

“Living High:” The Haze of *Stewart v. Elk Valley Coal* and What it Means for Future Labour Relations

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LABOUR RELATIONS**

TOP 10 THINGS TO REMEMBER FROM STEWART V. ELK VALLEY COAL

1. To establish *prima facie* discrimination, an employee must demonstrate:
 - (a) That s/he has a characteristic protected by human rights legislation (e.g. disability, gender, etc.);
 - (b) That s/he has experienced an adverse effect (e.g. termination, lack of promotion);
and
 - (c) That the characteristic was “a factor” in the adverse effect.
2. The protected characteristic need not be the sole factor of the adverse effect, or even a material factor in the adverse effect, just “a factor” that contributed to the harm.
3. If an employee is able to demonstrate *prima facie* discrimination, the burden then shifts to the employer to demonstrate either that the workplace rule or policy was a *bona fide* occupational requirement, meaning that it was established in good faith for a legitimate business reason and is necessary for the proper functioning of the business, and that it was not possible to accommodate the employee without experiencing undue hardship.
4. “Undue hardship” means that the employer is expected to experience “some” hardship in the search for accommodation, like incurring some expense or accepting reduced productivity.
5. What constitutes *prima facie discrimination* and what constitutes appropriate accommodation are questions of fact, and different jurists will sometimes come to different conclusions.
6. In discrimination cases dealing with addictions issues, *Elk Valley Coal* seems to pit “disability” against personal responsibility, suggesting that the *extent* of one’s addiction is relevant to the question of discrimination. Critical to this particular decision was the finding that the policy did not discriminate against the employee because he was able to “control” his addiction and should, therefore, have complied with the policy by disclosing his disability.
7. The implications of this decision for personal privacy regarding off-duty conduct are unknown but potentially far-reaching: Does *Elk Valley* mean that one must disclose to his employer all of his vices, just in case he is later found to be in violation of a policy? Does *Elk Valley* mean that employers can now insulate themselves from the duty to accommodate by formulating zero-tolerance policies requiring employees to self-report?