

Do Employees Have A Duty to Inform an Employer of a Disability?



Employers not always expected to accommodate employees who do not disclose disability

The title is not a trick question. We understand that in Canada an employee has no obligation to disclose personal medical or health information including disability to an employer. Some individuals will work for an employer their entire lives and never disclose a disability. Many disabilities have zero impact on the employee's ability to perform and need not be mentioned. But what happens when the disability impacts job performance? What duty does an employee have to inform an employer of the impact of disability in the workplace?

Can Discrimination Derive from Lack of Knowledge?

In Ontario, the AODA (Accessibility for Ontarians with Disabilities Act) does require proactive action on the part of organizations to mitigate the potential for discrimination. Employers in Ontario are required to create a plan. This plan must consider the potential for disability and create a non-discriminatory hiring process. This does not mean, however, that an employer is required to hire an employee who cannot perform the essential duties for the job.

In Alberta, a recent decision by the court upheld an adjudicators ruling that, in some cases, an employer does have the right to terminate an employee with a disability without first trying to accommodate the employee's disability.

The position held by the ruling was that in this particular case, the employee had an obligation to prove the employer knew or ought to have known about his disability. Even if the employer did know about their employee's disability, the employee needed to have provided details to the employer to help them determine how to provide accommodation. In other words, an employee must do more than announce their disability if he or she wishes to receive accommodation.

Why Accommodation Was Not Required in This Case

In the case in question, an employee was hired by Telus to work in a call centre. During the application process, this employee indicated he had a disability by checking a box on the application form. However, no further information was offered. During the probationary period, the poor performance of the employee required intervention. He needed additional training and coaching. The employer was still not

satisfied with the employee's performance after the intervention. Finally, in the week prior to the employee's termination, he disclosed to the employer that his disability was Asperger's syndrome.

The employee filed a grievance against Telus claiming they had failed in their duty to accommodate. The adjudicator and then the Court disagreed and said that while the employee provided some information he had not provided enough to enable the employer to make accommodations.

Furthermore, the arbitrator, relying on expert testimony, indicated that the disability itself was a contributing factor to his failure to meet the standard required for the job. Because the employee was still in the probationary period termination was an option and there was no duty to provide accommodation including an alternate job

Employer Take Away

- An employer in Alberta cannot be expected to accommodate an employee if the employer is not aware of the employee's disability or its impact on the employee's performance.
- When faced with a performance issue, it is very important for an organization to offer, deliver and document any actions taken to assist the employee. Records on attempts to discipline or coach an employee should be documented. These records should indicate the areas the employee was failing in and the attempts made to coach or train the employee.
- If an employee cannot be accommodated in a position or does not disclose the need for accommodation in a timely manner the employer may have the right to terminate the employee without offering accommodation. However, if the employee is not within the probationary period or if the disability can be accommodated in the job or in the organization a different outcome may result.
- It is always difficult to extrapolate the finding from one case to future possible cases. It may be advisable in another circumstance for an employer to consider directly inquiring if the disability an employee has indicated may be a contributing factor to his performance issues and then acting accordingly.

In response to the original question 'Do Employees Have A Duty to Inform an Employer of a Disability?' the answer can sometimes be yes, if they want to be accommodated they just may have a duty to inform.