Case In Point

Court Disapproves of Employee's Surreptitious Recordings of Meetings with Employer

Date: June 28, 2017

In Hart v Parrish & Heimbecker, a trial judge recently upheld the dismissal of a 42-year old Merchandising Manager (Plaintiff) with 15 of years service, for a series of separate incidents that he had with peers and subordinates.

The Plaintiff had engaged in inappropriate conduct which included repeatedly yelling at employees, displaying excessive anger and being disrespectful. This unacceptable conduct had been discussed with the Plaintiff on a number of occasions and he had been required to attend career counseling. His employment was eventually terminated for cause, although he was offered a severance package on a without prejudice basis.

The Plaintiff sued for wrongful dismissal and damages.

Unbeknownst to the Defendant employer, the Plaintiff had surreptitiously recorded several meetings with management:

[34] For the period from October 16, 2013 up to and including the date of his dismissal, the plaintiff surreptitiously recorded meetings with senior management of the defendant. He recorded the meetings by placing his cell phone on the table in the record mode and did not advise the parties that they were being recorded. The plaintiff sought to enter the recordings as an exhibit at the trial. The defendant agreed that the recordings could be entered in evidence and that submissions would be made regarding the weight and relevance of the information contained in the recordings. The recordings commenced shortly after the [third written] complaint [about the plaintiff was received by the employer].

At trial, the Defendant argued that the fact that the Plaintiff made secret recordings of his meetings with management was itself grounds for dismissal. The trial judge said that "[t]he plaintiff's inappropriate use of his cell phone in secretly recording meetings with his superiors does amount to a breach of his confidentiality and privacy obligations to the defendant." Significantly, on examination for discovery (prior to the trial), the Plaintiff had admitted that he knew that a breach of the confidentiality obligations could result in termination.

The trial judge noted that in "conducting the contextual analysis and assessing the severity of the misconduct [secret recording], the plaintiff did not disclose the recordings to third parties outside of the defendant other than to his legal counsel and for the purpose of these proceedings."

The trial judge found the Plaintiff's actions amounted to a breach of the employer's policies. He did not make a specific finding as to whether the Plaintiff's use of his cell phone amounted to just cause for dismissal in this case; however, he considered the misuse of the cell phone as a "factor in determining whether the defendant had just cause for dismissal":

[99] […] The plaintiff's misconduct, as noted above, was relied upon by the defendant at the time of dismissal, and in my view, that provides just cause for dismissal in the circumstances of this case.

The courts have not dealt with many situations regarding whether secret recordings of meetings may constitute grounds for dismissal, and while this case is not a definitive pronouncement on the issue, the trial judge clearly did not approve of the Plaintiff's actions.

Many employers are faced with situations involving employees secretly recording meetings or telephone discussions with coworkers or managers. Depending on the seriousness and specifics of the circumstances, such conduct need not be

tolerated by employers, and the appropriate corrective action may be issued.

In this case, the actual recordings did not serve the Plaintiff well, nor did they appear to have helped him in any way.