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Highlights

WORKPLACE HARASSMENT

the limits on an employer's liability

Joe Conforti examines the recent Ontario Court of Appeal decision in *Piresferreira v. Ayotte*, which rejected a general duty on employers to take care to shield their employees during the entire course of employment from acts in the workplace that might cause mental suffering. As a result, employers cannot be sued for negligently inflicting mental distress on employees other than in the context of a termination. Further, even in circumstances of intentional infliction of mental distress, liability will be limited to circumstances where there is flagrant and outrageous misconduct with knowledge that mental distress or a similar kind of harm will occur or is substantially certain to follow. 946

HUMAN RIGHTS

accommodating family status

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the scope of workplace stress claims

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the end of mandatory retirement?

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Federated Press

WORKPLACE HARASSMENT

The Limits on an Employer's Liability

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Every workplace should be free of harassment, bullying and violence.

What is the employer's responsibility if, contrary to its own policies and practices, one of its supervisors assaults staff, is verbally abusive, or is otherwise harassing on an onging basis leading to an employee suffering mental distress?

The Ontario Court of Appeal faced this issue head-on in *Piresferreira v. Ayotte*.[1]

Piresferreira holds that an employer cannot be sued for negligently – that is, not intentionally – inflicting mental distress on its employees in the workplace. The Court of Appeal rejected any duty of care in such circumstances, relying heavily on public policy reasons and recognizing that the imposition of such a far-reaching duty on employers would require courts to venture deeply and often into day-to-day workplace interactions, not only at the time of dismissal but throughout the period of employment.

Moreover, even in circumstances of intentional infliction of mental distress, liability will be limited to circumstances where the employer – or someone for whom it is responsible – engages in flagrant and outrageous misconduct with knowledge that mental distress or a similar kind of harm will occur or is substantially certain to follow.

In its decision, the Court of Appeal set aside a judgment at trial in excess of $500,000[2] and, in so doing, provided a framework for determining liability and damages against employers and managerial personnel in circumstances involving workplace harassment.

The Facts

The facts in *Piresferreira* are straightforward:[3]

- Ms. Piresferreira was an account manager, employed by Bell Mobility for approximately 10 years starting in 1995.
- Ms. Piresferreira worked under the supervision of Richard Ayotte, a sales manager. Mr. Ayotte had an abrasive, confrontational and sometimes verbally abusive management style. The Court of Appeal characterized Mr. Ayotte and his interactions with Ms. Piresferreira as follows:

  > Ayotte was critical, demanding, loud and aggressive. ... [H]e would yell and swear at employees, had a temper, and would bang his fist on the table to make a point. He had high expectations for the account managers on his team. Other employees described Piresferreira as nervous and sensitive, not taking responsibility for problems but instead blaming others, and not dealing well with criticism – regardless of how it was delivered. The two personalities could hardly be less complementary.

- In 2004, Ms. Piresferreira began to encounter performance difficulties at work and missed a number of her sales objectives. Many of these problems were caused by external factors that were beyond her control.
- Ms. Piresferreira's 2004 performance reviews, prepared by Mr. Ayotte, were strongly critical. Notwithstanding this, Mr. Ayotte noted that "Ms. Piresferreira has been a top performer in the past and I am quite confident she can do it again; however, hard work will be required to do so." Following continued monitoring of Ms. Piresferreira's performance, in early 2005, it was determined – by Mr. Ayotte together with his manager and the human resources department – that it was necessary for Ms. Piresferreira to be put on a formal performance improvement plan ("PIP") in order to assist in meeting her targets.

[1] [2010] ONCA 384 (decision released on May 28, 2010).
[2] (2008), 72 C.C.E.L. (3rd) 23 (S.C.J.).
[3] The factual background is set out at paragraphs 4 through 25 of the Court of Appeal decision.

