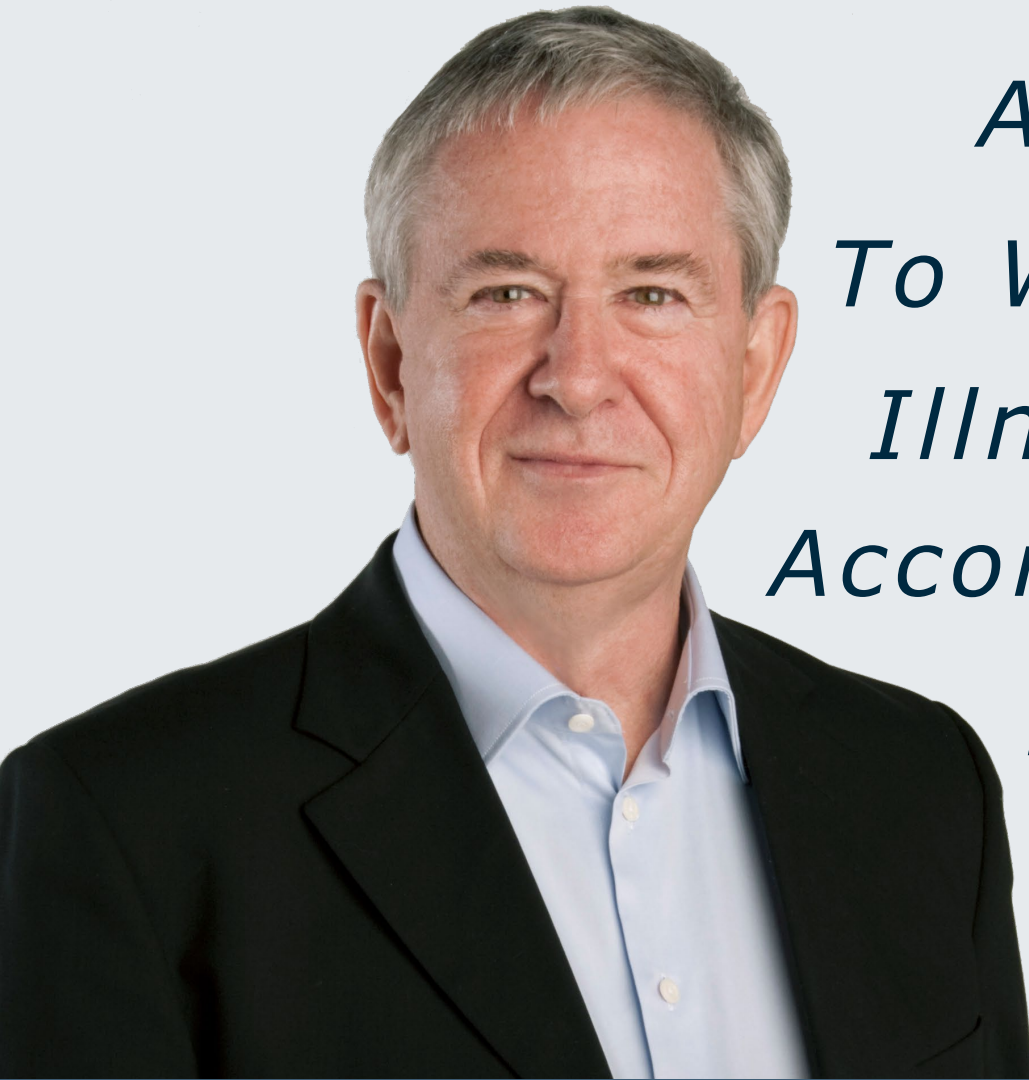


SPECIAL EMPLOYMENT AND LABOUR LAW EBOOK

THE DUTY TO ACCOMMODATE:



*A Guide
To Workplace
Illness And
Accommodation
In Canada*

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absenteeism
.com

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A Manual for Human Resource Personnel, Union
Representatives and Labour Relations Practitioners*

