

## **PUBLICATION**

### Terminating an Employee Due to a Disability

Shane B. King

October 9, 2013

Terminating an Employee Due to a Disability

A recent case came across my desk whereby an employer terminated an employee specifically because of his disability.

The particulars are as follows: Mr. X was a site supervisor for a company in the construction industry, and in this position he was required to drive between many sites throughout the day, and did so in a company vehicle, provided by, paid for, and insured by, the Employer.

Mr. X was diagnosed with a serious ailment which could affect his ability to drive. Mr. X's physician reported that Mr. X was able to perform all services of his employment, and did not require any restrictions to be placed upon him.

The Employer did its own research on the ailment, and upon doing so found that one of the symptoms could be that Mr. X could become weak after treatments. Again, it is important to note that the physician of Mr. X did not place any restrictions on his employment.

Based upon the Employer's own research, the Employer determined it did not want to risk having the Employee driving its company vehicle, with the possibility that he could get into an accident. Again, there was no such warning or proviso provided by Mr. X's physician (the intuitive reader may be noting some foreshadowing by the amount that I am reinforcing this point).

The Employer advised Mr. X that he was no longer going to be the site supervisor, and would instead be moved into an office position, with a reduction in pay, and would be losing his company vehicle.

Mr. X launched a complaint with the Alberta Human Rights Commission, which was then forwarded to me.

Had the Employer called me before proposing this unilateral change in Mr. X's employment, I would have strongly urged him to not do so, as this is not only a clear case of constructive dismissal; a substantive or material change in an employee's employment terms and conditions, but as the Employer confirmed the change was because of Mr. X's health, it was also a breach of the Alberta Human Rights Act.

While the Employer honestly thought he was doing the best for his company and the public at large, in

removing from the road an individual who could be more susceptible to being in an accident, there was no proof that Mr. X actually was more susceptible to being in an accident, and thus the employer not only had to pay for damages for wrongful dismissal, but was also required to pay damages for the breach of the Alberta Human Rights Act.

The moral of the story? You must work with any disabled employee, and must rely upon evidence to make a change in an employee's role. Absent same, you may be faced with significant damages. Call your friendly employment lawyer before taking any such steps.

For further information, please contact the author, Shane King at 403.254.3849 or any member of our Employment & Labour group