

Duty to Accommodate – Employer Obligations

Trustee Academy

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**SSBA HR and Employee
Relations**



Principles of Accommodation

Statutory Requirements

Accommodation arises from:

- *The Saskatchewan Human Rights Code*
- *The Saskatchewan Employment Act*

Saskatchewan Human Rights Code

s. 16 (1) No employer shall refuse to employ, refuse to continue to employ or otherwise discriminate against a person or class of persons with respect to employment, or a term or condition of employment, on the basis of a prohibited ground.

Saskatchewan Human Rights Code

Section 2(1) “Prohibited ground” means:

religion

creed

marital status

family status

sex

sexual orientation

disability

age

colour

ancestry

nationality

place of origin

race or perceived race

gender identity

receipt of public assistance

Legal Duties of School Divisions

School divisions as Employers must:

- Accommodate; and
- Accommodate to the point of undue hardship

Legal Duties of School Divisions

1. Ensure that there are no institutional barriers

Policies, procedures and practices:

- prohibit discrimination
- consider accommodation issues in planning
- address education for staff

Institutional Discrimination

Duty to Educate

- Employers have a positive legal duty to ensure that workplaces present a positive and non-discriminatory environment for all employees
- Employers must ensure that employees have access to and are aware of policy and procedures that address the workplace

Legal Duties of School Division

2. Accommodate individuals who may be experiencing barriers

- gather appropriate information
- consult with individual
- create a specific plan to eliminate discrimination
- Ensure confidentiality

Legal Duties of School Division

3. Accommodation need not be “Perfect” nor “Preferred”

Employers are not required to provide employees with a perfect accommodation, or even with their preferred accommodation, they are only required to provide an accommodation that is appropriate in the circumstances.

When Accommodation Has Been Met

- Acceptance of an offer of accommodation or outright rejection of an accommodation that is a reasonable one;
- The employee refuses to provide the Division with information that is necessary for the Division to determine what accommodation(s) may be appropriate; or
- The Division may determine that there is no accommodation that it can offer without incurring undue hardship.

Case Scenario

An injured employee could not agree on a return-to-work plan. The employee sues for disability discrimination and failure to accommodate. It is found that the employer offered 3 possible positions for the gradual return to work, all of which the employee rejected. The employee also refused to undergo a functional capacity evaluation that would help the employer get a better idea of the job duties the employee could do.

Is this a failure to accommodate on the employer's part?

Answer:

No this would not be found to be a failure to accommodate

- The employer found and offered 3 viable suitable and reasonable work accommodations that met the employee's work restrictions
- The employee refused all 3, hence, not participating in the accommodation process.

Accommodate to the point of Undue Hardship

Undue hardship exists when the steps required to accommodate the employee are so extreme, onerous or difficult that it is unreasonable to expect the employer to implement them.

Accommodate to the point of Undue Hardship

- Onus is on school division to prove undue hardship
- Cost alone is not undue hardship

Accommodate to the point of Undue Hardship

Common factors to determine whether undue hardship exists include:

- Financial cost;
- the size and nature of the employer's operations
- Interference with the rights of other workers
- Safety and efficiency impacts

Moore v British Columbia (Education),
2012 SCC 61

This case is discussed more fully in the November 17 2019 PowerPoint presentation for Board members, “Student Intensive Needs with the Legal Context” available in SSBA Legal’s dropbox

Moore v British Columbia (Education),
2012 SCC 61

- Student had a learning disability and attended a specialized program run by the Board
- The board cancelled the program based on budgetary considerations
- The student's parents enrolled him in a private facility and brought complaints against the board and the Province alleging discrimination on the basis of disability

Moore v British Columbia (Education),
2012 SCC 61

Applying this case to Board-employee matters, this case set the test for establishing discrimination by requiring the complainant to demonstrate that he/she:

1. Has a characteristic that is protected from discrimination;
2. Has experienced an adverse impact; and
3. The protected characteristic was a factor in the adverse impact.

Moore v British Columbia (Education),
2012 SCC 61

Applying this case to board governance, it is imperative for boards to exercise caution when budgetary cuts negatively affect accommodations for students or staff. The Court did not accept that the Board had achieved undue hardship because the board did not conduct appropriate budgetary analysis. As the result, a finding of discrimination was upheld.

