
Hot Topic Update: Accommodation in the Workplace

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Session Overview

- Termination and disability-related misconduct
- The duty to accommodate and privacy rights
- Recent trends in the accommodation of family status
- Personal assistive devices and the duty to accommodate
- Update on recent damage awards

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Benteler Automotive Canada Corp. v. CAW (2011 – Rayner)

- Facts:
 - Grievor, 25 years of service, terminated for making threats against co-workers and supervisor
 - Grievor suffered from bipolar manic condition and was hospitalized 7 months prior to the threat incident

Benteler Automotive Canada Corp. v. CAW (2011 – Rayner)

- Findings:
 - Termination upheld – threats of violence in the workplace a serious issue
 - No compelling medical evidence supported claim for diminished responsibility
 - While grievor suffered from mental disorder, it did not justify the misconduct or a mitigation of the penalty of dismissal

Wescast Industries and CAW (2011 – Levinson)

- Facts:
 - Grievor, 20 years of service, terminated for multiple death threats against supervisor
 - Grievor suffered from episodic major depressive disorder
 - Disciplinary record with one written warning

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Wescast Industries and CAW (2011 – Levinson)

- Findings:
 - Proven nexus between misconduct and mental disorder
 - Risk of actual harm medically assessed as low
 - Psychiatrist's opinion that threats were maladaptive stress
 - Reasonable rehabilitative prospects
 - Reinstated with conditions to address potential safety concerns

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Practical Implications

- Dismissal for disability-related conduct should be approached with caution
- Discipline may be vitiated by an underlying condition
- Employee must show a nexus between the conduct and the alleged condition
- Medical evidence must demonstrate a lack of culpability
- Document all behaviour to establish a record

Jones v. Tsige (2012 – Ont. CA)

- Facts:
 - Plaintiff and Defendant worked in different branches of the same bank
 - Defendant became involved with the Plaintiff's former spouse
 - Defendant used workplace computer to access Plaintiff's bank account 175 times over four years

Jones v. Tsige (2012 – Ont. CA)

- Findings:
 - Defendant's actions constituted an "intrusion upon seclusion"
 - Recognition of a cause of action for a right to privacy
 - Will only arise for deliberate and significant invasions of personal privacy
 - Highly offensive intrusions into matters such as health records and employment could satisfy the tort

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Complex Services Inc. and OPSEU (2012 – Surdykowski)

- Facts:
 - Employer sought medical information to assess restrictions for accommodation purposes
 - The information provided was vague and information was redacted
 - Employee refused to disclose medical documents citing privacy concerns
 - Employee was placed on leave of absence until she provided medical evidence of fitness

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Complex Services Inc. and OPSEU (2012 – Surdykowski)

- Findings:
 - *Jones v. Tsige* does not increase the burden to consider privacy during the duty to accommodate
 - Employer entitled to sufficient medical information for legitimate purposes
 - The information in this case was either:
 - Missing;
 - Lacking;
 - Insufficient; or
 - Inadequate for the purpose

Practical Implications

- Onus is on employees to establish the nature, extent and restrictions/accommodation required
- No right to privacy is absolute
- Refusing to disclose confidential medical information comes with consequences
- IMEs can be necessary and appropriate
- Employees only expected to disclose information necessary for legitimate work purposes

Update of Family Status

- The “serious interference with a substantial parental obligation” test is being used in Ontario
- Must be a substantial parental obligation
- Federally, family status cases are currently before the courts

Ontario v. OPSEU (2012 – Briggs)

- Facts:
 - Alleged failure to accommodate on account of family status
 - Grievor did not make employer aware of all the reasons for the request
 - Employer did not follow its accommodation policy
 - No meeting was held to discuss the extension of the accommodation

Ontario v. OPSEU (2012 – Briggs)

- Findings:
 - Neither the employer or employee fulfilled their accommodation obligations as per the policy
 - More information may have been gleaned if a proper meeting was held
 - Employer ordered to pay \$1,000 in damages

Practical Implications

- The “serious interference with a substantial parental obligation” test is being used in Ontario
- Employer entitled to information surrounding reasons for the request
- Must be a substantial parental obligation
- Analyze steps taken by the employee to balance their family and work-life responsibilities
- Provide flexible scheduling/absences for special care situations

Thunder Bay Catholic District School Board and OECTA (2011 – Luborsky)

- Facts:
 - Grievor suffered from serious progressive hearing loss
 - Modifications were made in the workplace:
 - Assigned to fewer students with more one-on-one time
 - Construction of a new soundproof office
 - Purchase of a directional microphone and specialized telephone
 - Board disputed the request to contribute to the cost of digital hearing aids

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Thunder Bay Catholic District School Board and OECTA (2011 – Luborsky)

- Findings:
 - Medical evidence supported the need for hearing aids
 - Hearing aids were essential for the grievor to perform her job
 - Steps taken were insufficient to allow the grievor to perform fundamental requirements of her job
 - Must inquire into the individual “needs of the person”
 - Board only responsible for portion of costs attributed to teaching

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Practical Implications

- Flexible administration of accommodation policies
- Look to personal circumstances of each employee
- Go beyond the nature of work and physical environment when accommodating
- Personal assistive devices short of undue hardship may be a form of accommodation
- Employees must establish that the proposed form of accommodation is necessary for relief from disadvantages of a disability

Damages Awarded by HRTO

- Lost wages
- Range of \$10,000 to \$20,000 for:
 - The loss of right to be free from discrimination
 - Injury to dignity, feelings, self-respect
 - Mental distress
 - Pain and suffering

Damages Awarded by HRTO

- ***Knibbs v. Brant Artillery Gunners Club (2011 – HRTO)***
 - Applicant on medical leave
 - Applicant was demoted from full to part-time while on leave and her confidential medical information was publicized
 - General damages – \$20,000 and lost wages
- ***Palangio v. Town of Cochrane (2011 – HRTO)***
 - Applicant alleged discrimination due to a hearing disability
 - Employer refused to install a speaker system to record Town Hall meetings
 - Loss of dignity and injury to feelings – \$10,000

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Duty to Accommodate Met – HRTO

- ***Saroyan v. Deco Automotive (2011 – HRTO)***
 - Employer asked Applicant to transfer from midnight to day shift despite conflict with child access arrangements
 - Applicant did little to alter child access arrangements
 - Dismissed – duty to accommodate met
- ***Huffman v. Mitchell Plastics (2011 – HRTO)***
 - Applicant terminated after intoxication at a work holiday party
 - Applicant requested that the Employer assist in funding Champix, which is commonly used for smoking cessation
 - Dismissed – Employer not made aware of alcoholism

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Questions?