

Was Firing Worker Who Claimed Fear of Workplace Violence Unjust?



SITUATION

After a bank employee breaks up with his girlfriend, he claims her brother's a manager at the bank's harassing him. He says the brother stalked him at work and threatened him with physical violence. The employee takes a leave of absence after attempting suicide, claiming he's dealing with severe depression and anxiety. He tells the HR representative he's afraid to return to work due to the brother's threats. He asks for a progressive return-to-work based on his therapist's suggestion, citing his depression and anxiety related to the breakup and threats. The employer investigates the employee's concerns of workplace violence by interviewing the brother and two witnesses, and concludes that there's no safety concern. It bases this conclusion largely on the brother's interview because the witnesses didn't hear what the brother said to the employee. The employer, which doesn't have a workplace violence policy, doesn't warn the brother not to bother the employee. The employer warns the employee, however, that he must return to work within three days or provide medical documentation explaining why he can't return or else he'll be terminated. He does neither and the employer fires him. The employee claims his termination was unjust.

QUESTION

Was the employee's termination unjust'

- A. Yes, because the employer failed to accommodate the employee's disability.
- B. Yes, because an employer can't fire an employee who refuses to work because he feels his workplace isn't safe.
- C. No, because he was warned he could be terminated if he didn't return to work or provide appropriate documentation.
- D. No, because bare threats of violence don't constitute workplace violence under the OHS laws.

ANSWER

A. The employee's termination was unjustified because the employer failed to accommodate his depression and anxiety, which are disabilities.

EXPLANATION

This hypothetical is based on a decision by an Ontario labor arbitrator, who ruled that the firing of a bank employee who refused to return to work after complaining of threats by his manager, the brother of his ex-girlfriend, was unjust. These threats of workplace violence caused him depression and anxiety and led to his attempted suicide. He was under medical care to help him deal with his mental disabilities and proposed a progressive return-to-work. But the arbitrator found that the employer failed to make any significant allowance for the employee's disability. It didn't offer him any assistance or follow up on the progressive return proposed by his therapist. It also provided little, if any, assistance to him in dealing with the alleged harassment and threats of violence that were directed at him by the manager. Thus, the bank's failure to accommodate the employee's disabilities with a progressive return-to-work made it hard to accept an argument that he was absent without leave. So the arbitrator

concluded that the employee was unjustly terminated. (The arbitrator also found that the bank's cursory investigation of the threats didn't comply with the OHS regulations. In fact, 'the investigation appears to have been more of a platform for the harassing manager' than for the concerns of the employee, observed the arbitrator.)

WHY THE WRONG ANSWERS ARE WRONG

B is wrong because although employers can be liable for illegal reprisal for disciplining a worker who has refused unsafe work, that liability isn't automatic or unqualified. If a worker has reasonable grounds to refuse to do his job or a particular task, his employer can't discipline him for exercising his right to refuse unsafe work. But if the employer properly investigates a work refusal and concludes that work is, in fact, safe and advises the worker to return to work, it [can discipline that worker if he still refuses to work](#). Here, the worker arguably had a reasonable fear of the risk of workplace violence at the hands of the manager. But the employer didn't conduct an adequate investigation of the alleged violent threats. It didn't even bother to warn the manager to stay away from the employee. Thus, under these circumstances, it wasn't just to fire the employee for continuing to refuse to return to work after the investigation.

Insider Says: For more information about work refusals, visit the [Work Refusal Compliance Centre](#).

C is wrong because simply warning an employee that termination may occur doesn't justify terminating the employee on its own. Employers must generally have just cause to fire a worker. And they should warn workers that certain conduct may result in discipline, including termination. But simply providing such a warning doesn't eliminate the need for just cause. In this case, the employer fired the employee when he didn't return to work when required. And it had warned him that he'd be fired

if he didn't return. But the employee's absence was warranted due to the employer's failure to accommodate his mental disabilities. Plus, giving him only three days to provide additional medical documentation was unreasonable.

D is wrong because even the mere threat of violence can be sufficient to trigger a worker's right to refuse unsafe work and an employer's duty to address workplace violence. The OHS laws either expressly or implicitly require employers to take reasonable steps to protect workers from workplace violence. And the right to refuse unsafe work includes the right to refuse work reasonably believed to expose a worker to violence. Under the law, 'workplace violence' is typically defined broadly to include not only physical actions, such as punches, slaps and kicks, but also verbal threats of violence. Here, the employee said the manager had stalked him and verbally threatened him with violence. Given that the manager was the brother of the woman who the employee had just broken up with, the employee's fear of the brother was reasonable under these circumstances. Thus, the manager's threats of violence alone were sufficient to constitute workplace violence.

Insider Says: For more information about dealing with workplace violence, visit the [Workplace Violence Compliance Centre](#) and see the OHS Insider's Special Report '[OHS Compliance: Protecting Workers from Violence](#).'

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Daoust v. JP Morgan Chase Bank National Assn., [2016] C.L.A.D. No. 41, March 7, 2016