MENTAL HEALTH AND THE WORKPLACE: IMPORTANT ISSUES FOR HR PROFESSIONALS TO CONSIDER

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May 29-31, 2013

We gratefully acknowledge the assistance of Matthew Demeo in preparing this paper.

The purpose of this document is to provide information as to developments in the law. It does not contain a full analysis of the law nor does it constitute an opinion of Norton Rose Canada LLP or any member of the Firm on the points of law discussed.
OVERVIEW

This paper provides an overview of some of the current issues relating to mental health and the workplace. The paper will focus on three main issues: (1) employee medical information; (2) mental health and discipline; and (3) an employer’s workplace obligations, as they relate to mental health. The best way to cover these issues is to focus on recent cases, and as such the paper summarizes several topical decisions.

Each of these topics could be the subject of its own paper. The jurisprudence relating to each topic is constantly developing, often in step with (or informing) human rights jurisprudence. However, there is also considerable overlap between these topics, and on a day-to-day basis an employer may be called upon to respond to a situation involving one or more of these issues. Therefore, this paper aims to assist employers in developing a basic understanding of each issue, and to equip employers to deal with mental health issues at the workplace, on a day-to-day basis.

While the focus of the paper is mental health, many of the basic principles are applicable to all circumstances involving the health and welfare of employees.

INTRODUCTION

As indicated by the title, and as should become clear as you read further, the theme in the jurisprudence regarding mental health issues is “balance.” That is, judicial and quasi-judicial bodies place considerable emphasis on balancing all of the competing interests in play. Quite often, this involves a balance between an employee’s rights (to privacy, to be free from discrimination, to equal opportunity) with an employer’s rights (to manage its workplace efficiently, to maintain a safe workplace, to be fully informed, to expect a certain level of performance and accountability). The ever increasing legal obligations imposed by legislation ensure that the “perfect” balance can never quite be defined.

Why is mental health and the workplace an important issue for employers and employees to understand? According to the Canadian Mental Health Association (CMHA), it is commonly reported that approximately 70 – 90 % of people with serious mental illness are unemployed.\(^1\) The CHMA suggests the following possible reasons for this disproportionately high rate of unemployment: gaps in work history, limited employment experience, lack of confidence, fear and anxiety, workplace discrimination and inflexibility, social stigma and the rigidity of existing income support/benefit programs.

It is also estimated that one in six Canadians is likely to seek help for a mental health problem in their lifetime.\(^2\)

A 2011 report highlights the significant impact of mental health issues on workplaces. Forty four per cent of the employees surveyed reported that they were either currently (12 per cent) or had previously (32 per cent) personally experienced a mental health issue.\(^3\) In addition, it is

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estimated that as much as 30 per cent of short-term and long-term disability claims in Canada are attributed to mental health problems and related illnesses.\textsuperscript{4}

Considering that most people spend more waking hours at work than anywhere else, these statistics demonstrate that mental health issues will impact upon almost all workplaces, and employers and employees alike need to understand their respective rights and obligations.

Another salient reason for employers to understand their rights and obligations regarding mental health is the potential cost savings they can achieve by implementing effective accommodations. It is suggested that the costs for providing accommodations are fairly low and most are under $500.\textsuperscript{5} Employers may also save on health benefits costs. For those who get access to treatment, the employer could save between $5,000 to $10,000 per employee per year in the cost of prescription drugs, sick leave, and average wage replacement.\textsuperscript{6}

Costs savings may also come in the form of increased productivity. One author suggests that employees who are diagnosed with depression and take appropriate medication will save their employer an average of 11 days a year in prevented absenteeism.\textsuperscript{7}

1 What is Mental Health?

Before delving into the substantive aspects of this paper, it is necessary to establish exactly what is meant by the term "mental health." From a legal perspective, under the Ontario Human Rights Code,\textsuperscript{8} "disability" includes both "a condition of mental impairment or a developmental disability" and "a mental disorder."\textsuperscript{9} The Mental Health Act\textsuperscript{10} defines "mental disorder" as "any disease or disability of the mind."\textsuperscript{11}

Generally speaking the law will recognize any form of impairment that affects a person's normal psychological and/or mental functioning, and impacts on his or her performance at the workplace. As one commentator put it: "we mean people who have serious mental health problems that may limit their major life activities during periods of illness. Major life activities include caring for yourself, working, and learning."\textsuperscript{12}

A broad definition of mental illness is provided by the Canadian Human Rights Commission. According to the Commission:

Mental illness is characterized by alterations in thinking, mood or behaviour – or some combination thereof – associated with significant distress and impaired functioning. The symptoms of mental illness range

\textsuperscript{4} Mental Health Commission of Canada website, http://www.mentalhealthcommission.ca/English/Pages/workplace_guide.aspx?routetoken=693c7727ad082284af7105fb78794e
\textsuperscript{7} See note 5 at p 17.
\textsuperscript{8} RSO 1990, c H19 ("Code").
\textsuperscript{9} See note 8 at s 10(1).
\textsuperscript{10} RSO 1990, c M7.
\textsuperscript{11} See note 10 at s 1.
\textsuperscript{12} See note 2 at p 3.
from mild to severe, depending on the type of mental illness, the individual, the family and the social-economic environment.\textsuperscript{13}

According to Mental Health Works, a website run by the CMHA, the major mental illnesses include schizophrenia, mood disorders (depression and manic depression), anxiety disorders, eating disorders, personality disorders, and organic brain disorders.\textsuperscript{14} These recognized mental illnesses will come within the legal definition of a “disability” under the Code and, therefore, employers will need to be able to identify the signs that an employee has such an illness. For example, in \textit{Niagara North Condominium Corp No 46 v Chassie}\textsuperscript{15} the term “mental disorder” was defined as a “disturbance or imperfect functioning of the mind.” As a result, a serious and long-term depression was held in this case to amount to a “mental disorder.”

Mental Health Works provides a list of “warning signs” that an employee may be suffering from a mental illness. Some of these signs include:

- consistent late arrivals or frequent absences;
- lack of cooperation or a general inability to work with colleagues;
- decreased productivity;
- increased accidents or safety problems;
- frequent complaints of fatigue or unexplained pains;
- difficulty concentrating, making decisions, or remembering things;
- making excuses for missed deadlines or poor work;
- decreased interest or involvement in one’s work;
- working excessive overtime over a prolonged period of time;
- expressions of strange or grandiose ideas;
- displays of anger or blaming of others.\textsuperscript{16}

As will be discovered below, it is very important that an employer be alert to the signs of mental illness amongst its employees. Tribunals and arbitrators have found that the duty to accommodate a mentally ill employee can arise by virtue of the deemed knowledge of the employer, without the employee ever having mentioned a mental illness or asked for an accommodation.


\textsuperscript{14} http://www.mentalhealthworks.ca/mental-health, accessed on April 17, 2013.

\textsuperscript{15} (1969), 173 DLR (4th) 524, (Ont Gen Div).

