

Does Pandemic Fatigue Give Rise To A Duty To Accommodate?



Now that we have persevered through one year of the COVID-19 pandemic, much has been written about pandemic fatigue and associated social isolation, mental stress, and anxiety. Employers may be seeing an increase in the incidence of mental illness claims in their workplaces. Statistics Canada conducted an online questionnaire in April-May 2020, Canadians' mental health during the COVID-19 pandemic, which found that over half of the participants reported a worsening of their mental health since the start of physical distancing measures. Of those participants, 41% reported the kind of symptoms consistent with moderate or severe anxiety. These participants also reported higher stress levels. Ten months after Statistics Canada conducted that questionnaire, the experience of worsening mental health, anxiety and stress has likely increased. In the circumstances, now may be an appropriate time to review the employer's duty to accommodate with respect to mental illness.

Human rights legislation in B.C. and other jurisdictions in Canada includes mental disability as a protected ground with respect to discrimination in employment. The BC *Human Rights Code* does not define 'disability.' Although the BC Human Rights Tribunal gives the term a large and liberal interpretation, 'disability' does not capture every medical problem. The condition generally must involve some severity, permanence, and persistence. The Tribunal has held that 'stress' and 'anxiety' on their own are not disabilities but they may be a symptom of a disability such as anxiety disorder or depression.

Employees who are experiencing stress or anxiety that is affecting their work performance may request the employer to make workplace accommodations. To respond to such requests, the employer needs sufficient information about the employee's medical condition to assess whether the condition would be considered a disability and the duty to accommodate arises. If the employee does not have a disability but is experiencing the common emotions of stress, sadness, or anxiety, the employer would likely not have a duty to accommodate. However, the employer in promoting the health and well-being of its workforce could still assist the employee to cope with these emotions, particularly during the COVID-19 pandemic, for example, by providing access to employee and family assistance programs and establishing peer support networks. Such support may also help reduce the incidence or severity of mental illness.

An employer may ask an employee who is requesting accommodation to provide the

following information:

- the general nature of the medical condition or disability;
- the limitations or needs associated with the disability;
- the expected duration of those limitations or needs;
- whether the employee can perform the essential duties or requirements of the job, with or without accommodation;
- the type of accommodation that is needed to allow the employee to fulfil the essential duties or requirements of the job; and
- expected return to work date, if the employee is on leave.

An employer is generally not entitled to an employee's detailed medical information such as diagnosis, cause, or treatment unless the information is relevant to the accommodation requested, or the employee's needs are complex or unclear and the information is necessary to proceed. The employee has an obligation to cooperate and participate in the accommodation process, while recognizing that obtaining medical assessments and reports may be challenging during the pandemic. Once the employee has provided information to substantiate a disability and identify the associated limitations or restrictions, the parties (including the union in a unionized workplace) can explore the possible accommodation options. If the parties agree on a reasonable accommodation, an accommodation plan should be put in place including a timeline for regular reviews. The employer has a duty to provide reasonable accommodation up to the point of undue hardship.

Some employees may not request accommodation in the workplace but the employer may have a duty to inquire where there is reason to be aware of a possible relationship between a disability and work performance problems and an accommodation may be required. Just like there is no freestanding duty to accommodate, there is no freestanding duty to inquire. However, if the employer does not make inquiries and proceeds with adverse action against the employee such as discipline or dismissal and it turns out that there was a relationship between the performance problems and the disability, the employer is at risk of a complaint and a finding of discrimination under the Code.

In the context of the COVID-19 pandemic, many employees may be feeling stress or anxiety that could affect performance. Although experiencing those emotions may not equate to a disability, employers should still consider these circumstances when determining corrective or disciplinary measures. Where an employee is demonstrating more acute or chronic emotional problems, the employer should inquire as to a possible relationship between the performance problems and a disability. If the employee does have a disability, then the duty to accommodate may arise.

The past year has been stressful as we manage through the prolonged COVID-19 pandemic. Many employers are taking proactive steps to promote the health and well-being of their workforces and to assist employees to cope with social isolation, anxiety and stress. Where anxiety and stress are symptoms of a mental illness such as an anxiety disorder or depression, employers should be mindful of their obligations under human rights legislation, including the duty to accommodate.

by Deborah Cushing
Lawson Lundell LLP