- On May 12, 2005, prior to implementing the PIP, Mr. Ayotte learned that Ms. Piresferreira had failed to arrange a meeting with one of her major clients. Mr. Ayotte became extremely angry. He yelled and swore at Ms. Piresferreira in front of another Bell Mobility executive, saying that she did not know what she was doing and that she was not doing her job. Ms. Piresferreira became very upset and insisted that she had done everything she could in order to arrange the appointment. She wanted to show Mr. Ayotte an e-mail as proof of her attempts to contact the client. Mr. Ayotte walked away, repeated that he was not interested, and told Ms. Piresferreira to get away from him. When Ms. Piresferreira held up her Blackberry in front of him, Mr. Ayotte pushed Ms. Piresferreira on her shoulder, repeating that she should get away from him. This push carried enough force that Ms. Piresferreira was forced backwards by about a foot and she needed to balance herself against a filing cabinet.
- After he pushed Ms. Piresferreira, Mr. Ayotte went back to his office and sat at his desk. Ms. Piresferreira followed Mr. Ayotte to his office and told him he should not have pushed her. Mr. Ayotte told her "to get the hell out of his office," that he had done nothing wrong, and that he was in the process of preparing a PIP for her. Ms. Piresferreira was shaken, went back to her desk and began to cry. After speaking to colleagues, she collected her things and went home.
- After the incident of May 12, 2005, Mr. Ayotte prepared a PIP requiring Ms. Piresferreira to take certain remedial steps and to meet with Mr. Ayotte on a daily basis to report on her progress, with the threat of "further disciplinary action up to and including dismissal" should this not be done. Mr. Ayotte sought quick approval of the PIP from human resources department and, in doing so, did not mention his confrontation with Ms. Piresferreira earlier that day nor her reaction to the incident. In contrast, Ms. Piresferreira sent an e-mail to Mr. Ayotte stating that "it is certainly not acceptable that you shoved me in the corridor yesterday afternoon" and offering "to sit down together outside the office and come to an agreement to work as a team."
- Ms. Piresferreira took some scheduled vacation days and then returned to the office a week later, on May 19, 2005. Upon her return, Mr. Ayotte presented her with the PIP he had prepared and asked her to review and sign it. Ms. Piresferreira refused and, on the next day, May 20, 2005, Ms. Piresferreira lodged a formal complaint against Mr. Ayotte with the human resources department.
- A few days later, on May 24, 2005, the human resources department advised Ms. Piresferreira that her complaint had been investigated, that Mr. Ayotte would receive a written disciplinary warning for his unacceptable behaviour and be asked to attend courses on effective communication and conflict resolution. Bell Mobility did, in fact, deliver a disciplinary warning letter advising Mr. Ayotte that his behaviour was unacceptable and that any further incident would subject him to further disciplinary action up to dismissal. Ms. Piresferreira was advised, therefore, that Bell Mobility considered the matter relating to the May 12, 2005 incident closed and she was requested to attend a meeting for the next day – to be attended by Mr. Ayotte as well – in order to review the PIP.
- Ms. Piresferreira responded – supported by her doctor – that she would be on sick leave and would not be able to attend the meeting with Bell Mobility. In fact, Ms. Piresferreira never returned to work.
- In September 2005, Bell Mobility proposed to have Ms. Piresferreira return to work and offered to assist her and Mr. Ayotte in an effort to "work out their differences" so that she could again report to him. As an alternative, Bell Mobility was prepared to have Ms. Piresferreira report directly to Mr. Ayotte's supervisor. Bell Mobility reiterated its offers to have Ms. Piresferreira return to work over the following year – initially when Mr. Ayotte was relocated within the organization and then when Mr. Ayotte retired. Ms. Piresferreira declined each time, advising that "by virtue of the assault and Bell's response to it, the work environment was a

poisoned one" and that, in any event, "she did not feel capable of returning to work."

- Ms. Piresferreira's psychologist diagnosed her with post-traumatic stress disorder, testifying that she was totally disabled from work as of the date of trial (December 2008). Ms. Piresferreira's psychiatrist diagnosed her as suffering from a major depressive disorder with symptoms of anxiety. In the opinion of both medical practitioners, Ms. Piresferreira disability was triggered by Mr. Ayotte's physical assault on her and on Bell Mobility's inadequate response to Mr. Ayotte's misconduct.

The Trial Judgment

Ms. Piresferreira sued Bell Mobility for damages for constructive dismissal and, in the same action, claimed damages against Bell Mobility and Mr. Ayotte personally for several torts, including assault and battery and infliction of emotional distress and mental suffering.

