

# Fulcrum Search Science Inc.

## Terminating Disabled Employees



### **Ontario Human Rights Code**

Under the Ontario Human Rights Code, an employer is prohibited from terminating an employee because s/he is disabled unless the person is incapable of performing or fulfilling the essential duties of the job. When assessing whether the person is incapable the Human Rights Commission looks at whether the needs of the disabled employee can be accommodated without undue hardship.

If a person's disability or perceived disability was simply a factor in the decision to terminate an employee then the employer could also very well be in violation of the Ontario Human Rights Code which provides that every employee has then right to equal treatment with respect to employment without discrimination because of handicap.

### **Wrongful Dismissal Law**

There are many situations when an employer restructures and permanently lays off several people including employees who are receiving long-term disability benefits. And the fact that a person is disabled is not factored into the decision in any way. In these kinds of cases, there are not generally any human rights concerns.

From a wrongful dismissal perspective in these kinds of cases, an employer generally has the right to terminate a person's employment without cause by providing reasonable notice of termination, or pay in lieu of such notice.

For employees who are receiving disability benefits at the date of termination, is the disabled person entitled to disability payments and termination pay, or are the disability benefits deducted from termination pay owing?

Until a 1997, the law in Ontario was essentially that the purpose of providing reasonable notice of termination was to allow a terminated employee to look for alternative employment so that a disabled employee was entitled to disability payments and termination pay because a totally disabled person cannot look for work.

In 1997, the Supreme Court of Canada in the Sylvester decision changed the law in certain circumstances. In cases where the employer establishes and pays for disability benefits, then the employer can deduct disability benefits from termination pay owing. In cases where the employee pays for disability plans, however, the employee can still claim termination pay without having disability benefits deducted from the termination pay. Thus, for an employee who is in receipt of long-term disability benefits, the issue is who pays the premiums for those LTD benefits. Accordingly, employers should keep the Sylvester decision in mind when deciding whether to self-insure or pay premiums for employee disability plans.

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