

EMPLOYERS GETTING STARTED
On the Road to Mental Health and Productivity

MODULE NINE

HUMAN RIGHTS AND MENTAL ILLNESSES
“A Matter of Law”

Highlights

This module is “**required reading**” for those who wish to become well-informed on the legal obligations, duties and imperatives associated with the human rights of employees experiencing mental disorders.

Given the sensitivity of the subject, the thoroughness with which it is discussed in this Module, and the reader-friendly style in which the information is organized and written, we will not summarize these contents here.

We commend this Module to all concerned and wish to emphasize that this Module – or this Plan – does not take the place of qualified legal advice in individual human rights complaints.

This Module is “required reading” at a time when mental disability insurance claims dominate in today’s workplace.

All employers must accommodate employees with mental disabilities according to their individual needs. Accommodation does not include offering an employee a lesser job at lesser pay.

The Supreme Court of Canada: “Work is one of the most fundamental aspects in a person’s life, providing an individual with the means of financial support and, as importantly, a contributory role in society. Work is an essential component of his or her identity, self-worth and emotional well-being.”

Alberta Human Rights Act defines mental disability as “any mental disorder, developmental disorder or learning disorder regardless of cause or duration.”

Not all mental impairments give rise to functional limitations and where such limitations do exist, they may be minor. WORKink (Michael Lynk)

Impairment refers to the medical documentation and quantification of reduction of function. Disability is a social/legal determination defining task specific limitations in performance.

Mental illness is explicitly protected against discrimination in human rights legislation. Courts have ruled that impairment due to disability is unique to the individual. Job accommodations must – and can – be the same.

Disability is defined as the gap between what a person can do and needs or wants to do while mental disability refers to the effects of any mental disorder regardless of cause.

Differential treatment as a result of drawing a distinction, exclusion or preference. This can be either the behavior of a terrible manager or a biased one, or both.

- *Organization remains responsible for the outcome of managing the signs of distress and agitation and where changes have occurred in the person's performance of their job.*
- Exclusion can come via attitude. (Banks include mental illness in diversity training).

Imposing a burden or withholding benefit.

- Q for managers is whether they are treating this person differently because they are put off by what they see and/or have decided to ignore it – thus handicapping that person's access to help or chances for rehab.
- This would include not only unfair treatment but also neutral factors which have a negative impact – such as doing nothing.

Offending human dignity encompasses individual self-respect and self-worth.

- This is concerned with physical and psychological integrity and empowerment such as when individuals are marginalized which, in the workplace, can mean being ignored or excluded.

Human rights and performance management are inconsistent

- Privacy and confidentiality includes stopping rumours about any one individual.
- Essence of accommodating people with disabilities is individualization. Law says accommodation must be done on an individual basis.

The presence of untended systemic barriers to integration

- Conclusion about inability to perform essential duties should not be reached without testing.
- Leaving someone to twist in the wind is the same as not testing. Calculated indifference. A form of abuse.

- Right to return to work exists when the individual can return to work and do the essential tasks with accommodation – without undue hardship to the employer.

Individual human rights are not limitless. But employer duties are clear

- Employer must accept the employee's request for accommodation in good faith.
- Get expert advice when needed, take active role in accommodation, maintain confidentiality.
- Grant accommodation requests in a timely manner, bear the cost of medical information.
- When an employee is clearly unwell or distressed, the employer should attempt to assist that employee although employers are not expected to diagnose or second guess the health status of an employee.
- When an employer sees performance problems and signs of distress, the employer must exercise progressive performance management or violate the code.
- Before an employer may terminate an employee for unacceptable behaviour, the employer must determine if it is caused by a disability.
- Severe changes in behaviour could signal to an employer that the situation merits further investigation or attention. This may be linked to mental illness and this is explicit.
- Prudent employers offer employees assistance and support employees before imposing sanctions.
- Some mental illnesses may render an employee incapable of identifying his or her needs. Mental illness engages the protection of the code. Once disability-related needs are known, the onus shifts to the employer.

The duty to accommodate an employee's return to work from mental illness falls squarely on the employer and – in a bargaining unit – the union – up to the point of undue hardship.

depression must be accommodated with modified work through changes in their existing job or through alternative positions.

The employer may assume the union's voice in RTW matters is, by definition, the voice of the employee. For RTW purposes, the employee should make that choice.

Unions, and employers, in fact, should recruit independent human rights experts to advise all parties including the employee on whether his/her rights are being observed and protected.

