

Confusion remains over duty to investigate

Recent case found employers don't have to launch discrimination probe

BY MARG. BRUINEMAN
For Law Times

A recent decision by the Ontario Human Rights Tribunal has focused the spotlight on employers' duty to investigate a discrimination complaint in the workplace and determined there are some situations in which they don't need to undertake an investigation.

But the tribunal also warned this is an area in which employers should tread very carefully.

"In previous cases, the tribunal has held an employer liable for the failure to investigate an allegation of discrimination even in circumstances where one, the underlying complaint is found to be without merit and two, the complaint is not made until after the employee's termination," says Leah Simon, an employment lawyer with Sherrard Kuzz LLP.

That approach, she says, is inconsistent with the Ontario Human Rights Code as it doesn't impose an independent duty to investigate. The employer's obligation is to provide a workplace free from discrimination. To investigate a discrimination complaint when the employee is no longer at the workplace will have no impact on someone who's no longer there, she adds.

Simon represented Insurance Search Bureau in *Scaduto v. Insurance Search Bureau* in which Andrew Scaduto charged that his job performance was subject to greater scrutiny during his employment because of his sexual orientation. He also alleged his sexual orientation was a factor in the decision to terminate his employment and that his former employer had failed to investigate his complaint.

Scaduto worked for the Insurance Search Bureau, a document retrieval company that provides a range of search services to its clients, from March 17 to June 15, 2011. During that period, he faced questions about the quality of his work.

Tribunal vice chairwoman Jennifer Scott found the behaviour of one of his supervisors to be problematic. A key question was whether the supervisor's own attitude had to do with Scaduto's sexual orientation. In her decision, Scott determined that although the supervisor's treatment of her employee was



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unfair, it wasn't discriminatory.

Ultimately, she found Scaduto hadn't told his supervisors he was gay and didn't raise any issues of discrimination until after the termination. She dismissed the complaints of harassment, failing to investigate during employment and after the dismissal, and termination.

And although Scott found the company's failure to investigate the complaint didn't cause or contribute to discrimination in the workplace because it didn't exist in this case, she issued something of a warning to employers.

"Employers are well-advised to investigate human rights complaints as the failure to do so can cause or exacerbate the harm of discrimination in the workplace. Internal investigations provide employers with the opportunity to remedy discrimination, if found, and can prevent applications being filed with the tribunal. They also limit employers' exposure to greater individual and systemic remedies. The failure to do so is at their peril. But, if they fail to investigate discrimination that does not exist, that failure is not, in and of itself, a violation of the code," wrote Scott.

Stuart Rudner, an employment lawyer with Rudner MacDonald LLP, says the decision is consistent with the Divisional Court's conclusion in *Walton Enterprises v. Lombardi*, in which it confirmed it's up to the worker to prove discrimination and there's no free-standing duty for the employer to investigate. The

court determined that the duty to investigate arises once a party has established that discrimination took place.

In *Walton*, the court agreed with the employer that the tribunal had erred in its finding that a fist fight that led to the worker's termination was partly a reaction to his being subject to harassment because of depression as well as perceived obesity and perceived homosexuality. The court concluded he had failed to prove a connection between the harassment and the fight.

In *Scaduto*, Scott pointed to *Walton* in her determination that a failure to investigate non-existent discrimination wasn't a contravention of the Ontario Human Rights Code.

"Of course, all of this analysis takes place after the fact and after a determination has been made regarding the existence of discrimination," says Rudner.

The problem is an employer can't always guess what a tribunal or court will conclude. So by not investigating a complaint, an employer could create a risk of future liability.

Rudner suggests employers take reasonable steps to investigate complaints of discrimination or harassment. And he says employers should ensure they have effective harassment and discrimination policies, communicate them to all employees, and enforce them consistently.

For lawyer Asha Rampersad, the law remains unsettled when

it comes to an employer's duty to investigate complaints. Even though February's decision in *Scaduto* is helpful for employers, they shouldn't interpret it to mean they're under no obligation to investigate an employee's complaints of harassment or discrimination. Each case, she adds, will turn on its own unique set of facts and an investigation will go a long way to ensure employers are fulfilling their duty.

"As management counsel, we always encourage employers to investigate... but it always depends on the facts of the case," said Rampersad, an associate with Crawford Chondon & Partners LLP.

She points to *Morgan v. Herman Miller Canada Inc.*, in which the tribunal held the employer liable for general damages in relation to the worker's termination even in the absence of a finding of discrimination.

That April 2013 decision involved allegations of discrimination based on colour and reprisal. While the tribunal found no discrimination in the assigned work or how the employer disciplined the worker, it did find a problem with how it reacted to the harassment and discrimination complaint. It concluded the employer's decision to terminate the worker followed his complaints and threat to sue the company.

Although there was no substance to the allegations, the employer didn't investigate and chose to terminate the worker, which is when it ultimately

made its mistake.

In addition to awarding damages and lost wages, the tribunal ordered the employer to review its human rights policy, distribute it to its workers, and train its managers. It also ordered its former vice president to take the Ontario Human Rights Commission's course on human rights.

In *Scaduto*, Scott emphasized the fact that "an employer's failure to investigate a complaint of discrimination can contravene the code when it causes or contributes to discrimination in the workplace." That, says Rampersad, leaves the door open.

The key for employers is their responsibility to ensure the workplace is free from discrimination and an investigation into any complaint will demonstrate their willingness to follow the Human Rights Code.

It all boils down to the steps the employer takes to address the issue and, in the case of a former employee, ensure the problem isn't systemic and current workers aren't subject to discrimination.

That means managers and supervisors ought to be aware of their responsibilities and legal obligations.

"My advice to employers is therefore to ensure managerial personnel receive regular, practical, hands-on training to ensure they are equipped to identify and respond appropriately to a code-based complaint," says Simon. LT

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