THE DUTY TO ACCOMMODATE IN CANADA

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14:000 INTRODUCTION

This Ebook sets out the general principles regarding the duty to accommodate in Canada and the nature of accommodative measures that must be extended to employees who have suffered discrimination attributable to a perceived or actual disability. The general principles described in this Ebook are elaborated upon in much more detail in our publication: [Illness & Absenteeism: A Manual for Human Resource Personnel, Union Representatives and Labour Relations Practitioners](#). **Note: References to page numbers in square brackets below indicate where additional elaboration and discussion may be found for each of these topics within the Manual.**

14:100 OVERVIEW

Human rights legislation prohibits employment-related discrimination on the basis of physical and mental disabilities.

Despite legislated differences among various jurisdictions, courts have taken a unified approach to defining the concept of disability. A disability has been distinguished from a transitory illness that has little impact on an employee's ability to participate productively in employment or other aspects of life.

The onus is on the employee to adduce sufficient evidence to establish that she is suffering from, or has suffered from, a perceived or actual disability, and that, as a consequence, she has been subjected to discrimination by the employer. A lack of intent to discriminate is not a defence to a claim of discrimination. The onus then shifts to the employer to establish its defence of justification. The employer must satisfy the tribunal that it took such reasonable steps toward accommodating the

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employee as were open to it without having to incur undue hardship.

The duty to accommodate is not a free-standing obligation. There is no duty to accommodate if the employee has not satisfied the tribunal that she has been subjected to discrimination based on a perceived or actual disability.

The characterization of discrimination as being either direct or indirect (adverse effect) now has little application when assessing the merits of an employer's defence. That defence now must be assessed having regard to three basic questions: (1) Has the employer established that its assessment of the physical or mental abilities required to perform the available work was connected rationally to the performance of the available work? (2) Has the employer acted in good faith in invoking that assessment in the case of the complainant? and (3) Would it impose an undue hardship on the employer to accommodate the complainant? Most cases focus on the third question.

The duty to accommodate is a multi-party obligation that extends to the employer, the employee, and, in certain circumstances, the affected union.

The disabled employee must take an active role in effecting an appropriate accommodation. She also must be prepared to accept a reasonable, as opposed to a perfect, accommodation. A complaint may be dismissed where the employee's conduct has affected the employer's ability to implement a reasonable accommodation.

The union's obligation to take steps to effect an accommodation arises only where the union is a party to the discrimination. That may occur where the union has participated in the formulation of a work rule that has a discriminatory effect (such as a provision in the collective agreement), or where its cooperation is required in order for the employer to take reasonable steps to remove or alleviate a discriminatory effect. In these latter instances, the union's duty generally is limited to circumstances where its involvement is required to make an accommodation possible and no other reasonable alternative has been, or reasonably could have been, found.

Although the obligation to find a reasonable accommodation extends to both the employee and the union, the primary obligation remains with the employer. The employer must take steps, short of undue hardship, to facilitate the disabled employee's return to, or continuation at, work. The employer must determine whether the disabled employee's regular or pre-injury job can be modified to permit the employee to remain at, or return to, that position. If the disabled employee cannot be accommodated in her regular job, the employer then must consider whether she can be accommodated in another position, with or without modification.

The duty to accommodate is limited by the words "reasonable" and "short of undue hardship." 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

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conditions in a fundamental way, but it does have a duty, provided it can be done without undue hardship, to modify the employee's workplace or duties in order to enable her to function in a productive manner.

The employer's duty to accommodate is not suspended by the fact that the employee is receiving wage-replacement benefits or is undergoing Workers' Compensation training to prepare her to seek alternate work.

The question of undue hardship must be determined in the circumstances of each case. An accommodation that does not constitute an undue hardship for one employer may constitute an undue hardship for another. Similarly, an accommodation that did not constitute an undue hardship may constitute an undue hardship at a later time because of changed circumstances.

In the absence of changed or different circumstances, accommodative measures extended in the past likely will not be found to constitute undue hardship. Nevertheless, arbitrators have recognized that an employer's ability to accommodate an employee short of undue hardship may be limited by the extent to which the employer already has extended similar accommodation to others.

