

WHAT'S NEW at RUBIN THOMLINSON LLP

Chris Thomlinson discussed workplace harassment on Canoe Live on Sun TV on June 2.

Janice Rubin was quoted in the Globe and Mail article, "Keeping the bullies and brutes at bay", on June 11.

Chris was quoted in the June 14 edition of Canadian Occupational Health and Safety News, in a story entitled, "Police re-investigate workplace abuse claims".

Chris co-chaired the popular Law Society of Upper Canada program, the Six-Minute Employment Lawyer, on June 15.

Janice also took part in the Six-Minute Employment Lawyer. Her topic was "Risk Assessments and Other Key Legislative Changes".

Janice was a guest on the CBC radio program, Ontario Today on June 15, where she discussed Bill 168.

Hena Singh discussed sexual harassment on Canoe Live on Sun TV on July 6.

Keep an eye out for our new podcasts on Bill 168, and pregnancy leave and parental rights.

Janice led a webinar for the Certified General Accountants on July 13 entitled, "Employment Law Essentials : Avoiding HR Disasters".

Take our Annual RT Employment Survey: Workplace Recovery, Job Offers & Alternative Work Arrangements. [Click here to take the survey.](#)

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.

A recent Ontario Court of Appeal decision provides further insight into damages which can be claimed by an employee after the employee's relationship with her supervisor became "toxic". The case, Piresferreira v. Ayotte, 2010 OCA 384 (QL) was an appeal from a lower court decision which granted a range of damages to the employee amounting to close to \$500,000.

Harassment in the workplace and damages

The employee, Marta Piresferreira ("Piresferreira"), was 60 years old and had worked for Bell Mobility for approximately 10 years as an account manager. Piresferreira had consistently received positive performance reviews throughout her career at Bell Mobility. Beginning in 2004, her manager, Richard Ayotte ("Ayotte"), began to display a range of aggressive behaviour towards her. In addition to providing Piresferreira with a negative performance review, he also harshly criticized her for failing to arrange a client meeting and pushed her when she tried to show him an email she had drafted on her BlackBerry. Ayotte then refused to apologize for his actions and instead proceeded to place Piresferreira on a performance improvement plan.

Piresferreira eventually left work and was diagnosed with post-traumatic stress disorder and a major depressive disorder. Piresferreira subsequently sued both Bell Mobility and Ayotte with respect to her treatment at work. The trial judge found Ayotte liable for the torts of battery and intentional and negligent infliction of mental suffering. The trial judge also found Bell Mobility vicariously liable for these torts and directly liable for negligence and constructive dismissal. The employee was ultimately awarded damages totalling approximately \$500,000.

The Ontario Court of Appeal held that the trial judge erred in finding that the tort of negligence was available against the

employer and supervisor for conduct that occurred at work. Rather, the Court held that, for policy reasons, the tort of negligent infliction of mental suffering was not appropriate in the employment context. Specifically, the Court refused to place a responsibility on employers to shield all employees from behaviour that might cause mental suffering. According to the Court, holding employers responsible for such acts would be overly intrusive and inconsistent with established employment law principles. The Court also pointed to the fact that mental distress damages were already available to employees and that this fact negated the need to enforce the tort of negligent infliction of mental suffering.

The Court also overturned the trial judge's finding of intentional infliction of mental suffering on the basis that the necessary elements did not exist in this case. The Court specifically held that, to succeed at such a claim, an employee must demonstrate that the employer not only engaged in flagrant and outrageous conduct, but also that the actions were carried out in a manner which were either intended to produce harm or, alternatively, that an individual would have reasonably known that it was likely to result in harm. Here, the Court stated that Ayotte was not responsible for the intentional infliction of mental suffering because his actions did not reflect either an intention

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to cause mental suffering nor did he have knowledge that his actions would lead to the damage which resulted. Based on these findings, the Court ultimately reduced the award portion representing tort damages, but did maintain the award of \$45,000.00 for mental distress damages, in addition to damages in connection with constructive dismissal and battery.

What does this mean for employers?

Legal consequences of treating employees poorly

By refusing to endorse the notion of negligent infliction of mental suffering in an employment context, the Court has narrowed the scope of potential liability when an employee is treated poorly by a supervisor, and when such behaviour renders the employment relationship untenable. However, the Court has not eliminated the possibility of liability altogether, and indeed, has affirmed an employee's entitlement to damages for constructive dismissal and damages for mental distress in these types of situations.

Therefore, employers must continue to be mindful about managing workplace culture, and ensuring that employees are treated with respect. In particular, now that Bill 168 is in force, employers must ensure that employees are not subjected to workplace harassment, or if they learn that they are, they must take immediate

steps to remedy the situation.

The continued importance of properly conducted workplace investigations

The trial judge was critical of Bell Mobility's workplace investigation. Indeed, the fact that it was so poorly done was a factor that contributed to Piresferreira's constructive dismissal. Nothing in the Court's decision changes this. Therefore, and again with reference to Bill 168, employers should pay careful attention to ensure that workplace investigations are done thoroughly and fairly, by competent individuals within the organization.

Be vigilant about violence

Judging from the conversations we have had with our clients, many employers simply do not believe that violence exists in Canadian workplaces. As this decision illustrates, employee behaviour can get out of control, as in this case, with Ayotte's push of Piresferreira over the BlackBerry issue. A 2004 Statistics Canada survey found that 17 percent of violent incidents in Canada occur in the workplace. While we do not wish to overstate the occurrence of violence, the fact is that it happens often enough that employers should be alive to the issue, and take appropriate steps that acknowledge the seriousness of the violent act, when they become aware of it. ●

UPCOMING EVENTS

September 15

Chris Thomlinson will be discussing Best Practices in Workplace Investigations of Alleged Employee Misconduct as part of the Osgoode Professional Development program.

Announcing our Autumn Teleseminars

Our Teleseminar series, "60 Minutes with RT" will return in the autumn. Look out for "Job Offers and Alternative Work Arrangements" on September 30 at 12 ET, and "An Update on Social Networking" on November 25 at 12 ET.

Teleseminars are a short, snappy and informative way of staying on top of employment law updates and changes from the comfort of your office. We are also able to provide customized training programs to suit your workplace in the Teleseminar format or through on-site training.

To find out more, please email: teleseminar@rt-law.ca

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You can also have our Alerts delivered right to your inbox so that you can stay up-to-date with changes in employment law. Don't worry about subscribing via email. Your details will never be passed on to a third party.

We work with employer clients to provide optimal legal solutions to their challenging workplace issues. If you would like to know more about our practice, please do not hesitate to contact us at (416) 847-1814 or via e-mail at contact@rt-law.ca.

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