2 Obtaining Medical Information

An issue that pervades all aspects of the employment relationship between an employer and an employee with a mental illness is the employer's knowledge and understanding of the employee’s illness, and, in particular, how the illness impacts on the employee’s ability to function at the workplace.

In order to understand an employee’s mental illness, an employer will need to obtain medical information from the employee. Being fully informed allows an employer to make considered, thoughtful decisions regarding the employee in question. How does an employer go about obtaining this information? Many grievances and human rights complaints focus on this very issue.

Generally speaking, an employer will need medical information about an employee in two broad sets of circumstances. One, where an employee is seeking a return to work after a medical-related absence or an employer questions an employee’s fitness to remain at work (a “fitness for work” scenario); and two, where an employee is seeking accommodation due to a mental illness. A third category, which arises less frequently than the previous two circumstances, is when an employer seeks medical information about an employee before or during a hearing.

A) Fitness for Work Scenarios

It is generally accepted that an employer is entitled to sufficient medical information about an employee’s health to allow the employer to make an informed decision in a fitness for work scenario.17

In fitness for work scenarios, the medical information an employer requires normally relates to the employee's ability to perform the duties of his or her job, and to any safety concerns regarding the employee and his or her colleagues.

However, there are definite limitations on when an employer can require an employee to provide medical information, and further, what information must be provided. An example of the latter is that, while an employer can request information about an employee’s work restrictions, the employer is generally not entitled to know, and should not inquire about, the employee’s diagnosis.18 In addition, and this should go without saying, an employer cannot contact an employee's medical practitioner to seek information about the employee, without the employee’s express consent, either in writing or through a collective agreement.19

An employer’s ability to require an employee to provide medical information is best illustrated by examining some cases. In NAV Canada v CATCA,20 NAV Canada wanted to require employees to release medical information to its own doctor in a number of situations, including a return to work and to substantiate sick leave requests. NAV Canada pointed to the public safety aspect of its operations21 in support of its need to satisfy itself that its employees are medically fit to return to work or to remain at work.

17 See for example NAV Canada v CATCA (1998), 74 LAC (4th) 163 (Swan); Re Purolator Courier v Teamsters (2000), 89 LAC (4th) 129 (Greyiell); and Fanshawe College of Applied Arts and Technology v Ontario Public Services Employees Union (Pinnell Grievance), [2012] OLAA No 43.
19 See for example Cape Breton Victoria Regional School Board v CUPE, Local 5050 (2003), 75 CLAS 268.
20 See note 17.
21 NAV Canada is responsible for Air Traffic Controllers throughout Canada.
Arbitrator Swan confirmed that an employer has the right to assure itself that its employees are medically fit to return to work or to remain at work. However, absent some statutory authority or express consent in a collective agreement or contract of employment, an employer cannot compel disclosure of personal medical information from an employee. If an employee refuses to provide medical information to an employer when reasonably requested, the employer can refuse to allow an employee to return to active duty, or to continue to work, and may suspend pay.

Thus, we have our first illustration of the theme of this paper, balance. Arbitrator Swan is cognizant of an employer’s need to ensure the safe operation of its workplace, particularly given the public safety aspect of its operations. However, an employee’s medical information is the property of the employee, who can elect whether or not to share it. The balance found by the arbitrator is to allow the employer to maintain its safe workplace, while at the same time respecting the privacy of the employee.

A recent decision of the Ontario Human Rights Tribunal (HRTO) provides another example of an employer’s ability to assure itself of an employee’s fitness to remain at work. In Alladice v Honda of Canada,\(^{22}\) Honda of Canada sent an employee home and required him to submit to a psychiatric examination before returning to work. The employee refused to undergo an examination, despite significant encouragement by the employer, and his employment was terminated. The employee complained to the HRTO that he had been discriminated against on the basis of a perceived mental disability, in violation of sections 5(1) and 9 of the Code.

The facts of this case will be familiar to many employers. The employee had been on sick leave in 2004 and 2005, due to concerns about his mental health. He returned to work in 2005. Around November 2007, his colleagues and supervisors began to notice significant changes in his behaviour. He became belligerent, aggressive and confrontational. Everyone agreed that his behaviour was out of character. Several meetings were held, between management to determine how to handle the matter, and with the employee to get his side of the story. The employee refused to acknowledge that there was anything abnormal in his behaviour, and denied that he had a mental illness.

Management, genuinely concerned about the employee’s wellbeing and the safety of those working with him, sought the opinion of the company’s medical director. The medical director attended a meeting with management and the employee. He recognized the employee’s behaviour as being similar to that exhibited when the employee previously took time off work due to concerns about his mental health. The medical director was of the view that the employee had suffered a relapse of this previous condition, and was not fit to be at work without clearance from his psychiatrist. Thus, the employee was sent home with full pay, and was not to return without the necessary psychiatric clearance. As mentioned above, the employee denied that he needed any assistance, and refused to see his psychiatrist.

The HRTO found that the employee was clearly sent home because of a mental disability or a perceived mental disability. However, given the circumstances of the case (i.e. the employee’s obvious change in behaviour, the medical director’s view, the employee’s medical history), the HRTO held that there was no violation of the Code. It found that the employer had a “justified basis for concern about the applicant’s sudden change in behaviour and that potentially this was

\(^{22}\) 2010 HRTO 1453 (CanLII).
related to his disability.\textsuperscript{23} Thus the employer had acted properly in sending the employee home, and requiring clearance from his psychiatrist before allowing him to return to work.

This decision is a clear indication that an employer is entitled to satisfy itself that an employee is fit to perform the duties of his or her job, and does not pose a safety risk to themselves and those around them. In fact, as will be seen below, an employer has a statutory obligation to maintain a safe workplace. So long as management acts reasonably, and has sufficient cause for concern, it will be justified in sending an employee home and requesting medical clearance before allowing the employee to return. The same principle applies to employees returning from sick leave – so long as it acts on reasonable grounds, an employer is justified in requesting medical clearance before allowing the employee to resume his or her prior position.

A good example of when an employer is not entitled to require an employee to provide medical confirmation of fitness is \textit{Canada (Att Gen) v Grover.}\textsuperscript{24} Here, a senior physicist with the National Research Council of Canada (NRC) was suspended indefinitely without pay after he refused to undergo a medical assessment by a doctor of the NRC's choosing. The physicist had taken sick leave on two occasions due to stress. He provided medical certificates indicating he was fit to return to work, however, the NRC rejected these certificates and stated that, before he could return, his fitness must be confirmed by a NRC-approved doctor.

The physicist grieved the NRC's requirement that he submit to a medical assessment. An adjudicator upheld the grievance and ruled that the NRC did not have sufficient grounds to demand a medical assessment. The NRC applied to the Federal Court for judicial review.

