

Mental health accommodation: Taking a new approach

Disability accommodation in the workplace is not a novel topic. Most employers understand they have a duty to accommodate where an employee's disability prevents him from participation in the workplace. However, disability management becomes more challenging when the disability is mental rather than physical — this is often referred to as an "invisible disability."



Shana French and Brian Wasyliw
LEGAL VIEW

Many of the barriers to effective disability management arise because the tools commonly used to assess and respond to a request for accommodation of a mental disability have been developed through the lens of physical disability accommodation.

Accommodation of a mental disability may also be particularly challenging because of the nuanced requirements each condition presents and the fact accommodation, if successful, often requires an employer to modify how human beings interact with each other.

Moreover, the estimated annual cost of long-term disability claims in 2008 related to mental health amounted to just over \$100 million, and the estimated annual productivity loss related to mental health in Canada in 2003 amounted to about \$18 billion, according to the report. Disability management is, therefore, big business.

In the 2014 *Emra v. Impression Bridal Inc.*, the Ontario tribunal awarded \$58,000 to an employee who successfully alleged his anxiety, and the necessary absences from work, were factors in his employer's decision to terminate his employment.

In the 2007 *Lane v. ADGA Group Consultants Inc.*, the Ontario tribunal (upheld on review in 2008) awarded about \$80,000 to an employee whose employment was terminated shortly after disclosing he had bi-polar disorder.

What these numbers illustrate is the need for every employer to proactively and effectively manage mental health in the workplace.

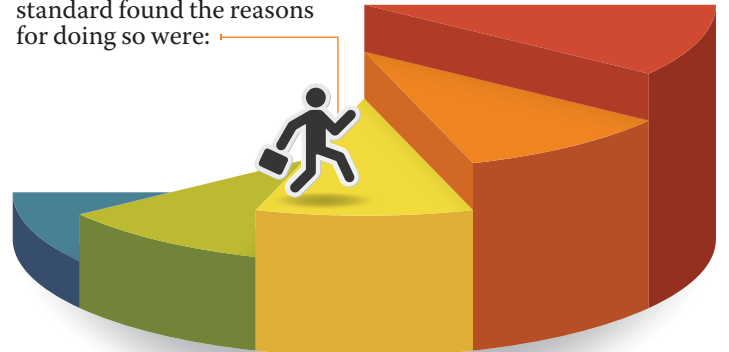
Strategies for employers

As challenging as it may seem and, at times, be, there are strategies (new and evolving) to assist employers to appropriately address and accommodate

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Psychological standard progress

In 2014, the National Standard of Canada for Psychological Health and Safety in the Workplace was released. And in 2017, a research project that tracked 40 employers, representing 250,000 workers, that adopted the standard found the reasons for doing so were:



- **91%** "It's the right thing to do."
- **84%** Protect the psychological health of employees.
- **72%** Increase employee engagement.

QUICK FACTS

- 500,000** Number of Canadians who can't work due to mental health problems in any given week.
- \$6 billion** Amount employers lost in productivity from absenteeism, presenteeism and turnover in 2011.
- \$2.5 trillion** Total cost to the Canadian economy from mental health issues over the next three decades.

Source: Mental Health Commission of Canada

There are new, more effective ways to consider mental health accommodation.

Disability management is big business

Almost half of all short- and long-term disability claims in Canada are related to mental health (including addiction), according to the 2010 report *Able-Minded: Return to Work and Accommodations for Workers on Disability Leave for Mental Disorders* by Human Solutions.

In addition, an employer bears direct financial risk where it fails to appropriately accommodate an employee's mental disability. In the 2015 *Budd v. 78372 Ontario Inc.*, the Human Rights Tribunal of Ontario awarded \$30,760 to an employee who was fired after being absent from work for two days due to anxiety and depression.

Notable cases dealing with employee mental disabilities

Cooper v. 133668899 Ltd., 2015 CarswellAlta 2625 (Alta. Human Rights Trib.)

An employee suffered from work-related stress. Her physician wrote a note recommending she take sick leave "for reason of mental illness (stress)." When the employee spoke to her employer on the phone, there was a heated argument, which culminated in the employee's dismissal. The Alberta Human Rights Tribunal determined the employee's stress was a mental disability within the meaning of the Alberta Human Rights Act, and the physician's medical note explicitly identified the employee's stress as a mental illness.

Bellehumeur v. Windsor Factory Supply Ltd., 2015 CarswellOnt 9460 (Ont. C.A.)

An employee's mental disability, unknown to his employer at the time of dismissal, played no role in the reason he was fired. Although the employer had been accommodating various disabilities he reported over time — his alcoholism, his thyroid and cardiac issues — the employer was unaware of the employee's "mental disability and did not engage in discriminatory conduct in firing him for workplace violence." The court stated: "They fired him as they would any employee who engaged in such workplace misconduct."

Dupuis c. Canada (Procureur général), 2010 CarswellNat 2243 (F.C.)

