

Can Employer Fire Addict for Excessive Absenteeism & On-Duty Impairment?



SITUATION

A janitor is addicted to alcohol and drugs. After several uneventful years, his absentee rate significantly increases and he exhibits anger management issues, leading to a significant disciplinary record. His employer acknowledges the janitor's disability and helps him get into a rehabilitation program. After inpatient rehab, the employer gives the janitor a special day-shift schedule normally awarded based on seniority, so he can continue out-patient rehab. However, he fails rehab several times and his absences increase to 60, 70 and 100 days in consecutive years. So the employer and janitor enter into a last chance agreement, which he violates on several occasions. Finally, the janitor appears for work several hours late and clearly impaired. The employer fires him, citing his absenteeism and showing up to work late and unfit to perform his duties. Although the collective agreement allows for termination of workers who are impaired while on duty, the janitor files a grievance.

QUESTION

Was the janitor's termination legal?

- A) No, because it constituted disability discriminatory.
- B) No, because the employer has a duty to continue accommodating the janitor's disability.
- C) Yes, because the collective agreement allowed the employer to fire workers impaired while on duty.
- D) Yes, because the employer had accommodated the janitor to the point of undue hardship.

ANSWER

D.) An employer no longer needs to accommodate a worker's disability when such accommodation imposes an undue hardship, as it did here.

EXPLANATION

This hypothetical is based on Ontario labor arbitration case in which an arbitrator found that a transit worker's termination was justified due to excessive absenteeism, a significant disciplinary record and multiple relapses into addiction despite attending several in-patient and outpatient rehabilitation programs. The employer had accommodated the worker by providing him with a schedule limited to day shifts to allow him to continue out-patient rehab. Such shifts were normally awarded according to seniority. After the employer received several reports concerning the worker's erratic behavior and he showed up for work impaired, it fired him. The arbitrator said that requiring the employer to continue with further accommodations was an undue hardship given the cost to the employer to manage the addicted worker, his failed attempts at rehab, the violations of his last chance agreement and the impact on other workers required to cover his duties during his absences and deprived of the opportunity to work day shifts. Thus, the worker's firing was appropriate, concluded the arbitrator.

WHY THE WRONG ANSWERS ARE WRONG

A is wrong because a worker with an addiction disability isn't immune to termination. Workers are protected from discrimination based on their disabilities but may be disciplined including fired if the employer has reasonable and legitimate reasons for doing so. For example, an addict can be fired if he fails to cooperate with accommodations or the conduct is intolerable, such as theft. Here, the janitor's failed rehab attempts, excessive absences, violations of the last chance agreement and finally showing up to work impaired gave the employer reasonable and legitimate reasons to fire him.

B is wrong because an employer doesn't have an unlimited obligation to accommodate a disabled worker. If continuing accommodation imposes an undue hardship, the employer no longer has a duty to accommodate. Examples of undue hardship include when the accommodation forces the employer to unfavourably treat other workers or the worker fails to cooperate with the accommodations. In this case, accommodating the janitor with day shifts that should go to more senior workers and having co-workers cover his duties during his excessive absences adversely affects other workers and the employer's operations. Also, the janitor didn't cooperate with the accommodations by failing rehab several times and violating a last chance agreement. So at this point, further accommodations *would* impose an undue hardship on the employer. (For more information about when the point of undue hardship has been reached, see *Accommodation v. Undue Hardship*.)

C is wrong because collective agreements don't trump the human rights laws prohibiting discrimination. So a provision in the collective agreement allowing an employer to terminate workers for on-duty impairment doesn't relieve an employer of its legal duty to accommodate disabled workers. Such a provision can be enforced, however, if the employer accommodated the disabled worker to the point of undue hardship. In this case, because the employer had reached the point of undue hardship as discussed above, it could exercise its right under the collective agreement to fire him for showing up to work under the influence.

SHOW YOUR LAWYER

Amalgamated Transit Union Local 113 v. Toronto Transit Commission, 2012 CanLII 51356 (ON LA) Aug. 3, 2012.