Accommodation of Disability

Human Rights Code

Disability:

- any degree of physical disability, or mental disorder
- definition is given an expansive interpretation by the courts
- does not include temporary illnesses

Obligations of Employees

1. provide updated medical information describing the medical restrictions or barriers faced by the employee
2. follow medical advice
3. cooperate in all phases of the accommodation process and try appropriate accommodation plan
4. Keep in contact with employer

What medical information is required

- “Medical restrictions” are:
 - the medical issues that create barriers to fully participate in the employee’s job duties
- Employers are not entitled to a diagnosis

Obligations of the School Division

1. Initiate process – Duty to Inquire

- Can be triggered 2 ways:
 - A. when an employee makes an express request
 - B. Where the employer realizes there may be a situation/need for an accommodation

2. Gather information regarding possible accommodations

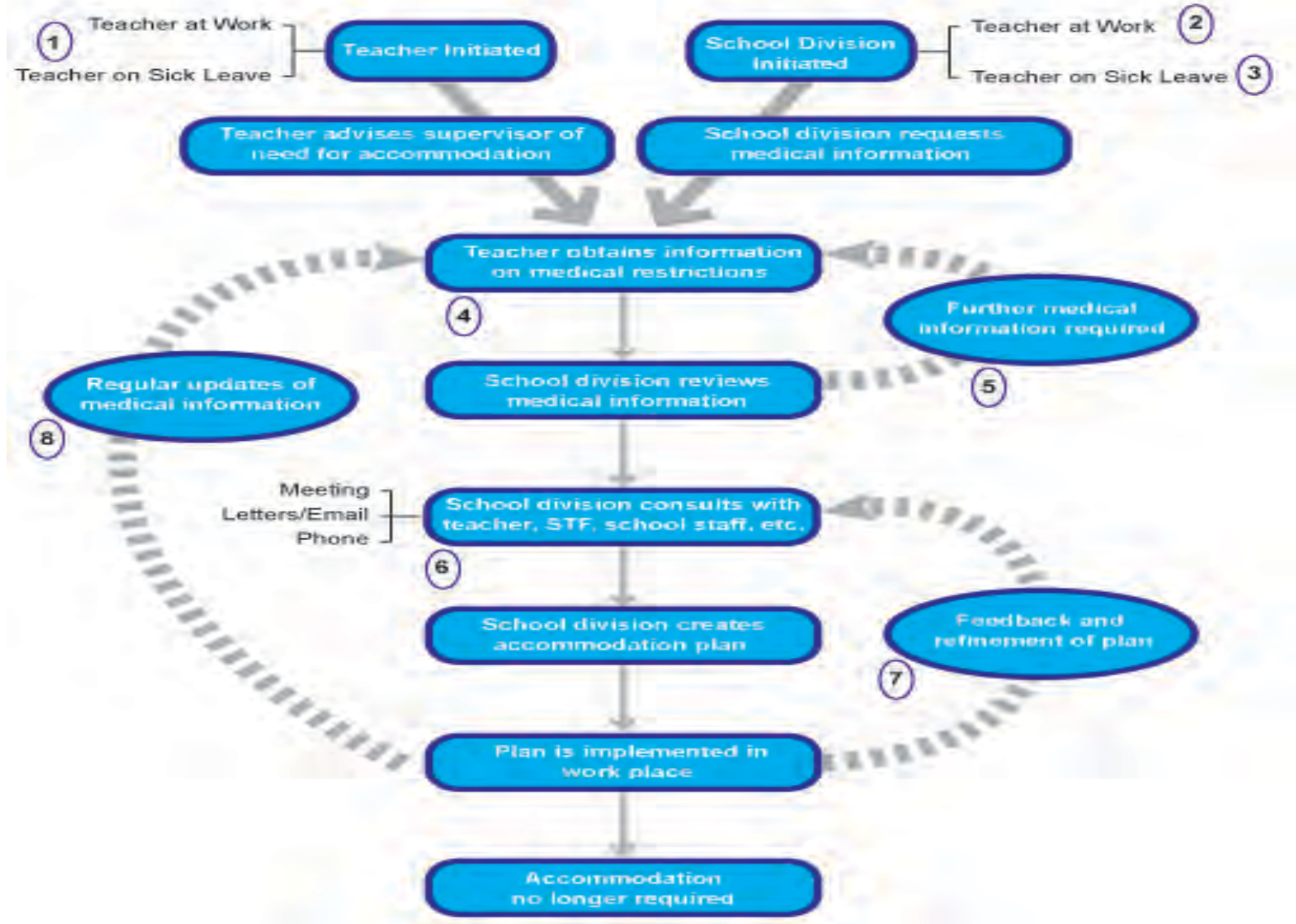
- recommendations of doctors or the employee are not determinative