The Federal Court found that if a manager can detect a change in an employee's behaviour that could be attributable to a mental disorder — major depression, in this case — it is the manager's responsibility to determine whether accommodation is necessary. It isn't a manager's place to diagnose, but "a manager can raise the question with the employee in private and suggest she consult a physician," said the court. "In the meantime, by way of accommodation, the manager can grant the employee leave, which would be particularly urgent if the employee appears to be fatigued, on the verge of a burnout or acting irrationally."



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Supervisor plays important role in return to work

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employees' mental disability in the workplace.

Step 1: Obtain better medical information

Too frequently, the medical information provided by an employee or her medical professional about the mental disability is insufficient or does not appropriately assist the employer to determine whether accommodation is feasible.

One reason is that the questions asked of the medical professional have been developed in the context of physical rather than mental disability.

the assistance of a third-party physician or independent medical examination.

Instead, an employer may want to first assess the sufficiency of the tools it already has to obtain the necessary medical information.

There are now some larger institutional employers and provincial workers' compensation bodies that include in their FAF detailed questions regarding the individual's cognitive, behavioural and psychological restrictions, including:

- ability to supervise others
- ability to tolerate pressure and deadlines
- task responsibility and persistence

assumption about an individual's ability to perform the essential duties of the job.

To fulfil the duty to accommodate an employee, an employer must objectively assess the requirements of the workplace, the individual's condition, and the restrictions imposed by the mental disability.

Frequently, the key source of objective information about the essential duties of the job is the job description itself.

However, as mental disability becomes more prevalent, an employer may wish to consider developing job descriptions that include both physical and psychological requirements.

Ideally, the psychological demands will describe the psychological, behavioural or cognitive restrictions in language mirroring that used in the Functional Abilities Form.

Step 3: Accommodate employees flexibly and creatively

When examining how to accommodate behavioural and cognitive limitations, an employer should evaluate options that consider not only the nature of the work, but also how, when and where work is performed.

While any accommodation plan should be developed in consultation with medical professionals, the chart that follows — adapted from "Accommodation Strategies" from Workplace Strategies for Mental Health, an initiative of the Great-West Life Centre for Mental Health in the Workplace — lists examples of the types of accommodation that may (if practical) be available for an employee's specific mental health limitations:

- ability to perform multiple tasks
- tolerance to external stimulus
- ability to work cooperatively with others
- ability to cope with confrontational situations
- responsibility and accountability
- cognitive demands
- tolerance of emotional circumstances

Step 2: Develop job descriptions that include physical and psychological requirements

Any decision about whether to accommodate an employee cannot be based on speculation or

Limitation related to:

Memory

Mode of accommodation

- Recording device (for example, a smart phone or digital recorder)
- Electronic or online organizer
- Written instructions for work assignments

Environmental stimuli

- Quiet work space with fewer visual and/or auditory distractions
- Soothing music through headphones
- Ear plugs to reduce noise distraction
- Noise buffer
- Work-at-home options

Attention to detail

- Reduction or removal of non-essential tasks
- Large tasks broken into a series of smaller tasks
- Increased time for completion of detailed work
- Short breaks when concentration declines

Multi-tasking

- Modification of workplace processes to allow focus on one task at a time
- Clear, close collaboration between employer and employee regarding priorities
- Job-sharing

Time pressures or stamina

- More time to complete a task considered "high quality"

Stress and emotions

- More frequent breaks
- Modified instructions to reduce stress response
- Clear expectations about tasks
- Counselor or Employee Assistance Plan assistance

Confrontational situations

- Clear policies and processes related to confrontational situations
- Increased support for an employee who works in an potentially confrontational situations

Change

- Advance notice of impending change
- A plan to manage change before it begins
- Regular meetings to discuss and support work-related change

Step 4: Actively manage the accommodation

The extent to which an employee with a mental disability is successfully reintegrated into the workplace depends largely on the ability of the employee's supervisor or manager to modify the way in which they engage with the employee. Suggestions to encourage and support high-level engagement include:

- With the assistance of medical professionals (where appropriate), educate managers and supervisors about mental health and accommodation, including strategies to proactively minimize factors that may contribute to mental health issues, and how to manage complex disability situations, suggests the 2009 report *The Missing Link: Supervisors' Role in Employee Health Management* from Shepell-fgi Research Group.
- Involve an employee's manager or supervisor in the discussions about accommodation, rather than have human resources make those decisions and advise the manager. The supervisor or

manager is often an important contributor to the discussion about how employee accommodation is likely to work "on the ground."

- While this may not work for every workplace, one study (cited in the *Able-Minded* report) suggests providing managers and supervisors with financial incentives (such as bonuses) that are tied to the successful reintegration of employees who have returned to work following a mental health issue.
- Hold managers and supervisors accountable (through their performance evaluations or other means) for the overall stress and satisfaction levels found within their own working groups, suggests the *Missing Link* report.

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