



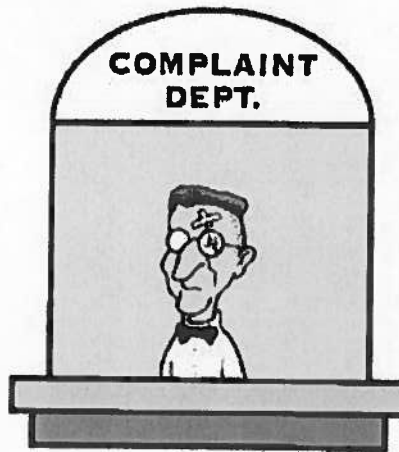
GROSMAN, GROSMAN & GALE LLP
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Workplace Law E-essentials

Thursday, August 22, 2013

Complaint About "Monkey" Comment, Leads to Reprisal Dismissal and Award

A migrant worker from St. Lucia commenced work at Double Diamond Farm through a federal government seasonal agricultural worker program in 2008, and was recalled the following year to work at the same farm. It was alleged that during the summer of 2009, the farm owner, and the crew supervisor, referred to the complainant, and some of his co-workers, shouting "You're like monkeys on a branch", and in a separate incident, "That's why [the owner] calls you guys monkeys".



The individual worker complained to the owner about the racial taunts, and was dismissed shortly thereafter. As a result, the worker commenced an application under the *Human Rights Code* claiming discrimination and reprisal. The farm owner and supervisor denied having made the racial taunt and claimed that the worker was terminated because "he was prone to violence".

The predictable result was an award in favour of the farm worker in the sum of \$23,500.00, in damages for wages owed, reprisal and loss of dignity. In addition, the farm was required to hire an expert to develop a comprehensive human rights and anti-discrimination policy within 120 days and ensure all of its supervisory staff complete an online human rights course.

While the fact situation above is unusual, the lesson learned is important, and bears repetition. Organizations must not only talk a good game, in terms of having appropriate human rights policies, but dissemination and enforcement are key tools. The situation above was certainly regrettable, as individuals in supervisory capacities clearly made ill-considered and inappropriate remarks. It was, however, then further complicated by the way in which the employee's complaint was mishandled, leading to a finding of reprisal and damages for loss of dignity.

There is a lesson to be learned from this decision for all organizations.

The Court of Appeal Defines a Poisoned Work Environment

In *General Motors of Canada Limited v. Johnson*, 2013 ONCA 502 the Court overturned the decision of the trial judge who had awarded Johnson \$160,000 in damages. Johnson, who is black, claimed that the work environment at GM had been poisoned by racism and, as a result, he had been constructively dismissed.

The statements made by the Court in reaching its decision are instructive, providing important guidance to employers confronted with allegations of a poisoned work environment.



In Other News...

On September 23, 2013, Mark Fletcher will be speaking at the OBA Fundamentals of Employment Law conference on the topic of moral damages.

On October 10, 2013, Jeff Hopkins will be speaking at the Lorman Educational Services "Employment Standards Act" seminar, on the topic "Employee vs. Independent Contractor"

On October 24, 2013, Mark Fletcher will be speaking at the HRPA 2013 HR Law conference.

On November 27, 2013, Mark Fletcher will be speaking at the HRPA Toronto Chapter Legalese conference on employee terminations and best practices for minimizing exposure to liability.

The Court began by recognizing that an allegation of a poisoned work environment can have serious implications for all involved. The Court wrote:

"An allegation of discriminatory treatment in the workplace due to racism is a serious claim that implicates the reputational and employment interests of the claimant, as well as those of the alleged perpetrators. It can also affect the dignity, self-worth and health of both the alleged victim and those accused of racist conduct. An allegation of this type can reverberate for many years after the incident or incidents in question, with potentially long-term consequences for all concerned.

No less serious are judicial findings of racially-motivated conduct in the workplace and a poisoned work environment due to racism. Judicial consideration of an allegation of constructive dismissal based on alleged racism in the workplace requires careful scrutiny of and balanced attention to all the evidence relating to the allegation in order to determine whether it is more likely than not that the alleged racism occurred."

The Court then defined a poisoned work environment and set out the evidentiary burden that will be placed on an employee claiming that he or has been constructively dismissed as a result of a poisoned work environment. The Court's findings can be summarized as follows:

- workplaces become poisoned for the purpose of constructive dismissal only where serious wrongful behaviour is demonstrated. The employee bears the burden of proving a claim of a poisoned workplace;
- the test for proving a poisoned work environment is an objective one. The employee's subjective feelings or even genuinely-held beliefs are insufficient to prove a poisoned work environment. There must be evidence that, to the objective reasonable bystander, would support the conclusion that a poisoned workplace environment had been created;
- the offending conduct must be persistent and repeated unless the incident in question is sufficient, standing alone, to taint the entire workplace. In other words, a stand-alone incident will not create a poisoned work environment unless it is particularly egregious; and
- where an employee has alleged he or she has been constructively dismissed by reason of a poisoned work environment, the employee must also establish that the employer's persistent conduct has rendered his or her continued employment intolerable. All the evidence of the circumstances surrounding the allegation will be considered by a court.

Allegations of harassment and other conduct that could be classified as contributing to a poisoned work environment are often difficult for an employer to respond to because of the competing interests at stake. Both the alleged victim and alleged perpetrator(s) have rights that need to be taken into account by the employer. Time is often of the essence. Moreover, in many circumstances the employer itself may be seen as biased.

It is therefore critical that any investigation undertaken in response to an allegation of a poisoned work environment be conducted in a manner that is not only unbiased but seen to be unbiased. It is for that reason that it may be appropriate for an external investigator to be appointed for particularly serious allegations of misconduct.

Significantly, however, the initial burden of establishing a poisoned work environment is on the employee. A single incident will likely be an insufficient base on which to build a claim for constructive dismissal.

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