

Guideline on Accommodating Physical and Mental Disabilities at Work

May 2017



NEW BRUNSWICK
HUMAN RIGHTS COMMISSION
COMMISSION DES DROITS
DE LA PERSONNE DU NOUVEAU-BRUNSWICK

Table of contents

1.0 Discrimination on the Basis of Physical and Mental Disability 4

 1.1 What is a Physical Disability?..... 4

 1.2 What is a Mental Disability? 5

 1.3 What is a Perceived Disability? 5

2.0 Employment 6

 2.1 Hiring..... 6

 2.2 During Employment..... 6

3.0 Duty to Accommodate 8

 3.1 What is undue hardship? 8

 3.2 Duties of Employers 8

 3.3 Duties of Employees with a Disability..... 10

 3.4 Duties of Unions..... 11

 3.5 Duties of Health Care Providers..... 11

 3.6 Examples of Accommodations 12

4.0 Limits to Accommodation 12

5.0 For More Information 14

Appendix A:..... 15

Appendix B:..... 17

Guideline on Accommodating Physical and Mental Disabilities at Work

Please Note:

The New Brunswick Human Rights Commission (“Commission”) develops guidelines as part of its mandate to prevent discrimination and educate the public. These guidelines are intended to help individuals understand their legal rights and responsibilities under the New Brunswick *Human Rights Act* (“Act”).

This guideline gives the Commission’s interpretation of the provisions of the *Act* relating to discrimination in employment on the basis of physical or mental disability, as set out in section 4 of the *Act*.¹ It is subject to decisions by boards of inquiry, tribunals and courts. Read this guideline in conjunction with those decisions and with the specific language of the *Act*. If there is any conflict between this guideline and the *Act*, the *Act* prevails. This guideline is not a substitute for legal advice. Direct any questions regarding this guideline to the Commission’s staff.

1.0 Discrimination on the Basis of Physical and Mental Disability

The *Act* prohibits discrimination (whether it is intentional or not) based on physical and mental disability in areas such as employment, housing, public services (e.g. schools, hospitals, restaurants, malls, and insurance), and membership in labour unions and professional associations.²

This guideline focuses solely on discrimination on the basis of actual or perceived physical and mental disabilities in the workplace. For information on the rights and obligations under the *Act* in other situations, please see the Commission's guidelines on those subjects or contact the Commission directly.

A physical or mental disability does not have to be a permanent condition in order to be considered a disability under the *Act*.³ The *Act*'s definition of disability applies to a number of situations where the disability is transient, episodic, temporary or non-evident. However, a common transitory ailment routinely experienced by most people (e.g. cold, flu, and strep throat) is not considered a disability.⁴

1.1 What is a Physical Disability?

Section 2 of the *Act* defines "physical disability". Boards, tribunals and the courts have accepted many illnesses and ailments as a physical disability. Some include:

- back problems⁵
- being exceptionally short⁶
- cancer⁷
- carpal tunnel syndrome⁸
- colour blindness⁹
- Crohn's disease¹⁰
- degenerative disc disease¹¹
- dependency on drugs or alcohol¹²
- heart attack/heart condition¹³
- hepatitis C¹⁴
- hypertension¹⁵
- hysterectomy¹⁶
- kidney stones¹⁷
- knee pain¹⁸
- migraines¹⁹
- miscarriage²⁰
- multiple sclerosis²¹
- obesity²²
- osteoarthritis²³
- ruptured hemorrhoids²⁴
- skin conditions²⁵
- stuttering²⁶

1.2 What is a Mental Disability?

Section 2 of the *Act* defines “mental disability”. Boards, tribunals and the courts have accepted many illnesses and ailments as a mental disability. Some include:

- anxiety²⁷
- Attention Deficit Hyperactivity Disorder (ADHD)²⁸
- autism²⁹
- depression³⁰
- bi-polar disorder³¹
- dyslexia³²
- panic attacks³³
- Post-Traumatic Stress Disorder (PTSD)³⁴

1.3 What is a Perceived Disability?

The *Act* provides protection for anyone who is perceived as having either a physical or mental disability. This includes:

- individuals whose disabilities do not actually result in any functional limitations but who experience discrimination because others believe their disability makes them less able;
- individuals who have recovered from a disability but are discriminated against because of their past disability;
- individuals who are discriminated against based on the real or perceived *possibility* that they may develop a disability.

Example: A woman developed various physical and mental disabilities following two car accidents, and as a result worked on and off for a number of years. When she returned to work full-time, she applied to work in a different department closer to her home. Her application was denied because her potential employer expressed concern that her medical problems would cause her to be absent from work again for considerable periods of time. The employer admitted liability by acknowledging the decision was based in part on a perceived disability.³⁵

Example: A woman with Parkinson’s disease had her hours of employment reduced despite the fact that she did not ask for and did not require this kind of accommodation. The employer’s actions were found to be discriminatory as there was no justification for reducing her hours based on the perceived effect of her Parkinson’s or medications.³⁶

2.0 Employment

It is a violation of the *Act* for an employer to discriminate against an employee or a potential employee because of a mental and/or physical disability.

The *Act* prohibits discrimination in all aspects of full-time, part-time, permanent, casual or probationary employment. It also applies to unpaid or volunteer employment, employment recruiters and agencies, trade unions and occupational associations.³⁷

2.1 Hiring

When hiring new employees, it is a violation of the *Act* for an employer to:

- Ask a potential employee in an application or during an interview whether or not he/she has ever been under psychiatric care;³⁸
- Post a job ad that excludes persons with disabilities;
- Not hire a candidate because he/she has a disability, or may become disabled;³⁹
- Withdraw an employment offer upon finding out that the candidate has a mental or physical disability;⁴⁰
- Ask a potential employee about their past or present physical or mental conditions, kinds of medications, treatments, worker's compensation claims, or sick leave.

The narrow exception is where it is a genuine qualification relevant to job performance that the successful applicant not have a specified mental or physical disability, and reasonable accommodation of the specified mental and/or physical disability would create undue hardship for the employer.