The factors generally considered in determining undue hardship include financial cost, disruption of a collective agreement, problems of morale involving other employees, interchangeability of workforce and facilities, the size of the employer's operation, matters related to safety, and the provisions of the governing collective agreement. These factors are not exhaustive. They are to be applied with common sense and flexibility in the context of each situation.

The disabled employee is responsible for initiating a request for accommodation, and must provide medical information substantiating the need for accommodation. An employer who questions the sufficiency of the employee's medical evidence must insist upon additional medical information to address its concerns. However, an employee's failure to advise of the need for accommodation may be of little or no consequence if the possible existence of a disability or the need for treatment and possible accommodation might have been inferred from the facts of the case.

The duty to accommodate is ongoing. Even where reasonable accommodation presently is not possible, an employer may be required to continue the employment relationship where there is a reasonable possibility that circumstances might change so as to permit subsequent accommodation, short of undue hardship.

A disabled employee who is being accommodated is entitled to be considered for a posted position where similar or additional accommodation may be required. Further accommodation, short of undue hardship, also may be required to address the changing needs of an accommodated employee.

Despite the ongoing nature of the duty, it has been accepted that it would amount to an undue hardship to deny an employer the right to finality at some point in the

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accommodation process.

Different considerations may apply, depending on whether the accommodation is temporary or permanent. While an employer is not necessarily obligated to extend interim or temporary accommodation on an indefinite basis, nevertheless, it must consider whether some other form of accommodation could be extended once the interim accommodation is brought to an end.

An employee who has not recovered fully from a disability may be obligated to accept suitable modified work that is made available by the employer. That obligation may exist even where her physician has recommended a further period of recovery.

The duty to accommodate usually has been limited to considering available positions and the manner in which such positions may be modified, short of undue hardship. The duty does not obligate an employer to displace another employee from her position in order to make a job available for a disabled employee. Moreover, the duty to accommodate does not require an employer to create a new job for a disabled employee. Nevertheless, an employer may be expected to consider the possibility of bundling job duties the disabled employee would be able to perform.

Accommodation may require that the disabled employee be provided with a familiarization period and, where appropriate, a limited amount of training. Where suitable accommodation requires that an employee be placed in a lower paid position or one having fewer benefits, the accommodated employee is generally not entitled to retain the salary or benefits associated with her previous position.

An employer may be obligated to accommodate a disabled employee outside the bargaining unit, but only where the need for accommodation is clear and there is no other way to fulfill the employer's duty to accommodate.

An employer also may be required to credit a disabled employee with service or seniority for the limited purpose of permitting the disabled employee to maintain her relative seniority ranking in matters related to choice of vacation period, bidding on posted positions, and protection from layoff.

SUMMARY OF PRINCIPLES

14:200 Prohibition of Discrimination on the Basis of Disability

14:201 Human rights legislation in all Canadian jurisdictions prohibits employment-related discrimination on the basis of both physical and mental disabilities. [Page 526]

14:202 The term “disability” is synonymous with “handicap.” While one or the other of those terms has been defined in most jurisdictions, the legislation in British Columbia, Manitoba, and Québec is silent on the matter. Despite differences in legislation, courts, arbitrators, and human rights tribunals have tended to take a unified approach to defining these terms. In general, it can be said that a disability usually is distinguished from a transitory illness that has little impact on an individual’s ability to participate productively in employment or other aspects of life. The disability need not be ongoing or permanent, and it need not be proven to have existed where the employer has discriminated based on a perception of disability. [Page 528]

14:203 The prohibition against discrimination extends to both direct and indirect (adverse effect) discrimination. Direct discrimination occurs where an employee suffers discrimination clearly related to that person’s disability, whereas indirect or adverse effect discrimination arises where a neutral rule or standard of general application has a discriminatory impact on a member of a particular group. The vast majority of discrimination cases alleging physical or mental disability fall within the category of direct discrimination. Cases of indirect or adverse effect discrimination involving disabilities are confined most often to those where the employer has adopted a general policy or rule, such as a fitness requirement, that adversely affects a disabled employee. [Page 530]

