

13. Duty to accommodate

Under the *Code*, employers and unions, housing providers and service providers have a duty to accommodate the needs of people with psychosocial disabilities to make sure they have equal opportunities, equal access and can enjoy equal benefits. Employment, housing, services and facilities must be designed inclusively or adapted to accommodate people with psychosocial disabilities in a way that promotes integration and full participation.

The OHRC's [Policy and guidelines on disability and the duty to accommodate](#), [Human Rights at Work](#) and the [Policy on human rights and rental housing](#)^[164] provide in-depth guidance on accommodating the needs of people with disabilities and other *Code*-protected groups in employment, housing and other areas. The purpose of this policy is to apply these principles specifically to people with mental health and/or addiction disabilities.

The duty to accommodate has both a substantive and a procedural component. The procedure to assess an accommodation is as important as the substantive content of the accommodation.^[165] In a case involving the accommodation of a mental health disability in the workplace, the Court said: “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.”^[166]

The duty to accommodate mental health disabilities is no less rigorous than the duty to accommodate physical disabilities.

Example: In one case, a tribunal found that an organization had discriminated when it failed to provide a stress leave to an employee with anxiety and depression, and instead required him to either retire or transfer to another province (despite the negative impact that the transfer would have had on his family situation and possibly on his mental health). In its decision, the tribunal pointed to the organization's generous sick leave policy for people with physical disabilities, such as cancer, and contrasted this with how differently the organization treated stress leaves.^[167]

Human rights law establishes that there cannot be a “double standard” for how mental health disabilities are treated versus how physical disabilities are treated.^[168]

13.1 Principles of accommodation

The duty to accommodate is informed by three principles: respect for dignity, individualization, and integration and full participation.

13.1.1. Respect for dignity

The duty to accommodate people with disabilities means accommodation must be provided in a way that most respects the dignity of the person, if doing so does not cause undue hardship. Human dignity encompasses individual self-respect, self-worth and inherent worth as a human being. It is concerned with physical and psychological integrity and empowerment. It is harmed when people are marginalized, stigmatized, ignored or devalued. Privacy, confidentiality, comfort, individuality and self-esteem are all

important factors.

Autonomy is also an important aspect of dignity. It reflects a person's right to self-determination, and means subjecting people to minimal interference in their choices. Dignity will include considering how accommodation is provided and the person's own participation in the process.

Respect for dignity includes being considered as a whole person, not merely in relation to one's disability or the psychiatric system. It includes respecting and valuing the perspectives of consumer/survivors and people with addictions, particularly when people speak about their own experiences.

Housing providers, service providers and employers should consider different ways of accommodating people with mental health or addiction disabilities along a continuum, ranging from ways that most respect dignity and other human rights values, to those that least respect those values.

Example: A woman asks for flexible work hours on Thursdays so she can attend a therapy appointment related to a mental health issue. Instead of taking her request in good faith and working with her confidentially to understand how best she can be successful at work, the employer tells the woman's colleagues about her request and asks them whether, based on their own impressions, they believe that the woman has a mental health issue. This approach is inappropriate and does not respect the employee's dignity or her privacy.

13.1.2. Individualization

There is no set formula for accommodating people identified by *Code* grounds. Each person's needs are unique and must be considered afresh when an accommodation request is made. What might work for one person may not work for others. A solution may meet one person's requirements, but not another's.

Example: In employment, a policy that mandates a set return to work plan for people with disabilities may be discriminatory if the particular circumstances of a person making an accommodation request are not considered.[\[169\]](#)

Accommodations may need to be re-visited over time to make sure that they continue to meet a person's needs appropriately.

13.1.3. Integration and full participation

Accommodations should be developed and implemented with a view to maximizing a person's integration and full participation. Achieving integration and full participation requires barrier-free and inclusive design and removing existing barriers. Where barriers continue to exist because it is impossible to remove them at a given point in time, then accommodations should be provided, unless this causes undue hardship.

It is well-established in human rights law that equality may sometimes require different treatment that does not offend the person's dignity. In some circumstances, the best way to ensure the equality of people with disabilities may be to provide separate or specialized services. However, employment, housing, services and facilities must be built or adapted to accommodate people with disabilities in a way that promotes their integration and full participation.[\[170\]](#)

Example: A co-op housing provider ensures that several of its one-bedroom units throughout

the co-op are available to people who, due to a mental health disability, need to live in quiet, private spaces on their own.

Segregated treatment in services, employment or housing for people with disabilities is less dignified and is unacceptable, unless it can be shown that integrated treatment would pose undue hardship or that segregation is the only way to achieve equality.[\[171\]](#)

13.2 Inclusive design

Ensuring integration and full participation means designing society and structures for inclusiveness. Inclusive or “universal” design emphasizes barrier-free environments and equal participation of persons with psychosocial disabilities with varying levels of ability. It is a preferred approach to removing barriers or making “one-off” accommodations, which assume that existing structures may only need slight modifications to make them acceptable.

Effective inclusive design will minimize the need for people to ask for individualized accommodation. As the Law Commission of Ontario has said:

The concept of universal design, which requires those who develop or provide laws, policies, programs or services to take into account diversity from the outset, is connected to the principle of autonomy and independence in that, when properly implemented, universal design removes from persons with disabilities the burden of navigating onerous accommodation processes and negotiating the accommodations and supports that they need in order to live autonomously and independently. In this way, the principle of autonomy and independence is closely linked to that of participation and inclusion.[\[172\]](#)

The Supreme Court has noted the need to “fine-tune” society so that structures and assumptions do not exclude persons with disabilities from taking part in society.[\[173\]](#) It has affirmed that standards should be designed to reflect all members of society, to the extent that this is reasonably possible.[\[174\]](#) Housing providers, service providers, employers and others have an obligation to be aware of differences between individuals and groups and must build in conceptions of equality to standards or requirements.[\[175\]](#) This proactive approach is more effective because it emphasizes accessibility and inclusion from the start.

Organizations, including government, should use the principles of inclusive design when they are developing and building policies, programs, procedures, standards, requirements and facilities. New barriers should never be created when designing new structures or revising old ones. Instead, design plans should incorporate current accessibility standards such as the Principles of Universal Design.[\[176\]](#) This type of planning decreases the need to remove barriers and provide accommodations at a later date.

Example: A municipality passes a bylaw that requires 10% of the units offered through all new rental housing developments to be affordable housing. It does this because it recognizes that many groups protected by the *Code*, including people with psychosocial disabilities, need affordable housing.

The *Accessibility for Ontarians with Disabilities Act*[\[177\]](#) provides a mechanism for developing, implementing and enforcing accessibility standards with the goal of a fully accessible province by 2025. Standards have already been passed into regulation for customer service, employment, information and

communication, transportation and public spaces. Changes have also been made to the accessibility provisions of the *Building Code Regulation*. Under the *AODA*, government public and private sector employers, service providers and landlords are required to comply with accessibility standards in varying degrees over time relative to an organization's size and sector. If accessibility standards under the *AODA* fall short of requirements under the *Code* in a given situation, the requirements of the *Code* will prevail.

Along with the expectation to prevent barriers at the design stage through inclusive design, organizations should be aware of systemic barriers in systems and structures that already exist. They should actively identify and seek to remove these existing barriers.

Example: A workplace designs a performance management procedure. It builds in flexible processes to make sure it adequately responds to people who may be experiencing difficulty performing their work due to factors related to a *Code* ground, including a mental health or addiction issue, by offering accommodation, short of undue hardship. In its approach to assessing and accommodating employees who are experiencing difficulty doing their work, it focuses on the employee's behaviours at work, and asks "What can I do to make sure you are successful at work?" It also identifies that accommodation is available, if needed. This approach allows employees to focus on their needs, decide if they want to disclose that they have a disability or other *Code*-related issue (for example, family status obligations) that is affecting their work, and allows them to begin a conversation about accommodation, if necessary.[\[178\]](#)

Organizations will likely find that inclusive design choices and removing barriers, as well as individual accommodations, will benefit large numbers of people.