The Federal Court considered whether the NRC was entitled to require the employee to submit to a medical examination. Its analysis began with the "foundational principle" that:

\begin{quote}
... employees have a strong right to privacy with respect to their bodily integrity and a medical practitioner; therefore, a trespass is committed if an employee is examined against his or her will. Consequently, the employer cannot order an employee to submit to a medical examination by a doctor chosen by the employer unless there is some express contractual obligation or statutory authority.\textsuperscript{25}
\end{quote}

However, the Federal Court then went on to note that the employee's right to privacy must be balanced against an employer's obligation to ensure a safe workplace. The corollary of the employer's safety obligation is that an employer has the right to know more about an employee's medical information if there are "reasonable and probable grounds to believe the employee presents a risk to health or safety in the workplace." How then to balance the right to privacy against the right to ensure a safe workplace? According to the Federal Court, the employer must explore other options to obtain the necessary information. If it is dissatisfied with these other options, including a medical certificate issued by the employee, then it must explain to the employee why the information is insufficient. If the employee still refuses or is unable to provide the necessary information, then an employer may be able to have the employee examined by a doctor of its choosing, before returning to work.

In this case, did the NRC have sufficient grounds to justify its demand that the employee see a physician of its choosing? The Federal Court agreed with the adjudicator that it did not. The

\textsuperscript{23} See note 22 at para 70.

\textsuperscript{24} (2007), 159 LAC (4th) 365 (FCTD), aff'd (2008), 170 LAC (4th) 257 (FCA).

\textsuperscript{25} See note 24 at para 64.
mere possibility that an employee may be ill or otherwise presents a safety risk does not amount to "reasonable and probable grounds" for so believing.

These cases provide a good illustration of the circumstances in which an employer can require an employee to provide medical information, in the context of a fitness for work scenario. Before turning to look at the provision of medical information in relation to accommodation of an employee with a mental illness, it is useful to summarize the general principles that can be gleaned from the jurisprudence relating to fitness for work scenarios:

- So long as it has "reasonable and probable" grounds for doing so, an employer is entitled to seek medical information from an employee to ensure that the employee is able to work safely and poses no hazard to himself/herself or to others.

- If reasonable and probable grounds exist, an employee has an obligation to provide medical information to his or her employer, when requested. If an employee refuses to cooperate with an employer and will not provide any information, an employer is justified in refusing to allow the employee to return to work, or to remain at work, until it is satisfied that the employee is fit to do so. To be satisfied, an employer may, in certain circumstances, require that the employee submit to a medical examination by a doctor of the employer's choosing.

- The employer should focus on how the employee's illness will impact on his or her ability to work (both effectively and safely), and what restrictions or limitations the employee faces.

B) Medical Information and Accommodation

There are obligations on both employers and employees when it comes to medical information in support of an employee's request for accommodation. The obvious starting point is the initial request. In most situations, the duty to accommodate only arises when an employee raises the issue with his or her employer.26 After the initial request has been made, an employer must consider how (and if) it can accommodate the employee. Often the employer will need a more complete medical picture from the employee to arrive at a fully informed decision. Similar to fitness for work scenarios, an employer is entitled to request that the employee provide it with further information about his or her restrictions and limitations, so that the employer can properly assess its options.

The following quote from the Federal Court of Appeal's decision in Garvey v Meyers Transport Ltd27 highlights an employee's obligation to request an accommodation by his or her employer, and provide sufficient information to support the accommodation request. Citing the Supreme Court of Canada's seminal decision in Central Okanagan School District v Renaud,28 the Court of Appeal stated:

... the fact of the matter remains that the [employees] never gave his employer, at the time of his employment, a medical assessment evidencing a disability. The [employee] never requested accommodation

26 For example see Toronto Board of Education v Canadian Union of Public Employees, Local 4400 (Yeo Grievance), [2000] OLAA No. 326. However, consider further the concept of "constructive knowledge", discussed below.
27 2005 FAC 327.
on account of his disability nor did he advise the [employer] of any limitations or restrictions he had in the performance of his work on account of his disability ...

The employer, although aware of sudden headaches and insomnia of the [employee], was never made aware of any kind of disability which required accommodation.\(^{29}\)

This general proposition is clearly stated by Arbitrator Davie's decision in *Toronto Board of Education v CUPE, Local 4400*.\(^{30}\)

The onus is on the employee to provide sufficient information to the employer so that the employer can search for, originate, consider and implement appropriate accommodative measures. Just as the employer is "in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business" the employee ... is in the best position to identify the needs which must be accommodated...

Therefore, we begin with the general rule that an employee must request an accommodation, before an employer's obligations begin. (However, as we shall see below, this general rule is qualified in some circumstances.) This leads to the next question: when an employee does request accommodation for a disability, what information should an employer ask for? This was considered by an arbitration panel chaired by George Surydowski in *Complex Services Inc (cob Casino Niagara) v Ontario Public Service Employees Union, Local 278 (CAB Grievance)*.\(^{31}\) The panel provided guidance as to the type of information that could be reasonably required by an employer:

- the nature of the illness, although not the diagnosis;
- whether the illness is permanent or temporary, and the estimated timeframe for recovery;
- the employee's restrictions and limitations due to the disability;
- how the medical conclusions were reached; and
- any treatment or medication that might impact the accommodation or the employee's ability to perform his or her job.

In that case, competing grievances were filed by the union and the employer. The union alleged discrimination and the failure to accommodate, while the employer grieved that the union and the employee did not meet their accommodation obligations by failing to provide the proper medical information. The grievor had presented a list of accommodation demands (including that employer communication with her was only to be done through the union as intermediary) for a vaguely described mental illness, but refused to provide any medical documentation to support the demand because of privacy concerns. The grievor was placed on an unpaid medical leave of absence until either the employer, or an independent medical examiner, could assess her fitness to return to work.

\(^{29}\) See note 28 at paras 25-26.
\(^{30}\) See note 28 at para 116.
\(^{31}\) (2010), 217 LAC (4th) 1 (Surydowski).
A unanimous panel agreed with the employer and dismissed the union’s grievance. Although acknowledging that medical information is private, the panel found that employees had no absolute right to privacy and that medical information was necessary as part of the duty to accommodate:

In the purely technical sense of the term, an employee has an "absolute" right to keep her confidential medical information private. But if she exercises that right in a way that thwarts the employer's exercise of its legitimate rights or obligations, or makes it impossible for the employer to provide appropriate necessary accommodation, there are likely to be consequences, because an employee has no right to sick leave benefits or accommodation unless she provides sufficient reliable evidence to establish that she is entitled to benefits, or that she has a disability that actually requires accommodation and the accommodation required. Although an employer cannot discipline an employee for refusing to disclose confidential medical information, the employee may be denied sick benefits, or it may be appropriate for the employer to refuse to allow the employee to continue or return to work until necessary such information is provided.32

This was one of the first decisions to take place after the Jones v Tsige33 decision where the Ontario Court of Appeal unanimously recognized the tort of invasion of privacy called “intrusion upon seclusion.” That tort provides that damages will be awarded when there is a deliberate and highly offensive intrusion upon someone's privacy. The arbitration panel found that there was nothing in the Jones v Tsige decision that would increase the employer's burden to consider privacy when requesting medical information as part of the accommodation process.

