Can Employer Fire HIV+ Worker for Safety Concerns?



SITUATION

A senior worker at a cleaning company who has an excellent employment record is diagnosed with HIV but doesn't tell his employer. While he's on medical leave for an unrelated illness, a co-worker inadvertently reveals his HIV status to a manager. When the worker fully recovers, he calls his manager to say he's ready to return to work full-time and resume all of his usual duties. The manager tells the worker he's being terminated because there's no work for him. The worker hears through former co-workers, however, that the company recently got a major contract and hired extra workers. So he files a disability discrimination complaint. The company admits that it terminated the worker after learning of his HIV status, but only because it feared the worker's medical condition was a safety hazard to co-workers and clients, although it couldn't explain exactly how his status threatened others. It also claims there were no current work assignments that would be suitable for an HIV-infected worker.

QUESTION

Did the employer commit disability discrimination'

A. Yes, because it terminated the worker based on his HIV status.

B. Yes, because it failed to accommodate the worker to the

point of undue hardship.

C. No, because the worker wasn't disabled.

D. No, because it fired the worker based on its safety concerns.

ANSWER:

A. The employer committed disability discrimination because the worker's HIV status was a factor in the termination.

A discrimination claim requires the worker to have a physical disability and be adversely treated in his employment, with the disability a factor in that treatment. The disability doesn't have to be the *only* factor; it just needs to be one factor in the employer's treatment of the worker.

This hypothetical is based on an actual discrimination complaint filed before the BC Human Rights Tribunal. In that case, the tribunal found that there was discrimination because the employer admitted that the worker's HIV status was a factor in its decision to fire him. In addition, the claim that there were no job assignments for this competent worker was undercut by the fact the company had just gotten a big contract and actually hired more workers. Thus, because the worker's disability, that is, his HIV status, was a factor in the termination, the employer was guilty of disability discrimination.

WHY THE WRONG ANSWERS ARE WRONG

B is wrong because accommodating the worker's disability isn't an issue here. Yes, employers have a duty to accommodate disabled workers to the point of undue hardship. But this duty only kicks in when the worker *needs* an accommodation. There's no evidence in these facts that this worker needed any accommodation. Although he'd taken medical leave, when he recovered, he asked to return to his former job

responsibilities fulltime. There's no indication that the worker couldn't do his job without accommodation or that he requested any accommodation.

C is wrong because being HIV+ *is* considered a disability. Canadian courts and human rights commissions have held that having an HIV infection is a disability protected by human rights laws. Thus, the worker in this situation did have a disability, even if he didn't have active symptoms of a disease or illness that affected his work abilities. In fact, HIV is often referred to as an 'episodic disability' because periods of good health may be interrupted by periods of illness and it's often difficult to predict when these episodes of illness will occur or how long they'll last. Note that an employer can be liable for discrimination even when a worker doesn't *actually have* a disability but it merely *perceives* the worker to be disabled. (For more information on perceived disabilities, see 'Is it Discrimination to Treat a Worker Adversely Because of His Weight''June 2012, p. 6.)

D is wrong because there's no evidence that the worker's HIV status created any safety issues in his work as a cleaner. Moreover, even if the employer had a legitimate safety concern as to the worker's HIV status, it still wouldn't be permitted to just fire the worker. The employer would have to determine whether there were any steps it could take short of termination to eliminate the hazard, such as requiring the worker to immediately bandage all cuts to prevent others from coming into contact with his blood.

SHOW YOUR LAWYER

Malin v. Ultra Care, [2012] BCHRT 158 (CanLII), May 9, 2012