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## **CHRONICALLY ABSENT EMPLOYEES: HOW CAN EMPLOYERS COPE?**

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### **A. INTRODUCTION**

Chronic absenteeism of employees is a serious and frustrating problem for employers in Ontario. Absenteeism generally refers to an absence from work that is unplanned, and does not include holiday time or pre-approved days off.<sup>1</sup> Studies have indicated that, on average, one day of an employee's absence costs an employer \$2,500.00 in direct and indirect costs, taking into account the decrease in productivity, financial costs and administrative costs.<sup>2</sup> On average, employees are absent eight days a year.<sup>3</sup> In total, absenteeism costs employers in Canada an estimated 10 billion dollars annually.<sup>4</sup> Absenteeism may be caused by any number of things such as a serious accident or illness, low morale, poor working conditions, boredom, lack of job satisfaction, personal problems, bad lifestyle choices, transportation problems, stress, workload or conflicts between employees or with management.<sup>5</sup>

This *Employment Law Bulletin* will distinguish between culpable and non-culpable absenteeism and will provide suggestions to employers as to strategies they can use to minimize both types of absenteeism,

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<sup>1</sup> Ernest B. Akyeamong, "Fact Sheet on Work Absences" (Winter 2001) *Perspectives*, Statistics Canada Catalogue No. 75-001-XPE, available at: <http://www.statcan.ca/english/studies/75-001/archive/e-pdf/e-0147.pdf>.

<sup>2</sup> Benefits Interface Inc, "Introduction to Attendance Management," available at <http://www.benefits.org/interface/cost/absent.htm>

<sup>3</sup> *Supra* note 1.

<sup>4</sup> Stephen Bird, "Reconciling Accommodation and Attendance Management" (Paper presented at The Canadian Institute's National Forum on The Employer's Duty to Accommodate, Toronto, April 2005) at 1["Attendance Management"].

<sup>5</sup> *Supra* note 2.

focusing on how to appropriately manage the situation where employees are absent due to work and non-work related physical or mental disabilities.

## B. DEFINING ABSENTEEISM

At the outset, employers must distinguish between “culpable” and “innocent” absenteeism. An absence is “culpable” if its cause could and should have been addressed and corrected by the employee.<sup>6</sup> Some examples of culpable absenteeism include being late for work, leaving work early, not notifying the employer about the absence or abusing a leave policy by using it for a reason for which it was not intended. In these instances, employers can and should discipline the employee, and if an employee is chronically culpably absent, it is appropriate to terminate the employee for cause.

Innocent absenteeism occurs for reasons that are beyond an employee’s control, such as illness, disability or the occurrence of a family crisis. In these instances, employers must be aware that they have a duty to accommodate employees under the Ontario *Human Rights Code* (the “Code”),<sup>7</sup> to the point of undue hardship, which is discussed below. As a result, employees who are absent for reasons that are beyond their control should generally not be disciplined in the same way as employees who are culpably absent, as this could lead to potential liability for the employer for infringing the employee’s human rights.<sup>8</sup>

## C. HUMAN RIGHTS LEGISLATION IN ONTARIO

Under the Ontario *Human Rights Code*, there is a general prohibition against discrimination in employment. More particularly, s. 5(1) of the Code states:

5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.

Discrimination can be either direct or indirect. Indirect discrimination occurs when the effect of an employment policy is to limit access to employment for a group that is protected by the human rights legislation (“protected group”), even though the policy is not intended to have this effect. Pursuant to the

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<sup>6</sup> Attendance Management, *supra* note 4.

<sup>7</sup> R.S.O., 1990 c. H.19.

<sup>8</sup> Attendance Management, *supra* note at 1.

Code and the policies that have been developed by the Ontario Human Rights Commission (“OHRC”), employers have a duty to accommodate employees that belong to a protected group to the point of undue hardship.<sup>9</sup> This includes employees who are mentally or physically disabled, whether or not their disability is caused by or related to their employment.

