

Winners & Losers: Can You Discipline Employees for Refusing to Get a Coronavirus Shot?



What's At Stake

One reason the coronavirus crisis is so alarming is that there's currently no vaccine against the virus. If and when that changes and a vaccine does become available, you'll want to urge your employees to get a shot as soon as possible. But what if they don't cooperate? While you can't control what employees do with their own bodies, you can discipline them for deliberately putting themselves, their co-workers and, if they work in health care setting, their patients at risk.

Or can you? Although its application to coronavirus is novel, this very same question has been the focus of numerous grievances involving employees disciplined for refusing to get a flu shot. And, as illustrated by the following cases, arbitrators facing nearly identical situations can reach totally opposite decisions.

EMPLOYEE WINS

Situation

An Ontario chronic care geriatric hospital specializing in treating old and frail patients adopts a new safety rule: In the event of a flu outbreak, 2 or more patients get the flu, employees who aren't vaccinated and who refuse to take Amantadine will be suspended without pay until the outbreak ends. Sure enough, an outbreak occurs and 15 hospital workers who choose not to be vaccinated or take the medication are suspended without pay for 7 to 9 shifts. The union files a grievance, contending that the flu policy violates the employees' privacy and right to "bodily integrity."

Ruling

The Ontario arbitration panel rules that the hospital can't suspend the employees without pay.

Explanation

The hospital claimed the flu policy was a reasonable measure to reduce the risk of flu spreading in a high-risk patient population. We're not forcing employees to get medical treatment, it argued; we're simply treating employees who are unvaccinated and not on Amantadine as unfit to work during a flu outbreak. In the hospitals' eyes, sending the employees home was an act not of discipline but infection control. But the panel didn't buy it. The employees were barred from working not because they were sick or did anything wrong but because they wouldn't get the medical treatment the hospital demanded. Forcing a person to undergo medical treatment without consent is an assault. And suspending employees without pay for refusing to undergo medical treatment violated their Charter rights, the panel concluded.

St. Peter's Health System v. Canadian Union of Public Employees, Local 778 (Flu Vaccination Grievance), [2002] O.L.A.A. No. 164, Feb. 7, 2002

EMPLOYEE LOSES

Situation

Following the recommendation of the BC Provincial Medical Health Officer, the Interior Health Authority adopts a policy to suspend without pay any non-immunized employees and employees who refuse to take antiviral medication during a flu outbreak. The policy doesn't allow for reassignment of non-immunized employees. A nurse at a long-term facility for "frail elderly" patients refuses to get a flu shot or take antiviral medication because she doesn't want "foreign bodies in her system." The Authority suspends her without pay during a flu outbreak in which one patient dies. The union claims the flu policy is unreasonable and violates employees' Charter rights.

Ruling

The BC arbitrator rules that the Authority can suspend the nurse without pay.

Explanation

As in the *St. Peter's* case above, the union argued that the flu policy essentially coerced medical treatment by threatening suspension from work without pay. But this time the argument didn't work. Employees who refused to be immunized or take antiviral medication would suffer economic consequences, the arbitrator acknowledged. But these consequences weren't so severe that they effectively denied employees control over their bodies. In fact, the nurse could have accessed vacation time or other accrued leave during the suspension. More importantly, employees had a *choice*, although not an easy one, according to the arbitrator. The Authority's legitimate goal was to prevent and contain outbreaks of influenza and the flu policy was an effective and reasonable way of accomplishing that goal.

Health Employers Assn. of BC v. BC Nurses' Union, [2006] B.C.C.A.A.A. No. 167, Sept. 15, 2006