Can Employer Fire Off-Duty Worker for Setting off Firecracker in the Workplace?



SITUATION

While bored after his shift ends, a gas bar attendant sets off a cherry bomb firecracker at his workplace, which includes 18 underground tanks and a large propane stack. Fortunately, the firecracker is the only thing that explodes. No property is damaged and no one is hurt. The employer claims the incident occurred dangerously close to the gas and propane but evidence shows the attendant set off the firecracker beyond the boundaries within which smoking is prohibited. The attendant, who admits he was stupid, has been employed at the gas bar for less than two years. His disciplinary record during that short term includes a written warning for being late to work, a second written warning for missing a shift followed two months later by a two-week suspension for walking off his shift early without permission. Less than a month after returning from that suspension and just days before this incident, he received a performance evaluation indicating he needs to improve his reliability, responsibility and professionalism, and adhere to company policies. The employer fires the attendant. The union argues the attendant’s termination is excessive.

QUESTION

Which of the following factors isn’t relevant to determining if termination was appropriate discipline for the attendant’

A. His short term of employment

B. The dangerous and serious nature of his misconduct

C. That he was off-duty at the time of the incident

D. His history of prior discipline

ANSWER

C. It’s not relevant that the attendant was off-duty at the time because the incident still occurred in the workplace and just after the end of his shift.

EXPLANATION

This hypothetical is based on a Saskatchewan decision in which an arbitrator ruled that a worker’s termination for lighting a firecracker was justified because he had a short work history with several prior disciplinary incidents and had just received an unsatisfactory job performance review. In addition, setting off a firecracker at a gas bar was reckless and serious misconduct, especially for a worker trained in handling explosive material. The employer argued that although the incident didn’t occur while the worker was working, discipline was still appropriate because it happened on company property where the worker usually worked and shortly after the end of his shift. The arbitrator agreed, noting that it was ironic that given the worker’s disciplinary record for being absent from the workplace, he was properly disciplined for this incident, which occurred when he was hanging around the workplace after his shift. Because the employer was looking for the worker to improve his conduct and adhere to its policies, which he continually failed to do, the arbitrator determined his termination was justified.

WHY THE WRONG ANSWERS ARE WRONG

A is wrong because the length of the attendant's employment is relevant to the type of discipline imposed. For example, new workers can be subject to probationary periods in which they can be terminated for even minor infractions, while a worker's lengthy employment may weigh in favour of lesser discipline for such infractions. Here, the attendant had been with the employer for less than two years. And his short history with the employer was filled with incidents requiring discipline. A worker with a lengthier employment history may have been able to demonstrate his overall dependability, compliance and motivation to improve, justifying lesser disciplinary action. But here, the attendant's short discipline-filled employment history strongly indicates that he wasn't reliable or motivated to improve, justifying his termination.

B is wrong because the seriousness of and danger created by misconduct are especially relevant when determining appropriate discipline. A serious incident of misconduct may not justify termination if it's an isolated incident, the worker has an otherwise unblemished disciplinary record or it's the result of unintentional, impulsive conduct or bad judgment followed by remorse and appropriate evidence of an intention to avoid future misconduct. But if misconduct results in property damage, injuries or fatalities, it may warrant termination'even for a first offence. Here, using firecrackers at a worksite where explosive materials were stored is very serious misconduct. Although luckily no one was hurt and no property was damaged, the attendant's actions could easily have resulted in a catastrophe. Thus, the seriousness of his misconduct was a relevant factor that justified his termination.

D is wrong because a worker's prior disciplinary record is always relevant in deciding current discipline. In fact, progressive discipline is based on the idea that discipline for current misconduct should build on that imposed for prior infractions, getting progressively more stringent and

ultimately ending in termination. In this case, although the attendant's prior disciplinary record involved a different type of misconduct'missing shifts and showing up late to work'the number of disciplinary actions in such a short time period indicates his failure to improve his conduct and adhere to the employer's policies. This pattern of behaviour is a factor that supports termination rather than a lesser penalty.

***Insider* Says**: For more information on discipline and factors relevant to determining what's appropriate, visit the Discipline & Reprisals Compliance Centre.

SHOW YOUR LAWYER

United Food and Commercial Workers, Local 1400 v. Saskatoon Co-Operative Association Ltd., [2015] CanLII 48607 (SK LA), Aug. 10, 2015