

# Was Employer's Handling of Security Breach a Reprisal for Work Refusal?



## SITUATION

A border services officer refuses to work, claiming the work environment is unsafe due to a lack of armed staff at the border, inadequate warnings about armed and dangerous subjects and insufficient training in how to deal with such subjects. A health and safety official reviews the matter and decides that, although the officer's concerns were genuine and reasonable, there's no danger. The officer returns to work but appeals the decision. While preparing for an appeals hearing, the officer sends documents to her lawyer to support her safety claims. During the hearing, the employer learns that the officer turned over these sensitive security-related documents. Believing the documents were improperly disclosed in violation of the employer's rules, it begins a professional standards investigation of the officer. Emails between employer representatives about the investigation indicate frustration with the officer's work refusal and a desire to get her to stop reviewing the adequacy of the employer's safety measures. As a result of the investigation, the employer requires the officer to attend, with her union representative, a 'learning conversation' at which she's instructed on the policies regarding disclosure of sensitive information. She files a complaint, alleging the employer threatened disciplinary action because she exercised her work refusal rights.

## QUESTION

**Were the employer's actions a reprisal'**

- A) No, because the officer violated policy and therefore should be disciplined.
- B) No, because she wasn't subjected to any adverse disciplinary action.
- C) No, because the work refusal wasn't upheld.
- D) Yes, because the employer's actions were disciplinary in nature and related to the work refusal.

## ANSWER

**D. The employer improperly took disciplinary action against the officer that was related to and motivated by her work refusal.**

## EXPLANATION

This hypothetical is based on a decision by the Public Service Labour Relations Board in which it ruled that subjecting a worker to an investigation and 'learning conversation' were disciplinary actions, or at the very least threatened discipline, which were sufficiently linked to the officer's work refusal to constitute a reprisal. The board found that because the employer's emails specifically connected the need for investigation to her work refusal and indicated an intent to dissuade her from continuing to press the issue of inadequate warnings, that refusal was a motivation for the investigation and resulting action. In addition, the employer had never required an employee to attend a 'learning conversation' before this case, noted the board. It concluded that the learning conversation was a 'ruse to skirt the connection of disciplinary action' resulting from the investigation to the exercise of work refusal rights and was akin to a verbal reprimand. So there was at least a threat of discipline that would dissuade the officer from making future work refusals. Thus, the officer had a valid reprisal complaint.

**Insider Says:** For information about the right way to handle work refusals, go to the Work Refusals Compliance Centre.

## WHY THE WRONG ANSWERS ARE WRONG

**A is wrong** because, although a worker can't hide behind an exercise of OHS rights to avoid disciplinary action for violating the employer's rules and policies, disciplinary action is improper if it's motivated 'even in part' by that exercise of rights. Here, the employer's emails link the investigation and subsequent learning conversation to the work refusal and indicate an intent to dissuade the officer from continuing to raise safety concerns. Therefore, the employer's actions were motivated at least partly by the work refusal and so were a reprisal, despite the fact that the officer may have violated its policies.

**B is wrong** because the border officer *was* subjected to an adverse disciplinary action. A worker needn't be demoted, suspended or dismissed to constitute disciplinary action in reprisal for an exercise of OHS rights. Even a warning may constitute discipline. Here, the officer was required to attend a 'learning conversation,' which was similar to a verbal reprimand or warning. The need to have a union representative present further demonstrates the disciplinary nature of the conversation. And because requiring her to attend this conversation was intended to dissuade her from exercising her rights, it was improper.

**C is wrong** because a worker can't be disciplined for reasonably raising a safety issue or refusing to work because of such concern. Even if the work refusal is found unjustified by an investigation, you should still hold off on discipline. Only after a worker exhausts appeals on the issue and *still* refuses to work might discipline be appropriate. Here, the officer's safety concerns were reasonable and genuine despite the fact an investigation ultimately concluded they were unfounded. Additionally, although she appealed the safety official's decision, she *did* return to work. So discipline for the refusal would be inappropriate.

## SHOW YOUR LAWYER

*Martin-Ivie v. Treasure Board (Canada Border Services Agency)*, [2013] PSLRB 40

(CanLII), April 12, 2013