

Infection Control v. Employee Right of Self-Expression



SITUATION

Emma Reebord is self-conscious about her chipped nails. So, she treats herself to a set of “sculptured,” i.e., false nails. Her fellow housekeepers at the Hans Zarkleen Nursing Centre where she works love Emma’s new look. But false nails are a violation of the Centre’s Dress Code. Even though Emma doesn’t directly treat residents, the Code applies to indirect caregivers, including housekeepers. Emma claims that the Dress Code violates her right of self-expression. The Centre argues that the policy is an important infection control policy and is based on accepted scientific evidence that false nails accumulate bacteria at an abnormally high rate and that this bacteria can be transmitted to nursing residents both directly by caregivers and indirectly by housekeeping staff.

QUESTION

Does Emma have a valid grievance?

1. No, because wearing false nails isn’t a form of self-expression.
2. No, because there’s evidence that the policy is necessary to prevent infection.
3. Yes, because infection control doesn’t justify taking away employees’ freedom of self-expression.
4. The policy is sex discrimination because, as a practical matter, it applies only to women.

ANSWER

B. The Centre’s no false nails policy is a valid infection control policy.

EXPLANATION

Workplace infection control and hygiene policies are essential to guard against the risks of coronavirus and other infectious illnesses. This is particularly true in healthcare, food handling and other businesses that involve direct or indirect physical contact with the general public. But infection control policies may also be intrusive of employees’ personal rights especially when they dictate what employees can and can’t wear at work. As the coronavirus crisis deepens, it’s important for HR directors to understand how courts weigh these competing interests. This scenario, which is based on an actual case from Alberta, illustrates the principles involved.

As a general rule, health and safety is more important than employee self-expression. However, you can't simply call a policy restricting employees' choice of dress a safety policy. You must be able to show that it actually does promote health and safety. The no false nails policy in this case stood up because there was solid medical evidence that "the wearing of sculptured nails by housekeeping staff in long term care facilities poses a material risk of infection to residents" [*Brewer v. Fraser Milner Casgrain LLP*, [2008] A.J. No. 1433].

WHY WRONG ANSWERS ARE WRONG

A is wrong because, according to the arbitrator, wearing false nails "is a legitimate exercise of employee self-expression." The choice of nails was part of the employee's self-image and how she wished to present herself to the world, the arbitrator explained. But the employer's interest in banning false nails was more compelling.

C is wrong because while it may be important, employee self-expression doesn't outweigh the need for legitimate infection control procedures at healthcare and residential nursing facilities, said the arbitrator citing the vulnerability of patients and recent outbreaks of "superbugs" like SARS in Canadian healthcare institutions.

D is wrong because a policy isn't sex discrimination just because it isn't completely gender-neutral. So, the no false nails policy wasn't illegal just because it happened to affect women more than men.