

# Tips for Accomodating Disability

Labour, Employment and Human Rights Group Seminar  
Wednesday, September 22, 2010



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## Tips for Accommodating Disability

September 22, 2010  
Karen M. Sargeant, Brian O'Byrne, Hadiya Roderique

### Tip #1 – Listen to the Employee

- In order to identify issues, need information
  - Initially, most information from employee
- If don't know about issue, may still have a duty to accommodate
  - Ask questions
  - Ask about suspected substance abuse
  - Ask about suspected physical or mental conditions

## Tip #2 – Don't Jump to Conclusions

- Can't come to a conclusion until all information has been considered

## Tip #3 – Collect the Right Information

- Usually requires information from a health practitioner
  - Try employee's physician first
  - May also consider
    - Company physician
    - Independent medical assessment
    - Functional abilities evaluation
- Provide health practitioner with duties of employee's position
- Not entitled to medical diagnosis
- But are entitled to:
  - Confirmation that employee fit to work
  - Detailed information about any restrictions
  - Expected duration of restrictions

## Tip #4 – Remember How the Duty Arises

- Before consider accommodation options, consider whether have duty to accommodate
- Personal hardship does not necessarily equal discrimination

## Tip #5 – Take a Fresh Look at the Requirement

- Can the employee be accommodated up to the point of undue hardship
- Undue hardship may be established by:
  - Creating a new job
  - Continuing to employ employee who cannot do essential duties
  - Displacing another employee
  - Increased safety risk
- Undue hardship may not be established where employer can:
  - Re-bundle existing duties
  - Transfer to a new position

## Tip #6 – Don't Rush to a Solution

- Process is important
- Consider all alternatives
  - Even if know not feasible

## Tip #7 – Get Full Participation of all the Parties

- Employer
- Employee
- Union
  - Employer not required to exhaust all possibilities before looking for union's cooperation

## Tip #8 – Consider All the Options

- Consider all options – even those you know won't work
- Assess each potential option
- Document the assessment

## Tip #9 – Don't Rely on Past Experience

- Draw on experience, but don't rely solely on past practice
- As time passes:
  - Business practices change
  - Skills of employees change
  - Volume and nature of work changes
- Motivations of employees differ
- Individual assessment important

## Tip #10 – Follow the Process

- Inquire into circumstances that have resulted in need for accommodation
- Seek all relevant medical information
- Ask the employee for input
- Conduct thorough investigations re available accommodation alternatives
- Consult with union
- Consider modified duties
- Consider other suitable positions, even if involve a transfer
- Consider comparable positions
- Consider whether all has been done to accommodate employee
- Seek legal advice



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# REFERENCE MATERIALS

# Patients Hospital Case Study

*Wednesday, September 22, 2010*

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Patients Hospital is a non-teaching community hospital in small-town Ontario. In addition to the doctors with privileges at the Hospital, approximately 1000 non-union and unionized employees work at Patients Hospital:

- a) 300 employees are nurses, and are part of the Nurses' Union bargaining unit;
- b) 300 employees are service employees, such as technicians, discharge planners, therapists, etc., and are part of the Service Union bargaining unit;
- c) 300 employees are considered clerical employees and are not part of a bargaining unit; and
- d) 100 employees are considered to be managerial.

Cheryl Jones is a nurse. She provides care to patients on the general surgery ward. Cheryl is part of the Nurses' Union bargaining unit. She is in her mid forties and has worked at Patients Hospital for six years, always in this capacity.

Cheryl is not a model employee. In fact, just yesterday she received a 3-day suspension for unexplained lateness and unsubstantiated absenteeism. Cheryl has a history of discipline:

- a) 5 months ago she received a verbal warning for being up to 30 minutes late for four shifts, with no explanation;
- b) 4 months ago she received a written warning for leaving work early, without permission, on three different occasions; and
- c) 2 months ago she received a one-day suspension, for being late for work on two occasions and absent without explanation on three occasions.

