



## Attendance Management: Renewed Systemic Discrimination Risks for Employer's Using Attendance Management Programs

*(B.C. Court of Appeal reviews Coast Mountain Bus decision)*

Workplace absenteeism and its costly impact on Canadian workplaces continues to present escalating challenges for most workplaces. A recent comprehensive study of absenteeism in Canada released in June 2010 confirmed what most employers have experienced... rising rates of absenteeism.

The rising costs and disruption of absenteeism has predictably tested the patience and resources of employers. Rising absenteeism rates have fuelled increased employer efforts to reduce absenteeism. Increased absenteeism rates are encouraging employers to heighten efforts to remove from the workplace individuals who persistently demonstrate absenteeism rates exceeding the workplace average.

### The Problem and Risks for Employers

Where responses to absenteeism rates exceeding workplace "averages" import employment sanctions or threaten future employment in the context of disability related absences, the responses are likely to trigger systemic discrimination.

Those of us with an interest in monitoring the impact of Human Rights

guarantees on legally supportable strategies to manage absenteeism have monitored the **Coast Mountain Bus Company** case since 2008.

Employers who found comfort in the B.C. Supreme Court decision in 2009, that rejected the B.C. Human Rights Tribunal's systemic discrimination analysis and findings in connection with the employer's AMP (Attendance Management Policy/Program) will not be comforted by the recent B.C. Court of Appeal decision that restores the problematic systemic discrimination analysis.

### A review of the key facts...

**Coast Mountain Bus Company** monitored individual employee attendance occurrences; identified employees whose absenteeism exceeded average levels and automatically enrolled these employees in an Attendance Management Program designed to hold such employees accountable to defined levels of attendance.

Employees who maintained expected attendance levels were released from the program. Those who did not were progressed to steps 3, 4, and 5, where



specific parameters for attendance were mandated. A failure to meet the specified levels could result in termination.

A number of bus drivers who failed to maintain the required attendance levels due to persisting disability issues initiated human rights challenges to this approach to managing absenteeism.

In March 2008 the B.C. Human Rights Tribunal held that the individual complainants were exposed to disability related discrimination in connection with their treatment under the Attendance Management Program. The Tribunal also concluded that the Attendance Management Program discriminated on a systemic basis against employees with chronic or recurring disabilities.

The Tribunal ordered the employer to cease applying the AMP to operators who experienced chronic or recurring disability issues. In April 2009, on review the B.C. Supreme Court while concerned that the individual complainants were exposed to discrimination, concluded that the AMP did not discriminate on a systemic basis against employees with chronic or reoccurring disabilities.

Understandably this decision was welcomed by employers and encouraged many employers to continue to enrol employees with absenteeism rates exceeding defined averages into Attendance Management Programs, without a consideration of

whether the absences were grounded in chronic or recurring disability issues.

In October of 2010 the B.C. Court of Appeal reviewed the decision of the B.C. Supreme Court and issued a decision in connection with such review. That decision restored the Tribunal's finding that the application of the Attendance Management Program to all employees, represented prima facie systemic discrimination. The reasons of the Court of Appeal were as follows:

1. *Level 3 of the program, enrolled employees with chronic disability issues into the program; even though the employer knew the employees had disability issues that could lead to elevated absenteeism rates;*
2. *The placement of employees with absences related to disabilities at Level 3 represented systemic discrimination (Level 3 introduced mandated attendance sanctions for non-adherence);*
3. *Placing employees at Level 3, based on partial days of absence as a result of graduated return to work activity represented systemic discrimination.*

It is worth noting that the Court of Appeal found the B.C. Supreme Court erred in the test it applied in assessing systemic discrimination. The Court of Appeal affirmed the test of whether it



was “*impossible*” to accommodate the employee without undue hardship.

The Court of Appeal re-instated the Tribunal’s Order that the employer must cease applying the AMP to employees with disabilities.

### **Critical Implications for Employer Strategies to Manage Absenteeism**

1. Strategies and programs that expose employees with absences beyond “*average*” or arbitrary standards, where such absences are caused by chronic or reoccurring disability issues, will trigger systemic discrimination.
2. Employers risk exposure to a significant risk of systemic discrimination and costly liabilities where attendance management strategies and programs involve:
  - Holding employees with disability related absences accountable to average or fixed attendance norms;
  - Enrolling employees with excessive disability related absenteeism into programs that threaten future employment, in response to a failure to adhere to defined attendance averages or norms.