As with all general rules, there are exceptions to the ones listed above. This exception has particular relevance to employees with mental illnesses. The jurisprudence has developed the concept of an employer having "constructive knowledge" of an employee's mental illness. In these circumstances, an employer is deemed to be aware of the employee's disability and the duty to accommodate will arise regardless of whether or not the employee has informed the employer of the need for accommodation.

An early example of this doctrine is Canada Safeway v UFCW, Local 401.34 Here the employee had a mental illness which caused him to make poor choices and was directly linked to his work performance. He was dismissed for poor performance. At no stage did the employee or his union raise his mental illness with the employer.

Arbitrator Wakeling distinguished this case from the general rule. Acknowledging that the employee and union have a responsibility in most cases to inform the employer of the employee's disability, Wakeling found that the situation is different where mental health issues are concerned. Most employees are reluctant to state they have a mental disability for fear that this information will be used to their detriment. For this reason, the employee was unwilling to share his "very personal information." The employee's behaviour suggested that he had a mental illness, and the employer should have been more alert to this. The employer should have taken positive steps, for example, advising the employee of the Employee Assistance Program, in response to the grievor's strange and unusual behaviour. Therefore, the arbitrator found that the employer failed to accommodate the employee.

32 See note 31 at para 86.
33 2012 ONCA 32.
A more striking example of this principle is *Direct Energy v CEP, Local 975.* The employee was dismissed for purchasing cocaine while on duty. The employee had previously advised Direct Energy that he was a drug user and he was properly referred to the Employee Assistance Program (EAP). Some time later, he came forward again and confirmed a relapse into drug use. This corresponded with the purchasing of cocaine while on work time and in a company vehicle and the employer dismissed the employee.

At the hearing, the employer claimed that it did not know the employee was a drug addict. Although it knew he was a drug user, his performance over two years had been fine and there was no indication he was a drug addict.

Arbitrator Burkett agreed that the employee's behaviour, removed from considerations of accommodation and disability, warranted termination. There was also no direct evidence establishing drug use or addiction at time of termination. However, the arbitrator found that when all of the evidence was considered together, it suggests that the grievor had suffered from a drug addiction at the time of his dismissal, and was, therefore, under a disability according to the Code.

Arbitrator Burkett approved of the employer's initial response to refer the employee to EAP. This was the right balance between a possible duty to accommodate and the employee's right to privacy. It was incumbent on the employee to follow through with EAP and to advise the employer if he required additional accommodation. The employee took neither of these steps.

However, Arbitrator Burkett found that when the employer was told that the employee had relapsed into drug use, it should reasonably have suspected that the employee was a cocaine addict. The arbitrator sums up this position as follows:

> An employer cannot turn a blind eye to suspicious behaviour and/or other manifestations of an actual disability and then be able to rely upon the absence of direct knowledge to argue that it is under no obligation to accommodate.

The arbitrator did not make any findings relating to the specific content of the employer's duty to accommodate, as the parties had only asked whether the duty arose.

It is also worth noting some human rights jurisprudence on the "constructive knowledge" doctrine. A good example is *Krieger v Toronto Police Services Board.* A police constable was involved in a struggle with a suspect carrying a handgun. The constable developed post-traumatic stress disorder that interfered with his ability to perform the duties of a police officer.

After this incident, the constable overreacted in response to an intoxicated person he encountered at a McDonald's restaurant. This overreaction compounded his mental illness and his behaviour was out-of-character in the hours and days that followed.

After the McDonald's incident, the constable was suspended as being unfit for duty.

After investigating the incident at McDonald's, the police service dismissed the constable. Even though his colleagues suspected he was suffering from a mental illness, the incident was dealt with as a case of professional misconduct. No independent medical evaluation was carried out.

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36 See note 35 at para 24.
37 2010 HRTO 1361 (CanLII).
In considering whether the constable had been discriminated against on the basis of disability, the HRTO reviewed the Ontario Human Rights Commission “Policy on Disability and the Duty to Accommodate.” In conformity with the general rule discussed above, the Commission’s policy is that accommodation is a “cooperative venture” between an employee, an employer, and a union, if applicable. The employee must advise the employer of his or her needs, cooperate with any experts, and work with any accommodation provider. The employer is required to accept the accommodation in good faith, obtain expert advice, and canvass opinions on how to proceed.

However, the HRTO adopted the “constructive notice” exception, and found that the general rule is premised on the applicant being able to recognize that he or she has needs arising from a disability. Sometimes, a person is not in a position to articulate or even recognize those needs because of the nature of the disability. Employers should attempt to assist a person who is clearly unwell or perceived to have a disability by offering assistance and accommodation. Even if the employer has not been advised of the employee’s mental disability, the perception of such a disability will engage protection of the Code.

In this case, the police service had reason to believe that the employee’s conduct, which led to his suspension and eventual termination, was caused by a disability. The service made only cursory attempts to ascertain whether this was so and otherwise failed to engage in the process to determine whether it could have accommodated the applicant. The applicant was reinstated and awarded $35,000 in damages. The HRTO found that the police service prolonged the employee’s suffering by its refusal to engage in the accommodation process.

How would we summarize the law regarding obtaining medical information in relation to the duty to accommodate?

First, the general rule is that an employee has the onus of bringing his or her disability to the attention of the employer. The duty to accommodate is not engaged unless the employer is aware of the need for accommodation.

Once the employer is aware of this need, it is then obliged to obtain medical information from the employee to allow it to make a fully informed decision regarding appropriate accommodation. The employee has a corresponding duty to provide this information to the employer, to the extent that the information is reasonably necessary for the employer to fulfill its duty. The employer is entitled to know what limitations the employee has, how these limitations affect the employee’s ability to perform his or her job, and how long the illness is expected to last. The employer is not entitled to the employee’s diagnosis.

In certain circumstances, such as where the employee is exhibiting unusual behaviour, the employer will be deemed to have knowledge of the employee’s illness and the duty to accommodate will arise, despite the employee not raising it with the employer. Similarly, the nature of an employee’s mental illness may be such that he or she is unable to articulate the need for accommodation, or is unaware that he or she is suffering from a mental illness. Therefore, employers will need to be vigilant and look for signs that employees are behaving uncharacteristically. The behaviours set out at the beginning of this paper provided a good checklist for employers to focus on. Staff should be trained to contact a supervisor or management if they have a concern about an employee’s behaviour.

Before moving on to consider the use of medical information at a hearing, it is necessary to comment briefly on the actual accommodation of employees with a mental illness. A full
examination of the duty to accommodate is beyond the scope of this paper. Suffice it to say that an employer's duty to accommodate requires an employer to consider alternative working arrangements for an employee, taking into account the employee's restrictions and limitations. The duty is the same regardless of whether an employee's disability is physical or mental. However, the actual accommodation itself will differ depending on the facts of each case.