On each occasion, Patients Hospital asked Cheryl if there were any reasons for her lateness and poor attendance and, even after Cheryl said no, referred Cheryl to the Employee Assistance Program.

This morning, the very day after Cheryl received her 3-day suspension, Cheryl has called into work and said she will be unable to attend work today and for the next week because she has a sore back. You don't believe Cheryl's story about a sore back, particularly since:

- a) you have given Cheryl many chances to tell you whether anything is wrong; and
- b) she has only raised this condition in the face of more serious discipline.

Cheryl's manager wants to fire Cheryl for cause. What is your advice?

**PLEASE STOP - DO NOT READ FURTHER**

You have stepped back and decided that Patients Hospital has an obligation to find out if there is anything to Cheryl's excuse that she cannot come to work because she has a sore back. As such, you have telephoned Cheryl and asked her to provide you with a note from her doctor, confirming that she is unable to work, the reason why she is unable to work and for how long she will be unable to work.

Two days later, Cheryl brings in a short note from a doctor, written on a prescription pad. The only comments that the doctor has made are the following:

“Patient reports that is unable to work for one week due to sore back.”

What's more, the note appears to be from a walk-in clinic.

Now you are very sceptical since the note:

- a) is from a walk-in clinic; and
- b) says only that the patient reports that she is unable to work. The note does not set out the doctor's assessment.

What should Patients Hospital do next?

**PLEASE STOP - DO NOT READ FURTHER**

You considered sending Cheryl for an independent medical assessment (“IME”) so that you could get to the bottom of whether she is really suffering from a sore back or not. Given the cost of such an assessment (\$1,500 to \$3,000) and the length of time it often takes to arrange for an IME, you decided to ask Cheryl to have her own doctor answer the following questions.

1. Does Ms. Jones have a condition which prevents her from working as a nurse on a full-time basis?
2. What is the treatment program that you have recommended for Ms. Jones to follow?
3. What workplace activities are you recommending that Ms. Jones avoid?
4. What workplace activities can Ms. Jones perform?
5. How long do you expect it will take Ms. Jones to recover from her current condition?
6. When do you expect Ms. Jones to be able to return to work, both on a full-time and/or modified basis?
7. What steps, or actions, do you recommend that Patients Hospital initiate to accommodate Ms. Jones’s condition?
8. In your opinion, is Ms. Jones unable to perform any of the duties of her position? If so, please describe in as much detail as possible your concerns with these required duties.

Cheryl arranged to have her own family physician answer all of the questions and you received her doctor’s responses within the one week time limit you had provided.

From Cheryl’s doctor’s answers, you have learned that Cheryl:

- (a) has suffered from back problems for at least a year;
- (b) was recently diagnosed with a herniated disc; and
- (c) is able to return to work immediately, so long as she:
  - i) avoids standing for more than 20 minutes at one time;
  - ii) avoids lifting anything over 5 pounds; and
  - iii) is able to take walking breaks at least every 30 minutes.

The doctor has further indicated that these work restrictions are expected to be permanent since Cheryl is not a candidate for surgery.

You know you have heard about this obligation to accommodate an employee’s disability up to the point of undue hardship. But what does that mean?

There is nothing you can do to accommodate Cheryl’s work on the general surgery ward where she has worked her entire tenure at Patients Hospital. You cannot have her avoid standing for more than 20 minutes at one time and she has to lift patients all day — that’s the essence of her job. Even if you could accommodate Cheryl’s condition, you couldn’t do so on a permanent basis.

What do you think Patients Hospital is required to do?

**PLEASE STOP - DO NOT READ FURTHER**

Because you were not sure about how far the duty to accommodate required Patients Hospital to go in its accommodation of Cheryl's disability, you spoke to one of your friends at another hospital. Your friend told you that the duty to accommodate applies regardless of whether an employee's restrictions are temporary or expected to be permanent. Your friend also told you that some employers have been required to transfer disabled employees to different work areas or even bundle job duties from a number of different jobs to "create" a job for a disabled employee.

