



LAW SOCIETY OF SASKATCHEWAN  
LABOUR & EMPLOYMENT SEMINAR

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**MLT AIKINS**  
WESTERN CANADA'S LAW FIRM

# ACCOMMODATING MENTAL HEALTH IN THE WORKPLACE

# AGENDA



## 1. The Legal Framework for Accommodation

- *Human Rights and Discrimination*
- *What is a “Mental Disability”?*
- *Duty to Accommodate*
- *Undue Hardship*
- *Accommodation Obligations*

## 2. Accommodation Case Studies and Examples

## 3. Practical Tips for Accommodation in the Workplace

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# THE LEGAL FRAMEWORK FOR ACCOMMODATION

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# HUMAN RIGHTS AND DISCRIMINATION

- *Saskatchewan Human Rights Code, 2018* (provincially-regulated employers); *Canadian Human Rights Act* (federally-regulated employers)
- Human rights legislation prevents discrimination in employment on “prohibited grounds,” which include “mental disability”
- Employers are required to make every reasonable effort, short of undue hardship, to accommodate an employee who comes under a prohibited ground of discrimination



# KEY PRINCIPLES OF DISCRIMINATION

- Discrimination does not have to be intentional or overt
- Not sufficient to treat all employees the same
- Duty to accommodate only arises once mental disability has been established
  - *E.g. Recreational marijuana user is not entitled to accommodation if no disability present*



# WHAT IS A “MENTAL DISABILITY”?



- *Saskatchewan Human Rights Code, 2018* defines “mental disorder” as: “a disorder of thought, perception, feelings or behaviour that impairs a person’s: a) judgment, b) capacity to recognize reality; c) ability to associate with others; or d) ability to meet the ordinary demands of life.”
- Interpret broadly: consider “whole of the evidence”
- Complainant needs to show some specificity in what their disability is – they cannot be overly vague
- Symptoms of a mental disorder (e.g. stress) different from a “disability”
- Adjudicators will consider if a condition is recognized by accredited medical professionals

# IS “PANDEMIC STRESS” PROTECTED?

- Many employees are anxious about returning to work or continuing to work
- Requests to work from home, for more protective measures or better PPE, for a change of position/shift may give rise to duty to accommodate if connected to mental disability
- Duty to accommodate generally only arises if employee has a recognized mental disability – does not include everyday stress and anxiety; being fearful of workplace





# WHEN IS ACCOMMODATION REQUIRED?

- Employer only required to accommodate if employee can establish *prima facie* discrimination, which requires:
  - ***A protected ground – e.g. a mental disability***
  - *An adverse workplace impact*
  - *Protected ground a factor in the adverse impact*
- Employee can raise issue informally
- No willful blindness



# DUTY TO ACCOMMODATE



- Certain limitations on individual human rights may be reasonable and justifiable in certain circumstances
- Enforcement of a “*bona fide* occupational requirement” (BFOR), or a reasonably necessary work standard, is not discrimination
- Three-part test to establish a BFOR:
  - *Requirement is rationally connected to performance of the job*
  - *Requirement is adopted in good faith belief that it is necessary*
  - *An employer **cannot accommodate individual employees under the requirement without experiencing undue hardship** (i.e. requirement is “reasonably necessary”)*

# UNDUE HARDSHIP

- Employers have a duty to accommodate to the point of undue hardship
- What constitutes undue hardship?
  - *Flexible concept; intentionally vague*
  - *More than minor inconvenience*
  - *Accommodation can require changing hours of work, modifying job duties, providing physical aids, training or granting leave of absence*
  - *No requirement to create a make-work position*



# UNDUE HARDSHIP



- High standard, but does not change nature of employment relationship
  - *Purpose is to allow those otherwise unfairly excluded from workforce to participate in workforce*
  - *Does not change basic bargain of employment: employee performs useful work for employer, receives compensation*
  - *Employees must productively contribute to employer objectives*

# GENERAL OBLIGATIONS

- Primary accommodation obligation is on the employer
- Employee has an obligation to co-operate in the accommodation
- Union must facilitate and cannot block a reasonable accommodation
- Employer must accommodate based on medical evidence, rather than subjective observations or anecdotal evidence