An employer will only be relieved of its duty to accommodate an employee if it can establish that such accommodation would cause it "undue hardship," which is a high standard. The Supreme Court of Canada's decision known as Meiorin\(^{38}\) is commonly referred to when considering whether or not an employer would suffer undue hardship in accommodating a disabled employee.

An HRTO decision sets out an employer's procedural and substantive obligations in accommodating an employee with a mental illness.\(^ {39}\) It also provides confirmation of the above principles and is a good example of how not to respond to an employee's mental illness. Here the employee was dismissed eight days into his employment, after he revealed to his employer that he suffered from bipolar disorder. The HRTO found that the employer had not turned its mind to the prospect of accommodating the employee and had, therefore, discriminated against the employee, and ordered the employer to pay the employee almost $80,000 in damages. The employer appealed the HRTO's decision to the Divisional Court, which dismissed the appeal and for the most part upheld the findings and orders of the HRTO.

The employer argued that the employee was dismissed because he had misrepresented his ability to perform the essential duties of the position. During the interview the employee was told that the job could be stressful. He did not disclose his illness and misrepresented the number of days he had been on sick leave during the past 12 months.

The Divisional Court rejected the employer's submissions and found that it had failed to take any steps towards assessing whether the employee could perform his job with accommodation. With respect to the procedural aspect of the duty to accommodate, the Court referred to the Meiorin decision and commented:

> The procedural duty to accommodate involves obtaining all relevant information about the employee's disability, at least where it is readily available. It could include information about the employee's current medical condition, prognosis for recovery, ability to perform job duties, and capabilities for alternate work. The term undue hardship requires respondents in human rights cases to seriously consider how complainants could be accommodated. A failure to give any thought or consideration to the issue of accommodation, including what, if any, steps could be taken constitutes a failure to satisfy the 'procedural' duty to accommodate.\(^{40}\)

As to the substantive aspect of the duty, the Court found that because the employer had not even assessed whether the employee could be accommodated, any submissions regarding undue hardship were anticipatory rather than factual. An employer cannot rely on anecdotal or impressionistic evidence. Undue hardship must be demonstrated through actual evidence, and cannot be based on what "might" or "could" occur.

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\(^{38}\) British Columbia (Public Service Employee Relations Commission) v BCGSEU, [1990] 3 SCR 3.

\(^{39}\) ADGA Group Consulting v Lane, 2007 HRTO 34 (CanLII); aff'd (2008), 91 OR (3d) 649 (Ont SCDC).

\(^{40}\) See note 38 at para 106.
The Mental Health Works website provides some examples of accommodations that may assist employees with a mental illness. Examples include:

- flexible scheduling, for example, accommodate medical appointments during work hours, part time instead of full time, more frequent breaks;
- changing supervision and instruction methods;
- modifying duties/bundling duties;
- use of technological aids (e.g. modified lighting, tape recorders).

C) Medical Information Before or During a Hearing

Another context in which the issue of obtaining medical information frequently arises is in anticipation of or during a hearing. Often, an employee’s mental health will only be raised for the first time at a grievance arbitration or a human rights tribunal hearing. The question then becomes, is an employer entitled to require the grievor to produce medical records or submit to medical examinations?

The general rule is that, if an employee places his or her mental health in issue, for example by raising it as a mitigating factor in a discipline grievance, then the need for a fair hearing will most likely trump an employee’s privacy interests and the employer will be entitled to receive medical information about the employee’s mental health.41 This may include requiring the employee to submit to an independent medical examination.

Arbitrator Whitaker in *Oliver Paipponge (Municipality) v LIUNA, Local 607*42 explored the basis for this general rule. This was a discharge grievance. The grievor had been diagnosed with a mental disability. The employer alleged that the grievor was unable to do his job, and that the information available to the employer indicated the grievor would be unable to do his job in the future. At the hearing, the employer proposed to prove these allegations in part through (as yet unattained) medical reports provided by the grievor’s physicians.

At the hearing, the union took the position that the grievor was able to perform the duties of his job, and would not put the grievor’s mental health in issue unless the arbitrator found for the employer on this point. The employer requested an order that the grievor produce his entire medical file, and submit to a medical examination by a doctor of the employer’s choice. Arbitrator Whitaker reviewed the jurisprudence and set out some general propositions, summarized as follows:

1. The production of medical information generally and a direction to a grievor to submit to a medical examination, should only be made where it is clear that the fact of the grievor’s health is being put in issue by the union, or where the employer needs the information to prove its case.

2. Where mental health records are in issue, a standard higher than “arguably relevant” should be applied to determine whether they should be produced.

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41 See for example *Canada Post Corp and CUPW, (AME Grievance)* (1996), CLAD No 960 (Devlin), *Telus Communications Inc v Telecommunication Workers Union (JG Grievance)* (2007), CLAD No 429 (Beattie).
42 (1999), 79 LAC (4th) 241 (Whitaker).
Medical records should only be ordered to be produced at the point in the hearing that the information becomes necessary.

These principles all derive from the same fundamental reasoning: the obligation to produce mental health records and to submit to a psychiatric exam are *prima facie* highly intrusive. These inquiries reveal the most intimate details of a person’s innermost private life. Therefore, such inquiries should only be undertaken at the point in time they are in fact necessary or essential for the purposes of the adjudication of the grievance.

**3 Discipline and Mental Health**

The current approach of human rights tribunals and grievance arbitrators when it comes to assessing disciplinary sanctions imposed on employees with a mental illness is to inquire whether or not there is a "causal connection" between the illness and the impugned conduct.

The case of *Direct Energy*, discussed above, provides a good example of this approach. To quickly recap, the employee was dismissed after purchasing cocaine while on duty. It will be recalled that Arbitrator Burkett found the employee’s behaviour, removed from considerations of disability, warranted dismissal. The employee raised his addiction to cocaine in mitigation of his actions. Arbitrator Burkett notes that the existence of a disability does not, in and of itself, shield an employee from consequences of misconduct. There must be a causal link between the disability and the misconduct.

The arbitrator identified two different applications of the "causal link" test. Firstly, there are those cases where the misconduct relied upon by the employer to support the imposition of discipline constitutes a manifestation of the employee’s disability, in this case, addiction to cocaine. For example, an alcoholic employee caught drinking at work. Alternatively, there are those cases where the misconduct is not a manifestation of a disability, for example, a theft that was not clouded by alcoholism. In the former, a *prima facie* (i.e. at first appearance) case of impaired judgment exists by virtue of the link between the disability and the misconduct alone. In the latter case, there is no *prima facie* case of impaired judgment, such that for the employee to rely upon his or her disability in mitigation of his or her conduct additional evidence (generally medical evidence) establishing the necessary causal connection is required.

