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EMPLOYMENT LAW

Considering the essentials of a thorough harassment investigation

Ad hoc, cursory or superficial efforts will not be considered sufficient by the courts

By Peter Matukas

In recent years, workplace investigations have proliferated in both number and public attention for numerous reasons — the dominant being legislative changes.

To protect workers in Ontario, for example, the Occupational Health and Safety Act (OHSA) now requires workplaces to conduct investigations into allegations of workplace harassment and sexual harassment.

Further, the Ontario Human Rights Code (HRC) requires employers to provide a workplace free of harassment and discrimination based upon a prohibited ground.

The HRC also states that every employee has a right to freedom from harassment in the workplace because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status, sex or disability by their employer, another employee, or agent of the employer.

An employer's obligation to conduct a workplace investigation is triggered by the OHSA once it becomes aware of a complaint, workplace misconduct, incident or issue — whether it is by way of a formal complaint brought forward by a non-aggrieved party or it is anonymous.

Regardless of whether the employer believes the complaint is without merit or comes from a party who has made numerous complaints in the past, each complaint must be properly investigated in a fair, thorough, impartial and timely manner.

Retaliation, reprisals

The basis for a workplace investigation can stem from a complaint based upon workplace harassment, sexual harassment, workplace violence, discrimination based upon a protected ground under the HRC, a failure to accommodate, a breach of a company policy (meaning misuse of company property, theft, fraud, improper payments or gifts such as kickbacks or bribes), a breach of fiduciary duties, bullying, a poisoned work environment and retaliation or reprisals.

It is essential for an employer to also protect workers who have made a complaint or have participated in an investigation because both the OHSA and the HRC place a positive obligation upon employers not to engage in reprisals or retaliation against workers bringing forward such complaints or participating in related investigations.

Reprisals and retaliation occur when the employer or its agent takes an adverse action against an employee as a result of engaging in a legally protected activity or refusing to infringe upon the protected right of another.

To understand the complex requirements placed on employers with respect to workplace investigations, it's important to first understand what is meant by workplace harassment.

In Ontario, the OHSA defines workplace harassment as "(a) engaging in course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome, or (b) workplace sexual harassment."

It does not matter whether a person didn't intend to offend someone; what matters is whether she ought to have known the comments were unwelcome.

Workplace sexual harassment is defined as "(a) engaging in a course of vexatious comment or conduct against a worker in the workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or (b) making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought to know that the solicitation or advance is unwelcome."

Thus, it does not matter whether a person didn't intend to offend someone, what matters is whether the person knew or ought to have known the comments or conduct were unwelcome to the other person.

Conduct that might fall into the above definitions of workplace harassment or sexual harassment may include: written or verbal insults (such as yelling, name-calling, jokes, innuendo which demeans, ridicules or offends); workplace supervision done in a demeaning or abusive manner; staring, glaring and inappropriate gestures or unwelcome physical closeness; and offering a benefit in exchange for a sexual favour.

However, not all conduct is harassment and the OHSA specifically states that reasonable actions taken by an employer in the direction of workers or the workplace is not workplace harassment.

"Appropriate" circumstances

The OHSA requires that any investigation must be conducted in a manner that is appropriate in the circumstances — but it fails to delineate what is considered "appropriate." This places the burden of navigating the vague standard of what is appropriate on the employer which, if not satisfied, may result in a review by the Ministry of Labour (MOL),

significant exposure to liability by the employer and related costs.

In any investigation, the person conducting the investigation must be: a licensed attorney carrying on the practice of law; a licensed private investigator under the Private Security Investigate Services Act; or company employees tasked with the investigation.

Often, to ensure a proper investigation, employers turn to legal counsel to conduct workplace investigations; however, this can be problematic as it could result in the legal counsel being conflicted out of representing the company in any ensuing litigation due to their involvement in the investigation.

Additional criteria in the conduct of an investigation is that it must be impartial, timely, fair and thorough, and the investigator must be, at the very least, arm's-length from the parties involved. The latter is crucial to avoid any real or perceived bias or favouritism as allegations of such a nature can undermine and erode confidence in the findings of what may otherwise be a valid and thorough investigation.

If the MOL deems the initial investigation as insufficient or not "appropriate" in the circumstances, it may require the employer to conduct another investigation using an impartial person who possesses specific knowledge, experience or qualifications — at the employer's expense.

It is imperative for employers to recognize that ad hoc, cursory, superficial or minimal investigations — in an effort to satisfy the obligation to conduct a workplace investigation into complaints, conduct or incidents — will not be considered sufficient by the courts or MOL.

Improper investigations elevate a company's exposure to liability and do not inspire confidence in employees to bring matters to their employer's attention in an effort to address such issues. Accordingly, it is essential that employers not only take the matters seriously but are seen to dedicate requisite attention and resources to the investigation.

Outside help

As is often the case, an employer is not necessarily best suited, prepared or has the required skills to conduct a workplace investigation, which results in an inadequate, improper or inappropriate investigation.

Consequently, the courts often denounce such investigations as improper, inadequate or insufficient, resulting in significant liability exposure to the employer. Accordingly, it is a good idea to use a third-party investigator with specialized skills in workplace investigations (such as gathering evidence, interviewing witnesses and making credibility assessments).

Coming from an independent party with expert knowledge and processes, the investigator's report is more likely to survive scrutiny by opposing counsel and the courts.

Using a trained third-party investigator also demonstrates to employees that the employer takes the issue seriously and provides legitimacy to the findings made.

Additionally, in the event of litigation, the third-party investigative report will provide the employer with the basis to support its position regarding any actions taken.

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