



EMPLOYMENT LAW GROUP

# ACCOMMODATING MENTAL ILLNESS IN THE WORKPLACE

## A Practical Guide

INFONEX CONFERENCE  
Managing Your Duty to Accommodate:  
Effective Front-Line Accommodation Strategies

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*Prepared by*  
Janice B. Payne, Partner  
Natalia Werhun, Student-at-Law

nelligan | o'brien | payne

Lawyers/Patent and Trademark Agents  
Avocats/Agents de brevets et de marques de commerce

[nelligan.ca](http://nelligan.ca)

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## 1. INTRODUCTION

Employees with mental illness can present particular challenges and difficulties for employers. Because mental illness is often not readily apparent, it can be difficult for employers to detect and accommodate this form of disability. However, notwithstanding these difficulties, employers have a legal duty to accommodate mental health disabilities. In light of this, the goal of this paper is to provide a guideline and offer some practical tips for accommodating workers with mental illness.

Disability is defined in section 25 of the *Canadian Human Rights Act*, R.S.C., 1986, c. H-6 (*Canadian Human Rights Act*) as:

... any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug ...

According to the Canadian Human Rights Commission (CHRC):

Mental illness is characterized by alterations in thinking, mood or behaviour, or some combination thereof, associated with significant distress and impaired functioning. The symptoms of mental illness range from mild to severe, depending on the type of mental illness, the individual, the family and the socio-economic environment. Mental illness may take many forms, including mood disorders such as depression and bipolar disorder; schizophrenia; anxiety disorders such as obsessive compulsive disorder and post-traumatic stress disorder; eating disorders; and addictions.<sup>1</sup>

In Ontario, disability is defined in subsection 10(1) of the *Human Rights Code*, R.S.O. 1990, c. H.19 (the *Code*) and includes:

...  
 (b) a condition of mental impairment,  
 ...  
 (d) a mental disorder ...

According to the Canadian Psychiatric Association, “mental illness” generally means:

... significant clinical patterns of behaviour or emotions associated with some level of distress, suffering (pain, death), or impairment in one or more areas of functioning (school, work, social and family interactions). At the root of this impairment are symptoms of biological, psychological or behaviour dysfunction, or a combination of these.<sup>2</sup>

This definition of mental illness has been adopted by the Ontario Human Rights Commission (OHRC).

Despite various stereotypes and perceptions, mental illness is not always crippling. Some illnesses will produce no noticeable effect on an employee’s work, while others can be disruptive, causing reduced productivity, increased absenteeism and difficulty with interpersonal relationships. A variety of conditions are encompassed within this disability and employers must be cognizant of the fact that not every mental illness will have the same effect on every person. As such, employers must develop an accommodation process that is suitable to the

<sup>1</sup> “Canadian Human Rights Commission’s Policy and Procedures on the Accommodation of Mental Illness” online: The Canadian Human Rights Commission <[http://www.chrc-ccdp.ca/pdf/policy\\_mental\\_illness\\_en.pdf](http://www.chrc-ccdp.ca/pdf/policy_mental_illness_en.pdf)> at 5 (“Canadian Human Rights Commission’s Policy and Procedures on the Accommodation of Mental Illness”).

<sup>2</sup> “Policy and Guidelines on Disability and the Duty to Accommodate” (December 2009), online: The Ontario Human Rights Commission <<http://www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2/pdf>> at 37 (“Policy and Guidelines on Disability and the Duty to Accommodate”).

individual needs of its employees. As a practical guide, this paper explores the process for accommodating employees with mental health disabilities.

## 2. PROCESS FOR ACCOMMODATING MENTAL ILLNESS

### 2.1 ACCOMMODATING MENTAL HEALTH DISABILITIES VS. OTHER TYPES OF DISABILITIES GENERALLY

Employers have a duty to accommodate employees with disabilities. However, there is no set formula for accommodation. Each employee's needs are unique and must be considered afresh when an accommodation request is made, because a solution that may meet one employee's requirements may not meet the needs of another employee. Further, mental disability raises particular issues that will merit independent consideration.<sup>3</sup>

Although mental health disabilities may involve different considerations and warrant a different process for accommodation, mental illness must be accommodated in the workplace like any other disability. Further, most employees with mental illness are capable of requesting accommodation and may only require it temporarily.<sup>4</sup> In fact, some employees may not require accommodation at all as the illness may not impact their ability to perform the job.

Since people with mental illness face many stigmas and stereotypes, employees are often hesitant to admit to their employer that they have a mental illness. They may fear reprisal from the employer or harassment from co-workers. Thus, employers should have an accommodation policy in place that addresses mental illness. Such a policy may make workers seeking accommodation feel more comfortable in raising their accommodation needs and will ensure that accommodation requests are dealt with effectively.

### 2.2 WHAT TO DO WHEN AN EMPLOYEE REPORTS OR EXHIBITS MENTAL HEALTH CONCERNS

An employer's duty to accommodate arises when the employer becomes aware of the disability. Although often times the employee is able to communicate his or her need for accommodation to the employer, the challenge when dealing with mental health is that some employees may not have come to terms with their illness or are prevented from doing so as a result of the illness and cannot take adequate steps to obtain treatment or seek accommodation.<sup>5</sup> As a result, employers are required to pay particular attention to signs that suggest that an employee may be suffering from mental illness. This is especially important in cases involving mental health because the perception of disability alone is enough to trigger human rights law protection, even if the employer has not been formally advised of the employee's disability.

This was affirmed by the Human Rights Tribunal of Ontario (HRTO) in *Krieger v. Toronto Police Services Board*.<sup>6</sup> Constable Krieger, who had worked for the Toronto Police Service for only five months, was involved in a traumatic incident involving a struggle with an armed suspect. Shortly after this incident, he began experiencing symptoms of post-traumatic stress disorder (PTSD), which led to a second incident, in which he over-reacted in a situation involving a customer at a fast-food restaurant.

During and after the incident at the restaurant, Constable Krieger acted in way which led his supervisors to believe that he could be experiencing PTSD. However, his supervisors did not act on their suspicions. Instead, Constable Krieger was suspended on the basis that he was unfit for duty and was investigated for misconduct.

<sup>3</sup> *Ibid* at 8-10.

<sup>4</sup> "Canadian Human Rights Commission's Policy and Procedures on the Accommodation of Mental Illness", *supra* note 1 at 6.

<sup>5</sup> *Ibid*.

<sup>6</sup> 2010 HRTO 1361.

Further, although medical evidence about his disability came to light during the labour relations process, the police service did not accommodate him.

The Tribunal found that by failing to accommodate Constable Krieger's disability, his employer had discriminated against him. Although Constable Krieger was unable to recognize his PTSD and was unaware that he was experiencing a mental health disability, it was clear to his employer that he was unwell and this triggered the employer's duty to accommodate. Constable Krieger was reinstated and the employer was ordered to develop an accommodation policy for police officers that have disabilities.