Bell Mobility took the position that Ms. Piresferreira had resigned her employment and that it was not responsible for Mr. Ayotte's misconduct.

Following a 12-day trial, the trial judge found Mr. Ayotte personally liable for the torts of battery and intentional and negligent infliction of mental suffering. She also found Bell Mobility vicariously liable for the torts committed by its employee, Mr. Ayotte, and directly liable for negligence and constructive dismissal.

With respect to the tort of intentional infliction of mental suffering, the trial judge concluded that Mr. Ayotte showed a "reckless disregard" for Ms. Piresferreira's emotional well-being and that, because Mr. Ayotte's misconduct caused or materially contributed to Ms. Piresferreira developing post-traumatic stress disorder and a major depressive disorder with anxiety, the defendants were responsible even though Ms. Piresferreira's injuries exceeded all reasonable expectations and foreseeable consequences.

As to the tort described by the trial judge as "negligent infliction of emotional distress, mental suffering, nervous shock and/or psycho-traumatic disability," the trial judge found that Bell Mobility, as Ms. Piresferreira's employer, and Mr. Ayotte, as Ms. Piresferreira's immediate supervisor, owed her a duty of care to ensure that she was working in a safe and harassment-free environment without verbal abuse, intimidation or physical assault. According to the trial judge, it was reasonably foreseeable that Mr. Ayotte's misconduct, his physical assault of Ms. Piresferreira, and his failure to apologize were all likely to cause Ms. Piresferreira anxiety, stress and emotional upset. Furthermore, Bell Mobility's failure to contact Ms. Piresferreira to express concern, to apologize on its own behalf, and to check up on how she was doing – all compounded by its insistence on following through with the PIP as a priority – independently breached Bell Mobility's duty of care.

The trial judge awarded Ms. Piresferreira damages totalling over $500,000, together with $15,000 to Ms. Piresferreira's partner as damages for "loss of guidance, care and companionship" pursuant to the *Family Law Act*.[4] Bell Mobility and Mr. Ayotte were jointly and severally liable for all of these amounts. In assessing damages, the trial judge calculated Ms. Piresferreira's loss of income to her expected retirement at age 65. No reduction was made for the long-term disability benefits that Ms. Piresferreira was receiving (although the trial judge did reduce the assessed damages by 10% for the "contingencies of life," including that Ms. Piresferreira may have suffered anxiety given the death of friends, her other medical problems and the fact that her partner had been seriously injured that year). Finally, Ms. Piresferreira was also awarded costs of the action and trial in the amount of $225,000.

The Court of Appeal Judgment

The Court of Appeal reversed the trial judgment in part and significantly reduced the damages to under $147,855 (in particular: $15,000 for battery; $87,855 for constructive dismissal representing 1-year's lost wages; and $45,000 for mental distress arising from the manner in which she was constructively

[4] R.S.O. 1990, c. F.3. Section 61 of the legislation permits a dependent to recover a pecuniary loss "to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person [injured] if the injury or death had not occurred."

dismissed). Costs of the trial were ordered reassessed.

The Court of Appeal addressed the following key points:

1. *Is the tort of negligent infliction of mental suffering available in the context of an employment relationship?*[5]

As indicated above, the trial judge found that there was a duty of care supporting the tort of negligent infliction of mental suffering on the contractual relationship between parties, that is, employer and employee. The foundation on which the trial judge based this duty of care was contractual, in particular, Bell Mobility's own code of business conduct which guaranteed employees "the equal right to work in an environment free from violence and threats" and which prohibited "all acts of physical, verbal or written aggression or violence." Of significance, all employees had to sign the code of business conduct annually as part of the performance appraisal process. Based on this allegedly contractual commitment, therefore, the trial judge determined that Bell Mobility, as employer, and Mr. Ayotte, as supervisor, owed Ms. Piresferreira, as employee, a duty to ensure that she was working in a safe and harassment-free environment.

The Court of Appeal disagreed.

For the purposes of its decision, the Court of Appeal accepted that Bell Mobility's code of business conduct formed a part of the employment contract. Nonetheless, the Court of Appeal reiterated that a breach of a contractual duty could not be the basis for the recognition of a common law duty of care. For concurrent tort liability to be available, there must be a common law duty of care that would exist even in the absence of the specific contractual term.

