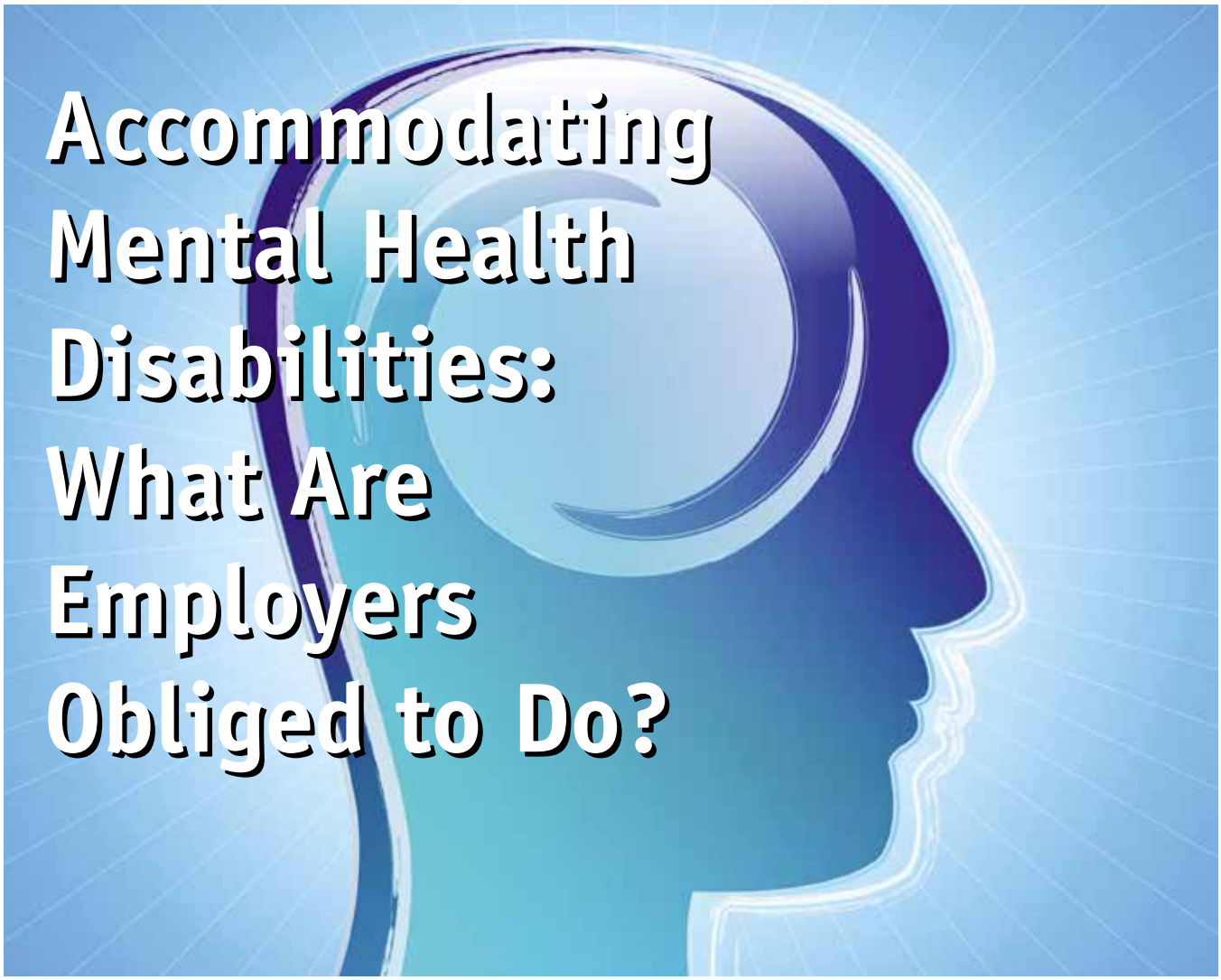

Accommodating Mental Health Disabilities: What Are Employers Obliged to Do?

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THE DUTY TO ACCOMMODATE HAS always been a confusing and troubling area for employers to navigate. Determining what an employer is obliged to do short of undue hardship in the context of an individual case can be difficult at best. These issues can become even more daunting when dealing with claims based on mental health disabilities, including addictions.

Part of what makes the duty to accommodate so complicated is the fact that employers are subject to *both* a substantive and procedural duty to accommodate. Significantly, these are considered separate obligations; this means that even if at the end of the day it would not be possible to accommodate an employee, that employers will still be liable if they failed to ask the right questions and document the process.