Obligations of the School Division

3. Create the accommodation plan

- must include follow up
- must protect confidentiality
- must accommodate employee to the point of undue hardship

Duty to Accommodate: The Typical Process



Disability – Mental Disorder

Mental Health – 30% of disability claims relate to mental illness (Mondaq: *The Duty to Accommodate Mental Disability: 5 Practical Tips*, Ryan McCarville & Michael Murphy – McInnes Cooper)

Disability – Mental Disorder

The Saskatchewan Human Rights Code refers to “mental disorder” which is defined as “a disorder of thought perception, feelings or behaviour that impairs a person’s

- a) Judgment;
- b) Capacity to recognize reality;
- c) Ability to associate with others; or
- d) Ability to meet the ordinary demands of life; (‘trouble mental’)

Disability – Mental Disorder

Same principles around employer duty apply & accommodations could be:

- Change the physical workplace;
- Change working rules or expectations;
- Alter employee job duties, hours of work or schedules;
- Provide a leave of absence; or
- Address workplace misconduct through non-disciplinary means

Accommodation of Family Status

Human Rights Code

Family Status means:

- the status of being in a parent and child relationship and, for the purposes of this definition:
 - (a) “child” means son, daughter, stepson, stepdaughter, adopted child and person to whom another person stands in place of a parent;
 - (b) “parent” means father, mother, stepfather, stepmother, adoptive parent and person who stands in place of a parent to another person

Duty to Accommodate – Family Status

- Accommodation on the basis of family status is one of the fastest growing areas in relation to workplace accommodations
- Majority deal with family responsibilities and caregiving:
 - Absences due to maternity, parental or other leaves
 - Requests for changes to shifts

Duty to Accommodate – Family Status

- In such circumstances, to prove family status discrimination, employees must demonstrate a serious interference with a substantial parental duty or other family duty

Case Scenario #1

- After working for her employer for 2 years, Sharon's employer changes her work hours (day shifts to night shifts) which impacts her daycare situation and her ability to secure day care for her young children. Sharon is a single mom with no other family supports. Sharon has looked for day care providers to provide day care during the evenings and nights to no avail. If Sharon were to have to work nights she would have no one to watch her kids.
- Does the employer have to accommodate her?

Answer

- The law in relation to accommodation of family status is not settled nationally.
- *United Nurses of AB v. AB Health Services, 2021 ABCA 194* involved interpretation of a Collective Agreement & its language mirrored the *Alberta Human Rights Code*.

Answer: *United Nurses of AB v. AB Health Services*,
2021 ABCA 194

[109] The test for prima facie discrimination in *Moore* does not require a claimant to prove self-accommodation. There is no justification for requiring a family status claimant to prove an additional element of self-accommodation at the *prima facie* stage of the inquiry. To do so would unfairly and unjustly elevate the burden of proof on family status claimants, perpetuating rather than ameliorating human rights inequality. Rather, the multi-party inquiry into accommodation, properly belongs in the second justification stage of the inquiry, where the burden remains on the employer to prove a *bona fide* occupational requirement for the impugned policy, and accommodation to the point of undue hardship in accordance with the principles set down in *Meiorin*.

Accommodation of Religion

Human Rights Code

Includes all aspects of religious observance and practice as well as beliefs

Definition of religion

A sincere and deeply held personal belief connected to an individual's spiritual faith or the divine.

