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Worker with a disability? Terminate with care

An employer's motives will be scrutinized when dealing with disability-related absences, as seen in $20,000 award given out in Ontario Superior Court of Justice case

In a recent decision, the Ontario Superior Court of Justice reminded employers that when responding to an employee's absence from work due to a disability, the employer's motives will be carefully scrutinized — and the monetary damages resulting from a finding of unfair treatment can be significant.

Patricia Wilson had been working for Solis Mexican Foods for a little more than one year when things came to a head. Initially hired as an assistant controller, she soon accepted a lateral move to the position of business analyst, which offered the same level of compensation.

Although there were some minor issues of timeliness, Wilson's performance was rated as satisfactory after six months at the new position.

Shortly after her performance review, Wilson told her manager she was experiencing back problems. The issue was raised all the way to management where it became a frequent topic of discussion between December 2010 and March 2011.

Also during that period, management began to discuss concerns regarding Wilson's "suitability" to work for the company.

LEGAL VIEW

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Employer, employee take divergent paths

Wilson went off work in March 2011, relying on a doctor's note stating she could not work until further notice due to "medical reasons."

The company correctly responded to the note by requesting further information from the treating physician regarding a potential timeline for a return to work, either with or without accommodation.

When no additional information was forthcoming, the company followed up again — only this time, it received a physician's note indicating Wilson could start a graduated return to work over the following three weeks.

But it was the company's next response that may have set things on the wrong path. In response to the suggestion of a work-hardening program, Solis advised that Wilson had to return to work at full-time hours, or not at all, and enclosed a functional abilities form for the physician to complete.

Wilson's physician completed the form, indicating Wilson could return to work with some physical accommodation regarding the amount of time she spent sitting, standing and walking.

Not satisfied with this response, Solis took the position the restrictions impaired a critical part of Wilson's job and enclosed a further form for completion by the physician.

Neither that form nor a followup email to Wilson were acknowledged. Instead, the company received a doctor's note stating Wilson needed to be off work for two months for "medical reasons."

Less than one month later, the company terminated Wilson's employment on the basis her job functions had become redundant as a result of Solis selling part of the business.

Wilson was provided the minimum two weeks' pay in lieu of notice required by Ontario's employment standards.

Employee sues for wrongful dismissal

Wilson sued for wrongful dismissal, claiming she was entitled to six months' notice and the company breached the Ontario Human Rights Code by terminating her employment due to her disability.

The trial judge found Wilson had been terminated without cause and awarded her three months' notice.

The judge then addressed the question of whether there had been a breach of the code. Frequently, these types of complaints are brought to the Human Rights Tribunal of Ontario.

However, the code also allows the Ontario Superior Court of Justice to address code-based claims of discrimination.

The trial judge noted that determining whether there had been an infringement of the code by Solis turned on whether Wilson's disability was one of the factors that led to her termination.

In other words, the question was not whether Solis failed to accommodate Wilson, but whether the company's motive was terminating her employment.

The company's position was simply that it had sold part of the business, resulting in Wilson's position becoming redundant.

In other words, the disability had nothing to do with the decision to let her go. Even Wilson conceded the sale meant her duties would have been cut in half.

Significantly, in the judge's reasons, he noted a very poor evidentiary record at trial in which no oral evidence was called, making it difficult for him to assess both Wilson's health and the company's motive in her termination.

Discrimination decision

Despite evidence the sale would have resulted in significant changes to her position, the trial judge held Wilson's disability played a critical role in the decision to terminate her employment.

The judge was persuaded by the following factors:

- Wilson's performance was deemed satisfactory until she raised her back problem, after which several discussions occurred among management regarding her "suitability" to stay with the company.
- During her absence from work, the exchange of correspondence with Solis suggested the company did not make any real attempt to consider accommodation or return to work. The trial judge characterized the exchange as disingenuous.

•Solis did not mention the potential sale of the business until the termination letter, suggesting the company waited to use the sale as an excuse for termination.
•Wilson's position at Solis was not likely to become redundant after the sale as she was already working significant overtime.

The judge awarded Wilson $20,000 as general damages for discrimination, noting the quantum had to be significant enough to not trivialize the issue or operate as a licence fee to discriminate.

Lessons for employers

Generally speaking, an employee on disability leave is not afforded any priority or special job protection relative to any other employee who might have her position eliminated through restructuring.

However, if a discrimination claim is made, the employer carries the burden of demonstrating it did not seize an opportunity to "get rid of a problem" under the guise of a restructuring.

In the case of Wilson's claim, the company might have helped itself by taking a more conciliatory approach in its written correspondence and bringing Wilson back to work as soon as possible with accommodation.

Thereafter, if the sale of the business resulted in her position becoming redundant, the decision to terminate her employment might have appeared less like Solis had been biding its time, waiting to use the restructuring as an excuse to terminate.

Finally, while hindsight is 20-20, the judge's decision may have been different had Solis offered a more robust presentation of oral evidence at trial in attempting to persuade the judge there was no improper motivation in the decision to terminate.

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