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Ask the Expert

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Human Rights Accommodations During Recruitment

How far is too far?

I once had a human rights case for a major Canadian national employer. It had hired a quadriplegic for a CSR position based upon a telephone interview without knowing anything whatsoever about the candidate's condition. Once hired, she immediately advised of her condition and further advised that she required a full-time employee at my client's expense to take her to and from both Wheel-Trans and the washroom as required during the day. She also required a special bed and phone set up in the office to perform her work. The client was prepared to accommodate the special apparatus, but not the other employee, certainly not at its expense, to assist her in her junior position. She proceeded to file a complaint to the Canadian Human Rights Commission.

I sensed that my client was the victim of a scam and sought production of previous complaints that she had filed to the federal Commission. I also threatened to bring an application for production of all complaints she had ever filed at the Ontario Human Rights Commission. I was confident that I would find similar complaints and suspected that she had made a personal cottage industry of creating difficulties for employers and then filing Human Rights Complaints. The case did not get as far as my threatened production motion.

We went to initial CHRC mediation, which I insisted be conducted in person and which the Commission accommodated with the appropriate Wheel-Trans service arranged to pick up the Complainant. The Complainant was initially quite resistant to attending and facing her erstwhile employer.

As we waited, ultimately impatiently, for her late arrival, we received a telephone call that she was unable to attend because there had been a fire alarm in her building, the elevators were locked and, of course, she could not use the stairs. I immediately called the building, located the building superintendent and asked if the story was true. It was. But upon further inquiry, I learned that the fire alarm had been triggered immediately outside of her apartment.

Even the Complainant friendly Commission lost patience with her at that point and that was the end of the case.

There is no difference whatsoever between the obligation to accommodate at the recruitment stage and respecting employees who become disabled or otherwise require accommodation *during* employment. The limit of such accommodation in both is undue burden or hardship, a tough test, even more onerous for a large employer which has the resources and potential positions to arrange either an accommodated position or modified work in the existing position. That is how undue burden is evaluated.

Obviously, if an employee is incapable of performing the basic functions of the job that you are recruiting for, you need not hire them, whether that inability results from a physical disability or a fundamental lack of competence or qualifications. However, if the employee otherwise is the appropriate candidate and mechanisms can be put into place to accommodate their physical disability, you have to provide those accommodations.

In the same way, if the employee is a Seventh-Day Adventist or an Orthodox Jew and the position requires work on a Saturday, you must accommodate their work schedule to permit their absence on Saturday even if that is seen by others, who have to work on Saturdays, to unfairly disadvantage them. The duty to accommodate supersedes collective agreement seniority and shift requirements.

Ask the Expert continued

There is one other aspect of preemployment hiring worth noting. If an applicant complains, say 10 months after their rejection, that they were not hired by reason of some prohibited ground pursuant to human rights legislation, you will have to affirmatively establish that that is not the case. This can be difficult if you barely recall that interviewee and do not have detailed records of why he or she was rejected. This can be a real problem if your systems are not properly organized. That is why I always ensure that my clients keep detailed analysis of the criteria that they developed for the positions they are interviewing and then detailed scoring or other data as to why each applicant was selected or not. Interviewing and selecting by score based on relevant job-related criteria not only allows you to defeat a human rights application by a rejected, lower scoring candidate, but permits you to defeat the implicit bias redolent in so many interview processes.

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