13.3 Appropriate accommodation

In addition to designing inclusively and removing barriers, organizations must also respond to individual requests for accommodation. In some situations involving people with psychosocial disabilities, organizations may also have to respond to situations where they perceive that there may be a need for accommodation, even if a specific request has not been made.[\[179\]](#)

The duty to accommodate requires that the most appropriate accommodation be determined and provided, unless this causes undue hardship. Accommodation is considered appropriate if it results in equal opportunity to enjoy the same level of benefits and privileges experienced by others or if it is proposed or adopted for the purpose of achieving equal opportunity, and meets the individual's disability-related needs. The most appropriate accommodation is one that most:

- respects dignity (including autonomy, comfort and confidentiality)
- responds to a person's individualized needs
- allows for integration and full participation.

Accommodation is a process and is a matter of degree, rather than an all-or-nothing proposition, and can be seen as a continuum. The highest point in the continuum of accommodation must be achieved, short of undue hardship.[\[180\]](#) At one end of this continuum is full accommodation that most respects the person's dignity and promotes confidentiality. Alternative accommodation (that which would be less than "ideal")

might be next on the continuum when the most appropriate accommodation is not feasible. An alternative (or “next-best”) accommodation may be implemented in the interim while the most appropriate accommodation is being phased in or put in place at a later date when resources have been put aside.

Determining the “most appropriate” accommodation is a separate analysis from determining whether the accommodation would result in undue hardship. If a particular accommodation measure would cause undue hardship, the next-best accommodation must be sought.

If there is a choice between two accommodations that equally respond to the person’s needs in a dignified way, then the accommodation provider is entitled to select the one that is less expensive or less disruptive to the organization.

13.4 The legal test

Section 11 of the *Code* prohibits discrimination that results from requirements, qualifications or factors that may appear neutral but that have an adverse effect on people identified by *Code* grounds. Section 11 allows an organization to show that a requirement, qualification or factor that results in discrimination is nevertheless reasonable and *bona fide* (legitimate). However, to do this, the organization must show that the needs of the person cannot be accommodated without undue hardship.[\[181\]](#)

The Supreme Court of Canada has set out a framework for examining whether the duty to accommodate has been met.[\[182\]](#) If *prima facie* discrimination (or discrimination on its face) is found to exist, a respondent must establish on a balance of probabilities that the standard, factor, requirement or rule

1. was adopted for a purpose or goal that is rationally connected to the function being performed (such as a job, being a tenant, or participating in the service)
2. was adopted in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal, and
3. is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.[\[183\]](#)

As a result of this test, the rule or standard itself must be inclusive of as many people as possible and must accommodate individual differences up to the point of undue hardship. This makes sure that each person is assessed according to their own personal abilities instead of being judged against presumed group characteristics.[\[184\]](#) The ultimate issue is whether the organization or individual providing accommodation has shown that they have done so up to the point of undue hardship.

The following non-exhaustive factors should be considered during the analysis:[\[185\]](#)

- whether the accommodation provider investigated alternative approaches that do not have a discriminatory effect
- reasons why viable alternatives were not put in place
- ability to have differing standards that reflect group or individual differences and capabilities
- whether the accommodation provider can meet their legitimate objectives in a less discriminatory way
- whether the standard is properly designed to make sure the desired qualification is met without placing undue burden on the people it applies to
- whether other parties who are obliged to assist in the search for accommodation have fulfilled their roles.

Similarly, section 17 of the *Code* also creates an obligation to accommodate, specifically under the ground of disability. Section 17 says that the right to be free from discrimination is not infringed if the person with a disability is incapable of performing or fulfilling the essential duties or requirements of attending to the exercise of the right. However, this defence is not available unless it can be shown that the needs of the person cannot be accommodated without undue hardship.

In employment, essential duties are the “vital” or “indispensable” aspects of someone’s job. In housing, the essential duties or requirements of being a tenant may include paying rent, maintaining one’s unit so it does not violate health and safety laws, and allowing other people to reasonably enjoy their premises. In the case of services, the “essential duties or requirements” of using a service will vary depending on the circumstances.

Section 17 means that someone cannot be judged incapable of performing the essential duties or requirements of a job, of being a tenant, or taking part in a service, without efforts to accommodate the person to point of undue hardship. Conclusions about a person’s inability to perform the essential duties should not be reached without actually testing the person’s ability.

Example: An employee experienced depression and anxiety. After coming back from a disability-related leave, he returned to modified duties. Even though his doctor cleared him to go back to work full-time, his employer placed him in a lower, part-time position at a lower pay rate. He was eventually terminated from his employment. The HRTO found that the employer failed to meet both its procedural and substantive duty to accommodate. The employer violated the *Code* when it based its decision to place the employee in a lower-paying position on its belief about the applicant’s ability to perform in the workplace, and continued to refuse to provide full-time work, even though this was supported by the employee’s doctor. The employer relied on its “non-expert opinion” and “stereotypes.” It incorrectly relied on assumptions that the employee could not handle the job pressures, and that his “performance would be unreliable” because of his past medical condition.^[186]

It is not enough for the organization to assume that a person cannot perform an essential requirement of a job, tenancy, service, *etc.* Rather, there must be an objective determination of that fact.^[187]

13.5 Forms of accommodation

Many different methods and techniques will respond to the unique needs of people with psychosocial disabilities. Accommodations may include modifying an organization’s:

- buildings and facilities
- policies and processes
- performance goals, conditions and requirements
- decision-making practices
- work, housing or service culture
- methods of communication.

Most accommodations are not expensive to provide, and if instituted widely, will benefit more than the person requesting the accommodation. Accommodation should be a non-coercive, co-operative process that both parties take part in. Accommodating someone because of their mental health disability or

addiction may also mean accommodating the side-effects associated with the person receiving treatment, such as medication for their disability, or accommodating symptoms of withdrawal.

Depending on a person's individual needs, examples of accommodation may include:

Employment

- modifying job duties
- making changes to the building (for example, building partitions in an open office space to increase someone's ability to concentrate)
- providing job coaching
- referring someone to an employee assistance program
- providing alternative supervision arrangements
- providing alternative ways of communicating with the employee
- allowing for more training, or training that is delivered in a different way
- modifying break policies (for example, to allow people to take medication on a more frequent basis)
- allowing short-term and long-term disability leave
- allowing a flexible work schedule
- job bundling[[188](#)]
- alternative work.[[189](#)]

Services

- providing multiple ways of contacting a service including by phone, in person and by regular and electronic mail
- providing extra time to a service user
- providing more breaks to a service user, where appropriate
- providing support for decision-making[[190](#)]
- making attendance requirements flexible, where possible, if non-attendance can be shown to be linked to a disability
- modifying rules around non-compliance with deadlines, if non-compliance can be shown to be linked to a disability[[191](#)]
- ensuring that service users have a quiet, comfortable space to sit
- considering someone's disability as a mitigating factor when addressing behaviour that would otherwise warrant imposing sanctions.

Housing

- helping someone fill out application forms (for example, for social or supportive housing)
- adjusting tenant selection criteria (such as using a guarantor when other information, such as credit history or rental history, is not available)
- modifying deadlines (such as deadlines to report income changes in social and supportive housing)
- modifying ways that information is communicated to tenants
- establishing a list of contact supports to call in emergency situations
- making structural modifications to units (such as sound-proofing)
- working with outside professionals to address someone's needs, if agreed to by the tenant.

A person's co-workers, as well as other tenants and service users, may have a role to play in helping with an accommodation. In these cases, it may be necessary for others to know that a person requires an accommodation to facilitate the accommodation. However, care must be taken to protect the person's privacy, to not reveal any more information than is necessary, to make sure that they are not "singled out,"

and that their dignity is respected.[\[192\]](#)

An accommodation provider should take steps to resolve any tension or conflict that may occur as a result of resentment on the part of others who are expected to help implement an accommodation. In some situations, tension may be linked to a lack of awareness about the nature of the person's disability or needs.

