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YOU CAN'T FIRE ME, I COMPLAINED ABOUT WORKPLACE HARASSMENT!

In November, the law of workplace harassment in Ontario took a surprising turn that will likely hurt employers. By now, most people are familiar with the amendments to the province's Occupational Health and Safety Act (OHSA) that were made in 2010 through Bill 168. Since then, employers have needed a policy on workplace harassment, together with a program for reporting and investigating complaints of workplace harassment. Bill 168 also added similar requirements for workplace violence policies.

Employees of course, have always complained about their managers and co-workers. While there are many legitimate workplace harassment complaints, such complaints are often a symptom of other problems. Employees with performance problems often complain about managers who try to take them to task. When two employees are in conflict, they often hurl accusations of harassment back and forth at each other. One of the major concerns about Bill 168 was that employees would have a new tool to attack the way their employer handled the underlying non-harassment problems whenever there was a harassment complaint. In particular, there was concern that employees would make a harassment complaint and then use that complaint as a shield against any steps the employer tried to take against the complainer.

In 2011, the Ontario Labour Relations Board, which hears complaints under the OHSA, considered an application from an employee who claimed he had been fired because he complained about workplace harassment. In *Conforti v. Investia Financial Services*, the employee said he had been fired in reprisal for his complaint. In a major victory for employers (argued by Whitten & Lublin's Aaron Rousseau), the Board decided that it was not going to hear the case. The Board decided that it was not the Board's job to hear these complaints. The employees could sue for wrongful dismissal in court, but they could not bring their complaints to the Board. For the next two years, the Board closed the door on similar complaints from other employees.

On November 22, 2013, the Board opened the door again in *Ljuboja v. Aim Group Inc.* Peter Ljuboja, a supervisor at a car plant, complained that his manager yelled and swore at him for allowing his assembly line employees to have washroom breaks despite being short-staffed. Mr. Ljuboja filed a formal written complaint with the company's Human Resources department. (HR, apparently, had told Mr. Ljuboja to grant the washroom breaks). A short time later, Mr. Ljuboja was fired. He claimed this was in reprisal for his complaint.

In a surprising decision, the Board allowed Mr. Ljuboja's application to proceed. The Board rejected the *Conforti v. Investia* approach and declared that the Board should hear applications from employees who claim they were terminated or disciplined because they complained about workplace harassment. The Board explained that it will use the same approach for these cases as it uses when an employee is terminated or disciplined after complaining about a safety violation.

This is bad news for employers. Applications of that type to the Board are a major headache for employers for several reasons. First, the bar for success is very low. The employer is liable even if it had other reasons for terminating or disciplining the employee, as long as the harassment complaint was part of the reason for the employer's decision. Second, the employer is guilty until proven innocent. The employer has to prove to the Board that the employee's harassment complaint had nothing to do with the termination or discipline. If there is no evidence, the employer

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loses. Third, if the employer loses, the employee can be reinstated into the old job, with full back pay. This can be much more expensive - and much more disruptive - than a simple notice period payment.

It isn't yet clear whether the Board will consistently follow this new approach. Nonetheless, employers should make sure that they are protecting themselves:

1. Document the real reason for the termination. This is the most important step. Whether the problem is poor performance, insubordination, or conflict with another employee, document each instance.
2. Be especially careful in communications with the employee when and after the employee makes a harassment complaint. Although a complaint may appear (and may be) dishonest or frivolous, follow the proper investigation procedures. A hotheaded or categorical initial reaction could build the employee's case for reprisal.
3. Consider holding off on termination right after a complaint of workplace harassment if your documentation of other problems is not strong. Waiting a few months may well be enough to defeat a subsequent application at the Board. In the meantime, problematic employees will give you more reasons to fire them.

UPCOMING EVENTS

January 24th, 2014

David Whitten will be speaking about executive employment agreements at the Human Resources Professionals Association's Annual Conference and Trade Show, January 24th, 2014, in Toronto.

Learning objectives include:

- Understand the various provisions found within executive employment agreements, including equity incentive plans, change in control provisions and post-employment restrictions
- Review effective provisions in executive employment agreements from both the executive's and the employer's perspective
- Understand the dynamics of negotiating executive employment agreements
- Know when to use certain provisions and when not to
- Learn how to address common issues that arise in enforcing executive employment agreements

For more information please visit HRPAs website.

IN THE MEDIA

Is it legal for employers to ask for sick notes and does an employee have to provide one? Daniel Lublin provided his opinion on the topic during his appearance on Global News.

LAW BLOG

Toronto court to decide if Twitter harassment warrants jail time

When employers are asking for sick notes

More tips for lawsuit-free corporate holiday party

Privacy in the Workplace; Employer Collection of GPS Information from Cell Phones Issued to Employees

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