This decision affirms that employers have both a procedural and substantive duty to accommodate an employee's mental health disabilities, even if the employee is not capable of expressing that he or she needs help and requires accommodation. Therefore, the duty to accommodate can arise not only where an employee explicitly reports to the employer that he or she has a mental illness, but also when the employee exhibits apparent mental health-related problems in the workplace.

### 2.2.1 How to tell if an employee has a mental illness

Although it is not the responsibility of employers, managers or supervisors to diagnose the mental health problems of workers, in light of the duty to accommodate, it is important that employers are aware of signs that may suggest that a worker may have a mental illness.

As previously stated, it can be difficult to determine if an employee is mentally ill because mental illness encompasses a broad range of symptoms, behaviours and conditions. A key indicator is when an employee begins to behave uncharacteristically. For instance, an energetic worker may become lethargic or a worker who is usually quiet and reserved may make grandiose claims about his or her abilities. Additionally, the following warning signs may be an indication that an employee has a mental health problem:

- consistent late arrivals or frequent absences;
- lack of cooperation or a general inability to work with colleagues;
- decreased productivity;
- increased accidents or safety problems;
- frequent complaints of fatigue or unexplained pains;
- difficulty concentrating, making decisions or remembering things;
- making excuses for missed deadlines or poor work;
- decreased interest or involvement in one's work;
- working excessive overtime over a prolonged period of time;
- expressions of strange or grandiose ideas; or
- displays of anger or blaming others.<sup>7</sup>

Behaviour changes such as these do not necessarily mean that an employee has a mental illness. The employee may simply be having a bad day, may be going through a stressful time in his or her life or may no longer be happy in his or her job. However, when this pattern of behaviour continues for a prolonged period of time, this behaviour may be indicative of an underlying health problem.<sup>8</sup>

### 2.2.2. What an employer should do if it suspects that an employee may be suffering from mental illness

If an employer observes behaviour or performance issues that suggest an employee has a mental health problem, the employer has a responsibility to both the worker and the other employees to take action. In most

<sup>7</sup> "Canadian Human Rights Commission's Policy and Procedures on the Accommodation of Mental Illness", *supra* note 1 at 15.

<sup>8</sup> *Ibid.*

cases, the best approach is to meet with the person privately in the context of workplace performance. This may assist an employer in determining whether mental illness is a factor.<sup>9</sup>

Preparation is key to successfully approaching an employee about suspected mental health issues. Before the meeting, the employer should prepare thoroughly by asking the following questions:

1. What behaviour or performance issue am I concerned about?
2. Why am I concerned?
  - a. Is there an objective work standard the employee is failing to meet?
  - b. Is the behaviour having a negative effect on other employees?
  - c. Is my concern performance-related, or is it a concern for the employee's personal health?
3. What resources does the employer have to offer the employee?
4. What policies does the employer have dealing with accommodation?
5. How can I make this meeting less stressful for the employee?
  - a. What positive contributions does the employee make?
  - b. Will my own fears make it difficult for me to respond appropriately?

When talking with the employee, the CHRC advises that an employer should consider how well it knows the employee. For instance, some employees may feel more comfortable if the meeting is treated as a performance review, focusing first on their strong points as a worker before addressing areas of concern. However, this form may make some employees defensive. If this is the case, the employer may begin by stating it is concerned about the employee and state its reasons for the concern. In either case, it is important that the employee is assured by the employer that it intends to work with him or her. If an employer can create an atmosphere in which the employee feels safe and comfortable, and the employer informs him or her that the information with respect to health matters is confidential, the employee may feel more open to working with the employer to find suitable accommodation.<sup>10</sup>

Therefore, it is important that the employer:

- approach the concern as a workplace performance issue;
- raise the possibility of providing accommodation if needed;
- provide access to an employee assistance program (EAP) or referral to community services;
- assure the employee that meetings with an EAP provider are confidential;
- set a time to meet again to review the employee's performance; and
- document this meeting fully.<sup>11</sup>

However, an employer should not do or say the following:

- Don't offer a pep talk.
- Don't be accusatory.
- Don't say "I've been there" unless you have been there. You may not understand or relate to a mental illness, but that shouldn't stop you from offering help.
- Don't try to give a name to the underlying issue. Even if you suspect a particular illness or problem, focus on how the employee's behaviour is concerning you and how you want to help them improve.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid at 16.*

<sup>11</sup> *Ibid.*

- If you learn that a specific illness is causing the behaviour, you should not ask what “caused” the illness but instead focus on solutions.<sup>12</sup>

If the employer’s concern is performance-related, it remains a performance issue even if the cause of the problem is a disability. Approaching the employee to discuss the issue does not constitute discrimination. Discrimination only arises when, as a consequence of the disability-related performance issue, the employee is either disciplined or his or her working conditions are changed. When performance is a concern, regardless of whether disability is an issue, an honest and frank discussion will be necessary. Whether the aim is to initiate a search for accommodation or to discipline the employee, discussing the concerns with the employee is the best practical way for the employer to proceed.

### 2.2.3. Is an employee obligated to tell the employer that he or she is mentally ill?

If an employee is able to work, then in most cases, the employee is not obligated to tell the employer that he or she is mentally ill. However, if the employee has a mental health problem that could affect his or her ability to do the job, the employee will have to consider whether disclosure may be necessary or beneficial. In addition, an employee may be required to disclose that he or she has an illness if the employer has an absenteeism policy that requires employees to provide a medical certificate. The employee will also have to disclose that he or she is ill if the employee is requesting accommodation. However, an employee is not necessarily obligated to disclose the nature of the illness. Instead, an employee has to provide just enough information about the disability to allow the employer to offer appropriate accommodation.<sup>13</sup>

## 2.3 DISCHARGING THE DUTY TO ACCOMMODATE

Finding appropriate accommodation is a task shared jointly by the employer, the union (if applicable) and the employee, and all parties are required to work reasonably and cooperate in the process.

### 2.3.1 Duties of the parties generally

#### 2.3.1.1 Employer’s duties

The employer, and not the employee, has the primary responsibility to offer and provide suitable accommodation. Once the employer is deemed to be notified of an employee’s disability, the employer is under a duty to investigate and consider accommodation. The employer’s duty to accommodate is extensive.

When an employee reports a mental illness and requests accommodation, the employer is obligated to respond in a timely and effective manner that is appropriate in the circumstances of the individual employee, and that conforms to the employer’s obligations under human rights legislation. This was affirmed by the Ontario Divisional Court in *ADGA Group Consultants Inc. v. Lane*.<sup>14</sup> Lane was hired by ADGA as a quality assurance analyst, which required “Mission Safety Critical” work, such as artillery software testing. After commencing his employment, he informed his supervisor that he had a bipolar disorder and requested accommodation. Lane informed his supervisor that she should not hesitate to intervene if she observed any inappropriate behaviour and advised her that if she had anything negative to say to him that she should do it one-on-one. The supervisor told Lane that she would get back to him.

