose in context of failure to accommodate religious observance and having to demonstrate substantial impact to establish undue hardship has carried over to other social areas of discrimination, including employment.

Hammond (2004) commented, "Defining 'undue hardship' is perplexing at best and uncertain at worst." "But if you think that a few upset employees or a frustrated supervisor who has to spend more time figuring out schedules will constitute undue hardship, you need to think again" (para. 6). Undue hardship is not just inconvenience or trivial.

As a result, "Under *Meiorin*… therefore, there is not only a greater scrutiny of workplace rules and standards but also an emphasis on examining the underlying norms embedded in such standards" (Lanyon, 2014, p. 106). Further, where an employer requires a certain standard of capacity to perform a job, *Meiorin* now requires that the standard is the minimum level for efficient and safe job performance, not the ideal or average, or whatever standard management preferred. An employer will be more likely to establish physical standards, tests, and cut-off scores are a BFOR, if they can demonstrate that the standard is based on methodologically sound data, based on a validated test, or is derived from a diverse population that demonstrates the necessity of the standard (Adams, 2016).

Procedural Accommodation - Failure to Inquire

The Tribunal stated that the fact that the employee has not requested accommodations is not a defence to failure to inquire, and an employer's failure to do so is a breach of the

procedural component to accommodate.[12] The Ontario Human Rights Commission referred to a procedural duty to accommodate and reiterated, "The procedural duty involves the considerations, assessments and steps taken to respond to an accommodation need" (Ontario Human Rights Commission, 2014b, s. 8.1; see also Ontario Human Rights Commission, 2015, s. 9.2, 2016, S.8). The Divisional Court's decision in *Adga Group Consultants Inc. v. Lane* (2008) is the authoritative legal precedent. The Court stated, "A failure to give any thought or consideration to the issue of accommodation, including what, if any, steps could be taken constitutes a failure to satisfy the 'Procedural' duty to accommodate" (para. 107, per. Ferrier J.). The Commission stated:

> In Ontario, it is clear that a failure in the procedural duty to accommodate can lead to a finding of a breach of the *Code* even if there was no substantive accommodation that could have been provided short of undue hardship. (Ontario Human Rights Commission, 2016, s. 8)

Employers cannot rely on an argument that they did not intend to discriminate by acting in their routine manner, where acting in this way has the effect of disadvantaging a person with a disability. Rootham (2014) commented that the procedural requirement "mean[s] that an employer had to fully examine possible alternatives to a discriminatory standard with employees and union" (para. 8). Similarly, just because employers do not routinely inquire about disabilities does not excuse them. Remain ignorant to avoid accommodation is not a choice open to employers. Prevailing decisions from various tribunals have shown that an employee "will not be held to a high standard of clarity in communication" (De Bousquet PC Barristers and Solicitors, 2017, para. 1) to trigger the duty to accommodate. Cases have held that employers must inquire

[12] However, the Federal Court of Appeal said that there is no separate procedural duty to accommodate (*Canada (Human Rights Commission) v. Canada (Attorney Genera)l* 2009 2014 FCA 131 (CanLII; [2015] 3 FCR 103).

whether the employee's behaviour is attributable to mental health issues (MacLeod , 2017). "I am mindful that it is difficult to accommodate where it is not made clear by a complainant what accommodation is requested or whether indeed he or she would co-operate in implementing a scheme of accommodation" (*Zaryski* v. *Loftsgard* (1995), 22 C.H.RR. D/256 (Sask. Bd. Inq)). However, the Board of Inquiry held the employer had a duty to at least make an inquiry, once they knew the employee exhibited "a delicate emotional state" before terminating the employee and failing to do so, was a contravention of the province's human rights code.

Acts of Commission

Harassment

Harassment is defined legally as "a course of vexatious comment or conduct that is known, or ought reasonably to be known, to be unwelcome" (*Human Rights Code, 1990, s.* 10(1)) and can include physical, verbal, and nonverbal forms of behaviour (McKay-Panos, 2017).[13,14] In Canadian law, bullying is distinct from harassment. Harassment refers to vexatious comments or conduct in respect to prohibited grounds set out by human rights codes, such as disability, whereas bullying is commenting on personal attributes such as competency and popularity (Coldwell, 2013). Bullying typically is psychological in that it is usually aggression

[13] In addition to human rights protection against workplace harassment, Ontario made changes to the *Occupational Health and Safety Act,* (R.1990, C.0.1) effective in 2010, adding workplace harassment. Employers are now required to assess the risk of workplace harassment occurring, to develop policies and procedures to investigate and manage complaints and incidents and to post the policy in a conspicuous place in the workplace. The Federal Government recently (June 24, 2020) released their *Workplace Harassment and Violence Prevention Regulations* (2020-130) which will become effective January 1, 2021. The *Canadian Labour Code* was recently amended to add harassment, which is defined as, "action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee" (Bill C-65, 2017, s. 0.1). The amendments established employer requirements to conduct risk assessments and establish a prevention policy, prevention training, to investigate and resolve complaints.

[14] Mobbing is a term akin to harassment used in many European countries and bullying is more common in English speaking countries, harassment is used in French speaking nations (Einarsen et al., 2020) and other researchers refer to workplace aggression, interpersonal deviance, workplace incivility, victimization, workplace incivility, scapegoating, abusive behaviour and emotional abuse (Teodora & Constantin, 2013).

that mentally injures or isolates the victim (Cobb, 2017; Coldwell, 2013). Bullying typically involves exploiting a power imbalance and has "been described as the assertion of power through aggression" (Cobb, 2017, p. 218). Harassment, though similar, differs in that it is a form of discrimination. In Ontario harassment and bullying are governed by the *Ontario Human Rights Code* (1990) and the *Occupational Health and Safety Act* (1990).

In the scholarly literature bullying, harassment, and related terms are used more interchangeably. While harassment and bullying occur in a work environment that legally proscribes this conduct, of interest for this research is not the legal context per se but employers' behaviours the ensuing discussion will concentrate on the occupational behaviour literature.

Keashly and Harvey (2005) identified abusive supervision, workplace incivility, and social undermining as related, though distinct concepts. However, the nonlegal literature uses the terms interchangeably, and only minor distinctions exist between the concepts (Einarsen, 2000; Einarsen et al., 2011; Einarsen et al., 2020; Sperry, 2009). At a general level, these terms refer to the systematic exhibition of interpersonal aggressive mistreatment, hostile antisocial communication, and/or social exclusion in the workplace directed at a subordinate, or the perception of receiving such systematic mistreatment in the workplace (Einarsen et al., 2020; Salin, 2003b).

Harassment is negative treatment involving abusive behaviour (Einarsen et al., 2020), that is most often of an emotional and psychological nature (Baillen et al., 2010; Keshley, 2001). Usually, harassment is ongoing, frequent, and generally escalates (Andersson & Pearson, 1999, Glomb, 2002; Keashly, Minkowitz et al., 2020; Keashly, Tye-Williams et al., 2020). Escalation suggests that the conflict will "become more intense, hostile and competitive; to include more issues; to undermine trust; and to involve more powerful attempts at control" (Keashly,

Minkowitz et al., 2020, p. 342). The bully generally assesses that the risk of aggression will subject themselves to minimal cost in respect to being disciplined for the behaviour (Salin, 2003a). Bullying is difficult for the employee to arrest or protect against, as it involves a perceived power imbalance (Leymann, 1996; Zapf, 1999) and generally leaves the employee feeling powerless (Einarsen et al., 2020; Glambek et al., 2018; Keashly, 2001; Keashly, Tye-Williams et al., 2020).

Harassment can manifest in a variety of ways. Harassment is targeted at humiliating, intimidating, frightening, or punishing the employee (Einarsen, 2000). “Harassment can be overt, taking the form of jokes, rudeness and physical intimidation. It can also be subtle, involving social ostracism and exclusion” (Sheldon, 2011, p. 189). Harassment can involve exposure to a course of insulting and offensive comment, persistent criticism, and personal or physical abuse (Einarsen, 2000). Harassment can result in isolation and social exclusion (Einarsen, 2000). Fevre et al. (2013) found employees with disabilities subject to these forms of ill-treatment at work in Britain. In addition, vexatious comments or physical abuse, work-related harassment may include unreasonable deadlines or unmanageable workloads (Einarsen et al., 2020, Vartia, 1996), and Fevre et al. (2013) found these two forms of mistreatment to be the most prevalent in respect to employees with disabilities at work in Britain. Harassment may also include being assigned to meaningless tasks or even no tasks at all and excessive monitoring of work (Einarsen et al., 2020; Liefooghe & Davey, 2001). Fevre et al. (2013) found unnecessary monitoring at work is also a highly prevalent form of harassment suffered by persons with disabilities. Other forms of harassment are loss of training opportunities; role ambiguity; loss of resources including social support (Einarsen et al., 2020; Figueiredo-Ferraz et al., 2012); interruption of information flow and thus impaired leader-member relationships (Einarsen et al., 2020, p. 31); rudeness; work

obstruction; destructive gossip; unkept promises; constant work changes; and unnecessary pressure for results (Vickers, 2015). Again Fevre et al. (2013), amongst these last forms of harassment, found employees with disabilities were subject to a high-level of rudeness and disrespect. As Robert and Harlan (2006) said, "In sum, harassment operates as an interpersonal mechanism of discrimination… not surprisingly, leave workers with disabilities feeling they must continually navigate a hostile work environment" (p. 614). Furthermore, harassment is stigmatizing, victimizing (Einarsen et al., 2020), and stress inducing[15]. Weber (2007) stated that harassment works to subordinate persons with disabilities by stigmatising them and by creating and perpetuating stereotypes.

Bullying is complex and has multi-faceted antecedents (Einarsen et al., 2020; Zapf, 1999). It may be interpersonal or systemic to the organisation (Blackwood & Jenkins, 2018). Harassment may be a factor of the perpetrator's personality, leadership style, or work demands. The work environment may also give rise to a culture that is permissive of bullying (Blackwood & Jenkins, 2018). Lastly, certain characteristics of the target are associated with the prevalence of being bullied in the workplace (Salin, 2003b). These factors interact (Samnaui & Singh, 2016). As Einarsen (2020) said, "The issue of bullying in the workplace is a complex one. It comes in many shapes, and shades, with multiple causes on many levels" (p. 4). Roscigno et al. (2009) advised that for bullying to occur, "motivated offenders must converge with suitable

[15] The resulting stress, from harassment, is associated with negative health effects (Einarsen et al., 2020; Okechukwu et al., 2014; Khubchandani & Price, 2015). Prolonged harassment may result in severe social, psychological and psychosomatic issues (Einarsen et al., 2020). Higher risk of poor mental and physical health, medical absence, lower productivity, early exit from the workforce, unhealthy behaviours, effects on family-well-being; negative impacts on outlook on life (Berthelsen et al., 2011; Glambek et al., 2018; Hango & Moyser 2018; Khubchandani & Price, 2015; Okechukwu et al., 2014); anxiety and depression, insomnia (Figueiredo-Ferraz, 2012); job insecurity (Glambeck et al., 2018); posttraumatic stress disorder (Mikkelsen & Einarsen, 2002); compulsive behaviour, paranoid thoughts (Matthiesen & Einarsen, 2001), exasperated acute and chronic illness (Moayed et al., 2006) are connected with harassment.

targets in the absence of capable guardians" (p. 1,563). Without negating the multiple levels that contribute to harassment, given that the focus is managers' behaviours, the ensuing review will principally focus on supervisors.

The most common group of workplace perpetrators are bosses, supervisors, and managers, and most commonly they target subordinates (Hoel et al., 2001; Namie & Namie, 2009; Rayner et al., 2003), particularly as management controls work environmental factors such as job design, reward systems, and structure (Salin, 2003b) and establish the organisation's ethical tone (Murphy & Endler, 1995). Managers may be motivated to bully employees, so that managers may achieve "the exploitation of power, taking advantage of a power deficit on the part of the target as revenge for perceived unwanted behaviour or characteristics observed in the target, or as a tactic in highly escalated interpersonal conflict" (Mathisen, 2011, p. 638). Unwanted characteristics are particularly salient from a disability employment perspective. Salin (2003a) noted, "Superiors may want to eliminate very high-performing subordinates perceived as threats, or very low-performing subordinates who are perceived as liabilities for the department" (p. 3). Given that employees with disabilities are often perceived as poor performers suggests that they may be likely targets of supervisor bullying. Weber (2003) made the case in stating:

> Harassment—or tolerating harassment, which amounts to the same thing-keeps people who are different from the dominant group in their place. For people with disabilities, one's "place" is anywhere but the workplace. Supervisors and co-workers who are uncomfortable with people with disabilities, who are prejudiced, or who simply want to feel superior, use harassment to convey the message that workers with disabilities do not belong, and, often enough, the verbal and physical abuse causes its intended result: the targeted individual leaves the job. (pp. 241-242)

While harassment is not solely a disability issue, in application to persons with disabilities (and other minority groups) it may stem from prejudicial attitudes and will constitute discrimination.

A multitude of personality characteristics including Machiavellianism (Linton & Power, 2013; Pilch & Turska, 2015), narcissism, psychoticism, aggression, disinhibition (Linton & Power, 2013), low self-regulation (Douglas & Martinko, 2001), trait anger (Douglas & Martinko, 2001), low or unstably high self-esteem (Ashforth, 1994; Matthiesen & Einarsen, 2007; Zapf & Einarsen, 2020), and authoritarian personality (Hoel et al., 2010) have been identified as predictors of bullying (Blackwood & Jenkins, 2018).

Several types of harassers have been identified. Autocratic leadership may be tyrannical or abusive supervision (Hoel et al., 2010), and an authoritarian management style has been shown to be related to abusive supervision (Aryee et al., 2008). Petty tyrants "use their power for personal gain, be distrusting and suspicious, be condescending and patronizing, emphasize their authority, take credit for others' efforts, make arbitrary decisions without consulting others and discourage initiative of their subordinates" (Blackwood & Jenkins, 2018, p. 7). Authoritarianism is associated with bullying when it is used to resolve conflicts, obtain compliance by use of force (such as directive or coercive leadership) or punishment, or where employees perceive their supervisor as overpowering, overcontrolling, and stifling (Hoel et al., 2010). Roscigno et al. (2009) noted that managers' direct personal supervision is a common workplace strategy to control employees; however, "that leaves managers and supervisors with few motivational tools besides threats and abuse" (p. 1,565). Further, there is little protection against "the tyranny of fiat, which sometimes occurs in small privately owned and operated enterprises" (Roscigno et al., 2009). Abusive supervisors "may humiliate and belittle to achieve organizational objectives or to send a message that poor performance will not be tolerated" (Blackwood & Jenkins, 2018,

p. 8). Abuse commonly manifests as shouting, rudeness, public criticism, and coercion (Bies, 2001). Hoel et al. (2010) found bullying to be correlated with autocratic, laissez-faire, noncontingent punishment forms of leadership and a lack of participatory leadership. Employees find noncontingent punishment or unpredictable punishment strongly associated with bullying (Zapf et al., 2020), and employees find this difficult to predict and therefore difficult to protect against (Hoel et al., 2010).

Conversely, a laissez-faire leadership style may signal that bullying is acceptable behaviour (Hoel et al., 2010; Skogstad et al., 2007) and has been found to be as detrimental as leadership that is aggressive or abusive (Skogstad et al., 2007). Laissez-faire leadership is passive or absent and involves avoidance of leadership tasks, such as intervention and lack of responsiveness to the needs of subordinates (Glambek et al., 2018; Skogstad et al., 2007).

An antecedent to bullying is an organisation's leadership and management style (Sammani & Sing, 2012). Liefooghe and Davey (2001) argued that to understand bullying the proper unit of observation is the organisation, not individual managers, as mangers may be seen as scapegoats for organisational pressures (greater competition and globalisation), that are out of their control, which in turn creates an environment conducive to managers bullying employees. Robert and Harlan (2006) concluded that discrimination in large bureaucratic organisations results from interpersonal mechanisms but are sustained through organisational mechanisms of tolerance and encouragement, such that "individual acts of discrimination become embedded patterns of discrimination that lead to such actionable outcomes such as … a hostile work environment" (p. 602). For harassment to thrive, it must be condoned by management either directly or tacitly (Brodsky, 1976). It is more apt to occur in environments with a culture that tolerates this behaviour or encourages power disparities (Blackwood & Jenkins, 2018) or where

there is a poor psychosocial safety climate (Law et al., 2011; Vartia, 1996). Bullying persists in organisations due to organisational tolerance (Mathisen et al., 2011; Rayner, 1998) and in part due to a lack of organisational inhibitors (Einarsen et al., 2020). Leymann (1992a) argued that the bullying process cannot perpetuate if those with power intervene. “Since bullying takes place within a situation regulated by formal behavioural rules and responsibilities, it is always (and by definition) is the responsibility of the organisation and its management” (Einarsen et al., 2020, p. 30). In some organisational contexts managers’ performance and rewards may be related to how well they enforce organisational practices, such as surveillance, performance statistics, and sick policy, that actually give rise to perceived bullying by employees (Liefooghe & Davey, 2001; Samani & Singh, 2012).

Tacit support of tolerance and encouragement of harassment of employees with disabilities is antithetical to the best practices for disability inclusion. Successful employment and integration of employees with disabilities requires senior management that is visibly committed to achieving successful inclusion of employees with disabilities (Frazer et al., 2009; Fredeen et al., 2013; Hernandez et al., 2008). Research has shown the importance of a high-level advocate in the organisation, who can heighten the profile of employment of persons with disabilities and remove barriers (Fredeen et al., 2013; Hernandez et al., 2008).

However, Mathisen et al. (2011) found that supervisor bullying was more acutely correlated with supervisors’ stress than personality. “Working organizations are like any other social setting where competition, scare resources, time pressures, differences in goals and personalities, and other stresses of group life can sometimes lead people to aggress against coworkers, subordinates and even authorities” (Aquino & Thau, 2009, p. 718). Workplace incivility stems from a hectic work environment (Appelberg et al., 1991), high workload (Baillen

Rodriguez-Muñoz et al., 2011; Hoel & Cooper, 2000; Salin, 2003a; Vartia, 1996), and time pressures (Pearson et al., 2000; Zapf, 1999). Pearson et al. (2000) reported:

> Similarly, many participants complained of work and information overload, leading to intensified feelings of time pressure and thus less time for the polite "niceties" of business life. A supervisor posed the question, "How can I take the time to thank each of my subordinates for a job well done when I have five deadlines to meet, four meetings to attend, and a spouse and two kids at home who need to be fed dinner? (p. 128)

Thus, managers under pressure are more likely to perpetrate bullying. Leyman (1996) argued that bullying results primarily from the existence of poor work conditions and inadequate management practices in the enterprise (see also Hauge et al., 2011). Roscigno et al. (2009) argued that bullying manifests from chaotic organisations that have failed to maintain a system of well-functioning production. As a result, civility breaks down and "in the absence of effective organization, managers may resort to bullying in an attempt to ensure that work gets done" (p. 1,566). Presumably, this environmental explanation for bully suggests that some managers likely experience more stressors in managing employees experiencing poor work conditions or who themselves are coping with the organisation's inadequate management practices. Tuckey et al. (2009) found that stressful working conditions impact the possibility of negative interactions with mangers by "increasing the likelihood that employees will voice concerns, which may be met with punitive (i.e., bullying) responses by superiors" (Tuckey et al., 2009, p. 228). This is a type of behaviour that may have implications for accommodation requests. Secondly, bullying may trigger "the projection of anger, frustration, and tension down the line from managers to subordinates and across work groups from one employee to another" (Tuckey et al., p. 228). Lastly, other research has found that employee's depression resulting from their experience of procedural injustice is associated with abusive management (Tepper et al., 2006). Vartia (1996) found poor internal communications, lack of opportunity to influence decisions effecting oneself,

and a lack of mutual conversations in respect to goals and tasks are strongly associated with bullying.

Institutional work environment pressures are common antecedents to bullying; however, these conditions are the result of "senior leadership decision-making and management actions, implying that even though the enactment of bullying behaviours are individual, they depend at least in part on structures that motivate, enable and justify them" (Lewis et al., 2020, p. 367). Examples may be organisational impediments to providing flexibility to accommodate health needs. A fundamental cause of bullying some employees with disabilities is their need to accommodate absences (Lewis et al., 2021). Particularly, there is evidence that:

> …showed disabled people were disproportionately falling foul of draconian sickness absence policy where managers were hamstrung by invoking warnings for sickness absence because of policy constraints but who also failed to recognize the nature of the conditions that people with impairments or chronic health issues were working under. (Lewis et al., 2021, 444)

Many companies are critical about time not accounted for due to illness and its impact on employee productivity statistics (Liefooghe & Davey, 2001). Thus, the illness policy is seen as a cause of bullying (Liefooghe & Davey, 2001). Foster (2007) found instances of bullying an employee with disabilities in the form of pressure to return to work from medical leave. Lack of training amongst line managers on disability and accommodations (Cunningham et al., 2004; Foster, 2007) and a fundamental misunderstanding of the employer's legal obligations lead to harassment of employees attempting to negotiate accommodations (Foster, 2007). Fevre et al. (2013) noted, "Managers prioritized other organisational policies and were constrained by cost considerations and poorly trained or supported. Senior managers tacitly showed compliance was not a priority – for example, when they left the detail of operationalizing policies to line managers" (p. 290). Cunningham et al. (2004) attributed the gap between an organisation's

espoused policies and the actual operational reality of accommodating an ill worker to leaving the decision up to line managers, who were often inadequately trained, lacked expert human resource support, had to navigate the conflict between organisational policies supporting vulnerable employees and absentee disciplinary requirements; lack budgetary resources to pay for accommodations while contending with the pressures of work intensification and lean staffing, which limits flexibility. Cunningham et al. (2004) found that "many line managers had no interest in monitoring or managing issues around long-term ill health because of other operational pressures" (p. 286). Lewis et al. (2021) noted that decisions to disclose a disability often depends on the employee's relationships with a manager; however, "In the context of bullying where so many incidences are perceived to be caused by poor management and/or supervisor practices…this is potentially even more problematic" (p. 441) and contrary to the intention of accommodation, legislation leaves the employee dependent on a manger's goodwill (Fevre et al., 2013; Foster, 2007). Thus, according to Foster (2007), disabled employees, rather than having the protection of law, are forced "to beg for conditions that enable them to continue in their employment" (p. 82).

Managers may organise work in a manner that could be perceived by the employee as harassment, where the employee views tasks assigned as illegitimate (Salin & Hoel, 2020). Illegitimate tasks are work that the employee believes does not "conform to what can appropriately be expected from someone in terms of his or her role" (Semmer et al., 2015, p. 33) and thus violates norms about role expectancy (Semmer et al., 2015). Tasks are perceived as illegitimate when they are unreasonable or unnecessary (Semmer et al., 2015). Tasks are unreasonable when they are inconsistent with one's occupational role (Semmer et al., 2015). Imbedded in such tasks is "an implicit message of disrespect" (Semmer et al. 2015, p. 33).

Semmer et al. (2015) found illegitimate tasks to be a workplace stressor that predicts strain and wellbeing.

One of the most significant individual employee attributes associated with bullying is low self-esteem (Einarsen et al., 1994; Matthiessen & Einarsen, 2001; Zapf & Einarsen, 2020). Targets that are perceived as week are more likely to experience harassment, and perpetrators generally target employees who seem less likely to defend themselves (Samnani & Sing, 2016).

> It may also be that the emotional and behavioral tone of people with low self-esteem invites victimization because someone with low self-esteem is less able to assertively defend him or herself against others' aggression (Matthiesen & Einarsen, 2001), deal constructively with conflict (Zapf, 1999), or challenge those who try to exploit them. (Aquino & Thau, 2009, p. 724)

Workplace bullying disproportionately impacts minority groups in the workplace (Blackwood & Jenkins, 2018; Lewis et al., 2020; Okechukwu et al., 2014). Employees who are numerically a minority in their work group appear more vulnerable (Karakowsky & Siegel, 1999), are perceived to have less social power, and are, as a result, more likely to be bullied (Samnani & Singh, 2016). Lewis et al. described bullying and discrimination as "inextricably linked" with common social cognitive mechanisms of social categorisation determining in-group and out-group membership boundaries. Persons with disabilities are often categorised as out-groups and experience discrimination and persons with disabilities are more likely to experience bullying.

Given the increased unacceptability of blatant discrimination in contemporary society, those common mechanisms may manifest more so as bullying than discrimination (Lewis et al., 2020). More specifically, persons with disabilities in Britain have been found to experience ill treatment at work (Fevre et al., 2013) and are more likely to report experiencing negative behaviours at work compared to nondisabled employees (Fevre et al., 2008). Fevre et al. (2008)

found employees attribute 41%- 47% of this negative behaviour to employers, supervisors, and line managers. An American study reported that persons with disabilities experience more subtle and overt discrimination than nondisabled employees (Snyder et al., 2010).

In Canada, 37 % of persons surveyed with a disability, employed in the Canadian federal public service, reported experiencing harassment compared to 17% of nondisabled employees (Jones et al., 2018). Jones et al. found that employees with a disability employed in public service had close to three times greater odds of experiencing workplace harassment, than nondisabled employees. Hango and Moyser (2018) found that persons with a mobility limitation affecting their daily activity had a 7% higher likelihood of reporting workplace harassment than employees without a mobility limitation. Forum Research (2018) reported that respondents with a disability were more likely to be emotionally (26%) or physically (27%) bullied in the workplace compared to employees who were not disabled (20% and 17%, respectively). Seventy-five percent of persons with disabilities, compared to 63% for persons without disabilities, identified that their employer did not act to end the bullying, and in 86% of the instances, perpetrators did not face consequences after the bullying was reported (Forum Research, 2018).

Ultimately, harassment of employees with disabilities stems from socially constructed attitudinal views of disability. “Though disability may define the group, what imposes limits on individuals is not necessarily disability itself but the artificial environment of physical and attitudinal barriers that people with disabilities negotiate. Harassment is a manifestation of the attitudinal barriers” (Weber, 2007, p. xi). Weber (2004) argued that harassment perpetuates the segregation of persons with disabilities from exercising their right to work.

In respect to disability, harassment has been explained as managers' discomfort stemming from not accepting employees with differences. "the person is a manifestation of a disability, and the discomfort of dealing with the manifestation causes a reaction of ridicule, shunning or abuse or causing others to ridicule, shun and abuse" (Weber, 2007, p. 2). The manager interprets their discomfort to stem from the person, rather than being embedded in the nature of the workplace, so they opt to remove the discomfort by ridding the organisation of the person, rather than addressing the real barriers (Weber, 2007). This often results in unemployment, which is the ultimate form of segregation (Harlan & Roberts, 2006).

Tahvonen (2003) noted in the American context, that "it would be unfathomable for the legislature to open the doors of the American workplace to people with disabilities only to have them forced out by harassing behavior" (p. 1,495). That statement is equally applicable in Canada. Not surprisingly, harassment has a pronounced impact on job satisfaction, intention to leave current employment, low motivation to perform well at their current employment, and a weak sense of belonging to the current organisation (Hango & Moyser, 2018).

Comparative Culture and Bullying. Trompenaars and Hampden-Turner (1997) noted:

> The difficulties that arise when cultural borders are crossed concern mainly the diminishing effectiveness of management processes that occurs when multinational companies, ignoring cultural differences, try to apply in foreign countries subsidiaries management formulas that are derived from their own cultural context and proved to be successful in that culture. (Bālan & Verja, 2013, p. 95)

Confucian Asia, which includes South Korea, was found to be more tolerant of bullying than Anglo, Latin American, and Sub-Saharan African country clusters (Power et al., 2011). Additionally, South Korean management style has been characterised as paternalist (Vojinovic, 2015). Power et al. (2011) attributed this tolerance of bullying to that culture's greater emphasis on high-performance than the other clusters. In addition, in Confucian Asia culture employees

have a higher sense of organisational collectivism and respect for hierarchy, which may make them more accepting of bullying by superiors. Vojinovic (2015) noted that employees are expected to "make all the necessary sacrifices to succeed in your job" (para. 8).

It is likely that South Korean branch plants operating in the west who import managers from South Korea import their corporate cultural attitudes along with them, with expectations that employees work regardless of illness. Choi Eun-hwa (as cited in Denyer et al., 2020), stated, "South Korea's corporate culture — that deems working while sick a virtue — pushes ill employees to show up at the office" (para. 15). Despite the implementation of a quota system in South Korea obliging private companies to have a modest disability employment rate of 3.1%, and despite levies for failing to do so, employment of persons with disabilities perpetually falls short of that rate (Nam et al., 2017). "Employers indicated that they would rather pay fines than hire people with disabilities" (Kim-Rupnow, 2001, p. 15). Confucian socio-cultural norms that portray disability as a reason for shame and negative employer assumptions and attitudes about persons with disabilities as employees impedes entry into the workforce of persons with disabilities (Hwang & Brandon, 2012; Hwang & Roulstone, 2015).[16]

Harassment as a Site of Power Relationships. Endemic in the definition of harassment are power relationships (Einarsen et al., 2020). Harassment is premised on some form of power imbalance between the harasser and the target (Einarsen et al., 2020). This often mirrors the organisation's formal hierarchical structure (Hole & Cooper, 2000; Keashly, Tye-Williams et al., 2020; Keashly 2001). Thus, bullying by a supervisor is already embedded in a hierarchy of power (Lutgen-Sandvik & McDermott, 2011; Roscigno et al., 2009). Bullying may also be

[16] On the other hand, Luu (2019) noted that benevolent leadership as an aspect of Confucian leadership, stating, "benevolent leaders may respond to the expectation among Vietnam-based employees with disabilities of leaders as "moral gentlemen" who, in the Confucian value framework, tend to help the disadvantaged" (p. 291).

premised on informal bases of power such as knowledge and experience or having the support of an influential patron in the organisation (Hole & Cooper, 2000). A victim's vulnerability, such as low self-esteem and high negative effect, is often exploited to create a power disparity (Einarsen et al., 2020; Keashly Tye-Williams et al., 2020; Sammani & Singh, 2016). Similarly, perceptions of inadequate work performance can give rise to power opportunities (Einarsen et al., 2020). Employees in lower power ranks tend to be more vulnerable to abuse (Keashly, Tye-Williams et al., 2020).

The power relationship may also stem from the employee's dependance on the harasser for economic, social, physical, or psychological reasons (Nidel, 1995, as cited in Einarsen et al., 2020; Keashly, 2001). Power-dependance theory posits that a:

> …person's dependence, is inversely related to their power. In relationships characterized by power imbalance, exchanges in which one actor is more dependent on the other for valued resources, the actor with greater dependence/less power is constrained in terms of their ability to act in ways that satisfy their self-interests. (Emerson, 1972, as cited in Tepper et al., 2009, p. 157)

There is an extensive literature on the relevant power differential of employees in relation to managers. The relevant power differential renders the employee's ability to respond, defend, and end the conflict limited (Einarsen et al., 2020; Glambek et al., 2018; Keashly, 2001; Keashly, Tye-Williams et al., 2020). Lower paid employees are more susceptible to bullying. Employed Canadians with a disability are more likely to be in lower paying jobs and generally earn less than nondisabled counterparts (Morris et al., 2017; Wall, 2017). Similarly, precarious employees may be considerably dependent on being in favour with supervisors to maintain work hours (Djurkovic, 2018), and employees with disabilities are highly represented in precarious employment (Wilton, 2006; see also Shuey & Jovic, 2013; Tompa et al., 2006). Job insecurity is a form of vulnerability that attracts bullying (Roscigno, 2009), and job insecurity is associated

with employee powerlessness in the workplace (Hodson et al., 2006). Given the heterogeneity of disabilities, it does not follow that all employees with disabilities are necessarily beholden to their supervisors; however, Schur et al. (2017) found that employees with disabilities report, relative to nondisabled employees, lower perceptions of job security and job satisfaction, but despite perceiving less favourable treatment by management, they have similar turnover intentions. Given their job insecurity, employees with disabilities may see their job as a valued asset and may make them more dependent.

Another source of vulnerability that has been seen to lead to harassment at work is minority status. Okechukwu et al. (2014) found that "discrimination, harassment, abuse and bullying in the workplace … are most often described as affecting workers in nondominant and/or disadvantaged worker groups" (p. 581). McCluney and Cortina (2017) stated, "In short, identity matters when it comes to workplace aggression" (p. 136). "Numerical minority status of an employee suggests that the employee may be perceived as having less social power within his/her group. In such a case, this numerical minority status will more likely result in bullying behaviour" (Samnani & Singh, 2016, p. 544). Numerical underrepresentation in a group makes those workers extremely visible and highly identified with the stereotypes that attach to the minority (Kanter, 1977, as cited in McCluney & Cortina, 2017; Salin, 2003b). Leymann (1992b) found, in an early study, disabled employees, being subsidised by the state, to be highly visible. "Organizational power differences are thus often connected with societal power differences and bullying often overlaps with related phenomena such as sexism or racism in the workplace" (Salin, 2003b, p. 1219) and presumably disability. Research has shown that women, racialised individuals, and persons identifying LGTBQ experience bullying at work (Keashly et al., 2020; McCluney & Cortina, 2017; Misawa, 2015; Sobre-Denton, 2012). Other research has found

existing mental health issues (such as anxiety, depression, PTSD) predictive of experiencing bullying later (Verkuil et al., 2015) and an association between exposure to bullying behaviours at work and symptoms of anxiety (Nielsen et al., 2017). Nielsen et al. argued that employees with impaired mental health may attract bullies by failing to meet expectations, being irritating, or violating social norms in interpersonal interaction (Nielsen & Einarsen, 2012; Nielsen et al., 2012).

Vulnerability is not exclusively the domain of lower paid employees. The Canadian Payroll Association (2018) reported that 44% of working Canadians agreed that "it would be difficult to meet their financial obligations if their pay cheque was delayed by even a single week" (p. 1). Middle incomes have barely increased over the last 30 years; however, at the same time, the middle-class lifestyle has become more expensive, increasing faster than inflation (OECD, 2019). In Ontario, "In 2019, average household expenses, which include housing, food and transportation costs, grew by 6.4 per cent. Meanwhile, average household income rose 5.5 per cent" (Tran, 2020, p. 3).[17] This is further exacerbated by high household debt. In 2012, individuals earning between $50,000 and $100,000 represent 38% of Canadian debtors, with an average of $95,400 per borrower (Chawla & Uppal, 2012). While not middle-class specifically, in the third quarter of 2019, the Canadian household debt-to-income ratio was 175.9% (Hogue, 2019). Statistics like this have led the OECD to conclude that the middle class is under financial pressure (OECD, 2019). It is not hard to see why middle-class employees would feel insecure and would forego requesting accommodations, to avoid the risk of job loss, even at the expense of their health or optimizing work performance.

[17] These statistics are pre-COVID pandemic, as they were reported in February 2020, prior to the economic consequences of the pandemic setting in.

Harassment Prevention. Yet, despite the preponderance of negative cultural factors catalogued in the preceding sections, there is evidence that constructive leadership results in less bullying. First, constructive leaders are less likely to engage in harassment (Salin & Hoel, 2020). Organisations that foster a positive work environment emphasise individual strengths and consider "negative behaviour as an organizational problem" (Härtel & Ashkanasy, 2011, p. 89) that needs to be addressed immediately so that bullying does not become entrenched (Härtel & Ashkanasy, 2011). "Constructive leaders also invest time and effort into conflict management" (Salin & Hoel, 2020, p. 314). Salin (2003b) noted "that stress may be conducive to bullying because it does not permit for 'time-consuming' conflict solving" (p. 1222). Conflict prevention takes managers' time and organisational resources. Mikkelsen et al. (2011) determined that a basic element of conflict management prevention strategy needs to encompass management training in identifying and handling conflict and that management needs to be involved in the development of the initiative, design, and evaluation strategy. Mikkelsen et al. (2011) suggested developing an effective anti-bullying training program that takes multiple days. Einarsen et al. (2018) concluded that bullying and its consequences will be reduced if employees see an organisation with appropriate procedures and policies with respect to interpersonal issues (Einarsen et al., 2018). Policies and procedures take time to develop, implement, and revise. Hutchinson (2012) contended that workplace bullying policies must go beyond the narrow conception of interpersonal level to include a more multi-dimensional conception that considers contextual elements. Hutchinson (2012) identifies the organisation's culture, the nature of the work, employment arrangements, and the political, social, and economic environment in which the bullying is embedded as contextual elements to consider. Bullying is not only a psychological issue but a management and legal issue and a sociological phenomenon

(Hutchinson, 2012). This suggests that creating a bully-free organisational environment is complicated and developing and implementing anti-harassment policies will be require a significant investment of managers' time.

Poisoned Work Environment

There is a nexus between the harassment and a poisoned work environment. A poisoned work environment, while not defined in the *Code* (MacLeod Law Firm, 2015), is described in case law as a situation where "serious wrongful behaviour sufficient to create a hostile or intolerable work environment is persistent or repeated" (or a single event that is sufficiently egregious; *General Motors of Canada Limited v. Johnson,* 2013, para. 67).

A poisoned work environment must be proven on an objective standard—that is, an objective bystander would conclude a poisoned work environment has been created (*General Motors of Canada Limited v. Johnson,* 2013, para. 66). This means that an employer arguing lack of intention to harass is not a defence (Bakerlaw, 2017; Murphy, 2017). A poisoned work environment may constitute constructive dismissal, where on an objective standard, a reasonable person would perceive the essential terms of the employment contract have been substantially changed such "that the employer's persistent conduct has rendered his continued employment intolerable" (*General Motors of Canada Limited v. Johnson,* 2013, para. 91). The Ontario Human Rights Commission (2016) explained, "A consequence of creating a poisoned environment is that certain people are subjected to terms and conditions of employment … that are quite different from those experienced by people who are not subjected to those comments or conduct" (s. 6.3). Thus, the norm is the expectation of a work environment free of harassment.

Mangers are responsible if they either know or ought to have known about the harassment and failed to investigate and intervene (Iannozzi, 2016). This amounts to tacit

acceptance of the harassment. The employer will often be found vicariously liable for workplace harassment, as they have the most suasion to set workforce expectations (Iannozzi, 2016).

Given that poisoned work environments often permeate the environment beyond the complainant and because poisoned work environments may not react to the more typical monetary remedies, tribunals have been employing public interest remedies to deal with the problem systemically (Iannozzi, 2016).

Failure to Substantially Accommodate

The substantive element of accommodation has to do with the reasonableness of an offered accommodation or the rationale for not providing accommodation (OHRC, 2016). "Accommodation is a process and is a matter of degree, rather than an all-or-nothing proposition, and can be seen as a continuum" (OHRC, 2016, s. 8.3). The general principles of accommodation are that the employer provides an accommodation that respects the employee's dignity, is individualised to their needs and allows integration and full participation of the employee (OHRC, 2008).

> Accommodation is considered appropriate if it results in equal opportunity to enjoy the same level of benefits and privileges experienced by others or if it is proposed or adopted for the purpose of achieving equal opportunity and meets the individual's disability-related needs. (OHRC, 2008, s. 8.3)

The Supreme Court in *Moore v. British Columbia (Education)* (2012) citing several priour high court decesions (*Meiorin*, at para. 38; *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, at pp. 518-19; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, at para. 130) stated, "an employer or service provider must show 'that it could not have done anything else reasonable or practical to avoid the negative impact on the individual'" (3 SCR 360, para. 49; see also *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. Caron* 2018 SCC 3; [2018] 1 SCR). In *Central Okanagan*

School District No. 23 v. Renaud (1992), the Supreme Court of Canada stated, *"*More than mere negligible effort is required to satisfy the duty to accommodate" (para. 19). Rudner (2015) stated, "The case law makes it clear an employer has a positive duty to consider requests for accommodation and must undertake a genuine and thorough analysis of the potential means of accommodation and their impact on the organisation.

The duty to provide accommodations is obviated where accommodating the employee imposes undue hardship on an employer. The Supreme Court maintained some level of hardship in providing accommodations must be endured so long as it is not unreasonable (*Council of Canadians with Disabilities v. via Rail Canada Inc*. 2007, 1S.C.R. 650). However, undue hardship does not require that it is impossible to accommodate an employee or that they are totally unfit for work; nor does the employer have to alter the workplace in a fundamental way (*Hydro-Québec v. Syndicat des Employées de Techniques Professionnelles et de bureau d'Hydro-Québec, section locale 2000* (*SCFP-FTQ;* 2008), 2 S.C.R. 56).

Reprisal

Reprisal is an adverse action or threat of adverse action—in this case an employer—against an employee who makes a human right claim or threatens to do so. Freedom from reprisal is protected by section eight of the *Ontario Human Rights Code.*

Freedom from retaliation has a significant policy objective. Reprisal is the use of the employer's imbalance of power in the workplace to intimidate the employee to avoid a claim (Foster et al., 2018). The policy reasoning behind protection from reprisal is well stated by the Board of Inquiry in *Entrop v*. *Imperial Oil Ltd*. (1995). The board stated:

> In assessing the reasonableness of the complainant's fears and perceptions, boards of inquiry must be sensitive to the particular difficulties that confront complainants, many of whom may experience great fear and anxiety surrounding the lodging and pursuit of a human rights complaint. This is exasperated where the complainant continues in an on-

> going relationship with the respondent, especially where that relationship is complicated by a differential in power, such is undeniably manifest in the employer-employee setting. In such a context, otherwise innocuous events, conversations and correspondence may take on an overtly intimidating aura, with impact all out of proportion to the original intent or understanding on part on the part of the respondent. The damage, however, may be enormous. Such actions may frighten complainants into dropping their allegations, submitting to otherwise unacceptable terms of settlement, or refusing to tender critical evidence. The overriding purpose of the Code, to assure equality and eradicate discrimination, is completely frustrated when this occurs. (pp. 19-20; see also *Nobel v. York University* 2010, HRTO 878, para. 30)

The prohibition against reprisal serves an important function. Without the prohibition employers could simply terminate employees who seek to enforce their rights resulting in a "chilling effect" on the enforcement of human rights (Poziomka, 2013).

The "chilling effect" is evident in Foster et al.'s (2018) finding that employees who are a visible minority had an expectation of negative consequences for requesting accommodations (17%) and reporting harassment (21%). They do not advise to what extent persons with disabilities are included in a visible minority, but regardless, the prevalence of an expectation of negative consequences amongst this group is at least analogous. Harlan and Roberts (1998) identified reprisal in respect to disabled employees requesting accommodation, as an employer resistance technique and that it may be aimed as a warning to other employees.

Reprisal arises in response to a claim of discrimination. By the time a claim has been filed the employer has already failed to accommodate the employee substantially or procedurally or committed harassment. Likely, the employer has failed to invest their time and effort into undertaking the accommodation process. Thus, reprisal has less to do with whether the employer sees accommodating as a nuisance, and more to do with the reaction to potential or actual litigation. That is, the employer reacts to deliberately punish the claimant for asserting a right under human rights legislation.

Conclusion

This chapter provides the legal context that employers and employees operate in. It establishes employees' entailment to human rights and employers' obligations not to discriminate and what constitutes disability discrimination in workplaces in Ontario. Essentially this is workplace discrimination. The next chapter looks at the why of discrimination, plumbing employer psychology and other theories applied to the research cases that will help us interpret employers' behaviours towards employees with disabilities.

Chapter 4 - Theoretical Lenses Part II: Industrial and Organisational Psychology

The previous chapter discussed the legal framework of workplace disability discrimination that govern employment relationships in Ontario. In this chapter the analysis is based on looking at organisational and management theory that will be applied to the data to tease out saliant aspects of employers' discriminatory behaviour towards employees with disabilities and will be applied to the data in subsequent chapters.

Industrial and organisational psychology is the study of the behaviour of persons engaged in work and the behaviour of organisations. Industrial and organisational psychology is the study of: "(a) the person, the worker; (b) the work (tasks) that is (are) being performed; and (c) the context in which the work is performed" (Sheldon 2011, p. xxi). Particularly, application of the factors in Stone and Colella's (1996) essential model explaining employers' responses to persons with disabilities at work and other authors' subsequent contributions to the model were used to analyse the employers' responses in the research cases of these employees. These lenses help bring to the surface the relevant patterns of behaviour.

The authoritative industrial and organisational psychology model of persons with disabilities and employment is Stone and Colella's (1996) model of factors affecting the treatment of disabled individuals in organisations. The model was revised by Beatty et al. (2019). The model involves consideration of the psychological responses of observers (coworkers, supervisors), mediated by various antecedents: legislation, organisational characteristics, attributes of the person with a disability, attributes of the observer, the nature of the job, and the observer's job-related expectations (Beatty et al., 2019). Stone and Colella (1996) included in characteristics of the employee: the nature of the disability, aesthetic qualities, origin of the disability, course (temporary or reversible or progressive or irreversible), concealability,

disruptiveness, danger, or peril (perceived level of threat, danger, or contagion), previous performance level, gender, interpersonal style, race, and status or social power. Beatty et al. (2019) also found that disability type, onset, and controllability significantly shape the treatment of employees with disabilities. Organisational characteristics included by Stone and Colella are technology, organisational norms and values, organisational policies and practices. In respect to attributes of the observer (i.e., managers and supervisors) Stone and Colella offered demographic characteristics, personality characteristics, and previous contact with disabled persons. These factors contribute to the observer's psychological response to the employee with a disability and translate to the observer's treatment of the employee. In turn, the reaction of the employee with a disability to the treatment feeds back to contribute to the observer's psychological response (Beatty et al., 2019; Stone & Colella, 1996). Thus, environment and personal characteristics of both the observer and the person with a disability contribute to the categorisation, stereotyping, and affected state of the observer (Stone & Colella 1996). These processes then shape the observer's job-related expectancies of the person with a disability (Stone & Colella, 1996).

Within management literature there are many subdisciplines. In building on Stone and Colella's (1996) model, the analysis here broadens the lenses applied by adding to supervisors' characteristics, management style, leader-member exchange, temporal management, and beliefs through the theory of planned behaviour. Added to employees' characteristics are precarity and job quality. In respect to organisational characteristics are added developments in the literature in respect to organisational structure, organisational size, human resource management, unionisation, and corporate culture. Beatty et al.'s (2019) adds diversity climate. To that I add psychological, disability and justice climate lenses and theories that explain managers' negative

justice behaviours. This is rounded out with consideration of psychological explanations for adverse reactions to employees with disabilities and the mitigating potential of contact theory.

Observers Attributes - Supervisors and Managers

One of the most influential set of observers are managers. The corporate culture is shaped considerably by management attitudes and signals. An attitude is defined by Allport (1935) as "a mental and neural state of readiness, organized through experience, exerting a directive or dynamic influence upon the individual's response to all objects and situations with which it is related" (p. 810). "They [managers] represent the organizational culture and serve as a model for the employees" (Vornholt et al., 2013, p. 470). Integration of employees with disabilities is unlikely to occur without support from management. In fact, the literature suggests that to successfully create disability inclusion in an organisation, it takes leadership from senior management, who are overtly committed, to drive change in an organisation's culture (Schur et al., 2005; Fraser et al., 2010; Fredeen et al., 2013; Gröschl, 2007; Hernandez et al., 2008) and supportive supervisors who see ability rather than disability (Kalargyrou 2014).

In a poll conducted by the Angus Reid Institute (2015), they found that 50% of Canadians agree that, "It's understandable that employers feel it is risky to hire people with physical disabilities," (p. 7). Given that this attitude is common, it is not hard to imagine that many managers also have a bias. Many managers hold unfounded beliefs about persons with disabilities around a range of issues including: (a) perceptions of persons with disabilities ability to perform and lost productivity (Bengisu & Balta, 2011; Donnelly & Joseph, 2012; Fredeen et al., 2013; Gröschl, 2007; Houtenville & Kalargyrou, 2012; Peck & Kirkbride 2001); (b) beliefs that additional training time is required (Gröschl, 2007; Kaye et al., 2011; Fraser et al., 2014; Unger, 2002; Waterhouse et al., 2010), (c) coworker and management resistance to working with

a person with disabilities (Boni-Saenz et al., 2004; Donnelly & Joseph, 2012; Fraser et al., 2010; Gröschl, 2007; Heera & Devi, 2016; Houtenville & Kalargyrou, 2012; Lengnick-Hall et al., 2001; Schur et al., 2005); (d) perceptions about the cost of accommodations (Boni-Saenz et al., 2004; Donnelly & Joseph, 2012; Fraser et al., 2010; Fredeen et al., 2013; Gröschl, 2007; Houtenville & Kalargyrou, 2012; Kalargyrou & Volis, 2014); (e) trepidation in terms of perceived liability and potential litigation (Boni-Saenz et al., 2004; Fraser et al., 2010; Heera & Devi, 2016; Kaye et al., 2011); (f) beliefs that persons with disabilities are a safety risk (Fraser et. al., 2010; Fredeen et al., 2013; Morgan & Alexander, 2005); (g) concerns that employees with a disability will have poor attendance (Bebisu & Balta, 2011; Frazer et al., 2009; Gröschl, 2013; Hernandez et al., 2008; Kaye et al., 2011); and (h) beliefs that these employees lack mobility (Bengisu & Balta, 2011; Fredeen et al. 2013; Gröschl, 2007). In the abscesses of objective data, they rely on their biases and stereotypes to assess the potential performance of persons with disabilities (Stein, 2000a; Vornholt et al., 2013).

Employers and mangers are influenced by categorising persons with disabilities with stereotypes associated with disabilities, which then shape the observer's expectancies. "[T]he way observers perceive disabled individuals exerts a powerful influence over their feelings and behaviours towards them. Thus, the basic underlying process in Stone & Colella's model stems from theory and research on social cognition (Stone & Colella, 1996, p. 357). Stone and Colella also referred to "implicit personality theory" (p. 358). Implicit bias are evaluations of stereotyped attributes that in this cased would be associated with an employee with a disability. They concluded that the stereotypical categorising of persons with a disability becomes a master status. Williams and Taras (2004) found negative managerial bias against employees with

disabilities and recalcitrance. A relevant example of the recalcitrance was the use of a minor disability "to fabricate an opportunity" to dismiss the employee (pp. 4-5).

Leadership Style

Stone and Colella (1996) also indicated that observers' characteristics, such as demographic, personality, and previous contact with the disabled, impact their evaluation of employees with disabilities. Stone an Colella's model, in respect to supervisors:

> …specifies that perceptions about disabled individuals are affected by the attributes of the observer, including (a) demographic characteristics (e.g., gender, occupation, socioeconomic status, educational level), (b) personality characteristics (e.g., authoritarianism, self-concept, tolerance for ambiguity, social empathy), and (c) their previous contact with disabled persons. (p. 369)

They pointed out that research "has not found consistent support for the relationship between observers demographic characteristics…and attitudes toward the disabled" (p. 369) or whether managers' personality differences affect the treatment of persons with disabilities in organisations. Such an analysis is beyond the intended research scope. Rather the subject of this research is inductively emergent patterns of employer behaviours.

However, while employer personality cannot readily be assessed, information can be gleened from considering the managers' leadership styles in the research cases. Personality is the "psychological qualities that contribute to an individual's enduring and distinctive patterns of feeling, thinking and behaving" (Cervone & Pervin, 2016, p. 7). Several studies have drawn a connection between leadership style and personality (Bertsch et al., 2017; Cable & Judge 2003; De Hoogh et al., 2005; Hassan et al., 2016; Hurst & Jung, 2013; Mihslcea, 2014; Mohammadi et al., 2015; Rabbani et al., 2016). Hassan et al. argued that a lack of definitive link between personality and leadership style is the result of the multitude of overlapping terms for leadership styles that have not been systematised in a coherent way within a common framework. They

identified in the literature 39 different terms to describe leadership styles. They grouped all styles into five representative styles on the basis of mutual theoretical underpinnings and shared characteristics and concluded, "The findings suggest that leadership styles are to some extent associated with personality types" (p. 174). Some leadership theorists and researchers consider leadership and management as overlapping concepts (Bohoris & Vorria, 2008). Other distinguish between management as:

> Managers are the people to whom this management task is assigned, and it is generally thought that they achieve the desired goals through the key functions of planning and budgeting, organizing and staffing, problem solving and controlling. Leaders on the other hand set a direction, align people, motivate and inspire. (Bohoris & Vorria, 2008)

Management may involve using coercive techniques "to manipulate or change employee behaviour", whereas leadership is the attaining of voluntary cooperation from followers (Bertsch et al., 2017, p. 33). However, a separate body of academic literature on management styles could not be found and lay literature uses the same terms used for leadership style.

Regardless, both leadership and personality are measured using survey instruments that cannot be applied without direct access to managers. Personality is typically measured using various surveys, such as the Myers-Briggs Indicator (Myers & Briggs, 1987) and the Neo Personality Inventory (Costa & McCrae, 1985), or the Wonderlic Personnel Test (Wonderlic, 1983). Many studies on leadership and personality use the Big 5 personality measurements or five factor model (Costa & McCrae, 1992) which assesses extraversion, agreeableness, conscientiousness, openness, and neuroticism. Leadership is assessed using the Leadership Grid Questionnaire (Blake et al., 1962), the Multifactor Leadership Questionnaire (Avolino & Bass, 2004), Global Leadership and Organisational Behaviour Effectiveness attributes, dimensions, and measurement standards (House, 2004), and the Likert Scale (Likert 1967).

Lewin (1939) identified three leadership styles: authoritarian (autocratic), participative (democratic), and delegative (laissez-faire). Autocratic leadership involves a manager's absolute control over decision making and subordinates roles, without consulting with employees and with little in the way of developing relationships with employees. Absolut obedience and adherence to rules are required (Hassan et al., 2016; Mohammadi et al., 2015). Participative leadership involves sharing power with subordinates and seeking consensus. Managers engage employees in exchange of ideas and encourage employees to participate in problem solving (Hassan et al., 2016; Mohammadi et al., 2015). Laissez-faire management is where management fails to take responsibility to manage (Hassan et al., 2016). Subsequently, researchers have expanded the categories of leadership style to include transformational (Bass, 1985, 1990), transactional (Bass, 1985), and situational (Hersey & Blanchard, 1969, 1977).

Burns (2017) set out a typology of harmful leadership, which includes toxic, abusive, and bullying styles. Bullying and abusive supervision were discussed in detail under harassment in the previous chapter (s. 3.4.1 & s. 3.4.2). In this section toxic leadership style is considered. Toxic leadership is defined as "a process in which leaders, by dint of their destructive behaviour and/or dysfunctional personal characteristics, inflict serious and enduring harm on their followers, their organisations, and non-followers, alike" (Lipman-Blumen, 2005, p. 1). Toxicity is relevant as many of the employees with disabilities in the research cases will be seen as having suffered harm at the hands of these managers.

There is of course overlap amongst toxic, abusive, and bullying leadership styles. There is a "wide spectrum of leader negative behaviours, from intentionally malevolent toxic leaders acting with deliberate negative intent, to ineffective leaders notable not for malevolence but for a dearth of positive results" (Burns, 2017, p. 40). The three destructive leadership styles share

multiple commonalities in leadership behaviours (Burns, 2017). Burns identified several behaviours in common to all three harmful leadership styles. Some of these behaviours are relevant in assessing managers' treatment of employees with disabilities in the research cases. Behaviours that are common to all three harmful leadership styles are demeaning and marginalizing. Harassment can be both abusing and bullying. Coercion is a factor of toxic leadership. Threatening employee job security and making employees endure hardship are characteristic of both bullying and toxic leadership. Abusive and toxic leadership can also include lying or deception. Shmidt (2008) identified additional traits, amongst others, that toxic leaders may exhibit including ridiculing subordinates, holding employees responsible for work outside their job description, badmouthing the employee to other employees, belittling the employee in public, and telling the employee they are incompetent.

Lastly, Lipman-Blumen (2005) asserted those toxic leaders may violate employees' human rights by reframing their toxic agenda as a noble endeavour. Tavanti (2011) described the concept as:

> …the violation of human rights or organizational compliance is often recognizable in the action of toxic leaders toward followers and dependents. This dynamic is based on the assumption that only the leader knows the truth and acts justly. Therefore, the respect of other people's dignity, opinion, or ability is necessarily functional to the leader's success and his or her interpretation of organizational success. (p. 130)

This characterisation of toxic leadership as violating human rights is germane to the heart of this research and supports the nexus between human rights violations and employers' actual behaviours empirically discerned from human rights cases.

Another management style that is relevant to the research cases is transactional management. Nikezć et al. (2018) noted how transactional management is intrinsic to one's personality: "Inflexibility of leadership is a characteristic of this model, so any attempt to change

his leadership style is difficult and almost unsuccessful, because the leadership style is part of human person, his personal characteristics and that is something unchangeable" (p. 287). Thus, it very well may be that identifying transactional management practices is a proxy indicator of personality.

This form of leadership is premised on exchanges between leaders and employees (Bass, 1985, 1990; Burns, 1978). Transactional leadership is an instrumental relationship in that it is aimed at fulfilling each party's self-interest (Bass, 1999), is motivated by contractual arrangements (McCleskey, 2014), and tends to emphasise extrinsic rewards (Sadgeghi & Pihie, 2012). In other words, this form of leadership is premised on and motivated by exchange.

> These exchanges allow leaders to accomplish their performance objectives, complete required tasks, maintain the current organizational situation, motivate followers through contractual agreement, direct behavior of followers toward achievement of established goals, emphasize extrinsic rewards, avoid unnecessary risks, and focus on improve organizational efficiency. In turn, transactional leadership allows followers to fulfill their own self-interest, minimize workplace anxiety, and concentrate on clear organizational objectives such as increased quality, customer service, reduced costs, and increased production. (McCleskey, 2014, p. 122)

Transactional leadership intent is maintaining the status quo (Grove & LaRocca, 2011; Nikezć et al., 2018; Roberts, 2007). This form of leadership is focused on short-term goals, not creative solutions (Nikezć et al., 2018). The emphasis is on efficiency, such as cost reduction; (Nikezć et al., 2018; Sadgeghi & Pihie, 2012) and risk aversion (Sadgeghi & Pihie, 2012).

The transactional leadership style tends to be management by exception (Sadgeghi & Pihie, 2012). "Management-by-exception is a less active approach to leadership that essentially informs followers of job expectations but resists further involvement with the follower unless the follower's actual performance varies significantly from those expectations" (Whittington et al., 2009, p. 1862). Management by exception is focused on correcting performance issues after they arise and often involves the risk of punishments. "This type of behavior is related to criticism

and negative feedback by the leader subject to unsatisfactory performance by the subordinate" (Shah et al., 2015 p. 76). This may be problematic for employees with disabilities who often struggle with issues of lower self-esteem (Ferro & Boyle, 2013; Seigel et al., 1990) and internalised stigma (Silván-Ferrero et al., 2020).

Given that the relationship between manager and employee is premised on exchange, the quality of the exchange is significant. "Transactional leadership is characterized by behaviors and attitudes that emphasize the quality of exchanges between superiors and subordinates" (Shah et al., 2015, p. 71). Rewards are contingent on the effort and productivity of the employee (Shah et al., 2015).

> These exchanges are based on the leader identifying performance requirements and clarifying the conditions under which rewards are available for meeting these requirements. The goal is to enter into a mutually beneficial exchange, but not necessarily to develop an enduring relationship. (Whittington et al., 2009, p. 1,861)

Employees are rewarded when their performance meets the contracted requirements (Howell & Hall-Merenda, 1999). Presumably, when a manager perceives that an employee can no longer meet the quality of exchange—that is, the contracted level of performance—or the employee seeks to change the expectations of the contract, possibly by seeking accommodations, and given that nature of the employee-employer relationship is not intended to be enduring, it is likely that the manager will terminate the relationship. McCleskey (2014) noted that there is evidence of transactional leadership being effective in some circumstances. It is rooted in teleological ethics; that is utilitarianism, premised on the norms of reciprocity and the motive of mutual altruism (Groves & LaRocca, 2011). It is focused on ends and outcomes (Groves & LaRocca, 2011). "Using the norm of reciprocity and mutual altruism as modes of influence, transactional leaders rely on the power, rewards, and sanctions of their official position to influence followers to demonstrate the requisite performance" (Groves & LaRocca, 2011, p. 513). This form of

leadership is premised on exchanges that "allow leaders to accomplish their performance objectives" (McCleskey, 2014, p. 122) and "serve their own personal interests" (Groves & LaRocca, 2011, p. 513). "Transactional leadership models are grounded in a worldview of self-interest" (Bass & Steidlmeier, 1999, p. 185).

Transformational (Kensbock & Boehm, 2016) and situational management (Cubero, 2007) have both been recommended by researchers as more beneficial ways to manage employees with disabilities. "Transformational leaders seek to change existing patterns, values, beliefs and goals, and create new ones that encourage the greater commitment" (Nikezć et al., 2018, p. 288). Transformative leaders exhibit five qualities: idealised influence (they act as an inspiring role model), idealised influence behavior (modelling behaviour), inspirational motivation (provide a vision), intellectual stimulation (motivate employees to be innovative and creative), and individualised consideration (provide mentoring and a supportive environment; McCleskey, 2014; Nikezć et al., 2018; Sadeghi & Pihie, 2012). Burns (1978) identified a transformational leader as "one who raises the followers' level of consciousness about the importance and value of desired outcomes and the methods of reaching those outcomes" (p. 141). A transformative leader motivates employees to move beyond self-interest to achievement and self-actualisation (Bass, 2008).

The limited research on transformational leadership and employees with disabilities has shown that transformational leadership may be effective with employees with certain disabilities and detrimental to employees with other conditions. Kensbock and Boehm (2016) found that transformational leadership improved employees' work-related self-esteem, decreased emotional exhaustion, and improved job performance. Preliminary research has found that transformational leadership reduces levels of chronic pain and work-related disability (Gulseren et al., 2020, as

cited in Haskayne School of Business, 2020). However, Parr et al. (2013) found that inspirational messaging in transformational leadership exacerbated the anxiety level of employees with autism spectrum disorder, but the individualised attention reduced anxiety and improved organisational performance.

Situational leadership (Hersey & Blanchard, 1969, 1979, 1996, 1980, 1981) is premised on the idea that one style does not fit all employees or all situations. It is matching the right leadership style to the relationship and task. The type of management varies with the employee's "maturity", which is a function of the employee's ability and willingness to do the task, which will vary with employees' experience, skills, confidence, and commitment (Hersey et al., 1979). Employees with disabilities may benefit from situational leadership's individualised approach. "In a sense the relationship between worker and manager becomes individualized under a situational leadership model, which leads to the potential for improved equality in the workplace" (Cubero, 2007, p. 354). This more customised approach to management for all employees would benefit employees with disabilities, as " having a manager that recognizes individual work capacities could provide comfort and a level of understanding between manager and worker that might not be reached in alternative work environments", reduce burnout, improve potential for advancement (Cubero, 2007, p. 355) and enhance job satisfaction which in turn can improve productivity (Ridlwan et al., 2021).

Benevolent leadership contributes to the wellbeing of employees with disabilities (Luu, 2019). Karakas and Sarigollu (2013) developed a conceptual model of benevolent leadership that involves: (a) spiritual depth – providing a sense of purpose and meaning at work, (b) ethical sensitivity – reflection on morals at work, (c) positive engagement – effecting positive change in the organisation, and (d) responsiveness – contributing to society by solving social problems and

fostering social innovation. Unlike other universal leadership styles, benevolent leadership seeks to balance ethical, social, and transformational concerns (Luu, 2019). Luu noted that benevolent leaders tend to provide resources such as nurturance, care, and support for employees with disabilities. Not surprisingly, benevolent leadership was found to reduce perceived discrimination, increase job satisfaction, and lesson the need for recovery (Luu, 2019).

Leader-Member Exchange Theory (LMX)

Leader-member exchange theory (LMX; Dansereau et al., 1975) is somewhat related to transactional management, in that it is premised on social exchange theory (Blau, 1964). However, LMX is a compound construct, in that it also encompasses a second concept of relationship quality (Sheer, 2015). LMX is an appraisal of the quality of the dyadic relationship between leaders and followers. It has long been recognised that the relationship employees with disabilities develop with their supervisors is a highly relevant workplace factor to their experience (Gates, 1993).

LMX theory holds that supervisors develop a unique differentiated leader-member exchange relationships with different subordinates (Dienesch & Liden, 1986; Graen, 1976; Graen & Uhl-Bien, 1995). “Due to limited resources (e.g., time and equipment), a supervisor (the leader) develops a close relationship with only a few employees within the unit, forming an ingroup” (Sheer, 2015, p. 214). In high-quality LMX the relationships is close, trustful, and reciprocal. High-quality relationships engender mutual respect, social support, affinity (Dansereau et al., 1975), loyalty, commitment, and trust (Cropanzano & Mitchell, 2005) and provide higher levels of supervisor support and guidance (Bauer & Green, 1996; Linden & Graen, 1980; Scandura & Graen, 1984), more interaction, greater concern, increased feedback,

and training and development opportunities (Bauer & Green, 1996; Dunegan et al., 2002; Linden & Graen, 1980).

The LMX exchange involves valued resources, which can involve money, goods, services, status, information, and affiliation (Foa & Foa, 1980), which can benefit the employee. "A high-quality LMX relationship is based on social exchange, meaning that a leader and member must contribute resources valued by the other party and both parties must view the exchange as fair" (Linden et al., 1997, p. 50). Information consists of advice, instructions, opinions, or enlightenment (Law-Penrose et al., 2015). Status is an opinion that connotes high or low prestige or esteem (Law-Penrose et al., 2015). Services involves labour output performed for another (Law-Penrose et al., 2015). Goods are tangible objects, materials, products, or material (Law-Penrose et al., 2015). LMX is a valued social resource to employees for the access it provides to other benefits (Law-Penrose et al., 2015; Liao & Hui, 2021).

Principally, what employees exchange is productivity and competence (Dulebohn et al., 2012). Some research has found that employees' performance is an antecedent to the rewards of LMX, while other research has considered performance an outcome of good LMX (Berdicchia, 2015; Brower et al., 2000). "From the perspective of subordinates, work performance is a form of currency in the social exchange between themselves and their supervisors, as well as a means of fulfilling obligations for reciprocity" (Chen et al., 2012, pp. 603-604). Perceived competence has been linked to higher quality LMX and vice versa for perceived incompetence (Gerstner & Day, 1997; Liden et al., 1997). "Competence in the exchange framework is the input from the subordinate and the resource valued by the supervisor" (Chen et al., 2012, p. 600). Research indicates that there is a significant relationship between the employee's ability and the manager's LMX quality (Day & Crain, 1992). However, it has been found that expectations about an

employee's performance are a better predictor of LMX than actual performance (Linden et al., 1993).

Supervisors benefit from exchange and reciprocity in that the employees have higher job satisfaction, and thus higher levels of performance, lower levels of turnover (Bauer & Green, 1996; Gerstner & Day, 1997) and improved organisational citizenship behaviors (lies et al., 2007). Supervisors further benefit in that employees have been shown to exhibit "positive associations between LMX and the attitude outcomes of satisfaction with supervision, overall satisfaction, and organizational commitment, as well as the role states of role conflict (with a negative association), and role clarity (with a positive association)" (Dulebohn et al., 2012, p. 1726). These benefits result from the employee's sense of obligation to reciprocate (Gouldner, 1960; Graen & Ul-Bien, 1995; Liden et al., 1997). Ultimately, both parties form expectations of each other (Linden et al., 1997).

Danserea et al. (1975) noted, "the superior invests a disproportionate amount of his time and energy in developing a select subset of his members" (p. 72). Stetiawan (2020) asserted, "Building relationships among group members is time-consuming process and relies heavily on shared learning and accommodation" (p. 1,559). The depth of LMX develops with time. According to Mayer et al. (1995), assessments of ability and integrity happen early in the relationship, where assessment of benevolence takes longer.

A low-quality LMX relationship, also referred to as an "outgroup", is limited to what is specified in the employment contract, characterised by an economic exchange of balanced and immediate tangible assets (Dulebohn et al., 2012). Low-quality LMX relationships tend to result in less consultation, less delegation, less mentoring, less support, fewer resources, less influence, and less trust (Chekwa, 2018). Glasø and Einarsen (2006) found that employees experiencing

frustration, violation, or uncertainty in their relationship with their supervisor report low LMX quality.

It is ironic that employees experiencing low LMX quality are literally referred to as being an outgroup. Outgroup status is a status persons with disabilities often experience, at work and elsewhere in society. Disability outsider status permeates employment, held in place by stereotypes and misinformation, ableism, the structure of work, and not recognizing disability as a form of diversity, and continued exclusion prevents mediation inherent in personal contact with persons with disabilities. In the LMX context these impediments to inclusion are amplified by social identity theory (Tajfel & Turner, 1986) and similar attraction paradigm (Byrne, 1971). Social Identity theory (Tajfel & Turner, 1986) posits that individuals socially assign people to a category, secondly one socially identifies with the group and derives esteem from the group and lastly, they social compare their group to other groups and maintain their esteem by the group's status relative to other groups. Often others perceive the identities of persons with disabilities through their impairment and assign a stigmitised and inferior status to disability (Dirth & Branscombe 2018, 2019; Santuzzi & Waltz 2016). Similar attraction paradigm (Byrne, 1971) holds that people generally feel more comfortable with other people who are similar to themselves and will feel less comfortable with people who are dissimilar. Given persons with disabilities are typically perceived as dissimilar by individuals without disabilities and excluded from ingroup status, relegated to outgroup, it is likely that they will experience low-quality LMX.

Common stereotypes of employees with disabilities are negative perceptions of their task competency and social and interpersonal competency. In the first stage (role-taking) of LMX, supervisors' assessment of competency is key. "During role-taking, negative task competency

stereotypes held about the physically disabled could undermine a supervisors' view that the subordinate can make meaningful work contributions" (Goldberg & McKay, 2015, p.389). Similarly, given the central role of trust in high-LMX relationships, stereotypes about the trustworthiness of employees with mental health issues could skew a manager's assessment (Goldberg & McKay, 2015). Outgroup status exacerbates disadvantage by affording outgroup members less support, information, privilege, resources, and status and can result in exclusionary treatment (Schaffer & Riordan, 2013).

LMX differentiation is seen as a norm in work (Guerrero et al., 2012). Outgroup members are more likely to perceive being discriminated against (Shaffer & Riordan, 2012). Guerrero et al. (2012) found that prodiversity measures without high LMX relationships are ineffective in creating minority inclusivity in an organisation. LMX, while promoting efficient use of managers' time, is a practice imbedded in the way work is structured, which serves to perpetuate systemic disability discrimination

In the earliest work on LMX and employees with disabilities, Colella and Varma (2001) postulated that supervisors' expectations of employees' future productivity and supervisors' dissimilar demographics based on the similar attraction paradigm (Byrne, 1971), will lead to a lower LMX. Colella and Varma (2001) found that employees with disabilities received lower LMX ratings than employees without disabilities but that this could be moderated by ingratiating behaviour.

Only one study assessed disability, performance, and LMX (Zwingmann & Boehm, 2013). They considered the impact of self-efficacy on performance of employees with a disability and found that self-efficacy positively impacts the relationship between performance and LMX quality, only in respect to high performing employees with a disability. On the other

hand, employees with a disability with high self-efficacy and low performance experience the lowest quality LMX. They found that demographic characteristics such as disability interact with personal characteristics, such as self-efficacy and performance to impact LMX quality. The authors stated:

> Our findings suggest that low self-efficacious employees with disabilities fulfill the stereotype of employees with disabilities and therefore are able to form high relationships with their supervisors regardless their performances. Whereas employees with disabilities, who seem to be inconsistent with these stereotypes (i.e., high self-efficacy - Fichten & Amsel, 1986), have to show high performances to overcome these stereotypes and to form high relationships with their supervisors. (p. 24)

Thus, the belief in one's own capabilities, which would be expected to moderate LMX (Zwingmann & Boehm, 2013), is not enough to overcome ingrained stereotypes.

Linden and Maslyn (1998) found that affect impacts LMX. Managers liking (affiliation) the employee has been associated with higher LMX (Dockery & Steiner, 1990; Wayne & Ferris, 1990). Affiliation is an expression of regard, affection, comfort, or support (Law-Penrose et al., 2015). A connection between affiliation and interactional justice has been argued. "Because interactional justice is measured using items that evaluate interpersonal interactions it is consistent with Foa and Foa's conceptualization of affiliation-increased ratings of interpersonal interactions should be related to increased regard or support" (Law-Penrose et al., 2015, p. 61). It makes sense that if a supervisor likes an employee, they are more likely to address them civically and accord them interpersonal justice.

Colella and Varma's (2001) second postulate was that dissimilar disability characteristics of a manager and the employee led to reduced LMX. They postulated that "Subordinate disability may also influence the quality of LMX relationships, with supervisors having less positive affect toward these subordinates because of the perception that these subordinates are different from themselves" (p. 305). Research has found that similarity of characteristics between

a follower and a leader is positively related to LMX (Bauer & Green, 1996; Linden et al., 1997). Schaffer and Riordan (2013) noted that "because of such processes [social identity theory and self-categorization theory], demographically dissimilar employees will likely experience higher levels of perceived discrimination from their supervisors, relative to similar employees" (p. 5). Schaffer and Riordan (2013) found that the more dissimilar employees were from their supervisors in respect to race, the greater their perception of discrimination and lower levels of support. However, Nahrgang and Seo (2015), in reviewing the extant research on this issue, found mixed results, as to demographic similarity significantly impacting LMX. Yet, they noted that perceived similarity is positively related to LMX quality. Dwertmann and Boehm (2014 & 2016) and Colella & Varma (2001) found that supervisor-subordinate disability incongruence does impact LMX negatively but that positive, inclusive climates extend beyond workgroups to the dyad level.

From the perspective of leader-member exchange theory, higher levels of perceived disability may impede employers from engaging in such a relationship on the basis that the employee will not be able to reciprocate (Lyubykh et al., 2020). Two studies have dealt with disability accommodations and LMX. Lyubykh et al. (2020) found that that LMX between the employee and the supervisor is positively associated with the provision of employment accommodations. In the second study, the Disability Case Study Research Consortium (2008) found "that the quality of one's relationship with one's manager (LMX) is even a stronger predictor of interactional justice during the accommodation process for people with disabilities" (p. 77). LMX was also positively associated with procedural justice during the accommodation process.

LMX evolved from vertical dyad linkage theory (Cashman et al., 1976; Dansereau et al., 1975), which acknowledges that managers differentiate between subordinates' and supervisors' closer relationships by providing them greater "negotiation latitude" (Cashman et al., 1976). Cashman et al. used two questions to assess negotiation latitude: (a) How flexible do you believe your supervisor is about evolving changes in your job? and (b) Regardless of how much formal authority your supervisor has built into his position, what are the chances that he would be personally inclined to use his power to help you solve a problem in your work? (p. 283). "The high follower-leader exchange (ingroup) indicates a broad relationship between leader and follower and negotiation of role responsibilities that are not recorded in the employment contract between the leader and followers" (Setiawan, 2020, p. 1558). Berdicchia (2015) noted, "it is reasonable to argue that higher LMX facilitates dialogue which, in turns, facilitates negotiated changes" (p. 17). The negotiation latitude evolves, as LMX involves negotiation of the didactic relationship over time (Bauer & Green, 1996; Dansereau et al., 1975; Nahrgang & Seo, 2016).

A significant element of higher LMX is trust; however, it is not clear whether trust is an antecedent or an outcome (Nahrgang & Seo, 2015). Mayer et al. (1995) defined trust in organisations as:

> The willingness of a party to be vulnerable to the actions of another party based on the expectation that the other will perform a particular action important to the trustor, irrespective of the ability to monitor or control that other party. (p. 712)

Their model of trustworthiness involves the trustor's appraisal of the trustee on three elements: ability, benevolence, and integrity. Ability is defined as "that group of skills, competencies, and characteristics that enable a party to have influence within some specific domain" (Mayer et al., 1995, p. 717). Benevolence is the extent the other party is believed to want to do good or benefit the trusting party, aside from egotistical motive. Lastly, integrity is the trustor's sense that the

trustee principles are acceptable to the trustor. Brower et al. (2000) noted that when a leader trusts an employee, they are more likely to take the risk to delegate to them. Employees trust their leader will provide encouragement, support, and career investment (Scandura & Pellegrini, 2008).

Social Construction of leadership

Leadership has also been seen as socially constructed (Fairhurst & Grant, 2010; Roberts, 2007). Fairhurst and Grant (2010) noted the "basic tenet that people make their social and cultural worlds at the same time these worlds make them" (p. 173). That is, they socially construct their worlds. Meaning is intersubjectively created, and there is no objective reality (Fairhurst & Grant, 2010). "That implies that 'reality' is constructed through language and, in turn, since language is a social phenomenon, the account of reality which prevails is often both a temporary and a collective phenomenon" (Grint, 2005, p. 1,471).

Thus, leadership is relational (Fairhurst & Uhl-Bien, 2012). The study of leadership has moved away from leaders' personality, style, traits, and behaviours (Fairhurst & Grant, 2010; Roberts, 2007) to notions of leadership that are co-constructed (Fairhurst & Grant, 2010; Roberts, 2007; Rost, 1991) and contextual (Yukl, 1989). Leadership is seen as co-constructed by leaders and followers (Fairhurst & Uhl-Bien, 2012). Uhl-Bien and Ospina (2012) noted, "leadership is co-created in relational interactions between people, and that…leadership is dynamic, developing and changing over time" (p. 541). Leadership is a "collective phenomenon that is distributed or shared among different people, potentially fluid, and constructed in interaction" (Denis et al., 2012, p. 2).

LMX is at heart relational.

> LMX clearly incorporates an operationalization of a relationship-based approach to leadership. The centroid concept of the theory is that effective leadership processes occur

> when leaders and followers are able to develop mature leadership relationships (partnerships) and thus gain access to the many benefits these relationships bring. (Graen & Uhl-Bien, 1995, p. 225)

Through the relationship created dyads socially construct their LMX relationship.

Similarly, DeRue and Ashford (2010) also saw leadership as socially constructed and relational. They theorised that leadership is co-constructed by one party claiming the leadership identity and the other granting it. "These reciprocal claims and grants promote the individual internalization of leader and follower identities and their relational recognition in group members' roles and relationships" (DeRue & Ashford, 2010, p. 632).

According to Ospina and Schall (2001):

> The discovery of contingencies and the importance of context to explain leadership styles and behaviors in some contemporary work – as well as some of the early constructionist perspectives on leadership – represent an implicit understanding that leadership results from a social agreement in a specific context. (p.12)

Thus, leadership style arises in certain socially constructed contexts.

Orientation Towards Time

As will become evident in chapter seven and eight, a central contention of the argument has to do with managers' perceived time resources. As such, it makes sense to consider how management researchers conceptualise time and to see if misalignment in the temporal factors identified in the developing field of temporal management contribute to understanding of managers' behaviour towards employees with disabilities.

Time itself is a social construction (Bluedorn, 2002). The concepts and values we hold about time are produced through human interaction (Bluedorn, 2002).

> The experience of time permeates everyday life. It is both immediate and mediated, all-pervasive and multi-faceted. It is indeed integral to human existence. However, the way we perceive and conceptualize that experience varies with cultures, historical periods and contexts, with members of societies and with a person's age, gender, and position in

> the social structure. The meanings and values attributed to time, in other words, are fundamentally context-dependent. (Adam, 2002)

Different cultures have different orientations towards time. Some are monochronic; others are polychronic (Hall, 1983). Within a given culture the concept of time has changed (Bluedorn, 2002). “Time is a sociocultural construct, something that humans have created to make sense of, and unite, disparate experiences and observations” (Todd, 2009, p. 50). Temporality has multiple dimensions as information, a resource, and a behaviour (Mohammed & Harrison, 2013).

Time is inescapable factor in contemporary organisations. Schein (1992) noted “there is probably no more important category for cultural analysis than the study of how time is conceived and used in a group or organization” (p. 114).

> All teams have some sort of implicit or explicit time constraints, and the ticking clock has practically become an obsession in modern organizations, with an unrelenting struggle to shorten wait times, speed up the delivery of services and products, and gain a temporal advantage over the competition (Mohammed & Harrison, 2013, p. 244).

As modern society becomes increasingly complex, greater management of temporal resources is necessary (Chen & Nadkarni, 2017; Mohammed & Nadkarni, 2011). Temporal management encompasses dealing with multiple timeframes, synchronizing members and coordinating work to meet deadlines (Mohammed & Alipour, 2014). Several key temporal dimensions have been identified: entrainment (Ancona & Chong, 1996; Hall, 1983), polychronocity (Hall, 1983), pace/speed (Bloun & Janicik, 2002), punctuality (Bluedorn, 2002), temporal depth (Bludorn, 2002; Lewin, 1951), and time urgency (a subset of A-type personality; Koslowsky, 2001; Prince, 1982). Different orientations towards time can result in conflict within organisations (Mohammed & Alipour, 2014).

Entrainment in organisational behaviour is defined as “the adjustment or moderation of one behaviour either to synchronize or to be in cycle or rhythm with another behavior” (Ancona

& Chong, 1992, p. 7). It is "the processes by which organizations cope with temporal change by synchronizing (i.e., tempo matching and/or phase aligning) their endogenous cyclic activities to those of the external environment" (Pérez-Nordvedt et al., 2008, p. 1). Entrainment involves alignment with external forces such as customers, suppliers, competitors, and government (Pérez-Nordvedt et al., 2008).

Polychronocity is defined as the extent to which individuals:

> (a) prefer to be engaged in two or more tasks or events simultaneously and are actually so engaged (the preference strongly implying the behavior and vice versa), and (b) believe their preference to be the best way to do things. (Bluedorn, 2002, p. 51)

Task engagement preference is both a personal characteristic and a behaviour that one engages in (Mohammed & Harrison, 2013; Palmer, 2006). Differences in polychronocity may affect the ability of individuals to entrain (Bluedron & Jaussi, 2008). Bluedorn (2000) noted that polychronicity is a "template for behaviour that is held largely out of conscious awareness and often so well institutionalized that it is taken for granted as the only way to do things" (p. 7). Taken for granted norms of how things are to be done often are barriers to inclusion for some persons with disabilities. It is not hard to imagine that pressure to multi-task may be a challenge for some employees with disabilities.

Pacing style (Bloun & Janicik, 2002) is how individuals distribute their work over time in respect to a work deadline (Chen & Nadkarni, 2017). There are three identified pacing styles: early action, steady action, and deadline action. Inconsistent pacing styles between can cause tension among team members (Mohammed & Nadkarni, 2011). Differences in pacing style may cause ambiguity about work scheduling as individuals apply patterns of inconsistent work distribution (Mohammed & Nadkarni, 2011). Such differences can result in anxiety when there is a lack of time to make revisions (Mohammed & Nadkarni, 2011). Leader-member exchange is likely enhanced when pace is entrained (Bluedron & Jaussi, 2008).

Punctuality is another aspect of temporal orientation (Bluedron & Jaussi, 2008). Adherence to schedules and deadlines instills structure and eliminates ambiguity (Bluedron & Jaussi, 2008). Leaders and followers with different preferences for punctuality will have difficulty entraining (Bluedron & Jaussi, 2008). Lateness in some circumstances can be grounds for dismissal, where there is willful disregard of the employer's lateness policy or where the employee because of lateness is not able to fulfil their work obligations (Ball, 2020).

> Lateness usually must hinder the employee from performing the essential duties of their job. Important factors to consider are whether the time was ever made-up by the employee, whether lateness is an ongoing issue, whether warnings were previously issued, the harm caused to the employer, and whether the lateness was the fault of the employee. (Whitten & Lublin, 2017b, para. 2)

If employers have tolerated lateness in the past, they are not allowed to terminate an employee on this ground unless they expressly advise the employee that it will no longer be tolerated (Ball, 2020). Of course, this is subject to the employer's duty, if triggered, to accommodate an employee with a disability.

Studies have shown that employees with disabilities are punctual (Chi & Qu, 2004; Graffam et al., 2002; Hernandez et al., 2008; Kalargyrou, 2014; Kalargyrou & Volis, 2014; Kaletta et al., 2012; Morgan & Alexander, 2005; Schartz et al., 2006).

Temporal orientation is one's time perspective, past, present, or future (Bluedorn, 2000). Temporal orientation has two dimensions, temporal depth, which is distance backward or forward, and temporal focus is the "direction of temporal emphasis: past, present or future" (Gibson et al., 2003, p. 11). Individuals with future-oriented time perspective tend to be long-term planners (Mohammed & Nadkarni, 2011), tend to be more goal oriented, and consider future consequences (Mohammed & Harrison, 2013). Individuals with a present orientation tend to be less deliberative and more action oriented (Mohammed & Nadkarni, 2011), plan with shorter

time horizons, and take more risks (Mohammed & Harrison, 2013). Past orientation has been associated with pessimistic, nostalgic, sentimental, or aversive views of the past (Mohammed & Harrison, 2013). Bluedron and Jaussi (2008) suggested that leaders and followers should negotiate their depth parameters to establish a shared understanding of temporal depth issues.

Time-urgent individuals believe there is constant time pressure—that is, they "are concerned that temporal resources are scarce and must be conserved" (Mohammed & Nadkarni, 2011, p. 490). Time pressure relates to external deadlines, where time urgency relates to internally generated constraints (Mohammed & Harrison, 2013). Less time-urgent employees, "tend to be less attentive regarding remaining time resources and tend to underestimate the passage of time" (Waller et al., 2002, p. 12). Different perceptions about deadlines may affect team performance (Waller et al., 2002).

Different orientations toward temporal factors can lead to conflicts of interest (Mohammed & Alipour, 2014). Mohammed and Harrison (2013) advised that "in practice, temporal individual differences likely operate 'beneath' awareness, and are not often part of the initial conversation or everyday language of getting work done in teams" (p. 245). Individual temporal differences have been identified as an underexamined element of diversity (Mohammed & Harrison, 2013). Employees with disabilities may experience issues with temporal fit. Gibson et al. (2003) defined temporal fit as "the congruence between organizational assumptions and norms about time and individual differences in time-related preferences" and noted it may have impacts on performance (p. 29). In particular, different cultures around scheduling autonomy, flextime, deadlines, polychronicity, and pace impact temporal fit (Gibson et al., 2003).