14:204 The prohibition against discrimination is subject to a justification defence. Historically, that defence depended on whether the discrimination was characterized as direct or indirect (adverse effect) discrimination. In 1999, the Supreme Court of Canada adopted a unified approach, so the characterization of the discrimination as being either direct or indirect now has little application when assessing the merits of an employer’s defence. [Page 532]

14.205 The test now employed to assess an employer’s defence to a prima facie case of discrimination (both direct and adverse effect discrimination) was promulgated in *British Columbia (Public Service Employee Relations Commission) (Meiorin Grievance)* [1999].⁹⁴⁴

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An employer may justify the impugned standard by establishing on the balance of probabilities:

- (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
- (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
- (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible^[945] to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

⁹⁴⁴ British Columbia (Public Service Employee Relations Commission) (Meiorin Grievance), [1999] 3 S.C.R. 3

⁹⁴⁵ The Supreme Court of Canada, in *Hydro-Quebec* (2008), 174 L.A.C. (4th) 1 (S.C.C.), clarified the third element of this test, stating that “What is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances ...”

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The *Meiorin* test was formulated in a case involving a rule of general application, so the language employed is problematic when considering cases alleging direct discrimination on the basis of a physical or mental disability. From a practical point of view, the *Meiorin* test, when applied to allegations involving a physical or mental disability, can be restated as follows:

- (1) Has the employer established that its assessment of the physical or mental abilities required to perform the available work was connected rationally to the performance of the available work?
- (2) Has the employer acted in good faith in invoking that assessment in the case of the complainant?
- (3) Would it impose an undue hardship on the employer to accommodate the complainant's disability?

A negative answer to any of these three questions would defeat an employer's justification defence to an established case of prima facie discrimination. [Page 534]

14:206 A lack of intent to discriminate is not a defence to a claim of discrimination. [Page 538]

14:207 An arbitrator appointed under a collective agreement has the jurisdiction to consider and address human rights protections enshrined in federal or provincial legislation. [Page 539]

14:300 ESTABLISHING A DISABILITY

14:310 The concept of disability has received a broad interpretation by reason of the remedial nature of human rights legislation. [Page 541]

A disability may be actual or perceived. It will be sufficient for a complainant to establish that she was discriminated against on the basis of a perceived, rather than an actual, disability.

Canadian courts, as a matter of practice, have ascribed a common meaning to similar provisions in the various human rights codes. Underlying this interpretive approach was said to be the fact that the “different human rights laws share a common objective.”

This has led to a somewhat principled approach to defining the term “disability.” In that regard, it has been found that:

- (1) A distinction may be drawn between an illness and a disability. [Page 542]
- (2) A disability need not be ongoing or permanent. [Page 545]
- (3) A disability can be founded on a perceived, rather than an objective, condition. [Page 546]
- (4) A disability must have been, or be seen to have been, a factor in the complainant’s adverse treatment. [page 547]
- (5) Periodic substance abuse is not necessarily a disability. [Page 548]
- (6) A condition necessitating non-essential surgery may constitute a disability. [Page 549]
- (7) Learning disabilities and many other cognitive issues may constitute a disability [Page 550]

14:320 Discrimination on the basis of disability generally will be found where the disability played some role, no matter how small, in the decision made regarding the complainant. Conversely, discrimination on the basis of disability normally will not be found where an actual or perceived disability did not, or was not perceived to, interfere with a complainant’s ability to fulfill the requirements of a position. A court or tribunal will be unlikely to find that a disabled employee had not been subject to discrimination merely because she received the same adverse treatment (discipline) as a non-disabled employee would have received in the same circumstances. [Page 554]

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14:330 The onus is on the employee to adduce sufficient evidence to establish (a) that she is suffering from, or has suffered from, an apparent or actual disability, and (b) that, as a consequence, she has been subjected to either direct or indirect (adverse effect) discrimination by the employer. [Page 557]

14:400 THE DUTY TO ACCOMMODATE: PRINCIPLES OF GENERAL APPLICATION

The Nature of the Duty to Accommodate

14:410 An employer's obligation to establish that it took steps to accommodate a disabled employee short of undue hardship does not arise until the employee has established a prima facie case of discrimination (i.e., that the employee is suffering, or has suffered, from a disability, perceived or actual, that has led to discriminatory treatment in her employment.)