As Lane waited to hear from management, he felt that his employment might be terminated as a result of disclosing his condition and he entered a pre-manic phase. Lane’s supervisor and manager were aware of this when they met with him several days later. However, despite being aware of his condition, they did not explore

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid* at 14.

<sup>14</sup> 2008 CanLII 39605 (Div. Ct.) affirming *Lane v. ADGA Group Consultants Inc.*, 2007 HRTO 34.

suitable accommodation. Rather, they terminated Lane's employment on the grounds that he would be unable to perform the essential duties of the job. There was no discussion about Lane's specific needs nor was there any suggestion by the supervisor or the manager that his employment should be suspended until they found out more about his condition and obtained legal advice on their duties under the *Code*. After his dismissal, Lane escalated from a pre-manic phase to full-blown mania within hours. He was hospitalized for twelve days, after which he experienced severe depression.

The Divisional Court upheld the decision of the Human Rights Tribunal of Ontario, which held that ADGA had dismissed Lane without meeting the procedural obligations of assessment under subsection 17(2) of the *Code* and without meeting the specific obligation to not dismiss someone without establishing that it could not accommodate the disability of that person without undue hardship. As a result, ADGA was ordered to pay Lane \$25,000 in general damages, \$10,000 for mental anguish, \$34,278.75 in special damages, as well as, pre and post-judgment interest. The Tribunal also ordered a number of public interest remedies.

The Tribunal found that Lane was terminated based on perceptions of his disability and that there was virtually no investigation into his condition or possible accommodation. It also determined that breaching the procedural duty to accommodate Lane was itself a form of discrimination. At paragraph 144 of the Tribunal's decision, Adjudicator Mullan explained that "the procedural dimensions of the duty to accommodate required those responsible to engage in a fuller exploration of the nature of the bipolar disorder, Mr. Lane's own situation a victim of bipolar disorder, and to form a better informed prognosis of the likely impact of his condition in the workplace". He further stated at paragraph 155 that:

While this was a case of essentially one incident, the termination, it was not only precipitate and unaccompanied by any assessment of Mr. Lane's condition but also callous to the extent of its consequences in the sense that nothing was done on the day to ensure that Mr. Lane in his pre-manic condition reached his home safely and sought medical attention. ...

In ordering public interest remedies, Adjudicator Mullen commented at paragraph 164:

This was an instance where [ADGA's] lack of awareness of its responsibilities under the *Code* as an employer was particularly egregious. There were no workplace policies in place on dealing with persons with disabilities. Moreover, senior management were singularly oblivious to those obligations. In addition, there are serious doubts in my mind as to whether these were matters that were part of the operational imperatives of the Human Resources Department ... As a consequence, the Commission was justified in seeking a broad range of public interest remedies for the purposes of ensuring inculcation in the values of the *Code* and is aimed at avoiding discrimination that formed the basis of this Complaint. Those public interest remedies are set out in my Order ...

As a result, amongst other public interest remedies that were ordered, ADGA was ordered to establish a written anti-discriminatory policy, with a focus on accommodating people with mental illness.

In accommodating workers with mental illness, employers also have a duty to ensure that these workers are not discriminated against. This was addressed by the Canadian Human Rights Tribunal (CHRT) in *Dawson v. Canada Post Corporation*.<sup>15</sup> In this case, the complainant was a letter carrier, who after a few years into her employment with Canada Post, was diagnosed with autism. She made a number of complaints after a series of actions taken by Canada Post, including an instance where it was discovered that the expert on autism it had retained turned out to be the complainant's past treating psychologist. In a separate incident, the employer had requested that she submit to a medical evaluation by a physician designated by the employer. She refused to do so and Canada Post asked her permission to contact her physician. When she refused to grant permission, Canada Post then wanted to send her for an independent medical assessment. However, after learning that the

<sup>15</sup> 2008 CHRT 41 (*Dawson v. Canada Post Corporation*).



physician chosen by the employer specialized in criminal behaviour and not autism, she refused to attend the assessment.

The Tribunal held that the complainant was subject to discrimination and harassment based on disability. Commenting on accommodating people with autism, Board Member Deschamps explained at paragraphs 243 and 245:

[243] An autistic person should expect that his workplace is free of any misperception or misconception about his condition. It goes to the right of autistic individuals to be treated equally, with dignity and respect, free of any discrimination or harassment related to their condition. In this respect, in a society where human rights are paramount, an employer has a duty to dispel such misconception or misperception about such individuals.

...

[245] Autistic people, if they want to be able to accomplish themselves in a workplace or in society, need to be reassured that everything possible short of undue hardship will be done in order to ensure that misperceptions and misconceptions about their condition are properly handled by their employer, so that co-workers have a proper understanding of their condition and are not inclined to discriminate against them or harass them.

Despite the Tribunal's findings, it did not award any remedial measures because the complainant had not requested any. However, Canada Post was ordered to work with the Canadian Human Rights Commission to modify its existing discrimination and accommodation policies, and was also ordered to set up workplace equity, accommodation and sensitivity training, notably in relation to autism and autistic individuals.

The Tribunal's decision in this case underscores the extent of an employer's duty to provide and maintain a workplace free of harassment. Not only are employers obligated to respond to individual requests for accommodation, they must also work towards dispelling misperceptions regarding disability. This involves educating and sensitizing employees and managers so that those with disabilities can perform their jobs in a workplace that is safe and free from negative misperceptions.<sup>16</sup>

An employer must be sensitive to an employee's condition and although it may seem obvious, an employer must not to reprise against a worker for seeking accommodation for mental disability. In *Knibbs v. Brant Artillery Gunners Club*<sup>17</sup>, the HRTO dealt with the particularly egregious conduct of an employer in response to an employee's mental disability. Knibbs was a bartender with the Brant Artillery Gunners Club. She filed a human rights complaint on the basis that the respondents had harassed or discriminated against her because of her disability and subjected her to reprisal with respect to her employment. More specifically, she alleged that, while she was on medical leave, the respondents demoted her from full-time or part-time status, publicized confidential medical information about her, including posting a letter at the club indicating that she was depressed which members of the club could see, and laid her off. She also alleged that, after legal counsel had informed the respondents that they had violated her rights under the *Code*, the respondents retaliated against her by falsely accusing her of misconduct, including theft of money, and filing police reports against her.

The Tribunal found that the respondents had discriminated against Knibbs because of her disability and subjected her to reprisal by filing a police report falsely accusing her of misconduct and theft. She was awarded \$20,000 for injury to dignity and self-respect, and \$16,083.99 for lost income. The respondents were also directed to develop and implement a policy on harassment and discrimination, and to complete the OHRC's online training module on human rights.

In addition to the duties outlined in the case law, in accommodating disability, employers generally have a duty to:

<sup>16</sup> *Disability and Accommodation eNewsletter* (Lancaster House), April 8, 2010, Issue #128.

<sup>17</sup> 2011 HRTO 1032 (CanLII).

