

THE RIGHT TO REASONABLE ACCOMMODATION

This document provides general information. It does not constitute legal advice, nor does it replace the opinion of a lawyer who has analyzed a specific situation.

Why should people with environmental sensitivities be interested in the right to equality?

In Quebec, every person has a right to equality without discrimination based on disability.

Environmental sensitivities constitute a handicap under the Charter.

A person with a disability has a right to **reasonable accommodation**. The disability could be the result of a congenital condition, a disease or an accident. Furthermore, it can be physical or psychological.

There is every reason to assert that **environmental sensitivities fall within the definition of a handicap** under the Quebec Charter of Human Rights and Freedoms.¹

However, most sufferers of environmental sensitivities would be able to function normally... if the people around them such as family, friends, workplace, building manager, etc., made a bit of an effort!

The Supreme Court of Canada has ruled that disabilities have a social dimension. In fact, it is the response—or lack of response—of society to functional limitations of certain people that gives rise to their disadvantage.²

From a legal perspective, the definition of a disability takes into account the interaction between and the evolution of biomedical, technological and social knowledge. Environmental sensitivities, therefore, meet all the criteria of the legal definition of a “handicap”.

What is reasonable accommodation?

Reasonable accommodation means that certain policies and practices are changed to ensure that people with disabilities have their right to equality respected in employment, housing and other areas. Reasonable accommodation is not predefined. It varies from one individual to the next, and from one context to the next.

Who has the obligation to accommodate someone with a disability due to environmental sensitivities?

Employers and landlords have the obligation to provide reasonable accommodation to persons suffering from a disability. The disability in this case is one or more environmental sensitivities.

Service providers also have the obligation to accommodate. This includes public service “providers” such as government agencies, schools, universities and public transit companies. It also includes service providers in the private sector such as restaurants or movie theatres. For the service sector, especially the private sector, there is less jurisprudence offering guidance on the kinds of reasonable accommodation to be provided.

By virtue of the Charter, employers, landlords and service providers have the obligation to provide reasonable accommodation to people suffering from environmental sensitivities.

What is the extent of the obligation?

The obligation to accommodate constitutes an obligation of means and not of end result. It is limited by “**undue hardship**.” The person with the disability has the obligation to cooperate throughout the process of seeking an accommodation and to try the different measures proposed, even if they are not perfect. In an unionized workplace, the union is also legally bound to participate in seeking accommodation.³

If the accommodation measures that are required are unfeasible, it is possible that the person suffering from sensitivities may have no choice but to give up their job or dwelling. This could occur even when reasonable accommodations are in place, if the person affected is still unable to perform the main tasks of their employment. For example, it would be difficult for an industrial painter who develops a sensitivity to fresh paint fumes to be accommodated at work. A paramedic suffering from sensitivities, who is called to emergency situations that may take place anywhere, could have a difficult time doing her job—even if colleagues do not wear perfume. However, giving up a job should be an exception that occurs only when all other options have been thoroughly explored.

For example, in the case of a person suffering from environmental sensitivities whose office is about to be painted, the employer could allow the person to work from home or from another workstation until the paint fumes are no longer present. Or the paint job could be postponed. What matters is that all parties involved work together to find a solution that meets each other’s legitimate needs.

People suffering from environmental sensitivities must be accommodated to the point of “undue hardship.”

What constitutes undue hardship?

Once again, the answer varies from one context to the next. A large company would have to take more measures than a smaller one before these would constitute undue hardship. Furthermore, financial costs incurred due to the accommodation measures do not constitute “undue hardship.” It is only when the obligation becomes excessive that accommodations give way to the needs of the employer or landlord. For instance, the obligation to build a wheelchair accessible washroom involves costs. However, this financial obligation would unlikely be considered “excessive” for most public agencies or private companies. The employer or service provider would have to prove that the cost of building an accessible washroom is so high that it interferes with the organization’s main purpose.

Associated costs or reduction in productivity do not constitute undue hardship, since some hardship is deemed acceptable.

According to the jurisprudence, the following factors are taken into account to determine if the employer’s required effort will reach the point of undue hardship:

- Significant risk to staff health and safety
- Substantial cost, to the point of disrupting company business, while taking into account the available sources of external financing. Examples of such sources include government subsidies such as those offered by the Canada Mortgage and Housing Corporation (CMHC) under the Residential Rehabilitation Assistance Program (RRAP) for persons with disabilities, tax deductions, and so on

The following factors **do not constitute** undue hardship:

- Mere inconveniences
- Co-worker resentment or resistance
- Overriding the terms of a collective agreement
- Customer preferences

To reach an accommodation, discussions and exchanges between the employer, the sufferer, and if applicable, the union, must be done in good faith. An “all or nothing” approach is not productive. Above all, negotiating accommodation is a process.

What are examples of accommodation measures given to people suffering from environmental sensitivities?