With that information in mind, you sit down at your desk, think about the jobs in the Hospital and make the following determinations:

- a) Patients Hospital could bundle a number of tasks to create a job for Cheryl but there would be no classification in the collective agreement to cover this new job. Also, the Union might object if Cheryl gets to do more of the lighter tasks, such that other employees have to do a greater percentage of the more physical tasks.
- b) Patients Hospital could move Cheryl to an outpatient clinic. But all of the nurses in outpatient clinics have far more seniority than Cheryl's six years.
- c) Patients Hospital could put Cheryl in a discharge planner role. But that would require her moving from the Nurses' Union to the Service Union. You wonder if the Nurses' Union would agree and what would happen to Cheryl's seniority if she moved to the Service Union.
- d) Patients Hospital could transfer Cheryl to one of its clerical jobs. In fact you have a vacant ward clerk job on one of the floors, but the pay is lower than what Cheryl is earning now.
- e) The only other position that meets Cheryl's physical limitations and is covered by the Nurses' Union collective agreement is in the Employee Health Unit. However, you already have three disabled employees in that role. You don't want that role to become the place where all disabled employees automatically go.

Are the concerns raised about each option valid?

**PLEASE STOP - DO NOT READ FURTHER**



# BIOGRAPHIES



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Karen is a partner in the Toronto office's Labour, Employment and Human Rights Group. She carries on a general employment and labour law practice acting on behalf of large and small employers in both the public and private sectors. Included in the scope of Karen's practice are the areas of employment contracts, wrongful dismissal, human rights, employment standards, workplace safety and insurance, union relations, labour arbitrations and pay equity.

Karen provides day-to-day advice to employers in relation to both non-union and unionized workplaces. She also represents employers before boards of arbitration and various administrative tribunals, such as the Ontario Labour Relations Board, Ministry of Labour Employment Practices Branch, Human Rights Commission, Workplace Safety and Insurance Appeals Tribunal and Pay Equity Hearings Tribunal.

A regular speaker at conferences and to groups of management employees about a wide variety of employment and labour matters, Karen writes regular articles for a number of legal publications. Karen also makes frequent contributions to Northern Exposure – Employment Law for US Companies with Operations in Canada, a blog published by HR Hero.com.

### Presentations

- Tips for Accommodating Disability, Labour, Employment and Human Rights Group Seminar, September 22, 2010
- Giving and Getting Employment References: What Can and Should You Do, Employment Law 2010, Proactively Managing Legal Risk in Challenging Times, April 26, 2010
- Socializing Your Business: Legal and Business Considerations of Social Media, Connecting the Dots: What's New, What's Working, What's Relevant to Your Association, April 14, 2010
- 25th Fasken Forum, Labour, Employment, Human Rights, Pensions & Benefits Conference, February 12, 2010
- Socializing Your Business: Legal and Business Considerations of Social Media, December 3, 2009
- The Changing Terms of Employment in Uncertain Economic Times, HR Law Conference, Human Resources Professionals Association, October 28, 2009
- Recent Developments In Employment Law And How They Impact HR Professionals, HR Compliance Course, September 29&30, 2009
- Human Rights Seminar, June 4, 2009
- Risk Management for Associations - What You Need To Know (Managing Matters), April 2009
- 24th Fasken Forum, Employment, Labour, Human Rights, Pensions & Benefits Conference, March 3, 2009
- 2008 Labour, Employment & Human Rights Update, Fasken Martineau National Labour, Employment and Human Rights Seminar, October 31, 2008

### Areas of Practice

Labour, Employment and Human Rights

Pay Equity

Collective Bargaining

Labour Relations

Employment Law Advice

Labour Mergers and Acquisitions

Employment Standards

Human Rights

Workers'

