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Employing Disability: Deconstructing Insufficient Protections for "Non-Mainstream" Disabilities

Abstract

This paper surveys leading and recent case law on disability with a specific focus on "non-mainstream" disabilities. Such disabilities are categorized according to the difficulty with which they can be medically diagnosed, their transient nature, and their fluctuations in severity. Jurisprudence on the duty to accommodate has been developed through what law professor Judith Mosoff classifies as "mainstream" disabilities. That is, disabilities that are better understood by employers and medical professionals, and to which the duty to accommodate more easily applies. In contrast, "non-mainstream" disabilities challenge the conventional understanding of the duty to accommodate. Standard accommodation practices do not necessarily assist persons with "non-mainstream" disabilities. As a result, "non-mainstream" disabilities are infrequently accommodated. Relevant human rights legislation is rendered ineffective because the threshold for undue hardship is easier for employers to meet in the context of "non-mainstream" disabilities. This leaves persons with these disabilities without recourse to statutory remedy. The lack of accommodation in the workplace further ostracizes vulnerable groups and reinforces inequality instead of addressing it.

This article is helpful for readers seeking to learn more about:

- disability, accommodation, "non-mainstream" disabilities, discrimination, human rights, equality

Topics in this article include:

- employment law, labour law, disability law, fibromyalgia, chronic fatigue syndrome

Authorities cited in this article include:

- British Columbia (Public Service Employee Relations Commission) v British Columbia Government Services Employees' Union (Meiorin Grievance), [1999] 3 SCR 3
- Honda Canada Inc v Keays, 2008 SCC 39

Keywords

disability, accommodation, "non-mainstream" disabilities, non-mainstream disability, duty to accommodate, human rights, equality, employment law, labour law, disability law, fibromyalgia, chronic fatigue syndrome, workplace law

EMPLOYING DISABILITY: DECONSTRUCTING INSUFFICIENT PROTECTIONS FOR “NON-MAINSTREAM” DISABILITIES

MAIA ABBAS*

INTRODUCTION

The duty to accommodate recognizes the rights of persons with disabilities to equal treatment in employment as individuals without disabilities. Accommodation imposes a duty on employers to do everything possible up to the point of undue hardship.¹ Unfortunately, ideal accommodation, where every individual has what he or she needs to perform equally to every other individual, i.e., substantive equality, is difficult to attain. In the case of “non-mainstream disabilities,” even adequate accommodation, where every individual is given the same thing to improve performance, i.e., formal equality, may be unattainable. Persons with disabilities or conditions that are poorly understood may be subject to more scrutiny in the workplace leading to greater difficulty in obtaining appropriate accommodation or any accommodation at all. Unfortunately, employers struggle to find appropriate accommodation for persons with “non-mainstream” disabilities.

Law professor Judith Mosoff defines “non-mainstream” disabilities as “[d]isabilities that are poorly understood, or do not fit neatly into a medical model.”² The term “non-mainstream” disabilities is problematic because it creates a binary opposition between mainstream and “non-mainstream” disabilities. Disabled persons are routinely separated from the able-bodied population in society through a complex process of “othering,” wherein the separation of disabled persons is the effect of implicit or explicit conduct of the dominant group of able-bodied persons. Persons with “non-mainstream” disabilities are isolated further given the frequent lack of understanding, acceptance, or even acknowledgement concerning their disabilities. This construction of difference distinguishes between persons with disabilities and persons

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¹ *Commission scolaire regionale de Chambly v Bergevin*, [1994] 2 SCR 525 at para 51.

² Judith Mosoff, “Lost in Translation?: The Disability Perspective in *Honda v Keays* and *Hydro-Québec v Syndicat*” (2009) 3 McGill JL & Health 137 at 141 [Mosoff].

with “non-mainstream” disabilities, and creates unique, real-world inequalities for persons with “non-mainstream” disabilities.

This paper investigates the accommodation of chronic-fatigue syndrome (CFS), fibromyalgia, personality disorders, post-traumatic stress disorder (PTSD), obsessive-compulsive disorder (OCD), epilepsy, and extreme allergies. The paper is structured in three parts. The first part articulates contemporary conceptions of disability in opposition to able-bodied society. The second part provides an overview of accommodation and undue hardship. The third part addresses issues specific to “non-mainstream” disabilities including unique accommodation, extreme accommodation, and the accommodation of innocent absenteeism. This paper takes a practical viewpoint: it argues that current legal protections for persons with disabilities, and accommodations for persons with “non-mainstream” disabilities, are insufficient.

One difficulty in accommodating such disabilities arises from the current state of medical knowledge with respect to diagnosis, symptoms, and treatment. CFS is characterized by “debilitating fatigue that affects function and is worsened by activity, not relieved by rest, and causes substantial disability.”³ Patients diagnosed with CFS are often subjected to scrutiny by their employers and physicians, particularly because doctors can only diagnose CFS after ruling out other medical conditions like depression and thyroid issues.⁴ Fibromyalgia is recognized by its three key symptoms: fatigue, sleep disturbance, and diffuse widespread musculoskeletal pain.⁵ Similar to CFS, fibromyalgia cannot be definitively diagnosed until other potential causes are ruled out.⁶

Personality disorders describe a range of conditions that typically result in interpersonal difficulties and erratic behaviour.⁷ PTSD is a psychological condition that can occur as a normal response after a traumatic event.⁸ PTSD is associated with depressive symptoms, anxiety, interrupted sleep, social issues, and inappropriate behaviour.⁹ Although PTSD is not a disability, it has been included here because it is a condition that is difficult to accommodate in the workplace and is akin to “non-mainstream” disabilities. Furthermore, PTSD has been accepted as a medical condition and a disability by the Ontario Human Rights Tribunal.¹⁰ OCD is a chronic condition that continues indefinitely and is characterized by obsessive thoughts and compulsive

³ Jeremy C Gibson, Bozena Smith & Christopher D Ward, “Chronic Fatigue Syndrome” (2011) 4:12 *InnovAIT* 691 at 691.

