

Decision of the Appeal Division

Number: 2001-2562

Date: December 20, 2001

Panel: Heather McDonald

Subject: Discriminatory Action — Refusal to Perform Unsafe Work

OCCUPATIONAL HEALTH AND SAFETY (DISCRIMINATORY ACTION) (REFUSAL TO PERFORM UNSAFE WORK) — Worker refused to wear “common boots” pending replacement of his own boots citing safety concerns regarding the boots’ cleanliness — Employer suspended worker without pay until he wore appropriate footwear — Reviewing officer denied worker’s complaint of discriminatory action — Worker appealed — Appeal Division panel found that that the worker was not exercising a right under section 3.12 of the Regulation to refuse to perform unsafe work — Employer’s offer of common boots was not a “work process” that it was asking the worker to carry out — Worker simply refusing to comply with employer’s policy regarding safe footwear — Even if worker was exercising a right to refuse to perform unsafe work, the employer had rebutted the presumption of unlawful discrimination — Worker appeal denied.

Law: WCA (1996): s. 150, s. 151, s. 152, s. 153; *Industrial Health and Safety Regulation*: s. 3.12, s. 3.13, s. 8.2(1)(b), s. 8.2(4)

Discriminatory Action [worker appeal (rev. officer)]
Appeal Division Decision No. 2001-2562

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Introduction

- (1) The worker is appealing a March 30, 2001 decision by a reviewing officer [“R”] in the Prevention Division, Workers’ Compensation Board (the “Board”). R decided that the employer had not discriminated against the worker when it refused to allow him to work for two days until he wore appropriate boots for work, and denied him wages for the two days he didn’t work. This decision overturned an earlier decision, dated October 17, 2000, by a different reviewing officer who found discrimination by the employer and ordered the employer to pay the worker one days’ wages.

Issue(s)

- (2) Did the employer discriminate against the worker in violation of section 151 of the *Workers Compensation Act* (the “Act”)? If so, what is the appropriate remedy?

Procedural Matters

- (3) The employer represented itself in these appeal proceedings. The worker's trade union represented him. Neither party requested an oral hearing, and I am satisfied that the comprehensive written submissions and evidence on the file enable me to determine the issues in this case.
- (4) My jurisdiction in these proceedings arises under sections 207–212 of the Act. The Act does not require that a party establish grounds for the appeal to proceed. Therefore the appeal is a rehearing by the Appeal Division. The Appeal Division has the discretion to initiate and to conduct a full inquiry into all of the issues arising out of an appeal once the matter is before it.

Relevant Statutory and Regulatory Provisions

- (5) Section 151(a) of the Act provides, in part, that an employer must not take or threaten discriminatory action against a worker for exercising a right or carrying out any duty in accordance with Part 3 of the Act, the regulations or an applicable order.
- (6) Section 150 describes “discriminatory action” of an employer by saying that it includes any act or omission by an employer or person acting on the employer's behalf, that adversely affects a worker with respect to any term or condition of employment. This would include suspension, lay-off or dismissal, demotion or loss of opportunity for promotion, transfer of duties, reduction in wages, and other examples provided in section 150(2).
- (7) Section 152 of the Act provides that a worker who believes an employer has violated section 151 may either deal with the matter through the collective agreement's grievance procedure (if there is one), or lay a complaint with the Board. A complaint to the Board must be in writing. Section 152(3) states that the burden of proving that there has been no contravention of section 151 is on the employer.
- (8) Section 8.2(1)(b) of the *Industrial Health and Safety Regulation* (the “Regulation”) states that a worker is responsible for providing appropriate footwear including safety footwear. Section 8.2(4) states that nothing in that section precludes or alters an existing or future agreement between a worker or workers and an employer to the effect that the employer will be responsible for the provision, either at no cost or some cost to the worker, of any or all of the items described in subsection (1). This would include safety footwear.
- (9) Section 3.12 of the Regulation provides that a person must not carry out or cause to be carried out any work process or operate or cause to be operated any tool, appliance or equipment if that person has reasonable cause to believe that to do so would create an undue hazard to the health and safety of any person.