- accept the employee’s request for accommodation in good faith, unless there are legitimate reasons for acting otherwise
- obtain expert opinion or advice where needed
- take an active role in ensuring that alternative approaches and possible accommodation solutions are investigated, and canvass various forms of possible accommodation and alternative solutions
- keep a record of the accommodation request and action taken
- maintain confidentiality
- limit requests for information to those reasonably related to the nature of the limitation or restriction so as to be able to respond to the accommodation request
- grant accommodation requests in a timely manner, to the point of undue hardship, even when the request for accommodation does not use any specific formal language
- bear the cost of any required medical information or documentation. For example, doctors’ notes and letters setting out accommodation needs should be paid for by the employer.<sup>18</sup>

### **2.3.1.2. Employees’ duties**

Although employers bear the primary responsibility, employees have a reciprocal duty to cooperate in the accommodation process. Once the search for accommodation begins, the employee must work with the employer to find appropriate accommodation. This requires the employee to share information with the employer about the nature of the illness and the limitations that it causes so that the employer can appropriately accommodate the worker. Once an accommodation measure is proposed, the employee must accept the proposal if it is reasonable. If the employee rejects a reasonable proposal, the employer has discharged its duty to accommodate and is not required to make further offers of accommodation.

The duties of the employee during the accommodation process can be summed up as follows:

- advise the employer of the disability (though the employer does not generally have a right to know what the disability is)
- make his or her needs known to the best of his or her ability, so that the employer can accommodate the worker
- answer questions or provide information regarding relevant restrictions or limitations, including information from health care professionals, where appropriate as needed
- participate in discussions regarding possible accommodation solutions
- co-operate with any experts whose assistance may be required to manage the accommodation process or when information is required that is unavailable to the person with a disability
- meet agreed-upon performance and job standards once accommodation is provided
- work with the accommodation provider on an on-going basis to manage the accommodation process
- discuss his or her disability with the individuals who need to know. This may include the supervisor, a union representative or human rights staff.<sup>19</sup>

### **2.3.1.3 Medical Documentation**

There may be instances where there is a reasonable and bona fide basis to question the legitimacy of an employee’s request for accommodation or an employer may have concerns with the adequacy of the information that is provided. In such cases, the employer may request confirmation or additional information from a qualified

<sup>18</sup> “Policy and Guidelines on Disability and the Duty to Accommodate”, *supra* note 2 at 19.

<sup>19</sup> *Ibid.*

health care professional to obtain the information that is required. As part of the reciprocal duty to cooperate in the accommodation process, the employee must cooperate with the employer's requests for medical information.

This duty is affirmed in the jurisprudence. For example, in *Baber v. York Region District School Board*<sup>20</sup>, a teacher alleged that the school board had discriminated against her on the basis of disability and that it breached its duty to accommodate her when it terminated her employment. The teacher had been diagnosed with anxiety disorder, depressive disorder and chronic lymphocytic leukemia in June 2007. However, the most recent medical information provided to the board stated that she was capable of performing her full duties as a teacher. Accordingly, she was asked by the board in October 2008 to provide further medical documentation substantiating her claim. The letter listed three options available to her to be off work while she regained her health, including:

1. applying for long-term disability benefits with supporting medical documentation from her treating specialist;
2. consent to have a Registered Nurse with the board's Disability Management Program contact her doctor with a view of clarifying whether she was able to work as a teacher; and
3. undergoing an independent medical evaluation to determine whether she was fit to work with or without accommodations, or not fit to work.

The teacher subsequently provided medical notes from her family physician and treating psychiatrist that referenced her health issues and recommended that she be given a teacher-librarian position. The board considered these medical notes to be inadequate because they did not identify her medical restrictions or the accommodations she required to fulfill her duties as a teacher. The board repeatedly requested further medical documentation and advised her that she would have to choose one of the three methods outlined in the October 2008 letter. However, she refused to do so and her employment was eventually terminated.

Accordingly, the teacher's complaint was dismissed. At paragraph 71, Vice-Chair Price explained:

The duty to accommodate does not give employees permission to refuse to provide their employers with information about their ability to work with or without restrictions where there is a legitimate question about that, as was the case here. Nor does the duty to accommodate require an employer to tolerate an employee's ongoing unsubstantiated absence from work. (One possible exception to this is where disability prevents the employee from responding to his/her employer's requests for medical documentation. There is no suggestion of that in this case).

The Tribunal found that the complainant knew that her employer required the medical documentation either to substantiate her ongoing absence from work or facilitating her return to work, and that her employment would be terminated if she failed to provide this information. Despite this, she consistently refused to provide the necessary documentation and as such, the employer had not breached its duty to accommodate her when it terminated her employment.

A similar finding was made in *Matthews v. Chrysler Canada*<sup>21</sup>, where the employee, who was bi-polar and suffered from depression, anxiety, drug and alcohol dependence, alleged that the employer had failed to accommodate his disabilities. On cross-examination, the employee admitted that not only did his supervisors in the plant not know about his medical needs, but also that he opposed providing them with any medical information on the basis of his privacy interests. In dismissing the Application, Board Member Bhabha explained at paragraphs 45 to 48:

[45] ... What is clear is that the applicant never made any specific accommodation requests or disclosed any of the needs he now says should have been accommodated. It is also clear from

<sup>20</sup> 2011 HRTO 213 (CanLII).

<sup>21</sup> 2011 HRTO 2053 (CanLII).

the applicant's testimony that he did not consent to disclosure of his medical file to his direct supervisors—those who disciplined him for the toilet and call in incidents.

[46] No doubt the applicant feels that the respondent did nothing to help him, and got away with doing nothing, while the applicant was the one with the disability who needed assistance. However, the applicant's view of the duty to accommodate places far too high a burden on the respondent. Not only is it unfair to expect an employer to impute and deduce a worker's needs based on remote and scant knowledge, it is dangerous. Basing accommodation on assumptions creates a risk that an employer will act in a high-handed and potentially discriminatory manner. ...

[47] Furthermore, as the applicant himself emphasized, privacy is of primary importance. Privacy requirements limit access to employee medical information. This is a practice designed to protect employees from unnecessary personal disclosure, minimizing the risk of indirect discrimination or reprisal. However, it also means that employees are expected to waive some of this privacy in order to open an accommodation dialogue. The applicant's refusal to disclose to his direct superiors his medical needs prevented him from carrying out necessary elements of the accommodation process.

[48] The duty to accommodate is not triggered simply because the applicant made a demand, and then breached because the respondent failed to accede to the applicant's demand. The accommodation process is a two-way street. The employee must co-operate in the process and provide as much information as possible to facilitate the search for accommodation. ...

The Adjudicator went on to state that employees have a responsibility to make the accommodation process work and the first step in doing so is to provide the employer with the necessary information to allow the employer to accurately understand what the restrictions are and how they can be best accommodated (para. 50).

