

Was Firing Worker with Scent Sensitivity Justified or Discriminatory?



SITUATION

An office worker suffers from scent sensitivity. His employer adopts a scent-free policy, posts signs notifying co-workers of the policy, conducts a walk-through of the workplace to identify scented products and removes those most harmful to the worker, restricts access to its office by unnecessary visitors who might be wearing scents and gives the worker a key to a fire door so he can quickly exit if affected by any scent. The employer also offers to transfer the worker to a different department when his department is moved to a new floor but he declines. The worker isn't satisfied with the accommodations, however, and claims all identified scented products weren't removed and using the fire door wasn't practical. He refuses to work for a brief period, but doesn't provide any medical evidence supporting his claims that his health is still in danger. Meanwhile, during efforts to accommodate his sensitivity, the worker disobeys a supervisor's orders and goes around his supervisor on another issue. He also acts disrespectfully to co-workers. This conduct mirrors past behaviour for which he received progressive discipline, including a warning that future incidents could result in termination. Citing insubordination and disrespectful conduct, the employer terminates the worker. He claims the termination is discriminatory.

QUESTION

Was the worker's termination improper?

- A. Yes, because his scent sensitivity is a disability.
- B. Yes, because it very closely followed his refusal to work and thus is retaliatory.
- C. No, because the employer accommodated the worker to the point of undue hardship.

D. No, because he'd engaged in misconduct after previously being warned further misconduct could result in termination.

ANSWER

D. The employer was justified in terminating the worker who was insubordinate, had a history of disciplinary issues and was warned future misconduct could result in termination.

EXPLANATION

This hypothetical is based on a Nova Scotia labour board decision that upheld the termination of a worker despite his scent sensitivity and claims of discrimination. The employer had cause to discipline the worker for his most recent behaviour towards co-workers and superiors, the board found. He had a history of discipline for similar conduct, been subjected to progressive discipline and been warned that further misconduct could result in termination. Therefore, the board ruled the termination wasn't linked to the worker's scent sensitivity issues but to his misconduct and legitimate business reasons.

WHY THE WRONG ANSWERS ARE WRONG

A is wrong because although the worker is disabled due to his scent sensitivity, the employer didn't fire him because of that disability. For a termination to be discriminatory, it must be based, at least in part, on an actual or perceived disability. In this case, however, the employer provided legitimate reasons unrelated to the worker's disability to support his termination. Therefore, the simple fact that the worker has a disability doesn't render his termination discriminatory.

B is wrong because the timing of a termination is only one factor to consider in determining whether the firing was a reprisal. An employer can't terminate a worker in retaliation for exercising his OHS rights, including the right to refuse unsafe work. And if the employer fires the worker immediately or soon after he exercises such rights, the timing may be evidence that the firing was an illegal reprisal. But other factors are also relevant. For example, a worker must have reasonable grounds for refusing to work. Here, the worker had no evidence that the scented products that weren't removed from the workplace were sufficient to endanger his health and so justify his refusal. More importantly, however, the employer had ample evidence that the worker's termination was unconnected to his work refusal and instead was justified by his current misconduct, prior disciplinary record and warnings that termination could result for recurring misbehaviour. Thus, the facts don't support a finding that his termination was retaliatory.

Insider Says: For more information about how to properly handle work refusals, visit the Work Refusal Compliance Centre.

C is wrong because whether the employer accommodated this worker to the point of undue hardship is irrelevant to his termination. It's true that an employer has a duty to accommodate a disabled worker to the point of undue hardship. If the employer has satisfied that duty, it may be permitted to terminate that worker. But, in this case, the employer isn't claiming it accommodated the worker to the point of undue hardship to justify his termination. Rather, the employer cited

recurring disciplinary issues for firing him. (It should be noted that this employer arguably *did* accommodate the worker's scent sensitivity to the point of undue hardship: it implemented a scent-free policy, posted signs notifying workers of that policy, removed scented products to minimize risk of the worker's exposure to scents and offered to relocate him. In addition, the worker didn't provide any evidence these accommodations weren't sufficient to protect his health.)

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Gillis v. Nova Scotia (Public Service Commission), [2016] NSLB 100 (CanLII),
Feb. 16, 2016