Temporal issues require management and leadership (Bluedron & Jaussi, 2008; Mohammed & Alipour, 2014; Mohammed & Harrison, 2013). "Team temporal leadership is

likely to serve as a situational mechanism to diffuse the negative and heighten the positive aspects of diversity in time perspectives" (Mohammed & Nadkarni, 2011, p. 494). Temporal leadership management includes: (a) scheduling of work—that is, creating a plan of milestones; (b) synchronizing work through regulating the flow of tasks, coordinating team members outputs, and modifying individual work cycles; and (c) allocating temporal resources, which "refers to distributing time across team activities in an efficient and effective way" (Chen & Nadkarni, 2017 p.11)—that is, alleviating scarcity of temporal resources (time pressure) by building in time contingencies and prioritizing tasks (Chen & Nadkarni, 2017; Mohammed & Nadkarni, 2011). Mohammed and Alipour (2014) noted the benefits of temporal leadership:

> At the dyadic and team levels, temporal leadership may positively influence shared temporal cognition, a common understanding of the time-related aspects of executing collective tasks (Gevers, van Eerde, & Rutte, 2009). Leaders who aid in scheduling and synchronizing activities as well as minimizing temporal conflicts may foster members coming to agreement on the importance of meeting milestones, the appropriate pacing of subtasks, and time allocation. (p. 180)

To the extent that temporal-leadership practices become diffuse throughout the organisation they may contribute to organisation-wide culture and climates that emphasise meeting temporal commitments (Mohammed & Alipour, 2014).

Theory of Planned Behaviour

Beliefs are determinative of behaviours. There is a nexus between behaviours towards employees and organisational culture (Hernandez et al., 2012). The theory of planned behaviour's core constituent elements are used to as heuristics or a "conceptual framework" to identify key employer behavioural factors and trends that influence employers (Hernandez et al., 2012). The theory of planned behaviour is predicated on "three determents of intention" (Ajzen, 1991, p. 188): behaviour beliefs, normative beliefs, and control beliefs. Behaviour beliefs are one's own beliefs about the perceived difficulty of executing a behaviour. Control beliefs relate

to one's beliefs about the availability of the resources required to execute the behaviour. And normative beliefs are one's perception of significant others' beliefs about a behaviour (Ajzen, 1991; Jasper & Waldhart, 2013). Taken together, the three determinants of behaviour form the antecedents to intention, which is predictive of behaviour (Ajzen, 1991). "As a general rule, the more favorable the attitude and subjective norm with respect to a behaviour, and the greater the perceived behaviour control, the stronger should be an individual's intention to perform the behaviour under consideration" (Ajzen, 1991, p. 188).

Several studies have applied the theory of planned behaviour to understand hiring intentions in respect to employees with disabilities. Fraser et al. (2010) applied the theory to focus groups of senior management to identify concerns in respect to hiring employees with disabilities relative to company size. Hernandez et al. (2012) used the theory as a conceptual framework to examine the differences in behavioural intentions of employers, expressed in focus groups in respect to hiring workers with disabilities between for-profit and not-for-profit organisations. Rimmerman et al. (2013) used the theory to compare U.S. and Israeli differences in hiring intentions in respect to persons with a disability in for-profit and not-for-profit organisations. Another study applied the theory to government survey data to determine "perceptions, beliefs and trends" in respect to employers' views in the leisure and hospitality industry about employing persons with disabilities (Jasper & Waldhart, 2013, p. 591). Ang et al. (2014, 2015) used a modified theory of planned behaviour to analyse survey data in respect to intention to hire persons with disabilities in Malaysia. Araten-Bergman (2016) found that the employer's attitudes predicted intention to hire persons with disabilities but did not predict actual hiring outcomes.

Control beliefs are beliefs about available resources. Harcourt et al. (2005) argued, in respect to statistical discrimination, that employers make discriminatory employment decisions on rational economic bases—that is, they make decisions to maximise profit. The rational economic perspective is rooted in individual self-interest, economic optimisation, and conscious decision-making (Harcourt et al., 2005).

> To accommodate the sick and disabled, employers must bear the costs of adapting the work environment to their needs, making special job assignments, hiring replacement workers during their absence, and possibly also providing extended health and insurance coverage at higher rates. The costs are even higher, if this group's productivity is lower than that of other groups. Further, to the extent that this group is often considered more accident-prone, the perceived cost of work days lost due to injury and related accident insurance premiums may be substantial. (Harcourt et al., 2005, p. 2116)

Employers perceive persons with disabilities as productivity deficits, and they rely on those perceptions to make what they believe are rational economic decisions (Harcourt et al., 2005).

It may be that some employers make decisions based on their perception of economic rationality in some cases, but if managers associate persons with disabilities as an extra expenditure in time, it is likely this calculous happens at a subconscious level, which leads to discrimination.[18] Behaviour, particularly in respect to hiring employees, is not rational (P. Cappelli, personal communication, November 1, 2020); it "exist below the level of self-consciousness" (Chabot, 2013) and is influenced by psychological processes (Bartolotta et al., 2014), likely due to implicit bias (Araten-Bergman, 2016). Cappelli (n.d., as cited in Bartolotta et al., 2014) found that:

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[18] In the research cases there is a range of manager responses, such as harassment, which may occur at a more deliberate level, but by and large most of the research cases fit a pattern of time and convenience being the resources consumed in providing accommodation.

> …humans do not make decisions, including decisions concerning whom to hire, for fully rational reasons. Calculations concerning return on investment (ROI) are seldom made in personal interactions. Instead, mental schemas concerning who is a viable employee candidate are influenced by psychological processes. (p. 3)

Arguably, this lack of rationality may extend to employment terminations, as in the research cases. Stein (2000b) made a somewhat similar argument in stating that there exists a state of "market failure that prevents certain employers from reaching rational labor market decisions by creating a 'taste for discrimination' in which the costs of including people with disabilities in a workforce are perceived as being greater than they really are" (p. 316). Bartolotto et al. (2014) made a similar assertion: "Calculations concerning return on investment (ROI) are seldom made in personal interactions. Instead, mental schemas concerning who is a viable employee candidate are influenced by psychological processes" (p. 3). Arguably, this lack of rationality may extend to granting accommodations and employment terminations, as in the research cases. Granting accommodations is an emotional response (Carpenter & Paetzold, 2013), varying with disability type and associated stereotypes (Breward, 2017), which suggests that stereotypes and stigmatisation about certain disabilities affect accommodation decisions. Further, Devine (1989) posited that stereotypes are an automatic process occur at a subconscious level independent of one's beliefs. Studies have found that granting accommodation requests was not driven by concern for compliance with legal requirements (Carpenter & Paetzold, 2013; Patterson, 2011). Araten-Bergman (2016) suggested a reason for the discrepancy between managers' stated intentions to hire and actual hiring may be attributed to implicit bias.

> While responding to a general survey question targets the manager's conscious beliefs, actual hiring requires managers to engage in live interaction with PWD. This live interaction may trigger an implicit negative perception of PWD and feelings, such as fear and anxiety among other stereotypes. (p. 1,523)

Chabot (2013) also argued that attitudinal and normative beliefs of employers are difficult to affect as they "exist below the level of self-consciousness" (p. 11).

In fact, implicit bias against persons with disabilities has been found to be most profound. In examining six years of Implicit Association Tests, it was found that "Preference for people without disabilities compared to people with disabilities was among the strongest implicit and explicit effects across the social group domains" (Nosek et al., 2007, p. 19), and "the relative negativity towards disabled people was evident across genders, ethnicities, age groups, and political orientations" (p. 19). The only category experiencing more implicit bias was age (Larson, 2008).

Management Time. Time is a valuable resource for managers. Managers' beliefs about time may be saliant to their decision making in respect to employees with disabilities. A manager's belief about their available time and resources to undertake a course of action may significantly impact their willingness to undertake a hire or retain an employee if they perceive, rightly or wrongly, that the accommodation will consume too much of their resources or time.

Managers are influenced by the national and societal cultures in which they exist, and those temporal elements likely influence organisational culture (Zellmer-Bruhn et al., 2000). Schriber and Gutek (1987) noted, "The current U.S. concept of time can be characterized as homogeneous, objective, measurable, infinitely divisible, unidirectional, irreversible, reified, and linear" (p. 643). Schein (2004) noted that American firms tend to have cultures with a present or future orientation and a monochronic perspective on work because that is the prevailing national culture. Given American cultural and business hegemony, it is safe to assume

that Canadian organisations are influenced by the same cultural constructs of time. Perlow (1999) coined the term "time famine" to refer to the impression of having too much work and not enough time to do it. This stemmed from constant interruptions, but it is conceivable that a perception of employees with disabilities as needing constant rescheduling or greater need to instruct, check, or oversee may lead a manager who feels time famine to react negatively to an employee with a disability. Zellmer-Bruhn et al. (2000) noted that the United States is at the time famine end of the range of national temporal cultures, and arguably so is Canada.

Robert Half International (2012) indicated that supervisors spend, on average, 17% of their time on managing poor performing employees. Extant research demonstrates that many employers associate persons with disabilities with poor performance (Bengisu & Balta, 2011; Donnelly & Joseph, 2012; Fredeen et al., 2013; Gröschl, 2007; Houtenville & Kalargyrou, 2012). Poor performance is perceived to equal inordinate time managing the employee. Time managing the employee equals opportunity cost in time not doing other necessary managerial tasks.

Becker (1992) opined on the significance of time:

> Different constraints are decisive for different situations, but the most fundamental constraint is limited time. Economic and medical progress have greatly increased length of life, but not the physical flow of time itself, which always restricts everyone to twenty-four hours per day. (pp. 1-2)

Schein (2004) noted, "Time is viewed as a valuable commodity that can be spent, wasted, killed, or made good use of; but once a unit of time is over, it is gone forever" (p. 154). Time, thus, is a valuable but perishable commodity.

It is no different for businesses. Mankins (2004) identified that:

> …time is the scarcest resource in any company—after all, no amount of money can buy a 25-hour day…. The price of misused executive time is high. Apart from the frustrations that individual managers suffer, delayed or distorted strategic

> decisions lead to overlooked waste and high costs, hastily conceived and harmful cost reductions, missed new product and business development opportunities, and poor long-term investments. (p. 60)

In addition:

> Money is not as important as time…There's so many reasons time is your most valuable resource. Sure, money pays the bills, but how you spend your time determines how much money, freedom and personal power you have. Once you spend that time, it's impossible to get back. (Locke, 2018, paras. 2 & 7)

Given how rare time is, it must be managed (Schriber & Gutek, 1987).

Arguably, to the extent mangers perceive employees with disabilities as being a greater drag on their time, they will be reluctant to hire or retain these employees. Several papers mention concerns by managers that hiring persons with disabilities may increase supervisory time (Alfasi, n.d., Burke et al., 2013; Chan Ho-ting & Wong Ming-Wai, 2015; Fredeen et al., 2013; Hernandez et al., 2008; Kaye et al., 2011; Paez & Arendt, 2014; Unger, 2002; Waterhouse et al., 2010). Gröschl (2007) found that hotel managers characterized employees with disabilities as requiring "constant monitoring and controlling" (p. 680). Chi and Quo (2004) noted that employers perceive employees with disabilities as requiring "close supervision" (p. 8). Peck and Kirkbride (2001) found that:

> Employers are concerned about the special attention that may need to be devoted to employees with disabilities. They are concerned about the amount of time the supervisor would need to commit to a worker with a disability and subsequently keep them from their other duties. (p. 72)

Harlan and Robert (1998) stated that "accommodations perceived as straightforward, inexpensive, one-time only, not-time consuming, or easy to make are much more readily granted by employers than requests that require sustained effort" (p. 420; see also Unger & Kregel, 2003). Other employers perceive hiring employees with disabilities as being coincident with more time dealing with government bureaucracy and regulation (Kaye et al., 2011). A report

from Wharton School of Business (Wharton, University of Pennsylvania, 2013) noted employers' apprehension that workers with disabilities will create more work for them and take more time to integrate the employee into the workforce. One employer's comments captured the current perception of managers with this mindset: "Often managers feeling like hiring people with disabilities is harder, that they require more time, require more energy. Most managers feel strapped managing their current workload…this perceived added responsibility seems too much" (Henry et al., 2014, p. 241).

Research by Anett (2017) supported the management-time theory. Lupton (1999, as cited in Annett, 2017) argued that hiring decisions are influenced by managers' risk perception. There are three broad frames of hiring risk identified by Lupton (1999, as cited in Annett, 2017): cognitive calculation, social-cultural, and governmentality. Anett found that managers generally make the cognitive calculation rather than assessing hiring risk through the other two lenses—that is, managers see the risks outweighing the benefits of hiring persons with disabilities. The most significant risk they identified was their perception of an increased "workload for themselves in managing the PWD [person with a disability]" (Annette 2017, p. 33), followed by concerns that the employee-supervisor relationship would require more from the supervisor than typical in the way of befriending or caretaking the employee with a disability.

Gewurtz and Kirsch (2009) commented that accommodations altering the social environment, such as changes to work schedules, have little expense "but required ongoing effort by the employer and could disrupt the day-to-day operation and structure of the organization" (p. 40). Williams and Taras (2004) noted, "Even managers who readily acceded to ethical principal of accommodation… were influenced by the practical challenges associated with having to

accommodate. Developing an accommodation plan may itself be time-consuming and expensive" (p. 5).

Moreover, effecting organisational change does take mangers' time. Maini and Heera's (2019) survey of mangers further the proposition that sustained inclusion of employees with disabilities takes time, stating, "Disability inclusion is a long-term phenomenon that requires a lot of investment, in terms of time and resources, both emotional and physical, in bringing this untapped potential in the mainstream" (p. 7). If management is fixated on the notion of the standard worker, they will view accommodations as expensive in respect to both resources and time (Foster & Wass, 2013). Lastly, Pothier (1992) stated, "There is time and effort associated with tackling discrimination and inequality" at work (p. 537). Other researchers have found that managers and supervisors who genuinely care about the welfare of employees with disabilities take extra time in their development, training, and performance management (Bartram et al., 2019).

Manager-Employee Relationship. Obtaining accommodations is a social process, with supervisors having a central role (Gates, 2000). Research indicates that supervisors play an important role in supporting employees with disabilities in the accommodation process (Kensbock & Boehm, 2016). Lyubykh et al. (2020) found that the quality of the supervisor-employee relationship is associated with the provision of accommodations. High-quality relationships between the employee with a disability and their supervisor positively impacts the provision of accommodations.

Lyubykh et al. (2020) suggested that the quality of the supervisor-employee relationship can be improved by supervisors practicing ingratiating behaviour, finding conformity in opinion, engaging the employee in purposeful activities, and participating in bias reduction training. This

takes managers' time and effort. Some cultures view time as sequential, while others view it as synchronic. "Different orientations [towards time] are also reflected in the quality of human bonds within an organization, and between the corporation and its partners" (Trompenaars & Hampden-Turner, 1998, p. 132).

> Synchronic time orientation cultures tend to be more relationship focused. If relationships are thought of as being more important than short-run efficiency, there is likely to be more emphasis on poly-chronicity. Punctuality or the rapid completion of a task may not be valued as highly as dealing with all the relationship issues that are brought up in relation to the task. (Schein, 2004, pp. 154-155)

However, in the Western world time orientation is generally sequential. "Cultures concerned with sequential time tend to see relationships as more instrumental. The separation between time intervals seems also to separate means from ends" (Trompenaars & Hampden-Turner, 1998, p. 131). Managers who perceive employees with disabilities as a barrier to the manager's or the organisation's ends will feel justified by a means, such as termination, that resolves the barrier, even apparently if it is discriminatory.

However, Hernandez and McDonald (2010) found supervisory time for both disabled and nondisabled workers similar. Scott et al. (2017), in an Australian study, did not find a difference "between them [employees with autism] and their colleagues in regard to weekly employment, supervision and training costs" (p. 10). These studies suggest that managers' perceptions that greater supervisory time is required to manage persons with disabilities are likely unfounded. However, Cavanagh et al. (2017) found that employers still had trepidation about working with persons with disabilities out of "fear of the unknown", and management tended to have concerns about the amount of supervision and training required, particularly for those with an intellectual disability (p. 32).

Persons with Disabilities' Attributes

Stone and Colella (1996) maintained that the nature of a person disability "influence the categorization of the disabled person, the inferences made about the individual's job-related attributes, performance expectancies, and the subsequent treatment of the person in the organization" (p. 361). Stone and Colella (1996) suggested this catagorisation involves some level of stereotyping based on cognitive associations of disability. Social cognition research "indicates that people categorize others on the basis of salient physical characteristics or social cues" (Stone and Colella, 1996, p. 361).

Another salient factor Stone and Colella (1996) identified is previous levels of performance, which is, again, salient to the change in view of an employee's adequacy. Stone and Colella (1996) stated that other attributes are thought to influence categorisation of employees with disabilities include aesthetic qualities; the origin of the disability (whether the individual is personally responsible or not for the disability onset of the disability); the course of the disability, in respect to permanence, progressiveness, chronic or incurability; concealability; disruptiveness; risk to others; gender; race; and social status.

Nonevident Disabilities

Invisible disabilities, "have no visible manifestations or have visible features that are not clearly connected to a disability" (Santuzzi et al., 2014, p. 204)—that is, the disability remains concealed. American research on patterns of workplace discrimination showed persons with behavioural impairments (depression, alcoholism, schizophrenia, drug addiction) had "a higher proportion of allegations in regard to termination and harassment/intimidation" in American civil rights cases (Graham et al., 2019). "Discrimination forms the behavioural dimension of stigma and refers to any acts to the disadvantage of people who are stigmatized" (Hanisch et al., 2016).

Disclosing a nonevident disability runs the risk of being seen as lacking credibility (Bülow, 2008, as cited in Prince, 2017). Prince's conclusion that disclosure of a nonevident disability can lead to "being called into question" and "may involve a trivialization or outright rejection of their condition, treating it as a contested illness" (p. 80) Prince's further advised that disclosure "may involve a trivialization or outright rejection of their condition, treating it as a contested illness" (p. 80). Gewurtz and Kirsch (2009) stated, "These characteristics [non-evident disabilities] seem to invite ambiguity and disbelief on the part of employers and co-workers" (p. 43). Williams and Taras (2004) found that "the assumption underlying the policy approaches and managerial behaviors in low trust organizations was that unless the disability was substantial, the cause was observed, or could be objectively verified, those claiming illness or injury were likely to be malingering" (p. 9). "Under circumstances of disbelief, accommodations are often perceived as special treatment, and persons with disabilities are often perceived as troublemakers" (p. 43). "The disbelief of others is thus an important component of impairment effects for impaired persons with able bodied appearance" (Lingsom, 2008, p. 11). Harlan and Robert (1996) also noted that employees with nonapparent disabilities have the most challenge convincing employers that they are entitled to accommodations.

There are other risks in disclosing one's nonapparent disability. Fitzgerald and Paterson (1995) noted, "if they reveal their illness or disability identity they must assume a socially devalued self-identity, that of sick and disabled, and all that these identities entail" (p. 15). They may also be perceived as manipulators or malingerers seeking to avoid role expectations (Fitzgerald & Paterson, 1995; Lingsom, 2008). Being perceived by others as a fraud is too significant a risk to the self-esteem and self-concept of many employees with nonevident disabilities (Fitzgerald & Paterson, 1995). "Not only are ill and disabled people discreditable in

Western societies, so are the dishonest, the malingerers, the manipulators" (Fitzgerald & Paterson, 1995, p. 18). "Invisibility is a complex social construction of many elements. It is a characteristic of an impairment, a choice of activity and context, concealment of the disabled self, social customs of silence and the suspicion of the others" (Prince, 2017, p. 83). Of course, that devalued self-identity, being seen as a fraud and being discreditable, is contrary to the intent of accommodations, which is to level the playing field and promote the dignity of persons with disabilities. An employee's disclosure should not be reduced to character traits such as honesty but seen as a strategy to navigate participation in the workplace and to maintain control over one's identity (Norstedt, 2019).

Mental Health

Persons with mental disabilities confront the most stigma in employment (Cavanagh et al., 2017). Studies have found that applicants with mental disabilities were seen as less desirable than persons with physical disabilities (Beatty et al., 2019; Brohan et al., 2012; Ren et al., 2008; Russinova et al., 2011). Persons with mental disabilities tend to be unemployed longer, have less access to high paying jobs and benefits, are subject to negative attitudes and behaviours on the job, are exposed to adverse results when they disclose their disability, experience more barriers to job acquisition (Russinova et al., 2011) and workplace integration (Krupa et al., 2009; Russinova et al. 2011), and suffer negative wage gaps (Krupa et. al., 2009). These outcomes are the consequence of the continuing prevalence of stigma related to mental health issues (Hanisch et al., 2016; Krupa et al., 2009).

Income & Job Quality

The quality of employment is considered a "multifaceted phenomenon" (Cazes et al., 2016; Charlesworth et al., 2014). Several indices exist to measure job quality,[19] but "there is little consensus about exactly what constitutes a good-quality job" (Charlesworth et al., 2014, p. 104). Various indices use differing combinations of subjective and objective criteria and extrinsic job features and intrinsic factors (Cazes et al., 2016; Charlesworth et al., 2014), depending on whether they are emphasizing an economics and psychology approach or sociological approach (Charlesworth et al. 2014).

Generally, work quality is seen as a combination of wages (Cazes et al. 2016; Munzo de Bustillo, 2011; Pisna, 2017), working time (control over the quantum and scheduling of hours), (Cazes et al., 2016; Charlesworth et al.,, 2014; Pisna, 2017), autonomy (Charlesworth et al., 2014), job security and forms of employment (Cazes et al., 2016; Charlesworth et al., 2014; Pisna, 2017), job control (task autonomy [pace and order of tasks and the taking of breaks] and employee voice), workload (Charlesworth et al., 2014), skill development (Cazes et al., 2016; Charlesworth et al., 2014; Pisna, 2017), work-life balance (Cazes et al., 2016; Charlesworth et al., 2014; Munzo de Bustillo, 2011; Pisna, 2017), health and safety (Munzo de Bustillo, 2011), and working conditions (Cazes et al., 2016; Pisna, 2017). Munzo de Bustillo (2011) included intrinsic elements: "two objective measures (use of skills at work and autonomy of work) and four subjective measures (an assessment of the worker's powerfulness, the work's meaningfulness, the amount of social support at work, and the worker's self-fulfillment)"

[19] Cazes, Hijzen, Saint-Martin (2016) identifies eight indexes [OECD Job Quality Framework (2014), UNECE (2015), EU Laeken (2001), UNICE-Business Europe (2001), ETUI (2008), EMCO (2010), ILO (2012) Eurofound (2012, 2013). Other indexes include the Job Quality Index (Munzo de Bustillo et al., 2011), the VicWAL job quality index (Charlesworth et al., 2014).

(Brucker & Henly, 2019, p. 412). Powerfulness is one's level of responsibility; meaningfulness is one contribution to society; and self-fulfillment is one's satisfaction with the level of intellectual challenge (Brucker & Henly, 2020).

According to Green (2006) and Tilly (1996) good jobs promote employee wellbeing. Applying Jones and Schmitt's (2016) criteria of bad jobs, including low wages and lack of health and retirement benefits, Brucker and Henly (2019) found that disability was associated with the likelihood of not having a good quality job (until controlled for self-reported health). Henley and Brucker (2020) found that among college graduates, employees with disabilities had lower levels of powerfulness, autonomy, and self-fulfillment.

The most obvious, objective, and measurable aspect of quality of employment is wages. Research has found that persons with disabilities generally earn less than similarly employed persons without a disability. Tompa et al. (2006) found:

> Labour force participants with disabilities have lower average annual earnings than non-disabled participants. Evan if the average annual earnings of people with disabilities with their non-disabled counterparts in specific forms of employment, from part-time work (temporary or permanent or self-employed or wage work) to full-time wage work (temporary and permanent), are compared, the former have lower earnings across all forms. (pp. 113-114)

This trend persists. A Statistics Canada report profiling persons with disabilities noted that the median income from employment of persons with disabilities is lower than employees without disabilities (Morris et al., 2018). Brucker and Henly (2020) found that a pay gap persists for persons with disabilities amongst college graduates but that it is less pronounced. Some research suggests the pay gap is a factor of the unobserved effect of productivity (Jones, 2006) and job mismatch (Choe & Baldwin, 2017; Jones et al., 2014; Jones & Sloan, 2010). However, an American study found that the pay gap was not attributable to issues of productivity and that

it is likely, in some part, attributable to discrimination (Baldwin & Choe, 2014; Kruse et al., 2018).

Employees with technical knowledge or professional knowledge provide the employee with a base of power in the organisation (Hardy & Clegg, 2006), may insulate them from the occurrence of discrimination in employment, and are more likely to obtain accommodations (Gewurtz & Kirsh, 2009; Harlan & Robert, 1998). Sutton et al. (1994) noted of white-collar employees that "the workers in this pool have valuable and portable skills, given the opportunities for horizontal mobility, they expect a sense of participation and citizenship in their work roles, and they are disinclined to tolerate traditional autocratic management regimes" (p. 945).

Wilton (2006) found persons with disabilities were disproportionately concentrated in precarious employment relative to nondisabled employees in Ontario. Tompa et al. (2006) also found that employees with disabilities are more likely to be in nonstandard work and most often in part-time work. Shuey and Jovic (2013) found that nonpermanent and part-time workers more often have unmet accommodation needs. In the case of part-time employment, Shuey and Jovic found unmet accommodation needs were mediated by one's place in the wage structure and by union representation.

Aesthetics

Stone and Colella (1996) theorised that more unattractive the disability, the more likely the person with a disability will be treated as undesirable by supervisors and coworkers. The aesthetics of disability are described as the "visible sensory and behavioural markers that trigger particular aesthetic and affective judgments about marked individuals" (Harris, 2019, p. 897). Often, employers will not hire persons with disabilities do to "aesthetic anxiety" (Colella &

Bruyère, 2011), particularly for positions with customer contact, out of concern that an employee's appearance might adversely affect customers. Donnelly and Joseph (2012) and Gröschl (2007) found that based on appearance there is a reluctance to hire persons with disabilities in the hospitality industry. Warhurst et al. (2009) found aesthetic discernment is particularly prevalent in the retail and hospitality industry. Stone and Wright (2013) found that job applicants with facial disfigurements experienced recruitment discrimination, in respect to jobs with a higher degree of customer contact. Other studies have found that organisations that sell services, such as hospitality and retail, are more likely to consider customer attitudes when considering hiring persons with disabilities (Houtenville & Kalargyrou, 2015; Stone & Wright, 2013).

Corporate concern with aesthetics goes beyond disability. Aesthetic labour is a growing trend in business, as employees are increasingly being seen as part of the brand image (Warhurst et al., 2009; Waring, 2019). "Aesthetic labour means corporeal dispositions in people that employers can commodify and exploit to their advantage when competing with other firms" (Karlsson, 2012, p. 54). Employers may prefer a certain look that they believe their customers will identify with (Waring, 2011) and may perceive this necessary to build their brand in a competitive marketplace (Cavico et al., 2012, 2013), particularly in a society that is appearance-obsessed (James, 2008; Mahajan, 2007). However, the consequence of this is that persons who are perceived not to meet the employer's standards of appearance are excluded regardless of their abilities. However, appearance is not a protected ground under human rights law (Cavico et al., 2012, 2013; Delagrave, 2020). Warhurst et al. (2009) went as far as to say, "This 'lookism' is being signaled as the next frontier in the struggle against discrimination in employment" (p. 132). Bendick (2018) suggested retailers may not hire persons with disabilities out of concern

that their appearance might impact their brand image. Studies indicate that appearance influences employment opportunities, career, and pay (Warhurst et al., 2009). Further, studies have found an earning premium based on beauty (Hamermesh & Biddle, 1993; Liu & Sierminska, 2014) and a wage penalty for plain looking people (Hamermesh & Biddle, 1993). This does not bode well for persons with evident disabilities as they may earn less because of their appearance.

Contrary to the above, Kuo and Kalagyrou (2014) found restaurant customers had a moderately positive purchase intention in respect to restaurants that employ a significant number of persons with disabilities as service staff. Organisations in the hospitality industry are effectively integrating persons with disabilities into their businesses, with positive reaction from customers (Gröschl, 2013; Kalargyrou 2014; Kalargyrou & Volis, 2014).

In Canada, human rights codes do not recognise lookism as an independent ground of discrimination[20]. When appearance has been found to be a factor, it has been in conjunction with disability or in respect to obesity, which has been held to be a disability (Hanson, 2018; Luther, 2010). However, physical features, like most grounds of discrimination, are generally an immutable trait (Cavico et al., 2013; Waring, 2011). While appearance is immutable in that it is not easily changed, society's connotations of attractiveness are not immutable. They are temporary and fluid. Aesthetics is very much, then, a social construction. "Beauty ideals and their consequences are *not* immutable, natural or unavoidable. They are *socially constructed"* (italicized in the original; Zevallos, 2011, para. 9). What constitutes attractiveness is plastic, changes over time, and differs among cultures (Cavico et al., 2013; Takáč, 2020). Cavico et al. (2012, 2013) pointed out that attractiveness is a creation molded by culture, community

[20] Only one state in Australia has made discrimination based on appearance legally discriminatory.

standards, and cultural norms. Thus, aesthetic qualities are another way that an employer can discriminate against an employee with a disability.

Organisational Characteristics

Organisational characteristics and whether these characteristics have a mediating effect are examined. While Stone and Colella (1996) addressed, in general, "observers' cognitions (i.e., categorization, stereotyping, expectancies) and affective states" (p. 352), they did not address specifically factors such as organisational size, key observers such as managers, the presence of a human resources capacity, and the presence of a union. However, Beatty et al. (2019) "found that larger, public-sector, unionized, and service organisations were associated with increased employment of persons with disabilities" and were more likely to provide accommodations, special training, and changing work systems (p. 125).

Organisational Size

Stone and Colella (1996) did not directly consider organisation size in their model. However, other studies have considered the impact of organisational size on the likelihood of employing persons with disabilities (Bruyère et al., 2006; Domzal et al., 2008, Fraser et al., 2010; Houtenville & Kalargyrou, 2012; Jasper & Waldhart, 2012, 2013). Beatty et al. (2019) included size as an organisational characteristic in their model of factors affecting treatment of persons with disabilities in organisations.

Certain concerns in respect to hiring persons with disabilities are more salient to smaller firms including matching skills to job needs, supervision, training time, and expense related to safety and medical insurance (Burke et al., 2013; Houtenville & Kalargyrou, 2012), the cost of accommodations (Houtenville & Kalargyrou, 2012; Jasper & Waldhart, 2013; Zappella, 2015a), whether employees with disabilities have the necessary skills (Domzal et al., 2008; Fraser et al.,

2011; Jasper & Waldhart, 2013), loss of productivity (Domzal et al., 2008; Fraser et al., 2010), customer and employee attitudes (Jasper & Waldhart 2013), and avoiding legal liability (Moore et al., 2007).

Small businesses have been more reluctant to hire persons with disabilities than larger businesses (Domzal et al., 2008; Jasper & Waldhart, 2012, 2013; Houtenville & Kalargyrou, 2012). This is significant as there are 1.15 million small businesses in Canada that employ 69.7% of private sector employees (Innovation, Science and Economic Development Canada, 2019). However, only 39% of surveyed small business owners hired individuals with a disability (BMO, 2014).

An American study concluded that vis-à-vis disability employment, that small businesses are motivated to comply with disability regulation either to avoid legal liability or those "owners who perceive potential gains from compliance through expanding their customer base or seeking a new market or niche were willing to invest in accommodations" (Moore et al., 2007, p. 121). Houtenville and Kalargyrou (2012) observed, "Hospitality companies of different sizes utilize different employment strategies for persons with disabilities (even though all firms share similar concerns)" (see also Domzal et al., 2008; Fraser et al., 2011; Jasper & Waldhart, 2013). Thus, despite the various concerns that small businesses may have in employing persons with a disability, many find solutions to retain the employees.

Beatty et al.'s (2019) review of the literature found larger organisations had a more positive response towards persons with disabilities. Other studies found large companies are more likely to provide accommodations (Bruyère et al., 2006). Yet, other studies identified large companies as being more likely to hire persons with disabilities than smaller organisations

(Bruyère et al., 2006; Domzal et al., 2008; Fraser et al., 2010). Large organisations are more likely to recruit persons with disabilities (Bruyère et al., 2006; Domzal et al., 2008.

American studies assessing charges alleging failure to accommodate employees with a disability under the *Americans with Disabilities Act* (2000), filed with the Equal Employment Opportunity Commission between 1992-2005, showed the greatest number of charges were filed against employers with more than 501 employees, followed in descending order by employers with 15-100, 101-200, and 201-500 employees (West et al., 2008). [21] If nothing else, these statistics underline the need for further research into organisation size and findings of disability discrimination.

Industrial Sector

Turcotte (2014) found men with a minor or moderate disability were most highly concentrated in manufacturing (13.8%), retail trade (12.4%), and transportation (8.4%). Men with a severe or very severe disability were most highly concentrated in two catagories, retail (14.2%), and transportation, and warehousing (8.7%). Women with disabilities were less represented in these sectors, except for retail where 15.4% of woman with a severe or very sever disability worked (Turcotte, 2014). Significantly, manufacturing and industry experience the highest level of unmet accommodation needs (Shuey & Jovic, 2013).

Bell (1973) stated that "if capital and labor are the major structural features of industrial society, information and knowledge are those of post-industrial society" (p. 13). It seems that there may be an information/knowledge discrimination divide. The knowledge economy

[21] Comparison to the Canadian context requires caution. First, West et al. (2008) presented allegations, where the research cases present findings of discrimination. There are differences between the OHRC and the ADA. The definitions of disability differ between Canada and the United States and American and Canadian judiciaries are ideologically different.

involves data analysis, problem-solving, research, and innovation. It is associated with high-tech manufacturing; certain service sectors, such as healthcare and software design; and business services such as insurance, information, and communications. The sectors where persons with disabilities have higher concentrations of workers are not typically considered part of the knowledge economy or engaged in those type of skills.

Organisational Structure

Stone and Colella (1996) theorised that persons with disabilities would fair more poorly in inflexible, bureaucratic organisations that emphasise equity principals over personal needs. Further, they suggested organisations whose "values [are] associated with competitive achievement, rugged individualism, self-reliance, in-group superiority, or conformity in appearance may negatively affect the degree to which disabled individuals are viewed as qualified for jobs" (Stone & Colella, 1996, p. 373). On the other hand, Beatty et al. (2019) found that large, public-sector, unionised, and service organisations were more inclusive and more proactive in responding to disability needs.

Norms and values of the organisation determine salient organisational characteristics, reflective of the organisation's culture, which impact persons with disabilities, such as whether work is organised in a flexible manner and how bureaucratic the organisation is (Beatty et al., 2019; Schur et al., 2005; Stone & Colella, 1996). Beatty et al. (2019) add organisational structure and design to Stone and Colella's model.

Employees with disabilities tend to thrive more in less bureaucratic (Beatty et al., 2019; Schur et al., 2005; Stone & Colella, 1996); less centralised, more flexible work environments that value diversity and emphasise needs over a strict equity system; environments that allow autonomy (Schur et al. 2009), and environments that promote cooperation over competition

(Schur et al.; 2005; Schur et al.; 2009; Stone & Colella; 1996) and are less focuses on scarcity. Flexibility has been analysed as consisting of formalisation and centralisation (Baumgärtner et al., 2015). Formalisation is the extent that rules, procedures, and instructions are prescribed by the organisation; while centralisation refers to the extent power is concentrated (Baumgärtner et al., 2015). The more decision making is concentrated, the less participation the employee will have in decision making about resources; and the more hierarchical the authority structure, the less the employee will have control over work decisions (Baumgärtner et al., 2015). Baumgärtner et al. found that employees with disabilities had greater job satisfaction in less centralised work environments; however, all employees were more satisfied in formalised environments, as it reduces ambiguity and provides guidance and clarity. Gewurtz and Kish (2009) found that flexibility and autonomy (scheduling, breaks, and time off when required) within the nature of the job was a significant enabling factor for persons with disabilities.

Flexible scheduling is the most requested form of accommodation as Morris (2019) found, based on the Canadian Survey on Disability. Accommodations requested were principally for flexible scheduling, different scheduling, or time off. Flexible work arrangements "refer to organizational initiatives or policies that enable employees to work for their organizations at times and places outside of an organization and/or outside of the normal workday" (Wittmer & Lin, 2017, para. 14.). Workplace flexibility may include flexibility in time, flexibility in location and connectivity, flexibility in amount of work, flexibility in work continuity and time off (Kossek et al., 2014).

A 2016 report noted that "organisational norms in many workplace cultures remain biased against flex work" and still a stigma attached to asking for flextime and fear of reprisal (Employment and Social Development Canada, 2016, p. 8). Robert (2003) stated that:

> Ultimately the least likely type of accommodation to be granted is any that might be perceived by able-bodied employees as equally useful to them. Thus, requests for more flexible work schedules or relief from mandatory overtime routinely get denied. Granting such requests could easily snowball into numerous requests from able-bodied employees for comparable accommodations. More fundamentally, granting such requests would threaten to expose the contingent character of the workplace routines that capital imposes on its employees. (p. 151)

Gewurtz and Kirsh (2009) point out "that accommodations to the social environment are perceived by employers and supervisors as particularly disruptive to the organization, operation, and structure of a workplace and can be contrary to the goal of maximizing productivity and performance" (p. 42). These challenges to flextime are exacerbated by organisations in which working on demand is required (Gewurtz & Kirsh, 2009). Given that work on demand requires workers to work when and how long the employer requires, it is the antithesis of flextime and makes flextime less viable and unlikely.

Additionally, many organisations have inflexible attendance management policies aimed at discouraging absences through stringent trigger points for absences with punitive disincentives (Gewurtz et al., 2021; Munir et al., 2008). Pressure to attend work while not well may exacerbate conditions and impact long-term work capacity (Munir et al., 2008). Pressure to be present at work regardless of one's condition increases incidents of presenteeism and absence amongst employees with chronic illness (Munir et al., 2008). It has also been found that such policies disadvantage employees with mental illness (Gewurtz et al., 2021).

Gewurtz et al. (2021) found support for the notion that workplace cultures that appreciate employee autonomy and flexibility improve integration of employees with disabilities, as well as performance and retention. They also found that practices that provide open dialogue, flexibility, collaboration, and supportive organisational policies improve the work experience for all employees including employees with mental illness (Gewurtz et al., 2021).

Organisation of work - Ideal Worker

The concept of the ideal, typical, or universal worker is embedded in the design of much modern work due to the ableist norms that shape the world of work (Foster & Wass, 2013). Foster and Wass's (2013) research highlighted "the complex design of many modern jobs: organized on largely unchallenged assumptions of what constitutes a typical or ideal worker" (p. 176). Acker (1990), in the context of gender, posited that the structure of work is not neutral. The ideal is a disembodied worker who fits an abstract job (Acker, 1990). Acker identified the ideal worker as a male who was unencumbered by family responsibilities. "There is no place within the disembodied job or gender-neutral organization for other 'bodied' processes, such as human reproduction" (Acker 1990, p. 151). Scholz and Ingold (2020) extended Acker's concept to persons with disabilities.

> …'ideal job seekers' were able-bodied (within an ideal state of body and mind), who had no other responsibilities outside the Program and were capable of adapting to the terms of benefit conditionality embedded within the Program, irrespective of fluctuations in their conditions. (Scholz & Ingold, 2020, p.1606)

Researchers have also made the case that work is premised on unchallenged ableist notions of the ideal worker (Foster & Wass, 2012; Jammaers & Zanoni, 2020; Van Laer et al., 2020). Even when employees with disabilities are accommodated, typically the ableist organisation of work is left unaltered and seen as concessions or inferior to the ideal conception of work (Foster, 2018). The ideal worker is produced and reproduced through ableist discourses (Jammaers & Zanoni, 2020), ableist processes and practices (Foster & Wass, 2012; Scholz & Ingold, 2020), and organisational culture (Foster & Wass, 2012).

> Ableism refers to a network of beliefs, processes and practices that produces a particular kind of self and body (the corporeal standard) that is projected as the perfect, species-typical and therefore essential and fully human. Disability then is cast as a diminished state of being human. (Campbell, 2001, p. 44)

Ableism privileges certain physical and mental conditions and inferiorises those with impairments (Jammaers et al., 2019; Scholz & Ingold, 2020). Ableism is the "the construction of disability as negated difference" (Foster & Wass, 2012, p. 173) and not only others nonconforming bodies and minds but in doing so, constitutes what is normal (Foster & Wass, 2012; Jammaers & Zanoni, 2020). It creates a binary hierarchy of disability versus ableness (Jammaers et al., 2019; Jammaers & Zanoni, 2020).

As Jacques (1996) noted, the ideal has become the normal worker. "The ideal is not the strongest, the most skilled or even the most compliant worker, but the 'normally' qualified worker able to hold a standardized job" (p. 108). Thus, the standard worker is the ideal worker. This conception of the ideal worker as a standard worker has implications for employees with disabilities who may not be perceived to be a standard worker, particularly when they require accommodations.

The notion of a standard worker requiring little managerial attention is a reification of workers. To the extent that meanings become fixed or reified in certain forms, which then articulate practices, agents, and relations, this fixity is power. "Power is the apparent order of taken-for-granted categories of existence, as they are fixed and represented in a myriad discursive forms and practices" (Clegg, 1989, p. 183). In this case the standard worker is seen as "bundles of human capital rather than as conscious, freely choosing agents" (Islam, 2013, p. 237), and contemporary workplace practices "promote a view of work as the production of tradable goods rather than meaningful works" (Islam, 2013, p. 238). To the extent employers continue to perceive employees with disabilities as incapable or a managerial challenge, they will continue to be perceived as nonstandard workers. Employees who don't fit employers' notions of productive potential and manageability are likely to be excluded from work.

Further, with the prevalence of lookism in the retail and hospitality sectors of business, physical appearance has also taken on a form of ideal worker (Foster, 2018). “Normalcy in organizations stigmatizes those with existing and future impairments and rewards those who most closely conform to socially prescribed ideal models of appearance and behavior” (Foster, 2018, p. 193). Thus, for many persons with disabilities, they are doubly discriminated against—their disability may exclude them from many jobs, and lookism may also exclude them from retail and hospitality work, which has typically had higher concentrations of employees with disabilities.

Human Resource Management

Given that Stone and Colella published their model in 1996, it is not surprising that one of their motivations was the lack of research on disability in human resource (HR) management. Human resource management is the “process of developing and unleashing expertise for the purpose of improving individual, team, work process and organizational system performance” (Swanson & Holton, 2009, p. 4). Ren et al. (2008) found from their meta-analysis of experimental research that human resources (HR) performance appraisals of employees with disabilities past performance was positive; however, disability had a negative effect on future performance expectations and the sense of how the employee will fit with the position and the organisation. Thus, having a disability may trigger negative HR judgments.

Coming full circle from Stone and Colella (1996), Beatty et al.’s (2019) review of the literature showed “that organizational policies designed to specifically address the needs of persons with disabilities led to improved treatment” (p. 126). Human resource practitioners are significant in establishing and implementing specific human resource practices and strategies

that foster career development for persons with a disability in organisations (Kulkarni, 2016; Kulkarni & Valk, 2010).

> HR practitioners thus create a context that influences employee expectancies, attitudes and behavior which in turn determine how PWD [persons with disabilities] within the organization are treated in terms of performance ratings, rewards, job assignments pay increases, training opportunities and mentoring. (Kukarni & Valk, 2010, p. 139)

Human resource practitioners can foster practices that help integration of persons with disabilities into the organisation, challenging outdated beliefs and helping shape the corporate culture to be more supportive of disability (Cavanagh et all., 2017; Kukarni & Valk, 2010). Cavanagh et al. (2017) stated:

> It is clear from the scoping review that HRM [human resource management] can play an important role in increasing the employment and success of workers with disabilities. To do this HRM reinforced by a variety of its functions (e.g., training and development of managers and employees) must shape, in partnership with its organizational citizens, the cultural values of the organization to encourage and indeed celebrate diversity at the workplace. (p. 34)

Thus, HR can use its functions such as training and development of managers and employees to encourage diversity and shape the organisation's values.

However, having said that, Procknow and Rocco (2016) found that HR has largely neglected persons with disabilities in respect to training and development, career progression, and disability-diversity training.

> Human resource development strategies such as disability awareness and diversity management training build attitudes of tolerance and acceptance of difference that are consistent with the stated mission of business and industry in today's marketplace. Thus, human resource management and development processes contribute to the development of a nondiscriminatory workplace that enables people with disabilities who want to work to do so and to remain economically and personally self-sufficient. (Procknow & Rocco, 2016, p. 398)

Human resource professionals' lack of engagement with conditioning workplaces to incorporate persons with disabilities is a lost opportunity for both employees and employers.

Further, Demuijnck (2009) stated, “the step from formal to substantial equality or treatment in the market presupposes that private agents, such as firms, behave in an impartial, fair and nondiscriminatory way” (Demuijnck, 2009, p. 89). “Delaney and Lund (1996) suggest that one of the hallmarks of equitable HRM [human resource management] systems is the enactment of objective standards that remove bias and subjectivity in the implementation of HRM practices” (Capell et al., 2016, p. 7). Demuijnck (2009) argued that companies have a moral obligation to accept responsibility for nondiscrimination and to implement rigorous nondiscriminatory human resource practices, as legal instruments have not on their own eradicated discrimination.

> If not altered via human resource management and development interventions, negative social attitudes may be manifested as employer restrictions, constraints, or intolerable working conditions that force workers with disabilities to resign, which is essentially the dynamic involved in constructive discharge. (Roessler et al., 2010, p. 410)

Many organisations over time have implemented policies and practices aimed at creating more inclusive, fairer, and safer workplaces for their employees (Capell et al., 2016). Such practices can engender employee trust by “signaling a message of support and commitment to all employees, by creating a sense of certainty, and through a sense of fairness and inclusion of professionalism” (Capell et al., 2016, p. 8). Yet in all too many cases, as is evident by the research cases, these organisational behaviours do not occur.

Goss et al. (2000, as cited in Beatty et al., 2019) suggested that size is a proxy for the likelihood of the firm having professional human resource capacity. Many companies do not have the budgetary resources to foster internal expertise on disability inclusion (Wharton, University of Pennsylvania, 2013). On the other hand, “larger companies have the resources and diversity of work functions to support diversity initiatives and inclusion programs” (Houtenville & Kalargyrou, 2012, p. 43). Goss et al. (2000), in a British study, found that larger organisations

are more effective at hiring persons with disabilities than small firms and attribute this to the greater likelihood of a large organisation having an in-house human resource professional. Larger organisations have a greater variety of jobs and greater personnel resources (Unger, 2002), such as dedicated human resource professionals to manage hiring and retention (Heera & Devi, 2016).

> Small and medium organisations do not have the diversity or human resources (HR) capability that larger organisations may have, and even if they are aware of the supports available to employ people with disability, they don't have the capacity to navigate the often changing and extensive matrix of programs and services available (Murfitt et al., 2018, p. 418)

Managers at smaller companies have "a dearth of proper information" (Houtenville & Kalargyrou, 2012, p. 50). Diversity and corporate social responsibility, which motivate many larger companies' disability inclusion activism, may not even be an issue of consideration for managers in smaller firms (Gustafsson et al., 2014).

Lunsford and Dolison (2019) conceptualised three attitudinal outcomes that are linked to improved employment success for persons with disabilities that HR professionals should support. These are employee engagement, empowerment, and inclusion/socialisation. Engagement has been defined "as a lasting, positive state of dedication, vigor, and absorption" (Lunsford & Dolison, 2019, p. 409). Empowerment entails structural empowerment and psychological empowerment (Taejun & Fareman, 2010). "Structural empowerment is the distribution of power and responsibility to lower levels in an organization" (Lunsford & Dolison, 2019, p. 409). This necessitates that "employees at the level empowered to make decisions must have the information, knowledge, power, and incentives to make decisions" (Lunsford & Dolison, 2019, p. 409). The last attitudinal outcome HR wants to foster is employee inclusion and socialisation (Lunsford & Dolison, 2019). In other words, HR wants to support attitudinal outcomes that lead

to the employee perceiving being accepted by others at work. “Inclusion offers the employee an opportunity for involvement in decision making, access to information, and job security” (Lunsford & Dolison, 2019, p. 410). This is a useful lens through which to examine the research cases.

Unionisation

As mentioned above, Beatty et al. (2019) found unionised organisations were more inclusive and more proactive in responding to disability needs. In the United States, unionised employees with disabilities earn a premium relative to nonunionised workers but still earn less than union employees without a disability (Ameri et al., 2019). Further, both unionised workers with a disability and without a disability are more apt to ask for accommodations than nonunionised counterparts (Ameri et al., 2019). Lastly, there are higher rates of retention for workers with disabilities in unionised employment (Ameri et al., 2019).

Unions in Canada have had a positive impact on asserting disability rights in work environments. Unlike individual employees, unions have the resources to peruse grievances and to seek legal redress of disability accommodation issues, generally through labour arbitrations and to monitor settlements and orders to ensure implementation (Lynk, 2007). “...the very fact that unions and employers have a long-term mandatory relationship, however loveless or difficult, means that they have been compelled to creatively co-operate with each other to make the accommodations, and the relationship, work over the long haul” (Lynk, 2007, p. 225). Lastly, arbitrators are active in the use of their remedial powers in conjunction with applying the human rights codes to reinstate an employee with a disability who has been terminated. Unlike human rights tribunals and arbitrators can also “issue flexible, viable and dynamic disability

accommodation remedies that go beyond the limited impact of damage awards given in lieu of reinstatement by the courts and by most human rights tribunals" (Lynk, 2007, p. 225).

However, unions in Canada, in 2020, represented only 31.3% of all employees (Statistics Canada, 2021). An American study found that from 2009-2017, the rate of unionised employees with disabilities declined relative to employees without disabilities more precipitously (Ameri et al., 2019). Ameri et al. attributed this to a likelihood of employees with disabilities not being hired to those jobs. They said, "In a union context they appear more likely to be 'last hired' but less likely to be 'first fired'" (p. 27).

Nonunionised employees must seek redress for human rights violations individually before a human rights tribunal. Additionally, many persons with disabilities are not in the labour force and are therefore not represented by unions. Furthermore, "unions tend to concentrate on the job retention of workers who become disabled and not on the subject of recruitment of disabled workers" (Lurie, 2017, p. 482). Lurie noted that "one problem of union representation is the tendency to advocate for the median worker" (p. 481) because they are political organisations whose leadership is dependent on majority acceptance.

Union interest and employee accommodation interest can conflict at times. Breward (2016), for instance, found higher levels of technical accommodations but a negative association in respect to being a union member and requesting job modifications, which Breward attributed to possible tension between individual needs versus the union's collective identity. Thus, unions, thought beneficial, have limited overall impact on disability accommodation obtainment and enforcement. "...workers with disabilities risk disrupting the status quo regarding seniority, job reassignment, job restructuring, and flexible scheduling to which unions have historically adhered" (Ameri et al., 2019, pp. 5-6). This conflict arises when an employee's equality rights

conflict with the terms of a collective agreement. Swinton (1995) summarised the tension between equality rights and collective agreements:

> Some argue that it is unfair to impose liability on unions who refuse to accept encroachment on a collective agreement, either because its terms are seen as hard fought "rights" bought by workers through concessions in negotiations, or because the responsibility for any discriminatory action should be attributed to management. Others concede the necessity for flexibility in some, but not all, areas of collective agreement application, since agreements tend to reflect the interests of the majority in a bargaining unit and, thus, may not always be sensitive to the needs of groups which are less well represented in the workplace. Therefore, some balancing of the interests of various groups of workers is seen to be in order. Still others, especially advocates for equality-seeking groups, argue that collective agreements deserve no special respect in a regime concerned about individual and group rights-indeed, the rules enshrined in collective agreements often create unfair and arbitrary barriers to the participation of disadvantaged groups. (p. 704)

This is most evident and acute when seniority rights conflict with an employee's right to accommodation. For example, a light duty job may be an appropriate accommodation for an employee with a disability, but it may also be a coveted job available based on seniority. "A worker's seniority is considered an earned entitlement, part of the compensation package 'purchased' through years of service" (Swinton, 1995, pp. 732-733). Many employee benefits and job security are connected to seniority.

The Supreme Court of Canada has resolved these conflicting rights in *Central Okanagan School District No. 23 v. Renaud* (1992). The court held that accommodation rights can supersede a collective agreement's seniority rules, unless to do so would cause undue hardship. The Court held that undue hardship in these cases requires the employer to show substantial interference with other employees' rights. Such interference would affect the employer's business operations and therefore be undue hardship. However, the Supreme Court has also held that a union member does not have to be accommodated indefinitely. Undue hardship is met, "If the characteristics of an illness are such that the proper operation of the business is hampered

excessively or if an employee with such an illness remains unable to work for the reasonably foreseeable future" [*Hydro-Québec v. Syndicat des Employées de Techniques Professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ),* 2008, para. 18].

Basas (2013), in an American study of collective agreements, found that, in general, agreements take a medical model of disability. The most dominant approach in the collective agreements Basas surveyed focused on disability at the individual and family level dealing with workers' compensation, workplace injury, sick and family leave; insurance; and disabled dependents. These agreements treat disabled workers as something that needs to be fixed or normalised. Basas (2013) concluded:

> In sum, disability, in this model, is stripped down to what it does to the body and the mind, and, perhaps, the finances of the disabled worker or the worker with a disabled dependent. It does not consider the social or civil rights aspects of disability, nor disability as an identity or point of pride. Arguably, it also does not make room for the disabled worker who arrived to the first day of work with his or her disability. (p. 820)

Organisational Culture

Stone and Colella (1996) identified organisational norms and values as factors that may affect the treatment of employees with a disability in organisations. Beatty et al. (2019) argued culture is an organisational characteristic that may be an antecedent to how employees with disabilities are treated in organisations.

An organisation's culture is the collective values, norms, beliefs, and behaviours (Schein 1999; Schur et al., 2005; Schur et al., 2017). Corporate culture also encompasses espoused value (e.g., philosophies, strategies, goals) and manifestations of culture or artifacts (e.g., the physical and social environment of the organisation; Schein, 1999)[22]. An organisation develops its culture

[22] It is acknowledged that there are many extant theorise of organisational culture. Schein's levels of culture (artifacts, espoused beliefs and values, basic underlying assumptions) are applied here as they provide useful indicia to analyse corporate culture in respect to accommodation requests. For a summary of other theories of organisational culture Cacciattolo (2014).

through a process of accumulated learning (Samant et al., 2009). Schein (2009) argued, “The essence of culture is then the jointly learned values and beliefs that work so well that they become taken for granted and non-negotiable" (p. 26). Schein (2004) stated:

> The culture of a group can now be defined as a pattern of shared basic assumptions that was learned by a group as it solved its problems of external adaptation and internal integration, that has worked well enough to be considered valid and, therefore, to be taught to new members as the correct way to perceive, think, and feel in relation to those problems (p.17, see also Schein 1984, n.p.).

Schein (2004) pointed out that an organisation’s values and norms provide guidance in how to deal with various situations. A corporation’s culture is derived from the values and norms that comprise “implicit rules of behavior, which reflect the central values of the organization and dictate the appropriateness of attitudes and behaviors” (Spataro, 2005, p. 29); thus, corporate culture is the commonly conceived expectations of how employees are to behave in their given work environment (Spataro 2005).

Organisational Culture and Disability

The experience of an employee with a disability is affected by an organisation’s culture (Kruse & Blank, 2005; Schur et al., 2009; Schur et al., 2017; Stone & Colella, 1996). Organisational culture impacts persons with disabilities as “an organization’s norms and values identify the types of behaviors that are appropriate and provide moral justification for organizational policies and practices” (Stone & Colella, 1996, p. 373). “An organization’s culture shapes much of what occurs within the organization, including how individuals behave, what people pay attention to, how they respond to different situations, and how they socialize new members and exclude those who do not fit in” (Spataro, 2005, p. 29). Corporate culture also affects the formation of a corporation’s policies, attitudes, and practices (Schur et al., 2013).

Hagner et al. (2014) found that organisations with weaker cultures provide less opportnties for social inclusion for employees with disabilities, and there is a larger concentration of persons with disabilities in organisations with weaker cultures. Social inclusion in the workplace indicates that the employee is a valued member (Kulkarni & Lengnik-Hall, 2011). Fillary and Pernice (2005, 2006) found that employees with intellectual disabilities in supported employment experienced less inclusion than their nondisabled peers. Where employees perceive an inclusive climate, they experience greater psychological empowerment and organisational support, which influences the employee's sense of inclusion, job satisfaction, commitment, and productivity (Disability Case Study Research Consortium, 2008).

Williams and Taras (2004) referred to a culture of trust that results from the organisation having "embraced the moral imperative to accommodate disability" (p. 8). Trust itself is a social construct (Atkinson & Butcher, 2003). In a culture of trust managers see the employee's request as legitimate, make every effort to find suitable accommodation, and as a result, coworkers take these cues and are supportive of employees with disabilities. Iwanaga et al. (2021) found a significant association between disability inclusion factors (disability inclusion policies and procedures, disability inclusion efforts and strategies, disability inclusion preparedness, and health and illness management policies and procedures) and an organisation's utilisation rate of employees with disabilities. That is, employers' attitudes are a significant element of corporate culture affecting persons with disabilities (Samant et al., 2009; Schur et al., 2005; Schur et al., 2009; Schur et al., 2017). "Studies find that supervisors and coworkers have a profound impact on their [employees with a disability] employment experiences" (Schur et al., 2017, p. 484). Regardless of a corporation's commitment to hiring employees with disabilities, if supervisors

have negative attitudes towards employees with disabilities it will affect integration of the employee into the work environment (Schur et al., 2005).

> A positive relationship with one's manager, and having a manager that engages in diversity valuing behaviors and views accommodations as a strong investment in his or her employees, is a manager that protects employees from feeling negatively treated. Other analyses revealed that managers are central to understanding how employees perceive their work environment, their fit in that work environment, their experiences in that work environment (both positive and negative), and ultimately their behaviors and intentions (Disability Case Study Research Consortium, 2008, p. 97).

Workplace culture also impacts the granting of accommodations (Schur et al., 2017). More inclusive organisations benefit all employees (Disability Case Study Research Consortium, 2008). It has also been found that flexible and supportive corporate cultures benefit all employees (Schur et al., 2014). In addition, inclusive organisations improve psychological safety, from which all employees benefit (Kalargyou, 2014). A psychologically safe climate refers to organisational practices that support "open and trustful interactions within the work environment" (Kalargyou, 2014, p. 124) and allow the employees to be themselves without concern of negative consequences (Kalargyou, 2014). "More specifically, it is the culture and support from the company that creates the best conditions for people with and without disabilities to work side by side" (Kalargyou 2014, p. 132). "Companies with an inclusive corporate culture benefit from an entire workforce that feels valued and returns value" (Disability Case Study Research Consortium, 2008, p. 98). The overall percentage of accommodation requests, particularly those that are granted, can serve as a barometer of the culture of an organisation. "Put differently, accommodations provide important information about the extent to which the organization values employees" (Schur et al., 2014, p. 696) rather than just seeing employees as an expense and replaceable if they cannot derive the most productivity for the least cost (Schur et al., 2014). Schur et al. (2014), further stated:

> When a higher proportion of [accommodation] requests are granted, employees are more likely to perceive that management views them as assets. However, when a high proportion of requests are denied, employees may feel that management does not value them and would prefer to replace demanding employees with ones who will not make 'costly' or 'disruptive' requests for accommodations. (p. 597)

Gould et al. (2021) noted, "Medicalized perceptions about disability-related costs and ableist assumptions about the anticipated social consequences of disrupting organizational culture detract from the valuation of workers with disabilities" (p. 2). Pro-accommodation corporate culture also conditions coworkers' attitudes around acceptance of accommodations (Schur et al., 2014). On the other hand, Schur et al. (2009) found that organisations perceived to be less fair and responsive impact the job satisfaction, loyalty, turnover intention, and intention to work hard of employees with disabilities.

An organisation's culture has implications for how diversity is conceived and defined; whether difference is emphasised or de-emphasised and the process by which individuals who are different are integrated or not (Spataro, 2005). Cultures that demonstrate commitment to disability inclusion, such as inclusion of disability in corporate diversity statements and recruitment and marketing materials, influence employee decisions to disclose their disability (Iwanaga et al., 2021; Von Schrader et al., 2014), and inclusion of disability in corporate diversity statements is one the most important predictors of management and organisational commitment to employing persons with disabilities (Chan et al., 2010).[23] However, most

[23] Diversity statements are not the only indicia of diversity associated with hiring employees with disabilities, but they are the most prominent in the literature. Other predictors of employment of persons with disabilities include prior experience with persons with disabilities (Hemenway et al., 2003; Hernandez et al., 2000; MacFarlin et al., 1991; Unger, 2002) the presence of accessibility expert, in-house disability management program (Habeck et al., 2010), disability inclusion training (Bengsiu & Balta, 2011, Chan et al., 2010; Fredeen et al., 2013 Kaye et al., 2021; Houtenville & Kalargyrou, 2012; Kalargyrou, 2014; Kalargyrou & Volis, 2014; Markel & Barclay, 2009), disability focused recruitment (Fredeen et al., 2013; Gewurtz et al., 2016), leadership supportive normative beliefs (Fraser et al., 2010; Gilbride et al., 2003; Schur et al., 2005), disability champions (Fredeen et al., 2013; Gould et al., 2021; Gröschl, 2007; Hernandez et al., 2008), written accommodation or inclusion policies (Gilbride et al., 2003; Habeck et al., 2010; Kalargyrou, 2014), health wellness, and disability management policies (Iwanaga et al., 2021) including

organisations' diversity strategies rarely take into account disability (Chan et al., 2010; Erickson et al., 2014; Gould et al., 2021; Khan et al., 2019). A survey of managers identified their company's diversity climate and lack of inclusion of disability in their organisation's diversity statement as a barrier to hiring and retaining employees with disabilities (Chan et al., 2010). Disability is included less than other minority groups in corporate diversity and inclusion statements (Ball et al., 2005; Gould et al., 2021). Stensrud (2007) found that employers view disability differently than diversity. "They [employers] saw disability as a problem to be accommodated rather than a difference to be celebrated" (Stensrud, 2007, p. 234). Of the 259 largest public companies in Canada, only eight specifically mentioned persons with disabilities in their diversity statements in 2019, and only 30% had any discernable "business-related mention of disability" (Donavan, 2020, p. 43); 181 of those companies have no publicly discernable activity in respect to disability (Donavan, 2020). Further, 67% of American organisations reported utilising diversity training; however, inclusion of disability in diversity training has been limited (Phillips et al., 2016). However, in the United States, the National Organization of Disability tracks certain key disability-employment benchmarks. They found that of the 199 companies they tracked, there had been an increase, from 2018 to 2019, in both human resource generalists and recruiters trained in disability employment (69%) and recruiters (65%). Additionally, the Disability Equality Index (2020; an inclusion benchmark tool for Fortune 1000 companies and the top 200 grossing law firms) has seen over five years the number of top scoring companies go from 43 to 205.

Another indicator of corporate culture is its espoused values (Schein, 1999). In addition to an organisation's diversity statement and diversity strategy, the organisations external

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mental health benefits (Accenture, n.d.), and tracking accommodation metrics, employment, education, retention and advancement programs for employees with disabilities (Erickson et al., 2014).

communication of their corporate social responsibility strategy reflects their culture and the organisation's norms, practices, and culture (Gould et al., 2021). Gould et al. (2021) found that organisations have still not prioritised disability in their diversity and inclusion reports and their corporate social responsibility plans. Most reports continue to emphasise specialised practice rather than incorporating practices that would mainstream inclusion of employees with disabilities (and these policies and practices often benefit other employees as well; Gould et al., 2021). The Disability Case Study Research Consortium (2008) in the United States established a standardised research design methodology for organisational case studies to assess corporate culture and disability inclusiveness (Disability Case Study Research Consortium, 2008). The consortium determined several benchmarks across four core categories: diversity outcomes, inclusive policies and practices, attitudinal and behavioural indicators of success, and bottom-line outcomes. Diversity outcomes is the extent to which they achieve numerical diversity across the organisation and management. Considering inclusive policies and practices is the taking stock of what has fostered inclusion in the organisation. This include determining which policies and practice foster strong recruitment, training and advancement opportunities, effective accommodations, and enhance corporate culture. Attitudinal and behavioural indicators of success assess whether the organisation's inclusion policies and procedures are perceived as successful. These indicaors examine employees' perceptions of managers, human resource practices, and the organisation. The latter category includes perceived organisational support, psychological empowerment enjoyed on the job, and a climate for inclusion (e.g., fairness, openness, and inclusion in decision-making). Lastly, assessing bottom line outcomes includes examining elements that impact the organisation's performance including job satisfaction, commitment to company, tenure, turnover intention, and organisational citizenship behaviours. It

would have been ideal if the research cases had yielded all this information, but a number of these indicators were applicable to analyzing the research cases.

All these aspects taken together contribute to the formation of an organisation's culture. Part of how organisational culture is defined, is through the norms and values ensconced in the collective basic assumptions on how to manage internal integration. An organisation's s ableist attitudes, flexibility, granting of accommodations, diversity, equity systems, etc. have significant implications regarding the integration of employees with disabilities. Schein (1985) stated:

> For a group to function and develop, one of the most important areas for clear consensus is the perception of who is *in* the new group and who is *not in*, and the criteria by which such decisions are made. (p. 96)

The ongoing outgroup status of employees with disabilities in many organisations remain a central barrier to equality of employment for many employees with disabilities.

Social Construction of Organisational Culture

Having canvassed elements of organisational culture, consideration of theories on how these cultures germinate may provide additional lenses to examine the research cases. Until the 1970s, organisations were seen as "instrumental social structures that are little affected by culture" (Dobbin, 1994, p. 117). Theories were premised on the presumption that organisations were characterised "by transcendental laws of rationality" (Dobbin, 1994, p. 119) and focused on issues of economic dependencies (resource dependency theory), available resources (population ecology theory), transaction costs (transaction cost theory), technology of production, and the operating environment (contingency theory; Senge, 2013).

Subsequently, the taken-for-granted view that organisations are rational was problematised by a social constructionist turn. Williams and Mavin (2012) noted:

> While they are often treated as such, it is critical to appreciate that social categories are not self-evident (Alvesson and Billing, 2002; Burr, 2003); rather, they are established

> through social practices (Butler, 1999), social constructions reflecting wider social and historical conditions (Alvesson and Billing, 2009). (p. 161)

In looking at organisations as socially constructed, organisations are now seen as cultures (Dobin, 1994 Pedersen & Dobbin, 2006; Senge, 2013). The rationalist conception of organisations was seen as a socially constructed practice (Dobbin, 1994; Mezias, 1985). Brown (1978) advised:

> …rationality neither instructs us to what action to take, nor is it a property inherent in conduct or in the social system as such. Instead, rationality emerges in interaction, and then is used retrospectively to legitimate what has already taken place or is being enacted. (p. 369)

"In effect, there is little reason to believe that there is a specifically rational process (or logos) lurking beneath what we take to be rational argument; to argue rationally is to 'play by the rules' favoured within a particular cultural tradition" (Gergen & Thatchenkery, 2004, pp. 234-235). Unlike the positivist theories that organisations function on rational decision making, social constructionists see organisations making decisions based on practices embedded in the culture as constructed by the collective organisational players.

There are two schools of organisational social construction; neoinstitutional theorists and organisational culture theorists (Dobbin, 1994; Pedersen & Dobbin, 2006). Neoinstitutionalist construction is centred on organisations' creation of legitimacy; organisational culture construction is aimed at creating identity (Pederson & Dobbin, 2006). Generally, organisational culture is an understanding of "what ought to be" in this organisation (Shien, 1985, p. 13).

Neoinstitutional theory is concerned with meaning socially derived from a variety of external organisations "through the creation of shared practices and collective attribution of rationality or justice of those practices" (Strandgaard et al., 2006, p. 897). Neonationalist see organisations as influenced by the wider society (Senge, 2013) and acquire cultural models from

the environment (Dobbin, 1994). Businesses borrow practices from the prevailing environment. Neoinstitutionalists contend that "meaning is socially constructed *among* large numbers of organisations through the creation of shared practices and the collective attribution of rationality or justice to those practices" (Pederson & Dobbin, 2006, p. 897). DiMaggio and Powell (1983) observed, "organizations tend to model themselves after similar organizations in their field that they perceive to be more legitimate or successful" (p. 152).

> Building blocks of conscious organizational culture often come from the environment, with the result that distinctive organizational cultures can be surprisingly similar to one another at any point in time. When managers began to believe in the efficacy of "strong" or "excellent" cultures, they began to deliberately construct local cultures from the building blocks they find in the environment. (Pedersen & Dobbin 2006, p. 901)

Kondra and Hurst (2009) noted:

> Organizational environments are "characterized by the elaboration of rules and requirements, to which individual organizations must conform if they are to receive support and legitimacy", and regardless of motivation, social-cultural values and beliefs external to the organization play a significant role in determining those organizational norm. (p. 40)

On the other hand, organisational culture theorists argue that cultural meaning is socially created within the organisation by creating unique practices and "the collective attribution of significance and identity to those practices" (Pederson & Dobbin, 2006, p. 898). "Actors in organisations create unique practices and justificatory rhetorics, to distinguish their organisations and to symbolize, and effect, the goals of rationality and justice" (Pederson & Dobbin, 2006, p. 898). Green (2005) pointed out:

> ...encouraging employees, whether formally or informally, to display commitment to common work norms is not discrimination. The problem with work culture from an antidiscrimination perspective, rather, is that the process of social interaction is likely to be infected with discriminatory bias, leading to work cultures that are defined and imposed along racial and gender lines. (and presumably ableist lines; pp. 643-644)

By definition, corporate culture is socially constructed by organisational members' shared meaning (Schein, 2004). That is, meaning is created intersubjectively. Mezias (1985) states "these shared meanings become an intersubjective, objective reality" (p.2). Barrett et al. (1995) advised that "For it is through patterns of discourse that we form relational bonds with one another; that we create, transform, and maintain structure; and we reinforce our beliefs" (p. 353). These authors maintained that organisational change thus occurs discursively (see also Camargo-Borges & Rasera, 2013). New ideas or "novel discourse" transform how players relate to each other (Barrett et al., 1995). "Further, as their new behaviors are reinforced over time, new structures will evolve, and attitudes and beliefs about work will be transformed" (Barrett et al., 1995, p. 354). The transformation permits members to conceive of themselves differently in the way members perceive themselves in how the group communicates about itself (Barrett et al. 1995). However, constraints make some utterances, activities, and routines unacceptable (Barrett et al., 1995). Camergo-Borges and Rasera (2013) talked about how organisations are increasingly co-creating with stakeholders such as employees as part of an organisation's creative process. Co-creating allows for deconstruction of existing routines and creating new meaning (Camergo-Borges & Rasera, 2013).

Discourse can take multiple forms in organisations, including rhetoric, social learning, and coercion. Rhetoric is the spoken component of ideology (Lawrence & Suddaby, 2006). "Rhetoric is the tool for persuading others to take up ideas and practices. Rhetoric is manipulative and non-substantive" (Hartelius & Browning, 2008, p. 18) "Rhetoric is seen as the attempt to purposefully communicate the values of the organization and the preferences of leaders" (Hartelius & Browning, 2008, p. 18). Rhetoric is a "spoken and written discourse that justifies the use of a set of techniques for managing organizations or their employees" (Barley &

Kunda, 1992, p. 366). Rhetoric provides institutional logic, sustains the routines that constitute the organisation's characteristics, and creates a distinct identity (Hartelius & Browning, 2008). Given that organisational culture is constituted discursively, employees within that discourse "engage in sense-making 'identity work'" (Hartelius & Browning, 2008, p. 25). "In short, labels are a rhetorically constructed way of sorting organizational members into groups by assigning identity" (Hartelius & Browning, 2008, p. 27).

Corporate culture is transmitted to employees both explicitly and tacitly, and employees intone the culture through social learning, role modelling, and observation. Culture disseminates from artifacts (rules, policies, procedures), observable behaviours, tacit values and assumptions, rewards, punishment, rituals, and stories, and these become the organisation's routines (Kondra & Hurst, 2009). Further, what is absent also communicates. "Indirect communication is a way of relying on the unspoken as much as the spoken" (Harteliu & Browning, 2008, p. 23)

One of the most overt manifestations of culture that shapes behaviour expectations and conformity is the use of coercion (rewards and sanctions; Kondra & Hurst, 2009). Coercive power is the forced compliance of employees—in this case, to organisational norms (Tourish et al., 2009). Coercive power is intended to ensure conformity by sanctioning undesirable behaviours and rewarding desired behaviours (Tourish et al., 2009). "The intent appears to be to render behavior consistent with the needs of the corporation, always and everywhere" (Tourish et al., 2009, p. 375). Thus, how rules are interpreted and applied also becomes part of the cultural apparatus (Kondra & Hurst, 2009).

In contrast to coercive power, coercive persuasion "encourages subjects to internalize dominant cultural norms as their own, subsequently producing individuals deemed to be 'appropriate' by the ruling group" (Tourish et al., 2009, p. 363). This implies that employees are

under observation. “Social control creates self-generating discipline to conform to organisational norms to ensure a sense of belonging” (Kondra & Hurst, 2009, p. 48). In essence, it creates a form of governmentality and self-discipline (Foucault, 2004). Employees, to reduce anxiety over sanctions, may align themselves with management’s behavioural expectations (Tourish et al., 2009). Kondra and Hurst (2009) noted that in acute cases of non-compliance employees are terminated to retain a “static culture” (p. 47).

However, coercion diminishes as employee’s internalise required aspects of organisational culture. An aspect of the process of social construction process is internalisation (Berger & Luckman, 1967; Mezias, 1985). “Subjects begin to internalise the standards that are created through discursive categories, and the techniques of observation are no longer necessary” (Barrett et al., 1995, p. 369). Zucker (1983) maintained that internalisation is an aspect of organisational institutionalisation. “Institutionalization is rooted in conformity - not conformity engendered by sanctions (whether positive or negative), nor conformity resulting from a black box internalization process but conformity rooted in the taken-for-granted aspects of everyday life” (Zucker, 1983, p. 6). This serves to create self-governmentality by organisational participants.

Employees with disabilities are not impervious to self-regulation, as is evident from the anxiety many experience in deciding to disclose their disability. The effect of coercion may give rise to intoning the organisational culture around disclosure “as a means of … surviving” (Tourish et al., 2009, p. 370). Self-auditing may suppress the likelihood of disability disclosure, obtaining necessary accommodations, and enforcing legal rights at work.

Organisational Learning

Organisations can change the social construction of their cultures by learning new routines. New routines lead to new organisational behaviours (Cyert & March, 1963; Nelson & Winter, 1982). Organisations take on cultural practices in the environment because: (a) they are coerced by rules and practices imposed on the organisation by other institutions--for example reasonable accommodation; (b) they mimic practices of other organisations to try and achieve better outcomes; and (c) of normative reasons to enhance their legitimacy, such as presumably integrating persons with disabilities into an organisation's workforce (DiMaggio & Powell, 1983). Presumably, in a marketplace that is increasingly concerned with diversity, successfully incorporating persons with disabilities into one's workforce would enhance the organisation's image, legitimacy, and diversity (Cagliostro et al., 2018; Gould et al., 2021; Lindsay et al., 2020; Khan et al., 2019; Siperstein et al., 2006).

Discrimination is a behaviour attributed to a corporation, and behaviours can be changed, through learning (Levitt & March, 1988; Wooten & James, 2005). Gelfand et al. (2007) noted that "…aspects of organizations—including formal and informal structure, organizational culture, leadership, strategy, human resource systems, and organizational climates—may contribute to or attenuate discrimination" (p. 5). Gelfand et al. further stated, "…the relationship between these organizational-level processes and actual levels of discrimination is necessarily mediated by individual cognitions and interpersonal behaviours" (p. 5). According to Huber (1991), organisations learn by obtaining knowledge and distributing information, which is then interpreted and, in turn, developed into organisational memory by encoding the information into routines (Wooten & James, 2005). Those are all human actions. Routines are created and

implemented by individuals. They are assimilated by employees and feed-back to contribute to the organisation's structure and culture, which perpetuates new behaviours.

A practice is a repeated or customary action (*Merriam-Webster,* n.d.). Becker (2000) defined routines as "patterns, repetitive and persistent, collective, non-deliberative and self-actuating, of processual nature, context-dependent, embedded and specific and path dependent" (p. 2). Generally speaking, "organizational routines are *repeated patterns of behavior that are bound by rules and customs and that do not change very much from one iteration to another"* (italicised in the original, Feldman, 2000, p. 611). Levitt and March (1988) noted:

> The generic term "routines" includes the forms, rules, procedures, conventions, strategies, and technologies around which organizations are constructed and through which they operate. It also includes the structure of beliefs, frameworks, paradigms, codes, cultures, and knowledge that buttress, elaborate, and contradict the formal routines. (p. 320)

Routines are the organisation's practices and procedures (Zellmer-Bruhn et al., 2004). Routines contribute to organisational culture by establishing acceptable standards and behaviours and often emanate from managers (Frost, n.d.). Routines serve to "conserve cognitive effort" by creating decision rules and standard operating procedures and they resolve conflict by creating tacit agreement such that divergent goals and interests are not continually negotiated in effecting routine tasks (Howard-Grenville & Rerup, 2017, p. 3), thus reducing uncertainty and saving time (Zellmer-Bruhn et al., 2004). Routines ensconce the lessons of history but not the actual history (Levitt & March, 1988). Current employees may not understand the original problems to which the routine developed as the solution (Becker, 2000). Routines are communicated by socialisation, imitation, education, personnel movement and professionalisation.

Routines are hard enough to change; it is considerably harder to change organisational culture. In fact, Schein (2004) maintained that culture is the most difficult to change. "On the contrary…culture refers to those elements of a group or organization that are most stable and

least malleable" (p. 11). In part, this is because culture is an abstraction. Culture is a "phenomena that is below the surface, that are powerful in their impact but invisible and to a considerable degree unconscious" (Schein, 2004, p. 8). Cultural change requires replacing prevailing ideologies, symbols, and customs (Trice & Beyer, 1993). It is about changing beliefs, which is more challenging than just changing attitudes (McCarthy, 2018). "At this level [shared cultural values] culture can be extremely difficult to change, in part because group members are often unaware of the many values that binds them together" (Kotter & Heckett, 1992, p. 4). Those values emanate from rhetoric which creates organisational logics that are hard to change.

> Profound institutional change, such as that necessary to create a new form of organizing, is accompanied by a shift in the dominant institutional logic. Shifts in logic, however, are highly contested, and because logics are abstractions, such contestations are often a function of rhetoric in which the legitimacy of competing logics is openly debated. (Suddaby & Greenwood, 2005, p. 41)

Generally, culture evolves slowly and is deeply embedded in the organisation (Torben, 2015). Cultural change involves changing several causal factors such as articulation of mission, structures, systems, technologies, communication flow, and leadership (McCarthy, 2018). Edmondson and Bertrand (1998) noted that routines are human outcomes. Those outcomes are based on individuals' interpretations of the environment, which occur without conscious awareness and are therefore not easily changed. Those interpretations become shared assumptions (Schein, 1992). Routines endure based on the "logic of appropriateness and legitimacy" rather than the "logic of consequentiality or intention" (Levitt & March, 1988, p. 320). Thus, routines cannot be changed by command decision alone; instead, employees' "attention must be called to the nature and effects of the way they see their environment" (Edmondson & Bertrand, 1998, p. 29), or as Michalak (2010) put it, "Because the future is often uncertain in terms of change, people in general are not motivated to change unless there are

compelling reasons to do so" (p. 26). Time pressure increases the likelihood of maintaining routine. "Under increased constraints such as time pressure, prior knowledge gains a stronger impact on choices and can also overrule new evidence in the decision process" (Becker, 2000, p. 11). Secondly, routines economise on scarce resources - cognitive resources but in turn lead to inertia (Becker, 2000). "Culture by definition provides stability, continuity, and predictability to organisational life" (Levin & Gottlieb, 2009, p. 31). Routines tend to contribute inertia to change (Becker, 2000). Ultimately, "cultural change is difficult and time consuming" (McVeigh, 2017, Para. 7). It takes many months but often years to effect cultural change (Fajak, 2018; McCarthy, 2018).

On top of all these impediments, there are numerous sources of resistance to cultural change. Gilley et al. (2009) noted "Reasons for resistance are numerous, individual attitudes toward change, fear of the unknown, disruption of routine, conflict with current culture, fear of failure, lack of reward for change, loss of status, control, power, or security" (para. 8). Rosenberg and Mosca's (2011) review of the literature rendered 20 reasons for resistance including lack of management support, employees' lack of trust, lack of employee inclusion in a top-down process, conflict over resources, ill-conceived change goals, and poor implementation. Particularly, managers who don't appreciate the discursive nature of organisational change and continue to be rooted in organisational change as a rational model "actually become keepers of institutionalized structures and routines" (Lewis, 2017, p. 73). Factors identified that reduce resistance include employee involvement, effective leadership, good communications, and motivated management (Gilley et al., 2009). So, management has much to contend with in effecting cultural change.

Wooten and James (2005) suggested that incidents of discrimination, as in the research cases, are the result of organisations lacking routines to manage disability discrimination or that existing discriminatory routines intentionally perpetuate poor behaviour and create a barrier to learning. "Through the organizational mechanisms of encouragement and tolerance, as expressed in the policies, procedures, rules, decisions, and systems of resource and reward allocation that structure large, bureaucratic organizations, individual acts of discrimination become embedded patterns of discrimination" (Robert & Harlan, 2006, 602). Thus, discrimination becomes institutionalised; however, management practices are behaviours. Dysfunctional behaviours can be adjusted through learning and setting new routines that respond to disability discrimination and aid the integration of persons with disabilities (Wooten & James, 2005).

On the other hand, some organisations fail to adapt cultural change. The disability employment literature is replete with references of how employers avoid hiring persons with disabilities for fear of potential litigation (Domzal et al., 2008; Hernandez et al., 2008; Fraser et al., 2010; Wooten & James, 2005; Kaye et al., 2011, Panel on Labour Market Opportunities for Persons with Disabilities, 2013). Liability management is a significant aspect of managing a business. Avoiding litigation expenditure and potential liability is a form of risk management, which preserves financial resources and avoids diminishing profits or reserves. Fear of potential litigation is a common organisational behaviour

Another factor that undermines adoption of new practices is an organisation's rules being merely symbolic in that the stated policies are decoupled from the actual reality of an organisation's practices (Meyers & Rowan, 1977). "That is … organisations adopted elaborate sets of formal rules and practices to demonstrate compliance with, attentiveness to, evolving concepts of efficiency and justice within organisations, and then routinely ignored those formal

rules and practices" (Dobbin, 1994, p. 135). Decoupling rules and practices allows organisations to maintain formal structures aimed at legitimacy, while in practice they can implement on-the-ground routines that are inconsistent with the organisation's "ceremonial rules" (Meyer & Rowan, 1977). Numerous studies demonstrate that the presence of diversity and affirmative action programs are ineffective (Catilla & Bernard, 2010) or actually lead to adverse discrimination results (Dobbin et al., 2015; Kang et al., 2016). "Reforms designed to control managers evidently activate rebellion" (Dobbin et al., 2015, p. 1035). These studies measured diversity programs impact on race, and gender job inequality and segregation. Studies measuring diversity and disability were not found. Research shows that inclusion of disability as a corporate diversity strategy is rare (Ball et al., 2005; Chan et al., 2010; Donavan, 2020; Erickson et al., 2014; Gould et al., 2021; Khan et al., 2019; Phillips et al., 2016)

Organisations may immunise themselves from change. Immunisation is the recognition of new models but not implementing them and maintaining the status quo. Organisational cultural change requires that an existing organisational culture "must be denied or restricted because it is a hindrance to the organisation and a legacy from the past" (Strati, 1998, p. 1380). It necessarily means new values differ from existing assumptions or change will not occur (Hatch, 1993). Organisational resistance to incorporate persons with disabilities is well established, based on maintaining existing values and assumptions and circulates around standard beliefs, such as lack of productivity (Bengsiu & Balta, 2011; Donnelly & Joseph, 2012; Frazer et al., 20090; Fredeen et al., 2013; Gröschl, 2007; Houtenville & Kalargyrou, 2012, 2015; Kalargyrou & Volis, 2014; Schur et al.; 2005). This reluctance exists despite an emerging consensus about the positive results of creating a disability confident culture (Bengsiu & Balta, 2011; Fredeen et al., 2013; Hernandez et al., 2008; Houtenville & Kalargyrou, 2012; Kalargyrou, 2014;

Kalargyrou & Volis, 2014; Waxman, 2015, 2017). Immunisation can provide an analytical perspective from which to consider how organisations resist changing discriminatory practices.

Normative Diffusion

One of the ways organisations change is by learning from the experiences and adapting best practices from other organisations (Garvin 1993). Theorizing around inclusion of persons with disabilities is nascent, and the extent of diffusion of the disability organisational change literature (Bengsiu & Balta, 2011; Fredeen et al., 2013; Hernandez et al., 2008; Houtenville & Kalargyrou, 2012; Kalargyrou, 2014; Kalargyrou & Volis, 2014; Waxman, 2015, 2017) in the business community is unknown but likely limited. Yet, it is a literature that continues to expand both academically and in grey literature. However, the United States has more than 50 years of experience with employer affirmative action and diversity practices. Examining mechanisms of diffusion leading to normative change could guide the impact of the uptake of disability inclusion in organisations.

Dobbin et al. (2011) found that the driver in organisations to adapt legitimacy enhancing policies, is not regulatory oversight, lawsuits, or a need to enhance an existing lack of diversity in a workforce, but an organisation's corporate culture. "Corporate culture is a strong predictor, so firms that do not have a history of formalizing their commitment to new societal norms can be expected to stand back" (Dobbin et al., 2011, p. 405). Firms that have a history formal personnel policies and previous adaption of programs to mitigate work-family conflict were more likely to adapt diversity programs (Dobbin et al., 2011). However, research on the impact of the Americans with Disabilities Act (analogous to the *Ontario Human Rights Code*) on employment of persons with disabilities found evidence of reluctance to disrupt workplace culture, which affects hiring and accommodation decisions (Gould et al., 2015). Dobbin et al. (2011) found, in

addition to a corporate culture of normative adoption, that industry norms and the power of identity group were the leading predictors of adapting diversity programs. Industry adaption norms have the strongest influence on adaption of diversity programs (Dobbin et al., 2011). Firms tend to heed the preferences of important managerial factions, so organisations where managerial diversity exists are more likely to adapt diversity programs (Dobbin et al., 2011).

Organisational Climate

Organisational climate is groups of workers perceptions about their work environment. Organisational climate is defined as "a collective set of individual perceptions regarding policies, practices and procedures that an organization rewards and supports" (Spell & Arnold, 2007, p. 725). Further, it is the "shared perceptions of and the meaning attached to the policies, practices and procedures employees experience and the behaviors they observe getting rewarded and that are supported and expected" (Schneider et al., 2013, p. 362).