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- (10) Subsections (2) through (5) of section 3.12 of the Regulation describe the procedure for dealing with a refusal to work on the grounds that it is unsafe. Those subsections state:
- (2) A worker who refuses to carry out a work process or operate a tool, appliance or equipment pursuant to subsection (1) must immediately report the circumstances of the unsafe condition to his or her supervisor or employer.
 - (3) A supervisor or employer receiving a report made under subsection (2) must immediately investigate the matter and
 - (a) ensure that any unsafe condition is remedied without delay, or
 - (b) if in his or her opinion the report is not valid, must so inform the person who made the report,
 - (4) If the procedure under subsection (3) does not resolve the matter and the worker continues to refuse to carry out the work process or operate the tool, appliance or equipment, the supervisor or employer must investigate the matter in the presence of the worker who made the report and in the presence of
 - (a) a worker member of the joint committee,
 - (b) a worker who is selected by a trade union representing the worker, or
 - (c) if there is no joint committee or the worker is not represented by a trade union, any other reasonably available worker selected by the worker.
 - (5) If the investigation under subsection (4) does not resolve the matter and the worker continues to refuse to carry out the work process or operate the tool, appliance or equipment, both the supervisor, or the employer, and the worker must immediately notify an officer, who must investigate the matter without undue delay and issue whatever orders are deemed necessary.
- (11) Section 3.13 of the Regulation provides that a worker must not be subject to discriminatory action under section 150 of the Act because the worker has acted in compliance with section 3.12 of the Regulation. It also provides that temporary assignment to alternative work at no loss in pay to the worker until the matter in section 3.12 is resolved is deemed not to constitute discriminatory action.

Evidence and Background

- (12) The employer is involved in meat and other food processing. Its employee guidelines, acknowledged as read by the worker on January 21, 1999, state that all employees are expected to have good personal hygiene, and that a neat appearance, clean clothing and footwear are

necessary before commencing to work in the plant. A safety rule in the guidelines states that employees must wear rubber footwear with non-skid sole and heel while working on the production line. The guidelines state that plant boots are not allowed outside the building. The evidence is that this is because the plant environment is wet and boots would need to be sterilized before entering the plant.

- (13) The employer's policy was to buy its employees steel-toed rubber boots, or to reimburse them a maximum of \$25.00 to purchase their own boots. It would normally take the employer two to three days to order a pair of replacement boots for an employee. The employer also kept a supply of "common boots" for visitors on plant tours. Those boots would be left out after use for sterilizing by a cleaning company. The employer would also provide the boots with new insoles after they had been sterilized.
- (14) The worker arrived at work on February 8, 2000 with boots that had holes in them. He requested a replacement pair from the employer. The employer advised the worker that it would take two to three days to order and receive a new pair in his size, but he could purchase a new pair and they would reimburse him up to \$25.00. This was in accordance with the employer's policy on supplying appropriate footwear for employees.
- (15) The worker refused the option of purchasing his own pair of boots and accepting \$25.00 reimbursement from the employer. The next day, February 9, 2000, the worker told the employer that his boots were no good, as they had holes in them. The employer then offered him another option. It had located a pair of "common boots" in his size. "Common boots" are usually reserved for visitors on plant tours. The employer offered him the common boots in his size, in order to accommodate him during the several days while the employer ordered and waited for new boots in his size to arrive. The worker advised the plant manager that common boots concerned him as they might transmit foot infections if not properly sanitized. Although the worker was aware of the employer's practice of having the cleaning company sanitize common boots after use, there was no written record or clear indication of when the particular boots offered to him had been previously used and/or sanitized. Therefore, the worker refused to wear them, being concerned about safety in terms of the boots' cleanliness. The worker requested the employer to sanitize the boots for him by purchasing disinfectant spray and spraying the boots. The employer refused. It told the worker to purchase his own spray to disinfect the boots.
- (16) On February 10, 2000, the worker told the employer that he could not work because he had no boots to wear. He asked the employer again to purchase disinfectant spray for the common boots. There was some discussion between the worker and the employer, with the worker suggesting that alternate duties be provided him, and the employer questioning him as to why he hadn't requested replacement boots before complete holes had developed in his boots. Ultimately, the employer advised the worker that if he refused to purchase new boots or wear the common boots offered to him, he should go home, and he would be considered absent without leave. The worker went home.

