Was Employer’s Termination of Pot-Smoking Worker Discriminatory?



SITUATION

A worker for a logging company operates heavy machinery to load and unload logs from trucks and rail cars. He openly smokes marijuana during work hours at the work site, claiming that, as a cancer survivor, he needs it to treat his pain. Co-workers report the worker’s smoking marijuana to a foreman several times but he doesn’t take action until an incident in which the worker hits a moose with a truck and marijuana is discovered in the vehicle. The foreman asks the worker if he smokes marijuana and he admits that he does but claims that it’s medical marijuana, it doesn’t impair him and his doctors condoned (but didn’t authorize) his use of marijuana for pain relief. However, he doesn’t have a medical marijuana card and can’t prove the marijuana has no potential to impair him on the job. Citing a zero tolerance policy for drug use, the foreman tells him he can’t return to work unless he’s drug-free. The worker says he intends to continue using marijuana and will quit if he can’t do so at work. So the employer terminates the worker’s employment because he refuses to return to work drug-free. The worker claims discrimination based on disability.

QUESTION

Was the employer’s firing of the worker discriminatory’

A. No, because he violated a zero tolerance policy.

B. No, because accommodating his marijuana use would be an undue hardship.

C. Yes, because he was smoking marijuana for medical reasons.

D. Yes, because firing a sick worker is presumed to be disability discrimination.

ANSWER

B. The employer’s termination of the worker wasn’t discriminatory because accommodating marijuana use would be an undue hardship due to the illegal nature of such drug use.

EXPLANATION

This hypothetical is based on a BC human rights tribunal decision in which the tribunal upheld a worker’s termination for use of marijuana at work. Although the tribunal accepted the worker’s claim that he smoked marijuana to manage pain, he didn’t have a marijuana card authorizing such medical use and therefore his use was illegal. Although an employer must accommodate workers’ disabilities, which may include their use of medication to treat those disabilities, there’s a limit to how far the employer must go. Employers aren’t required to incur an undue hardship. The tribunal concluded that letting the worker smoke marijuana at work without legal or medical authorization to do so would’ve been an undue hardship for the company. Thus, firing him for violating the company’s zero tolerance policy on drugs wasn’t discriminatory.

WHY THE WRONG ANSWERS ARE WRONG

A is wrong because violating a zero tolerance policy doesn’t always justify automatic termination. An employer must still consider the facts and circumstances of each case, including

whether the worker is disabled and entitled to accommodations, before imposing discipline. Saying a policy is 'zero tolerance' simply indicates that this policy is so important to workplace safety that more serious discipline will result for violations of it than for infractions of other workplace policies. (See, 'Discipline for Safety Infractions & 'Zero Tolerance'.') In this case, a zero tolerance policy for drugs would be justified given the safety sensitive nature of the workplace. And the worker's refusal to stop using marijuana on the job site and the safety sensitive nature of his job would be circumstances to be considered and could justify his termination. But simply violating the zero tolerance policy alone isn't enough without consideration of all the aggravating and mitigating circumstances.

***Insider* Says:** For more information about appropriate discipline for safety rule violations, go to the Discipline and Reprisals Compliance Centre.

C is wrong because although the worker claimed he was smoking marijuana for medical reasons, he couldn't produce a medical marijuana card authorizing such use. The use of marijuana is generally illegal in Canada. The exception is the use of so-called 'medical marijuana.' But for such use to be legal, it's not enough that an individual does, in fact, have pain or that he decides on his own that marijuana alleviates that pain. To legally use marijuana for medical reasons, the individual must have authorization from his doctors and legal authorization in the form of a marijuana card. Here, the worker didn't have legal or medical authorization to smoke marijuana to manage his pain. He simply unilaterally decided that pot was the appropriate medication for his condition, which isn't sufficient to legalize its use.

***Insider* Says:** For more information about medical marijuana, see, 'Medical Marijuana in the Workplace: Risks for Employers' and watch this recorded webinar on the topic.

D is wrong because every termination of a worker with a disability isn't presumed to be discriminatory. Employers aren't prevented from terminating workers simply because they have a disability if there are justifiable reasons for termination. A worker must show that he has a condition caused by or related to a bodily injury, birth defect or illness and that the employer treated him differently or unfairly at least partly because of that condition. Thus, the employer must be aware of the worker's disability or otherwise perceive the worker to be disabled. In this case, when the worker was terminated, he hadn't requested nor was the employer aware of his need for any accommodation due to a disability. He was terminated not because he was disabled but because he was using an illegal drug at the workplace during work hours in violation of a zero tolerance policy. So his termination wasn't disability discrimination.

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French v. Selkin Logging, [2015] BCHRT 101 (CanLII), July 8, 2015