# EMPLOYER OBLIGATIONS



- Carefully consider the needs of the employee and the information they provide
- Inquire if more information is needed
- Investigate and develop options for accommodation
- Make a reasonable attempt to modify the rule or practice
- Duty to accommodate is ongoing process
- If no further accommodation is reasonable or practical in the circumstances – duty to accommodate discharged

# DUTY TO INQUIRE



- If the employer knew or reasonably ought to have known that the employee is suffering from a mental illness or addiction, the duty to inquire is triggered
- Duty to inquire usually arises when there is unusual behaviour that should alert the employer. For example:
  - *Emotional outbursts at work*
  - *Excessive absenteeism*
  - *Signs of substance abuse*
  - *Expressions of paranoia or strange or grandiose ideas*
  - *Significant departure from previous consistent behaviour*

# EMPLOYEE OBLIGATIONS

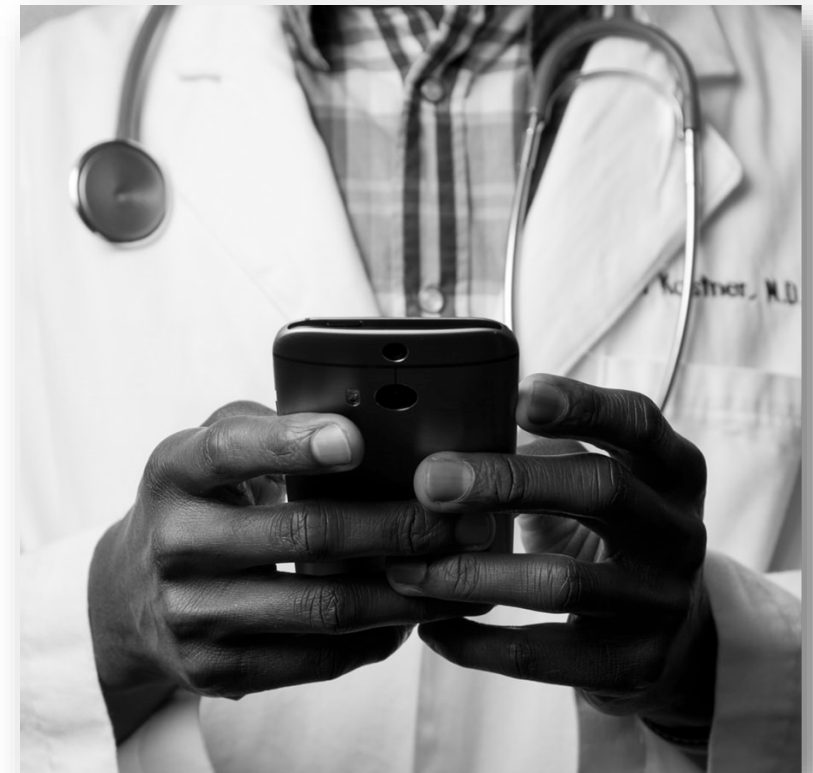


- Must co-operate
- Must advise employer of capabilities and restrictions
- Cannot insist on perfect solution
- Cannot insist on improvement of pay or position
- Refusal to accept accommodation may lead to dismissal
- Must provide reasonable explanation for refusal



# MEDICAL INFORMATION

- Employer needs access to medical information in order to assess viability of return to work and accommodation obligations
- Employee has right to privacy over some medical details
- Need-to-know basis
- Prognosis vs. diagnosis
- Detailed medical information vs. sick note



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# ACCOMMODATION CASE STUDIES AND EXAMPLES

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# SUBSTANCE ADDICTION



## ***Danychuk v University of Regina, 2022 SKQB 35***

### **Facts**

- Student complained about instructors for misconduct and other issues
- Student had several concerning interactions with faculty and students
- Had a concerning academic performance record and was removed from a practicum placement
- Student was eventually dismissed from the program for misconduct
- Student says University should have known about his mental health disability even if not officially diagnosed or reported to the faculty.
  - *Further, the student rejected on numerous occasions that his mental health was to blame, and instead said he was in the pursuit of justice to correct wrongs committed to him.*

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WAS THE STUDENT'S APPEAL OF  
THE UNIVERSITY'S DECISION  
SUCCESSFUL OR DISMISSED?