> Climate perceptions form as part of a sense-making process. Employees retrieve information from salient stimuli to describe and interpret their work environment and, in doing so, integrate their perceptions of unique workplace conditions and events into broader perceptions of climates. (Pugh et al., 2008, p. 1,423)

Organisational climate is the cumulative understanding of the aggregation of climates based on sharing individual perceptions of meaning ascribed to the organisation to infer an organisational climate exists (James et al., 2008 p.16). That is, climate considers employees' shared perceptions of organisational justice, organisational psychological safety, or other goals or organisational processes (Ehrhart, 2016).

Psychological Climate

Beatty et al. (2019) included diversity climate in culture. While culture and climate are interrelated, they refer to different concepts. Work climate, at the individual employee-level of analysis, is referred to as psychological climate, and it relates to employees' individual

interpretation of their work environment and its impact on individual outcomes (Parker et al., 2003). Psychological climate has been defined "as individual descriptions of organisational practices and procedures that relate to organisational influences on individual performance, satisfaction and motivation" (Baltes et al., 2009, p. 670; see also Baltes, 2001). D'Amato and Zijlstra (2008) advised, "People do not respond to the work environment directly but must first perceive and interpret their environment" (p. 35), which involves how they see the environment and the meaning to which the employee attributes the environment (James & James, 1989). "In effect the environment the individual 'knows' is a product of cognitive constructions, reflecting various forms of filtering, abstraction, generalization and interpretation" (James & Sells, 1981, p. 276). This results in descriptive analysis of the environment and may lead to valuation. Valuation is the cognitive appraisal of perceived environmental factors as they determine the employee's wellbeing based on the employee's emotional cognitions (James & James, 1989). Work behaviour is a function of the employee's personal characteristics and contextual variables. Various individual employees will react differently to organisational policies and procedures, and those policies and procedures will not equally impact all employees' behaviours (D'Amato & Zijlstra, 2008). Psychological climate is affected by employee's personal values (James & James, 1989). "Psychological climate perceptions enable an individual to interpret events, predict possible outcomes, and gauge the appropriateness of subsequent actions" (Parker et al., 2003). There are as many personal climates in an organisation as there are employees (Toprak & Karakus, 2018). Thus, psychological climate is measured at the individual level (Baltes et al., 2009; Chan, 1998; James et al., 2008; Parker et al., 2003), reflecting its idiosyncratic nature (James & Sells 1981).

Locke (1976, as cited in James, 1989 and James, 2008) applied four factors that seem to capture psychological climate in various work environments. The factors are: "(1) role stress and lack of harmony, (2) job challenge and autonomy, (3) leadership facilitation and support, and (4) work-group cooperation, friendliness, and warmth" (p. 10). These factors are predictive of employee job satisfaction (Baltes et al., 2009). They encompass job importance and job autonomy; work group pride, warmth, and cooperation; role stress and lack of harmony or trust in one's leader; empowerment of employees by leaders to meet group goals, leader facilitation of resources, guidance and problem solving; leader support in being aware of employees needs and acts; and responding with consideration for the employee's personal value (Baltes et al., 2009).

Härtel and Ashkanasy (2011) noted that employees' perception of the work environment being psychologically safe is a factor in positive work environments. They found that positive work environments are characterised by a positive organisational climate, social inclusion, and the promotion of an emotional climate that promotes human flourishing. Positive organisational climates tend to value openness, friendship, collaboration, encouragement, personal freedom, and trust. Social exclusion in this context is that some employees do not have the opportunity to build skills and knowledge required to succeed, that other employees gain (Ferris et al., 1996, as cited in Härtel & Ashkanasy, 2011). Lastly, a psychological climate that promotes human flourishing fosters positive emotions. This does not mean there are never negative emotional experiences in organisations. "Indeed, negative emotions often provide important signals to people in regard to moral dilemmas and areas where learning is required" (Härtel & Ashkanasy, 2011, p. 88). However, reacting constructively and resilience are buffered by positive emotional experiences (Härtel & Ashkanasy, 2011). Such an emotional climate would also have an absence of emotional game playing (managing emotions in an inauthentic and manipulative way for

ulterior agendas), backstabbing, uncooperativeness, and incivility. Constructive emotional management skills include providing recognition, helpfulness, courtesy, optimism, and conflict management (Härtel & Ashkanasy, 2011).

Psychological climate perceptions have a significant relationship with employees' work attitudes and wellbeing (Baltes, 2001; Baltes et al., 2003; D'Amato & Zijlstra, 2008; Parker, 2003; Parker et al., 2003). Employee wellbeing consists of affective responses, domain-specific satisfaction, life satisfaction, and workplace aggression (Diener et al., 1999, Hershcovis & Barling, 2010). One way the psychological climate is impacted is through workplace aggression (Bendi et al., 2012; Hershcovis & Barling, 2010). "Workplace aggression is defined as negative acts that are perpetrated against an organization or its members and that victims are motivated to avoid" (Hershcovis & Barling, 2010, pp. 24-25) and as behaviour that inflicts verbal, physical, or psychological harm to individuals or the organisation (Baron & Neumen, 1996). Aggression has been found to include discrimination (Niven, 2013; Wood et al., 2013). The "negative attitude against the organization may create a climate of mistrust, anxiety and uncertainty, thus generating an unfavorable psychological climate" (Bedi et al., 2012, p. 352). Workplace aggression is associated with anxiety, resentment, anger, depression, job dissatisfaction, turnover and counterproductive work behaviour and impacts job performance and organisational commitment (Bedi et al., 2012). "An employee's appraisal of climate as stressful has important repercussions on individual's well-being, thus resulting in gradual loss of emotional cognitive and personal energy" (Bedi et al., 2012, p. 353). Tepper (2000) found unfair supervisor behaviour associated with employee anxiety, depression, and emotional exhaustion.

Most typically, psychological wellbeing impacts manifest as psychological distress, depression, and emotional exhaustion (Diener et al., 2010). According to Eisele and D'Amato

(2011), “Well-being appears to be largely dependent on work-related factors, and to assess the impact of work on well-being, researchers mostly look at the negative impact of work on well-being, or rather the lack of well-being” (p. 9; see also Bates, 2001; D’amato & Zijlstra, 2008; James & James, 1989; James et al., 2008). Wright and Cropanzano (2000) noted that negative outcomes such as depression and loss of self-esteem, amongst others, are associated with “work-related dysfunctional psychological well-being” (p. 86). Researchers refer more generally to burnout as an indication of compromised well-being (Cropanzano & Wright, 2001; D’amato & Zijlstra, 2008). It is defined as a “state of physical, emotional and mental exhaustion caused by chronic job stressors” (Bedi et al., 2012, p. 351). Typically, burnout is assessed in respect to emotional exhaustion, depersonalisation, and diminished sense of personal accomplishment or depletion of emotional resources, cynicism, and diminished self-efficacy (Maslach, 1982). Burnout often involves depression and loss of self-esteem (D’amato & Zijlstra, 2008).

Parker et al. (2003) found that the relationship between the employee’s perceptions of their job and leader perceptions had the most significant effect on psychological wellbeing. Cropanzano and Wright (2001) noted that the research demonstrates an association between indicators of wellbeing and job performance. James et al. (2008) informed that, “The meta-analysis supported the relationship between psychological well-being and employee performance, with stronger of the relationships belonging to employee work attitude and psychological well-being” (p. 240). Cropanzano and Wright stated, “The available data point to a common conclusion: When happiness is operationalized as well-being, it is positively related to various measures of job performance” (p. 192). Supervisors play a significant role impacting employee wellbeing. “Because of the emotional, instrumental, informational, and social support that supervisors provide, as well as their ability to prevent certain job stressors, supervisors might

have a significant impact on employee" (Zweber et al., 2015, p. 2). Studies have shown that supervisors have a direct effect on employees' psychosocial symptoms (Johnson & Johnson, 1992; Winnubst et al., 1982). Hershcovis and Barling (2010) found that supervisors' aggressive behaviour had the greatest negative impact on employees' wellbeing relative to coworkers and outsiders.

Wood et al. (2013) advised, "As a negative act that a victim would wish to avoid, discrimination clearly falls under then definition of aggression" (p. 618). Langkamer and Erving (2008) found that discrimination and aggressive behaviour formed part of the psychological climate. Wood et al. (2013) found that discrimination by supervisors had the most significant impact on employee wellbeing relative to other workplace stakeholders.

Although not employment specific, some studies in respect to persons with disabilities have found associations between perceived discrimination and negative wellbeing. Schmitt et al.'s (2014) meta-analysis found perceived discrimination was negatively associated with wellbeing measures and that disabilities was a category were perceived discrimination was found to have a greater negative impact on wellbeing. Studies have found perceived discrimination, amongst self-reported disability, associated with higher psychological distress and more negative mental functioning, life satisfaction, and self-rated health (Alvareez-Gavez & Salvador-Caulla, 2013; Du Mont & Forte, 2016; Hackett et al., 2020; Kagan et al., 2018; Kim, 2015; Krnjack et al., 2017; Sutin et al., 2015; Temple & Kelaher, 2018; Wamala et al., 2007).

Disability Climate

Matt and Butterfield (2006) advised that a form of organisational climate includes disability climate. Disability climate is where there is a perception "that positively affects attitudes toward workers with disabilities" that "can lead to a reduction in occupational stress

experience of those workers" (Matt & Butterfield, 2006, p. 129). Wittmer and Lin (2017) described disability climate of an organisation as the extent to which an organisation includes persons with disabilities and promotes professional advancement of employees with disabilities through pro-disability technology and flexible work arrangements. Wittmer and Lin stated, "The presence of a pro-disability climate in organizations suggests that leaders take active steps in promoting diversity to make the pro-disability climate perceivable and experienced by individual organizational members" (para. 9). Luu (2019) stated that a disability inclusive work environment encompasses disability inclusive values, care for individuals with disabilities, and an absence of discrimination, and employees with disabilities can ask for and receive support from colleagues. McMahon et al. (2004) found that organisations successful in disability employment emphasised "the quantity, quality and stability of employment opportunities for workers with disabilities [which] are strongly affected by the recruitment, training, accommodation and retraining practices of the business" (p. 54) and that managers play a key role in disability inclusion (Disability Case Study Research Consortium, 2008).

Iwanaga et al. (2021) found that disability inclusion policies and procedures, disability inclusion efforts and strategies, disability inclusion preparedness, and health management policies and procedures are associated with the rate of utilisation of employees with disabilities in organisations. Disability inclusion policies and procedures included disability in their diversity and inclusion policies and procedures, stay-at-work/return to work policies and procedures, senior leadership level commitment to recruiting and hiring persons with disabilities, and internal and/or external disability inclusion resources to support their disability employment and inclusion initiative. Disability inclusion efforts and strategies entail having executives with disabilities and contracting recruitment agencies to hire employees with disabilities. Disability

inclusion preparedness may include disability training and an accommodation budget. Lastly, providing health management policies and procedures including short-term benefits aimed at retention of employees with disabilities contributes to inclusion (Iwanaga et al., 2021).

Disability climate then is employees' perceptions of policies, procedures, practices, and behaviours that impact the integration of employees with disabilities in the organisation (Matt & Butterfield, 2006). An inclusive climate is one where the individual feels valued for their uniqueness, and they have a high sense of belonging (Brewer, 1991). Gould et al. (2021) noted, "Creating a sense of belonging is a major challenge when it comes to disability inclusion. Similar to workers from other categories that experience marginalization, people with disabilities face challenges in being seen as valuable employees" (para 9). Perceptions about an organisation's inclusion climate impact the employee's level of psychological empowerment at work and their sense of organisational support (Disability Case Study Research Consortium, 2008). They also impact employees' loyalty, commitment, turnover intention, and job satisfaction (Disability Case Study Research Consortium, 2008).

Matt and Butterfield (2006) advised that the disability climate in an organisation is shaped cumulatively by multiple societal and organisational levels, from macro to micro levels: societal, peri-organisational, organisational, and work group stratus (Matt & Butterfield, 2006). Thus, influences range from the media and law to industry-level attitudes, to organisational policies and procedures, to supervisors' attitudes and coworker cooperation (Matt & Butterfield, 2006). The research cases operate at the firm level, so the analysis is at the micro range. The cases do not deal directly with broader societal structures.

Disability Climate and Disclosure

The workplace climate is also relevant to disability disclosure (CAHRS Working Group, 2014; Von Schrader et al., 2014; Wittmer & Lin, 2017). Employees with a disability want to know they are safe to disclose their disability. Von Schrader et al. (2014) found that the highest response influencing a decision to conceal a disability was fear of termination. On the other hand, seeing a coworker with a disability succeed in their workplace encouraged disclosure (Von Schrader et al., 2014). Gewurtz et al. (2009) noted that "the challenge of obtaining accommodations and the lack of tolerance for disability in the workplace deterred individuals from seeking accommodations" (p. 41). Disclosure has negatively impacted employment opportunities, promotion and training opportunities, harassment, and relationships with supervisors and coworkers (Von Schrader et al., 2014).

Employers' behaviour that results in denial of reasonable accommodations would likely have a chilling effect on any other employee who might require accommodation at a later date. Santuzzi et al. (2014) stated, "As a consequence, the high risk of stigmatization for people with invisible disabilities who disclose and receive accommodations is likely to perpetuate less disclosure among workers, hindering accommodation and integration of those workers in the workplace" (p. 213). Further, denying accommodations would impact an organisation's justice climate and would not foster a disability climate. Harlan and Robert (1998) found employers use resistance strategies to avoid accommodating employees with a disability to maintain the abled workplace norm and status quo, to protect the existing hierarchy, and to maintain management's authority to structure and control work. Harlan and Robert (1998) commented that denial of accommodations is a form of employer resistance "albeit the far end of the continuum" (p. 417).

Thus, cases of rejected accommodation requests demonstrate why employees so often withhold disclosing requests for accommodation (Baldridge & Vega, 2006). Prince (2017) commented, “Given the negative attitudes, stereotyping and ignorance surrounding invisible disabilities, there are real risks to the individual to disclose their hidden impairment” (p. 80). In addition, “a requester’s assessment regarding the likelihood of supervisory compliance is pivotal, because if compliance is perceived to be unlikely, requesters may simply choose not to make a request” (Baldridge & Vega, 2006, p. 162). This may partially account for why so many employees with disabilities are underemployed (Baldridge & Swift, 2013). Without necessary accommodations, many workers with disabilities cannot perform at their best (Baldridge & Vega, 2001, 2006), impacting management’s and coworkers’ assessment of the employee’s work abilities, and the organisation loses out on improved productivity (Baldridge & Vega, 2001).

Santuzzi et al. (2014) noted there are “psychological incentives” that may impede an employee seeking an accommodation (p. 206). Baldridge and Vega (2006) pointed out that employees with a disability make a calculus of whether the benefit of improved performance outweighs the risk of accommodation, based on the accommodation attributes (i.e., assessment of the monetary cost to the organisation, imposition on others), the social consequences of the likelihood of supervisory compliance in granting the request, the personal costs including indebtedness due to inequity, loss of freedom, threat to self-esteem, embarrassment, and perceived normative appropriateness of the request.

As a matter of law, seeking accommodations is an assertion of legal rights that should be dependent only on the reasonableness of the accommodation sought and the extent of the hardship it would pose to the employer’s business. However, as a matter of psychology, to an extent, the decision to disclose one’s disability is premised on an act of trust. Trust is the act of

putting oneself in a position of risk premised on anticipation that the trustor will not harm the trustee (Atkinson & Butcher, 2003). Atkinson and Butcher noted that "phenomenon of trust…is considered as an important component of organisational social capital" (p. 282). Trust is premised on the trustor's (employee) judgments about the trustee's (employer) motives, which underlie the trustee's intentions, both of which are hard to construe, particularly in the political environment of work and given that work relationships tend to be less interpersonally close. Thus, the act of disclosure is often more complicated than a simple assertion of rights but involves cognitive and affective elements (Atkinson & Bucher, 2003) in assessing whether such a request involves risk. Capell et al. (2016) theorised that disclosure by employees with concealable stigmas is moderated and mediated by the employee's trust in their manager and organisation. Trust of management is not only an important aspect in respect to disability climate but also plays a significant role in the organisation's climate of safety, procedural justice, and culture change initiatives.

Justice Climate

Schur et al. (2009) referred to justice climate as an aspect of corporate culture that may be significant for persons with disabilities. A corporation's justice climate is the employee's perceptions of organisational justice (Schur et al., 2009). Organisational justice consists of four dimensions: distributive, procedural, informational, and interpersonal (Scott et al., 2009). Within these dimensions, the management literature identifies conceptual rules (Scott et al., 2008). Justice rule adherence refers actions by management that meet the justice rules developed in the management literature (Scott et al., 2008). Distributive justice reflects the perceived fairness of the distribution of resources. Procedural justice entails providing employees' voice, consistency, bias suppression, accuracy, correctability, representativeness and ethics in making decisions

impacting employees. Informational justice involves providing justification and truthfulness for decisions. Interpersonal justice requires employers to treat employees with respect and propriety (Scott et al., 2008).[24] Table 2 summarises Scott et al.'s organisational justice dimensions and rules.

Table 2

Rules Represented in Justice Rule Adherence and Violation

Justice dimension	Description of what it means to adhere to the rule
Distributive Equity	Allocate outcomes (such as pay, benefits, status symbols, punishments, or intrinsic rewards) in accordance with employee inputs.
Procedural Voice	Provide employees with an opportunity to express their views and opinions during decision making.
Consistency	Use procedures that are consistent across employees and across time.
Bias suppression	Be neutral and unbiased in one's decision making.
Accuracy	Use accurate facts and information as inputs into decision-making procedures.
Correctability	Provide employees with an opportunity to appeal the decisions arrived at by procedures.
Representativeness	Take into account the concerns of relevant groups in the design and execution of procedures.
Ethicality	Uphold ethical and moral standards in the design and execution of procedures.
Informational Justification	Provide adequate explanations for decision- making outcomes and procedures.
Truthfulness	Be candid and honest in discussions of decision-making outcomes and procedures.
Interpersonal Respect	Treat employees with dignity and sincerity when interacting with them.
Propriety	Refrain from improper or prejudicial statements when interacting with employees.

[24] These rules are derived from: distributive justice (Adams, 1965; Leventhal, 1976); procedural justice (Thibaut & Walker,1975; Leventhal, 1980); and informational and interpersonal justice rules (Bies & Moag, 1986; Greenberg, 1993).

Note. (Scott et al., 2008)

The terms “justice” and “fairness” have been used by organisational justice scholars synonymously. However, some scholars have seen them as distinct concepts (Colquitt & Rondell, 2015; Goldman & Cropanzano, 2015). Justice is the perceived adherence to organisational rules, whereas fairness is perceived as the overall perception of compliance with those rules (Colquitt & Rondell, 2015; Goldman & Cropanzano, 2015).

Organisational justice is typically measured by employee responses to a self-reported scale that gauges employees’ perceptions, typically in respect to justice rule adherence (Colquitt et al., 2014). While the research cases do not have the benefit of such a scale, they do have the employees’ evidence, which provides employees’ perceptions of injustice. Granted, evidence in a hearing is couched in advocacy to prove discrimination on the balance of probabilities, which may be a form of social desirability bias in that it is aimed at impressing the adjudicator and is different from a social science inquiry in that it is not psychometrically confirmed as valid and reliable (Brashear et al., 2002; Colquitt, 2001). However, unlike self-reported responses, the employee’s evidence is subject to cross-examination to test the witness’s credibility and is considered in the context of other contemporaneous documents and witnesses’ testimony, which is a counter to advocacy’s social desirability bias. Further, the evidence is weighed by an impartial professional adjudicator. Proving evidence on the balance of probabilities is a high standard. Lastly, veracity is motivated by consequences of a possible perjury charge. While there is little incentive to lie on a survey, organisational evidence scales have little protection against false statements, no way to assess credibility of the responses, no proof that the responses meet any standard, and no consequences to the employee for a false answer.

Distributive Justice. Distributive justice deals with the distribution of valued organisational resources, such as remuneration (Heuer, 2011; Schur et al., 2009). Distributive justice encompasses the distribution of resources, such as pay and promotions (Snyder et al., 2010). Distribution has to do with the outcomes of an organisation's material decisions affecting employees. Fairness has to do with adherence to justice rules about equity and need, depending on the organisational context (Colquitt & Rondell, 2015). Equity theorists posit that resources should be expended where the greatest contribution to the organisation occurs (Adams, 1963). Where the need rule is premised on resources flowing to where they are needed, and fulfillment of the need is adjudged to be distributive fairness (Baldridge & Veiga, 2001; Colella, 2001). Colella (2001) stated:

> The appearance of being fair and considerate is often integral to one's self-identity, which, when combined with a general "norm to be kind" toward persons with disabilities, suggests that the need rule may be particularly likely to be used when the accommodation is for disability purpose. (p. 107)

Schur et al. (2005) said that coworkers who are governed by the need rule are more likely to approve of accommodations, but if the fellow employee's disability is invisible, undesirable, or seen as self-caused, the accommodation will be perceived as less warranted. Stone and Colella (1996) stated, "In addition, we believe that the acceptance of an equity value system creates a continuing organisational dilemma for managers because the equity doctrine pits the fairness of treatment for all employees against the personalized consideration of individuals' needs" (p. 373). Management plays a crucial role in sensitizing nondisabled workers by communicating those accommodations are not preferential treatment of employees with disabilities but are necessary and reasonable (Kalargyrou, 2014).

Accommodations are valued resources. Heuer (2011) commented in respect to rights afforded under human rights codes that:

> It is natural and reasonable to think about the implications of the ADA [*Americans with Disabilities Act*] in terms of its implications for distribution of valued resources including mandated accommodations and ancillary benefits that accrue to disabled workers when accommodations are implemented: the satisfaction stemming from gainful employment; the ability to perform one's assigned tasks; the maintenance of valued social relationships. (p. 209)

To an extent, the value of accommodations can be seen, in that coworkers often perceive accommodations as being distributivity unfair (Colella, 2001). Colella noted:

> [P]erceptions of distributive unfairness may occur when coworkers perceive that accommodating another increases their own inputs, especially when they do not receive a commensurate increase in rewards. Any accommodation that requires the time, energy, or resources of coworkers may be perceived as unfair. (p. 106)

Accommodations can lead to animosity amongst coworkers, particularly in equity-based workplaces (Markel & Barcley, 2009; Schur et al., 2005). However, all employees can benefit from accommodations, particularly from a workplace that is more supportive and flexible (Shure et al., 2014), have increased psychological safety and are barrier free workplace (Kalargyrou, 2014). Ironically, a significant number of accommodations are provided to nondisabled employees (Shartz et al., 2006).

The job itself is a form of distributed resources (Minton et al., 1994; Villanueva-Flores et al., 2017). Given the ramifications of termination for employees, in terms of lost wages, benefits, self-esteem and social forum, employees will scrutinise the fairness of dismissal decisions more closely (Harcourt et al., 2013). Fairness is assessed based on balance and correctness (Minton et al., 1994). Balance refers to similar responses in similar situations. If management's response to similar situations in respect to other employees is seen as not equivalent, it will be perceived as unfair (Minton et al., 1994).

Villanueva-Flores et al. (2017) stated, "Thus the perception of discrimination necessarily involves the perception of distributive injustice, when people perceive discrimination due to

being disabled, they perceive injustice when comparing themselves to their non-disabled peers" (p. 682). Employees with disabilities have historically earned less than their colleagues for the same work. To the extent that the employee is aware of lower earnings for comparable work in an organisation, they will perceive injustice. Further, presumably, employees with a disability compare their treatment to the treatment of other employees when they request accommodations. They are looking to see whether those employees' requests for accommodations result in termination.

Procedural Justice. Procedural justice has to do with the employee's perception of fairness in a process used to make decisions that impacts the employee (Snyder et al., 2010). Heuer (2011) advised, "There are various suggestions from social psychological theory and research that non-disabled individuals will perceive disabled individuals as less deserving, so that they might judge it fair to grant them fewer procedural considerations than would be granted to others" (p. 216). Employees generally perceive fairness with the decision process if they can provide input into the decision (Balser & Harris, 2008; Heuer, 2011) or process control (Colquitt & Rondell, 2015), regardless of the outcome (Heuer, 2011). "A number of studies …have presented evidence that procedures that give the disputing parties a clear opportunity to present their positions were viewed as fairer by them… Conversely, procedures that deny voice were viewed as procedurally unfair" (Goldman, 2001, p. 365). The process applied to accommodation requests has been shown to be equally and sometimes more important than the outcome (Heuer, 2011). Heuer noted:

> …one's treatment was postulated to carry important symbolic or relational content: being asked for one's input influenced judgments of procedural fairness because it communicated that the decision maker respected the decision recipient as a valued member of one's valued group. (p. 208)

Yongblood et al. (1992) stated of the processes in the cases they examined that "the complainants equate … voice process to mute procedures, which served only to add the insult of being denied procedural justice to the injury of job loss" (p. 300). Employee input cannot be underestimated from an organisational psychology perspective and from an employee perceiving that they were afforded a just process. The Supreme Court has acknowledged the importance of the procedural element. The Supreme Court stated:

> Notwithstanding the overlap between the two inquiries, it may often be useful as a practical matter to consider separately, first, the procedure, if any, which was adopted to assess the issue of accommodation and, second, the substantive content of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard. [British Columbia (Public Service Employee Relations Commission) v. BCGSEU, para. 66, per. McLachlin J.)

Moreover, in respect to accommodation requests, human rights law requires that employees have input in the accommodation process. The Supreme Court called the search for accommodation "a multi-party inquiry", and the employee has responsibilities in finding the appropriate accommodation (*Central Okanagan School District No. 23 v. Renaud* [1992] 2 SCR 970, per. Sopinka J.). That is, the employer is required to allow the employee input into the accommodation solution.

Other decision-making procedures, in addition to allowing employee voice, are consistency, accuracy of information, bias suppression, correctability — that is appealablity (Colquit & Zipay, 2015), decision control—that is, the procedures influence the outcome—and representativeness in considering subgroups and ethics (Colquitt & Rondell, 2015). The extent of the employee's perception of fair process may impact the employee's perception of the organisation's beneficence, which, in turn, may impact the employee's satisfaction with the employer and the job and thus, impact the employee's loyalty and commitment (Heuer 2011;

Snyder et al., 2008). Procedural justice also has an impact on the employee's sense of belonging, inclusion, and value (Heuer, 2011).

Disability accommodation is distinct from most other human rights obligations in "that the protected class must be determined on a case-by-case basis" (Heuer, 2011, p. 218), which exposes employees with disabilities to potential unjust results. An American study found that persons with disabilities report experiencing greater amounts of procedural injustice than nondisabled employees (Snyder et al., 2010). "However, the procedural justice research has shown that the fairness of the procedures employed to respond to accommodation requests might be equally, or in some circumstances even more important than distributional concerns in shaping the satisfaction of disabled workers" (Heuer, 2011, p. 209). It is particularly important for employees requesting an accommodation to have an opportunity to participate in determining the accommodation to be granted. The employee will know more about their condition and the required accommodation than the employer. In fact, as mentioned earlier, in Canadian law, there is an expectation that employees will participate in the process.

Interpersonal Justice. Several studies have found manager bullying and ill of treatment of employees with a disability who requested accommodations (Fevre et al., 2013, Foster, 2007). Interpersonal justice deals with whether employees are treated with dignity, respect, (Balser & Harris, 2008; Schur et al., 2009), and propriety (Colquitt & Rondell, 2015, Colquitt & Zipay, 2015). Like all employees, fairness matters to employees with disabilities. It connotes the way one is dealt with by one's supervisor and whether the interactions were dignified (Balser & Harris, 2008). Tyler and Bies (1990) suggested that people not only consider procedural fairness, but in addition, "people focus on how decision makers conduct themselves during the enactment of decision-making procedures" (Tyler & Blies, 1990, p. 78). People are concerned with the

quality of interpersonal treatment regardless of the outcome of the decision. “Both winners and losers reacted negatively too poor interpersonal treatment” (Tyler & Blies, 1990, p. 82). Unlike other aspects of justice, which are based on comparative justice, interactional justice is based on the noncomparative principals of truth and human dignity (Bies, 2015). Truth violations include deception and derogatory judgments, while dignity violations include disrespect, invasion of privacy, and exposure to personal danger (Bies, 2015).

Organisational Justice and Discrimination Claims. Stone-Romero and Stone (2005) argued there is a nexus between discrimination and organisational injustice. Research has shown that there is a link between employee perceptions of unfair procedural and distributive justice practices and employment discrimination legal claims (Goldman, 2001). Similarly, Lind et al. (2000) found that employees who believed they were treated unfairly and insensitively at termination were much more likely to file a wrongful termination case. Other research has found that procedural injustice is the primary reason given for claiming (Bies & Tyler, 1993; Yongblood et al., 1992).

Theories of Management’s Negative Justice Behaviour

Scott et al. (2009) proffered that managers’ negative justice behaviour stems from both cognitive and affect motives. Negative justice behaviour is a violation of the rules under one of the four dimensions of organisational justice (distributive, procedural, informational, and interpersonal; Scott et al., 2009). The rules were outlined in Table 2. Cognitive acts are controlled and premeditated with intent to gain some beneficial outcome, whereas affect is impulsive and automatic and the result of the managers’ affective states. Scott et al. (2009) identified three cognitive goals that motivate managers’ justice adherence or violation —

affecting employee compliance, creating, and maintaining desired identities, and belief in a just world.

Effecting Employee Compliance. The first of these goals is effecting employee compliance—that is, to maintain control of their environment (Scott et al., 2009). Scott et al. suggested that "managers adhere to and violate rules in an attempt to control their subordinates" (p. 659). Based on social exchange theory (Blau, 1964), adherence to justice rules should be reciprocated by employees' positive behaviour. Some managers, however, "may believe violating justice rules is the most effective way to influence employees" (Scott et al., 2009, p. 10). Scott et al. (2009) suggested these managers may act this way, for example, to motivate employee productivity or to send a message.

However, use of injustice may also have a detrimental effect on other employees. "Through this mechanism, injustices may spread ill will throughout a workgroup" because people care about ethical behaviour and are stressed even if they are only witnesses and not personally effected (Cropanzano et al., 2007, p. 36).

Identity Maintenance. The second motivation for adhering to or violating justice rules is identity maintenance—that is, creating and maintaining a desired identity (Scott et al., 2009).

> Justice rule adherence may be used proactively by managers to build a reputation of being a good boss. Alternatively, it may be a reaction to a situation in which the manager's moral identity is called into question, prompting the manager to engage in self-protective actions. (Scott et al., 2009, p. 759)

While employers often prefer to cultivate an image of being fair, others prefer to be seen as tough as a way to obtain respect and to enhance credibility (Scott et al., 2009).

Managers may be motivated to violate justice rules in response to threats or provocations (Scott et al., 2009). Often, "threats to one's self-concept motivate biased behavior and a general negativity toward others" (Scott et al., 2009, p. 760). Managers may proactively violate justice

rules to intimidate, demonstrate power, obtain respect, and support the credibility of future threats (Scott et al., 2009).

Maintaining Just World Hypothesis. A compelling cognitive explanation for manager justice violations is the just world hypothesis[25] (Lerner, 1980). This theory is premised on the belief that there is a just world. Lerner (1980) described a just world as one where people get what they deserve and deserve what they get. That is good things happen to good people, and negative consequences occur to people who deserve bad outcomes. "These assumptions have a functional component which is tied to an image of a manageable and predictable world" (Lerner, 1980, p. 9). This belief allows people to conceive of their social world as being stable and orderly (Dalbert & Donat, 2015) and therefore provides adaptive functions (Dalbert, 2009). When they are confronted with threats to their belief in a just world, they employ strategies to defend their belief (Lerner, 1980). Dalbert (2009) stated, "People confronted with injustices that are difficult to redress in reality may try to restore justice cognitively by blaming the victim or justifying the status quo" (p. 288), as well as anti-social tendencies and norm-breaking behaviours (Wenzel et al., 2017).

Belief in a just world suggests that innocent victims may be construed as less deserving and blameworthy for their perceived negative fate. Lerner (1980) suggested that individuals socially construct people to conform to their view of a just world. Belief in a just world is associated with attributing blame to disadvantaged groups of people (Bègue & Bastounis, 2003; Sutton & Douglas, 2005). It may be that the employers in the research cases socially constructed these employees. "Under certain circumstances, people who become aware of that person's fate will construe events, including the personal attributes of the victim, so the victim appears to

[25] The just world concept is referred to by authors both as a hypothesis and a theory seemingly interchangeably and similarly both terms are used here.

"deserve" his suffering" (Lerner, 1980, p. 12). "A long tradition of just-world research has compellingly demonstrated that people often reinterpret their experiences of people and events to sustain a commitment to justice and deserving" (Callan & Ellard, 2010, p. 54). Callan and Ellard concluded:

> People find justice in daily life through their construal of events and through their actions… Although we have no doubt that our participants had as firm a grasp on conventional naturalistic understandings of cause and effect as anyone else, we also found that they were willing to construe cause and effect in nonnaturalistic but justice-sustaining terms. (pp. 71-72)

Research indicates that the belief in a just world response may occur both explicitly and implicitly (Hafer & Bégue, 2005; Modesto & Pilati, 2017). Lerner (2003) referred to a "preconscious occupation with justice-related cognitions" and "automatic intuitive response" to injustice (p. 395), as well as explicit responses. Dalbert (2011) concluded, "Justice motive theory (Dalbert, 2001) thus interprets the belief in a just world as indicating an implicit justice motive that operates on an unconscious level and can be expected to explain intuitive reactions to injustice better than conscious reactions" (p. 36; see also Dalbert & Donat, 2015). Modeso and Pilati's (2015) findings are consistent with belief in a just world not being entirely conscious. Thus, a belief in a just world defence does not necessarily occur at a conscious level (Dalbert, 2009; Dalbert & Donat, 2015; Rüsch et al., 2010).

Victim Blaming. One mechanism of maintaining a just world belief is victim blaming. A way of defending a just world is by attributing the victim's fate to their behaviour, reasoning that the victim inflicted their state of affairs upon themselves (Dalbert, 2009; Dalbert & Donat, 2015; Hafer & Sutton, 2016; Sutton & , 2007). Lerner (1980) suggested that innocent victims may be construed as less deserving and blameworthy for their perceived negative fate. "Under certain circumstances, people who become aware of that person's fate will construe events, including

the personal attributes of the victim, so the victim appears to 'deserve' his suffering" (Lerner, 1980, p. 12). "A long tradition of just world research has compellingly demonstrated that people often reinterpret their experiences of people and events to sustain a commitment to justice and deserving" (Callan & Ellard, 2010, p. 54). Callan and Ellard concluded from their research:

> People find justice in daily life through their construal of events and through their actions… Although we have no doubt that our participants had as firm a grasp on conventional naturalistic understandings of cause and effect as anyone else, we also found that they were willing to construe cause and effect in nonnaturalistic but justice-sustaining terms. (pp. 71-72)

Research has also shown that belief in a just world for others (as opposed to self) correlates with attribution of blame to disadvantaged groups of people (Bègue & Bastounis, 2003; Sutton & Douglas, 2005). In other words, prejudice and harsh social attitudes towards lower status groups is justified on the premise that these people are to blame for their status and deserve a poor outcome. (Bègue & Bastounis, 2003).

Belief in a just world translates to blaming a person with a disability for having a disability. "Research generally shows that a stronger BJW is related to blaming victims for their negative outcomes, as well as to negatively evaluating victims" (Hafer & Sutton, 2016, p. 149). Specifically, in respect to disability, Furnham (1995) concluded:

> Presumably the fact that some people with disabilities are born disabled makes those with a just world beliefs feel threatened. Unless one can 'blame' people with disability for their plight by concepts like original sin or wickedness in a previous life (both of which are relatively rare), the fact that some people appear to be randomly born disabled must fundamentally threaten just world beliefs. (p. 581)

Boehm and Dwertmann (2014) stated, "persons with disabilities could be blamed for having a disability and could be perceived as deserving their health challenges.... Moreover, negative characteristics might be attributed to persons with disabilities to rationalize their circumstances as justified" (p. 6). Bizer et al. (2012) stated, "If high-BJW individuals tend to blame victims, it

would stand to reason that high-BJW individuals would blame the mentally ill in the same way for their disorders" (p. 429). Disability is typically perceived as negative and under the just world belief, a person with a disability is deserving of negative events (Dunn, 2010). "To maintain a consistent world view and to preserve their place in it, nondisabled people must devalue, even derogate, people with disabilities" (Dunn, 2010, p. 382). Hafer (2000) noted, "...victims presumably threaten the belief in a just world, because they provide evidence that people may not reap their just desert" (p. 171). Disability may be such an example. Nario-Redmond (2020) stated, "The idea is if negative outcomes like disability can be blamed on someone's own negligence, as long as I am not negligent, or don't make bad decisions, such things can't happen to me" (p. 90). Research has also found the persons with a belief in a just world blame persons with mental illness for their condition (Bizer et al., 2012; Rüsch et al., 2010). Some managers "need to believe in a just world motivates individuals to rectify what they perceive to be offensive, norm-violating behaviour by others", which may motivate justice rule violations (Scott et al., 2009, p. 760). This belief in a just world may lead to retributive justice—that is, retribution to restore the manager's world view (Scott et al., 2009).

Derogation. Another way individuals rebalance their belief in a just world is to derogate the character of the victim on the premise that their fate—in this case their disability—is a deserving penalty for a bad character (Dalbert, 2009; Dalbert & Donat, 2015). "Disdaining the disadvantaged means pretending less worthiness" (Dalbert, Schmitt & Montada, 1985, p. 6). Derogation is the act of disparaging or belittling the person. "Assessment of the individual's character is adjusted, so the individual's fate seems more deserving" (Hafer & Sutton, 2016, p. 145). Hafer (2000) suggested that derogation abrogates the need to provide restitution if the victim is perceived as deserving of this treatment. Derogation of persons with disabilities has

been found in a handful of studies in respect to AIDS (Furnham & Proctor, 1992) and physical disabilities (Gruman & Sloan, 1983; Keller & Siegrist, 2010)[26].

Derogation as Dirty Work. Hughes (1958, 1962) coined the term "dirty work" to convey the stigma of work that is disgusting. Work "may be dirty in one of several ways. It may be simply physically disgusting. It may be a symbol of derogation, something that wounds one's dignity" (Hughes, 1958, p. 319). Ashforth and Kreiner (1999) described dirty work as work that people react to with "visceral repugnancy" (p. 415). People who do dirty work tend to be tainted as dirty themselves (Holmqvist, 2009). Ashforth and Kreiner (1999) defined physical taint as work that is associated with garbage, effluent, or death or that involves dangerous or noxious work conditions. Holmqvist (2009) concluded:

> By accepting the social role of 'disabled' people may become 'productive actor', carrying out assignments that are seen as too unpleasant, dangerous, boring etc. by the able, strong and successful, thus reproducing the familiar norm of disabled people as less capable citizens. (p. 880)

Dirty work is therefore a social construct, derived by what people impute to the work and the people doing the work (Ashforth & Kreiner, 1999; Holmqvist, 2009).

Denial. Lerner (1980) also identified denial as a strategy to maintain a justice world perspective. Denial as a strategy entails sustaining one's justice perspective by ignoring contrary evidence (Hafer & Sutton, 2016). Bardon (2019) described denial as involving "the emotionally motivated rejection (or embrace) of a factual claim in the face of strong evidence to the contrary" (pp. 1-2). Denial requires motivated cognition. "Motivated reasoning refers to the tendency of people to unconsciously process information— including empirical data, oral and written arguments, and even their own brute sensory perceptions — to promote goals or interests

[26] In addition, there is literature demonstrating discursive construction of employees with disabilities in the workplace (Jammaers et al., 2016; see also Dobusch, 2017; Foster & Wass, 2013; Holmqvist et al., 2013; Mik-Meyer, 2016, 2017; Zanoni, 2011).

extrinsic to the decision-making task at hand" (Kahan, 2011, p. 7). "The denier is exhibiting a kind of emotional self-protective self-deception" (Bardon, 2019, p. 4). This self-deception is an implicit psychological process that rationalises, reinterprets, and distorts unwelcome information so as to diminish its impact (Wilson, 2002). Cognitive dissonance is a state of mind that occurs when one is confronted with information that does not agree with one's beliefs (Bardon, 2019). Dissonance is the conflict that arises when there is discrepancy between two cognitions. Festinger (1957) theorised:

> The existence of dissonance, being psychologically uncomfortable, will motivate the person to try to reduce the dissonance and achieve consonance" and "When dissonance is present, in addition to trying to reduce it, the person will actively avoid situations and information which will likely increase the dissonance. (p. 3)

The presence of dissonant information is disruptive, leading to an unconscious effort to relieve the anxiety by discounting or dismissing the information that disagrees with current beliefs (Bardon, 2019). Gosling et al. (2006) found that denial of responsibility is a mode of dissonance reduction "through a mechanism of disengagement from one's own behaviour" (p. 730).

Denial may be one of the most cogent strategies, as it doesn't require reality distortion (Hafer & Sutton, 2016). However, it is also one of the least examined strategies (Hafer & Sutton, 2016)[27]. No study on denial and exposure to disability is known, but it seems plausible that that disability may cause an irresolvable injury to belief in a justice world for some that could lead to denial. While there is no disability specific denial literatur, the more general literature on denial of responsibility for disadvantaged groups is informative. Schwartz and Howard (1980) noted that denial of responsibility counters one's sense of moral obligation, which undermines the pull

[27] Denial has been shown to be an effective coping strategy for exposure to trauma of political violence of the Norther Ireland (Binks & Ferguson, 2007; Cairns & Wilson 1989) and the Mumbai terrorist attacks (Ferguson & Kamble, 2012) in dealing with "situations that are irresolvable" (Binks & Ferguson, 2007, p. 13).

of internalised norms and values to help. “Denial of responsibility is a defensive reaction following an act that one does not want to be accountable for” (Gosling et al., 2006, p. 723). Dalbert et al. (1985) found that it is distressing when more privileged people are confronted with the disadvantaged. One possible way of defensively coping with the resulting guilt is to disdain the underprivileged to restore psychological justice, which serves as reason to deny responsibility for the underprivileged. “The more a person tends to deny responsibility for the underprivileged and the more he/she simultaneously believes to live in a just world, the more he/she will tend to disdain the disadvantaged” (Dalbert et al.,1995, p. 21). Montada et al. (1986) also found similar correlation to responsibility denial—a belief in a just world and existential guilt. Dalbert (2001) argued that denial of responsibility preserves one’s belief in a just society. “RD [responsibility denial] arguments allow people to refuse responsibilities for others without doubting their world view and probably their self-concept as a person” (Montada, 2001, p. 87) and that denying responsibility (amongst other justifications) is associated with prejudice towards and blaming the poor.

Denial: Willful Ignorance. DeNicola (2017) said, “A person is commonly called willfully ignorant about a matter when he persistently ignores the topic despite its likely salience and even resists learning about it or assimilating facts that bear on it” (p. 84). According to Bardon (2019):

> A conscious, *willful* blindness to the truth would seem paradoxical: This implies simultaneously knowing and not knowing the truth. The concept of motivated cognition suggests a process by which evidence known to undermine a preferred result is ignored or discounted, the intention of producing a false, or at least unwarranted, belief. (p. 14)

Rather, self-deception results from unconscious bias in assessing evidence (Bardon, 2019).

One of the strategic reasons for avoiding information is to eschew moral responsibility by ignoring knowledge of one’s actions and how those actions affect other people—thus avoiding cognitive dissidence (Hertwig & Engle, 2016). Hertwig and Engle (2016) referred to this as

"epistemological abstinence" (p. 360). Willfully ignorant people resist or discredit information that contradicts their prejudice (DeNicola, 2017). Montada (2001) stated, "The attribution of and refusal to accept responsibility are often personal or social constructions and frequently, they are 'negotiated'" (p. 88). Similarly, DeNicola (2017) referred to willful ignorance as "constructed ignorance". Ignorance may be deliberately constructed (DeNicola, 2017) to eschew legal liability and moral blame (Wieland, 2019).

Physical Avoidance. Physical avoidance of injustice is another stratagem (Ellard, et al. 2016; Hafer & Bègue, 2005; Hafer & Gosse, 2009; Hafer & Rubel, 2015; Lerner, 1980) in managing a belief in a just world. Lerner (1980) posited that a way to deal with threats to one's belief in a just world is to avoid exposure to the sources of injustice (Hafer & Gosse, 2009). This entails the physical avoidance of injustices and the physical withdrawal from threats to justice when encountered (Hafer & Bègue, 2005)—that is, the physical avoidance of victims of injustice (Hafer & Rubel, 2015). Pancer (1988) found persons with a high belief in a just world had better recall with the low salience appeal than the high salience (graphic) appeal for donations to a children's charity. "This result is consistent with the notion that people with a strong belief in a just world will avoid information that threatens their beliefs" (Pancer, 1988, p. 138). A number of studies attest to the tendency to physically avoid contact with persons with physical disabilities (Bowan, 1987; Mills et al., 1984; Park et al., 2003; Kleck et al., 1966; Snyder et al., 1979; Thompson, 1982), AIDS victims (Connors & Heaven, 1990), people with mental health issues (Adewuya & Makanjuola, 2005; Brockelman et al., 2002; Corrigan et al., 2001; Jorm, 2009; Lauber et al., 2004; Marie & Miles, 2007; Martin et al., 2007) and people with intellectual disabilities (Wilson & Scior, 2014). Follmer and Jones (2017) found specifically in the employment context, employees with anxiety, bipolar, and depression experienced social

distancing. We know that lack of social inclusion of employees with disabilities has been a persistent barrier to success of persons with disabilities at work (Colella, 1994; Hagner et al., 2014; Kullkarni & Legnick-Hall, 2011 & 2014; Nelissen et al., 2015; Schur et al., 2005; Stone & Colella, 1996; Wehman, 2003).

Social Construction and Just World Belief. The perception of a threat to just beliefs is a psychological mechanism that triggers degrading deservedness, seeking physical avoidance, and blaming the victim for their behaviour or character. There is a synergy between just world belief and the social construction of stigma (Major & O'Brien, 2005; Stangor & Crandall, 2000). Stangor and Crandall (2000) argued that stigma is socially constructed in response to a threat. Stangor and Crandall (2000) proposed that "stigma develops out of an initial, universally held motivation to avoid danger, followed by (often exaggerated) perception of characteristics that promote threat, and accompanied by social sharing of those perceptions with others" (pp. 62-63). Threats can be real or symbolic, including threats to health, physical features that evoke aversion, and threat to belief in a just world (Stangor & Crandall, 2000).

Compensation. Just world theory maintains, where possible, a just world will be restored, usually by compensating the victim, and only when that is not possible people will defend their belief cognitively (Hafer & Rubel, 2015; Lerner & Simmons, 1966). Shotland and Stebbins (1983) found that help is more forthcoming in higher states of emergency, with lower cost of helping. Shotland and Stebbins found one of the factors bystanders consider when calculating the cost of helping is the time that would be lost. Pancer (1988) stated, "other demands are present that tend to inhibit helping" (p. 133). "Helping invariably involves costs in time (Shotland & Stebbins, 1983), money (Dovidio, 1982), or effort" (Pancer, 1988, p. 133). Hafer and Gosse (2009) stated, "People might

often prefer the just-world preservation strategy that requires the least effort, whether that effort involves psychological resources (e.g., cognition) or nonpsychological resources (e.g., time, physical energy, or material assets)" (p. 83).

Interestingly, the law requires employers to help first (accommodate) and compensate as a last resort (just severance) in the event the employee cannot be helped by providing reasonably accommodation. It may be that employers view helping the employee by providing accommodation will result in too high a cost in time and effort.

Affect

Scott et al. (2009) proffered that in addition to the cognitive reasons discussed above, managers may violate justice rules in response to affect. Affect encompasses mood and emotion (Fisher, 2000). This suggests that managers may sometimes violate justice rules automatically (Scott et al., 2009; Stone-Romero & Stone, 2007). Stone-Romero and Stone advised, "Many seminal works (Goffman, 1963; Jones et al., 1984) argue that stigmas often evoke strong, negative affective and/or emotional responses in others. Not surprisingly, the same responses may have profound effects on human resource management (HRM) processes and practices" (p. 119). Managers who are stimulated to negative affect are more likely to treat subordinates who trigger the affect unjustly, antisocially, or discriminatorily (Paddock, 2017; Scott et al., 2009).

Both Hughes (2012) and Goodley et al. (2018) discussed how disabilities are "necessarily affective: it has the potential to affect and be affected" (Goodley et al., 2018, p. 212). Goodley et al. (2018) and Hughes (2012) also adverted to disability evoking fear and disgust in nondisabled individuals. They both argued that this stems from an emotional reaction to disability as symbolizing lack (pain, suffering, and death). Hughes (2012) denoted that disability challenges "the stable view of embodied self that is characteristic of non-disabled identity" (p. 69) leading to the emotional, physical, and social distancing from the person with a disability. This affect

response is consistent with the evolutionary psychology perspective of stigma (Kurzban & Leary, 2001).

While the evolutionary model might explain managers' dismissal of employees seeking accommodations, according to Stone-Romero and Stone (2007), so might several other theories of stigma. The point being that theories led to the conclusion that disability can be affect evoking in third parties.

The literature on disability, employment, and affect is limited. Stone and Colella's (1996) in their model identified several possible factors that could influence affective reaction to employees with disabilities. There are two articles discussing a scale for assessing affect response towards employees with disabilities (Copeland et al., 2010; Popovich et al., 2003), and a third article discussing coworkers response to employees with disabilities (Scherbaum et al., 2005).

Other Psychological Explanations of Disability

There are other psychological theories that provide explanations of prejudice and discrimination (Dion, 2003) and a variety of psychological theories have been applied to disability to explain bias in respect to persons with disabilities (Chan et al., 2009; Hirshberger et al., 2005; Livneh, 1982; Żołkowska, 2015). On the other hand, theories of prejudice identified by Dion (2003) do not seem to have purchase in respect to disability. No literature on disability in relation to authoritarian personality theories (based on exposure to authoritarian parenting practices) is apparent. Similarly, research on belief congruence theory (in which "individuals cognitively organize their psychological world" to be congruent with their beliefs) and disability could be found.

Aversive discrimination is an important concept and is relevant in respect to disability (Deal, 2006; Friedman, 2018; VanPuymbrouck et al., 2020). However, blatant failure to accommodate or outright termination of an employee who ask for accommodation is not subtle.

Social dominance theorists proffer that societies are organised based on hierarchies of social identity groups, with at least one group that exerts dominance over other groups. The dominant group enjoy the greatest social value in society (unearned privilege) and there is at least one subordinate group that experiences significant negative social value (Kattari, 2015; Sidanius et al., 1999). "In the context of ableism and able-bodied privilege, able-bodied people are the dominant group, while people with disabilities are the subordinate group" (Kattari, 2015, p. 376). Social dominance orientation is the degree to which one wishes their group to be dominant (Brandes & Crowson 2009); those with higher social dominance orientation are more apt to use moral and intellectual justifications for group inequality (Brandes & Crowson, 2009). No literature has been identified on social dominance theory, disability, and employment. However, Brandes and Crowson (2009) found an association amongst preservice teachers and the adaption of negative attitudes towards students with disabilities and their inclusion in the classroom. Social dominance theory may explain some of the employers' discrimination; however, to be more conclusive employers would need be tested applying the Social Dominance Orientation (SDO) Scale (Pratto et al., 1994).

Katz (1981), founder of ambivalent-amplification theory, posited that people hold simultaneously both positive (sympathy) and negative (aversion) attitudes towards persons with physical disabilities, which cause psychological tension that amplifies reactions to persons with disabilities. This tension causes their reaction to be either more positive or more negative towards persons with disabilities depending on whether the behaviour of the person with a

disability is construed as favourable or unfavourable (Dovidio et al., 2011; Dunn, 2010; Hishberger et al., 2005). Livneh (1988) stated, “People with disabilities are construed as objects of ambivalence, triggering momentary fluctuating favorable and unfavorable feelings of compassion and sympathy but also aversion and distaste” (p. 37).

Disability can also affect existential anxiety (Nario-Redmond 2020; Stone & Colella, 1996). “Existential anxiety describes the fear that persons experience as another person’s disability reminds them of their own vulnerability” (Boehm & Dwertmann, 2014, p. 6). Several theories account for this anxiety response, including negative halo effect or spread phenomenon, threats to one’s body image, and guilt by association, amongst others (Chan et al., 2009; Hirschberger et al., 2005; Livneh, 1982; Nario-Redmond, 2020).

Disability can heighten fear of mortality and disease (evolutionary psychology – avoidance of disability and disease as threatening survival [Nario-Redmond 2020]), which is consistent with terror management theory (Greenberg et al., 1997). Many studies have addressed the association between disability and death and found that there are both negative associations (Ben-Naim et al. 2008; Hirschberger et al., 2005; Hirschberger et al., 2008; Sher et al., 2017) and prosocial associations (Taubman-Ben-Ari et al., 2011). Sher et al. (2017) found mortality salience in the workplace associated with disability. They stated:

> If these dimensions are associated with death and research has long established that death-related thinking is likely to induce harsh judgment and stereotypic thinking, then one might assume that the discriminatory outcomes affect people with disabilities based on their standing on several key dimensions. With an unfortunate cocktail of death-related dimensionality, people with disabilities may be more subject to harmful outcomes that have little direct relationship with their actual disability type designation. (p. 47)

Livneh (1982, 1988) pointed out that other factors that may contribute to negative attitudes towards persons with disabilities including anxiety resulting from unstructured

encounters, demographic and personality traits, hierarchical views towards different types of disabilities, and moral beliefs in relation to disability.

While social dominance theory, ambivalent-amplification, and existential anxiety are equally relevant and possible causes of employer behaviour towards employees with disabilities, it was hard to discern these unseen psychological states from the cases. While belief in a just world is also difficult to discern, it provides useful tools in its related behaviours—victim blaming, derogation, physical avoidance, denial, and willful ignorance.

Deservedness

As will be seen in chapters seven and eight, a theme emerges in respect to employers' views on deservedness of accommodations and employment of employees with disabilities. Deservingness has been defined as the "state of compatibility in valance between a target's actions or traits and his or her outcomes" (Olson et al., 2010, p. 127). Lucas (1995) stated, "Deserving is tied to doing" (p. 125). Feather (2015) defined deservingness as earned outcomes following a person's actions—that is, deservedness generally arises from doing something that one is viewed as worthy of rewarded or punishment. Negative outcomes that result from one's positive actions are perceived as undeserving (Feather, 2015).

However, Lerner et al. (1976) also identified that personal attributes rather than performance or behaviour can result in deservedness assessments. Undesirable personal attributes can lead to assessing a person as less deserving. Heuer (2011) noted that social psychology research suggests that disabled individuals will be perceived as less deserving. "Disabled individuals might pose a threat to the just world beliefs of non-disabled individuals, which, in turn, might be sufficient to engage defensive mechanisms culminating in derogation and potentially lowered beliefs that disabled individuals deserve accommodations" (Heuer, 2011,

p. 217). Persons with disabilities are often perceived as having a deficit, and that perception may lead to attributing other negative qualities to the person with a disability and inferring other complications and liabilities (Dunn, 2014; Dunn & Elliot, 2005). Wright (1983) and Livneh (1982) called this phenomenon "spread"; others refer to it as negative halo effect or negative attributions (Colella et al., 1997). Wright (1983) stated:

> Physique (as well as other salient, personal-social characteristics) evokes a wide variety of impressions and feelings about people. Not only are specific characteristics of the person inferred from physique, but the person as a whole is sometimes evaluated accordingly. The problem becomes especially harmful when global devaluation takes place so that the person *as a person* is felt to be less worthy, less valuable, less desirable. (p. 34)

Disability has had a long and enduring relationship to stigma (Goffman, 1963). Negative attributions associated with disability can lead to viewing persons with disabilities as less deserving.

It has been recognised that the social construction of various groups influences policy agendas, creation of policy instruments and the rationale used to support them (Shnieder & Ingram, 1993). The theory of social construction of deservedness of certain groups of people is commonly reflected in creation of public policy (Ingram & Schneider, 2005; Pierce et al., 2014; Wilkins & Wenger, 2014). Skrentny (1996) wrote, in the American context:

> The key idea in the cultural logic of employment preferences is the social construction of desert or worthiness. Some groups…have been construed as being more deserving than others. And exactly who is considered deserving can be shown to be highly contingent – it is based on historically constructed meanings and little else. (p. 37)

It is not much different in Canada. Ingram and Wenger (2005) stated, "Unless challenged by social movements and countervailing public policies, social constructions of deservedness and entitlement result in an 'other'—an underclass or marginalized and disadvantaged people who are widely viewed as undeserving and incapable" (p. 2). It will be argued that deservedness also

applies on a micro interpersonal scale, in that some employers socially construct employees with disabilities as being less deserving.

Contact Theory

Allport (1954) theorised in his intergroup contact hypothesis that contact between different groups will lead to attitude change, diminish intergroup prejudice, and improve intergroup harmony. Pettigrew and Tropp (2006) stated, "Numerous reviews show general support for contact theory, suggesting that intergroup contact typically reduces intergroup prejudice" (p. 752). Allport (1954) suggested that there were four conditions that create optimal contact. Being that both parties have equal status and cooperate for common goals, the interaction needs to be meaningful, not just typical, and fosters intergroup cooperation supported by authority, the latter of which creates norms of acceptance (Chan et al., 2009; Harpur, 2014; McKay, 2018; Novak & Rogan, 2010; Pettigrew & Tropp, 2006; Vezzali & Capozza, 2011). However, Pettigrew and Tropp (2006) found that the presence of all "Allport's conditions are not essential for intergroup contact to achieve positive outcomes" (p. 766). This may mean the unequal status between managers and employees may be of less consequence. Several authors argue the mere exposure effect, that a small dose of exposure can affect attitude (Bornstein, 1989; Harmone-Jones & Allan, 2001; Pettigrew et al., 2011, Zajonc, 1968). Zajonc stated:

> Mere repeated exposure of the individual to a stimulus is a sufficient condition for the enhancement of his attitude toward the stimuli. By 'mere exposure' is meant a condition which just makes the given stimulus accessible to the individual's perception. (p. 1)

Contact with persons with disabilities is posited as a mitigating factor. Some studies noted that prior positive contact with persons with disabilities leads to more positive views of persons with disabilities by employers and improves the likelihood of their employment (Hernandez et al., 2000; Lengnick-Hall et al., 2001; Schur et al., 2005; Stone & Colella, 1996)

and increases employers' acceptance of the duty to accommodate (Lengnick-Hall et al., 2001). A similar outcome was found in a study of brief direct contact with wheelchair users (Galli et al., 2015). On the other hand, Kallman (2017) found that brief video exposure of positive disability exemplars did not improve implicit bias.

Trust

Trust is an essential element of organisational behaviour that arises in many areas' organisational behaviour. Trust is a component of high quality LMX (Cropanzano & Mitchell, 2005) and low quality LMX results in less trust (Chekwa, 2018). Human resource policies that improve inclusivity and fairness and create safer workplaces for employees engender trust (Capell et al., 2016). Climates characterised by psychological safety allow for open and trustful interactions in the workplace (Baltes et al., 2001; Kalargyou, 2014). A determinant of psychological safety is a positive work environment, one element of which is trust (Härtel & Ashkanasy, 2011). Trust is undermined by harassment (Keashly et al., 2020) and petty tyranny (Blackwood & Jenkins, 2018). Aggression leads to mistrust and undermines psychological safety (Bedi et al., 2012). Lack of employee trust is a source of resistance to cultural change (Rosenberg & Mosca, 2011).

Trust is also an important element of creating a disability climate (Capell et al., 2016). Williams and Taras (2004) noted that trust is an important element of integrating disability in a corporation's culture. Heuer (2011) also noted employees' perceptions of being trusted by managers impacts their notion of organisational justice. Trust is an essential component of the accommodation process (Williams-Whitt, 2007).

Social Construction of Disability at Work

Harlan and Robert (1998) discussed that organisations reflect and reproduce the wider society and the hegemonic structures of society. They argued the structure of work is the result of the dominant social groups and their power to shape organisational culture.

> These seemingly ordinary arrangements that structure our work days and work lives are not the inevitable form of organizations, but rather are deeply rooted in historical divisions of labor between classes, genders, racial groups, and people with and without disabilities. (Harlan & Robert, 1998, p. 400)

Williams and Mavin (2012) stated it as "differences between incumbents of social categories are argued to be hierarchically constructed, reproduced and maintained through organizing processes and practices in ways which centre the requirements of some organizational members with normative expectations, while marginalizing the requirements of others" (p. 160). The workplace has been premised on ableism. Ableism has been defined as "ideas, practices, institutions and social relations that presume able-bodiedness and by so doing, construct persons with disabilities as marginalized… and largely invisible others" (Chouinard, 1997, p. 380). Ableism is perpetuated by competitive individualism, the historic trends of medicalisation of disability, and "a rehabilitation industry dedicated to making people with disabilities able and willing to assimilate into working organisations" (Harlan & Robert, 1998, p. 402) rather than locating the problem in the organisation of work.

Social construction at work is embedded in discourse, policies, routines, and workplace cultures. Jammaers et al. (2016) argued, "These discourses – structured collections of texts… produce and maintain subordinate identity positions that become established over time as transparent, normative expectations" (p. 1366). Sussman (1994) noted how disabling conditions can evoke negative or punitive perceptions of persons with disabilities.

> If one accepts that experiences of disability have been influenced, up to the present day, largely by perceptions of negative difference (deviance) and their evocation of adverse responses (stigma), then any work which says something about the social construction of disability's meanings necessarily also says something about stigma and deviance. (Susman, 1994, p. 15)

How organisational policies and routines are operationalised can lead to disparaging characterisations of employees with disabilities.

Furthermore, disability in respect to employment has not been problematised by organisational studies (William & Mavin, 2012). Organisational studies have not engaged with disability, impairment, and ableism (William & Marvin, 2012) or the social model of disability and social construction of disability in organisations (Harlan & Robert, 1998).

> Foster (2007) suggests there is a narrow approach to researching disability across business studies, which focuses on a managerial perspective of managing disabled workers which, it could be argued, reflects the dominant approach within mainstream management literature upon managerialist agendas. (William & Marvin, 2012, p. 160)

This, in turn, effects knowledge construction (William & Marvin, 2012) and presumably what managers are taught or read. William and Marvin argued for organisational studies informed by a disability studies lens, with its emphasis on ableism and social construction.

Chapter 5 - Methodology

Research Purpose

The purpose of this research was to discern patterns of actual discriminatory employment behaviours, doctrines, concepts, or practices evident in the cases that socially construct disablement. The data were 2017 substantive decisions of the Ontario Human Rights Tribunal, where the Tribunal found that the employers discriminated against persons with disabilities in respect to employment.

Gap in the Extant Literature

While there seems to be considerable research on employers' perceptions of employees with disabilities, there is little research on their actual experiences. Most of the extant research measures managers' intentions. No systemic assessment of discrimination patterns has been undertaken in Canada. Typically, employers' prejudices as a barrier to employment have been examined by attempting to gauge employer attitudes towards employees with disabilities. Hernandez et al. (2008) pointed out that there are numerous studies examining employers' perceptions of workers with disabilities, of which the vast majority are quantitative surveys or quasi-experimental designs. They further pointed out that "While such data are valuable, the in-depth experiences of employers have not been more fully explored" (Hernandez et al., 2008, p. 158). In fact, my review of the literature, from 2000 to the 2017[28] in respect to employers' perceptions of employees with disabilities (Appendix A and B) reveals 108 studies of this construct—49 surveys, 11 interviews, seven mixed methods, seven focus groups, 12 experimental designs, 17 literature reviews and one policy review.

[28] The year 2000 presented a natural break point giving a date range sufficiently far back so as to capture the major works on this construct and methodological trends but without reaching back so far as to include works that may be outdated.

Significant discrimination has been found in some American studies (Bendick, 2018; Houtenville & Kalargyrou, 2012), as well as the persistence of manager bias in American and Dutch studies (Hernandez et al., 2008; Vornholt et al., 2013). Luecking (2008) found in an American study that despite more enlightened views of disability, employers still hold confused and stereotypical views about employees with disabilities.

However, studies from Israel, the United States, Netherlands, and Sweden also reveal that managers' intentions are not a significant predictor of actual behaviour (Andersson, 2012; Araten-Bergman, 2016; Hernandez et al., 2000; Sālājeanu, 2012; Zissi et al., 2007). As Araten-Bergman stated, most studies use "managers' expressed intentions as an adequate proxy for actual hiring, making little effort to validate the conjecture" (p. 1511). Araten-Bergman further stated that "although potential employers generally tend to express positive attitudes and a willingness to hire PWD in employers' surveys, they rarely do so in real-world situations" (p. 1511).

Most of the nonexperimental studies do not get at actual lived experience and discrimination. Ren et al. (2008) maintained that, at best, correlation studies frame research questions that need further exploration, through experimental study. However, not all experimental designs get at actual behaviour. Kulkarni and Lengnick-Hall (2014) pointed out a disconnect between laboratory studies and field studies, with the former more likely to demonstrate positive attitudes towards employees with disabilities. Further, the analogue nature of certain experimental designs means that the results are not generalizable (Cook & Rumrill, 2005).

Most of the surveys conducted to reveal employers' attitudes towards persons with disabilities are designed by individual research teams. Lengnick-Hall et al. (2001) pointed out

only a small percentage of the structured surveys reviewed used validated scales. Lindsay et al. (2013) pointed out that most disability employment research "lacks a rigorous design" (p. 9). My review of the studies in Appendix A found that at least 18 of the studies relied on researcher-constructed surveys. Four studies used published scales. Most of these studies, if not all, are limited by the absence of preexisting psychometric development (Antonak & Livneh, 2000; Mak et al., 2014; Palad, 2016). In an extensive review of the organisational behaviour literature, Hinkin (1998) found that "inappropriate domain sampling, poor factor structure, low internal consistency and reliability and poor reporting of newly developed measures continue to threaten our understanding of organisational phenomena" (Hinkin, 1998, p. 1). As Lengnick-Hall et al. (2001) stated, "While author-created surveys are not necessarily, by definition, lacking validity, their one-time use makes them difficult to assess" (para. 4). Several authors have noted that there are conflicting findings in respect to various factors on acceptance of employees with a disability (Unger, 2002; Vornholt et al., 2013), which suggests concerns about the reliability and generalizability of the studies. Another significant limitation is the lack of longitudinal studies (Heera & Devi, 2016; Vornholt et al., 2013), save for the study by Araten-Bergman (2016).

Many forms of qualitative research are susceptible to the possibility of data being skewed by social desirability bias. This is a situation in which the respondent deliberately distorts their views, chiefly to give a good account of oneself or to provide the socially appropriate response (Antonak & Livneh, 2000; Araten-Bergman, 2016; Wilson & Scior, 2015), which the researcher then "interprets as a meaningful, typical or stable attitude" (Antonak & Livneh, 2000, p. 215). Some papers in Appendix A indicate that social desirability bias is a possible limitation of the survey research (Araten-Bergman 2016; Gustafsson et al., 2014; Jasper & Waldhart, 2013; Wilson & Scior, 2015). Further, Wilson and Scior (2015) found no association between implicit

attitudes, which were somewhat negative, and explicit self-reported attitudes towards, in this case, persons with intellectual disabilities.

Civil rights cases are used in other jurisdictions to discern empirical trends in disability discrimination. In the United States, researchers have accessed the Equal Employment Opportunity Commission's (EEOC) Integrated Mission System, which tracks filing, investigation, and resolution of workplace discrimination, in respect to statutes the EEOC is responsible for adjudicating (McMahon et al., 2005; McMahon & Hurley, 2008; McMahon & McMahon, 2016). Researchers working on the National EEOC ADA Research Project have been able to plumb this data to determine various profiles of disability discrimination. Researchers have been able to analyse this data to determine the characteristics of claimants in hiring discrimination cases in respect to age, gender, ethnicity, sexuality, religion, and impairment, including type of impairment and type of discrimination (Chan et al., 2005; Graham et al., 2019; McMahon, 2012; McMahon & McMahon, 2016). Similarly, researchers have been able to discern the characteristics of employers alleged to have committed hiring discrimination in terms of industry classification, size of workforce, and region (McMahon et al., 2008; Rumrill & Fitzgerald, 2010; West et al., 2008; Von Schrader, 2014). The research presented in Chapter seven provides similar analysis, albeit with a much more limited sample.

Unfortunately, Canada does not have such a database. The only relevant overall data reported by Tribunals Ontario are that 62% of Ontario Human Rights Tribunal cases were on grounds of employment, and 53% of the claims were on grounds of disability (Tribunals Ontario, 2020).

However, Canada does have reported decisions of federal, provincial, and territorial human rights tribunals from which to track trends and mine data after assembling the cases and

manually analysing them for specific criteria. Decisions of the Ontario Human Rights Tribunal, applying the *Ontario Human Rights Code* (the Code; R.S.O., 1990, c. H.19) where the employer was found to have discriminated against an employee with a disability, were used for the research presented in this study. This is a unique and until now an untapped data source from a disability studies perspective that allows for retrospective analysis. Darcy et al. (2016) stated in the Australian context that "no research has examined employment-related disability discrimination as examined by national disability discrimination cases" (p. 1251). Similarly, no Canadian use of human rights tribunal cases could be found.

Leading grounded theorists and other scholars state that documents alone can constitute an entire study (Charmaz, 2014; Glaser & Strauss, 1967; Turner, 1983; Pandit, 1996). Given that case reports are retrospective, they provide evidence of actual behaviour and may not suffer from some of the confounds discussed above in respect to other methods. As Hall and Wright (2008) pointed out, legal cases are no more imperfect than other forms of social science data; "though judge-reported facts may not 'purport to be the real facts' they are 'near enough'" (p. 97). In fact, Darcy et al. (2016) identified legal case decisions as source of natural data. As Silverman (2006) stated, "Naturally occurring texts document what participants are actually doing in the world – without being dependent on being asked by researchers" (p. 163). Naturally occurring data are not dependent on a researcher's intervention, or as Potter (2004) stated, it is "a preference for materials that are not 'got up' or produced for a specific research task" (p. 539).

The use of human rights cases for empirical research is relatively unique. There are only a handful of previous studies using legal cases to study disability and employment discrimination. In fact, Darcy et al. (2011, 2016) and Darcy and Taylor (2009) studied similar case decisions in the Australian context, in their review of the Human Rights and Equal

Opportunity Commission (predecessor to the Australian Human Rights Commission) and Federal Court decisions under the *Australian Disability Discrimination Act* 1992 (Australian Government, 1992). The Human Rights and Equal Opportunity Commission would be the equivalent of the HRTO. Darcy et al. (2016) stated that several patterns of discrimination emerged, which contributed to a deeper understanding of "the construction of disability discrimination in the workplace" (p. 1260). A Canadian researcher used a set of data from labour arbitration cases to research employer factors affecting accommodations on employees' return to work (Williams, 2004); the interaction between disability and employee performance (Williams-Whitt, 2008), how managers and unions contribute to making accommodations difficult (Williams-Whitt, 2007), and performance problems that arise upon return to work (Williams-Whitt & Taras, 2010). Foster and Wass (2012) used four Employment Appeals Tribunal cases (United Kingdom) to study the mismatch between standard jobs designed around ideal (nondisabled) workers' and managers' attitudes towards modifying work for employees with disabilities. The existence of a similar study lends credence to the use of HRTO cases as data and the proposed methodology.

The data relied on for the subject research are not susceptible to social desirability bias. While the defendant-employers were, of course, trying to make the most persuasive and favourable argument they could to support their defence, most of their positions were excuses to attempt to avoid accommodations and liability for their unjustified terminations. In fact, in almost all the cases the employer made disparaging claims about the employees to justify the employer's behaviour. So, they were hardly making what would be considered socially desirable statements about persons with disabilities. None of the employers said they did not discriminate, or that providing accommodation would be unreasonable but that they were excused by some

negative factor about this employee with a disability as an employee. These excuses are all associated with stereotypical perceptions of employees with disabilities and disparaging. Further, the data are not the employers' statements per se but the Human Rights Tribunal of Ontario (HRTO) adjudicators' interpretation of the employers' documentary and oral evidence. The adjudicators based their decisions on their assessment on the credibility of the evidence provided by the employee and usually the employer, on the balance of probabilities. Williams-Whitt (2007) stated, of the use of of labour arbitration cases for empirical evidence:

> Arbitration cases were chosen because the narratives provide unobtrusive information on the interaction between disabled workers, their unions and employers. The historical records are accurate, vetted by neutral arbitrators, and include data that may not otherwise be easily accessed (e.g., physician testimony, disciplinary records, etc.). Arbitration cases have been recognized as a uniquely reliable data source for investigating organisational policies and practices. (p. 411; see also Williams & Taras, 2004; Williams-Whitt, 2008; Williams-Whitt & Taras, 2010)

This description, less the union component, is equally applicable to human rights tribunal decisions. Likewise, human rights cases provide unobtrusive evidence on the interaction between employees and employers in the form of a record that is accurate and vetted by neutral adjudicator.

Research Design - General Inductive Approach

The research methodology, applied to the research cases, was the general inductive approach (Thomas, 2006). It was aimed at concept development as a step towards theory building and eventual construct development (Gioia et al., 2013). As Gioia, et al. advised that inductive analysis is useful for discovering concepts and that concepts are important to understand organisational behaviour. They stated:

> Yet our concern with construct development and measurement sometimes blinds us to the arguably more important work of concept development in organisation study. By ‘‘concept,’’ we mean a more general, less well-specified notion

> capturing qualities that describe or explain a phenomenon of theoretical interest. Put simply, in our way of thinking, concepts are precursors to constructs in making sense of organizational worlds—whether as practitioners living in those worlds, researchers trying to investigate them, or theorists working to model them. For organization study to fulfill its potential for description, explanation, and prescription, it is first necessary to discover relevant concepts for the purpose of theory building that can guide the creation and validation of constructs. (p. 16)

Jabreen (2012) pointed out that inductive analysis "refers to an approach that primarily uses detailed reading of raw data to derive concepts, themes and models, through the researcher's interpretations of the raw data" (p. 170). Thomas (2006) delineated that there are at least three purposes for which inductive research is useful:

- to condense extensive and varied raw text data into a brief, summary format;
- to establish clear links between the research objectives and the summary findings derived from the raw data and to ensure that these links are both transparent (able to be demonstrated to others) and defensible (justifiable given the objectives of the research); and
- to develop a model or theory about the underlying structure of experiences or processes that are evident in the text data (p. 238).

The general inductive approach does theorise but limits "findings to the presentation and description of the most important themes", and "it mainly aims to build connections between research objectives and research findings" (Liu, 2016, p. 130). Inductive analysis is appropriate for natural inquiry (Lincoln & Guba, 1985) as the cases present a natural environment.

Induction is aimed at emergent theory. "The primary purpose of the inductive approach is to allow research findings to emerge from the frequent, dominant or significant themes inherent in the raw data, without restraint imposed by structured methodologies" (Thomas, 2006, p. 238). The intention is to allow the actual effects to be determined, not just the imposed or planned

effects (Thomas, 2006). As the data are empirically unexplored, at least from a disability studies perspective, and there was no particular a priori hypothesis to test, a method that results in a theory makes sense for these nascent data. Charmaz (2008) stated that "emergent methods are particularly well suited for studying uncharted, contingent or dynamic phenomena" (p. 155), such as employers' attitudes in the Ontario Human Rights Tribunal cases.

As will be seen in later chapters, categories or themes of employer behaviour and of social construction of disability in employment did emerge in examining "frequent, dominant or significant themes inherent in the raw data" of the cases (Thomas, 2006). Thus, connections were made between research objectives and research findings (Liu, 2016).

Moreover, inductive analysis of the data resulted in "theory building" in the development "of a model or theory about the underlying structure of experiences or processes that are evident in the text data" (Thomas, 2006, p. 238). It is hypothesised that employers' behaviour results from managers' concern that hiring persons with disabilities will inordinately consume a valuable resource—time.

Appropriateness of the Research Design

Inductive methodology was the most appropriate relative to other common qualitative methodologies. Ethnography is characterised by fieldwork to observe people in their natural settings (Goulding, 2005). The cases on their own do not lend themselves to this type of research. I would need to have attended the tribunal proceedings to make such observations, and while useful to researching some constructs, court is anything but the natural environment to study persons with disabilities in the workplace. Further, it would be difficult to observe managers' discriminatory behaviour in fieldwork in an organisation. Similarly, phenomenology is aimed at determining the lived experience of the research subjects, usually elicited from

interviews (Goulding, 2005; Starks & Trinidad, 2007). Interviewing claimants in these cases would certainly have value but deriving a phenomenological theory from such data would not likely be possible given that managers would be reluctant to participate, and if they did, it could have affected the data with socially biased responses. Discourse analysis looks at language-in-use and its shared meaning (Starks & Trinidad, 2007) and might be relevant to analysing *légalisée* used in tribunal decisions, but it would not get at how disability is talked about in a particular organisation in any depth. While providing "rich empirical description of particular instances of a phenomenon" (Eisenhardt & Graebner, 2007, p. 25), a case study design would be too specific to generate theory without multiple cases. Content analysis applies coding to the data and likewise could be applied to the proposed data, but it has a lower level of abstraction, deriving only priority categories rather than new theory based on relationships between codes (Cho & Lee, 2014).

The constructive approach to inductive methodology complements critical disability research epistemically and ontologically.[29] Constructionists view the researcher as co-constructing knowledge and interpretation of meaning in conjunction with the research subjects and assumes there is no single objective external truth that can be positively known but rather multiple realties exist (Mojtahed et al., 2014). This is captured in subjectivist epistemology (Denzin & Lincoln, 2005). Ontologically, it is reasonable to expect that researchers impact the interpretation of the data. This is reflected in a relativist ontology (Guba & Lincoln 2005). Co-construction of reality aligns with the aims of the disability movement, giving voice and agency to persons with disabilities. Both constructionist induction and emancipatory disability research

[29] Philosophers dating back to Hume recognize an epistemological problem with induction in that it may not serve as knowledge, in that the induction involves not just an experiential but a psychological component (Bendassolli, 2013; Ketokivi & Mantere, 2010). "Inductive thinking is problematic because we can never be certain that a recurring (known) event will continue to occur" (Bendassolli, 2013, n.p.).

are aligned in that they aim to give voice to the lived experience of research participants and persons with disabilities, respectively (Breckenridge et al., 2012; Gioia et al., 2013, Hosking, 2008). As Gioia et al. stated of their inductive research, "Studying social construction processes implies that we focus more on the means by which organisation members go about constructing and understanding their experience" (Gioia et al., 2013, p. 16). Positivism privileges the researcher as expert, and its emphasis on objectivism and neutrality conflict with "alternative views, such as a social model perspective [which] were viewed as politically biased and /or subjective" (Barnes, 2001, p. 11). Critical disability research is referential to critical theory, which has been associated with a critique of positivism and the medical model of disability, both of which are problematised by the social model of disability and the human rights model of disability.

Epistemologically, the constructionist view of knowledge was adopted because it fits with critical social research in that "all knowledge is socially constructed and culturally relative" (Barnes & Mercer, 1997, p. 5) and because critical theory is not objective. Unlike positivism, critical social research, seeks to more than just explain but also to normatively transform and emancipate society. There is a nexus between the social model of disability and constructionism, as the social model of disability is a social constructionist model, and the social model of disability and constructionism are both subjective in their epistemology (Anastasiou & Kaufman, 2011).

Procedure

Data Collection

The data source was 2017 Ontario Human Rights Tribunal cases reported on the CanLII database that were derived from the search criteria. The search criteria applied to the database was: Disability + Employment + Ontario Human Rights Tribunal + 2017 + accommodation.

This search resulted in a truly random sample in that the mechanics of the Ontario Human Rights Tribunal, were out of my control to influence. What cases were adjudicated and in which of these cases discrimination was found (the search criteria) happens independently of the research. In 2017-2018 the Tribunal received 4,425 applications, of which only 97 proceeded to a final decision on the merits **(**Tribunals Ontario, 2018). Seventy percent of the overall applications was on account of employment, and 56% was on account of disability (Tribunals Ontario, 2018). Taking those percentages, 70% of 56% means, as a rough estimate, 39% of the applications were in respect to disability and employment. Therefore, approximately 1,725 applications are on account of disability and employment. Thus, most cases alleging discrimination based on disability and employment are settled, abandoned, or dismissed for procedural reasons. Of the cases that settle there is no way to know what the actual merits of the claims were, as minutes for settlement are not in the public record. Procedural dismissals are reported, but they are determined for reasons other than the merits of the case, except where the Tribunal found "that there is no reasonable prospect that the Application or part of the Application will succeed" (Ontario Human Rights Tribunal, 2017, Rule 19.1A). It is reasonable to conclude that the cases that are adjudicated occur in a random manner.

The unit of analysis was both supervisors/managers and the employer/organisation, per each case. Given that the research did not involve human subjects, ethics approval was not

required. Further, given that the cases are readily available in the public domain confidentiality controls were not required.

The search resulted in 500 hits, which is the database's upper search bound. This rendered 173 interim decisions, reconsiderations, and decisions, which dealt with procedural matters but not the substance of the allegations (with the exception where the allegations were found to have no prospect of success). Culling the cases for substantive decisions, which rendered findings as to whether employers contravened the *Ontario Human Rights Code* (R.S.O., 1990, c. H.19) derived 36 cases. Through the review of the codes and data seven cases were eliminated from the coded pool because while they may have been descriptive, they did not make any conclusions relative to the employee's disability. The search included eight cases from 2018 and one case from 2016 that were retained as they met the search criteria, except for the date, but are proximate enough to be of value. The total procedural and substantive cases totaled 192 cases. The balance of 308 data hits were cases about discrimination in respect to disability and the provision of services, which were outside the scope of this review. When the database was screened using an Ontario specific filter it rendered 491 hits, of which 438 were cases. Other database hits that were excluded were cases that may be disability human rights and employment cases but are from forums other than the HRTO, such as other Province's human rights tribunals, the federal court, or the Canadian Human Rights Tribunal. As well, human rights cases that are relevant to Ontario and employment but are decisions of other forums such as Grievance Settlement Board, Labour Arbitration Awards, or the Divisional Court, were culled. Other extraneous hits are cases from the Landlord and Tenant Board, Ontario Social Benefits Tribunal, and other Social Justice Tribunals, as well as duplicate cases. Similarly, hits that were journal articles and papers were excluded. The occasional hit was about employment but not disability

and was excluded. Cases where the respondent was the Workplace Safety Insurance Board were excluded. Although these cases, for example, have to do with employment and disability, they do not deal with an allegation of employer discrimination. Of the 40 cases ultimately coded, 16 resulted in findings of discrimination in part or whole, or 40% of the substantive cases coded.

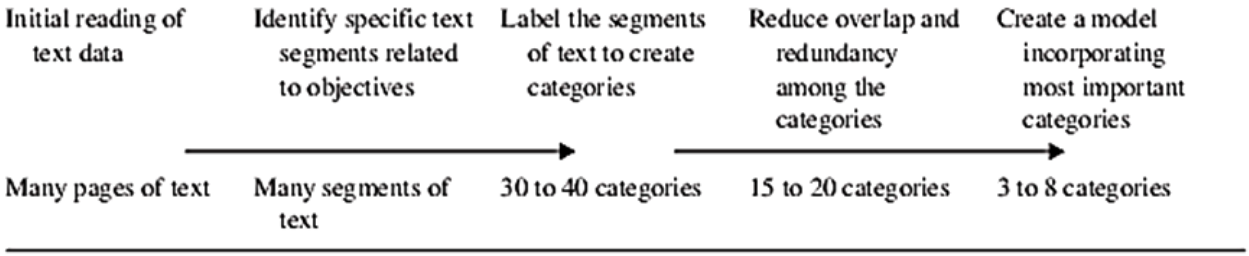
Coding

In reading each case salient fragments of empirical evidence were identified and tagged with a descriptive code. Codes are generated inductively. Related data from each case were similarly coded to create a cluster of data, which created categories of employer behaviour. Cases coded were HRTO cases meeting the search criteria that decided a disability employment case on the merits of the discrimination claim. Figure 1 provides a representation of the coding and analysis process. NVivo 12 was used to house the data, to catalogue codes, and to create a database of coded sections.

All the cases reviewed that gave rise to codes are listed in Appendix C. Appendix C, in addition to listing the case citation, was also used to record certain key variables, including the case verdict—whether the applicant was successful or not; a short summary of the decision; the justification alleged by the employer for its behaviour; the remedy ordered by the tribunal; whether the applicant had legal council or other representation or was unrepresented; and to the extent possible the intersectional identities of the applicant, although intersectionality did not turn out to be a fruitful path of inquiry due to inconsistency and uncertainty in the data.

Figure 1

The Coding Process in Inductive analysis



Note: From "A General Inductive Approach For Analyzing Qualitative Evaluation Data," by D. R. Thomas, 2006, *American Journal of Evaluation*, *27*(2), p. 242 (https://doi.org/10.1177/1098214005283748).

The initial cases reviewed spawned codes in respect to failing to provide accommodations: due to alleged employee breaching of the employer's anti-drinking policies (*Haley v. 5274398 Manitoba Limited o/a Cross Country Manufacturing*, 2017), and termination due to alleged absenteeism and the employee being in the employment probation period (*Conklin v. Ron Joyce Jr. Enterprises Ltd. o/a Tim Horton's*, 2017). These cases gave rise to initial codes drinking and drug use as excuse and excuse-absenteeism and excuse-probation.

In the course of ongoing research, literature about systemic remedies prompted the realisation of the need to track the Tribunal's public interest awards, which led to the code "systemic remedies". Subsequently, a review of the already coded cases was conducted, and all new cases were coded as appropriate for the code "systemic remedies".

In *Bray* it was found that there was no prima facie case of discrimination where a lack of accommodation was alleged *[Bray v. Ontario (Ministry of Community Safety and Correctional Services),* 2017]. No prima facie discrimination cases are of interest because they directly deny discrimination occurred in that the adjudicator could not reasonably infer from the evidence a

case of discrimination.[30] The incidence of claims failing on their face were tracked to consider whether a systemic barrier exists, so the code "no prima facie case" code was established.

In *Renda* the application was dismissed for delay *(Renda v. Toyota Motor Manufacturing Canada Inc.,* 2017). In many cases, all or part of claims were dismissed for being outside the one-year limitation period. This gave rise to tracking cases under the code "disability does not give reason for delay in filling". In these cases, the claimant tried to justify their late filing based on their disability or health condition. There were no instances where claims that one's disability contributed to the delay in filing their claim was accepted, in these cases, by the tribunal as establishing a good faith reason to waive the limitation period.

