

# Invisible Disabilities and the Duty to Accommodate

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# Outline of Presentation

- What are invisible disabilities?
- The duty to accommodate
- What medical information can an employer request as part of its accommodation and return to work obligations?
- Practical considerations

# Disability

- The Ontario *Human Rights Code* prohibits discrimination based on someone's disability in all aspects of the employment relationship.
  - Includes: job applications, recruitment, training, transfers, promotions, dismissal, layoffs and situations where an employee returns to work after a disability-related absence, rates of pay, overtime, hours of work, holidays, benefits, shift work, discipline and performance evaluations.
  - It also includes the “extended workplace” – for example, business trips and off-site work events.
- “Disability” is to be interpreted broadly and includes past, present and perceived conditions.

# Invisible Disabilities

- Invisible disabilities include:
  - Mental illness
    - Depression
    - Bipolar disorder
    - etc.
  - Learning disabilities
  - Attention Deficit Hyperactivity Disorder (ADHD)
  - Chronic pain
  - Chronic fatigue
  - Etc.

# The Duty to Accommodate

- What is it?
  - A positive obligation/requirement on employers to take steps to eliminate disadvantages to employees resulting from workplace rules, practices or physical barriers that have or may have an adverse impact on individuals or groups
    - Up to the point of undue hardship
- The goal of accommodation is to allow equal benefit from and participation in the workplace
- An employee must provide sufficient information to substantiate a disability before the duty to accommodate is triggered

# Duty to Accommodate - Procedural and Substantive Components

- There are two components to the accommodation process:
  - **Procedural.** The employer is required to take all reasonable steps to obtain required information to assess the employee's disability and to assess the availability of accommodations in the workplace.
  - **Substantive.** The employer is required to offer appropriate accommodations to the point of undue hardship to allow the employee to participate fully in the workplace.
- *Coates v G4S Secure Solutions (Canada) Ltd*, 2018 HRTO 1005 (CanLII)
- *Gaisiner v Method Integration Inc.*, 2014 HRTO 1718 (CanLII)

# The Duty to Inquire

- *“Where an organization is aware, or reasonably ought to be aware, that there may be a relationship between a disability and someone’s job performance, or their abilities to fulfil their duties as a tenant or service user, the organization has a “duty to inquire” into that possible relationship before making a decision that would affect the person adversely. This includes providing a meaningful opportunity to the employee ... to identify a disability and request accommodation.”* – Ontario Human Rights Commission’s Policy on ableism and discrimination based on disability, 2016

# The Duty to Inquire: Case Law

*Krieger v Toronto Police Services Board*, 2010 HRTO 1361 (CanLII)

*Stewart v Ontario (Government Services)*, 2013 HRTO 1635 (CanLII)

*Ioannou v Power-Can Financial Services Inc.*, 2018 HRTO 289 (CanLII)

# Employee's Obligation to Cooperate

- As part of the obligation to co-operate, an employee must:
  - Provide sufficient information to substantiate the need for accommodation
  - Identify his or her medical restrictions in order to permit employer to understand what accommodation is required
  - Actively participate and co-operate in the return to work process
  - Not refuse reasonable accommodation (i.e. there is no requirement for the employer to provide a “perfect solution”, and there may be some hardship with an accommodated position.)
    - *Coates v G4S Secure Solutions (Canada) Ltd*, 2018 HRTO 1005 (CanLII)

# Reasonable Proof

- An employer has a duty to accommodate a disabled employee to the point of undue hardship
- However, employee is required to provide *reasonable proof* to the employer that he/she has valid justification to support his/her accommodation needs or absence from work
- Reasonable proof is not:
  - “... Ms. X is unable to attend work for two weeks for medical reasons.”
  - “... Please provide Mr. Y with light duties for the next four weeks. I will reassess at that time.”
  - “... Ms. Z is now ready to return to work full-time.”

# Requesting Medical Evidence

- Employer is not entitled to receive confirmation of medical diagnosis
- Employer can request information to:
  - Provide justification for the absence
  - Assess that employee is fit to return to work
  - Understand the employee's ongoing medical restrictions in order to manage its accommodation and return to work obligations
  - Confirm prognosis and timeline for recovery

# Practical Strategies - Requesting Medical Evidence

- Letter to employee/treating physician should:
  - Clearly communicate what information is required by employer, and request response by specified deadline
  - Request that questionnaire be filled out completely and accurately
  - Explain that information is required so that employer can provide accommodation consistent with the employee's functional limitations
  - Offer to reimburse reasonable costs