In a five-point analysis by lawyer William J. Johnson of McGown, Johnson in Calgary, we learn that:

1. Unions have a responsibility to accommodate and cannot escape this duty through any provision of a collective bargaining agreement.
2. Unions and co-workers of the RTW employee must participate in the search for an accommodation – and cannot flatly refuse on the basis of seniority or job posting rights.
3. Neither can the employer ask the union and co-workers to waive seniority rights unless “no other reasonable alternative resolution exists.”
4. Unions have a duty to represent their members “at the higher end of the scale” in matters concerning a disabled employee. This is particularly true when an employee is mentally disabled and the issue is termination.
5. In one case –
 - The union was “held to have violated its duty of fair representation to the employee” by failing to seek arbitration in the case of an employee disabled by depression who was fired for not following orders and getting along with fellow employees.
 - The Saskatchewan Labour Relations Board held that “the union failed to take sufficient account of the mental disability experience by the employee and it therefore discriminated against him in handling the grievance.”

Unionized Workplace

In the unionized workplace, collective agreement provisions are to be respected in the course of fulfilling an employer’s duty to accommodate. But these may have to be waived if they unreasonably block a viable option.

Supreme Court of Canada – Madam Justice McLachlin recognized in 1999 the need to be proactive and sensitive to the individual in designing workplace requirements:

- “Employers designing workplace standards owe an obligation to be aware of both the differences between individuals and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards.

- “To the extent that a standard unnecessarily fails to reflect the differences among individuals, it runs afoul of the prohibitions contained in the various human rights statutes . . .”
- “The employer is required to provide for individual accommodation if reasonably possible.
- A viable accommodation can override the provisions of a collective agreement unless the proposed accommodation would “significantly” interfere with the rights of other employees such as causing the loss of another employee’s job or granting super-seniority to an accommodated employee.

What’s a Disability?

- More generally, a disability is the consequence of a disease, injury or condition that impairs one or more facets of a person’s ability to perform the daily functions of life. (Source: Michael Lynk)
- The Human Rights Commission advises that disability should be interpreted in broad terms including past and present conditions as well as a subjective component based on perception, myths and stereotypes.
- Certain disabilities might be non-evident (pain, chronic fatigue, episodic conditions).
- Regardless of whether it is evident or non-evident, certain social constructs and stigma define features of discrimination.
- The Supreme Court of Canada has recognized the distinct disadvantage and negative stereotyping faced by persons with mental disabilities and has held that discrimination against individuals with mental disabilities is unlawful.
- Discrimination may also take place where a term or condition of employment requires enrolment in a group insurance contract and the applicant does not qualify for the insurance plan because of disability. The term or condition of employment would be seen as a violation of the human rights code.

In 1982, the Supreme Court of Canada wrote: “Discrimination may be described as a distinction, intentional or not, based on grounds relating to personal characteristics of the individual or group.”

In 2000, Court wrote that:

- “Unlike gender or ethnicity which usually stamps a member with of the class with a singular characteristic, disabilities vary in type, intensity, and duration across the full range of personal physical or mental characteristics that present an individual from working. Disability means vastly different things.”
- “An individual may suffer severe impairments that do not prevent him or her from earning a living. Beethoven was deaf when he composed some of his most enduring works. Franklin Roosevelt, limited to a wheelchair, was elected president of the U.S. four times. Terry Fox inspired Canadians coast to coast.”
- “The concept of disability must therefore accommodate a multiplicity of impairments, both physical and mental, overlaid on a range of functional limitations, real or perceived, interwoven with recognition that in many important aspects of life, the so-called “disabled” may not be limited in any way at all.”
- “The principal objective ... is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes. Exclusion from the mainstream of society results from ... (construction) of a society based solely on mainstream attributes.”

No Set Formula

There is no set formula for accommodating people with disabilities. The goal of employers should be to create an “environment where a person with a disability may access their environment and face the same duties and requirements as everyone else with dignity and without impediment.”

Employees cannot expect a perfect solution, but the human rights code guarantees equal treatment to all persons capable of performing the essential duties or requirements of the job or service.

No one can be declared incapable of performing those duties until efforts have been made to accommodate the individual up to the point of undue hardship which (Corry) should be determined with “common sense and flexibility”.

The duty to accommodate may require employers to consider modifying performance standards and productivity targets, referring broadly to qualitative or quantitative standards on some or all aspects of the work. Productivity relates specifically to output.

“The task of determining how to accommodate individual differences may place burdens on the employer and union. (Sopinka)

Duty to accommodate requires more than simply looking to see if there is an existing job that might be suitable for a returning employee.

Questions to ask:

- Can the employee perform his/her existing job
- If not, can he/she perform it with some of the duties modified
- If not, is there another job in the company in its existing form
- If not, is there another job in a modified form?