Keeping in mind that everyone experiences disability differently, accommodation providers are also required to educate themselves about the nature of disabilities as part of the procedural duty to accommodate,[\[193\]](#) and to dispel any misperceptions or stereotypes that employees, other tenants or service staff or users may have about people with disabilities[\[194\]](#) that could lead to inequitable treatment. Resolving these issues must be done in a way that most respects the person's dignity and privacy. One key approach to doing this is to implement anti-harassment and accommodation training. Otherwise, tension and conflict could lead to harassment or a poisoned environment for the person with the psychosocial disability.

13.6 Duties and responsibilities in the accommodation process

The accommodation process is a shared responsibility. Everyone involved should co-operatively engage in the process, share information and consider potential accommodation solutions. The person with a disability is required to:

- make accommodation needs known to the best of their ability, preferably in writing, so that the person responsible for accommodation can make the requested accommodation[\[195\]](#)
- answer questions or provide information about relevant restrictions or limitations, including information from health care professionals, where appropriate and as needed[\[196\]](#)
- take part in discussions about possible accommodation solutions
- co-operate with any experts whose assistance is required to manage the accommodation process or when information is needed that is unavailable to the person with a disability
- meet agreed-upon performance standards and requirements, such as job standards, once accommodation is provided
- work with the accommodation provider on an ongoing basis to manage the accommodation process
- discuss his or her disability only with persons who need to know.[\[197\]](#)

The accommodation provider is required to:

- be alert to the possibility that a person may need an accommodation even if they have not made a specific or formal request[\[198\]](#)
- accept the person's request for accommodation in good faith, unless there are legitimate reasons for acting otherwise
- get expert opinion or advice where needed (but not as a routine matter)
- take an active role in ensuring that alternative approaches and possible accommodation solutions are investigated,[\[199\]](#) and canvass various forms of possible accommodation and alternative solutions[\[200\]](#)
- keep a record of the accommodation request and action taken
- maintain confidentiality
- limit requests for information to those reasonably related to the nature of the limitation or restriction, to be able to respond to the accommodation request
- implement accommodations in a timely way, to the point of undue hardship
- bear the cost of any required medical information or documentation (for example, the accommodation provider should pay for doctors' notes, psychological assessments, letters setting out

accommodation needs, *etc.*).

Although the person seeking accommodation has a duty to assist in securing appropriate accommodation that will meet their needs, they are not responsible for originating a solution^[201] or leading the accommodation process. It is ultimately the accommodation provider's responsibility to implement solutions, with the co-operation of the person seeking accommodation. After accommodation is provided, the person receiving the accommodation is expected to fulfil the essential duties or requirements of the job, tenancy, or taking part in a service.

Contracting with a disability management company does not absolve an employer of responsibilities or liability if the accommodation process is not managed properly.^[202]

In employment, unions and professional associations are required to take an active role as partners in the accommodation process, share joint responsibility with the employer to facilitate accommodation, and support accommodation measures regardless of collective agreements, unless to do so would create undue hardship.^[203]

Generally, if the accommodation is required to allow the person to be able to take part in the organization without impediment due to disability, the organization must arrange and cover the cost of the accommodation needed,^[204] unless this would cause undue hardship.^[205]

Where a person requires assistance for their disability beyond what is required to access housing, employment or services equally, such as an assistive device for daily living, the organization would not generally be required to arrange or pay for it, but is expected to allow the person to access this type of accommodation without impediment.

Accommodating someone with a psychosocial disability may be hindered by a lack of appropriate mental health services in the community to identify someone's disability-related needs and limitations, or to assist with an accommodation. Waiting lists for psychiatrists' assessments, for example, can be extremely long. In these cases, accommodation providers should use the best information they have available to make the accommodation, or provide interim accommodation, taking into consideration how the person identifies their own needs, pending the assessment. Otherwise, people with mental health disabilities or addictions may be denied equal opportunity to housing, services or employment.

Requirements under the *Convention on the Rights of Persons with Disabilities* state that States Parties, including Canada, must take steps to make sure that people with disabilities are provided with accommodation (for example, to ensure equal access to justice, education and employment).^[206]

13.6.1 Duty to inquire about accommodation needs

In general, the duty to accommodate a disability exists for needs that are known. Organizations and persons responsible for accommodation are not, as a rule, expected to accommodate disabilities they are unaware of. However, in some circumstances, the nature of a psychosocial disability may leave people unable to identify that they have a disability, or that they have accommodation needs.^[207]

Accommodation providers should also be aware that people with psychosocial disabilities may be reluctant to disclose their disabilities, due to the considerable stigma surrounding mental health issues and addictions.^[208]

Accommodation providers must attempt to help a person who is clearly unwell or perceived to have a mental health disability or addiction by inquiring further to see if the person has needs related to a

disability and offering assistance and accommodation.[\[209\]](#)

Mental health disabilities and addictions should be addressed and accommodated in the workplace like any other disability. In some cases, an employer may be required to pay special attention to situations that could be linked to mental disability. Even if an employer has not been formally advised of a mental disability, the perception of such a disability will engage the protection of the *Code*.

Example: An employer is unaware of an employee's drug addiction but perceives that a disability might exist due to noticeable changes in his behaviour. The employer sees that the employee is having difficulty performing, and is showing obvious signs of distress that include repeated bouts of crying at his desk. If the employer imposes serious sanctions or terminates the employee for poor performance, without any progressive performance management and attempts to accommodate, these actions may be found to have violated the *Code*.[\[210\]](#)

Example: A new police constable was involved in a traumatic incident and started experiencing symptoms of post-traumatic stress disorder (PTSD). His symptoms led to a second incident, in which he over-reacted to a patron at a restaurant, whom he incorrectly perceived to be a threat. He acted in a way that led his supervisors to believe he could be experiencing PTSD. However, his supervisors did not appropriately accommodate him by offering assistance or suggesting that he seek help or take time off. Instead, he was eventually fired for misconduct. The HRTO ruled the police service's actions were discriminatory, and affirmed that an employer has both a procedural and substantive duty to accommodate a person's mental health disability, even when that person is not capable of recognizing that they have a disability, or expressing that they need help or accommodation.[\[211\]](#)

Where an organization is aware, or reasonably ought to be aware, that there may be a relationship between a disability and someone's job performance, or their abilities to fulfil their duties as a tenant or service user, the organization has a "duty to inquire" into that possible relationship before making a decision that would affect the person adversely.[\[212\]](#) This includes providing a meaningful opportunity to the employee, tenant or service user to identify a mental health disability or addiction as the reason for the inappropriate behaviour and to request accommodation. A severe change in a person's behaviour could signal that the situation warrants further examination.

Example: John has bipolar disorder. He has chosen not to disclose this information to his employer because he is concerned about how he would be treated at work if it were known that he had a mental disability. He experiences a crisis at work, followed by a failure to appear at work for several days. The employer is concerned about John's absence and recognizes that termination for failure to report to work may be premature. The employer offers John an opportunity to explain the situation after treatment has been received and the situation has stabilized. Upon learning that a medical issue exists, the employer offers assistance and accommodation.

Where a person exhibits inappropriate behaviour due to a psychosocial disability, employers, housing providers or service providers have a duty to assess each person individually before imposing measures

that may affect the person negatively. Such measures might include starting eviction proceedings, revoking subsidies, withdrawing services or imposing discipline in employment. Before sanctioning a person for misconduct or “unacceptable behaviour,” an organization must first consider whether the actions of the person are caused by a disability, especially where the organization is aware or perceives that the person has a disability.[\[213\]](#) The person’s disability must be a factor that is considered in determining what, if any, sanctions are appropriate, unless this causes undue hardship. Where the behaviour is not related to a disability, sanctions or discipline will generally apply, as usual.[\[214\]](#)

Accommodation providers should always inform employees, service users and tenants that a disability-related assessment (such as a medical assessment) or accommodation can be provided as an option to address job performance issues or issues relating to fulfilling one’s duties as a tenant or a service user.