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# SUBSTANCE ADDICTION



## ***Danychuk v University of Regina, 2022 SKQB 35***

### **Decision: Appeal Dismissed**

- When the University inquired about his health and offered him a medical withdrawal, the Student rejected that his health was to blame
- Student provided no evidence/diagnosis needing accommodation
  - *Did not argue his mental health conditions were a factor in his issues or treatment*
  - *He argued that the University was entirely to blame for the “injustices” committed against him*
- He later argued at appeal that the University was discriminating against him based on his mental health condition, and did not accommodate
  - *Deliberative bodies can only proceed with the evidence & argument that is submitted and cannot undertake their own investigation and decide on different facts than what was presented to them*

# SUBSTANCE ADDICTION



## ***Haghir v University Appeal Board, 2019 SKCA 13***

### **Facts**

- Resident doctor had mental health condition that caused him to steal
- He entered into an accommodation agreement with the College
  - *He was required to continue seeing his psychiatrist, report any deterioration of his progress, follow the treatment plan set out by his doctors, and not steal*
- Doctor attempted to steal, and did not report the “deterioration”
  - *Investigation launched and found that he did not comply with the accommodation program and was terminated from the residency program*
- Appeals within the University’s processes were unsuccessful on the basis that the doctor did not seek further accommodations
- Did the College of Medicine provide reasonable accommodation of the Employee’s mental health disability, which caused criminal behaviour?

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# WAS THE DOCTOR'S APPEAL OF THE UNIVERSITY'S DECISION SUCCESSFUL OR DISMISSED?

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# SUBSTANCE ADDICTION



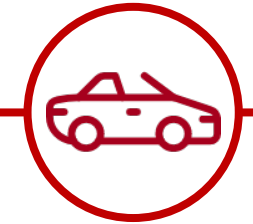
## ***Haghir v University Appeal Board, 2019 SKCA 13***

### **Decision: Appeal Successful – sent back to Appeal Board**

- Employee had a mental condition which caused him to steal
  - *Condition is comparable to those who suffer from drug/alcohol issues and could relapse*
  - *Accommodations need to allow for relapses, but employee still needs to pursue treatment*
- Employer knew, or reasonably ought to have known, that complainant could relapse into stealing because of his mental condition
  - *Employer overlooked evidence (doctors letters) that indicated the Doctor's stealing was caused by his mental disorder and it potentially relapsing*
- Duty to accommodate to the point of undue hardship not met
  - *Accommodation agreements do not necessarily satisfy an Employer's duty to accommodate – all relevant context and evidence must be considered*



# SUBSTANCE ADDICTION



## ***CUPE, Local 21 v City of Regina, 2021 SKLA***

### **Facts**

- Employee abused and threatened coworkers on numerous occasions and smoked on premises
- Employee was disciplined multiple times for his behaviour
- During investigation Employee retaliated against coworkers
- After an investigation, the Employee was terminated for behaviour
- Alleged discrimination on grounds of being terminated as a result of behaviour caused by mental conditions of depression and anxiety

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# WAS THE EMPLOYEE'S DISCRIMINATION GRIEVANCE SUCCESSFUL OR DISMISSED?

