Can Worker Be Fired for Not Reporting Off-Duty Impaired Driving?



SITUATION

A corrections officer was arrested for driving while impaired during her off-duty hours. The officer didn't immediately tell her employer about the arrest despite a policy requiring employees to report criminal charges 'without delay' so the employer can determine if there's any conflict between the charges and the officer's responsibilities. The policy also warns that failure to report can result in discipline 'up to and including dismissal.' The officer, who knew about the policy, doesn't advise her employer of the arrest until two years later when she pleads guilty to the charges. She claims she failed to promptly report the charges because she was new to that jail at the time and didn't know who she could trust. Plus, she was embarrassed about the arrest. Additionally, she was waiting to see if her lawyer could get the charges dismissed and reported the arrest as soon as she knew dismissal wasn't possible. The officer has a lengthy work history with no prior disciplinary record but the employer terminates her for violating policy and destroying its trust. Other workers who had similar driving while impaired charges weren't fired but allowed to continue working with accommodations for their suspended drivers' licences.

QUESTION

Was the employer’s firing of the corrections officer appropriate’

A. Yes, because she was arrested for criminal charges.

B. Yes, because the policy warns termination is a potential consequence of noncompliance.

C. No, because her arrest was for off-duty conduct.

D. No, because dismissal was unjust under the circumstances.

ANSWER

D. Considering all the circumstances of the officer’s arrest, her history with the employer and the treatment of other officers in similar circumstances, dismissal is unjust.

EXPLANATION

This hypothetical is based on Ontario Grievance Settlement Board decision, which concluded that a corrections officer’s dismissal was disproportionate to her failure to report her arrest for drunk driving at the time it happened. The officer did fail to report her arrest immediately. Had she promptly reported it, she likely would’ve been treated like other officers who’d been arrested for similar charges and permitted to continue working with accommodations for her inability to drive. The board found, however, that she did eventually disclose the arrest on her own when it became apparent her lawyer couldn’t get the charges dismissed. In addition, the officer had worked for the employer for seven years with no prior disciplinary record. Therefore, the board characterized her conduct as an understandable error in judgment but one that didn’t irreparably break the bond of trust with the employer. Thus, termination based solely on her delay in reporting the arrest was overly harsh given all of the circumstances.

WHY THE WRONG ANSWERS ARE WRONG

A is wrong because an employee's arrest for criminal charges isn't automatically a justification for termination. First, an arrest isn't a conviction'the accused worker may ultimately be proven not guilty. Additionally, even if the worker is found or pleads guilty, the totality of the circumstances, including the nature and extent of the crime charged, must be considered. Here, although the officer was arrested for the serious offence of drunk driving, she has a lengthy work history without prior discipline and did eventually disclose the arrest on her own, which shows she can be trusted. Those facts don't justify her termination for a first offense.

B is wrong because termination isn't justified simply because the policy the officer violated warns that termination is one of the potential consequences of noncompliance. If the policy *hadn't* warned that termination was a possibility for violations, the officer's firing certainly wouldn't be appropriate because employees need to be on notice of the possible consequences of violations. But even violating a so-called 'zero tolerance' policy doesn't mean termination is automatically justified. All the surrounding circumstances must still be considered. When those circumstances are considered in this case as discussed above, termination is disproportionate to the officer's failure to timely report her arrest.

C is wrong because off-duty conduct *can* be grounds for discipline or dismissal in certain circumstances. For example, if a worker's off-duty conduct harms the employer's reputation, interferes with its ability to effectively operate its business or the worker's ability to do his or her job, or makes co-workers unwilling to work with the individual, discipline'even dismissal'may be warranted. (See, 'When is Off-Duty Conduct Just Cause for Discipline") In addition, the officer wasn't terminated for her off-duty conduct but for her violation of the employer's policy requiring her to report the arrest based on her off-duty conduct. Therefore, the employer

could appropriately discipline her based on that policy violation even though it relates to off-duty conduct. (Note that although some discipline would be warranted, termination was excessive for the reasons previously discussed.)

***Insider* Says**: For more information about discipline for policy violations, visit the Discipline & Reprisals Compliance Centre.

SHOW YOUR LAWYER

Ontario Public Service Employees Union v. Ontario (Ministry of Community Safety and Correctional Services) (Lunario Grievance), [2015] O.G.S.B.A. No. 130, Aug. 31, 2015