No Canadian appellate court had previously recognized a free-standing cause of action in tort against an employer for negligent infliction of mental suffering by an employee. As such, the Court of Appeal approached the issue on first principles in order to determine whether there was a duty of care owed by either or both of the defendants towards Ms. Piresferreira and, if so, the scope of the duty. This involved asking: Firstly, is the relationship sufficiently close or "proximate" to render damages reasonably foreseeable and to justify the imposition of a duty of care? Secondly, are there countervailing policy considerations as to why a duty of care should be limited or not recognized?

As to proximity, the Court of Appeal agreed with the trial judge that it was reasonably foreseeable that Ms. Piresferreira would experience mental suffering from the abusive behaviour to which Mr. Ayotte subjected her during her employment.

However, the Court of Appeal determined that policy considerations foreclosed the recognition of a duty of care. According to the Court of Appeal:

- The Supreme Court of Canada had already expressly rejected the notion that a tort existed for breach of an act of "good faith" and "fair dealing" obligation by employers in dismissing employees. As strongly intimated by the Supreme Court of Canada, the creation of a similar tort in the employment context – that is, where it is not a part of a termination – would be such a radical shift as to be better left to the legislature.[6] In connection with this point, the Court of Appeal referred to the reformulated framework established by the Supreme Court of Canada in *Honda Canada Inc. v. Keays*[7] for awarding damages for bad faith dismissal, in particular:
  - normal distress and hurt feelings resulting from dismissal are not compensable;
  - "bad faith" damages are available if, during the course of dismissal, the employer engages in conduct that is unfair or in bad faith;
  - such an award must be limited to compensatory damages and not be punitive; that is, an award should reflect the actual damages that result from the employer's conduct; and
  - in order to be entitled to damages for bad faith, a plaintiff must demonstrate that mental distress damages were in the contemplation of the parties.

[5] This analysis appears at paragraphs 44 through 63 of the Court of Appeal's decision.

[6] See, e.g., *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at paragraph 77.

[7] [2008] 2 S.C.R. 362.

- Any recognition of a general duty to take care to shield an employee during the entire course of his or her employment from acts in the workplace that might cause mental suffering would be "overly intrusive" and involve courts too much in day-to-day employment relationships.
- The introduction of a duty of care would skew damages awards. This is evident by the trial judge's own assessment of damages: 1-year's compensation for wrongful/constructive dismissal and $45,000 for mental distress representing over 4-years' compensation totalling $500,000 for tort damages. The Court of Appeal noted that "it would seem anomalous to award a different level of damages for what is essentially the same wrong on the sole basis of the form of action chosen."[8]

The Court of Appeal indicated that where an employer's allegedly tortious behaviour is so intolerable as to trigger or at least to accompany the dismissal of the employee, compensation for mental distress is available under the framework set out by the Supreme Court of Canada in *Honda*. Therefore, even in a case where the employer does not expressly dismiss the employee, an employee can claim constructive dismissal as a result of his or her employer's abusive conduct[9] and, in such event, the employee still has recourse to mental distress damages. In other words, in a dismissal context, the law already provides a remedy in respect of the loss complained of.

The Court of Appeal certainly recognized that there was a category of cases in which the employee suffers mental distress from employer conduct that would not provide grounds for a claim of constructive dismissal. Recognition of the tort of negligent infliction of mental distress in such circumstances would require an assessment of whether the employer's criticisms of its employee's poor work performance was constructive. The Court of Appeal expressed the view that it is both unnecessary and undesirable to expand judicial involvement in the ongoing work performance of employees and the content and manner of their supervision:

> It is unnecessary because if the affected employee is sufficiently aggrieved, he or she can claim constructive dismissal. It is undesirable because it would be a considerable intrusion by the courts into the workplace, it has real potential to constrain efforts to achieve increased efficiencies, and the postulated duty of care is so general and broad it could apply interminably.[10]

Put another way, the courts are disinclined to intervene in and effectively to arbitrate every internal workplace dispute.

