

### Ontario Court of Appeal answers Bell's call

The *Occupational Health and Safety Amendment Act* (Violence and Harassment in the Workplace), 2009, which comes into effect on June 15, 2010, has focused attention on workplace violence and harassment (see [Workplace Violence and Harassment: New Obligations Under the Occupational Health And Safety Act](#)). While it is well settled that workplace harassment can be the basis for an employee's claim of constructive dismissal, in *Piresferreira and Scott v. Ayotte and Bell Mobility Inc.*<sup>1</sup>, the Ontario Court of Appeal has recently limited the types of claims an employee can make when workplace harassment and violence lead to mental distress.

#### factual background

Marta Piresferreira was an account manager for Bell Mobility Inc. ("Bell"). Her manager Richard Ayotte was described as "critical, loud, demanding and aggressive". Conversely, Piresferreira was described by her fellow employees as a nervous and sensitive person who did not deal well with criticism. In 2004, Ayotte gave Piresferreira a poor performance review and continued to be very critical of her performance in 2005, leading to a deteriorating relationship.

On May 17, 2005 Ayotte confronted Piresferreira over her failure to arrange a meeting with a client. Piresferreira attempted to explain why the meeting was not arranged but Ayotte refused to listen to her explanation. When she attempted to have Ayotte read an exculpatory message on her blackberry, he pushed her in the shoulder with enough force to make her stagger back.

Piresferreira attempted to discuss the situation with Ayotte, but Ayotte refused and instead informed her that he would be placing her on a performance improvement plan. Not surprisingly, Piresferreira filed a complaint with Bell's human resources department. She also commenced a sick leave related to stress and anxiety from the incident. Notwithstanding that Bell reprimanded Ayotte for his conduct, ordered him to apologize to Piresferreira and required that he attend counselling, she never returned to work.

Piresferreira filed a claim for constructive dismissal. She also pursued various tort claims against Ayotte and Bell. Piresferreira was successful on her claims at trial and was awarded over \$500,000 in damages for wrongful dismissal, battery and intentional and negligent infliction of mental suffering (for which Bell and Ayotte were jointly liable) plus \$225,000 in legal costs. In addition her partner Judy Scott was awarded \$15,000 under the *Family Law Act* for the loss of “guidance, care and companionship” that she might reasonably have been expected to receive from Piresferreira.

### Court of Appeal’s decision

The Ontario Court of Appeal found that the tort of negligent infliction of mental suffering should not be available to an employee in the employment context for policy reasons.

Speaking for the Court, Justice Jurizansz stated that to recognize such a tort would impose a general duty on employers “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” (emphasis added). It would hamstring an employer’s attempts to impose discipline or some other form of corrective action, since legitimate workplace conduct could cause mental suffering to an employee who reacts badly to criticism. The Court was clearly uncomfortable imposing a broad duty on employers to protect employees from any activity during the course of employment that could lead to an employee’s mental suffering. However, an employee may still claim damages based on emotional distress arising as a consequence of the manner of termination as addressed in the Supreme Court of Canada’s decision in *Honda Canada Inc. v. Keays*<sup>2</sup> (see *Keays v. Honda Canada Inc. – Supreme Court of Canada and Honda in Accord*)

The Court also ruled that Piresferreira could not recover damages for the tort of intentional infliction of mental suffering in the circumstances of this case. In order to establish that there was an intentional infliction of mental suffering, an employee must show that the employer (or another employee) not only engaged in flagrant and outrageous conduct, but that such conduct was directly calculated to produce harm or the perpetrator knew such harm was substantially certain to occur. As there was no evidence that Ayotte intended or knew that it was substantially certain that his actions would result in the type of suffering Piresferreira experienced, the Court overturned the judge’s award of damages for this tort.

Damages for wrongful constructive dismissal, battery and mental distress were maintained by the Court. However, the Court also set aside the award to Scott under the *Family Law Act*.

## what this decision means for employers

It is encouraging that the Court of Appeal refused to recognize that an employee could claim damages for negligent infliction of mental suffering based on workplace conduct, despite a bad fact pattern. There is a range of legitimate activities that occurs during the course of an employer/employee relationship that could cause mental suffering for an employee. To impose a general duty on an employer to not cause emotional distress during the relationship would unnecessarily expand the involvement of the courts in the workplace.

However, as Bell discovered, employers should recognize that they can be found liable for the conduct of managers and supervisors who are overly aggressive in managing their employees. While physical assaults may be rare, employers need to ensure that they curb aggressive tendencies of managers and supervisors and respond promptly to allegations of harassment and violence.

by [Dave McKechnie](#)

(Endnotes)

<sup>1</sup> 2010 ONCA 384

<sup>2</sup> [2008] 2 SCR 362.

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### a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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