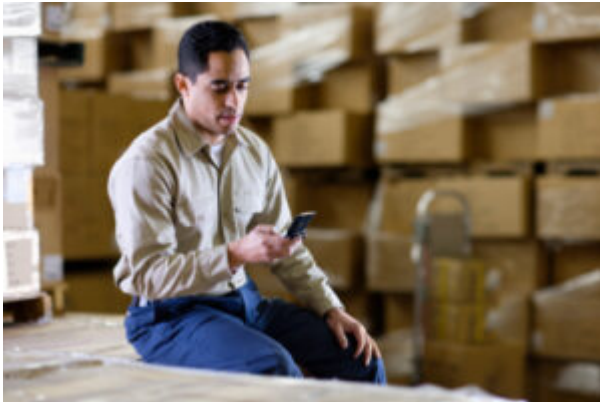


Is Firing a Worker for Violating Company Cell Phone Policy Excessive?



SITUATION

A plant worker's caught playing a game on his cell phone during work hours while sitting at a supervisor's desk. His supervisor tells him to put the phone away but doesn't tell him he could be formally disciplined for this conduct. Company policy forbids use of cell phones in the plant but does let workers *carry* their cell phones with them while there. The worker has been talked to several times before about improper cell phone use but none of these incidents were documented except for one informal verbal warning a year ago. The employer decides to suspend the worker for five days. But before it can do so and a week after the game incident, he's caught again using his cell phone inside an oil shed that contains flammable products. Company policy doesn't specifically bar the use of cell phones in the oil shed. The worker, who has been a plant employee for 22 years, says he didn't know it's dangerous to use a cell phone near flammable products and if he did, he wouldn't have used his phone in the oil shed. He admits violating company policy and expresses remorse. The worker has prior suspensions for different policy violations within the last two years. And the employer says there are additional disciplinary incidents older than two years, but there's no evidence of those incidents. The employer fires the worker, who files a grievance.

QUESTION

Was firing the worker excessive'

- A. Yes, because the worker has 22 years of service with the employer.
- B. Yes, because the employer didn't give the worker sufficient warning that significant, formal discipline could result for a cell phone policy violation.
- C. No, because he was talked to several times before about violating the policy and been verbally warned about this conduct.
- D. No, because the employer was properly imposing progressive discipline.

ANSWER:

B. The employer failed to indicate to the worker that he could be formally disciplined and even terminated for using his cell phone in the workplace, so firing him was excessive.

EXPLANATION

This hypothetical is based on an Ontario case in which the arbitrator ruled a worker's termination for using his cell phone in violation of company policy was excessive. The arbitrator noted the worker received one informal verbal warning about cell phone use a year ago and when caught in the first of the two recent incidents, he was merely told to put the phone away. He wasn't informed he would be subject to discipline for that incident. And he wasn't actually suspended for that incident before he committed the second infraction. The arbitrator also noted nothing specifically barred use of a cell phone in the oil shed or warned of the danger of using cell phones there. Therefore, the arbitrator concluded the worker had no reason to believe significant discipline would result from improper cell phone use, adding that he'd demonstrated remorse and didn't appear likely to repeat this misconduct. So the arbitrator substituted a ten shift suspension and reinstated the worker without back pay.

Insider Says: For information about cell phones in the workplace, see the OHS Insider's Cell Phones and Other Electronic Devices Compliance Centre.

WHY THE WRONG ANSWERS ARE WRONG

A is wrong because even workers with a long, unblemished history with their employer can be terminated for as few as one incident of misconduct if it's severe enough or destroys the employment relationship, leaving the employer unable to trust the worker. (See, 'Brief Senior Management: Yes, You Can Fire Long-Time Employees for Safety Infractions,' Aug. 2013, p. 11.) So termination of a long-term employee wouldn't be excessive if the violations were serious enough. Here, the worker had worked for the employer for more than 20 years. However, his termination wasn't excessive because of his long history but because he wasn't properly warned of the potential consequences of using his cell phone at work in violation of company policy.

C is wrong because not documenting disciplinary problems will mean you can't rely on them to defend your disciplinary action later. Here, the employer only issued one informal verbal warning and never documented the several prior instances in which it allegedly talked to the worker about using his cell phone at work. In addition, the employer had no record of his other infractions that were older than two years. So without a written record of these prior violations, the employer can't rely on them as a justification for imposing progressive discipline for these two violations.

D is wrong because progressive discipline typically involves multiple steps of punishments of increasing severity and doesn't ordinarily involve a leap from a verbal warning directly to termination. A typical progression is verbal warning, written warning, suspension and then termination. Although an employer can skip steps in progressive discipline, such a departure is usually justified only when violations are serious, create significant safety risks or involve other extraordinary circumstances. In this case, the employer had only given the worker an informal verbal warning a year ago. His last two violations didn't cause any injuries or property damage and he showed remorse. So there were no

grounds to warrant skipping directly to termination.

SHOW YOUR LAWYER

PGI Fabrene Inc. v. International Assn. of Machinists and Aerospace Workers, Local Lodge 2922 (Montgomery Grievance), [2013] O.L.A.A. No. 378, Sept. 16, 2013