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# SUBSTANCE ADDICTION



## ***CUPE, Local 21 v City of Regina, 2021 SKLA***

### **Decision: Grievance Dismissed**

- Employee had disability of anxiety and depression
- While disabilities can impact performance and require the Employer to accommodate, not all actions are connected to the disability
  - *Depression and anxiety do not protect him from being held accountable from his abusive behavior towards others and smoking; such behaviours were not entirely caused by his disability*
- Employer did not have a duty to accommodate
  - *The Employee's actions did not have a nexus between the protected characteristics of his disability and the reasons behind his termination, therefore there was no duty to accommodate*

# SUBSTANCE ADDICTION



## ***Unifor, Local 890 v Procon Miners Inc., 2019 SKLA 33***

### **Facts**

- Employee suffered physical injuries, which were accommodated for a period of time before the accommodations were no longer sufficient
- Employee requested further accommodation in the form of being able to withdraw the employer-funded portion of his RRSP
- Employer's refusal to allow access to RRSP resulted in no access to income which caused him mental distress as he could not pay outstanding bills
- Employee eventually resigned as a result of this mental state and claims employer failed to accommodate his medical limitations

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# WAS THE EMPLOYEE'S DISCRIMINATION COMPLAINT SUCCESSFUL OR DISMISSED?

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# SUBSTANCE ADDICTION



## ***Unifor, Local 890 v Procon Miners Inc., 2019 SKLA 33***

### **Decision: Grievance Successful**

- Employer failed to properly accommodate Employee's medical & physical limitations which caused him financial hardship, leading to a poor mental state
- Resignation should be rescinded as he was in no mental state to make such a decision as a result of the strain he was under

# SUBSTANCE ADDICTION



## ***Kvaska v Gateway Motors (Edmonton) Ltd, 2020 AHRC 94***

### **Facts**

- Employee began drinking heavily and coming to work intoxicated
- Fellow employees began to notice; never formally addressed
- Employee brought up topic of medical leave with sales manager and office manager but never formally requested leave or disclosed disability
- Employee arrived at work late and very intoxicated one day, acted belligerently and was terminated
- At time of termination, employee made request for time to attend rehab
- Alleged discrimination on grounds of physical and mental disability

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# WAS THE EMPLOYEE'S DISCRIMINATION COMPLAINT SUCCESSFUL OR DISMISSED?

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# SUBSTANCE ADDICTION



## ***Kvaska v Gateway Motors (Edmonton) Ltd, 2020 AHRC 94***

### **Decision: Complaint Successful**

- Employee had disability: alcohol addiction
  - *Consider “the whole of the evidence” to determine if a disability exists*
  - *Even if no medical information provided prior to termination, employer may have duty to inquire*
- Employer knew, or reasonably ought to have known, that complainant suffered from disability and it may have impacted performance
  - *Employer had a duty to inquire whether the disability affected the employee’s performance and, if so, whether accommodation was possible before terminating the employee*
- Duty to accommodate to the point of undue hardship not met
  - *Employer did not need to accept a serious safety risk or accept ongoing intoxication BUT it needed to investigate options, including the complainant’s request for medical leave to seek treatment*

# SCOPE OF MENTAL DISABILITY



***Re Unifor, Local 2215 and I.M.P. Group Ltd. (AB) (2019 NS LA)***

## **Facts**

- Grievor was reported to employer for masturbating in work bathroom
- Employer had a conversation with the grievor and invited him to disclose any medical issues; none were disclosed
- Employer investigated; suspended the employee
- While suspended, the employee sought assistance from the Employee Assistance Program and was referred to a doctor who provided him with the opinion that he had a sex addiction
- Union grieved suspension, claiming employee had a disability

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# WAS THE EMPLOYEE'S GRIEVANCE ALLOWED?

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# SCOPE OF MENTAL DISABILITY



***Re Unifor, Local 2215 and I.M.P. Group Ltd. (AB) (2019 NS LA)***

## **Decision: Grievance denied**

- EAP doctor was not qualified to offer an opinion on whether sex addiction existed as a “recognized condition or disability” or that the grievor suffered from it
- Sex addiction is not a condition generally recognized by any accredited professional governing body or the DSM
- The symptoms the EAP doctor based medical conclusion on were non-specific and the doctor admitted that there was no standard list of symptoms attributed to sex addiction

# MEDICAL INFORMATION



## ***Rutkowski v Westin Bayshore Hotel et al, 2018 BCHRT 235***

### **Facts**

- Employee, a unionized painter in the employer's engineering department, filed human rights complaint concerning employer's treatment of him dealing with his mental disability
- Alleged that Westin Bayshore discriminated by requiring him to go on administrative leave due to his mental disability and requiring him to obtain an independent medical evaluation (IME) before returning to work

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# WAS THE EMPLOYEE'S DISCRIMINATION COMPLAINT SUCCESSFUL OR DISMISSED?