Defining Undue Hardship

The employer must accommodate up to the point of undue hardship; and while there is no single definition in law as to what constitutes undue hardship, the employer must demonstrate that its efforts were serious, conscientious and genuine.

The duty to accommodate rests on three sets of shoulders, according to the Supreme Court of Canada:

1. Primary responsibility rests with the employer
2. The union must cooperate with the accommodation process and not unreasonably block a viable option.
3. The employee is expected to participate in the process also and cannot refuse a reasonable offer of accommodation.

Standard Life's "Return to Work Guide" offers this:

"Overall, an employer has a moral and in some circumstances, a legal duty to accommodate to the point of undue hardship." The following steps are recommended by the company:

- Welcome the request (to accommodate) in good faith, treat all requests as confidential and clarify what is needed to accommodate (prognosis).
- Avoid asking the employee to fill out forms in the early days off disability leave. This task is tough for anyone but especially so for someone having a difficult time concentrating.
- Don't badger the employee, don't ask for a lot of information and limit your requests to those reasonably related to the nature of his/her limitations or restrictions. Do not breach privacy requirements.
- Obtain expert advice and opinions, respond in a timely manner.

Critical Features of Human Rights Concerning Mental Illness:

- When an employee's capacity for rational judgment is impaired by mental disability, human rights place a higher onus on both employers and unions to accommodating the employee.
- The fact the employee does not disclose the mental illness when he or she was hired, or did not provide the employer with a diagnosis in the throes of the illness is not disentitled to accommodation for these reasons.
- When an employee returns, part-time, the employer cannot terminate their employment unilaterally. The employer must demo the genuine effort before claiming undue hardship.
- The duty to accommodate applies to part-time and probationary employees.

Human Rights and Human Resources

QUESTIONS / ANSWERS

Question: *Briefly, what are the laws in place to deal with discrimination in the workplace?*

Answer:

- There are several: employment law, the Canadian Charter of Rights and Freedoms and the Provincial and Federal Human Rights Codes. The obligations under all three are very similar.

Question: *What does the law say about job accommodations?*

Answer:

- Employers have a duty to accommodate employees with disabilities if the accommodation will allow them to perform the requirements of the job.
- Accommodation can include providing a quiet office for a person who is easily distracted, or permitting a person to take an extra break if they are required to eat when taking medication.
- Employers are only obligated to accommodate a person to the point of undue hardship. The Ontario Human Rights Code and the Canadian Human Rights Code restrict what constitutes undue hardship.

Question: *Can I ask someone whether they have a mental illness when they are interviewed for a job?*

Answer:

- A person can be asked whether they can perform the essential functions of the job. But the interviewer should not ask the applicant if they have an illness or whether they require accommodation until they hire the person.

Question: An employee has requested an accommodation but has not disclosed detailed information about the disability. What information can I request?

Answer:

- The employee is required to provide the employer enough information to enable the employer to provide the accommodation but not disclose the specific diagnosis or even the category of disability.
- Information about a diagnosis provided for the purposes of disability insurance, should not be disclosed to an employee's manager without their consent, even if an accommodation is requested.
- Employees may be afraid to disclose a diagnosis of mental illness because of concern about the reaction of their co-workers or managers. This must be respected.
- Longer term, the best solution is creating a workplace in which harassment or negative comments about mental illness are not tolerated.

Question: An employee's performance has deteriorated over the past year. Can I ask them if anything is wrong? What if they say that there is no problem?

Answer:

- An employer may, as part of a discussion about performance, ask an employee whether there are any problems, including health problems, which are interfering with their work. This must be done in a way that reassures the employee that disclosing this information will not jeopardize their employment.

If the employee replies that there are no problems, the employer is allowed to follow normal disciplinary process if there is no disclosure.

Question: An employee has returned to work after an extended disability leave. They are fine while taking their medication, but have behavioural problems when they stop taking it. Can I require an employee to take their medication?

Answer:

- It is difficult to find any legal basis for an employer requiring an employee to take or continue a particular treatment, even as part of a return to work program.

- However, the employer can make it clear when the person returns, that there are certain performance expectations. If these are not met, then the return to work will be reviewed and a determination made about whether the person can carry out the requirements of the job.

***Question:** Does an employee with a mental health problem pose a safety risk? Can I refuse to hire the person on that basis?*

Answer:

Safety is one of the criteria which can be used to refuse to hire someone on the basis of a disability provided that it is directly related to a bona fide occupational requirement and there is clear evidence that the individual cannot do the job in a safe manner, even with accommodation. Basing the decision on stereotypes would be considered discriminatory.

**Our appreciation to Patricia Bregman, a lawyer, for guidance in preparing this Q/A.*