

No knowledge, no liability for employer in sexual assault case

Polichronis v Teys Australia Food Solutions Pty Ltd [2016] QDC 225

Key Points

- The Plaintiff was sexually assaulted by a co-worker. To succeed in a damages claim, the Plaintiff must show the employer was on notice that the assailant co-worker had “significant history of misbehaviour”.
- A thorough post-incident investigation is crucial to protect an employer against unfounded allegations at trial.

Background

The Plaintiff was a meatworker who was the victim of a serious sexual assault committed by a co-worker as she was walking from the employer’s carpark to its factory. She did not pursue a claim against the assailant but pursued a claim against the employer on the basis that it:

- Ought to have known the assailant had a propensity to carry out a sexual assault.
- Failed to respond to the Plaintiff’s complaints to her supervisor.
- Did not enforce a reasonable sexual harassment policy.

The Plaintiff’s case was that prior to the assault, the assailant and two other workers regularly committed “indecent/sexual assaults” which included “cupping her bottom, pinching, slapping, staring and similar behaviour”.

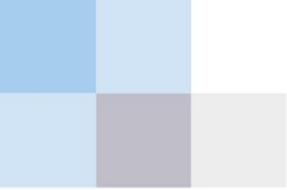
The Plaintiff called two former co-workers to give evidence, but neither supported the Plaintiff’s allegations. The first witness the Plaintiff called said the Plaintiff had told her that the assailant had passed dirty messages to her. Crucially, the witness did not say she had witnessed any inappropriate touching by anyone or that the Plaintiff had complained about such behaviour.

The second witness said he had observed the Plaintiff speaking to the assailant once or twice per day. Despite the witness being engaged in an extra-marital affair with the Plaintiff, he said the Plaintiff had not made any complaints about the assailant’s conduct.

The Plaintiff herself gave evidence that she complained to her supervisor about the assailant on several occasions and that the supervisor would tell him three or four times a day to leave her alone.

Liability

In addition to the Plaintiff’s evidence, her Honour found that:

- 
- One of the men who had allegedly assaulted the Plaintiff prior to the incident was 17 years of age at the time. He and the Plaintiff had both flirted, and the Plaintiff had touched him on the penis and pushed her bottom into his groin. He had not seen the assailant's alleged behaviour prior to the assault.
 - The other worker who was alleged to have engaged in the pre-assault behaviour did not touch the Plaintiff inappropriately and did not make inappropriate remarks to her.
 - The Plaintiff made no complaints to her supervisor about the assailant's conduct or sexual harassment in the workplace generally.
 - The Plaintiff complained to another worker with whom she was having an extra-marital affair with at the time of the incident about verbal comments made by the assailant but had made it clear that she wanted "to handle him" herself.

Crucially, the employer conducted a thorough investigation immediately following the assault. The Plaintiff's first statement was that the assailant's behaviour prior to the incident was only verbal and that she had not told anyone about it.

Therefore the Plaintiff's case failed as there was no evidence that the employer was on notice that the assailant had a history of misconduct which would alert the employer to the risk of assault.

Medical causation

Dr Nandam's evidence for the Plaintiff was that she had developed Post Traumatic Stress Disorder (PTSD) and cannabis dependence as a result of the incident.

However, her Honour preferred the opinion of Dr Kar who, whilst accepting the Plaintiff would have suffered significant stress as a result of the incident, considered her problems were due to a pre-existing borderline personality disorder that had been aggravated by her longstanding cannabis use.

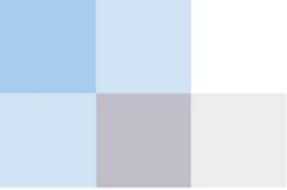
Her Honour found that Dr Nandam had placed considerable emphasis on matters about which Her Honour did not accept. In particular that:

- The Plaintiff's marriage broke down as a result of the assault in circumstances where the evidence was that it was likely the Plaintiff was having overlapping extra-marital affairs and that, as a result, her then husband had "kicked her out".
- The Plaintiff had not returned to work after the assault, when she had actually continued to work for seven months after the incident until her separation from her husband.
- Dr Nandam had assumed the husband blamed the Plaintiff for the assault despite the medical records showing he was supportive of the Plaintiff.

Lessons Learnt

This case demonstrates that Plaintiffs will continue to face significant difficulty establishing liability against employers for the criminal conduct of co-workers.





The employer's successful defence of this claim was largely due to its prudent decision to conduct a thorough contemporaneous investigation. The Plaintiff's first statement that she had not reported the assailant's lewd comments was fatal to her attempt to allege at trial six years later that the employer was on notice of serious systemic abuse within the workplace.

This case also demonstrates that even where one would expect the Plaintiff would receive significant sympathy, a court will not be afraid to disregard expert medical evidence which is based upon demonstrably untrue assumptions.

Contact

For more information on this article, please contact:

Chris Murphy

Partner

T: +61 (0) 7 3307 5504

M: 0405 537 425

chris.murphy@hbalegal.com

Visit www.hbalegal.com for more case articles and industry news.

Disclaimer: This article is intended for informational purposes only and should not be construed as legal advice. For any legal advice please contact us.

