

# **Mental Health and Invisible Disabilities: Understanding the Obligations and Duties in the Employment Context**

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# The *Ontario Human Rights Code*

## **Disability** is defined as:

(a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,



# The *Ontario Human Rights Code*

## Def'n of **Disability** cont'd:

(b) a condition of mental impairment or a developmental disability,

(c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,

(d) a mental disorder, or

(e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*; (“handicap”)



# The *Ontario Human Rights Code*

## Examples of common “hidden” disabilities:

- Post-traumatic stress disorder
- Anxiety disorders
- Panic attacks
- Addictions to drugs or alcohol
- Depression
- Personality disorders
- Epilepsy
- Diabetes



# The *Ontario Human Rights Code*

## Disabilities take various forms:

- May be present at birth, caused by an accident or incident, or develop over time
- May be temporary, sporadic or permanent
- May be subject to environmental sensitivities – may flare up from one day to the next and may be entirely non-evident at other times



# Duty to Accommodate

- As an employer, school boards have a duty to accommodate employees to the point of undue hardship.
- There are procedural and substantive aspects to accommodation
  - The procedural component requires school boards to investigate and obtain all relevant information about the employee's disability and take steps to explore and determine how the employee can be accommodated.
  - Employees have a role in the procedural component as they have a duty to co-operate in the accommodation process, which includes a facilitation of the search for an accommodation by providing enough information so that the employer can decide on the accommodation.
  - The disclosure of a precise diagnosis is not required.



# Duty to Accommodate

- To trigger the duty to accommodate, the employer must know or ought reasonably to have known that an employee has a disability.
- The employee seeking an accommodation has the duty to bring the fact that they have a disability and work-related needs arising from that disability to the attention of the employer.

*-Huffman v. Mitchell Plastics (a division of Ultra Manufacturing Ltd.)*, 2011 HRTO 1745 at para.15.

- The substantive component is all about exploring all legitimate options to provide accommodations to the point of undue hardship. It is the determination of the adequacy and/or appropriateness of the proposed accommodations.

*-L.B. v. Toronto District School Board*, 2015 HRTO 1622



# Employer's Duty to Inquire

Two relevant instances that trigger duty to inquire

1) Duty to inquire before adverse action is taken

- When employer takes an adverse action against an employee (i.e., discipline, demotion, termination etc.) and employee alleges that the action is related to a previously undisclosed disability.
- Employer claims that it had no knowledge of a disability and therefore takes the position that the action was not discriminatory.
- Decision-maker will look at whether there were sufficient indicators of a disability to trigger duty to inquire





## Employer's Duty to Inquire

### 2) Duty to inquire into the need for accommodation

- Employer has an active and ongoing obligation throughout the employment relationship to inquire as to the need for accommodations, even without an adverse action on the part of the employer.
- This duty may arise even though the employee does not formally request an accommodation.
- Duty is triggered once employer knows or ought to have known about any disability, condition or signs that trigger the duty.



# Employer's Duty to Inquire

Signs that may trigger duty to inquire:

- Crying or other forms of distress
- Change in behaviour or attitude
- References to symptoms of depression (difficulty eating or sleeping)
- References to health issues
- Significant absences from work
- Knowledge that employee previously took or is taking sick leave
- Knowledge of another medical condition
- Knowledge of ongoing or upcoming medical treatment

*All apply even if no further details are known/provided*



# Employer's Duty to Inquire

## ***Wall v. The Lippe Group, 2008 HRTO 50***

- Employee alleged that termination was discriminatory on the ground of disability, as she was later diagnosed with PTSD and depression.
- Employer claimed that it was not aware of employee's disability and there was uncertainty as to when she would return back to work.
- Tribunal found ample evidence that employer was well aware she was suffering emotional consequences as a result of a workplace incident.



## Employer's Duty to Inquire

...Nonetheless, at that point, even on their own testimony, they each had an awareness of her symptoms and the traumatic workplace events that had given rise to those symptoms. If this was not sufficient to put them on actual notice that Ms. Wall was suffering from a disability, at the very least, it placed on them the onus to inquire further and precluded any defence based on ignorance of Ms. Wall's condition

...

As stated in other cases dealing with the test for establishing a *prima facie* case of discrimination, the question is whether the respondents knew or ought reasonably to have known that the complainant was suffering from a disability. For those purposes, there is no absolute requirement that a complainant communicate the nature of the disability to her or his employer.

(emphasis added) (at para. 80)



# Addictions in the Workplace

- Challenges arise when an employer is trying to balance its duty to accommodate along with its health and safety obligations and the enforcement of its policies and standards.
- Where it is established that an employee's addiction disability is a factor in their inability to comply with a workplace rule, a *prima facie* case of discrimination will be set out and the employer will have to turn its mind to its duty to accommodate.
- Prior to making any decision on discipline, employers should explore whether any nexus exists between the conduct and the addiction disability.
- Employers should familiarize themselves with signs of addiction disability so that they can properly discharge the procedural aspect of the duty to accommodate.



# Tips and Best Practices for Employers

## 1) Work culture

- Employers should take an active role to remove the stigma associated with mental illnesses
- Employers should take steps to show that there are supports for employees

## 2) Train managers to identify signs of mental illnesses

- Learn how to deal with return to work issues, performance issues and manage conflict
- Develop appropriate communication strategies to manage mental health issues



## Tips for Employers

- 3) Take a proactive approach to fulfilling duty to accommodate
  - Establish effective lines of communication so issues and concerns raised by employees are heard and addressed
  
- 4) Consider individual employee circumstances
  - Take the extra step of considering every individual employee's circumstances before any form of discipline, termination or change to employee's work is made