2.2 During Employment

Under New Brunswick human rights law, there are a number of ways an employer's actions could be found discriminatory. One way is to subject an employee to differential treatment in the workplace as a result of his or her disability:

- Subjecting an employee to adverse treatment by taking advantage of his/her mental disability;⁴¹
- Subjecting an employee to excessive questioning about an undisclosed disability (actual or perceived) when there are no performance issues associated with the disability and no reasonable basis for believing the disability could impact the employee's job;⁴²
- Refusing to allow an employee with a disability to return to work until the employee can perform all of his/her job duties without restrictions;⁴³

Guideline on Accommodating Physical and Mental Disabilities at Work

- Permitting co-workers to harass an employee based on a physical or mental disability;⁴⁴

Another way is to deny or withhold a benefit from an employee with a disability:

- Demoting an employee because he/she has become disabled;⁴⁵
- Withholding a promotion, or fail to consider an employee for a promotion because of his/her physical or mental disability;⁴⁶
- Denying an employee the right to transfer seniority to another department with a separate seniority list when the employee has been moved to the other department as part of an accommodation;⁴⁷
- Refusing to renew an employment contract because an employee has a disability or has become disabled.⁴⁸

Ending the employment relationship with an employee with a physical or mental disability may also be found discriminatory:

- Terminating an employee upon learning that they have a physical and/or mental disability;⁴⁹
- Terminating or laying off (even with notice) an employee because he/she has become disabled;⁵⁰
- Terminating an employee for “excessive absenteeism” for disability-related absences;⁵¹
- Terminating an employee on long-term disability leave in order to avoid paying the employee severance pay;⁵²
- Terminating an employee on a disability-related leave because a replacement was hired for his/her position;⁵³
- Forcing an employee with a disability to resign by making working conditions unacceptable (constructive dismissal).

The lists above are not exhaustive, and whether an employer’s actions constitute discrimination under the *Act* is determined on a case-by-case basis and in light of the specific circumstances.

Example of Constructive Dismissal: A woman with back problems took a job as a cashier because she knew this position would adequately accommodate her working restrictions. When a new owner purchased the business he decided to change the cashier work duties to include maid services for 2-6 hours of the shift. The female employee initially attempted to perform these additional work duties but found that they were well beyond her limitations. She presented her employer with a doctor’s note indicating her restrictions. Her employer told her she must perform the additional duties or go on sick leave for 3 months to improve her health. If after 3 months she was still unable to perform these duties then she could not return to her employment. The employee’s back condition was permanent. The Panel concluded that the employee was constructively dismissed from her employment.⁵⁴

3.0 Duty to Accommodate

The *Act* requires employers to avoid policies that have a discriminatory effect on employees who have a physical or mental disability. Employers have a duty to accommodate their employees' physical and mental disabilities to the furthest point possible short of undue hardship. The search for an accommodation is a multi-party inquiry⁵⁵ that includes employers, employees, unions (as the case may be), and health care professionals.

3.1 What is undue hardship?

- Undue hardship occurs if accommodating an employee's physical or mental disability would be extremely difficult for an employer.
- The determination of undue hardship depends entirely on the circumstances of each specific case.
- Examples of undue hardship in this context could include:
 - Extremely high financial costs;
 - A serious disruption to a business;
 - Health and safety considerations;
 - A very long absence of indefinite duration;⁵⁶
 - A substantial interference with the rights of other employees;⁵⁷
 - Inability to renovate the facilities to accommodate an employee;
 - Inability to interchange, alter or substitute duties within the workforce;⁵⁸
 - The extent to which the inconvenience would prevent the employer from carrying out the purpose of its business.

3.2 Duties of Employers

The duty to accommodate with respect to physical and mental disabilities is a two-step process:

1. Information gathering: Requires the employer to conduct *individual* assessments of an employee's needs and capabilities, with the assistance of health care professionals.
2. Providing a suitable accommodation: Once the employee has been assessed, the employer has a duty to make a reasonable effort to accommodate the employee by modifying his/her position, or by finding the employee a new position that corresponds to his/her current capabilities.

Employers must:

- Make meaningful inquiries about an employee's disability-related needs upon becoming aware that the employee has such needs;⁵⁹

Guideline on Accommodating Physical and Mental Disabilities at Work

- Accept the employee's request for accommodation in good faith, unless there are legitimate reasons for acting otherwise;
- Obtain an expert opinion or advice where needed;
- Take an active role in ensuring that alternative approaches and possible accommodation solutions are investigated, and canvass various forms of possible accommodation and alternative solutions, as part of the duty to accommodate;
- Consider accommodating the employee in a different department or bargaining unit, if at all possible, particularly when the employee's job classification has significant physical and/or psychological demands and a high rate of job-related injuries;⁶⁰
- Keep a record of the accommodation request and action taken;
- Maintain confidentiality;⁶¹
- Limit requests for information to those reasonably related to the nature of the limitation or restriction so as to be able to respond to the accommodation request (employers do not need to know the exact diagnosis or cause of the disability);⁶²
- Make requests for medical information in a timely manner,⁶³ and seek clarification⁶⁴ or additional assessments⁶⁵ when needed;
- Grant accommodation requests in a timely manner;
- Bear the cost of any required medical documentation or information when the employer is requesting more information than what was initially provided by the employee;
- Provide a reasonable timeline to the employee to provide the requested medical documentation;⁶⁶
- Reevaluate an accommodation periodically, and explore other accommodations if the original accommodation proves unworkable or ineffective;⁶⁷
- Take an individualized approach in relation to the consequences an employee in a safety-sensitive position faces for failing a test for drugs or alcohol.⁶⁸

In most cases, the duty to accommodate will arise after the employee has made a request for accommodation. However, in some instances the duty to accommodate will arise without an accommodation request being made. If the employer has reason to believe an employee is experiencing difficulties as a result of a disability, the employer has a duty to inquire about the situation.⁶⁹ Care must be taken with such inquiries, as inappropriate or unfounded inquiries could constitute discrimination on the basis of a perceived disability.