⁴ *Panacci v Treasury Board (Canada Border Services Agency)*, 2011 PSLRB 2 [*Panacci*].

⁵ Vani Velkuru & Keith Colburn, “Fibromyalgia” [Feb 2009] *Primary Care Reports* 1 at 5.

⁶ *Ibid* at 3 and 6.

⁷ *Hydro-Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d’Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43 [*Hydro-Québec*].

⁸ *Kreiger v Toronto Police Services Board*, 2010 HRTO 1361 [*Kreiger*].

⁹ *Ibid*.

¹⁰ *Ibid*.

behaviour.¹¹ Epilepsy is marked by unexpected seizures; however, these can be controlled by medication.¹² Extreme allergies arise when the individual cannot come into contact with particular substances without experiencing severe and possibly life-threatening reactions.¹³ Extreme allergies may not be subject to the same level of scrutiny in order to prove the existence of the disability to co-workers and employers. However, individuals suffering from extreme allergies may have to provide extensive information regarding their condition. The previously outlined conditions are classified as “non-mainstream” disabilities here because their relevance in recent case law illustrates the difficulties of accommodation with respect to conditions that are not easily classified or treated.

In order to determine whether an employer has satisfied its duty to accommodate, the context must be analysed.¹⁴ The goal of accommodation is to ensure that an employee who is able to work can do so.¹⁵ However, for both mainstream and “non-mainstream” disabilities, the struggle to attain substantive rather than merely formal equality continues.¹⁶ “Non-mainstream” disabilities in particular often require accommodation that reaches the threshold of undue hardship, and as a result neither formal nor substantive equality is attained.

I. CONCEPTUALIZING DISABILITY

Definitions and understanding of disability are integral to how disability is managed in society. Prevalent approaches to disability appear at odds with “non-mainstream” disabilities because these approaches permit, and possibly encourage, high levels of scrutiny and discrimination. This trend of discrimination contributes to the insufficiency of legislation that purports to protect persons with disabilities. Numerous models set out how disability is conceived. These models are loosely categorized into two groupings: individually based and socially based conceptions of disability.¹⁷ The two prevalent models for understanding disability are the medical model and the economic model.¹⁸ The medical model “emphasized the individual pathology of the

¹¹ *Toronto District School Board v Elementary Teachers’ Federation of Ontario*, 2013 CanLII 67042 (Ont LA) [*School Board*].

¹² *Canadian Mental Health Association v Ontario Public Service Employees Union, Local 133*, 2012 CanLII 7443 (Ont LA) at para 156 [*Mental Health Assn.*].

¹³ *London Health Sciences Centre v Ontario Nurses’ Association*, 2013 CanLII 21422 (Ont LA) [*London Health*].

¹⁴ *Central Okanagan School District No. 23 v Renaud*, [1992] 2 SCR 970 at para 19 [*Central*].

¹⁵ Mosoff, *supra* note 2 at 147, citing *Hydro-Québec*, *supra* note 7 at 14.

¹⁶ Marcia H Rioux & Fraser Valentine, “Does Theory Matter? Exploring the Nexus between Disability, Human Rights, and Public Policy” in Dianne Pothier & Richard Devlin, eds, *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (Vancouver: UBC Press, 2006) 47 at 50 [Rioux].

¹⁷ *Ibid* at 50-51.

¹⁸ Michael Lynk, “Disability and work: The Transformation of the Legal Status of Employees with Disabilities in the Canadian Workplace” in R. Echlin & C Paliare eds *Law Society Special Lectures 2007: Employment Law* (Toronto: Irwin Law, 2008) 189 at 191 [Lynk].

disability itself, and . . . [it] proposed an agenda of prevention, cure, containment, pain management, amelioration, and palliation.”¹⁹ The economic model is similarly individually-based but instead focuses on the costs of the disability, or, in other words, the limitation of the disability on the “employee’s repertoire of productive capacities, abilities and skills.”²⁰ These approaches place the burden of the disability on the individual, a privatization that “justifies the limitation of state intervention to prevention and comfort.”²¹ Furthermore, these models focus on curing or rehabilitating disabling conditions, a fact that is problematic in dealing with “non-mainstream” disabilities because many do not have a cure. Socially based models of disability, on the other hand, understand disability to be a social product rather than something “wrong” with the individual.²² The socio-political model sees disability as a consequence of social injustice in the form of discrimination and stigma towards disablement.²³ Yet, despite the socio-political model’s acceptance by the Supreme Court of Canada²⁴ and within various legal protections, discrimination remains problematic across Canada.²⁵

Individually based models of disability are especially problematic in understanding “non-mainstream” disabilities. The medical model defines disability as an individual health pathology for which society’s goal is the elimination or cure of the disability through medical means.²⁶ A wide array of disabilities do not fit into the medical model because they are incurable, unpredictable, or lack a biological mechanism. This includes disorders that are poorly understood by the general population or even medical professionals; classification as a “non-mainstream” disability, however, is notably unrelated to prevalence.²⁷

The *Canadian Charter of Rights and Freedoms* (*Charter*) provides protection and equality for persons with mental or physical disabilities.²⁸ However, doubts have arisen with regards to “the importation of s.15 *Charter* principles into statutory human rights jurisprudence” because “the Supreme Court of Canada has issued numerous s.15 *Charter* decisions that are widely regarded as failing to deliver on the promise of

¹⁹ *Ibid* at 191.