2. *Did Mr. Ayotte commit the tort of intentional infliction of mental suffering?*[11]

The tort of intentional infliction of mental suffering requires proof by the plaintiff of the following elements: (a) flagrant or outrageous conduct; (b) calculated to produce harm; and (c) resulting in a visible provable illness.[12]

The focus of the trial judge was on Mr. Ayotte's failure to apologize to Ms. Piresferreira in presenting the PIP; implicitly, it was accepted that the PIP was required to address legitimate performance concerns. As such, the Court of Appeal expressed some doubt as to whether Mr. Ayotte's misconduct was so "flagrant and outrageous" as to establish the first element of the tort of intentional infliction of mental suffering. Ultimately, however, the Court of Appeal did not need to make a decision on that point because the second element of the tort – the requirement that the misconduct be calculated to produce harm – was not established.

It is well established that "for the conduct to be calculated to produce harm, either the actor must desire to produce the consequences that follow, or the consequences must be known by the actor to be substantially certain

[8] Paragraph 59 of the Court of Appeal decision.

[9] See, e.g., *Shah v. Xerox Canada Ltd.* (2000), 49 C.C.E.L. (2nd) 166 (Ont. C.A.). In *Shah*, the Court of Appeal upheld a determination of constructive dismissal, stating that the employee's position became intolerable as a result of a series of unfair and unsubstantiated criticisms leveled against him by his manager (described by the trial judge as "authoritarian, impatient and intolerant") and without having a reasonable opportunity to respond to the criticisms.

[10] Paragraph 62 of the Court of Appeal's decision.

[11] This analysis appears at paragraphs 64 through 80 of the Court of Appeal's decision.

[12] See, e.g., *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3rd) 474 (C.A.).

to follow."[13] Instead of following this test, however, the trial judge found that Mr. Ayotte showed "reckless disregard" for Ms. Piresferreira's emotional well-being. This is incorrect as an intentional tort provides remedies for advertent, not unintended behaviour. Therefore, even if a reasonable person should reasonably know that harm was foreseeable or likely to result, this does not meet the test for an intentional tort; rather, that standard is more aligned with negligence (which the Court of Appeal had foreclosed earlier in its decision in the employment context except when it leads to a dismissal). In short, having closed the door on the tort of negligent infliction of mental suffering in an employment relationship, the Court of Appeal refused to reopen it as an intentional tort by introducing a "recklessness" standard dependent on whether the harm ultimately suffered was foreseeable or likely to result.

Finally, in order for there to be liability, the harm that was intended must be of the same nature or kind as what occurred. As the Court of Appeal put it: "The extent of the harm need not be anticipated, but the kind of harm must have been intended or known to be substantially certain to follow."[14] In this case, although Mr. Ayotte could reasonably foresee some harm to Ms. Piresferreira as a result of his misconduct, the kind of harm actually suffered by her could not reasonably be expected.

3. *What are proper damages for assault and battery in the workplace?*[15]

It was conceded that Mr. Ayotte committed an inexcusable battery on Ms. Piresferreira. The contested issue was the appropriate amount of damages.

The trial judge did not separately assess damages for battery, instead awarding a global amount for all of the tort claims. In considering what damages flowed from the battery, the trial judge reasoned that the battery "started a chain of events" that "collectively resulted in the deterioration of Ms. Piresferreira's emotional health and resulted in her disability."

The Court of Appeal disagreed with this approach.

Damages for battery are not limited to what the defendant intended or foresaw. However, it is still necessary that damage be caused by the battery and not by other matters. While Mr. Ayotte's battery was the first incident of several chronologically, it was not linked casually into a chain of events with what followed. Moreover, following the initial battery, most of the actions were those of Bell Mobility rather than Mr. Ayotte. For example, an employer, faced with the same circumstances, might have taken completely different and appropriate steps: it might have apologized to Ms. Piresferreira for the assault; it might have withdrawn the PIP; or it might have immediately disciplined Mr. Ayotte. In other words, the acts and omissions of Bell Mobility were neither the necessary nor the inevitable result of the battery.