In employment, for example, an accommodation provider may be able to ask for medical documentation to clear fitness to work, if there is sufficient objective evidence that there are legitimate reasons to be concerned.

Example: A receptionist has multiple crying spells at work, which is interfering with his ability to answer the phone. The manager expresses concern about his performance and behaviour, asks what he needs to do well at work, and offers accommodation in the form of an employee assistance program. The person does not disclose any disability-related needs, refuses offers of assistance, and continues to have crying spells that compromise his work. The manager then asks the person to seek a medical assessment to document any accommodation needs. The person declines. The manager starts a process of progressive performance management, meeting with the employee at points during the process to continue to offer accommodation and support.

The use of progressive performance management and progressive discipline as well as outside supports, such as employee assistance programs, makes sure that people with psychosocial disabilities have a range of opportunities to address concerns on an individualized basis before termination, removing a service or eviction is considered.

Once disability-related needs are known, the legal onus shifts to those with the duty to accommodate.[\[215\]](#) For example, counselling or referral through employee assistance programs (EAPs) could be the solution for an underlying disability that might be aggravated by workplace or personal stress.

13.7 Medical information to be provided

In the OHRC’s mental health consultation, questions were raised about the kind of information an accommodation provider can ask for from a person with a mental health issue or addiction. Many of these issues have been raised in the context of employment, but the issue may also arise in housing and services, depending on the circumstances. These issues have implications for the privacy of employees, tenants and service users. At the same time, organizations must have enough information to allow them to meet their duty to accommodate.

As stated above, the person seeking accommodation is generally required to advise the accommodation provider that they have a disability, and the accommodation provider is required to take requests for accommodation in good faith.[\[216\]](#) In employment, a person with a mental health disability does not have

to meet an onerous standard for initially communicating that a disability exists to trigger the organization's duty to accommodate. Organizations should limit requests for information to those reasonably related to the nature of the limitation or restriction, to assess needs and make the accommodation.

The type of information that accommodation seekers may generally be expected to provide to support an accommodation includes:

- that the person has a disability or a medical condition
- the limitations or needs associated with the disability
- whether the person can perform the essential duties or requirements of the job, of being a tenant, or of being a service user, with or without accommodation (this is more likely to be relevant in employment)
- the type of accommodation(s) that may be needed to allow the person to fulfill the essential duties or requirements of the job, of being a tenant, or of being a service user, *etc.*
- in employment, regular updates about when the person expects to come back to work, if they are on leave.

Example: An employee tells her employer that because of her disability, she needs to attend medical appointments every Wednesday morning for the next month. The employer accepts this information in good faith and provides flexible hours on those days as an accommodation.

Example: A tenant tells his landlord that he has been hospitalized due to a disability and cannot make his rent payment on time. Knowing that the person is in hospital, the landlord does not require confirmation that the tenant has a disability, but asks for information to indicate that his need is temporary in nature, and that he will be able to pay his rent once released in a few weeks' time. The person provides this information, and the landlord makes an allowance for the late payment.

There may be rare instances where there is a reasonable basis to question the legitimacy of a person's request for accommodation or the adequacy of the information provided. In such cases, the accommodation provider may request confirmation or additional information from a qualified health care professional to get the needed information.

Example: A large employer establishes a disability management program, because it finds that a significant number of employees experience mental health disabilities at some point in their working lives. Instead of expecting an employee to provide medical documentation to support a request for accommodation, it focuses on the person's own assessment of their needs and strengths. Only if the person's needs are complex, or the person is not taking part in the process, will additional information from a doctor be sought. Using this approach, the employer maintains good employee/employer relations, and employees come back to work sooner from disability leave.[\[217\]](#)

Where more information about a person's disability is needed, the information requested must be the least intrusive of the person's privacy while still giving the accommodation provider enough information to make the accommodation.

Example: A person (who has anxiety) enters a grocery store with a dog. For health and safety reasons, the store normally does not allow animals, but makes an exception for service animals. The store owner asks the person to leave, and the person states that his dog is a service animal. The store owner needs further verification, because the dog does not have any identifying markings to indicate that it is a service animal. The person is asked to provide medical documentation that he has a disability and that the disability is related to his need to use a service animal.[\[218\]](#)

In the rare case where an accommodation provider can show that it legitimately needs more information about the person's disability (as opposed to just the needs related to the disability) to make the accommodation, it could ask for the nature of the person's illness, condition, or disability[\[219\]](#) (for example, is it a mental disability, a learning disability or an addiction?), as opposed to a medical diagnosis.

Organizations are not expected to diagnose illness or "second-guess" the health status of an employee. An accommodation provider is not entitled to substitute its own opinion for that of medical documentation provided by a doctor.[\[220\]](#) Similarly, an organization must not ask for more confidential medical information than necessary because it doubts the person's disclosure of their disability based on its own impressionistic view of what a mental health disability or addiction disability should "look like."[\[221\]](#)

Example: A woman discloses to her co-workers that she experiences depression. Later, she presents a doctor's note verifying that she is being treated for a "medical condition" and indicating she requires a week off work. While the employer knows that the woman has said she is depressed, it is his view that she doesn't appear to be sad or distressed. As a result, he refuses to provide the accommodation unless she provides more information about her diagnosis. This could be a violation of her rights under the *Code*.

An accommodation provider should be able to explain why it is requesting particular information about a person's disability and how this relates to accommodating the person.

Generally, the accommodation provider does not have the right to know a person's confidential medical information, such as the cause of the disability, diagnosis, symptoms, or treatment,[\[222\]](#) unless these clearly relate to the accommodation being sought, or the person's needs are complex, challenging or unclear and more information is needed. In rare situations where a person's accommodation needs are complex, challenging or unclear, the person may be asked to co-operate by providing more information, up to and including a diagnosis.[\[223\]](#) In such situations, the accommodation provider must be able to clearly justify why the information is needed.

Example: A person is employed as an addictions counsellor for an abstinence-based drug treatment program. She requests an accommodation based on a "disability" to take time off work each week to attend "treatment." Based on recent observations of the person, and concerns about the person coming to work while inebriated, the employer wants to know from the employee's doctor if she has a substance dependence related to alcohol or drugs. The employer could argue that this request is legitimate, because of the potential negative impact of someone who appears inebriated working with clients with addictions. Knowledge of the employee's diagnosis will inform how the employer accommodates her (for example, by

providing her temporarily with a different position, or offering her time off to address her addiction).

However, wherever possible, an accommodation provider must make genuine efforts to provide needed accommodations without requiring a person to disclose a diagnosis, or otherwise provide medical information that is not absolutely necessary.

Where someone's needs are unclear, they may be asked to attend an independent medical examination (IME). However, there must be an objective basis for concluding that the initial medical evidence provided is inaccurate or inadequate. The IME should not be used to "second-guess" a person's request for accommodation.^[224] Requests for medical examinations must be warranted and take into account people's particular disability-related needs.^[225]

Example: A person with bipolar disorder is employed as a lifeguard, which is a "safety sensitive" position. He is hospitalized for a period of time and upon being released, his doctors indicate that he is fit to return to work. However, upon returning, he is evaluated and his supervisor notices that he cannot focus well, his reaction time is slow, and he makes repeated mistakes. In this case, the employer may be justified in asking the employee to attend an independent medical examination.^[226]

No one can be made to attend an independent medical examination, but failure to respond to reasonable requests may delay the accommodation until such information is provided, and may ultimately frustrate the accommodation process.

Mere assertions of symptoms, such as statements that the person experiences "stress," "psychological problems," "anxiety," "pain" or "feels depressed" – things that many people commonly experience – may not be enough to establish a mental disability within the meaning and protection of human rights legislation.^[227] If choosing to disclose such information in writing, individuals and doctors should make it clear that these symptoms relate to a disability.

Example: A person provides a doctor's note to their employer stating that they are experiencing "stress" and need a leave of absence. The employer may be entitled to ask for more information about whether the stress is linked to an underlying disability. If it is, the employer may ask about the person's restrictions, the expected date of return to work, and whether or not the person could still be present at work with an accommodation.