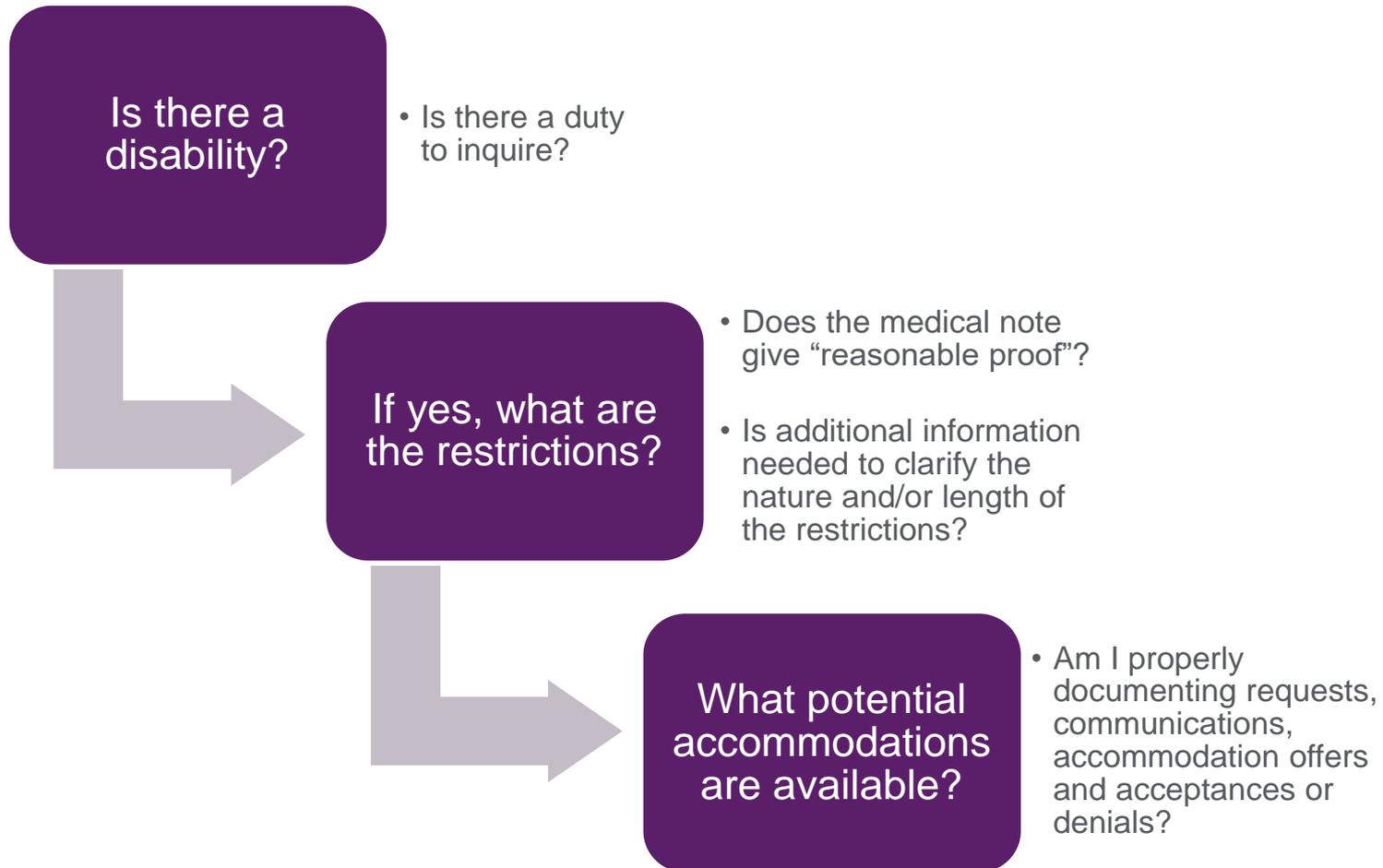
# Practical Strategies - Requesting Medical Evidence

- Questionnaire should request:
  - Details of any functional limitations
  - Assessment of how the employee's limitations will impact on his or her job duties (as set out in job description or physical demands analysis)
  - Projected duration of absence or restrictions
  - Timeline for further assessment or referral to specialist
  - Prognosis for recovery, with or without limitations
- Document requests in response to “stone-walling” by employee or physician

# Practical Strategies - Requesting Medical Evidence

- Respect the employee's privacy interests:
  - Provide the employee with a consent form
  - Protect the confidentiality of information
  - Limit the information requested to only what is necessary to assess accommodation
  - Share information only with a designated company representative or appropriate management personnel on a "need to know" basis

# Questions Employers Should Ask Themselves in Accommodation Process



# Thank you

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