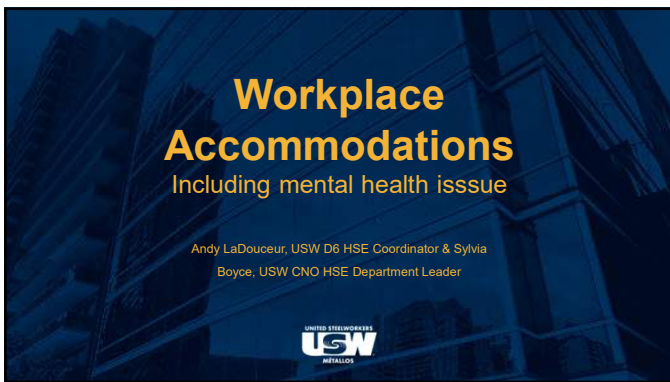
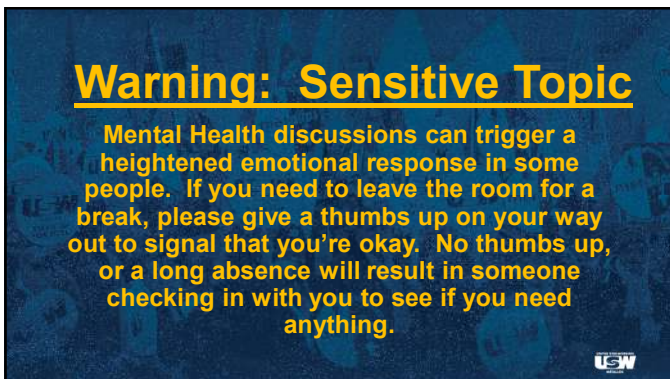




1



2



3





4

The Constitution Act, 1982

Equality before and under law and equal protection and benefit of law

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.






5

The Canadian Human Rights Act

Prohibited grounds of discrimination

3 (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, *disability* and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

6




7

Primacy of Constitution of Canada

52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Binding on Her Majesty


66 (1) This Act is binding on Her Majesty in right of Canada, except in matters respecting the Yukon Government or the Government of the Northwest Territories or Nunavut.



8

Provincial Human Rights Primacy Clauses

- Most have a primacy clause and those that don't state that the legislation binds the Crown.
- Charter prevails over all legislation which includes provincial human rights legislation.
- Human Rights legislation is quasi-constitutional and is afforded a broad and liberal interpretation.



9

Other Relevant Legislation

- Canada Labour Code
- Provincial Health and Safety Legislation
- Labour Relations Legislation
- Equity Legislation (including Accessibility Legislation)
- Workers Compensation Legislation



10



11

Definition of disability

Disability results from the interaction between individuals with a health condition, such as cerebral palsy, Down syndrome and depression, with personal and environmental factors including negative attitudes, inaccessible transportation and public buildings, and limited social support.



12

Definition of mental illness

“Mental illness is a **biopsychosocial** condition that causes alterations in thinking, mood and behaviour and is associated with significant distress and impaired functioning.”



13

Section 25 of the Canadian Human Rights Act

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



14

Provincial Human Rights Legislation

- Most provinces have a similar definition of disability in their legislation, and none have an exclusion for mental health conditions as a disability.
- All provincial human rights legislation specifically prohibit discrimination in employment.
- Duty to accommodate is specified in half of the jurisdictions but applies to all through interpretation.



15



16

Principles of Accommodation

The duty to accommodate is informed by three principles:

1. respect for dignity
2. individualization
3. integration and full participation

UAW

17

Principles apply to mental health issues

The duty to accommodate mental health issues triggers the same requirements from an employer as a physical injury. It is the method of accommodation that is different.

UAW

18

Origins of the Duty to Accommodate

The duty to accommodate is a fundamental legal obligation. It comes from two sources:
✓ Human Rights legislation
✓ Supreme Court of Canada decisions
The application of this duty has been regularly enforced by arbitrators and human rights tribunals.



19

The Duty to Accommodate



20

Expectations of worker

- Request accommodation and have medical documentation describing limitations
- Participate in accommodation discussions and offer possible solutions
- Accept reasonable accommodations (offering solutions doesn't mean picking your job)
- Indicate how long the accommodation is required, if known, or when the next updated prescribed limitations will be provided.