The onus is always on the employer to show that efforts have been made to accommodate the employee to the point of undue hardship. The OHRC recommends that employers keep the following in mind when dealing with an employee who requires accommodation:

- The needs of persons with disabilities must be accommodated in the manner that most respects their dignity, to the point of undue hardship;
- There is no set formula for accommodation. Each person has unique needs and it is important to consult with the person involved;
- Taking responsibility and showing willingness to explore solutions is a key part of treating people respectfully and with dignity; and
- Voluntary compliance may avoid complaints under the Code, as well as save the time and expense needed to defend against them.<sup>10</sup>

The type and degree of accommodation an employer can provide will depend on the type of business, the size of the employer’s workforce, the revenues or budget of the business, health and safety concerns and the cost of the accommodation that is required. As such, it may be easier for an employer to accommodate a particular employee if the employer’s workforce and budget is large. However, employers should not take prejudicial or stereotypical opinions of customers or other employees into account when making decisions regarding accommodation as these factors would not be considered by the OHRC or court if the employee who requires accommodation should lodge a complaint.

#### **D. DEFINING DISABILITY**

The OHRC has given a broad interpretation to the word “handicap” in the Code. Handicap includes:

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<sup>9</sup> OHRC Policy and Guidelines on Disability and the Duty to Accommodate, available at: <http://www.ohrc.on.ca/english/publications/disability-policy.shtml> [“Accommodation Policy”]

<sup>10</sup> *Ibid.* at Intro

... both present and past conditions, as well as a subjective component, namely, one based on perception of disability. ... Protection for persons with disabilities under this subsection explicitly includes mental illness, developmental disabilities and learning disabilities. Even minor illnesses or infirmities can be “disabilities”, if a person can show that she was treated unfairly because of the perception of a disability.<sup>11</sup>

The question for employers to ask is whether the physical or mental limitation in question is interfering in some way with the person’s ability to obtain or perform the job in question. There are some disabilities that are not immediately apparent but yet can cause substantial problems for employees and employers. Some examples of these non-apparent disabilities include:

- persons whose disabilities do not actually result in any functional limitations but who experience discrimination because others believe their disability makes them less able;
- persons who have recovered from conditions but are treated unfairly because of their past condition, and
- persons whose disabilities are episodic or temporary in nature.<sup>12</sup>

1. Employees with Mental Health Problems

Mental health disorders are becoming more common in the Canadian workforce, and employees with these disorders can be very difficult for employers to manage. Absenteeism due to mental health issues is very prevalent and costly. Employers in Canada give up 13 percent of their annual profits to absenteeism for mental health related reasons. Depression is the most common form of mental health problem faced by Canadian employees, followed by anxiety and drug and alcohol addiction.<sup>13</sup>

The key to dealing with mental health issues in the workplace is to ensure that they are diagnosed and treated as soon as possible. This is especially true for depression because treatment for depression is most effective within the first six months after onset.<sup>14</sup> Some symptoms of depression include sadness, tearfulness, forgetfulness, poor concentration, increased appetite, anxiety and fatigue. There are effective medications that can be prescribed for depression and supportive psychotherapy has been found to be effective as well.<sup>15</sup> Due to the social stigma and misinformation associated with mental

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<sup>11</sup> *Ibid.* at 1.1.

<sup>12</sup> *Ibid.* at 1.3

<sup>13</sup> Dr. Joan Tucker, “Psychiatric Disabilities and the Challenges of Accommodation”. presented at The Canadian Institute’s National Forum on: The Employer’s Duty to Accommodate (Toronto: April, 2005).

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

illness and psychiatric disorders, employers should be aware that an employee suffering from a mental disability may feel uncomfortable about disclosing their disability or seeking job accommodation. For the employer, this means addressing the issue as soon as the employer becomes aware of potential problems, pointing out the absentee problem and its impact on the workplace, and seeking the employee's input on ways to improve the situation. It is only where an employee seeks accommodation that the employer can request documentation from the employee's physician, and only that information that is directly related to the accommodation needs. An employer is generally entitled to the following information for the purposes of assessing the employee's ability to return to work:

- Confirmation that the employee suffers or continues to suffer from the disability that is preventing the employee from performing the duties of their job;
- The employee's prognosis;
- A report on the employee's physical restrictions; and
- A report on the employee's limitations.

With this information, the employer can properly assess the needs for accommodation, whether it be a leave of absence, reduced work hours, or physical alteration of the workplace.

