

# Terminating Employees with Disabilities



*Examining undue hardship and reasonable expectations of employees with disabilities in the workplace*

The idea of terminating an employee with a disability, or because an employee has a disability, is unpalatable to many. It should be. In the past decade, the right of individuals with disabilities to accommodation in the workplace has gained momentum. Governments and organizations recognize the right of the disabled to be treated with dignity and respect in the Canadian workplace. In Ontario, the Accessibility for Ontarians with Disabilities Act (AODA) specifically includes an employment standard that spells out the efforts an organization must put forth to hire and retain, through accommodation, individuals with disabilities. And of course, the Canadian Charter of Rights and Freedoms spells out the rights of all Canadians to be protected from discrimination across Canada. No Canadian should be discriminated or mistreated on the basis of a disability.

Does this mean, however, that any individual with a disability has cart blanche to do anything in the workplace and be assured protection against discipline and termination? Of course not. Organizations have the right to ensure their employees are contributing to the success of the workplace.

In the event your organization has an employee with a disability who is unable to perform the work required and/or who is creating a hostile or dangerous workplace, you may take steps to discipline or terminate the employee.

## **Two Situations Where Termination May Occur**

According to the AODA in Ontario (and similar guidelines across Canada) organizations have a duty to accommodate employees with disabilities to the point of undue hardship? Courts across Canada have frequently protected employees from discrimination but also supported organizations in their decisions to terminate employees with disabilities under certain circumstances.

### **Not Capable of Job Performance**

There are times when an employee's disability cannot be reasonably accommodated in the workplace. This is more likely to occur in organizations of smaller size and with fewer resources. If, for example, an employee from a small organization drives a delivery vehicle and that employee can no longer drive due to a disability, the employer may be able to demonstrate there is no reasonable way to accommodate that

employee. The employer does not have the obligation to create a brand new job for that employee, or kick another employee out of a job to make way for the employee with a disability (there may be exceptions in the case of a collective agreement).

In a larger organization, an employer is more capable of reassigning job duties to other employees or providing retraining to allow the employee to train for another position. However, it is possible that even in larger organizations a disability may not be accommodated and an employee must be terminated.

## **Personal Performance Failures (such as behaviour)**

There are also times when the employee himself acts in ways as to give an employer cause to terminate his employment. For example although alcoholism is considered a disability, an employee who frequently is absent from work, or shows up intoxicated, is not protected by his illness. Accommodation does not mandate that an employee be protected or absolved of offenses due to disability. Additionally, an employee cannot be put in a 'better' position than other employees who commit similar offenses just because of his disability. Where an employee demonstrates inappropriate behaviours as a result of a disability (such as mental health health or neurological disability such as the presence of Turrets or addiction), attempts for reasonable accommodation will first be required. This situation is difficult to navigate, and may require some time to demonstrate all efforts to accommodate are exhausted.

## **When You Can Terminate**

Courts have held that while employers must try to accommodate employees, this does not mean the workplace must be fundamentally changed. An employer is not required to maintain or create a position that is not useful or productive as part of its operations as a component of accommodation.

You may be entitled to terminate when at the time of dismissal the employee..

- was unable to meet his or her employment obligations (after attempted accommodation)
- performed or behaved in a way that would have lead to termination of any other employee engaged in similar actions
- is unable to offer any persuasive medical assurance that s/he would be able to meet obligations at some predictable point in the near future
- could not be accommodated, short of undue hardship, in any other position in the operations.

It is always a good idea to consult with legal counsel in a situation with potential legal consequences will result. If you believe you cannot accommodate an employee with a disability in your workplace, however, you may be in a position to terminate that employee. When you do make this decision, it should not come out of the blue or be the first time you have addressed any concerns with the employee. Carefully document your concerns and attempts at accommodation before taking action.

When you have genuinely tried to accommodate an employee, but are unable to do so, termination may be a reasonable and necessary course of action to maintain the success of your business.

## **Resources**

[Justice Laws Website Government Of Canada](#)

[Group Long Term Disability Termination Study: Canadian Institute of Actuaries \(2011\)](#)

[Blind Canadians Accommodating Disabilities Canadian Workplace](#)