21

Employer Responsibilities

- Respect the dignity and privacy of the person requesting accommodation
- Be aware that once a request based on prohibited ground is made that the employer bears the duty to accommodate
- Discuss potential accommodation options with the worker
- Take reasonable steps to accommodate the person seeking accommodation to the point of undue hardship
- Reply to the request for accommodation within a reasonable period of time
- Make a formal written accommodation agreement with the person being accommodated and ensure that the accommodation is given a fair opportunity to work
- Follow up and be prepared to revisit the process as necessary



22

Employer's Duty to Inquire

Generally, it is the individual employee's responsibility to disclose their accommodation needs to the employer. However, people do not always come forward. Individuals with substance dependence or other mental health disabilities may not recognize or admit that they have a disability. Stigma and fear can also make individuals reluctant to admit there is a problem or request accommodation.

The duty to start a conversation about accommodation may shift to the employer if they know or ought to know from changes in an employee's attendance, behaviour or performance that the employee may need some form of accommodation. This is called the duty to inquire.

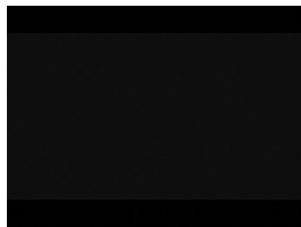


23

Access to medical information

The courts have confirmed, in many decisions, that an employer is entitled to medical information to:

- ✓ verify the existence of a disability.
- ✓ understand an employee's capabilities and limitations in order to devise a suitable accommodation.
- ✓ be assured that an employee can return to work without posing health and safety risks.
- ✓ determine whether an employee's disability still requires them to remain away from active employment.



24

Independent Medical Examinations

- Where someone’s needs are unclear, they may be asked to attend an independent medical examination (IME). However, there must be an objective basis for concluding that the initial medical evidence provided is inaccurate or inadequate. The IME should not be used to “second-guess” a person’s request for accommodation.
- Requests for medical examinations must be warranted, take into account a person’s particular disability-related needs, and respect individual privacy to the greatest extent possible.
- Contracting with a disability management company does not absolve an employer of responsibilities or liability if the accommodation process is not managed properly (IMEs are a form of contracting out).



25

Union Rights

Case law has established that Unions have the right:

- To be notified,
- To participate, and
- To make recommendations
- But can’t let seniority be a barrier.



26

Union Responsibility

Case law has established Union Responsibility:

- The duty of fair representation applies to accommodating workers, and in fact the Union is expected to act more diligently when dealing with people with disabilities.



27

Union Liability

Case law has established Union Liability:

- As a cosignatory to the CBA the Union can be found jointly liable with the employer for any damages awarded for discriminatory clauses, (including seniority being a barrier for accommodation).



28

Seniority Rights

- Seniority rights in a collective agreement should only be overridden where no other accommodation option, short of undue hardship, is possible.
- Generally, arbitrators have been very reluctant to interfere with seniority rights, unless all other possible accommodation efforts have been exhausted.



29

CONSEQUENCES

A settlement by a tribunal or court could include financial compensation for:

- ✓ lost wages
- ✓ interest
- ✓ pain and suffering
- ✓ loss of dignity
- ✓ humiliation
- ✓ general damages
- ✓ medical bills
- ✓ legal fees



30

Leading Case on Duty to Accommodate



31

The unified test

If prima facie discrimination (or discrimination on its face) is found to exist, a respondent must establish on a balance of probabilities that the standard, factor, requirement, or rule:

1. was adopted for a purpose or goal that is rationally connected to the function being performed
2. was adopted in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal, and;
3. is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.



32

Guidance from the Supreme Court

Hydro-Québec v. Syndicat Des Employées De Techniques Professionnelles Locale 2000 (2008)

- Worker suffered illnesses, both physical and mental
- Employer made numerous attempts to accommodate
- Worker dismissed based on inability to work on a "regular and reasonable" basis with no expectation of improvement



"The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work."