In all, 89 codes were generated. Completing a comprehensive review of the codes led to combing codes that were redundant or overlapped. This reduced the number of codes to 25. Nine of those codes were found to be not relative to this analysis as they dealt with cases where the employer was found to have not violated the *Code,* and some of these cases dealt with technical matters outside of the issues at hand. Four additional codes deal with remedies and systemic considerations. The collation of codes is set out in Table 3. A full list of the codes is listed at Appendix D.

Purely procedural decisions that did not rule on disability discrimination were excluded from coding. However, HRTO disability employment cases that met the search criteria but were procedural decisions or summary dismissals, were reviewed in case some significant insight arose. All such decisions encountered were logged in a document referred to as "Cases Reviewed

[30] The Supreme Court of Canada explained a prima facie case as, "A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent–employer" (*O.H.R.C. and O'Malley v. Simpsons-Sears. Ltd.* [1985] 2 S.C.R. 526 at 558, per. *McIntyre*).

but not Coded". Reviewing these cases was to ensure thoroughness; however, they did not provide insight into employers' attitudes. Cases reviewed but not coded are listed in Appendix E.

Table 3

Collation of Codes

Constructive discrimination/Adverse effects	- Adverse effects discrimination - Constructive discrimination - Discrimination against mat leave
Disability as part of the reason for termination	- Mental Health
Excuse	-Excuse - absenteeism -Excuse – applicant's behaviour -Excuse – Abandonment -Excuse – decision to terminate made before -- Disability occurred -Excuse not to accommodate -Excuse – medical note not specific of Disability -Excuse - performance -Excuse – probation -Excuse – zero-tolerance policy for all violations -Drinking or drug use as excuse not to accommodate
Failed to accommodate	-Failure to substantively accommodate -Not taking account of disability needs
Failure to inquirer – procedural accommodation	-Duty to inquirer -Procedural accommodation -Need for accommodation apparent
Intersectionality	-Intersectionality – sex and family status -Intersectionality – race not reason to terminate -Intersectionality – race and place of origin -Intersectionality – sexual solicitation
No evidence of advising of need for accommodation	-Accommodation not requested -Accommodation requested undue hardship -Insufficient evidence that the requested accommodation is required -Insufficient medical evidence therefore not failure to accommodate -Not transferring applicant is not failure to accommodate
Harassment	-Harassment
Poisoned environment	-Poisoned environment

Sample - Research Cases

Of the 36 substantive disability employment human rights cases surveyed, 16 exhibited behaviour in which the respondent employer was found to have breached the *Ontario Human Rights Code* in respect to disability and employment. The research cases are listed in Table 4. The balance of the 36 cases that did not ultimately meet the inclusion criteria are listed in Table 5.

Table 4

Research Cases

Betts v. United Brotherhood of Carpenters and Joiners of America, Local 1256	2017 HRTO 886 (CanLII), <http://canlii.ca/t/h4zzj>
Bonnici v. Loblaws Inc.	2017 HRTO 1456 (CanLII), <http://canlii.ca/t/hn8cf>
Brittain v. 2374855 Ontario Inc. o/a Minden 50s Diner and Lisa Hope	2017 HRTO 1688 (CanLII), <http://canlii.ca/t/gv293>
Brown v. 2229853 Ontario Limited	2018 HRTO 814 (CanLII), <http://canlii.ca/t/hstzv>
Campbell v. Paradigm Sports, Inc	2017 HRTO 1683 (CanLII), <http://canlii.ca/t/hph56>
Carter v. Chrysler Canada Inc.	2017 HRTO 168 (CanLII), <http://canlii.ca/t/gxfnp>
Conklin Applicant and Ron Joyce Jr. Enterprises Ltd. o/a Tim Horton's	2017 HRTO 723 (CanLII), <http://canlii.ca/t/h4jfc>
Groh v. Waterloo (Regional Municipality),	2017 HRTO 1460 (CanLII), <http://canlii.ca/t/hn8c5>
Haley v. 5274398 Manitoba Limited o/a Cross Country Manufacturing	2017 HRTO 1694 (CanLII), <http://canlii.ca/t/hrs42>
Hayes v. R.J. Burnside & Associates Ltd.,	2017 HRTO 790 (CanLII), <http://canlii.ca/t/h4q0r>
Passmore v. Illumiti	2017 HRTO 725<http://canlii.ca/t/h4jfw>
Prothero v. Ontario (Community Safety and Correctional Services)	2016 HRTO 1481 (CanLII), <http://canlii.ca/t/gvr9v>
Sellner v. Canadian Cab Ltd,	2017 HRTO 1060 (CanLII), <http://canlii.ca/t/h5hxg>
Tavares v. Mistura Restaurant & Hang Out Inc.	2017 HRTO 1553 (CanLII), <http://canlii.ca/t/hp0lz>
Titze v. O.I. International Inc.	2018 HRTO 77 (CanLII), <http://canlii.ca/t/hsxj8>

Trinh v. CS Wind Canada Inc.	2017 HRTO 755 (CanLII), <http://canlii.ca/t/h4lzv>

Table 5

Substantive Decision Cases Not Meeting Inclusion Criteria

Aitchison v. L & L Painting and Decorating Ltd.	2018 HRTO 238 (CanLII), <http://canlii.ca/t/hqsnf>
Brown v. 2229853 Ontario Limited, 2018	HRTO 814 (CanLII),<http://canlii.ca/t/hstzv>
Bray v. Ontario (Ministry of Community Safety and Correctional Services)	2017 HRTO 752 (CanLII), <http://canlii.ca/t/h4kt2>
Danso v. Maximum Seafood	2018 HRTO 486 (CanLII), <http://canlii.ca/t/hrmrv>
Dix v. The Twenty Theatre Company, 2017 HRTO 394 (CanLII)	2017 HRTO 394 (CanLII),<http://canlii.ca/t/h33vx >
Fiallos v. PWD-Division of Instore Focus Inc.	2017, HRTO 469, <http://canlii.ca/t/h3hr1>
Graff v. Jones Lang LaSalle Real Estate Services Inc.	2018 HRTO 104 (CanLII),<http://canlii.ca/t/hq036>
Harriott v. Conavi Medical Inc.,	2018 HRTO 613 (CanLII), <http://canlii.ca/t/hrzh4>
Hutchinson v. Queen's University	2017 HRTO 326, <http://canlii.ca/t/h1tlp>
Jones v. EJ Industries Limited	2017 HRTO 1518 (CanLII), <http://canlii.ca/t/hnwvj>
Kakulakanthan v. Oncidium Health Group	2017 HRTO 236 (CanLII), <http://canlii.ca/t/gxrjl>
Kasubeck v. General Dynamics Land Systems Canada	2017 HRTO 390 (CanLII), <http://canlii.ca/t/h329q>
Konesavarathan v. Middlesex London Health Unit	2017 HRTO 454 (CanLII),<http://canlii.ca/t/h3fpp>
McDonald v. CAA South Central Ontario	2018 HRTO 163 (CanLII),<http://canlii.ca/t/hs4kx>
Morrissey v. OBN Security Investigative Consultants Inc.	2017 HRTO 756 (CanLII),<http://canlii.ca/t/h4lzw>
Philippe v. The Ottawa Hospital	2017 HRTO 822 (CanLII),<http://canlii.ca/t/h4rdc>
Pourasadi v. Bentley Leathers Inc**.**	2017 HRTO 1418 (CanLII),<http://canlii.ca/t/hmthq>
Rajic v. Omega Tool Corp.	2017 HRTO 818 (CanLII) <http://canlii.ca/t/h4rd6>
Rae v. Near North District School Board,	2017 HRTO 568 (CanLII), <http://canlii.ca/t/h3x99>
Scipione v. Safety First Consulting Professional Corporation	2017 HRTO 1566 (CanLII), <http://canlii.ca/t/hp32m>
Shaver v. Queensway Carleton Hospital	2017 HRTO 685<http://canlii.ca/t/h3x99> <http://canlii.ca/t/h4df8>

Shepherd v. 1459312 Ontario Limited o/a Nathaniel's Restaurant	2018 HRTO 235 (CanLII), <http://canlii.ca/t/hqsng>
Smith v. Canadian Tire 162 (Graham J. Keene Enterprises Ltd.)	2017 HRTO 582 (CanLII), <http://canlii.ca/t/h41z9>
Watkins v. Toronto (City),	2017 HRTO 504(CanLII),<http://canlii.ca/t/h3q11>
Youssef v. Gemstar Security Services Ltd.	2017 HRTO 1434 (CanLII),<http://canlii.ca/t/hmvrt>

Theoretical Lenses

In addition to the steps outlined earlier, the research cases were also examined using several different theoretical lenses. As Ancona et al. (2001) said:

> We tend to use different lenses-strategic design-political and cultural-to understand how organizations function, depending on our theoretical orientations (Ancon, Kochan, Scully, Van Maanen & Westney 1999). Like different schema, each of these lenses leads us to focus on certain variables and relationships while ignoring others. Focusing multiple lenses on a given phenomenon highlights different aspects of that phenomenon. (p. 645)

Similarly, the research cases were examined using different lenses to surface different aspects of the phenomenon of managers' discriminatory behaviours towards persons with disabilities.

Based on Stone and Colella's (1996) organisational psychology model of discrimination, the cases were examined from the perspectives of various indicia: the employees' characteristics, the organisations' characteristics, and attributes of supervisors and managers. Employees' characteristics include the type of disability, gender, white versus blue collar work. Organisational characteristics include size, structure, organisation of work, conception of the ideal worker, human resource management, unionisation, corporate culture, organisational justice, psychological safety, and disability culture. Managers' behaviours were considered through theories about effecting employee compliance, manager identity maintenance, and maintaining a just world (Lerner, 1980). Managers' behaviours were examined using affect,

other psychological explanations of disability, theories of deservedness, and contact theory (Allport, 1954). Further, managers were examined by considering their management style, leader-member exchange theory (LMX; Dansereau et al., 1975), orientation towards time, and the theory of planned behaviour (Ajezen, 1991).

The use of multiple lenses in studying organisations allows for more of a composite view of managers' discriminatory behaviour towards employees with disabilities. Multiple lenses surface more aspects of the complex and multifaceted aspects that contribute to organisational discrimination.

Reliability and Validity

The trustworthiness of this research was determined by reference to Guba and Lincoln's (1985) criteria for determining the quality of qualitative research—credibility, transferability, dependability, and confirmability.

Credibility is the accurate representation of the participants' lived experience (Cypress, 2017). Representation of the participants is attended to by prolonged engagement with the cases and persistent observation to determine the behaviours most relevant to employment discrimination (Pandey & Patnaik, 2014). "Prolonged engagement" (Guba & Lincoln, 1985) is aimed at gaining "an adequate understanding of an organisation" or the scope (Pandey & Patnaik, 2014, p. 5747). On the other hand, persistent observation provides the depth. Persistent observation "is to identify those characteristics and elements in the situation that are most relevant to the problem or issue being pursued and focusing on them in detail" (Guba & Lincoln, 1985, as cited in Pandey & Patnaik, 2014, p. 5,747).

Prolonged engagement and persistent observation are evident in the multiple modes of interacting with the cases. This was accomplished in this research using multiple lenses to focus

on each employer's behaviour. First, employers' behaviours such as their excuses, acts of omission, and other prejudicial acts of commission are examined. Further, employers' behaviours are examined by looking at each of these employers and organisations through aspects of industrial and organisational psychology. This includes considering various characteristics of the employees with a disability, and various organisational characteristics such as size, presence of human resource departments, and unionisation. On top of that, these organisations' cultures and climates are considered for how they influence employers' behaviours towards persons with disabilities.

Credibility is enhanced by thick description to account for the data (Pandey & Patnaik, 2014). Thick description also demonstrates potential transferability by accurate and detailed description of the phenomenon that readers can use to assess its applicability to other contexts (Anney, 2015; Cypress, 2017; Pandey & Patnaik, 2014). Significant effort was made to describe the data in detail. The data were described from several perspectives to provide a detailed account of the discriminatory behaviour to make "explicit the patterns of cultural and social relationships and [to] put them in context" (Pandey & Patnaik, 2014, p. 5750). Thick description is intended to provide a measure of external validity in that others can assess the applicability of the conclusions to "other times, settings, situations, and people" (Pandey & Patnaik, 2014, p. 5750). While every legal case is obviously subject to its own facts and the state of the evolution of the law and legal precedent at any given time, the cases examined in this research were relevant not so much for their conclusions of law but for the empirical trends of employer discrimination. While every case of employer discrimination is unique, the description of the employer behaviours and conclusions provided should help further understand trends in employer discriminatory behaviour, trends in who experiences discrimination, the impact of

managers and human resources staff, organisational characteristics, corporate and disability climate, and employers' social construct of disability.

Dependability and confirmability were established by creating a comprehensive audit trail of all decisions made throughout the research, so a third party can judge the research process and product (Anney, 2015; Cypress, 2017; Pandey & Patnaik, 2014). Research decisions, analysis, and conclusions were memorialised in memos. Memos serve as a record of procedures, a place to work out what was being seen in the data, a store of my reflections, and ultimately an audit trail to confirm the research process and that conclusions were grounded in the data. The memos reveal the process decisions, including the theoretical, methodological, and analytical choices made (Bowen, 2009). The memos demonstrate that hypothesis development was grounded in the data, is visible, and is verifiable (Bowen, 2009).

To a certain extent the memos also demonstrate reflexivity towards understanding the context of knowledge construction (Anney, 2015, Cypress, 2017; Pandey & Patnaik, 2014). However, documents are not reactive to the research process, nor are they subject to lack of reflexivity in terms of the many potential influence on the research (Bowen, 2009), so reflectivity was somewhat less of a concern.

Potential Limitations

The data are limited to reported discrimination and are a self-selected sample, as cases brought to the Human Rights Tribunal of Ontario are voluntary in a complaint-driven process. Engle and Munger (2003) asserted that in the American context, victims of discrimination rarely invoke legal remedies but that rights become active in more informal ways. Furthermore, reported decisions do not account for cases settled by tribunal, mediation, or negotiated by the parties. In 2018-2019, the Tribunal closed 4,460 cases (Tribunals Ontario, 2019). The Tribunal

does not maintain data on settled cases. Unfortunately, there is no way to assess the merits of settled cases, and given the lack of adjudication, there can be no findings to assess employers' behaviours towards employees with disabilities.

It may be that the reported cases are more extreme or are outliers relative to settled cases and therefore not representative. As Williams-Whitt (2007) stated of their study of arbitration cases, reliance on arbitration cases "may introduce bias in that arbitration cases are a product of controversy and therefore may underrepresent good practices" (p. 411). As the intent of the research was to study employers' discriminatory behaviour, bias (if there is) towards bad behaviour served this study's purpose. As well, there are other sources available to consider good practices (Bengsiu & Balta, 2011; Fredeen et al., 2013; Hernandez et al., 2008; Houtenville & Kalargyrou, 2012; Kalargyrou, 2014; Kalargyrou & Volis, 2014; Lindsay et al., 2019; Waxman, 2015, 2017). Not all disability human rights decisions were captured in this sample, as other forums also decide human rights issues that arise in the context of their proceedings.

Another challenge was that case decisions are not created for social science research; therefore, the cases varied in consistency of information of interest. However, social legal research has a long history of case law research. As Banakar (2005) pointed out, cases are "brought on by legal reasoning as it informs legal decision making, which can exclude from documentation much of what is sociologically interesting" (pp. 158–159). Finally, the nature of the adversarial process itself and the inequity of resources between complainants and respondents impacts the results. However, unlike other data, there are professional adjudicators of fact and law who routinely seek an approximation of the truth, at least on the balance of probabilities. Reported judicial facts are near enough to the truth (Hall & Write, 2008), and all qualitative data have limitations.

A limitation is that we cannot measure empirically managers' actual motivations in the decisions they make in respect to persons with disabilities. So, it is undiscernible whether the excuses employers offered were sincerely held beliefs about the employee in question, or mere excuses for the employee's termination, or were posthawk rationalisation to create a defence or a combination. From a legal point of view, it does not matter. Intention is not an element of discrimination. I relied on the adjudicators and their determinations as to the employers' discrimination. However, lack of actual information about the employers' intentions may be a limitation of the research.

Lastly, while the cases provide insights into managers' involvement in discrimination of employees with disabilities, the cases do not reveal what role coworkers may have on the managers' normative beliefs and their contribution to the termination of the employees in the research cases.

Chapter 6 - Data: The Cases

There is a gap in the literature on disability and employment in that much of the extant research relies on employers self-reporting their behaviours towards persons with disabilities, rather than obtaining actual behaviours of employers. To analyse employers' actual behaviours, a unique data source, Ontario Human Rights Tribunal cases, were analysed. The research cases report employers' actions and behaviours as found by the Tribunal's adjudicators based on evidence of whether the actions and behaviours were discriminatory. The cases that met the selection criteria constituted the data analysed for this research. This chapter summarises those cases.

Overview

Of the 43 substantive disability employment human rights cases were surveyed. Sixteen exhibited behaviour for which the respondent employer was found to have breached the *Ontario Human Rights Code* (the Code or OHRC; R.S.O., 1990, c. H.19) in respect to disability and employment. In the following section the core data, the cases, are introduced and described.

The Cases

Betts v. United Brotherhood of Carpenters and Joiners of America, Local 1256 (Betts)

The applicant was an apprentice carpenter. The local union, for the purposes of the Code is considered the apprentice's employer. Section 5 of the Code uses the term "with respect to employment", which has been found to be broader than just an employee-employer relationship and captures nontraditional employment arrangements (*Payne v. Otsuka Pharmaceutical Co. Ltd*, 2001). On this basis, "with respect to employment" is broad enough to capture the relationship between the applicant and the union.

The union required the applicant and all apprentices to obtain their Certificate of Qualification (COQ) within three months and to take the test every 15 days until they passed. Betts had written the exam six time unsuccessfully and had cancelled nine other scheduled test dates, between June 2010 and July 2012. Betts was combative and resitant to writing the test and resistant to various practice sessions offered by the local.

He and other apprentices were laid off for not obtaining the COQ. The apprentices had their good standing status with the union revoked in December 2012, making it difficult to obtain work. After finding out that his apprenticeship status was being revoked and he was being laid off work he posted derogatory comments on Facebook.

He was diagnosed not long before the layoff as experienced anxiety and panic attacks which interfered with his testing ability. Just after the layoff the union received a medical note stating his condition and that he should refrain from writing the exam until treatment was completed. He was later diagnosed as having “difficulties with social skills, impulse control, anger management and ability to see someone else’s side of things” (para. 96), which was stemming from a neurological basis. He did not write the test from July 2012 to June 2014.

The union continued to require the applicant to apologise for derogatory Facebook postings against the union, to sign a letter of commitment to take a mock exam, and to continue to take the exam, despite receipt of the medical note to the contrary. The Tribunal stated, “The local’s requirement that he apologizes and sign the letter of commitment does not address the applicant’s needs with respect to writing the exam” (para. 138). The Tribunal found that the employee’s refusal to apologise was one barrier to the employee returning to work, but the other barrier was the local ignoring the medical advice about the employee’s accommodation needs. The Tribunal found that “it is clear the local did not believe or understand the applicant had

anxiety and associated restrictions" (para.142). The local's requirements were directly contrary to the medical advice provided. The tribunal found that "once the local got the January 2013 medical information it should have revisited its imposition of a deadline on the applicant to challenge the exam and get his COQ, which resulted in the applicant's lay off" (para. 143). The Tribunal stated:

> The local's view of the applicant's condition and restrictions also comes across tellingly in Mr. Leneve's September 9, 2013 letter in which he stated that the local believed that if the applicant channeled as much energy into preparing for and writing the exam as he does arguing and avoiding against it, he would have no problem succeeding. Even at that stage, it is clear the local did not believe or understand the applicant had anxiety and associated restrictions, in the face of having been provided with precisely this information by Dr. Svec in January 2013. (para. 142)

The Tribunal held the employee experienced discrimination because of the union not removing the requirement to continue attempting the exam and by not changing the deadline to achieve the COQ. Further, discriminated by not changing its requirements in respect to challenging the Certificate of Qualification exam and the deadline to obtain the necessary qualification, regardless of receipt of medical information documenting his disability. The Tribunal found:

> The imposition of a deadline on the applicant and others to write the exam and obtain their COQ constructively discriminated against the applicant because the neutral rule of imposing those requirements adversely affected the applicant in light of his disability. (para. 101)

> [T]he local's evidence was that contrary to the limitations expressed Dr. Svec's letter of January 2013, it required its members not only to do the mock exam but to continue to challenge the exam, which was clearly contrary to the applicant's disability related needs. (para. 142)

The Tribunal stated:

> The respondent adversely affected the applicant by failing to permit the applicant to write the exam in a manner that accounted for his disability-related needs once it knew that the applicant had a disability and the nature of the disability …The neutral rule of imposing a deadline on the applicant to write the exam and get his COQ had an adverse effect on him because the local would not permit him to continue working without his COQ. (p. 108)

The Tribunal concluded that the union's requirements constructively discriminated against the applicant because even though the rule was neutral, it adversely affected the applicant on account of his disability. The Tribunal ordered the company pay damages to the employee for injury to dignity, feelings, and self-respect and for lost wages. It further ordered that the company develop policies on accommodating employees with disabilities and that it retains an expert to provide human rights training to the executive board.[31]

Bonnici v. Loblaws Inc. (Bonnici)

The employee was a part-time grocery clerk with a cognitive disability. The employee claimed that he was required to perform duties that exceeded his medical restrictions. The employee provided a medical note in July 2013. In October 2013, there was a subsequent medical note with his current restrictions. The employer discovered the second medical note while preparing its response to the HRTO claim. The later note had not been communicated by human resources to the employee's store manager and so the employee was accommodated based on only the earlier medical note. The Tribunal awarded damages for injury to dignity, feelings, and self-respect. It further ordered the company to review the employee's duties to make sure they comply with his restrictions and to meet with the employee to review tasks that the employee is not to undertake as they exceed his documented restrictions.[32]

Brittain v. 2374855 Ontario Inc. o/a Minden 50s Diner (Brittain)

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[31] Applicant Request to Reconsider was denied [*Betts v. United Brotherhood of Carpenters and Joiners of America, Local 1256*, 2017)].

[32] The employee subsequently brought an application claiming contravention of settlement by the employer. The Tribunal dismissed the application, as being outside of the Tribunal's jurisdiction, as the resolution of the matter was based on the decision discussed above and not a settlement.

Julie Brittain was a server at a diner. Brittain is a person with mental health issues, which were known to her manager. Brittain was asked to work two shifts for which she was not available. She advised her manager she was having a mental health crisis and could not work her usual shift on this day and did not come in despite her manager's insistence. In response, her manager cut one of her usual shifts. The manager said it was because she was no longer reliable due to her mental health issues and that she did not want to deal with her mental health issues anymore. The Tribunal concluded:

> Based on the evidence of the applicant there is no evidence that the applicant was unreliable. I have come to these conclusions because I accept the applicant's evidence that her absence history was unremarkable and that she was generally able to find coverage in the event that she was unable to work for any reason. (para. 42)

The employer alleged the employee had abandoned her employment. However, the tribunal summed up the employer's actions as:

> I find that while the respondent made some efforts to accommodate the applicant's disability related needs it ceased doing so on or about August 7, 2015, and subsequently took steps to end the employment relationship while contriving to assert that the applicant had quit her employment when she had not. (para. 40)

The Tribunal found the employee was discriminated against based on her mental health.

Brown v. 2229853 Ontario Limited (Brown)

Brown was a hostess and cashier, who suffered from anxiety. She asked to be assigned as a cashier during the week when the restaurant was less busy. The employee also asked the manager to accommodate her condition by providing her extra support and instructions.

> The applicant testified that she advised her manager that she had anxiety and that as a result of the anxiety she would ask the manager many questions. She believed she was doing a good job as hostess and bussing tables but that she was particularly nervous about making a mistake when cashing customers out. She testified that she asked the manager many questions about the cashier job so that she would not make mistakes. She stated that being allowed to ask many questions and getting reassurances from her manager was a means of support for her so that she could do her job effectively. (para. 11)

The manager did not provide the requested support. The manager called her derogatory names; "yelled at her in front of customers; and denied that she had any disability-related needs when she told the applicant that the anxiety was all in her head" (para. 28).

> The applicant detailed one occasion when she was helping an elderly man to pay his bill and he was having difficulty with the technology to use his bank card. The manager pushed her way into the cash area, shoved the applicant out of the way and called her stupid. (para. 13)

Further, the employee was required to clean the bathrooms, although no other hostess was required to do so. As a result of the harassing treatment, the employee, on her doctor's advice, left the job.

The Tribunal found that discrimination increased her depression, anxiety, and panic attacks and that she became isolated, suffered diminished self-esteem and suicidal ideation. The Tribunal awarded Brown damages for loss of dignity and lost wages, as well it ordered that the manger take prescribed human rights training.

Campbell v. Paradigm Sports, Inc. (Campbell)

Winsome Campbell was one of two applicants in *Campbell*. The other applicant was her husband, who also worked for the employer. Ms. Campbell had worked for the company, a golf cart manufacturer, since 2000. The company originally employed six people to do the shipping, handling and assembly of the company's product, golf carts but by 2015 only Ms. Campbell and her husband were working in the warehouse.

"Ms. Campbell alleges that near the end of her employment she was experiencing stress, anxiety and depression and that the Paradigm [the employer] was aware of this" (para. 4). Near the end of her employment with the respondent she had a fall, injuring her neck, back, and shoulder. She filed a Workplace Safety Insurance Board (WSIB) claim. She was very upset that her employer docked her for time off for medical appointments and sick days and left angry

voicemails and sent several letters to her manager and the owner. One manager witnessed Ms. Campbell crying on the job, and another company office manager testified that Ms. Campbell seem stressed.

The Tribunal held that the company should have known that the company's reduced work force was causing the Campbells stress. Ultimately, the Tribunal found that at the time of being laid off Ms. Campbell suffered from anxiety and depression, as well as a rotator cuff injury. The Tribunal found that this uncharacteristic and erratic behaviour triggered a duty on the employer to inquire as to whether Mrs. Campbell was suffering from mental health issues. The adjudicator stated"

> In my view… the respondent herein had sufficient information that ought to have triggered an inquiry into the uncharacteristic behaviour Ms. Campbell was exhibiting in the workplace, whether that behaviour may have been linked to mental health concerns and if so whether those issues were affecting her ability to cope with her job or to communicate accommodation needs. I find that, instead, the respondent chose to largely ignore the crying episodes, letters, etc. and did not engage in inquiries regarding these behaviours, which in turn would have been a precursor to any discussions into whether any accommodations might be necessary. (para. 134)

Even more to the point, the Tribunal stated, "Having not engaged in accommodation discussions with Ms. Campbell, the respondent cannot say there was nothing that could have been done to accommodate Ms. Campbell or that an accommodation would have reached undue hardship" (para. 139). Germanely, the adjudicator found:

> In my view, rather than make reasonable inquiries as to whether there may have been mental health concerns, and if so to engage in discussions on how to accommodate her, the respondents seized the opportunity to lay her off when she returned to work after having missed one day of work. (para. 146)

The employer moved up a planned layoff by two weeks, according to the employer, in response to a letter from Ms. Campbell. Ms. Campbell sent her manager a letter stating that she and her

husband quit and as they did not attend work the day after sending the letter. The respondent claims the layoff was planned before Ms. Campbell's injury. Managers also testified that:

> Continuing declines in revenue due to a downturn in the golf industry, and competition from Chinese cart manufactures forced Paradigm in 2015 to delay the repair of these carts until the spring, closer to the time the repairs were paid for. (para. 85)

The Tribunal found that a one-day absence was unlikely the reason for termination and that it did not constitute abandonment of their positions. "Under the circumstances, I find that Mr. Lange's conclusion that the Campbell's quit, given this context, is not tenable…. what I take from all of this is that Mr. Lange did not actually believe either employee had quit; instead, he decided to penalise them and move their lay-off dates forward" (par 160). The Tribunal stated:

> In my view, it is more likely than not, that a factor in the decision to move up the layoff from Labour Day to August 18, 2015 was Ms. Campbell's workplace fall and the respondent's knowledge that WSIB would be involved, rather than the absence of a single day from work. Even if the absence for a day and the angry letters and messages were factors, and assuming those were non-Code related factors, the WSIB report was also a factor in the early layoff and it only needed to be one factor. (para. 162)

Mr. Campbell was laid off by the employer based on his being married to Ms. Campbell.

The Campbells engaged a lawyer who wrote the company threatening a human rights claim. At that point the employer chose not to recall either Ms. or Mr. Campbell. Their manager testified that "they sued me in November" and "they are not coming back now" (para. 173). The Tribunal found this to be reprisal for a possible human rights claim. In addition, the Tribunal awarded both Ms. And Mr. Campbell damages for each of their loss of dignity and self-respect as well as damages for lost wages.

Carter v. Chrysler Canada Inc. (Carter)

Carter was off work for a heart attack. He returned to work with medical restrictions in respect to the type of work he could perform. In the meantime, he also lost "ownership" of his

former job. The employee was laid off, as he did not have sufficient seniority to obtain the only suitable full-time positions available.

The manager on the Medical Placement Committee responsible for looking for suitable work for medically restricted employees, looked for only permanent standard jobs for the employee. The employee was not considered for temporary or nonstandard jobs. Employees with an active Workplace Safety and Insurance Board (WSIB) claim for work-related injury insurance claims were preferred for nonstandard jobs, so nonstandard jobs were not typically available to other medically restricted employees. The manager testified:

> Under the NEER program [WSIB experience rating system], the assessments paid by an employer can vary significantly depending on the amount of lost time injured workers experience after a work-related injury. The system creates an incentive to employers to offer injured workers suitable work at full pay after an injury. If the employer does not offer such work and the worker remains off work in receipt of WSIB benefits, the amount that the employer must pay in assessments can increase significantly. (para. 76)

So, the employer has an economic incentive to treat some injured workers differently than others.

> The Tribunal did not find preferring WSIB claimants discriminatory.
>
> This is not a distinction that is based on a prohibited ground. While the result of the policy is that some disabled workers are treated more advantageously than others, the distinction does not arise from disability but rather from the operation of a statutory scheme. (para. 96)

However, the Tribunal found that over a 10-month period, the company discriminated against the employee on the basis of disability by failing to consider physically suitable temporary postings that met his seniority and awarded him damages for injury to dignity, feelings and self-respect. The Tribunal also ordered the company to review its return-to-work procedures for employees who are medically restricted and do not have an active workplace insurance claim to assure they comply with the code.[33]

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[33] The Ontario Divisional Court on judicial review upheld the Tribunal's decision as reasonable *(Carter v. Human Rights Tribunal of Ontario*, 2019.

Conklin v. Ron Joyce Jr. Enterprises Ltd. o/a Tim Horton's (Conklin)

Conklin was a new employee, still in her employment probationary period when she requested a medical leave of 30 days due to starting a new medication for her chronic depression and anxiety. She provided appropriate supporting documents from her doctor. Up until then, she had missed one day to tend to a sick child.

The employer's bookkeeper instructed that she be terminated "because of the indication that the applicant had excessive absenteeism" (para. 39). The employer claimed that as the employee was in the probationary period of employment, the employer was entitled to terminate the employee at any time during the probationary period and without the need to provide a reason. Further, the employer claimed the employee had a record of excessive absenteeism. The evidence was that prior to the request the employee missed only one day of work, when her daughter was sick. The Ontario Human Rights Tribunal (the Tribunal or HRTO) adjudicator found:

> In regard to the suggestion that a pattern of excessive absenteeism was established, the available evidence is that prior to February 3, 2016, the applicant called in one only one occasion, when her daughter was ill. There is no evidence of any other absenteeism until February 3, when the applicant called in sick and then provided a doctor's note that said she needed a medical leave for up to 30 days. I find that this does not reasonably lead to the conclusion that there was a pattern of excessive absenteeism. (para. 52).

The employer argued because the employee was on probation they could terminate them without cause, as the intent of probation is to ensure the employee is a good fit for the organisation and that it could terminate the employee at any time during the probation period without reason. However, while the employee may have been in a probationary period of employment, probation did not supplant the employee's human rights under the Code.

Groh v. Waterloo (Regional Municipality) (Groh)

The employee was diagnosed with Asperger's syndrome and took a leave as an accommodation. Upon his return to work, there was a return-to-work meeting attended by the employee, three representatives from the region (his supervisor, his manager, and the region's labour relations advisor), and two representatives from his union. The meeting dealt with an outstanding grievance, a memorandum of understanding, and a letter of expectation. The meeting moved quickly in a way that the employee could not follow, so he could not understand what was going on or the documents that were involved, some of which were yet to be drafted. His stress increased upon return to work and was further aggravated when he received the letter of exception (a nondisciplinary letter of warning about a workplace infraction by the employee) six days later, which had a threatening tone. Even though the letter was quickly revised by the region at the union's request, the effect was cumulative, leading to a paranoid episode at work, which resulted in the employee being escorted off the property. The Tribunal stated of his return to the work:

> Given the applicant's state of mind and his request to take a break, and in light of the medical evidence and his e-mail from the previous evening, I find Ms. Steadman should have permitted the applicant to take a break rather than issuing what would have seemed to him like discipline and an ultimatum to either do the work or go home. In addition, Ms. Steadman had notice, given the applicant's e-mail of the night before, that he was struggling and took the view that his needs were not being met, and she did not address those but instead told him to do the work or go home. (para. 145)

Subsequently, the employee was hospitalised again.

The Tribunal found:

> Instead of permitting this [more time to consider the documents], the parties did what they would have done with any other employee in a return-to-work meeting, which was to take steps in the applicant's best interests, without recognizing that in the applicant's particular case, this was not appropriate. (para. 128)

The Tribunal stated:

> I find the respondents constructively discriminated against the applicant in the manner in which they conducted the return to work meeting in that they conducted it the same way they would have with someone who did not have the applicant's particular limitations, which included being sensitive to sensory input such as noise, bright lighting and crowded places; being unable to recognize social cues; having social issues particularly when under stress; and needing clear communication that preferably would be backed up by written communication. Both Waterloo and the union representatives knew of the applicant's limitations prior to the return to work meeting. (para. 124)

The Tribunal recognised that the region did not intend to discriminate against the applicant, but lack of intention was not a factor in finding discrimination. The Tribunal found, the return-to-work meeting was conducted in a fashion that was stressful and difficult to follow for the employee, despite the Region's representatives knowing of the employee's limitations. The Tribunal held the region decimated in treating the employee like they would any other employee at a return-to-work meeting. The Tribunal awarded damages for injury to dignity, feelings, and self-respect.

Haley v. 5274398 Manitoba Limited o/a Cross Country Manufacturing (Haley)

The applicant, who was African-Canadian and aboriginal, had suffered a collapsed lung and when he returned to work, he discussed with his manager that he needed a respirator as an accommodation for his disability. His supervisor told him that he did not think the company would provide one and "that he didn't want the applicant falling over or collapsing on his shift" (para. 19). A couple of days later he was out for lunch with coworkers for his birthday. One of them bought a beer for each of them. When he returned to work, the employee was questioned by management about drinking and affirmed that he had. He was summarily terminated. His coworkers were given only a warning.

The Tribunal found:

> Given the conversation the applicant had with Mr. Grover the week before, I am prepared to draw the inference that the applicant's disability and whether he could continue in his job was an active concern for the respondent on July 8, 2015. In the absence of any evidence on this issue from the respondent, I find therefore that the applicant has established that his disability and his request for accommodation contributed to his being terminated on July 8, 2015, rather than letting him off with a warning as was done for the other two employees. (para. 37)

The Tribunal stated:

> I do find that the applicant's disability, and the prospect of accommodating his restrictions, had been raised by the applicant, and had been received with skepticism by the respondent, shortly before the decision was made to terminate his employment the following week. (para. 25)

The Tribunal also found "that the applicant has established that his disability and his request for accommodation contributed to his being terminated on July 8, 2015, rather than letting him off with a warning as was done for the other two employees" (para. 37). The Tribunal stated:

> Though the applicant acknowledged in his testimony that he was aware the respondent had an official "zero tolerance" policy in writing with respect to drug and alcohol use during work hours, based on the evidence before me I cannot find that it was zero tolerance in practice, but was rather selectively applied depending on the circumstances. On July 8, 2017, it was selectively applied against the applicant. After he and two other employees had a drink on their lunch hour, only the applicant was terminated. (para. 35)

The Tribunal found that the employee's disability and his request for accommodation contributed to the dismissal. It awarded damages for injury to dignity, feelings and self-respect and lost wages.The Tribunial also ordered a public interest remedy requiring the company's managers take perscribed human rights training.[34]

Hayes v. R.J. Burnside & Associates Ltd. (Hayes)

Hayes was hired as the Environmental Assessment Coordinator/Environmental Planner and was in the probationary employment period. She had an asthma attack at work, which she

[34] Subsequently, a Request to Reconsider was granted. The Tribunal found that it lacked jurisdiction to grant the original decision, as the employer had filed a notice of intention under the *Bankruptcy and Insolvency Act,* which stayed all claims against the company (Haley v. 5274398 Manitoba Limited o/a Cross Country Manufacturing, 2018).

attributed to pet dander on a coworker's clothing. She attempted to deal with the issue with the coworker, but when that was unsuccessful, she escalated the issue to management. To accommodate the employee the company moved her into a vacant office over the employee's objections for fear of increasing coworker resentment. They did not consider any of the accommodation suggestions made by the employee. The office option was attractive for reasons unrelated to the employee's accommodation needs. The employer's HR manager stated in an email (at the time accommodation options were being considered) that:

> The secondary reason for moving Debra from the group environment, is it also removes her ability to track the comments, and the "deficiencies" of her colleagues, which is the other side of the coin. Debra has served up multiple complaints in writing after five short weeks on this team and appears to be keeping a daily log of what she finds lacking in the department. (para. 47)

The Tribunal found that the company used the accommodation request as a pretext to remove her from her coworkers.

A month after commencing the accommodations the employee was terminated. The employee alleged her termination was connected to her accommodation needs. Her position was that the increased scrutiny she received, and that the judgment of her work and interpersonal relationships were unfairly related to her accommodation request. The Tribunal did not agree, as it found that the company, "based its decision on its perceived dissatisfaction with the quality of the applicant's work, her unwillingness to take on more senior work and her interactions with the other members of her team, including her supervisor" (para. 87). However, the Tribunal did find that the form of accommodation provided did not respect the applicant's dignity and resulted in her being further isolated from coworkers and awarded damages for injury to dignity, feelings and self-respect.

Passmore v. Illuminate (Passmore)

The employee, an employment recruiter, had been off work for posttraumatic stress disorder. She had requested an accommodation of returning to work part-time. A plan suggested by a return-to-work specialist from the disability insurance company who managed these matters for the employer, called for a gradual reintegration to work. The day she returned for work she was terminated.

All the company's witnesses claimed that a part-time recruiter would be a hardship on the company, that a recruiter could not work part-time effectively. The employer claimed the decision to terminate the employee was made prior to her being off for disability. The employer claimed they waited to terminate her first, prior to the disability onset, as it was better to have someone in the position until they filled it and, subsequent to the disability onset, until she recovered.

The tribunal found that the alleged performance issues were not credible. There was no documentation of conversations between her manager, HR, or the president in respect to her performance. There was no documentation in the employee's personnel file. She received a performance bonus for the year and an advance on the second installment of her bonus. Her performance review indicated no performance issues. The performance gap complained of was only a 2% difference from the prior period. The employer did not create a performance improvement plan, as they have done for other under-performing employees. The Tribunal held:

> Based on the propensity of the evidence, it is more reasonable and probable that once the applicant revealed that she had been diagnosed with PTSD and was asking to come back part-time or to a different role, the respondent then decided to terminate her employment. (para. 115)

The Tribunal found that the employee's disability was a factor in her termination. Damages were dealt with in a separate decision.[35]

Prothero v. Ontario (Community Safety and Correctional Services) (Prothero)

The employee was a network administrator who worked for the Ontario Provincial Police. He was working at the time on a large project, replacing information technology resources in his department. He started experiencing digestion issues, panic attacks, and sleeplessness. He provided a medical note to his sergeant, the personal respondent in the case. A subsequent medical form identified that the employee was impacted by decreased concentration. The sergeant made immediate and frequent requests for clarification about the employee's leave, with very short deadlines to reply. In total, over a three-month span Prothero's doctor provided six medical notes and filled out three medical forms. The sergeant set deadlines for the requested return of documents that were shorter than the employer's human resource advisor was comfortable with.

The sergeant, in a phone conversation with the employee in January, "told him he wanted him to come back to work on January 24, 2011, that he could possibly extend the time off to the January 31, 2011, but after that would have to cut his pay off" (para. 25) The sergeant asked the employee "what this decreased concentration thing was" (para. 25). After this call, Prothero called the human resource adviser for reassurance about his pay. She, in turn, notified a superior about her concerns. The sergeant demonstrated an "unwillingness to accept that he [the

[35] Decision on Remedy awarded the applicant $40,000 compensation for injury to dignity, feelings, and self-respect and $83,450.31 for lost wages [*Passmore v. Illumiti Inc*., 2018].

employee] had a medical problem that was keeping him away from work" (para. 35). As well, the sergeant made unflattering comments to coworkers about the employee being on sick leave. Th sergeant told the employee that his employers did not believe the employee was away from work due to illness. Colleagues testified that the sergeant answered inquiries about the employee by saying "Tim needs some Tim-time", a comment that one of them described as "not flattering" (para. 36). The organisation argued that it needed to know about the employee's limits and restrictions, as it was useful to manage time off for sick leave and to facilitate the return-to-work process. The Tribunal found that the supervisor, personally, and the police force had harassed the employee on the basis of disability and awarded damages for injury to dignity, feelings and self-respect against both.[36]

Sellner v. Canada Cab Ltd. (Sellner)

The applicant was a taxi driver. Sellner was pregnant and was diagnosed with a high-risk pregnancy at the time of these events. Previously she had provided her employer documentation of her restrictions.

Her dispatcher made a complaint against the employee, in respect to the most recent incident in an ongoing dispute between the employee and the dispatcher, about how loud she was on the radio. She was required to attend a meeting before the company's board of directors. She was experiencing a high-risk pregnancy and asked to not have to climb the stairs in the office. The company says it made alternative arrangements to meet. However, when the applicant followed up, she was advised "the bod [board of directors] will get back to you" and not to

[36] The employee's Request for Reconsideration of certain aspects of the Decision was denied, as the Request did not present a basis to reconsider the Decision (*Prothero v. Ontario [Community Safety and Correctional Services*], 2018).

"come to the office" (para. 53), so she did not attend. However, the board still expected her to attend and as a result they suspended her for nonattendance. They then reviewed her file and terminated her based on her complaint history, which included several complaints of her losing her temper and shouting at dispatch personnel and customers. The company claims the employee refused to attend the meeting, even after being told she did not have to climb the stairs. The respondent position was that she was terminated for her complaints record, not for failure to attend the meeting.

The Tribunal pointed out, "Whether the respondents may have had non-Code reasons for the decision to terminate the applicant, however, is not the question. The question is whether her pregnancy-related accommodation request contributed to her termination" (para. 57). The Tribunal held that, "the board clearly did not get back to the applicant about arrangements for her to come to the meeting" (para. 42.). Further, the documentary evidence provided at the hearing indicated that there were multiple complaints by dispatch personnel and by customers, that the employee had issues with her temper, including incidents of yelling at dispatch and phone personnel on the radio and in the office, and had unacceptable behaviour with customers. The Tribunal concluded:

> The earlier complaints against the applicant were, on their face, more serious, and she had not even been suspended for those incidents…. I cannot conclude on the evidence that she would have been suspended, let alone terminated, if she had actually come to the meeting. (para. 59)

The Tribunal held that she was discriminated against based on her disability.

> These events, the discussions between the applicant and the respondent on April 5, were all in the context of how the applicant's accommodation request was going to be addressed. She would never have ended up in the position she was in if she did not require and had not requested an accommodation. Because she was in that position, she ended up being suspended. This is a sufficient connection to find that the applicant has met the test to establish her suspension was prima facie discriminatory. (para. 51)

The Tribunal concluded the employee would not have been suspended if there was not a miscommunication about the meeting, for which accommodations had been requested. The Tribunal awarded damages for compensation of monetary loss and for injury to dignity, feelings, and self-respect, as well as a public interest remedy of perscribed human rights training for members of the employer.

Tavares v. Mistura Restaurant & Hang Out Inc. (T*avares*)

The employee was a hired at an upscale restaurant. He worked four shifts when he was terminated. He had multiple sclerosis (MS) but did not request any accommodations. Coworkers testified that Tavares "displayed a complete lack of interest in learning the Mistura way of service, and asked questions only about how much the servers make and about staff meals" (para. 8). They testified that the employee conducted himself very poorly, including when he was serving coffee to customers while holding the tray above the customer's head. An observer reported that he "walked in a wobbly manner and was leaning against walls" (para. 9). Coworkers claimed that the employee:

> Slow, lacked efficiency, didn't interact with customers, didn't know where to go and seemed lost. The Employer states that Mistura relies upon a team approach with its servers, and that the applicant was not working as part of the team. (para. 14)

Two coworkers testified they saw him drinking alcohol on the job. One of his coworkers had worked with the employee previously and knew he had multiple sclerosis. The coworker advised his supervisor, who, in turn, advised the owner that the employee's swaying might be due to his multiple sclerosis rather than drinking. In addition, there was evidence in respect to the employee's appearance. One employee:

> Testified that he also noticed that the applicant walked in a wobbly manner and was leaning against walls. He states that his concern was that if he could see it, customers and the manager also would see it…. [he] also testified that the applicant looked unkempt and

> distracted at work, and expressed concern about the applicant's lack of interaction with customers. (para. 9)

and "that on the second shift on November 27, 2015, he was approached by the floor captain …, who asked whether the applicant had been drinking because he had been observed to be swaying when he walked" (para. 10). Tavares was terminated after his fourth shift. In terminating him, the employer mentioned that he feared for his safety when he saw him working.

The Tribunal found that at least part of the reason for terminating the employee was a concern for his personal safety, which was related to the employee's MS by the restaurant management. Therefore, the employee experienced discrimination. The Tribunal found that some aspects of the employee's performance were attributable to his MS but that his attitude was not. The employer claims he fired the employee for legitimate reasons that had nothing to do with his disability. In fact, the Tribunal found that the employee would have been terminated regardless of his disability, for nondiscriminatory reasons. The Tribunal awarded damages for injury to dignity, feelings and self-respect as well as ordered specific managers to undergo prescribed human rights training.

Titze v. O.I. International Inc. (Titze)

The applicant was a labourer who was employed by an employee leasing agency. He sustained an injury on the lessee client's job site when he fell after being directed to walk on a platform without fall arrest equipment. The lessee no longer wanted him on their job site. The company had a zero-tolerance policy for fall violations, and after an investigation he was terminated for cause for having violated the company's rules. The injuries left him bedridden for several weeks. The Tribunal found that "the respondent had decided that it was going to terminate the applicant for cause and worked backwards to arrive at this result" (para. 27). The tribunal found that:

> In arriving at the conclusion that it had cause to terminate the applicant's employment, the respondent relied on a rigid application of the employment contract and related documents that ignored the workplace reality, the real as opposed to the ostensible chain of command on the worksite, and the pressure that its employees were under to complete the project within a certain timeframe. (para. 28)

The Tribunal also found the employer's claim that it had cause to terminate the employee was calculated to avoid the necessity to accommodate the employee for the balance of his term of employment.

> The zero-tolerance policy for fall violations was not observed in practice in the workplace, and the applicant was given contradictory instructions with regard to the use of fall arrest equipment. The respondent was aware of this and I am satisfied that the respondent's reliance on the rule was a pretext for terminating his employment and not considering his disability and whether it could be accommodated. (para. 33)

The employer also argued there was no duty to accommodate, as none was requested. The Tribunal stated that the employee's need for accommodations was apparent and therefore, the employer had a duty to consider whether it could accommodate the employee despite there being no request for accommodation. The Tribunal ordered the company pay damages to the employee for injury to dignity, feelings and self-respect and that certain managers take prescribed human rights training.[37]

Trinh v. CS Wind Canada Inc. (Trinh)

The employee, a production technology specialist, was denied accommodation to work half-days for complications of her pregnancy. The Tribunal held that her complications were a disability. "I do not agree with the respondent's submissions. I find that the debilitating joint pain is a disability. In section 10(1) of the *Code*, 'disability' includes "any degree of physical disability …"

[37] The employer's request for reconsideration was denied [Titze v. O.I. International Inc., 2018]. The employee's request to reconsider was granted clarifying the order [Titze v. O.I. International Inc., 2019].

Trinh was told by the Production Division Manager that "You know that you will get fired if go half-day" (para. 17). The Tribunal found that:

> Once she made the request to him, he was obligated to engage in the process of complying with the respondent's duty to accommodate. There is no evidence of any steps he took beyond telling the applicant she would be fired. I accept that the applicant was scared that she would actually lose her job. The threat of losing her job was in effect a refusal to allow the applicant to work reduced hours. (para. 115)

The tribunal found the employee had a genuine fear of losing her employment. The company's response was:

> That since the applicant had the employee handbook she should have been aware that she should have gone to human resources if she was not accepting of Mr. Shin's response. The respondent also submits that Mr. Shin did not have the authority to terminate the applicant's employment so this could not be seen as a failure to accommodate. It submits that the applicant herself could have suggested alternatives such as starting her maternity leave early. (para. 112)

Management's defence in respect to some of the comments was that, "The respondent submits that the comments made were the result of her poor work performance and the difficulties the applicant was experiencing when she returned from her maternity leave" (para. 177). However, the Tribunal found:

> The applicant was entitled to receive a bonus and raise for work performed in 2012. There was no evidence presented to establish that she would not have been so entitled. In fact, all evidence about her performance supports a finding that she would have received a bonus and raise for her 2012 performance. (para.173)

Thus, performance did not bear out as a legitimate excuse.

In addition to the employee's disability, there were intersecting claims around race, sex, family status and ethnic origin. The employee claimed that she was subject to harassment and exposed to a poisonous work environment. There were several harassing comments by the managers to whom she reported. Initially, she reported to the Production Division Manager and then later to the Director of Production.

Both managers were from Korea. In respect to ethnic origin and race, when she requested the half-day accommodation, the Director of Production told her he was disappointed and "you are not like other Vietnamese" (para. 12). On another occasion, her manager was upset about not making production targets. He claimed she was supposed to plan for both lines of production. After she explained that she was responsible for only one line, the manager called her a "stupid Vietnamese woman" (para. 40). On another occasion, when the manager was upset about a report, he told her, "You Canadians are so stupid and cannot produce good report" (para. 141).

In respect to sex and family status, the Tribunal found the employer constructively discriminated against the employee in only allowing one employee from each department to attend the manger's workshop. The tribunal concluded:

> Although this "requirement" may appear to be neutral, it resulted in the exclusion of the applicant, who was a new parent on a leave to care for her newborn child. As a result of not inviting and not allowing her the opportunity to decide if she would attend, the applicant was not able to participate in discussions that appear to be integral to her work as part of the planning team. (p. 127)

The employer provided no evidence that allowing more than one employee to attend would cause undue hardship. One manager made several comments that were sexist and demeaning of family status. She was told on one occasion that "if she did not have a perfect plan in a month she should stay home with her son" (para. 134). The employee in exploring a possible transfer to the company's Texas facility, was told by her manager, "You are a woman with [a] young child and you need to stay in Canada" (para. 50).

The employee later learned from the president that there were other complaints about the manager. The manager was relocating, but it was not stated whether it was related to the manager's behaviour. The manager was the chairman's brother-in-law.

The Tribunal found discrimination, harassment, and a poisoned workplace. The Tribunal stated:

> I find in this case, using an objective standard, that the denial of a reduced hours which her doctor had recommended during her pregnancy; the fact that she did not receive bonuses and raises that others had even after her inquiry about this; compounded by the atmosphere created by the serious harassment was so intolerable that it formed a poisoned environment which is an infringement of s.5(1) of the Code. I find that it had become a condition of her employment that she must endure discriminatory conduct and comments. (para. 180)

The Tribunal accepted that she had no choice but to resign.

Chapter 7 - Findings

As described in Chapter five, the research cases were examined by coding salient fragments of empirical data and inductively analysing the fragments to create themes. Two broad categories of themes emerged: excuses and acts of omission and commission.

Excuse behaviour encompassed eight different forms: (a) absenteeism, (b) abandonment, (c) blaming the employee's behaviour, (d) the employees' performance, (e) probation period, (f) violation of the employer's zero-tolerance policy, (g) the decision to terminate the employee was made before the disabling injury, and (h) the medical note provided was not specific enough.

The second broad category that emerged from this research was employer acts of omission and commission. There were two types of acts of omission: (a) constructive discrimination, also known as adverse effects discrimination; and (b) failure to inquire, which is a form of failure to procedurally accommodate the employee. Employers omitted to act by constructively discriminating, by applying their usual practice or policy. In constructively discriminating, the employer adversely affected the employee, due to the employer's failure to consider and accommodate the employee's needs. Second, the employer omitted to act where it had a duty to do so, in failing to inquire whether the employee required accommodation in circumstances where the employee's change in behaviour was such that the employer should have considered the possibility of mental health issues.

There were five forms of acts of commission: (a) threating the employee, (b) harassment of the employee and/or the employer creating a poisoned work environment, (c) the employee's disability as the reason for termination, (d) the employer's failure to substantially accommodate the employee, and (e) reprisal against the employee threatening to bring a human rights application.

The data were then examined through the lens of industrial and organisational psychology, by applying Stone and Colella's (1996) model of factors effecting persons with disabilities in organisations. This examination yielded findings in respect to the characteristics of the employees with disabilities experiencing discrimination. This included the prevalence of persons with nonapparent disabilities, mental health issues, precarity, and invisibility. Organisational characteristics were examined for trends in organisational characteristics associated with discriminatory behaviours against persons with disabilities. These characteristics included organisational size, the presence of professional human resource capacity, and the presence of a union. The organisations' cultures, values, and beliefs, including their organisational justice climate, were examined to determine their impact on employees with disabilities.

The characteristics of organisational observers are thought to affect their reactions to employees with disabilities and chief amongst those observers are managers and supervisors (Stone & Colella 1996). One such element is their personality. Certain patterns of behaviour can assist in assessing personality, such as managers' leadership styles. Another source of patterns of behaviourcan be seen through leader-member exchange (LMX) relationship. Managers' beliefs were examined by looking at the research cases through elements of the theory of planned behaviour (Ajzen, 1991), to surface behavioural trends.

Similarly, organisational structure, culture, and climate were engaged. Structure was looked at in respect to flexibility and bureaucracy. Climate was examined by looking at the psychological and justice climates. Lastly, organisations' learning abilities were examined. All these elements were engaged to discern further employer behavioural patterns in respect to employees with disabilities.

Employers' Behaviours

Of the 43 HRTO cases that meet the search criteria, 16 were cases where discrimination against employees with disabilities was found to have occurred. These employers' discrimination took the form of eight types of behaviours. These behaviours are listed in Table 6. As there is often more than one breach of the Code per case, or multiple excuses or behaviours per case, there are 34 instances of employer discriminatory behaviour emanating from these cases. There is overlap in that the cases may have more than one behaviour; in fact, there are only 16 cases represented in Table 7.

Table 6

Behavioural Themes

Behaviour	Number of cases
Constructive discrimination	3
Disability as part of or is the reason for termination	8
Failure in the duty to inquire whether accommodations are required/failure to accommodate	8
Excuses	8
Mistaken belief that accommodations in place are adequate	1
Harassment	3
Poisoned environment	2
Reprisal	1

Excuses

One of the behavioural themes listed in Table 7 is excuses. It is one of the most prevalent behaviours evident from the cases and involves employers creating a pretext or post hock rationalisation to defensively support the legitimacy of their discriminatory acts against the employee with a disability. There are nine pretext and excuse themes distilled from the cases.

Table 7

Employers' Excuses

Behaviour	Number of Cases
Abandonment	2
Absences	2
Accommodation offered not real or accommodation requested is an undue hardship	2
Decision to terminate made before disclosure	2
Discipline/poor behaviour	3
Medical note not sufficient in terms of disclosing limitations or disability	2
Performance	3
Probationary employee	1
Zero-tolerance of an internal policy contravention	2

Absenteeism

One of the most common pretexts for terminating an employee with a disability in these cases was a claim of absenteeism. This allegation occurred in three cases (*Brittain, Campbell, Conklin).* In two cases (*Conklin* and *Campbell),* the employer argued that the employee had records of absenteeism. In both, this was based on a single day of missed work. The third case (*Brittan)* culminated in the refusal of a shift but was really about her manager not wanting to continue to accommodate the employee's ongoing mental health issues.

In one case (*Conklin)* the employee had missed only one day of work. When the employee requested a 30-day medical leave supported by a doctor's note, the employer saw this as reason to terminate the employee and stated on her record of employment excessive

absenteeism. The Ontario Human Rights Tribunal adjudicator found missing one day of work did not constitute a record of absenteeism.

The employer made a similar claim in the other absenteeism case (*Campbell).* The employees took an unscheduled day off during a dispute with the employer. The adjudicator stated the real reason the employee's layoff was moved up was because of the employee's workplace insurance claim. No evidence was provided to substantiate that Ms. Campbell had a record of absences.

Lastly, The Tribunal held the employee who refused a shift *(Brittain*) did not have a significant record of absence. What had changed was not the employee's reliability but the employer's attitude to accommodating her mental health issues.

Abandonment

There are two research cases in which the employers alleged the employee had abandoned their employment. In both cases, the Tribunal held one day's absence does not constitute abandonment. In *Brittan* the claim of abandonment was a contrivance to terminate the employee, and in *Campbell* it was an excuse to move up a planned layoff.

Employees' Behaviour

In two of the cases (*Bett, Sellner*) the employer made claims with respect to the employee's behaviour as at least part of the reason for either terminating the employee or failing to provide necessary accommodations. An employee's behaviours may be a legitimate reason for terminating the employee, but that does not obviate the employer's responsibility to act in a nondiscriminatory manner. In both cases the employee was not accommodated. In both cases the Tribunal did not believe that the employee's behaviour was the sole reason for the adverse treatment of the employee.

Performance

Three cases alleged performance as the cause of the employee's termination. In *Passmore* the employer's claim was found to lack credibility because there was no evidence to support the claim. In *Tavares* the Tribunal found the employee did have performance issues, but that did not obviate the employer's other disability related discriminatory considerations in terminating the employee. In *Hayes,* the tribunal accepted performance as an issue, unrelated to the employee's disability or request for accommodation that led to her termination, though they found discrimination in the manner she was accommodated.

Probation

In one case (*Conklin*) the employer argued that their actions were excused, on the basis that they could terminate the employee at will when they are in the probationary period. While that may be the case generally, they cannot do so to avoid their obligation to accommodate the employee's disability.

Zero-Tolerance Policies

In two cases (*Haley, Titze*) the employers relied on claiming the employee breached the organisation's zero-tolerance policy as an explanation for termination. However, the Tribunal found discrimination as the policies were applied selectively. In one case (*Haley*), involving three employees, only the employee with a disability was terminated, and in the other case (*Titze*), the tribunal found, despite the existence of a zero-tolerance policy, zero-tolerance did not exist in practice. In both cases the Tribunal found that the application of these zero-tolerance policies was a pretext for a discriminatory dismissal of the employee to avoid accommodation.

Decision to Terminate Made Before the Disabling Injury

In two cases (*Campbell, Passmore),* the respondents both argued that the decision to terminate was made prior to the disabling event. In both cases discrimination was found. In *Campbell* the layoff was moved up in reaction to her workplace insurance claim. In *Passmore* the Tribunal found that it was more reasonable that the employer did not want to accommodate the employee with part-time work.

Medical Note Not Specific

In *Trinh* the Tribunal did not agree with the employer's assertion that the medical note provided was not specific enough for disclosing a disability.

Acts of Omission and Commission

Acts of Omission

In addition, to what appears to be overt discrimination, there are three cases where the employer's behaviour is discriminatory for what they didn't do. Two types of acts of omission arose in the research cases. The first type of discrimination occurred constructively in two cases (*Betts, Trinh*) by applying a neutral rule that has a discriminatory effect on the employee with a disability. The second type of discrimination occurred in one case (*Campbell*), procedurally by failing to make necessary inquiries; the employer should have been alerted inquiry was necessary. Regardless, a lack of intention to discriminate in these cases did not excuse a discriminatory result.

Constructive Discrimination/Adverse Effects Discrimination. Discrimination can occur constructively by applying a neutral rule in a way that has an adverse effect on an employee due to their disability. In two cases (*Betts, Trinh*) this sort of discrimination arose. This involved applying their policies or procedures in such a fashion, as they would in respect to any

other employee, but in so doing, it disadvantaged the employee with a disability. In these cases, it involved the employer conducting a return-to-work meeting in their usual manner (*Groh)* but not modifying its testing requirements, even after notice of the employee's need for such an accommodation (*Betts)*.

Failure to Inquire - Procedural Accommodation. In the other case (*Campbell*), the employer failed in its duty to inquire about the employee possibly having a disability, where the employer reasonably ought to have been alerted by the employee's unusual behaviour. The employer is required to make reasonable inquiries if the employer knows or ought to know there is a disability. The Tribunal found that the employee's erratic and uncharacteristic behaviour was enough to trigger the duty to inquire.

In another case (*Betts*), despite receipt of a doctor's note advising of the necessary accommodations, the local did not seem to accept that the employee was experiencing anxiety. Relations between the employee and the employer had become strained, and effective communication was not possible. The Tribunal held that under the circumstances, the union should have made inquiries of the employee's doctor to determine what accommodations were required and should have accommodated the employee by altering the testing requirement, as requested.

In a third case (*Titze*), the Tribunal said that the need to inquire was apparent, even though the employee made no request for accommodation. The employer knew the employee had sustained a work-related injury. The Tribunal held that the company had a procedural duty to request medical information about the employee's ability to return to work, what restrictions the employee might have upon return to work, and upon receipt of that information, whether the employee could be accommodated.

Acts of Commission

Conversely, there are several acts of commission in the research cases that compound the discrimination experienced by the employee including threatening the employee (*Trinh*), harassment and creating a poisoned work environment *(Brown, Trinh*), and reprisal for the employee threatening a human rights claim (*Campbell*). Regardless of any rationale the employer argued, if disability was part of the reason for the adverse treatment, the employer's behaviour is discriminatory. Lastly, failure to provide an accommodation that meets the employee's disability needs or failure to engage in the accommodation process at all is discriminatory.

Threat. Not only did one employer not make an effort to accommodate the employee, but manager told the employee, in response to her request for accommodations, that she needed to work full-time or risk being fired (*Trinh*)—a threat the employee took seriously. The employer's argument that the employee could have taken other steps to go around her manager does not excuse the company from its obligations. The manager was obliged to accommodate the employee, up to undue hardship.

Harassment and Poisoned Work Environment. Two research cases demonstrate harassment of the employees with a disability (*Brown, Trinh*), and in both of those cases the Tribunal found a poisoned work environment resulted. In a third case (*Prothero*) harassment and a poisoned work environment were also found but in addition to the organisation being held responsible, the harassing manager was also held personally liable.

Job Insecurity. Two employees expressed experiencing job insecurity because of the harassment (*Prothero*, *Trinh).* One employee *(Prothero*) had been threatened with loss of his income if he did not comply with his manager's unreasonable requests to return to work. In the

other case (*Trinh*), she was threatened with being fired for asking for a medical accommodation of half-days.

Manager Resistance to Sick-Leave. Both *Prothero* and *Trinh* show how managers' attitudes around medical absences become a site of harassment by their resistance to accommodate their leave requirements (Liefooghe & Davey, 2001). *Prothero* demonstrates harassment in terms of pressuring the employee to return to work from medical leave. The manager, in this case, threatened to cease the employee's pay contrary to the organisation's policy if he did not return by a short date set by the manager—a date the manager knew was much earlier than what was medically advised. In *Trinh* the resistance was in the form of a threat of termination if the employee perused her medically required need to only work half-days for a period.

Disability as the Reason for Termination. In nine research cases disability was at least part of the reason for termination or resignation. The Tribunal found in one case that the employee's WSIB claim was part of the reason for being laid-off (*Campbell*). In other cases, the Tribunal found terminations related to the employees' requests for accommodations including working half-days (*Passmore, Trinh*), moving a meeting to a more accessible location (*Sellner*), requesting a leave (*Conklin*), requesting a respirator (*Halley*), being able to ask questions (*Brown*), switching shifts (*Brittain)* and being considered for nonstandard jobs (*Carter*). In another case, no accommodations were requested, but the employee was terminated, in part, due to symptoms of his muscular sclerosis.

Failure to Substantially Accommodate. Four research cases exemplify employers' failures to provide substantive accommodations. These failures included not implementing the most up-to-date documented accommodations (*Bonnic*i), not being assigned as a cashier

(*Brown*), not providing an alternative location for a meeting (*Sellner*), and not engaging in an accommodation discussion (*Titze*).

Reprisal. One case (*Campbell*) of reprisal was found in the form of refusing to call the employees back from layoff after the employees commenced a human rights claim.

Characteristics of the Employees With a Disability

Prevalence of Mental Health Issues and Nonevident Disabilities

Examination of the research cases reveals, in respect to employee characteristics, a potential systemic trend. As set out in Table 8, eight of 16 cases of discrimination, involved employees with a mental health condition (*Betts, Brittain, Brown, Campbell, Conklin, Groh, Passmore, Prothero)*. Eight of the research cases appear to involve employees with nonevident disabilities. Eight of the employees with nonapparent disability were in respect to mental health issues (*Betts, Brittain, Brown, Campbell, Conklin, Groh, Passmore, Prothero*).

Table 8

Health Conditions

Case	Health issues as described by the Tribunal
Betts	anxiety symptoms and panic attacks
Bonnici	cognitive disability
Brittain	mental health issues
Brown	social anxiety and depression
Campbell	mental disability
Carter	cardiac condition, - physical work restrictions
Conklin	depression and anxiety
Groh	Asperger's syndrome, mental health difficulties
Haley	collapsed lung
Hayes	asthma
Passmore	PTSD
Prothero	problems with digestion, panic attacks and sleeplessness – limited by
Sellner	high-risk pregnancy
Tavares	multiple sclerosis
Titze	physical injury
Trinh	complications with her pregnancy

Five of the employers in the research cases did not want the inconvenience of dealing with mental health issues (*Brittain, Brown*, *Campbell*, *Passmore, Prothero*). In the two other cases the employers constructively discriminated by failing to modify its neutral but discriminatory routines *(Betts, Groh*).

Income

Another personal characteristic trend that is evident in the data is the extent to which discrimination is wrought on more financially vulnerable workers. Ten of the 16 cases involved workers who were at the low-wage end of the earning spectrum, as can be seen in Table 9. This included four servers or hostesses, one taxi driver, three labourers, one grocery clerk, and one apprentice. In at least four cases the applicant worked part-time (*Bonnici, Brittain, Brown, Campbell*). In the handful of cases where there is income data, there are minimum wages or very low wages. A server and a hostess earned $11.00/hour and $11.25/hour, respectively. In the two cases involving labourers, the employees earned $13/hour and $11.25/hour.

Table 9

Precarity

Case	Job Description/Earnings
Betts	Unionised apprentice
Bonnici	Part-time grocery clerk
Brittain	Server $11.00 per hour plus tips, approximately 25 hours per week
Brown	Hostess/cashier $11.25 per hour/ 15 hours per week
Campbell	Warehouse labourer $11.25 per hour, 15 hours/week
Carter	Unionised auto worker
Conklin	Server – Fast food employee – shift work
Groh	Unionised worker
Haley	Labourer $13.00/hour
Hayes	Environmental Assessment Coordinator/Environmental Planner
Passmore	Employment recruiter
Prothero	Network administrator
Sellner	Taxi Driver, approximately $120 per day, plus tips,
Tavares	Server
Titze	Labourer and assembler

Trinh	Production technology specialist

Another metric that may corelate to lower income status is the ability to avail oneself of legal counsel. As can be seen in Table 10, eight of 16 claimants were not represented at the Tribunal by a lawyer. Five were self-represented, and three were represented by someone other than legal counsel. Of the 36 cases coded, 18 were self-represented (45%); two were represented by someone other than legal counsel. Therefore, in 26 of 36 of the cases (56%) the employee-complainants did not have a lawyer.

Of the 18 self-represented cases, the employee-complainant won only five (28%). Of the four cases represented by someone other than legal-council, two cases were won. Of the 22 self-represented and represented by other than council cases, seven (32%) were successful. As far as is known, there is no other research profiling disabled human rights claimants in Ontario by legal representation where discrimination has been found.

Table 10

Legal Representation

Case	Legal Representation
Betts	Counsel
Bonnici	Represented by a family member
Brittain	Student-at-law
Brown	Representative
Campbell	Counsel
Carter	Self-represented
Conklin	Self-represented
Groh	Counsel
Haley	Self-represented
Hayes	Self-represented
Passmore	Counsel
Prothero	Counsel
Sellner	Self-represented
Tavares	Counsel
Titze	Counsel
Trinh	Counsel

Quality of Employment

Several employees in the research cases lacked control over scheduling of work. Employers fired employees with disabilities to no longer accommodate the need for shift changes (*Brittain*), for requiring a one-month medical leave (*Conklin*), and for requesting working half-days to facilitate a return-to-work plan (*Passmore*). Another employee was threatened with termination for requesting half-days (*Trinh*). An employee was harassed for not returning to work as quickly as the supervisor wished (*Prothero*). Another employee was not afforded control over test-taking, despite documenting the need for accommodation (*Betts*).

A lack of job control (task autonomy) was evident in one research case when an employee was refused a break (*Groh*). In another research case the employee was made to do "dirty work" unrelated to her actual job (as the only hostess with a disability). She experienced voicelessness as her protests were ignored (*Brown*).

In one research case the employee was clearly suffering stress and anguish, in part due to the increased workload, being the only two workers remaining after staff reductions (*Campbell*). In another research case mention was made of the very long days the employee worked (*Trinh*).

Other than the two cases (*Prothero, Trinh*) discussed above, there are only two other cases of obvious job insecurity. In one research case, the employee was very concerned about the correction of his record with respect to mischaracterisation of issues of discipline (*Groh*). In another research case the employee's ability to work was significantly impacted by being laid off, as not in good standing, due to failing to obtain his certificate of qualification (*Betts*). While many of the research cases ended in termination, other than these four cases there is no evidence that these employees were concerned about being fired prior to requesting accommodations.

The only research case where skills development was an issue directly in respect to disability discrimination involved refusal to accommodate the employee's testing anxiety, impacting the employee's certificate of qualification testing (*Betts*). There is one other instance of impacting skills development in the research cases (*Trinh*). It involved an employee who experienced disability discrimination as well as other grounds of discrimination and harassment. She was refused the opportunity to attend a manager's workshop where there would be team building, brainstorming, and considerable training. However, that there were not more issues, skills development is likely due to the high level of low-skilled work in the research cases. Given that, as will be discussed in the next section, most of these employees were in low-skill work, they likely did not expect skills development.

In respect to more intrinsic elements of job quality overall, these employees were not in powerful positions, did not have high levels of responsibility, and did not have high levels of autonomy or independence. In respect to self-fulfilment (intellectual challenge) and meaningfulness (contribution to society) the data do not reveal the employees' levels of satisfaction on those criteria.

Skill

Ten of the employees in the research cases worked in what are typically considered low-skilled jobs (four servers/hostesses [*Brittain, Brown, Conklin, Tavares*], one taxi driver [*Sellner*], three labourers [*Campbell, Haley, Titze*,] one grocery clerk [*Bonnici*]). Additionally, one employee was an autoworker with limited seniority (*Carter*). Prior to his injury he worked in the paint department. After his injury, given his low level of seniority and work restrictions potential work was on the production line. No reference was made, in respect to this employee, about any special skills. There was one skilled trade employee, an apprentice carpenter. Only four

employees were in white collar positions (Network Administrator [*Prothero*])*;* Technology Specialist [*Trinh*], Environmental Assessment Coordinator/Environmental Planner [*Hayes*] and an Employment Recruiter [*Passmore*]). Presumably these three positions required special training and/or credentials. A recruiter may not have required any specialised education; however, in this case the employee had 20 years of experience in the niche market.

Tenure

Table 11 sets out the lengths of employment for the employees in 11 research cases where duration of employment could be determined from the case reports. Duration of employment ranged from four shifts to eight years. Five cases are eight months or less, and six cases range from two years to eight years.

Table 11

Length of Tenure

Case	Tenure
Betts	More than 3 years
Bonnici	Undisclosed
Brittain	8 months
Brown	2 months
Campbell	8 years
Carter	6 years
Conklin	1.5 months
Groh	Undisclosed
Haley	Undisclosed
Hayes	3 months
Passmore	3 years
Prothero	Undisclosed
Sellner	7 years
Tavares	4 shifts
Titze	Undisclosed
Trinh	2 years

Organisational Characteristics and Disability Discrimination

Industrial Sector Classification

Based on the North American Industry Classification (Statistics Canada, 2021), the organisations in the research cases were in the following sectors: construction (*Titze)*; manufacturing (*Carter, Haley, Trinh*); transportation and warehousing (*Campbell, Sellner)*, professional, scientific, and technical services (*Hayes, Passmore*); other services (other than public administration; *Betts*); accommodation and food services (*Brittain, Brown Conklin, Tavares*); retail trade (*Bonnici*); and public administration (*Groh, Prothero*).

Organisational Size

The research cases represent businesses of a range of varying size and sophistication. Table 12 sets out the respondent organisations by nature of their business and size. The organisations ranged from a single location diner to a large American-based multinational automobile manufacture.

Table 12

Employer Characteristics

Case	Human Resource Capacity and/or Unionised Workplace	Nature of the Business	Organisation Size
Betts	Unionised	Carpentry	Large -Union Local -more than 680 members
Bonnici*	HR	Groceries	Large -multi – location retailer- 27,500 full-time employees
Brittain		Diner	Small
Brown		Hospitality	Small
Campbell		Manufactures motorised golf caddies	Small U.S. based
Carter	Unionised, HR	Manufactures automobiles	Large U.S. & Canadian based
Conklin		Coffee Shop	Small –3 Franchises- Approx. 30 employees
Groh	Unionised, HR	Regional Municipality	Large

Haley		Manufacturing	Small
Hayes	HR	Consulting firm	Medium -350 plus employees
Passmore	HR	Systems analyst and management consultant company	Small -Employee recruiting
Prothero	HR	Police	Large - 9000 employees
Sellner		Taxi dispatching service	Small -Approximately 50 independent taxi owners
Tavares		Upscale, fine dining restaurant and lounge	Small
Titze		Construction employee leasing company	German based
Trinh	HR	Manufactures Wind turbines	Medium – 470 employees in Canada Multinational corporation

Based on Statistics Canada's typology of company size (Leung et al., 2015), four organisations were large (Chrysler, Loblaws, Ontario Provincial Police (OPP), Region of Waterloo; Unifor, 2020; Weston, n.d.; OPP, n.d.; Region of Waterloo, n.d.), two corporations were medium-sized (C.S. Wind Canada Inc., *Hayes;* CBC.ca 2019). The remaining ten organisations appear to be small corporations. The ratio of discriminating organisations is 5(small):2(medium):1(large).

Human Resource Capacity

Seven of the research cases involved organisations with HR personnel. Yet, these organisations still ended up contravening the *Code*. The following behaviours were exhibited in the research cases: (a) managers acted contrary to HR advice (*Prothero*); (b) incorrect information was provided by the HR manager resulting in implementing the wrong accommodations (*Bonnici*); (c) HR, along with other managers, constructively discriminated

(*Groh*); (d) HR was unaware of what the offending manger was doing (*Trinh*); and (e) HR was involved in the discrimination by implementing a discriminatory accommodation (*Hayes*).[38]

Lunsford and Dolison (2019) conceptualised a model of three attitudinal outcomes to promote the successful employment of persons with disabilities that human resource professionals should foster: engagement, empowerment, and inclusion. Applying these factors to the research cases, where human resource managers are present, reveals no lack of engagement. There are, however, issues of empowerment and inclusion.

There is little reason to conclude that the employees in the research cases were not engaged. While engagement was not necessarily referred to in those terms in the research cases, it can be inferred to be at least adequate, given that the Tribunal found no productivity or other employee issues.

One element of empowerment is structural empowerment, which is distributing responsibility and power to employees (Lunsford & Dolison, 2019). In several of the research cases the employee lacked discretion. In *Groh*, the employee was not allowed to take a break when requested and did not seem to have discretion about refusing a task he felt was a manufacture's issue. In *Hayes,* despite seeking the employee's input, the form of the accommodation HR decided on was exactly what the employee asked it not to be. Rather than empowering the employee in the decision-making, HR treated the accommodation process as an opportunity to solve other problems by isolating the employee. In *Trinh,* given the level of harassment and criticism it is hard to disentangle whether the employee had discretion. Empowerment also entails a psychological component or the employee's intrinsic motivation.

[38] In *Carter*, no mention is made of HR involvement, although Chrysler surely has an HR department. However, management consulted the company's medical centre and their labour relations specialist.

In most of the research cases, there is no reason to suspect the employees' intrinsic motivation. However, in a few research cases, work conditions did effect motivation. In *Trinh* the level of harassment led to the employee's resignation and her self-esteem being affected.

It is fair to say, at least vis-à-vis, several employees did not feel included. In *Trinh* managers from Korea made harassing comments, inferiorising Canadian work capabilities, disparaging her Vietnamese heritage, and making sexist remarks. In *Prothero,* the employee was not able to return to work at all. One of his doctors opined that he should not return to his original office, due to "the damaging effect of the particular work environment on the applicant's health" (para. 96). In *Groh* the employee was struggling to understand the terms of his return-to-work accommodations and how discipline issues had been resolved, and so in his mental state he interpreted other requests and responses as discipline. Management dealt with him in a way that exacerbated his sense that his disability and needs were not understood. The way he was dealt with clearly did not make him feel very included. In *Hayes*, her accommodation served to further alienate her from her colleagues by isolating her.

Unions

Unions were present in three of the research cases. In the apprenticeship case (*Betts)* the local was found to be the employer of apprentices and was found to have acted discriminatorily in not providing accommodations. In the regional municipality employee case *(Groh)*, the adjudicator held that the union failed to accommodate, but there was no legal basis to hold the union liable. In the auto manufacture case (*Carter),* the union was not involved in the provision of accommodations; however, union-negotiated seniority requirements barred the employee from the only suitable available permanent job.

Observers and Disability Discrimination

One factor in Stone and Colella's (1996) and Beatty et al.'s (2019) models of the treatment of persons with disabilities in organisations is the behaviour of observers (coworkers and supervisors). Findings in respect to certain characteristics of supervisors are presented in this section, as are findings about *Supervisor-Employee Relationship*. The cases provide limited details about coworkers' characteristics, but they reveal one salient finding about interpersonal conflict and disability in the workplace.

Supervisors

Stone and Colella's (1996) model noted that supervisors' reactions to persons with disabilities are influenced by demographic characteristics, personality characteristics, and previous contact with disabled persons. Unfortunately, the case reports are not fine-grained enough to determine all these factors. What we can determine is in respect to gender/sex.[39] Of the manager most closely associated with the discriminatory decision in the research cases, the ratio is eleven males to five females.

The cases are very scanty in respect to information on race. Haley is described as African Canadian and Aboriginal. It seems reasonable to conclude by inference in *Haley* that management was Caucasian. In *Trinh,* the case reports that the managers were South Korean. Trinh was Canadian of Vietnamese heritage. Her first manager told her when she asked for a medically necessary leave "that he was very disappointed" and "you are not like other Vietnamese" (para. 12). There is no evidence on manager demographics in the other research cases.

[39] Sex refers to a person's physical attributes, while gender refers to a person's identity and gender expressions. Determinations as to sex or gender are based on how the managers are presented in the research cases.

However, acts consistent with various leadership styles are discernable from the research cases and these reflect certain personality traits of managers. Nine harmful leadership behaviours were identified, as listed below in Table 13 involving five (31%) of the research cases.

Table 13

Traits of Abusive, Toxic and Bullying Leadership

Demeaning/marginalizing	Brown, Trinh
Degrading and ridiculing or mocking	Betts, Prothero, Trinh
Harassment	Prothero, Trinh
Threatening employee job security	Betts, Prothero, Trinh
Imposing employees to endure hardship	Betts, Brown, Prothero, Trinh
Lying or being deceptive	Trinh
Ridiculing subordinates	Brown
Hold employees responsible work outside their job description	Brown
Badmouths the employee to other employees	Brittan, Prothero
Belittles the employee in public	Brown
Tells the employee they are incompetent	Brown

While it cannot be said categorically without more information, there does not appear to be evidence to conclude that transformational and situational management styles were present in the research cases. On the other hand, 14 cases exhibit transactional management style. Maintaining the status quo was evident in five research cases (*Betts, Groh*, *Passmore, Prothero, Trinh*). Accommodations, such as working half-days (*Passmore* and *Trinh),* not retur*ning* to work as quickly as the manager would like (*Prothero*), or having to change routines (*Betts,*

Groh) all from management's point of view would change the status quo. Seven research cases could be seen as altering the bargain in the exchange between the employer and the employee. In five cases (*Brittain*, *Brown*, *Conklin, Haley, Titze)*, it would appear the employer viewed accommodating the employee as affecting the quality of the exchange. In two cases (*Carter, Campbell*) the added cost of a workplace insurance claim affected the benefit of the exchange for the employer. Lastly, in two cases the employer used the situation as a pretext to isolate (*Hayes*) or eliminate (*Sellner*) personnel that management believed had behavioural problems.

Coworkers

Coworkers are mentioned in only two research cases. In both cases, coworkers had a negative view of the employee with a disability. However, their adverse perspective did not stem from the employees' disabilities but from the employees' attitudes. In one case (*Tavares),* coworkers found the employee lacked a work ethic, had a poor attitude, and was not suited for the restaurant's team approach. Coworkers' opinions informed managements' decision not to retain the employee. In the second case (*Hayes*), the employee's attitude and aggressiveness, as well as her ongoing critique of coworkers, resulted in interpersonal issues with coworkers. This employee's toxicity was a factor amongst others for not being retained. In *Sellner* the employee had interpersonal issues with the taxi dispatcher. It is possible that was a factor in dismissing the employee. It seems logical that the employer would value a dispatcher more highly than a driver.

Supervisor-Employee Relationship

Seven research cases exemplify poor manager-employee relationships. These involve: (a) manager harassment of the employee (*Brown, Prothero*), (b) the employee's fear of provoking her manager and being disciplined (*Trinh*), (c) an acrimonious relationship involving discipline where the manager was unsympathetic to the employee's condition (*Betts*), (d) a manager openly

saying that she did not want to deal with the employee's mental health issues anymore (*Brittan*); (e) a manager who stated "he didn't want the applicant falling over on his shift" (*Haley,* par. 19), (f) a case where the Tribunal found the employee "was more generally on management's radar" (*Hayes*, p. 74), and (g) the human resource manager using her accommodation request to isolate the employee from her colleagues for nondisability-related reasons (*Hayes)*. In all these cases the employee did not have a good relationship with the employer. In all these cases the employee either: (a) did not receive the requested accommodation (*Trinh, Haley*), (b) the accommodation was withdrawn (*Brittain*), (c) it took an inordinate amount of time for management to accept the need for accommodation (*Betts)*, (d) they were harassed (*Brown; Prothero),* or (e) the accommodation provided was isolating and didn't respect the employee's dignity (*Hayes*).

Organisational Culture, Values, and Beliefs

Beliefs and the Theory of Planned Behaviour

According to the theory of planned behaviour the likelihood of an action occurring can be predicted by looking at normative, control, and behavioural beliefs of managers (Ajzen, 1991). Behaviour beliefs are managers' personal beliefs, normative beliefs are what significant other's believe, and control beliefs are beliefs about available resources. The theory of planned behaviour was used as a framework to examine trends in respect to managers' beliefs towards the employees with disabilities who experienced discrimination.

Normative Beliefs. Most of the cases do not avert coworkers' or more senior managements' pressure on managers (social pressure) to fire the employee with a disability. The lack of information about significant third parties may be a limitation of the study or may indicate that third parties were not a salient issue. However, a few instances are discernable.

There are two research cases *(Trinh* and *Prothero*) where there was evidence of some normative pressure from management. In one case (*Prothero),* senior management's failure to act after being alerted about the ongoing harassment, was found by the Tribunal to be tacit approval of the behaviour. Finally, in one case (*Trinh),* it seems other managers were aware of the behaviour of the employee's manager but did not intervene earlier, as there had been other complaints about this manger.

There were only two instances of coworkers' negative attitudes towards their coworker with a disability (*Hayes* and *Tavares),* although those attitudes did not have to do with the coworkers' disabilities. Rather, they stemmed from the employee's poor work attitude (*Tavares*) and the employee's interpersonal conflicts with other employees (*Hayes*). Coworkers may have influenced managers' normative perceptions, but those normative pressures were not about accommodations.

Control Beliefs. To the extent that accommodation is seen as a resource, one could argue all the research cases demonstrate elements of control beliefs, assuming managers perceived they did not have the resources to provide the accommodations. In fact, in all but one of the research cases (*Haley*) no financial expenditure was required for the accommodation. However, in many of the cases managers had economic rationales to not accommodate the employees.

The most evident case of nonaccommodation related to costs involved workplace insurance claims. Providing a nonstandard job to an employee who does not have an active workplace insurance claim (*Carte*r) was expensive for the employer. The workplace compensation scheme imposes penalties on the employer for insured employees, based on the duration of time lost to injuries. Thus, there is an incentive to prefer injured employees with an active workplace compensation claim for open nonstandard job.

In *Campbell,* the Tribunal found that Mrs. Campbell's workers' compensation claim was a reason for her and her husband's early layoffs. While the tribunal did not connect it to the employer's business situation, the supervisor advised of a continuing downturn in their business. So, there may have been a financial incentive to layoff the only remaining labourers earlier than planned. Lastly, in one research case (*Tavares)* no accommodations were requested at all; however, part of the reason for termination was the concern that the employee's aesthetics would negatively impact customers.

The only case requiring outlay of financial resources (*Haley*) was in respect to an accommodation request for a respirator. The response to the request was, "The applicant told Mr. Grover that his doctor had said all he needed was a respirator. Mr. Grover responded that he did not think the company would supply one" (para. 19). Respirators are not an expensive item.[40]

In *Titze*, the case report pointed out the employer claimed he had no other construction work at the time, which may have been the underlying motivation for his termination rather than the claimed breach of a zero-tolerance policy.