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- (17) The next day, February 11, 2000, the parties replayed their positions. The employer again told the worker to go home if he would not purchase appropriate footwear or wear the common boots offered by the employer, and that he would be considered absent without leave. The worker went home.
- (18) The next workday, February 14, 2000, the worker purchased a spray and used it to disinfect the common boots provided to him by the employer. He then went to work.
- (19) Two Board safety officers arrived at the employer's plant on February 17, 2000. The contact record they completed states, in part, that:
- It appears the company has gone beyond what the Regulation requires and were also diligent in instituting a procedure to sterilize the common boots.
 - The worker was advised that both officers agreed the company was diligent in its effort and that it was his responsibility to come prepared to work.
 - We also advised him that if he didn't agree with our decision he could fill out the discrimination forms for submission to Richmond or file a grievance with the union, but not both.

[reproduced as written]

- (20) The worker, represented by his trade union, filed with the Board a complaint under section 151 of the Act that his employer had discriminated against him. The worker complained that the employer had not explicitly confirmed that the common boots it offered to him had been disinfected, and that it discriminated against him by deducting wages for the days he was absent. His position was that he was absent because he was refusing to work unsafely by wearing boots that he wasn't sure had been disinfected. His position was that he was exercising a right or duty under Part 3 of the Act, namely the refusal of unsafe work under section 3.12(1) of the Regulation. By way of remedy, the worker requested two days' lost wages, for February 10 and 11, 2000.
- (21) The evidence is that since the worker's filing of the discrimination complaint, the employer has changed its policy regarding provision of footwear in the plant. Now, consistent with section 8.2(1)(b) of the Regulation, it is the responsibility of the workers to provide their own footwear, including safety footwear. The employer no longer offers to purchase the footwear or give a \$25.00 reimbursement if they purchase their own footwear.
- (22) In his October 17, 2000 decision, the reviewing officer concluded that the worker had legitimately exercised a right of refusing to wear footwear that may not have been disinfected and may have led to a foot disease. The reviewing officer noted that under section 152(3) of the Act, the burden of proof is on the employer to refute the allegation that it violated section 151(a) by discriminating against the worker for exercising a right under the Act or Regulation. He found that the employer had provided insufficient evidence for him to conclude that its response to the worker's refusal to wear boots was lawful. The reviewing officer found:

Under the circumstances, [the worker] had a reasonable expectation that the employer was fully responsible for replacing his damaged boots. For example, if the right size of boots were available in stock, or if full reimbursement was offered immediately to the worker, this dispute would not have arisen at all.

(23) Having found that the employer had violated section 151(a) of the Act, the reviewing officer ordered the employer to pay the worker one day's wages. The reviewing officer found that the worker could have reduced his losses to no more than one day of work by purchasing a can of disinfectant and using this disinfectant on the boots in question.

(24) The reviewing officer concluded his decision by stating:

Lastly, I am somewhat surprised that the Board would be required to make a formal determination with respect to a dispute that is essentially about the lack of assurance that work boots were properly sanitized. Such a dispute could easily have been avoided and/or minimized. It is my impression that if [the employer] had kept \$10.00 worth of disinfecting chemicals on site, the dispute would not have arisen in the first place. Furthermore, as noted above, [the worker] could easily have purchased a can of disinfectant immediately after being sent home on February 10, 2000, thus, minimizing his loss.

(25) Under section 201 of the Act, the employer then requested the Board to review the reviewing officer's decision of October 17, 2000. The matter went to review, and the second reviewing officer, R, issued his decision on March 30, 2001. This is the decision from which the worker appeals.

(26) R overturned the earlier decision of October 17, 2000.

(27) The worker's trade union had argued that the employer had breached the procedure in section 3.12 of the Regulation for dealing with a refusal to work on the grounds that it is unsafe. R found that both the worker and the employer had "technically" breached the procedure in that neither had immediately notified the Board when they had failed to resolve the matter between them. In the circumstances, R did not attach any significance to that technical breach. He concluded that it did not illustrate any improper motivation by the employer toward the worker or the exercise of rights under Part 3 of the Act.

(28) R assumed, for the purposes of his decision, that the worker complied with section 3.12 in having "reasonable cause to believe" that an undue hazard would arise from wearing the common boots without a guarantee from the employer that they had been sanitized. R concluded, however, that the employer had met the onus of proof in section 152(3) in rebutting a presumption that it had discriminated against the worker for exercising a refusal to perform unsafe work. In this regard, R stated:


All the evidence indicates that the employer was only motivated by attempting to assist him in obtaining proper boots for himself; it followed its normal process for providing boots to its employees as well as offering the additional option

of using the “common boots”. The loss of two days’ pay did not result from an individual decision by the employer directed at [the worker] that he could not work. It simply followed from the general company rule and practice that workers could not work if they did not have suitable boots.

