

BULLETIN

Absenteeism

January 1, 1999

The Report: January 1999 vol.19 num.5

by SARAH O'LEARY



Can I be fired for being absent too often from work?



If you are absent from work on a prolonged basis due to a chronic, long-term health problem, you are protected by the *BC Human Rights Code*. The Code imposes a duty on the part of the employer to seek some accommodation to allow the disabled employee to work within the limits of her abilities. The onus on the employer is to seek an accommodation to the point of -undue hardship". However, there are some circumstances where an employee may be dismissed for absenteeism even if there is no fault on his or her part. This is called -non-culpable" or -innocent absenteeism."

In most cases with HSAs employers, where an employee is suffering from a long-term disability, she or he will have the option of applying for LTD benefits and going onto the LTD plan. As long as the member is on LTD, she cannot be terminated from her employment by reason of her absence.

If an employee does not wish to apply or does not qualify for LTD, however, and continues to miss excessive time from work, he or she may be subject to termination for -non-culpable absenteeism."

In order to terminate an employee on this basis, the employer must establish that the employee is not being -singled out" and treated differently from other employees. It must then be established that the employees record of absenteeism is excessive and unlikely to improve. Once the employer has proved this to the satisfaction of an arbitrator, recent jurisprudence has held that the employee has -reached the point of no return."

A recent arbitration award stated:

Once an employer has established a consistent pattern of absenteeism, the onus shifts to the employee to show that the condition which has caused his absenteeism has been arrested and there is a reasonable prospect for regular attendance in the future.

As stated earlier, with most HSA members, this point should never be reached because we have the LTD plan. As long as a member is receiving (or has applied for and is awaiting a decision on) LTD benefits, the employer would be subject to a finding of discrimination under the *Human Rights Code*, and under the HSA master agreement if they were to take steps to fire that member.

If a member is experiencing serious absenteeism due to health problems or disability, he or she should be encouraged to apply for LTD in order to avoid being put in a situation where their job may be at risk.

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