

Must an Employer Discipline Workers for Harassing Blog Posts?



SITUATION

A prison begins implementing changes to work practices such as overtime at the same time it's investigating claims of correctional officers' alleged use of excessive force. These actions create tension in the workplace and several unionized officers vent frustrations and criticisms of management in a public blog. Several blog posts make lewd and hateful comments about managers but it's unknown who made those posts. The prison has a 'zero tolerance' policy regarding harassment but the policy doesn't mandate any specific disciplinary action, leaving the prison discretion on how to handle individual situations. After the prison is notified about the blog, it sends a warning letter to all employees that such conduct violates policy and won't be tolerated. It also works with the union to try to resolve the situation. The bloggers make the blog private and password-protected, eliminating public access. But the offended managers want more action and file complaints, claiming the prison should institute a formal investigation and discipline those officers who participated in the blog.

QUESTION

Must the prison discipline the blogging correctional officers for harassing managers'

- A. Yes, because OHS laws require employers to provide a workplace free of harassment.
- B. Yes, because the prison has a zero tolerance policy regarding harassment.
- C. No, because the prison's harassment policy doesn't mandate disciplinary action.
- D. No, because the harassing blog activity occurred off-duty and outside the workplace.

C. The prison doesn't have to discipline the officers because its harassment policy didn't require any specific action but allowed it to choose the method for handling the harassment based on individual circumstances.

EXPLANATION

This hypothetical is based on an Ontario arbitration case in which the Public Service Grievance Board found that a prison's harassment policy empowered 'but didn't require' the prison to make a formal investigation or impose discipline on correctional officers who violated that policy by making harassing blog posts about members of management. The board found that the prison acted reasonably in forgoing a formal investigation, which would be disruptive to the workplace, particularly in light of the ongoing investigation for excessive use of force. It also said the prison acted reasonably in declining to discipline individual officers because the employment policy didn't mandate discipline but required consideration of the individual circumstances in assessing the appropriate response to policy violations. And the board found that the prison made reasonable efforts to provide a harassment-free workplace by consulting with the union with whom the blog was linked, meeting with officers to strategize their approach to the blog and sending the warning letter to all staff about the blog posts. The fact that the blog was subsequently made private and password-protected demonstrated that these efforts had an effect.

WHY THE WRONG ANSWERS ARE WRONG

A is wrong because although OHS laws generally require employers to protect workers from harassment, they don't specify how employers must do that. The laws simply require employers to take reasonable steps to protect workers from harassment and other hazards, such as by having policies barring specific conduct. In this case, the prison *had* a policy barring harassment that didn't require any specific disciplinary action for violations. And when alerted to violations of that policy on the blog, the prison took reasonable action to address the issue, including warning staff that harassing blog posts weren't acceptable, working with the union and getting the blog removed from the public domain.

B is wrong because although the prison's harassment policy was a 'zero tolerance' policy, it didn't require automatic termination (or any other disciplinary measure) for violations. In fact, if the policy *had* required the prison to fire any worker who violated it, a court or arbitrator may have ruled that the policy wasn't enforceable as it didn't allow for consideration of the circumstances of individual infractions. Thus, it's wise to make sure your zero tolerance policies give you leeway to impose whatever discipline you determine is most appropriate for the particular circumstances.

D is wrong because courts have said employers can discipline workers for conduct outside the workplace or while off duty under certain circumstances, such as when it adversely affects the workplace, other workers or the employer's business. For example, an employer may have just cause to discipline a worker for off-duty conduct that hurts the employer's reputation, prevents the worker or other workers from doing their jobs or is a serious violation of criminal law. [For more information on when such conduct is grounds for discipline, see 'When is Off-Duty Conduct Just Cause for Discipline'] Here, if the prison had elected to discipline individuals responsible for the harassing blog posts, it would likely have been justified in doing so as the posts directly related to the workplace, referred to co-workers and adversely affected the work environment.

SHOW YOUR LAWYER

Lee v. Ontario (Ministry of Community Safety and Correctional Services), 2013
CanLII 4672 (ON PSGB) Jan. 22, 2013.