When Can an Employer Sue an Employee for Damages?

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Property Damage

Emily Anne Maclean worked in a farmer's market. On August 1, 2003, she placed eggs on a hot plate to boil in order to make them ready for the next day's sandwiches. She got distracted in another part of the store. Upon smelling smoke, she returned to the hot plate only to find "full blown flames". The farmer's market was destroyed and Ms. MacLean was sued in negligence by the market's insurer. In dismissing this claim, the Court concluded:

- employees are not generally held liable for ordinary negligence or carelessness in the performance of their duties;
- the imposition of liability in such a case would be unjust and/or unfair;
- an employer accepts the risk of employee fallibility and takes that into account in the costs of doing business, supervising the employee and insuring the enterprise.

Accordingly, although it is clearly reasonable for an employer to expect its employees to exercise reasonable care in the performance of their duties, it will only be where the degree of fault by the employee goes beyond mere negligence, that a claim for damages will have any chance of success.

The inability to recover damages in negligence does not preclude the employer from alleging cause for dismissal in an appropriate case.

A Suit to Recover Damages Payable to a Third Party

It is settled law that employers are vicariously responsible for the harm caused by an employee in the performance of the employee's duties. The question then becomes whether the employer can recover the damages it paid to the third party from the negligent employee. As one might expect from the analysis above, the likely answer is that recovery will be restricted to those situations where the employee's conduct was grossly negligent. Again, inability to recover does not prevent discipline and, where justified, dismissal for cause.

Suing for Breach of Contract

It is quite common for employers to require senior employees to execute covenants which prevent or restrict certain activities. Examples include maintenance of confidentiality and prohibiting the soliciting of clients or co-workers for a reasonable period of time following resignation or termination. Provided these clauses are carefully drafted to meet current judicially mandated standards and are incorporated into a properly executed employment agreement, they can form the basis of a successful lawsuit against an employee who ignores contractual terms to which the employee agreed.

In this type of lawsuit, the employer must act quickly after learning of the breach, seeking a mandatory order prohibiting the continuation of the offensive action. While an order actually prohibiting continuance of the breach (an injunction) may not be granted, the employee will be required to pay the damages suffered by the employer resulting from the competitive activity. Furthermore, the very act of commencing the lawsuit may cause the offending employee to cease the prohibited activity.

Breach of Duty of Fidelity

Even without a valid restrictive covenant, senior employees are required to act in good faith towards their employer and not exploit the vulnerability which flows from the nature of the relationship. For example, although such an employee is entitled to compete following employment, in doing so, he/she must not do so unfairly. This means that for a reasonable period of time following resignation, he/she is not to utilize confidential information or affiliations developed during employment in a manner detrimental to the former employer. Doing so is considered unfair and a breach of this obligation of fidelity. Provided the status with the employer was senior enough, a court will enforce these obligations by way of requiring the departed employee to disgorge the profits earned from the improper activity.

Failure to Provide Reasonable Notice of Resignation

There are a number of recent cases which have awarded damages against a departing employee who provided inadequate notice of resignation. In none of these cases was there a written contractual requirement obligating the employee to provide a specific amount of prior notice to resign. Notwithstanding this, the courts reasoned that the obligation to provide reasonable notice to terminate the relationship is a mutual one which, in the case of employee resignation, should be sufficient to allow the employer reasonable time to find a replacement. The more important the employee's role and more limited the pool of available replacements, the greater the implied notice period will be.

In a fairly recent case, an Ontario court held that the two weeks' notice given by a group of employees who were resigning to pursue a competitive venture was inadequate, holding that given the seniority of their positions, they ought to have provided ten months' prior notice. The court went on to assess damages to the employer on the basis that had the employees provided the ten months' notice, they could not have started the competitive enterprise and seized a valuable contract.

While the requirement to provide ten months' prior notice of resignation is undoubtedly unique to the fact situation of that case, it is also clear that offering a mere two weeks' notice to resign, without reference to the particulars of the relationship, will no longer necessarily be regarded as acceptable. This will especially be the case where the intention of a senior employee, post resignation, is to enter into direct competition.

Summary

While an employee may not be subject to a tenable action for damages in cases of mere negligence, employers may seek damages against a former employee in cases where the employee's conduct has amounted to more than negligence or carelessness and the employer's losses are significant. Employers may also pursue dismissal with cause in such cases, but must be careful to ensure first that it had provided appropriate training, supervision and materials to the employee.

In order to avoid potential actions for damages, an employee must also ensure that he/she acts in accordance with reasonable contractual terms to which he/she agreed both during and post-resignation or termination with respect to confidentiality, fidelity and non-solicitation. Even absent a contractual or statutory term requiring an employee to provide a specific period of notice of resignation, courts have indicated a willingness to award damages to an employer where, in light of the position the employee held, insufficient notice of resignation was provided.