

Feature

Employers Who Discriminate Pay the Price

Probationary employees have the same rights as all other employees

Mary is on a three month probation period. She works hard and her performance is average. During month two, she takes leave for anxiety and is out of the office for two weeks. She comes back to work and then goes out again for another week. The leaves are unpaid as her benefits haven't started yet. Her absence is noticed in the office. Co-workers are asking if this could be a pattern and voicing that they don't want to take on her duties every time she is out. Word has made it up the chain of command and your boss says "Mary has to go. What do we do?" But for the anxiety and subsequent leave she would have passed the probationary period. As an HR professional, what do you do?

Mary has the same human rights as any other employee and had them from day one of employment. Since anxiety qualifies as a disability under the Nova Scotia *Human Rights Act*, it can't play any part in the decision to end her employment or claim that she didn't pass probation. Simply letting her probation period end and telling her she didn't pass probation will not save you unless you have concrete valid reasons that are in no way related to her disability to support why she didn't pass probation. Mary is owed the same duty to accommodate to the point of undue hardship that is owed to long term employees. A human right is just that, regardless of how long a person has been employed with you.

So, in wanting to ensure you protect the organization as best you can, you advise your boss "If we let her go for any reason related to her disability, she could file a human rights complaint against the company." He answers, "That's fine. She is probationary so any money she would get would be minimal, right?" What do you say now?

The best advice is to provide examples of cases where a probationary employee was terminated for discriminatory reasons. In *Brothers v. Black Educator's Association* (2013 CanLII 94697 (NS HRC)), a probationary employee was terminated for discriminatory reasons and received \$11,000 for general damages and loss of income. In *Eagles-Hazelwood v. Mondart Holdings Ltd.* 2005 NSHRC 3 (CanLII) a probationary car salesperson was terminated after one month of employment for discriminatory reasons. She received \$5,150 as general damages and lost income.



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It would also be worth mentioning the case of *Lane v. ADGA Group Consultants Inc.* 2008 Carswell Ont 4677 (Ont. S.C.J) reversing in part *Lane v ADGA*, 2007 HRTO 34 (CanLII) (Ont. Human Rights Tribunal). While it is an Ontario case, it is still good to have it on your radar. In that case, a probationary employee with only eight days on the job was terminated for reasons linked to his disability. He received almost \$80,000 in damages from the human rights tribunal, which was held up on appeal. He received \$35,000 as general damages for the infringement of his human rights, \$10,000 for mental anguish and almost \$35,000 in special damages for the salary he lost because of the violation of his human rights. He had only worked for them for eight days.

These cases reaffirm that probationary employees are entitled to the same human rights protections as other employees. Minimal years of service does not mean minimal rights when it comes to human rights! Keep this in mind as well when occupational health and safety matters arise. The Nova Scotia *Occupational Health and Safety Act* does not differentiate between probationary and non-probationary employees when it comes to safety concerns.

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