Employers should also keep the lines of communication open with an employee going through the accommodation process, and make sure that the employee is apprised of the status of the employer's accommodation efforts.⁷⁰

Some mental disabilities that have triggered the duty to accommodate have stemmed (at least in part) from discrimination in the workplace, such as harassment based on a prohibited ground of discrimination.⁷¹ As such, it is important for employers to

Guideline on Accommodating Physical and Mental Disabilities at Work

understand all of their obligations under the *Act* and maintain an inclusive and welcoming environment for employees.

Attendance Management Programs:

Employers have a legitimate interest in ensuring that their employees show up for work on a regular basis, and many employers have an attendance management program (AMP) in place to deal with instances of excessive absenteeism. These programs must be administered in a non-discriminatory way and take an employee's particular circumstances into account, such as whether an employee's absenteeism is due to a disability. A failure to consider disability-related absences while administering an AMP may be considered discriminatory.⁷²

Employers should avoid a blanket application of an AMP in light of their obligations under the duty to accommodate. Nevertheless, when an employer raises attendance issues and an employee is placed in an AMP, it should be done in a non-threatening way as there may be disability-related needs that are not yet known to the employer. The employer should indicate that it is prepared to work with the employee and provide accommodations if they are needed.⁷³

The employee must also be given the opportunity to provide supporting medical documentation if the absences are related to a disability, and warned before the employer takes any action that would have an adverse impact on that employee.⁷⁴ Ultimately the employer remains obligated to accommodate the employee's disability, and an employee cannot face discipline or termination for disability-related absences unless it would constitute undue hardship to provide accommodation.⁷⁵

3.3 Duties of Employees with a Disability

- Inform the employer of the need for accommodation; employers do not have a duty to accommodate if they are unaware that a disability exists and that it requires accommodation;
- Inform the employer of the kinds of accommodation required, preferably in writing, so that the person responsible for accommodation may make the requested accommodation;
- Provide the employer with medical information which includes information on the employee's functional limitations with regard to the duties required by the job; a prognosis for recovery; the length of time for the accommodation; and the employee's capabilities for alternative work (the employer is not entitled to know the specific diagnosis);
- Participate in discussions regarding possible accommodation solutions;
- Accept reasonable accommodation when it is offered, even if it is not the preferred accommodation;⁷⁶
- Work with the employer on an ongoing basis to manage the accommodation process.

3.4 Duties of Unions

- Take an active role in the accommodation process;
- Share joint responsibility with the employer to facilitate accommodation;⁷⁷
- Support accommodation measures irrespective of collective agreements, up to the point of undue hardship;
- Consider in good faith accommodation requests from employees within and outside the bargaining unit that may infringe on collective agreement rights if other accommodation alternatives are not available or are less reasonable.

3.5 Duties of Health Care Providers

While unions and employers are increasingly aware of their roles in the Duty to Accommodate and return to work process for persons with disabilities, good faith efforts by employers, unions and disabled persons can often break down if health care providers are not full participants in the return to work process. The Canadian Medical Association⁷⁸ and associations representing other health care professionals recognize this fact and have developed their own policies to guide their members in achieving equal access to employment for persons with disabilities. The discussion among health care professionals is informed and driven by principles related to patient care.

Some principles for health care professionals to observe in assisting with employment accommodation practices are as follows:

- Facilitate the patient's return to work by encouraging communication with the employer early in treatment or rehabilitation;
- Be familiar with the patient's support systems in the community and responsibilities at home and at work;
- Have a frank discussion with the patient early on about expected healing and recovery times and the benefit of an early or graduated return to work;
- Be knowledgeable of the employer's and the union's duties in accommodating a return to work and of the various agencies and professionals available to assist in this process, including: WorkSafeNB, an in-house employer occupational health service, and the Commission;
- When the employer requests medical information, and if the patient consents, be as specific as possible.⁷⁹ If the medical information forms require more detailed investigations, refer the patient to the appropriate health specialists for a comprehensive and objective assessment of functional capacity;
- If suggestions are sought for modified job details, be as specific as possible and state, whenever possible, if the job restrictions are permanent or temporary and give the expected recovery time;
- Ensure that the information provided is objective and accurate to the best of the health care professional's knowledge,⁸⁰ and is not based on speculation and conjecture;⁸¹

Guideline on Accommodating Physical and Mental Disabilities at Work

- Be mindful of the intended audience and use language and terminology that can be understood and acted upon by the employer;⁸²
- Be aware of the risks to the patient but also of any risks that an early return to work may pose to others and advise both the patient and the employer appropriately; and
- Always ensure when sharing any recommendations or patient records with outside parties that the patient's consent is clear and specific.

3.6 Examples of Accommodations

- Providing assistive devices;⁸³
- Assignment to alternate or light duties;⁸⁴
- Providing access to facilities and services (with ramps, elevators etc.);
- Allowing for flexible work and leave schedules;
- Making information available in alternative formats;⁸⁵
- Providing a period of recovery;⁸⁶
- Re-bundling of work duties;⁸⁷
- A reduction of work hours.⁸⁸

Providing a paid leave of absence, worker compensation benefits, short-term disability leaves and long-term disability leaves may be a form of accommodation. However, employers may not force an employee with a disability who is capable of working with modifications to apply for a leave simply because the employer is unwilling to attempt to accommodate him/her in the workforce.

4.0 Limits to Accommodation

Conduct may be found to be non-discriminatory if the employer can show that the limitation, specification or preference is based upon a *bona fide* ("in good faith") qualification (BFQ).⁸⁹

In order to be a BFQ, the standard adopted by the organization must pass the "*Meiorin Test*".⁹⁰ This three-part test requires that the employer establish that the standard:

1. Was adopted for a purpose or goal that is rationally connected to the performance of the job;
2. Was adopted in an honest and good faith belief that it was necessary to fulfill that legitimate work-related purpose; and
3. Is reasonably necessary to accomplish that legitimate work-related purpose, in the sense that the employer, owner or service provider cannot accommodate affected individuals without incurring undue hardship.⁹¹

Guideline on Accommodating Physical and Mental Disabilities at Work

Example: A man was refused a job as a service attendant because he was missing his right index finger and the employer believed that the potential employee would not be able to perform the job safely or effectively. The employer believed that employees needed their right index fingers to safely pump the gas. The employer satisfied the first two parts of the “*Meiorin Test*” as 1) the standard requiring that an individual have all of his/her fingers is rationally connected to the service attendant job; and 2) the standard was adopted in good faith.