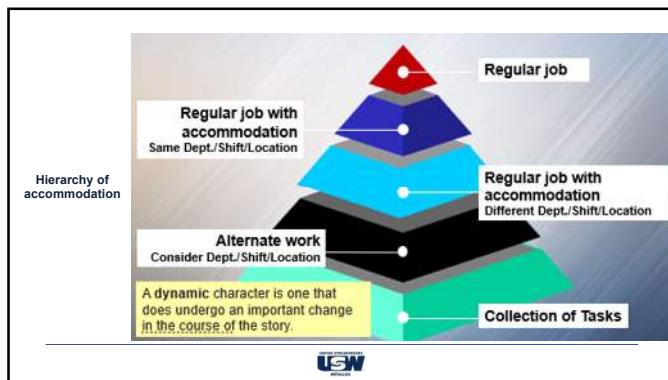
33

Unified Test with modifications

- must show that it adopted the standard for a purpose **rationaly connected** to the performance of the work
- must establish that it adopted the standard in an **honest and good faith** belief that it was necessary to fulfillment of that legitimate work-related purpose
- needs to demonstrate that the policy was **reasonably necessary**, which is determined by assessing whether employees affected by the policy could be **accommodated** up to the point of **undue hardship**



34



35

Section 15 of the Canadian Human Rights Act

Exceptions

15 (1) It is not a discriminatory practice if

- a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement;

Accommodation of needs

(2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a bona fide justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.



36

Undue Hardship



37

Undue Hardship

Christie v. Central Alberta Dairy Pool the Supreme Court developed a non-exhaustive list of six factors that it said were relevant to what constitutes "undue hardship"

- **Financial cost** (outside sources of funding must be considered)
- **Safety** (worker, co-workers, general public)
- Size of the employer's operations
- Interchangeability of the work force and facilities
- Impact on a collective agreement
- Problems of employee morale



38

Onus of Proof

- In order to claim the undue hardship defence, the **party** who is making that claim has the **onus of proof**
- The nature of the evidence required to prove undue hardship must be **objective, real, direct**, and, in the case of cost, **quantifiable**



39

Limits on Duty to Accommodate

- Only applies to prohibited/protected grounds listed in human rights legislation.
- It isn't discrimination if the worker can't perform the essential duties of a job with accommodation.
- It isn't discrimination if a bone fide occupational requirement can't be accommodated without undue hardship.
- Duty to accommodate is a dynamic process but it doesn't protect someone from non-culpable termination like frustration of contract.
- Worker failing to participate in the process.
- Competing human rights issues.



40

Other issues with accommodation

Direct Discrimination

Rule or practice is discriminatory on its face

Adverse Effect Discrimination

Neutral in appearance but impacting differently on an employee or group of employees

Effect not Intent



41

HUMAN RIGHTS LEGISLATION



42

Harassment

Engaging in a course of vexatious comment or conduct that is known or out to be known to be unwelcomed.



43

Poisoned Environment

This is a form of discrimination where the atmosphere of a workplace may result in a hostile or oppressive atmosphere for one or more people.



44

Systemic Discrimination

This type of discrimination consists of attitudes, patterns of behaviour, policies or practices that are part of the social or administrative structures of an organization or sector, and that create or perpetuate a position of relative disadvantage for people with disabilities.



45

Lane v. ADGA Group Consultants Inc. HRTO(October 2007)

- Lane was fired after revealing his diagnosis of bi-polar disorder.
- Employers have procedural and substantive duties to accommodate employees with disabilities up to the point of undue hardship.

The **procedural duty** involves the considerations, assessments and steps taken to respond to an accommodation need. This includes an individualized investigation of potential accommodation measures to address those needs.

The **substantive duty** is about the appropriateness or reasonableness of the chosen accommodation as well as the reasons for not providing an accommodation including proof of undue hardship.



