

No discrimination? Then there's no duty to investigate, says Ontario tribunal (Legal View)

But not a green light to stop conducting investigations into discrimination claims

By Leah Simon

There is no duty on an employer to investigate an allegation of workplace discrimination if the discrimination doesn't exist, the Human Rights Tribunal of Ontario has ruled.

But employers would be unwise to abandon any discrimination investigations in light of this ruling.

Andrew Scaduto was employed by the Insurance Search Bureau of Canada (ISB) for fewer than four months when his employment was terminated for poor performance. There had been numerous attempts to provide Scaduto with additional training and multiple discussions with him about his performance prior to the decision to terminate.

At the termination meeting, Scaduto advised ISB — for the first time — that he believed his performance was more harshly scrutinized after he told his supervisor he was gay.

If Scaduto's allegation was accurate, his termination could have been ruled discriminatory under Ontario's Human Rights Code.

But ISB did not launch a formal workplace investigation into the allegation because at the time Scaduto made his complaint of discrimination, he had already been terminated.

Shortly thereafter, Scaduto filed an application with the Human Rights Tribunal of Ontario, alleging ISB had violated the code by discriminating on the basis of sexual orientation and failing to investigate his allegations.

Is there a duty to investigate?

Scaduto's argument that the code had been breached by ISB's failure to investigate was not novel. Prior tribunal decisions had held an employer could be liable for damages for failure to investigate even absent a finding there had been workplace harassment or discrimination.

Other cases from the tribunal also suggested the duty to investigate could outlast the employment relationship such that an employer would have an obligation to inquire into a claim of discrimination even when the claim was raised post-termination.

Tribunal disagrees with applicant

Scaduto was not successful in his application. On the allegation of discrimination in the workplace, the tribunal found he was not subject to discrimination either during his employment or in the course of his termination.

As for the alleged breach of the "duty to investigate," the tribunal held there can be no independent duty to investigate a complaint absent actual discrimination.

In Scaduto's case, he had not been discriminated against so it would be irrational to then penalize his employer for not having investigated his complaint when, had the complaint been investigated, it would have resulted in a finding of no wrongdoing.

In the words of the tribunal:

"This case demonstrates the difficulty of finding a breach of the code solely for the failure to investigate. I have found there was no discrimination in the applicant's workplace. Therefore, there is no contravention of the code. It does not make sense to say to the (employer) 'You have contravened the code because you have failed to investigate the applicant's complaint but, had you investigated, you would not have found discrimination.'

...the respondent's failure to investigate the applicant's complaint did not cause or contribute to discrimination in the workplace because it did not exist. It is inconsistent with the wording of... the code to conclude the respondent contravened the applicant's rights by failing to investigate his complaint when that failure did not deprive him of a workplace free from discrimination."

There was also no duty to investigate a complaint made after an employee is no longer in the workplace, said the tribunal:

“A further difficulty with finding the respondent has violated the code... stems from the fact that the applicant’s complaint was made after the (employer) decided to terminate his employment. The purpose of the duty to investigate is to ensure a complainant is not required to work in a discriminatory environment.

“In this case, the applicant was no longer in the workplace. It could not then be said that the applicant’s right to be free from discrimination in his workplace was infringed by the failure to investigate because he was no longer there.”

Lessons for employers

While the Ontario tribunal’s decision is helpful for employers, it should not be interpreted as relieving them of responsibility to investigate a discrimination complaint.

Employers should continue to be vigilant in addressing claims of workplace discrimination and harassment from employees who remain in the workplace.

As noted by the tribunal:

“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.”

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