However, the employer failed to satisfy the third part of the test. The employer failed to individually assess the potential employee to see if he was capable of safely performing the duties of a service attendant, and failed to attempt to accommodate him to the point of undue hardship if he was found to be unable to safely perform the duties without accommodation.⁹²

Example: An employee in a large organization had medical documentation stating that he could not work a shift starting at 3:30 a.m. due to a sleep disorder and should work a regular day shift. During a restructuring of the employer’s operations, the employee was placed in a 3:30 a.m. shift. After being placed in the new position, the employee obtained additional medical documentation stating that he should be working only a day shift. The employer advised the employee that there were no day shift positions available and that he should go on disability leave. A return to work plan was developed while the employee was on leave, but the employer maintained that there were no positions available. The employee eventually resigned.

The employer was found to have discriminated the employee. In relation to the 3:30 a.m. shift assignment, the employer was found to have failed all three parts of the *Meiorin Test* as it could not provide any evidence to support its decision.

In relation to the discontinuance of the employee’s employment, the employer failed to meet the second and third parts of the *Meiorin Test*. For the second part, the employer did not properly consider whether its decision to not accommodate the employee was reasonably necessary as the employee’s file and medical reports had not been reviewed prior to determining accommodation was not available. For the third part, the employer did not do an individual assessment of the employee and consider: the employee’s skills, capabilities and potential contributions; alternate approaches to accommodation; alternative employment within the organization for the employee; or flexible and creative approaches to accommodate the employee.⁹³

As noted above, what constitutes undue hardship will depend on the specific circumstances. As a general proposition, an employer is not required to maintain the position of a person who is neither productive nor useful to the company.⁹⁴ Also, employers are not expected to hire or continue to employ someone whose disability notably increases the probability of health or safety hazards to that individual, other employees and/or the public. However, it is up to the employer to demonstrate that the employee’s disability would threaten the safety of that individual or others at the worksite.

5.0 For More Information

For further information about the *Act* or this guideline, please contact the Commission at 1-888-471-2233 toll-free within New Brunswick, or at 506-453-2301. TTD users can reach the Commission at 506-453-2911.

You can also visit the Commission's website at <http://www.gnb.ca/hrc-cdp> or email us at hrc.cdp@gnb.ca

New Brunswick Human Rights Commission
P.O. Box 6000
Fredericton, NB E3B 5H1
Fax 453-2653

Follow us!

Facebook: www.facebook.com/HRCNB.CDPNB

Twitter: [@HRCNB_CDPNB](https://twitter.com/HRCNB_CDPNB)

Appendix A:

Sample Letter from Employer to Attending Physician of an Employee with a Mental or Physical Disability

(Date)

Dear Dr. *(Name of physician)*:

Re: *(Name of employee)*

We understand that *(Name of employee)* is a patient of yours. *(Name of employee)* is currently on leave from work and has indicated to us that it is for medical reasons. OR

We understand that *(Name of employee)* is a patient of yours. *(Name of employee)* has advised us that he/she has a disability that is impacting his/her ability to satisfactorily complete his/her employment duties.

Mr./Ms. *(Name of employee)* works as a *(Position title)* for our company. His/her duties include X, Y and Z. *(Please provide a fairly detailed description of the employee's position, including the physical, mental and social efforts required of the employee. This will make the physician's job easier and will enhance the validity of the process. It would also be pertinent to include a list of the employee's responsibilities.)*

In an effort to accommodate *(Name of employee)* according to his/her medical needs, we are writing to ask you for the following information:

- a) *(Name of employee)*'s anticipated date of return to work (if absent);
- b) A long-term prognosis of the medical condition in relation to *(Name of employee)*'s current position within our company;
- c) Any physical or functional limitations affecting *(Name of employee)*'s ability to carry out his/her duties;
- d) Any medical information that could help us put in place the conditions necessary to ensure that *(Name of employee)* can return to working in our employ or continue working in our employ.

Please be advised that we are not seeking identification of the diagnosis (identification of the specific medical condition), but are requesting confirmation that a disability does exist.

To make this task easier for you, we are enclosing a medical report form that you can fill out and return to us. Please rest assured that the information you give us will be kept confidential and will be used for the employee's benefit, for the sole purpose of facilitating his/her return to work and/or accommodation. Also, please note that *(Name of employee)* has given his/her consent to the disclosure of the requested medical information, as indicated on the enclosed form.

Guideline on Accommodating Physical and Mental Disabilities at Work

(*Name of employee*) is a valued employee of our company and that is why we hope to have him/her back to work as soon as possible. We are fully prepared to accommodate (*Name of employee*) according to his/her medical condition by modifying his/her duties and by decreasing his/her work hours so that he/she may be reinstated in his/her position as soon as possible. (*Name of employee*)'s recovery is very important to us, as it is to you.

If you have any questions about this letter or the enclosed form, please do not hesitate to contact us.

Yours truly,
(*Supervisor's signature*)

Appendix B:

Sample Form to be Filled Out by Physician

CONFIDENTIAL

EMPLOYEE MEDICAL REPORT

Name of employee: _____ Date: _____
Name of physician: _____
Address: _____ _____
Physician's telephone number: _____ Physician's fax number: _____

***** Employee's authorization to disclose information:**

I, _____, authorize my attending physician, Dr. _____, to disclose the information requested by my employer _____ in this form.

Employee signature: _____ Date: _____

***** Questionnaire to be filled out by attending physician:**

Date employee absence commenced: _____

Date(s) on which employee was examined: _____

Is the employee's disability temporary or permanent? _____

If it is temporary, how much time should be required for recovery?