## 2. Employees with Addiction problems

Severe substance abuse and dependency has been classified as a form of disability by the OHRC and the courts, and people who have serious addictions to drugs or alcohol are protected under the Code.<sup>16</sup> Generally speaking, employers in Ontario cannot have a blanket policy regarding drug and alcohol testing unless they can show that the requirement to be drug and alcohol free is a *bona fide* occupational requirement ("BFOR"). Some questions employers should ask themselves when developing policies regarding drug and alcohol testing in the workplace are:

- Is there an objective basis for believing that job performance would be impaired by drug or alcohol dependency? In other words, is there a rational connection between testing and job performance?
- In respect of a specific employee, is there an objective basis for believing that unscheduled or recurring absences from work, or habitual lateness to work, or inappropriate or erratic behaviour at work are related to alcoholism or drug addiction/dependency? These factors could demonstrate a basis for "for cause"

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<sup>16</sup> OHRC *Policy on Drug and Alcohol Testing* available at: <http://www.ohrc.on.ca/english/publications/drug-alcohol-policy.shtml>

or "post incident" testing provided there is a reasonable basis for the conclusions drawn.

- Is there an objective basis to believe that the degree, nature, scope and probability of risk caused by alcohol or drug abuse or dependency will adversely affect the safety of co-workers or members of the public?<sup>17</sup>

Once it has been established that an employee has a substance abuse problem, the employer is required to provide accommodation to that employee to the extent that this is possible. The employer should encourage the employee to seek treatment for the problem. Because of the nature of drug and alcohol addiction, the employer must be prepared in the event that the employee has a relapse to encourage the employee to return to treatment. If the employee is not willing to participate in any accommodation plan, or if the nature of the job is such that the employee would be placing others at risk by being intoxicated at work, the employer might be justified in terminating the employee for cause.<sup>18</sup>

### 3. Employees with physical disabilities

There are many different kinds of physical disabilities that can affect an employee's ability to do their job. The employee's diagnosis is less important than the effect the disability has on the person's ability to perform. Some types of illness, such as HIV infection or obesity can have the effect of limiting an employee's ability to do their job because of the perception that others, including co-workers have about the illness even if the employee does not have any physical symptoms. This is an example of a socially constructed disability.<sup>19</sup> For the purpose of human rights legislation and policies, it is not important whether the disability was caused by, or is related to, employment or whether the employee is or is not eligible for disability insurance. The employer's duty to accommodate arises if the employer receives a request for accommodation from a disabled employee.

## E. HOW CAN EMPLOYERS COPE WITH ABSENCE DUE TO DISABILITY?

As stated above, employers should not discipline an employee who is absent because of a disability. Instead, the employer should address the problems caused by the disability with the employee and attempt to put into place an accommodation plan. When an employer receives a request for accommodation from an employee, the information about the employee's disability should be kept confidential. A record should be kept of all the

<sup>17</sup> *Ibid.* at 5.

<sup>18</sup> *Richmond Hill (Town) v. Canadian Union of Public Employees, Local 905 (Doobay Grievance)*, 2004 O.L.A.A. No. 418.

<sup>19</sup> Mark Hart, Sanson & Hart, "The Physically Disabled Employee: What are your obligations now?" presented at The Canadian Institute's National Forum on: The Employer's Duty to Accommodate (Toronto: April, 2005).

steps that have been taken by the employer to accommodate the employee's request for accommodation. Employers are allowed to request medical information from their employees when an accommodation request has been made and employees are expected to provide specific information about how their disability affects their ability to perform their employment. Only information that is required for the purposes of creating an accommodation plan should be requested by the employer. Both the employer and the employee have a responsibility to actively participate in finding solutions to the barriers that the employee is facing due to their disability. If the environment is unionized, the union is also expected to participate in developing an accommodation plan for the employee. Testing can be done to assist in developing an accommodation, including a Physical Demands Analysis ("PDA") in order to determine the physical demands of the job, and a Functional Abilities Evaluation ("FAE") which looks at the functional abilities of the employee.<sup>20</sup>

Once an appropriate accommodation plan has been developed that is tailored to the employee's needs, the employee has an obligation to participate in the accommodation plan and to keep the employer advised of any progress or additional barriers the employee is facing. The employee also has an obligation to provide up-to-date medical information to the employer if that information is relevant to the accommodation plan.<sup>21</sup>