Burkett concluded that, whether or not the employee used cocaine at work, it is difficult to separate the fact of leaving work to purchase cocaine from the fact of his addiction to cocaine. This connection mitigates the employee’s culpability. Therefore, the employer did not have just cause to dismiss the employee. The employee was reinstated, with an order that he attend rehabilitation before being allowed to resume work.

The requirement for a causal connection between the misconduct and the disability is highlighted in the recent decision of *Toronto Transit Commission v Canadian Union of Public Employees, Local 2 (MS Grievance)*. Similar to *Direct Energy*, the grievor in *Toronto Transit Commission* had a cocaine addiction, but because the causal connection test was not met, the discharge was upheld. In that case, the grievor, who had a clean disciplinary record and was also President of the union, was discharged by the employer after pleading guilty to theft over $5,000. The grievor had stolen copper wire from his employer and sold it to a recycling facility to support his cocaine addiction. The union argued that the grievor should be reinstated as part of the duty to accommodate his disability, namely his cocaine addiction.

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43 See note 35.
44 (2011), 210 LAC (4th) 268 (Stout).
In upholding the discharge, Arbitrator Stout found that the theft was serious enough to warrant termination and that the medical evidence did not demonstrate that the theft was caused by the cocaine addiction. The arbitrator characterized the theft as a "pre-mediated criminal act" because although the grievor had a cocaine dependence problem, and thus a disability, he lived a middle class lifestyle with very little debt and, therefore, had the financial resources to feed his addiction without stealing from his employer.

With respect to the requirement for a causal connection, Arbitrator Stout stated:

The grievor clearly suffers from a disability and he suffered adverse treatment when he was terminated. However, I find that the disability was not a factor in the adverse treatment. The only connection between the theft and the cocaine addiction is the fact that the grievor used the money he received for selling the stolen copper wire on May 11, 2010 to purchase an eight ball of cocaine. As noted earlier the use of that money was a choice the grievor willingly made instead of using his own money that he had readily available.

Additionally, I accept the evidence of Dr. Reznek that there is no causal connection between the grievor's misconduct and his dependence on cocaine. In my view, the evidence also does not support a finding of any nexus between the misconduct and the disability. Accordingly, I find that the Union has not proven a prima facie case of discrimination based on the broader more purposive analysis of Madame Justice Kirkpatrick. Having found that the Union has not proven prima facie discrimination, the Employer had no duty to accommodate the grievor.45

The causal connection has also been applied by the HRTO in *Fleming v North Bay (City)*.46 The employee, a firefighter, was suspended and then terminated as a result of off-duty conduct. The employee alleged that his misconduct was related to his alcohol addiction. The employer denied any knowledge that the employee was addicted to alcohol, or that there was a nexus between the alleged disability and the misconduct.

As part of his evidence, the employee included a report from his doctor that stated that there was a direct relationship between his addiction to alcohol and his misconduct. He submitted that he was never drunk at work, but often came in hung-over or called in sick for the same reason.

The HRTO reviewed the evidence and found that there was no assertion that the employee was drinking or intoxicated when any of the misconduct occurred. There was also no explanation of the nexus between the off-duty misconduct and the alleged alcohol addiction.

Citing a number of decisions from British Columbia, the HRTO stated:

In a case such as this one that involves addiction to alcohol, discipline and termination of employment, the main issues that I am required to determine are whether the [employee] has established that the [employer] suspended him and then terminated his employment because of misconduct that was causally related to his addiction to alcohol, and if so, whether the [employer] has established that it accommodated the

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45 See note 44 at paras 109-110.
46 2010 HRTO 355 (CanLII); Request for Reconsideration of Tribunal's Decision dismissed, 2011 HRTO 140 (CanLII).
The employee has the onus of proving on a balance of probabilities that a violation of the Code has occurred. In this case, the HRTO decided that the employee had not demonstrated a causal connection between his alcoholism and the misconduct. The HRTO rejected the employee’s medical evidence as lacking in detail and being too vague. Therefore, the employer did not discriminate against the employee when it suspended and then terminated his employment.

One of the key cases in the development of the current approach to discipline and mental illness is the British Columbia Labour Relations Board decision in Fraser Lake Sawmills Ltd (Re). The Labour Relations Board identified a number of factors that arbitrators should weigh when assessing the appropriateness of the discipline in question, for example:

- the special nature of the disease of addiction in relation to the specific circumstances of the case;
- the compulsion associated with an addiction;
- the nature and seriousness of the misconduct;
- the impact beyond the individual grievor, including the risk posed to the employer and the impact on others in the workplace such as employees or the public;
- the need for deterrence;
- the employer’s efforts to help the employee deal with the addiction;
- steps taken by the employee to deal with the disease; and
- the grievor’s employment record.

Thus it can be seen that if an employee is suffering from a mental illness, and is disciplined for misconduct that is causally connected to the illness, this will mitigate the employee’s culpability. It may not result in complete absolution, as there may be cases where the misconduct is so egregious that the employee cannot rely on the disability in mitigation.

4 Workplace Safety and Mental Health

a. Bill 168

The Bill 168 amendments to Ontario’s Occupational Health and Safety Act have introduced new obligations on employers in relation to the prevention of workplace violence and harassment.

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47 Seemingly, B.C. is at the forefront of developing the “causal link” approach. See those cases listed at para 68 of the HRTO’s decision.
49 RSO 1990, c O1 ["OHSA"].
50 These provisions can be found at PART III.0.1 of the OHSA.
The Bill 168 amendments introduced definitions of "workplace violence" and "workplace harassment:"

"Workplace violence" means,

(a) The exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker

(b) An attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker

(c) A statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

"Workplace harassment" means engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome.\textsuperscript{51}

According to the Ministry of Labour, workplace harassment may include bullying, intimidating or offensive jokes or innuendos, displaying or circulating offensive pictures or materials, or offensive or intimidating phone calls.\textsuperscript{52} It includes, but is not limited to, the grounds of harassment set out in the Code.

The requirements under Bill 168 have been in force since June 15, 2010, and arbitrators have had the opportunity to begin to interpret the extent of employers' legal obligations under the new requirements and how those might be balanced with the rights and interests of employees. Although not involving mental health, one of the first decisions to be decided under the new Bill 168 framework was Kingston (City) v Canadian Union of Public Employees, Local 109 (Hudson Grievance).\textsuperscript{53} In that case, Arbitrator Newman upheld the termination of an employee for making verbal threats on the basis that Bill 168 required employers to "take every precaution reasonable in the circumstances for the protection of a worker." In making his finding, Arbitrator Newman went as far as stating that as a result of the Bill 168 amendments, "workplace safety trumps personal privacy."\textsuperscript{54}

Although it is easy to take Arbitrator Newman's comments out of context, it is statements such as the one mentioned above that illustrate the difficult balancing act that employers face in order to comply with their obligations. An employer has to balance its obligations to its employees to protect them and provide a safe workplace, with its duty to accommodate a mentally ill employee, all the while maintaining the privacy of all involved.