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# MEDICAL INFORMATION



## ***Rutkowski v Westin Bayshore Hotel et al, 2018 BCHRT 235***

### **Decision: Complaint dismissed**

- Tribunal found that employer was justified in placing employee on an administrative leave and requiring an IME to determine appropriate accommodation
- Tribunal also found that duty to inquire whether accommodation was appropriate in lieu of discipline was properly triggered

# PROCEDURAL & SUBSTANTIVE DUTY



## ***Salazar v JSL Investments Corp, 2020 AHRC 8***

### **Facts**

- Employee took leave of absence from dental assisting job for mental health (i.e. suicidal tendencies) and was hospitalized
- Employee attempted to set up return to work plan with employer
- Employer asked to speak to employee's doctor and employee provided access to psychiatrist
- Employer asked her doctor to help persuade her to look for another job
- Employer did not explore options with employee but told her no graduated return available; employer terminated employee, leading to human rights complaint



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# WAS THE EMPLOYEE'S DISCRIMINATION COMPLAINT SUCCESSFUL OR DISMISSED?

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# PROCEDURAL & SUBSTANTIVE DUTY



## ***Salazar v JSL Investments Corp, 2020 AHRC 8***

### **Decision: Complaint successful**

- Termination based on employer's own belief that work would be stressful
- Employer decided there was no way to accommodate
- Employer alleged that it would be undue hardship to accommodate employee on gradual return to work, as he would have to rely on temporary dental assistants to supplement shifts
- Employer decided to terminate before any attempts to accommodate – did not meet the procedural duty
- Employer did not demonstrate that accommodating would have resulted in undue hardship

# DUTY TO ACCOMMODATE



***Thanh v BC Ministry of Public Safety et al, 2020 BCHRT 15***

## **Facts**

- Complainant was coroner on medical leave for PTSD that developed after investigating particularly gruesome death
- Employee participated in treatment program
- Physician suggested no exposure to dead bodies on permanent basis
- Employer informed employee that restrictions prevented him from working as coroner; no other positions available that met restrictions
- Employer did not offer accommodation options
- Employee alleged that employer failed to accommodate

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# WAS THE EMPLOYEE'S DISCRIMINATION COMPLAINT SUCCESSFUL OR DISMISSED?

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# DUTY TO ACCOMMODATE



## *Thanh v BC Ministry of Public Safety et al, 2020 BCHRT 15*

### **Decision: Complaint dismissed**

- Role of coroner is to investigate deaths – to exempt employee from attending scenes of death would alter the very function and purpose
- Employer searched for other available positions but could not find one that met the employee's permanent restrictions
- Although there were certain tasks and duties that the employee could perform, to perform only those duties would not be performing the role of coroner or any other position that existed with the employer
- The employer established that it could not have done anything else reasonable or practical to avoid negative impact to the employee

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# PRACTICAL TIPS FOR ACCOMMODATION IN THE WORKPLACE

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# THE DUTY TO INQUIRE

## QUESTION

I suspect an employee might have a condition that is affecting their work performance. How should I address this?

## ANSWER

There are a number of practical suggestions you can follow in your process:

- raise the issue in the context of work performance;
- be prepared;
- only allow the min. number of people required to conduct the interview;
- assure confidentiality; and
- advise of the possibility of accommodation, benefits, or an employee assistance program (EAP).

# ACCOMMODATION REQUESTS

## QUESTION

How should I respond if an employee informs me they have a mental disability or makes a request for accommodation?