However, where these types of assertions exist alongside other indicators that the person is distressed or unwell, and where an employer, housing provider or service provider perceives that a person may have a disability, the *Code's* protection will be triggered.

Where a person provides disability-related information that an accommodation provider deems "insufficient" to enable it to provide accommodation, the accommodation provider cannot use its own failure to ask for additional information to deny the accommodation or to otherwise subject a person to negative treatment (for example, termination of employment, denial of service, *etc.*).^[228]

If the person does not agree to provide additional medical information, and the accommodation provider can show that this information is needed, it may be the case that the person seeking accommodation could

be found to not have taken part in the accommodation process and the accommodation provider would likely be relieved of further responsibility.[\[229\]](#)

13.8 Confidentiality

Maintaining confidentiality for people with mental health disabilities or addictions may be especially important because of the strong social stigmas and stereotyping that persist about such disabilities.

Example: In one case, an employer publicized confidential medical information when it posted private medical details about the applicant (including details of her depression) on the club's bulletin board. The tribunal found that this was discriminatory because it stigmatized her and poisoned her work environment.[\[230\]](#)

Documentation supporting the need for a particular accommodation should be provided only to the people who need to be aware of the information. For example, in employment, it may be preferable in some circumstances for information to be provided to the company's health department or human resources staff rather than directly to a supervisor, to further protect confidentiality.

Example: A person needs flexible scheduling due to a mental health issue when attending court. Documentation to support the accommodation is given only to the Court's accessibility co-ordinator. It may be sufficient for other court staff to know only that they need to provide the person with the accommodation.

A person's medical information should be kept separately from their personnel file, or any file associated with their tenancy or use of a service.

In cases where there are compelling circumstances affecting the health and safety of an individual, it may be necessary to disclose information about a person's health to others.[\[231\]](#) This should be done in accordance with privacy laws. More information about privacy laws and how they apply to public and private housing providers, employers and service providers can be found at the Office of the Information and Privacy Commissioner of Ontario and the Office of the Privacy Commissioner of Canada.[\[232\]](#)

Example: A health care practitioner at a university health centre or a college academic advisor would be allowed to disclose personal health information to a client's family or physician if there were reasonable grounds to believe it was necessary to do so to reduce the risk of suicide.[\[233\]](#)

13.9 Treatment

Seeking treatment,[\[234\]](#) such as medication or therapy, is a very personal issue, and speaks to the fundamental rights of people to decide what to do with their own bodies. All capable adults have the right to consent or refuse to consent to treatment.[\[235\]](#) This is protected under section 7 of the Canadian *Charter of Rights and Freedoms*.[\[236\]](#) A substitute-decision maker must consent to treatment for people who have been deemed incapable.[\[237\]](#)

13.9.1 Requiring treatment

Employers, housing providers and service providers should be aware that it may be a violation of a person's human rights to impose blanket conditions or requirements to:

- get treatment
- get a particular kind of treatment (*e.g.* medication, see a psychiatrist)
- monitor someone's treatment

as a condition of getting or maintaining housing, services, or employment, where this is not a *bona fide* or legitimate requirement of taking part in the organization. Housing providers, service providers and employers should be aware of imposing extra conditions on people with psychosocial disabilities that are not imposed on people with other types of disabilities, or people without disabilities, where these are not legitimate requirements.

Example: A university student seeks testing accommodation to accommodate her mental health issue. She is told that she must see her counsellor regularly as a condition of receiving this accommodation. Unless this condition can be shown to be a *bona fide* requirement of providing testing accommodation, this likely infringes her rights under the *Code*.

Example: A person with schizophrenia lived in shared accommodation, provided by a mental health agency. It offered onsite rehabilitative services, including in-house counselling. The housing agreement required him to, among other things, comply with his treatment regime, refrain from drug or alcohol abuse, and not engage in violent behaviour. The tenant stopped taking his medication, but continued to see his medical professional team regularly. Without warning to him and with no consultation with his medical professionals, the agency told him to leave the housing because he no longer fit the program criteria. During a legal hearing, the agency said that it had asked him to leave because he was no longer on medication, had a history of violence (from 10 years earlier), was deteriorating emotionally (*e.g.* hearing voices and talking in computer language) and had told the staff he was an alcoholic. Although the case was not analyzed according to the *Code*, the Court found that the housing provider had breached the housing agreement, and that there was no real urgency to remove the person from his home, given that there was no indication that he posed a risk to anyone.[\[238\]](#)

To show that a requirement to take part in treatment is reasonable and *bona fide*, an organization must meet the three-step legal test set out in the *Meiorin* decision. This includes showing that it would cause the organization undue hardship to accommodate the person using alternative methods.[\[239\]](#)

People must be assessed based on their individual needs. Requirements should not be based on blanket assumptions that just because someone has a psychosocial disability, he or she must seek treatment, or a particular kind of treatment. Imposing such requirements, where they are not *bona fide*, can contribute to the disadvantage that people with psychosocial disabilities face as a group that has historically faced lack of informed consent with respect to treatment.

At the same time, while a person has the right to refuse treatment for their psychosocial disability, there may be repercussions flowing from this decision.[\[240\]](#)

A person's refusal to get treatment, where the requirement to take part in treatment is reasonable and *bona*

fide, may affect an organization's ability to provide appropriate accommodation, and it may interfere with a person's ability to perform the essential duties of the job or the essential requirements attending the exercise of a right.

In some cases, an employer may require treatment as part of a "last chance agreement" where an employee has engaged in behaviour that has warranted termination. In such cases, these agreements are used as a condition of reinstatement.^[241] Where last chance agreements are put in place, they must be designed to take into account a person's individual circumstances.^[242] And, they should not contain provisions that impose penalties or higher standards for the person with a mental health or addiction disability (such as greater expectations for work performance) than those required of other similarly situated people.^[243]

13.9.2 Treatment and the duty to accommodate

Accommodating a person's mental health issue or addiction by modifying processes, procedures, requirements or facilities to allow equal access, is not the same as treating someone's mental health issue or addiction. An employer, housing provider or service provider is generally not expected (or qualified) to give counselling, treatment or medication to a person. For example, a landlord would not be expected to "counsel" their tenant with a mental health issue or provide social work services as part of their duty to accommodate.^[244]

In some circumstances, someone might choose to seek treatment and must be accommodated while doing so in housing, services or employment.

Example: A housing provider may be expected to allow building access, or provide information to third-party agencies (with the tenant's consent) that help a tenant with hoarding behaviours if these are affecting the organization.

Example: An employee starts a methadone treatment program. He works out an accommodation plan with his employer that allows him to collect his dose every day at a pharmacy during work hours and visit his doctor several times a week, provided he makes up the time at work. His employer is aware that he may have difficulty waking up during the acclimation stage of the program. His employer provides him with flexible work hours in the mornings to help him adjust.^[245] With these accommodations, the employee is able to fulfil the essential duties of his job.

There may be greater expectations on organizations that have a care-taking responsibility to a person (compared to other organizations that are more peripheral to people's lives) to arrange treatment for the person as a form of accommodation, providing the person agrees to this.

Example: Where mental disability-related behaviours are perceived to be interfering with a student's ability to take part in education, part of the school's duty to accommodate could be to seek consent to arrange for counselling through an available service, such as a school social worker, or make a referral to an outside agency. However, a fitness facility would not likely have this same duty.

[164] These policies are available on the OHRC's website at: www.ohrc.on.ca.

[165] See *Meiorin*, *supra*, note 67 at paras. 65-6 and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, 1999 CanLII 646, [1999] 3 S.C.R. 868, at paras. 22 and 42-45 ["Grismer"]. In *Gourley v. Hamilton Health Sciences* 2010 HRTO 2168 (CanLII), the adjudicator stated (at para. 8): "The substantive component of the analysis considers the reasonableness of the accommodation offered or the respondent's reasons for not providing accommodation. It is the respondent who bears the onus of demonstrating what considerations, assessments, and steps were undertaken to accommodate the employee to the point of undue hardship..."