²⁰ *Ibid* at 191.

²¹ Rioux, *supra* note 16 at 51.

²² *Ibid* at 51.

²³ Lynk, *supra* note 18 at 191.

²⁴ See *Québec (Commission des droits de la personne et des droits de la jeunesse) v Montreal (City)*, [2000] 1 SCR 665 at para 77.

²⁵ Lynk, *supra* note 18 at 193.

²⁶ Marcia Rioux & Fraser Valentine, “Does Theory Matter? Exploring the Nexus between Disability, Human Rights and Public Policy” in D. Pothier & R. Devlin eds, *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (Vancouver: UBC Press, 2006) 47 at 49.

²⁷ Mosoff, *supra* note 2.

²⁸ *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

substantive equality.”²⁹ The Ontario *Human Rights Code (Code)* provides, “Every person has the right to equal treatment with respect to services, goods and facilities, without discrimination because of...disability.”³⁰ “Non-mainstream” disabilities are protected under the *Code*, as physical disabilities, mental disorders, or conditions of mental impairment, depending on their nature.³¹ The *Code* also states, “No tribunal or court shall find a person incapable unless it is satisfied that the needs of a person cannot be accommodated without undue hardship.”³²

The *Code* clearly entitles employees with “non-mainstream” disabilities to protection from discrimination. Professor Gwen Brodsky has suggested that, “[I]f human rights commitments were implemented with seriousness by governments at all levels, and if tribunals and courts adjudicated human rights legislation purposively and substantively to provide clear-sighted direction to public and private actors, much could be done to improve the lives of people with disabilities.”³³ Thus, the *Code* is perceived as having at least the capacity, if not the reality, of providing protection for persons with disabilities. The regulations made under the *Accessibility for Ontarians with Disabilities Act (AODA)* require that employers inform their employees of the disability support available to them, including accommodations.³⁴ The regulations also outline what is required when developing individual accommodation plans, return to work plans, and performance management,³⁵ with an aim to protecting employee privacy.³⁶

These regulations should serve as safeguards for employees with disabilities, yet small organizations are excluded from many of these regulations due to their limited resources. Despite legislative protections, some persons with disabilities remain unprotected by the *AODA* and do not know, or do not believe, that they warrant protection from discrimination by the *Code*. Employees with disabilities have been shown to have lower levels of pay, less access to benefits, and greater job insecurity than able bodied employees.³⁷ Workers in precarious part-time or temporary arrangements—categories which often include workers with disabilities—are less likely to perceive discrimination in the workplace or to ask an employer for workplace accommodation and are more likely to have requests for job modifications denied.³⁸

²⁹ Gwen Brodsky, Shelagh Day & Yvonne Peters, *Accommodation in the 21st Century*, (March, 2012), online: Canadian Human Rights Commission <http://www.chrc-ccdp.gc.ca/proactive_initiatives/default-eng.aspx> at 31 [Brodsky].

³⁰ *Human Rights Code*, RSO 1990, c H.19, s 1 [*Code*].

³¹ *Ibid*, s 10(1).

³² *Ibid*, s 17(2).

³³ Brodsky, *supra* note 29 at 1.

³⁴ O Reg 191/11, s 25(1).

³⁵ *Ibid*, ss 28-30.

³⁶ *Ibid*, s 28.

³⁷ Kim M Shuey & Emily Jovic, “Disability Accommodation in Nonstandard and Precarious Employment Arrangements” (2013) 40:2 *Work and Occupations* 174 at 179 [Shuey].

³⁸ *Ibid*, at 193.

Given that persons with “non-mainstream” disabilities are likely more marginalized than persons with mainstream disabilities, these legislative protections are insufficient.

II. OVERVIEW OF ACCOMMODATION AND UNDUE HARDSHIP

The duty to accommodate is consistent with two general rules in labour law: employers must respect the fundamental rights of their employees, and employees must do their work.³⁹ To accommodate employees with disabilities, employers may need to adjust employee’s workspace or duties to enable them to complete the assigned work.⁴⁰ The duty to accommodate is intended to encourage employers to determine how “employment requirements can be adapted to the particular needs of the employee’s disability (through modifying the workplace and the tools of production).”⁴¹ Disability is unique as against other statutorily protected grounds for three reasons: first, there is great individual variation among the disabilities and in the experience of persons with disabilities; second, disabilities can be highly changeable, for better or worse for reasons within the individual or due to outside causes such as medical or technical innovation; third, accommodation itself is more complex because it will need to be more creative, diverse, individually tailored, and, ultimately, more costly.⁴² These unique considerations for accommodation of mainstream disabilities are likely to be of even greater concern for the accommodation of “non-mainstream” disabilities.

The duty to accommodate is measured against the individual’s pathology. As a result, accommodation must be periodically reassessed when an employee’s condition changes.⁴³ To satisfy the duty to accommodate, the employer and employee must both meet certain obligations.⁴⁴ The employer has a procedural obligation to inquire as to whether it is realistic to accommodate the employee as well as a substantive obligation to make a genuine effort to assess the possibility of accommodation.⁴⁵ The employer is “required to make every reasonable effort, short of undue hardship, to accommodate an employee with a disability.”⁴⁶ The employee has an obligation to ask for accommodation, provide sufficient information to establish that the accommodation is required, and participate in the development of the accommodation plan.⁴⁷ However, an employee cannot be expected to understand what information is required for the employer to address the duty to accommodate; rather, the employer must elicit the

³⁹ *Hydro-Québec*, *supra* note 7 at para 19.

⁴⁰ *Ibid* at para 16.