46

Baber v. York Region District School Board

- Baber (a teacher) was advised of a performance review by the principal
- She asked for a deferral of a couple years, and it was denied
- Medical documentation was supplied stating that she should be a teacher-librarian or English as a second language teacher
- She wasn't qualified to be a librarian
- No functional abilities information was provided (she had anxiety)
- The HRTO found that she didn't participate in the accommodation process because she didn't provide functional abilities information



47

Accommodation Fundamentals

- The work itself, and the worker's presence in the workplace, should not pose a risk to the worker, co-workers or the general public
- The worker must be able to perform the tasks of his or her job at a level where meaningful work is possible with appropriate accommodations
- The workplace must be supportive and free from harassment and other pressures that might delay recovery
- Accommodations are used when someone has a functional/psychological limitation preventing them from performing duties of their job
- Accommodations (especially those for mental health problems) usually are easy to implement, inexpensive and (many have no cost at all), may be temporary and increase productivity
- Small adjustments can make a big difference in the mental health of workers



48

Accommodation Fundamentals

- Ask the worker what they need
- More than anyone else, the worker will know what they are capable of, and what they need to succeed in the workplace, and they'll be motivated by the reassurance that they work in a supportive environment
- Set benchmarks
- Set realistic goals and standards based on the needs of the organization and the employee's current abilities
- The process of setting clear, defined goals is a useful way to reintegrate employees into the workplace
- Lead by example
- Stigma like gossip or infighting, is poisonous to a productive work environment
- Demonstrate that you still trust, respect and value a co-worker who has been on disability leave for a mental illness



49

Some ways to accommodate addictions

- Referral to rehab
- Payment for rehab
- Peer counselor to monitor rehab
- Peer support upon re-employment
- Exercise & healthy diet options at work
- Avoiding work isolation
- Anti-stigma training



50

Accommodating Medical Marijuana

“People who use cannabis for a medical purpose related to a disability, and people addicted to cannabis, also have the right to disability-related accommodation to the point of undue hardship – that is, significant health and safety risks or excessive costs.”



51

Lessons from Case Law

- A prescription for medical marijuana does not entitle an employee to be impaired at work;
- A prescription for medical marijuana does not entitle an employee to compromise his or her safety or the safety of others;
- A prescription for medical marijuana does not entitle an employee to smoke in the workplace;
- A prescription for medical marijuana does not entitle an employee to unexcused absences or late arrivals;
- The employer is, however, required to attempt to find reasonable accommodation for the employee as would be required for any other employee with a disability.



52

Possible Accommodation Solutions for Stress and Emotional Issues

- Provide praise and positive reinforcement
- Refer to counseling and employee assistance programs
- Allow telephone calls during work hours to doctors and others for needed support
- Allow the presence of a support animal
- Allow the employee to take breaks as needed



53

Possible Accommodation Solutions to Meet Productivity Expectations

- A self-paced workload and flexible hours
- Backup coverage for when the employee needs to take breaks
- Time off for counseling
- An environment that encourages supportive employment and job coaches
- Work from home during part of the day or week



54

Possible Accommodation Solutions for Memory Deficit

- Allowing the employee to tape record meetings
- Providing typewritten minutes of each meeting
- Providing written instructions
- Allowing additional training time
- Providing written checklists



55

Possible Accommodation Solutions to Maintain Stamina

- A self-paced workload and flexible hours
- Flexible scheduling
- Longer or more frequent work breaks
- Additional time to learn new responsibilities
- Job sharing opportunities



56

Possible Accommodation Solutions to Stay Organized and Meet Deadlines

- Make daily TO-DO lists and check items off as they are completed
- Use several calendars to mark meetings and deadlines
- Remind employee of important deadlines
- Use electronic organizers
- Divide large assignments into smaller tasks and goals



57

Possible Accommodation Solutions for Difficulty Interacting with Coworkers

- Educate all employees on their right to accommodations
- Provide sensitivity training to coworkers and supervisors
- Do not mandate employees to attend work-related social functions
- Encourage employees to move non-work-related conversations out of work areas



58

Possible Accommodation Solutions for Concentration Issues

- Reduce distractions in the work area
- Provide space enclosures or a private office
- Allow for use of white noise or environmental sound machines
- Allow the employee to play soothing music (using headphones if safe)
- Increase natural lighting or provide full spectrum lighting
- Plan for uninterrupted work time
- Allow for frequent breaks
- Divide large assignments into smaller tasks and goals
- Restructure the job to include only essential functions



59

More than one appropriate accommodation?

