Case In Point

Arbitrator Upholds Dismissal of Grievor for Posting Vicious Comments about Co-Worker on Facebook

Date: June 2, 2014

In a recent labour arbitration award, Arbitrator Laura Trachuk upheld the dismissal of a three and one-half year employee for posting vicious, humiliating and threatening comments about a co-worker on Facebook. While the Arbitrator left many specifics out of her decision in order to protect the identities of those involved, this decision serves as an important reminder that in a "connected" society, off-duty, on-line conduct can lead to discipline and discharge.

In United Steelworkers of America, Local 9548 v. Tenaris Algoma Tubes Inc., the grievor "D" complained about a co-worker (identified in the decision as "X") for not following workplace procedures during a shift. A Team Leader spoke with X, who stated that D was not following workplace procedures either, and both were told to finish out the shift and speak to another manager the following day.

However, before that could happen, D decided to take their dispute to Facebook, posting disparaging comments about X without referencing her by name, but by making reference instead to a distinctive physical characteristic. A co-worker responded to this post and suggested that a physically aggressive act be performed with this particular physical characteristic. The grievor then responded with further violent and sexual suggestions.

Upon learning of the postings the next day, X complained to management. The grievor took down his posts and apologized to management. He asked to apologize to X, but was told that she was too upset. The grievor was sent home pending investigation and was ultimately terminated for breach of the collective agreement and the employer's workplace violence and harassment policy. The other employee who replied to D's Facebook posting was given a ten-day suspension.

Arbitrator Trachuk did not hear evidence from either X or D, and made her findings based on the submissions of the parties and evidence from the manager responsible for the termination decision. The Union argued that there were a number of mitigating factors which should weigh in favour of lessening D's penalty, including:

- there was a workplace incident between D and X prior to the comments being made which caused D frustration;
- the comments were made in the heat of the moment;
- D did not refer to X by name in his postings; and

- D had apologized for his comments and admitted that they were wrong.

Arbitrator Trachuk rejected all of these arguments for mitigation, importantly stating that the conduct in question did not constitute “off-duty” conduct because it was directed at “poisoning X’s work environment.” It was obvious to the Arbitrator that the employer’s workplace violence and harassment policy would include threats and harassment via Facebook, and that the grievor ought to have known that discipline and discharge were potential responses to this conduct.

In concluding her decision, the Arbitrator stated:

…An employee does not necessarily get one free sexual harassment before he loses his job. The grievor, in this case, posted hateful comments about X, one of which could reasonably be construed as a threat of sexual assault. When men “joke” about the sexual violence they should inflict on a woman she can reasonably be concerned that they may actually hurt her… [T]he grievor sexually harassed X and created a poisoned work environment. The grievor is not a long term employee and the company could have little confidence that he could be trusted to never harass someone else. The company is responsible under the *Human Rights Code*, OHSA and the collective agreement for maintaining a workplace free of harassment and, in these circumstances, reinstating the grievor would be contrary to that goal, even if he were assigned to a different shift from X. This is not an appropriate case for progressive discipline. I do not find that the company violated the collective agreement by terminating the grievor’s employment. The grievance is denied.

The employer in this case was able to rely on its policies concerning workplace violence and harassment to defend its decision to terminate the grievor for his on-line actions against a co-worker. However, whether or not an arbitrator is willing to shoe-horn off-duty conduct into such a policy will likely depend on the nature of the conduct and the wording of the policy. In order to ensure that employers are able to discipline for off-duty, on-line conduct, it is important that such conduct is contemplated under the organization’s workplace violence and harassment policies. Likewise, if an organization has policies concerning social media use, those policies should also address how on-line misconduct may be treated. Taking such steps to address these issues from a policy perspective will help employers defend their decisions to discipline and discharge employees when they engage in off-duty, on-line conduct that harms fellow employees or brings negative attention to the organization.