In two cases (*Brittan, Conklin*) the employer sought to avoid the risk and expense of absenteeism. In *Conklin* the employer explained the cost, time, and inconvenience of accommodation saying:

> That when an employee calls in sick the managers will try to find someone who is not scheduled to come in to cover but most often it is not possible to find someone in which case, the other employees have to cover. This requires that they do more work and also that management staff may have to assist with the serving of customers. At times, this can have a negative effect on business because a customer may simply leave if they arrive and find long lines. (para. 25)

Absenteeism is believed to be expensive in the expenditure of management effort and other HR.

[40] In my review of several vendor websites the most expensive respirator found was $237.

However, the most requested accommodation was for a flexible or different schedule. This was the situation in five of the research cases. In *Passmore* and *Trinh* half-days were requested. In *Trinh* the manager warned the employee that half-days would result in her termination. In *Passmore* the employer argued that half-days were not feasible in this business. In *Brittan,* due to her mental health issue, she would sometimes need to reschedule her shifts. In *Conklin,* the employee required a month off for medical reasons, and in *Prothero* the employee took disability leave due to a reoccurrence of a health issue and did not return to work as soon as his manager would have preferred. Seemingly, the resource expended in granting these accommodations would be the managers' time and effort to facilitate different scheduling.

In other research cases there was no economic basis for withholding accommodations. The accommodations requested were exam accommodations (*Betts)*, accommodations required to conduct a return-to-work meeting in a less stressful way (*Groh)*, minimise exposure to asthma-inducing allergies (*Hayes)*, move a meeting to a physically more accessible venue (*Sellner),* answering employee questions (*Brown),* and apply the most up to date work restrictions (*Bonnici*).

Behaviour Beliefs. Behaviour beliefs are employers' sense of how difficult a behaviour is to execute and their control to execute the behaviour (Ajzen, 2002, as cited in Kraft et al., 2005). There is little evidence that these managers could not obtain accommodations for these employees if they chose to. The exception might be the workplace compensation case, where the manager seemed to be executing an organisational practice, incentivised by the economic penalties imposed by the workplace accommodation policy, and acting from the organisation's perspective in a rational and beneficial way (*Carter*).

Organisational Structure, Culture, and Climate

Organisational Structure

The research cases represent a spectrum of workplaces with different organisational behaviour. There was inflexibility and a sense of bureaucracy in: (a) *Betts,* where no effort was made by the local to modify the testing regime, even after notice of the employee's disability; (b) *Carter,* where the company's routine was to prefer disabled employees with WSIB claims for nonstandard jobs; and (c) in *Groh,* where the region did not modify their routine in respect to a return-to-work meeting to suit the needs of the employee.

Further inflexibility and lack of autonomy were also evident in *Groh*. Upon the employee's return to work, he was refused a break and told to either do the assigned work or go home, despite the supervisor having notice of him struggling with the work environment, his disability, and a sense of paranoia over how the region had treated him. In *Prothero* inflexibility is evident in the unreasonably short deadlines given for the employee to provide requested medical information (which the Tribunal found to be harassment).

Climate

Psychological Climate. Psychological climate reflects the employee's perception of the work environment. Table 14 sets out employee reactions to their work environment, mostly consisting of mental health and emotional consequences. Eight of these employees suffered mental health issues and/or emotional distress because of the employers' treatment. In, addition two of the employees also suffered physical health issues concomitantly with their mental health issues.

Table 14

Impacts of Employee Perceptions of Wellbeing

Betts	Suffered a nervous breakdown because of the employer laying him off.

Brittain	Suffered mental health crisis following these events and was admitted to the psychiatric unit of her local hospital for several days' treatment. Felt stigmatised by her treatment, and felt she was stigmatised in her community.
Brown	The employee experienced depression and felt ill at the thought of going to work. The work environment increased her anxiety and depression and physical symptoms she was experiencing because of the anxiety. After leaving her employment she felt a loss of self-esteem and she experienced severe anxiety, depression and physical illness.
Campbell	Stressed due to increased workload, experienced mental health issues. Ongoing depression and anxiety due to the termination.
Groh	The way his return to work was handled increased his stress and anxiety.
Hayes	Distress at being moved and isolated.
Passmore	Went into a manic state after termination. Went back on disability insurance for 18 months.
Prothero	Harassment had a severe impact on the employee's stress and health. Caused him high level of anxiety, upset and trauma.
Titze	Lost focus and was unable to undertake tasks that he once could do easily; described as moody and irritable
Trinh	Due to the lack of accommodation, other harassment and the poisoned work environment, the employee resigned. The treatment experienced impacted her self-esteem.

It is bad enough that these employees had unmet accommodation needs, but these employees' health conditions, principally mental health issues, were exacerbated by the treatment of insensitive managers. Work can make employees sick, but this may be prevalent and acute with respect to employees with disabilities who experience discrimination at work.

Organisational Justice Climate. ***Distributive Justice.*** Twelve research cases involved issues of distributive injustice. Both accommodations and the job itself are valuable resources. Nine research cases (*Brittain, Brown, Carter, Conklin, Haley, Passmore, Sellner, Titze, Trinh*) involved not only accommodations not being provided but termination of the employee or the employee resigning. Two cases (*Campbell, Titze*) involved the employer's failure to inquire,

with the result being no accommodations were considered or provided, and one case involved the way accommodations were provided such that they did not respect the employee's dignity (*Hayes*). In other words, not only did the employee not receive the accommodation of their choice, but the accommodation provided was detrimental in other ways. In *Bonnici*, the employee did not receive a resource in the form of the most up-to-date accommodations prescribed for the employee. *Betts* involved a delay in the employee receiving the required accommodation because the employer did not believe the employee had a disability. Lastly, *Groh* was deprived constructively of the resource of accommodation by the employer not modifying its return-to-work process to meet the employee's disability-related needs.

Procedural Justice. The following have been identified by organisational justice scholars as procedural justice rules applicable to organisations: voice, consistency, accuracy of information, bias suppression, correctability (appealable), decision control (the procedures influence the outcome), representativeness (considering subgroups), and ethics (Colquitt & Rodell, 2015; Colquit & Zipay, 2015). Table 15 lists the procedural rule breaches identified in the research cases.

Table 15

Procedural Justice Violations

Lack of Process Control (Voice)	Betts – Ignored accommodation request, denied employee had a disability. Brittan – Terminated Brown – Denied employee had a disability Conklin – Terminated Groh – No accommodation process, as treated like every other employee Haley – Terminated Hayes – Suggestions as to how to accommodate not considered Passmore – Terminated Prothero – Supervisor did not believe employee had a disability and tried to bully employee into an early return to work Sellner – Terminated Trinh – Threatened with termination
Lack of Decision Control	Betts – Denied disability, so did not engage in accommodation process. Bonnic – Wrong accommodations provided. Brittan – Manager engineered the applicant's dismissal.

	Brown – Denied disability, so did not engage in accommodation process. Campbell – Decision to layoff the employees had to do with workplace insurance claim. Carter – Accommodation process failed, as the employer did not consider nonstandard jobs for the employee. Conklin – Probation is not a reasonable ground for denying accommodation. Groh – In treating the employee as they would any other employee there was no. process. around the accommodations the employer knew this employee required. Haley – Terminated instead of accommodating. Hayes – Decision on accommodation made for reasons not having to do with accommodation needs. Passmore – No evidence that working half-days was undue hardship, terminated instead of engaging in the accommodation process Sellner – She was suspended for not showing up to a meeting, for which she requested accommodations, after being told not to come to the meeting until she heard further from the employer. Titze –Zero-tolerance was a pretext not to accommodate. Trinh – No accommodation process was undertaken.
Lack of Consistency	Bonnici – Did not provide most up to date accommodations Brittan – Manager no longer wanted to deal with the employee's mental health issues Brown – Only hostess made to clean the washrooms Carter – Injured employee treated differently in respect to accommodations than injured employees with a workplace insurance claim Haley – Zero-tolerance policy was selectively applied to this employee Titze – The zero-tolerance policy was not followed in practice in the workplace
Lack of Bias Suppression	Betts – Employer did not believe employee had a nonapparent disability Brittan – No longer accommodating mental health issue Brown – Harassment Prothero –harassment and did not believe employee had a nonapparent disability
Lack of Accuracy	Bonnici – Accommodations based on inaccurate information as most recent not transmitted by HR Conklin – Probation is not a valid reason to deny accommodations
Lack of Correctability	All the research cases
Lack of Responsiveness	Betts – Denied employee had a disability Brittan – Terminated Brown – Denied employee had a disability Carter – Not responsive to employees with a nonworkplace injury Campbell – Layoff Conklin – Terminated Haley – Terminated Passmore – Terminated Sellner – Terminated Titze – Terminated Trinh – No accommodation process was undertaken
Lack of Ethicality	Brown – Harassment Campbell – Reprisal Prothero – Harassment Trinh – Threatened with termination instead of being accommodated & harassment

In ten of the research cases (*Bonnici*, *Betts*, *Brittain, Brown, Carter, Conklin, Grow, Haley, Passmore, Sellner, Titze,* and *Trinh*) there is a lack of employee voice (process control) in

respect to accommodations. Lack of voice is evident in accommodation requests resulting in termination of the employee or the employee being harassed until they quit. More specifically, in at least three research cases (*Betts, Brown, Prothero*) the employer did not accept that the employee had a disability, and in other cases (*Betts, Hayes, Prothero*, *Trinh*) the employer ignored the employee's input on appropriate accommodations. In addition, there were two failures to inquire cases (*Campbell, Titze*). Presumably, in these research cases the employee did not yet know they were entitled to have a voice.

Further, the accommodation decision process (decision control) failed due to lack of employer engagement in the accommodation process in 14 research cases (*Bonnici*, *Betts*, *Brittain, Brown, Campbell, Carter, Conklin, Grow, Haley, Hayes, Passmore, Sellner, Titze,* and *Trinh*), due to the employer not accepting the employee had a disability, to terminating or threatening to terminate the employee, or to constructive discrimination.

As there was no appeal process, the decisions not to accommodate the employees with a disability lacked correctability. Given that the processes did not properly consider disability, or more specifically, took a negative account of disability, the decisions in the research cases lacked responsiveness to a subgroup. This occurred in 11 research cases *(Betts, Brittan, Brown, Carter, Campbell, Conklin, Haley, Passmore, Sellner, Titze,* and *Trinh)*. Given that discrimination was found in all the research cases, most, if not all the employers' procedures could be considered as lacking bias suppression towards employees with disabilities.

Five research cases lacked consistency. That is, the employee with a disability was treated differently than other employees. This different treatment involved the employee with a disability being the only one made to clean the washrooms (*Brown*), being the only employee to whom the zero-tolerance policy was selectively applied (*Halley, Titze*), and in treating

nonworkplace injured employees differently in respect to accommodations than injured employees with a workplace insurance claim (*Carter*). The fifth case involved temporal inconsistency in deciding to no longer accommodate the employee, where accommodations had been provided previously (*Brittain*).

In a sixth case there is inconsistent treatment of a sort, though not relative to employees without disabilities. In *Bonnici*, the employee was mistakenly not provided with the appropriate task exclusions, as per his most up-to-date medical report, provided to the company. Arguably, he was treated inconsistently to other employees with disabilities in the organisation.

Given that the employees in the research cases were terminated often on a pretext, denied accommodations, given inappropriate accommodations, or harassed until they quit, there is a lack of ethicality. The most obvious examples are the harassment cases (*Brown, Trinh*) and the case of reprisal (*Campbell*). However, all the research cases where the employee with a disability was terminated on a false pretense lacked ethicality.

Interpersonal Justice. One form of derogatory comments is untrue statements (Bies & Trip, 1996) about the employee, such as falsely being blamed for poor performance. In three of the research cases (*Hayes, Passmore, Taveres*), employers specifically allege poor performance as an excuse for their discrimination. For example, in *Passmore,* despite the employer's claim, the employer did not present evidence to support the claim. Similarly, employers' false allegations of absenteeism (*Brittain*, *Campbell, Conklin*), abandonment (*Britain, Conklin*), discipline (*Betts, Sellner*), and unreliability (*Brittain*) issues are derogatory.

Three cases exemplify social undermining (Duffy et al., 2006). Acts of social undermining include an employer telling coworkers that the employee had become unreliable (*Brittain*), acting abusively to the employee in front of coworkers and clients (*Brown*), and

making “cryptic and disparaging remarks” to coworkers about the employee’s sick leave (*Prothero*, para. 36). These actions are entirely undermining of the employee and may diminish the employee in the eyes of coworkers.

Lastly, interpersonal justice is affected when an employee’s dignity is assaulted with acts of disrespect and abusiveness (Bies, 2015). In *Brown*, the employee was subjected to public embarrassment and humiliation. She was yelled at every day by the manager. She was the only hostess required to clean the bathrooms. The manager continually denied she had anxiety, called her stupid, and snapped her fingers in the employee’s face. This also exemplifies rudeness, prejudicial statements, and insults. The tribunal found that the workplace was a harassing and poisoned environment. In three additional research cases (*Prothero*, *Brown, Betts*) disrespect manifested in the supervisors not believing the employee had a disability. In *Trinh* the Tribunal found that, in addition to being denied accommodations, the employee was harassed in the form of racist and sexist comments that amounted to a poisoned environment. It seems that the harasser disparaged multiple aspects of the employee’s intersectional characteristics. The Tribunal summed up her experience in saying:

> I find in this case, using an objective standard, that the denial of reduced hours which her doctor had recommended during her pregnancy; the fact that she did not receive bonuses and raises that other had even after her inquiry about this; compounded by the atmosphere created by the serious harassment was so intolerable that it formed a poisoned environment. (para. 180)

In both *Trinh* and *Brown,* the employee felt they had no choice but to reseign.

Organisational Learning

The employers in the research cases likely failed to either acquire disability rights knowledge, or, if acquired, failed to adapt their behaviour to change their routines (Wooten & James, 2005). In the research cases there are instances where employees requesting

accommodation were terminated. In two cases (*Conklin* and *Brittain*) there is a lack of disability management routines or continuing negative routines, where the employees were immediately terminated instead of accommodated. In *Betts and Groh* there was constructive discrimination, where despite the provision of medical information, the organisation did not modify their testing requirements or return-to-work routine. To a certain extent, these organisations in the failure-to-inquire cases (*Campbell, Betts,* and *Titze)* lacked the learning of new routines. Inquiry would have been outside the usual routine and would have required adapting routines in response to managing employees with disabilities.

However, some of these cases do not fit so neatly into the lack of disability routine and are more akin to existing discriminatory patterns that keep managers from learning about disability integration practices. This can be seen in cases where the tribunal found that certain arguments were just pretexts to discriminate, as in *Haley* and *Titze.* Similarly, in the case of *Sellner,* the employer based their alleged decision to discriminate on the applicant's behaviour, which seems like a deliberate decision to terminate the employee regardless of their obligation to provide accommodations. While *Conklin, Brittain,* and *Campbell* are discussed under lack of routine, they very well could be interpreted as deliberate behaviours that resist learning and adaption. Similarly, in *Trinh,* threatening termination instead of dealing with the accommodation request is overtly demonstrable of outdated routines by prevailing Canadian huma resource norms.

The Price of Discrimination

The second research question is, what do the cases reveal in respect to patterns of doctrines, concepts, or practices that socially construct disablement? The research cases exemplify employers' construction of disability.

Awards rendered by the Human Rights Tribunal are relatively modest. Table 16 sets out the Tribunals' awards in the research cases for injury to dignity, lost economic opportunity, and public interest awards. Damages for injury to dignity ranged from $500-$27,500. The average award in these cases was $12,812.50. In addition, awards were made to compensate for lost economic opportunities such as wages, raises, bonuses, and maternity benefits, and ranged from $2,750-$34,875.04. The average award in these cases was $6,042.11. However, in ten research cases there is no award for economic loss, either because it was not appropriate or not sought by the claimant. The average award in the six cases where economic loss was awarded is $16,112.29.

Public interest awards are given to create policies consistent with the Code, to hire an expert to provide human rights training, and to take the Ontario Human Rights Commission online eLearning module "Human Rights 101". It may well be that the low cost of discrimination permits employers to continue to socially construct employees with disabilities as all the disparaging characteristics discussed in this chapter. Of course, the cost incurred by the employers in the research cases for legal representation (not to mention the opportunity cost of managers' time diverted from other business matters) is not known. For some organisations the cost of litigating is no doubt significant, while for larger corporations it is just the cost of doing business.

Table 16

Ontario Human Rights Tribunal Monetary Awards—Research Cases

Case	Injury to Dignity	Lost Wages	Public Interest Remedy
Betts	$8,000		Develop a policy and procedure to accommodate employees with disabilities consistent with the Human Rights Commission's guidelines on disability and the duty to accommodate

			and retain an expert in human rights to provide training.
Bonnici	$500		
Brittain	$15,000	$2,750	Retain an expert in human rights to train supervisory staff and management in managing human rights issues, in particular the accommodation of persons with mental health disabilities.
Brown	$15,000	$3,543.75	Respondent's managers shall complete the online training module "Human Rights 101", (online Human Rights training module).
Campbell	$20,000 (Mrs.) $15,000 (Mr.)	$17,325 lost wages (Mrs.) $22,950 lost wages (Mr.)	
Carter	$5,000		
Conklin	$10,000		Review their human resources and discrimination and harassment policies.
Groh	$10,500		
Haley	$5,000	$20,350.00 lost wages	Managers to complete the online Human Rights training module.
Hayes	$7,500		
Passmore	Damages were reserved for further submissions.		
Prothero	Ted Clark, $2,500 Ontario Provincial Police, $25,000		Individual respondent to complete the online Human Rights training module.
Sellner	$20,000	$3,300 lost wages, $8,580 lost maternity EI benefit	
Tavares	$6,000		
Titze	$15,000		
Trinh	$25,000	$16,399.29 for lost bonus and raises, $18,475.75 lost earnings	

Table 17 displays data from the Social Justice Tribunals Annual Reports from 2009-2010 to 2018-2019 on the HRTO's case load in regard to employment and disability. Over the decade the number of applications increased from a low in 2011-2012 of 2,740 to a high in 2018-2019 of 4,541 (Tribunals Ontario, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019). That represents a 165% increase. The percentage of cases on account of employment remained relatively stable fluctuating between 69% and 76.4%, with an average of 73%. Similarly, cases

on account of disability fluctuated between 52.2% and 57%, with an average of 55%. These number suggest that as the overall caseload has increased so has the overall number of claims on account of employment and on account of disability. It is not clear what accounts for the increases in claims, but at a minimum it does not seem that prior decisions are serving as a general deterrent.

Table 17

Ontario Human Rights Tribunal Case Load Disability & Employment

Year	Employment (percent)	Disability (percent)	Applications received
2009-2010	75	52.2	3,543
2010-2011	76.9	53	3,167
2011-2012	76.4	54.4	2,740
2012-2013	77	57	2,837
2013-2014	74	54	3,242
2014-2015	74	56	3,259
2015-2016	70	55	3,357
2016-2017	69	55	3,585
2017-2018	70	56	4,425
2018-2019	69	56	4,541

Chapter 8 - Discussion

One objective of inductive research is "to establish clear links between the research objectives" and "the summary findings derived from the raw data and to develop a model or theory about the underlying structure of experiences or processes that are evident in the text data" (Thomas, 2006, p. 238). As will be discussed in this chapter, a hypothesis is proffered to explain employers' behaviour. Employers discriminate against employees with disabilities out of an implicit bias—that managing employees with a disability will consume inordinate amounts of time. One pattern that became evident from considering the research cases is that employers proffer a range of excuses to support and defend their prejudicial decisions.

Excuses/Justifications

Excuses Versus Justifications

The employers in the research cases deployed explanations to excuse their discrimination against employees with disabilities. The employers claimed that the employees had a record of absenteeism (even though these employees all had good attendance histories), had abandoned their positions (even though they were absent for a single day), and were unproductive (even though the Tribunal found that not to be the case).

Interestingly, none of the employers argued justification. That is, the employers did not claim that their actions were discriminatory but not inappropriate due to a superordinate goal (Montada, 2001; Shaw et al., 2003). Of course, the only acceptable justification in human rights law is undue hardship. Only one employer argued they could not accommodate the employee because the accommodation posed an undue hardship. However, the Tribunal held there was no evidence of undue hardship (*Passmore*). The other employers asserted that they should be

excused from wrong-doing due to mitigating circumstances or external causes (Montada, 2001; Shaw et al., 2003).

A conclusion that emerged from the data is that the employers' behaviours in mischaracterizing employees with disabilities had the effect of perpetuating stereotypes and biases and socially constructing employees with disabilities as being unreliable, unproductive, and other disparaging characteristics. Second, these cases led to my hypothesising that employers preferred to avoid the extra time and inconvenience required to manage the required accommodations. To choose justification would necessitate an employer engaging with the time-consuming process of establishing undue hardship. Not only is the latter time consuming, but it necessitates conceding the employee has a disability that needs accommodating, if only the employer could reasonably do so.

The following sections discuss each excuse and how the employer's actions socially constructed the employees in negative ways. Second, they demonstrate that employers view disability as an inconvenience and a potential burden on their time.

Pretext

In at least 11 research cases, the Tribunal found that the various reasons managers gave were pretexts to behave discriminatorily toward the employees who disclosed their disability. In examining the research cases, the employers' rationales were not supported. The Tribunal found no performance issues. In fact, most of these employees had been performing their respective jobs for considerable periods with no evidence of performance issues. No records of absenteeism were found. Nor did the *de minimis* amount of time missed at work constitute abandonment. Probationary periods, discipline for employee poor behaviour, and selective application of zero-tolerance policies were not accepted cloaks for actual discrimination. Customer contact and

safety concerns were raised as issues in only one case (*Tavares),* and as the safety issue related to the employee's disability, it was found discriminatory. Coworker resistance was present in two cases (*Hayes*, *Tavares*), but it was in respect to the employees' poor attitude, not their disability. Concern over liability cannot be the motive in these cases, given that accommodating the employee, rather than behaving discriminatorily, would have been more prudent.

The only accommodations that required actual expenditure was a respirator in an industrial setting (*Haley*). This is not an unusual piece of equipment in industrial worksites, and a respirator would not amount to undue hardship. This accommodation is likely consistent with the extant research that identifies most accommodations cost under $500 (Gröschl, 2007; Hammett, 2003, as cited in Lengnick-Hall, 2007; Schur et al., 2013). Other accommodations required in the research cases were modifying exam testing frequency requirements (*Betts*), taking more time in a return-to-work meeting (*Groh*), and providing an employee with additional supervision (*Brown*).

All these accommodations in the research cases required no expenditure, other than manager time and effort. It is a central contention of this research that the discriminatory managers' behaviours stemmed from implicit bias—that employees with disabilities require more time and effort to manage. Time is a valuable resource and a perishable commodity.

Williams and Taras (2004) noted a similar pattern of managerial recalcitrance as a factor in denying accommodations to employees with disabilities. In arbitration cases they reviewed, they saw opportunism to terminate disabled employees. Williams-Whit (2007) also noted two Canadian arbitration cases where "there were indications that managers used a minor disability to fabricate an opportunity to terminate the employee" (p. 413). Similarly, there are indications in the research cases of the use of fabricated pretexts to create an opportunity to terminate

employees with disabilities (*Brittain, Brown, Conklin, Haley, Sellner, Titze*). One research case (*Hayes*) is particularly exemplary of this opportunism. An HR manager used the accommodation request as an opportunity to isolate the employee to solve unrelated, intra-office, interpersonal challenges.

Excuses: Social Construction

Some employers attempted to justify their discriminatory decisions in ways that served to disparage the employees with disabilities to characterise them in inaccurate ways. Five of these excuses (absenteeism, bad behaviour, poor performance, breach zero-tolerance policy, decision to terminate was made before the disabling injury) in nondiscriminatory circumstances, if true, would be legitimate reasons for progressive discipline, possibly ending in termination and are within the employers' prerogative. However, most of the reasons for termination or refusing accommodation in these cases appear to be nothing more than excuses or pretexts. What may be a limitation in assessing these behaviours is determining whether they were sincerely but wrongly held beliefs at the time, premeditated excuses prior to termination, or posthawk rationalisations trumped up to create a defence. From a legal perspective, it does not matter because the employer's intention is not an element of a human right violation. In most, if not all the cases discussed above, the employers were motivated by the employee's disability. The employers in these cases discriminated against employees with disabilities intentionally or constructively.

Discrimination in the research cases emanated from the employer avoiding the extra work—inconvenience and time to either implement or facilitate accommodations. In doing so the employers deployed various excuses that socially constructed these employees as having

negative characteristics. The employer attached labels to these employees: absent, job abandonment, poor performers, and behavioural problems.

Excuses, Social Construction and Litigation

It is a hallmark of the judicial system that everyone is entitled to a defence of a legal claim brought against them. To the extent, those mischaracterisations occur in the workplace due to implicit bias; they are unconscious and therefore not intentional, but the effect is disparaging, nonetheless. However, this disparagement was reproduced by employers in their efforts to defend their discriminatory actions. Berrey et al. (2017) noted that in the American context, "Most plaintiffs not only lose or gain small settlements in the process of litigation; they are vilified by their employer (or former employer) during the EEOC complaints process and litigation" (p. 19). Berrey et al. also stated, "Law-in the form of employer responses to claims of employer discrimination and the administration of complaints and lawsuits by the EEOC and the courts – reinscribes the invidious hierarchies it was created to ameliorate" (p. 19). They attributed this to three interconnected factors, the adversarial nature of litigation, structural asymmetries of power at work and in the legal system, and the individualisation of complaints. While there are certainly differences between the Canadian and American systems, they are similar enough, that there is little reason to assume this reinscription does not occur in Canada. While there are adjudicators who, in the end, as in the research cases, uphold rights, by that point the damage of reproduction of the disparagement has occurred. Employers' litigation behaviours are a vestige of Canada's adversarial human rights system. The point is not whether the human rights system is good or bad, effective or ineffective, but only that by its nature, it perpetuates employers' disparaging behaviour.

Excuses Deployed in the Research Cases

Absenteeism. In the research cases the employers attempted to characterise employees who did not have records of missing work as having records of absenteeism. The employer may have alleged absenteeism to excuse the employer's actions and to create a defence to the human rights claim. However, the effect was to construct these employees with a disability as deficient and unreliable in a stereotypical way, that was consistent with the traditional employer biases.

It is clear from the evidence that in the event of an employee's absence, management would be inconvenienced and need to spend more time managing the situation. The manager in both the restaurant cases (*Brittain, Conklin*) would have to scramble to find a replacement or need to help with serving if they could not get an employee to cover the shift[41]. In *Brittain*, the employer said, "She did not want to deal with the applicant's mental health issues any longer" (para. 27). These instances are examples of a pattern that runs through the research cases of the employer preferring their convenience over the employee's needs and rights.

Abandonment. As in the absentee cases, the allegation of abandonment was to perpetuate the stereotype and construct persons with disabilities as unreliable and lacking organisational commitment. In the two research cases where abandonment was alleged, the Tribunal found that the alleged abandonment was "engineered" by the employer (*Brittain*), and the employer "did not actually believe either employee had quit" but essentially used it as a pretext to punish the employees (*Campbell,* para. 160).

The employees in these cases did not intend to abandon their employment, even though in both cases the working conditions were stressful, poorly paid, and at least in one case lacked

[41] Given that one of the research cases, where employee absence was claimed by the employer, involved a Tim Hortons coffee shop, it is ironic that a case study of another Tim Hortons franchisee shows much better absentee rates from employees with disabilities. In the case study organisation employees with disabilities constitute 17% of the workforce and had an absenteeism rate of 35%, relative to an industry standard of 75% (Fredeen et al., 2013).

sick pay benefits. The statements and actions in these cases were not consistent with finding that the employees clearly and unequivocally demonstrated an intention to no longer be bound by the employment terms (*Betts v. IBM Canada Ltd.,* 2015). Clearly, a one-day absence, in both cases, is not abandonment.

The employees in one case (*Campbell)* often threatened to quit, which may have demonstrated an intention to quit and a lack of job satisfaction. The employees in this case experienced poor remuneration, working conditions, and job-related stress, all of which are associated with lack of job satisfaction (Firth et al., 2004; Hann et al., 2011). However, even though employees with disabilities may experience lower levels of job satisfaction, they have been shown to have similar turnover intentions and organisational commitment as nondisabled employees (Schur et al., 2017).

Like in the absenteeism cases, abandonment was used by management as a pretext in seeking to avoid the inconvenience and extra time to deal with scheduling or the inconvenience of a workplace injury claim. Likewise, wrongly characterising an employee as a job abandoner is to characterise them as unreliable. The characterisation seems to associate disability with unreliability.

Probation. The probation period was used as an excuse to avoid accommodating an employee with a disability (*Conklin*). Discrimination aside, in the probationary period, employees are already at their most vulnerable, having fewer of the rights inherent in a standard employment relationship to curb employer fiat (F. Bhabha, personal communication, November 15, 2021). Probationary periods have their place to ensure the employee is a good fit. Canadian employment law has held that employers need a good faith reason to terminate a probationary employee **(**Keri & Kent**,** 2007; see also *Nagribianko v. Select Wine Merchants Ltd*., 2017).

Discrimination is antithetical to good faith. Regardless, no matter what the reason for termination, if discrimination is involved, the employer cannot rely on probation to avoid liability under human rights law.

Discriminatory employers can attempt to leverage the probationary period as a possible sword and a shield. Probation is a shield in that it is used as an excuse to discriminate. Probation is a sword in that it is used to avoid the extra effort in managing the accommodation and extra work in staffing that they perceive is needed. In other words, this is about managers' convenience and time.

Probation provides a ready vehicle to label an employee with a disability as an inadequate worker. It appears that the discrimination in this research case (*Conklin)* was of the statistical variety, given that it was based on incomplete and inaccurate information about the likelihood of the employee being absent. The employer seemed to paint the employee with a disability with a broad but inaccurate brushstroke, thus constructing the employee based on the employer's perception of the group average, without any information about the future attendance of the employee. In fact, the employee required time off to adjust to a new medication that improved her health and stability, thus making the likelihood of absences less likely. Second, if the employer assumed persons with disabilities are more likely to be absent, the employer's conclusion about the average of absenteeism for persons with disabilities was based on inaccurate information. Persons with disabilities have lower absenteeism rates (Dupont, 1993; Graffam et al., 2002; Hernandez et al., 2008; Hernandez & McDonald, 2010).

Statistical discrimination, while being dressed up as economically rational, is just a more abstract way to socially construct an employee with a disability in a negative way, particularly because it is often based on inaccurate information. In this case the employer, at least implicitly,

assumed a comparison of absenteeism of employees with disabilities and nondisabled employees that constructed the employee as an absentee issue.

Admittedly, one case is a limited sample to concluding any pattern related to probationary periods in respect to disability and discrimination. However, this instance is not anomalous. The authoritative case of *Lane v. ADGA Group Consultants Inc*. (2007)[42], involved virtually the same scenario. A probationary employee who was terminated after disclosing his disability was awarded a significant amount of monetary compensation in lue of reinstatement. Clearly, probationary periods are open to abuse by discriminatory employers (F. Bhabha, personal communication, November 15, 2021). When probation is used wrongfully the effect is naming the employee with a disability as being inadequate and not worthy of retention.

Performance. Gould-Werth et al. (2018) noted how disability is used as a pretext to get rid of an employee. This is a good characterisation of the termination of the employee in *Passmore.* The employee alleged performance as an issue. "The respondent alleges that the decision to terminate was based solely on her poor performance in meeting her targets" (para. 101). The Tribunal found that the employee's performance had not changed from the previous year during which the employee received a bonus and that there was no documentation of poor performance in her file.

Performance is one of the most often cited concerns about hiring employees with disabilities (Bengsiu & Balta, 2011; Domzal et al., 2008; Donnelly & Joseph, 2012; Fraser et al., 2010; Fredeen et al., 2013; Gröschl, 2007; Heera, 2016; Houtenville & Kalargyrou, 2012; Ju et al., 2013; Lengnick-Hall et al., 2008), and this perception continues to persist (Bonaccio et al., 2019), an unjustified conclusion that continues to persist (Procknow & Rocco, 2016).

[42] Upheld on appeal *ADGA Group Consultants Inc. v. Lane 2008*).

The company's witnesses testified that it was impossible for a recruiter to work part-time. The Tribunal held that there was no evidence provided to show the requirement to work full-time was bona fide. The evidence was that there was no issue of "productivity" until the employee requested what appeared to be an inconvenient accommodation of working half-days.

While the company's excuse was about retrospective performance where it was unfounded, it may reflect a bias about future performance. Associating the employee with a disability with lack of productivity is a perpetuation of the most common stereotype of an employee with a disability. It constructs the employee as something they are not. It associates an employee with a disability with a negative connotation.

It is interesting, given how pervasive the concern about performance of employees with disabilities is, that only one case mooted this issue.[43] This may be a reflection that discrimination in modern society tends to be aversive, and it is less acceptable to discriminate on an overt basis such as disability. It may also be that termination based on performance requires a paper trail of documentary evidence substantiating performance claims. In the absence of such documentary evidence, it is difficult to establish performance as a viable defence to a human rights claim.

Employee's Behaviour. There are two cases in which the employee's behaviour was the reason given to terminate or lay off the employee. In both cases the employer failed to make the requested accommodations. These cases have elements of punishing the person with a disability, rather than addressing the accommodation needs. In one case the employee's credentials were suspended, which made it difficult for him to work (*Betts).* In the other case the employer terminated the employee allegedly because of her record of complaints (*Sellner*). While both

[43] In two other research cases (*Hayes* and *Tavares*) the employee had performance issues for which they were ultimately terminated, but the discrimination these employees experienced related to other issues.

employees exhibited behavioural issues, that did not negate the duty to accommodate the employees' disabilities.

In *Sellner*, the organisation may have taken advantage of the situation to rid itself of an employee they viewed as undesirable. They allegedly terminated the employee based on the employee's complaints history, which mostly predated her disability, as a raison d'être. Some of the complaints stemmed from an ongoing dispute the employee had with her dispatcher.

In the second case (*Betts*), the union neglected to consider that their rigid adherence to their testing policy was detrimental, despite eventually having knowledge of the employee's disability and documented accommodation need for modification of their testing requirement. Before receipt of documented disclosure of the employee's disability, the apprentice was laid off for failing the test. One of the reasons for delaying reinstalment was the employee's refusal to apologise for derogatory comments about the organisation posted on social media.

The behaviour in both cases had to do with derogatory or confrontational communications directed at the supervisor in one case and the organisation in the other. This behaviour could be considered constituted insolence. In these research cases discipline of the employee was neither proportionate nor progressive, which suggests that something else was at play in these cases. As one business journal stated, "Companies usually prevail when they've let an employee go for 'behaviour' not for disability" (Business Management Daily Editors, 2003, para. 2). Both cases involved difficult, argumentative employees.

In both cases the employer situated the behaviour as being intrapersonal—that is, stemming from the employees' personal factors (Hart, 2011). The employers in these cases did not consider the possibility that the behaviours stemmed from interpersonal or organisational factors. As mentioned about the first case, there was an interpersonal issue. In the second case

the employee's attitude and comments had to do with his frustration with organisational factors—the requirement to continually take the qualifying test until he passed, regardless of his testing anxiety issues.

If these employers did consider these issues as stemming from interpersonal or organisational factors, in the first case (*Sellner*) the organisation would have had to intercede with the employee involved and try resolve or at least manage the dispute. In the second case (*Betts)*, even after the union had knowledge of the apprentice's disability and understood his anxiety, they did not reframe their understanding of his behaviour and continued to treat him as a behavioural problem. The tribunal held that essentially the union did not believe the employee had anxiety and concomitant restrictions. The local avoided the work and inconvenience of adjusting its attitude, practices, and routines. Providing accommodations would have required the local to deviate from their regular routine; moreover, accommodating the employee would have required the local to come to terms with the idea of nonapparent disability, and that would require a shift in their organisational culture, both of which seemed beyond this employer.

In the research cases in which the employees' attitudes were alleged as the reason for termination or not being reinstated, the employers, in avoiding accommodation, created a fiction by associating their disability and their difficult attitudes. The employers in these cases made the issues about the employee with a disability rather than interpersonal or organisational issues. They penalised the employee with disproportionate sanctions. In penalizing the employee, they associated disability with negative characteristics. While these employees in question (*Betts*, *Sellner*) did have behaviour issues, they were separate from the employers' obligation to engage in the accommodation process.

Zero-tolerance Policies. In two research cases, reliance on the company's zero-tolerance policy was a pretext to terminate employees with a disability after they requested accommodations. In *Haley*, the Tribunal found that the zero-tolerance policy was applied selectively, and that Haley was the only employee of three to be terminated for the same behaviour. The Tribunal held that the termination was linked to the request for accommodations the week before.

Similarly, in *Titze* the application of the zero-tolerance policy was found to be a pretext to avoid accommodation. The Tribunal held that zero-tolerance was not actually practiced. The employee was required by his supervisor to work without the proper safety tie off. The Tribunal held that company could, therefore, not rely on the policy to establish cause for terminating the employee. The termination was discriminatory as it happened after he sustained injuries from the fall that prevented the employee from working.

Arguably, in both cases the employer did not want to invest the time and effort to accommodate the employee. In *Haley* the Tribunal found it was "prepared to draw the inference that the applicant's disability and whether he could continue in his job was an active concern for the respondent" (para. 37). That concern should have translated into effort to ensure the employee had the reasonable accommodations to be as successful as possible in the position. Similarly, in *Titze* the employer made no effort to inquire about the employee's disability and possible accommodations, even though it had full knowledge that the employee was injured. The Tribunal stated, "The respondent did not state that it had no other work for him, nor did it enquire about when he would be able to return to work on another construction site, or whether he could return to work and perform modified duties" (para. 33). The Tribunal noted evidence that the company had no other construction industry clients with whom they could place the

employee, “but the duty to accommodate requires that an employer consider all accommodation measures throughout all of its operations that would not cause undue hardship” (para. 48).

Fulfilling the duty to accommodate takes time and effort. As the Supreme Court held, “More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term "undue" infers that some hardship is acceptable; it is only "undue" hardship that satisfies this test” (*Central Okanagan School District No. 23 v. Renaud,* 1992, per. Sopinka J., para. 18). In these two research cases managers would have to expend the time and effort required to manage implementing accommodations. The research cases demonstrate the employer preferring their convenience over the employee's rights and needs.

The selective application of workplace policies, such as the zero-tolerance policies in the research cases (*Haley*, *Titze),* socially constructed these employees with disabilities as being different from other employees. It enforced the idea of disability as a negative difference or a deviance (Susman, 1994). In these two cases the employee treatment resulted from the perception of negative differences, their disabilities, and more specifically, their accommodation requests, resulting in being terminated.

Applying zero-tolerance policies only to employees with disabilities suggests that they deserve to be treated more punitively. This is akin to stigmatizing employees with disabilities as more deviant than their coworkers. Stigma is the evoking of negative or punitive responses to the ongoing trait of an individual (Susman, 1994). Termination, as in these research cases, is certainly punitive.

On its face, the differential treatment of the employees with disabilities suggests that these employees can be less trusted to not reoffend contravention of the zero-tolerance policy. Further, the zero-tolerance policy in its exclusive application to persons with disabilities

negatively associated disability with punitive measures. Jammaers et al. (2016) maintained that discourses create subordinate identities that become invisible, normative modes of operation. The policy may become a discursive symbol of the place of persons with disabilities in these organisations' cultures.

Decision to Terminate Made Before the Disabling Injury. In two cases the Tribunal found discrimination even though the employer claimed that the decision to terminate the employee was made before disclosure of the employee's disability. In *Campbell* the Tribunal found that the layoff was moved up, due the employee's fall and her WSIB claim. In *Passmore*, the Tribunal found that the employee's disability was a factor in the termination. The timing of a decision to terminate is an excuse if the employee's disability was a factor in the decision to terminate.

What is clear from case law[44] is that claims as to the timing of the decision to terminate an employee as being nondiscriminatory are fact dependent. For an employer to succeed in claiming the decision to terminate was made prior to the disability being disclosed requires credible evidence; otherwise, it is merely an attempt to excuse an employer's discriminatory behaviour. In the two cases in question, the Tribunal did not find the employer's evidence credible. In one case the Tribunal found it probable that the decision to terminate was in response to the employee's accommodation request and in the second case because the workplace insurance board would be involved.

The employers' claim in respect to timing also exemplifies employers' efforts to excuse their avoidance of the inconvenience and the time involved in accommodating the employee. In

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[44] See discussion at pp. 72-74 *supra*. on B*ellehumeur v. Windsor Factory Supply Ltd*. (2015); *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees Union* (2008); *Morris v. BC Rail* (2003); *Mou v. MHPM Project Leaders*, (2017); *Whitmore v. Dr. J. T. Kelsall Inc. and another* (2017).

these cases, timing is a convenient excuse but unsupported by the evidence. Treating the employee in this manner minimises the employee's disability.

Medical Note Not Specific. The Tribunal did not agree with the employer's claim that the medical note provided was not specific enough in disclosing a disability (*Trinh)*. The Tribunal stated, "I do not agree with the respondent's submissions. I find that the debilitating joint pain is a disability. In section 10(1) of the Code, "disability" includes "any degree of physical disability" (*Trinh,* para. 113). Instead of accommodating the employee, the manger intimidated her by threatening to fire her if she sought to work only half-days.

Clearly, the manager did not accept the employee's request for accommodation in good faith. The Tribunal found the employee's communication was sufficient to trigger the employer's duty to accommodate. Employees have a low bar as to what is a sufficient articulation of their need for accommodation (The Ontario Human Rights Commission 2016), and the employer has an obligation to accept the disclosure in good faith (*Yeats v. Commissionaires Great Lakes*, 2010). On the other hand, employers have a high standard of duty to seek sufficient information to assess the accommodation request. Given this combination of standards of disclosure and duties to inquire and good faith, it is highly unlikely that almost any disclosure, let alone provision of medical note, would not have been sufficient to trigger the employer's duty to accommodate.

The erroneous claim about the sufficiency of the disclosure is another effort by an employer to obfuscate its discriminatory behaviour, likely stemming from the desire to avoid the inconvenience of having to accommodate an employee with half-days and the extra work of having to scheduling a replacement employee. If the information provided was truly lacking, the employer had a duty to make further inquiries and not hide behind its willful ignorance. Simply

ignoring the medical advice is more than ignorance; it is calculated to prioritise the manager's needs over the employee's needs. It can have serious consequences; in this case the employee had to work through pain. Similar to the cases in which the employers claimed that the decision to terminate was made before the disabling injury, claiming a medical note is insufficient, is to discount the employee's disability as not mattering.

Acts of Omission and Commission

A second theme discerned from inductive analysis of the research cases is employer acts of omission and acts of commission. Employers omitted to act by constructively discriminating (adverse effects discrimination). That means the employer applied their usual neutral practice, but the consequence was that the usual practice adversely affected the employee with a disability, requiring the employer to accommodate the employee's individual disability needs. The second omission was the employer failing to inquire (failure to procedurally accommodate) whether the employee required accommodation in circumstances where the employee exhibited signs of a disability. Similarly, acts of commission were discerned in terms of action that are discriminatory, including: threating the employee, harassing the employee, and creating a poisoned work environment, firing the employee because of their disability, failing to provide substantial accommodation, and reprising against the employee for threatening to file a human rights claim.

Acts of Omission

Constructive Discrimination/Adverse Effects Discrimination. Constructive discrimination was found in two research cases. In *Groh* the Tribunal stated:

> I find the respondents constructively discriminated against the applicant in the manner in which they conducted the return-to-work meeting in that they conducted it the same way they would have with someone who did not have the applicant's particular limitations. (para. 124)

In *Betts* the Tribunal held that the apprentice had been constructively discriminated against by the local not modifying the deadline to write the exam and obtain the Certificate of Qualification (COQ). This adversely affected the apprentice because the local did not permit him to continue to work without his certification.

Regardless of the justifications employers offered, none amounted to a bonified occupational requirement or undue hardship. Revising the testing requirements or altering the return-to-work meeting were not occupational requirements and certainly would not amount to undue hardship. These employers demonstrated a lack of consideration for the needs of employees with disabilities.

Treating employees with disabilities like everyone else in some cases homogenises persons with disabilities by not recognising difference in a productive and equitable way and by ignoring the right of persons with disabilities to not be disadvantaged by neutral rules. It is a demonstration of the hegemonizing power of work for persons with disabilities and their experience of having to fit into an able-bodied and able-minded conception of work. The whole point of constructive discrimination is to disrupt the concept of normal (Pothier, 2010), which is rooted in formal equality (*British Columbia (Public Service Employee Relations Commission) v. BCGSEU* (*Meiorin)*, 1999). Constructive discrimination is essentially an erasure of the person's disability and a reminder that these employees should be like "normal" employees. Constructive discrimination is setting up persons with disabilities for failure and then faulting them when they fail. In *Groh* the way the return-to-work meeting was handled was confusing for the employee and exacerbated his already paranoid mental state, which led to other workplace issues and conflict upon his return to work. In *Betts* not removing the requirement to continue taking the exam, not extending the deadline to get his Certificate of Qualification, and not being allowed to

continue working heightened the employee's anxiety - anxiety which impeded the employee's test-taking. These employers socially constructed the negation of the employees' disabilities as if they did not exist and socially constructed the employee's entitlement to belong in the workplace as being conditional upon their functioning the same as everyone else.

In many ways, adverse effects discrimination is even more inconvenient for managers. It requires managers to think beyond their usual routines and policies in a proactive way and to envisage how their routines and policies might impact minority employees. In the research cases the employers continued to act in their normal fashion but doing so is not a justification to constructive discrimination (Pothier, 2010). The standards set in *Meiorin* (1999) requires employers to examine their rules and practices to ensure they do not produce inequities in respect to discriminatory grounds (Schucher, 2000). Employers are required to build equality into workplace standards and to create standards in a way that provides substantial equality and roots out systemic discrimination (*Meiorin*). It requires employers to adapt policies that are not solely the most convenient for management to administer but can be administrated in a way that is inclusive of all protected groups of employees. Employers are required to makes these changes, to be inclusive of the needs of employees with disabilities, even if it involves significant hardship. The employers in the research cases did not make this effort. To establish a workplace standard that meets these requirements is obviously less convenient and more time-consuming for managers.

Failure to Inquire - Procedural Accommodation. In *Campbell*, the Tribunal held that the employer had sufficient information based on the employee's erratic behaviour to make inquiry. Given the employer's failure to initiate a discussion about the employees potential accommodation needs, the employer could not later claim there was nothing they could have

done to accommodate the employee or that an accommodation would have amounted to undue hardship. The Tribunal found the employer instead used the circumstances as an opportunity to terminate the employee.

In *Betts*, the union ignored a medical note requesting accommodations and did not make sufficient inquiries to clarify the necessary accommodations. The Tribunal stated that the local should have realised the strain in the relationship that made communication unlikely and should have attempted to communicate with the employee's doctor. Inquires would have necessitated the local changing their testing routine.

In the final research case (*Titze*), the employer should have asked for medical information, even though the employee did not request accommodations. The Tribunal stated, "An accommodation provider is required to be alert to the possibility that a person may need an accommodation even if they have not made a specific or formal request" (para. 40). If they had done so, given they had no further construction work, the employer would have had to make the effort to find him work in other aspects of its organisation. The duty to inquire can result in extensive effort having to be expended by an organisation's managers. The Tribunal described the extra work that would be entailed stating:

> Discharging the procedural component of the duty to accommodate would have involved requesting and obtaining medical information about his prognosis and the ability to return to work. If the applicant had been cleared to return to work at some point during the remainder of his term, or if specific restrictions had been identified, the respondent would have had to determine if he could have been assigned to modified duties on the Assmont project, or with another one of the respondent's clients with whom it has placement agreements. (para. 46)

In these research cases the implication was that the employers preferred their convenience over the needs of the employee by preferring to avoid the trouble and the investment of the time it might take to deal with the complications of these situations.

Acts of Commission

Harassment and Poisoned Work Environment. In the three cases (*Brown*, *Prothero, Trinh*) involving harassment/poisoned work environment, the employees were dependent on the managers' behaviour towards accommodations, despite the employers' disability leave policy. There was evidence of manager harassment of employees with disabilities and job insecurity. There was managers' resistance to medical leave. In two cases senior management failed to intercede, despite knowledge of what was occurring, thus colluding in the bullying by tacitly establishing an environment tolerant of harassment. Further, in two research cases (*Prothero, Trinh*), despite having status related to technical knowledge that often insulates employees from bullying (Gewurtz & Kirsh, 2009; Harlan & Robert, 1998), that was not the result in the research cases.

Managers' Resistance to Medical Leave. In both *Prothero* and *Trinh,* managers' attitudes to medical leave are reflected in their resistance to time off for illness. Requests for time off become a site of harassment. In *Prothero* the Tribunal found harassment in the unnecessary number of letters sent, unreasonable deadlines for compliance, and the threat to interrupt the employee's pay which was contrary to the organisation's policy. Second, the case demonstrates harassment in terms of pressuring the employee to return to work from medical leave. These findings agree with Liefooghe & Davey (2001) and Foster (2007).

In *Trinh* the manager's resistance was so excessive and blunt the employee didn't even have an opportunity to engage the organisation's policy. Further, *Trinh* experienced from her manager a lack of flexibility, as he was not willing to consider half-days. Lewis et al. (2018) and Liefooghe and Davey (2001) interpreted this inflexibility in respect to medical leave to emanate from institutionalised work environment pressures. However, as the company later argued,

unsuccessfully, the employee should have known she could have gone to HR given that she had an employee handbook. It is arguable that she could have obtained accommodation through this route and that she just experienced a recalcitrant manager, so that the organisation was possibly not systemically discriminatory. However, it is the result that matters. If HR needed to be consulted, it was the manager's responsibility to engage them. The Tribunal held the threat of loss of employment was a refusal to accommodate the employee. Threat of termination is a form of harassment in respect to grounds of discrimination.

It is not clear if the employee would have been accommodated if she spoke to HR? There is no evidence either way. It does seem as if the de facto policy, based on the demonstrated behaviour, was to resist such leaves. It also seems that despite whatever the policy might have been, that it was left up to the line manager's fiat and that the manger prioritised other organisational policies (Fevre et al., 2013) in respect to avoiding disruption and inconvenience.

Vulnerability and Job Insecurity. As is evident from the harassment cases, employee vulnerability can affect their ability to pursue their rights. Employees experiencing job insecurity from harassment (Hodson et al., 2006; Roscigno et al., 2009) was a factor at play in two of the harassment research cases. In *Trinh* and *Prothero* both employees were in fear of losing their jobs. In *Prothero* the employee was told to come back to work with an unrealistically early date or his pay would be terminated. Prothero testified that, "He was extremely concerned about losing his income and had a panic attack while on the phone" (p. 23) and was in a fragile state. In *Trinh* fear inhibited the employee's ability to respond to her accommodation request being denied. The employee:

> Testified that she did not respond to Mr. Shin's reaction, and she believed that if she spoke further, Mr. Shin would take this as talking back to him and she could be reprimanded. She felt it was best to keep quiet as she was really frightened that she would be fired. (para. 17)

Both cases demonstrate employee vulnerability and powerlessness. The inability to respond is evidence of the employee's powerlessness and vulnerability in relation to their manager (Einarsen et al., 2020; Glambek et al., 2018; Hodson et al., 2006; Keashly, 2001; Keashly et al., 2020).

Most often the victims of discrimination, harassment, abuse, and bullying at work are disadvantaged employees (Okechukwu et al. (2014). In all three cases the targets of harassment were employees with nonapparent disabilities (two employees had mental health issues, and one had physical complications due to pregnancy, but the pregnancy was not yet apparent). Two of the employees were experiencing significant anxiety, and the third experienced anxiety about losing her job. This is consistent with research indicating that psychological states such as anxiety are predictive of experiencing harassment (Verkuil et al., 2015) and that exposure to harassment is associated with anxiety (Nielsen et al., 2017).

These research cases exemplify that vulnerability is not limited to low-income, low-skills employees. Even presumably middle-class, white-collar employees like those in *Prothero* and *Trinh* cannot afford to lose employment, let alone the cost of retaining counsel for a human rights claim[45] given the pressure on middle income earners (OECD, 2019) and the low rate of savings (The Canadian Payroll Association, 2018).

Technical Skills as an Insulator. Interestingly, in *Prothero* and *Trinh* the employees had specific technical skills and knowledge, which often insulates employees from harassment. Often

[45] As noted in the previous chapter, a significant percentage of employees represented themselves or were represented by someone other than a lawyer.

the targeted employee has low self-esteem (Einarsen et al., 1994; Matthiesen & Einarsen, 2001) little autonomy (Einarsen et al., 1994; O'Moore et al., 2003; Vartia, 1996; Zapf et al., 1996) and low skill utilisation (Einarsen et al., 1994). However, in *Prothero* the Tribunal found that the harassment "had a severe impact on him given when it occurred and his emotionally fragile state at the time that it took place" (para. 112), and in *Trinh* the employee testified to a loss of self-confidence. In the third harassment/poisoned work environment research case (*Brown*), the employee was in a lower skilled position as a restaurant hostess. The harassment exacerbated her anxiety and depression. It has been found that an employee may be targeted for bullying because of an employee's psychological distress and that bullying may cause psychological distress in a vicious cycle (Nielsen et al., 2012).

Bullying Tolerant Culture. However, it is also arguable that the company in *Trinh* had a culture of tolerating bullying. Trinh had two managers, both South Korean nationals, over her tenure, both of whom discriminated against her, one based on disability and both on other grounds. One manager failed to accommodate her and made comments about her ethnic origin. The other made racist and sexist comments and comments in respect to her citizenship. Moreover, the company was found to have discriminated based on her sex in not giving her a bonus or wage increase because she was on leave due to pregnancy complications and subsequently maternity leave. It is likely that these managers brought with them disparate views stemming from Confucian Asian culture and that those views were reflected in their management style, in regard to sick leave and disability, which differ from North American work and employment culture. What plays well in Wonju may be incongruous in Windsor.[46] However, this

[46] While not indicative of CS Wind's treatment of employees with disabilities per se, other information about the company may be reflective of their management style. The company brought over 31 employees from their Vietnamese division, under Canada's International Mobility Program. These employees were paid Vietnamese salary levels ($140-$421/month). They were brought over ostensibly to train the Canadian employees. However, the

is not to say that all is rosy in the West in respect to absence management, as we see in certain research cases (Brittain, *Prothero, Trinh*).

Bully Protected by Influential Patrion. In *Trinh* one of the harassing mangers had a base of power beyond his place in the organisational chart, as he had an important patron in the organisation. In this case being a brother-in-law to the chairman of the organisation clearly, at least in the harassed employee's perspective, limited her options of complaint. The employee's testimony is telling in this regard:

> She testified that Mr. Oh [President of the Canadian division] told her during this [exit] meeting that …that she should reconsider because Mr. B.C. Kim [her supervisor] would not be at the respondent after the end of the year. She stated that she did not believe that Mr. B.C. Kim would actually leave the respondent because he is the brother-in-law of the chairman, so it would not make much difference as Mr. B.C. Kim would come to visit the respondent facility. (para. 88)

This testimony also speaks to the level of abuse and tyranny the employee experienced.

Management De Facto Tolerance of Harassment. Another feature of both *Trinh* and *Prothero* is that the senior managers who had the power to arrest the harassment failed to intercede. There is evidence that these two organisations tacitly showed tolerance and encouragement for the harassing behaviour. In an exit interview in October, the employee was told that "she was not the only one who had complained about Mr. B.C. Kim [her manager]" (para. 88), and he would not be with the Canadian division soon. This suggests that management eventually knew of the problem but that it was seemingly tolerated by the company. Essentially,

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local employees experienced "resentment stemmed from the employer's claim that they needed the Vietnamese workers because local workers did not have the specialized knowledge and skill required to perform the work. Not only did this strike at the workers' sense of their own abilities, but as time wore on, the claim rang increasingly hollow and some viewed the Vietnamese workers as low-wage competitors taking jobs that should have gone to unemployed workers in the Windsor area" (Tucker, 2020, p. 380). The Ontario Labour Relations Board found the company liable for unfair labour practices (International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 721 v CS Wind Canada Inc., 2015). Between 2012, when CS Wind commenced production, to November 2014, the Ontario Ministry of Labour issued 90 work orders for safety violations (Person, 2014).

the employee was told to endure for a couple of more months, not that management had done anything immediately to curb the behviour and make the employee feel safe. Thus, like what Peyton (2003) found, management "in effect colluded with him [the harassing manager], when they replied, 'He's going to retire soon'" (p. 19, see also Lutgen-Sandvik & McDermott, 2011). Of course, the manager's power base may have been a factor as well. Similarly, in *Prothero* HR advised senior managers how the harassing manger was behaving, but they failed to act. The Tribunal found, "As a result of its failure to take meaningful and timely action despite having knowledge that ought to have prompted action, the respondent employer effectively condoned the conduct of that I find amounted to harassment" (para. 68). Like other employees, persons with disabilities are subject to work environments that condone and tolerate cultures of harassment and fear, and senior managers possibly even collude with the harasser.

Harassment and Manager Inconvenience. Manager inconvenience may be a factor in the research cases. Consistent with Cunningham et al. (2004), it appears that at least one manager in the research cases was not interested in managing issues around leaves (*Brown*). Fevre et al. (2013) pointed out employees' reliance on managers' goodwill to obtain accommodation. This was exemplified in *Prothero* by the manager's threats. The manager threatened to cut off the employee's pay if he didn't return within a short deadline. The implication is that the manager was inconvenienced by the employee's absence and used an accommodation resistance strategy (Harlan & Robert, 1998), to intimidate the employee into returning to work sooner than was appropriate.

In a second research case (*Brown*), the Tribunal found "that the manager yelled at her every day. The manager told her that it was part of her job to clean the bathrooms when no other hostess was required to clean the bathrooms" (para. 15). The harassment was of such a nature

that the Tribunal found a poisoned work environment resulted. While the manager appears to be harassing and ableist and while not a legitimate excuse, it may be that the manager was also frustrated with the employee's anxiety-induced need to ask many questions and receive reassurance. Those needs were likely inconvenient and required more of the manager's time, but that inconvenience must have been trumped by the inconvenience of having to train a new employee, as the manager said she would not accept the employee's resignation for two weeks.

The third case (*Trinh*) involved prohibited grounds that the Tribunal found constituted harassment, which were sufficient to create a poisoned work environment. From the disability human rights perspective, it included failure to accommodate the employee, compounded with harassment in respect to other grounds of discrimination. What is interesting is each of the harassing comments, in this case, were connected to instances where the manager was critical of the employee's work, where the manager claimed the employee was not working hard enough, or when the employee needed time off for health reasons. The form of harassment and poisoned work environment fits the inconvenience hypothesis.

Further, managing conflict takes managers' time and organisational resources (2003a & b; Salin & Hoel, 2020). Creating a conflict management prevention strategy takes training, and effective training does not happen overnight (Mikkelsen et al., 2011). Having proper anti-harassment policies and procedures in place reduces bullying (Einarsen et al., 2018), but again, developing effective policies and procedures takes time and effort. Effective policies are complex, extending beyond the mere interpersonal level to encompass in a contextual way multiple dimensions of organisational life (Hutchinson 2012).

Harassment and Social Construction. Harassment stems from the social construction of disability in organisations. What is disabling is "the artificial environment of physical and

attitudinal barriers that people with disabilities negotiate" (Weber, 2007, p. xi) manifests in attitudes in the workplace (Weber, 2004). In the harassment/poisoned work environment research cases, employers' harassing attitudes as socially constructed barriers to these employees' continued employment. The employee's disability being stigmatised and stereotyped, the hostess being called stupid, and the network administrator's condition not being believed. The employees in these cases were all subjected to derogatory comments and behaviour. These employees were subordinated in various ways, as Weber (2007) pointed out. In all three cases the harassment was tolerated by senior management, which makes the harassment organisationally systemic. In all three cases, the Tribunal ordered remedial human rights training. The problem of harassment in these organisations is multifaceted. Certainly, managers were at fault. It may be, in part, that these managers did not have adequate anti-harassment training, if any training. It may also be that they are a vestige of an obsolete culture. However, managers both inherit and construct the organisational culture. They inherited a culture that tolerates bullying, which means the organisation constructed a culture where managers are not held to a high standard in this regard. Policies are ineffective if not enforced, sustaining the systemic tolerance and opportunity of harassment. In turn, the managers construct the cultures, creating a lack of a safe-psychosocial climate for employees and giving them virtually no real opportunity to arrest the harassment short of their departure. Significantly, in two out of three of the harassment research cases, the culture of harassment was constructed to such an extent that the Tribunal found a poisoned work environment. Ultimately, in two cases the employees were forced to quit due to the harassing behaviour. In the third case, when the employee recovered from his illness, he was unable to return to work, as the environment was detrimental to his

disability. In these cases, the harassment constructed the employee as subordinate on account of their disability and resulted in their ultimate segregation by departure.

Failure to Substantially Accommodate. In many of the research cases, at best, the employer did nothing to accommodate the employee; at worst, the employee was terminated or harassed rather than accommodated. It is neither "genuine effort" (*Holmes v. Canada (Attorney General),* 1997) nor "more than mere negligible effort" (*Central Okanagan School District No. 23 v. Renaud,* 1992) to do nothing to accommodate employees, or worse, to harass them. Having to make genuine effort to engage in the accommodation process requires an expenditure of time by the employer on an issue that is not part of their management agenda.

Reprisal. The sample reveals one instances of reprisal. Ironically, such a claim now requires managers to invest their time on human rights litigation with the additional complicating factor of defending a reprisal claim. Seemingly an ineffective strategy for the employer, but of course we do not have data on reprisals that are actually effective in shutting down the employee making or sustaining a claim.

Characteristics of Employees, Employers, Organisations, and Disability Discrimination

Following Stone and Coella (1996) is an assessment of the trends in characteristics of employees with disabilities experiencing discrimination in the research cases. Stone and Colella (1996) suggested the nature of the disability, aesthetic qualities, origin of the disability, course (temporary, reversible, progressive, or irreversible), concealability, disruptiveness, danger or peril (perceived level of threat, danger, or contagion), previous performance level, gender, interpersonal style, race and status, or social power may contribute to the occurrence of employees with disabilities experiencing discrimination. To those are added job quality and income.

Gender. In respect to gender, the research cases were split: seven males (*Betts, Bonnici, Carter, Groh, Haley, Hayes, Prothero, Tavares, Titze*) and nine females (*Brittain, Brown, Campbell, Conklin, Passmore, Sellner, Trinh*). This difference does not appear significant, so no inference about gender was drawn[47].

Race, Ethnicity, and Citizenship. It is not possible to discern all the employee's attributes from the research cases, as research cases lack information on race, with one exception where race was also pled as a ground of discrimination (*Haley*). In one other case, the employee's ethnic origin and citizenship were grounds of complaint (*Trinh*).

Income and Precarity. The analysis shows that 10 of 16 employees (62.5%) in the research cases were in precarious employment, given that their employment tends to be poorly paid, insecure, and unprotected. These jobs are hostesses, labourers, a taxi driver, a grocery clerk, and an apprentice carpenter. Of these, four worked part-time (*Bonnici, Brittain, Brown, Campbell*), which is a form of nonstandard employment and generally considered more precarious.

There is a persistent pattern of persons with disabilities earning low wages in employment (Morris et al., 2018; Tompa et al., 2006). In the research cases where income information is provided, five employees were earning minimum wage or very close to it. In four of the cases employees were earning between $11/hour and $15/hour. Minimum wage in Ontario was $11.40/hour (October 2016-October 2017; Omololu, 2021). It was increased to $14/hour in 2018 and was supposed to be further increased to $15/hour before the recent change of provincial government. It is currently $14.35 (Omololu 2021). Thus, by current standards these

[47] At the time Stone and Colella (1996) theorized their model, sexual orientation, and to a lesser extent, gender identity, would not have been as socially accepted and therefore not part of the zeitgeist of their time. These are more recognised as intersecting factors today, but they are not apparent in the research cases.

workers were making minimum wage or less. At 11.40/hour, based on an eight-hour workday and a five-day work week, annualised wages were $21,888 before taxes and statutory deductions. Lastly, the taxi driver earned $120/day plus tips. Based on a five-day work week, before taxes and not including gratuities, the taxi driver earned $28,800 annually. These employees earned just above the individual poverty line.[48] As noted earlier, the Tribunal did not find performance issues, thus if these earnings represent a pay gap, they are not attributable to performance. Baldwin and Choe (2014) and Kruse et al. (2018) found the pay gap for employees with disabilities not attributable to performance but likely to discrimination.

Not only is there a prevalence of low paying work in the sample, but jobs such as servers, labourers, and taxi drivers tend to require low skill and lower educational attainment, which make these employees easily replaced and therefore significantly more vulnerable. Shuey and Jovic (2013) concluded: "Workers in low-wage, low-skill positions tend to have less power, voice and access to workplace protections, are viewed by employers as more expendable, and are at greater risk of job loss and cycling among low-wage jobs" (p. 178). The research cases bear this out. Clearly, once the employees in the research cases requested accommodations, they became expendable from these employers' perspectives. Secondly, employees were in nonstandard work arrangements. Shuey and Jovic found that precariously employed persons with a disability were more likely to have unmet accommodation needs. Obviously, in all the research cases the employees had unmet accommodation needs. Expendability and unmet accommodation needs are further demonstrations that persons in vulnerable positions, such as many of the employees in the research cases, are more likely to experience discrimination.

[48] In 2015 Canada's official poverty line for a family of four averaged $37,542 and for an individual it ranged from $16,463 to $20,389 depending on location (Government of Canada, 2018).

Only four of the employees in the research cases were in white collar positions. Of these, only one employee left employment of her own accord, although the Tribunal found she had no choice to escape the poisoned work environment (*Trinh*). One white-collar employee did not return due to health reasons (*Prothero*), and another was terminated for nondisability related reasons (*Hayes*). In the fourth research case, a recruiter was terminated rather than accommodated (*Passmore*).

On the other hand, two blue-collar employees (*Campbell, Titze*) acquired disabilities on the job, which is consistent with the nexus between low-income and occupationally-acquired disability. Sorensen (2013) noted:

> Poor health or disability that is created through the activities of work illustrates the direct link between the body and the larger processes of production and consumption. The placement of bodies within a complex system of intersecting inequalities affects the likelihood that one will experience occupational disablement. Some groups of people are more likely than others to be involved in hazardous occupations, based solely on class, race, gender, and immigration status. (p. 246)

Given that both employees were labourers earning low wages, these two cases support a class-based risk of being employed in work that leads to acquiring a disability. One of the injuries acquired was physical. However, the other was related to mental health concerns. Granted, mental health knows no class barriers, at work or otherwise.

Quality of Employment. The research cases demonstrate aspects of poor-quality jobs. There are six instances of lack of work control (*Betts, Brittain, Conklin, Passmore, Prothero, Trinh*), two cases of lack of task autonomy (*Groh, Brown*), two cases of excessive workload (*Campbell, Trinh*), four cases of job insecurity (*Betts, Groh, Prothero, Trinh*), and two cases of lack of skills development (*Betts, Trinh*). Thus, only half of the research cases had at least one category of poor-quality work, and only two cases had three areas of poor-quality work.

Generally, these employees did not have powerful positions or autonomy over their work. Indices used to determine job quality use a composite of all these criteria. At best, some of the research cases exhibit elements of poor-quality work.

Origin of Employees' Disabilities. Stone and Colella (1996) argued that the origin of the disability is a factor affecting treatment of employees with a disability. In two cases the disability was acquired on the job. In three cases existing disabilities were exacerbated by the work environment. Six cases involved employees whose disabilities pre-dated their employment or were acquired during employment but were unrelated to their employment. Seven cases involved mental health. Seven cases were in respect to physical health and one case involved a cognitive disability. None of the research cases involved self-inflicted disabilities.

In two of the research cases the employees acquired their disability on the job (*Campbell, Titze*). Both these jobs were manual labour (warehouse labourer, labourer and assembler). In the research cases there were a total of four manual labour positions (the other two being a grocery clerk [*Bonnici*] and a labourer [*Hayes*]). The autoworker (*Carter*) was blue-collar labour, but his disability was not acquired from work. Food servers also perform manual labour in their work (four research cases); however, restaurants are generally considered a service.

In three other research cases, while the disability was not necessarily acquired on the job, the work environment clearly exacerbated the employee's condition (*Betts* – anxiety, *Groh* – mental health issues and Asperger's syndrome, *Prothero* – mental health issues). Two of these positions, carpenter and network administrator, may not be at the lowest end of the wage scale, but they are probably closer to that end. The latter position would be considered white collar. However, these cases demonstrate that work can affect one's disability in blue- or white-collar positions. While, this statistical portrait is rudimentary, no other research on the economic

characteristics of persons with disabilities who have been found to suffer discrimination by employers is known to exist.

Nonevident Disabilities. Eight of the research cases involve employees with nonevident disabilities.[49] One out of every two cases of employer discriminatory behaviour in the research cases are in respect to employees with mental health disabilities. Eight of the 16 research cases involved mental health issues (*Betts, Brittain, Brown, Campbell, Conklin, Groh, Passmore, Prothero*). This finding is consistent with the American trend in respect to prevalence of mental health issues and employment discrimination (Graham et al., 2019).

Given the significant proportion of the research cases that involve mental health disabilities and given that mental health issues are highly stigmatised, the research cases are consistent with findings of significant stigmatisation of mental health in the workplace (Brohan et al., 2012; Hanisch et al., 2016; Krupa et al., 2009; Overton & Medina, 2008; Russinova et al., 2011). However, the research cases are more than just stigmatising. They are discriminatory. It is when stigma leads to prejudicial acts against a minority group, in these cases against persons with a mental illness that discrimination arises (Hanisch et al., 2016). The research cases stigmatised disability to the ultimate extent.

Employers in the research cases involving employees with mental health disabilities did not accommodate or ceased accommodating them. I theorise that these employers did not want to deal with the perceived inconvenience of accommodating employees with mental health issues. In three of the cases, once accommodations were requested the employee was laid-off or terminated. In another case, the employer stopped accommodating the employee and said, “She was no longer prepared to accommodate the applicant’s mental illness” (*Brittain*, para. 42). This

[49] There is possibly a nineth non-evident disability case, depending on classification of the disability of the employee (*Haley*) with a collapsed lung.

demonstrates that the employee's need to change shifts at times and her absences were inconveniences for the manager. In two other cases (*Betts*, *Groh*), the discrimination occurred constructively by the employers not changing their usual routines to consider the employee's disability limitations. In both these instances it would be inconvenient for management to make these changes to their routines and would have consumed time to consider and implement the necessary accommodations.

Moreover, in terminating or harassing employees with a mental health disability for requesting accommodations, employers constructed these employees as not worthy of employment, let alone accommodation. It is worth reiterating that these employees were found not to have productivity issues, poor absentee records, or any of the myriad other alleged rationales employers alleged to terminate these employees and that the accommodations in question required no financial expense. The barrier to employment then was the employers' attitudes towards accommodation. Thus, the barrier to these employees continuing in their employment was the employers' social construction of disability, which I argue stems from the perception of inconvenience of time and effort.

Nonevident Disabilities and Disclosure. A few of the research cases demonstrate the impact on the employee's disclosure challenge when the disability is nonevident. Research indicates that disclosure of a nonevident disability can result in the employee's condition being perceived as ambiguous, being disbelieved (Gewurtz & Kirsch, 2009), being contested, and being trivialised (Prince, 2017). This treatment exemplified in the research cases in "that the manager would tell her [the employee] that she did not have anxiety; would tell her it was all in her head" (*Brown,* para. 12). Another manager said to his employee with a disability, "What this

decreased concentration thing?" (*Prothero,* para. 25) and that he disbelieved the employee was ill. In these research cases the employer did not believe the employee had a disability.

The Social Construction of Nonevident Disabilities and Disclosure. To ignore or disbelieve a person's disability disclosure socially constructs them as something other than who they are. It is ignoring an essential facet of that human being's existence. It utterly diminishes and treats with contempt their disability disclosure, which may have been fraught with anxiety, perceived by the employee as taking significant risk, and constituting a departure in one's work persona, all of which form a significant episode in the life of an employee with a disability. These cases demonstrate managers' ableist behaviour. In three research cases the employers either ignored the accommodation request or denied the existence of the disability. There are cases where the employer disbelieves the employee has anxiety (*Brittan*) and another case where the employer denies the employee has concentration issues (*Prothero*). In one research case (*Betts*) the employer told the employee, "If the applicant channeled as much energy into preparing for and writing the exam as he does arguing and avoiding against it, he would have no problem succeeding" (*Betts,* para. 142), despite knowing about the employee's disability. What is inherent in this statement is that the employee needed to change or conform to the current structure of work, rather than adjusting the work to be inclusive and accommodating (Williams & Mavin, 2012). There is a presumption of ableness by the managers as a normative assumption about what constitutes the traits of a worker (Harlan & Robert, 1998, Williams & Mavin, 2012).

Second, ignoring employees' nonevident disabilities is more adverse than just creating a binary of ableness and disability. It creates an ableist conception that if it cannot be seen it doesn't exist. It is rendering nonevident disabilities as a void, as being nonexistent because if the disability is nonexistent, it is not worthy of accommodation. This denial is to perceive that all

those whose are not evident, categorically, must be abled. This is consistent with Williams and Taras's (2004) finding that in organisations characterised with low trust, that managers and policies treat claims of disability as malingering unless it is observable or verifiable. These managers continue to reproduce this ableism by signaling ableist organisational norms to other managers and employees, by failing to disrupt the embedded ableist practices in the organisation's routines, and by failing to learn new routines. This behaviour is antithetical to creating a disability climate. Senior management has a significant impact on disability climate through policies, procedures, and practices they establish and through attitudes and behaviours they exhibit towards persons with disabilities (Matt & Butterfield, 2006; Vornholt et al., 2013). Leadership from the top of the organisation is critical to integrate persons with disabilities into the workforce (Fraser et al., 2010; Fredeen et al., 2013; Gröschl, 2007; Hernandez et al., 2008; Schur et al., 2005).

The outsized reaction of employers to the accommodation request of employees with nonevident disabilities—that is the employers' termination or harassment of employees with nonevident disabilities, is concerning. Employers must provide only reasonable accommodation. The accommodation requests were all found to be reasonable by the Tribunal. The high percentage of discharges found were consistent with American research; Graham et al. (2019) found terminations to be, proportionately, the highest issue by volume reported in the Equal Employment Opportunity Commission's database of human rights claims.

Ultimately, in respect to nonevident disabilities, the employee assesses the likelihood of their supervisor granting the request and depending on that assessment may forgo making the request (Baldridge & Vega, 2006). Employees considering seeking an accommodation need to

estimate to what extent their manager will perceive the accommodation and/or the accommodation process as an inconvenience and unworthy of their time.

This calculus and "psychological incentives" (Santuzzi et al., 2014) speak to how disability is socially constructed in the workplace, particularly by managers' attitudes, as is demonstrated by the nonevident disability research cases. A great deal of employee motivation stems from the employees' perception that managers are not receptive to disability in the workplace. Reasons for employee suspicion are borne out in the research cases, which demonstrated mangers' attitudes and behaviours. The employees' calculus, to the extent they made calculations, were unsuccessful given the outcomes. Given that, "Disclosure is of central concern in legislation covering accommodation" (Wilton, 2006, p. 26); no calculus should be required, and no negative consequence should result from requesting a rightful accommodation.

Aesthetics. *Tavares* masks another typical issue that creates a barrier to employment for many persons with disabilities. In this case, a coworker identified the effect of the employee's disability as being a potential problem for customers. The coworker's testimony was that "he also noticed that the applicant walked in a wobbly manner and was leaning against walls. He states that his concern was that if he could see it, customers and the manager also would see it" (para. 9). The implication is that this would be unappealing for clientele or, as referred to by Colella and Bruyère (2011), it would cause "aesthetic anxiety". Colella and Bruyère (2011) define aesthetic anxiety as, "People experience discomfort due to interacting with someone who deviates from society's norms about what is considered physically attractive" (p. 475). There is a sense in this research case of the employees being part of the brand image (Warhurst et al., 2009; Waring, 2011) and management being sensitive to customer biases (Houtenville & Kalargyrou, 2015; Stone & Wright, 2013). This case demonstrates the ongoing pattern of appearance being a

major factor in decisions on employee selection in the workplace (Turkmenoglu, 2020). In treating the employee as part of the brand and reacting to perceived customer biases perpetuates those biases rather than create new paradigms. This pattern of reluctance to hire persons with disabilities in the hospitality industry continues (Donnelly & Joseph, 2012; Gröschl, 2007; Warhurst et al., 2009). Lookism represents just another way that persons with disabilities are judged on factors other than their actual capabilities. Further, it is another way to socially construct persons with disabilities (Zevallos, 2011) in a negative way, given how notions of attractiveness change over time and differ between cultures (Cavico et al., 2013; Takáč, 2020).

Job Seekers Versus Existing Employees. All the research cases involved existing employees, some who had been in their positions for years. Interestingly, none of the cases involved job applicants. This may be attributable to the likelihood that such discrimination is likely aversive and therefore difficult to prove. Darcy et al. (2016), in discussing their research on disability discrimination cases under Australian human rights legislation, found that 20% of the cases reviewed were on account of applicants with disabilities being rejected due to their disability. They noted:

> What is interesting about this theme is not what has been discovered but that employers were so ill informed that they directly told the individual with a disability that they were not being employed because of their disability. The implication is that many other employers who may be savvy with respect to disability discrimination, would not be as honest or naive as the employers uncovered in this research. (p. 1258)

It is likely that most employers are not honest or naïve when it comes to rejecting a candidate with a disability. What cannot be known is whether there are cases where the discrimination is overt, but the employee just didn't think it was worth pursuing a human rights case. I conjecture that, in general, employees are less likely to bring a discrimination case in a hiring scenario than in the termination or failure to accommodate scenario, not only because it is difficult to prove but

because they feel that a claim is more tenuous in that circumstance, and they may be less invested than if they had been employed. If they are unemployed or underemployed the prospect of finding ongoing employment is probably a higher priority than bringing a claim with an uncertain outcome. On top of this, the usual barriers of lack of financial resources to obtain legal representation, or the complication and time required to self-represent one's own case impede job seekers from making claims.

Organisational Characteristics. Building on Stone and Colella's (1996) theory about corporate characteristics affecting integration of persons with disabilities, I broadened the factors by adding organisational size, human resource management, and broadening corporate culture and climate. Other factors examined in Stone & Colella's model are industry sector and the organisation of work. Beatty et al. (2019) consider the impact of the presence of a union as an aspect of the model. Stone and Collella (1996) consider how bureaucratic the organisation is structured. To that is add here structural flexibility using Baumgärtner et al. (2015) analysis. One key component identified by Stone and Colella (1996) is the impact of observers on the integration of employees with a disability. Here this analysis is rounded out by considering leadership style and leader-member exchange.

Industry Sector. The research cases occurred in a broad range of sectors. They range from manufacturing, construction, and warehousing to retail, public administration, and professional services. This suggests that many sectors are not immune from discrimination. The highest concentrations were in food services (*Brittain, Brown, Conklin, Tavares*) and manufacturing (*Carter, Haley, Trinh*). One quarter of the research cases involved restaurants. Interestingly, key studies on integrating persons with disabilities emanate from the hospitality industry (Bengsiu & Balta, 2011; Hernandez et al., 2008; Houtenville & Kalargyrou, 2012;

Kalargyrou & Volis, 2014). However, most of that existing literature focuses on larger hotel organisations, rather than the small diners and fast-food establishments. The distribution of employees experiencing discrimination is consistent with Turcotte's (2014) findings of heavier concentrations of men with disabilities in manufacturing, retail trade, transportation, and warehousing, and woman in retail.

Further, it may be that the organisations in the research cases were rooted in an antiquated paradigm. Food services, manufacturing, construction, warehousing, retail, and even public services and professional sectors, at least as they occurred in the research cases, were not what would be considered highly information or knowledge driven. None of the research cases seem to fall on this side of the digital divide.

Organisational Size. Stone and Colella (1996) did not directly consider organisation size in their model. However, several other studies have considered the impact of organisational size on the likelihood of employing persons with disabilities (Bruyère et al., 2006; Domzal et al., 2008, Fraser et al., 2010; Houtenville & Kalargyrou, 2012; Jasper & Waldhart, 2013). Beatty et al. (2019) included size as an organisational characteristic in their model of factors affecting treatment of persons with disabilities in organisations.

Organisational size in the research cases ran the spectrum from a sole-location diner to a multinational auto manufacture. Organisations of all sizes committed discrimination. However, most organisations found to have discriminated against persons with disabilities were small businesses, followed by large businesses, with the least amount of discrimination found in medium-sized organisations. This is consistent with Shuey and Jovic (2013) who found unmet accommodations are more prevalent in smaller firms.

Large Organisations. I theorise that managers in the large companies in the research cases failed to change their routines to the detriment of employees with disabilities, due to the time and inconvenience. In this section the research cases are examined in the context of the extant literature on corporate size and disability discrimination to further discuss the emergent hypothesis of management time and inconvenience**.**

In the larger organisations no effort was made to adapt their existing routines. They continued to deal with the employee with a disability as they would any other employee, despite the need to accommodate the employee. This failure to adjust routines was evident in the way automobile manufacturer (*Carter*) did not consider nonwork-injured employees for nonstandard jobs; in the way the municipality (*Groh*) failed to adapt their return-to-work meeting and in the way the union local (*Betts)*[50] failed to adjust its testing requirements. The provincial police case (*Prothero*) is an outlier of sorts, in that the requests for excessive documentation went beyond the force's usual practice, to the point of constituting harassment. Failure to adapt routines indicates a lack of organisational learning. In these cases, the employers failed to learn their legal obligation to provide persons with disabilities accommodations. Alternatively, if learned these legal obligations, senior managers failed to culturally change by intervening when organisations' routines were abused or not adhered to. All of this takes time, effort, and sustained commitment to plan and implement outside of a manager's usual practices.

However, studies of industry leaders in disability inclusion show that integrating persons with disabilities into their workforce does not occur without considerable management time and effort to create a disability-confident culture (Bengisu & Balta, 2011; Kalargyrou, 2014;

[50] I noted *Betts* here under large organisations as the union have more than 680 active members (Irwin, 2017). However, without further information it is not possible to conclude how many members they would consider being in relationship "with respect to employment".

Kalargyrou & Volis, 2014; Lindsay et al., 2019; Waxman, 2015, 2017). Best business practices that contribute to successfully integrating persons with disabilities into an organisation include: (a) visible commitment to employing persons with disabilities from senior management, (b) assuring sensitive and committed managers are in supervisory roles, (c) matching the employees skills to the job tasks required, (d) providing accommodations, (e) providing pre-employment training, (f) providing disability awareness training for other employees, and (g) evaluating employees with disabilities no differently than other employees (Bengisu & Balta, 2011; Kalargyrou, 2014; Kalargyrou & Volis, 2014; Lindsay et al., 2019; Waxman, 2015, 2017). While the managers in the large organisations did not have to go to these lengths to accommodate the employees, they had to do more than they did, which would have required putting more time and effort into changing their routines and usual practices.

Small Organisations. Many of the concerns[51] in respect to hiring persons with disabilities that have been shown to be salient to smaller firms are not present in the research cases. I suggest that the remaining reticence to retain employees with disabilities has to do with supervisors' attitudes and hypothesise that discrimination stems from their implicit perception of the time and inconvenience involved in managing an employee with a disability.

As with any hire, it is important to match the employee's skills to the needs of the job (Bengisu & Balta, 2011; Gustafsson et al., 2014; Kalargyrou, 2014; Rioux, 2017; Rioux et al., 2019; Zappella, 2015b). It is no different for small businesses. However, these employees' skills

[51] Previously identified concerns: matching skills to job needs, supervision, training time, expense related to safety and medical insurance (Burke et al., 2013; Houtenville & Kalargyrou, 2012), the cost of accommodations (Employment Monitoring and Evaluation Branch, 2011; Fraser et al., 2011; Houtenville & Kalargyrou, 2012; Jasper & Waldhart, 2012, 2013; Zappella, 2015a;), whether employees with disabilities have the necessary skills (Domzal et al., 2008; Fraser et al. 2011; Jasper & Waldhart, 2013), loss of productivity (Domzal et al., 2008; Employment Monitoring and Evaluation Brarnch, 2011; Fraser et al., 2010), concerned with customer and employee attitudes (Jasper & Waldhart, 2013) and avoiding legal liability (Fraser et al., 2011; Moore et al., 2007).

apparently were already matched to the employer's needs, and the employees had been performing their duties adequately up to the point they requested accommodation. A poor match of skills to needs might be evident in poor productivity. Employers did argue in many of the cases that the employees in question were not productive; however, the Tribunal rejected that argument in each instance except one (*Tavares),* where the performance issues were found not to be connected to the employee's disability.

Further, in respect to the research cases, most of the other concerns noted in the literature are not evident. The employees were already on the job, so training time was not at issue. Customer attitudes were not mentioned (except for *Tavares*). Co-employee attitudes in respect to the employees with disabilities were mentioned in two cases (*Hayes, Tavares*) but were related to the poor attitude of one employee and interpersonal issues of the other, not their disabilities.

Of the concerns raised in the literature, that leaves supervisors' attitudes towards employees with disabilities as the remaining issue. What really is at stake in these discriminatory terminations is managers' attitudes.

Managers' attitudes stemming from the time and inconvenience of providing accommodations (or any other reason) should not lead to noncompliance with human rights obligations. An American study found that there was a high compliance with the *Americans with Disabilities Act* (ADA) amongst small businesses (Moore et al., 2007). However, 47% of those small businesses indicated they comply with the legislation to avoid penalties and lawsuits (Moore et al., 2007). Notably, the ADA has penalties for not meeting certain design standards that are not comparable in Canadian human rights codes. On the other hand, 52% of small firms indicated positive incentives, such as market expansion, as the motivator for their compliance. While small businesses should fulfill their human rights obligations regardless, this study may

provide Canadian policy developers guidance on how to increase compliance. Given the prevalence of small firms in the Canadian economy,[52] to create systemic change in the employment status of persons with disabilities, considerable effort will have to be mounted to penetrate the small business *zeitgeist.*

Organisational Structure

Arguments have been made for two different types of flexibility as methods to better integrate employees with disabilities into an organisation. One is structural flexibility. Baumgärtner et al. (2015) proposed that structural flexibility is important for organisations to be responsive to the needs of employees with disabilities and this, in turn, will impact those employees' job satisfaction. "In other words, the more flexible an organisation is, the more likely it seems that it does a good job in recognizing, approving, and implementing custom-made unbureaucratic solutions, which seems particularly important for employees with disabilities" (Baumgärtner, 2015, p. 328).