⁴¹ Michael Lynk, “Accommodating Disabilities in the Canadian Workplace” (1999) 7 CLEJ 183 at 184.

⁴² *Ibid* at 185-186.

⁴³ *County of Brant v OPSEU, Local 256*, 2013 ONSC 1955 at para 22.

⁴⁴ *Mental Health Assn.*, *supra* note 12 at para 100.

⁴⁵ *Lane v ADGA Group Consultants Inc*, 2007 HRTO 34 at para 96.

⁴⁶ Lynk, *supra* note 41 at 191.

⁴⁷ *Mental Health Assn.*, *supra* note 12 at para 149.

relevant information from the employee.⁴⁸ The employer is also permitted to require physical testing of the employee, to follow-up with the employee's doctor and to request an Independent Medical Examination if appropriate.⁴⁹ The employee and employer must fulfill their obligations to ensure they satisfy the duty to accommodate. Employers are not required to do everything possible to accommodate employees with disabilities—they must accommodate up to the point of undue hardship.⁵⁰ Undue means disproportionate, improper, inordinate, excessive, or oppressive, and in some way significant.⁵¹ Some hardship is to be expected, but only undue hardship can discharge the duty of accommodation.⁵²

Factors Contributing to a Finding of Undue Hardship

The test for undue hardship is not total unfitness for work. It is a complex analysis that considers multiple factors.⁵³ In *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*,⁵⁴ the Supreme Court of Canada provided a non-exhaustive list for evaluating whether undue hardship is met. These factors are: the financial costs of accommodation; disruption of the collective agreement; problems with the morale of other employees; interchangeability of the work-force and facilities; size of the employer's operation; and safety concerns. Some of these factors are more significant when determining if the accommodation of "non-mainstream disabilities" reaches undue hardship. Tension between seniority rights and a disabled employee's request for accommodation, particularly with regard to promotions and disruption of the collective agreement, are typically not significant concerns. Problems of employee morale are also unlikely to meet the threshold for undue hardship. Costs, size of the employer's operation, and safety concerns are more frequently deciding factors when determining undue hardship for "non-mainstream" disabilities.

Proving that financial costs of accommodation constitute undue hardship is a high threshold⁵⁵ to the point that the cost must amount to extreme financial distress for the employer. To determine whether cost constitutes undue hardship "the costs of accommodation should be compared with the resulting benefits."⁵⁶ While accommodations for "non-mainstream" disabilities can be expensive, costs rarely meet this threshold except in small or newly developed operations. Smaller operations may

⁴⁸ *School Board*, *supra* note 11 at para 94.

⁴⁹ *Harnden v The Ottawa Hospital*, 2011 HRTO 1258 at para 45 [*Harnden*].

⁵⁰ *Hydro-Québec*, *supra* note 7 at para 12.

⁵¹ *Council of Canadians with Disabilities v Via Rail*, 2007 SCC 15 at para 140.

⁵² *Central*, *supra* note 14 at 984.

⁵³ *Hydro-Québec*, *supra* note 7 at para 18.

⁵⁴ [1990] 2 SCR 489 at 521.

⁵⁵ *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 at para 41.

⁵⁶ *Lynk*, *supra* note 41 at 196.

not have the necessary resources to support accommodation, and employers are not obligated to create piecemeal positions to accommodate an employee.⁵⁷ Moreover, employers need not overhaul working conditions for an employee.⁵⁸ In a small operation with limited flexibility, creating a new position or altering working conditions may be the only route to accommodation, but the duty of accommodation does not require employers to take such drastic measures. Conversely, larger employers tend to be unsuccessful when claiming undue hardship on the basis of cost.

Safety concerns may constitute undue hardship when accommodating “non-mainstream” disabilities. With certain positions, no accommodation is possible due to safety concerns for the employee or fellow employees. For example, a properly medicated person with epilepsy can often work without significant accommodation in most workplaces; however, accommodating positions such as pilots, surgeons, firefighters, and certain construction jobs imposes undue hardship due to safety concerns for the employee and other people, and therefore cannot be accommodated.⁵⁹ In addition, severe allergies cannot be accommodated in certain workplaces.

In *London Health*, an emergency room nurse with a life-threatening latex allergy was not accommodated in a hospital because patients could not be screened for latex before coming into contact with the employee; thus, any attempts to accommodate this nurse could not ensure her safety.⁶⁰ In *Buttar v Halton Regional Police Services Board*, a probationary constable with OCD repeatedly failed to conduct an appropriate search of offenders out of fear of contamination, thereby compromising his own safety as well as that of other employees.⁶¹ This police constable could not be accommodated in his role without endangering others; thus accommodating his disability amounted to undue hardship and his employment was terminated.⁶² Safety concerns may constitute undue hardship for “non-mainstream” disabilities depending on the occupation and the nature of the disability.

“Non-mainstream” disabilities can be even more challenging to accommodate, particularly if the employer lacks an understanding of the disability. This often occurs where the employee’s health is unpredictable and if the only appropriate accommodation amounts to undue hardship. Current law suggests employers need not accommodate employees with disabilities where accommodation imposes undue hardship. This is more likely to arise when “non-mainstream” disabilities are non-specific, difficult to treat, or have unpredictable prognoses.⁶³ “Non-mainstream”

⁵⁷ *Lafrance v Treasury Board (Statistics Canada)*, 2009 PSCRB 113 at para 113.

⁵⁸ *Zaytoun v Canadian Food Inspection Agency*, 2010 PSLRB 35 at para 36.

⁵⁹ *Mental Health Assn.*, *supra* note 12 at para 156.

⁶⁰ *London Health*, *supra* note 13.

⁶¹ *Buttar v Halton Regional Police Services Board*, 2013 HRTO 1578.

