Sound Investigation Policy & Employer Liability
in Race and Sex Harassment Cases

by

Ernest J. Guiste, Trial & Appeal Lawyer

Increasingly employers are starting to appreciate that it is simply not worth it to cut corners if their goal is to avoid civil liability in the work place on account of allegations of racial, sexual or other forms of prohibited grounds for discrimination or harassment in their work places. Employers who are serious about avoiding huge judgments or settlements flowing from civil claims for causes of action such as negligent investigation, slander or libel are forewarned to make the implementation of a sound investigation component part of their anti-harassment policies. My work as a plaintiff employment litigation lawyer has opened up my eyes to a glaring omission in many of the anti-harassment policies that I encounter in the course of my work. The vast majority of such policies lack a sound investigation policy. An anti-harassment policy without a sound investigation component is like a car without wheels.

The purpose of this article is two-fold. Firstly, it will illustrate the types of civil causes of action which employers subject themselves to when they fail to incorporate a fair and sound investigation policy as part of their anti-harassment policy. Secondly, it will delineate the core legal principles which must be incorporated in an investigation policy in order for employers to successfully defend their interests when such claims are brought against them by former employees.

Negligence

The primary cause of action which employers open themselves to when dealing with claims of racial and or sexual harassment based on the adequacy of their investigation is negligence. Like the other causes of action which we will discuss later, this cause of action can arise from both the victim and the alleged perpetrator of the harassment. The crux of such an action is that the employer failed in its duty to conduct a fair and impartial investigation of the allegations. In practical terms this means that the investigation fell below the standard or quality that the law imposes on like employers. While there seems to be some judicial authority for the proposition that an employer at common law was under no duty to investigate allegations of wrong-doing by their workers, it is submitted that this proposition could not reasonably apply in circumstances where the employer has implemented an anti-harassment policy. Hence, the duty to conduct a fair and impartial investigation is a by-product of the employer's decision to establish policies regulating work-place behaviour.

Duty of Care:

It is well established that an individual can be as negligent as he or she wishes so long as they owe no duty to act prudently. An employer who witnesses a fist fight in the place of employment and summarily dismisses the two employees would clearly not be a strong candidate for a negligence investigation action. This is to be contrasted with the company which has an elaborate written sexual anti-harassment policy and following an investigation of a complaint elects to summarily dismiss an employee for breach of the said policy. In this scenario the employer has the power to determine that an employee was for lack of a better word "guilty" of sexual harassment. Clearly, this is a very serious allegation of misconduct. Accordingly, one can appreciate the law's imposition of a duty to take care in the manner of such an investigation. The duty to take care arises from both the fact of the existence of the anti-harassment policy and any express or implied employer's duty to investigate complaints under the said policy. Indeed, it makes ample sense that if an employer is going to pass a formal policy prohibiting certain conduct in the work place that such an employer would be under an implied duty to investigate before finding blame.

Damages:

Another well established principle in negligence law is that a plaintiff must show that they suffered damages as a result of the defendant's breach of duty. In some negligent cases this is often an impediment to recovery for a plaintiff. However, this is not often the case in a negligent investigation action. Typically, the plaintiff will be seeking compensation for the following: general damages and loss of income. It is important to note that unlike your standard wrongful dismissal action damages for negligent investigation are not capped. They do not follow the principles established in Bardhal and other cases. Accordingly, employer liability on such claims can easily be two to four times that of a standard wrongful dismissal claim.

Intentional infliction of mental distress

Another popular cause of action advanced by employees flowing from poor or inadequate investigations of race or sexual harassment policies is known as intentional infliction of mental distress. The thrust of this cause of action is that on account of the defendant's outrageous conduct the employee has suffered mental distress for which he or she should be compensated. Outrageous conduct has been interpreted by the courts to mean conduct that is outside the bounds of social norms. Employers who flagrantly disregard their own published and established policies in carrying out a summary dismissal could be found to engaging in outrageous conduct. In addition, employers who make serious allegations against an employee attacking their integrity and reputation without granting the employee an opportunity to respond have been found to be liable under this cause of action. The question of the quality and extent of evidence an employee need in order to establish a claim under this cause of action is not clear. However, it appears that the courts may be prepared to infer such harm in the proper circumstances.

Defamation of character:
Slander / Libel

Claims for defamation of character are common causes of action brought against employers in the context of sexual and racial harassment complaints. These claims take two distinct forms. Defamation by way of writing is known as libel while defamation by way of speech is known as slander. The thrust of such claims is that the employer has damaged the plaintiff's reputation in the general community and or in his or her profession or occupation. In both forms of defamation there is a requirement for what is referred to as "publication" before one can be liable of slander or libel.