If the employee continues to require time off work due to their disability despite the employer's efforts to accommodate the disability, the employer should ask the employee to provide regular written updates from the employee's doctor about the employee's medical condition.<sup>22</sup> It may be possible to reduce an employee's absenteeism by creating a modified work schedule or reduced work schedule for the employee in some situations.<sup>23</sup> If the employer determines that the person can no longer fulfill the essential duties due to their disability, there is an obligation on the part of the employer to attempt to find alternative work for the employee if at all possible.<sup>24</sup>

## F. WHAT IS INVOLVED IN ACCOMMODATING TO THE POINT OF "UNDUE HARDSHIP"

Despite the requirements noted above, there is no absolute right to accommodation. The Code expressly provides that the employer must accommodate to the point of undue hardship. However, the Code does not

<sup>20</sup> *Ibid.*

<sup>21</sup> Geoffrey J. Litherland and Page E. Kendall, "The Employee's Obligations in the Accommodation Process" (Paper presented at The Canadian Institute's National Forum on: The Employer's Duty to Accommodate, Toronto: April 2005).

<sup>22</sup> Attendance Management, *supra* note 4 at 7.

<sup>23</sup> *Ibid.* at 8.

<sup>24</sup> *Ibid.* at 9.

provide a definition of “undue hardship.” The courts have held it to mean “severe suffering or privation that is excessive and disproportionate to the objective of the accommodation,”<sup>25</sup> which has been interpreted to mean that the cost of accommodation to the employer must be weighed against the benefit to the disabled person of accommodation. The Supreme Court of Canada has expressed it in the following terms:

More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term “undue” infers that some hardship is acceptable; it is only “undue” hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words “reasonable” and “short of undue hardship”. These are not independent criteria but are alternate ways of expressing the same concept. What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case.<sup>26</sup>

Once the employer has accommodated the employee, they are entitled to expect the employee to attend work on a regular and reliable basis, applying the firms’ general attendance-management policy, unless the employee requires further accommodation.<sup>27</sup> Making such a determination will have to be done on a case by case basis. Employers are generally advised to clearly document all matters related to accommodating the employee’s disability to the point of undue hardship, including requests for relevant information from the employee and their health providers, and reports from specialists.

The Federal Court recently overturned a decision of the Canadian Human Rights Tribunal (“CHRT”) that may have proven onerous for employers in terms of tolerating excessive chronic non-culpable absenteeism. In *Parisien v. Ottawa-Carleton Regional Transit Commission*,<sup>28</sup> the court concluded that the employee had “a horrendous level of absenteeism from the time [he] began his employment with the employer,” and that with an absentee rate in excess of 30 percent it was “not reasonable ... to require the employer to tolerate this.”<sup>29</sup> As a result, there is now case law to suggest that employers will not be required to tolerate excessive chronic

<sup>25</sup> *Jansen v. Ontario Milk Marketing Board* (1991) 13 C.H.R.R. D/391 (Ont. Bd. of Inq.).

<sup>26</sup> *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 at 984.

<sup>27</sup> Bird, *supra* note 4 at 6.

<sup>28</sup> [2004] F.C.J. No. 2172 (*sub nom Desormeaux v. Ottawa-Carleton Regional Transit Commission*) (T.D.). The Federal Court held the appeal of two cases together, both Desormeaux and Parisien. The Federal Court of Appeal overturned the court’s finding with respect to Desormeaux, but there was not an appeal of the court’s decision with respect to Parisien. See *Desormeaux v. Ottawa-Carleton Regional Transit Commission*, [2005] F.C.J. No. 1647 (C.A.).

<sup>29</sup> *Ibid.* at para. 117.



non-culpable absenteeism,<sup>30</sup> however, what constitutes excessive absenteeism will depend on the individual circumstances of each case.

## G. CONCLUSION

It is recommended that all employers have an attendance management policy that differentiates between culpable and non-culpable absenteeism. Any attendance management policy should address the duty of the employer to accommodate its employees to the point of undue hardship. The policy should be flexible enough to address individual circumstances and should not expose disabled employees to disciplinary consequences. Other considerations in developing attendance management policies are whether they are in accordance with the *Employment Standards Act, 2000*, the *Occupational Health and Safety Act*, the *Workplace Safety and Insurance Act*, and the Code. It is also important to consider how the policy fits in with any collective agreement that may exist in the workplace.<sup>31</sup>

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<sup>30</sup> Bird, *supra* note 4 at 6.

<sup>31</sup> *Ibid.* at 8.