⁶² *Ibid.*

⁶³ Mosoff, *supra* note 2 at 149.

disabilities are therefore more onerous on employers because they often require challenging accommodations that are unique or extreme.

III. ACCOMMODATING PERSONS WITH “NON-MAINSTREAM” DISABILITIES

Skepticism and discrimination surrounding “non-mainstream” disabilities presents a significant barrier to adequate accommodation. Professor Judith Mosoff observed that these barriers establish a “hierarchy of disabilities,” where “non-mainstream” disabilities are considered less legitimate than mainstream disabilities.⁶⁴ Although some difficulties exist with regards to the accommodation of mainstream disabilities, employers, compensation officials, and physicians do not subject these claims to the same level of scrutiny as “non-mainstream” disabilities.⁶⁵ Persons with “non-mainstream” disabilities are often forced to repeatedly establish the veracity of their disabilities to a level beyond that of persons with mainstream disabilities. To satisfy heightened skepticism, employers often impose unduly strenuous monitoring systems or request that employees undergo multiple assessments.⁶⁶ Employers may hold negative perceptions regarding persons with disabilities and view them as “unable to work at a normal pace, capable of only limited tasks, and more expensive for the company.”⁶⁷ It follows that employers may be less willing to comply with accommodation requests.⁶⁸ Fellow employees and unions may share these perceptions and resist supporting accommodation for employees with “non-mainstream” disabilities.⁶⁹

For instance, in *Honda Canada Inc v Keays*,⁷⁰ an employee with CFS was required to provide a doctor’s note verifying that every absence was a result of his disability. Neither the court nor the employer viewed this as discriminatory, despite the fact that other employees were not required to continually prove the existence and effect of their disabilities.⁷¹ Accommodating “non-mainstream” disabilities can be more onerous for employers than accommodating mainstream disabilities. The nature of the “non-mainstream” disability may interfere with the widely accepted obligations of the employer and employee flowing from the duty of accommodation. Employers must be aware of the barriers persons with “non-mainstream disabilities” face and craft creative accommodation solutions for them. Furthermore, employers must be aware of the issues related to accommodating persons with “non-mainstream disabilities” because of the likelihood that these persons are less secure in their employment than those with

⁶⁴ *Ibid* at 141.

⁶⁵ Mosoff, *supra* note 2 at 142.

⁶⁶ *Ibid*.

⁶⁷ Shuey, *supra* note 37 at 181.

⁶⁸ *Ibid*.

⁶⁹ *Pinder v Ontario Secondary School Teachers Association*, 2010 HRTO 1863.

⁷⁰ *Honda Canada Inc v Keays*, 2008 SCC 39 [*Honda*].

⁷¹ *Ibid*.

mainstream disabilities. Employer awareness and support contributes to a workplace that potentially improves employee health and morale, especially for “non-mainstream” disabilities exacerbated by stress. These practices may circumvent the need for increased accommodation and avoid reaching the undue hardship threshold.

When an employee feels that he or she has not been accommodated up to the point of undue hardship, two steps must be undertaken. First, the employee must establish both evidence of a disability requiring accommodation, and that the employer failed to accommodate. Second, an employer will try to defend against this claim by “prov[ing] reasonable accommodation of the employee’s disability.”⁷² “Non-mainstream” disabilities challenge both of these steps. Employees may not recognize the need for accommodation and thus fail to ask for it,⁷³ particularly when handling socially stigmatized psychological conditions such as PTSD or personality disorders that may be denied accommodation due to the employer's lack of understanding and the associated stigma. The employee may be unable to recognize or articulate his or her needs or to provide medical documentation. Although the duty to accommodate does not impose a positive duty to inquire, an employer’s recognition of the presence of a disability will trigger the duty to accommodate.⁷⁴ If the employer is skeptical about the existence or degree of disability, which is common for “non-mainstream” disabilities, the employer may be less likely to explore or develop accommodations, particularly unique ones.⁷⁵

An employer’s skepticism can also result in unnecessary testing and intrusive requests for information beyond what is appropriate.⁷⁶ Even with the best intentions, an employer who does not understand the disability may request inappropriate information or actions from the employee that are unduly onerous.⁷⁷ In *DeSouza v 1469328 Ontario Inc.*,⁷⁸ a tennis club asked its employee with epilepsy to disclose his condition and explain what to do if he suffered a seizure to anyone he interacted with on a regular basis. The adjudicator deemed this request unduly onerous and a violation of the employee’s privacy rights.⁷⁹ Courts and tribunals have recognized the potential difficulties in accommodating “non-mainstream” disabilities but only in the context of insurance and worker’s compensation.⁸⁰ Increasing recognition of the unique barriers to

⁷² Lynk, *supra* note 41 at 192.

⁷³ Kreiger, *supra* note 8 at para 133.

⁷⁴ *Ibid.*

⁷⁵ *Metsala v Falconbridge*, [2001] 39 CHRR 153.

⁷⁶ *Panacci*, *supra* note 4 at para 49.

⁷⁷ *DeSouza v 1469328 Ontario Inc.*, 2008 HRTO 23 at para 42 [*DeSouza*].

⁷⁸ *Ibid.* at para 41.

⁷⁹ *Ibid.*

⁸⁰ *Battlefords and District Co-op v Gibbs*, [1996] 3 SCR 566; *Martin v Alberta (Workers’ Compensation Board)*, 2012 ABCA 248.

accommodation facing persons with “non-mainstream” disabilities is a crucial step towards substantive equality for persons with disabilities in the workplace.

