Is a Policy Requiring Workers to Shave Discriminatory?



SITUATION

An employer adopts a clean shaven policy, barring all workers in its smelting division from having facial hair. The reason is that facial hair may interfere with the proper fit of respirators worn for safety reasons because of dust and gas in the workplace. The employer notifies workers of the new policy but says accommodations or exemptions can be sought for religious or medical reasons. A crane operator refuses to shave because he has a beard in support of the 'Movember' movement to raise awareness of prostate cancer. In response, the employer threatens to suspend him without pay. The crane operator argues that the policy is discriminatory and the threat of discipline for his failure to follow the policy is an improper reprisal.

QUESTION

Has the employer discriminated against the crane operator'

A. Yes, because lack of facial hair isn't a bona fide occupational requirement for operating a crane.

B. Yes, because the policy doesn't impact women.

C. No, because he wasn't actually disciplined.

D. No, because he didn't refuse to shave for religious, medical or other reasons protected by human rights law.

ANSWER

D. The employer didn’t discriminate against the crane operator because his beard wasn’t tied to a right protected by human rights law.

EXPLANATION

This hypothetical is based on an Ontario Human Rights Tribunal decision that a crane operator’s right to grow a beard wasn’t protected under by human rights law. The employer instituted the clean shaven policy for safety reasons because facial hair’except for certain types such as mustaches or soul patches’could interfere with the fit of respirators. Respirators were needed to protect workers from dust and gas in the air in the workplace. Thus, the clean shaven policy was justified. If a worker had a beard for religious reasons, such as he was a Sikh, or medical reasons, such as he had a skin condition that prevented shaving, the employer would have to accommodate the worker. But in this case, the tribunal decided that the crane operator’s facial hair wasn’t protected under human rights law because his beard wasn’t connected to his religious beliefs or a medical condition. Instead, he didn’t shave to support a cause. Therefore, the employer didn’t discriminate against the crane operator by requiring him to comply with the clean shaven policy.

WHY THE WRONG ANSWERS ARE WRONG

A is wrong because the bona fide occupational requirement test doesn’t apply here. When a policy infringes on protections under human rights law, it can still be upheld if there are bona fide occupational requirements supporting the infringing policy. For example, human rights law bars discrimination based on age. But age restrictions can be justified if an employer can demonstrate that at a certain age, it’s risky for workers to engage in certain work, such as flying a commercial airline. In this case, as explained above, the crane

operator's beard isn't protected under the human rights law. So whether being clean shaven is a bona fide occupational requirement for his position is irrelevant.

B is wrong because a policy that impacts one gender more than the other isn't necessarily discriminatory. Although beards are unique to men, not all men wear beards. Having facial hair is a choice and can be prohibited for safety reasons when not related to any grounds protected under human rights law. Similarly, a policy that bars workers from wearing jewellery around machinery because it could get entangled in the equipment would likely impact female workers more than male workers but would be justified on safety grounds. Therefore, the simple fact that women don't have beards doesn't automatically mean the clean shaven policy discriminates based on gender.

C is wrong because the threat of discipline *can* be an improper reprisal. Employers can't discipline workers for exercising their rights under human rights law or OHS law, such as by requesting an accommodation for a disability or raising safety concerns. An employer can violate this prohibition by simply threatening a worker with future discipline or other action that could induce the worker not to exercise his rights. But employers are still permitted to discipline or threaten discipline when justified. If a worker isn't exercising rights protected by human rights or OHS laws, the employer's discipline or threat of discipline for not following a safety or other policy isn't improper. Here, the crane operator wasn't exercising any rights under human rights or OHS law by refusing to comply with the clean shaven policy. So the employer's threat to suspend him for refusing to comply with this safety policy isn't an illegal reprisal.

***Insider* Says:** For more information about reprisals, go to the Discipline and Reprisals Compliance Centre.

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Browne v. Sudbury Integrated Nickel Operations, [2016] HRTO 62 (CanLII), Jan. 14, 2016