A prima facie case of discrimination, in the context of the duty to accommodate, has been defined as one "which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of answer from the respondent-employer." [Page 562]

14:420 The duty to accommodate postulates that an employer must take steps, short of undue hardship, to facilitate a disabled employee's return to, or continuation at, work. The duty requires that the employer consider whether a disabled employee's regular job (including matters such as hours of work) can be modified to permit her to remain at, or return to, that job. If she cannot be accommodated in her regular job, the employer then must consider whether she may be accommodated in another position that will, with or without modification, enable her to resume, or continue in, active employment.

An employer cannot insist that related grievance issues be resolved prior to agreeing to extend accommodation. [Page 566]

The Duty to Accommodate Is a Multi-Party Obligation

14:430 The duty to accommodate is a multi-party obligation that extends to the employer, the employee, and, in certain circumstances, the affected union. [Page 570]

14:431 The employer bears the primary obligation to identify and effect an appropriate accommodation. It must establish that it has taken steps, short of undue hardship, to accommodate an employee's disability. That onus arises from the fact that it is the employer that has knowledge of the work, and can assess, at least initially, reasonable steps that might be taken to modify the work or otherwise accommodate the disabled employee. [Page 572]

14:432 A disabled employee is obligated to take an active part in effecting an

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appropriate accommodation. She must act reasonably, and must assist in, and facilitate, the search for suitable accommodation. The duty to accommodate is neither absolute nor unlimited. Where an accommodation process fails because the employee does not cooperate, the complaint may be dismissed. [Page 573]

A disabled employee who seeks accommodation has the following obligations:

(1) The disabled employee normally will be responsible for triggering the accommodation process. That expectation may be diminished where the employee's conduct was such that the employer knew, or should have known, of the need for accommodation.

The disabled employee is responsible for advising the employer when changing circumstances necessitate an amendment to any existing accommodation. [Page 574]

(2) The disabled employee must demonstrate a flexible and cooperative attitude, and must take steps to facilitate the search for accommodation. The disabled employee cannot reject a Suitable accommodation or insist on one that she would prefer. It follows that a disabled employee may be required to accept a less-than-perfect accommodation. [Page 574]

(3) The disabled employee must ensure that the employer is provided with the necessary medical information to effect a proper accommodation. [Page 575]

(4) The disabled employee must accept and pursue treatment required to alleviate the effects of the disability. This includes compliance with any course of medication prescribed by the employee's physician(s), along with attendance at, or compliance with, other treatment recommendations. [Page 575]

(5) The disabled employee must make a reasonable effort to facilitate implementation of a return-to-work plan, and must cooperate in accepting modified work. [Page 577]

Notwithstanding these obligations, an employee's failure to facilitate the accommodation process normally will not be a relevant factor where it has neither impaired the placement/accommodation process nor the viability of the employee's continued employment. [Page 579]

14:433 A union's obligation to take steps to effect an accommodation arises only where the union is a party to the discrimination. That may occur where the union participates in the formulation of a work rule that has a discriminatory effect (such as a provision in a collective agreement), or where its cooperation is required for the employer to take reasonable steps to remove or alleviate a discriminatory

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effect. In the latter situation, the union's duty generally is limited to circumstances where its involvement is required to make accommodation possible, and no other reasonable alternative has been, or reasonably could have been, found.

Although the process of effecting accommodation necessitates consultation with the union, the union does not maintain a veto over accommodative measures advanced by an employer.

