

Terminating a worker with a disability

Employer strategies need to keep pace with frequently litigated, evolving laws

BY PAMELA YUDCOVITCH

Lawyers regularly receive questions from employers about terminating disabled employees. It takes both sensitivity and a careful consideration of the legal issues to handle the situation.

The first thing an employer has to consider is the reason for the disability. Different cases and statutes apply, depending on the jurisdiction (for the purposes of this article, we'll look at Ontario's laws) and whether the employee suffered an injury or illness at work, which is covered in Ontario by the Workplace Safety and Insurance Act, or whether the employee suffered a non-work-related injury that is compensable under his short- or long-term disability insurance plan. If an employee is chronically unable to perform his work as a result of an illness, disability or stress-related problem, this advice will probably be different once again.

There is a specific statutory provision under Ontario's Workplace Safety and Insurance Act that prevents employers with more than 20 workers from terminating an employee who suffered an injury at work. Under that statute, any employee who was continuously employed for one year or more prior to the date of injury must be offered re-employment. This obligation can last for up to two years following the date of injury.

Defining 'disability'

The Ontario Human Rights Code prevents discrimination on the basis of disability. "Disability" is very broadly defined under the legislation. It includes an injury or disability for which benefits were

claimed under the Workplace Safety and Insurance Act. Disability under the code also includes such diverse situations as chronic sleeping disorders, alcoholism or drug addiction and physical restrictions traditionally associated with a disability such as a lack of mobility, hearing or sight impairment.

However, an employer should assess whether the employee suffers from a chronic issue, a single incident of illness or a temporary impairment that occurred such that there is no real disability.

An employee suffering from disability can still be terminated from employment on the basis of just cause. However, under the Ontario Human Rights Code, there is an onus on the employer to demonstrate the disability was not a consideration in making the decision to terminate the employment.

In theory, an employer can terminate any employee upon providing reasonable notice, but disability cannot be the reason for the termination of employment. This means, in practice, it can be difficult to terminate an employee with a disability, even upon reasonable notice, without risking some litigation.

The employment contract

Sometimes the situation will reach a point where an employee has been incapable of performing the essential duties of her job over a lengthy period of time. Lawyers will often refer to this as "frustration of the employment contract."

In unionized environments, it is typical for the parties to have entered into an agreement whereby employees automatically "lose seniority and employment" after an absence from work of 24 con-

secutive months. These clauses are legal, and enforceable, provided the employer has considered its accommodation obligations under human rights legislation prior to implementing the clause.

In a non-unionized environment, an employer is not entitled to treat a contract of employment as "frustrated" unless it is determined the employee has been unable to perform the essential duties of his job for a period of time, and will continue to be able to fulfill those duties for the foreseeable future. This is a difficult test and employers frequently try to assess employees with limited information.

In these situations, it is important to carefully review available medical information and to obtain additional medical information, if possible, before making a decision to treat the contract as frustrated.

Duty to accommodate

Employers have a duty to accommodate a disabled employee to the point of undue hardship. This is considered on a case-by-case basis, taking into account the financial cost of the accommodation, size of the employer's operation, health and safety risks, morale of other employees, impact of accommodation on other employees' rights and other factors.

It can, therefore, be very hard to determine whether an employer is accommodating an employee to the point of undue hardship. The employer is expected to accept an employee's request for accommodation in good faith and take an active role in ensuring alternative approaches and various accommodations are investigated and considered.

But the duty of accommoda-

tion is not a one-way street – employees have obligations too. An employee is expected to advise the employer of the nature of the accommodation he requires and to answer questions and provide information, even medical information, regarding relevant restrictions. In addition, he is expected to co-operate with any expert, including a medical expert, whose assistance is required to manage the accommodation.

Another issue that arises when deciding to terminate an employee with a disability is the level of damages the employee is going to suffer. She may have been receiving disability benefits and not actually be suffering a significant loss of income.

However, in a recent Ontario Superior Court case, it was determined disability benefits are not generally deductible from an award of damages.

Furthermore, termination pay under Ontario's Employment Standards Act is generally not payable where a contract of employment is frustrated, but there is an exception if the frustration was as a result of a disability or illness. So, even if an employee could not earn any money during the notice period, the employer may still owe termination pay.

Terminating the employment of a worker with a disability is an area of law that is frequently litigated and changeable. Employers should regularly assess strategies for this area.

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