The other type is flexible scheduling. Wooten (2008) argued, "If leaders want to succeed at breaking barriers for inclusion, their organisations will incorporate fluid and flexible work-life balance policies to accommodate employees' professional and personal needs" (p. 193). The research cases were examined through the lens of both types of flexibility to demonstrate employer behaviours, to demonstrate lack of support for employees with disabilities, and to add to the time and inconvenience hypothesis.

Organisational Flexibility. Inflexible organisations are characterised by the extent to which the organisation has formalised rules and the extent to which power is more centralised (Baumgärtner et al., 2015). The latter is characterised by the extent to which employees are

[52] As of December 2017, 97.9% of companies in the Canadian economy were classified as small businesses, employing 69.7% of private sector employees (Innovation, Science and Economic Development Canada, 2019).

included in decision making and the hierarchy of authority (Baumgärtner et al., 2015). There was only one research case where an employee was given the opportunity for input on their accommodation (*Hayes),* and then her preferences were ignored in favour of the human resource manager's objectives. The accommodation request was used as a pretext to deal with other, unrelated interoffice issues. In all the research cases, the employees' requested form of accommodation was either denied or resulted in their termination—obviously instances where employees had no input.

In all the research cases the hierarchy of authority was such that it did not include the employees. In the smaller and middle-sized organisations, the power resided mostly in an immediate supervisor with a powerful fiat (*Betts, Brittain, Brown, Campbell, Conklin, Passmore, Prothero, Trinh)*. Baumgärtner et al. (2015) argued that concentration of power means that the "direct supervisors tend to have less autonomy and fewer opportunities for action as well" (p. 328). The power to make the decision about granting accommodations resided elsewhere and at a distance even from the supervisor either, in specialised departments or up the corporate chain of command. However, in most of the research cases, the opposite was true; there was low power centralisation. These managers were able to provide "the approval and implementation of individualized solutions for employees with disabilities" (Baumgärtner et al., 2015, p. 328). They had the authority and opportunity for action but exercised their discretion to the detriment of the employees.

In all cases (with the likely exception of *Carter* and *Bonnici*), there was a lack of formality—that is, lack of prescribed rules—providing managers greater opportunity to determine how to make the decision and what the outcome would be (Baumgärtner et al., 2015). However, that same informality is detrimental to these employees in that there was an absence of

an accommodation policy to protect the employees. Managers' ad hoc responses to accommodation requests left the employees with no rights or recourse short of a human rights claim. Where company policy was invoked, it was used by employers selectively to avoid accommodation (*Haley, Titze),* or the policy worked against the employee by accommodating another class of employees based on greater economic benefit to the corporation (*Carter*).

Carter, Groh and *Prothero* involved larger, apparently more bureaucratic workplaces, two of which were public sector organisations and all of which were unionised. This is contrary to Beatty et al.'s (2019) finding that large, public-sector, unionised, and service organisations are more inclusive and more proactive in responding to disability needs. These organisations certainly had a more centralised power structure. These employees had no input in decisions. For example, Carter could do little to influence the company's prioritisation of employees with active workplace compensation claims. Nor could Groh or Prothero effect much how they were accommodated. On the other hand, these organisations had formality, but *Carter* and *Groh* formality meant doing things as they always did, which was no help to these employees. In *Prothero* formal policies did not protect against a rogue supervisor using the procedures to harass the employee.

In sum, the results match Baumgärtner et al.'s (2015) conclusion that formality may be preferred by employees with disabilities, particularly if a policy specifically prescribes an accommodation process, and it is properly implemented. On the other hand, the results differ from Baumgärtner et al. (2015) in that lower centralisation of power is not necessarily more beneficial to employees with disabilities. It depends on how power is exercised and how justly the exercise of that power is perceived by the employee. This sort of flexibility is not workable without employee participation and is unachievable where power is concentrated in recalcitrant

managers. Creating formality in respect to accommodation policies, changing management style to provide employees input in the decisions about accommodations, and moving the decision making closer in the hierarchy to the employee (where that is not the case) also takes time and effort, particularly because in some organisations these changes necessitate changing the organisation's culture.

Flexible Scheduling in Accommodations. Many of the other organisations in the sample are smaller enterprises and appear to be less bureaucratic, but obviously were no more disability-friendly or less discriminatory. All requests for flexible scheduling, whether small or large enterprises, were refused (*Betts*, *Brown, Passmore, Trinh*). This is contrary to Matos et al. (2017), who in an American survey found small organisations more likely to provide all or most employees flex time, flex place, self-management over break times, gradual return from caregiving leaves, and task flexibility. A form of flex time as an accommodation was evident in only one case (*Brittan)* and eventually the manager abandoned this practice. Providing rescheduling appeared to be inconvenient for the manager.

The expenditure that flexibility entails is a manager's time and effort, to not only manage flexible arrangements but to create the climate that facilitates their use. This requires creating policies that support the use of flexible work arrangements (Wittmer & Lin, 2017). Flexible location work requires managers to shift from visual management to outcomes management (Gewurtz et al., 2021). Flexible work arrangements are affected by the extent to which managers support its use (Wittmer & Lin, 2017). Even where flexible work arrangements are available, their uptake is conditioned by the organisational climate (Wittmer & Lin, 2017), so managers will need to actively instill acceptance of flexibility as a form of accommodation throughout the organisation for it to be effective. Second, the organisation needs to provide technology that

enables flexibility, as well as assistive technologies to facilitate their use (Wittmer & Lin, 2017). Again, it takes managers' time and effort to infuse a climate of flexibility, to determine what type of flexibility works in the circumstances of the organisation, and to implement and manage flexibility. The point is that implementing effective flexible work accommodations does not occur without considerable management effort and expenditure of time.

Organisation of Work - Ideal Worker. The employees in the research cases were perceived by their employers as something other than standard workers. The ideal worker is the "'normally' qualified worker able to hold a standardized job" (Jacques, 1996, p. 108). Presumably, the standard worker requires little managing, fits the job in a standard way, and obviously requires no accommodations. Accommodations deviate from the standard work design and require more of managers, even when the accommodations are not complicated. However, even these simple alterations of how work is done is sometimes perceived by mangers as inconvenient, and having a "nonnormal" (Jacques, 1996, p. 108) employee may be perceived as time consuming. Foster and Wass (2013) commented, "Decision-making remains in the hands of managers who, if wedded to the concept of a standard worker, will view an adjustment as disruptive or unworkable and costly in terms of time and resources" (p. 717). Implicit in the employers' excuses in the research cases is the notion of a standard worker, at least in the sense that they don't want workers who are perceived to: (a) be absent more than a typical worker, (b) require different work arrangements than the typical employee, (c) require different testing requirements than a typical worker, (d) need alternative work assignments, or (e) treated differently in a return-to-work meeting than other employees. In short, the standard worker is implicit in the pretexts given by employers in that they want workers who require no accommodations.

Human Resource Management

HR capacity was evident in seven of the research cases. Several behavioural trends emerged from the cases: (a) managers act contrary to the advice of the human resource professional, (b) HR provided incorrect information to the manager causing the issue with accommodations, (c) HR participated with other management in constructive discrimination of the employee with a disability, (d) HR was unaware of what the discriminating manger was doing, and (e) HR participated in the discriminatory act.

Lunsford and Dolison (2019) identified that human resource development can help employees with disabilities achieve engagement, empowerment and inclusion in an organisation. Several best practices have been identified to create an organisational culture that integrates persons with disabilities. These practices include: (a) top management commitment (Fraser et al., 2010; Fredeen et al., 2013; Hernandez et al., 2008; Schur et al., 2005); (b) assuring supportive managers are in key positions (Kalargyrou, 2014); (c) job matching (Bengsiu & Balta, 2011; Gilbride et al., 2003; Kalargyrou, 2014); (d) having a network of community partners (Kalargyrou, 2014, Kalagryrou & Volis, 2014); (e) disability awareness and anti-discrimination training (Bengsiu & Balta, 2011; Chan et al., 2010; Fredeen et al., 2013; Gröschl, 2007; Houtenville & Kalargyrou, 2012; Kalargyrou, 2014; Kalargyrou & Volis, 2014; Markel & Barclay, 2009; Schur et al., 2014); (f) identifying disability in diversity and inclusion plans, (g) having a process for accommodation requests including a grievance mechanism; (h) designating a specific person or team to deal with accommodations, (i) having a return to work disability management program; (j) providing extended leaves (Erickson et al., 2014), (k) flexible work arrangements (Wittmer & Lin, 2017); and (l) "monitoring employment outcomes on dimensions such as disability…rewarding successful performance on this goal in employees' performance

appraisal, compensation and promotions; and severely disciplining employees violating the norm" (Bendick, 2018, p. 21).

Enacting these practices would involve engaging an organisation's human resource professionals. As can be seen, creating a disability-inclusive culture is a considerable management endeavour, requiring considerable amounts of managers' and human resource managers' time, thought, and effort.

Looking at HR through the lens of Lunsford and Dolison's (2019) conceptual model of attitudinal outcomes for employees with disabilities reveals no discernable issues in respect to employee engagement, but there are instances of a lack of empowerment and inclusion. In several research cases where HR was present, there was a lack of structural empowerment. The employee seemed to lack decision-making power ranging from being allowed to take a break at their discretion to not having input about their accommodation being ignored (*Groh, Hayes, Trinh*). Psychological empowerment is affected by harassing work conditions, as harassment leads to diminished of self-esteem. This likely resulted in diminishment of intrinsic motivation, such that it led to the employee resigning (*Trinh*). Lastly, there are several cases where managers harassed and inferiorized the employee, thereby making them feel excluded (*Prothero, Trinh*), isolated the employee (*Hayes*), and dealt with an employee in a way that exacerbated his sense of paranoia.

Discrimination occurred in some organisations in the research cases despite the existence of human resource capacity. This was evident in two of the research cases. In one case (*Prothero*), the manager continued his harassing behaviour despite, HR's objections to the practices being used. In another research case (*Trinh*), the manager in responding to a request for accommodation, threatened that there would be consequences (termination) for the

accommodation. As a result, neither the manager nor the employee engaged HR. If HR was involved there likely would have been a different result for the employee. Finding a disconnect between disability discrimination and the presence of HR professionals is in line with Cavanagh et al.'s (2017) research which identified a disconnect between human resource policies and what employees with disabilities experience.

Ren et al. (2008) found that disability had a negative effect on managers' expectations of future performance. Thus, having a disability may be associated with negative HR judgments. This future-oriented bias may explain the termination in *Passmore* (employee returning to work, asked for half-days as an accommodation of her PTSD), but it does not fit well with the other research cases.

While HR is not directly responsible in all the research cases, clearly not all the HR pieces were in place in several of the research cases, such that the managers were sufficiently sensitised towards employees with disabilities. This may explain the harassment of the production technology specialist (*Trinh)*. The harassing manager was from South Korea and exhibited biases that may be rooted in a foreign work culture but were not consistent with general Canadian norms and practices. An intervention was required. As Demuijnck (2009) noted, if HR does not intervene to implement nondiscriminatory human resource practices, it will not happen on its own.

HR can do only so much when confronted with managers who are unwilling to comply with HR advice or organisational standards. As Demuijnck (2009) stated, "[I]t is shown that negative managerial influence is more powerful than ethical codes: ethical codes are totally powerless tools for dealing with discrimination when human resource managers face a discriminatory hierarchy" (p. 95). This was the case in *Prother*o, where the manager acted

contrary to HR's advice. The Tribunal held the employer liable, as well the individual manager, stating that "as a result of its [senior managements] failure to take meaningful and timely action, despite having knowledge that ought to have prompted action, the respondent employer effectively condoned the conduct that I find amounted to harassment" (para. 68). Human resource managers, as advisers, may not be able to curb a recalcitrant manager, but senior managers, when alerted, have a duty to act.

Examining the research cases contributes two disability discrimination scenarios where HR is directly implicated that were not evident in the HR literature. In *Groh* the employer's HR department was involved in constructive discrimination by failing to change their usual practice to accommodate the employee's limitations in the employee's return-to-work meeting. The HR personnel conducting the meeting where aware of the employee's limitations and conducted the meeting as usual.

In *Hayes* HR decided on an accommodation to which the employee had expressly objected. The accommodation served to make the employee's work conditions even worse and caused her further distress. The Tribunal stated that the HR manager "used its obligation to accommodate the applicant's asthma as a pretext to isolate her from the members of her team" (*Hayes,* para. 56) to reduce opportunities for continued inter-office conflict. The Tribunal found the accommodation provided did not respect the employee's dignity.

These two incidents may be rare cases in which HR was implicated in discrimination. However, they also demonstrate instances in which HR preferred their convenience over its duty to the employee. In *Groh*, avoiding the discrimination would have required the HR manager to vary its back-to-work meeting routine. This would have required time and planning, which would be less convenient for the manager. In fact, the Tribunal stated that the situation could

have been avoided if management had provided the documents in advance for the employee to review, given that they knew from the employee's medical assessment that the employee required information in writing. In *Hayes* proper accommodation would have meant more time commitment from the HR manager in two ways. The HR manager would have to engage further in the accommodation process to derive a more suitable accommodation, and management would have to manage the employee's attitude and aggressiveness, rather than isolating the employee.

Goss et al. (2000, as cited in Beatty et al., 2019) suggested that larger organisational size is an indicator of the likelihood of an organisation having professional HR capacity. Six businesses in the research cases are classified as small. Of those, in only one case (*Titze)* was there mention of an HR department but no mention of their involvement in considering this employee's accommodations or the termination. However, the *Human Rights Code* obligations do not vary with organisation size or lack of HR. Employers big and small have the same obligations to employees with disabilities. The only thing that may vary with size is the threshold of what constitutes undue hardship[53].

Disability awareness, and specifically, disability inclusion, takes managers' time and effort. Where a firm has an HR manager, they would be in the epicentre of such an initiative. HR is well placed given its usual domains, such as training and development of managers and employees, to encourage inclusion and shape the organisation's values. HR managers should be the vanguard of disability inclusion, not a party to discrimination.

[53] To be considered undue, the hardship, the cost must be "so substantial that they would alter the essential nature of the enterprise, or so significant that they would substantially affect its viability" (Ontario Human Rights Commission, 2016, s. 9.2.1).

Union Presence

Beatty et al. (2019) found that the presence of a union was associated with responding positively to persons with disabilities and the provision of accommodation. The results of the analysis of the research cases vary from Beatty et al.'s (2019) conclusion.

The variance of these results from Beatty et al. (2019) is likely a function of the selection criteria, which by design are cases where discrimination has occurred. For example, in the two research cases in question, the union was considered the employer in one (*Betts*) and a participant in the discrimination in the other (*Groh*). In cases where the union is active in supporting an employee with a disability, a discrimination case would be heard by an arbitrator at the Ontario Labour Relations Board as the appropriate jurisdictional forum, rather than the human rights tribunal. Lastly, variation in union behaviour may not be representative due to the size of the sample.

Unions have been both supporters of persons with disabilities and an opponent of accommodations where accommodations interfered with other union rights. Typically, unions are likely to oppose accommodations when an employee's need for one conflicts with seniority rights under a collective agreement, as was the case in *Carter*. The union was not actively involved in the accommodation process for this employee; however, the seniority system impacted the employee's return to work.[54] Ultimately, the corporation was found to have discriminated by not considering nonstandard jobs for the employee, but it was the union seniority scheme that was a barrier to accommodation in the first instance.

Unlike the more typical cases, two of the research cases were not about conflicting accommodation and collective agreement rights. These cases were about whether the unions

[54] The employee was bumped from his prior job by an employee with more seniority. The employee was laid-off on the basis that there was work the employee could perform, but he lacked the seniority to qualify for those jobs.

were liable for discrimination, based on disability and employment. The Supreme Court held that a union can be held accountable for discrimination in respect to employment, where the union participated in formulating a work rule that has a discriminatory effect (such as a prevision of the collective agreement), or where the union is a party to the discrimination by impeding the employer's efforts to accommodate the employee (*Central Okanagan School District No. 23 v. Renaud,* 1992*)*.[55]

In *Groh*, the research case about the return-to-work meeting for an employee with Asperger's syndrome, the Tribunal stated,

> In summary, the combined actions of the respondents constituted constructive discrimination against the applicant in the way in which they handled the return-to-work meeting and the events that occurred upon the applicant's return to work. However, as indicated I have no way of finding liability against the union. (para. 147)

Given that the union did not participate in creating a discriminatory rule, nor did it impede the employer's attempt to accommodate the Tribunal could not find them liable even though they found the union complicit.

The second union research case is somewhat different. In *Betts* the union was held to be the employer of apprentices.[56] Therefore, the local was liable for constructive discrimination in respect to the employee's disability by not accommodating the employee's test anxiety.

These research cases demonstrate that in some circumstances, a union can be an employer, while in other situations they can be complicit in the employer's discrimination. As well, both of these cases demonstrate, again, entities considered employers refusing to revise

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[55] A union may be a party to the discrimination in two situations: (a) where the union has participated in formulating a work rule that has a discriminatory effect; and (b) where it has failed to accommodate the employee, notwithstanding its lack of involvement in creating or applying the discriminatory rule (*Central Okanagan School District No. 23 v. Renaud,* 1992).

[56] The Tribunal held that the term "with respect to employment" in section 5 of the *Code* goes beyond the traditional employer-employee relationship.

their routines to accommodate an employee with a disability, even in the face of being aware of the employee's limitations. The failure to make these accommodations likely stem from time and inconvenience they would entail.

Organisational Culture and Climate

Stone and Colella (1996) mentioned cultural change in the context of organisational norms and values influencing organisational policies and practices. Subsequently, a body of literature on corporate culture, as well literature on organisational climate, has evolved since Stone and Colella. The research cases were examined through organisational culture and climate lenses to determine trends in employer behaviours.

Culture. The research cases demonstrate corporate cultures whose norms and values cultivate policies and practices that are not favourable to persons with disabilities. The cultures in the research cases allow managers to perpetuate negative attitudes towards persons with disabilities and towards accommodations, lack inclusiveness, value employees for maximum productivity at minimal cost, lack psychological safety, and emphasise difference rather than integration. These cultures guide these organisations to respond adversely in respect to integrating persons with disabilities, as it encounters new accommodation situations. These cultures, at least as demonstrated in the research cases, are not creating "pattern[s] of shared basic assumptions" in respect to "internal integration" (Schein, 1992; p. 12; Schein, 2004, p. 17) of persons with disabilities. These organisations have not undertaken the process of accumulated learning (Samant et al., 2009) in respect to integrating person with disabilities. In short, these organisations' collective values, norms, beliefs, and behaviours (Schur et al., 2005; Schur et al., 2017) do not seem to include accommodating persons with disabilities.

Policies. Corporate culture impacts an organisation's policies and practices (Schur et al., 2013). Several the companies in the research cases exhibited policies and practices that were applied in a detrimental fashion to employees with disabilities—for example, Chrysler preferring employees with workplace claims for nonstandard employment opportunities, to the detriment of employees with nonworkplace disabilities. Similarly, the selective application of zero-tolerance policies in two of the research cases (*Haley, Titze*) demonstrated a culture that did not foster inclusion of employees with disabilities.

Other research cases demonstrate inflexibility in applying policies and practices, such that the employee's disabilities were not taken into consideration. For example, in *Betts* the policy was neutral in respect to disability. However, it is not the policies per se but the lack of accommodation in the application of the policies that makes these discriminatory. It is the lack of adapting the organisation's routines that says something about these corporation's cultures vis-à-vis valuing persons with disabilities. Adapting routines takes managers' time and effort.

The abusive application of the OPP's human resource policy (*Prothero*) in the form of excessive requests for medical information with unreasonable deadlines is consistent with Meyer and Rowan's (1977) decoupling argument. In *Prothero*, the stated policy was decoupled from how the policy was actually practiced. Applying the harsher practices only to a person with a disability, rather than applying the actual policy, seems evident of a discriminatory culture. It seems that despite the espoused policy and HR's objections, there was some shared understanding that this was how they deal with accommodation requests, as can be seen by the lack of intervention from senior managers who were apprised of the manager's behaviour.

Practices. In other research cases employers' behaviours could be considered practices. In the cases where a manager's behaviour constituted harassment (*Brittain, Prothero, Trinh*),

given that harassment usually has an ongoing and repeated nature, such behaviour likely constitutes a practice. Similarly, managers continuation of the usual practice despite the employee with a disability requiring modifications to accommodate their disability is evidence of discriminatory practices. Examples in the research cases are a return-to-work meeting, conducted in the routine manner, as they would with any other employee, without considering the employee's known limitations (*Groh*) or insisting an employee continually challenge a qualification exam despite knowledge of need accommodations (*Betts*). These are both examples of practices. Leaving these practices unadjusted is telling about the ableist attitudes in these organisations. Lastly, preferring workplace-injured employees over nonworkplace-injured employees for nonstandard job openings is a practice (*Carter*), that may be less ableist, but the practice creates a hierarchy of disability. In the other research cases it is not obvious whether managers' reactions to accommodation requests are a practice since it is not known whether the behaviour was repeated—that is, whether other employees with disabilities were treated similarly.

Ultimately, cultural change has many impediments, is time consuming (McVeigh, 2017), and may take many months or even years to effect (Fajak, 2018; McCarthy, 2018), which means successful cultural change entail sustained effort by managers. Changing practices means changing routines. Routines are meant to save cogitative resources (Becker, 2000) by providing decision rules and avoiding conflict through established tacit agreement (Howard-Grenville & Rerup, 2017), thus minimizing uncertainty and inefficiency (Zellmer-Bruhn et al., 2004), which contributes to change inertia (Becker, 2000). Managers who are already under time pressure are more likely to rely on prior knowledge even in the face of new evidence (Becker, 2000). To the extent that managers perceive employees with disabilities as adding to their time pressure and the

extent that changing routines to accommodate employees with disabilities requires manager focus, the more likely that there will be inertia on the manager's part to change routines.

Though cultural change is generally hard to accomplish, disability culture change has occurred successfully. Organisations have been able to integrate employees with disabilities (Bengsiu & Balta, 2011; Fredeen et al., 2013; Hernandez et al., 2008; Houtenville & Kalargyrou, 2012; Kalargyrou, 2014; Kalargyrou & Volis, 2014; Waxman, 2015, 2017).

Valuing Employees. Some of the research cases demonstrate corporate cultures that see employees as expendable. Schur et al. (2014) noted that employees are seen as an expense and replaceable if they cannot derive the most productivity for the least cost (Schur et al., 2014). Employers seem to assume that disability equates to more cost, but a germane cost is also measured in the managers' time. Employers' association of employees being expensive in terms of time may be the real practice exemplified in these cases.

How the employer values an employee can be gauged, to an extent, from approving or denying an accommodation. Approval of accommodations creates a perception that the employee with a disability is valued (Schur et al. 2014), whereas organisations that routinely deny requests suggest to employees with disabilities that their accommodation requests are disruptive (Gould et al., 2021; Schur et al., 2014).

Seeing the employee as an expense and replaceable is evident in these cases: (a) the manager engineered the employee's dismissal, rather than continued to deal with her mental health issues (*Brittain*); (b) harassment of an employee with anxiety, who the manager treated as inefficient rather than accommodating her anxiety (*Brown*); (c) an employee was laid off due to a workplace insurance claim (*Campbell*); (d) terminating a probationary employee for requesting a medical leave out of concern that she would be an absentee risk (*Conklin*), (e) terminating an

employee who requested a respirator (*Haley*), (f) terminating an employee for requesting an accommodation of half-days as part of a return-to-work plan (*Passmore*); and (g) treating nonworkplace injured workers differently than workplace insurance claimants (*Chrysler*). It is clear in many of these cases that the employers viewed the employees in a transactional frame, judging the employees' value essentially on a cost/benefit basis. A high number of the research cases ended in termination and resignation, a clear sign of a lack of valuing these employees.

Manager-Employee Relationship. Positive managerial-employee relationships contribute to the integrating employees with disabilities into their business. Several of the research cases highlight this significance by the absence of such a relationship. Eight of the research cases demonstrate poor manager-employee relationships (*Betts, Brittain, Brown, Campbell, Hayes, Prothero, Sellner, Trinh*). The relationships were fraught with insults and abuse (*Brown, Prothero, Trinh*). In other cases, management preferred to isolate the employee rather than dealing with a difficult interpersonal relationship (Hayes, Sellner). In another case, management preferred to ignore the employee's stress and dissatisfaction (*Campbell*), and one case management became intolerant of the employees need for constant scheduling changes as an accommodation (*Brittain*). The employees did not have high-quality relationships with their supervisors. The quality of the supervisor-employee relationship is associated with the provision of accommodations (Lyubykh et al., 2020). Without manager support, obtaining accommodations is difficult (Kensbock & Boehm, 2016).

Social Construction of Organisational Culture. Neoinstitutionalists argue that businesses borrow cultural models from the prevailing environment (DiMaggio & Powell, 1983; Pederson & Dobbin, 2006). One research case literally exemplifies the social construction of organisational culture in that management practices and employee expectations that are typical in

parts of Asia in respect to sick leave, accommodations, and disabilities differ from typical Canadian expectations. In Confucian Asian cultures, management expects employees to work while, sick and employees are culturally inculcated to work under those circumstances (Denyer et al., 2020). While presenteeism is an increasing phenomenon in the West, it is associated most with individuals who experience job insecurity (Miraglia & Johns, 2016) and financial difficulty (Aronsson & Gustafsson, 2005; Gustafsson & Marklund, 2014). The importation of different cultural expectations socially constructs different corporates culture, which begets different employee self-governmentality.

Most organisations in the research cases do not seem to encompass prevailing diversity practices, HR practices, or, at a minimum, human rights liability mitigation. Yet again, some of these enterprises are smaller and not necessarily steeped in these practices. Regardless, research shows that normative cultural change is driven by corporate culture, industry norms, and the presence of minority managers (Dobbin et al., 2011). Investigation of the latter two elements is beyond the scope of this research as they are not evident from the research cases. Lastly, the extent that any of the organisations in the research cases immunised themselves—that is, know about prevailing models but choose to ignore them in favour of current practices is not divinable from the research cases (Pederson & Dobbin, 2006; Strati, 1998). It is not known whether these organisations were aware of these diverse, HR, and human rights practices but rejected them in favour of the existing culture, thus continuing to sustain cultures that are unaccepting of employees with disability.

Organisational cultural theorists argue that organisations socially construct their culture to create organisational identity (Dobbin, 1994; Gergen & Thatchenkery, 2004; Mezias, 1985; Pedersen & Dobbin, 2006; Senge, 2013; Shien, 1985 & 2004; Strandgaard et al., 2006; Williams

& Mavin, 2012). They create unique practices and rhetoric (Pederson & Dobbin, 2006) to justify those practices. The organisations in the research cases proffered many excuses as defences to the human rights claims advanced against them. These may be reflections of their corporate culture, though many of these organisations' excuses were found by the Tribunal to be invalid. Rather, it is their discriminatory behaviour that is reflective of their identity.

Whether the claimed excuses were their genuine reasons, these organisations preferred (at least at a rhetoric level) some other cultural values (productivity, absenteeism, etc.) over disability inclusion. Green (2005) noted that culture has the power to shape beliefs, expectations, and behaviours. One of Schein's (1985) indicia of corporate culture is managing internal integration, which determines the criteria of who is in the in-group and who is not. In the research cases, it seemed that disability was an out-group. These organisations clearly had constructed a culture where persons with a disability who seek accommodations were not welcome. The response to accommodation requests in the research cases transmits a behavioural expectation that accommodations will not be tolerated and likely will have a suppressing effect on future workers' accommodation requests. Thus, creating organisational where "what ought to be" (Schein, 1985, p. 13) is a culture devoid of persons with disabilities needing accommodations. These cultures may create a bounded choice (Green, 2005) around disclosing disability to fit into the culture and seemingly to retain employment.

Employees engage in sense making of identities, which are rhetorically sorted by labels (Hartelius & Browning, 2008). Likely, the sense employees in these organisations made from employers' treatment of employees with disabilities, the excuses deployed, and the very absence of accommodated employees with disabilities in these organisations is that "who we are," our identity, (Shien 1985) is not disabled

Many of the research cases demonstrate the use of coercion in the form of termination. Many of these cases ended up with the employee being terminated in circumstances where the Tribunal found the terminations to be unreasonable and having to do with their disability. Termination is an extreme sanction, Kondra and Hurst (2009) asserted, used to maintain a "static culture" (p. 47). Corporate culture is reflected in the coercive manner organisational rules are interpreted and applied. There are several research cases where rules, such as zero-tolerance policies, were applied strictly to employees with disabilities, while in practice, not enforced against employees without disabilities. In practice, these businesses created, through differential application of their policies, two sets of rules: one for persons without disabilities, where the policies were not applied strictly, and harsher ones for persons with disabilities, where the policies were fully enforced. In the research cases, despite the excuses offered, the employees were terminated so the organisation could avoid provision of accommodations and retain the organisational culture unchanged. Coercion has implications for employees with disabilities, whose noncompliance may be solely the very existence of their disability.

In these cases, the employee with a disability was subject to coercive power. However, the example of the treatment of the employees with disabilities may be an element of coercive persuasion on coworkers (Tourish et al., 2009). The responses to accommodation requests created an environment where other workers with a disability likely learned to self-discipline, to conform to organisational norms (Kondra & Hurst, 2009; Tourish et al., 2009) by not disclosing their disability. The cultural message in the research cases is that managers will not be supportive of accommodations and having a supportive supervisor has been found to be essential for obtaining accommodations (Gewurtz & Kirsch, 2009; Von Schrader et al., 2014). Such a culture

creates an unsafe psychological climate in respect to requesting disability accommodations and a detrimental disability climate.

Further, research shows that disability inclusion initiatives that change an organisation's culture requires leadership and visible commitment of senior management (Fredeen et al., 2013, Frazer et al., 2009; Gröschl, 2007; Hernandez et al., 2008; Schur et al., 2005) and supportive supervisor (Kalargyrou, 2014). As Green so poignantly noted, "Work culture discrimination is at its core a human problem; however, as the business literature on corporate culture suggests, organisations influence and shape work culture through structural and other institutional choices" (p. 648). Such change is unlikely to happen without support at all levels of management. What is evident from the research cases is that managers in these organisations were not supportive of integrating these employees with disabilities. Arguably, these managers' discretion was used to resist workforce compositional change.

Ultimately, how organisational culture is constructed is impactful on how disability is constructed in those organisations. Culture impacts, whether organisations adapt best practices or immunise themselves; how organisations construct expectations around accommodations and sick leave; how organisations use coercion, the procedural fairness of how organisations apply their rules; how supportive managers are; their messaging; and the extent of discernable commitment from senior management. All these factors contribute to the shared meaning about and the internal integration of employees with disabilities.

Organisational Climate

Organisational climate analysis is not offered *qua* climate per se but as a heuristic to examine how employers construct employees with disabilities. To determine climate, one would need to know the shared perception of employees (Schneider et al., 2013; Spell & Arnold, 2007),

which cannot be garnered from the research cases. However, as climate is the aggregation of perceptions based on sharing individual understanding of meaning ascribed to the organisation (James et al., 2007), the cases nonetheless allow one to intuit the perception of employees with disabilities to a certain degree. Granted, while the research cases provide a window into the climate of these organisations, the treatment of one or two employees may not be indicative of the overall climate. On the other hand, psychological climate is measured at the individual level (Baltes et al., 2009; Chan, 1998; James et al., 2008; Parker et al., 2003). Climate is less a limitation of the research as it was used in this study not for the actual shared perception of employees but to leverage what can be gleaned about employers' behaviours.

Positive Work Environments. In general, in the research cases the employees with disabilities do not experience positive work environments. Many of these organisations' employees with disabilities did not experience openness, collaboration, encouragement, personal freedom, or trust (Härtel & Ashkanasy, 2011). Nor did they experience social inclusion or emotional climates that promote human flourishing (Härtel & Ashkanasy, 2011). In several of the cases the employees were subject to negative emotional experiences and harassment.

Psychological Climate. While it is impossible to discern the employees' cognitive constructions, which would involve understanding the employees' filtering, abstraction, generalisation, and interpretation (James & Sells, 1981) of their manager's behaviours, there is some sense of the impact on the employees' wellbeing in many of the research cases. Negative psychological climate impacts employee wellbeing (Baltes, 2001; Baltes et al., 2003; D'Amato & Zijlstra, 2008; Parker et al., 2003). One way the psychological climate is impacted is through workplace aggression (Bendi et al., 2012; Hershcovis & Barling, 2010), and aggression includes

discrimination (Wood et al., 2013). Impact on wellbeing may be a useful proxy for indicating psychological climate.

A significant pattern in the research cases is injury to the wellbeing of many of the employees with disabilities. Nine of the employees in the research cases indicated that the treatment by their employer gave them psychological or emotional health issues. The employees expressed that they suffered various impacts on their mental wellbeing, ranging from distress (*Hayes*), loss of focus (*Titze*), loss of self-esteem/self-confidence (*Brown, Trinh*), stress (*Campbell*), anxiety (*Brown*; *Campbell*; *Groh*; *Prothero*), depression (*Brown*; *Campbell*), mental health crisis (*Betts*; *Campbell*), suicidal ideation (*Brown*), and hospitalisation (*Groh*).

Disability Climate. There is little evidence that the organisations had a positive disability climate. There is no evidence that these organisations worked towards inclusion of employees with disabilities, did anything to positively affect attitudes towards employees with disabilities (Matt & Butterfield, 2006), or promoted professional advancement of employee with disabilities (Wittmer & Lin, 2017), and they certainly did not work at accommodating and retaining employees with disabilities[57]. Almost none of the companies in the research cases had formal accommodation policies[58]. The companies did not reference disability inclusion policies or procedures, disability inclusion efforts and strategies, or disability inclusion preparedness practices (Iwanaga et al., 2021).

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[57] Chrysler is likely an exception to this conclusion. It is common knowledge that Fiat Chrysler Automobiles (formerly Chrysler prior to 2014) is a large automobile manufacturer. They have three plants in Ontario, employing 9,540 people, as of July (FCA Fiat Chrysler Automobiles, 2020b). There website notes that they have been recognized by Diversity Inc. as a top 50 diversity employer (FCA Fiat Chrysler Automobiles, 2020a).

[58] The only mention of policies is in *Prothero* in respect to managing disability leaves. In *Tavares*, management referred to their handbook which includes House Rules and Policies, listing that "no employee or manager shall be permitted to comment on, joke about, or make reference in any way to any person's sexuality or sexual preference, physical disability or deformity, race, religion or culture" (para. 69). In *Trinh* management claimed that the employee should have known, from having the employee handbook, that the employee could go to human resources if she didn't accept her manager's accommodation refusal. The Tribunal rejected that argument.

Disclosure of a disability leading to diminished employment opportunities is consistent with other research findings (Brohan et al., 2012; Von Schrader et al., 2014). The workplace climate affects disability disclosure (CAHRS Working Group, 2014, Von Schrader et al., 2014; Wittmer & Lin, 2017).

In a strong disability climate, employees with a disability would have perceived being valued for their uniqueness and would have a sense of belongingness (Brewer, 1991) or empowerment (Disability Case Study Research Consortium, 2008). The very act of refusing accommodations, and worse, being terminated, indicate a lack of valuing these employees. Certainly, being harassed (*Brown*, *Prothero, Trinh*) being mischaracterised in negative ways (*Betts, Brittan, Campbell, Conklin, Passmore*), being a recipient of selective enforcement of a zero-tolerance policy (*Halley, Titze*), being denied appropriate accommodations on the basis of unrelated behavioural issues (*Betts, Hayes, Sellner*), not modifying routine practices to recognise the employee's disability (*Betts*, *Groh*), and using the employee's accommodation request as a cause celeb to isolate the employee (*Hayes*) connote a lack of valuing employees with a disability. While it cannot be said categorically, without more direct evidence of the employees' shared perceptions, it is likely based on these employers' behaviours that the climate was likely not perceived as disability positive.

Organisational Justice Climate. Managers' lack of adherence to justice rules has significant impacts on employees. Hashim et al. (2015) found that organisational climate is the antecedent to the job embeddedness of employees with disabilities. Job embeddedness refers to an employee's attachment to the social web in an organisation based on links, fit and sacrifice. Links are the formal and informal connections to people, groups, and teems. Fit is the employee's perception of compatibility with the job, organisation, and community (Mitchell et

al., 2001). Sacrifice is the material or psychological benefits the employee believes they may lose if they leave this employment (Mitchell et al., 2001). It is reasonable to conclude that the organisational climates in the research cases did not lead to strong employee embeddedness for employees with disabilities. Virtually all the organisations in the research cases do not appear to exhibit climates of justice. In fact, they seem to exhibit climates of injustice, at least in respect to disability. The impact of the employers' organisational injustice behaviours (procedural, distributive, and interpersonal) on employees is considered to discern how employers socially construct employees with disabilities as being less deserving of organisational justice. Manager motivations are considered as set out in Scott et al.'s (2009) model of actor-focused justice adherence and violation, and aspects of Scott's model are applied to see how managers socially construct employees with disabilities as less worthy.

It has been argued that there is a nexus between discrimination and organisational injustice (Stone-Romero & Stone, 2005). Research has shown that there is a link between employee perceptions of unfair procedural justice (Bies & Tyler, 1993; Goldman, 2001; Yongblood et al., 1992), distributive justice (Goldman, 2001), employment discrimination legal claiming, and wrongful termination claims (Lind et al., 2000). Lastly, some of these employees in the research cases were made to suffer interpersonal injustice in the form of derogatory comments, false accusations, and social undermining. The various employers' discriminatory acts in the research manifested as the various forms of organisational injustice and while we cannot know what these employees perceive about the organisation's justice climate we do know they were sufficiently injured to file and pursue human rights claims.

Distributive Justice. Many of the research cases constructed employees with disabilities as not worthy of organisational justice. In these cases, the employees were construed as not even

entitled to a modicum of distributive justice. In only one case was an accommodation provided and at that the Tribunal held it to be injurious to the employee's dignity (*Halley*). Accommodations are considered a valuable resource that can be distributed (Heuer, 2011). However, in the research cases the employees with disabilities were found not worthy of any accommodations. In 11 cases employees' accommodation requests were not considered. This is despite the fact that virtually all the accommodations involved zero-cost (other than managers' time). So, for these employers, when it came to employees with disabilities, zero-cost was too much. Not only did the employees not receive distribution of their need accommodation and thus were deprived of distributive justice, but these employees were treated discriminatorily (Goldman, 2001) on account of their disability.

Worse than not receiving the distribution of an accommodation, almost all the requests for accommodations resulted in harassment or termination. Not only were many of these employees construed as not deserving accommodation, but they were apparently not even worthy to retain their current jobs. Given that a job itself is a distributive resource (Minton et al., 1994; Villanueva-Flores et al., 2017), employees will be sensitive to issue of fairness in respect to dismissal decisions. Fairness consists of balance and correctness (Minton et al., 1994). While the cases do not advert to how requests for accommodations are handled by these employers in respect to persons without disabilities, it is safe to assume, given that termination is an extreme result, that those accommodation requests do not end in job loss. Not only were the employees' accommodation requests in the research cases not considered, but nine of the employees were terminated or forced to quit even though the employees had no performance issues. Further, it is reasonable to assume that many of the employees would need to be replaced, resulting in the employer incurring associated recruitment and training expenses. Yet, presumably, these

managers, who would surely be aware of these costs. Still, the employers preferred to incur these expenses rather than the lesser expense of retaining and accommodating the employee with a disability.

The second element of fairness is correctness, which is that the decision is compatible with employees' notions of "consistency, accuracy, clarity, procedural thoroughness, and compatibility with morals and values of the times" (Minton et al., 1994, p. 140). In the research cases, the employers either implicitly or explicitly constructed these employees as not being worthy of or being too much of a bother for management to retain. Given that these employees were adequate before requesting accommodations, their terminations would be seen as offending notions of consistency prerequest versus postrequest. Particularly, there is a lack of consistency in the zero-tolerance policy cases (*Hayes, Titze*), where the policy was applied differently to employees with disabilities compared to those without a disability. Similarly, the research case treating employees with nonworkplace injuries different from those with workplace injuries would be perceived as lacking consistency (*Carter*). Many of the decisions to terminate would likely be seen by the employees as lacking accuracy and procedural thoroughness (as was confirmed by the Tribunal). No doubt, these employees would likely see the lack of accommodations, not to mention the terminations, as likely lacking compatibility with the norms of the times. By their act of requesting accommodations, we can attribute an expectation that the employees expected accommodations to be granted, and if that expectation. The research cases are examples of where employers' attitudes are socially constructed barriers to employment of persons with disabilities. The social construction is evident in that these employees were considered adequate workers before requesting accommodations but not after their disability was known.

What has socially constructed the employees with disabilities in the research cases as undeserving of fairness are the employers' reactions to the accommodation requests. In many of the research cases the reason for termination of the employee with a disability was fallacious (*Brittan, Campbell*, *Conklin*, *Passmore*) or inconsistent with the employer's actual application of its policy (*Haley, Titze).* In other research cases the accommodation requests were met with unfounded threats of termination *(Prothero, Trinh)*. Other research cases involve employers using unrelated discipline problems to withhold accommodations (*Betts*) or terminate the employee (*Sellner*). Applying the indica of correctness to these employers' actions shows they are lacking consistency, accuracy, and compatibility with morals and values of the times (Minton et al., 1994). It is these acts of incorrectness that socially construct the employees with disabilities as something other than adequate employees deserving distributive justice.

These organisations were not governed by either equity theory (Adams, 1963) or distribution based on the need rule. Reasonable accommodation is based on the need rule, which is that resources flow to where they are needed, and distributive justice is judged by fulfilling the need (Baldridge & Veiga, 2001; Colella, 2001).

In contrast, equity rules suggest that distributive fairness will be judged based on resources flowing to where the greater contribution to the organisation occurs. The treatment of these employees was not a matter of equity given that the employees were found to be productive and not exhibit any of the negative behaviours alleged by the employers, and the requested accommodations did not require significant expense—certainly nowhere near undue hardship. Nor would the distribution of accommodations have been unfair to other employees (Stone & Colella, 1996). Satisfying the personal needs of employees with disabilities did not interfere with

other employees being treated equitably. There is no suggestion that managers saw accommodations as being unfair to other employees.

The employees with disabilities, in the circumstances of the research cases, would not likely perceive that the employer acted out of distributive fairness. The employer neither satisfied the employee's need by providing accommodations nor acted out of a sense of equity, given that the accommodations required minimum resources and were not detrimental to other employees.

It may be from managers' perspective that the resource they were conserving was their time. Colella (2001) noted that coworkers may perceive any accommodation to a coworker as unfair if it requires time, energy, or resources without commensurate compensation. This perception of distributive unfairness is equally applicable to managers. Managers may undergo a similar calculous, and if they perceive an employee requires a greater amount of their time without a commensurate increase in rewards, they may judge retaining the employee with a disability as inequitable. Schur et al. (2005) suggested that for corporate culture to change, disability should be included in managers' evaluation and reward criteria. Some businesses have recognised that being perceived a socially responsible can create a competitive advantage for companies, as a way to differentiate themselves and attract new customers (Miethlich & Oldenburg, 2020), which likely would increase managers' rewards. Managers may have perceived that these employees being disabled might be more time consuming or a nuisance to manage. This suggests there is an innate reaction by managers in the research cases that causes them to construct employees with disabilities as less deserving and/or more burdensome.

Procedural Justice. Similarly, these employees were construed by employers in the research cases as not deserving procedural justice. Procedural justice consists of voice, bias suppression, correctability, decision control (the procedures to influence the

outcome), representativeness (considering subgroups), and ethicalness, and in some cases, consistency, and accuracy (Colquitt & Rodell, 2015; Colquitt & Zipay, 2015).

In all but two research cases (the two being failure to inquire cases), employees were given no voice in the decision-making process. So, in 100% of the cases where the employee's disability was known, there was a failure of procedural justice. Voice has been shown to be highly valued by employees regardless of the actual decision outcome (Goldman, 2001; Heuer, 2011; Yongblood et al., 1992). The employees in the research cases were clearly not valued by their employers. The employers' devaluation of these employees was associated with their disability and in making that categorisation the employer socially constructed the employees as not being valuable enough to warrant having input in decisions that affect them substantially. In only one research case (*Hayes*) was there mention of the employee having input into the form of possible accommodations, and yet, as mentioned previously it was ignored by the employer.

There also was no decision control. The process did not affect the outcome because the employer did not deem the employee worthy of engaging in the process in 12 cases. In two of these cases the employer simply nullified the employee's nonapparent disability by denying it existed (*Brown*, *Prothero*). In other cases, accommodation claims were met with threats of termination (*Trinh*) or actual termination (*Brittan, Campbell, Carter, Conklin, Haley, Passmore, Sellner, Titze*) demonstrating that the employers viewed these employees as not worthy of the effort or inconvenient to the process. Further, bias is evident in each case. In all these cases, the employer's decisions were found to be discriminatory by the Tribunal. In none of the cases did the Tribunal suggest that the employer applied a procedurally just process of assessing the accommodation request, providing voice, suppressing bias, considering subgroups where

relevant, and applying ethics to the process. Lastly, there were no internal mechanisms of appeal to review the managers' decisions.

Trust, neutrality, and respect are important symbolic values to employees (Heuer, 2011). The research cases are devoid of these values. Denying the existence of one's disability demonstrates a lack of trust and respect. Not engaging in an accommodation process and terminating employees for being disabled is not neutral. It constructs employees with a disability as not trustworthy, respectable, or worthy of the neutrality that would be afforded nondisabled employees.

A lack of ethics can be seen in terminating employees on pretexts, denying legitimate accommodations that did not pose undue hardship, giving undignified accommodations, and most acutely, harassing the employee. The excuses offered by the employers in defence to the human rights claims could also be viewed as lacking ethics, particularly where they were pretexts for termination. In the constructive termination cases the employers did not have an intention to discriminate, so arguably the employers' actions were not intended to be unethical. However, organisational justice and fairness in the decision process are viewed from the perspective of the employee. It is likely that these employees perceived the decision process lacked procedural justice in respect to failing to provide accommodations.

Interpersonal Justice. Some of these employees suffered a lack of interpersonal justice via derogatory comments, social undermining, false accusations, and untruthful statements about the employee with a disability. One form of derogatory comment, identified by Bies and Trip (1996), is being blamed for a performance failure by a manger when in fact it was due to the manager's poor decisions. In several research cases false accusations about the employees were made, such as poor performance (*Passmore*), unreliable (*Brittan*), absenteeism (*Brittan,*

Campbell, *Conklin*), abandonment, and employee misbehaviour (*Betts*, *Sellne*r). The false assertions were made either contemporaneously, or more often posthoc, to cover the lack of procedural and distributive justice experienced by the employee and to justify the human rights violation. Three of the research cases (*Brittan, Brown, Prothero*) involved social undermining (Duffy et al., 2006); three cases illustrated disrespect of the employee by doubting them (*Prothero*, *Brown* and *Betts*), and other cases (*Brown, Prothero, Trinh*) involved assaults on the employee's dignity (Bies, 2015). Two research cases (*Brittan, Trinh*) exemplify a related concept of abusive supervisor (Bies, 2015; Tepper, 2007).

Observers - Managers and Supervisors

One leg of Beatty et al.'s (2019) and Stone and Colella's (1996) models is the behaviour of observers (coworkers and supervisors). The observer's behaviour is a function of several factors. The factors specific to the observer are: (a) the demographic and personality characteristics of the observer, (b) the extent of previous experiences with people with a disability, (c) the observers' job-related expectations such as anticipation of extra work for the observer, (d) nature of the job, (e) the degree of interdependence, (f) the reward system, and (g) psychological factors such as stereotyping and the responses of the person with a disability (Beatty et al., 2019; Stone & Colella, 1996).

The research cases do not lend themselves to identifying managers' demographic characteristics, the degree of interdependence, or the reward system in each of the organisations. In addition, the research cases do not mention mangers' previous contact with persons with disabilities. However, if any of the managers had such experience, it clearly did not moderate their behaviour toward employees with disabilities. Yet, salient information can be glean about general personality characteristics, the nature of the job, and psychological factors. In respect to

the latter, the theory of planned behaviour is employed to reveal beliefs that may have been at play.

Leadership Style. Mangers' personalities may be gleaned from their management styles. There is a prevalence of toxic and transactional management styles in the research cases. In respect to toxic management style, five cases demonstrated nine destructive management practices (*Betts, Brittain, Brown, Prothero, Trinh*). They included: (a) demeaning, marginalizing, or degrading, ridiculing or mocking the employee; (b) harassing; (c) threatening employee job security; (d) making the employee endure hardship; (e) lying or being deceptive; (f) holding employees responsible for work outside their job description; (g) badmouthing the employee to other employees; (h) belittling the employee in public; and (i) telling the employee they are incompetent. There is no evidence that these managers were toxic to all employees. In two (*Brown, Trinh*) out of five cases employees experiencing was sufficiently toxic that the Tribunal held they had no choice but to resign (*Brown*, para. 31; *Trinh*, para. 181). In *Brittain* the employee experienced toxic, demeaning, falsehoods and badmouthing the employee by the employeer in front of other employees. Ultimately, all three of these employees lost their jobs. In the fourth (*Betts*), *the employee* was laid off for a period, which contributed to his toxic experience, including deeming comments and threatening his job security. In the fifth case (*Prothero*), the employee could not return to work, even though the toxic manager had been transferred, though the Tribunal held that his inability to return to work did not require accommodation as he could no longer fulfill essential services. However, that does not take away from the harassment and discrimination the employee experienced.

The fact that only two of the employees resigned leaves as an open question whether employees with disabilities are more likely to feel trapped in a toxic work relationship out of vulnerability and low self-confidence to acquire subsequent employment.

Managers behaved in an autocratic manner in four research cases. Authoritarian leadership is associated with force or punishment to obtain compliance, as is abusive leadership such as humiliation (Hoel et al., 2010). Three of the cases involved the employer attempting to dictate the extent of accommodations, insisting the employee continue without accommodations, refusing testing accommodations (*Betts*), attempting to force the employee back to work early, depriving them of their disability leave using an edict and threat (*Prothero*), and threatening to fire the employee for seeking accommodation (*Trinh*). These three cases can be seen as the managers trying to avoid being inconvenienced by changing the testing protocol, by avoiding the absence of an employee, and by having to schedule an employee to cover the other half of the day. Another case involved degrading the employee by ordering her to do dirty work (*Brown*).

The research cases also demonstrate instances of transactional leadership. One aspect of transactional management is maintenance of the status quo. It seems that terminating ornthreatenening to terminate employees (*Passmore*, *Trinh)* for requesting half-days was aimed at not disrupting the status quo and not having to alter routines to provide the accommodation. Similarly, the harassment of one of the employees was aimed at restoring the status quo by attempting to get the employee back on the job in short order (*Prothero*). By management not making changes to their routines, status quo maintenance is evident in the two constructive discrimination cases (*Betts, Groh*).

Several cases exhibit situations that can be interpreted as request for accommodations being perceived by management as affecting the benefit of the manager-employee exchange.

This is evident in cases involving the increased expense from workplace insurance claims (*Carter, Campbell),* which made the exchange significantly less beneficial for the employer. In other cases (*Brittain*, *Brown*, *Conklin, Haley, Titze)*, the requested accommodations were likely perceived by the employer as a change in the contract relationship, sufficient to affect the quality of the exchange such that the employer believed it was no longer was beneficial. Given that only one of these cases involved financial expenditure, it is likely that change in benefit involved the employers' perceptions of the time commitment to supervise employees with a disability. In two research cases (*Hayes*, *Sellner),* the employer may have found a pretext to isolate a toxic employee in one case and rid itself of an employee with a behavioural problem in the other case. The behavioural issues tipped the balance in the exchange, such that management no longer perceived the exchange as beneficial. All the cases have some element of requiring managers to alter routines—some slightly by providing a respirator, others more extensively by facilitating half-days. Managers having to put the extra effort into modifying routines may have been perceived as affecting the value of the employer-employee exchange. The research cases exemplify that transactional management relationships may lack tolerance for persons with disabilities, as they ended in termination or resignation.

Leader-Member Exchange. It is evident from looking at the research cases through the lens of leader-member exchange (LMX) that all the leader-member relationships appear to be low quality. The manager seemed to be benefiting from the employee's labour performance despite their claims to the contrary. It is possible that these managers' expectations of future performance changed upon discovering that their employees had a disability. As mentioned previously, there were no productivity issues with these employees. A disability does not automatically translate into future productivity issues. If anything, productivity should improve if

accommodations are provided. However, this issue is worthy of further investigation. It is troubling that there may be a presumption amongst some employers that accommodation equals poor future performance.

Further, most of the employees in the research cases had more than enough tenure to have established LMX. Linden et al. (1993) found that leaders' assessment of performance occurs very early in a dyadic relationship and the impact of performance on LMX development should occur in the first two weeks. Other authors noted that LMX relationships occur quickly (Dienschen & Linden, 1986; Graen & Scandura, 1987; Nahrgang & Seo, 2015). Similarly, employees' expectations of managers also start forming early (Dienschen & Linden, 1986; Graen & Scandura, 1987; Linden et al., 1993; Nahrgang & Seo, 2015).

Typically, then, employees with some tenure would have established some level of LMX relationships and likely would expected accommodations, if required, to be forthcoming out of reciprocity. Likely, so would the employees of longer tenure in the research cases. In general, all employees who request accommodations are placing themselves in a position of vulnerability (Mayer et al., 1995). Being vulnerable connotes there is something of value to be lost (Mayer et al.,1995). The employees in the research cases expected the employer to fulfill its obligations with integrity. They took a risk in their disclosures. Legally, there should be no risk in disclosing a disability. The research cases are thus examples of employees' nightmares. Not only did the employees not receive accommodation, but most lost their livelihood. Their vulnerability was misplaced, and their contribution was not reciprocated.

Further, trust is premised on ability, benevolence, and integrity (Mayer et al., 1995). Virtually all the managers in these cases had the ability to obtain accommodations for the employees but did not exercise that power. Rather, these employers demonstrated a lack of

benevolence and a lack of integrity. In general, the act of seeking accommodations implies the employees must have had an expectation of benevolence and integrity.

An expectation of benevolence anticipates that the trustee will act to benefit the trustor (Mayer et al., 1995). There is some evidence that employers hire employees with disabilities for altruistic reasons (Huang & Chen, 2015), or because they perceive that employing persons with disabilities provides a competitive advantage (Bengisu & Balta, 2011; Donnelly & Joseph, 2012; Fredeen et al., 2013; Hartnett et al., 2011; Henry et al., 2014; Herndez et al., 2008; Houtenville & Kalargyrou, 2012; Houtenville & Kalargyrou, 2015; Kalargyrou, 2012; Kalrgyrou & Volis, 2014; Moore et al., 2006), or to comply with legislative requirements (Moore et al., 2006).

However, employers do not always act with benevolence. There are numerous studies as to why employers do not hire employees with disabilities (see Appendices A & B). There is, however, limited literature on why they fail to accommodate existing employees.

Several factors have been identified that may account for lack of accommodation of existing employees. “Knowledge of accommodations, ability to identify supports and having the authority to provide accommodations are factors that can impact employment retention and advancement of persons with disabilities (Bruyere et al., 2006; Unger & Kregel, 2003)” (Rodriguez et al., 2020, p. 90). These factors did not seem to be in play in the research cases. The managers had authority, and the employees identified what accommodations they required. Managers’ lack of familiarity with health issues was a barrier to provision of accommodations (Gould-Werth et al., 2018; Vornholt et al., 2018). Lack of knowledge of relevant human rights legislation is another possible factor (Fraser et al., 2010, 2011; Henry et al., 2013; Rodriguez et al., 2020). This seems like a much more plausible explanation regarding the research cases.

Mak et al.'s (2014) research indicates that employers' preexisting relationship with cancer survivors explained a greater intention to retain than to hire. It may be that existing employee-employer relationships impacted providing accommodations in the research cases. Gould-Werth et al. (2018) found that employers were more likely to accommodate employees with longer tenure, due to investment in the employee, the employee's demonstrated loyalty, and the effect on other team members. Impact on the community of failing to retain a long-term employee (Gould-Werth et al., 2018) and effect on the organisation's public image (Hartnett et al., 2011) have been cited as factors. This was not the case in the research cases, as several long-term employees were denied accommodations or not retained.

McDonough et al. (2020) found that employee alignment with the organisation's culture led to greater retention. It may be that the managers did not see the employees aligned with their organisation's cultures. Working half-days or requiring flextime might be examples.

Other factors have been identified as impacting retention including unknown costs of accommodation (Heera & Devi, 2016; Houtenville & Kalargyrou, 2012; Kaye et al., 2011; Morgan & Alexander, 2005; Peck & Kirkbride, 2001; Rodriguez et al., 2020), fear of litigation (Fraser et al., 2010, 2011; Henry et al., 2013; Rodriguez et al., 2020), and inexperience or negative experiences with employees with disabilities (Hernandez et al., 2008), but these do not seemingly fit the research cases. Gould-Werth et al. (2018) also found provision of accommodations is impacted by available financial and staff resources, management's ability to communicate with stakeholders, the nature of the work (physical vs. sedentary), and the stability and progressiveness of the condition. The employee's work performance, prior to making an accommodation request, has been found to be a factor affecting employer provision of

accommodations (Gould-Werth et al., 2018). Some employers claimed performance issues, though the claims were not borne out on the evidence.

Concerns over supervision of employees with disabilities has also been identified as a factor contributing to lack of retention (Henry et al., 2013; Peck & Kirkbride, 2001). However, "the avoidance of the investment of time and money recruiting, hiring and training new employees appears to factor heavily into the decisions to accommodate" (Hartnett et al., 2011, p. 22). Managers conserving their time is consistent with the hypothesis argued in this dissertation. These factors can explain why many managers do not act benevolently towards employees' requests for accommodations. There are likely many more yet to be undetermined business rationales and manger perspectives that impede managers' benevolence in providing employees with disabilities accommodations.

Whatever the underlying reason, managers harassed, terminated, and disbelieved rather than acted in the employees' best interests. Managers failed to make the necessary inquiries, and in the one instance in which accommodation was provided, it was done for management's self-serving purpose, not to benefit the employee. In asking for accommodations employees anticipate integrity, which is their belief that the employer's actions will coincide with the employee's values (Mayer et al., 1995). Mayer et al. (1995) states, "The relationship between integrity and trust involves the trustor's perception that the trustee adheres to a set of principles that the trustor finds acceptable." At a minimum, they would expect this means the employer will at least adhere to normative values, and even if not, they would expect the employer to comply with their legal obligations. Rather, these managers committed many acts lacking integrity including assigning dirty work where it was not expected, labelling the employee, isolating the employee, denying the existence of the disability, and terminating the employee. Employees'

expectations that they could trust the employers' integrity and benevolence and therefore allow themselves to be vulnerable by disclosing their disability was, unfortunately, in these cases, misplaced and consequential.

High-quality LMX involves latitude to negotiate job role (Cashman et al., 1976; Dansereau et al., 1975). Typically, employees would have input on the form of accommodation to be provided by the employer. In fact, in Canada, by law, they are permitted input and expected to cooperate in the process. Reciprocation engendered in a high quality LMX relationship means that employees have a voice in the accommodation process, unlike the research cases, where there was no process and thus no voice.

In addition, there was a lack of acts of affinity. Providing reasonable accommodations aside from being a legal requirement would be a significant provision of support and expression of valuing the employee. However, not only did employees not receive accommodations, but where accommodations had been provided the support was withdrawn. Rather than expressions of support, these employees experienced disparagement and other adverse treatment. Lastly, similar characteristics are thought to promote affinity (Bauer & Green 1996; Linden et al., 1997). Almost all the employees in the research cases were found not to be the negative descriptions the employers accorded to these employees.

Leader-Member Exchange – Outgroup Status. To the extent that mangers may have perceived employees with disabilities in the research cases as outgroup members, that identity may have become a master status that no amount of information or contact could overcome. Goldberg and McKay (2015) noted that "stereotype-reliance is greatest when little individual information is available to the perceiver" (p. 392). However, at the time of the accommodation requests many of the employees should have been well known to their manager. Of the 11 cases

that provide information on tenure, seven were employed longer than eight months, and of those seven, five were employed over two years. The employers should have more than sufficient information to assess their competencies. Contact theory (Allport, 1954) suggest that intergroup contact decreases prejudice. Yet, in the research cases, despite contact, some of which was up to eight years, discrimination of employees with disabilities still occurred.

Leader-Member Exchange and Time. Except for one case, none of these managers took time to implement any accommodations. The most common requested accommodation was flexible scheduling or half-days, which would have presumably taken time for managers to organise on an ongoing basis.

Leader-member exchange theory is premised on the concept that managers don't have enough time to manage every employee. Differential relationships with employees are the result of time limitations managers confront in their work. On this basis I argue that supervisors develop only a few close relationships with key employees (Danserea et al., 1975; Kinicki & Vecchio, 1994). Danserea et al. noted that managers have only so much time and energy and given all their responsibilities, simply do not have enough time to devote to all their members. Jordan and Troth (2011) identified that there is a tension that exists between the organisational imperative for efficient use of time and employees' wish to develop high-quality relationships with their manager.

However, while high LMX has been recognised as having many benefits for organisations, relationship-based management is recognised as very time consuming (Danserea et al., 1975; Jordan & Troth, 2010; Ordun & Acar, 2014). Managers invest considerable time and energy developing their selected in-group (Danserea et al., 1975), and building relationships is a process that takes time (Stetiawan, 2020).

It seems misplaced, that employers would discard with an established relationship that they have presumably invested in. Seemingly, in the research cases, the employees with disabilities experienced low-quality LMX. Given all managers have to do, they may perceive managing employees with disabilities or the provision of accommodations as not a worthwhile use of their time, particularly where the manager already does not perceive receipt of a quality LMX exchange. Taken at face value, the excuses the employers used in these cases (unreliable, absentee issues, performance issues) indicate low LMX. However, these excuses were found not valid by the Tribunal. Further research on the intersection of employees with disabilities, managers' time restraints, and LMX is warranted.

Initiating Structure and Consideration. Northouse (2016) noted that in some situations managers need to be more task or relationship oriented. Holtz & Harold, (2013) identify that "these two factors succinctly represent the fundamental, day-to-day, behaviors that are important across all types of leaders" (p. 492). Initiating structure is about coordinating group activities, defining task roles, setting performance expectations, and assessing performance (Holtz & Harold, 2013; McGuire et al., 2015). Consideration, on the other hand, "…is characterized by behaviors that indicate one is friendly and approachable, respects the input of others, and treats group members as equals" (Holtz & Harold, 2013, p. 492).

In these research cases, managers needed to be more relational oriented. The research cases exhibit instances of managers who were unapproachable *(Prothero*, *Trinh)*, not friendly (*Brown, Brittain, Groh, Hayes, Haley, Prothero, Trinh*), did not treat employees as equals (all the research cases), did not respect their input regarding accommodations (*Betts*, *Brittain, Bonnici*, *Hayes, Haley, Groh, Passmore, Prothero, Trinh*), and did not demonstrate concern for the employees with a disability (*Betts, Brittain, Brown, Campbell, Conklin, Haley, Hayes,*

Passmore, *Prothero, Sellner, Titze, Trinh*). Some of the cases the employees with disabilities experienced hostility (*Brittain*, *Prothero, Trinh*) and were required to do dirty work, outside their job expectations (*Brittain*).

In contrast, initiating structure did not always benefit employees with disabilities or the organisations. Some of the research cases raise the issue of conflicts in initiated structure, which seems prima facie to be bad management. Policies that say one thing but manager's practices that do another do not promote uniform standards, particularly when the policy is applied selectively and only against employees with disabilities. In *Carter* the organisation initiated structure to prefer employees with workplace safety claims, to minimise workplace claim expenses to the company. While, from the organisation's perspective, this was rational, it has an unintended consequence of resulting in a human rights violation of other employees with a disability. Given the expense and managers' time in this case in dealing with litigation and the ultimate finding of discrimination, the result was not likely as rational as the organisation intended.

Several of the research cases demonstrate clear lines of communication. Expectations were communicated to the employees' detriment in that they avoided dealing with accommodation requests, penalised or isolated the employee, or were harassing. However, these communications were also to the employers' detriment. To the extent the employee is denied accommodations should theoretically impact group activities, fulfilling defined task roles, and performance expectations by increasing absenteeism or presenteeism, exacerbating the employee's disability, and ultimately, leading to job turnover.

Orientation Towards Temporal Management. Management theory conceptualises time through the idea of temporal management. Temporal management has to do with scheduling work, synchronizing work, and allocating temporal resources (Chen & Nadkarni, 2017;

Mohammed & Nadkarni, 2011). The dimensions of those three components have to do with avoiding conflicts in entrainment (Ancona & Chong, 1996; Hall, 1983), chronicity (Hall, 1983), pace/speed (Bloun & Janicik, 2002), punctuality (Bluedorn, 2002), temporal depth (Bludorn, 2002; Lewin, 1951), and urgency (Koslowsky, 2001; Prince, 1982). Presumably, if managers associate a conflict in one or more of these dimensions with employees with disabilities, it may lead to biased reactions towards the employee.

The evidence in the cases does not suggest the employees with disabilities were affecting the organisational entrainment with any external schedule, nor is there any reference to a conflict between requirements to multitask versus monotasking, temporal depth, or urgency. Deeper conclusions about these temporal aspects would require a level of abstraction that is beyond the scope of the present research. Two cases do, however, involve the speed of work (*Brown, Tavares*). In *Brown* the manager was clearly frustrated with how long the hostess took to cash out a customer, and in *Tavares* a server was observed as not being passive, slow, and inefficient.

Several research cases dealt with issues of accommodating absences (*Conklin, Prothero*) and scheduling half-days (Passmore, Trinh). Pre-arranged half-days is not lateness. While punctuality and absence are connected, they are not the same thing. In fact, a reasonable accommodation that has a temporal component cannot be a violation of temporal management.

Temporal mismatch could not lead a manger to discriminate, but that there is a distinction between temporal management and what I refer to as “management time”. Temporal mismatch is the management of employees’ time, while management time is the management of a mangers’ own time. Essentially, it is their workload. Managers’ workloads include managing other peoples’ time but also managing their own time.

Beliefs. The theory of planned behaviour (Ajzen, 1991) was applied to the research cases by using the theory's constituent elements, behaviour beliefs, control beliefs, and normative beliefs to analyse accommodating employees with disabilities. The theory is usually used as a way predict behaviour, based on understanding intention to perform an action, which is the antecedent to a behaviour occurring. I applied the three core elements of the theory, not for its predictive powers, but to discern trends in employers' behaviours vis-à-vis employees with disabilities.

In only two cases (*Carter, Haley*) was there a sense that the manager did not have the control to effect provision of the accommodation, so behaviour beliefs were not the most prevalent cause of discrimination. Similarly, there is a low incidence of normative beliefs attributable for the discrimination occurrence in these cases. Normative beliefs, or social pressure from significant others, was seen in three research cases (*Betts, Trinh and Prothero).* "Normative beliefs are concerned with the likelihood that important referent individuals or groups approve or disapprove of performing a given behaviour" (Ajzen, 1991, p. 195). In a few of the cases mangers were subject to considerations of social pressure from significant others or social pressure. In *Carter* there is pressure on the manager to return employees with active workplace claims to work ahead of nonworkplace injured workers, based on the financial incentives inherent in the operation of workers' compensation law and policy. It is possible that management's tacit tolerance of bullying created a normative expectation (*Prothero, Trinh*). Lastly, concern over patrons' reaction to the aesthetic of an employee with MS (*Tavares*) is a form of normative belief.[59]

[59] In *Tavares,* although the tribunal found discrimination, they held he would not have been retained on other grounds.

It is argued that the lion's share of the failure to provide accommodations is attributable to control beliefs or the availability of the resources to conduct the behaviour. In respect to resources, only *Hale*y required actual financial outlay. A second case reflects economic opportunity cost by avoiding penalties under the provincial workplace insurance plan (*Carter).* I hypothesise that the driving factor in not accommodating the employees' disabilities is managers' beliefs that they are inconvenient and require additional time.

Most of the remaining cases did not require financial outlay to accommodate the employee with a disability. However, employers' advert to ulterior economic motives unrelated to accommodation expenses as a pretext to terminate these employees. This is a significant pattern in and of itself. However, many of the employers had nonaccommodation-related economic incentives that were discriminatory. These included a downturn in business (*Campbell*), lack of available construction worker (*Titze*), perceived absenteeism risk (*Conklin, Brittain*), staffing needed to provide half-days (*Passmore*, *Trinh*), safety issues, and the impact of aesthetics on customers (*Travers*). The Tribunal found none of these reasons supported not providing accommodations. Regardless, these ulterior rationales do not explain the other 44% of the research cases, where the employer failed to accommodate the employee, despite their being no cost associated with the accommodations and no other apparent economic rationale.

Control Beliefs and Management Time. The extant literature places a great deal of emphasises on the financial impact of accommodations (Bengisu & Balta, 2011; Boni-Saenz et al., 2006; Collin et al., 2013; Donnelly & Joseph, 2012; Fraser et al., 2010; Fredeen et al., 2013; Gröschl, 2007; Heera & Devi, 2016; Houtenville & Kalargyrou, 2012; Jasper & Waldhart, 2012, 2013; Kalargyrou & Volis, 2014; Kaye et al., 2011;) but little time assessing how managers value their time as a possible factor impeding employment and retention.

Throughout this analysis, is noted several bases on which retaining these employees would add to the managers' time burden in one way or another, either directly in respect to accommodations, or indirectly. The most obvious are the restaurant cases (*Brown, Conklin)* where shift changes and a medical leave mean that managers may have to cover shifts or provide extra support to help manage an employee's anxiety (*Brittain*). However, even resistance to white-collar absences may be rooted in the time, effort, and expense to fill the position during the employee's medical leave (*Prothero*). Similarly, accommodations requiring part-time employment of white-collar employees (P*assmore, Trinh*), require managers to find replacements and possibly train and manage another individual. Similarly, looking for alternative work for an injured employee within the organisation (*Carter, Titze*) takes time. Modifying an employee's return-to-work meeting *(Groh*) to meet the employee's needs takes time to organise and implement. Making inquiries about an employee's erratic behaviour takes mangers time (*Campbell*). Less directly, managing employee interpersonal conflict (*Betts, Hayes, Sellner)* has been noted as time consuming. Many of these accommodation requests would have required managers to change routines, which is time consuming. None of this includes the considerable time to foster inclusivity or change organisational cultures and climates in other ways to promote the retention of employees with disabilities.

Managers exist in a North American culture that sees time "as homogeneous, objective, measurable, infinitely divisible, unidirectional, irreversible, reified, and linear" (Schriber & Gutek, 1987) and characterised by a sense of perpetual time famine (Perlow's 1999; Zellmer-Bruhn et al., 2000). Time is perceived to be a manager's most valuable resource (Mankins, 2004; Schein, 2004), but it is also perishable (Becker, 1992) and irretrievable (Locke, 2018).

Managers spend a considerable portion of their time managing poor performing employees (Robert Half International, 2012), and employees with disabilities are habitually (albeit, wrongfully) associated with poor performance (Bengisu & Balta, 2011; Gröschl, 2007; Houtenville & Kalargyrou, 2012; Donnelly & Joseph, 2012; Fredeen et al., 2013)—a perceived time demand that mangers would likely seek to avoid. There is extensive research showing that employing a person with a disability is perceived to increase supervisory time (Alfasi, n.d.; Burke et al., 2013; Chan Ho-ting & Wong Ming-Wai 2015; Chi & Quo, 2004; Fredeen et al., 2013; Gröschl, 2007; Henry et al., 2014; Hernandez et al., 2008; Kaye et al., 2011; Paez & Arendt, 2014; Peck & Kirkbride, 2001; Unger, 2002; Waterhouse et al., 2010; Wharton School of Business, 2013). Anett (2017) found that mangers perceive the time risk associated with hiring employees with disabilities as outweighing the benefits.

Employees with disabilities are perceived as requiring more supervision (Alfasi, n.d.). Particularly, employees with developmental disabilities are perceived to be no more expensive than employees without disabilities except with respect to supervision and training (Olson & Cioffi, 2001). Olson and Cioffi (2001) found that employers were willing to invest in extra supervision time or invest the time in providing flextime.

In general, provision of accommodations can be time consuming. Gould-Werth et al. (2018) noted that in all 14 businesses they interviewed about 50 cases, the human resource managers all expressed that accommodating these employees required expenditure, time, and effort. “To accommodate and retain employees with new health conditions, organisations must have the staff capacity to identify and provide accommodations, as well as cover the responsibilities of employees whose work duties change as a result of accommodations” (Gould-

Werth et al., 2018, p. 619). Accommodating an employee creates extra work for managers and can be ongoing.

Accommodations such as flexible scheduling require "ongoing effort by the employer" and may be disruptive to routine operations (Gewurtz & Kirsch, 2009) are seemingly even less likely to be appreciated by managers. This type of concern may have been the case in several of the research cases (*Brittain, Conklin, Passmore, Trinh*) where employees sought half-days or shift changes as accommodations.

Other accommodations requested by employees in the research cases were more one-offs or seemingly not time consuming. However, in these cases, it was not the time involved in providing the accommodation but the time and effort that would be involved in changing embedded attitudes. This presumes that these managers were self-aware, which they were not. Even if they were enlightened about disability, correcting discrimination (Pothier, 1992) and disability inclusion are perceived as a long-term commitment (Heera, 2019). The difficulty is that employers likely associate employees with a disability and time commitment at an implicit level (Araten-Bergman, 2016; Bartolotta et al., 2014; Chabot 2013; P. Cappelli, personal communication, November 1, 2020).

Time, is a valuable and rare resource, must be managed (Schriber & Gutek, 1987). Arguably, to the extent mangers perceive employees with disabilities as being a greater drag on their time, they will be reluctant to hire or retain these employees. Time may be a manger's most important resource and, in turn, their most sensitive control belief. The amount of time in a day is finite and perishable. Burdens that are perceived to be consumptive of managers' time are likely to be unwelcome. Employees with disabilities are perceived to require monitoring, controlling, and special attention, which creates more work for managers and requires more effort to manage.

Further, there is a presumption that accommodation plans and integrating employees with disabilities into the work environment are onerous. In short, based on the forgoing discussion, there is a belief that employees with disabilities take up more time and require more work in disproportionate to the anticipated return.

Control Beliefs and Policy Created Hierarchy of Disability. Another important revelation is public policy's creation of a hierarchy of disability. Avoiding the cost associated with workplace insurance is a control belief. In *Campbell, Carter*, the employees were victims of the operation of workplace insurance public policy. A union witness testified:

> That injured workers who were receiving benefits from the WSIB seemed to be generally returned to work even if they had significant impairments whereas workers who have restrictions that are not from a work-related injury are more likely to remain at home in receipt of sickness and accident benefits. (*Carter*, para. 75)

Thus, nonstandard positions become a valuable resource from the company's point of view, to return work-injured employees to a job and from nonwork injured employee's point of view as a valuable and rare accommodation.

Chrysler created a hierarchy of disability, where it prefers to provide accommodations to employees with work-related injuries over employees with nonwork-related injuries. Research has shown that amongst nondisabled individuals there are hierarchies of preference in comparing different disability groups (Deal, 2003; Tringo, 1970), with employers preferring certain types of disabilities over other types (Anderson et al., 2015; Boman et al., 2015; Chi & Qu, 2004; Hernandez & Keys, 2000; Gouvier et al., 2003; Norta et al., 2013; Ren et al., 2008; Unger, 2002; Zissi et al., 2007). However, the type of hierarchy created in this case had nothing to do with the type of disability but with the economic consequences of the workplace insurance scheme. So, in the case of two employees with identical disabilities competing for the same vacancy, one injured on the job and the other with a nonwork-related injury, the one with the work-related

injury will be preferred. Granted, this hierarchy is created by operation of law and was found not to be discriminatory, but it was also found by the Tribunal that it was discriminatory to not consider the nonworkplace injured employees for nonstandard job—jobs reserved in preference for workplace compensation claimants. While Chrysler created this hierarchy of disability, in the way they responded to the workplace compensation scheme, it is the economic disincentives in this public policy that ultimately created the impetus for such a hierarchy of disability.[60]

In exercising this control belief, in respect to the distribution of a valued resource in *Carter,* again, the employer is preferring its convenience over at least one class of persons with disabilities. This is one case where the company's behaviour stemmed from a seemingly rational economic basis (Harcourt et al., 2005), using available job vacancies to accommodate employees with a view towards maximizing return on investment. The employer made no effort to consider the nonworkplace injured employee for nonstandard positions. While the employer had a financial incentive to place employees with an active workplace insurance claim in nonstandard positions ahead of other injured workers and the likelihood of an employee with a nonwork-related disability claim being placed in a nonstandard job may be low, it does not mean that no effort should be made in this regard for employees with a nonwork-related disability. It can be surmised that the manager did not look for nonstandard job opportunities because it was inconvenient and perceived to be a poor use of a manager's time, despite the company's obligation to accommodate all employees with disabilities where possible.

[60] Ironically, the workplace insurance system creates another perversion. In Ontario workplace insurance pays 85% of take-home pay up to $90,300. In comparison, the Ontario Disability Support Plan pays a single individual up to $1,169/month and a family of four up to $2,126/month. So, the better supported worker has a priority to return to work, while the non-workplace injured employee is pushed into poverty, unless they can find alternative employment (ISAC, 2020).

Explanations of Manager Justice Violations. Scott et al. (2009) cited three cognitive goals that motivate managers' justice adherence or violation. Managers may violate justice rules to motivate compliance with their authority, to create and maintain a desired identity, and to assuage their belief in a just world. Behaviours emanating from each of these goals can socially construct persons with disabilities as less deserving.

Effecting Employee Compliance. If the managers in the research cases were trying to effect employee compliance and using violation of justice rules to transmit a message, as Scott et al. (2009) argued, it is hard to see what benefit was gained by the managers in not accommodating the employees, particularly when they terminated or harassed the employees. Terminated employees can no longer perform and has been previously discussed, employees' performance had not be an issue. It may be that the managers constructed these employees as no longer having anything to exchange, in the sense of social exchange theory (Blau, 1964). The employers may have decided that no matter how much they adhered to justice rules, employees with a disability cannot reciprocate more productivity or less absenteeism or the inverse of any of the other negative attributes employers ascribed to the employees.

It is difficult to interpret what message was sent in treating the employees with a disability as they were treated, especially in the instances of termination. If the message was intended for the employee with a disability, the message must have been "don't ask for accommodations and if you do, you are no longer welcome here." If the message was intended for other employees, then the message was "do not be disabled or at least don't need accommodations." However, the remaining employees may have been disturbed by the injustice (Cropanzano et al., 2007). The research cases did not advert to the reaction of other employees to

disability-related injustices. This is worthy of further study. If the message was intended for coworkers, the negative effect on employees may have outweighed the intended impact.

Regardless, in either case, the employees could have been dealt with justly by the employers. The employers could have engaged procedurally in an accommodation process and distributivity provided reasonable accommodations. If, after that, the employee did not reciprocate with positive behaviour, such as adequate productivity, the employer could have terminated the employee with dignity and appropriate notice and minimised legal exposure for their organisation.

Identity Maintenance. The presence of an individual with a disability may trigger aesthetic anxiety and existential anxiety (Stone & Colella, 1996; Tillitch, 1952) or ambivalent amplification (Dovidio et al., 2011; Dunn, 2010; Hirschberger et al., 2005; Katz, 1981). Aesthetic anxiety is not evident from the case reports, except for one case (*Tavares*) that did not hinge on the aesthetic issue. Similarly, ambivalent amplification doesn't correspond as there is no evidence of a desire to be fair, egalitarian, or sympathetic (Dovidio et al., 2011). Nor does the data from the research cases fit the existential anxiety response well. First, no-evident disabilities in at least half of the cases. Two cases involved high-risk pregnancies (*Sellner, Trinh*), which are unlikely to cause their male supervisor's anxiety. Asthma (*Hayes*), test anxiety (*Betts*), a collapsed lung (*Haley*), and a back injury (*Titze*) are also less evident disabilities and not likely to evoke anxiety. Preferring workplace compensation claimants over nonworkplace injured employees (*Carter*) and mistakenly providing the wrong accommodations (*Bonnici*) also do not fit the aesthetic anxiety rationale.

Maintaining Just World Hypothesis. Lerner (1980), founder of the just world hypothesis, argued that the managers may have mistreated employees to maintain the

equilibrium of their belief in a just world—that is, a belief that bad things happen to people because they deserve it and if bad is associated with disability, then disabled people deserve bad outcomes. Defending a belief in a just world manifests in several ways: blaming the victim, derogating the victim, denial, willful ignorance, and physical distancing.

Blaming the Victim. Victim blaming is a plausible explanation for employers' discriminatory behaviour in the research cases. It may be that the employees' disabilities threaten the managers' sense of just world in some of the research cases, which they try to correct by blaming the employee for their condition. In theory, employers who believe bad things happen to those who deserve bad outcomes will feel justified in their ill treatment of these employees, based on their perception of the employee's deservedness. This means that because they are disabled, which they may associate as a bad outcome, they deserve bad outcomes.

Belief in a just world is premised on the belief that innocent victims are construed as less deserving and to blame for their perceived negative fate. Thus, people socially construct other people to conform to their view of a just world. Belief in a just world is associated with attributing blame to disadvantaged groups of people (Bègue & Bastounisns, 2003; Callan & Ellard, 2010; Lerner, 1980; Sutton & Douglas, 2005). It may be that the employers in the research cases socially construct the employees.

It may be that the employers in the research cases see employees with a disability as victims, rather than employees, who will be more enabled with the proper accommodations. Treating persons with a disability as a victim furthers the concept of disability as a personal tragedy (Oliver, 1990; Swain & French, 2004). In understanding disability as a personal tragedy, the employee's impairment becomes their defining characteristic, and persons with disabilities are perceived as vulnerable (Hemingway, 2011). A belief in a just world may lead an employer

to respond to an employee with a disability as deserving of discriminatory treatment in the workplace. Treating persons with disabilities as less deserving socially constructs such employees as lesser than other employees. In the research cases they were treated as less deserving of accommodations or employment. Scott et al. (2009) stated, “Perceptual biases suggest that in many cases, managers’ retributive actions toward subordinates may not be warranted and/or may be asymmetrical in severity” (p. 760). The employers seemed to treat requests for accommodations as norm-breaking behaviour, worthy of the asymmetrical severity, to the extent of termination in many of the cases. If the employers acted out of their need to correct their notion of a just world, they were likely socially constructing the employees as victims, deserving of discriminatory outcomes.

It is not possible to categorically attribute the employers’ behaviour in the research cases to just world belief without other psycho-social research, given that at least part of the response to a challenge to one’s belief in a just world occurs implicitly (Dalbert, 2011; Dalbert & Donat, 2015; Lerner, 2003; Modesto & Pilati, 2015). However, there are instances of blaming the employee with a disability in several cases. For example, In *Betts* the employer wrote the employee “that if the applicant channeled as much energy into preparing for and writing the exam as he does arguing and avoiding against it, he would have no problem succeeding” (para. 142), despite knowledge of the employees need for accommodations. In the research cases there are instances of treating the employee as incompetent despite knowing about the employee’s anxiety (*Brown*). In *Groh* the employer threatening to discipline the employee despite knowing about the employee’s Asperger’s, social issues, and current state of paranoia. A final example is the employer suspending and then terminating the employee based on a spurious chain of events where the employee was blamed for not attending a meeting with her management that was

cancelled by the employer (*Sellner).* In other words, if she had not requested accommodations, which set off this chain of events, she would not have been blamed for alleged disciplinary issues. Blaming her for disciplinary issues in this chain of causation is tantamount to blaming her for having a disability. What have previously been referred to as pretexts could also be read as blaming the employee with a disability. Employers in the research cases label some of the employees with a disability as unreliable (*Brittain*), as an absenteeism problem (*Campbell, Conklin*), as breaching the organisation's zero-tolerance policies (*Haley*, *Titze*), and as having poor performance (*Passmore*). Given that these accusations were found to be unwarranted, an interpretation is that labels serve as proxies for blaming the employee for having a disability.

Derogation. Derogation is evident in six of the research cases (*Betts, Brittain, Brown, Hayes, Prothero, Trinh*). Derogation in these cases ranged from comments disbelieving the employee's disability (*Brittain*), accusations of being unreliable (*Brown*), and accusations of not applying oneself (*Betts*). In one other case, derogation was not verbal but was evident in how the employee was treated—being isolated from coworkers (*Hayes*). In three of the cases the derogation of the employee was so severe and sustained it constituted harassment and/or a poisoned work environment (*Brown, Prothero, Trinh*). Harassment is an extreme form of derogation. For example, in one case the employee was harassed daily—e.g., yelled at, called stupid, and disability denied. These discursive acts construed the employees to be something they are not. This discursive construction of disability adds to the growing literature demonstrating discursive construction of employees with disabilities in the workplace (Jammaers et al., 2016; see also Dobusch, 2017; Foster & Wass, 2013; Holmqvist et al., 2013; Mik-Meyer, 2016; Zanoni, 2011). The employees were not unreliable or lacking motivation. However, the managers' attitudes, comments, and actions in the workplace constructed the employees as

inferior, and this treatment occurred in front of coworkers and customers often. The result of disparagement is that the employers socially construct the employees with nonevident disabilities as illegitimate. Further, it constructs disability as if disability consists of one category; visible disabilities and all else are nondisabled (Valeras, 2010).

Derogation as Dirty Work. It is worth pointing out one specific form of derogation that occurred in a research case (*Brown*). One of the indignities imposed upon this employee, seemingly because she had a disability, was being the only hostess required to clean the bathrooms.

> The manager told her that it was part of her job to clean the bathrooms when no other hostess was required to clean the bathrooms. When the applicant questioned the manager about this, she was told not to worry about what others were doing and to just do the bathroom cleaning. (para. 15)

Hughes (1958, 1962) coined the term "dirty work" to convey the stigma of work that is disgusting and therefore is a derogation of the person that wounds their dignity. Dirty work is a social construct, derived by the connotation people impute to the work and then in turn impute to the people doing the work (Ashforth & Kreiner, 1999; Holmqvist, 2009). Associating an employee with a disability with physical taint of dirty work (Ashforth & Kreiner, 1999) socially constructs them as dirty (Ashforth & Kreiner, 1999; Holmqvist, 2009).

In this case (*Brown*) the employer clearly intended to derogate the employee because the employee had a disability. The employer made her do dirty work, likely to assuage the employer's belief in a just world. In doing so, the employer socially constructed the employee with a disability as being unworthy (Holmqvist, 2009).

