

Don't Interfere with Efforts to Accommodate Workers



✘ A part-time paramedic with multiple sclerosis had decreased sensation in his fingertips, making him unable to “palpate a pulse”. The health service wouldn’t let him work as a paramedic, saying being able to feel a pulse was a bona fide occupational requirement. The BC Human Rights Tribunal found the health service and a senior manager liable for disability discrimination by failing to accommodate the paramedic. There was no evidence of actual harm arising from not having both paramedics in an ambulance able to palpate a pulse. So the service could’ve accommodated him without undue hardship by making him a “Driver Only” or “Special Driver Only”. The Tribunal specifically criticized the senior manager for “actively thwarting” accommodation efforts and deliberately trying to prevent the paramedic from returning to work [*Cassidy v. Emergency Health Services Commission*].

THE PROBLEM

Human rights laws require employers to make reasonable efforts to accommodate disabled workers unless doing so would be an undue hardship. And workers have an obligation to cooperate with the accommodation process. But employers must also cooperate in this process. The *Cassidy* case illustrates what can happen when a member of management doesn’t assist in the accommodation process but actively tries to undermine it.

THE EXPLANATION

The duty to accommodate means you can’t automatically fire workers because a disability makes them incapable of doing their previous jobs. For example, if a worker injures his shoulder and so is unable to lift items over a certain weight, you’ll need to determine what he’s able to safely do given his physical limitations and what he can’t do because of his medical restrictions. And then you’ll have to modify his duties accordingly unless doing so would impose an undue hardship on the company, which is a very hard to establish.

The accommodation process can involve many parties besides the disabled worker, including his supervisor, the safety coordinator, a representative from HR, the return-to-work program manager and members of management. The process can be long, complicated and often frustrating for all parties. It may involve some

trial and error as both the company and the worker try to find accommodations that work for everyone. But just as workers have a duty to cooperate in this process, such as by providing enough information about their medical condition to allow the employer to create successful accommodations, employers must also participate in this process in good faith. And certainly no one involved in the accommodation process, especially members of senior management, should try to thwart these efforts.

In the *Cassidy* case, the Tribunal was very critical of the senior manager. Instead of supporting the paramedic in his search for an effective accommodation, the manager actively thwarted the accommodation process on several occasions. For example, he distorted the information he received about the paramedic's condition and limitations when communicating it to others involved in the process. Although the manager's actions may have arisen out of genuine concerns, said the Tribunal, they were "seriously misconceived" and "constituted substantive violations of the duty to accommodate". The manager pursued issues respecting the paramedic's ability to drive an ambulance unreasonably and used information he knew or should've known was tainted as an excuse to delay the paramedic's return to the workplace, resulting in a dramatic delay in his accommodation as a Driver Only. In short, the senior manager didn't do the things expected of management when considering accommodations.

THE SOLUTION

It's important that companies properly handle accommodation requests from workers, and senior management should set the example. So to avoid a situation like the one in *Cassidy* and liability for disability discrimination, make sure that whenever a worker requests an accommodation, the company asks the following questions:

1. Does the worker have a disability'
2. If so, what are his restrictions or limitations'
3. What effect do these restrictions and limitations have on his work and the company's needs'
4. How could the worker's duties be modified to meet these restrictions'
5. If more than one modification is possible, what are benefits and detriments of each to the company relative to cost, productivity, quality, health and safety, etc.'
6. If the worker's job can't be modified, are other accommodations, such as other jobs or other shifts, possible and available'
7. What will be the effect of such accommodations on the company, considering cost, production quality, health and safety, and on the worker'
8. Is accommodating this worker an undue hardship'

Insider Says: For more on accommodating workers, watch this recorded webinar on whether you have to create a job for a injured worker returning to work.

SHOW YOUR LAWYER

Cassidy v. Emergency Health Services Commission, [2013] BCHRT 116 (CanLII), May 6, 2013