

Harassment as an Independent Cause of Action

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A recent decision of a Superior Court judge in Ontario has found that harassment, including workplace harassment, is a cause of action in Ontario (*Merrifield v. The Attorney General*, 2017 ONSC 1333).

The plaintiff in the decision had joined a police force in 1998. He alleged as part of his claim that after he ran for political office, his superiors started making unjustified and unwarranted decisions about him based on allegations that had no merit. The plaintiff alleged that his superiors harassed and bullied him, damaged his reputation, impaired his career advancement, and caused him to suffer severe emotional distress including depression. As a result, he was off work for significant periods of time. The plaintiff commenced his claim against the police force as well as the individual supervisors who had participated in the allegedly harassing activities. The Plaintiff's evidence at trial was largely accepted by the trial judge.

Among other legal issues, the trial judge was asked to consider whether harassment was recognized as a tort upon which a civil cause of action may be based in Ontario and, if so, if the actions of the defendants met the required test for the tort of harassment.

The plaintiff argued that damages for harassment could be claimed in Ontario. The defendants disagreed relying on an earlier decision which had, in a case involving allegations of sexual harassment in the workplace, stated that "there is no freestanding tort of harassment" (*Desjardins v. Society of Obstetricians and Gynecologists of Canada*, 2012 ONSC 7294). The defendants requested that the Court decline to recognize a new tort of civil harassment but had to acknowledge that other Ontario cases had determined that the existence of the tort of harassment in Ontario is a "live legal issue" (*John v. Cusak*, 2015 ONSC 5004).

The trial Judge accepted the plaintiff's position that harassment is a tort upon which a civil claim can be commenced. The trial judge adopted the following test for the tort of harassment which had been set in an earlier decision in British Columbia and had been favourably considered in Ontario:

- (a) Was the conduct of the defendants toward the plaintiff outrageous?
- (b) Did the defendants intend to cause emotional stress or did they have a reckless disregard for causing the plaintiff to suffer from emotional stress?
- (c) Did the plaintiff suffer from severe or extreme emotional distress?
- (d) Was the outrageous conduct of the defendants the actual and proximate cause of the emotional distress?

The Court found that the plaintiff met the above test as a result of the plaintiff's conduct and the emotional distress suffered by the plaintiff as a result of the defendants' conduct. The plaintiff was also found to satisfy the test for the tort of intentional infliction of mental suffering, which has been recognized in Ontario for some time. The plaintiff was accordingly awarded general damages in the amount of \$100,000.

This decision demonstrates the potential monetary impact of failing to take workplace harassment complaints seriously. Most employers are now aware of their obligations under the Ontario *Occupational Health and Safety Act* which sets out the roles and responsibilities of employers with respect to workplace harassment. The legislation requires the development and implementation of policies and programs to deal with both workplace harassment and violence. Employers who fail to comply with the *Occupational Health and Safety Act* can be fined. In addition, employees may also attempt to seek compensation as a result of workplace harassment by relying on the tort of harassment.

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