



ACCOMMODATING A DIVERSE WORKFORCE

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You are a promising employee – bright and enthusiastic. You have a career track position with a respected organization. You are dedicated, enjoy your work and receive good feedback. Everything seems to be going fine until one of the following occur: 1) *you are diagnosed as suffering from a permanent but “invisible” medical disability;* 2) *you are about to become a parent;* 3) *your aging parent needs your personal attention and care;* 4) *your religious beliefs change and preclude you from working on specific days;* or 5) *you develop a physical disability and need modifications to your work area.*

You believe that you can continue to be productive if adjustments are made to your work schedule or workplace. Your dilemma is: *“If I disclose my need for accommodation, I may be stereotyped as incapable or viewed as an economic burden. But if I do not disclose my needs, my fluctuations in productivity may become a performance issue. Either way, I am afraid I will lose my job.”*

What can employees and employers do to reconcile an employee's interests in accommodation and job security with the employer's interest in productivity? The courts have made it clear that in these circumstances the employee's needs must be accommodated to the point of “undue hardship.” The duty to accommodate is changing how employers manage their organizations. Employers risk discrimination complaints by requiring all employees to look, act and perform according to one traditional norm.

Lack of understanding about medical conditions such as addictions, discomfort with a person with a disability, fear of being taken advantage of by a “special case” and an unwillingness to pay the economic costs of a diversified workforce contribute to employer refusals to accommodate. The result is terminated employees, lost productivity, resentment, formal human rights complaints and legal actions for wrongful or constructive dismissal.

continued on page 2

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continued from page 1

Employers must address today's legal realities and balance their economic needs with their legal duty to accommodate.

Consider the legal reality:

Diversity is a valuable and protected cornerstone of Canadian society. Human rights law enshrines a person's right to be free of discrimination in employment on numerous grounds; in the case of accommodation, some of the key grounds are: sex, religion, family status, and physical or mental disability.

Human rights law recognizes that society is enriched when every person has an equal opportunity to contribute meaningfully to the workplace. The courts acknowledge that certain individuals or groups of individuals are disadvantaged because of their personal characteristics.

For example, in 1989, the Supreme Court of Canada noted that society as a whole, benefits from the birth of children but that women bear the major costs of procreation. *Brooks v. Canada Safeway Limited* [1989] S.C.R. 1219. The court recognized that bearing children is not a "lifestyle choice;" pregnancy is a medical condition that requires accommodation. Balancing work with parental duties is an "ever-increasing" imperative for men as well as women. The courts are looking to employers to help parents, regardless of gender, achieve this balance. The need for balance is illustrated by these common complaints: 1) employees are concerned that they must "justify" requests for parental leave; 2) women complain of termination due to pregnancy; and 3) parents, particularly men, are regarded as "lacking dedication" if they reduce their work hours to increase their parenting hours.

An individual's need for reasonable accommodation is now considered by the Supreme Court of Canada, as an acceptable price for employers to pay to ensure that "opportunity" and diversity are fostered. The onus is on the employer to prove that the accommodation requested creates an "undue financial hardship." The financial impact must be real, quantifiable by financial experts and more than *de minimus*. The duty to accommodate ceases when the level of hardship meets

the onerous standard of "undue severity." Other factors are considered when assessing "undue hardship;" they include: size of the organization, the ability of other personnel to adjust or modify their workload, flexibility of the office design, the impact upon morale, safety issues, and comparisons with equivalent organizations. Research indicates that physical modification costs are often surprisingly low.

Canadian employers have been required by the tribunals and courts to modify job duties, alter work schedules, refrain from firing or demoting employees, provide equitable compensation, purchase equipment, build facilities or provide a new job to an employee who requires accommodation. The duty to accommodate is continuous and may require recurring costs after initial accommodation occurs.

If a request for accommodation arises, an employer has an obligation to enter into a good-faith and thorough exploration of options for resolution. There is a corresponding duty on the employee to co-operate with efforts to accommodate and to communicate specific needs with supporting medical evidence, unless those needs are obvious to the employer.

The opportunity to retain talented and committed employees multiplies with a diverse workforce. The long-term advantages of accommodating a valued employee include lower turnover costs, fewer disruptions to the workplace, and preservation of intellectual "capital". In *Green vs. The Public Service Commission of Canada (2000)* the Federal Court (Trial Division) noted that a government witness estimated that an average of 280 applicants per year were denied access to career advancing opportunities with the Federal Government because their needs were not accommodated by the employer. In *Green*, an employee was denied access to a management position because her learning disability was not accommodated by allowing increased time on an aptitude test. The litigation process unfolded over a ten-year period. The loss to the employer and to talented people with a disability over this period of time speaks to the importance of employers being pro-active in meeting their duties to accommodate today's diverse workforce.