However, it is important to note that although an employer may request additional medical documentation, an employee may not have to submit to an independent medical examination.<sup>22</sup> In addition, an employee is not legally required to disclose the specific diagnosis or category of disability.<sup>23</sup> The OHRC further advises that persons with disabilities are not necessarily required to disclose private or confidential information, and should only disclose to the employer information that pertains to the need for accommodation.

Confidentiality in cases dealing with mental illness is particularly important because of strong stigmas about such disabilities. As such, documentation supporting the need for accommodation should only be provided to those who need to be aware of the information. If the employer has a health or human resources department, it is advisable that the medical information be provided to those departments rather than directly to the employee's supervisor. The OHRC also advises that medical documentation should be kept separate from the employee's corporate file.<sup>24</sup>

### 2.3.2 Forms of accommodation

Just as individuals with physical disabilities may require physical aids or structural changes in the workplace, individuals with mental illness often require that social or organizational accommodation be made.<sup>25</sup> Because mental illnesses include a wide array of health problems, this form of disability calls for a wide variety of

<sup>22</sup> "Policy and Guidelines on Disability and the Duty to Accommodate", *supra* note 2 at 21.

<sup>23</sup> "Mental Health Works: Workplace Resources" (2007), online: Canadian Mental Health Association <[http://www.mentalhealthworks.ca/sites/default/files/free\\_resources/MHW\\_workplace\\_resource.pdf](http://www.mentalhealthworks.ca/sites/default/files/free_resources/MHW_workplace_resource.pdf)> at 12 ("Mental Health Works: Workplace Resources").

<sup>24</sup> "Policy and Guidelines on Disability and the Duty to Accommodate", *supra* note 2 at 21.

<sup>25</sup> "Canadian Human Rights Commission's Policy and Procedures on the Accommodation of Mental Illness", *supra* note 1 at 6.

accommodation measures. Since accommodation tends to be based on the individual needs of the employee, working with the employee to find suitable accommodation is recommended. More often than not, the employee is in the best position to tell the employer what accommodation is needed to allow him or her to work productively.

Although there is no comprehensive list of accommodations for people who are dealing with mental health issues, common accommodations include:

- *Flexible scheduling*
  - flexibility in the start or end of working hours to accommodate effects of medication or for medical appointments
  - part-time work (which may be used to return a worker to full-time employment)
  - more frequent breaks
- *Changes in supervision*
  - modifying the way instructions and feedback are given, for example, written instructions may help an employee focus on tasks
  - having weekly meetings between the supervisor and employee may help to deal with problems before they become serious
- *Modifying job duties*
  - Exchanging minor tasks with other employees
- *Changes in training*
  - allowing an employee to attend training courses that are individualized
  - allowing extra time to learn new tasks
- *Using technology*
  - allowing an employee to use head phones to protect him or her from loud noises or providing an employee with a tape recorder to tape instructions if they have memory troubles<sup>26</sup>
  - allowing an employee to use headphones to protect them from loud noises
- *Modifying workspace and changing location*
  - allowing an employee to work from home or to relocate to a quieter area of the office where he or she will be free from distractions.<sup>27</sup>

Additionally, the following accommodations are suggested based on the particular challenges an employee may be experiencing:

If the challenge is maintaining stamina:

- vary tasks throughout the day
- provide opportunities to learn new responsibilities
- allow a self-paced workload
- supportive employment services with a work coach
- do some or all of the work from home
- job-sharing
- change to part-time work
- allow more frequent breaks
- allow longer breaks

<sup>26</sup> See for example *Dawson v. Canada Post Corporation*, *supra* note 15.

<sup>27</sup> “Canadian Human Rights Commission’s Policy and Procedures on the Accommodation of Mental Illness”, *supra* note 1 at 20.

If the challenge is concentration:

- remove all but essential functions of the job
- play soothing music
- break large tasks into a series of smaller tasks
- allow a break when concentration declines
- increase natural lighting in your work area

If the challenge is organization and/or deadlines:

- use of an electronic organizer
- break large tasks into a series of smaller tasks
- encourage supervisors to make regular reminders
- arrange regular meetings for follow-up and to set priorities

If the challenge is memory:

- use recording devices to keep track of information discussed at a meeting
- write down important or complicated issues
- provide instructions or assignments in writing
- provide additional training time

If the challenge is workplace relationships:

- outline clear expectations
- define what constitutes good working relationships
- have regular meetings to review and address issues
- provide open and honest feedback in a prompt manner
- develop strategies to deal with problems before they arise
- provide correspondence in writing
- provide clear expectations and the clear consequences for not meeting them
- provide written work agreements
- develop a procedure to evaluate effectiveness of each accommodation
- think about how to measure effectiveness
- explain to employees about the accommodation process
- allow the option of not attending work-related social functions

If the challenge is handling stress and emotions:

- outline clear expectations
- allow employee opportunity to seek help from counsellors or EAP
- provide praise and positive reinforcement
- allow time off to attend counselling sessions or medical appointments
- allow phone calls to doctors and others to gain necessary support during the workday
- provide awareness training for employees on mental illness

If the challenge is dealing with change:

- encourage employee to let you know when they feel anxious about a change
- provide information in advance of changes so that employee can prepare himself or herself psychologically

- allow employee to maintain communication with previous supervisor to ensure effective transition<sup>28</sup>

Employers and supervisors need to be aware of what it is they do that is supportive to the employee and what may inadvertently make the employee's symptoms worse. An understanding of the phrases or actions that should be avoided and processes or interactions that are helpful can increase the employer's own comfort level and the success of the employee's return to productivity.<sup>29</sup>

## 2.4 DISCIPLINARY MEASURES

The duty to accommodate may arise after disciplinary measures have been imposed when it becomes apparent that the employee was suffering from mental illness at the time he or she engaged in conduct that led to the disciplinary measures being imposed. The period of time between the discipline and the duty arising can be substantial.<sup>30</sup>

However, there must be a causal connection between the disability and the misconduct. In *CUPE, Local 2 v. Toronto Transit Commission*,<sup>31</sup> the grievor was dismissed after pleading guilty to theft for stealing copper wire from his employer and selling it to a recycling facility. The grievor stated that he stole the copper wire to support his cocaine addiction and requested that his employer accommodate him by reinstating him.

The Arbitrator held that the employer had not discriminated against the grievor by terminating his employment because the medical evidence did not demonstrate that the theft was caused by the addiction. Further, the Arbitrator found that since the grievor had the financial means to support his addiction without having to resort to theft, his misconduct was a premeditated criminal act that warranted dismissal.

In reaching his decision, Arbitrator Stout made the following remarks (paras. 109-110):

[109] The grievor clearly suffers from a disability and he suffered adverse treatment when he was terminated. However, I find that the disability was not a factor in the adverse treatment. The only connection between the theft and the cocaine addiction is the fact that the grievor used the money he received for selling the stolen copper wire on May 11, 2010 to purchase an eight ball of cocaine. As noted earlier the use of that money was a choice the grievor willingly made instead of using his own money that he had readily available.

