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• "MEND YOUR SPEECH A LITTLE, LEST IT MAY MAR YOUR FORTUNES": ARE EMPLOYEE DEFAMATION CASES A FOOL'S ERRAND? •

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A recent Ontario Superior Court decision confirms that an employer must carefully consider how it responds to critical comments made by an employee (or in this case, former employee).

Williams v. Vac Developments Limited[1] is a decision arising out a layoff that an employee believed was a reprisal for raising allegations of racial discrimination. The employee went public with his allegations, and, in response, the employer filed a counterclaim for $1.5 million alleging defamation.

BACKGROUND FACTS

The employee began his employment with the employer, a sheet metal and machining products company, in January 2018. In June 2021, the employer laid off the employee, citing the pandemic and a resulting slowdown in business. Importantly, in the weeks leading up to the layoff, the employee had met with management on several occasions to express his concern regarding racially motivated comments and threats in the workplace, including violent, anti-Black graffiti on his locker and in the work bathroom.

Due to the timing of the incidents, the employee believed that his layoff was a reprisal and that his employer was attempting to silence him. The employee contacted CTV News to express his concerns with the company's failure to keep him safe or to appropriately respond to workplace racism. Following the interview, CTV News published an investigative report on anti-Black racism in Canadian workplaces, using the employee's experience to ground the article as a personal interest story.

In August 2021, the employee filed a $160,000 wrongful dismissal claim. In November 2021, four months after the CTV article was first published, the employer issued a $1,500,000 counterclaim alleging the employee's discussions with CTV News post-layoff and an article that was published about the company caused it reputational damage.

The employee brought a motion under s. 137.1 of the Ontario *Courts of Justice Act*, also known as an anti-SLAPP motion (an acronym for "Strategic Lawsuits Against Public Participation"), seeking to dismiss the employer's counterclaim for unduly limiting his expression on a matter of public interest. The Court ultimately dismissed the employer's counterclaim.

THREE-STAGE ANALYSIS FOR ANTI-SLAPP MOTIONS

The Court considered whether the counterclaim should be barred as a gag proceeding through the lens of the three-stage test established in Ontario case law: the threshold expression hurdle, the merits hurdle and the public interest hurdle.[2] The crux of the analysis is not a party's intentions, but a broader assessment gained by stepping back and asking, "what is really going on?".[3]

1. Threshold Expression Hurdle

The "threshold expression hurdle" requires the moving party to demonstrate that a proceeding initiated against them arises from an expression relating to a matter of public interest.[4]

In this case, the parties conceded that the first part of the test was met, as the employee's statements to CTV News were regarding anti-Black racism and workplace harassment – two matters that were clearly of public interest.

2. Merits Hurdle

To satisfy the "merits hurdle", the party opposing the motion bears the onus of demonstrating that the proceeding has substantial merit, and that the moving party has no valid defence.[5] A finding of substantial merit only requires that the claim have "a real prospect of success," which is a lower standard than a balance of probabilities.[6]

In assessing whether the employer's defamation proceeding had substantial merit, the Court found that the employer's failure to provide a comment in response to CTV News' interview request was relevant to the issue of mitigation of reputational harm. It found that, had the employer simply responded to CTV News' request for comment with a statement regarding the employer's position and steps taken to address the workplace incidents, there would have been minimal reputational harm.

Furthermore, the Court found that the company could not substantiate any losses caused by the CTV News article. Where the plaintiff seeking damages for defamation is a corporation, in the absence of proof of damages, it is unlikely that it will be entitled to a substantial award of damages.

Based on these factors, the Court was not satisfied that the counterclaim had substantial merit.

3. Public Interest Hurdle

To satisfy the "public interest hurdle", the Court must consider whether the harm suffered by the responding party because of the moving party's expression is sufficiently serious such that the public interest in permitting a defamation claim to continue outweighs the public interest in protecting the expression.[7]

In this case, the Court found that the public interest overwhelmingly weighed in favour of protecting the employee's expression. It compared the nature of both claims – including the fact that the employee's claim was a relatively modest amount for statutory benefits and severance pay arising from his over three-year employment. In contrast, the Court found that the employer's counterclaim for $1.5 million was disproportionate and any alleged loss was unsupported by evidence.

KEY TAKEAWAYS FOR EMPLOYERS

Employees have several forums to criticize their workplace and are not always shy about expressing their opinions. Glassdoor, Reddit, Twitter and traditional media outlets are replete with stories about allegations of mistreatment in the workplace and employers should be considering their communications strategy in response.

This decision makes it clear that employers have to be measured and strategic in their response to these criticisms. Courts will closely scrutinize an employer's response to these situations and defamation claims may not be the best response to criticism. Further, employers who use counterclaims as a strategic and abusive litigation tactic to chill employee expression may face heightened risk of a wrongful dismissal claim, including liability for bad faith/moral damages.

To increase the likelihood that a defamation counterclaim will be successful, employers should demonstrate actual reputational harm caused by the statements through evidence that itemizes financial losses, lost business, or lost opportunities. Employers should also carefully consider the steps they have taken to mitigate the potential impact of defamatory comments or publications, including responding to the allegations when confronted by them. Engaging with legal counsel and crisis communications experts to develop a well-thought-out strategy will help employers be prepared to deal with these issues appropriately and protect the reputation of the company.

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1 [2023] O.J. No. 4092, 2023 ONSC 4679.
2 *Ibid*, at para 10.
3 *Ibid*, at para 10.
4 *Ibid*, at para 48.
5 *Ibid*, at para 48.
6 *Ibid*, at para 48.
7 *Ibid*, at para 48.

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