A recent arbitration decision sheds light on the difficulty an employer faces in balancing employee's privacy issues with their duty to prevent workplace violence and harassment. In IBEW, Local 636 and Niagara Peninsula Energy Inc,\textsuperscript{55} Arbitrator Dissanayake found that an employer invaded an employee's privacy when they required that employee to undergo a psychiatric assessment before allowing him to return to work.

\textsuperscript{51} See note 49 at s 1(1).
\textsuperscript{54} See note 53 at para 227.
\textsuperscript{55} (2012), 217 LAC (4th) 307 (Dissanayake).
In that case, the grievor was suspended indefinitely following a number of workplace incidents involving aggressive behaviour. The grievor, while cleaning the garage at his workplace, had purposely splashed water and dirt on a co-worker who was meeting with an outside contractor and then swore loudly at the co-worker when he was asked to stop. The co-worker complained about the incident and the grievor was suspended for five days. While the grievor was suspended, the employer had the formal complaint delivered to the grievor at home and the grievor was alleged to have acted in an aggressive and intimidating manner toward the courier, who complained to the employer. After the five-day suspension, the grievor had a meeting with union and management regarding the incident with the courier. The grievor became agitated and belligerent and stormed out of the room, slamming the door. In response, the grievor was placed on an indefinite unpaid suspension and could only return on the condition that he arranged to "attend a properly qualified and licensed psychiatrist for an examination respecting [his] ability to work satisfactorily." The union grieved the suspensions and the employer’s right to require a psychiatric evaluation.

Arbitrator Dissanayake found that although the grievor had deserved some discipline, the conduct did not justify the employer’s request for a psychiatric assessment. The employer, citing City of Kingston had argued that the requirements under Bill 168 required workplace safety to take priority over employee privacy rights and that the doubt they expressed towards the grievor’s mental well-being required them to get more information on the risks. In rejecting this argument, Arbitrator Dissanayake cited the principle established in the Federal Court ruling in Grover (mentioned above) that required an employer to have reasonable and probable grounds to believe the employee presented a risk to health or safety in the workplace:

This brings me to an argument by the employer to the effect that as a result of Bill 168, “safety trumps employee privacy rights”. Re City of Kingston (supra) was relied upon as supporting that proposition. With the greatest respect, arbitrator Newman’s comment has nothing whatsoever to do with an employer’s right to require medical examinations, psychiatric or otherwise. She is alluding there to an employer’s right and obligation to provide information to employees which would assist in protecting the employee’s from potential workplace violence. With the enhanced obligations resulting from the Bill 168, employer’s may now provide the workforce with information, for example about an employee’s violent tendencies, which previously may have been considered to be protected by privacy concerns. In Re City of Kingston, arbitrator quite correctly concluded that conduct that engages workplace violence within meaning of Bill 168 does not automatically justify termination. In my view, similar reasoning applies with regard to an employers’ entitlement to require psychiatric IME’s. The mere fact that an employee has engaged in conduct that engages Bill 168 does not mean that the employer may require a psychiatric examination. The pre-Bill 168 jurisprudence still applies in that there has to be a balancing of the employer’s right and duty to maintain a safe workplace and the employee’s privacy rights. The test for achieving that balance continues to be the "reasonable and probable" test reviewed earlier in this award.66 [emphasis added]

The Niagara Peninsula case provides a good example of how, in the post Bill 168 workplace, employer needs to balance the heightened responsibilities of maintaining a safe workplace with the continued responsibilities to protect an employee’s right to privacy. In that case, the fact

66 See note 24 at para 121.
that the employer believed that the grievor had an anger problem, did not constitute reasonable and probable grounds for a psychiatric evaluation.

In addition to an employer's obligations regarding workplace violence and harassment, the OHSA also limits an employer's collection and use of employees' personal information. For example, an employer cannot seek to gain access to a "health record" concerning a worker, without that worker's written consent or pursuant to an order of a court or tribunal.\textsuperscript{57} If an employer does have cause to obtain an employee's medical record, it must not disclose any information about the employee except "in a form calculated to prevent the information from being identified with a particular person or case."\textsuperscript{58} This does not apply in the event of a medical emergency.\textsuperscript{59}

b. Standard for Psychological Health and Safety in the Workplace

In addition to the statutory obligations imposed by Bill 168 that require employers to provide a safe workplace, free from workplace violence and harassment, employers may now be faced with the almost impossible burden of protecting the mental health of workers.

Earlier this year, the Mental Health Commission of Canada (MHCC) introduced a voluntary national standard for psychological health and safety in the Canadian workplace. The report, entitled "Psychological Health and Safety in the Workplace – Prevention, Promotion and Guidance to Staged Implementation" (the Standard) was developed by the Canadian Standards Association (CSA), in conjunction with the Bureau de normalisation du Québec as a set of "best practices" for preventing psychological harm and promoting psychological health and safety in the workplace. These voluntary standards target three pillars of psychological health and safety: the prevention of harm; the promotion of health; and the resolution of incidents or concerns.

The Standard highlights the business case for improving the psychological health and safety of employees in the form of risk management, cost effectiveness, recruitment and retention, and organizational excellence and sustainability. The Standard provides a number of tools and recommendations for employers to implement as assistance in obtaining those objectives.

The Standard invites employers to create a Psychological Health and Safety Management System, which addresses various workplace factors that can impact an employee's psychological health. The Standard focuses on multiple overlapping aspects of workplace health, including: physical and psychological safety (making workers feel their well-being and safety are respected); self-esteem (where the workers feel they can be successful and expectations are reasonable, and that they receive appropriate praise and rewards); accomplishment and autonomy (workers feel they are an important part of the organization and that they can exercise judgment); and belonging (where workers feel they are part of a team and properly supported by their managers). The Standard specifically targets situations where job demands are beyond a worker's capacity and the worker receives negative feedback for failing to meet unreasonable expectations.

To create and improve a psychologically healthy and safe workplace, the Standard provides a four-part framework to achieve that objective:

\textsuperscript{57} See note 49 at s 63(2).
\textsuperscript{58} See note 49 at s 63(1)(f).
\textsuperscript{59} See note 49 at s 63(5).
the identification and elimination of hazards in the workplace that pose a risk of psychological harm to a worker;

2. the assessment and control of the risks in the workplace associated with hazards that cannot be eliminated;

3. implementing structures and practices that support and promote psychological health and safety in the workplace; and

4. fostering a culture that promotes psychological health and safety in the workplace.

There are a number of guiding principles that the Standard is based on. The principles provide that organizations that choose to adopt the Standard are required to take into account the various legal requirements for a psychologically healthy and safe workplace (which is the minimum obligation under the Standard), the confidentiality of sensitive information, and to recognize that organizational decision-making must incorporate psychological health and safety.

