



EMPLOYMENT DISCRIMINATION AND THE DUTY TO ACCOMMODATE

Employers have a legal duty to reasonably accommodate characteristics identified in *The Saskatchewan Human Rights Code* unless doing so creates an undue hardship on the employer.

The Saskatchewan Labour Standards Act defines accommodation as: “modifying the duties or reassigning the employee”. This duty applies to all characteristics identified in the *Code* including: disabilities, family status, pregnancy, ancestry, and religion.

Employers

Courts have set a high threshold for satisfying the duty to accommodate. Some hardship is implied. The employer’s obligation will be met if:

- the disabled employee has been accommodated and remains unable to return to work in the foreseeable future or
- the accommodation threatens the proper operation of the business.

Granting a leave of absence to recover from injury or illness, allowing a gradual return to work, altering work conditions, approving a transfer to another job, or rearranging shifts, or bundling meaningful job duties in order to allow the employee to continue working. It may mean adjusting start/finish times to accommodate family issues.

The courts have said the possibilities are endless and vary according to circumstances. Engaging in a process to achieve accommodation is the key to meeting the duty to accommodate.

Employers may satisfy themselves that an employee is physically or mentally capable of performing their job safely. This could include asking for necessary medical information or a functional assessment. The employer is only entitled to know the obstacles to employment and not a specific diagnosis. Medical information should be kept on a separate file. This duty extends to the point of ‘undue hardship’.

Undue hardship is generally defined as an unbearable financial cost or a considerable disruption to business, or an interference with the rights of others. The size of the employer’s operation or labour pool may be taken into account, as well as safety considerations and the nature of the employment contract.

Employers may apply a ‘reasonableness test’ in circumstances where an employee has experienced considerable absenteeism with no likelihood of returning to work. Employers may also pay the level of wage and benefits according to the work being performed.

Employees

Employees have right to “reasonable” accommodation. They also have responsibilities:

- They have an obligation to inform an employer of their need for accommodation, where possible and practical, and to assist in securing an appropriate accommodation.
- The employee should not turn down any reasonable proposal for accommodation that is offered. Accommodation may be a continuum of measures and not a perfect or final solution.

Employees are obligated to provide necessary detailed medical or other information that justifies the request for accommodation. This could include undertaking a functional assessment. Employees must co-operate with rehabilitation efforts and should work within medical restrictions.

The employee must accept the rate of pay for the type of work performed. Benefits may also be adjusted to reflect time worked.

An employee may not likely displace another employee to achieve accommodation. Excessive absenteeism and the prospects of returning to work or not may be considered by the employer in determining the on-going duty to accommodate, as may safety considerations.

Unions

Unions must assist in the accommodation process wherever possible. This means applying due diligence to requests for accommodation and assisting the worker where necessary. The union may be obligated to take the issue forward before the human rights commission does.

Collective agreements should be screened for potential human rights violations. The union may be party to a complaint by virtue of the wording of the agreement.

The duty to accommodate may go against seniority in some cases if the seniority system itself results in discrimination. Cross-unit transfers with seniority may be a form of reasonable accommodation. Document your efforts to assist the worker and to achieve accommodation.