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EPISODIC DISABILITIES AND THE DUTY TO ACCOMMODATE: A Legal Overview



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Agenda

1. **Episodic Disabilities: A Primer**
2. **What is the Duty to Accommodate?**
3. **What are the Employer's Duties?**
4. **What are the Employee's Duties?**
5. **Accommodating Episodic Disabilities**
6. **What are the Limits to Accommodation?**
7. **Caselaw re: Employers Failure to Accommodate Employees with Episodic Disabilities**
8. **Q&A**



Episodic Disabilities: A Primer

- Episodic disabilities are defined as disabilities involving periods of good health alternating with periods of illness or disability
- Mental illness, arthritis, epilepsy, HIV and some types of cancers can be characterized as episodic disabilities
- They are not permanent disabilities but rather periodic and unpredictable in nature
- Many conditions resulting in episodic disability are invisible or hidden—signs and symptoms are not apparent until they are severe
- Accommodation of employees with episodic disabilities presents special challenges for employers in trying to balance the individual's privacy rights and obtaining medical information necessary to meet a worker's needs



The Duty To Accommodate

Ontario's *Human Rights Code* provides:

5 (1) *Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.*

Sometimes “equal treatment” requires accommodation



The Duty To Accommodate

Accommodation is:

The Process of modifying the workplace or terms of employment to prevent a discriminatory outcome.

The Goal of Accommodation in employment is to allow the employee to perform the essential duties of their job with: dignity, individualization, and inclusion.



The Duty To Accommodate

An employee who needs accommodation is entitled to:

Accommodation that is reasonable in the circumstances

An employee who needs accommodation is not necessarily entitled to:

The perfect form of accommodation
Their preferred form of accommodation



The Parties To Accommodation

Accommodation is a Multi-Party Process

1. Employer: modifying workplace or work assignments
2. Employee: disclosing need for accommodation, and restrictions
3. Union: facilitating accommodation and navigating collective agreement



Employers' Duties

1. ***In some cases* Inquire into need for accommodation**
2. **Accept accommodation requests and medical information in good faith**
3. **Investigate alternative approaches to accommodation**
4. **Maintain confidentiality**
5. **Assess and disclose undue hardship**



Employees' Duties

- 1. Disclose need for accommodation**
- 2. Provide objective information regarding restrictions and limitations, ie. Doctor's Notes**
- 3. Cooperate in the accommodation process**
- 4. Accept reasonable accommodation**
- 5. Meet work standards once accommodation is in place**



Providing Medical Information

Balancing Human Rights against Privacy Rights

- Need to provide up to date medical information from a qualified practitioner

Substance of Medical Information

- Only what is needed to advance accommodation
- Eg. Nature of condition, nature of restrictions, prognosis

Timeframe from Provision of Medical Information

- Ensure employees are provided with a reasonably timeframe to submit medical information



Accommodating Episodic Disabilities

Remember that accommodation is a process.

Employee

- Be proactive with providing information and requests for accommodation

Employer

- Be flexible with potential accommodations



Examples of Accommodating Employees with Epilepsy

Proper accommodation can look like:

- Training other employee's on how to handle a potential seizure
- Allowing an employee to return home after a seizure
- Allowing an employee to work a consistent schedule so that they may take their medication



Undue Hardship Limit on Accommodation

There is no right to accommodate an employee beyond the point of undue hardship on the employer.

- On an objective and quantifiable basis
- Often related to monetary cost, or health and safety



Frustration of Employment Contract

Frustration: an intervening event that makes a contract impossible to perform, that is not the fault of either party to a contract, and was not anticipated when the contract was made.

Employment can be frustrated due to injury or illness.

- Employee is normally still entitled to notice of termination and severance pay under *Employment Standards Act, 2000*

Employment will not be frustrated if it would disentitle employee from group insurance benefits.



Instances where Adjudicator has Found Employers Failure to Accommodate Employees with Episodic Disability

- Dismissal of an employee without considering accommodation in another position constituted discrimination
 - *Philips v. Ritchie-Smith Feeds Inc*, 2021 CHRT 9
- City's limited efforts to contact employee with a disability prior to dismissal breached duty to accommodate, despite employee's lack of cooperation
 - *Ottawa-Carleton Public Employees Union, Local 503 v. City of Ottawa*, 2019 CanLII 103859 (ON LA)



Further Questions?

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