[166] *Lane v. ADGA Group Consultants Inc.*, *supra*, note 60; *ADGA Group Consultants Inc. v. Lane*, *supra*, note 60 at para. 106.

[167] *Stevenson v. Canadian Security Intelligence Service* (2001), 41 C.H.R.R. D/433 (C.H.R.T.).

[168] *Ibid.*; *Gibbs v. Battlefords*, *supra*, note 1.

[169] *Duliunas v. York-Med Systems*, 2010 HRTO 1404 (CanLII).

[170] *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241.

[171] In *Eaton v. Brant County Board of Education*, *ibid.*, the Supreme Court of Canada stated that "integration should be recognized as the norm of general application because of the benefits it generally provides" (at para. 69). However, the Court found that in Emily Eaton's circumstances, segregated accommodation was in her best interests. The Court was of the view that this was one of those unusual cases where segregation was a more appropriate accommodation.

[172] Law Commission of Ontario, *A Framework for the Law as It Affects Persons with Disabilities*, *supra*, note 58 at 79.

[173] *Eaton*, *supra*, note 170 at para. 67.

[174] *Meiorin*, *supra*, note 67 at para. 68.

[175] *Ibid.*

[176] See www.ncsu.edu/project/design-projects/udi/center-for-universal-design/the-principles-of-universal-design/.

[177] *Supra*, note 71.

[178] This example is adopted from the approach by Great West Life Centre for Mental Health in the Workplace and Mental Health Works. See: www.workplacestrategiesformentalhealth.com/display.asp?11=177&12=207&13=229&d=207.

[179] See section 13.6.1 entitled "Duty to inquire about accommodation needs" for more information.

[180] *Quesnel v. London Educational Health Centre*, (1995), *supra*, note 22 at para. 16.

[181] The test for undue hardship is set out fully in the OHRC's *Policy and guidelines on disability and the duty to accommodate*, *supra*, note 16 and is discussed in greater detail in the "Undue hardship" section of this policy. The same standard applies to all grounds of the *Code*, including to people with mental health

disabilities or addictions.

[182] *Meiorin, supra*, note 67 at para. 54.

[183] See *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000*, [2008] 2 S.C.R. 561 for the Supreme Court of Canada's comments on what the third part of this test means, in a practical sense, in the context of a disability accommodation in the workplace.

[184] *Grismer, supra*, note 165 at para. 20.

[185] *Meioirin, supra*, at para. 65.

[186] *Duliunas v. York-Med Systems, supra*, note 169 at para. 74. Along the same lines, see *Ilevbare v. Domain Registry Group*, 2010 HRTO 2173 (CanLII), in which the HRTO states at para. 52: "The termination of a disabled employee's employment, in the midst of a medical leave of absence, is *prima facie* discriminatory and likewise demands an explanation." This suggests that *prima facie* discrimination will be found where an employee is terminated while on medical leave and the onus will be on the employer to provide a non-discriminatory reason for the termination.

[187] *Grismer, supra*, note 165; *Cameron v. Nel-gor Nursing Home* (1984), 5 C.H.R.R. D/2170 at D/2192 (Ont. Bd. of Inq.). See also *Crabtree v. 671632 Ontario Ltd. (c.o.b. Econoprint (Stoney Creek))*, [1996] O.H.R.B.I.D. No. 37 (QL) (Ont. Bd. Inq.).

[188] See *Vanegas v. Liverton Hotels International Inc.*, 2011 HRTO 715 (CanLII). See also *Briffa v. Costco Wholesale Canada Ltd.*, 2012 HRTO 1970 (CanLII).

[189] Human rights case law recognizes that employers have a duty to consider temporary and permanent alternative work for people who can no longer remain in their position even with accommodation. This duty includes diligently investigating accommodation and proposing job options that are within functional limitations. This is consistent with the Supreme Court of Canada decision in *Hydro-Quebec, supra*, note 183. The HRTO has identified a number of "best practices" related to this process. For example, in at least two cases the HRTO commented favourably on an employer's practice of canvassing vacant positions that match an employee's disability-related needs and qualifications and then "holding" or "protecting" those positions to make sure that they are not first filled by someone who does not require accommodation; see *Harnden v. The Ottawa Hospital*, 2011 HRTO 1258 (CanLII) and *Gourley v. Hamilton Health Sciences, supra*, note 165. Direct placement in an alternative position, without being required to succeed in a job competition, may be required: see *Fair v. Hamilton-Wentworth District School Board*, 2012 HRTO 350. But see also *Buttar v. Halton Regional Police Services Board*, 2013 HRTO 1578 (CanLII) and *Formosa v. Toronto Transit Commission*, [2009 HRTO 54 \(CanLII\)](#) for possible exceptions in specific circumstances. For more information about these and other accommodation strategies, see "Workplace Strategies for Mental Health," online: Great West Life, Centre for Mental Health in the Workplace <http://gwlcentreformentalhealth.com/display.asp?11=175&12=6&d=6#3> (retrieved April 24, 2014).

[190] See section 16 on "Consent and capacity" for more information.

[191] *Allen v. Ottawa (City)*, 2011 HRTO 344 (CanLII) and *Kelly v. CultureLink Settlement Services*, 2010 HRTO 977 (CanLII). Note that delays must be shown to be related to a psychosocial disability and must be made in good faith: see *Arcuri v. Cambridge Memorial Hospital*, 2010 HRTO 578 (CanLII) and *Vallen v. Ford Motor Company of Canada*, 2012 HRTO 932 (CanLII). Note also that in relation to adjudicators or in

the context of administrative tribunals, the “Doctrine of Judicial Immunity” may apply to protect adjudicators who are alleged to have not provided accommodation in the exercise of their decision-making and dispute resolution functions: see *Thomson v. Ontario Secondary School Teachers’ Federation*, 2011 HRTO 116 (CanLII); *Hazel v. Ainsworth Engineered*, 2009 HRTO 2180 (CanLII); *McWilliams v. Criminal Injuries Compensation Board*, 2010 HRTO 937 (CanLII).

[192] See section 13.8 on “Confidentiality” for more information.

[193] In *Lane v. ADGA Group Consultants Inc.*, *supra*, note 60, the Tribunal stated at para. 144: “The procedural dimensions of the duty to accommodate required those responsible to engage in a fuller exploration of the nature of bipolar disorder and to form a better informed prognosis of the likely impact of his condition in the workplace.”

[194] See *Dawson v. Canada Post Corp.*, *supra*, note 36 at paras. 243-245.

[195] See section 13.6.1 entitled “Duty to inquire about accommodation needs” for information on when an organization is expected to inquire about accommodation needs, even when a person may not have made a specific request.

[196] In *Baber v. York Region Dist. School Board (No. 3)* (2011), 71 C.H.R.R. D/293, 2011 HRTO 213 (CanLII), the HRTO found that even if the duty to accommodate was triggered, the employer had fulfilled its duty to accommodate because Ms. Baber failed to co-operate in the accommodation process by refusing reasonable requests for information that would confirm her needs. She consistently refused to provide the necessary medical information. The HRTO found that the employer did not breach its duty to accommodate her when it terminated her employment.

[197] This may include the manager, landlord, a union representative or human rights staff.

[198] See section 13.6.1 entitled “Duty to inquire about accommodation needs” for information on when an organization is expected to inquire about accommodation needs, even when a person may not have made a specific request.

[199] *Meiorin*, *supra*, note 67 at paras. 65-66.

[200] *Conte v. Rogers Cablesystems Ltd.*, (1999) 36 C.H.R.R. D/403 (C.H.R.T.); *Mazuelos v. Clark* (2000) C.H.R.R. Doc. 00-011 (B.C.H.R.T.); *Lane v. ADGA Group Consultants Inc.*, *supra*, note 60; *Krieger v. Toronto Police Services Board*, 2010, *supra*, note 23.

[201] *Central Okanagan School Dist. No. 23 v. Renaud*, [“*Renaud*”], [1992] 2 S.C.R. 970.

