

Members Quarterly

Winter 2016 Edition

Feature

Employee Aggression in the Workplace

Immediate discipline or termination may not work



Tom Ross

Dealing with aggressive or threatening behaviour in the workplace is challenging. Information regarding an employee who threatens a co-worker or client can prompt a knee-jerk reaction to discipline or terminate an employee.

It is important that employers deal with workplace aggression in a systematic method to protect their interests in maintaining a safe workspace while not violating employee rights by jumping to conclusions.

Employer Obligations in Respect to Aggressive Behaviour

Workplace aggression can take many forms. Aggressive, violent or threatening behaviour in the course of employment has always been recognized by courts and arbitrators as being incompatible with an employer's legitimate interest in maintaining a safe and productive workspace.

Moreover, employers have statutory and common law duties to keep the workplace safe and free from violence, abuse and harassment.

At common law, an employer has a duty to protect its workforce from threats and violence as part of its implied contractual duty to provide a healthy and safe working environment.

Under statute, Ontario has specifically addressed workplace violence through amendments to Occupational Health and Safety legislation. While other provincial legislatures and Parliament have not made similar amendments, all Occupational Health and Safety Legislation across Canada contains broad language requiring employers to protect the health and safety of workers as far as is reasonably practicable. Therefore, all employers in Canada are under an obligation to identify and address risks (such as violence or potential violence), which are typically managed through workplace policies and monitoring.

The Employer's Response: Investigation and Discipline

Risks of Acting Prematurely

Employers are often tempted to immediately discipline or terminate employees who are accused of engaging in workplace aggression. This course of action is generally inadvisable. The first risk to an employer is that it will proceed with insufficient information the employer loses the opportunity to gain evidence and a full appreciation for what has happened. Further, it deprives itself of the opportunity to act on the best information and to set itself up for success if the matter is litigated.

The second risk in failing to properly investigate prior to disciplining an employee is that the employer can expose itself to additional damages.

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Feature

Interim Risk Prevention

The recommendation to complete an investigation prior to disciplining an employee does not preclude interim measures to protect an employer's interests and those of its employees. Employer obligations to protect the health and safety of their employees should not be jeopardized while an investigation is in progress. The employer must therefore act immediately to eliminate or minimize the possibility of continued aggression during the investigation.

This might mean suspending an employee pending investigation (with the possibility of later compensation if the employee was blameless). It might mean requiring the employee to work in a different department, on a different shift or from home.

Investigation

An employer should always conduct a thorough and well-documented investigation of the entire incident. This will often include considering events leading up to the actual aggressive act and the historical relationship of those involved.

Once it has been determined that the aggressive behaviour occurred, the employer will need to assess what the discipline should be. In assessing what disciplinary action is justified, courts and tribunals typically consider the following:

1. The identity of the target of the aggression
2. Whether the aggressive action was a momentary flare up or pre-meditated
3. The seriousness of the aggressive behaviour
4. The presence or absence of provocation
5. The employee's discipline record
6. The employee's length of service
7. The economic conditions brought about by the discharge
8. The presence or absence of an apology

There have been many cases where employees who engaged in physical altercations or made serious threats have had their terminations overturned because the employer failed to properly balance all of the factors when assessing the appropriate level of discipline.

The need for an employer to balance the seriousness of the aggressive behaviour against the employee's other attributes is a critical factor. An employer policy can assist in justifying discipline, but will not be determinative of the outcome.

In all cases of dismissal, the ultimate question to be asked is whether the employment relationship is so damaged that it is beyond redemption. Where the likelihood of recurring behaviour is minimal and the employee has shown real remorse, discipline short of termination is usually warranted. On the other hand, where an employee shows no remorse and poses a real threat for reoffending, trust may be lost and termination may be warranted.

Conclusion

When dealing with an instance of workplace aggression, employers must ensure that they fully understand all the facts and circumstances before disciplining an employee. Interim measures which remove the aggressor from the target are often important to ensure that the aggressor

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Feature

does not pose a risk while the investigation is ongoing. However, employers should be reticent to jump feet first into termination or discipline without knowing all the facts. When in doubt, proper advice is a good place to start.

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