Publication simply means communicating the defamatory statement to a third party. An example may assist in making this point. Rudy was a successful general manager employed by a large electronics retailer. His employer fired him alleging he had sexually harassed three female co-workers. This was not true. In an effort to protect itself from potential liability for defamation the employer did not mention the sexual assault allegation in the termination letter and made sure not to mention it in the subsequent Employment Insurance investigation conducted by appropriate governmental agency. However, as part of the benefit application process the employer is obligated to issue the worker a form called a Record of Employment and note on that form the reason for its issuance. This particular form has a number of choices and one of them is "M" and according to the definition grid "M" means "misconduct". The employer is further required to file a copy with the government agency. The very act of filing a copy of this report with the government agency may constitute publication where the allegation is untrue and there is evidence of malice or improper purpose on the part of the employer. In the jurisdiction in which this example stems from the enabling Employment Insurance Act expressly makes information supplied by the parties subject to a qualified privillege. This means that evidence of malice or improper purpose will defeat the privillege and the question of the employee's defamation of character will be considered on all of the evidence.

Claims which deal with damage to the plaintiff's reputation in his or her profession or occupation expose employers to significantly more potential liability. Injury to a plaintiffs reputation in his or her profession or occupation is one of the four categories of defamation known as libel or slander per se. This category of defamation is significant because damages are presumed. Accordingly, a plaintiff in such an action is prima facie entitled to compensation from the defendant for the injury to their reputation. Evidence of loss of income and mental distress and the like will significantly increase such awards. Unlike the conventional wrongful dismissal action, damages for loss of income in such an action are not capped or tied to what is known as "reasonable notice" but is subject to proof by the plaintiff and is subject to the duty to mitigate. That is that the plaintiff can not simply sit on their hands and look to the defendant for compensation but must make reasonable efforts to lessen his or her loss.

In this segment of the paper I will now focus on delineating the core ingredients of an effective investigation policy to accompany your companies anti-harassment policy. It can not be stressed enough that this is a very serious part of any organizations anti-harassment policy. An

anti-harassment policy in the absence of an effective and thorough investigation policy is of no utility to an employer and nothing more than an invitation to the types of liability previous discussed above.

Written & Widely Communicated:

The first and most important quality you will want your investigation policy to have it that of being written and well-communicated. Like the anti-harassment policy its investigative component derives legitimacy by being in writing and by being widely communicated. The most practical means of communicating your companies anti-harassment investigation policy is through a published manual containing all of the companies other rules and regulations. This document should be delivered to every new hire and most importantly someone with knowledge of the workings of the policy should make sure to explain the full policy to new hires. Thereafter, the policies, namely, the anti-harassment policy and the investigation portion should be communicated to employees through the annual performance appraisal. At least fifteen minutes ought to be set aside during each employees annual performance appraisal in order to communicate the workings of the policy to employers. Of course, it would be benificial to have employees acknowledge receipt of this

Audi alteram partem:

> "Hear the other side. Hear both sides.
> No man should be condemned unheard."

The above-noted quotation is the Black's Law Dictionary definition of one of the fundamental legal principles, namely, audi alteram partem. This simple Latin maxim is capable of providing procedural integrity and legitimacy to an employer's anti-harassment investigation policy. Any legitimate investigation of any type must incorporate this fundamental principle in order to meet the basic litmus test of a fair and impartial investigation. A failure to adhere by this key fundamental principle will simply leave your organization's investigation and conclusion open to attack as being a "shoddy investigation" as was the case in Francis v. C.I.B.C.

Sworn or unsworn evidence:

Another significant decision which one will have to make regarding their policy is whether or not to insist on sworn evidence from witnesses. As a trial lawyer who is routinely involved in litigation involving such policies I fail to see any utility in electing to go with

unsworn evidence in support of an investigation. Unsworn evidence defeats the purpose if your purpose is to have an effective and reliable policy for prohibiting and investigating harassment issues in the work place.

Internal vs. External Investigators:

Do we use internal investigators or hire from outside the firm ? This is the last but perhaps the most important decision which will have to be made when investigating an allegation of sexual or racial harassment in the work place. Again, whether an organization decides to go with internal or external investigators will depend upon a number of factors including the size of the firm. At the end of the day whether one employs insider or outside investigators should be guided by the degree to which those investigators have no potential to be biased – since fairness and integrity are the foundation of a firm's harassment policy. It will likely cost the firm significantly more to hire outside professionals to do this work but this will go a long way in giving credibility and legitimacy to the process.

Note: Ernest J. Guiste, B.A., LL.B. is a member of the Ontario Bar. The law on the issues touched in this article may vary from jurisdiction to jurisdiction.