Swift Termination: Is Protecting a Company's Reputation at All Costs the Endgame in the #MeToo Era?

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Harassment is unacceptable. In fact, an employer has a duty to ensure that employees have a harassment-free workplace under section 3(1)(c) of the *Occupational Health and Safety Act*. So, when a high-profile employee is alleged, especially publicly, to have committed harassment, an employer may be tempted to terminate the employee immediately before conducting a proper investigation to signal to the public its zero-tolerance policy towards harassment, and thus protect its reputation. This decision, however, may create tremendous risk for employers beyond a wrongful dismissal lawsuit.

Statutory Requirements

An employer is required to have a harassment prevention plan, and conduct investigations into harassment incidents.1 Although failing to conduct an investigation may not always attract the maximum penalty, failing to comply with the *Occupational Health and Safety Act* for the first time can result in a fine of not more than $500,000 and/or imprisonment not exceeding six months.2

Aggravated Damages

An employer may also face aggravated damages for failing to conduct an adequate investigation. Although the court has emphasized that an employer should not be punished simply because an investigation was clumsy,3 the court has also stated that the consequences of false allegations can have potentially devastating consequences for the person accused of such conduct.4 As a result, flawed investigations may attract aggravated damages.

In *Lalonde v. Sena Solid Waste Holdings Inc.*, Lalonde was terminated for failing to follow safety procedures and failing to follow his supervisor's instructions. An investigation was done, but it was flawed in many ways:

- Employer made the decision to terminate Lalonde's employment two days after his suspension, despite not having any response from Lalonde;
- Lalonde was not given an opportunity to fully explain the alleged misconduct; and
- Employer ignored a letter from an employee, which supported Lalonde's contention that he had done nothing wrong.

The court described the case as a situation where the employer decided to "shoot first and ask questions later," and concluded that the internal investigation was essentially a sham. These actions caused Lalonde significant mental distress, and the court awarded him $75,000 of aggravated damages.5

With faulty investigations attracting significant damages, not conducting any investigations may potentially attract an even higher amount.

Derivative Actions

Although some employers may still view the above statutory fines and aggravated damages as an acceptable tradeoff in protecting the company's reputation, the consequences may become exponentially more problematic if shareholders find the failure to investigate caused harm to the company.

Directors have a duty to act honestly and in good faith with a view to the best interests of the corporation, and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.6 Breaching these duties may lead to personal liability for directors. Since a company is statutorily required to investigate harassment allegations, it can hardly be said that choosing not to investigate is in the best interest of the corporation. The resulting harm to the company may allow a complainant, including shareholders, to initiate a derivative action by seeking leave of the court to commence an action on behalf of the corporation for wrongs done to the corporation under section 240 of the Alberta *Business Corporations Act*.7

One example of a derivative action in the sexual harassment context can be seen in the United States in *City of Monroe Employees' Retirement System, derivatively on behalf of Twenty-First Century Fox, Inc. v. Rupert Murdoch, et al* after multiple sexual harassment and racial discrimination allegations were made against several employees of Twenty-First Century Fox (Fox).

In the claim, the plaintiff argued that Fox's directors' duties of good faith and loyalty included the duty to conduct a good faith investigation into known violations of laws, regulations, and internal policies concerning sexual harassment and discrimination. The failure of the directors to perform their fiduciary duties caused the company to sustain significant damages including fines, damages awards, settlements, expenses, and increased regulatory scrutiny.8 Ultimately, Fox settled the claim for $90 million.

Although the allegations were never proven in court, the claims made in the complaint offer a look into what additional factors an employer may need to consider before an immediate termination.

Takeaway

Instead of protecting the company's reputation, a sudden termination may actually signal to the market that the company lacks an appropriate policy in dealing with sexual harassment. This may actually harm the company's reputation.

Furthermore, the related legal costs arising from wrongful dismissal claims, statutory fines, and punitive damages, many of which may be prevented by conducting a proper investigation, may lead shareholders to initiate a derivative action against the employer's directors and officers for failing to implement or monitor a proper sexual harassment policy and investigation as required by law.

Even if the derivative action is ultimately unsuccessful, and the directors do not face personal liability, the company can still face significant opportunity costs as senior management and directors are embroiled in litigation instead of running the business. The business disruption may be more devastating than the legal repercussions. Furthermore, it is inconclusive whether a delay in termination due to a proper investigation will actually cause any additional reputational damage to the company. As a result, an immediate termination without an investigation may lead to higher costs without any value in protecting the company's reputation. Ultimately, employers must at least consider factors beyond simply the wrongful dismissal implications when making termination decisions relating to allegations of harassment.

[1] *Occupational Health and Safety Code*, Alta Reg 87/2009 at ss 390.4, 391, 391.1.

[2] *Occupational Health and Safety Act*, RSA 2000, c O-2 at para 41(1)(a).

[3] *Elgert v. Home Hardware Stores Limited*, 2011 ABCA 112 at para 88.

[4] *Smith v. Vauxhall Co-Op Petroleum Limited*, 2017 ABQB 525 at para 84.

[5] *Lalonde v. Sena Solid Waste Holdings Inc.*, 2017 ABQB 374 at paras 72, 80-81

[6] *Business Corporations Act*, RSA 2000, c B-9 at s 122.

[7] *Ibid* at s 240.

[8] *City of Monroe Employees' Retirement System, derivatively on behalf of Twenty-First Century Fox, Inc. v. Rupert Murdoch, et al*, C.A. No. 2017-0833-AGB (Verified Derivative Complaint at paras 206, 208).

By

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