Can Supervisor Be Fired for Sexually Harassing Workers He Thought Were Friends?

SITUATION

Two female workers claim their male supervisor has been sexually harassing them for months by touching them near their breasts, showing and sending them sexual, nude photos, making sexual comments or comments with sexual innuendo and giving them sexual nicknames. The workers, who are young enough to be his daughters, don't directly confront him and delay reporting his behaviour for a couple of months because they're afraid of retaliation. The supervisor, who has worked with the company for nine years and has had no prior disciplinary issues, admits some of the conduct but says the workers were his friends and he had no reason to believe they were offended or that he made them uncomfortable. He also claims they never indicated any objections to the conduct. However, the workers say they *did* object to some of the conduct. The workers also admit to having socialized with the supervisor and his fianc initially but ceased socializing with him after the harassment began. During the employer's investigation of the workers' claims, which substantiated the allegations, the supervisor doesn't express sufficient remorse or understanding of the impact of his behaviour.

QUESTION

Can the employer fire the supervisor'

A. No, because the workers didn't immediately report the alleged misconduct.

B. No, because he didn't require the workers to submit to his misconduct to keep their jobs.

C. Yes, because his conduct constitutes serious sexual harassment for which he showed no remorse.

D. Yes, because the evidence proves beyond a reasonable doubt that he committed sexual harassment.

ANSWER

C. The supervisor's repeated sexual comments and unwelcome contact constituted serious sexual harassment, and his position as supervisor and lack of remorse warrant termination.

EXPLANATION

This hypothetical is based on an Alberta arbitration decision upholding the termination of a store supervisor for sexual harassment. The supervisor's conduct'showing young, female subordinates nude photos, touching and poking them, giving them sexual nicknames and making sexual comments'constituted serious sexual harassment. The arbitrator dismissed the supervisor's claim that he thought the workers were friends and not offended, stating, 'It is hard to fathom what perverse pleasure a 51 year old supervisor could get out of shocking and disgusting two young females who could, given their ages, be his daughters.' The arbitrator concluded that the egregious nature of the conduct, the supervisor's position of power in relation to the workers, the youth of the workers, and his lack of remorse warranted his termination despite his otherwise clean record.

WHY THE WRONG ANSWERS ARE WRONG

A is wrong because there's no required timeline for reporting sexual harassment. A delay, especially a significant one, in reporting any kind of harassment might call into question the alleged victim's credibility or make the investigation of the claim difficult because witnesses may be unable to precisely recall the facts after, say, a year. But a delay in reporting doesn't relieve an employer of its duty to investigate the alleged misconduct and, if appropriate, impose discipline. Here, the delay was only a matter of a few months. Additionally, the delay was reasonable given the workers' subordinate position to the person they were accusing of sexual harassment and their fear of retaliation. Therefore, the minimal delay in this case was understandable and doesn't excuse the supervisor's behaviour.

B is wrong because sexual harassment doesn't have to involve an ultimatum or quid pro quo aspect to be improper and worthy of disciplinary action. It's true that sexual harassment often includes requests for sexual favours in exchange for affirmative employment actions, such as a promotion, or threats that if a worker doesn't perform some sexual act, she'll be demoted or suffer some other negative employment consequence. But such conduct doesn't have to include a quid pro quo to be inappropriate and justify discipline. *Any* conduct that's harassing to workers and creates an uncomfortable work environment violates harassment prohibitions in OHS and employment standards laws and warrants discipline. In this case, although the supervisor didn't require the workers to submit to his conduct to keep their jobs, it was still egregious. And when they *did* object, the conduct didn't stop. The supervisor also didn't express sufficient remorse or understanding of the impact of his behaviour during the investigation. Therefore, his termination was justified by his misconduct.

***Insider* Says:** Although some OHS laws require employers to have policies on harassment in general, some specifically address *sexual* harassment. For example, new requirements in Ontario designed to protect workers from sexual harassment and violence in the workplace will take effect on Sept. 8, 2016.

D is wrong because reasonable doubt isn't the legal standard for review of disciplinary action for sexual harassment. The appropriate standard is whether

on the balance of probabilities the conduct occurred’a much easier standard to meet. In this case, both workers described the same conduct and the supervisor even admitted some of the conduct. Therefore, the balance of probabilities supports the finding that the supervisor sexually harassed the workers.

SHOW YOUR LAWYER

Union of Calgary Co-operative Employees v. Calgary Co-operative Assn. Ltd., [2016] CanLII 39729 (AB GAA), June 26, 2016