- ❖ Most appropriate accommodation;
 - ✓ most respects the dignity of the individual with a disability,
 - ✓ meets individual needs,
 - ✓ best promotes integration and full participation, and
 - ✓ ensures confidentiality.
- ❖ Determination completely distinct and separate from whether the accommodation would result in "undue hardship"
- ❖ Appropriate if it will result in equal opportunity to attain the same level of performance, benefits and privileges experienced by others or proposed or adopted for the purpose of achieving equal opportunity, meeting the individual's disability related needs.



60

Summary

- The duty to accommodate is a multi-stakeholder obligation
- The duty rests on three sets of shoulders, with employers, unions and the employee seeking the accommodation all assuming legal responsibility for ensuring the success of an accommodation request.
- The union must co-operate with the accommodation process, and not unreasonably block a viable accommodation option.
- The employee is expected to participate in the accommodation process and cannot refuse a reasonable accommodation offer.
- The duty to accommodate is a two-step process; the procedural aspect followed by a substantive determination.
- Accommodation measures must be taken unless it is impossible to do so without imposing undue hardship.
- The undue hardship threshold is high.
- Employers and unions must be sensitive to the various ways that individual capabilities may be accommodated.



61

Example of Accommodation

A transit operator suffering from PTSD was unable to work due to fear of being assaulted by a customer again.

The bus was outfitted with a driver protection barrier.



62

Canadian Human Rights Commission Success Story

Andrea is a member of the Spruce Tree First Nation and has worked for the Band council as a bookkeeper and administrator for seven years. The Band council told Andrea that they would fire her because of her poor attendance, moodiness, and angry behaviour when she drinks. Andrea believed the Band council was discriminating against her on the ground of disability. She suffers from depression every September, which is the anniversary month of her daughter's death five years ago, and she drinks when she gets depressed.

Andrea's doctor agreed that the depression and drinking were disabling conditions. He referred Andrea to a therapist for ongoing counselling and help in finding an alcohol treatment program. The doctor also prescribed anti-depressants.



63

Andrea's Story Cont'd

The counsellor told Andrea that her only option was a 28-day treatment program away from the reserve. Andrea worried that the Band council would not agree to her missing work for such a long time, so she made a plan with the following:

- a request for a leave of absence due to medical disability.
- a letter from the doctor explaining that Andrea suffers from a medical condition that leaves her temporarily unable to work but that medication and the treatment plan should improve her condition dramatically.
- a note from the therapist confirming that Andrea is undergoing ongoing counselling to deal with her workplace problems and angry behaviour.
- a work plan from Andrea showing how she could draw together the periodic financial reports when she returns, as long as another employee tracks the invoices, expenses and other relevant information.



64

Another reason for employers to accommodate mental health issues

Absences and presenteeism are costing employers close to \$645 million annually according to Manulife's 2022 Wellness Report.

When employees habitually miss work, either in-office or remotely, without good reason, that's absenteeism. Pre-authorized absences, such as vacations and holidays do not count.

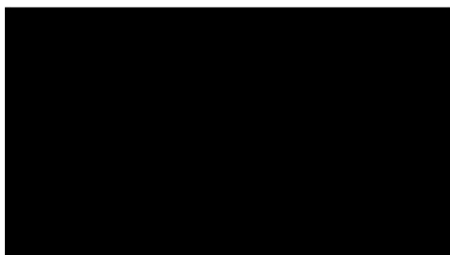
Employees who function below par at work, either due to sickness, mental state or a lack of interest in their jobs, are exhibiting presenteeism.

Research shows that both absenteeism and presenteeism are largely attributed to mental health issues.



65

Mike Rousselle's RTW Success Story



66

Group Exercise

Identify barriers and accommodations required for the following scenario:

Occupation: hotel housekeeping

Duties:

- Cleaning and sanitizing guest rooms
- Vacuuming hallways
- Cleaning elevators
- Laundry (bedding, towels, and guest laundry)
- Emptying waste baskets in guest rooms and hallways

Functional abilities:

- No physical restrictions
- Some difficulty with short term memory
- Fear of contracting communicable disease



67

What about victims of domestic violence?

Does human rights legislation trigger the duty to accommodate for victims of domestic violence?

What are some methods of protecting victims of domestic violence at work?



68

For more information
about the duty to
accommodate, USW
has a week-long
course.



69



70



71
