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Defamation action against employee who spoke out about workplace racism dismissed *of (Williams v. Vac Developments Ltd.)*

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Our past blogs have discussed anti-SLAPP motions at length. This post explores yet another decision on an anti-SLAPP motion, but this time, in the context of an aggrieved employee who publicly spoke out about incidents of racism at his workplace.

In *Williams v. Vac Developments Ltd.*, 2023 ONSC 4679, the plaintiff mechanic was laid off from his job at a sheet metal and machining company. While the company informed him that the lay-off was due to the COVID-19 pandemic, the plaintiff felt that he was laid off because he asked for police to be called to respond to a series of escalating and racially motivated threats against his life. He was later permanently laid off without receiving any settlement or any statutory benefits.

The plaintiff stated he experienced incidents of disturbing anti-Black graffiti, including a time when a noose was drawn on his company locker, and that he experienced racist comments, death threats, and the sabotaging of machines on which he worked. On one occasion, racist graffiti, that threatened the plaintiff's life, was quietly taken down before the plaintiff or others could see it. On this occasion, police were not called, and the plaintiff only became aware of the threat after a co-worker showed him a photo.

Following his layoff, the plaintiff contacted CTV News to express his views and concerns about the company's failure to appropriately respond to workplace racism. The company was called for comment, but declined to respond. CTV then ran a news article specifically naming the company and quoted the plaintiff's statement that the company failed to protect him from racist death threats and that he feared for the remaining employees of colour at the company. The article also quoted a number of studies that pointed to employees' fear of reprisal as stopping them from reporting racism in Canadian workplaces.

The plaintiff issued a Statement of Claim against the company for, *inter alia*, statutory entitlements under the *Employment Standards Act, 2000* equivalent to three weeks of pay in lieu of notice, six months of pay in lieu of

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reasonable notice (about $24,000), $100,000 in damages for breach of the *Human Rights Code*, and $20,000 in bad faith damages.

The company counter-claimed against the plaintiff for defamation, claiming approximately $1.5 million in general damages for injury to reputation, loss of customers and business, and punitive and aggravated damages.

Of note, the company did not initiate an action against CTV or the reporter who wrote the article.

The plaintiff moved to dismiss the counterclaim, arguing that it was strategic litigation attempting to limit expression of matters of public interest (i.e., a SLAPP action).

The court first reviewed the test for an anti-SLAPP motion, as discussed by the Supreme Court of Canada in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22.

1) First, the plaintiff employee bears the onus of proving that the proceeding initiated against him arises from an expression relating to a matter of public interest.
2) Second, the defendant employer bears the onus of demonstrating that the proceeding has substantial merit, and the plaintiff employee has no valid defence.
3) Third, even if the claim has substantial merit and there is no valid defence, the court must consider whether the harm likely to be suffered by the defendant employer as a result of the plaintiff employee's expression is sufficiently serious that the public interest in permitting the defendant's counterclaim to continue outweighs the public interest in protecting the expression. In other words, is the harm sufficiently serious that the alleged SLAPP action should continue?

The company conceded that the expression related to a matter of public interest.

Therefore, the analysis moved to the second part of the test: determining whether the counterclaim had substantial merit and whether the plaintiff had a valid defence.

To have substantial merit, the claim needed to have a real prospect of success (*Pointes*, at paragraph 49).

In general, a defamation action will have substantial merit if the plaintiff can satisfy the following three elements: (i) the words complained of are published; (ii) the words complained of refer to the company (or plaintiff); and (iii) the words complained of would lower the company's (or plaintiff's) reputation in the eyes of a reasonable person.

The court found that the first two elements were met.

However, the court found that third element of the test was not met.

The CTV article highlighted the issue of underreported anti-Black racism in the Canadian workplace, using the plaintiff's recent experience as an example. The court reasoned that if a reasonable person read the article, the company's reputation would only falter with respect to whether the company acted appropriately upon discovery of anti-Black racism in its workplace. The main issue was that the company declined to respond. Any damage to its reputation would have been minimized with a quick two-liner stating that the company does not tolerate racism and that the matter was under police investigation.

Additionally, the company could not point to any evidence that it had lost money as a result of the article. The company provided no itemization or explanation of loss suffered, or any basis for the amounts of damages claimed.

The company's failure to meet the third element of the test for defamation permitted the court to

grant the plaintiff's motion and to dismiss the company's counterclaim.

Nevertheless, the court went on to consider the other parts of the SLAPP test, particularly whether the harm caused to the company was sufficiently serious that the public interest in permitting the counterclaim to continue outweighed the public interest in protecting the plaintiff employee's expression.

The court concluded the public interest overwhelmingly favoured the protection of the plaintiff's expression. The former employee's action was for a modest amount of benefits and severance pay. In contrast, the company's counterclaim for $1.5 million in damages was disproportionate and without foundation.

The court concluded with the following apt statement:

> Unidentified damages for assumed reputational harm to a corporation that has not suffered any actual financial loss two years out from the incident cannot outweigh the harm that would arise from interfering with an expression of public interest as significant as anti-Black racism in the workplace. There are few expressions more essential to a productive pluralistic society than the elimination of workplace racism.

In addition to confirming the significant public interest in discourse on anti-Black racism, this decision highlights the importance of tendering evidence of potential harm suffered by a company due to a defamatory comment, even at the anti-SLAPP motion stage. The court noted that there is an important distinction between whether a plaintiff seeking damages for defamation is a corporation or an individual (see *Barrick Gold Corp. v. Lopehandia*, 2004 CanLII 12938 (Ont. C.A.) at para. 49). For corporations, in the absence of proof of special damages, or proof of a general loss of business, a company is unlikely to be entitled to a substantial award for damages.

Furthermore, the case suggests that companies who are offered an opportunity to respond to a media request for comment in connection with allegations of racism in the workplace should do so. A carefully crafted response can minimize the impact of potential loss of reputation and mitigate damages.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact Isabel Yoo, at 416.865.6655 or iyoo@grllp.com.

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