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Where Disability Affects Performance: A Delicate Minefield for Employers

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To what extent is an employer required to accommodate an employee who is unable, due to illness or disability, to meet the requirements of his or her job? Unfortunately, there is no simple answer to this question as it will be highly dependent on the facts in each situation.

A recent case decided by Alberta's Court of Appeal highlights the difficulties that an employer may run into, even when it has no knowledge that the employee suffers from a disability. In that case, the employee had disclosed in on his on-line application form that he was a person with a disability, but there was no further follow-up requested or provided with respect to what disability the employee was affected with.

However, during the employee's first 90 days of employment (which was considered a probationary period), a number of performance issues arose including achieving less than 50% on the company's call centre score cards which was well under the 80% standard which the company required to be considered for permanent employment.

The employee was terminated just prior to the end of his probationary period for failing to meet performance standards. The employee grieved his termination, arguing that his disability, namely Asperger's Syndrome, played a role in his termination and that the employer failed to reasonably accommodate his condition.

The Court of Appeal determined that it was ***not*** necessary to demonstrate the employer's knowledge of the employee's disability in order to establish a *prima facie* case of discrimination. Rather, the uniform application of a seemingly neutral employment policy to all employees, regardless of protected characteristics, may give rise to adverse-effect discrimination.

On the facts of that case, the Court held that the grievor had satisfied the burden of showing a *prima facie* case of discrimination. The burden then shifted to the employer to justify that its discriminatory standard was a *bona fide* occupational requirement based on the following three-part test:

1. That the employer adopted the standard for a purpose rationally connected to the performance of the job;

2. That the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and

3. That the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

In that case, the employer satisfied its burden by establishing that there was no accommodation that could be made which would allow the employee to perform the job of a call centre agent. This was informed, however, by the fact the employee was still on probation.

An employer only has to accommodate a probationary employee within the role for which he or she was hired. However, in most situations, an employer must establish that there was no other suitable position in the organization which could accommodate the employee's disability, up to the point of undue hardship.

There is no general definition of what amounts to undue hardship. However, an accommodation should not result in undue interference in the operation of an employer's business or undue expense. Relevant factors include financial costs, disruption of a collective agreement, problems of morale of other employees, interchangeability of workforce and facilities, size of the workforce, and safety concerns. The point at which undue hardship is reached will vary widely. For example, the costs of modifying a building to make it wheelchair accessible may not constitute undue hardship for a large company but, for a very small company, it may.

Safety is clearly an important consideration in determining whether an employee with a disability can be accommodated without undue hardship. For instance, if an employee is addicted to drugs or alcohol, while considered a disability that is protected under the *Human Rights Code*, such will not necessarily shelter the employee from discipline for misconduct.

Human rights tribunals and adjudicators will consider what steps the employer has taken to allow the employee an opportunity to demonstrate control of the disorder so that the employee can be relied upon to prevent the disorder from adversely affecting his or her attendance or performance at work. Also, in considering whether future accommodation of an employee would involve undue hardship, it is appropriate to take into account the burden of all previous accommodation measures taken by the employer.

Arbitrators and tribunals have recognized that the resources of employers, even of large companies or organizations, are not limitless. Rather, the financial costs and management resources associated with an employee's high levels of absenteeism, and the impact that such absenteeism has on other employees can, in certain situations, amount to undue hardship.

There is both a substantive and a procedural component to the employer's duty to accommodate. As a result, employers must make more than a cursory look at accommodating an employee with a disability. The employer, who has charge of the workplace, is considered to be in the better position to formulate accommodations.

The duty to accommodate requires positive action by the employer to obtain all relevant information about the employee's disability, including information about the employee's current medical condition, prognosis for recovery, ability to perform job duties, and capabilities for alternative work. This information must be considered before an employer can reasonably conclude that it is unable to accommodate the employee without undue hardship.

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