- (29) R noted the trade union’s argument that under section 3.13 of the Regulation, the employer was required to provide alternative work while the dispute was being investigated under section 3.12 of the Regulation. He found that section 3.13 did not entitle a worker to reassignment. Rather, it states that if an employer makes such a reassignment, it is immune from a discrimination complaint for making the assignment. R found that there was no evidence in this case that the employer had a general practice of providing alternative work for workers who failed to have proper boots and that it failed to give the worker the benefit of that practice.
- (30) On appeal to the Appeal Division, the trade union submits that it was the worker’s sincere and reasonable belief that using worn communal footwear may lead to foot infection. It argues that where, as here, the employer disagreed with the worker’s position, section 3.12 of the Regulation required the employer to refer the matter to the Board, and to assign the worker alternative work in the interim. The employer submits that the employer’s response of sending the worker home for two days without pay, violates Regulation procedure and amounts to unlawful discrimination under section 151 of the Act.
- (31) In a subsequent written submission dated April 26, 2001, the trade union submits that it does not contest that an employer is not obliged to provide alternative work. It says that the essence of its appeal, not addressed in R’s findings, is that an employer must refrain from suspension or layoff with resulting loss of wages, pending investigation by the Board, when a worker exercises his lawful right to refuse to perform unsafe work. When, as here, an employer suspends a worker without pay, the employer discriminates against the worker in contravention of section 151 of the Act.

Analysis and Findings

- (32) I have decided to dismiss the worker’s appeal of R’s decision dated March 30, 2001.
- (33) Was the worker exercising a right under section 3.12 of the Regulation to refuse to perform unsafe work?
- (34) My review of the evidence leads me to conclude that the worker was not exercising a right under section 3.12 of the Regulation to refuse to perform unsafe work. The employer was not asking the worker to perform unsafe work. By contrast, the employer wanted the worker to work safely, by wearing safe footwear. The matter of the “common boots” and their sanitization is a red herring. I do not find the matter of the common boots to be a pivotal issue in this case, as the employer was merely providing the worker with another option available to him regarding safe footwear. The worker was not required to use the common boots and the employer was not insisting that the worker use them.

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- (35) Workplace safety at the employer's worksite required the worker to wear rubber boots in the plant. Section 8.2(1)(b) of the Regulation makes safe footwear the responsibility of the worker, although it recognizes that worker and employer may agree to other divisions of responsibility regarding safe footwear. The employer's policy, known to the worker, was that the employer would either provide the safe footwear or reimburse the worker \$25.00 toward his purchase of safe footwear.
- (36) The worker did not provide the employer with appropriate notice that he required replacement boots so that the employer was in a position to immediately provide him with new boots. It is not unreasonable for the employer to require a few days' notice that boots are deteriorating so that it will have time to order a replacement pair. Failing appropriate notice, the second part of the employer's policy came into play: it was the worker's responsibility to purchase a new pair, with the employer reimbursing him the sum of \$25.00. No unsafe work situation arises in that scenario.
- (37) The employer would have been within its rights in not offering the worker the option of wearing the common boots. It went further than it needed to do, by trying to find another reasonable solution that would enable the worker to work safely in the plant. The fact that the worker wasn't certain that this other option was safe is irrelevant. In rejecting that extra option offered by the employer, which of course he was entitled to do, the worker's obligation under the employer's policy, consistent with section 8.2(1)(b) of the Regulation, was to purchase his own safe footwear and accept the \$25.00 reimbursement by the employer. He could then have worked safely in the plant.
- (38) Section 3.12 of the Regulation says that a person must not carry out or cause to be carried out "any work process" if that person has "reasonable cause" to believe that to do so would create an "undue hazard" to the health or safety of any person. The employer's offer of the common boots was not a "work process" that it was asking or requiring the worker to carry out. It was a suggestion, over and above its policy regarding safe footwear, to help the worker with the obligation to wear safe footwear in the plant. In rejecting that suggestion, the worker was not exercising a regulatory right to refuse to perform a work process that would create an undue hazard to him. The employer's policy regarding safe footwear in the plant still applied: the worker's obligation, given the circumstances of his failure to provide the employer with appropriate notice to purchase new boots for him, was to purchase his own boots and accept the \$25.00 reimbursement from the employer. The worker had no reasonable cause to believe, in these circumstances, that the employer was asking him to carry out a work process that would create an undue hazard for him. The employer had a policy regarding safe footwear, and the worker was simply refusing to comply with it.
- (39) Did the employer discriminate against the worker in violation of section 151 of the Act?
- (40) Section 151's prohibition against discrimination arises only when a worker has acted under subsections (a), (b) or (c) in that section. The worker is relying on subsection (a) in this case, saying that he was exercising a right to refuse to perform unsafe work under section 3.12 of the Regulation. Given my finding that the worker was not exercising such a right, section 151 does not apply in this case.