The Standard sets out laudable goals that all employers would do well to consider for their workplaces. As a set of best practices for promoting the important goal of creating a psychologically healthy workplace, the new Standard has great merit. Although considered voluntary, employers who adopt the Standard are expected to make every reasonable effort to protect mental health in the workplace. Parties are also expected to address any systemic issues that influence the workplace, including organization culture. Once implemented, the Standard applies to the organization as a whole and to everyone in the workplace.

The obligations imposed upon employers by the Standard are significantly broader than any of the current legal obligations in Canada. Currently, employers are not legally required to provide and sustain a psychologically safe workplace. In fact, the current state of the law as set out by the Ontario Court of Appeal in Piresferreira v Ayotte⁶⁰ expressly rejects the suggestion that such a duty exists or ought to be recognized. In that case the Court of Appeal specifically rejected the proposition that there is a general legal duty in Canada to take care to shield an employee during the entire course of his or her employment from acts in the workplace, including the acts of other employees that might cause mental suffering.

There is a patchwork of legislation in Canada that provides a range of legal obligations that stop short of requiring employers to create and sustain a psychologically healthy workplace. Workers’ compensation regimes provide, in some instances, for the compensation of workplace psychological injury, the employment contract allows the employer and employee to agree on working conditions, and some occupational health and safety regulations require that violence and harassment be prevented in the workplace.⁶¹

The fact that the Standard is voluntary may not shield employers who fail to maintain a psychologically healthy and safe workplace from legal liability. Section 25(2)(h) of the OHSA, often referred to as the “general duty clause” requires employers to take “every precaution reasonable in the circumstances for the protection of a worker.”⁶² Courts and tribunals have often regarded standards created by the CSA and other national, multinational or international instruments in determining whether the general duty has been met. Therefore, it may be that in

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⁶⁰ 2010 ONCA 384 at paras 50-63.
⁶² See note 49 at s 25(2)(h).
the future, employers will see the Standard incorporated into the general occupational health and safety duty.

At this stage, however, employers should ensure that they comply with their statutory obligations. They may wish to consider implementing the goals set out in the Standard, although they are not legally obligated to do so.

c. **Accessibility for Ontarians with Disabilities Act, 2005**

In recognizing the history of discrimination that people with disabilities have faced in Ontario, the Ontario government enacted the AODA in order to ensure that Ontarians with disabilities are able to obtain full access to goods, services, accommodations, employment, buildings and premises. It applies to "every person or organization in the public and private sectors of the Province of Ontario, including the Legislative Assembly of Ontario."\(^{64}\)

The definition of "disability" under section 2 of the AODA is the exact same as that contained in the Code and, thus, mental illnesses are captured under that broad definition.

The AODA promotes accessibility through the creation of legally binding standards adopted via regulation. To date, five of these standards have been developed under the AODA relating to customer service, information and communications; employment; transportation; and finally, built environment. The compliance mechanisms within this series of standards have varying dates of implementation.

The information and communication, employment and transportation standards have all been encompassed within the Integrated Accessibility Standards.\(^{65}\) One of the mechanisms that employers must comply with as it relates to mental health, are the workplace emergency response information requirements that came into force January 1, 2012. This section states that:

Workplace emergency response information
27.(1) Every employer shall provide individualized workplace emergency response information to employees who have a disability, if the disability is such that the individualized information is necessary and the employer is aware of the need for accommodation due to the employee's disability.

(2) If an employee who receives individualized workplace emergency response information requires assistance and with the employee's consent, the employer shall provide the workplace emergency response information to the person designated by the employer to provide assistance to the employee.

(3) Employers shall provide the information required under this section as soon as practicable after the employer becomes aware of the need for accommodation due to the employee's disability.

(4) Every employer shall review the individualized workplace emergency response information,
(a) when the employee moves to a different location in the organization;

\(^{63}\) SO 2005 c 11 ["AODA"].

\(^{64}\) See note 63 at s 4.

\(^{65}\) Ontario Regulation 191/11.
(b) when the employee’s overall accommodations needs or plans are reviewed; and
(c) when the employer reviews its general emergency response policies.

(5) Every employer shall meet the requirements of this section by January 1, 2012.\(^6\)

Employers must be careful with the requirement to provide individualized workplace emergency response information to disabled employees who would require one as it must be balanced with an employee’s right to privacy. As mentioned above, employers do have a duty to inquire into the health status of an employee if they believe there is a problem. However, employers must continue to be cognizant of an employee’s rights, such as the privacy of their information.

The Employment Standard requires employers to:

- notify employees and the public about the availability of accommodation for applicants with disabilities in its recruitment process;
- notify job applicants about available accommodations where assessments are conducted;
- notify successful job applicants and current employees about its policies for accommodating employees with disabilities;
- where requested, provide employees with accessible formats and communication supports that allow the employee to perform his/her job; and
- where requested, provide employees with accessible formats and communication supports for information that is generally available to employees in the workplace.

Most notably, however, employers with 50 or more employees are required to develop written, individual accommodation plans. The plans must set out the accommodation that will be provided to each employee and in addition, must address the following issues:

- how an employee can request the assistance of a bargaining agent in unionized workplaces or support person in non-unionized workplaces;
- steps taken to protect the privacy of the employee’s personal information;
- frequency with which the individual accommodation plan will be reviewed;
- If an individual accommodation plan is denied, the manner in which the reasons for the denial will be provided to the employee; and
- means of providing the individual accommodation plan to the employee in a format that takes their disability into account.

\(^6\) See note 65 at s 27(1).
In addition, the accommodation plans must consider how the employee can participate in the development of the plan; how the employee is to be assessed on an individual basis; and, how the employer can request an evaluation by a third party medical provider.

The onerous requirements under the Employment Standard of the AODA are phased in. For large designated public sector organizations, the Employment Standard requirements must be met by January 1, 2014. For small designated public sector organizations, the Employment Standard requirements must be implemented by January 1, 2015. It must be implemented by large (private) organizations by January 1, 2017, and by small (private) organizations with more than 50 employees by January 1, 2017.

CONCLUSION

There should be great incentive for employers and employees to achieve a balanced approach to mental illness in the workplace. Employers can play a positive role in the treatment of an employee’s mental illness by encouraging them to remain in the workforce. Employers can also achieve cost savings in areas such as health benefits, lost time, and productivity. Employees who are accommodated can participate in the workplace and contribute as active members of society.

To achieve this ideal, employers and employees need to be aware of their rights and responsibilities. Many issues can arise regarding employees with mental illnesses, such as the duty of accommodation, obtaining medical records, discipline, performance and productivity, and absences. Employers who are proactive and put in place clear and concise policies setting out how mental illnesses will be dealt with stand the best chance of obtaining positive results for themselves and their employees. Employees, who understand their role in the accommodation process and their rights at the workplace, can ensure that they are treated according to the law, and can maximize their value to their employers through improved productivity and performance.