In this case, Ms. Piresferreira suffered no physical injury, psychological or other ill-effects from the push itself. In fact, Ms. Piresferreira was still willing "to come to an agreement to work as a team" with Mr. Ayotte after the battery. It was only subsequent events which did not inevitably follow from the battery – which caused Ms. Piresferreira's deterioration.

The damages award for battery absent actual injury that were considered at trial ranged from $400 to $11,000. Taking into the consideration the entire context of the battery, the Court of Appeal assessed Ms. Piresferreira's damages "generously" at $15,000.

As Ms. Piresferreira had no entitlement to damages for negligent or intentional infliction of mental suffering and, on the trial judge's own findings, she suffered no actual damage from the battery itself, the Court of Appeal set aside the derivative damages award for loss of guidance, care and companionship awarded to Ms. Piresferreira's partner.

There was no appeal from the trial judge's finding that there was a constructive dismissal. As accepted wrongful dismissal principles were applied, the Court of Appeal did not disturb the assessment of damages based on 1 year as compensation. Further, the Court of Appeal agreed that the trial judge's assessment of Ms. Piresferreira's damages of $45,000 for mental suffering from the manner of her

[13] Paragraph 73 of the Court of Appeal's decision.
[14] Paragraph 78 of the Court of Appeal's decision.
[15] This analysis appears at paragraphs 81 through 87 of the Court of Appeal's decision.

dismissal had a solid evidentiary foundation and was in accord with the framework established by *Honda*.

Conclusion and Implications

In *Piresferreira*, the Court of Appeal has clarified that employees have no entitlement to damages for negligent infliction of mental suffering. In addition, the tort of intentional infliction of mental suffering will be extremely difficult to establish.

This does not mean, however, that employers can ignore the issue of workplace bullying.

In *Piresferreira*, the employer was required to pay substantial damages to its former employee. It also faced a lengthy trial and incurred substantial legal fees (note: the employer's exposure has not ended as the plaintiff has sought leave to appeal from the Supreme Court of Canada). Finally, it suffered by reason of workplace inefficiency and lack of productivity.

Furthermore, the legislative framework prohibiting workplace harassment and violence is developing. Since the release of *Piresferreira*, Ontario's *Occupational Health & Safety Amendment Act (Violence & Harassment in the Workplace) 2009* has come into force. This legislation, perhaps the most comprehensive in Canada combatting workplace violence and harassment, requires employers to develop policies and programs to prevent workplace violence and harassment and permits workers to remove themselves from harmful situations if they have reason to believe that they are at risk of imminent danger due to workplace violence. Contravention may lead to fines of up to $25,000 or 12-months' imprisonment for individuals or fines of up to $500,000 for corporations.

Employees have a right to be treated with fairness, dignity and respect and the right to a harassment-free workplace. In order to achieve this objective and to meet their legal obligations, employers must take a proactive approach to managing workplace disputes, including the following steps:

- preparing and/or expanding existing anti-harassment policies in order to prohibit bullying or psychological harassment in the workplace and requiring management to treat personnel with courtesy, civility and respect;
- implementing appropriate training to ensure that managers and all employees understand appropriate workplace behaviour;
- confronting a poisoned work environment by addressing the source of the misconduct (including re-education and/or discipline of those in breach); and
- ensuring that complaints be investigated promptly, independently and without reprisal from management.

Much of the employer's difficulty in *Piresferreira* arose from the perceived unfairness or, at least, the lack of completeness of its investigation into the workplace dispute. Therefore, when faced with a complaint to be investigated:

- for independence, employers should consider the use of an external investigator (there is a suggestion in *Piresferreira* of bias on the part of the employer; for example, all information regarding the workplace incident came from Mr. Ayotte whereas Ms. Piresferreira was not even interviewed); and
- ensure that steps taken at the end of the investigation are not and do not appear to be retaliatory (for example, in *Piresferreira*, requiring Ms. Piresferreira to return to work immediately under the supervision of the very person who assaulted her and to receive a performance improvement plan from him).

Notwithstanding the result in *Piresferreira*, the lesson is clear: if employers – or those to whom they have delegated responsibility – fail to treat their employees decently, they will find themselves exposed to liability one way or the other. With proper implementation of these steps and continued workplace monitoring, an employer's risk to adverse damages awards will be minimized.