Compensation/Occupational Health and Safety

### Education

LLB,  
University of Toronto, 1995

B Comm (Hons),  
University of British Columbia,  
1992

### Year of Call

British Columbia, 1996

Ontario, 1997

- Federated Press 7th Annual Employee Complaint Management Conference, November 2008
- Human Resources Professional Association (HRPA) Annual HR Law Conference, Senior Practitioners Panel, October 2008
- Employee Discharge and Documentation Conference (Lorman Education Services), June 2008
- Human Resources Professional Association (HRPA) Disability Management Webinar, April 2008
- Law Society of Upper Canada Advanced Roundtable on Employment Law, February 2008
- Employment Law from A to Z (Lorman Education Services), December 2007
- Significant Developments in Wrongful Dismissal Law- Rotman School of Management Conference, May 2007
- Just Cause for Termination: How Firings can Backfire in Canada- M. Lee Smith Audio Conference for U.S. Companies, June 2006
- Significant Developments in Wrongful Dismissal Law- Rotman School of Management Conference, May 2006
- Unlocking the Secrets of Successful WSIB Management (Lorman Education Services), March 2006
- The End of Mandatory Retirement in Ontario- The Impact on Unions (Infonex), November 2005

### **Publications**

- "The HR Space: Do Age-Based Early Retirement Programs Violate the Human Rights Code?", Labour, Employment and Human Rights Bulletin, May 11, 2010
- "The HR Space: Keays v. Honda One Year Later", Labour, Employment and Human Rights Bulletin, October 13, 2009
- "Keays vs. Honda One Year Later: Have Canadian Courts Changed Their Approach to Punitive and Bad Faith Damages?", Northern Exposure: Employment law for U.S. companies with employees in Canada, October 12, 2009
- "Occupational Health and Safety Law May Apply to Nonworkers", Northern Exposure: Employment law for U.S. companies with employees in Canada, September 8, 2009
- "Giving Working Notice - What you Need to Know", Law Society of Upper Canada's Six Minute Employment Lawyer Conference, June 17, 2009
- "New Bill Introduced to Curb Workplace Violence and Harassment", Northern Exposure: Employment law for U.S. companies with employees in Canada, May 5, 2009
- "New Bill Introduced to Curb Workplace Violence and Harassment", Labour, Employment, and Human Rights Bulletin, April 2009
- "Be Careful Taking Cost-Saving Measures in Union Workplace", Northern Exposure: Employment law for U.S. companies with employees in Canada, March 24, 2009

### **Memberships and Affiliations**

- Canadian Association of Counsel to Employers
- Ontario Bar Association, Labour and Employment Law Section
- Canadian Bar Association
- Law Society of Upper Canada



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### Areas of Practice

Labour, Employment and  
Human Rights

Health

### Education

BA,  
University of Toronto, 1971

LLB,  
Osgoode Hall Law School at  
York University, 1974

### Year of Call

Ontario, 1976

Brian O'Byrne practises labour relations, employment and human rights law. He provides general counsel and advice with respect to a variety of matters including restructurings and downsizings, employee terminations, employment agreements and policies, privacy rights, union organizational campaigns, collective agreement interpretation, workers' compensation, pay equity, employment standards and occupational health and safety matters. Brian also represents clients in a full range of litigation matters involving employment, labour and human rights issues before the courts as well as the various tribunals that deal with these matters. He also spends a significant portion of his time negotiating collective agreements on behalf of both private and public sector clients and representing clients before interest arbitration boards.

Brian is a frequent speaker on various labour, employment and human rights issues at professional conferences and seminars. Over the last few years, he has spoken at such events in Canada's major centres - Toronto, Montréal, Calgary and Vancouver as well as in the United States of America and England. He also conducts various seminars and training programs for clients.