Please check any boxes that apply:

- The employee can return to work immediately, with full duties, because he/she is not suffering from any physical or functional limitations relating to his/her job.

Guideline on Accommodating Physical and Mental Disabilities at Work

- The employee suffers limitations that affect his/her ability to perform all the duties of the position he/she occupies. (Complete the “Accommodations Required” section below.)
- The employee should return to work in his/her position, as modified by the employer, on _____. (Complete the “Accommodations Required” section below.)
- The accommodation plan for this employee should continue for a period of _____.
- The current medical prognosis shows that the employee will be able to return to work without accommodation on _____.

ACCOMMODATIONS REQUIRED

**** Please note that that these tables are only examples and will have to be adapted for each company or position.**

a) Physical restrictions (if applicable)

	Frequency (max. no. of hours)	Weight (max. kg) if req.
Lifting (ground to hips)		
Lifting (hips to shoulders)		
Carrying objects		
Bending		
Standing		
Turning around, pivoting		
Walking		
Working at a computer		
Climbing stairs		
Other: _____		

b) Functional restrictions

	Number of hours at a time	Number of hours per day
Concentrating		
Having interpersonal contact		
Doing more than one thing at a time		
Solving problems		
Handling interpersonal conflict		
Managing stress and deadlines		
Other: _____		

Guideline on Accommodating Physical and Mental Disabilities at Work

Does the employee's medication have any effects we should know about?

Additional comments about our employee's recovery:

Physician's signature:

Dr. _____

Date: _____

Guideline on Accommodating Physical and Mental Disabilities at Work

¹ The Commission would like to acknowledge and thank the human rights commissions from various jurisdictions across Canada for the opportunity to study and draw from their policies and documents on physical and mental disabilities.

² *Human Rights Act*, R.S.N.B. 2011, c. 171, sections 4, 5, 6 and 8 [*Human Rights Act*]

³ As in the case of a firefighter requesting accommodation due to seasonal allergies *Morgoch v. Ottawa (City)* (1989), 11 C.H.R.R. D/80 (Ont. Bd. Inq.); a health care worker requiring an indeterminate period of rest to recover from a hysterectomy *Wilson v. Douglas Care Manor* (1992), 21 C.H.R.R. D/74 [*Wilson*]; or an office worker dealing with a temporary anxiodepressive syndrome *Commission des droits de la personne et des droits de la jeunesse c. Société de portefeuille du Groupe Desjardins (Assurances générales des Caisses Desjardins Inc.)* (1997), R.J.Q. 2049 (T.D.P.).

⁴ *Ouimette v. Lily Cups Ltd.*, (1990), 12 C.H.R.R. D/19 (Ont. Bd. Inq.); *Burgess v. College of Massage Therapists of Ontario*, 2013 HRTO 1960, CHRR Doc. 13-2460; *Valmassoi v. Canadian Electrocoating Inc.*, 2014 HRTO 701, CHRR Doc. 14-1201.

⁵ *McLellan v. MacTara Ltd. (No. 2)* (2004), 51 C.H.R.R. D/103 (N.S. Bd. Inq.).

⁶ *Ede v. Canada* (1990), 11 C.H.R.R. D/439 (Can. Trib.).

⁷ *L.H. v. Vietnamese Non-Profit Housing Corp.* (2007), 60 C.H.R.R. D/73 (Man. Bd. Adj.); *Torrejon v. 114735 Ontario Inc. (No. 4)*, 2010 HRTO 934, CHRR Doc. 10-1110.

⁸ *Downey v. Keenan Truck Repair Inc.*, (2014), CHRR Doc. 14-3017 (N.B. Bd. Inq.).

⁹ *Bicknell v. Air Canada*, (1984), 5 C.H.R.R. D/1992 (Can. Trib.).

¹⁰ *Lowe v. William L. Rutherford (B.C.) Ltd. (No. 3)*, 2007 BCHRT 336, 61 C.H.R.R. D/72 [*Lowe*].

¹¹ *Price v. Fredericton (City) (No. 2)*, (2004), CHRR Doc. 04-587 (N.B. Bd. Inq.).

¹² *Entrop v. Imperial Oil Ltd.* [1995], 23 C.H.R.R. D/196 (Ont. Bd. Inq.) affirmed 30 C.H.R.R. D/433 (Ont. Div. Ct.); appeal allowed in part [2000] O.J. No. 2689, (2000), 37 C.H.R.R. D/481 (O.C.A.) [*Entrop*]. See also: *Benoit v. Bell Canada (Quebec)*, 2004 CHRT 32, 51 C.H.R.R. D/30; *Horrocks v. Northern Regional Health Authority*, 2015 MHRBAD 3, CHRR Doc. 15-3090.

¹³ *Hall v. Seetharamdoo* (2006), 57 C.H.R.R. D/322 (N.S. Bd. Inq.).

¹⁴ *Repas v. Albert's Family Restaurant and Lounge (Red Deer)* (2004), CHRR Doc. 04-011 (Alta. H.R.P.); *A. v. Natural Progress Inc.* (2005), 51 C.H.R.R. D/305 (Man. Bd. Adj.).

¹⁵ *McKinley v. BCTel* 2001 SCC 38; *Lee v. Strata Plan 4082*, (2012), CHRR Doc. 12-0003, 2012 BCHRT 3; *Pelletier v. Veolia Transportation (No. 2)*, 2015 HRTO 323, 81 C.H.R.R. D/54.

¹⁶ *Wilson*, *supra* note 3.

¹⁷ *Hitchcock v. Lafarge Canada Inc. (No. 5)*, 2015 HRTO 731, CHRR Doc. 15-1231.

¹⁸ *Boyce v. New Westminster (City) (Re)* (1994), 24 C.H.R.R. D/441 (B.C.C.H.R.).

¹⁹ *Ottawa (City) v. Canada (Human Rights Comm.) (No. 2)*, 2005 FCA 311, 54 C.H.R.R. D/462 [*Ottawa (City)*].