Nevertheless, accommodation for all disabilities may never accomplish more than formal equality. In *Meiorin*, the Supreme Court adopted the observation that accommodation does not require an “examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful, and rewarding for the many diverse groups of which our society is composed.”⁸¹ Instead, “the right to be free from discrimination is reduced to a question of whether the ‘mainstream’ can afford to confer proper treatment on those adversely affected, within the confines of its existing formal standard. If it cannot, the edifice of systemic discrimination receives the law’s approval.”⁸² Despite the fact that this approach to accommodation was rejected in *Meiorin*, it seems to be the current standard for “non-mainstream” disabilities, as discussed below, as well as for mainstream disabilities.

Unique Accommodation Required for “Non-Mainstream” Disabilities

“Non-mainstream” disabilities often require a unique accommodation plan. Employee and employer must work together to develop a creative and adaptable solution specific to the employee’s disability. In the case of disabilities that are poorly understood, such as epilepsy or environmental sensitivities, the employer may be justified in asking for medical information about the disability and disclosure of the employee’s personal experiences.⁸³ However, the employer must be aware of the line between unjustified and justified requests for information. Unjustified requests are unduly intrusive, meaning that the information requested is not relevant to proof of the disability or to development of the accommodation plan.

Uniquely tailored solutions are ideal when dealing with mood disabilities. For example, in *Harnden v Ottawa Hospital*, a registered nurse with PTSD, depression, and a personality disorder suffered from emotional issues.⁸⁴ Her doctor recommended limiting in-patient bedside nursing, which the Ontario Human Rights Tribunal ruled was an appropriate restriction that did not unduly interfere with her work.⁸⁵

Standard accommodation may also be appropriate for some “non-mainstream” disabilities. In *Sketchley v Canada (Attorney General)*, an employee with CFS and fibromyalgia benefitted from common accommodations, which included reduced

⁸¹ *British Columbia (Public Service Employee Relations Commission) v British Columbia Government Services Employees’ Union (Meiorin Grievance)*, [1999] 3 SCR 3 at para 41 [*Meiorin*] citing Day & Brodsky, “The Duty to Accommodate: Who will Benefit?” (1996), 75 Can Bar Rev 433; see Brodsky *supra* note 29 at 6-7 for further discussion of formal equality in this context.

⁸² *Ibid* at para 42.

⁸³ *DeSouza*, *supra* note 77 at para 38; *Ottawa Hospital v Canadian Union of Public Employees, Local 4000*, [2010] OLAA No 368 [*Ottawa Hospital*].

⁸⁴ *Harnden*, *supra* note 49.

⁸⁵ *Ibid*.

working hours, an ergonomic keyboard, and back support, though she ultimately took full-time leave due to her deteriorating health.⁸⁶ Some “non-mainstream” disabilities fluctuate in severity. This requires employer patience and understanding for facilitating accommodation. Persons with CFS or fibromyalgia frequently return to work without accommodation but require accommodation periodically throughout their employment. Employers should be supportive and aware of the fluctuating health needs of these employees.⁸⁷ Some “non-mainstream” disabilities require unique and extreme accommodation and employers frequently rely on undue hardship to deny accommodation.

Unique Accommodations Required for “Non-Mainstream” Disabilities

Extreme accommodations present several challenges to employers. Extreme accommodations may reach the undue hardship threshold, or the disability may limit the employee to the extent he or she cannot complete assigned work. In *Hydro-Québec*, the employer was faced with accommodating a personality disorder. The union’s expert recommended that the employer periodically change the employee’s work environment by appointing a new immediate supervisor and new co-workers in order to manage interpersonal tensions.⁸⁸ The arbitrator found this constituted undue hardship, particularly given the fact that previous accommodations including “modification of her workstation, part-time work, [and] assignment to a new position” were provided.⁸⁹ The Supreme Court of Canada upheld the arbitrator’s decision.⁹⁰ Employers are expected to be flexible when accommodating employees, but employers are not obligated to change the employee’s working conditions in a fundamental manner.⁹¹

In some circumstances the necessary accommodation may prevent the employee from completing his or her work. In *Peel Regional Police Services Board v Peel Regional Police Assn. (Compensation Grievance)*,⁹² a police constable’s doctor restricted him from confrontational and emotional situations due to his PTSD. The employer was skeptical and unsure how to accommodate the officer given the nature of police work. Further medical testing found the restriction from stressful situations was unnecessary and the arbitrator was not required to make a decision concerning whether the recommended accommodation constituted undue hardship. However, given that shielding a police officer from confrontation would bar nearly all of his required duties (except perhaps administration), the employer likely would have been able to establish undue hardship.

⁸⁶ *Sketchley v Canada (AG)*, 2005 FCA 404 at para 7 [*Sketchley*].

⁸⁷ *Panacci*, *supra* note 4 at para 101.

⁸⁸ *Hydro-Québec*, *supra* note 7 at para 6.

⁸⁹ *Ibid* at para 17.

⁹⁰ *Ibid* at para 23.

⁹¹ *Ibid* at paras 13 and 16.

⁹² [2011] OLAA No 314.

In cases of “non-mainstream” disabilities, doctors’ recommendations vary depending on the specific job at issue, on the symptoms, and on severity of the disability. Medical practitioners often disagree on the appropriate treatment or even the existence of the disability. This is especially true for disabilities without a direct biological test such as CFS and fibromyalgia. In *Peel*, the employee’s personal physician diagnosed the employee with PTSD and recommended a restriction from emotional and confrontational situations. The employer’s physician examined the employee and recommended no restrictions, although he upheld the PTSD diagnosis.⁹³ It is conceivable that the difference in recommendations and diagnoses emerged from different medical opinions rather than the specific needs of the employee. Where medical opinions vary to large degrees, an employer might deliberately retain a doctor known to dismiss or under-diagnose “non-mainstream” disabilities or to treat them more conservatively.⁹⁴ The employee in *Honda* claimed his employer used a biased doctor, but the Supreme Court of Canada dismissed this argument, perhaps due in part to the overly strong and combative language of the trial judge.⁹⁵ Nonetheless, many employees with “non-mainstream” disabilities must contend with unsupportive doctors selectively chosen by their employers. As such, employers should be prohibited from deliberately retaining medical professionals known for biases or limited knowledge of the “non-mainstream” disability at issue.