[110] Additionally, I accept the evidence of Dr. Reznick that there is no causal connection between the grievor's misconduct and his dependence on cocaine. In my view, the evidence also does not support a finding of any nexus between the misconduct and the disability. Accordingly, I find that the Union has not proven a prima facie case of discrimination based on the broader more purposive analysis of Madame Justice Kirkpatrick. Having found that the Union has not proven prima facie discrimination, the Employer had no duty to accommodate the grievor.

<sup>28</sup> "Mental Health Works: Workplace Resources", *supra* note 23 at 32.

<sup>29</sup> *Ibid* at 33.

<sup>30</sup> See *Re Canada Safeway Ltd. and U.F.C.W., Loc. 401* (1992), 26 L.A.C. (4<sup>th</sup>) 409, where new medical evidence gave rise to a duty to accommodate nearly two years after the employee was discharged.

<sup>31</sup> (August 6, 2011) Ontario Grievance Arbitration (Arbitrator: John Stout).

## 2.5 RETURN TO WORK CONSIDERATIONS

After being away from work because of mental illness, employees may be afraid to return to work because they fear being harassed by co-workers and supervisors. The employer has an obligation to ensure that the employee is returning to a safe environment that is free from harassment. Employers should have a harassment policy in place and all employees should be aware of their obligations under the policy. If the policy and the employees' obligations in respect to harassment are communicated to employees on a regular basis, the returning employee is less likely to feel that he or she is to blame for any discipline that may take place.<sup>32</sup>

There are three fundamentals that must be in place for an employee's return to work to be successful. These are:

1. The work itself and the employee's presence in the workplace should not pose a risk to the employee or co-workers.
2. The employee must be able to perform the tasks of his or her job at a level where meaningful work is possible with appropriate accommodations.
3. The workplace must be welcoming and free from harassment and other pressures that might delay recovery.<sup>33</sup>

In evaluating these fundamentals, the employer should consider the demands of the job and the employee's progress, including the:

- employee's symptoms and severity of those symptoms
- effectiveness of treatment
- employee's resilience
- employee's ability to prevent a relapse by identifying and avoiding the issues that lead to relapses
- level of mental acuity and stamina the job requires.<sup>34</sup>

The return to work process after an extended absence should involve a gradual return beginning with reorientation, retraining and reintegration. To facilitate a plan that will enable an employee to return to work, the suggested practice involves:

- establishing the essential duties of the job
- considering the possible challenges in meeting the objectives of the job
- understanding the immediate supervisor's goals and concerns
- reviewing the healthcare provider's report on limitations, if any
- considering previous performance or workplace relationship issues that were not resolved prior to the employee's absence
- ensuring that the immediate supervisor and the employee have a shared understanding of what will happen upon return to work.<sup>35</sup>

Upon an employee's return to work, an employer may require evidence that the employee is capable of returning to work. The ability of an employer to satisfy itself of a worker's fitness to work upon return to work was addressed in *Service Employees International Union, Local 1. On v. Stirling Heights Long-Term Care Centre*.<sup>36</sup> The grievor was a personal support worker, who was employed at a long-term care facility. She was not allowed to return to

<sup>32</sup> "How Can I Support an Employee's Return to Work After Disability Leave for a Mental Health Problem?" (2012), online: Mental Health Works <<http://www.mentalhealthworks.ca/employers/faqs/accommodations/return-to-work>>.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> "Mental Health Works: Workplace Resources", *supra* note 23 at 14.

<sup>36</sup> (February 23, 2009) Ontario Grievance Arbitration (Arbitrator: Randy Levinson).



work after going on sick leave because she refused to provide further medical information about her mental fitness to return to work. This behaviour included a series of harassment allegations made against the employer. The parties disagreed about whether the grievor had established her fitness to return to work and about whether the Employer was entitled to require the grievor to provide further medical information about her fitness to return to work, in addition to what she had already provided.

Arbitrator Levinson held that the employer was entitled and indeed obligated to satisfy itself about the grievor's fitness to work as a personal support worker, because her work involved working with frail and vulnerable residents. Further, the Arbitrator found that since the grievor has exhibited unusual behaviour after her sick leave, the employer was entitled to require further medical information about her health, as there were reasonable concerns about her mental fitness to return to work.

However, although employers have an inherent right to require employees to demonstrate fitness to work upon returning to work, an employer must have compelling reasons to require employees to undergo medical or psychiatric assessments. This was addressed in *CAW-Canada, Local 1010 v. Canadian Pacific Railway*.<sup>37</sup> In this case, the grievor, who had over 20 years experience with the Canadian Pacific Railway (CP), had made threatening comments to co-workers and management on two separate occasions. Although the grievor had no history of propensity for workplace violence or threats of any kind, following a three-day investigation CP advised him that he would be held from service with pay and that he would be required to undergo an independent medical exam to confirm his fitness to return to work. CP arranged for the grievor to attend such an assessment on two different occasions. However, he failed to attend and was advised by CP that he would no longer receive pay while being withheld from service.

Several months later, CP informed the grievor that his employment file would be terminated if he did not attend a psychological assessment. The grievor advised CP that he would not comply with its request. The grievor's own doctor provided a report to CP indicating that he had never showed any signs of mental disturbance. The report also indicated that the doctor did not believe that the grievor had a psychiatric problem and that he could return to work. However, despite the doctor's reports, CP advised the grievor that his employment record had been closed. As a result, the union filed grievances on his behalf.

Arbitrator Picher determined that the grievor was not required to submit to an independent medical examination requested by the employer. He allowed the grievance in part, ordering that the grievor be reinstated, but without compensation. The Arbitrator explained that long-standing arbitral jurisprudence establishes that, while employers have an inherent right to satisfy themselves of an employees fitness to work, they must have compelling reasons to require employees to undergo medical or psychiatric assessments. Arbitrator Picher further explained that an employer may require that employees pass a medical examination to determine an employee's fitness to return to work where "reasonable and probable" grounds exist. Although he acknowledged that the grievor's comments were not an acceptable form of communication in the workplace, he held that it did not justify CP's actions.

In addition, it is noteworthy that under the *Code*, there is not fixed rule as to how long an employee with a disability may be absent before the duty to accommodate has been met. This will depend on the ability of the employee to perform the essential duties of the job in consideration of the unique circumstances and the nature of the employee's condition, as well as the circumstances in the workplace. Other important considerations include the predictability of the absence, in regards to when it will end, if it may recur and the frequency of the absence; the employee's prognosis; and the length of the absence. The duty to accommodate does not necessarily guarantee a limitless right to return to work. However, a return to work program that relies on arbitrarily selected cut-offs or that requires an inflexible date of return may be challenged as a violation of the *Code*. The ultimate standard for assessing return to work programs is the test for undue hardship.<sup>38</sup>

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<sup>37</sup> Company Canada Grievance Arbitration (June 2011) (Arbitrator: Michel Picher) as discussed in *Disability and Accommodation eNewsletter* (Lancaster House), January 5, 2012, Issue #157.