An accommodation can involve either temporary measures (reassignment to another job or working from home for a certain period of time) or permanent ones. Some accommodation measures can be gradually put into place, while others will require ad hoc decisions, such as disabling the WiFi in a dwelling or relocating a workstation far from equipment that emits electromagnetic radiation.

Employment

In the area of employment, the most basic example of an accommodation is the implementation of a scent-free policy in the workplace accompanied by an educational campaign to help co-workers understand the reasoning behind such a policy. In general, any improvement made to indoor air quality will be helpful to workers with environmental sensitivities, as well as to others.

An arbitral tribunal confirmed that a school board of a Toronto high school, not only had to adopt a scent-free policy applicable to everyone, including students, but among other things, was also required to use cleaning products approved by the person suffering from environmental sensitivities throughout the building where the person worked.⁴

The Public Service Labour Relations Board of Canada has already decided that a federal department was required to accommodate its employee by allowing her to work full time from home and by providing her the equipment needed to do so.⁵ It all depends on the context. Refer to the list “Accommodating Practices for Environmental Sensitivities” compiled by the Canadian Human Rights Commission (Appendix).

Accommodation measures can include implementing a scent-free policy in the workplace, opening a window and replacing cleaning products with less-toxic products that are chosen after consulting the person suffering from environmental sensitivities.

Please note: If you are no longer able to work, please refer to the Jurisprudence Guide.

Services

In the education field, a college student was granted permission to follow several courses by either sitting next to an open window or in the corridor adjacent to the classroom, or by asking another student to take notes or record classes for her. However, the college requirement that the student attend courses based on experiential learning was deemed non discriminatory by the human rights tribunal.⁶

In the health services sector, the adoption of a scent-free environment would no doubt be a necessary accommodation for people suffering from environmental sensitivities. It would also benefit people suffering from other diseases. In other provinces, for the past several years many hospitals have posted signs with such policies.⁷

In other public service sectors, there is little or no jurisprudence.

Housing

In housing, an example of an accommodation would be exemption from the obligation of having carpeting in a dwelling or condominium. Other examples include replacing toxic cleaning products with unscented non-toxic products that are chosen after consulting the person suffering from environmental sensitivities, as well as giving reasonable advance notice and relocating the person prior to renovations or maintenance work.

When requesting reasonable accommodation due to environmental sensitivities, am I required to provide a medical certificate?

It is not necessary to provide a medical certificate in order to request accommodation for your disability. First, simply and clearly inform your employer (or landlord) that you have a disability due to environmental sensitivities and that you are requesting an accommodation on that basis.

If the matter subsequently goes to court, a medical certificate clearly explaining your limitations could be decisive. In principle, it is not the sufferer who determines what the functional limitations are—even though the person can help explain them. A medical certificate will determine precisely the accommodation measures required to allow the person to continue working or remain in a dwelling, school, etc. It is the basis upon which an assessment is made to determine if the accommodation measures are feasible without reaching the point of undue hardship.

If the matter goes to court, a medical certificate clearly explaining the functional limitations could be decisive.

The physician is required to specify the triggers to be avoided and, should an accidental exposure occur, the necessary treatment to be applied to lessen symptoms. Of course, the physician's opinion will be based on the patient's history.

Once I have requested and obtained an accommodation, what happens if additional measures are needed to avoid health risks?

It is never too late to modify an accommodation. That being said, take the time to fully explain the basis of the new request so the people with the obligation to provide accommodation understand that it is reasonable.

What recourse do I have if my employer refuses to accommodate me?

The recourse depends on whether a person is unionized or not. For unionized workers, an employer's refusal to accommodate can be challenged by filing a grievance according to the terms of their collective agreement. If an agreement is not reached, the union refers the matter to a hearing before a grievance adjudicator who will decide the rights of each party.⁸

For non-unionized workers, an employer's refusal to accommodate can be challenged within the first two years following the refusal to accommodate by filing a complaint with the Commission des droits de la personne et de la jeunesse, Quebec's commission of human rights and youth rights. The Commission will investigate the matter and offer mediation services. If the Commission determines the complaint is founded and it is not possible to amicably settle the dispute, the case can be referred to Quebec's Human Rights Tribunal, which will hold a hearing and give a decision.

If your accommodation request is not respected, you can file a complaint with the Commission des droits de la personne et de la jeunesse. If you are an unionized worker, and the request for accommodation was made to your employer, you can file a grievance.

I was unable to obtain an accommodation from my employer and I now find myself too sick to work. Can I file a claim with the CSST (Quebec's occupational health and safety board) or with my group insurance company while simultaneously taking steps to obtain an accommodation?

If the environmental sensitivity is recognized by the CSST, it may be difficult to have the problem considered as both a "handicap" and a "work injury." If in doubt, it is best to take all available recourses and wait for a decision from the CSST.

If a person is receiving group benefits, there is no problem with continuing to take steps to have the right to a reasonable accommodation respected.

I was on sick leave due to my environmental sensitivity. I now have to return to work. I'm worried that exposures at work will make me sick again. What can I do?

