Is Termination Warranted for Verbal Fight?

SITUATION

Worker A, a new employee with less than a year on the job, is assigned to a production line. As Worker B is relieving Worker A, the line shuts down and the two workers get into a heated argument about who's at fault for the shutdown—yelling, swearing, making threats and using abusive language. Specifically, Worker A calls Worker B a "fat ass." Both workers remove their hard hats and move closer to each other. As it appears that they're about to hit each other, a third worker intervenes and separates them. Worker B starts to calm down. But Worker A continues to act aggressively and "egg on" Worker B. Both workers report the incident and the employer investigates it that afternoon, while allowing the workers to continue to work together. Worker B's account of the fight candidly documents his language during the encounter and coincides with the reports of witnesses. Worker A's account, however, doesn't match witness accounts and downplays his own role in the incident, claiming he only responded to Worker B's accusations. Worker A has a prior verbal warning for being late to work. After completing the investigation, the employer fires Worker A for violating its workplace violence and harassment policy. Both that policy and applicable OHS law include threatening statements in the definition of "violence." The union argues the termination is excessive.

QUESTION

Is termination of Worker A excessive?

A. No, because he violated the workplace violence and harassment policy, and OHS law using aggressive and very offensive language.

B. No, because Worker A has only worked with the company for less than a year and already has one prior disciplinary incident.

C. Yes, because the incident was only a verbal dispute without physical contact or use of any weapons.

D. Yes, because the employer let the workers continue to work together after the incident.

ANSWER

A. Worker A's aggressive and offensive language violates employer policy and OHS law bans on workplace violence and harassment, and so justifies termination.

EXPLANATION

This hypothetical is based on an Ontario arbitration in which the arbitrator ruled an employer had just cause to terminate a line worker who used "hurtful, derogatory terms" attacking a co-worker's physical appearance and sexual orientation. The arbitrator noted that all workers were trained on the employer's workplace violence and harassment policies and Bill 168 amendments to Ontario's *OHS Act*, which includes threatening language in the definition of "workplace violence." The arbitrator acknowledged that there was no physical contact between Worker A and Worker B and no weapons were used. But based on the circumstances, the arbitrator determined there could've been physical contact if a third worker hadn't intervened and Worker A's language was more serious than general profanity. And when the third party tried to defuse the situation, Worker A continued to egg on and antagonize Worker B. Finally, Worker A didn't take responsibility for his actions, downplayed his role in the incident and didn't apologize until the hearing on his termination, which the arbitrator found didn't indicate rehabilitative potential. So the arbitrator concluded that Worker A's conduct and his initial lack of candor or remorse justified dismissal.

WHY THE WRONG ANSWERS ARE WRONG

B is wrong because although the worker's prior verbal warning within the first year of employment doesn't speak well for him, on its own, it doesn't justify termination in these circumstances. But his prior disciplinary record *is* a factor to be considered. The prior verbal warning was for a minor infraction completely unrelated to workplace violence or harassment. However, his disciplinary history combined with the nature of his conduct in this specific incident and his violation of the employer's workplace violence policy does justify termination.

C is wrong because although no weapons were used, there was no physical contact between the co-workers and no one was harmed, Worker A still violated the employer's workplace violence and harassment policy as well as the jurisdiction's OHS laws. OHS laws in jurisdictions such as MB, ON and SK include threatening behaviour and language within the definition of "violence." Here, Worker A's language during the incident included threats and went beyond use of simple profanity to use of derogatory and discriminatory language about Worker B's physical appearance and sexual orientation. That language violates workplace violence and harassment protections, justifying Worker A's termination.

***Insider Says*:** For more information about workplace violence, visit the Workplace Violence Compliance Centre.

D is wrong because an employer doesn't have to send workers home or suspend them while investigating an incident. In fact, if the employer rushes to judgment and suspends workers *before* finishing its investigation, it could be held liable for excessive discipline. An employer does have a general duty to provide a safe workplace, which must inform its strategy during an investigation. Therefore, the employer should consider whether a worker implicated in an investigation of workplace violence is an immediate danger to his co-workers or himself. If the incident giving rise to the investigation involves significant threats or

threatening behaviour, the employer may need to remove the worker from part of the workplace or the workplace entirely while continuing to pay him until the investigation is complete. But an employer's decision not to remove a worker or to separate workers doesn't necessarily indicate how serious it considered the incident. So although it may have been risky in this case to allow these two workers to continue working during the investigation despite such a heated exchange, that risk doesn't negate the seriousness of Worker A's conduct or restrict the employer's decision-making about appropriate discipline imposed *after* completing the investigation.

***Insider Says*:** For more information about conducting workplace investigations see "Workplace Investigations Done the Right Way."

SHOW YOUR LAWYER

Unifor Local 80-0 v. Certainteed Insulation Canada, [2015] CanLII 600 (ON LA), Jan. 7, 2015