

Cause termination upheld due to undisclosed disability

Disability didn't play a factor in employee's dismissal following workplace threats, so there was no discrimination

BY RONALD MINKEN

THESE DAYS more employees are willing to disclose their disabilities to their employers to trigger the employers' duty to accommodate in accordance with human rights legislation. This creates a greater understanding between the employers and employees of the specific circumstances facing the employee in the workplace and adjustments can then be made to ensure a more productive working environment for all.

But what happens when an employee does not disclose a mental disability until after the employee makes violent threats in the workplace? What rights does the employee have in that situation? What obligations does the employer have towards the employee? Would the employer's act of terminating the employee for cause be upheld or be viewed as an act of discrimination?

In a recent decision — *Bellehumeur v. Windsor Factory Supply Ltd.* — the Ontario Court of Appeal agreed with the trial judge that the employer's termination of the employee for cause due to violent threats made by the employee was justified and not an act of discrimination.

Although the employee had disclosed some of his disabilities to his employer, including alcoholism, a thyroid condition and heart issues, the employee did not disclose a mental disability that he also had. The employer accommodated the employee for the disclosed disabilities as required by the Ontario Human Rights Code.

One day, the employee made violent threats in the workplace to his co-workers. As a result of these threats, which were unrelated to his disclosed disabilities, the employer terminated the employee for cause. The employee brought an action seeking damages for wrongful dismissal, taking the position that he should not have been terminated for cause due to his mental disability and that the termination was an act of discrimination on the basis of grounds protected under the code.

Employer wasn't aware of employee's mental disability when it fired him

At trial, the judge determined that because the employer was not aware of the employee's mental disability until after termination and the decision to terminate was based on the violent threats in the workplace only, the employer was justified in terminating the

employee for cause and the termination was not discriminatory.

The employee appealed this decision to the Ontario Court of Appeal.

The Court of Appeal ultimately dismissed the appeal on the basis that the employer was not aware of the employee's mental disability at the time of termination and the employee's misconduct — consisting of violent threats — resulted in a breakdown of the employment relationship justifying the employee's termination for cause in accordance with principles outlined in the Supreme Court of Canada's decision of *McKinley v. BC Tel*. The court noted that the employer "fired him as they would any employee who engaged in such workplace misconduct." Accordingly, the employer's conduct in terminating the employee was not an act of discrimination and there was no violation of the Human Rights Code.

The employer fired the employee as it would any employee for similar misconduct. Accordingly, the employer's conduct was not an act of discrimination.

Lessons for employers

This decision demonstrates that an employer's duty to accommodate is specific to each disability in that an employer's awareness of one disability does not imply that the employer is aware of all the employee's dis-

abilities. It is the obligation of the employee to disclose all disabilities she wishes an employer to accommodate and to take into consideration in its dealings with that employee. An employer will likely not be expected to accommodate an employee for a disability it is not made aware of by the employee. Employers should be cautious prior to taking disciplinary action against any employee to determine whether there are any obligations to be considered before taking action.

Lessons for employees

Employees should be aware that while human rights legislation offers protections to workers from discrimination based on certain grounds and places certain obligations on employers to accommodate, disclosure of the disability is required to trigger those obligations. If an employee does not disclose her disability, the employer will not be expected to take that into consideration when implementing discipline, including termination, or in its overall conduct towards the employee. While it is understandable that some employees may not want to disclose their disability to an employer, not disclosing may have greater negative consequences than sharing that information with the employer.

For more information see:

- *Bellehumeur v. Windsor Factory Supply Ltd.*, 2015 CarswellOnt 9460 (Ont. C.A.).
- *McKinley v. BC Tel*, 2001 CarswellBC 1335 (S.C.C.).

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