

# Dismissing the Disabled Employee

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What do you do with the employee whose work is fine except for one problem — they always seem to be sick? Dealing with this poses both legal and practical concerns for an employer.

With the stresses of today's work place, more often we see a pattern where an employee's condition results in lengthy absences or numerous short term absences. Where the employee's failure to report to work is based on some bona fide illness, the law is clear that he or she cannot be disciplined. Yet that does not leave the employer without recourse. Courts have recognized that as the employment relationship is one of contract, employers are entitled to receive the benefit of their bargain with the employee. If an employee regularly fails to report to work due to illness, or is absent for long periods, courts may find that the employment relationship has been frustrated. Frustration occurs where due to some intervening factor, e.g. illness or other non-culpable incapacity, the employee cannot perform the job for which he or she has been hired. In such circumstances the employee may be let go for "innocent absenteeism."

However, the employer does not have unfettered discretion in making this decision. Rather the absenteeism must be evaluated to determine if two tests are met. First, are the prior absences in fact excessive (based on both comparative and absolute figures)? Second, does the reason for the absences indicate that there is no reasonable likelihood that the pattern of absenteeism will be corrected in the future? These questions must both be answered in the affirmative before the employee can be dismissed for innocent absenteeism.

In the past, arbitrators sometimes looked to post-discharge events in deciding if excessive absenteeism would continue in the future. In particular, where the employee's disability was alcohol or drug related, and after dismissal he or she sought treatment or counselling, reinstatement was ordered. A recent decision of the Supreme Court of Canada has held, however, that the employee's conduct must be evaluated solely at the time of discharge. This issue is now whether at the time of discharge the two tests to dismiss for innocent absenteeism were met.

Without delving into Workers' Compensation issues, different considerations apply where employees are unable to do their jobs due to injury. This usually occurs where an employee is injured at work, then returns to discover the position previously held is too strenuous. It may also arise where an employee is diagnosed with an illness (eg: multiple sclerosis or other disability) which affects his or her ability to carry out former duties. To dismiss an employee in either circumstance, particularly in a unionized environment, is to risk a grievance or even a human rights complaint. Arbitration decisions have held that in these circumstances the employer has a duty to accommodate the disabled employee. This requires that an employer modify the employee's current job duties so he or she may continue to work; it does not currently mean that a special position be created to accommodate the employee. Yet one recent arbitration decision has gone almost that far, holding that the employer may have an obligation to assemble a number of tasks into a job the employee can do. If this decision is upheld on review, the duty to accommodate may be expanded, requiring the employer to take additional steps before resorting to dismissal.

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One final pitfall in dismissing a disabled employee relates to the dismissal's effect on employee benefits. A recent decision of the British Columbia Court of Appeal held that where discharging a disabled employee affects that employee's eligibility for benefits, in particular long term disability, the employer may be responsible to compensate for those lost benefits. It is important that the employer monitor entitlement and the services provided by the disability plan administrator.

As this brief overview illustrates, discharging a disabled employee involves a number of heavy obligations and potentially unforeseen liabilities. As such, it is crucial that an employer consider carefully all its obligations to the employee before seeking to end the employment relationship.

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