

What's New at Rubin Thomlinson LLP

Janice Rubin covered "Legal Landmines in the Out Workplace" at the Out on Bay Street conference on September 25.

James Heeney was quoted in the Globe and Mail on September 24 in a story about the perils of workplace romances.

James also participated in the teleseminar "Ethics and Risk Management in an Economic Downturn" hosted by the Law Society of Upper Canada on September 23.

Janice spoke at the 2009 Atlantic HR Conference in Halifax on September 23. She discussed what human resources professionals need to know about workplace investigations.

James was quoted in a story about inappropriate email and Internet use in the September 21 edition of the Canadian Occupational Health & Safety News.

Janice was quoted in the Toronto Star on September 16 in a story about the former CEO of the Ontario Lottery and Gaming Corporation.

Christine Thomlinson appeared on both CFRB 1010 in Toronto and AM 770 in Calgary on September 9. She was discussing the H1N1 virus and its potential impact on the workplace.

Christine and **Janice** were included in the 2010 edition of *The Best Lawyers in Canada*. The list is based on a rigorous peer-evaluated national survey of more than 270,000 lawyers.

This alert is prepared as a service for our clients and other persons dealing with employment issues. It is not intended to be a complete statement of the law or an opinion on any subject. Although we endeavour to ensure its accuracy, no one should act upon it without a thorough examination of the law after the facts of a specific situation are considered, and without seeking the advice of legal counsel. No part of this publication may be reproduced without prior written permission of Rubin Thomlinson LLP. This has been sent to you courtesy of Rubin Thomlinson LLP.

In a recent case decided by the Superior Court of Justice of Ontario, employers are reminded how important it is to set up expectations of employee behaviour during the course of an investigation, and the consequences to employees if they fail to follow these expectations.

Mid-investigation Witness Communication Leads to Cause Termination

The case, *Cavaliere v. Corvex Manufacturing*, involved Frank Cavaliere, a 50 year old senior manager who had been employed by the company for 20 years. Corvex terminated Cavaliere's employment for cause, after Mr. Cavaliere engaged in a sexual relationship with a female subordinate, notwithstanding its explicit warning to him not to do so. Corvex also relied on the fact that Cavaliere had approached a witness during the investigation, again after explicitly being warned not to do so. Both these facts lead to a successful defence against Cavaliere when he subsequently brought a wrongful dismissal complaint against the company.

The case is particularly helpful to human resources professionals and employers because it provides a good example of the benefits of setting up an investigation properly and communicating effectively with those involved. These benefits continue even if an employee is terminated and litigation follows. It is also a reminder of what is lost when workplace investigations are not recorded properly, and when inappropriate behaviour is condoned by the employer.

Direction Not to Talk to "Any Employee"

The evidence at trial was that Cavaliere had had a sexual relationship with a female subordinate, notwithstanding the fact that after a similar relationship in the past, he had been warned not to engage in these relationships in the future. While the trial judge accepted that the relationship was consensual, the judge noted that the subordinate was vulnerable due to her position, and the fact that she was an immigrant for whom English was not her first language. The relationship came to light when the woman's husband complained to the employer. Corvex initiated an investigation, and as part of its process, it wrote to Cavaliere and told him that he was to "have no contact with any...employee", clearly anticipating that some of these employees might be witnesses, but also presumably, to try and maintain as much confidentiality around the investigation as possible. This directive was also mentioned again in the course of the investigation, and Cavaliere indicated that he understood and would abide by it.

Nevertheless, Cavaliere approached the
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woman with whom he was having the relationship, as well as her husband, and tried to convince them to withdraw the complaint. This, the trial judge stated was a "...flagrant breach of a legitimate and necessary direction, a breach of (Cavaliere's) undertaking to the company, and an attempt to subvert the investigation – none of which is the type of conduct a company is entitled to expect from a senior employee".

