

Failure to accommodate costs employer more than \$22,000

Employer was aware of employee's depression, but didn't check whether performance and behavioural issues were linked to it before dismissal

| BY RONALD MINKEN |

POOR performance and bad behaviour by an employee can be a headache for an employer and may set the employee on the road to dismissal. However, though the employer may think things would be easier with the troublesome employee out of its hair, it must be careful to determine whether the problems are caused by a disability.

In *Mackenzie v. Jace Holdings Ltd.*, the British Columbia Human Rights Tribunal determined an employer discriminated against an employee suffering from depression when the employer terminated the employee due to the negative impact of her disability on her performance while at work.

The employee, Sharon Mackenzie, worked for Thrifty Foods in its floral department for eight years when she was terminated without notice due to poor performance. Specifically, Thrifty Foods complained Mackenzie was curt and abrupt towards co-workers and management, exhibited mood swings, refused to take responsibility for her performance issues, engaged in gossip, and was manipulative, disruptive and demotivating with little hope her behaviour would change. Although Thrifty Foods was aware Mackenzie suffered from depression and she had been away from work on stress leave for about two months before her termination, the company did not investigate whether her behaviour was linked to her depression and if she required any accommodation. Mackenzie launched a human rights application against the company alleging discrimination due to disability and seeking damages for unpaid wages for a period of six months, as well as damages due to injury to dignity, feelings and self

respect.

The tribunal considered all of the circumstances leading up to Mackenzie's termination, including Thrifty Foods' knowledge of her disability. Although the tribunal noted Mackenzie did not seek any accommodation, no evidence was presented by Thrifty Foods to demonstrate it would have been impossible to accommodate her without imposing undue hardship on the company.

Although the employee didn't seek accommodation, no evidence was presented by the employer to show it would have been impossible to accommodate without undue hardship.

The tribunal determined that, given Thrifty Foods' knowledge of Mackenzie's disability, it had a duty to inquire into whether her behavioural issues were related to her disability and whether she required any accommodation in the workplace. The tribunal concluded Thrifty Foods failed to fulfil this duty and its actions in terminating Mackenzie's employment due to her behaviour which was the result of mood swings, irritability and being manipulative — symptoms of her depression — were discriminatory and a breach of the B.C. Human Rights Code. As a result of Thrifty Foods's discriminatory conduct, Mackenzie was awarded six months of lost wages — totalling \$17,616.06, plus \$5,000 for damages to injury to dignity, feelings and self respect.

Impact of decision on employers

When considering taking discipli-

nary action, including termination of an employee, employers should ensure they inquire into any potential health issues which could be affecting the employee's behaviour in the workplace. If an employer is aware an employee has a disability, it is obligated to inquire as to whether the disability is affecting work performance and whether any accommodation may be required.

Impact of decision on employees

Employees with disabilities, whether mental or physical, should be aware they have certain protections under human rights legislation. Although some employees may prefer not to disclose particulars of their disability to their employer, some disclosure is necessary to trigger an employer's duty to accommodate and to inquire about the potential link between poor performance and the health issue experienced by the employee.

For more information see:

■ *Mackenzie v. Jace Holdings Ltd.*, 2012 CarswellBC 3320 (B.C. Human Rights Trib.).



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