While every situation must be assessed on a case-by-case basis, the following is an outline of some of the key issues employers in the emergency medical services (EMS) sector should be conscious of when addressing mental health issues.

Identifying mental health and addiction issues

While there have always been individuals who require accommodation as a result of mental health disabilities, in recent years, these requests have increased significantly. While this may suggest there is now less stigma surrounding mental health issues, the fact is that many employees remain reluctant to disclose these issues.

The Human Rights Tribunal of Ontario (HRTO) has found that employers can be subject to a duty to accommodate if they *reasonably ought to have known* an employee suffered from a disability. This obligation can be difficult to achieve in the context of a mental health or addictions issue. If an employee has not disclosed they have a disability, but begins to exhibit a change in behaviour, what is an employer obligated to do?

If you have reason to be concerned, the best practice is to have a meeting with the employee. It would be prudent to involve the union, as the duty to accommodate places obligations not just on the employer, but on the union and the employee, as well.

While we do not recommend asking the employee directly if they have a disability, you should explore the reasons for the change in behaviour. Ask if there is anything the employer should be aware of and advise the employee of any employee assistance programs that are available. Making these inquiries in a sensitive way may or may not lead the employee to disclose if they have a disability. However, it will provide a defence to any future allegations, making it difficult for the union to assert that the employer ignored the signs.

Being aware of potential mental health or addictions issues is also important in the context of discipline investigations. If, in the process of your fact-finding investigation, an employee makes statements indicating that they are experiencing personal difficulties, these statements should not be ignored or avoided. Although it may feel like prying, invite the employee to explain.

The duty to accommodate requires employers to consider if misconduct was caused by an employee's disability. As a result, it is always better to find out that misconduct was the result of a mental health or addictions issue during the investigation stage, rather than during a grievance meeting or, worse, at arbitration. At that point, your opportunity to canvass accommodation options and limit liability may already have passed.

Accommodating mental health and addiction issues

Whether accommodating physical or mental health disabilities, employers are subject to both a substantive and procedural duty to accommodate. The substantive obligation relates to the ultimate form of accommodation that is provided to an employee and its suitability in addressing the employee's needs. The procedural component relates to the process followed by the employer in reaching the ultimate accommodation offered, if any. These are separate and distinct obligations. Failure to fulfill either duty can result in liability.

The procedural duty to accommodate requires an employer to show all options have been canvassed, even if they are all ultimately rejected. This requires canvassing all available work in the workplace, considering whether modifications can be made to the employee's own position and, if not, whether there is other work the employee can perform, either with or without modifications. This process *must* be well-documented. The employer should also be able to show it has consulted with all appropriate parties, including the employee and union, medical practitioners, and any workplace party whose participation is required to achieve appropriate accommodation.

When considering what would constitute an appropriate form of accommodation, employers must remember they have a duty to accommodate up to the point of undue hardship. This test is notoriously difficult to meet, as the employer must demonstrate more than mere hardship, but that the hardship is *undue*. Relevant considerations include cost, outside sources of funding, safety, size of organization, interference with rights of other employees and employee morale. Other limits on the duty to accommodate include the requirement that the employee has the necessary qualifications and skills to perform the new duties competently, though the requirement for additional training would not be a bar. In addition, the work performed by the employee must still have productive value to the employer.

Accordingly, employers must be able to explain and justify any accommodation options that are ultimately rejected. Where it is unclear why a particular limitation or restriction or accommodation option is being presented, employers should obtain the employee's consent to follow-up directly with their medical practitioner to obtain further information. For example, there may be legitimate reasons why an employee requires a schedule of straight day or night shifts. These requests should not be dismissed out-of-hand as displaying an employee's preference, but should be further explored with the employee's medical practitioners, including any psychologist or psychiatrist involved in the employee's care.

Finally, employers must remember that the duty to accommodate is an ongoing one. As such, employers must be responsive to changed circumstances and consider if the current accommodation remains appropriate. The importance of documenting this process cannot be overstated.

Navigating accommodation issues can be difficult in any situation, particularly when addressing mental health issues. Hicks Morley specializes in advising employers in all areas of labour and employment law, including human rights and accommodation issues. John Saunders, Mark Mason and Stephanie Jeronimo specialize in labour and employment issues faced by the emergency services sector. If you have any questions about any workplace issue, please contact John at (461) 864-7247, Mark at (416) 864-7280 or Stephanie at (416) 864-7350; each would be pleased to assist you.