

## Member's Quarterly

## Winter 2024 Edition

### Feature

# Discipline and Safety are a Dangerous Mix

*Disciplinary action complaints in Alberta*



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### Introduction

When discrimination is mentioned, the term is often associated with discrimination based upon a human rights protected ground. However, there are other discriminatory actions that can put employers in danger of complaints.

Under section 18 of the Alberta Occupational Health and Safety Act (the "Act"), "No person shall take any disciplinary action against a worker by reason of that worker acting in compliance with this Act, the regulations, the OHS Code or an order issued under this Act.", where "disciplinary action" means any action or threat of action by a person that does or would adversely affect a worker with respect to any terms or conditions of employment.

If an employer breaches this section, an employee can pursue what was previously called "discriminatory action complaints" (now renamed as disciplinary action complaints) under section 19 of the Act.

### The Process

An employee has 180 days from the date of the contravention to file the complaint. An officer may refuse to investigate a complaint if in the officer's opinion, the complaint is without merit or is frivolous, trivial, vexatious, filed with improper motives or otherwise an abuse of process. If refused, the employee will be notified in writing, and the employee can ask the Occupational Health and Safety Director to review the refusal decision. The Director can then confirm or revoke the officer's refusal or assign the complaint to a different officer.

If the complaint proceeds, the investigating officer will first establish that (1) the employee was complying with a requirement under the Act or an order and the employer took disciplinary action against the employee.

Once established, the officer will generally offer the option for a voluntary resolution between the parties. If that fails, the officer will continue with the investigation process and ask the employer to provide information to support that the disciplinary action was for a reason other than compliance with the Act.

The onus is on the employer to establish that the disciplinary action was for a reason other than compliance with the Act, and there is a presumption in favour of the employee that the disciplinary action was taken against the employee because the employee acted in compliance with this Act.

An officer will then prepare a written report of the complaint, the investigation and the officer's findings. If a contravention is established, the officer can do one or more of the following:

- cease the disciplinary action;
- reinstate the worker to the worker's former employment under the same terms and conditions under which the worker was formerly employed;
- pay the worker not more than the equivalent of wages and benefits that the worker would have earned if the worker had not been subjected to disciplinary action;
- remove any reprimand or other reference to the matter from the worker's employment records;
- take other measures to prevent recurrence.

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#### Non-Occupational Health and Safety Reason for Discipline

Although the following decision was decided under the previous iteration of the Act, it is still helpful in illustrating the factors that an officer considers.

Appellant and Alberta, Re, 2022 CarswellAlta 1826 was a Disciplinary Action Complaint Appeal decision that upheld the Officer's decision to dismiss the Employee's complaint. The complaint involved a clash between an Employee with a history of alleged inappropriate behaviour and her refusal to work due to mold issues at her worksites.

The Employee's employment was terminated based on her inappropriate behaviour and the Employee alleged her employment was terminated for reporting and refusing dangerous work.

The Officer found that the Employer established that it terminated the Employee's employment for a non-OHS reason, which was the Employee's continued inappropriate behaviour towards supervisors and co-workers. The Officer referenced multiple examples provided by the Employer of inappropriate behaviours by the Employee and evidence from the Employer of its steps to provide personal protective equipment to mitigate the Employee's potential exposure to mold. The Officer found, in particular, that the evidence of attempts to provide personal protective equipment established the Employer took the Employee's health and safety concerns seriously and was willing to cooperate.

#### Takeaways

Remember that the onus is on the employer to prove the disciplinary action is for a non-OHS reason. Because of that, it will be important for employers to maintain proper records to establish the actual reason for discipline.

As well, when an employee raises issues regarding health and safety at the workplace, it will be crucial for the employer to address these concerns and document measures taken to show that the employer took the employee's OHS concerns seriously. Not only because an employer has a duty to do so, but also because this will help support the position that any discipline was for a non-OHS reason.

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