### **What’s the Problem?**

Employer policies, strategies and practices to support attendance objectives that ignore the human rights

status of disability related absence and the duty to accommodate, leave employers exposed to increasingly costly risks of discrimination.

### **Impact of the Duty to Accommodate?**

It is important to remember that:

- Disability related absenteeism attracts the Duty to Accommodate;
- “*Accommodation*” in the context of *disability related absenteeism* requires adjusting the *average* or *norm* attendance expectations;
- Accommodation of *disability related absences* demands a redefining of the employment bargain; in effect accepting the delivery of a lower level of attendance than what is delivered by employees without chronic or reoccurring disability issues (*subject of course to the “undue hardship” limit*).

### **How Much Absenteeism must be Accommodated?**

In providing counsel and support to employer organizations with respect to attendance and disability management this question is regularly raised. Given the individualization required in connection with each accommodation issue, there is no clear or consistent answer. The limit is impacted by the unique circumstances of each attendance management challenge.



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While there is no room or place in the current equality rights context of disability related absenteeism for rote approaches or responses to disability related absenteeism, there is an opportunity for effective management on an individual basis. Effective management can reduce one or more of the following:

- amount of absence;
- frequency or duration of absences;
- impact of absence on workplace;
- duration of the employee's presence in the workplace.

### **Lessons to Learn:**

1. Effectively and legally compliant attendance and disability management is complicated and impacted by the equality rights guarantees attending disability and as a result disability related absences.
2. A significant and growing percentage of workplace absenteeism is disability related; increasingly psychological or non-evident disabilities.
3. Absenteeism/Attendance Management policies or practices that are structured to hold all employees accountable to fixed attendance requirements, irrespective of disability issues, leave employers exposed to serious risks and costs attending disability discrimination.

4. Attendance Management Programs/ Practices must effectively integrate the impact of the equality rights guarantee of *accommodation* of disability related absences to avoid or minimize the increasingly costly risks of discrimination.
5. Disability related absences can be managed in a manner that responds to the employers legitimate interest in minimizing the impact of the disability related absenteeism (*i.e. minimize disruption and cost*).
6. Effective management of disability related attendance issues demands new strategies, knowledge, tools and above all PATIENCE AND PERSISTENCE!<sup>1</sup>

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<sup>1</sup> Trends developing in Ontario with the new Human Rights Tribunal in connection with complaints of discrimination based on disability and disability related absenteeism evidence a heightened risk for employers and escalating liabilities attending discriminatory terminations for disability related absences.



### ***Remediation Trends***

***Given the growing appetite for terminating employees with excessive absenteeism it is useful to highlight the emerging remediation trends. Employers who are found to have engaged in discriminatory terminations of employees with disability related absenteeism are likely to face significant income loss liability, serious general damages and an increased risk of reinstatement.***

- Escalating damages for injury to dignity (\$20,000.00 to \$35,000.00);
- Reinstatement: Prior to the new Tribunal, reinstatement was a remedy rarely considered or ordered. Recent decisions under the new Tribunal suggest a new and unprecedented interest in considering and ordering reinstatement as a part of remediation. This development is a relevant factor for employers to consider when evaluating the costs and risks of a risky termination for absenteeism (*i.e. where disability is a factor contributing to absenteeism*).

### **For further information:**

For expert and effective support in managing your attendance and disability management challenges and assessing the compliance risks of your current Attendance Management programs, policies, or practices contact Barbara G. Humphrey Professional Corporation.

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## **Opportunity for Discounted Registration**

Barbara Humphrey is speaking at the [\*\*Federated Press 17th Managing Absenteeism in the Public & Private Sectors Conference\*\*](#) in Toronto on March 28-30, 2011. To receive a discount of between \$300.00-\$450.00 for this conference call: 416-665-6868 ext 230 or 1-800-363-0722 ext 230, and indicate that Barbara Humphrey referred you to the conference.