"Evidence" of Previous Workplace Investigation Not Accepted

The company also wished to rely on the fact that a few years prior to his termination, it had received an anonymous complaint which alleged sexually predatory conduct by Cavaliere. The company said that it had investigated this complaint. While this might have assisted in the employer's case, the trial judge was not prepared to make any findings of fact here because neither the individuals involved in this investigation were called as witnesses, and more importantly, Corvex was unable to produce any written record of the investigation. The judge stated that "...for

reasons which, to my dismay, have never been explained, satisfactorily or otherwise the notes allegedly taken during the investigation and the original complaint no longer exist".

"Inexcusable" Condonation

At trial it was revealed that another female employee had been sexually touched without consent by Cavaliere. She made a complaint to Cavaliere's supervisor, who was the most senior person at the plant where Cavaliere worked. The supervisor told the female employee that if it ever happened again, she should be sure to let him know. He did not report this to human resources, the trial judge emphasized, "as he was required to do", nor did he speak with Cavaliere about this. The trial judge characterized the employer as having "inexcusably condoned" this behaviour. Moreover, noting that the information had been reported to a senior manager, and he should have done something about this, the judge reduced the costs that the employer would have otherwise received because it had won its case against the employee. ●

WHAT CAN WE LEARN FROM CAVALIERE?

- 1. Communicate to parties that they are not to talk about the investigation.** It is important to set out in writing what you expect from parties involved in an investigation at the commencement of it. This includes not speaking to anyone else about the investigation. This not only prevents "witness tampering" and supports the integrity of the investigation, but also helps contain the investigation itself. We recommend that this type of communication become part of an employer's standard workplace investigation practice.
- 2. Keep records.** It is imperative that notes, documents and reports that are part of a workplace investigation be retained in a safe place for future reference if required. In this case, the employer could rely on other facts to ground its case for cause. If the only conduct at issue would have been that dealt with in the prior investigation, the employer would have had no case, as it had no record. We recommend that employers should also establish record retention as part of its standard workplace investigation practice.
- 3. Report and investigate complaints when they are made.** This case is one among many which illustrates that managers have a special duty to report complaints of inappropriate workplace behaviour to the company. Sadly, this is an obligation that is recognized by many of those in human resources, but not by managers themselves. As workplace investigations become more commonplace, it is imperative that managers are trained to report all complaints coming to their attention to human resources.

Our New Workplace Investigation Training Curriculum

We are pleased to announce our new, expanded workplace investigation curriculum beginning in 2010. We will be offering the following sessions:

- Basic Workplace Investigation Techniques Workshop
- Advanced Workplace Investigation Techniques Workshop
- Report Writing Workshop
- Creating Effective Workplace Investigation and Respect at Work Policies Workshop

Please see the "Training" section of our website www.rubinthomlinson.com for course details, dates and registration information.

Comments From You

We are always happy to hear from you in response to our Workplace Investigation alerts. Last month, Paul Starkman, an attorney with the law firm Arnstein & Lehr LLP in Chicago, wrote in response to our August alert about a negligent investigation. He said:

"You posted a very interesting article. It brought back memories of a case I litigated a few years back involving a claim that the employer had negligently terminated two employees in breach of an alleged duty to perform an adequate investigation before firing the plaintiffs, a duty that the employer had supposedly assumed by establishing procedures for internal investigations, training investigators, and setting up an employee complaint hotline. We found, and more importantly the Illinois courts agreed (all the way to the Illinois Supreme Court), that employers in at-will employment relationships typically owe no such duty in the US, unless they agree to assume such a duty by contract or some other means.

As you undoubtedly know, typically, in the private sector in the US, the adequacy of an internal investigation usually only comes up in either (1) a claim that the employer investigated the misconduct of minorities differently than it investigated the misconduct of non-minorities (i.e., a discriminatory investigation), or (2) where the adequacy of the investigation goes to affirmative defences that may be asserted by employers, such as the Faragher/Ellerth affirmative defence to a harassment claim that requires a showing that the employer took reasonable measures to remedy the harassment once it became aware of it.

The public sector (i.e., government jobs) is treated differently in the US in that public employees may have constitutional rights to due process before they can be terminated, which can include a right to an adequate investigation before termination. Thank you, Paul."