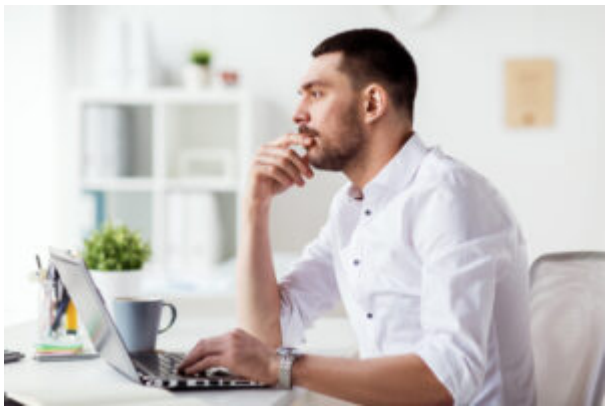
Is Firing a Worker for Horseplay at the Workplace Permissible?



SITUATION

Workers at a construction site engage in a series of pranks and horseplay, mimicking behaviour witnessed on the TV show ‘Jackass.’ The latest prank involves daring a worker to staple his scrotum to a wood plank. The stapling occurs during break time in the company’s lunchroom, which is open to construction-related personnel on the worksite, and is videotaped. No one present at the stapling indicates an unwillingness to participate or that they’re offended by the conduct. In fact, the room cheers on the activity and several individuals pay the worker to encourage him to participate. The video is posted on the Internet and becomes a topic of conversation within the industry and at an industry conference. The company fires the stapled worker, citing its harassment policy and claiming the conduct risked the company’s reputation and violates the OHS law’s ban on horseplay. The worker claims he didn’t know company policy barred this conduct and argues that the series of pranks and presence of pornographic material at work and pin-up calendars of women on the lunchroom walls created a culture in the workplace condoning such behaviour. The company says it wasn’t aware of such pranks or material at its worksite until the video of this incident came to its attention. The worker files a grievance.

QUESTION

Was firing the worker proper’

A. Yes, because the conduct risked the company’s reputation and impacted workplace safety.

B. Yes, because the worker committed the acts in the workplace and on company time.

C. No, because no one was offended or harmed by the conduct.

D. No, because the workplace culture condoned the behaviour.

ANSWER:

A. Because the worker's conduct risked the company's reputation in the safety-sensitive construction industry, his firing was appropriate.

EXPLANATION

This hypothetical is based on an Ontario Labour Relations Board decision, which ruled a worker's termination for stapling his genitals to a board was grounds for termination. The board said the worker knew the incident was being videotaped and so would likely be made public, especially given that the workers were mimicking the TV show 'Jackass.' The board rejected the argument that the worker claimed he'd never seen the company's harassment policy. '[A]ny reasonable employee would recognize that exposing one's genitals and having one's scrotum stapled to a 4'4 wooden board on the employer's premises and permitting that conduct to be recorded on a video is patently unacceptable in almost any workplace ' and an employer needn't establish and promulgate a policy prohibiting that kind of behaviour,' explained the board. It added that the company had 'a significant interest ' if not an obligation' under OHS law to prevent workers from engaging in such stunts or horseplay in the workplace. Finally, the board said the activity prejudiced the company's reputation 'as a safety conscious elevator contractor with a highly skilled and competent workforce.' Noting the pattern of escalating pranks in the workplace, the board concluded dismissal was justified.

***Insider* Says:** The Ontario OHS law relevant in this case bars horseplay in the workplace as do the OHS laws in other jurisdictions. (See, Spot the Safety Violation: It's all Fun and Games Until Someone Gets Hurt.)

WHY THE WRONG ANSWERS ARE WRONG

B is wrong because the prank wasn't conducted on company time but during a break. In additional, not every act of misconduct committed in the company's workplace is grounds for termination. For example, more benign horseplay that doesn't lead to harm, such as spraying a co-worker with a water pistol, may not warrant termination. In this case, the worker's conduct was so flagrant and extreme, and prejudiced the company's reputation that his firing was warranted.

C is wrong because regardless of whether anyone present during the stapling was actually offended, the conduct was so inappropriate that any worker should reasonably have known that it would be unacceptable in any workplace. Additionally, the worker knew the activity was videotaped and would likely become public, thus potentially offending viewers of the video. And the incident *did* cause harm'it hurt the company's reputation within the industry.

D is wrong because the company wasn't aware of and didn't condone the series of pranks that occurred prior to this incident. Therefore, it didn't allow the creation of a culture in the workplace that would indicate such activity was acceptable. The seriousness of this conduct warranted a significant disciplinary action to discourage similar conduct in the future and the company took such action when it became aware of the latest prank. The fact that prior incidents occurred without the company's knowledge doesn't mean it can't take action against known participants as soon as it becomes aware of such horseplay and inappropriate behaviour in its workplace.

SHOW YOUR LAWYER

International Union of Elevator Constructors, Local 50 v. ThyssenKrupp Elevator (Canada) Ltd., [2011] CanLII 46582 (ON LRB), July 28, 2011