Employers may perceive extreme accommodations as impossible to implement. In *London Health*, the arbitrator deemed accommodation impossible where a nurse suffered from a severe latex allergy because of the impossibility of keeping the grievor safe and latex-free.⁹⁶ In *Ottawa Hospital*, an orderly who had sensitivity to scents was not accommodated because the hospital said it was not possible to remove all scents from the workplace. Despite an occupational health physician’s opinion that the orderly could work in the position, the hospital administration believed that it was impossible to remove all scents from the hospital environment.⁹⁷ However, the arbitrator upheld the orderly’s grievance on the grounds that the employer did not have sufficient medical evidence that there was any danger in hiring the orderly and that the employer could not safely accommodate the grievor.⁹⁸ This is a growing issue in need of greater attention if disabled employees’ rights are to be safeguarded in the future.

In situations where recommended accommodations are extreme and may reach undue hardship, employers rarely consider alternatives to termination. The option of working from home is rarely offered. Although occupations such as nursing or policing

⁹³ *Ibid.*

⁹⁴ Mosoff, *supra* note 2 at 149.

⁹⁵ *Honda*, *supra* note 7.

⁹⁶ *London Health*, *supra* note 13.

⁹⁷ *Ottawa Hospital*, *supra* note 83.

⁹⁸ *Ibid.*

cannot be accommodated in this way, other creative options for different duties may be possible in larger, institutional employers. Whenever possible, creative options such as working from home or creating new positions should be considered, and termination should be the last resort.⁹⁹

Innocent Absenteeism and “Non-Mainstream” Disabilities

Innocent absenteeism occurs when the employee cannot come into work for legitimate health reasons outside of his or her control. Such behaviour is often tolerated, but it cannot be accommodated because the employee must be at work—whether at the workplace, at home, or at another workspace—in order to receive accommodation.¹⁰⁰ The employment relationship is hindered if an employee has a disability preventing the completion of assigned work. The employer’s duty to accommodate ends when the employee is unable to fulfill the fundamental obligation to provide work for the foreseeable future.¹⁰¹ The employee’s ability to return to work within a reasonable period of time has become a determining factor when assessing undue hardship.¹⁰² Employers are expected to tolerate lengthy periods of chronic absenteeism in an effort to accommodate the employee, but an employee’s inability to provide a medical prognosis indicating a date of return to work in the foreseeable future will trigger the undue hardship threshold.¹⁰³ In such cases, an employer is obligated to “counsel and warn employees that their level of absenteeism is reaching a point where non-culpable dismissal is a possibility.”¹⁰⁴ The duty to accommodate presupposes that the employee is able to return to work and fulfill his or her side of the employment contract. Where a “non-mainstream” disability challenges this assumption, an undue hardship finding frequently follows.

Anticipated hardships flowing from proposed accommodations (in this case, the continuing employment of an absentee employee) should not reach the undue hardship threshold if the alleged hardship is based on the employer’s speculated concern of adverse consequences.¹⁰⁵ Although it is reasonable for employers to rely on poor or unpredictable prognoses for the foreseeable future to prove undue hardship, this limits the rights of people who have disabilities that fluctuate in severity or manifest unpredictably. This is a potentially prejudicial limitation. These concerns may create animosity and lead to unsupportive return to work procedures after periods of chronic absenteeism.

⁹⁹ Meiorin, *supra* note 55.

¹⁰⁰ *Health Sciences Assn. of Alberta v David Thompson Health Region*, 2007 CanLII 80620 (AB GAA) [David Thompson].

¹⁰¹ *Hydro-Québec*, *supra* note 7 at para 19.

¹⁰² *Scheuneman v Canada (Attorney General)*, [2000] FCS No 1997 at para 7.

¹⁰³ *David Thompson*, *supra* note 100.

¹⁰⁴ Lynk, *supra* note 41 at 209.

¹⁰⁵ Catherine Milne, “Proving undue hardship not impossible” (2009) 22:2 Canadian HR Reporter 5 at 5.

It is unreasonable to expect an employer to bear the costs of keeping an employee from whom the employer receives no benefit.¹⁰⁶ If an employee is chronically absent, then the employee cannot be accommodated and cannot provide labour to the employer. Unpaid medical leave ensures that neither party benefits or suffers from the employment while maintaining the possibility the employee will eventually return to work. The employer is minimally affected and the employee may return to work, which is ideal for both parties. Unpaid medical leave is often limited to two years, a limit which seems arbitrary for persons with “non-mainstream” disabilities. If after two years of leave the employee cannot demonstrate the ability to return to work in the foreseeable future, his or her employment is terminated.¹⁰⁷ “Non-mainstream” disabilities often give rise to inability to predict a return to work date and to determine whether the disability has caused permanent incapacity to work.¹⁰⁸ Employers must be aware that terminating an employee due to lack of foreseeability because the employee cannot predict a return to work date but is not completely impaired is potentially discriminatory.¹⁰⁹ Returning to work can serve as a motivating factor for the employee’s improvement. Where the disability in question is unpredictable but the person is not fully impaired, the appropriate accommodation may be an extension of the time limit for unpaid medical leave. Employers may not have any flexibility in extending the time limit due to provisions in the insurance plan. Moreover, an employer’s right to run their business as they see fit may justify the limitation of unpaid medical leave given the uncertainty in the employment situation. Such lengthy leave may also give rise to frustration of contract.