After a leave of absence due to environmental sensitivities, you can request reasonable accommodation measures to avoid health risks and continue working. A medical certificate that specifies the triggers to be avoided must be submitted to your employer in advance. If you are unionized, contact your union.

The right to reasonable accommodation can be requested either to return to work or to retain a person suffering from environmental sensitivities in the workplace.

APPENDIX: ACCOMMODATING PRACTICES FOR ENVIRONMENTAL SENSITIVITIES

Even though the appropriate accommodation measures will depend on each case, the following is a list of some of the accommodations identified in the jurisprudence, in secondary literature and through researchers' consultations:

- Establishing and enforcing scent-free policies
- Instituting a non-smoking policy that requires smokers to remain at a distance from entrances and ventilation intakes and that provides designated closets for the jackets and belongings of smokers
- Providing carpet-free environments
- Ensuring that the environment has not recently been renovated and that all furniture and products are sufficiently worn that they no longer off-gas
- Informing the individual of planned cleaning, renovations or furniture purchases so that they may be involved in selecting products or may refrain from being present during that period
- Eliminating or reducing chemical spraying, especially near ventilation intakes and, if the spraying is unavoidable, informing individuals beforehand
- Flexible work options, including telecommuting
- Having windows that open
- Having activated carbon or activated-charcoal-filtered air cleaners
- Relocating workstations away from copying and cleaning products and indoor traffic
- Providing books that are sufficiently used, that no longer off-gas and that are mould- or dust-free
- Providing low electromagnetic field equipment
- Refraining from inserting any perfume samples or limiting exposure to scented advertisements placed in magazines
- Establishing no-idling policies." (References omitted)

Source: Cara Wilkie and David Baker, *Accommodating for Environmental Sensitivities: Legal Perspective*, Canadian Human Rights Commission, 2007.

Online: http://www.chrc-ccdp.ca/sites/default/files/legal_sensitivity_en_1.pdf.

1. In areas under federal jurisdiction, the Canadian Human Rights Act applies. According to a legal opinion formulated by the Canadian Human Rights Commission, environmental sensitivities constitute a “disability”—a handicap—in the sense given to it in the Act: Cara Wilkie and David Baker, *Accommodation for Environmental Sensitivities: Legal Perspective*, Canadian Human Rights Commission, 2007, online at http://www.chrc-ccdp.ca/sites/default/files/legal_sensitivity_en_1.pdf. In areas under Quebec jurisdiction, it is the Quebec Charter of Human Rights and Freedoms that applies. The Commission des droits de la personne et de la jeunesse considers that discrimination complaints due to environmental sensitivities are admissible as complaints based on a disability. In interaction with governments (federal or provincial) or with government agencies, the Canadian Charter of Rights and Freedoms applies. Once again, environmental sensitivities seem to fall within the definition of a disability in the sense given to it in section 15, the provision in the Canadian Charter that guarantees equality of rights.
- 2 *Granovsky v. Canada (Ministry of Employment and Immigration)*, 2000 SCC 28.
- 3 According to the Supreme Court of Canada, “When the most sensitive solution implies a variant in the collective bargaining, the union must accept this solution as long as it does not represent a significant interference in the rights of the other members of the union”. *Central Okanagan School District, No 23 v. Renaud*, [1992] 2 S.C.R. 970.
- 4 *Toronto District School Board v Ontario School Teachers’ Federation, District 12*, 2011 Can LII 60708 (ON LA) Labour Arbitration Awards (Pinder Grievance).
- 5 *Cyr v. Treasury Board (Department of Human Resources and Skills Development)*, 2011 PSLRB 35.
- 6 *Harris v. Camosun College*, 2000 BCHRT 51.
- 7 For example, The Women’s College Hospital in Toronto, Queen Elizabeth II Health Sciences Centre in Halifax, and the Ottawa Hospital.
- 8 If the union wrongly refuses to assist a sufferer or to file a grievance with an arbitrator who sets a date for a hearing, it is possible to file a complaint against the union with the Commission des relations du travail—the labour relations board—to obtain the right to be heard by a grievance arbitrator. This is a “Complaint lodged against an employees’ association” under section 47.2 of the Labour Code. The complaint must be filed within the first six months after the sufferer has become aware of the violation of the union representative’s obligation. Please refer to the form available on the Commission des relations de travail website at <http://www.crt.gouv.qc.ca/english.html>.

Document produced by : **Rachel Cox**, Professor of Law, UQAM

In collaboration with: **Martin Gallié**, Professor, Juridic science, UQAM

André Bourbeau, professional resercher, UQAM

WHEN
THE ENVIRONMENT
MAKES YOU ILL

Need to
understand,
need
to act

© Association pour la santé environnementale du Québec
(Environmental Health Association of Québec),
Service aux collectivités de l’Université du Québec à
Montréal, TÉLUQ (2012). All rights reserved.

With the financial support of the Ministry of Education,
Recreation and Sports (Québec). Québec 