

How Far Must Return to Work Programs Go to “Accommodate” Injured Employees?



Companies are legally required to make reasonable efforts to accommodate employees who want to return to work after a debilitating injury or illness. Accommodation involves letting employees return to modified duties and schedules commensurate with their current capabilities. Establishing a Return-to-Work (RTW) program helps ensure compliance with these obligations, which derive from workers' compensation and human rights laws. But there are also limitations on how far RTW must go.

The *Automodular* Case

For nearly two years, an auto supply plant employee with an injured back tries unsuccessfully to return to modified work. The supplier finally runs out of suitable work. Rather than terminate her, it treats her as indefinitely absent due to a disability and promises to let her know when and if it can find her appropriate work. The employee sues the supplier for not doing enough to accommodate her. The Ontario arbitrator throws out the disability discrimination claim, citing the supplier's "credible" early and safe RTW program and genuine efforts to accommodate [[Automodular Corp. v. CAW-Canada, Local 1256 \(Petkovska Grievance\)](#), [2011] CanLII 20787 (ON L.A.)].

Drawing the Line between Reasonable Accommodation & Undue Hardship

Automatically firing employees who can no longer do their job due to a work injury or illness violates the employer's duty under human rights laws to reasonably accommodate disabled employees. Reasonable accommodation involves determining what employees are capable of doing and modifying their duties accordingly. The RTW program essentially manages the accommodation process in accordance with applicable workers' compensation requirements.

Unfortunately, RTW doesn't always result in positive outcomes. Some injuries are too severe to return from; even where employees are willing and able to return to work, the company may not have any work that they can safely and productively perform. For these reasons, the duty to accommodate is limited to "reasonable" accommodations and doesn't require accommodations that would impose undue hardship. Unfortunately, in real-life distinguishing between reasonable accommodation and undue hardship isn't so simple. Thus, companies that think a requested accommodation would impose undue

hardship run the risk of being second-guessed in court.

Automodular illustrates where courts draw the line between reasonable accommodation and undue hardship. The injured employee's physical restrictions got progressively worse; she could stand for 15 to 30 minutes and sit for 30 to 60 minutes. The company repeatedly gave her modified work but soon ran out of assignments that she was capable of doing. The key is that before reaching that point, it made good faith efforts to accommodate her, including:

- Preparing three separate RTW plans for her.
- Frequently requesting updated medical information and modifying the RTW plans based on that new information.
- Letting her perform jobs of little to no value.

In the arbitrator's words, the company had "proactively and diligently monitored the [employee's] physical condition and thoroughly searched for and offered" her whatever work it could provide that she could safely do. But after all of this and with no improvement in site, the company had run out of assignments and ideas. Thus, the arbitrator concluded that the company accommodated the employee to the point of undue hardship.

Takeaway

There's only so much the RTW process can accomplish. The expectation is not that RTW will achieve positive outcomes in every case but that it will deliver whatever effort and energy is necessary to give the process its best chance of success in all cases. The law recognizes that there may come a point where, in spite of everybody's best efforts, the employee simply can't be reintegrated into the workforce and deployed safely And productively.

Unfortunately, determining when that point is reached is based not on an ironclad formula but the specific circumstances of the particular case. However, what **is** true in all cases is that having a well-designed RTW program and implementing it consistently and in good faith significantly reduces the risks of liability for failure to accommodate and bolsters the credibility of the company's determination that the accommodation process has run its course and that ending the employment relationship is necessary to avoid undue hardship.