

LEGAL OBLIGATION TO ACCOMMODATE AN EMPLOYEE'S FAMILY NEEDS

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Human rights laws across the country require employers to accommodate employees with needs that are based on the protected grounds of discrimination (e.g., disability, religion, sex, etc.). This includes accommodation based on family status.

While the law on accommodating family obligations is still developing, this article provides an overview of the approach that the courts and tribunals are taking with respect to accommodating family needs.

Protected Grounds

There are several prohibited grounds of discrimination that are relevant to a consideration of the duty to accommodate family needs:

1. Family status
2. Marital and same-sex partnership status
3. Pregnancy, child birth and breastfeeding

These grounds are not mutually exclusive and an employee may argue that he or she is being discriminated against based on a combination of grounds. For example, a woman with childcare needs might argue that her employer's refusal to accommodate her constitutes discrimination based on both family status and sex, since women often carry the larger burden with respect to childcare responsibilities.

Human rights laws dictate that employers must accommodate family related needs short of undue hardship, which is a very high standard.

Accommodation Requests

An employee with family obligations may need accommodation with respect to:

- meeting his or her child or elder care needs
- taking care of a sick, disabled or injured family member
- attending to court or school proceedings with respect to a child, e.g., attending at Young Offenders Court or a school disciplinary hearing
- mourning the death of a spouse or other family member
- a divorce or separation and any child custody disputes
- seeking shelter from an abusive spouse or partner
- infertility treatments

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- pregnancy related illnesses, including miscarriage
- adopting a child; and
- breastfeeding.

Unfortunately, the duty to accommodate an employee's family needs is a very political area that meets with much resistance. Indeed, it seems that employers will more readily accommodate a disability or religious need than a family need. As the Ontario Human Rights Commission has stated, this resistance may be related to the fact that:

There are numerous stereotypes about a mother with a young child, particularly about her ability to continue working. For example, some believe that a mother who has an infant at home may miss work more often than employees who do not have a young family, or may be less committed to their employer or to their career. Others may feel that hiring or keeping an employee who may become pregnant or who is on maternity leave costs the company too much.

One of the problems with this area is that family needs, such as childcare, often arise with greater frequency than disabilities or religious needs and many managers are concerned about the slippery slope – if they accommodate one employee, they will have to accommodate everyone.

In addition, an employee's colleagues may be resentful of measures taken to accommodate the employee. For example, parents who work shift work may be upset that their colleagues are allowed to work straight days to meet their childcare needs. Single, childless employees are also often resentful and complain that they must carry a greater share of the load, while those with children get special considerations.

In addition negative attitudes about things like breastfeeding or mothers working outside the home persist, which compounds the problem. For example, some people view breastfeeding as distasteful and are uncomfortable when a woman breastfeeds in public or breastfeeds an older child.

There are also those who believe that accommodating family needs actually hurts women because it creates the kinds of resentment outlined above.

Some people also argue that the extension to a one year pregnancy/parental leave has ultimately harmed women, because it makes it even less likely that an employer will hire women of child bearing age.

The courts pay scant attention to these types of concerns, on the theory that doing so would merely perpetuate the discrimination.

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Accommodation Measures

One of the most commonly sought after accommodation measures is time – either time away from work or a flexible work schedule. Employees may also request full participation in a disability benefit plan or request modified duties or a transfer to a different position.

Time Off

Occasionally, all an employee needs are additional break times. For example, a pregnant employee may need to take more frequent washroom breaks or a new mother may need additional breaks to breastfeed her baby or express milk or may need a longer pregnancy/parental leave if she is experiencing problems breastfeeding.

While these would appear to be fairly simple accommodation measures, a surprising number of managers resist them. They do so at their own peril – human rights administrators have clearly stated that these measures are an appropriate means of accommodating pregnant or breastfeeding employees.

Managers may also be required to tolerate employee lateness, if that lateness is related to a protected ground. For example, a woman undergoing fertility treatments or an employee with an ill child or parent may be late for work on occasion. Unless such lateness creates an undue hardship on the employer, it must be tolerated.

Employees with family needs may also be absent from work more often. For example, an employee may need to be absent from work because of a divorce hearing or a death in the family.

