

# Complex Employee Statuses



Presented by

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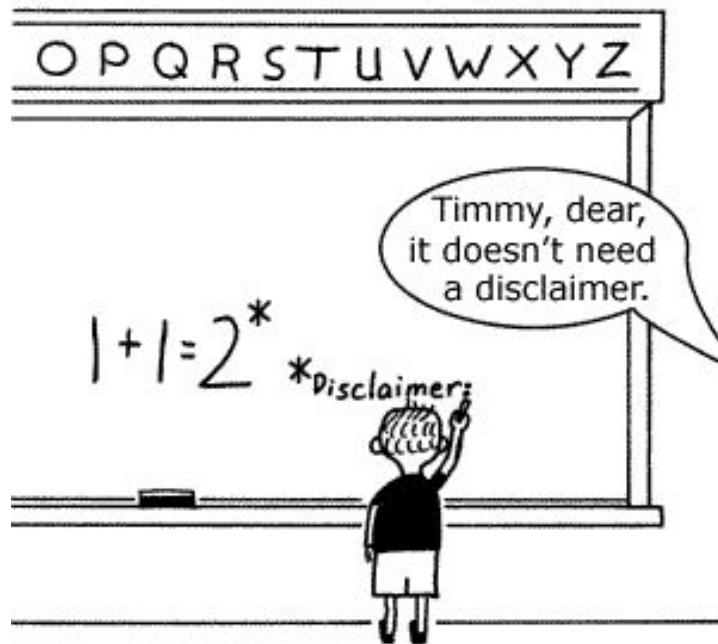


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Timmy  
doesn't need  
a disclaimer  
but we do...



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# Presentation Roadmap

- What is the Duty to Accommodate
- Asking for Medical Information
- Frustration of Contract
- Job Abandonment

# Employee Entitlements to Medical Leave

- Employment Standards Legislation
  - Ontario: 3 unpaid sick days per year
- Human Rights Code
  - Ontario: s. 17
- Workers Compensation Legislation
- Common Law
- Employment Agreement and Employer Policies

# What is the Duty to Accommodate?





# What is the Duty to Accommodate?

- Legal duty imposed on employers
- Arises out of ss. 17 & 24 of the Ontario Human Rights Code
- Begins with a request from an employee (or where the employer reasonably ought to know an accommodation may be required)
- Requires some modification in the workplace: change of hours, shifts, work assigned, equipment

# S. 17 of the Code

## Disability

17 (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.

## Accommodation

(2) No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

## Determining if undue hardship

(3) In determining for the purposes of subsection (2) whether there would be undue hardship, a tribunal or court shall consider any standards prescribed by the regulations.

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# Undue Hardship

- Core duties
- Safety
- Cost

# Key Concepts

- Accommodation is an individualized process
- The process involves a dialogue between employee and employer (and union, if applicable)

# Asking for Medical Information



# Medical Information

- Employers are entitled to medical information reasonably necessary to support the right to a medical leave
- Employers are not entitled to know the specific diagnosis
- Employer must determine the extent of an employee's limitations or suitability of accommodation request
  - The limitations the disability places on the employee's physical or mental capacity
  - The prognosis for recovery
  - The expected timeline for the employee's recovery and return to work
- Document, document, document!

# Frustration of Contract

**CONTRACT OF  
EMPLOYMENT**

The Employee

Last Name:

Name:

Address:

Phone:



# Long Term Absences & Frustration of Contract

- Frustration occurs when:
  - an unexpected event prevents the parties from performing the basic obligations of the employment contract/relationship
- Clear medical evidence illustrating permanent incapacity or inability to RTW in a reasonable amount of time is **necessary**



# LTD and Frustration of Contract

- Effect of LTD on frustration depends on:
  - Terms of the LTD plan
  - Facts of situation
- Employer can still claim frustration when employee is receiving LTD benefits
- LTD benefits may require increased tolerance for absence

# Claiming Frustration

- Rare, unpredictable and difficult to prove
- Fact-driven analysis dependent on medical evidence

# Job Abandonment



EXIT ↓

# Job Abandonment

- Applied when an employee's actions reveal:
  - A clear and unequivocal intention to no longer be bound by the employment contract
- Treated as a resignation
- Case of abandonment must be properly 'built'

# Job Abandonment is Not...

- A brief absence whether explained or unexplained
- Meeting silence with silence

# Job Abandonment & Human Rights

- Abandonment often involves protected grounds that employers must be sensitive to
- Often engages the need for accommodation
- Failure to participate in the accommodation process may lead to a finding of abandonment

# Practical Tips for Abandonment Claims

- Attempt to understand before claiming abandonment
- Attempt to contact the employee
  - Try again, and again
- Set reasonable deadlines
- Inform employee of the consequences of failing to respond

# Key Takeaways

- Employers must accommodate medically-based employee absences to the point of undue hardship
- If there is no reasonable prospect of a return based on the medical prognosis, an employer may terminate based on frustration of contract
- The onus is on employers to prove job abandonment and the bar for frustration of contract is HIGH
- Employees are required to participate in the accommodation process
- Document, document, document!



# Questions?

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