



## Accommodation under the *Human Rights Code*: Issues and Considerations for the Health Industry

Presented by: Erik Marshall

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# AGENDA

1. Overview of the Duty to Accommodate
2. Recent Decisions Finding Personal Liability for Managers and Supervisors
3. Update on Family Status Accommodation
4. Case Study on Employee Drug Addiction and Theft of Narcotics

# Prohibited Grounds of Discrimination

## Employment – s. 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

## Disability – s. 10(1):

- a) any degree of physical disability;
  - b) mental impairment, a developmental disability or learning disability;
  - c) A mental disorder;
  - d) an injury or disability for which WSIB benefits were claimed or received
- A disability may be actual or perceived

# Duty to Accommodate

## Arises when:

- A neutral rule has a discriminatory affect on an individual due to a prohibited ground; OR
- a rule on its face discriminates against individuals due to a prohibited ground

## AND

- the discriminatory rule is not reasonable or *bona fide*

# Procedural & Substantive Obligations

- An employer's duty to accommodate has both **procedural** and **substantive** obligations:
  - **Procedural**: requires an individualized investigation of accommodation measures and assessment of employee's needs
  - **Substantive**: involves an analysis of the reasonableness of the accommodation offered

# Bona Fide Occupational Requirement

## Criteria:

- Adopted for a purpose connected to the job;
- Adopted in honest and good faith belief that it was necessary for the job; and
- Rule is necessary for the legitimate job purpose and it is impossible to accommodate employees without imposing undue hardship

# Undue Hardship

## Factors to consider:

- **Cost – s. 17(2)**
- **Sources of Outside Funding – s. 17(2)**
- **Health and Safety Requirements – s. 17(2)**
- Size of Operation?
- Morale of Employees?
- Interchangeability of Workforce?



# Some “Truths” about Undue Hardship

- Some level of hardship (and inconvenience) is expected and acceptable  
BUT
- The test (per S.C.C. in 2008) is not one of “impossibility” and is not limitless
- Practically, the **larger** the employer, the **higher** the threshold
- A significant limitation on the employer’s right to manage
- If you’ve offered it in the past, you will be deemed to be capable of offering it again

# Accommodation

## Options:

- Creating a new position
- Creating a shadow position
- Make work vs. productive employment
- Displacing incumbents
- Bundling or carving out duties
- Providing assistive devices, ergonomic equipment or a personal attendant
- Modified shifts, reduced hours and flexible work schedules
- Modification of physical surroundings, work areas or performance standards
- Additional training
- Transfers to other locations or positions – possibly to positions outside of the bargaining unit if that is the only alternative

# Personal Liability for Managers

## Halliday v. Van Toen Innovations Inc.

- Discrimination on the basis of disability
- Sales agent addicted to crack cocaine
- Employee confided in boss about addiction and recovery

# Personal Liability for Managers

## Halliday v. Van Toen Innovations Inc. cont'd...

- Incidents:
  - Transportation of employee to detox program under false pretenses
  - Comment to employee - “F\*\*king crack-head”
  - Email to fellow sales agent - “crack head”
  - Email to business contacts - “crack addiction” and “physical threats”

# Personal Liability for Managers

## Halliday v. Van Toen Innovations Inc. cont'd...

- Tribunal finding owner and his company jointly and severally liable for discrimination on the basis of disability - violated right to be free from harassment
- Award:
  - \$4,524 for lost income
  - \$25,000 for injury to dignity, feelings and self-respect
  - Human rights training ordered
  - Human Rights Code card to all new staff

# Personal Liability for Managers

## *Favuzzi v. 1140782 (c.o.b. Weedman)*

- Age discrimination case
- 45-year old seasonal lawn and garden maintenance worker
- Specifically advised by owner that he was terminated for being “too old”
- Tribunal finding owner and his company jointly and severally liable

# Personal Liability for Managers

*Favuzzi v. 1140782 (c.o.b. Weedman) cont'd...*

- Award:
  - \$1,640 for lost income
  - \$1,000 for injury to dignity, feelings and self-respect

# Personal Liability for Managers

## *Farris v. Staubach Ontario Inc.*

- Complex procedural history
- Sex discrimination case
- Real estate agent subjected to poisoned work environment:
  - Was an atypical woman and held in disdain for it
  - Subject of vicious and false sexual rumour
  - Subject of offensive remarks made by male agents
  - Management complicit in permitting the poisoned work environment



# Personal Liability for Managers

## *Farris v. Staubach Ontario Inc.* cont'd...

- Tribunal finding two managers and company jointly and severally liable for \$22,500 of \$30,000 damage award for injury to dignity, feelings and self-respect

