

OFF-COLOUR/OFF-DUTY – TERMINATION OF HYDRO ONE EMPLOYEE GARNERS MEDIA ATTENTION

Posted on May 15, 2015

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The media has taken a keen interest in a story about bystanders who interrupt live broadcasts, primarily by female reporters, with shouts of a vulgar and offensive phrase that is being referenced with the acronym FHRITP. This trend began with a series of fake news reports posted on YouTube in January 2014, which were intended to be comedic. Since that time, reporters in a number of countries have been subject to "hundreds" of verbal attacks involving the offensive phrase. Recently, Shauna Hunt, a reporter with CityNews, confronted a group of men outside a Toronto FC game about their intention to participate in this trend. The video of this confrontation quickly went viral, and one of those men has been identified as an employee of Hydro One.

Although the employee did not actually yell FHRITP at Ms. Hunt, he did endorse the trend by calling it "hilarious" and "amazing", as well as saying "I respect it", and telling Ms. Hunt "you're lucky there's not a f***ing vibrator in your ear".

Hydro One has taken a stand against the employee's behaviour, by promptly terminating his employment. Following these events, a number of commentators have opined upon whether Hydro One was justified in terminating the employee for events that took place outside of the workplace and on his personal time.

Termination for Off-Duty Conduct

There is a long line of cases which consider the issue of whether off-duty conduct constitutes cause for termination of employment. It is unknown at this time whether the employee in question was unionized or non-unionized. The general test for whether termination is justified in a given case has evolved slightly differently in unionized versus non-unionized environments, although the core elements are similar:



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Ultimately the decision as to whether off-duty conduct constitutes cause for termination of employment depends upon the specific facts of the case and whether the conduct actually impacts the employer or the employment relationship. In this regard, adjudicators often take into account some or all of the following factors: Whether the conduct renders the employee unable to perform the employee's duties, including whether customers or other employees would refuse to work with the person going-forward

- Whether the conduct breaches the law or the employer's policies, which can include an analysis of whether relevant policies reference off-duty conduct
- Whether the conduct is of such a serious nature that discharge would reasonably be considered a proportionate response
- The employee's position within the organization, including seniority level and level of responsibility, as well as the employee's past performance, disciplinary record and length of service
- The employee's conduct following the incident, including whether the employee admits that his/her actions were inappropriate, accepts responsibility for such actions, and sincerely apologizes early in the process
- The notoriety and reputation of the employer within the community.
- Where the off-duty conduct involves inappropriate public statements (such as racist, sexist or other derogatory postings on social media sites), other relevant factors include: (1) whether the comments target co-workers, customers or the employer itself; and (2) whether the comments are repeated and prolonged versus an isolated incident

What happens next?

If this individual is a member of a union representing employees at Hydro One, there is a good chance that a grievance will be filed alleging that the discharge was unwarranted or excessive. If he is not a unionized employee, he may bring a claim for wrongful dismissal. The CEO of Hydro One has been quoted as saying: "I think in the fullness of time he's going to do what he needs to do and the company will defend its decision."

In defending the termination, Hydro One has a number of arguments at its disposal. In particular, Hydro One has indicated that his behaviour violates its Code of Conduct, which all employees are required to sign, and is inconsistent with the organization's core values. However, the applicability of the Code of Conduct to off-duty behaviour will be an open issue, especially if the policy is silent on this matter.

Ultimately, the outcome of this case will likely turn on a number of facts that have not been made public, including details about the employee's position and past record at Hydro One, as well as his conduct following his offensive remarks to Ms. Hunt.

by Lyndsay A. Wasser

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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