- (41) Even if I am wrong in my finding that the worker was not exercising a right under section 3.12 of the Regulation, I find that the employer has rebutted the presumption of unlawful discrimination in this case. Even if the evidence regarding the common boots can be interpreted as the worker exercising a right to refuse to perform unsafe work, the evidence is clear that the employer did not send the worker home because he refused to wear the common boots. As earlier noted, the offer of the common boots was simply an extra suggestion by the employer that the worker was entitled to reject. The employer was not requiring the worker to wear the common boots.
- (42) The employer had a policy in place regarding safe footwear, a policy consistent with section 8.2(1)(b) of the Regulation. In the absence of fair notice allowing the employer to purchase new boots for him, the worker was required to purchase his own boots and accept a \$25.00 reimbursement. The worker refused to comply with the policy, and the employer could not allow him to work in the plant without safe footwear. The employer was not required to find the worker alternative work in these circumstances. The employer was entitled to send the worker home, without pay, until the worker had safe footwear for the plant. The employer's decision did not constitute discrimination under section 151 of the Act. It did not send the worker home because he refused to work unsafely. Rather, the employer sent the worker home because it could not allow him to work unsafely.
- (43) The trade union has argued that an employer must refrain from suspension or layoff, pending investigation by the Board, whenever a worker exercises his lawful right to perform unsafe work. Otherwise, the suspension or layoff constitutes discrimination against the worker under section 151 of the Act. In this case, I have found that the worker was not exercising a lawful right to perform unsafe work. Therefore, I disagree with the union's position that the worker's suspension constitutes discrimination under section 151 of the Act.
- (44) I also note that section 3.13(1) of the Regulation says that a worker must not be subject to discriminatory action because the worker has acted "in compliance with section 3.12 or an order made by an officer." My interpretation of that provision is that if it turns out that the worker has not acted in compliance with section 3.12, for example, then unlawful discrimination under section 151 of the Act will not arise from the simple fact that an employer has disciplined the worker for the refusal to work. I also agree with R's finding that section 3.13(2) of the Regulation does not require an employer to assign a worker to alternative work, pending investigation of the merits of a worker's complaint of an unsafe work process.
- (45) In this case, the employer has now changed its policy of providing safe footwear for its employees or reimbursing them \$25.00 toward their purchase of safe footwear. Now employees must bear the entire burden of responsibility, under the strict wording of section 8.2(1)(b) of the Regulation, in providing their own safe footwear for work in the plant. It is ironic that an employer who offered a benefit to its workers, above and beyond Regulation requirements about footwear, was then confronted with a charge of discrimination by one of its workers when it didn't give him even more of a benefit by way of an absolute guarantee of common boot sanitization. It is unfortunate that, in order to avoid any future charges of discrimination regarding footwear, the employer has found it necessary to revise its policy by relying on the Regulation's provision that it is the worker's responsibility for providing his or her safe footwear.

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- (46) Given my findings that the worker was not exercising a right under section 3.12 of the Regulation to perform unsafe work, and that the employer did not discriminate against the worker in violation of section 151 of the Act, the issue of remedy does not arise.
- (47) For the foregoing reasons, I dismiss the worker's appeal of the decision dated March 30, 2001 by R, the second reviewing officer who dealt with the worker's complaint in the Prevention Division.

Editors' Note: The names of the parties have been removed for privacy considerations. The text of the decision is otherwise unchanged.