# Personal Liability for Managers

## Summary:

- Managers cannot hide behind corporate veil
- Managers must address complaints of poisoned work environments or may be held liable
- Purpose of *Code* is to provide an effective remedy
- Remember to consider requests for removal of personal respondents where claims unfounded

# Family Status Accommodation

## *Johnstone v. Canada (Border Services)*

- Federal Court decision
- Application for judicial review of a Canadian Human Rights Tribunal decision
- Dealt with parental childcare obligations

# Family Status Accommodation

## Facts:

- Mother of two and a border services officer at the Canadian Border Services Agency
- Full-time employee working rotating shifts of at least 37.5 hours per week as did all full-time Agency employees
- After maternity leave, requested to work fixed day shifts to allow her to arrange childcare for her young child
- Agency's policy restricted full-time employees from working fixed day shifts and only made these shifts available to part-time employees

# Family Status Accommodation

- Agency denied request and offered her part-time work on a fixed schedule
- Agency offered her a maximum of 10 hours a day for three days plus a further four hour shift on a fourth day for a total of 34 hours a week
- She accepted the three 10-hour days but not the additional four hours on the fourth day

# Family Status Accommodation

- She asked if she could remain on full-time status and characterize the hours not worked as leave without pay so that her income would still be pensionable - request denied
- Following the birth of her second child, she renewed her request to work full-time in fixed shifts of 13 hours over three days – request denied

# Family Status Accommodation

- Filed complaint with the Tribunal
- Tribunal held Agency had discriminated against her on basis of family status and that Agency had not accommodated her to the point of undue hardship
- Agency had accommodated employees seeking accommodation for medical or religious reasons, but had been uncompromising in Ms. Johnstone's case

# Family Status Accommodation

- The Tribunal awarded:
  - lost wages and benefits, including overtime she would have received and pension contributions as if she had been working full-time;
  - \$15,000 for general damages for pain and suffering; and
  - \$20,000 for special compensation
- Tribunal's decision upheld for the most part by Federal Court



# Family Status Accommodation

- Rejection of “serious interference” test in favour of a test focused on whether “the employment rule interferes with an employee’s ability to fulfill her substantial parental obligations in any realistic way”
- Need to ensure your organization is not differentiating between requests based on one prohibited ground versus others in an arbitrary or inappropriate way

# Family Status Accommodation

- See also *Devaney v. ZRV Holdings*
  - human rights case dealing with family status → elder care
  - Employee caring for elder, disabled mother
  - Company required employee to attend work despite pre-existing practice of working from home
  - Subsequent termination deemed discrimination on the basis of family status

# Employee Drug Addiction & Theft of Narcotics

- Case Study on *ONA v. London Health Sciences Centre (B.S. Grievance)*

# Employee Drug Addiction & Theft of Narcotics

## Facts:

- Grievor a nurse in surgical care unit
- Patients typically experiencing high level of pain that is treated with narcotics and sedatives
- Concern raised by co-workers that grievor stealing & using narcotics intended for patients
- Grievor denies, then admits to theft and use

# Employee Drug Addiction & Theft of Narcotics

## Hospital narrative:

- stole narcotics
- withheld narcotics from patients
- fraudulent entries made in medical records
- failed to apologize or express remorse

# Employee Drug Addiction & Theft of Narcotics

## Union narrative:

- drug addict
- addiction caused her to lie and steal
- attended treatment and counseling
- drug and alcohol free for over a year and a half

# Employee Drug Addiction & Theft of Narcotics

## Key Question:

- Is there a causal connection between the drug addiction and the commission of the offence (that lead to the imposition of discipline)?
- If yes and grievor discharged → potential for discharge to be set aside as *prima facie* discrimination under the *Human Rights Code*

# Employee Drug Addiction & Theft of Narcotics

- Grievor understood actions to be wrong, but not capable of overcoming that understanding due to disability
- Arbitrator held grievor's addiction was direct cause of her misconduct → prima facie discrimination on the basis of disability
- Parties to determine whether grievor could be accommodated to point of undue hardship having regard to conditions imposed by College of Nurses



# Other Human Rights News of Interest

- HRTO in process of revising Rules of Procedure – useful new “vexatious litigant” provision
- *Tremblay* case - \$1,000 damages for breach of settlement via Facebook post
- Pinto Report calling for higher damage awards
- *Fair v. Hamilton-Wentworth D.S.B.* case – reinstatement and lost wages ordered 10 years later

# Questions?

# Thank You

## Erik Marshall

- Tel.: 416.595.2656
- Email: [emarshall@millerthomson.com](mailto:emarshall@millerthomson.com)