[202] *Puleio v. Moneris Solutions*, 2011 HRTO 659 (CanLII).

[203] The Supreme Court of Canada’s decision in *Renaud*, *supra*, note 201 sets out the obligations of unions. See also *Bubb-Clarke v. Toronto Transit Commission*, 2002 CanLII 46503 (HRTO).

[204] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

[205] However, human rights case law has not yet determined whether this would include the cost of treatment such as therapy, medication, *etc.*

[206] *Convention on the Rights of Persons with Disabilities*, *supra*, note 27 at Article 13(1), Article 24(2)(c), and Article 27(1)(i), respectively. “Reasonable accommodation” is covered under Article 5

generally.

[207] For example, people may experience a first episode of a mental health disability that renders them unaware that they are experiencing impairment. Also, denying the presence of a disability may be an aspect of having an addiction.

[208] The Supreme Court of Canada has recognized that the stigma and embarrassment of mental illness may discourage disclosure: *Battlefords and District Co-operative Ltd. v. Gibbs*, *supra*, note 1 at para. 31. See also: *Mellon v. Human Resources Development Canada*, 2006, *supra*, note 15 at para.100.

[209] See, for example, *Lane v. ADGA Group Consultants Inc.*, *supra*, note 60; *ADGA Group Consultants Inc. v. Lane*, *supra*, note 60; *Krieger v. Toronto Police Services Board*, 2010, *supra*, note 23; *Mellon*, *ibid.* at paras. 97-98; *Willems-Wilson v. Allbright Drycleaners Ltd.* (1997), 32 C.H.R.R. D/71 (B.C.H.R.T.); *Zaryski v. Loftsgard* (1995), 22 C.H.R.R. D/256 (Sask. Bd. Inq.).

[210] For more information about the accommodation responsibilities related to drug and alcohol disabilities, see the OHRC's *Policy on drug and alcohol testing*, *supra*, note 17.

[211] *Krieger v. Toronto Police Services Board*, 2010, *supra*, note 23.

[212] See, for example, *Lane v. ADGA Group Consultants Inc.*, *supra*, note 60; *Krieger v. Toronto Police Services Board*, 2010, *supra*, note 23; *Mellon v. Human Resources Development Canada*, *supra*, note 15; *Willems-Wilson v. Allbright Drycleaners Ltd.*, *supra*, note 209; *Zaryski v. Loftsgard*, *supra*, note 209.

[213] See *Krieger*, *ibid.*; *Zaryski*, *ibid.*; *Bowden v. Yellow Cab Co. (No. 2)* (2011), CHRR Doc. 11-0014, 2011 BCHRT 14; *Trask v. Nova Scotia (Correctional Services) (No. 1)* (2010), 70 C.H.R.R. D/21 (N.S. Bd. Inq.). In cases of misconduct, a person with a psychosocial disability would have to show a causal relationship between the misconduct and a psychosocial disability to engage the Code's protection; *Fleming v. North Bay (City)*, 2010 HRTO 355 (CanLII), *Walton Enterprises v. Lombardi*, 2013 ONSC 4218 (CanLII).

For example, in *Fleming*, the applicant did not establish a causal relationship between his addiction to alcohol and conduct for which he was suspended and ultimately fired (there were eight criminal convictions between 1992 and 2007, including several threats or acts of violence against women and an incident in an arena where he allegedly threw a stick over the glass).

[214] See *Fleming* and *Lombardi*, *ibid.* and *Wright v. College and Association of Registered Nurses of Alberta* (Appeals Committee), 2012 ABCA 267.

[215] In *Morris v. British Columbia Railway Co.* (2003), 46 C.H.R.R. D/162, 2003 BCHRT 14, a tribunal found that if performance problems related to a disability are a reason for the termination, the disability is a factor in the termination. Knowing of the claimant's depression, the employer should have considered whether the disability was affecting his performance and sought further medical assessment. It failed to do so. The case also confirms that an employer can't "blind itself to its observations of an employee's behaviour...All relevant factors must be considered by an employer dealing with an employee with a disability, including medical evidence, its own observations, and the employee's own comments and concerns." (at para. 238).

[216] *Ibid.*; *Yeats v. Commissionaires Great Lakes*, 2010 HRTO 906 at paras. 47-8 (CanLII).

[217] This example is based on CIBC's disability management program; see: Andrea Davis, "DM Diagnostic" (1 March 2006), available online at: www.benefitscanada.com/news/dm-

[diagnostic-8220](#) (Retrieved: May 3, 2012).

[218] People with mental health or addiction issues who use service animals to assist with them with disability-related needs (such as anxiety) are also protected under the definition of “disability” in section 10 of the *Code*. Service animals for people with psychiatric disabilities or addictions do not have to be trained or certified by a recognized disability-related organization. However, where it is not immediately obvious that the animal is performing this service, a person must be able to show evidence (such as medical evidence, or from a similar service provider) that they have a disability and that the animal assists with their disability-related needs. Service providers and others who receive such documentation should not use their own assumptions and observations to second-guess this verification. See *Allarie v. Rouble*, 2010 HRTO 61 (CanLII).

[219] In *Providence Care, Mental Health Services v. Ontario Public Service Employees Union, Local 431*, 2011 CanLII 6863 (ON LA), the arbitrator distinguishes the “nature of disability” from a “diagnosis” by saying at para. 33: “However, I continue to be of the view that nature of illness (or injury) is a general statement of same in plain language without an actual diagnosis or other technical medical details or symptoms. Diagnosis and nature of illness are not synonymous terms, but there is an overlap between them, such that a description of the nature of an illness or injury may reveal the diagnosis and in others it will not.”

[220] See *Duliunas v. York-Med Systems*, *supra*, note 169; *Devoe v. Haran*, *supra*, note 35; and, *Eagleson v. Co-operative Homes Inc. v. Théberge*, 2006, *supra*, note 23.

[221] See *Morris v. British Columbia Railway Co.*, *supra*, note 215; *Russell v. Indeka Imports Ltd.*, 2012 HRTO 926 (CanLII). But also see *Oak Bay Marina Ltd. v. British Columbia (Human Rights Tribunal) (No. 2)* (2002), 43 C.H.R.R. D/487, 2002 BCCA 495.

[222] In *Simpson v. Commissionaires (Great Lakes)*, 2009 HRTO 1362 (CanLII), a case dealing with a physical disability, the HRTO stated at para. 35:

For the purposes of a request for employment accommodation, generally the focus should be on the functional limitations of the employee’s condition (capacities and symptoms) and how those functional aspects interact with the workplace duties and environment.

Consequently, an employer need not be informed of the specific cause of the employee’s condition or the exact diagnosis in order to be put on notice that an employee has disability-related needs requiring accommodation.

See *Wall v. The Lippé Group*, [2008 HRTO 50 \(CanLII\)](#), 2008 HRTO 50 (CanLII); *Mellon v. Canada (Human Resources Development)*, [2006] C.H.R.D. No. 2. See also *Ilevbare v. Domain Registry Group*, *supra*, note 186.

[223] *Complex Services Inc. v Ontario Public Service Employees Union, Local 278*, 2012 CanLII 8645 (ON LA) and *Canadian Bank Note Company, Limited v International Union of Operating Engineers, Local 772*, 2012 CanLII 41234 (ON LA). Also, accommodation providers should keep in mind that diagnoses for certain mental health issues can be difficult to get, may change over time and may result in vastly different symptoms and experiences for different people. Therefore, a general statement that a person has a disability and identifying what a person needs in relation to their functional limitations may be more helpful to the accommodation process than a diagnosis. See *Mellon v. Human Resources*

Development Canada, supra, note 15 at para. 99: “An individual with a disability and, in particular, somebody with a mental disability may not know the exact nature and extent of that disability at the time they are experiencing the symptoms. In such circumstances, we cannot impose a duty to disclose a conclusive medical diagnosis.” Some people may present with a set of symptoms, but without a specific diagnosis. See *Ball v. Ontario, supra*, note 154.

