

Employment & Labour Law ... Staying ahead of the curve

Written by [Thomas J. Gorsky LL.B](#)

August 4, 2011

A retirement home support worker attends one day with a medical note informing you of a back condition. The note states the employee is unable to lift weights more than 10 pounds or stand for more than 15 minutes at a time. Support workers generally need to assist in lifting of residents and are required to stand for prolonged periods, so it is clear the worker will not be able to continue to perform his or her duties of employment as before. In days of yore, this might be something an employer would be willing to work around to a degree, but only to a degree, and out of a sense of moral obligation rather than legal.

However, that was then, and now an employer is required to accommodate the needs of disabled employees up to the point of "undue hardship". Moreover, it does not matter if the employee's disability has arisen as a result of work or otherwise. The obligation to accommodate is based on the employee having a disability and not on its cause. Accommodation may include modification or removal of duties, acquisition of additional equipment, or obtaining assistance from other employees.

What is "accommodation"?

If accommodation cannot be accomplished by the employee continuing in the same job, an employer is required to explore other potential job opportunities within the retirement home. For example, there may be a more sedentary clerical position available. Employers are required to take the lead in exploring potential accommodation opportunities; it is not the employee who is expected to search out potential accommodation.

However, the search for accommodation is not a licence for an employee to be entirely passive. Employees are required to cooperate in the accommodation process. An employee must accept an accommodated position offered which the employee is reasonably capable of performing. An employee is not permitted to be choosy, merely because the accommodation offered does not satisfy the employee's subjective preferences.

The risk of failing to make efforts to accommodate

Employers must be cautious in situations where accommodation issues arise. An employer does not have an option of simply terminating employment and paying a severance payment. Termination of employment or persistent failure to comply with accommodation requirements can expose the employer to significant liability. Such liability can include reinstatement, back pay, and intangible damages for the loss of dignity in being discriminated against.

If faced with an accommodation situation:

- Request and obtain sufficient medical information to establish the employee's claim for accommodation is sufficiently made out. A simple doctor's note is often not sufficient and should not be accepted at face value.
- In some cases an independent medical examination can be requested if adequate information is not forthcoming from the employee's doctor.
- If the need for accommodation is sufficiently made out, obtain detailed medical information of exactly what accommodation is required.
- Meet with the employee and attempt to obtain his or her agreement to the accommodation proposed.
- Follow up on a regular basis. Do not assume accommodation is working on its own.
- Document all steps taken throughout the accommodation process. Having careful records will prove invaluable if you are ever faced with a legal challenge.
- Often it is prudent to seek expert legal assistance early. It is preferable and cheaper to stave off an explosive situation than to delay the seeking of legal assistance to a time when only mop-up strategies are left.

If there is a specific employment or labour related issue you would like to see addressed, please feel free to send us suggestions at info@sherrardkuzz.com.

Thomas Gorsky is a lawyer with **Sherrard Kuzz LLP** a management-side employment and labour law firm in Toronto. Tom can be reached at 416.603.0700 (Main), 416.420.0738 (24 Hour) or by visiting www.sherrardkuzz.com.

The information contained in this article is provided for general information purposes only and does not constitute legal or other professional advice. Reading this article does not create a lawyer-client relationship. Readers are advised to seek specific legal advice from Sherrard Kuzz LLP (or other legal counsel) in relation to any decision or course of action contemplated.