Questions and Answers

Drugs, Alcohol, Social Media, and Harassment in the Workplace: A Canadian Overview

October 24, 2013

What defines "a reasonable person"?

David Stack (d.stack@mckercher.ca)
A: It is a bit of an artificial legal construct. Judges tend to consider what is customary conduct in the industry or area, such as recognized human resource practices.

Employee talks down/yells/makes threats to employer (always done in private) and when written up denies that they did/said. Where are the employer's rights.

Erin Kuzz (ekuzz@sherrardkuzz.com)
A: If the employee is non-union, the employer always has the right to terminate the employee’s employment, provided they provide the appropriate notice or pay in lieu. In a unionized environment it is more challenging, but you may decide to proceed with discipline and deal with any resulting grievance. You would need to be able to demonstrate to an arbitrator why it is you accepted the word of the supervisor over the employee. Just because the employee denies it doesn’t mean the matter is over – an arbitrator can still find that he or she believes the supervisor over the employee.

David Stack (d.stack@mckercher.ca)
A: The employer needs to make a judgment call through the investigation process as to who to believe. This happens often and it confirms the importance of a good investigation that can help the employer assess who is more credible.
Are Harassment Policies mandatory in BC

David Stack (d.stack@mckercher.ca)
A: Nope. Not BC. BUT - WorkplaceBC is making changes as of Nov 1 that may require employer policy – see: www2.worksafebc.com/topics/bullyingandharassment/home.asp.

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Does the harasser have the right to know who is complaining against them and the nature of the complaint?

David Stack (d.stack@mckercher.ca)
A: If an employee wants to formally pursue a complaint against another employee, then yes the alleged harasser should be told who is complaining and the substance of the complaint so that he or she has an opportunity to respond.

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When you referenced that a harassment policy should include a statement that "any complaint made in bad faith" should be addressed, what is the manner by which you meant for it to be addressed? Any complaint made in bad faith will be...?

Catherine Maheu (cmaheu@lavery.ca)
A: Any employee "making a complaint in bad faith will be the subject of disciplinary action, up to and including termination of employment." An employee needs to be forewarned, consequences of bad faith complaint can be very significant. A complaint typically involves an investigation into the facts; the employer will need to expend energy and resources in doing so. Witnesses (other workers) may be involved. The falsely accused harasser will be subject of stress and much inconvenience. If it can be ascertained that there was bad faith in filing a complaint (i.e. filing a false complaint) in order to advance personal interests that should be the subject of discipline.

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How about the reputational cost for the employer once someone like the employee who has the blog is public information? that the employer condones discrimination?

Greg Heywood (gheywood@ropergreyell.com) & Katharine Ford (kford@sherrardkuzz.com)
A: If it is a truly personal blog and there blog isn't one that is on the employer's site or otherwise "endorsed" by the employer, it is unlikely there is a strong case that the site itself suggests the employer condoned discrimination.
If someone is harassing another Facebook user that is an employee but its not stated they are a coworker how could you address that?

Greg Heywood (gheywood@ropergreyell.com) & Katharine Ford (kford@sherrardkuzz.com)
A: If the harassment is occurring on personal Facebook sites and the "harasser" is not necessarily an employee, an employer's policies on harassment in the workplace will generally not apply.

What policy language would you recommend that acknowledges obligations the employer may have to disclose otherwise confidential information that becomes known as part of a harassment investigation (example, notifying police if employee has uttered threats)

Erin Kuzz (ekuzz@sherrardkuzz.com)
A: The Employee acknowledges that all information received by the Employer in the course of employment is subject to disclosure to the extent that the Employer is required to comply with legal obligations, including but not limited to health and safety obligations.

Are Harassment Policies mandatory in AB?

David Stack (d.stack@mckercher.ca)
A: Currently they are not mandatory but are recommended by the human rights commission.

Retail store, an employee shows u smelling like alcohol can they be sent home?

Krista Smith (krista.smith@ritchdurnford.com)
A: I don’t know what province you’re in, but there's a 2013 Nova Scotia case where the smell of marijuana on an employee sitting in a truck was not enough evidence. There also needed to be evidence that the employee was impaired (difficulty communicating, etc.

For EV logistics case, could the employer request the employee to take down the blog under the reason that it offended other employees?

Greg Heywood (gheywood@ropergreyell.com) & Katharine Ford (kford@sherrardkuzz.com)
A: the threshold question is where it is work related behaviour - in this case the arbitrator said the nexus was not here - so the answer would be no
When you speak of random of alcohol testing - you are testing for impairment on the job, as opposed to use (i.e. recreational off duty alcohol consumption)?

Krista Smith (krista.smith@ritchdurnford.com)
   A: Correct. Recreational off-duty is not the employer's concern unless (1) the employee shows up to work still affected (2) the employee's inebriated conduct while off duty somehow harms the employer's reputation (this could be tricky to justify though).

What about a retail employee (ON), who attends work seemingly under the influence drugs (previous admission to same) and behaves irrationally on the job; how can you establish violation of corporate policy that prohibits attending work under influence?

Erin Kuzz (ekuzz@sherrardkuzz.com)
   A: You would have to look and see what objective evidence is available; is the employee physically unsteady, slurring words, glassy eyed?

B.C. so for the employee that shows up smelling like alcohol or drugs if they get sent home they should be paid there full shift?

Krista Smith (krista.smith@ritchdurnford.com)
   A: I would err on the side of caution and pay for the shift...but Hugh may see it differently.

Hugh McPhail (hmcphail@mross.com)
   A: The ordinary rule would be no work, no pay, unless the C/A says otherwise.

For Alberta: Can you please let us know how someone would prove whether they were "addicted" or just a casual user?

Hugh McPhail (hmcphail@mross.com)
   A: One should question an employee on the regularity of their usage but this is usually determined by a substance abuse professional. Your policy should generally involve engaging a firm which provides this service.

If an employer send an employee for alcohol testing and he is negative, can the employer tell the employee that he wants him to get tested again in a week?

Hugh McPhail (hmcphail@mross.com)
   A: Information one week from now is seldom relevant because you are usually interested in current impairment when alcohol is concerned.
Also, if an employee proves positive and then he tells the employer that he has an alcohol problem, is it mandatory for the employer to get them assistance?

Hugh McPhail (hmcphail@mross.com)
   A: No, but you would ordinarily have to give leave from work for them to get help.
I am GM at this workplace and I have a Union President who I don't believe understands Bill 168 as it relates to a specific harassment complaint I have been presented by a Union member. It has to do with other employees switching languages.

You indicated that harassment policies are not mandatory in BC. they will be as of November 1st under WCB policies.

David Stack (d.stack@mckercher.ca)  
A: You’re absolutely right. I missed that in the earlier response. Sorry about that the information about the new WorkSafeBC requirements can found here: www2.worksafebc.com/topics/bullyingandharassment/home.asp