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Feature

Defamation & Workplace Harassment

What happens when these two worlds collide?

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Lately our newsfeeds have been filled with lawsuits about defamation, censorship and workplace harassment. The Ontario Court of Appeal tackled these issues head on in a recent case that pitted an obligation to investigate workplace harassment against defamation claims arising from the investigation in *Safavi-Naini v Rubin Thomlinson LLP,* 2023 ONCA 86.

This case was an appeal of a lower court decision granting a motion under anti-SLAPP (Strategic Lawsuits Against Public Participation) legislation to dismiss an action alleging that summaries of the findings of a harassment investigation were defamatory.

The Appellant in this case was a medical resident (the "Appellant") at the Northern Ontario School of Medicine (the "School"). The Appellant filed complaints of workplace harassment and sexual harassment against two (2) doctors at the School: one was the director of the Appellant's program and the other was a faculty member. Prior to the investigation, the Appellant issued a press release detailing the allegations in her complaints.

In response to the Appellant's complaint, the School retained a law firm and investigator to investigate pursuant to its obligations under the *Occupational Health and Safety Act,* RSO 1990, c O 1 ("OHSA"). The investigator conducted an investigation and determined that the complaints were unsubstantiated. The investigator prepared two executive summaries which were only provided to two staff members of the School and its legal counsel. The summaries were not publicly disseminated. However, one of the summaries was ultimately disclosed as part of a Human Rights Tribunal of Ontario application brought by the Appellant against one of the doctors involved in the alleged harassment.

Following the investigation, the Appellant brought an action against the School, the law firm and the investigator (collectively, the "Respondents") alleging that the executive summaries were defamatory.

The Respondents brought a motion to dismiss the action pursuant to section 137.1 of the *Ontario Courts of Justice Act,* RSO 1990, c C 43, governing the dismissal of proceedings which limit debate. The purposes of these legislative provisions are to encourage individuals to express themselves on matters of public interest; promote broad participation in debates on matters of public interest; discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action. For an action to be dismissed, the moving party must establish that the proceeding arises from expression related to a matter of public interest. If the moving party establishes this criterion, the onus shifts to the responding party to establish that the proceeding has substantial merit, there is no valid defence to the defamation claim, and the public interest in allowing the proceeding to continue outweighs the public interest in protecting the expression.

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The motion judge dismissed the action, finding that the proceeding arose from a matter of public interest, a valid defence of qualified privilege existed, and the balance of interest favoured the protection of the disclosure. Qualified privilege arises when a publication is made in the course of a duty, be it legal, moral, or social; the person making the disclosure has a duty to or interest in making the disclosure to the recipient; and the recipient has a duty to or interest in receiving the disclosure. The disclosure must not be motivated by malice or exceed the purpose for which the disclosure was intended.

The Appellant appealed the decision dismissing the action to the Ontario Court of Appeal. The Court of Appeal found that the executive summaries related to matters of public interest, meaning that some segment of the community had a genuine interest in receiving information on the subject. Although the Court of Appeal found that the public has significant concern over sexual workplace harassment and investigations into these issues, the Court was careful to point out that sexual harassment and workplace harassment were of public interest in this case. This is because it was alleged to have occurred in an educational institution and in particular, a medical setting where patient safety was a concern.

The Court of Appeal agreed with the motion judge that there was a valid defence of qualified privilege because there was an obligation on the

investigator to complete the report and provide it to the School pursuant to the *OHSA*; the School had a duty to receive it; and there was no evidence of malice. The Court of Appeal also agreed that the balancing of interests favoured the protection of the disclosure, upholding the decision to dismiss the action.

Anti-SLAPP legislation is aimed at curbing lawsuits designed to thwart participation in matters of public interest and dissemination of related information. These provisions are often at play in more traditional forums for dissemination of information, like news stories, where the main purpose is to communicate the information to as many members of the public as possible. In contrast, this case occurred in a context in which the purpose of the dissemination of the summaries in question was not to communicate the information to as many members of the public as possible, but only communicate the information on a "need to know" basis. What makes this case interesting to employers, investigators and legal counsel alike is that it confirmed that this provision can be used as a shield to protect against defamation claims arising from legally mandated dissemination of information critical to workplace health and safety.

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