

## ONTARIO LABOUR RELATIONS BOARD

**3654-08-ES** Susan Gray, Applicant v. **Springfield Hotels Airport Inc. operating as Hampton Inn & Suites Toronto Airport** and Director of Employment Standards, Responding Parties.

Employment Practices Branch File No. **70021275-1**

**BEFORE:** Mary Anne McKellar, Vice-Chair.

**APPEARANCES:** Susan Gray appearing on her own behalf; Warren Bowles appearing for the responding party employer; no one appearing for the Director of Employment Standards.

**DECISION OF THE BOARD:** July 31, 2009

### Introduction

1. This is an application under section 116 of the *Employment Standards Act, 2000* (“the Act”) for review of an Employment Standards Officer’s (“ESO’s”) decision not to issue an order to pay against the responding party employer (“the Employer”), in respect of a claim by the applicant for termination pay.

2. I convened a hearing into this matter on July 31, 2009.

### The Facts

3. The pertinent facts are not in dispute.

4. The applicant had been employed by the Employer for more than four years, but less than 5 years, at the time her employment was terminated in October 2007. At the time she worked full-time hours for the Employer, but may also have worked additional hours performing similar duties for another inn.

5. On or about October 18, 2007, the applicant left work for medical reasons and provided the Employer with a doctor’s note indicating that she “will be off work for the next three weeks for medical reasons”.

6. Shortly thereafter, the Employer learned that she was working at another inn performing similar duties to those normally performed for the Employer. Her employment was terminated effective October 22, 2007, although the decision was not communicated to her until October 31, 2007. She was advised of the decision both verbally and by letter of the same date. The pertinent part of the letter reads:

I am writing in regards to the conversation we had this afternoon, where you were confronted with the fact and admitted that you were employed at

another hotel, despite being on a three week medical leave from the Hampton Inn & Suites - Toronto Airport.

7. The question that arises on the above facts is whether the applicant's conduct disentitles her to termination pay. The quality of conduct that an employee must engage in to disentitle herself to termination pay is conduct that amounts to willful misconduct or willful neglect of duty.

8. The applicant submits that she did not do anything wrong, and emphasized that she had regularly worked extra hours outside her employment. While she acknowledged that she had represented to the Employer that she was unable to work because of her medical conditions when that was not in fact the case, she asserted that, after absenting herself from work and providing the medical note, she had attempted to speak to a supervisor who did not make himself available for that purpose. She suggested that if she had been able to speak to him she could have clarified that there was a "problematic" situation and work and they might possibly have worked out a schedule of hours she would have been able to work. Although she did not use this language, it appeared to be the applicant's contention that the supervisor's failure to meet with her absolved her of any responsibility for the misleading nature of the medical note.

9. The applicant's explanation does not improve her situation. Indeed, all it does is clarify what was already abundantly clear from her behaviour. She was physically fit to work. She may have wanted a break from whatever situation was troubling her at the Employer's workplace, but the way she chose to obtain that was by absenting herself from work and deliberately misleading the Employer as to the reason for and the necessity of the absence.

10. In all of the circumstances, I conclude that the applicant's behaviour does amount to willful misconduct or willful neglect of duty. It follows that I agree with the ESO's disposition of this matter.

### **Disposition**

11. The application for review is dismissed.

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"Mary Anne McKellar"  
for the Board