This dirty work also constituted organisation of work in an illegitimate way. Being the only hostess required to clean the washrooms was seen by the employee as being unreasonable and violated the employee's role expectancy (Semmer et al., 2015) as is evident from her

unheeded protest. Illegitimate work is a role stressor (Semmer et al., 2015) and in this case it was found to form part of the harassment and poisoned environment.

Denial. If one can deny responsibility for the disadvantaged to assuage a sense of a just world (Dalbert et al., 1985; Montada, 2001; Montada et al., 1986), it is even more likely that they can do the same in respect to persons with disabilities. Several of the research cases exhibit denial of the employees' disabilities. They involve managers telling an employee that their anxiety wasn't real (*Brown*), not believing an apprentice had testing anxiety despite receipt of medical documentation (*Betts*) and doubting the employee's concentration issue in spite of multiple notes from the employee's doctor (*Prothero*). In other research cases the denial was of a more general nature.

There seems to be a considerable amount of denial on the part of employers in these five cases. These cases exemplify how nonevident disabilities are apt to be contested and called into question (Prince, 2017). Bardon (2019) suggests that self-deception occurs implicitly to counter unwelcome information (Wilson, 2002) and to allow employers to reject facts, so that they can pursue their goals (Kahan, 2011). That self-deception allows the employer to assuage their sense of a just world, but in doing so they denied fundamental truths about these employees.

Denial: Willful Ignorance. *Campbell* and *Groh* are cases of constructive discrimination. The Tribunal spoke in terms of the respondents having had sufficient information that they ought to have made reasonable inquiries into the employees' mental health. In *Groh*, the employer ignored everything it knew about the employee's disability and treating him as they would any other employee essentially amounted to a denial of his disability. Similarly, in *Campbell* management turned a blind eye to the employee's distress as a possible mental health issue. The

manifestation of constructive discrimination in these cases is tantamount to another form of denial—willful ignorance.

Denial and willful ignorance of an employee's disability socially constructs them as not requiring or not being entitled to accommodations. They allow the employer to deny and avoid responsibility to even consider providing accommodations. That is, people may deliberately construct ignorance (DeNicola, 2017) to avoid legal liability and moral blameworthiness (Wieland, 2019).

Denial also has implications for mangers' perceptions of the time required to manage an employee with a disability. Montada (2001) noted, "Responsibilities are costly. They may cost freedom of decision, time, effort, money or other resources" (p. 89). It may be that employers maintain willful ignorance of the existence of an employee's disability because of perceived managerial time commitment.

Physical Avoidance. Termination of employment must be the ultimate form of physical avoidance. Avoiding persons with disabilities is a prevalent behaviour and well documented (Adewuya & Makanjuola, 2005; Brockelman et al., 2002; Bowan, 1987; Connors & Heaven, 1990; Corrigan et al., 2001; Jorm, 2009; Kleck et al., 1966; Lauber et al., 2004; Marie & Miles, 2007; Martin et al., 2007; Mills et al., 1984; Park et al., 2003; Snyder et al., 1979; Thompson, 1982; Wilson & Scior, 2014). This behaviour is evident in the research cases. Request for accommodations in the research cases resulted in two layoffs, eight terminations, and two resignations. Employers may lay off or terminate employees with physical disabilities to achieve physical withdrawal (Lerner, 1980) from a person with a disability and to assuage disability as a threat to their belief in a just world. Physical distancing, like derogation, serves to lessen the link between the employer and the employee perceived as a victim (Correia et al., 2012). In upholding

their belief in a just world, it necessitates those employers first construct these employees as suffering an injustice, rather than just a variation of the human condition, and, in turn, construct employees with disabilities as not deserving of continued employment. Given that the employers' assessments of the employees as suffering an injustice sufficient to necessitate physical distancing occurs implicitly; it is not determined on whether the employers acted on this basis. However, the result is a significant number of the research cases (62.5%) ended in extreme physical distancing in the form of terminations and layoffs.

On its face, the employers' responses to employees with disabilities seems to be contrary to contact theory. Contact theory posits that intergroup contact improves intergroup harmony (Allport 1954). Most of Allport's (1954) conditions are satisfied in the research cases to achieve reduced prejudice between persons with and without disabilities, in that they cooperate for common goals and the interaction needs to be meaningful. The condition—that both parties have equal status—is not present, but Pettigrew and Tropp (2006) found that not all of Allport's conditions are essential for intergroup contact to be effective.

The last condition is cooperation is supported by authority, the latter of which creates norms of acceptance. It may be that given how the managers socially constructed the employees in negative ways, no meaningful interaction could occur, and the managers were not subject to the influence of higher authority or expectations of normative acceptance. Many of the managers, given their position, were either not subject to higher authority in their organisations (*Brittan, Brown, Conklin, Passmore, Sellner, Tavares, Titze*) or simply ignored their organisation's norms (*Prothero*).

Given that managers' exposure to the employees' disabilities ranged from as little as four shifts to as much as eight years, it seems that the duration of exposure is not indicative. One may

ask, if the limited exposure in the five cases where the employee had under eight months of employment (*Brittan, Brown, Conklin, Hayes, Tavares*) would be sufficient contact to change attitudes. It is posited that mere exposure effect, that is a small dose of exposure can affect attitude (Bornstein, 1989; Harmon-Jones & Allan, 2001; Pettigrew et al., 2011, Zajonc, 1968). "In short, familiarity leads to liking", as posited by Bornstein (1989, p. 265).

That was not the case in the research cases. Familiarity did not lead to liking. Seemingly, the implicit social construction of the employees had more valiance than the benefit of contact. It may be that their innate perception of the time commitment or inconvenience was so ingrained, it countered the benefit of contact. At any rate time commitment versus contact should be further explored.

Cost and Time. A premises of belief in a just world is that where possible the situation will be restored, usually by compensating, and failing that possibility people will defend their belief cognitively (Hafer & Rubel, 2015; Lerner & Simmons, 1966). This raises interesting questions. If these employers were moved by a belief in a just world, they would have accommodated employees with disabilities, or at least provided proper notice or severance. However, people may not compensate innocent victims when they perceive the cost as being too high (Shotland & Stebbins, 1983). Effort involved in assistance can include psychological resources or nonpsychological resources such as time, physical energy, or material assets (Hafer & Gosse, 2009) and usually includes costs in time, money, or effort (Pancer, 1988). The cost that may have been most significant to the employers in the research cases is time. Other demands can inhibit providing help (Pancer, 1988), and often people prefer the just world preservation strategy that costs them the least regardless of the resource to be expended (Hafer & Gosse,

2009). Shotland and Stebbins (1983) found that even in emergency situations bystanders consider time in calculating the cost of intervention.

It may be that employers perceive the cost of time too extensive to manage employees with disabilities and correct their belief. Colella and Varma (1999) noted that raters' belief, in their laboratory experiment, that an employee with a disability would be a poor performer, and "in practice, such beliefs might lead a rater to be less willing to spend time with an employee discussing strengths and weaknesses and trying to develop the employee" (p. 82). The presumed time expenditure is one cost that may drive employers to act discriminatorily to employees with disabilities.

Social Construction and Just World Belief. The perception of a threat to just beliefs is a psychological mechanism that triggers employers to degrade an employee's deservedness, to seek physical avoidance, and to blame the employee as a victim for their behaviour or character. In the research cases the employees in question were found not to have productivity issues or behavioural issues. The Tribunal found, for the most part, that the employees did what they were hired to do. Their positive actions should not have resulted in negative outcomes. The significant point is that the employers in the research cases socially constructed these employees as not being deserving of accommodations and employment.

Affect

Interestingly, there is convergence, a sort of triangulation, between Stone-Romero and Stones's (2007) human resource perspective and Goodley's (2018) psychology perspective around disability being associated with a lack of self-reliance or autonomy. Stone-Romero and Stone (2007) stated, "As a result of the value placed on individualism and self-reliance in the U.S. (Hofstede, 1980, 1991), workers are expected to be proactive and to do their work with little

or no assistance from others" (p. 127) and Goodley et al. (2018) stated, "Ableism is associated with broader cultural logics of autonomy, self-sufficiency and independence" (p. 209). These perspectives synergise with the proposed time management hypothesis. If managers expect employees to be independent and self-reliant and they associate disability with a lack of independence and self-reliance, it is a short distance to arrive at: disability equals dependence equals more management equals more time.

There is no way to categorically conclude any of the employers' affects in the research cases. Affect influences cognition, and cognition influences affect (Scott et al., 2008; Stone-Romero & Stone, 2007), so there is no neat way in the two dimensions of the research case reports to distill one from the other. Affect cannot be discount as playing a role in managers' reactions to employees with disabilities. However, I argue that in virtually all the research cases, the discrimination stemmed from predominantly cognitive sources. Scott et al. (2009) noted, "We acknowledge the significance of affect by proposing that in addition to the more cold, cognitive reasons … managers fulfill and violate justice rules for hot, affective reasons" (p. 760). However, none of the terminations or failures to accommodate the employees in the research cases occurred in the heat of the moment. In fact, in six of the research cases the employer conjured pretexts to avoid accommodating the employee, such as rigid interpretation of zero-tolerance policies, alleging absenteeism where there was no record of it, and alleging poor performance which was discordant with actual assessment of the employees' performance. In one case the HR manager used the accommodation request as an opportunity to isolate the employee for interpersonal reasons, not related to the required accommodation, after considerable internal discussion with the employee and other managers and executives (*Hayes*). In *Brittain*, it was found that the employer engineered the employee's dismissal, alleging she was

unreliable. In one case (*Sellner*), but for the fact that the cab driver was suspended for not attending a meeting, even though the meeting was cancelled, she would not have been terminated based on her complaints record. Two cases involved harassment (*Brown, Trinh*) and one of those a poisoned work environment. Given the sustained nature of the harassment, it is likely that there was a substantial deliberate element. In the Chrysler case (*Carter*) the discrimination was deliberate and systematic—preferring workplace insurance claimants over other employees with disabilities. In two additional cases, the Tribunal found constructive discrimination, essentially meaning the employer ignored knowledge of the employee's disability to continue to operate as usual, regardless of the employee's need for accommodation. Many of these employees had been on the job for a considerable amount of time, some for years. One would anticipate that in cases involving longer-term employees, their prior relationships with their respective employers would moderate the employer's affect response to disclosure of their disability.

Deservedness

All these cases socially constructed the employees with disabilities as undeserving of accommodations and employment because they requested accommodation. Employers' attribution of employees with disability's undeservedness is a recurring theme throughout this discussion.

The lack of deservedness for employees with disabilities manifests in several ways. Employers' selective application of zero-tolerance policies implies the employees with disabilities deserved to be treated punitively and connects them to deviant behaviour. Further, the analysis has shown that employees with disabilities were treated as not deserving organisational justice. Employers making decisions about the employees lacking correctness (inconsistency, inaccuracy, and incompatibility with morals and values of the times) socially constructed them as

something other than adequate employees deserving distributive justice. They were socially constructed as not deserving accommodations and when terminated, in some cases, treated as not deserving proper severance. Similarly, these employees were not accorded as deserving procedural justice. They were denied the opportunity to have a voice in and avenues of appeal.

Further, based on the theory of maintaining a belief in a just world—that bad things happen to people because they deserve negative outcomes—employers may have perceived disability as being negative and therefore deserving of adverse treatment by the employer. Thus, employees with disabilities may be seen as deserving of discrimination. It may be that the employers socially constructed these employees as victims, rather than employees who have human capital and potential. If termination and layoffs are a form of physical distancing to assuage disability as an injury to an employer's belief in a just world, the result is to construct the employee with a disability as as not deserving of accommodations or continued employment. Treating employees with disabilities as undeserving construes them as less than other employess. The employers' deservedness treatment likely arose from an implicit perception associating disability with a significant draw on their time to manage employees with disabilities.

Chapter 9 - Conclusions

An inductive look at Ontario Human Rights Tribunal cases in which the employers were found to have discriminated against employees with disabilities has revealed 13 employer behaviours. Those behaviors are: (a) deploying excuses, not justifications; (b) the typical reasons employers gave for not hiring persons with disabilities were note born out; (c) not altering routines to facilitate accommodations; (d) organisations are structured by employers in an inflexible (low concentration of power, employee input) way leading to denial of accommodations; (e) disclosure leads to disability seemingly being treated by the employer as the employees master status; (f) blaming employees' behaviour rather than managing the actual interpersonal situation; (g) denying the existence of employees' nonevident disabilities; (h) resisting medical leave; (i) HR failing to mitigate discrimination; (j) the presence of unions does not necessarily deter employer discrimination, (k) employers respond to workers compensation law by creating an organisational hierarchy of disability (a consequence of public policy), and (l) disclosure of a disability, seemingly, detrimentally impacts employers reciprocation in leader-member exchange. The last finding may be less a behaviour than a function of the vicissitudes of human rights litigation, but the cases were all on account of existing employees, not job applicants.

The cases were examined using lenses from organisational psychology, chiefly Stone and Colella's (1996) model of factors affecting the treatment of disabled individuals in organisations. Other saliant theoretical lenses applied includes management style, leader-member exchange, temporal management, the theory of planned behaviour, organisational climates (psychological, disability and justice) and explanations of managers' organisational justice violations (belief in a just world, identity maintenance, and effecting employee compliance). Aspects of organisational

characteristics are updated with the benefit of developments in the literature on organisational structure, particularly in respect to flexibility, organisational size, HR management, unionisation, and corporate culture. In addition, management practices are informed by the literature on harassment, bullying, and poisoned work environment. In analysing the employers' behaviours, a theory emerged to explain employers' discriminatory behaviour towards employees with disabilities.

The second aspect of the research was an examination of the cases for what they reveal about doctrines, concepts, or practices that socially construct disablement. The excuses used by employers to avoid accommodations constructed employees with disabilities in derogatory and unsubstantiated ways. Moreover, employees with disabilities (like other employees) exist in a world of work characterised by layers of social construction. Excuses are one direct level of social construction, but constructive discrimination is another, adjudging the employee against some mythical concept of the standard/normal worker. Another practice noted in the cases is denial of nonapparent disabilities, which, again, subjects employees to a denial of an essential aspect of their being. On top of these issues is having to function in a corporate culture that is a social construction of "what ought to be" (Schein, 1995, p. 13) and organisational justice climates that do not see employees with disabilities as deserving of justice. Leaders' styles are also socially constructed, and certain styles (transactional and autocratic leadership) tend to be problematic for employees with disabilities. Employees who experience harassment exist in an artificially created environment premised on the perpetrator's attitudes. The very institution of accommodations, whether the law intends it or not, is premised on the social construct of trust. Employees trust that the vulnerability in their disclosure will be reciprocated with reasonable accommodation.

Employers' Overall Behaviours

Research has found several reasons that smaller organisations are reluctant to hire persons with disabilities. But none of those issues appear in these cases. Employees were already trained; their skills matched the requirements of the position. There was no real evidence of poor productivity. There were no issues with coworkers' or customers' attitudes. Therefore, liability became an issue only when the employee was wrongfully terminated. This leaves managers' attitudes as the prime barrier and the through line of these cases, particularly if they perceived the ideal worker is a "standard" or "normal" worker (Jacques, 1996). A worker who fits the job requires no accommodation and little managing. It is theorised that employers' attitudes stemmed from a perception that they would have to invest extensive time in accommodating and managing an employee with a disability.

Similarly, in respect to larger organisations, it is seen that no effort was made to adapt their routines, except when procedures were used to harass the employee. The organisations continued to deal with the employee as they would any other employee, without consideration of the employee's disability. Creating a disability-confident culture requires deliberate and strategic corporate initiative, which takes managers' commitment, time, learning, planning, and effort and requires cultural change that doesn't necessarily come easily (Bengisu & Balta, 2011; Kalargyrou, 2014; Kalargyrou & Volis, 2014; Lindsay et al., 2019; Waxman, 2015, 2017).

Of the companies in the research cases, the small- and medium-sized companies' organisational structures appeared more flexible because there was low power concentration. However, the employees had no input into decisions about the outcome of their accommodation requests, and despite the managers mostly having the decision-making power and the lack of formal rules dictating the course a supervisor had to follow, supervisors did not exercise their

authority to provide accommodations for employees with disabilities (Baumgärtner et al., 2015). Rather, it seems that they exercised their power to avoid the inconvenience of providing accommodations.

In the research cases, the act of disclosure seemed to transform the employee from being seen as an adequate worker, to a needy employee requiring more of management, and those needs seemed to become the employee's master status. Beirenbaum (1979) stated, "Acquiring a handicapping condition involves little intentional choice and can be conceived of as the crystallisation of involuntary deviance into roles now performed by previously voluntary conformists" (p. 90). The so-called deviance is managers' perception that employees with disabilities are more demanding of their time.

Employers' Behaviours - Excuses

The employers in the cases deployed several explanations to excuse their discrimination of disabled employees. The employers claimed that the employees had records of absenteeism (even though these employees all had good attendance histories), claimed they abandoned their positions (even though they did not), and claimed they were unproductive (though the Tribunal found that not to be true). In other instances, they argued that termination or layoff was due to employee's bad behaviour or attitude or that the employee was in the probationary period, entitling them to dismiss the employee arbitrarily, regardless of the employee's accommodation needs. Another excuse employers argued was that the decision to terminate the employee was made before disclosure of the employee's disability. The timing of a decision to terminate is a mere excuse if the employee's disability was a factor in the decision to terminate.

None of the employers argued justification. That is, they did not claim what they did was discriminatory but not inappropriate due to a superordinate goal (Montada, 2001; Shaw, 2003).

Of course, the only acceptable justification in human rights law is undue hardship. None of the employers argued they could not accommodate the employees on account that the accommodation posed an undue hardship. Rather, all their assertions were in the realm of excuses. They argued that they should be excused from wrongdoing due to mitigating circumstances or external causes (Montada, 2001; Shaw, 2003).

Excuses and Manager Inconvenience

It is clear from the evidence that in the event of an absent employee, management would be inconvenienced and must spend more time managing the situation, getting shifts covered, or, if all else fails, having to help on the floor themselves. Employers used fictional pretexts of branding the employees as having records of absence, having abandoned their position, or being unreliable to not engage in the work of accommodating the employee.

While an employee can be terminated during probation without reason, they cannot avoid accommodating an employee with a disability during probation. An employer can leverage the probationary period as a possible sword and a shield. Probation can effectively shield the employer from making a poor hire. Probation is a sword when used to terminate an employee with a disability to avoid the extra effort in managing the accommodation and extra work in staffing and scheduling that they perceive this employee presents.

Probation is a poor sword though, as it based an imperfect tool. It may not be a good barometer of attendance. On the one hand, nondisabled employees have been shown to act differently in respect to absenteeism during probation than they do after the probationary period (Riphahn & Thalmaier, 1999). On the other hand, employers may misjudge the likely attendance of employees with disabilities. In the research cases performance is not the only characteristic

culled during probation. The employer used probation to exercise their presumption about disability and absenteeism.

Employers argued employee behaviour as the reason to terminate or layoff the employee. However, even if employees exhibited behavioural issues, that does not negate the duty to accommodate the employee's disability. The employers considered the behaviour issues as being intrapersonal—that is, the behaviour stemmed from the employees' personal factors (Hart, 2011), rather than considering the possibility that the behaviours stemmed from other interpersonal issues that would require management intervention or organisational issues that would require accommodation.

Even if the employees were insolent, the law requires that discipline be proportionate to the insolence and aimed at correcting the behaviour, not punishing the employee (Whitten & Lublin, 2017a). Discipline is required by law to be progressive, meaning the discipline escalates with subsequent violations. The discipline was neither proportionate nor progressive, which suggests that something else was going on in these cases.

Organisations used reliance on the companies' zero-tolerance policies as a pretext to terminate employees with disabilities after they requested accommodations. The policies in these organisations were applied selectively. The de facto policy on the ground was uncoupled from the stated policy and not enforced. Enforcing the policies only against employees with disabilities made the reliance on the policy discriminatory. It was also an attempt to mask management having to provide accommodations. Moreover, management essentially created two sets of rules by implementing the policy differently based on whether the employee had a disability.

In other instances, the employers denied the employee had a disability when the disability was nonapparent, even after disclosure and documentation. Acknowledging the existence of the

disability required that employers work at adjusting their attitudes and practices. It would require that they deviate from their regular routine. Accommodating the employee would have required the employers to come to terms with the existence of nonapparent disabilities, meaning acknowledge that there were disabilities that were not physically apparent. Such attitude adjustments would, in turn, require a shift in their organisational cultures. Denying these disabilities allowed the employers to avoid all this "inconvenient" work.

What is clear from a legal stance is that claims related to the timing of the decision to terminate an employee as being nondiscriminatory turn on their facts. For an employer to succeed in claiming the decision to terminate was made prior to the disability being disclosed, they need credible evidence; otherwise, it is merely an attempt to excuse an employer's discriminatory behaviour. This behaviour arose from employers avoiding the inconvenience and time involved in accommodating the employee.

Given the employee has a low bar as to what constitutes valid disclosure of their need for accommodation, and the employer has an obligation to accept the disclosure in good faith, combined with the employers' high standard to seek sufficient information to assess the accommodation request, it is highly unlikely that almost any disclosure, let alone provision of a medical note, would be insufficient to not trigger the employer's duty to accommodate. If the information provided is truly lacking, the employer has a duty to make further inquiries and not engage in willful ignorance. The erroneous claim about the sufficiency of the disclosure is another effort by an employer to obfuscate its discriminatory behaviour, likely stemming from the desire to avoid the inconvenience of having to accommodate an employee. Accommodating the employee would have meant extra work and inconvenience entailed in having to scheduling replacement shifts.

Management deploys these excuses as pretexts to avoid the inconvenience of providing accommodations and the perception of extra time to manage these employees. Fulfilling the duty to accommodate takes time and effort. As the Supreme Court of Canada held, “While the words ‘short of undue hardship’ limit this duty, the use of the term ‘undue’ infers that some hardship is acceptable. More than a mere negligible effort is required” (*Central Okanagan School District No. 23 v. Renaud,* 1992, per. Sopinka J.). However, rather than accommodate the employees, they terminated, laid off, punished, or harassed them employees. Regardless of the inconvenience or extra time requirements, the only acceptable excuse to not accommodate an employee is undue hardship.

In addition to the debunked excuses already canvased, none of the usual reasons for not wanting to accommodate employees with a disability were present in these cases. There was no or minimal cost to accommodate the employees. There were minimal cases of coworker resistance. Concern over legal liability cannot be the raison d'etre; otherwise, the employers would have chosen a more prudent course, one that did not ultimately result in litigation. There were no mobility issues raised. Concern over customer contact arose in only one instance. Given (a) that the plethora of reasons that employers usually give for not wanting to hire persons with disabilities are not born out by the evidence in the cases, and (b) that the time and inconvenience hypothesis fits these cases as a possible explanation of employers’ behaviours, it is hypothised that concern that managers’ time will be inordinately consumed in managing employees with disabilities is a plausible explanation of employer behaviors. As with any emergent theory, further research is necessary to substantiate this claim.

Employers' Behaviour - Acts of Commission

Employers committed several acts of commission that were apparent from the cases including threating the employee, harassing the employee, creating a poisoned work environment, firing the employee because of their disability, failing to provide substantial accommodation, and reprising against the employee. Chief amongst these were acts of harassment. Requests for medical leave or part-time work and employer resistance to these accommodations become a site of employer harassment, either in respect specifically to the leave or as part of a continuing pattern of harassment. Regardless of the organisation's official policy, the actual policy was what the employee's supervisor decided. In these cases, the supervisor chose their convenience over disruption to the continuity of a position. These organisations seemed to have cultures tolerant of bullying, where senior management, despite knowledge of the harassment, by their inaction, tacitly condoned the behaviour. On a more organisation-wide level, abating harassment can be inconvenient. Such a change would likely entail changing the organisational culture, which is a significant undertaking requiring sustained effort. Implementing conflict management practices, anti-harassment training, and developing and creating policies and procedures impose additional tasks and effort and necessitate attitude changes by managers for these efforts to be successful.

Employers' Behaviour - Victim Demography

Victims of employment disability discrimination seem to be evenly split by gender. A significant proportion tend to be at the lowest end of the employment income scale in jobs that require low skill and educational attainment. Victims of harassment tend to be economically vulnerable. Overall, in the research cases, few employees with disabilities were in white-collar jobs. Union representation was very low amongst victims.

There is an even split between mental and physical disabilities. There was only one case of intellectual disability and one case where aesthetics played a factor in the discrimination. However, that means one of every two employees who experienced disability discrimination had a nonapparent disability. The finding that 50% of the research cases are in respect to nonapparent disabilities is revealing as no other research is known as to the percentage of nonapparent disabilities in the Tribunal cases.[61]

Thirty-eight percent of the sample's disabilities predated employment or was acquired during employment but unrelated to work. None involved self-inflicted disabilities. Thirteen percent of the sample's disabilities were acquired because of employment, and in all instances the employee was a manual labourer. However, those injuries were split evenly between physical and mental health issues. This supports that there is a class-based risk of acquired injury through work, meaning there is a nexus between income, dangerous work, and acquired disability (Sorensen, 2013).

Most interesting is that 100% of the cases involved existing employees, and none involve job applicants. It may be that job seekers experience aversive discrimination and that employers are sophisticated enough not to be honest in rejecting a job applicant on account of their disability. It may also be that in instances where job seekers experience overt discrimination, they are less invested than they might be if they worked for the employer for a period. Overt or not, it may be difficult to prove. Where there is an economic imperative (unemployed,

[61] This finding is consistent, in a manner, with what the Canadian Human Rights Commission (CHRC; 2020) has only recently reported. They found, in 2019, that 53% of complaints in respect to disability were related to mental health. However, there is a notable distinction, in that the CHRC reports in respect to overall claims made, were as the above, reports in respect to decisions of finding of discrimination at the HRTO and only in respect to cases about employment, in 2017.

underemployed), the job seeker is likely to prioritise continuing their job search. This is certainly worthy of further study.

Employers' Behaviour – Organisational Characteristics

There is a range of different sized employers against whom disability discrimination was found. The ratio of discriminating organisations is 5 small: 2 medium: 1 large. Most organisations discriminating against employees with disabilities were smaller companies. Surprisingly, 44% of the organisations in the research cases had HR capacity. Only a handful of the companies in the sample were unionised.

Regardless of size, human resource capacity, or unionisation, employers' duty to accommodate does not vary. Their obligation to accommodate is conditioned only by undue hardship, not by convenience or time. Nor does the duty to not discriminate vary by sophistication or simplicity of an organisation.

Employers' Behaviour - Human Resource Management

In the normal course the presence of human resource professionals should be beneficial for employees with disabilities. In addition to their typical expertise, Lunsford and Dolison (2019) argued that HR should contribute to the engagement, empowerment, and inclusion of employee with disabilities. However, in these cases it is seen that: (a) managers acted contrary to the advice of the human resource professional, (b) HR provided incorrect information to the manager causing the issue with accommodations, (c) HR participated along with other management in constructive discrimination of the employee with a disability, (d) HR was unaware of what the discriminating manger was doing, and (e) HR participated in the discriminatory act.

Two scenarios arose where HR professionals were complicit in the discrimination in ways that were not previously noted in the HR literature. One case involved HR not modifying a back-to-work meeting to facilitate the employee's known limitations, and the other involved using the request for accommodations to fulfill HR's ulterior agenda of isolating the employee which was contrary to the employee's desired accommodation outcome. These examples are cases where HR preferred their convenience over the employee's rights and needs. In both these cases it would be inconvenient to plan different practices to accommodate the employee's meeting needs or to manage difficult interpersonal issues in the workplace. HR practitioners should be the vanguard of disability accommodation and inclusion, not complicit in disability discrimination.

Employers' Behaviour - Unions

The presence of a union often serves to aid employees with disabilities with obtaining accommodations, so long as the accommodations do not conflict with seniority rights established in the collective agreement. However, the research cases demonstrate that unions can be implicit in discrimination as an employer or as accomplices to employers[62] where they did not alter routines to accommodate an employee with a disability. HR is powerless to intercede in the face of a recalcitrant manager and where HR is not supported by senior management in enforcing policies (Demuijnck, 2009). As mentioned previously, the findings here are contrary to Beatty et al. (2019). Typically, unions are a counterbalance to employers' discriminatory intentions. Regardless, in these cases the presence of a union did not deter the organisations' discrimination.

[62]Though in the latter case (*Groh*), despite the Tribunal finding the union complicit in the discrimination, the Tribunal could not hold the union liable, as the union did not participate in a manner that contravened the rules established for union liability by the Supreme Court of Canada (*Central Okanagan School District No. 23 v. Renaud,* 1992).

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Employers' Behaviour - Culture

What is evident from the research cases is that these employers did not create climates conducive to employees with disabilities. These employers did not create "pattern[s] of shared basic assumptions" in respect to "internal integration" (Schein, 1992, p. 12; also see Schein, 2004, p. 17) of persons with disabilities. These organisations' collective values, norms, beliefs, and behaviours (Schur et al., 2005; Schur et al., 2017) did not seem to include accommodating persons with disabilities. Few of these organisations had policies in respect to accommodations, and those that did continued with their ableist practices that, at a minimum, constructively discriminated. The real practice was that the employers did not value the employees, given how they were treated as expendable once they disclosed their disability. In addition, there was a high prevalence of poor manager-employee relationships. How an employer treats accommodation requests can be a barometer of how employers value employees with disabilities. The inordinately high level of terminations and resignations in these cases is indicative of their devaluation.

Routines - Cultures

There are numerous instances where the explanation for why employers did not provide accommodations can be interpreted as not wanting to make the effort to adjust their routines. Prologue to any such adjustment would be for employers and managers to reckon with their attitudes around disability—in some instances, to recognise and accept nonevident disabilities where they have been denied and to actively change their organisations' cultures.

A form of manager behaviour that arose from inductive analysis of the research cases is employer acts of omissions involving constructive discrimination and failure to inquire. Constructive discrimination is the application of a neutral rule that disadvantages the employee

with a disability based on their disability. Employers continue to act in their usual routines without consideration of the effect on employees with a disability. Acting in their usual manner would obviously be most convenient for the employers.

Constructive discrimination is even more inconvenient for managers than revising substantively discriminatory practices. It requires managers to consider, in a proactive way, the detrimental effects of their usual practices and routines on employees with disabilities and other equity-seeking groups (Pothier, 2010). Policies and practices are no longer intended to be in the purview of what is most convenient for managers but are required to make the necessary changes to be inclusive of employees with disabilities. Managers and organisations are expected to endure some hardship. Creating workplace standards that are inclusive is time consuming and thus inconvenient for managers. In these cases, employer consideration of the detrimental effect of their policies did not occur, with the result being discrimination.

One would expect unions to be more enlightened but that was not the situation in the case in which the union was the employer. In one case, they were reticent to revise their routines to accommodate an employee with a disability. Maybe, the more egregious union case is where the union was actually the employer and in control of providing accommodations and remained so entrenched with their attitudes and routines that they ignored the employee's articulated needs.

The second form of acts of omission employers committed is failure to inquire as to whether a change in employee behaviour constituted a mental health issue requiring accommodation. The act of inquiring would alter routines in two ways: the inquiry itself and then providing any accommodations because of the inquiry. Inquiring would be outside the employer’s usual routines. Making an inquiry would lead to the manager having to accommodate

and manage the employee's new situation, which requires the inconvenience of investing his or her time.

Curbing harassing behaviour also requires organisations to act outside their usual practices. It requires implementing new routines to facilitate cultural change. Senior management can no longer be tolerant of harassment. They will have to provide leadership, create new policies, and model intolerance of harassment by actively intervening. In these organisations, at least some senior managers will have to undergo attitude changes. It may require training that has not previously been part of the usual practice, at all levels of the organisation. Clearly, routines will have to change at many levels of the organisation.

Organisational cultural change is more complicated than mere routine change, though ultimately it results in new routines. An organisation's behaviour is based on its routines (Cyert & March, 1963; Nelson & Winter, 1982). Changing an organisation's culture requires learning (Levitt & March, 1988; Wooten & James, 2005) and implementing new information into new routines (Wooten & James, 2005), which translates into new behaviours. The employers in the research cases, in varying degrees, did not learn about accommodations or human rights obligations and failed to adjust their routines.

Culture change encompasses more than just routine change. Shifting culture to be more inclusive necessitates effecting, inclusive policies and practices, attitudinal and behavioural indicators of success and bottom-line outcomes (Disability Case Study Research Consortium, 2008), commitment to diversity (Disability Case Study Research Consortium, 2008; Samant et al., 2009; Spataro, 2005), and the managing the culture to focus on deemphasis difference (Spataro, 2005). Cultural change that is inclusive of persons with disabilities takes reconsidering organisational structures such as equity value systems, ideal job characteristics (Schur et al.,

2005), the structure of work (Baumgärtner et al., 2015; Schur et al., 2014), and organisational justice outcomes (Heuer, 2011; Schur et al., 2009). However, cultural change is even more challenging because it goes deeper than policies and practices to challenge unseen shared values (Kotter & Heckett, 1992) and to replace prevailing ideologies, symbols, and customs (Trice & Beyer, 1993). Specifically, it involves managers' knowledge and assessment of accommodation practices and reactions to accommodations (Disability Case Study Research Consortium, 2008). Clearly, the employers in the research cases did not undertake this work. In failing to do so, they lost an opportunity to enhance their corporate culture and to become disability-confident employers.

Disability-inclusive cultural change takes time. It requires sustained effort by managers to effect successful cultural change. Organisational cultural change adds to managers' time pressures and cognitive load. Routines are instituted because, by their nature, they ameliorate some of managers' time pressures and cognitive load (Becker, 2000) That is it reduces the need for managers to decide and instruct each time a similar situation arises. It is therefore likely that if managers perceive accommodating employees with disabilities as adding to their time pressures and requiring more of their attention, they will be resistant to routine change in addition to cultural change.

Employers' Behaviour - Climate

Workplace aggression, including discrimination, impacts an organisation's psychological climate (Hershcovis & Barling, 2013; Wood et al., 2013). In more than 50% of the cases employees suffered psychological effects, ranging from loss of focus to hospitalisation. Similarly, there was little evidence of a positive disability climate. Employees with disabilities in these climates would perceive not being valued and an absence of a sense of belongingness.

Examining these cases through organisational justice climates, the organisations appeared to exhibit climates of injustice in respect to employees with disabilities. From a distributive justice perspective, accommodations are considered a valuable resource (Heuer, 2011). In most of the cases the accommodation requests of employees with disabilities were not considered. In all but one case, accommodations did not require a financial expenditure, yet zero-cost was too much.

Further, the job itself is a distributive resource. Terminating an employee for requesting accommodations would not be perceived by employees as being balanced or correct. It would not be balanced compared to how nondisabled employees' accommodation requests were treated. Further, given that none of the employees were found to be inadequate in terms of production before termination, termination would be seen as an inconsistent result.

Procedurally, employers did not provide the employees a voice, decision control, or an appeal process. The cases also indicate a lack of trust, neutrality, and respect, which employees highly value as aspects of procedural justice (Heuer, 2011). Denying the existence of one's disability is an act of distrust and failing to engage in the accommodation process and terminating employees who request accommodations are not neutral.

Lastly, there was a lack of interpersonal justice as many employees suffered derogatory comments, social undermining, false accusations, and untruthful statements that discredit the person with a disability as an employee.

Employers' Behaviours - LMX

The cases researched exhibited low-quality, leader-member relationships. Given that assessment of performance occurs early in dyadic relationships, concerns about performance were not likely the reason for deterioration of LMX in these cases. An aspect of LMX is

reciprocation. It is likely that aside from their legal rights, LMX theory suggests that the employees would expect accommodations to be forthcoming based on reciprocation of their exchange relationship. Similarly, they would expect the latitude for role negotiation, if they perceived they were providing a quality exchange. Not only were these employee exchanges not reciprocated in the form of requested accommodations, but the employees' trust and vulnerability were not met with employer integrity and benevolence. Seemingly, there is something in discovering an employee has a disability that converts the employers' perception in respect to affinity. The employee is now perceived as being so dissimilar as to override previous commonalities and the perception is so powerful as to nullify the prior seemingly adequate work history with the employer. The result of disability disclosure in these cases was a lack of reciprocation, benevolence, and integrity. Once these employers knew the employees had a disability, they were devalued to the extent of not needing to reciprocate or act with benevolence and integrity.

Employers' Behaviours - Control Beliefs - Hierarchy of Disability

Workplace compensation policy in Ontario (and elsewhere) has the financial incentive to reinstate employees with active workplace injury claims. Employers seek to avoid penalties by reinstating workplace-injured employees in preference to nonworkplace injured employees. The consequences can be dire for nonworkplace-injured employees. In this case but for the employee's human rights claim, they would never have been considered for nonstandard work. Typically, an employer like a large automotive producer has more workplace claimants than nonstandard work opportunities available. Thus, a nonworkplace-injured employee may effectively be foreclosed from ever returning to work with their employer. Essentially, a conflict results between the employer's duty to accommodate employees with disabilities under the

human rights code and the workplace insurance policy's economic incentives to accommodate a subset of those employees with workplace employment claims. The employer, from a liability mitigation perspective, will resolve the conflict in favour of avoiding cost to the organisation and prefer the workplace injury claimant.

Social Construction

Excuses: Social Construction

Employers may allege these mischaracterisations are an effort to excuse their actions; however, the effect was to construct employees with disabilities as unproductive, unreliable, or having behavioural problems in a stereotypical way that is consistent with and perpetuates traditional prejudicial depictions of employees with disabilities. These labels impose a fictitious negative identity on these employees.

It is clear from the forgoing that some employers sought to justify their discriminatory decisions on various fictitious bases. However, most of the reasons for termination or refusing accommodation in these cases appear to be nothing more than pretexts for employers to execute bad behaviour. Employer discrimination stemmed from attitudes about employees with a disability. Attitudes are socially constructed (Berger & Luckmann, 1967; Herek, 1999). "Attitudes and perceptions are not created in a vacuum but develop through processes of social comparison and influence – that is, they are socially constructed" (Umphress et al., 2000, p. C1). While it is not clear in all cases whether the excuses offered by the employers were extensions of their attitudes or tactical for the purpose of litigation strategy, the excuses were found to be unsubstantiated and a form of construction.

A factor contributing to discrimination in the research cases emanated from the employer avoiding the extra work, inconvenience, and time to either implement accommodations or

continue to facilitate existing accommodations. In doing so, the employers deployed various excuses that socially constructed the employees with a disability as having negative characteristics. The employer attached labels to the employees: absent, abandonment, poor performers, and behavioural problems. These discursive statements constructed them in a negative fashion as being something they are not. The excuses created fictions.

The probationary period for new hires was one mechanism rendering social construction of employees with disability. Employers perceived the probationary period as a catch all to terminate employees at will. They may have believed (wrongfully) that it excused them from having to accommodate an employee with a disability. More specifically, terminating the employee based on an assumption of likely poor attendance because the employee had a disability, is statistical discrimination. The employer constructed the employee as an attendance risk, a negative connotation without any real information, based on their perception of the group average. Further, the group average they assumed is often based on misinformation. Statistical discrimination from the employer's perspective appeared economically rational, but it served to socially construct the employee in a negative fashion.

Claiming an employee is unproductive was the most typical form of stereotype perpetuation. It socially constructs the employee through association with negative connotations of being unproductive. The employers' claims of lack of productivity were not supported on the evidence, as found by the Tribunal.

In the research cases in which the employees' attitude was alleged as the reason for termination, thus avoiding providing accommodation, created a fiction by conflating their disability and their difficult attitudes. Moreover, by penalizing the individual, they associated disability with negative qualities worthy of punishment. Effectively, the employer internalised

the problem as being innate to the employee with a disability rather than dealing with the organisation of work or interpersonal issues.

In cases where the employer claimed the decision to terminate the employee was made prior to disclosure of the disability, timing was a convenient excuse but unsupported by any evidence. Treating the employee in this manner says the employee's disability does not matter and is to construct the employee as worthy of being ignored.

Applying zero-tolerance polices exclusively to employees with a disability treats them differently, as deviant and deserving of punitive measures. In essence, selective application of these policies connotes that those employees with disabilities are not to be trusted. The implication is that they will contravene the policy again.

Constructive Discrimination: Social Construction

Constructive discrimination entrenches normal as a standard of performance, opaquing an employee's disability in a world that is made up of a range of capabilities. In this manner, it social constructs disability as incapable by setting standards that result in manifesting substantive inequality. Such standards homogenise work in that they require employees with a disability to be able to meet unattainable standards. Constructive discrimination perpetuates the enduring hegemonising power of work on persons with disabilities who have to continue to confront a world of work designed exclusively for the able-bodied and able-minded.

Harassment: Social Construction

The negative attitudes about disability upon which harassment is founded are socially constructed. Harassment is founded on an artificial atmosphere of attitudinal barriers that bar employees with disabilities from accessing their rights (Weber, 2007). Harassment's oxygen is stereotype and stigma, and its bile is subordination and derogation (Weber, 2007). Harassment is

systemic in organisations where senior management continues to tolerate its perpetration, thus permitting the construction of a bully-tolerant culture. In such cultures that lack psychological safety, the only chance for an employee to arrest the situation is to exit.

Nonapparent Disabilities: Social Construction

Almost 50% of the cases are on account of nonapparent disabilities. In almost half those cases, the employer disbelieves the employee's disability disclosure. Disbelief ignores an essential characteristic that contributes to the whole identity of the employee. Denial treats the accommodation process and the employee's rights with contempt.

Inherent in employers' comments denying the existence of the employees' disabilities, was an ableist normative assumption that the employee needed to adapt to the existing configuration of work rather than work adjusting to accommodate the employee (Williams & Mavin, 2012). This, however, is more problematic than creating a binary dynamic of able or disable. Rather, this ablest attitude constructs a work world that believes if the disability is not visible it does not exist. In doing so it is the nullification of nonapparent disabilities and the nullification of disclosure of a disability. If the disability doesn't exist, it is not deserving of accommodation and certainly not worth the employer's inconvenience. On this logic the binary relationship that is constructed is one that reduces the range of what constitutes disability. Continuing to deny nonapparent disabilities perpetuates ableism and discrimination in the organisations' practices and forecloses learning new routines.

These attitudes also signal to future accommodation seekers that their nonapparent disability is likely to be constructed as nonexistent and their accommodation request denied. This will undoubtably have an impact employees' trust of management, which is socially constructed

over various encounters and the calculus of the risk benefit analysis of disclosing their disability, by skewing the employee's estimate of the "psychological incentives" (Santuzzi et al., 2014).

Social Construction of Organisational Culture

Organisational culture is a function of shared beliefs about solving problems of external adaption and internal integration (Schein, 1992, 2004). As a function of shared beliefs, culture is socially constructed. The construction of organisational culture impacts the construal of disability in those organisations. Organisational culture is transmitted through policies, practices, discourse, and rhetoric, which reveal an organisation's collective values, norms, beliefs, and behaviours. Whether organisations adapt best practices or immunise themselves, how they construct expectations around accommodations and sick leave, how they use coercion, how procedural fair the organisation is in how they apply their rules in respect to consistent application, how supportive managers are, and managers' messaging, the extent of discernable commitment from senior management are all a function of the organisation's culture. All these elements, in turn, manifest the shared meaning about disability and the extent to which employees with disabilities are internally integrated into the organisation.

In the organisations "what ought to be" (Schein, 1995, p. 13) is employees who are not disabled. They failed to borrow more progressive social-cultural values and beliefs external to the organisation (Zonda & Hurst, 2009). Likely, the organisations did not perceive themselves as needing legitimacy and support. Nor did they have unique practices and justificatory rhetoric (Pederson & Dobbin, 2006) aimed at inclusion of person with disabilities. These organisations' rhetoric and practices communicated disability disclosure was not welcome. The institutional logic and routines emanating from that rhetoric did not include accommodation. Rather than creating disability inclusive practices and justificatory rhetoric, they used coercive power in the

form of layoffs, harassment, threat of termination, and termination. The rhetoric they create were discourses of unfounded excuses to ameliorate their discriminatory behaviour, which served to construct their organisations as unaccepting of disability by perpetuating stereotypes and maintaining a "static culture" (Kondra and Hurst, 2009, p. 47). Thus, there was no internal integration of the notion of accommodation.

Social Construction – Justice Climate

Looking at these cases through the lens of organisational justice reveals employer construction of employees with disabilities as not being worthy of organisational justice. In respect to distribution of resources, employees with disabilities were not deemed worthy of accommodations and worse, of retaining their jobs. Construction was evident in these employees being adequate employees before their disability disclosure but construed as inadequate in some way after the disclosure. Similarly, employers did not deem these employees worthy of a fair process; in virtually all case there was no process. Given the lack of process, there was no voice, decision control, bias suppression, correctability, or ethics. Also, many of the cases involved a lack of interpersonal justice. Not only were the employees denied fair consideration and ultimately valuable resources, but they were devalued through derogatory comments, social undermining, false accusations, and untruthful statements.

Proffered rationales for organisational justice violations by managers—affecting employee compliance, identity maintenance (Scott et al., 2009), and belief in a just world theory (Lerner, 1980)—were based on their own social constructions. An employee who is terminated can no longer comply, so this seems like an implausible explanation. It may be that the employer terminated the employee with a disability by associating the employee as having nothing more to contribute, à la social exchange theory (Blau, 1964). If the message was aimed at the remaining

employees, it is hard to see how it can be anything other than “don’t request accommodations; don't be disabled.”

Identity maintenance seems a less plausible explanation. It is unlikely that the disabilities presented in these cases were of a nature that would cause existential anxiety (Stone & Colella, 1996). The cases did not suggest ambivalent amplification (Dovidio et al., 2011; Dunn, 2010; Hirschberger et al., 2005) as there was no sense in the cases of managers’ positive attributes to these employees, or in all but one case, aesthetic anxiety.

A more plausible explanation of employers’ behaviours is their motivation to assuage injury to their belief in a just world provoked by employees with disabilities. Employers’ behaviours are consistent with treating the employees as deserving blame, possibly stemming from socially constructing the employee with a disability as a victim. There are derogation behaviours against employees with disabilities ranging from labelling to harassment to being made to do dirty work outside of the employee’s job expectations (Hughes, 1958, 1962). Discursive construction renders these employees to be something they are not. An extreme form of derogation is associating a person with the dirty work they do, which in the case of disability devalues the person with a disability, such that they are made to do dirty work, thus imputing disability as being abject (Holmqvist, 2009). Derogation of the employees with a disability in these cases socially constructed them as being unworthy.

Another route to organisational injustice through just world belief is denial and willful ignorance. Denying that employees have a disability constructs them as not entitled to accommodations. It allows the employer to avoid what they may deem an inconvenience. Nonevident disabilities were construed as nonexistent, essentially rendering them illegitimate. This behaviour constructed a binary world where disabilities are visible or nonexistent.

Terminating these employees was a severe form of social distancing. Employers, through an implicit mechanism, constructed the employees as not being entitled to continued employment. Contrary to contact theory (Allport, 1954), even in the longest exposure cases, contact did not counter the occurrence of employers' biased social constructions of employees with disabilities.

Social Construction of Leadership

Leadership is relational (Fairhurst & Uhl-Bien, 2012) and socially constructed (Fairhurst & Grant, 2010; Roberts, 2007). Because leadership is socially constructed there is no one way that a manager should or does act in any given situation (Grint, 2000). The leadership styles and leader-member relationships in these cases need not be as they were - leaders could have acted diffrently in respect to approving accommodations. Leadership in the research cases was predominantly transactional, and to an extent, autocratic. Further, all the leader-member relationships in these cases appear to be consistent with low quality leader-member relationship. Given the transactional nature of both the predominant leadership style in the research cases and the exchange nature of LMX, it is likely these managers' perspective was that time and effort to accommodate the employees would not sufficiently benefit the managers' interests.

It is not surprising then, in this light, that those mangers considered accommodations and disability from a transactional perspective. However, while return on exchange may be the math that serves most of these employers', it is a mistake to include accommodations in this calculus. Employees are not required to provide any quid pro quo in exchange for accommodations, and employers' only limit to providing accommodations is undue hardship.

It is not just the calculous that is at fault but the construction of the calculator – the social construction of leadership in these organisations. It is exactly because the transactional nature of

the market does not always render fair outcomes, that society imposes regulations to influence behaviours, by codifying normative expectations into laws and human rights legislation.

Trust

Trust is a social construct (Atkinson & Butcher, 2003). Trust is important to the accommodation process (Williams-Whitt, 2007). Trust connotes placing oneself in a state of vulnerability, in expectation of receipt of a beneficial action of another, based on an assessment of the trustee's ability, benevolence, and integrity (Mayer et al., 1995).

Agreement between culture, LMX, psychological and disability climate, HR, and organisational justice creates a level of theoretical triangulation around the importance of trust, as one element in creating an inclusive work culture. Managers' distrust can construct employees with disabilities detrimentally. Employees' loss of faith in employers' integrity, benevolence, and ability affects their trust and ability to seek necessary accommodations. Trust may be a social construct, but it has real impacts on organisational behaviour vis-à-vis disability at work.

A World of Social Constructions

Employees with disabilities reside in a work world of multiple, intersecting, and overlapping social constructions that severally and collectively contribute to possible discriminatory behaviour. It is not just a matter of prejudicial attitudes, though as these cases demonstrate there is plenty of that. Fictitious excuses that labelled employees in negative fashion or associated them as worthy of punishment exemplified social constructions or worse, led to harassment. Disbelief of nonapparent disabilities constructed a work world where invisible disabilities did not exist.

However, it is not as simple as just prejudicial attitudes. It is that these attitudes may have stemmed from multiple sources that served to construct employees with disabilities as deserving

of abhorrent treatment. Attitudes shape corporate cultures, and corporate cultures shape attitudes. There are corporate cultures that continue to perpetuate "what ought to be" (Schein, 1995, p. 13) as not including disability. These organisations continue to perpetuate these shared beliefs.

Organisations may construct climates of social injustice in respect to employees with disabilities. How organisations render distributive, interpersonal, and procedural justice are also social constructions. The resulting treatment stems from how employers construe employees with disabilities based on the managers' needs to effect employee compliance or assuage a belief in a just world. Inherent in the latter was the manager perceiving the employee with a disability as deserving blame and victimisation and derogation or being willfully blind to the employees' needs.

Overlayed on these proclivities is management style, which is also socially constructed (Fairhurst & Grant, 2010; Roberts, 2007). The research cases appear to be dominated by transactional management. Employees with disabilities' accommodations may not serve a transactional leader's self-interest or the manager's sense of the employee being able to provide a quality of exchange.

It is suggested that a manager's perception of time involved in managing an employee with a disability contributes to discriminatory reactions. If a manager does not believe they have the time (control belief) the result will be a lack of retention. Managers' time is a valuable and perishable resource. Managers have many competing demands on their time. Incorporating employees with disabilities into an organisation comes with (or at least is perceived to come with) several additional matters that will add to managers' workloads, but one's attitude towards time is a social construction. This is a world seemingly fraught with multiple layers of social

construction that seem stacked against the retention of employment of employees with disabilities.

Time

Employers offered many excuses to explain their discriminatory behaviour, none of which were found to be bona fide. None of the accommodations requested approached unreasonableness, let alone undue hardship. Employers argued poor performance or poor attendance, but this was found not to be the case. A possible explanation is that the employers associated employees with disabilities as being too time consuming as time is a manger's most valuable but perishable resource.

Time was offered as an explanation for several of the issues that the cases reveal. Building quality employee-employer relationships takes supervisors' time. An organisation's culture regarding time impacted treatment of employees. Time is a social construction (Bluedorn, 2002). The concepts and values a culture holds about time are produced through human interaction, as are the temporal work cultures organisations construct.

If key managers believe employees with disabilities are too burdensome in terms normative, control, or behaviour beliefs, it is not likely a shared belief around disability inclusion can develop, and organisational culture will remain static in this respect. Numerous researchers have shown that disability inclusion needs visible support of senior management (Fredeen et al., 2013; Frazer et al., 2009; Gröschl, 2007; Hernandez et al., 2008; Schur et al., 2005).

Overwhelmingly, the instances of discrimination relate to control beliefs. Only three cases turned on managers' normative beliefs and on behaviour beliefs. On the other hand, strikingly, only two cases reflect the more obvious type of control belief involving direct outlay of financial resources or potential liability. In many cases employers claimed economic

circumstances to explain their failure to accommodate, but the Tribunal did not accept those excuses.

A manager's time is a significant resource, and a manager's belief about the time commitment in managing an employee with a disability impacts their decision to retain an employee with a disability. Accommodating employees with disabilities generally takes managers' time in one way or another. It is argued that a plausible explanation for the beliefs in the research cases is time. Employers' perception of the draw on their time to accommodate and manage employees with disabilities may be a contributing factor leading to employer discrimination of employees with disabilities. This may occur cognitively (Anette, 2017), but hiring behaviour is not necessarily rational (P. Cappelli, personal communication, November 1, 2020), is often not made consciously (Chabot, 2013), and is often based on implicit bias (Araten-Bergman, 2016).

The benevolence aspect of LMX takes more time to develop than assessments of integrity and ability (Mayer et al., 1995). Seemingly, in some cases, benevolence did not develop at all, as seemed to be the situation in the research cases. It may be that the perceived extra time and effort to provide accommodations or manage an employee with a disability unbalance a low-quality LMX relationship such that the leader could judge it not worthwhile, despite normative and legal requirements.

Conflict management takes time as well (Salin, 2003b; Salin & Hoel, 2020). As Salin and Hoel advised, constructive leadership takes an investment of effort and time in conflict management. Rather than managing the actual interpersonal issue between two employees or considering the possibility that the way work is organised creates the conflict, the employer

situated the behaviour as being intrapersonal in the employee with a disability, which would require time and effort to manage.

Anti-harassment policies also take time to develop and are complicated to implement. The basic element of conflict management prevention strategy needs to encompass management training to identify and handle conflict. Management needs to be involved in the development, design, and evaluation strategy for the anti-harassment strategy created and implemented (Mikkelsen et al., 2011). Such a strategy needs to consider the organisation's culture, the nature of the work, employment arrangements, and the political, social, and economic environment (Hutchinson, 2012). Senior management intervening rather than condoning bullying takes time and effort.

A fulsome accommodation process also takes time to complete. Managers may perceive that the provision of accommodation and/or the accommodation process itself is an inconvenience and that the employee with a disability is unworthy of their effort and time. Williams-Whitt (2007) came to a similar conclusion, stating as a factor effecting accommodation that "the time, energy and 'creativity' necessary for developing an accommodation plan were often cited as barriers" (p. 414). Managing employees with mental or episodic health issues is more complicated. Managing shift changes and absences is inconvenient. Changing routines is time consuming, and accommodations often require changes in routines. All of this takes managers' time and takes them away from advancing other more saliant aspects of their business agenda.

Accommodating employees with disabilities may not simply constitute modifying work but may encompass necessitating change to a range of dimensions of organisational cultural. Policies may have to be administered flexibly or changed. Routines are repetitive behaviours that

constitute practices. Making changes to these elements of culture requires considerable time and effort by managers. As important as these are, these are just components of cultural change. Cultural change's objective is to affect the shared beliefs of all organisational members about how things ought to be done in the organisation. That takes months if not years and requires managers' sustained efforts to accomplish (Fajak, 2018; McCarthy, 2018; McVeigh, 2017). Organisational change requires managers' efforts to overcome inertia of relying on the familiar (Becker, 2000), overcoming internal resistance, and the fortitude to sustain efforts in the face of time constraints (Becker, 2000).

Organisational learning takes time, but legal obligations may be inconvenient. It takes effecting cultural change which requires ongoing work by managers outside their usual routines. Organisations that are wedded to notions of standard workers being ideal will be offended by the need for accommodation, likely perceive providing accommodations as unworkable, and an unnecessary use of their time (Foster & Wass, 2013).

Integrating employees with disabilities takes considerable commitment and time from management. Where available, HR managers would likely play an integral role fostering disability inclusion, which would absorb considerable amounts of their time. In these cases, employers failed to learn their legal obligations to provide persons with disabilities accommodations, and if they were aware of these obligations, senior managers failed to change the organisation's culture by intervening when routines were abused or not adhered to. Integrating employees with disabilities into an organisation's workplace is a multilevel, multifaceted, process, stemming from senior management's visible commitment to disability awareness training of all employees (Bengisu & Balta, 2011; Kalargyrou, 2014; Kalargyrou &

Volis, 2014; Lindsay et al., 2019; Waxman, 2015, 2017). Every step in between takes management effort and time.

Limitations

Like all data, the data used from the Ontario Human Rights Tribunal cases have limitations. There is limited view as to the role of organisational significant others, as the cases do not deal with coworkers, and clients. It is recognised that the sample size is small and may be a limitation of this research in respect to generalizability, but the intention of this research was to identify trends. A larger-scale empirical examination of tribunal cases is warranted to confirm the findings and conclusions.

It is unknown whether managers were motivated by the reactions of coworkers to the employees with disabilities or to the possibility of accommodations. Similarly, for the most part, the cases do not provide information in respect to third parties (e.g., customers, suppliers, other more senior management) which may be a limitation of the study or may indicate that third parties were not a salient issue. What may be a further limitation in assessing these behaviours is the inability to determine whether the employer's excuses were sincerely but wrongly held beliefs at the time of rejecting accommodation or termination of the employee. Furthermore, it is a challenge to determine if the employers' reasons are premeditated excuses prior to termination or post-hawk rationalisations, trumped up to create a defence to the human rights claim.

While the cases reveal behaviour strained through organisational psychology concepts, they raise as many questions as they answer. The actual organisational climate cannot be discerned from the cases but logical inferences can be made. The research cases provide a window on the climate of these organisations; however, the treatment of one or two employees per an organisation may not be indicative of the overall climate. Climate is less a limitation of

the research, as it was used in this study not for the actual shared perception of employees but to leverage what can be gleaned about employers' behaviours.

Actual beliefs are difficult to discern. The cases do not provide an empiric measure of the implicit reactions of managers, so one can only surmise that disability evokes control beliefs about time. Given that managers' actual beliefs cannot be known from the research cases, it is not possible to categorically attribute the employers' behaviours to just world beliefs without other psychosocial research, given that at least part of the response to a challenge to one's belief in a just world occurs implicitly (Dalbert, 2011; Dalbert & Donat, 2015; Lerner, 2003; Modeso & Pilati, 2015). Nor can it be certain whether employers' perceptions of LMX were impacted by accommodation requests. Similarly, there is no way to categorically conclude any of the employers' affects in the research cases. It cannot be said with certainty why these employers acted as they did. The research cases, though illustrative of employers' discriminatory behaviour, are not sufficiently informative to definitively judge what was in each employer's mind during their discriminatory practice. Robert and Harlan (2006) advise "that motivations are unobservable and empirically unverifiable…. they must be imputed based on evidence viewed through the lens of theory" (pp. 601-602). That it cannot empirically measure the implicit reactions of managers in the research cases may be a limitation for the moment, but the purpose of inductive research is to see what emerges for further study.

Like all qualitative research that occurs in natural settings it is difficult to replicate inductive research (Wiersma, 2000). Inductive research is not intended to prove correlations. So, it is not possible to substantiate any relationships or causality of relationships in the data.

Areas for Future Research

Manager's Control Beliefs - Management Time and Employees With Disabilities

The main theme that emerged from this research is a hypothesis that managers associate disability with increased demands on their time, and while there are multiple causalities of employer discrimination against employees with disabilities, managers' perception of the time commitment to manage employees with disabilities may be an overlooked cause. Perceptions about time would form a control belief. Managers' beliefs about available resources impact their intentions to undertake certain actions.

Hernandez and McDonald (2010) found supervisory time for both persons with disabilities and nondisabled workers similar. Similarly, Scott et al. (2017) found in an Australian study that employees with autism spectrum disorder and their nondisabled coworkers were the same in respect to weekly employment, supervision, and training costs. These studies suggest manager's perceptions that greater supervisory time is required to manage persons with disabilities are likely unfounded. Clearly, further research is warranted to confirm the hypothesis offered here and if confirmed to debunk managers' erroneous perception.

As can be seen, despite employers intending to make discriminatory employment decisions on rational economic bases (Harcourt et al., 2005), decisions about employees were not always made on a wholly rational basis (Bartolotta et al., 2014), and accommodation provision was not driven strictly by concern for compliance (Carpenter & Paetzold, 2013; Patterson, 2011). These decisions may be guided by implicit bias (Araten-Bergman, 2016), emotional response (Carpenter & Paetzold, 2013), or stereotype (Breward, 2017). Our understanding of managers' relationship to employees with disabilities would benefit from a deeper understanding of the

impact of managers' sense of valuing time, its relationship to disability, and the psychological mechanism involved.

Creation of an instrument to measure managers about how they value time would extend understanding of what may motivate management decisions in respect to hiring and retaining employees with disabilities. Particularly, much of the extant literature on employers' beliefs relates to concerns about the financial cost (Bengisu & Balta, 2011; Boni-Saenz, 2004; Collin et al., 2013; Donnelly & Joseph, 2012; Fraser et al., 2010; Fredeen et al., 2013; Gröschl, 2007; Heera & Devi ,2016; Houtenville & Kalargyrou, 2012; Jasper & Waldhart, 2012, 2013; Kalargyrou & Volis, 2014; Kayeet et al., 2011) of accommodating disability. There is not a great deal of literature considering employers' time commitments to accommodate and manage employees with disabilities. Several studies advert to employees with disabilities requiring greater supervision (Bezyak et al., 2013; Chan Ho-ting & Wong Ming-Wai, 2015; Chi & Quo, 2004; Gröschl, 2007; Harlan & Robert, 1998; Henry et al., 2014; Hernandez et al., 2008; Kaye et al., 2011; Peck & Kirkbride, 2001; Unger, 2002; Unger & Kregel, 2003; Waterhouse et al., 2010; Wharton School of Business, 2013). Many of these are not focused in-depth on the time issue. Managers' perceptions of time vis-á-vis employees with disabilities is ripe for further study.

Temporal Leadership

No literature on disability and temporal leadership could be found. Temporal leadership is nascent and many of leading academic supporters call for more research and theorizing (Bluedorn & Jaussi 2008, Chen & Nadkarni 2017, Shamir 2011; Sonnentag 2012), identifying time-based characteristics of management as being under-explored (Mohammed & Harris 2013). Polychronic versus monochronic work environments may impact persons with certain

disabilities. Likewise, pace, punctuality, and time urgency may also affect some persons with disabilities.

Public Policy and the Hierarchy of Disability

Public policy, in the form of workplace injury compensation, seems to have a consequence of incentivising employers to distinguish between employees with and without a workplace injury. It is seen in one research case how the workplace compensation system created a hierarchy of disability, with workplace injured employees being preferred for nonstandard positions over employees with nonworkplace injuries. This hierarchy of disability is likely pervasive, given that workplace disability compensation policy is applied province-wide and that other jurisdictions have similar workplace compensation requirements. The perpetuation of this hierarchy warrants further research. The creation of a disability hierarchy seems to be an unintended consequence of current public policy. Is it driven by changes in the organisation of workplace compensation practice? For example, the Meredith principles[63] upon which workplace compensation in Ontario was premised, is based on collective liability. "This means compensation costs are spread across groups of employers in the same class of industry or occupation" (Injured Workers Online, 2018, para. 1). The introduction of experience rating impacts individual employers based on injury claims and lost time, which pressures employers to return injured employees to work early. The insurer has had unfunded liabilities (Office of the Auditor General, 2009), likely due to the insufficiency of the fund's premium rates, which

[63] The Meredith Principles: 1) established no-fault compensation regardless of how an employee was injured at work. Employers take responsibility and liability for compensation without workers having to prove fault, and employers gain the security of not facing employee lawsuits. 2) In exchange, employees gain the security of guaranteed funds to pay compensation benefits. 3) Employers agree to collective liability, with the cost of the compensation system shared by the group of employers in a certain class or industry.4) The compensation system is independently administered and, 5) The workplace compensation administration is the sole insurer. All claims are directed to them, and they have final authority on the disposition of all claims

suggests that the insurer prefers employers' interests in low premiums over workers' interests. In short, it seems that the workplace compensation scheme has been co-opted by neoliberal mentality, that it has a knock-on effect of unintendedly creating a hierarchy of disability.

The Business of Learning Business

In addition, disability in organisational studies is undertheorised. In fact, there is scant substantive consideration of disability in organisational studies literature (Williams & Mavin, 2012). Williams and Mavin advocated for a disability lens to contribute to organisational studies to refocus the understanding of disability in organisations through a "social interpretation" (p. 172). Further, critical management studies has not engaged in disability at all. No other literature could be located that applies critical management theory to disability in the workplace.

It may be that systemic change runs through business academy. Changing managers' perspectives on disability may change organisational behaviours towards persons with disabilities. It would be important to determine whether and how disability is addressed in business schools by, for example, surveying business textbooks or course syllabi. A sensitive treatment of disability in business school curriculum has the potential to correct the misinformation that plagues managers' notions of disability and would be an opportunity to sensitise future business leaders.

The extent that business schools engage in critical management studies would be of interest. To date, the business academy has emphasised scientific rigour (Breen, 2017).

> As a result, recent critics in business schools have been accused of conducting theoretically grounded but irrelevant research; of doing an inadequate job of preparing students for the business school world; of pursuing curricular fads at the expense of sound educational principles; of being too analytical and not process oriented; of failing to provide sufficient ethical and professional guidance to potential managers; and of responding to the demands of the market by pandering to the business school rankings. (Breen, 2017, p. 117)

Ghoshal (2005) noted:

> Academic research related to the conduct of business and management has had some very significant and negative influences on the practice of management...by propagating ideologically inspired amoral theories, business schools have actively freed their students from any sense of moral responsibility. (p. 76)

Critical management studies and critical disability studies have a common antecedent in critical theory and can be allied. Both problematise structures of domination, power, and their reproduction, such as systems of business management; question taken-for-granted assumptions, such as the exclusion of employees with disabilities; challenge instrumental relationships; positivism; and examine both how institutions perpetuate class and other oppressive relations, such as ableism. Adler et al. (2008) noted that business education is also dominated by the idea of business as instrumentalism. Adler et al. (2008) stated that:

> This vision of business education marginalizes efforts to equip students to think critically about issues of the public good and sustainability and ignores the fact that managers often feel themselves tugged in competing directions by their loyalties to various stakeholder groups and by their personal commitments to values other than profitability. (p. 128)

Embedding a more critical approach to management studies may result in more enlightened, inclusive, and healthier workplaces.

Contributions to the Literature

The research makes several contributions to the literature. In a general way, this research contributes to the literature by considering a broader array of organisational elements than much of the extant literature. As comprehensive as some literature is, even Beatty et al. (2019) and Stone and Colella (1996) did not put it all together, as was attempted in this dissertation. Further, no studies seem to address disability and temporal management or disability and perceptions of supervisors' time commitments to managing persons with disabilities, as I attempted to do. I added to the existing model factors that have developed in the literatures on organisational size

and human resource management. Aspects of corporate culture and climate were broadened by including disability climate, psychological climate, organisational justice climate, and explanations for justice violations. To observers is added literature on LMX and leadership style, and to organisational characteristics is added organisational flexibility—the notion of the standard worker and human resource management and disability. These factors contribute more entrepôts to analyse employers' discriminatory behaviours. In general, this research contributes to the literature by doing a comprehensive analysis of employers' behaviours towards employees with disabilities.

It is believed that this is the only assessment of the nature of employers' legal defences in cases where the employers were found to discriminate against employees with a disability, at least in Ontario human rights cases. In assessing their espoused reasons on an excuse versus justification basis, they were all found to be excuses.

The literature identifies several excuses that employers normally offer as reasons for discrimination. In fact, many excuses were offered by employers in the research cases. However, none of the usual rationales for not retaining employees were found to be valid in the research cases. Allegations of productivity (Bengsiu & Balta, 2011; Donnelly & Joseph, 2012; Domzal et al., 2008; Fraser et al., 2010; Fredeen et al., 2013; Gröschl, 2007; Heera, 2016; Houtenville & Kalargyrou, 2012; Ju et al., 2013; Lengnick-Hall et al., 2008) and absenteeism (Fraser et al., 2010; Fraser et al., 2011; Heera & Devi, 2016; Ju et al., 2012; Kaye et al., 2011) were found to be invalid. The accommodations in question were not costly, and safety, as well as customer and coworker attitudes were raised in only one case.

The finding that probation was used in a statistically discriminatory way adds to other literature that argued employers use protected grounds, such as disability, as a proxy for

unobservable characteristics such as expected productivity and absenteeism (Hegan, 2006; Lam & Harcourt, 2005; Leblanc, 1995; Sattinger, 1998). But moreover, the data here shows that at least some employers expect the probationary period to excuse any reason for termination, even if it is discriminatory.

There is established research on employees with disabilities in the form of drug or alcohol addiction. It is, however, certainly an evolving area, as employers come to terms with the changing morass of laws, and science on drug use (Wolch et al., 2018). However, where the findings in this research may contribute to the literature is in the selective use of zero-tolerance policies to discriminate against certain employees with disabilities.

Employers' resistance to providing medical leaves for employees, as encountered in these cases, is consistent with and adds to other extant literature on employees' intransience, and worse, harassment (Foster, 2007; Lewis et al., 2018; Liefooghe & Davey, 2001).

Baumgärtner et al. (2015) argued that organisational flexibility, being low-power concentration, and employee input benefit employees with disabilities. Low-power concentration in these cases did not benefit employees with a disability.

Unlike the United States' Equal Employment Opportunity Commission's (EEOC) Integrated Mission System, (Chan et al., 2005; McMahon, 2012; McMahon & McMahon, 2016; Graham et al., 2019), Canada has no database that allows researchers to track various characteristics of employees and employers (McMahon et al., 2008; Rumrill & Fitzgerald, 2010; West et al., 2008; Von Schrader, 2014). It is believed that this research is the first to attempt to identify demographic trends in the victims of disability-employment discrimination found in Human Rights Tribunal of Ontario decisions. This research contributes to the literature, particularly in that no other report of the proportion of discrimination against employees with

mental health disabilities in Ontario human rights cases, could be found. Similarly, no other research could be found that attempted to disaggregate organisational characteristics of employers who were found to discriminate against employees with disabilities in Ontario human rights cases.

Beatty et al. (2019) found that organisations with human resource departments and corporations that are unionised are less likely to discriminate. The results in this study differ from Beatty et al.'s (2019) conclusion. In these cases, a range of behaviours in respect to HR's participation in discrimination is seen, ranging from being passive to fully participating, either constructively or overtly. Given the selection criteria, it is likely that these cases are the exceptions. These cases are not a contradiction of Beatty et al.'s (2019) finding, rather they are less common variations.

Similarly, though unions were found to be complicit in discrimination as an employer in one case and as a participant in another, these are also likely exceptions to the more typical instances of unions generally being allies to employees with disabilities and mediating organisations discriminatory tenancies.

A significant contribution to the literature is how operationalizing workplace compensation policy creates a hierarchy of disability. Hierarchies of disability have been found in other contexts. Nondisabled persons prefer certain types of disability over others (Deal, 2003; Tringo, 1970), and employers have also been found to prefer certain disabilities (Boman et al., 2015; Chi & Qu, 2004; Gouvier et al., 2003; Ren et al., 2008; Zissi et al., 2007). However, no other research appears to show a hierarchy of employer preference stemming from the economic incentives embedded in a public policy (the workplace compensation plan) that lead to

organisations discriminating between employees whose injuries occurred at work versus persons with disabilities whose injuries occurred outside of work.

Conclusion

This research started by seeking to identify actual employer behaviours towards employees with disabilities and how those behaviours socially construct disability in the workplace. The iterative examination of the cases shows that employers deploy several unfounded rationales to excuse their behaviours and that those excuses socially construct disability in detrimental ways.

In the process, two major findings emerged. The first hypothesis that managers may perceive that managing employees with disabilities will demand excessive amounts of their time. As is the case with iterative research, this requires further investigation, but if it proves true, it will provide a valuable focus to reorientate practitioners.

The second finding is the appreciation that contemporary work environments are constituted of layers of social constructions. Not only do employers' discursive treatment of employees with disabilities characterise them in derogatory ways, but organisations' cultures and climates, leadership styles, leader-member exchange relationships and perceptions of time affect employees with disabilities.

And while it seems the deck is stacked against integrating employees with disabilities into work, this contribution to understanding the world can help practitioners focus on overcoming biases and reorienting routines that improve social justice in their workplaces. The challenge to management educators, human resource practitioners, disability employment advocates and the disability policy community is disseminating these ideas. Still, there seems to be an ever-increasing demand to improve social justice in the workplace, both for normative and

instrumental reasons. Whatever the reason, employers understanding these themes can help them to ameliorate these barriers.

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Appendix A

Survey of Non-Canadian Studies Re Employers' Attitudes Towards Persons With Disabilities 2000–2017

Study	Year	Location	Methodology	Sample Size	Focus	Findings
Alfasi	n.d.	Israel	Survey	1900 businesses		Generally, no difference in attitude between firms employing persons with disabilities and those not employing persons with disabilities was found.
Ameri, Schur, Adya, Bentley, et.l	2013/ 2014	United States	Field experiment (sent three different applications)	6,016 advertised positions		Applications with disabilities received 26% fewer expressions of interest.
Andersson	2012	Sweden	Survey	68 head-hunters or employers	Psychological disabilities	Employers hold favorable attitudes towards persons with disabilities.
Andersson, Luthra, Hurtig, and Tideman	2015	Sweden	Survey Vignette	212 employers		Employers' interest in hiring persons with disabilities varies with the nature of the disability and their previous experience with persons with disabilities. Employers with experience with persons with disabilities. were more interested in hiring persons with disabilities compared to what they thought other employers were. Access to financial compensation, extra resources and guidance and openness about disability were seen as essential.
Araten-Bergman	2016	Israel	Survey Theory of Planned Behaviour Questionnaire Longitudinal (6 months)	146		The Theory of Planned Behaviour failed to predict actual hiring. Managers' intentions were not significant predictors of actual behaviour.
Baert, De Visschere, Schoors, and Omey	2014	Belgium	Experimental Matched pair	304 job vacancies	Depression	Identifying previous depression as a reason for unemployment is rewarded by female recruiters and is treated negatively by males. Depression is also treated less favorably in low-skill occupations.

Bell and Klein	2001	United States	16 experimental conditions Ranking of hypothetical job applicants	98 psychology undergraduates 88 employees		An applicant with paraplegia was ranked higher for activity and potency than the applicant with depression or the applicant without a disability. All three applicants with a disability were ranked higher on activity than the applicant without a disability, and the applicants with paraplegia and epilepsy were rated higher for potency than the applicant without a disability. Female applicants were ranked higher than male applicants on all variables except potency. Male applicants were ranked higher than female applicants for supervisory roles, but females were ranked higher for non-supervisory roles.
Bendick	2016	United States	Matched pair	31	Mobility	Those with a disability were only 27% as likely to receive a job offer or otherwise advance as far in the hiring process compared to their equally qualified counterparts without a disability. Discrimination, either conscious or unconscious, was documented by 41% of retailers tested.
Boni-Saenz, Heinemann, Crown, and Emanuel	2006	United States	In-depth semi-structured interviews Four case studies Longitudinal			Businesses generally employ people with disabilities because of some commitment that derives from a variety of sources. The major perceived benefits to hiring people with disabilities focused on the diverse perspective they provide to the company and the loyalty they show the company that hires them. The major perceived barriers to hiring people with disabilities included attitudinal barriers. Smaller companies see employing people with disabilities as a larger risk than larger companies perceive. Larger companies also had differing views of the Americans with Disabilities Act, with larger companies having a more positive view of the law. Companies generally desired vocational rehabilitation and job counselors to aim for a good match between an applicant with a disability and the job position rather than just a placement. Lack of business knowledge among vocational rehabilitation counselors was a complaint.

						Health care costs were not seen as a barrier. Companies do not generally use tax credits for the employment of people with disabilities or for accommodations. Outsourcing is a serious issue in the technology sector for people with mobility impairments. As with "offshoring," outsourcing eliminates a large class of entry-level jobs and telecommuting opportunities for individuals with disabilities. In addition, the opportunities that are still available in the United States may not present the same opportunities for career advancement as they would if the jobs were still housed in a large, disability-friendly corporation.
Bricourt and Bentley	2000	United States	Survey Employers' employability ratings of hypothetical job applicants *Employment Characteristics Scale*	248 hiring managers		Non-disabled job applicants were rated more employable than applicants with severe disabilities. Employees with acquired brain injury and schizophrenia were rated similar.
Burke, Bezyak, Fraser, Pete, et al.	2013	United States	Literature review	34		The study found that employers were either very optimistic or very pessimistic about employees with disabilities skills. Employers need accurate information to dispel myths.
Center for Information, Training & Evaluation Services, Florida State University	2003	United States	Survey	306 businesses		Persons with prior experience with employees with disabilities have a more favorable attitude, as do employers with formal disability policies. Behavioural disabilities were perceived as the hardest to accommodate. Employers may not be aware of available workplace supports and programs. Two out of three employers were unaware of disability issues.

Chan, Strauser, Maher, Lee, Jones, and Johnson	2010	United States	Survey *SPR/nAblement Employer Survey*	132 human resource managers and line managers		Managers are moderately positive (ambivalent) about the productivity and reliability of employees with disabilities. Barriers identified are 1) lack of commitment to including disability in companies' diversity plans, 2) lack of resources to recruit and retain persons with disabilities and 3) inadequate training in ADA and workplace accommodations. Points 1 and 2 are key predictors of corporate and management commitment to hiring persons with disabilities.
Chan Ho-ting and Wong Ming-Wai	2015	Hong Kong	Interviews Survey	8 209		This discusses perceived additional costs of training, supervision of accommodation, lack of management commitment and concern over requisite skills.
Chen, Blankenship, Austin, Cantu, and Kotbungkair	2015	United States	38- item Employer Attitudes Questionnaire and 33-item Small Business Owners Survey	270 Hispanic small business owners	270 Hispanic small business owners	This discussed significant predictors of hiring persons with disabilities: prior contact with persons with disabilities, marital status and awareness of the ADA.
Chi and Qu	2004	United States	Survey	500 restaurant employers	Restaurant sector	This found that employers preferred persons with sensory impairments or physical disabilities to those with mental disabilities. Employers' attitudes towards employees with sensory impairments and physical disabilities had a positive impact on the probability of employing persons with disabilities. Prior work experience with disabled persons leads to a more favorable attitude towards employees with disabilities.
Copeland, Chan, Bezyak, and Fraser	2010	United States	Survey *Disability Questionnaire*	142 employers		The findings support the reliability of the scale. Employers did not have significant negative cognitive or affective reactions towards employees with disabilities. Employers had a moderately positive attitude towards accommodations. Employers had a high positive attitude towards treating these employees like other employees. Experience working with persons with disabilities can result in a high positive attitude.

Deuchert, Kauer, and Zannol	2013	Switzerland	Discrete choice experiment	533	Mental disorders	They found few employers willing to train apprentices with special needs, even though there were no direct costs. Very low acceptance rate of the employee profiles presented. Non-cognitive dysfunctions are the main deterrent.
Domzal, Houtenville, and Sharma	2008	United States	Survey	3,797 companies		Large companies are more likely to hire. Small and medium sized companies require information about job performance and are more concerned about health care costs and workers' compensation premiums, and they prefer employer tax credits. Large companies found their challenge to be in recruiting and prefer mentoring as a strategy. The nature of the work was more of a concern in industries with physically demanding work. For companies that employ persons with disabilities there is more of a challenge around advancement than the attitudes of customers or co-workers. The public sector is more likely to recruit persons with disabilities than the private sector.
Employment Monitoring and Evaluation Branch	2011	Australia	Survey Online Employer Forum	1230 40		Key findings from 2011 Online Employer Forum: 1) Honesty up front should be encouraged. 2) Employment is all about getting the right person for the job. 3) Workers with a disability are often considered the more reliable and loyal employees. 4) DES support plays a large role in the employment decision. 5) Financial incentive is a decision helper and not a deal breaker (for most). 6) Employer incentives are deemed to be more than just wage subsidies (for most). 7) Ideally for employers, financial incentives are linked to worker productivity and are paid in instalments. 8) Employers desire incentive to be longer and more substantial. DES providers are highly praised. The stand-out message from the forum is the importance of getting the right person for the job.

Fraser, Ajzen, Johnson, Hebert, and Chan	2011	United States	Survey Theory of Planned Behaviour	92		This looks at how companies' size affects norms and control beliefs and how small, medium and large companies' concerns in respect to hiring persons with disabilities varies.
Fraser, Johnson, Hebert, Ajzen et al.	2009	United States	Semi-structured focus groups Theory of Planned Behaviour	20		This found that education and marketing approaches to companies re hiring persons with disabilities need to be tailored based on company size. Behavioural concerns including fear of potential litigation, loss of revenue and fear of affording changes for physical accommodation. Normative concerns, including co-worker and management attitudes. Control beliefs around effectiveness and efficiency of contact with vocational rehabilitation. Behavioural concerns were more salient to small companies, with normative concerns being more relevant to midsize companies. All companies, independent of size, were concerned with the control issue.
Gatchalian et al. (Abstract only)	2014	Philippines	Survey of employers and HR practitioners	210		Employers generally have positive attitudes about persons with disabilities. Attitudes vary with the company and disability characteristics.
Gilbride, Stensurd, Vandergoot, and Golden	2003	United States	Focus Groups and Interviews Grounded Theory	16 successfully employed consumers 39+ employers 8 placement service providers		This discusses three major categories of characteristics (comprising 13 specific characteristics of employers open to hiring and accommodating persons with disabilities): inclusive work, cultural issues, quality job match, employer experience with diversity and support in accommodating.
Gouvier, Sytsma-Jordan, and Mayville	2003	United States	Four medical conditions and four sample resumes for two job positions Forced choice	295 undergraduate students business-related majors		The authors found hiring discrimination varies as a function of type of disability and the interaction of type of disability with contextual variables. Physical disabilities are more likely to be preferred over mental disabilities.

Graffam, Shinkfield, Smith, and Polzin	2002	Australia	Survey	643 employers who had employed persons with disabilities		Employers placed greatest emphasis on work performance both individually and as it affects the organisation/work group. Four underlying employer values were identified: 1) they value their business so factors affecting the business were of greater importance, 2) Factors related to personal performance were ranked highly, 3) They value the whole organisation so they consider social integration/acceptance as a factor of job performance and 4) They value partnership and expect employment services and employees to consult in planning, implementation and maintenance of the job.
Gröschl	2011	Germany	Case study Semi-structured interviews	5 integrated hotels		This concludes that artificial barriers (perceptions and stereotypes) of employers at non-integrated hotels is the barrier to greater disability inclusion.
Gustafsson, Peralta, and Danermark	2014	Sweden	Semi-structured interviews Content analysis	19	Wage subsidies	Four factors were found: employers' attitude (based on previous experience with persons with disabilities), job matching, wage subsidies as incentives and the necessity of soft accommodations. Cost was less important than performance.
Hartnett, Stuart, Thurman, Loy, and Batiste	2011	United States	Structured survey	387 employers	Accommodt-ions	This found that satisfaction with accommodations is high, costs are minimal, positive financial outcomes, increased productivity and retention and enhanced public image.
Heera and Devi	2016	India	Literature review	44 studies		The authors found the following factors influence employers' perspectives on hiring persons with disabilities: 1) Previous experience with persons with disabilities creates more favorable perceptions. 2) The type of disability has an impact on inclusion. 3) Concerns over work performance are a factor. 4) Concerns over possible legal ramifications 5) Concerns over customer and co-worker reactions 6) Concerns about the added cost of accommodation 7) Employers' level of education, gender and organisational characteristics
Hemenway, King, Rohani, and Word	2003	United States	Survey	306 employers		The authors found differences between Chamber of Commerce and non-Chamber groups, employer's lack of awareness of disability issues and resources and employer attitudes toward individuals with disabilities.

Henry, Petkauskos, Stanislawzyk, and Vogt	2014	United States	Focus groups	51 employers, 16 community rehabilitation providers, 7 persons with disabilities		The employer saw stigma, uncertainties in respect to applicants' abilities and the complexity of the public disability employment service system as hiring barriers. They saw diversity, expanded talent and improved brand loyalty as advantageous.
Hernandez, Chen, Araten-Bergman, Levy, Kramer, and Rimmerman	2012	United States	Theory of Planned Behaviour, Focus group	12 employers		The Theory of Planned Behaviour can predict employers' intentions to hire persons with disabilities. Not-for-profit organisations' attitudes are more favorable than those of for-profit organisations.
Hernandez, Keys, and Balcazar	2000		Literature review	37 studies		Employers with prior positive contact have a favorable perception of employees with disabilities. Willingness to hire still exceeds actual hiring. There is a preferential hierarchy of disability types. The trend of a relationship between a positive perception of persons with disabilities and employers' level of academic achievement and company size is diminishing. Employers are positive about employees placed by vocational, employment and supported-employment programs.
Hernandez, McDonald, Divilbiss, Horin, Velcoff, and Donoso	2008	United States	Focus groups	21 employers	Healthcare, hospitality and retail sectors	Five themes emerged: 1) importance of disability employment agencies and disability advocates, 2) persistence of manager bias, 3) lack of promotional opportunities for persons with disabilities 4) perceptions of costs associated with having employees with disabilities and 5) there are benefits associated with hiring persons with disabilities (low absenteeism, long tenure, diversification, more positive work environment).
Houtenville and Kalargyrou	2012a	United States	Analysed 2008 ODEP Survey of Employer Perspectives on the Employment of People with Disabilities	320 hospitality companies	Hospitality and Leisure sector	The study found prejudice and stereotyping, but the chief concern was for the bottom line.

Houtenville and Kalargyrou	2015		2008 ODEP Survey of Employer Perspectives on the Employment of People with Disabilities	263 leisure and hospitality companies	Hospitality and Leisure sector	Service producing companies are more likely to hire than goods producing companies. Service companies where there is direct customer interaction are more likely to identify customer attitudes as a reason not to hire.
Huang and Chen	2015	Taiwan	Interviews	12 employers		Four reasons for employing persons with disabilities were found: personal experience with disability; cost effectiveness due to reduced turnover; altruism and charitable perspectives (i.e., improved image CSR); and compliance with the quota. Employers were more concerned with the recruitment stage than after hiring. Once hired, they tended to focus on capabilities than limitations and focused on training and job match. All employers agreed with accommodations. The authors found that there are limited career advancement opportunities for persons with disabilities.
Jasper and Waldhart	2013	United States	Statistical analysis of 2008 ODEP Survey of Employer Perspectives on the Employment of People with Disabilities Theory of Planned Behaviour	320 leisure and hospitality companies	Leisure and Hospitality	The authors found chief concerns were job performance and cost of accommodation. Much more of a concern for smaller employers. Most appealing practices: employee and manager attitudes, job mentoring, financial incentives.
Jasper and Waldhart	2012	United States	Statistical analysis of 2008 ODEP Survey of Employer Perspectives on the Employment of People with Disabilities Perceptions of Challenges Index		Retail	Employer size is a significant predictor of retailer perceptions of hiring people with disabilities.

