Pornography in the Workplace: Trends and Developments

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In a 2013 Forbes article, Cheryl Conner noted that 25% of working adults admit to looking at pornography on a computer at work. Also interesting to note is that 70% of all online pornography access occurs between 9:00 a.m. and 5:00 p.m. Older statistics indicate that two-thirds of human resources professionals have discovered pornography on employee computers, and that 28% of surveyed workers had downloaded sexually explicit content from the web while on the job.

Against this backdrop, employers face an increased concern over the propriety of employees' digital conduct at work. In the school context, especially, it is essential that student safety is protected and the school's reputation is upheld.

Labour arbitrators in Canada have addressed these issues in the context of employees accessing pornography on work-issued computers, during work hours, and/or with students as the subjects of the images. While the principles in the decisions are similar, the outcomes have varied depending on a range of circumstances.

Disciplining Employees

Two cases involving a Vancouver school board address an employer's ability to dismiss employees who access pornography at work. In *Vancouver School District No. 39 v. U.A., Local 170* (2011), 212 L.A.C. (4th) 248 (B.C. Arb.), Arbitrator Sanderson considered the dismissal of a maintenance coordinator who was sending and receiving pornographic emails on a daily basis using work computers. Similarly, in *Vancouver School District No. 39 v. C.J.A., Local 1995* (2010), 197 L.A.C. (4th) 421 (B.C. Arb.), Arbitrator Ready addressed the school's dismissal of a carpenter who repeatedly viewed and distributed pornography that he stored on a work computer and shared using a school board email address.

In both cases, the dismissal was upheld. In assessing whether the trust relationship between employer and employee had been irrevocably broken, the arbitrators considered many of the standard factors in a discipline case:

- the employee's length of service;
- the employee's disciplinary record;
- whether the employer fairly warned the employee;
- whether the discipline was consistent with the employer's treatment of other employees; and
- the employee's degree of cooperation and remorse.

The arbitrators also noted that the grievors' use of work-issued computers and email addresses, and their accessing pornography during work hours, had contributed to the irreparably harmed trust relationship between grievor and employer.

In *Alberta (Department of Children's Services) v. A.U.P.E.* (2005), 138 L.A.C. (4th) 301 (A.B. Arb.), a case upholding the dismissal of a child and youth worker at a residential treatment facility, the Arbitration Board laid out a number of factors that should be considered in the context of wrongful internet use specifically:

- the offensive character of the pornographic material itself;
- the individual's perseverance and time spent viewing the sites;
- the use made of the material within the workplace and whether it was saved, downloaded, or shared with coworkers;
- the workplace culture and whether the activities poisoned the environment
- or made the person's reintegration problematic; and
- the known employer policies respecting internet use.

The unique position of a school also proved relevant in assessing the appropriateness of dismissal as a penalty for accessing pornography at work. Arbitrator Sanderson wrote:

If the nature of his misconduct had become known publically, it could have done significant harm to the school board's reputation as the protector and educator of children.

Arbitrator Ready also emphasized the school's special position:

A school district is entrusted with the care and education of students from early childhood through development to their young adult years. The grievor's actions clearly and reprehensively violated that trust on a continuing basis for a significant period of time.

Not every instance of viewing pornographic material at work will end in a dismissal being upheld; context and proportionality continue to be crucial facets of the analysis. In *Asurion Canada Inc. v. Brown,* 2013 NBCA 13, two call centre employees were fired after they received pornographic materials in their work email. The emails were either deleted or forwarded to a personal email address, and were not shared within the workplace.

Although the employer argued that the trust relationship had been broken due to a violation of its internet use policy, the New Brunswick Court of Appeal found that dismissal was a disproportionately severe penalty in the circumstances. Because the emails were unsolicited, they did not contain illegal images, the employees had clean disciplinary records, and neither had been clearly warned about the "zero tolerance" approach to pornography in the workplace, the dismissals were found to be wrongful and the damages awards made by the lower courts were upheld.

In *Andrews v. Deputy Head (Department of Citizenship and Immigration),* 2011 PSLRB 100, a senior government employee was found to have spent about 50% of his work time surfing the internet, including a large percentage of that time looking at, commenting on, and distributing pornography. Adjudicator Rogers stated that "measuring the level of offensiveness of the images seems to me both subjective and irrelevant." Her analysis focused mainly on the issue of time theft rather than pornography, and she ordered the employee to be reinstated based on his very long service, clean record, good performance, and acceptance of responsibility.

Importance of Proper Policies

The employees in *Asurion Canada* were successful in court partially because they were not made aware of their employer's strict policy on internet usage. It is crucial that employers develop, publicize, and enforce reasonable policies on computer and internet use.

In one case, *N.S.T.U. v. Chignecto-Central Regional School Board* (2004), 126 L.A.C. (4th) 267 (N.S. Arb.), a school board dismissed a teacher who had taken inappropriate photos of female students and saved them to a school computer, which was left accessible to students along with a large amount of pornography saved to floppy disks. The school had internal policies governing appropriate internet usage, which were distributed on the first day of school and were required to be posted in the classroom. Arbitrator Ashley wrote that the fact that “teachers were not required to ‘sign off' on the internet policy, does not lead to a conclusion that the policy was not enforced or enforceable.” It was also not problematic that the policy did not specifically detail the consequences of breach.

In some cases, particularly in the school context, the lack of a clearly-communicated policy may not be fatal to an employer's position. Arbitrator Ready opined that even though the school board had no formal rules on computer or internet use, the carpenter's decision to access pornography while working in a school reflected a lack of common sense:

The grievor's actions demonstrate an ongoing patent lack of the application of common sense when he used the Employer's computer to receive, send and store pornographic emails. It should have been obvious to him that such material would not be acceptable to the business of a school district…

The principles outlined in the jurisprudence clearly place responsibility on employees to exercise common sense and use good judgment. They serve to defeat the Union's condonation defence which fails to recognize any positive duty on the part of an employee.

Similarly, Arbitrator Ashley wrote that "in any event, common sense would dictate that the conduct was wrong and that it would not be tolerated by the employer, whether there were specific policies or not."

Is Pornography Addiction A Disability?

In some cases, an employee who has been dismissed for accessing pornography may argue that he suffers from a pornography addiction, and that this addiction is a disability on the grounds of which he cannot be dismissed.

This somewhat novel argument has not yet proved to be grounds for overturning discipline. Currently, pornography addiction is not listed in the Diagnostic and Statistical Manual of Mental Disorders (DSM) and it has no official diagnostic tools. However, some arbitrators have suggested that with proper expert opinion to support the argument, they could conclude that pornography addiction is a disability.

Employers should be sure to properly consider the possibility of a pornography addiction before taking any significant disciplinary steps. If an employee succeeds in proving, through expert opinion, that he or she suffers from a disability, the *Human Rights Code* could prevent an employer from disciplining the employee on the grounds of that disability.

Conclusion

Arbitrators appear to be taking a fairly strict approach to pornography in the workplace. While traditional labour principles of employee history, employer warnings, and proportional responses are still central, accessing pornography at work is generally seen as significant misconduct for which discipline is usually warranted. Each case will be assessed based on its individual facts and circumstances.

However, employers must handle incidents with proper protocols and measured responses. Although the school context requires strong protection regarding student safety and well-being, teachers and school staff are still entitled to fair treatment to properly protect their livelihoods.

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