While a union may be required to accommodate the transfer of an employee into its bargaining unit, that obligation will arise only where no other reasonable accommodation is available. [Page 581]

Elements of the Duty to Accommodate

14:440 The duty to accommodate has realistic limits, in that the obligation to accommodate extends only to the point of undue hardship. [Page 584]

14:450 The extent to which an employer has met its obligation to accommodate a disabled employee short of undue hardship is to be assessed globally, having regard not only to all past accommodation, but also to the additional hardship that would be imposed if further accommodation were to be required. [Page 585]

14:460 The duty to accommodate is ongoing. Even where a reasonable accommodation presently is not possible, an employer may be obligated to continue the employment relationship where there is a reasonable likelihood that the employee's health will improve, or other circumstances might change, so as to subsequently permit accommodation, short of undue hardship.

A disabled employee who is being accommodated is entitled to be considered for posted positions, even though similar or additional accommodation may be required.

The ongoing nature of the duty to accommodate also requires that further accommodation, short of undue hardship, be made to address the changing needs of an accommodated employee. Decisions the employer makes in this regard must be based on updated medical information.

Despite the ongoing nature of the duty, it has been accepted that it would amount to an undue hardship to deny an employer the right to finality at some point in the accommodation process. [Page 587]

14:470 Considerations that apply to a temporary accommodation will not apply necessarily to a permanent accommodation. Different considerations also may apply when the accommodation is to be limited to a known and temporary period of time. [Page 591]

14:480 An employee who has not recovered fully from a disability may be obligated to accept modified work extended by the employer. That obligation may exist even where the employee’s physician has advised that additional recovery time is required. [Page 595]

14:490 The duty to accommodate normally has been limited to considering available positions and the manner in which such positions may be modified, short of undue hardship. Arbitrators, however, have concluded that an employer may be obligated to consider transferring a disabled employee to a position closer to her home, or temporarily permitting her to “telework” from home. The provision of personal assistive devices (such as hearing aids) has been held to fall outside an employer’s duty to accommodate. [Page 598]

The Concept of Undue Hardship

14:501 The employer bears the onus of establishing that a proposed accommodation constitutes an undue hardship. [Page 600]

14:502 The question of undue hardship must be determined in the circumstances of each case. An accommodation that does not constitute an undue hardship for one employer may constitute an undue hardship for another. Similarly, an accommodation that did not constitute an undue hardship may constitute an undue hardship at a later time because of changed circumstances. The inverse of this proposition is equally true.

In the absence of changed or different circumstances, accommodative measures extended in the past likely will not be found to constitute undue hardship. [Page 601]

14:503 The factors that may constitute an undue hardship include financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of workforce and facilities, the size of the employer’s operation, and matters related to safety. The provisions of a collective agreement also can be relevant in assessing whether a particular measure would constitute an unjust hardship. These factors may be affected by statutory considerations. [Page 605]

14:5031 Financial cost: The factor of cost has been extended to include both monetary and institutional costs, with the latter incorporating several factors (deterioration in morale, safety concerns, loss of flexibility, and increased inefficiencies, including time and costs associated with having to monitor an addicted employee’s compliance

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with treatment conditions). This factor may be given relatively little weight where the employer fails to quantify the costs likely to be involved. [Page 607]

14:5032 Disruption of a collective agreement: Substantial departure from the terms and provisions of a collective agreement may constitute undue hardship. On the other hand, the terms of a collective agreement may be a factor in concluding that a particular accommodation would not amount to an undue hardship. [Page 611]

14:5033 Effect on the morale of other employees: The reaction of employees may be a factor in deciding whether a particular accommodation would constitute an undue hardship. However, employee concerns attributable to attitudes inconsistent with human rights are of no relevance, nor are concerns of employees who have been temporarily back-filling a position while the disabled employee was absent. It also has been held that the preferred solution is one that focuses the burden of accommodation on the pool of junior employees. [Page 613]

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14:5034 Interchangeability of workforce and facilities: The lack of flexibility in this regard may constitute a factor in determining undue hardship. [Page 615]

14:5035 The size of the employer's operation: Accommodation measures appropriate in a large organization may create an undue hardship for a smaller employer. [Page 616]

14:5036 Matters related to safety: A risk to the safety of others, or a risk of reinjury to the disabled employee, may constitute an undue hardship. [Page 617]