Ju, Zhang, and Pacha	2012	United States	Survey	168 employers		The authors found that employers' four most valued employability skills (integrity/honesty, ability to follow instructions, respect for others and timeliness) were the same for persons with disabilities and those without. A discrepancy arises with the fifth most valued employability skill where employers value regard for safety for persons with disabilities vs. ability to read with understanding for persons without disabilities. Employers ranked all five skill areas the same. Employers expect more skills from employees without disabilities. Employers from service/business area had higher expectations regarding higher-order thinking skills, social skills and personal traits Women had higher expectations regarding certain skills than male employers.
Kang	2013	Korea	Interview	20 human resource directors		The study makes a number of recommendations to government, including improving the job skills of persons with disabilities; decrease employers fears about industrial accidents for workers with disabilities; and support employing persons with disabilities through tax and social insurance breaks, a national campaign to alter peoples' attitudes, adjustments to quotas, providing a database of job seekers with disabilities and strict enforcement of the quota system.
Kaye, Jans, and Jones	2011	United States	Survey of known ADA – recalcitrant employers	463 human resource professionals and mangers		Chief barriers are lack of awareness of disability and accommodation issues, cost perceptions and fear of liability.
Kulkarni and Lengnick-Hall	2014	United States	Literature review			Obstacles identified in the literature may only represent partial reality due to the great reliance on laboratory studies.
Lengnick-Hall, Gaunt, and Brooks	2001	United States	Literature review			Looks at a number of factors affecting employment of persons with disabilities and how those perceptions are not based on evidence.
Louvet	2007	France	Experimental	132 management undergrads 152 graduate business students		The study found a job fit effect; applicants with a disability were rated more negatively than non-disabled in poor fit conditions (i.e., requiring public contact or perceived to be a typically male job).

						It also found that persons with disabilities were perceived to be warm but not competent.
Luecking	2008	United States	Literature review			Despite more enlightened views of disability, employers still hold confused and stereotypical views about employees with disabilities. Usually exposure to persons with disabilities improves employers' views, so the real barrier may be the lack of being prepared to support these employees. Job developers need to refocus on demand-side concerns by being customer-oriented, focusing on understanding employers' needs and taking on a role more like an organisational consultant than a job finder, as well as providing post placement services, being responsive to employer needs and focusing on improving employers' financial situation.
Mak, Ho, and Kim	2014	Singapore	Theory of Planned Behaviour and Social Cognitive Theory Quantitative 72-item online survey	145	Cancer	The strongest factors related to intention to hire are efficacy followed by attitude. The strongest factors re retention were perceived moral obligation and attitude towards cancer.
McDonnall, Cruden, and Zhou	2013	United States	Survey	183 rehabilitation counselors and business relations staff	Blind/ visually impaired	Vocational rehabilitation staff have a more negative view of employers' attitudes in respect to the likelihood of employing blind or visually impaired employees than business relations staff.
McDonnall	2014	United States	Survey 11-item attitude scale developed	158 in hiring positions	Blind	They found the instrument has criterion validity. The authors found that some employers have negative attitudes towards employees who are visually impaired and others have positive attitudes.
McDonnall and O'Mally	2015	United States	Survey	181 employers	Blind/ visually impaired	The findings show that employers' attitudes improve with contact with vocational rehabilitation agency personnel.

Moon and Baker	2012	United States	Delphi survey	44	Accommodati o-ns	There is a perception that employers fail to accommodate because they are unaware of the range of options or assume they are too expensive.
Morgan and Alexander	2005	United States	Survey	534 employers		Most respondents with experience indicated that the employment usually or sometimes worked well, and they were likely to hire again. Many inexperienced respondents were also receptive to hiring. Experienced respondents identified advantages to employing individuals with disabilities at higher rates than inexperienced respondents.
Nota, Santili, Ginevera, and Soresi	2013	Italy	Experimental design - randomly assigned to two conditions, one where candidates presented the difficulties of their disability and another where they discussed their positive aspects	80 employers		The authors found participants' attitudes were more negative in respect to people with psychological problems than those with an intellectual disability or a sensory disability. All types of disability presented benefited from positive presentations about their disability.
Olson, Cioffi, Yavanoff, and Mank	2001	United States	Survey	126 HR personnel, managers and corporate executives		Employers perceive that employees with mental retardation have a positive impact on the workplace, except that they will require additional training and supervision.
Paez and Arendt	2014	United States	Survey	124 hotel and restaurant managers		Found a slightly positive attitude towards working with persons with disabilities.
Papakonstantinou and Papadopoulos	2017	Europe	Test-retest after short information program	40 employers		Employer's behaviours can be modified by providing information.

Peck and Kirkbride	2001	United States	Review of rehabilitation strategies to respond to employers' fears about employing persons with disabilities			Employers' four main fears: cost associated with hiring, need for additional supervision and lost productivity, not being able to terminate a bad hire and concern over being stuck with an unqualified employee.
Pearson, Ip, Hui, Ho, and Lo	2003	Hong Kong	Experimental Multiple pairwise comparison	409 job advertisements x 4 application letters each = application 1636 letters 331 responses		
Popovich, Scherbaum, Scherbaum, and Polinko	2003	United States	Survey Two studies without and one with the ADA definition of disability	118 undergraduates 147 undergraduates		Participants had little knowledge of what a disability is under the ADA. Women favor more reasonable accommodations. Experience with people with disabilities is associated with more positive affective reactions but not with more reasonable accommodations.
Ren, Paetzold, and Colella	2008	United States	Meta-analysis Literature review	23 articles re experimental studies		Having a disability and especially a mental disability is causally connected to negative human resource judgments.
Sālājeanu	2012	Holland	Interview	10 employers		Employers' willingness to hire persons with disabilities and actual practices differ.
Schur, Kruse, and Blank	2005	United States	Literature review Study corporate culture			Corporate commitment in and of itself is not sufficient. If supervisors and fellow employees do not accept the disabled worker's disability, initiatives will fail. These attitudes are affected by stereotypes, discomfort in being around persons with disabilities, strain caused by communication difficulties, personality and prior experience with disabled persons.

Stevens	2002	United Kingdom	Survey	120 companies		Specific impairments seen as obstacles to employment are limited keyboard/writing ability and speech and vision impairment. Important personal skills for successful work performance were seen as interpersonal social skills and the ability to handle information.
Stone and Wright	2013	United Kingdom	Replied to job postings with three CVs in three conditions (facial disfigurement, wheelchair and non-disabled)	144 companies		The study found recruitment discrimination against persons with facial disfigurement in jobs involving a greater degree of customer contact.
Ta, Wah, and Leng	2011	Malaysia	Survey	39 companies		Barriers to employing persons with disabilities are lack of knowledge and lack of experience in managing persons with disabilities. Employers perceive that they require more expense to supervise and train employees with disabilities. Most employers lack accessible environments.
Unger	2002	United States	Literature review	24 studies		The type and severity of disability may affect the likelihood of employment. Employers may sacrifice productivity for dependability. Employers recognize potential to enhance their community image. Employers with previous experience are more willing to employ persons with disabilities.
Vornholt, Uitdweillgen, and Nijhuis	2013	Netherlands	Literature review	48 articles		In respect to employers, they see hiring persons with a disability as a risk and resist making reasonable accommodations. They are motivated by concerns over cost, safety and legal liability or managerial biases. However, employers open to hiring who are characterized by openness to diversity and equality are also identified.
Waterhouse, Kimberly, Jonas, and Glover	2010	Australia	Focus group	40 employers		Employers see their own lack of knowledge, understanding and capability as the problem. They do perceive difficulties in hiring persons with disabilities, and this creates barriers.

Weigand	2008	United States	Experimental Ranking 50 mock job applicants	3 students		Emphasis on work experience is the most significant influence on preference ratings. Ratings are improved when a disability is presented in a positive way.
Woodley and Metzger	2012	New Zealand	Interviews and survey	106		There is a hierarchy of disability that does impact employers' perceptions. Perceptions as to how staff and customers may react may give social permission not to hire.
Zappella	2015b	Italy	Literature review (Abstract only)			The findings synthesised around some broad categories: personal characteristics of employers (perceptions about the legislation, emotional reactions, obstacles and concerns), characteristics of the organisation (type of the activity and methods of recruitment) and characteristics of the worker (physical, intellectual or acquired disabilities).
Zappella	2015a	Italy	Interviews Phenomenological approach	30	Intellectual disabilities	Found that decisions to hire were effected by 1) personal characteristics of the employer in respect to their concept of disability and past experience with persons with disabilities 2) the selection process i.e. identification of tasks and whether candidates are assessed by the employer or a third party, evaluated for limitations or abilities, 3) concerns of the employer over law, productivity, safety, and managing the employee's emotions.
Zappella	2015c		Interviews Phenomenological approach Delphi	30	Small and medium-sized companies	"The results show that experience towards the employee with a disability are influenced by three important topics: the[re] previous experience, the [choice] of the tasks and the reasons that lead to the recruitment process."
Zissi, Rontos, Papgeorgiou, Pierrakou, and Chtouris	2007	Greece	Cross-sectional survey	102 employers		Employers' attitudes differ depending on the type of disability.

Appendix B

Survey of Canadian Studies Re Employers' Attitudes Towards People With Disabilities 2000–2017

Angus Reid Institute	2015	Survey			One finding is high agreement with the statement "It is understandable that employers feel it is risky to hire people with physical disabilities".
Applications Management Consulting Ltd.	2014	Survey - Annual Calgary and Area Labour Market Report	801 business		53% of employers surveyed do not employ persons with disabilities. Only 15% proactively recruited persons with disabilities. 49% were unaware of available employment supports. More can be done to understand employers' concerns, dispel myths and provide more information.
Beaton, Kabano, and Léger	2012	Associative techniques, open-ended and semi- structured interviews	64 directors of human resources or head of company		They found implicit discrimination or aversive disablism. Employers apply the logic of the labour market as a way to evaluate persons with disabilities. Employers associate that different is incompatible with their business priorities in that they perceive limitations, underperformance, increased cost and extra supervision.
Benoit, Jansson, Jansenberger, and Phillips	2013	Quantitative analysis of Participation and Activity Limitation Survey 2006 Semi-structured interviews	41,750 18	Blind	They found very low labour force inclusion and lower inclusion than other disabilities. They found the major barrier is stigma.
Canadian Human Rights Commission	2012	Presents data from 2009 Survey on Labour and Income Dynamics and 2006 Participation and Activity Limitation Survey			This presents data on: 1) status in the labour force, 2) the relationship between specialization and employment, 3) work-related benefits and 4) discrimination experienced in employment .

Collin, Lafontaine-Émond, and Pang	2013	Literature review Background paper			Reviews Canadian legislation for people with disabilities.
Deloitte	2010	Focus group Roundtable	90 representatives from business and government agencies, employees		This identified barriers to employment, accommodation and accessibility, including attitudes and myths, the business case and the need to educate individuals involved in hiring and solutions.
Fredeen, Martin, Birch, and Wafer Panel on Labour Market Opportunities for Persons with Disabilities	2013	About 70 in-person and telephone interviews Consultations Approx. 130 online submissions	About 200 employers		This gives a number of recommendations and best practices. Education and training are required to overcome barriers, dispel myths and put theory into practice.
Gröschl	2007	Qualitative semi-structured interviews	42 hotel managers	Hospitality industry	This identified a number of barriers to hiring persons with disabilities in the hospitality industry due to managers' perceptions, such as lack of legislative pressure, concerns around aesthetics, productivity, training costs, accommodation costs, inflexibility and need for constant management.
Hand and Tryssenaar	2006	Cross-sectional survey involving interviews and a questionnaire	58 employers	Mental health	Employers have concerns about persons with disabilities' characteristics and particularly their work personality and concern over potential violence.
Institute for Research and Development on Inclusion and Society	2014	Literature review and consultations with Community Living leadership		Developmental disabilities	This discusses six themes that could comprise a comprehensive strategy. Policy recommendations to improve labour market access are given.
Lindsay, Goodfellow, Stergiou-Kita, Kirsh and Lero	2013	Scoping review	61 studies		This identifies promising policies, programs and practices for service providers, employers and policy makers. For employers it identifies the need for more employer awareness of disability, strong senior management commitment for the success of a disability employment initiative and the need for employers to interface with service providers to provide expertise on integration and accommodation.

Lindsay, Robinson, McDougall, Sanford, and Adams	2012a	Survey	33 employers	Adolescents	This found supervising youth with disability improved employers' perceptions in respect to employing persons with disabilities.
Lindsay, McDougall, and Sanford	2012b	Survey	36 supervisors	Youth	The study focused on supervising rather the hiring. Supervisors mostly improved their assumptions in respect to persons with disabilities after supervising youth with disabilities.
Lindsay, Robinson, McDougall, Sanford, and Adams	2005	Survey Qualitative and quantitative	33 employers	Youth	This identified some concerns about accommodations and workload. Overall, employers had a positive experience supervising youth with disabilities.
Loo	2002	Survey *Attitudes Toward Employing Persons with Disabilities* and *Marlow-Crowne Social Desirability Scale*	231 management undergrads		This found that there are positive attitudes towards employing persons with disabilities but also conflicting attitudes (i.e., organisations should not give special staffing consideration for persons with disabilities).
Loo	2004	Survey MacLean and Gannon's *Discomfort-Sympathy categories* and *Attitudes Toward Employing Persons with Disabilities* and *Interaction with Disabled Persons Scale*	231 management undergrads		This found that discomfort dimensions play a dominant role in attitudes towards employing persons with disabilities.
Morris-Wales	2010	Thematic literature review and meta-analysis			This identifies macro-level (exogenous economic circumstances and personal socio-demographics) and micro-level (workplace dynamics and psychological factors) as affecting job retention and progression.
Murray	2014	Policy analysis and semi-structured interviews	3 employers		This found variance in application of the policies and less understanding of the policies in organisations without a human resource department.
Partnership Council on Employment Opportunities for	2015	Policy review	13 members from various sectors		This makes a number of recommendations.

People with Disabilities					
Public Service Commission of Canada Equality and Diversity Directorate Policy Branch	2011	Literature review			This reviews government surveys, barriers to employment and best practices.
Quesnel	n.d.	Local survey	30 persons with disabilities 62 employers		This identifies that less than 50% of businesses surveyed hire persons with disabilities. Those who did employ persons with disabilities only experienced minor challenges. Most of those who had not employed persons with disabilities would not know how to attract them.
Shaw	2013	Scoping review/Literature review	38 evidence articles 19 grey literature		Four predominant barriers are identified: attitudinal barriers, employer barriers about performance, employers' lack of awareness of disability and managing disability and lack of integration of services and policies to promote hiring.
Shankar et al.	2014	Interviews	28 employers	Mental illness	A high percentage of the employers were in favor of hiring persons with disabilities. Previous negative experience with an employee with mental illness may be a barrier to employment. Employers who have had positive experiences or worked with employment placement providers have less prejudicial attitudes. The findings suggest the need for support for front-line managers.
Shier, Graham, and Jones	2009	One-to-one semi-structured open-ended interviews and focus groups	56 persons with a disability participating in employment training programs in Calgary and Regina		Persons with disabilities face extensive stigmatization and discrimination within the labour market. Discrimination and labelling are the primary barriers.

Shuey and Jovic	2013	Quantitative analysis of Participation and Activity Limitation Survey 2006	1,567 persons with a disability		Persons in precarious employment are more likely to have unmet accommodation needs.
Till, Leonard, Yeung, and Nicholls	2015	Data from 2012 Canadian Survey on Disability			This discusses barriers to employment: 1) greater need for reduced or modified hours 2) unmet accommodations. Identifies barriers to looking for work (lack of available jobs, lack of training and experience, lack of previous employment, discrimination).
Turcotte	2014	Data from 2012 Canadian Survey on Disability			Discusses the perceptions of persons with disabilities regarding employment discrimination.
Wilton and Schuer	2006	Semi-structured interview	46 employers		This found: 1) Some manufacturing employers are concerned about the feasibility of accommodating the physically disabled

Appendix C

Case Coded

Case	Representa-tion	Intersec-tionality	Result	Justification	Remedies
Aitchison v. L & L Painting and Decorating Ltd., 2018 HRTO 238 <http://canlii.ca/t/hqsnf>			Applicant successful. Not sufficiently clear medical evidence to establish restriction against standing in excess of an hour, therefore requiring certain work in excess of an hour was not discriminatory. There is no evidence that the applicant requested an accommodation with respect to his marijuana use Would have no difficulty in concluding that the applicant's preferred accommodation presented an undue hardship in light of the health and safety concerns particular to this workplace. [159] I find that the applicant has failed to make out a breach of the duty to accommodate with respect to his marijuana use. No breach in procedural duty to accommodate as the applicant had already committed a serious health and safety breach that was in violation of the zero-tolerance policy before the respondent was ever made aware of any accommodation need	Breach of no drug policy - health and safety violation.	Application dismissed

			Termination due to employee's misconduct, no evidence of discrimination.		
Aitchison v. L & L Painting and Decorating Ltd., 2018 HRTO 238 <http://canlii.ca/t/hqsnf>			Applicant successful. Not sufficiently clear medical evidence to establish restriction against standing in excess of an hour, therefore requiring certain work in excess of an hour was not discriminatory. There is no evidence that the applicant requested an accommodation with respect to his marijuana use. Would have no difficulty in concluding that the applicant's preferred accommodation presented an undue hardship in light of the health and safety concerns particular to this workplace. [159] I find that the applicant has failed to make out a breach of the duty to accommodate with respect to his marijuana use. No breach in procedural duty to accommodate as the applicant had already committed a serious health and safety breach that was in violation of the zero-tolerance policy before the respondent was ever made aware of any accommodation need. Termination due to employee's misconduct, no evidence of discrimination.	Breach of no drug policy - health and safety violation.	Application dismissed.

Betts v. United Brotherhood of Carpenters and Joiners of America, Local 1256, 2017 HRTO 886 (CanLII), <http://canlii.ca/t/h4zzj>			Applicant unsuccessful. "…the parties agreed for the purposes of this hearing that the local was the employer of the apprentices Applicant has proved a prima facie case of discrimination. Constructive discrimination in the way it administered testing in not considering the applicant's disability "result, the local took no steps to address the applicant's needs and inquire as to how it might best accommodate those needs. In addition, the local's evidence was that contrary to the limitations expressed Dr. Svec's letter of January 2013, it required its members not only to do the mock exam but to continue to challenge the exam, which was clearly contrary to the applicant's disability related needs." The neutral rule imposing a deadline by which certification was required had an adverse effect of not allowing the applicant to work. Found the local had no duty to inquirer prior to receiving doctor's letter.	Union required its members not only to do the mock exam but to continue to challenge the exam. Local failed to accommodate once it got the January 2013 medical information. The local should have revisited its imposition of a deadline on the applicant to challenge the exam and get his COQ, which resulted in the applicant's lay off. Justification behaviour –"I acknowledge the local's position that the barrier to the applicant returning to work was that he would not apologize for his Facebook postings, and there is no doubt that this was a factor. However, this was not the only barrier to the applicant returning to work. The local told the applicant he not only had to write the mock exam but had to continue challenging the exam. That directly contradicted Dr. Svec's January 7, 2013, recommendation that the applicant be permitted to not write the exam for a period of time." "Even at that stage, it is clear the local did not believe or understand the applicant had	Injury to dignity - $8,000. Public interest – develop a policy and procedure to accommodate employees with disabilities, and that it retains an expert in human rights to provide training to the executive board.

				anxiety and associated restrictions, in the face of having been provided with precisely this information" Duty to inquire – "The local established in cross-examining Dr. Svec that it tried to contact the applicant after January 2013 but was not successful because the applicant would not speak to it. However, as I indicated above, it was open to the local to attempt to communicate with Dr. Svec's office and it did not do so until August 2013. I find that given the relationship between the applicant and the local at that point in time, it should have been obvious to the local that the applicant would be hampered in his ability to speak to anyone from the local, particularly given his anxiety and the fact the local had laid him off."	

Bonnici v. Loblaws Inc., 2017 HRTO 1456 (CanLII), <http://canlii.ca/t/hn8cf>	Represented		Applicant unsuccessful. Procedural breach of duty to accommodate in failing to transmit accommodation requirements to the applicant's store. Substantive breach to accommodate in requiring applicant to lift waits in excess of his restrictions.	Mistaken belief about adequacy of accommodations - "The respondent states that due to a misunderstanding the store where the applicant works did not receive the FAF. …Consequently, until recently, the store had accommodated the applicant based on the doctor's note that claimant submitted in July 2013." "The respondent states that from October 2013 it has no record of anyone advising it that the claimant was required to perform duties beyond his restrictions. Management personnel at the store believed they were accommodating the claimant appropriately."	Injury to dignity $500.
Bray v. Ontario (Ministry of Community Safety and Correctional Services), 2017 HRTO 752 (CanLII), <http://canlii.ca/t/h4kt2>	Self-represented		Applicant successful. No evidence that the rule breached rights. No evidence of disability at the time of writing the exam, therefore cannot establish a prima facie case. No proof that the rule requiring 75% on exams breached his rights. Employer satisfied duty to inquire by asking the applicant.	Applicant cannot demonstrate how the 75% testing requirement is a breach of the code. They are not liable to provide accommodation as non-were requested. "It submits that if it had a duty to inquire, it satisfied that duty when he was asked those questions."	Application dismissed.

Brittain v. 2374855 Ontario Inc. o/a Minden 50s Diner and Lisa Hope, 2017 HRTO 1688 <http://canlii.ca/t/gv293>			Applicant unsuccessful. Discriminated in terminating employee due to her mental illness.	Justification – employee abandoned job Excuse Performance/ behaviour - no longer reliable due to abscesses and no longer reliable because of her mental health issues.	Injury to dignity $15,000 Public interest Remedy - retain an expert in human rights to train supervisory staff and management in managing human rights issues in particular the accommodation of persons with mental health disabilities.
Brown v. 2229853 Ontario Limited, 2018 HRTO 814 (CanLII), <http://canlii.ca/t/hstzv>	Repres-ented		Applicant unsuccessful. Respondent failed in her duty to accommodate applicant's disability and found the manager harassed the applicant on the basis of her disability.	Noted the respondents in default.	Injury to dignity: $15,000 Public interest remedy: training.

Carter v. Chrysler Canada Inc., 2017 HRTO 168 (CanLII), <http://canlii.ca/t/gxfnp>	Self-represented		Applicant unsuccessful. Discriminated against the applicant on the grounds of disability by refusing to consider assigning the applicant to temporary postings. "I conclude that in the period from August 2013 to May 2014, the respondent discriminated against the applicant on the grounds of disability by refusing to consider assigning the applicant to temporary postings that were available based on his seniority and that were physically suitable." "The respondent does give preferential treatment in regard to access to non-standard jobs to injured workers who have an active claim with the WSIB. This results from the operation of the WSIA and not from discrimination contrary to the *Code*. The respondent did discriminate against the applicant by precluding consideration of categories of jobs other than a permanent standard job in the period from August 2013 to May 2014. "This is not a distinction that is based on a prohibited ground. While the result of the policy is that some disabled workers are treated more advantageously than others, 21 2017 HRTO 168 (CanLII) the distinction does not arise from disability but rather	Denial of failure to accommodate. "The respondent subsequently agreed that because of cost incentives created by the WSIB system, the respondent is more likely to offer work to workers with restrictions resulting from work-related injuries as compared to workers with restrictions from non-work-related injuries. However, the respondent maintained that the applicant was not discriminated against, and that the respondent fully met its duty to accommodate the applicant."	Injury to dignity - $5000

			from the operation of a statutory scheme."		
Conklin Applicant and Ron Joyce Jr. Enterprises Ltd. o/a Tim Horton's, 2017 HRTO 723 <http://canlii.ca/t/h4jfc>	Self-represented		Applicant successful. Terminated due to asking for sick leave, a reason for the decision to terminate the employment was that the applicant asked for accommodation of a disability. "find that this does not reasonably lead to the conclusion that there was a pattern of excessive absenteeism." Code applies to probationary employees.	Excuse - "The respondent's explanation for why it did not accommodate the applicant is that she was a probationary employee who had demonstrated a pattern of excessive absenteeism."	Injury to dignity - $10,000 Public Interest Remedy: "The respondent is directed to review its policies in the manner described above to ensure that they reflect the fact that the Code applies to probationary employees."
Danso v. Maximum Seafood, 2018 HRTO 486 (CanLII), <http://canlii.ca/t/hrmrv>	Self-represented		Applicant successful. Found that the respondent was not required to hire an additional employee to help the applicant with the essential duties of the job. "…given the nature of the work and the applicant's restrictions, that they had nothing to offer to him"	Made efforts to accommodate the applicant. Based on the restrictions provided by the applicant the respondent could not accommodate the applicant.	Application dismissed.
Dix v. The Twenty Theatre Company, 2017 HRTO 394 (CanLII),	Self-represented	Sex	Applicant unsuccessful. Decision to terminate was made prior to disclosure of disability.	Fired for performance reasons.	Injury to dignity $5000 Public Interest Remedy:

<http://canlii.ca/t/h33vx>			Found reprisal but that the applicant would have been terminated any way.		mandatory human rights training for all board members.
Fiallos v. PWD-Division of Instore Focus Inc., 2017, HRTO 469, <http://canlii.ca/t/h3hr1>	Self-represented		Applicant successful. Found that accommodations provided and no harassment on account of disability.	Denied discrimination, historically had provided accommodation.	Application dismissed.
Graff v. Jones Lang LaSalle Real Estate Services Inc., 2018 HRTO 104 (CanLII), <http://canlii.ca/t/hq036>			Applicant unsuccessful. - "…the applicant has failed to meet the test for reconsideration."	The applicant did not ask for accommodation during his employment, nor did he act in such a way as to alert the respondent to the possibility that he had disability-related needs that may have required accommodation. Terminated for reasons unrelated to disability – applicants' salary was too high.	Request for reconsideration denied.
Groh v. Waterloo (Regional Municipality), 2017 HRTO 1460 (CanLII), <http://canlii.ca/t/hn8c5>			Applicant unsuccessful. Constructively discriminated against the applicant in the manner in which they conducted the return-to-work meeting in that they conducted it the same way they would have with someone who did not have the applicant's particular limitations, "the applicant has not established a *prima facie* case of discrimination by	Both Waterloo and the union representatives knew of the applicant's limitations prior to the return-to-work meeting. "I also recognize that the respondents did not intentionally discriminate against the applicant, but intent is not a requirement of discrimination. The	Injury to dignity - $8000. Public interest remedy denied.

			Waterloo in the manner in which it requested medical documentation from him between August 2011 and September 2012." I acknowledge the timeline in which to provide the information was short, but that does not mean it is discriminatory." "I find no liability on the union in the area of employment because it did not participate in establishing a discriminatory rule, nor did it impede Waterloo's attempts to accommodate the applicant." "In summary, I find the combined actions of the respondents constituted constructive discrimination against the applicant in the way in which they handled the return-to-work meeting and the events that occurred upon the applicant's return to work."	respondents failed to recognize that the way they conducted the return-to-work meeting did not permit the applicant to follow and understand it, and it did not take into consideration his particular limitations." "The cumulative effect of the events on the applicant obviously continued unabated"	
Haley v. 5274398 Manitoba Limited o/a Cross Country Manufacturing, 2017 HRTO 1694, <http://canlii.ca/t/hrs42>	Self-represented	Race	Applicant unsuccessful. Terminated for asking for accommodation. "based on the evidence before me I cannot find that it was zero tolerance in practice but was rather selectively applied depending on the circumstances. On July 8, 2017, it was selectively applied against the applicant."	Excuse – zero-tolerance	Injury to dignity - $5000. All managers at the respondent shall take the eLearning module - Human Rights 101.

Harriott v. Conavi Medical Inc., 2018 HRTO 613 (CanLII), <http://canlii.ca/t/hrzh4>	Self-represented		Applicant successful. Applicant's disability was not a factor in the termination.	Terminated for poor performance, accommodations provided.	Application dismissed.
Hayes v. R.J. Burnside & Associates Ltd., 2017 HRTO 790 (CanLII), <http://canlii.ca/t/h4q0r>	Repres-ented		Applicant unsuccessful. Injury to dignity in the way she was accommodated.		Injury to dignity - $7,500.
Hutchinson v. Queen's University, 2017 HRTO 326, <http://canlii.ca/t/h1tlp>	Self-represented		Applicant successful. The University had no ongoing duty to accommodate the applicant since her residency with the University ended - therefore the change to not require fees to register in a subsequent year did not change the applicant's status. Application untimely as against the personal defendant.	Application is an abuse of process.	Application dismissed.
Jones v. EJ Industries Limited, 2017 HRTO 1518 (CanLII), <http://canlii.ca/t/hnwvj>	Self-represented	Race, Age	Applicant successful. "…the applicant has not presented any evidence that could demonstrate that he had a disability while he was employed at the respondent." Found "there is no evidence to support a conclusion that in terminating the applicant, the respondent intended to reprise against him for asserting his rights as a person with a disability"	Absenteeism.	Application dismissed.

Jones v. EJ Industries Limited, 2017 HRTO 1518 (CanLII), <http://canlii.ca/t/hnwvj>	Self-represented	Race, Age	Applicant successful "…the applicant has not presented any evidence that could demonstrate that he had a disability while he was employed at the respondent." Found "there is no evidence to support a conclusion that in terminating the applicant, the respondent intended to reprise against him for asserting his rights as a person with a disability."	Absenteeism.	Application dismissed.
Kakulakanthan v. Oncidium Health Group, 2017 HRTO 236, <http://canlii.ca/t/gxrjl>			Applicant successful. No prima facie case of discrimination.		Request to reconsider denied.
Kasubeck v. General Dynamics Land Systems Canada, 2017 HRTO 390 (CanLII), <http://canlii.ca/t/h329q>			Applicant successful. No breach of procedural duty to accommodate due to an agreement between the parties.	The only medical accommodation that she submitted to the respondent was a requirement for graduated hours of work, which were given to her. Found that she cannot prove that she was discriminated against by the respondent in employment.	Application denied.
Konesavarathan v. Middlesex London Health Unit, 2017 HRTO 454<http://canlii.ca/t/h3fpp>	Self-represented		Applicant successful. Despite differential treatment, the applicant did not demonstrate adverse impact.	despite shorter practicum due to medical issues no adverse effect The respondent maintains it used appropriate interview screening criteria.	Application dismissed.

			No evidence that not granting interview was due to previous request for accommodation or a reprisal.		
McDonald v. CAA South Central Ontario, 2018 HRTO 163 <http://canlii.ca/t/hs4kx>	Self-represented	Race	Applicant successful. Did not find sufficient proof that the requested accommodation was required. Found harassment on account of race. Did not find discrimination or reprised against her when it denied her transfer request.	Since she had been cleared to return to work and had not done so, the respondent regarded her failure to return to work as a resignation. "I am not persuaded that her disability precluded her from returning if the respondent undertook to facilitate her return to work in the way that Ms. Duncan described it above."	Remedies awarded for racial harassment. Public Interest Remedy: race training.
Morrissey v. OBN Security Investigative Consultants Inc., 2017 HRTO 756 <http://canlii.ca/t/h4lzw>	Repres-ented		Applicant successful. No violation of the code has not stablished that he was discriminated against on the basis of disability, he did not request any accommodation, and that the respondent did not fail to accommodate him.		Application dismissed.
Passmore v. Illumiti, 2017 HRTO 725 <http://canlii.ca/t/h4jfw>			Applicant unsuccessful Disability was a factor in termination.	Excuse-poor performance. Excuse- decision made before advised about disability (found not credible). No evidence of undue hardship -"Although the respondent's witnesses all appeared to have the view that allowing the applicant to work	TBD

				even for a short period of time on a part-time basis was unworkable, there was no evidence put before me to establish this would have constituted an undue hardship."	
Philippe v. The Ottawa Hospital, 2017 HRTO 822 <http://canlii.ca/t/h4rdc>		Race, Colour	Applicant successful. Applicant was accommodated. Delay in processing E.I. was due to complications, response to calling in sick was not discrimination.	"The respondent argues that the applicant's restrictions during both her back injury and arm injury were fully accommodated, and the applicant never indicated otherwise at the time."	Application dismissed.
Pourasadi v. Bentley Leathers Inc., 2017 HRTO 1418 (CanLII), <http://canlii.ca/t/hmthq>		Race	Applicant successful. Respondent did not breach substantive component of duty to accommodate by not transferring her and demoting another employee. Bundling the work that was within the applicant's restrictions would not result in a useful and productive job Accommodation "…does not require permanently changing the essential duties of a position or permanently assigning the essential duties of a position to other employees. The duty to accommodate also does not require exempting employees from performing the essential duties of their position." "...the applicant was incapable of performing a significant proportion of the essential duties of a Store Manager."	Respondent made efforts to accommodate employee.	Application dismissed.

Prothero v. Ontario (Community Safety and Correctional Services), 2016 HRTO 1481 (CanLII), <http://canlii.ca/t/gvr9v>			Applicant partially successful. Found harassment by personal respondent, and by organisational respondent, in the manner that documentation was required by personal respondent and with the knowledge of the organisation. "…not accepting the results of the WDHP process undertaken by the respondent employer in respect of the applicant's first complaint, primarily against Ted Clark." Found that there was not discrimination on account of disability as the applicant indicated he could not return to work "Given this assertion, it is difficult to see how an accommodation process is triggered." Reprisal not found.	"Ted Clark denied this version of events and disputes that he threatened the applicant with loss of income. His evidence is that the initial note provided was insufficient as it provided no indication of the applicant's limitations or restrictions." "The respondents point out that by the time the WDHP investigation concerning Ted Clark had concluded, the applicant had been told he was not reporting to Ted Clark any longer. The reporting relationship had been changed and his new supervisor would be someone who had been involved in managing the applicant's disability related leave." "None of these proposals were met with agreement. The respondent employer took the view then and over the next few years that the applicant's job was at a particular location. Given his job, the respondent employer said that it was necessary that he be present most of the time where the server and its users are located, which is in Toronto." "Further, the respondent employer took the position	Injury to dignity organisational respondent $25,000. Personal respondent $2,500.

				that in order to provide IT assistance to people in the Bureau, the applicant would need to be in the main office location where most employees from the field would come for assistance. Finally, the applicant's job also required travel to locations around the province to address IT issues, which could not be done if he needed to remain at a location close to his home." "The respondent employer has sent a number of communications to the applicant indicating that, since that time, he is considered to be absent from the workplace without approved leave. The respondent employer has also requested by way of letters dated February 5, 2013, and February 7, 2013, that the applicant take part in an independent medical assessment ("IME"), which the applicant declined at the time, and has continued to decline to participate in."	
Rajic v. Omega Tool Corp., 2017 HRTO 818 (CanLII) <http://canlii.ca/t/h4rd6>			Applicant successful. "He was terminated for reasons unrelated to his disability – for failure to comply with the respondent's reporting absences policy."	It was not his absences that led to his dismissal, but rather his repeated failure to follow requirments of the company's Attendance Policy.	Application dismissed.

Rae v. Near North District School Board, 2017 HRTO 568 (CanLII), <http://canlii.ca/t/h3x99>	Self-represented		Applicant successful. No evidence that advised the proposed accommodation did not meet her needs and no evidence provided as to how it did not meet her needs. No proof of reprisal.	Accommodation provided.	Application dismissed.
Renda v. Toyota Motor Manufacturing Canada Inc. 2017 HRTO 1002, <https://canlii.ca/t/h58ln>	Self-represented		Respondents motion to dismiss due to applicant filing claim outside of the one -year limitation period was successful as applicant could not demonstrate a good faith reason.		Application dismissed.
Scipione v. Safety First Consulting Professional Corporation, 2017 HRTO 1566 (CanLII), <http://canlii.ca/t/hp32m>			Applicant successful. No evidence of requesting accommodation. Threat made is not reprisal as did not request accommodation. Not reprisal as they had clear cut non-code reasons for dismisal.	Accommodation provided prior to return to work in the form of leave.	Application dismissed.
Sellner v. Canadian Cab Ltd, 2017 HRTO 1060. <http://canlii.ca/t/h5hxg>	Self-represented		Applicant unsuccessful. Found prima facie discrimination – fired for asking for accommodation – "I find that had the applicant not been suspended for failing to attend the meeting on April 5, 2016, she would have continued working as a cab driver at least until she was medically unable to work in early May 2016. The fact that she had been suspended, which as I	Justification Behaviour "The respondent's evidence was that they decided to terminate her because of her complaints history, as set out in her termination letter."	Injury to dignity - $20,000. Public interest remedy -board members of the respondent take the eLearning module-

			have found was discriminatory, therefore contributed to the fact that she was terminated on April 7, 2016. The suspension and the termination were therefore discriminatory." "She was effectively told to wait, which she did. She did not refuse to come after being told she did not have to climb the stairs [accommodation]. She was then suspended anyway for, in effect, following Ms. Bos' instructions."		Human Rights 101.
Shaver v. Queensway Carleton Hospital, 2017 HRTO 685 <http://canlii.ca/t/h4df8>	Self-represented	Age	Applicant successful. "…the evidence establishes that the on-call policy was applied to the applicant, not because of his age or disability, but because in 2010 he ceased on-call duties and there appeared to be no prospect that he would be able to resume those responsibilities." Found "…he has satisfied me that he was acting on the basis of a mandatory reporting obligation and not with an intention to reprise against the applicant."	Concerned about the applicant's competencies, privileges had responsibilities which he could not fulfill, the applicant's privileges were connected to the applicant's home department and therefore not entitled to special arrangements with another department where he was now practicing "….had a mandatory obligation to report to the College following receipt of the interim report"	Application dismissed.
Shepherd v. 1459312 Ontario Limited o/a Nathaniel's Restaurant, 2018 HRTO 235 (CanLII), <http://canlii.ca/t/hqsng>	Self-represented		Applicant successful. Found that applicant was terminated for his misconduct in the form of abscesses and unreliability. In the circumstances requiring a doctor's note was not discriminatory due to mental health.	Terminated for abscesses as a result of reckless behaviour. Requiring a doctor's note before the applicant could be reinstated.	Application dismissed.

Smith v. Canadian Tire 162 (Graham J. Keene Enterprises Ltd.), 2017 HRTO 582 (CanLII), <http://canlii.ca/t/h41z9>	Self-represented	Family status	Applicant successful. Applicant cannot prove that he was discriminated against on the basis of disability, family status, or reprisal-disciplinary action was not on account of disability and reprisal. Termination was not harassment.	Respondent denies discrimination, Employee was laid off due to low season and employees reduced hours, and as his performance had dropped.	Application dismissed.
Tavares v. Mistura Restaurant & Hang Out Inc., 2017 HRTO 1553 (CanLII), <http://canlii.ca/t/hp0lz>			Applicant partially successful. Found harassment by personal respondent, and by organisational respondent, in their manner that documentation was required by personal respondent and with the knowledge of the organisation. "…not accepting the results of the WDHP process undertaken by the respondent employer in respect of the applicant's first complaint, primarily against Ted Clark." Found that there was not discrimination on account of disability as the applicant indicated he could not return to work "Given this assertion, it is difficult to see how an accommodation process is triggered." Could not find reprisal.	Concerned for the applicant's personal safety. Performance issues. Not suited for the team system used by the respondent. Would have been fired once heard about drinking on the job	Injury to dignity $6,000. Public Interest – training.
Titze v. O.I. International Inc., 2018 HRTO 77 (CanLII) <http://canlii.ca/t/hsxj8>			Applicant unsuccessful. "However, in the circumstances I am satisfied the applicant's need for accommodation was apparent. The duty to inquire was triggered."	Failure to Inquire- "The respondent contends that this case does not involve the duty to accommodate as the applicant never requested accommodation."	Injury to dignity - $15,000. Public Interest Remedy:

			"In arriving at the conclusion that it had cause to terminate the applicant's employment, the respondent relied on a rigid application of the employment contract and related documents that ignored the workplace reality, the real as opposed to the ostensible chain of command on the worksite, and the pressure that its employees were under to complete the project within a certain timeframe."	"In conclusion, I find that the respondent's failure to obtain information about the applicant's disability, and to consider whether the applicant would be able to return to work before the end of his contract and whether it could reasonably accommodate his disability was contrary to the provisions of the Code." Excuse- Zero-tolerance of falls "The assertion of cause by the respondent to terminate the applicant's employment was a pretext in order to avoid its obligation to accommodate the applicant for the remainder of his term of employment." "…the respondent was well aware the zero-tolerance policy was not being observed or enforced in the workplace. The respondent cannot rely on the workplace rule to support its claim of termination for cause." "The respondent blames the applicant for not wearing fall arrest equipment when it was well aware that Assmont and its managers were at fault for their failure to provide a safe workplace"	Certain managers to take Human Rights 101 and obtain and read a copy of the Ontario Human Rights Commission's "Policy and Guideline on Duty to Accommodate ".

Trinh v. CS Wind Canada Inc., 2017 HRTO 755 <http://canlii.ca/t/h4lzv>		Race Sex and family status	Applicant unsuccessful. Constructive discrimination – neutral rule – not allowing her the choice to attend meeting due to one person per department rule. Refused request for accommodation. Found harassment and a poisoned work environment.	"The respondent's response to her request for the reduced hours appeared to be that there was a requirement that she work full-time hours or risk being fired." Excuse – request not specific "The respondent submits that the decision to deny her request for half-days is not connected to disability or pregnancy because what is outlined in the doctor's note is not an indication that she had a disability that needed to be accommodated." Blame the applicant - The respondent argues that since the applicant had the employee handbook, she should have been aware that she should have gone to human resources if she was not accepting of Mr. Shin's response. The respondent also submits that Mr. Shin did not have the authority to terminate the applicant's employment so this could not be seen as a failure to accommodate. It submits that the applicant herself could have suggested alternatives such as starting her maternity leave early." Excuse- "The respondent submits that the comments	Injury to dignity - $25,000. Public Interest – review policy and training for persons in positions of management and above.

				made were the result of her poor work performance and the difficulties the applicant was experiencing when she returned from her maternity leave."	
Watkins v. Toronto (City), 2017 HRTO 504 <http://canlii.ca/t/h3q11>	Self-represented		Applicant successful. No evidence to indicate that his employer knew anything about a disability or a need for accommodation.		Application dismissed.
Youssef v. Gemstar Security Services Ltd., 2017 HRTO 1434 (CanLII), <http://canlii.ca/t/hmvrt>			"I accept the respondent's position that its decision to terminate the applicant's employment was the result of multiple actions by the applicant and not just the culminating incident." "In the final analysis, the applicant has failed to establish that the timing of his job termination or the respondent's reaction to his request for workplace accommodation supports the inference of discrimination on the basis of disability."	Car accident culminating event in a series of incidents - determined the applicant was not suitable for the position.	Application dismissed.

Appendix D

Codes

Codes	Sub-Codes
Accommodation as adverse treatment	
Constructive discrimination	- Adverse effects discrimination -Constructive discrimination - Discrimination against mat leave
Definition of employer	
Disability does not establish reason for delay in filling	
Disability as part of the reason for termination	Mental Health
Discrimination due to restrictions	
Excuse - absenteeism	-Excuse – applicant's behaviour -Excuse – Abandonment -Excuse – decision to terminate made before --Disability occurred abandonment -Excuse not to accommodate -Excuse – medical note not specific of Disability -Excuse - performance -Excuse – probation -Excuse – zero-tolerance policy for all violations -Drinking or drug use as excuse not to accommodate
Failed to accommodate	Failure to substantively accommodate - Not taking account of disability needs
Failure to inquirer – procedural accommodation	-Duty to inquirer -Procedural accommodation

	-Need for accommodation apparent
Injury to dignity	
Intersectionality	-Intersectionality – sex and family status -Intersectionality – race not reason to terminate -Intersectionality – race and palace of origin -Intersectionality – sexual solicitation
No discrimination as lacked experience	
No evidence of advising of need for accommodation	-Accommodation not requested - Accommodation requested undue hardship -Insufficient evidence that the requested accommodation is required -Insufficient medical evidence therefore not failure to accommodate -Not transferring applicant is not failure to accommodate
No *prima facie* case	
Not failure to accommodate where claimant cannot be accommodated	-Applicant did not want to work -Applicant resentful -Distinction not discrimination
Not discrimination	
Not harassment	
Not represented by council	
Not reprisal	-Not retaliation -Termination not reprisal where other reasons exist
Poisoned environment	-Harassment -Undue hardship
Precarious employment	
Reprisal	-Threat not reprisal
Requested accommodation provided	

Rule does not breach code	
Satisfied duty to inquirer	
Self-represented	
Systemic remedies	

Appendix E

Cases Reviewed but not Coded

Case Name	Decision Type	Representation	Outcome
A.B. v. Z Co., 2018 HRTO 350 (CanLII), <http://canlii.ca/t/hr5vh>	Consent Order - ordering the accommodation to applicant for disability-related absences by classifying such absences as excused absences and restoration to the applicant's allotment of personal emergency leave days .		Found in employee's favour
Agachi v. Starbucks Canada, 2017 HRTO 1582 (CanLII), <http://canlii.ca/t/hp337>	Interim Decision - denying request for respondent to produce documents.		Found in employee's favour
Akash v. Toronto Transit Commission, 2012 HRTO 677 (CanLII), <http://canlii.ca/t/fqwp2>	Interim Decision - application dismissed in part as having no prospect of success as employer accommodated the claimant.	Self Represented	Found in the employer's favour
Alli v. Mid-Ontario Diesel Limited, 2017 HRTO 17 <http://canlii.ca/t/gwsp8>	Decision – case dismissed as did not allege in any substantive way that disability was a factor in her termination.	Self Represented	Found in the employer's favour
Allen v. ACL Steel Ltd., 2017 HRTO 1095 (CanLII), <http://canlii.ca/t/h5mcl>	Decision - dismissed as having no prospect of success. Frustration with the WSIB process and employer objecting to obtaining specialized medical opinion is not discrimination.	Represented by other than a lawyer	Found in the employer's favour
Atadero v. Shoppers Drug Mart Inc., 2017 HRTO 780 (CanLII) <http://canlii.ca/t/h4mz1>	Interim Decision – the applicant's request to amend her Application to include reprisal is denied; The applicant's request to amend the remedies that she is seeking is granted; the applicant's allegations that are before the Tribunal are only those set out in her Application and Reply; Some allegations dismissed as untimely.	Self Represented	Mixed result

Atadero v. Shoppers Drug Mart Inc., 2017 HRTO 41 (CanLII), <http://canlii.ca/t/gx00l>, retrieved on 2018-06-06	Interim Decision - preliminary matters re production of information denied, denied a request for a Tribunal Ordered Inquiry to obtain evidence, and the continuation of Shoppers Drug Mart as a party	Self Represented	Mixed result
Atas v. Toronto Police Services Board, 2018 HRTO 161 (CanLII), <http://canlii.ca/t/hqhdl>	Application dismissed against certain defendants as having no prospect of success	Self Represented	Found in the employer's favour
Backus v. The Brick, 2017 HRTO 789 (CanLII), <http://canlii.ca/t/h4ppt>	Decision - application dismissed due to civil proceeding seeking the same remedies		Found in the employer's favour
Barker v. Elizabeth Fry Society of Simcoe County, 2017 HRTO 805 (CanLII), <http://canlii.ca/t/h4qg6>	Interim Decision – application not barred just because commenced a civil action arising from the same facts, as the civil action does not allege infringement of the code		Found in employee's favour
Badrounova v. Sunnybrook Health Sciences Centre, 2017 HRTO 647 (CanLII), <http://canlii.ca/t/h4bw3>	Interim Decision - re granting the removal of individual respondents		Found in the employer's favour
Bageya v. 559185 Ontario Ltd., 2018 HRTO 146 (CanLII), <http://canlii.ca/t/hqqcq>	Interim Decision – applicants request to amend the application is granted; ordered respondent to provide information about other certain other employees.	Self Represented	Found in employee's favour
Bansal v. RBC General Insurance Company, 2017 HRTO 1320 (CanLII), <http://canlii.ca/t/h6lbr>	Interim Decision – application dismissed against certain parties.	Self Represented	Found in the employer's favour
Barr v. Coca-Cola Refreshments Canada Company, 2017 HRTO 521 (CanLII) <http://canlii.ca/t/h3qrg>	Decision - dismissed as having no reasonable prospect of success.	Self Represented	Found in the employer's favour
Bassis v. Commissionaires Great Lakes, 2017 HRTO 1667 (CanLII), <http://canlii.ca/t/hpf41>	Decision - application dismissed as a nose bleed does not come within the definition of a disability.		Found in the employer's favour

Bean v. CAAT Pension Plan, 2017 HRTO 1487 <http://canlii.ca/t/hnqww>	Decision - no reasonable prospect of success - applicant has not been able to point to any evidence of discrimination beyond her own suspicions.		Found in the employer's favour
Bedawi v. The Algonquin College of Applied Arts and Technology, 2017 HRTO 1338 (CanLII), <http://canlii.ca/t/h6nz4>	Interim Decision – Removing personal respondents.	Self Represented	Found in the employer's favour
Betta v. District School Board Ontario North East, 2018 HRTO 171 (CanLII), <http://canlii.ca/t/hqkr4>,	Interim Decision – allegation of discrimination on the basis of disability is dismissed as having no prospect of success.		Found in the employer's favour
Bigelow v. Toronto District School Board, 2018 HRTO 263 (CanLII), <http://canlii.ca/t/hqwrt>	Interim Decision – denying consolidation of three complaints.		Found in the employer's favour
Biondic v. Intact Financial Corporation, 2017 HRTO 80 (CanLII), <http://canlii.ca/t/gx2bx>	Decision – Dismissed as an abuse of process due to multiple late adjournments, and unsupported request for accommodation.		Found in the employer's favour
Bilz v. Toronto (City), 2018 HRTO 761 (CanLII), <http://canlii.ca/t/hsjkv>	Interim decision – re access to health files.	Self Represented	Found in the employer's favour
Bociurko v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, 2017 HRTO 1123 (CanLII), <http://canlii.ca/t/h5qf0>	Interim decision – certain parties removed from the application		Found in the employer's favour
Bourdeau v. Kerry's Place Autism Services, 2017 HRTO 936 (CanLII), <http://canlii.ca/t/h52p3>	Decision - As the applicant didn't actually apply for the position no discrimination could have occurred.	Self Represented	Found in the employer's favour

Bradford v. Kappeler Masonry Ltd., 2017 HRTO 1479 (CanLII), <http://canlii.ca/t/hnqvb>	Interim decision – application against individual respondent stayed because the corporate respondent, against which the application is already stayed due to bankruptcy proceedings, would be liable for any monetary remedy.		Found in the employer's favour
Brown v. Tamarack Lumber Inc, 2017 HRTO 826, <http://canlii.ca/t/h4v0w>	Decision – HRTO does not have jurisdiction as cannot proceed with an application when a civil proceeding has been commenced.		Found in the employer's favour
Butcher v. Muskoka Algonquin Healthcare, 2017 HRTO 1601 (CanLII), <http://canlii.ca/t/hp4p2>	Interim decision - application dismissed against the union as no evidence that the union pressured the applicant into the return to work agreement, effecting her seniority.		Found in the employer's favour
Caissie v. Reko Automation and Machine Tool, 2015 HRTO 1594 (CanLII), <http://canlii.ca/t/gmcnd>	Interim decision – despite the ongoing appeal at the WSIB, it appears that further deferral until after WSIAT has dealt with the appeal could mean a further delay of two or more years still. And it is not clear that even that delay would mean that the substance of the application was appropriately dealt with.	Represented by other than a lawyer	Found in employee's favour
Carmody v. Longo Brothers Fruit Market Inc., 2017 HRTO 338 (CanLII), <http://canlii.ca/t/h2pfq>	Interim decision – request to have respondent provide telephone numbers and addresses of employees who may be witnesses granted.		Found in employee's favour
Carter v. Chrysler Canada Inc. , 2017 HRTO 788	Reconsideration- The applicant has not established that any of the criteria in Rules re reconsideration apply here.	Self Represented	Found in the employer's favour
Czajkowski v. Hamilton (City), 2017 HRTO 924 (CanLII), <http://canlii.ca/t/h51pl>	Decision - Application to reactivate claim after arbitration denied as being untimely.	Self Represented	Found in the employer's favour

Dempsey v. Ontario (Treasury Board Secretariat), 2017 HRTO 572 <http://canlii.ca/t/h406d>,	Interim decision – cannot find no reasonable prospect of success deferred granted pending the resolution of the union's policy grievance at the Grievance Settlement Board, amended on consent to remove allegations re. disability accommodation.	Self Represented	Mixed result
Dias v. the Liquor Control Board of Ontario, 2017 HRTO 348 <http://canlii.ca/t/h2ssd>	The Tribunal has held that failure to meet the required timelines means the Tribunal does not have jurisdiction to hear an application. The limitation period is consistent with the objective that human rights claims should be dealt with expeditiously. Thus, the Code requires that an individual who wishes to pursue a human rights matter at the Tribunal to act with all due diligence and file their application within one year of the incidents giving rise to the claim.	Self Represented	Found in the employer's favour
Di Capua v. Magna International Inc., 2018 HRTO 79 (CanLII) <http://canlii.ca/t/hpx16>	Interim decision – the respondent's request that the application as a whole be dismissed for delay is denied; the respondent's request that certain allegations in the application and reply be struck out as untimely is granted in part; the respondent's request that certain allegations in the reply be struck out as improperly raised is denied; the respondent's request that certain allegations in the Application and Reply be dismissed as having no reasonable prospect of success is denied; and the respondent's production requests are granted in part.		Mixed result
Dutra v. Toronto Police Services Board, 2017 HRTO 447 (CanLII), <http://canlii.ca/t/h3b74>	Interim Decision – certain allegations dismissed as untimely, application against personal respondent dismissed, granted request to amend application to add a later event.		Mixed result
Dombroskie v. Compass Group Canada Ltd., 2017 HRTO 1482 (CanLII), <http://canlii.ca/t/hnqwt>	Interim Decision – As grievance withdrawn no other action has dealt with the substance of the claim therefore not dismissed.		Found in employee's favour

Edgar v. Vantage Foods (ON) Inc., 2017 HRTO 760 (CanLII), <http://canlii.ca/t/h4m23	Interim Decision - application to dismiss denied – employer refuses to return employee to work.	Self Represented	Found in employee's favour
Ellis v. Life Labs, 2018 HRTO 493 (CanLII) <http://canlii.ca/t/hrms0>	Interim Decision – Granting disclosure of certain documents and records to the applicant.	Self Represented	Mixed result
Espinoza v. The Regional Municipality of Peel Police Services Board, 2017 HRTO 1301 (CanLII), <http://canlii.ca/t/h6k1l>	Interim Decision – awarding respondent production of medical records.		Found in the employer's favour
Fajardo v. Unger Nursing Homes Ltd., 2018 HRTO 667 (CanLII), <http://canlii.ca/t/hs5fp>	Interim Decision – denying respondent's request for the insurance settlement entered into by the applicant following her car accident.		Found in employee's favour
Fajardo v. Unger Nursing Homes Ltd., 2018 HRTO 767 (CanLII), <http://canlii.ca/t/hsl98>	Interim Decision – Request for production refused again.		Found in the employer's favour
Farr v. Baycoat Limited, 2017 HRTO 1167 (CanLII), <http://canlii.ca/t/h5wjs>	Interim Decision - certain allegation dismissed as untimely.	Self Represented	Found in the employer's favour
Fil v. 2336845 Ontario Inc., 2018 HRTO 479 (CanLII), <http://canlii.ca/t/hrm1w>	Interim Decision - Application for interim relief denied.	Self Represented	Found in the employer's favour
Flanagan v. Workplace Safety and Insurance Board, 2018 HRTO 154 (CanLII), <http://canlii.ca/t/hqf68>	Decision - The substance of the Application is that the WSIB Case Manager and the WSIAT erred in not considering the employer's allegedly discriminatory failure to comply with the terms of the collective agreement in determining whether the employer had provided suitable work. As it was already decided that the work was suitable by the WSIAT means the HRTO does not have jurisdiction as it would essentially be an appeal of the decision.		Found in the employer's favour
Foster v. Ameresco Canada Inc., 2018 HRTO 112 (CanLII), <http://canlii.ca/t/hq6cg>	Interim Decision – Denying respondents request to strike out reply.		Found in employee's favour

Francis v. Great Northern Hydroponics, 2017 HRTO 336 (CanLII), <http://canlii.ca/t/h2s7z>	Application should not be dismissed due to prior proceeding before the WSIB, because the process was unfair in that did not receive proper notice of the respondent's allegation, and therefore did not have a fair opportunity to respond to it.		Found in employee's favour
Gavin v. Hamilton Health Sciences Corporation, 2018 HRTO 780 (CanLII), <http://canlii.ca/t/hskgn>	Interim Decision – Respondent's request to place no weight on doctors' notes unless doctor called as a witness granted and granted request for production of other doctor's notes.		Found in employee's favour
Gale v. Avenue Motor Works Inc., 2017 HRTO 743 <http://canlii.ca/t/h4k57>	The allegations of a disability and that the employer knew about it, is sufficient to create an evidentiary link between the allegations of discriminatory treatment and a Code-protected ground.	Self Represented	Found in employee's favour
Gallagher v. OCAD University, 2017 HRTO 525 (CanLII), <http://canlii.ca/t/h3s3k>	Interim Decision – Removing personal respondents.	Self Represented	Found in the employer's favour
Gallagher v. OCAD University, 2017 HRTO 1458 (CanLII), <http://canlii.ca/t/hn8bw>	Interim Decision - dealing with production of documents.	Self Represented	Found in employee's favour
Gallagher v. OCAD University, 2017 HRTO 1609 (CanLII), <http://canlii.ca/t/hp5bz>	Interim Decision - production of documents.	Self Represented	Found in employee's favour
Geller v. Signarama Canada Inc., 2017 HRTO 388 (CanLII), <http://canlii.ca/t/h32hb>	Interim Decision – Granting amendment of the parties to the application.		Found in employee's favour
George v. Presstran Industries, 2017 HRTO 1478 (CanLII), <http://canlii.ca/t/hnqvc>	Interim Decision - re what documents are relevant to be disclosed, to establish what employer knew about the applicant's mental health.		Found in employee's favour
Gould v. Vaughan Public Library, 2018 HRTO 682 (CanLII), <http://canlii.ca/t/hs684>	Decision - Dismissed as already dealt with by grievance.	Self Represented	Found in the employer's favour

Gul v. ManpowerGroup, 2017 HRTO 306 (CanLII), <http://canlii.ca/t/h0ptd>	Interim Decision - Application deferred pending grievance.		Found in the employer's favour
Graff v. Jones Lang LaSalle Real Estate Services Inc., 2018 HRTO 104 (CanLII), <http://canlii.ca/t/hq036>	Reconsideration Decision - on liability denied.		Found in the employer's favour
Harriott v. Conavi Medical Inc., 2018 HRTO 316 (CanLII), <http://canlii.ca/t/hr37g>	Interim Decision – Request for list of employees and organisational chart denied as not being relevant to the issues raised	Self Represented	Found in the employer's favour
Hatton v. Securitas Canada Limited, 2017 HRTO 1155 (CanLII) http://canlii.ca/t/h5vnc	Interim Decision - production of certain documents denied		Found in the employer's favour
Henriksbo v. Hamilton (City), 2018 HRTO 702 (CanLII), <http://canlii.ca/t/hs8gm>	Interim Decision – consolidating two applications.		Found in employee's favour
Hewitt v. HTS Engineering Ltd., 2017 HRTO 899 (CanLII), <http://canlii.ca/t/h4zzl>	Interim Decision – application deferred pending appeal of ESA decision.	Self Represented	Found in the employer's favour
Hewitt v. HTS Engineering Ltd., 2017 HRTO 1548 (CanLII), <http://canlii.ca/t/hp00k>,	Interim Decision – application deferred pending appeal of ESA decision.	Self Represented	Found in employee's favour
Hibbert v. Metrolinx, 2018 HRTO 430 (CanLII), <http://canlii.ca/t/hrfd9>	Interim Decision – allowing addition of new allegations.		Found in employee's favour
Humphries v. General Electric of Canada, 2011 HRTO 1492 <http://canlii.ca/t/fmm4m>	Decision - the allegations contained in the application are untimely and that the applicant has not demonstrated that her delay filing her Application was made in good faith.	Self Represented	Found in the employer's favour

Husain v. Centre for Addiction and Mental Health, 2018 HRTO 179 (CanLII), <http://canlii.ca/t/hql61>	Interim Decision - application not dismissed as an abuse of process, because arbitration did not deal with then merits of the human rights claim.		Found in employee's favour
Huston v. Ryan ULC, 2017 HRTO 1464 (CanLII), <http://canlii.ca/t/hnsh0>	Interim Decision – application to amend claim, to add a party, granted.		Found in employee's favour
Hutcheon v. Hudco Electric Supply (Barrie) Ltd., 2017 HRTO 697 (CanLII), <http://canlii.ca/t/h4g0c>	Decision - claim dismissed as untimely	Self Represented	Found in the employer's favour
Ismael v. AppleOne Services Limited, 2017 HRTO 940 (CanLII), <http://canlii.ca/t/h52p5>,	Interim Decision - application of delay due to pending WSIB appeal denied - employer withdrew accommodations when WSIB determined applicant could return to her pre-injury duties.		Found in employee's favour
Johnson v. Kingsville Stamping Limited, 2017 HRTO 1038 (CanLII), <http://canlii.ca/t/h5gjv>	Interim Decision - application not dismissed because of a finding that the ESO decision did not appropriately deal with the substance of the application.		Found in employee's favour
Kennelly v. Wilson, 2017 HRTO 1666 (CanLII), <http://canlii.ca/t/hpf40>,	Decision – application dismissed as having no prospect of success as applicant has not been able to point to any evidence of reprisal under the code.	Self Represented	Found in the employer's favour
Keough v. The Governing Council of the Salvation Army in Canada, 2017 HRTO 115 (CanLII), <http://canlii.ca/t/gx703>	Interim Decision – Order deleting personal respondents and ordering a preliminary hearing to deal with other procedural issues.		Found in the employer's favour
Kilpatrick v. Ontario (Attorney General), 2017 HRTO 59 (CanLII), <http://canlii.ca/t/gx1pl>	Reconsideration Decision - application to reconsider denied	Self Represented	Found in the employer's favour
Knight v. Surrey Place Centre, 2017 HRTO 281, <http://canlii.ca/t/h0qrl>	Interim Decision - dismisses against Manulife, no evidence they treated her claim differently than other claims. Continued against employer to determine if	Self Represented	Xmixed result

	employee did provide sufficient medical information to support her request for accommodation.		
Konesavarathan v. The Ontarion Inc., 2017 HRTO 967 (CanLII), <http://canlii.ca/t/h55k2>	Interim Decision - denied respondents application to dismiss as having no prospect of success, which in this case cannot be settled without hearing evidence.		Found in employee's favour
Konesavarathan v. Ontario Public Interest Research Group –, 2017 HRTO 1256 (CanLII), <http://canlii.ca/t/h6dcd>	Decision - insufficient evidence provided that the board discriminated in not choosing him, therefore no prospect of success.	Self Represented	Found in the employer's favour
Kontopodis v. Workplace Safety and Insurance Board, 2017 HRTO 1110 (CanLII)	Interim Decisionn- continued application as WSIB did not determine the issue of accommodation.		Found in employee's favour
Kurpel v. Ontario Provincial Police, 2018 HRTO 138 (CanLII), <http://canlii.ca/t/hq7mq>	Interim Decision - deferral not granted because grievance looking at whether the same policy was applied discriminatorily, is not duplicative as the question the applicant places before the Tribunal is limited to her own fact situation.		Found in employee's favour
Lawrence v. FCA Canada Inc., 2018 HRTO 437 (CanLII), <http://canlii.ca/t/hrfd0>	Decision – application dismissed as being untimely, having no prospect of success and it has appropriately been dealt with in another proceeding.		Found in the employer's favour
Lance v. Conestoga Meat Packers Ltd., 2018 HRTO 573 (CanLII), <http://canlii.ca/t/hrvvq>	Interim Decision – application to dismiss denied as WSIB decision did not deal with the termination.	Represented by other than a lawyer	Found in employee's favour
Lazo v. Dufferin-Peel Catholic District School Board, 2018 HRTO 514 (CanLII), <http://canlii.ca/t/hrp7d>	Interim Decision – application deferred pending grievance.	Represented by other than a lawyer	Found in the employer's favour
Lee v. Halton Healthcare, 2017 HRTO 1522 (CanLII), <http://canlii.ca/t/hnw1g>	Decision – suspicions of discrimination are not sufficient evidence.	Self Represented	Found in the employer's favour

Leentjies v. The London Transit Commission, 2017 HRTO 1027 (CanLII)	Interim decision - no jurisdiction to hear allegations against certain respondents where no connection between the actions and a code ground.		Found in the employer's favour
Leroux v. C. Lizzi Enterprise Inc. o/a La Rose Italian Bakery, 2017 HRTO 1077 (CanLII), <http://canlii.ca/t/h5jk6>	Interim decision – request to dismiss and request to defer pending WSIAT appeal denied.		Found in employee's favour
Lewis v. Toronto District School Board, 2017 HRTO 537 (CanLII), <http://canlii.ca/t/h3t09>	Interim decision – found application should not be dismissed application was timely and that can find application has reasonable prospect of success in respect to some allegations, dismissed against personal respondent.		Mixed result
Lin v. Caterpillar Tunneling Canada Corporation 2017 HRTO 724	Decision - disability issue dealt with by OLRB.	Self Represented	Found in the employer's favour
Lozier v. Miskokon, 2017 HRTO 996 (CanLII), <http://canlii.ca/t/h58lc>	Decision – application dismissed as outside the HRTO jurisdiction as complaint does not fall under any social grounds covered by the code.	Self Represented	Found in the employer's favour
Luelo v. Wendell Motor Sales Ltd., 2018 HRTO 334 (CanLII), <http://canlii.ca/t/hr6p5	Decision - dealt with in another forum.	Self Represented	Found in the employer's favour
Magee v. Toronto District School Board, 2017 HRTO 1013 (CanLII), <http://canlii.ca/t/h5b89>	Decision – application found untimely	Self Represented	Found in the employer's favour
Magee v. Toronto District School Board, 2017 HRTO 1470 (CanLII), <http://canlii.ca/t/hns72>	Reconsideration Decision – denied.	Self Represented	Found in the employer's favour
Mammarella v. Adecco Employment Services Ltd., 2017 HRTO 1630 (CanLII), <http://canlii.ca/t/hpc1g	Decision, - no "good faith" reason for the delay dismissed for delay.	Self Represented	Found in the employer's favour

Martin v. Banyan Community Services, 2018 HRTO 25 (CanLII), <http://canlii.ca/t/hpnqn>	Interim decision -application deferred pending grievance.		Found in the employer's favour
Marques v. Toronto Transit Commission, 2017 HRTO 1344 (CanLII), <http://canlii.ca/t/h6mk8>	Interim decision - the respondents are granted disclosure and access to the applicant's OHCM file related to the applicant's absence in 2017.	No one appearing	Found in the employer's favour
Mastroianni v. Fanshawe College of Applied Arts and Technology, 2017 HRTO 1319 (CanLII), <http://canlii.ca/t/h6l1b>	Interim decision – granting removal of personal respondents.	Self Represented	Found in the employer's favour
Mastromatteo v. Kenora (City), 2018 HRTO 42 (CanLII), <http://canlii.ca/t/hpqtl>	Interim decision - request to amend application to add allegations of reprisal granted.		Found in employee's favour
Matthews v. The Manufacturers Life Insurance Company, 2017 HRTO 978	Decision - HRTO lacks jurisdiction over the conduct of a lawyer retained by a party other than the applicant and it has no jurisdiction to hear applications against courts and tribunals based on the execution of adjudicative duties or decision-making because of the doctrine of judicial or adjudicative immunity.	Self Represented	Found in the employer's favour
Mattiasch v. PETM Canada Corporation o/a PetSmart, 2018 HRTO 210 (CanLII), <http://canlii.ca/t/hqrss>	Decision – application dismissed as out of time		Found in the employer's favour
McCance v. York Region Police, 2017 HRTO 803 (CanLII), <http://canlii.ca/t/h4qfq>	Interim decision - application timely as a series of events.		Found in employee's favour
McCormack v. Markham (City), 2017 HRTO 248 (CanLII), <http://canlii.ca/t/gxr65>	Interim decision – granting the respondents request that the application be deferred pending the outcome of the grievance filed.		Found in the employer's favour

McWilliam v. Toronto Police Services Board, 2017 HRTO 425 (CanLII), <http://canlii.ca/t/h373x>	Interim decision – ruling on amending remedies, witnesses, and production.		Mixed result
Millsop v. Great Canadian Gaming Corp, 2017 HRTO 184 (CanLII), <http://canlii.ca/t/gxgnp>	Interim decision – found the intervenor union is not in a conflict of interest to the applicant.	Self Represented	Found in the employer's favour
Moorhouse v. La Vie Executive Health Centre, 2017 HRTO 1139 (CanLII), <http://canlii.ca/t/h5sk0>	Application to dismiss is denied as issues of discrimination were not dealt with by ESA proceeding, case deferred pending the completion of the OLRB proceeding.		Mixrd result
MacEachern v. Ontario (Community Safety and Correctional Services), 2018 HRTO 211 (CanLII), <http://canlii.ca/t/hqqcw>	Interim Decision- deferred pending grievance arbitration.	Self Represented	On consent
Medeiros v. Toronto (City), 2018 HRTO 422 (CanLII), <http://canlii.ca/t/hrfth	Decision – application dismissed as the civil case brought covers the same issue of accommodation		Found in the employer's favour
Melo v. Pomerleau Inc., 2017 HRTO 170 (CanLII), <http://canlii.ca/t/gxfnt>	Interim Decision – deferred pending outcome of WSIAT appeal.		Found in the employer's favour
Morris v. Ontario Lottery and Gaming Corporation, 2017 HRTO 378 (CanLII), <http://canlii.ca/t/h30p5>	Interim Decision- deferred pending grievance arbitration		On consent
Morrow v. Serco Canada Inc. c.o.b. Driver Examination Services, 2018 HRTO 733 (CanLII)	Interim Decision – application dismissed against the union; certain allegations dismissed	Self Represented	Found in the employer's favour
Mossa and Presstran Industries, a division of Magna Structural	Interim Decision – the ESO's determinations have removed the substance of the application from		Mixed result

Systems Inc., 2017 HRTO 990, <http://canlii.ca/t/h56w4>	consideration by this Tribunal; issues re accommodation however the substance of issue may not have been dealt with by the ESO and WSIB decisions		
Nagre v. Citigroup Fund Services Canada, Inc., 2017 HRTO 1397 (CanLII), <http://canlii.ca/t/hmqbw>	Interim Decision - the respondent's request to dismiss part of the Application on the basis of delay is upheld; the applicant's request for production of documents is denied.	Represented by other than a lawyer	Found in the employer's favour
Newman v. Ontario (Attorney General), 2018 HRTO 61 (CanLII), <http://canlii.ca/t/hpw66>	Interim Decision – dismissed action against personal respondent.		Found in the employer's favour
Nikitopoulos v. Strabag Inc., 2017 HRTO 1302 (CanLII), <http://canlii.ca/t/h6jzx>	Decision - application dismissed for being untimely.		Found in the employer's favour
O'Brien v. Toronto Transit Commission, 2018 HRTO 262 (CanLII), <http://canlii.ca/t/hqzlp>,	Interim Decision – the respondent is permitted disclosure and access to the OHCM from January 2012 to August 14, 2017.	Self Represented	Found in the employer's favour
Okouneva v. Ryerson University, 017 HRTO 334 <http://canlii.ca/t/h2pfp>	Decision – application dismissed as untimely.		Found in the employer's favour
Ongaro v. Costco Wholesale Canada Ltd., 2018 HRTO 464 (CanLII), <http://canlii.ca/t/hrjqq>	Interim Decision – granting adjournment – loss of representation shortly before the commencement of a hearing amounts to extraordinary circumstances warranting adjournment.	Self Represented	Found in employee's favour
Parkhurst v. Nestle Food Service Trenton, 2018 HRTO 692 (CanLII), <http://canlii.ca/t/hs7mn>,	Interim Decision -application deferred pending outcome of grievance.		Found in the employer's favour
Paradis v. Teppen Corporation, 2017 HRTO 430 (CanLII), <http://canlii.ca/t/h3b3p>	Interim Decision – application reactivated after completion of WSIB action.		Found in employee's favour

Paterson v. Barrie Police Services Board, 2017 HRTO 1144 (CanLII), <http://canlii.ca/t/h5sjw>	Interim Decision- application not dismissed for delay, personal respondents not dismissed.		Xmixed result
Picard v. Sudbury Integrated Nickel Operations, a Glencore Company, 2017 HRTO 838 (CanLII), <http://canlii.ca/t/h4t7d>	Interim Decision – application granted to amend remedy, deferred pending outcome of grievance.	Self Represented	Mixed result
Pilcicki v. Sodexo Canada Ltd, 2017 HRTO 1497 (CanLII), <http://canlii.ca/t/hnsj5>	Interim Decision -application not dismissed as Minutes of Settlement have not dealt with the substance of the Application because they did not address the question of whether the respondent employer has discriminated against the applicant on the basis of disability, by not accommodating her medical needs.	Self Represented	Found in employee's favour
Plummer v. Workplace Safety and Insurance Board, 2017 HRTO 1134 (CanLII), <http://canlii.ca/t/h5sk9>	Decision – action actually against the WSIB in assessing accommodation needs for designation of suitable employment, dismissed as covered in WSIB proceedings.		Found in the employer's favour
Ramey v. ORNGE Ltd., 2017 HRTO 1531 (CanLII), <http://canlii.ca/t/hnz28>	Decision – terms of settlement were not breached by disclosure by employer to the WSIB of payments to applicant.	Represented by other than a lawyer	Found in the employer's favour
Rafuse v. Qualtech Seating Systems, 2017 HRTO 151 (CanLII), <http://canlii.ca/t/gxcj4>	Interim Decision – on the admissibility of medical records during the hearing without calling the author.		Found in the employer's favour
Rafuse v. Qualtech Seating Systems, 2017 HRTO 914 (CanLII), <http://canlii.ca/t/h50p2>	Interim Decision – consolidating two applications.		Found in employee's favour
Rae v. Near North District School Board, 2017 HRTO 568	Interim Decision – certain claims excluded as outside the time limitation.	Self Represented	Found in the employer's favour

Ranger v. Greater Sudbury (City), 2017 HRTO 186 (CanLII), <http://canlii.ca/t/gxhk9>	Interim Decision - application not dismissed due to grievance settlement.	Self Represented	Found in employee's favour
Reid v. Regional Municipality of York Police Services Board, 2017 HRTO 1491 (CanLII), <http://canlii.ca/t/hnsjb	Interim Decision - case deferred pending completion of the grievance proceeding	Self Represented	Found in the employer's favour
Renaud v. Toyota Motor Manufacturing Canada Inc., 2018 HRTO 665 (CanLII), <http://canlii.ca/t/hs4kt>	Interim Decision – Order granted removing personal respondents.		Found in the employer's favour
Renaud v. Your Fit Mindbody Inc., 2017 HRTO 1203 (CanLII), <http://canlii.ca/t/h66cs>,	Interim decision – granting applicants request to add a party and to amend the requested remedies.	Self Represented	Found in employee's favour
Renda v. Toyota Motor Manufacturing Canada Inc., 2017 HRTO 1002 <http://canlii.ca/t/h58ln>	Decision - fear of retaliation or reprisal is not sufficient to establish good faith for the purposes of extending the one-year limitation period.		Found in the employer's favour
Robbins v. Peterborough (City), 2017 HRTO 1056 (CanLII), <http://canlii.ca/t/h5hx2>	Interim Decision – respondents request to defer application pending outcome of grievance is dismissed as there is no indication that the outcome of that grievance will have any impact on the claims made in the application.		Found in employee's favour
Rock v. FCA Canada Inc., 2017 HRTO 361 (CanLII), <http://canlii.ca/t/h2vjq>	Decision – found certain allegations to be filed untimely and the "remaining allegations are dismissed as having no reasonable prospect of success".	Self Represented	Found in the employer's favour
Rouyer v. Toronto Atmospheric Fund, 2017 HRTO 1534 (CanLII), <http://canlii.ca/t/hnzwd>	Interim Decision - application not dismissed as cannot yet say that perceived discrimination was not an issue in the applicant's termination.	Self Represented	Found in employee's favour

Royeton v. Toronto District School Board, 2017 HRTO 371 (CanLII), <http://canlii.ca/t/h3058>,	Interim Decision – granted amendments to application grounds.		Found in employee's favour
Royeton v. Toronto District School Board, 2018 HRTO 675 (CanLII)	Interim Decision - re accommodations on cross examination et.		Found in employee's favour
Rudolph v. Ontario Shores - Centre for Mental Health Sciences, 2017 HRTO 557 (CanLII), <http://canlii.ca/t/h3x92>	Interim Decision – re authorization to disclose occupational health records	Self Represented	Found in employee's favour
Rudolph v. Ontario Shores - Centre for Mental Health Sciences, 2018 HRTO 425 (CanLII), <http://canlii.ca/t/hrftb>	Interim Decision - the respondent will provide the applicant with a complete copy of her Occupation Health file and shall provide to the applicant with any document, correspondence, communication, record and notes in the respondent's possession regarding the applicant's injury.	Self Represented	Found in employee's favour
Salisbury v. Independent Electricity System Operator, 2017 HRTO 1440 (CanLII), <http://canlii.ca/t/hmvrw>	Interim Decision – respondent's motion that the Application is not dismissed as having no reasonable prospect of success; the respondent's request for dismissal of the Application for delay is denied.		Found in employee's favour
Sarmany v. The Governing Council of the Salvation Army in Canada, 2018 HRTO 304 (CanLII), <http://canlii.ca/t/hr084>	Interim Decision - application dismissed against the disability/claims management services respondent as having no prospect of success		Found in the employer's favour
Singh v. Walmart Canada Corp., 2018 HRTO 508 (CanLII), <http://canlii.ca/t/hrnm5>	Interim Decision – providing respondent with documentary disclosure		Found in employee's favour
Spiteri v. Ford Motor Company of Canada Ltd., 2017 HRTO 60 (CanLII), <http://canlii.ca/t/gx1pm>	Interim Decision – dismissed against the union as mere failure to represent the employee is not an act of discrimination.	Self Represented	Found in the employer's favour

Spafford v. City Housing Hamilton Corporation, 2017 HRTO 1455	Interim Decision - cannot dismiss at this point as need evidence to determine if contract frustrated.	Represented by other than a lawyer	Found in employee's favour
Stafford v. Sheridan College, 2018 HRTO 420 (CanLII), <http://canlii.ca/t/hrftd>	Interim Decision – the application was held not to be moot, allegations held not to be untimely, certain respondents removed, request for a summary hearing denied.		Mixed result
Stavickis v. Ontario (Treasury Board Secretariat), 2018 HRTO 441 (CanLII), <http://canlii.ca/t/hrfd1>	Interim Decision - deferred pending completion of grievance		Found in employee's favour
Swan v. Toyota Motor Manufacturing Canada Inc., 2018 HRTO 63 (CanLII), <http://canlii.ca/t/hpw6k>	Interim Decision - application to dismissed denied as no proof the WSIB applied the code or deal with whether disability was a factor in termination.		Found in employee's favour
Taylor Estate v. Royal Canin Canada Company, 2017 HRTO 1286 (CanLII), <http://canlii.ca/t/h6hdl>	Decision – held that delay in filling application was not for a good faith reason.		Found in the employer's favour
Taylor v. Ontario (Community Safety and Correctional Services), 2018 HRTO 627, <http://canlii.ca/t/hrz10>	Interim Decision - the Request to amend the Application is granted including the additional grounds of discrimination.		Found in employee's favour
Taylor v. North Bay Police Services Board, 2017 HRTO 386 (CanLII), <http://canlii.ca/t/h31n6>,	Interim Decision- deferred pending outcome of *Police Services Act* proceeding.		Found in employee's favour
Thomas v. Marcone, 2017 HRTO 323 (CanLII), <http://canlii.ca/t/h2mmx	Interim Decision – request to reconsider the decisions the HRTO had rendered in this matter because of procedural fairness concerns. Tribunal did not find that the applicant has established any breaches of procedural fairness.		Found in the employer's favour

Thomas v. Marcone, 2018 HRTO 326 (CanLII), <http://canlii.ca/t/hr2hp>	Reconsideration – none of the alleged grounds justify reconsideration of the decision.	Self Represented	Found in the employer's favour
Thomas v. Workplace Safety and Insurance Board, 2017 HRTO 690 (CanLII), <http://canlii.ca/t/h4f7m>	Interim Decision – dismissed as untimely against one defendant and deferred until the WSIB has made a final decision about the applicant's entitlement to benefits.		Found in the employer's favour
Tjernqvist v. Mary Berlund Community Health Centre Hub, 2017 HRTO 1362 <http://canlii.ca/t/h6prj>	Interim decision - found that the Ministry of Labor proceeding did not deal with the substance of the application.	Self Represented	Found in employee's favour
Travis v. 1333714 Ontario Inc. o/a Maxam Fitness, 2017 HRTO 235 (CanLII), <http://canlii.ca/t/gxpwn>	Interim decision - application not dismissed as ESA decision did not deal with human rights.		Found in employee's favour
Turnbull-Fay v. B. Lockie Group Inc. o/a Silver Cross, 2017 HRTO 998 (CanLII), <http://canlii.ca/t/h58lj>	Interim decision – approving addition of a personal respondent.		Found in employee's favour
Verreault v. North Eastern Ontario Family and Children's Services, 2017 HRTO 839 (CanLII), <http://canlii.ca/t/h4v52>	Interim decision- respondent's request for production of documents is denied as not being arguably relevant.		Found in employee's favour
Velastegui v. Nailor Industries Inc., 2017 HRTO 1075 (CanLII) <http://canlii.ca/t/h5k2p>	Interim decision – upheld respondent's request deferring hearing until WSIB claim is adjudicated.	Represented by other than a lawyer	Found in the employer's favour
Venables v. Glen White Industries Ltd., 2018 HRTO 503 (CanLII), <http://canlii.ca/t/hrms4>	Reconsideration Decision – did not establish that the decision was in conflict with previous decisions of the tribunal - applicant has not established a lack of clarity in the Tribunal's approach to cases where an applicant has executed a release in favor of a respondent.		Found in the employer's favour

Verreault v. North Eastern Ontario Family and Children's Services, 2017 HRTO 234 (CanLII), <http://canlii.ca/t/gxpvp>	Interim decision - granted application to amend application.		Found in employee's favour
Visic v. Law Society of Upper Canada, 2017 HRTO 708 (CanLII), <http://canlii.ca/t/h4ht4>	Reconsideration - dismissed, as untimely and a collateral attack on prior decisions of this Tribunal as well as that of the Divisional Court and an abuse of process.		Found in the employer's favour
Visic v. Elia Associates Professional Corporation, 2017 HRTO 744 (CanLII), <http://canlii.ca/t/h4vzc>	Reconsideration - dismissed as not showing a conflict with established jurisprudence or nor are there other factors that out way the public interest in finality- the decision by the Tribunal does not mean people with a disability have to disclose their disability to employers.		Found in the employer's favour
Waddell v. Weeneebayko Area Health Authority, 2017 HRTO 118 (CanLII), <http://canlii.ca/t/gx5ks>	Interim decision – case deferred pending the outcome of the Public Hospitals Act proceeding.		Found in the employer's favour
Walsh v. General Motors of Canada Company, 2017 HRTO 329 (CanLII), <http://canlii.ca/t/h2nlm>	Reconsideration Decision – overturning prior finding that application had been abandoned.	Self Represented	Found in employee's favour
Way v. Bridge Co Foods Inc., 2017 HRTO 1465 (CanLII), <http://canlii.ca/t/hn8wl>	Interim decision - application for dismissal of claim denied as ESA did not consider accommodation and discrimination.		Found in employee's favour
Wei v. Seneca College of Applied Arts and Technology, 2010 HRTO 2046 (CanLII), <http://canlii.ca/t/2cvrb>	Decision – dismissed, as found the substance of the human rights claim was dealt with by the Board of Arbitration Decision.	Self Represented	Found in the employer's favour
Wei v. Seneca College of Applied Arts and Technology, 2010 HRTO 2046 (CanLII), <http://canlii.ca/t/2cvrb>	Decision – dismissed, as found the substance of the human rights claim was dealt with by the Board of Arbitration Decision.	Self Represented	Found in the employer's favour

Whilby v. Corporate Express Canada, 2017 HRTO 1298 (CanLII), <http://canlii.ca/t/h6jx6>	Interim decision – application not dismissed as having no prospect of success.		Found in employee's favour
White v. Greater Sudbury (City), 2018 HRTO 406 (CanLII), <http://canlii.ca/t/hr93h>	Interim decision – Certain allegations dismissed as untimely, not contravention of rule 45.1, as grievances settlement not accepted by applicant, did not find no prospect of allegations succeeding.	Self Represented	Mixed result
Wingate v. C. Martin's Bus Service Ltd., 2018 HRTO 277 (CanLII), <http://canlii.ca/t/hqzfj>	Interim decision – granting the addition of a personal respondent in addition to the corporation.	Self Represented	Found in employee's favour
Woolcock v. Kaiser Aluminum Canada, 2017 HRTO 480 (CanLII), <http://canlii.ca/t/h3hvx	Decision - Dismissed for delay.	Represented by other than a lawyer	Found in the employer's favour
Wyman v. Prysmian Power Cables and Systems Canada Ltd., 2017 HRTO 1318 (CanLII), <http://canlii.ca/t/h6l19>	Interim decision – granting respondents request for particulars.	Represented by other than a lawyer	Found in the employer's favour
Yeomans v. Canadian Corps of Commissionaires Ottawa Division, 2018 HRTO 604 (CanLII), <http://canlii.ca/t/hrxnw>	Interim decision – As the ESO decision found he was terminated for cause due to an illegitimate medical leave, the factual foundation of the substance of the application is removed.	Self Represented	Found in the employer's favour
Zakharkiv v. Monaghan Mushrooms Ltd, 2018 HRTO 712 (CanLII), <http://canlii.ca/t/hscg4>	Interim decision – re production of documents.	Represented by other than a lawyer	Found in the employer's favour