Guideline on Accommodating Physical and Mental Disabilities at Work

- ²⁰ *Mou v. MHPM Project Leaders*, 2016 HRTO 327, CHRR Doc. 16-0827.
- ²¹ *Cassidy v. Emergency and Health Services Comm. (No.2)*, 2008 BCHRT 125, 62 C.H.R.R. D/459; *Chong v. Violetta Industries Ltd. (No.2)*, 2007 BCHRT 249, CHRR Doc. 07-339.
- ²² *Hamlyn v. Cominco Ltd.* (1989), 11 C.H.R.R. D/333 (B.C.C.H.R.); *Ball v. Ontario (Community and Social Services)*, 2010 HRTO 360; *Turner v. Canada Border Services Agency (No. 2)*, 2014 CHRT 10, 79 C.H.R.R. D/194.
- ²³ *Hodkin v. SCM Supply Chain Management Inc.*, 2013 HRTO 923, 77 C.H.R.R. D/129 [*Hodkin*].
- ²⁴ *Carriere v. Boonstra Trucking Ltd.*, 2013 AHRC 10, 78 C.H.R.R. D/139.
- ²⁵ *Datt v. McDonald's Restaurants of Canada Ltd. (No. 3)*, 2007 BCHRT 324, 61 C.H.R.R. D/19. An employee developed a skin condition which was aggravated by excessive hand washing. The employer had a hand washing policy which required all of their employees to engage in frequent hand washing, and as a result the employer made no attempt to accommodate this employee.
- ²⁶ *Commission des droits de la personne et des droits de la jeunesse c. Commission scolaire des Draveurs*, J.E. 99-1061; REJB 1999-12851 (T.D.P.) ; *Klassen v. Toronto District School Board*, 2014 HRTO 191.
- ²⁷ *Turner v. 507638 Ontario (No. 4)*, 2009 HRTO 249, CHRR Doc. 09-0366; *Wall v. Lippé Group*, 2008 HRTO 50, 64 C.H.R.R. D/26; *Emra v. Impression Bridal Ltd.*, 2014 HRTO 1736, 80 C.H.R.R. D/260;
- ²⁸ *University of British Columbia v. Kelly*, 2015 BCSC 1731, 82 C.H.R.R. D/77; *Gaisiner v. Method Integration Inc.*, 2014 HRTO 1718, 80 C.H.R.R. D/284.
- ²⁹ *Dawson v. Canada Post Corp.* 2008 CHRT 41, 64 C.H.R.R. D/354.
- ³⁰ *Fendick v. Lakes District Maintenance Ltd. (No. 2)*, 2005 BCHRT 573, CHRR Doc. 05-730; *McDonald v. Dental and Hearing Crafts Ltd.* (2009), CHRR Doc. 09-2491 (NL. Bd. Inq.).
- ³¹ *Alberta (Human Rights and Citizenship Comm.) v. Federated Co-operatives Ltd.*, 2005 ABQB 587, 53 C.H.R.R. D/496; *Oak Bay Marina Ltd. v. British Columbia (Human Rights Tribunal) (No. 2)*, 2004 BCHRT 225, 51 C.H.R.R. D/68; *MacLeod v. Lambton (County) (No. 2)*, 2014 HRTO 1330, 80 C.H.R.R. D/227.
- ³² *Vasil v. 528716 BC Ltd. (No. 4)* (2009), CHRR Doc. 09-0473, 2009 BCHRT 117 [*Vasil*]; *Trask v. Nova Scotia (Correctional Services) (No. 1)* (2010), CHRR Doc. 10-0470 (N.S. Bd. Inq.).
- ³³ *Cameron v. Fletcher Challenge Canada Ltd. (Re)* (1995) 24 C.H.R.R. D/506 (B.C.C.H.R.); *Mellon v. Canada (Human Resources Development) (No. 2)*, 2006 CHRT 3, CHRR Doc. 05-242.
- ³⁴ *Warren v. West Canadian Industries Group Ltd.* (2007), 60 C.H.R.R. D/473 (Alta. H.R.P.).
- ³⁵ *Berberi v. Canada (Attorney General)*, 2009 CHRT 21, CHRR Doc. 09-1654.
- ³⁶ *Morgan-Hung v. Provincial Health Services Authority (No. 4)*, 2009 BCHRT 371, CHRR Doc. 09-2481.
- ³⁷ *Human Rights Act*, *supra* note 2, s. 4.
- ³⁸ *Thompson v. Selective Personnel Ltd. (No. 1)*, 2009 HRTO 1224, CHRR Doc. 09-1670.

Guideline on Accommodating Physical and Mental Disabilities at Work

³⁹ *Britlz v. Yaki's Pizza & Subs* 2006 BCHRT 245, CHRR Doc. 06-305. A woman was refused employment when her potential employers learned that she had epilepsy.

⁴⁰ *Century Oils (Canada) Inc. v. Davies*, [1988] B.C.J. No. 118 (B.C.S.C.). See also: *Dorvault v. Ital Décor Ltd. (No.3)*, 2005 BCHRT 148, 52 C.H.R.R. D/136.; *Young v. 633785 B.C. Ltd.*, 2004 BCHRT 135, CHRR Doc. 04-264.; *Maciel v. Fashion Coiffures Ltd. (No.3)*, 2009 HRTO 1804, CHRR Doc. 09-2373.

⁴¹ *Vasil*, *supra* note 32. The Tribunal concluded that the employer adversely treated an employee based on his mental disabilities. The employer took advantage of the employee's mental disabilities by failing to keep adequate work records on the employee and failing to adequately compensate the employee for his work.

⁴² *Davis v. Sandringham Care Centre*, 2015 BCHRT 148, 82 C.H.R.R. D/49.