Brian has also written various articles and commentaries on labour, employment and human rights issues. He is the author of the chapter on Canadian labour and employment law in the European Lawyer Reference book entitled *Labour and Employment Law* and is also the editor of the Canadian Chapter in the textbook *International and EU Employment Law* published by Jordans in the United Kingdom.

Brian has been consistently recognized by Lexpert as a leading labour law practitioner; by WHO's WHO LEGAL, *The International Who's Who of Business Lawyers*, published by Law Business Research in London, U.K. as one of the world's leading management side practitioners in the field of labour and employment law; and also by *The Guide to the World's Leading Labour and Employment Lawyers* published by Euromoney Legal Media Group. He is also listed in the first three editions of *BEST LAWYERS IN CANADA* (2007, 2008 and 2009) and is listed as a recommended lawyer in the area of labour and employment (Canada) by Practical Law Company in 2009.

Brian joined the firm as a partner in 1989.

### Representative Experience

- *Ontario Ministry of Correctional Services in public-private partnership agreement with Utah corporation*  
Advised the Ontario Ministry of Correctional Services

### Presentations

- Tips for Accommodating Disability, Labour, Employment and Human Rights Group Seminar, September 22, 2010
- 25th Fasken Forum, Labour, Employment, Human Rights, Pensions & Benefits Conference, February 12, 2010
- Human Rights Seminar, June 4, 2009

- 24th Fasken Forum, Employment, Labour, Human Rights, Pensions & Benefits Conference, March 3, 2009
- What You Need To Know About Labour, Employment and Pensions, Navigating The Financial & Economic Crisis Seminar Series, January 15, 2009
- Fasken Martineau National Human Rights Seminar, May 25, 2007
- 22nd Labour, Employment, Human Rights, Pension & Benefits Conference, February 8, 2007
- National Human Rights Seminar, May 26, 2006
- Implementing Collaborative and Innovative Approaches to Public Sector Labour Relations, May 14-15, 2003

### **Publications**

- "Landmark Supreme Court of Canada Decision Significantly Alters the Law Regarding Damages in Wrongful Dismissal Cases", Labour, Employment and Human Rights Law Bulletin, July 2008
- "Hospitals and Foundations in Transition", Presentations by George Glover, Lynne Golding and Bryan O'Byrne, January 22, 2004
- "Ontario Ministry Of Labour Releases Guide to Preparing Union Salary Disclosure Statements", Labour, Employment and Human Rights Bulletin by David Corbett and Brian O'Byrne, March 2001
- "Maternity and Parental Leave - Update on the Status of Legislation", Labour, Employment and Human Rights Bulletin by David Corbett and Brian O'Byrne, March 2001



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Hadiya Roderique is an associate in the Labour, Employment and Human Rights Group. She is engaged in a broad practice assisting employers with matters relating to restructuring, downsizing, human rights, employment agreements and terminations, labour relations and collective agreement interpretation.

As a law student at the University of Toronto, Hadiya was the Vice-President (Student Affairs) of the Students' Law Society and served as an executive member of Downtown Legal Services, the law school's legal clinic.

Hadiya summered with the firm in 2007 and was seconded to SonyBMG Canada Inc. In 2008/09, she articulated with the firm and joined as an associate in 2009.

### Areas of Practice

Labour, Employment and Human Rights

### Education

JD,  
University of Toronto, 2008  
MA,  
University of Toronto, 2008  
BSc (Hons),  
McGill University, 2003

### Year of Call

Ontario, 2009

### Languages

English

### Presentations

- Tips for Accommodating Disability, Labour, Employment and Human Rights Group Seminar, September 22, 2010
- 25th Fasken Forum, Labour, Employment, Human Rights, Pensions & Benefits Conference, February 12, 2010