<sup>38</sup> "Policy and Guidelines on Disability and the Duty to Accommodate", *supra* note 2 at 18.

## 2.6 UNDUE HARDSHIP

Although employers have a duty to accommodate employees with disabilities, the duty is discharged if the employer has reached a point of undue hardship. In assessing whether accommodation would cause undue hardship, subsection 17(2) of the *Code* prescribed three considerations, including:

1. cost;
2. outside sources of funding, if any; and
3. health and safety requirements, if any.

Determining undue hardship involves weighing a variety of factors and balancing them “against the right of the employee to be free from discrimination”. The following list of additional considerations emerges from the case law:

- financial cost considering the circumstances (including considering the size of the employer)
- disruption of a collective agreement
- problems of morale of the employees
- interchangeability of the workforce
- adaptability of facilities
- magnitude of any safety risks
- identity of those who bear the risks.<sup>39</sup>

Another consideration that has evolved is the ability of the employer to accommodate absenteeism. This is particularly relevant within the context of mental illness because employees may be absent for the workplace frequently or for an extended period of time as a result of their illness.

Undue hardship resulting from frequent absences within the context of mental disability was addressed by the Supreme Court of Canada in *Hydro-Quebec v. Syndicat des employe-e-s de techniques professionnelles et de bureau d'Hydro-Quebec, section locale 2000 (SCFP-FTQ)*.<sup>40</sup> In this case, the complainant was an employee of Hydro-Quebec, who had a number of physical and mental problems. Her record of absences indicated that she had missed 960 days of work during the last seven and a half years of her employment. Her absences were due to her many problems, one of which was a personality disorder that resulted in deficient coping mechanisms and made her relationships with co-workers and supervisors difficult. Over the years, the employer had adjusted her working conditions in light of her limitations, including light duties and gradual return to work following a depressive episode. Her attending physician had recommended that she stop working for an indefinite period, and the employer's psychiatric assessment mentioned that the complainant would no longer be able to “work on a regular and continuous basis without continuing to have an absenteeism problem as . . . in the past”. The complainant filed a grievance, alleging that her dismissal was not justified.

The Arbitrator dismissed the grievance on the basis that the employer had proven that, at the time it dismissed the complainant, she was unable, for the reasonably foreseeable future, to work steadily and regularly as provided for in the contract. Furthermore, the conditions for her return to work suggested by the union's expert would constitute undue hardship. The Superior Court dismissed the motion for judicial review of the Arbitrator's decision.

The Court of Appeal set aside the Superior Court's judgment, holding that the employer had not proven that it was impossible to accommodate the complainant's characteristics. It added that the Arbitrator should not have taken only the absences into account, since the duty to accommodate must be assessed as of the time the decision to terminate the employment was made. The Supreme Court allowed the appeal.

<sup>39</sup> *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 SCR. 489 at para. 62.

<sup>40</sup> 2008 SCC 43, [2008] 2 SCR 56.

In considering whether the employer had reached a point of undue hardship, Deschamps J. set out the test for undue hardship to be applied in cases involving the discharge of employees for absenteeism (at paras. 18-19):

[18] Thus, the test for undue hardship is not total unfitness for work in the foreseeable future. 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 even though the employer has tried to accommodate him or her, the employer will have satisfied the test. In these circumstances, the impact of the standard will be legitimate and the dismissal will be deemed to be non-discriminatory. I adopt the words of Thibault J.A. in the judgment quoted by the Court of Appeal, Québec (Procureur général) v. Syndicat de professionnelles et professionnels du gouvernement du Québec (SPGQ), 2005 QCCA 311 (CanLII), [2005] R.J.Q. 944, 2005 QCCA 311:

[translation] “[In such cases,] it is less the employee’s handicap that forms the basis of the dismissal than his or her inability to fulfill the fundamental obligations arising from the employment relationship” (para. 76).

[19] The duty to accommodate is therefore perfectly compatible with general labour law rules, including both the rule that employers must respect employees’ fundamental rights and the rule that employees must do their work. 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.

Deschamps J. further explained that when determining undue hardship as a result of absenteeism, the duty to accommodate must be assessed globally and take into account the entire time the employee was absent (para. 20).

Accommodation to the point of undue hardship was also addressed by the Ontario Human Rights Tribunal in *Harnden v. The Ottawa Hospital*.<sup>41</sup> The complainant was a nurse who had a long history of mental health problems, including clinical depression, post-traumatic stress disorder and borderline personality disorder that prevented her from working in her regular job as a registered nurse providing bedside care in a critical-care hospital setting. She alleged that her employer had impeded her access to health benefits and had failed to properly accommodate her disabilities because it refused to provide her with a financial package, and has been unwilling or unable to provide her with alternate work. Her employer denied the allegations, submitting that it had accommodated her disability-related absences, provided her with health benefits even when she was not entitled, and has made numerous attempts to locate a position suitable to her qualifications and accommodation needs, including making an offer of temporary work at her pay level and in her area of specialty.

The Tribunal dismissed the complaint, finding that, based on the totality of the evidence, the employer had discharged its duty to accommodate the complainant to the point of undue hardship. In considering the employer’s duty to accommodate the complainant, Adjudicator Chapman explained that the onus is on the Respondent to establish that it discharged its duty to accommodate the applicant to the point of undue hardship. Considering the evidence, she determined that the employer had met this onus.

She further explained her findings at paragraphs 64 to 65:

[64] The evidence establishes that the Respondent met the procedural component of the duty to accommodate in that the Respondent was aware of and actively pursued its duty to consider alternate work, and also attempted to assist the Applicant to pursue the various benefits available to her. The Respondent had a fulsome and well-equipped program in place to meet its obligations in a return-to-work situation, and in the Applicant’s case it diligently undertook its responsibility to

<sup>41</sup> 2011 HRTO 1258 (CanLII).

investigate accommodation and propose job options to address the Applicant's functional limitations. Moreover, the return to work process undertaken by the Respondent reveals that, in fulfilling its duty to accommodate, the Respondent was committed to ensuring that employees requiring accommodation received priority consideration over other prospective candidates bidding for a job. As noted in *Gourley v. Hamilton Health Sciences*, 2010 HRTO 2168 (CanLII), 2010 HRTO 2168, "not all employers could take this position as part of their accommodation analysis".

[65] The substantive component of the duty to accommodate requires me to assess the sufficiency of the Respondent's accommodation efforts and, if accommodation was not achieved, whether there were reasonable and valid reasons why those efforts failed to yield appropriate accommodation. I conclude that the Respondent offered a satisfactory answer as to why it was so difficult for it to successfully accommodate the applicant, such that she was unable to secure a permanent position which met her restrictions, and why the first offer the hospital was able to make was a temporary position in April 2009. The fact that consideration of over 12 nursing postings between April 2008 and April 2009 did not lead to a suitable alternate position speaks to the difficulties in accommodating the Applicant's significant shift and duty restrictions. I accept the Respondent's explanation that the search was complicated by the fact that the applicant did not have technical skills, training, experience, and/or education which were easily transferable to some of the very few nursing positions at the hospital which provided regular 8-hour day shifts in non-bedside nursing. It is also clear that these positions were competed for by other nurses seeking permanent accommodation, meaning that the Applicant was being compared to other applicants to whom the hospital also owed a duty. In these circumstances, I find that the respondent did not violate the substantive aspect of the duty to accommodate under the Code.