⁴³ *Tanzos v. AZ Bus Tours Inc. (No. 2)*, 2007 CHRT 33, 61 C.H.R.R. D/128. An employee requested sick leave due to stress, chest pains, and chronic headaches. The employer would not allow the employee to return to work until she could work 5 days a week without any restrictions. The Tribunal found that the employer had not exercised their duty to accommodate. See also: *Ollinger v. Akula Subs Ltd. (2008)*, 62 C.H.R.R. D/338 (S.H.R.T.); *Kuehn v. Granum (Town)* (2006), CHRR Doc. 06-325 (Alta.H.R.P.); *Horvath v. Rocky View School Div. No. 41*, 2015 AHRC 5, 81 C.H.R.R. D/16; *Tombs v. 1303939 Ontario Ltd. (No. 4)*, 2015 HRTO 842, CHRR Doc. 15-1342.

⁴⁴ *Wutke v. Mageria Holdings Ltd.*, 2006 BCHRT 340, 57 C.H.R.R. D/56; *Selinger v. McFarland*, 2008 HRTO 49, CHRR Doc. 08-480.

⁴⁵ *Schuyler v. Oneida Nation of the Thames (No. 3)*, 2006 CHRT 34, 57 C.H.R.R. D/469. An employee was replaced while out on sick leave for colon cancer treatment. When she returned to work her employer refused to give her old position back and instead offered her a new position which was essentially a demotion and required a 3-month probationary period.

⁴⁶ *Lowe*, *supra* note 10. An employer refused to put an employee on the regular payroll because the employee's medical condition affected his attendance at work. As a result, the employee was denied the opportunity to access a number of benefits, including the ability to qualify for employment insurance. When the employee was absent from work due to illness his employer terminated him due to absences. The Tribunal found that the employee had been terminated due to his disability, and that the employer's refusal to put the disabled employee on the regular payroll was also discrimination based on disability.

⁴⁷ *Bubb-Clarke v. Toronto Transit Commission*, 42 CHRR 326, 2002 CanLII 46503 (ON HRT); *Amalgamated Transit Union, Local 741 v. London Transit Commission*, 2011 CanLII 76422.

⁴⁸ *Cardamone v. Crown West Steel Fabricators (No. 2)*, 2005 BCHRT 369, 53 C.H.R.R. D/236. A press operator employee had minor surgery to prepare for eventual dialysis. When he was scheduled to return to work he was laid off. Eventually other press operators were recalled to work, but he was not. The Tribunal concluded that the employee's disability was a factor in the employer's decision not to recall him to work. See also: *LaFortune v. Washington Mills Electro Mineral Corp. (No. 2)*, 2009 HRTO 504, CHRR Doc. 09-0705.

⁴⁹ *ADGA Group Consultants Inc. v. Lane* (2008), 64 C.H.R.R. D/132 (Ont.Div.Ct.). When an employee began his employment he informed his supervisor that he had bipolar disorder. A few days later his employment was terminated on the grounds that he could not fulfil the responsibilities of the job. The Tribunal found that the employer had discriminated against the employee based on his mental disability.

Guideline on Accommodating Physical and Mental Disabilities at Work

⁵⁰ *Emerick v. Sooke Esso*, 2007 BCHRT 79, 59 C.H.R.R. D/460. The Tribunal concluded that the employer discriminated against an employee based on his physical disability when his employment was terminated after he had a seizure at work.

⁵¹ *Ottawa (City)*, *supra* note 19. A woman was terminated from her employment as a driver for Ottawa-Carleton Transportation Commission due to excessive absenteeism. She suffered from migraine headaches which caused her to be absent for a few days every year. The Tribunal found that taking disability-related absences into account in deciding to terminate an individual's employment for excessive absenteeism is discriminatory.

See also: *Gariano v. Fluor Constructors Canada Ltd.* (2006), 57 C.H.R.R. D/43 (Alta. H.R.P.); *Coast Mountain Bus Company Ltd. v. National Automobile, Aerospace, Transportation and General Workers of Canada (CAW-Canada), Local 111*, 2010 BCCA 447 [*Coast Mountain Bus*].

⁵² *U.S.W., Local 1-423 v. Weyerhaeuser Co.*, 2009 BCHRT 328, CHRR Doc. 09-2052. Four disabled employees on long-term disability were terminated from their employment for "non-culpable absenteeism". The Tribunal found that the Human Resource Manager had learned that the plant would soon be closing, and took action to terminate these four disabled employees in order to avoid paying them severance pay.

See also: *MacRae v. International Forest Products Ltd. (No. 2)*, 2005 BCHRT 462, 54 C.H.R.R. D/223; *Québec (Comm. des droits de la personne et des droits de la jeunesse) v. Cambior Inc.*, 2007 QCTDP 20, CHRR Doc. 07-480.

⁵³ *Cottreau v. R. Ellis Chevrolet Oldsmobile Ltd.* (2007), 61 C.H.R.R. D/8 (N.S.Bd.Inq.).

⁵⁴ *Smith v. Fawcett Truck Stop (No. 1)* (2005), CHRR Doc. 05-05-433 (Alta. H.R.P.). See also: *Ehret v. Shandro Investments Ltd. (No. 2)*, 2006 BCHRT 486, CHRR Doc. 06-651; *Simpson v. JB & M Walker Ltd.* 2010 HRTO 819, CHRR Doc. 10-0977; *Lipp v. 0965319 B.C. Ltd. (c.o.b. Maverick's Sports Lounge)*, 2014 BCHRT 199.

⁵⁵ *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, (1992), 16 C.H.R.R. D/425 (S.C.C.) [*Renaud*].

⁵⁶ *Re Emrick Plastics and C.A.W.* (1992), 25 L.A.C. (4th) 19 at pp. 25-26.

⁵⁷ *Carter v. Chrysler Canada Inc.*, 2014 HRTO 845, 79 C.H.R.R. D/388.

⁵⁸ *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, (1990), 12 C.H.R.R. D/417 (S.C.C.).

⁵⁹ *Budd v. 783720 Ontario Inc.*, 2015 HRTO 825, 81 C.H.R.R. D/235.

⁶⁰ *British Columbia v. Emergency Health Services Comm. (No. 1)*, 2005 BCHRT 361, 53 C.H.R.R. D/156.