- Includes 'traditional' religions as well as non main-stream religions and atheism
- A sincerely held religious belief is an individual's belief and might not be held by all members of the same faith.

Duty to Accommodate – Religion

- Employee must establish:
 - a sincerely held religious belief; and
 - interference with that belief

Duty to Accommodate - Religion

Workplace can inquire into:

- whether the employee's belief is sincere:
 - nature of belief
 - previous religious experience
 - extent to which the beliefs are applied in the employee's life
- whether or not the interference with the belief is trivial

Duty to Accommodate - Religion

Religious Accommodations typically involves:

- Providing time off for religious holidays or time away from work to attend prayers;
- Changing work schedules to accommodate Sabbaths and other holy days;
- Providing breaks or a quiet place for employees to pray;
- Making changes and flexibilities to dress codes;
- Dealing with and dietary restrictions.

Duty to Accommodate - Religion

- Board policies and procedures must be consistent with allowing accommodation (ex: dress codes)

Case Scenario

Dan is very religious and his religion observes the Sabbath to be Friday from sundown to Saturday sundown. He states he cannot work during Sabbath as it goes against his religion.

Is there a duty to accommodate here ?

Answer

Yes Religion is a protected ground

- Taking into consideration:
 - Is the belief a sincerely held one apparent in the religion;
 - Accommodation – could include providing work schedules that allow him his days off on Saturday

Accommodation of Gender Identity

Gender identity

- an individual's internal and inherent sense and/or experience of gender
- it is linked to an individual's intrinsic sense of self and their sense of being female, male, a combination of both, or neither regardless of their biological sex.

Discrimination Against Individuals

Self-identification by employee is sufficient

- consistently asserted at the workplace
- evidence of medical procedures not required

EN v. Gallagher's Bar & Lounge **2021 HRTO 240 (CanLii)**

- The three complainants all identified by queer and used the pronouns “they/them”. They asked the Bar owner to refer to each of them using “they/them” pronouns but the owner refused to do so and was overheard referring to these staff members as “trannies” to Bar customers.
- The complainants brought complaints under the *Ontario Human Rights Code* for discrimination

EN v. Gallagher's Bar & Lounge **2021 HRTO 240 (CanLii)**

The Ontario Human Rights Tribunal found the Bar owner breached the Code by discriminating against the complainants on the basis of gender identity, gender expression and sex as a result of

- the use of “trannies” and the owner’s discussion with customers were “effectively outing the complainants” causing them to fear for their safety
- Mis-gendering the complainants by using incorrect pronouns when referring to them was adverse treatment in their employment

EN v. Gallagher's Bar & Lounge
2021 HRTO 240 (CanLii)

The Ontario Human Rights Tribunal ordered the Bar owner to pay each complainant \$10K for compensation for injury to their dignity, feelings and self-respect (for a total of \$30K) plus lost wages.

Discipline vs. Duty to Accommodate



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Discipline versus Duty to Accommodate

- If an employee has a disability, the division must assess whether the employee's misconduct is related to the employee's disability or not.

Discipline versus Duty to Accommodate

- If the employee's misconduct is or may be related to the employee's disability the **accommodation** process applies
- If the employee's misconduct is not related to the disability (i.e. the employee had control over the behaviour) the **disciplinary** process applies

Case - Alberto Lara Mendieta v Dominion Diamond Mines ULC, 2021 CanLII 61913 (NT HRAP), July 13, 2021].

A mining engineer claimed the company included him in the temporary layoff list because of the accommodations for his bad back and hip. The company claimed that it was the engineer's job performance, not his disability that factored into the decision. The Northwest Territories human rights tribunal agreed and dismissed his discrimination complaint, citing evidence showing that the engineer had a rocky relationship with his supervisor and had been put into the performance improvement program. Maybe the supervisor could have done a better job of communicating the company's expectations, the tribunal acknowledged, but this is not a wrongful dismissal case.

Other Resources

SSBA Legal Dropbox:

<https://www.dropbox.com/sh/jhifoioddekeln/AAA4EjcD-405nOA7t8mwJKrca?dl=0>

Questions



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Thank You

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