14:504 To require an employer to undertake measures that have little chance of success has been considered to constitute an undue hardship. Moreover, accommodations that may be possible in theory may constitute an undue hardship if continuing accommodations previously implemented for others render further accommodations unworkable. [Page 622]

14:505 Arbitrators have held, relying on the principle of proportionality, that the burden an employer should be required to bear in effecting an accommodation varies inversely with the consequential relief flowing to a disabled employee. [Page 623]

14:506 The ongoing receipt of long-term disability benefits (or other collective agreement entitlements) does not relieve the employer of the obligation to work toward an accommodation. Similarly, an employer is not relieved of the obligation to seek accommodation merely because the disabled employee has enrolled in a WCB retraining program intended to equip her to obtain alternate employment. [Page 625]

Searching for an Accommodation

14:601 An employer must engage in substantial consultation with the disabled employee and her union at all stages of the accommodation process. Failure to do so may result in an arbitrator's rejecting the sufficiency of the efforts undertaken by the employer. [Page 627]

14:602 The accommodation process normally is triggered by the disabled employee's advising the employer that she is able to return to work but with certain limitations or restrictions.

The employee must advise the employer of the nature of the disability and the consequent need for accommodation. While failure to do so may affect the remedies available to the employee, generally, it will not relieve the employer of the obligation to provide accommodation on a going-forward basis.

The failure of an employee to advise that she is suffering from a disability that

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requires accommodation may be of little or no consequence if the possible existence of a disability and/or the need for treatment and possible accommodation might have been inferred from the facts of the case. [Page 632]

14:603 An employee who suffers from a disability must provide the employer with sufficient medical information to establish that she is otherwise capable of returning to, or continuing to, work with suitable accommodation. The medical information must detail the nature of the disability and the extent to which it limits the employee's performance. The employee also must cooperate in obtaining additional medical documentation that the employer reasonably requires in order to effect a proper accommodation.

Where the employer is not satisfied with the sufficiency of the medical information provided, it must advise the disabled employee and the union, and then must take further steps to pursue provision of the required information. [Page 641]

14:604 An employer is not obligated to implement an accommodation advanced by the employee's physician. [Page 645]

14:605 An administrative decision of a Workers' Compensation Board or an insurance carrier will not be sufficient to determine the degree of an employee's disability or the viability of her accommodation. A different result may prevail where the decision was made following a rigorous adjudicative process that decided the same issue. [Page 647]

14:606 An employer cannot rely on subjective impressions. If the employer does not have the necessary resources and skills, consideration may have to be given to retaining a medical or workplace consultant who can consider the employee's position in relation to her accommodation needs, and then, if necessary, all available positions to determine whether any of those positions would, with or without modification, be appropriate for accommodating the disabled employee.

To minimize the subjective element, an employer should consider the possibility of providing the disabled employee with a short trial period or, at least, an opportunity to demonstrate whether the employee can function adequately in a suitably accommodated position. [Page 649]

14:607 Accommodation does not require that an employer place an employee in a position for which she lacks the essential skills, even accounting for a reasonable training period. Stated differently, it has been held that an employee must be able to perform all, or most all of, the essential duties of the position for which accommodation is being sought. [Page 653]

14:608 A disabled employee is entitled to be returned to her former position if that can be done, with or without accommodation, short of undue hardship to the employer. If the disabled employee cannot be accommodated in her regular job, the employer then must consider whether the employee can be accommodated in a different job, and, if necessary, in another location or department. [Page 656]

14:609 Where limited aspects of a position's duties fall outside an employee's medical restrictions, consideration should be given to whether those duties could be assigned to other employees. An employer who is concerned about the impact that such an assignment might have on other employees cannot factor that concern into its decision without first canvassing the views of the affected employees. [Page 657]

14:610 An employer may be required to consider, particularly in the case of temporary accommodation, the possibility of permitting the employee to work less than full time. [Page 659]

14:611 Where a disabled employee cannot be returned to her former position, the employer must conduct a comprehensive review of bargaining-unit positions to determine if the employee can be placed in a different position, with required modifications as necessary, short of undue hardship to the employer. [Page 661]