⁶¹ *DeSouza v. 1469328 Ontario Inc.*, 2008 HRTO 23, 63 C.H.R.R. D/197. The Tribunal ruled that the employer discriminated against their employee with epilepsy when he was required to inform others (staff, patrons, club members etc.) of his condition.

⁶² *Jackson v. M Butler Insurance Brokers Ltd.*, 2007 HRTO 5, 59 C.H.R.R. D/17. An employee required 6 weeks off to recover from surgery for ovarian cancer. When she was ready to return to work, her position had been replaced. The employers argued that they did not know she had cancer. The Tribunal found that the employee had provided the employer with 2 doctors' notes indicating that the employee required 6 weeks off to recover from surgery, the employer did not need to be informed of the precise diagnosis. See also: *Kazmir v. 1056217 Ontario Inc.*, 2009 HRTO 1974, CHRR Doc. 09-2586.

⁶³ *Dunkley v. University of British Columbia*, 2015 BCHRT 100, 81 C.H.R.R. D/295.

Guideline on Accommodating Physical and Mental Disabilities at Work

⁶⁴ *Lee v. Kawartha Pine Ridge Dist. School Board (No. 7)*, 2014 HRTO 1212, 80 C.H.R.R. D/97 [Lee].

⁶⁵ *McCarthy v. Caesar's Plumbing and Heating (No. 5)*, 2014 HRTO 1795, CHRR Doc. 14-2295.

⁶⁶ *Hawman v. Battlefords School Div. No. 118* (2008), 62 C.H.R.R. D/113 (S.H.R.T.). An employer requested that a disabled employee provide them with medical documentation in three days or the employee would be terminated. The Tribunal concluded that the employee was discriminated against based on their disability because the employer's request was unreasonable.

⁶⁷ *Wesley v. 2252466 Ontario Inc. (No. 2)*, 2014 HRTO 1591, 80 C.H.R.R. D/195.

⁶⁸ *Teamsters Local 879 v. Holtz Environmental (Envirosystems) (G.B. Grievance)*, [2016] O.L.A.A. No. 45; *Entrop*, *supra* note 12.

⁶⁹ *Sears v. Honda of Canada Mfg. (No. 5)*, 2014 HRTO 45, 78 C.H.R.R. D/103.

⁷⁰ *Croteau v. Canadian National Railway Co.*, 2014 CHRT 16, 79 C.H.R.R. D/347.

⁷¹ *Kelly v. Nova Scotia Liquor Corp.*, (2015), 80 C.H.R.R. D/408 (N.S. Bd.Inq.); *Knox-Heldmann v. 1818224 Ontario Ltd. (No. 2)*, 2015 HRTO 1376, CHRR Doc. 15-1876.

⁷² *Coast Mountain Bus*, *supra* note 51.

⁷³ *Klonowski v. Ontario (Ministry of Community Safety and Correctional Services)*, 2012 HRTO 1568. An employee had been absent from work due to a work-related injury. The employee was informed that she had been placed in an AMP and was advised that her attendance was being monitored. The letters and meeting did not chastise the employee for her absences. A letter made reference to accommodation and indicated that the letter was not disciplinary in nature. While the application of the attendance standard was "mechanical", it was held that the employee had not been discriminated against.

⁷⁴ *Senyk v. WFG Agency Network (No. 2)*, 2008 BCHRT 376; *Sluzar v. Burnaby (City)*, 2010 BCHRT 19.

⁷⁵ *Coast Mountain Bus*, *supra* note 51.

⁷⁶ *Smith v. Canadian National Railway Co.*, 2008 CHRT 15, CHRR Doc. 08-262.

⁷⁷ *Renaud*, *supra* note 55.

⁷⁸ Canadian Medical Association, *The Treating Physician's Role in Helping Patients Return to Work After an Illness or Injury*, Ottawa: CMA 2013.

⁷⁹ *Szczesniak v. Northern Health Authority (No. 2)*, 2012 BCHRT 81. A physician's letter did not specifically identify the employee's limitations, and it was one of the reasons for the employee's delayed return to work.

⁸⁰ Canadian Medical Association, *supra* note 78 at p. 3.

⁸¹ *Lee*, *supra* note 64. The Tribunal was not satisfied that the opinions of a family doctor and a psychiatrist had a legitimate medical basis. The family doctor's opinion was given little weight as it was "grounded in speculation and conjecture, and was primarily based on parroting the applicant's wishes." Similarly, the psychiatrist's recommendation was made because it "was what the applicant asked and wanted him to do."

⁸² Canadian Medical Association, *supra* note 78 at p. 3.

Guideline on Accommodating Physical and Mental Disabilities at Work

⁸³ *Visic v. Elia Associates Professional Corp.*, 2011 HRTO 1230.

⁸⁴ *Hodkin*, *supra* note 23.

⁸⁵ *Gamache v. York University*, (2012), CHRR Doc. 12-2828, 2012 HRTO 2328.

⁸⁶ *Woolworth Canada Inc. v. Human Rights Commission (Nfld.) and White* (1995), 135 Nfld. & P.E.I.R. 45; *Munoz v. Roman Catholic Episcopal Corp. of the Diocese of Toronto*, 2011 HRTO 1434, 73 C.H.R.R. D/90.

⁸⁷ *Vanegas v. Liverton Hotels International Inc. (c.o.b. Metropolitan Hotel)*, 2011 HRTO 715.

⁸⁸ *Lagana v. Saputo Dairy Products Canada G.P.*, 2012 HRTO 1455.

⁸⁹ *Human Rights Act*, *supra* note 2, s. 2.2.

⁹⁰ *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3 (SCC).

⁹¹ New Brunswick Human Rights Commission Annual Report 2002-2003, pp.13-14.

⁹² *Knight v. Société de transport de l'Outaouais*, 2007 CHRT 15, CHRR Doc. 07-281.

⁹³ *Willoughby v. Canada Post Corp.*, 2007 CHRT 45.

⁹⁴ *Re Hamilton Civic Hospital and CUPE, Local 794* (1994), 44 L.A.C. (4th) 31 (Kennedy).