Although the Adjudicator found that the complainant's frustration was understandable, her requests demonstrated a misunderstanding of the duty to accommodate.

More recently, undue hardship was addressed in *Dover Flour Mills (Dover Industries Limited) v. United Food and Commercial Workers Canada, Local 175*.<sup>42</sup> The grievor was discharged by the employer, an operator of a flour mill, for being absent without approval and not providing adequate medical information. At the time of the discharge, the grievor was abusing alcohol and drugs. There was no dispute that he suffered from a disability nor was it disputed that his conduct, absent disability, would be cause for some discipline. However, the issue was whether the employer had just cause to discharge the grievor having regard to its duty to accommodate the grievor's disability to the point of undue hardship.

The Arbitrator dismissed the grievance, finding that the employer had accommodated the grievor to the point of undue hardship and had just cause to terminate his employment. In considering the employer's duty to accommodate, Arbitrator Stout made the following remarks at (paras. 98 and 101):

[98] The parties provided me with a number of arbitration awards that addressed situations involving grievor's suffering from addictive behavior. I have reviewed these awards very carefully and note that each case was decided based on their own particular facts. I also observe that generally, the awards indicate that discharge is not appropriate in circumstances involving an employee who has been discharged because of actions directly linked to their disability, if the employee's disability could be accommodated without undue hardship. However, a finding of undue hardship will be found and a discharge will be upheld when an employee has failed to respond to multiple rehabilitation efforts and there is no objective evidence to support a finding that further efforts of accommodation would succeed.

...

[101] The scope of the duty to accommodate varies depending on the circumstances, including the nature of the employment and the needs of the employee. The duty to accommodate is also

<sup>42</sup> 2012 CanLII 1234 (ON LA) (Arbitrator: John Stout).

to be applied on an individualized basis and involves not only an obligation on the Employer, but also the employee who seeks accommodation. In addition, the Union is required to participate and assist in accommodation efforts.

Abitrator Stout further explained at paragraph 103:

[103] There is no dispute that the grievor suffers from a disability. The grievor has mental health issues and addictions to drugs and alcohol. It is well accepted that addictions are disabilities that require accommodation. It is also well established that employees with addictions are prone to relapse and may need to be accommodated more than once. However, there is no set formula in determining the number of accommodation opportunities an employee with an addiction should be provided. Each case must be examined on an individualized basis to determine if the employee will be able to fulfill their basic employment obligations in the foreseeable future.

In this case, the grievor had a history of absenteeism and was put on notice that his absences would no longer be tolerated. The Arbitrator found that the employer had made a number of efforts to accommodate the grievor and that although the grievor made efforts to overcome his disability prior to being discharged, he failed to adequately discharge his duty to cooperate in the accommodation process. The Arbitrator also explained that the employer's safety concerns were reasonable, explaining that the employer has a statutory obligation to provide a safe workplace and to ensure that the product they make is safe for public consumption.

### 2.6.1 Health and safety concerns

Employers have a duty to ensure the safety of all of their employees. Sometimes, this duty conflicts with the duty to accommodate disabilities. However, the existence of a safety concern does not inevitably generate undue hardship. Instead, the impact of proposed accommodation on the health and safety of employees and the public are factors to be weighed in the undue hardship analysis alongside other factors.

The amount of hardship caused by a safety risk is assessed by considering:

- the severity of the consequences if the risk were to materialize;
- the probability of the risk materializing; and
- the identity of the people who are exposed to the risk.<sup>43</sup>

Some mental illnesses can impair an employee's ability to perform certain tasks safely. Usually, these risks relate to symptoms such as difficulty concentrating. As such, the increased risks are usually predictable, quantifiable and can be controlled by adopting appropriate measures. Unfortunately, many people have misconceived notions that mental illness is associated with violent behaviour. These fears are founded on myths and stigmas surrounding mental health issues. While it is true that certain mental illnesses can trigger violent behaviour, mentally ill people are generally no more violent than the rest of the population. In fact, according to the Canadian Mental Health Association, people with mental illness are far more likely to be victims of violence than to be violent themselves.<sup>44</sup>

In weighing any safety concern, the employer must consider the means available for controlling the risk. In some circumstances, it may be reasonable to require, as a condition of employment, that the employee follow a course of medical treatment to control the symptoms of the disability. However, there is no guarantee that an employee will diligently follow the course of treatment

<sup>43</sup> Kevin D. MacNeill, *The Duty to Accommodate in Employment*, looseleaf (Aurora: Canada Law Book, June 2005) at 12-36 – 12-43.

<sup>44</sup> "CMHA – ACSM – Info Centre", online: Canadian Mental Health Association <[http://www.cmha.ca/english/info\\_centre/mh\\_pamphlets/mh\\_pamphlet\\_04.htm](http://www.cmha.ca/english/info_centre/mh_pamphlets/mh_pamphlet_04.htm)>.

prescribed by his or her doctors. Where the employer has objective evidence supporting its concern that a safety risk is not under control, further accommodation may not be necessary.<sup>45</sup>

Since employers are obliged to provide a safe workplace for all of their employees, a growing number of employers are implementing strict anti-violence and anti-bullying policies. This focus on health and safety is commendable, but employers are reminded that the duty to accommodate is not displaced by the duty to provide a safe workplace. Rather, the two duties co-exist. By rigidly applying zero-tolerance anti-violence policies without heeding the duty to accommodate, employers could inadvertently be guilty of adverse effect discrimination against mentally disabled employees. Disciplining employees for violent or bullying behaviour is generally acceptable and is a necessary part of ensuring workplace safety. However, in cases where the offensive behaviour is caused by a mental illness, the employer's duty to accommodate arises. This does not mean that employers should accommodate disabled employees by tolerating violent behaviour. It means only that the blind application of disciplinary measures, without regard to mental disability, may lead to a breach of the duty to accommodate in some circumstances.

### 3. CONCLUSION

Although mental health issues can cause various challenges and difficulties for employers, mental illness is a disability that entitles the affected employee to the same protections as workers with other disabilities. While the practical impacts of accommodating employees with mental health disabilities may vary, whether an employee's disability is physical or mental in nature, the employer's duty to accommodate is theoretically the same. The practical tips and guidelines offered in this paper can assist employers in discharging their duties in a manner that is suitable for both parties and that complies with employers' obligations under human rights legislation.

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<sup>45</sup> See for example *C.A.W., Local 80 v. Honeywell Limited*, Lancaster's Equity, Disability and Accommodation Reporter, July/August 2002 (Tacon), affirmed [2003] O.J. No. 3699 (Div. Ct.).

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