Flexible Work Schedules

Accommodating family obligations may also mean providing flexible work schedules to employees. This may include offering straight day shifts, part time work, job sharing, compressed work weeks, working from home, split shifts or allowing employees to refuse overtime work.

There are two cases of note that consider flexible work schedules when the need for the change is based on childcare issues. In both cases, the female employees had worked three rotating shifts but wanted to avoid the requirement to work a night shift when they return from their maternity leaves. In the first case the arbitrator ruled that the employer did not need to accommodate the individual by eliminating the night shift. In the second case the Canadian Human Rights Commission said that the employer did have to accommodate the employee by not requiring her to work the night shift.

In reviewing the case before it, the Canadian Human Rights Tribunal said:

A parent must...carefully weigh and evaluate how they are best able to discharge their obligations as well as their duties and obligations within the family. They are

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therefore under an obligation to seek accommodation from the employer so that they can best serve those interests.

We can therefore understand the obvious dilemma facing the modern family wherein the present socio-economic trends find both parents in the work environment, often with different rules and requirements. More often than not, we find the natural nurturing demands upon the female parent place her invariably in the position wherein she is required to strike this fine balance between family needs and employment requirements.

It is this Tribunal's conclusion that the purposive interpretation to be affixed to [the family status protections under the Canadian Human Rights Act] is a clear recognition within the context of "family status" of a parent's right and duty to strike that balance coupled with a clear duty on the part of an employer to facilitate that balance...to consider any lesser approach to the problems facing the modern family within the employment environment is to render meaningless the concept of "family status" as a ground of discrimination.

These two cases have similar facts, in that both women were seeking accommodation by being freed of the requirement to work rotating shifts, yet opposite conclusions were reached. There are several factors that may have contributed to the differences in these cases:

- a) The first case involved a grievance filed under a collective agreement, whereas the second case was filed under the Canadian Human Rights Act. Generally speaking, human rights tribunals tend to apply broader, more liberal interpretations to discrimination and accommodation.
- b) In the first case, the grievor had not really tried to help herself and simply expressed her belief that she would not be able to find satisfactory care. The second woman, on the other hand, had diligently tried to find care.
- c) In the second case, the woman's husband also worked shift work and was unable to offer support (unlike the first woman, whose husband's excuse was that he needed to go jogging in the morning).

Modified Duties

Another accommodation measure that may be required is modified duties, which sometimes arises with respect to pregnant women.

Female police officers have faced this situation with respect to active duty while pregnant. In several cases the employer was found liable for failing to provide light duties to female officers. In one case, a female officer was told that she could take a part-time civilian position at a much lower salary, which would mean she would have to resign from the force. In another case, two female officers were sent home on unpaid leaves of absence. In both of these cases the employers' argument that it would create an undue hardship to

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provide modified duties failed, since both employers had provided modified duties in the past for male employees with medical disabilities.

Benefits

The Supreme Court of Canada has held in one case that pregnancy leave should be included in employee benefit plans, without having to be categorized as an illness, accident or disability. In that decision, the employer had an accident and sickness plan that excluded pregnant women from benefits during a seventeen week period shortly before and immediately after the birth of the child. During that period of time, the exemption from coverage was absolute, regardless of the reason for the absence (e.g., even if the woman was suffering from a non-pregnancy related illness she would be denied coverage). The court held that discrimination based on pregnancy was discrimination based on sex and, therefore, that the benefit plan resulted in sex discrimination. It also held that women who are absent for health reasons related to their pregnancy should not be treated differently from employees who are absent for other health-related reasons.

The Ontario Divisional Court has also held that sick leave benefits should be available to a woman who has chosen not to take a pregnancy/parental leave under the Ontario *Employment Standards Act*. In that case, the employee preferred disability benefits because of the low level of compensation provided by Employment Insurance benefits.

Conclusion

Accommodating family obligations is an expanding area that will, no doubt, continue to develop as greater numbers of parents seek support from their employers and managers in balancing their work and home lives. It will be interesting to watch this area of the law progress.

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Lauren is a lawyer and human resource advisor with the Mississauga firm of Bernardi Human Resource Law. Lauren's advisory, training and educational services help managers direct their human resources in a strategically sound and legally appropriate manner. She is an accomplished and entertaining speaker on management and human resource issues.

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