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14:612 The duty to accommodate does not obligate an employer to displace another employee from her position to make a job available for a disabled employee. [Page 662]

14:613 The duty to accommodate does not require an employer to create a new job for a disabled employee. Arbitrators remain divided on whether an employer is required to create work for a disabled employee by bundling job duties that fall within the employee's restrictions. [Page 663]

14:614 As part of the search for accommodation, primary consideration should be given to positions within the bargaining unit that preserve, as much as reasonably possible, the employee's existing seniority rights and terms of employment. [Page 670]

14:615 Substantive consideration must be given to reasonable accommodation that would minimize resultant hardships to the disabled employee. However, where suitable accommodation dictates placement in a lower paid position or in one having fewer benefits, the accommodated employee generally will not be entitled to retain the salary or benefits associated with her pre-accommodation position. Similarly, where an accommodation necessarily involves a relocation, an employee will not be entitled to recover associated costs unless such are compensable under either the employer's policy or the terms of the collective agreement. [Page 671]

14:616 Accommodation may require that the employee be provided with a familiarization period and, where appropriate, a limited amount of training. A need for training is more likely to constitute an undue hardship where the disability and the resultant need for accommodation are limited in duration. [Page 675]

14:617 A disabled employee is not entitled to preference for management positions or positions involving a promotion. [Page 676]

14:618 An employer may have to explore accommodation outside the employee's bargaining unit. Where the employee could be accommodated in another bargaining unit, the duty to effect such accommodation will prevail only where the need for accommodation is clear, and there is no other reasonable way to fulfill the employer's duty to accommodate. The question of portability of seniority will be a factor that must be considered.

The requirement to consider an accommodation outside the employee's bargaining unit may obligate an employer to accommodate the employee in another plant located some distance from the employee's established work site. [Page 677]

14:619 A disabled employee is not entitled to a perfect accommodation. An employer generally will have met its obligation when it extends a reasonable offer of accommodation. It follows that a disabled employee has no right to choose a different accommodation that might be more suited to her preference. [Page 679]

14:620 An accommodation is more likely to constitute an undue hardship where it interferes with the seniority rights of other bargaining-unit employees.

An employer may, nevertheless, be required to give preference to a disabled employee for available positions to be filled through a job posting, and, in doing so, must consider whether those positions can be modified to meet the disabled employee's medical restrictions. [Page 681]

14:621 Where a workplace accommodation cannot be made, an employer may have to consider a layoff or an unpaid leave of absence as an accommodative measure. [Page 684]

14:622 An employer may have to reconsider the nature of existing accommodations where accommodated employees might be affected adversely by a layoff. This may include having to justify a limitation on the number and type of disabled employees who can be accommodated in a particular department.

An employer is not, however, obligated to provide an accommodated employee with protection against layoff by more senior employees who are subject to layoff. [Page 686]

14:623 An employer may be required to credit a disabled employee with service

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or seniority for the limited purpose of permitting the disabled employee to maintain her relative seniority ranking in matters such as choice of a vacation period, bidding on posted positions, and protection from layoff. Such entitlement will not, however, extend to benefit or monetary considerations that depend on classification or service. [Page 689]

14:624 The duty to accommodate may require that an employer provide training that an employee missed while disabled if the lack of such training will have an impact on her ability to compete for a vacant position or promotion. [Page 691]

14:625 The duty to accommodate may obligate an employer to relieve a disabled employee from certain aspects of its attendance management or monitoring program. However, the existence of a disability will not insulate a disabled employee from the possibility of being terminated for excessive, non-culpable, absenteeism. [Page 692]

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Entitlement to Damages

14:701 An employer may be required to compensate an employee for losses incurred as a result of unnecessary delays in effecting an accommodation. [Page 693]

14:702 Compensation generally will be awarded where a failure to accommodate has resulted in lost wages and benefits, an injury that has an impact on the employee's dignity, feelings, and self respect, or psychological trauma or mental anguish occasioned by the employer's willful or reckless disregard for the employee's right to accommodation. [Page 694]