### Publications

- "The HR Space: Background Check Program a Reasonable Exercise of Management Rights", Labour, Employment and Human Rights Bulletin, August 4, 2010
- "The HR Space: Working Notice: Is it right for you?", Labour, Employment and Human Rights Bulletin, April 6, 2010
- "The HR Space - Drug and Alcohol Testing – What's Permitted in the Workplace", Labour, Employment and Human Rights Bulletin, December 22, 2009
- "Cell Phone Ban and Employer Liability", Canadian Labour Relations and Employment Topics, November 2009
- "Cell Phone Ban and Employer Liability", Labour, Employment and Human Rights Bulletin, October 26, 2009
- "Giving Working Notice - What you Need to Know", Law Society of Upper Canada's Six Minute Employment Lawyer Conference, June 17, 2009

### Memberships and Affiliations

- Member, Canadian Bar Association
- Member, Ontario Bar Association
- Member, Law Society of Upper Canada

### **Rankings and Awards**

- Gordon Cressy Student Leadership Award, University of Toronto (2008)
- Education Equity Award, Law Society of Upper Canada (2007)

# **FASKEN MARTINEAU INSTITUTE SEMINARS FALL 2010**



TORONTO

# Fasken Martineau Institute Seminars Fall 2010



# Fasken Martineau Institute Seminars

## Fall 2010

Welcome to Fasken Martineau Institute! We are excited to announce the fall 2010 program of educational seminars designed to keep you abreast of the key legal issues facing senior business leaders in the GTA.

The course calendar in this brochure provides an overview of the current seminars planned for the fall of 2010. We hope this makes it easier for you to plan which seminars you would like to attend. Save the date for any topics of interest and then keep an eye out for the e-invitations coming to you shortly with further details about each seminar.

Please also visit us online at [www.fasken.com](http://www.fasken.com) to see a list of our upcoming seminars and to register. You will also find more details about each seminar as well as additional seminars added to the program.

We hope you can attend these informative seminars with Fasken Martineau Institute.

Area	Seminar Dates
Antitrust, Competition & Marketing	November 18
Financial Institutions & Services	October 13
Investment Products and Wealth Management	September 17, October 15
Labour, Employment & Human Rights	September 22, October 20, November 24
Pensions and Benefits	November 16
Product Liability	September 29
Securities and Mergers & Acquisitions	October 5, November 4, November 18
Technology & Intellectual Property	September 15

## SEPTEMBER 2010

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15 <b>Generating Revenue and Reducing Risk: Our IP Survey Results Are In</b> 8:00 am - 10:00 am	16	17 <b>Regulatory Update - NI 31-103 Registration Reform and Other Matters</b> 12:00 pm - 2:00 pm	18
19	20	21	22 <b>Tips for Accommodating Disability</b> 8:00 am - 10:00 am	23	24	25
26	27	28	29 <b>The Canada Consumer Product Safety Act - Let the Seller Beware!</b> 8:00 am - 10:00 am	30		

## OCTOBER 2010

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
					1	2
3	4	5 <b>What to Do When You Have Allegations of Wrongdoing</b> 8:00 am - 10:00 am	6	7	8	9
10	11	12	13 <b>Legal and Regulatory Developments Affecting Financial Institutions</b> 4:30 pm - 7:30 pm	14	15 <b>CLS Training Seminar</b> 8:00 am - 10:00 am	16
17	18	19	20 <b>Workplace Violence and Harassment Laws - Are You in Compliance?</b> 8:00 am - 10:00 am	21	22	23
24	25	26	27	28	29	30
31						

## NOVEMBER 2010

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
	1	2	3	4 <b>Public Company - Strategies to Handle Aggressive Minority Shareholders</b> 8:00 am - 10:00 am	5	6
7	8	9	10	11	12	13
14	15	16 <b>Pension Reforms - Part II</b> 8:00 am - 10:00 am	17	18 <b>Strategic Considerations in Acquisitions by State Owned Enterprises</b> 8:00 am - 10:00 am	19	20
21	22	23	24 <b>Wrongful Dismissal - New Issues and Recent Cases</b> 8:00 am - 10:00 am	25	26	27
28	29	30				