[224] See *Canadian Union of Public Employees, Local 831 v. Brampton (City)* [2008] O.L.A.A. No. 359 (QL).

[225] The Canadian Human Rights Tribunal has found that requests for a person with autism to undergo a psychiatric examination after asking for a leave of absence because of workplace harassment was in itself a form of harassment. It stated, “Indeed, the evidence shows that the Respondent remained deaf to the pleas of Ms. Dawson who did not want to see a physician whom she did not know and who knew nothing about autism, of her union representatives who expressed concern and consternation about Ms. Dawson having to submit to a medical examination by a Canada Post designated physician but more importantly, of her treating physician who stated that she was very concerned that this could provoke a serious emotional reaction from Ms. Dawson. ... However well-intended Canada Post management was in seeking a medical evaluation, the Tribunal finds that, in the present circumstances, the general behaviour of those Canada Post employees who were involved in the medical evaluation process constitutes harassment.” See *Dawson v. Canada Post Corp.* [2008] C.H.R.D. No. 41 at paras. 216 and 219.

[226] See, for example, *Oak Bay Marina Ltd. v. British Columbia, supra*, note 221.

[227] See, for example, in *Crowley v. Liquor Control Board of Ontario*, 2011 HRTO 1429 (CanLII), in which the Tribunal stated at para 62: “A bare assertion of ‘stress’ and other symptoms by an applicant is not sufficient to establish a mental disability within the meaning and protection of the *Code*.” [63] Rather, consistent with the decision in *Skytrain, supra*, I agree that in order to meet the definition of mental disability within the meaning and protection of the *Code*, where the case does not involve an allegation of discrimination on the basis of perceived disability, there needs to be a diagnosis of some recognized mental disability, or at least a working diagnosis or articulation of clinically-significant symptoms, from a health professional in a report or other source of evidence that has specificity and substance.”

Similarly, in *Matheson v. School District No. 53 (Okanagan Similkameen)*, [2009 BCHRT 112 \(CanLII\)](#), 2009 BCHRT 112, the BC Human Rights Tribunal dismissed a claim where a person revealed to her employer that she experienced “stress” when seeking an accommodation. The claimant did not disclose enough information to enable her employer to fulfill its duty to accommodate, and the Tribunal found that her refusal to disclose her disability was fatal to her claim.

[228] *Alberta (Human Rights and Citizenship Comm.) v. Federated Co-operatives Ltd.* (2005), 53 C.H.R.R. D/496, 2005 ABQB 58, *Duliunas v. York-Med Systems, supra*, note 169 at para. 77 and *Pridham v. En-Plas Inc.*, 2007 HRTO 8 (CanLII).

[229] See *Baber v. York Region District School Board, supra*, note 196 and *C.U.P.E., Local 831 v. Brampton (City), supra*, note 224.

[230] *Knibbs v. Brant Artillery Gunners Club, supra*, note 65.

[231] In Ontario, the *Occupational Health and Safety Act*, R.S.O. 1990, c.O.1, ss. 32.0.5(3), (4) includes workplace harassment and violence prevention provisions that lay out obligations for employers to assess workplace risk. Employers must also warn workers about the threat of violence from individuals that the

worker could encounter during the course of their work, including from other workers, if the person has a history of violent behaviour and there is a risk that another worker could experience physical injury. However, employers and supervisors must not disclose more personal information about the risk than is necessary to protect the worker from physical injury.

[232] See: www.priv.gc.ca/index_e.asp and www.ipc.on.ca/english/Home-Page/. Different privacy laws apply to different organizations – for example, private housing providers may be covered by *Personal Information Protection and Electronic Documents Act (PIPEDA)*, and are only permitted to disclose personal health information under certain circumstances (see Section 7(3)).

[233] Example taken from: Office of the Information and Privacy Commissioner of Ontario, Fact Sheet: “Disclosure of Information Permitted in Emergency or Other Urgent Circumstances,” Number 7, July 2005, p.2.

[234] The *Health Care Consent Act*, S.O. 1996, Ch.2, Schedule A states in s. 2(1) that “treatment” means anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health-related purpose, and includes a course of treatment, plan of treatment or community treatment plan, but does not include:

- (a) the assessment for the purpose of this Act of a person’s capacity with respect to a treatment, admission to a care facility or a personal assistance service, the assessment for the purpose of the *Substitute Decisions Act, 1992* of a person’s capacity to manage property or a person’s capacity for personal care, or the assessment of a person’s capacity for any other purpose,
- (b) the assessment or examination of a person to determine the general nature of the person’s condition,
- (c) the taking of a person’s health history,
- (d) the communication of an assessment or diagnosis,
- (e) the admission of a person to a hospital or other facility,
- (f) a personal assistance service,
- (g) a treatment that in the circumstances poses little or no risk of harm to the person,
- (h) anything prescribed by the regulations as not constituting treatment.

[235] In *Fleming v. Reid, supra*, note 61, the Ontario Court of Appeal affirmed a competent person’s right to determine what should be done with his or her own body, and the right to be free from non-consensual medical treatment. As well, the case found that if a person becomes incompetent, his or her prior wishes about treatment that were expressed while he or she was competent cannot be overridden. The Court made the comparison that people in a psychiatric facility have just as much right to refuse to take a doctor’s advice or medication as patients who have physical illnesses. Hospitalizing someone against their will does not automatically make them unable or incompetent to make treatment decisions. The Court recognized that at paragraph 34 that, “Mentally ill persons are not to be stigmatized because of the nature of their illness or disability; nor should they be treated as persons of lesser status or dignity. Their right to personal autonomy and self-determination is no less significant, and is entitled to no less protection, than that of competent persons suffering from physical ailments.” A person is capable with respect to a treatment, admission to a care facility or a personal assistance service if they are able to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service, as the

case may be, and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision: see the *Health Care Consent Act*, S.O. 1996, c. 2, Sched. A. s. 4(1).

[236] Under section 7 of the Canadian *Charter of Rights and Freedoms*, all people have the right to life, liberty and security of the person and cannot be deprived of these rights except according to the principles of fundamental justice.

[237] See the *Health Care Consent Act*, S.O. 1996, Ch.2, ss. 10(1)(b) and 20.

[238] *Bobyk-Huys v. Canadian Mental Health Assn.*, [1994] O.J. No. 1347 (Gen Div.).

[239] See section 13.4 entitled “The legal test” for more information.

[240] *Alladice v. Honda of Canada*, 2010 HRTO 1453 (CanLII). See also *Buttar v. Halton Regional Police*, *supra*, note 189.

[241] Last chance agreements can also take place in housing and service situations.

[242] In *Capital Health Authority v. Alberta Union of Provincial Employees, Local 054 (K.M. Grievance)*, [2006] A.G.A.A. No. 40, it was stated: “...last chance agreements often are a suitable mechanism to address workplace problems brought about by addiction, and where the employment relationship has by then been greatly damaged but is possibly still salvageable. However, obviously, great care should be taken to draft the agreement to reflect achievable results through a realistic recovery program.” [para 49].

[243] *Ibid.*; *Edmonton (City) v. Amalgamated Transit Union, Local 569 (Ezeard Grievance)*, [2003] A.G.A.A. No. 71. See also *Ontario Human Rights Commission v. Gaines Pet Foods Corp.* (1994) 16 O.R. (3d) 290.

[244] In Justice LeSage’s report on the eviction of Al Gosling from the Toronto Community Housing Corporation and his subsequent death, one recommendation made was, “TCHC must better communicate its mandate. It is a landlord, not a direct provider of social work services, but it must assist tenants to identify, locate and contact appropriate support services.” The Honourable Patrick J. Lesage, Report on the eviction of Al Gosling and the Eviction Prevention Policy of Toronto Community Housing Corporation. May 2010, at page 84; available online at: www.torontohousing.ca/webfm_send/6512/1

[245] Adapted from Open Society Foundations, *Harm Reduction at Work, A Guide for Organizations Employing People Who Use Drugs*, December 2010, pp. 18-19. New York: Open Society Foundations, p. 26-27.