

Does Mental Illness Excuse Theft and Other Serious Employee Violations?



The “it wasn’t me, it was my mental illness” excuse for workplace misconduct rarely works

“It wasn’t me; it was my mental illness.”

That’s something employees are apt to say after getting caught committing a serious work violation like theft, workplace violence, absenteeism or other serious offence. More often than not, this explanation is little more than a lame excuse to avoid discipline. But if—and that’s a big if—it happens to be the truth, disciplining the employee may violate your failure to accommodate mental disabilities under human rights laws. The good news is that you can take steps to protect yourself in case one of your own employees tries to blame a serious work offence on a mental disability.

The Law of Mental Disability Excuses

Employees that sue for discrimination have the burden of proof. If they can’t make out what’s called a prima facie case for discrimination, you can get the court or tribunal to toss the claim without having to go to trial. In a don’t-blame-me for misconduct case, the employee would have to show that:

- The employer knew or should have known that the employee was disabled;
- The misconduct was related to the disability; and
- The employer had a duty to inquire into whether there was a relationship between the disability and misconduct.

You can knock out an employee’s discrimination claims by foiling any one of these prongs. Here are 4 good approaches:

1. Employee Isn’t Disabled

The most direct way to make out a legal defence is by challenging that the employee actually had a disability. **Example:** A health care aide was terminated for using his work computer to view and download porn and engaging in sexual conversations on dating sites at work. The aide, who had a clean disciplinary record, apologized and blamed mental depression and sex addiction for his conduct. But neither the employer nor the BC arbitrator were impressed. Since there was no evidence showing he had an actual disability, the employer was under no duty to look into how his issues might

have impacted his actions, the arbitrator concluded [[Interior Health Authority v Hospital Employees' Union](#), 2013 CanLII 104980 (BC LA)].

2. Mental Illness Had Nothing to Do with Misconduct

Simply proving the existence of a mental disability that can cause people to engage in unethical or illegal behaviour isn't enough. To make out a case for disability discrimination, the employee must also show that the disability caused the misconduct that led to termination. Stated simply, employees with disabilities are generally deemed capable of exercising free will and being held accountable for their own actions.

Example: A sanitation employee with 15 years of discipline-free service got caught stealing a jacket worth \$75 from his employer. The employee admitted to committing theft but claimed the behaviour was caused by depression. The employer fired him anyway. While acknowledging that the employer didn't even consider the possibility that the employee was disabled, the BC court still upheld termination because the link between the employee's depression and his act of theft was pure "conjecture" not supported by medical evidence [[Francescutti v. Vancouver \(City\)](#), 2016 BCSC 1191 (CanLII)].

3. Mental Illness Had Nothing to Do with Termination Decision

Firing an employee because of his mental illness is discrimination, even if there are other factors for the decision. Firing for committing serious misconduct is justifiable as long as you can show you'd terminate any other employee who committed the same offence. **Example:** A SaskTel store employee lost his job when his long-running theft schemes came to light. The union claimed that it was depression and substance addiction that caused the employee to steal but the Saskatchewan arbitrator tossed the grievance. He was terminated, like any other employee would have been on the same facts, for theft, according to the arbitrator. "The fact that depressed and alcohol dependent persons may have greater temptation to steal alcohol from their workplace doesn't prove that this factored into the decision to terminate," [[Unifor, Local 1-S v Saskatchewan Telecommunications Holding Corporation \(Sasktel\)](#), 2015 CanLII 153356 (SK LA)].

4. Accommodating Employee Would Impose Undue Hardship

An employee that manages to overcome all the obstacles and prove that misconduct was caused by a mental disability still isn't home free. It just means that the employee is entitled to **reasonable** accommodations. Employers can still justify discipline by showing that keeping the employee on the payroll is undue hardship to the extent it poses an unreasonable risk of future misconduct. **Example:** A grocery store cashier fired for stealing from the till got rehired when labour was short. Result: She continued stealing from the store and got fired again. While her mental illness factored into the decision, the federal arbitrator refused to order the employer to reinstate her "based upon her history and the reservations that exist about her future prognosis." Sure, the store could subject her to abnormally close supervision but that would amount to undue hardship, the arbitrator concluded [[Canada Safeway Ltd. and U.F.C.W., Local 401 \(Brands\)](#), (2000) 94 L.A.C. (4th) 86].