Employers and fellow employees may perceive chronic absenteeism as a lack of effort on the part of the employee. This perception can foster negativity and reluctance to help the employee. In fact, some employers have pressured employees to retire on medical grounds or go on long-term disability (LTD).¹¹⁰ After a lengthy period of absenteeism, the employer may be hesitant to reinstate the employee because of expectations that the absences will continue.¹¹¹ Employees viewed as fully and irrevocably disabled by fellow employees and management may be subject to different treatment. This treatment may aggravate the employee’s condition, particularly because many “non-mainstream” disabilities are negatively affected by stress and the surrounding environment.¹¹² It is possible that work could serve as a safeguard against relapse by providing structure to the employee’s time, as it did for an employee

¹⁰⁶ Mosoff, *supra* note 2 at 148.

¹⁰⁷ *Sketchley*, *supra* note 86 at para 95.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.* at para 8.

¹¹¹ *TRW Canada Limited v Thompson Products Employees’ Association*, 2013 CanLII 48488 (ON LA).

¹¹² *Shuswap Lake General Hospital v British Columbia Nurses’ Union (Lockie Grievance)*, [2002]

BCCAAA No 21 at para 63 [*Shuswap*]; *Panacci*, *supra* note 4.

suffering from bi-polar disorder in *Shuswap Lake General Hospital v British Columbia Nurses' Union (Lockie Grievance)*.¹¹³

When “Non-Mainstream” Disabilities Cannot be Accommodated

Persons with “non-mainstream” disabilities often seek LTD when accommodation is not possible. Employers and insurance companies frequently impose barriers on such claims.¹¹⁴ The employee must meet several requirements before he or she can go on LTD. The most significant and problematic requirement for “non-mainstream” disabilities is that the employee must be wholly unfit to work. But, many people with “non-mainstream” disabilities who cannot be accommodated are not wholly unfit; instead their doctors recommend restricted work and therefore they do not meet the LTD requirements.¹¹⁵ However, section 17(2) of the *Code*¹¹⁶ provides that a person who cannot be accommodated without undue hardship is considered incapable. Therefore, once an employee with a “non-mainstream” disability is denied accommodation because it would be an undue hardship for the employer, he or she could be considered wholly unfit and satisfy the LTD requirement. The employer, after failing to accommodate the employee, should be obligated to assist the employee in obtaining or at least applying for LTD.¹¹⁷

“Non-mainstream” disabilities often occur simultaneously with other disabilities, such as the frequent co-occurrence of fibromyalgia and depression.¹¹⁸ In these circumstances, the employee may have a stronger claim for LTD when the associated disability is also a mainstream disability. It is often easier to obtain accommodation and LTD with a claim based on depression than a claim based on fibromyalgia, since the latter is often subject to extensive scrutiny and misunderstanding. Pain disorders are typically expected to have both a physical and psychological impairment. It follows from this that a claim based on depression and fibromyalgia, for example, is stronger than a claim of fibromyalgia alone.¹¹⁹ The presence of a mainstream disability lends more ‘credibility’ to the “non-mainstream” disability claim. However, the employee must nonetheless insist on accommodation for the “non-mainstream” disability, in addition to accommodation for the mainstream disability, in order to obtain the most appropriate accommodation.

¹¹³ *Shuswap*, *supra* note 112 at para 24.

¹¹⁴ *Panacci*, *supra* note 4 at para 46.

¹¹⁵ *Sketchley*, *supra* note 86 at para 12.

¹¹⁶ *Code*, *supra* note 30 at s 17(2).

¹¹⁷ *Harnden*, *supra* note 49 at para 15.

¹¹⁸ *Velkuro*, *supra* note 19 at 4-5.

¹¹⁹ *OPG and Power Workers Union, Canadian Union of Public Employees, Local 1000 (Massaquoi Grievance)*, [2009] OLA No 602.

CONCLUSION

“Non-mainstream” disabilities are poorly understood in the workplace and subjected to excessive scrutiny because of the lack of definitive testing and medical understanding. This creates unique concerns in obtaining and maintaining employment for persons with “non-mainstream” disabilities. Employers need to be more aware of the barriers faced by persons with “non-mainstream” disabilities in obtaining accommodation. The duty to accommodate has created significant progress towards the ideal of substantive equality for persons with disabilities. Despite this, legislation and jurisprudence has been demonstrably insufficient for protecting the rights of individuals with “non-mainstream” disabilities. Academics and practitioners have considered complex accommodation problems with respect to more common mental illnesses such as depression, but the accommodation of “non-mainstream” disabilities is a subject that has received little attention. Such disabilities present unique challenges to accommodation, give rise to the prospect of extreme accommodation, and challenge dominant orientations towards accommodation methods such as leaves of absences and return-to-work programs. Accommodation for these disabilities can be expensive and is not justifiable under individually based models of disability that assign the costs of a disability to the individual.

Accommodation is not an adequate method to obtain substantive equality for persons with “non-mainstream” disabilities. Accommodation is problematic as a method of attaining equality in that it “simply make[s] some concessions to those who are ‘different,’ to accommodate them on the margins, rather than working for genuine inclusiveness.”¹²⁰ Persons with “non-mainstream” disabilities are even less protected than other groups seeking equality, given the lack of success in attaining accommodation and insufficient legislative protections. In order to achieve protection and equality for persons with “non-mainstream” disabilities, we must work for genuine inclusiveness outside the realm of “normal.”

¹²⁰ Brodsky, *supra* note 29 at 42.