## ANSWER

- Develop protocol for handling accommodation requests – who receives them?
- Have a designated person(s) to receive requests and gather needed information from employees
- Ensure your leaders and supervisors know what to do **BEFORE** they have a disability disclosed or receive an accommodation request
- Investigate precise nature of the characteristic requiring accommodation
- Consider alternatives for accommodation and be able to demonstrate what alternatives were tried



# REQUESTING MEDICAL INFORMATION

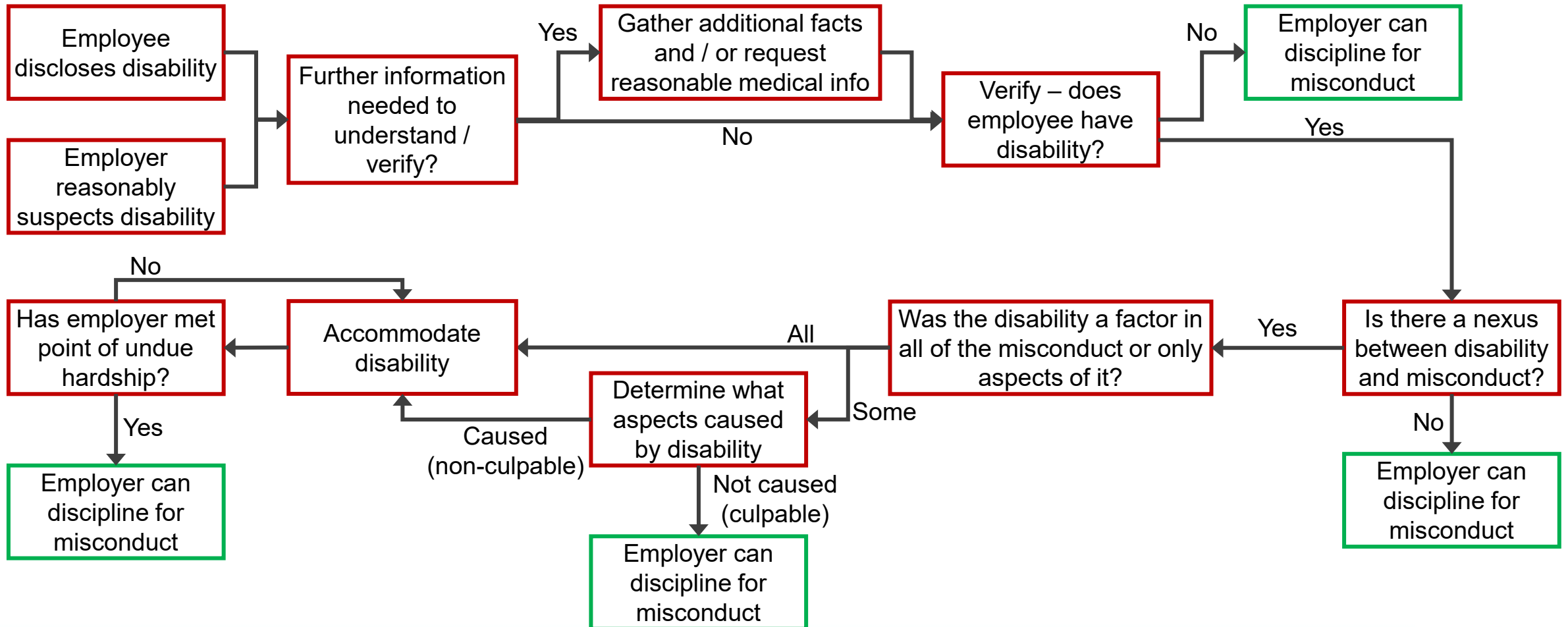
## QUESTION

How do I go about requesting medical information if an employee has requested accommodation but hasn't provided any medical information?

## ANSWER

- If straightforward, ask employee for information
- Seek medical information from employee's doctor by giving employee letter to give to doctor
  - Explain context: facts, behaviours, job duties, etc.
  - Pose specific questions for doctor in letter
  - Ask doctor to respond to employer directly
  - Employee consents when asks doctor to respond
  - Cost?
- Generally employer is entitled to know the nature of the illness but not the specific diagnosis
- Anything disclosed must be kept confidential

# CONSIDERATIONS BEFORE TAKING DISCIPLINARY ACTION



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# QUESTIONS?

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