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ONTARIO LABOUR RELATIONS BOARD CLARIFIES "WORKPLACE HARASSMENT"

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A. INTRODUCTION

With the enactment of Bill 168[1] in June, 2010, Ontario employers, including charities and not-for-profits, are subject to legal duties to develop and maintain policies and programs to address workplace harassment and violence. However, employers and employees still face issues as to what types of behaviour or incidents are "harassment", as opposed to legitimate management conduct. In the Ontario Labour Relations Board (the "Board") decision in *Amodeo* v. *Craiglee Nursing Home Limited*,[2] the Board provides guidance as to what is and is not workplace harassment. This *Charity Law Bulletin* discusses this decision and its implications for employers.

B. THE FACTS

Marianne Amodeo was employed as a social worker at Craiglee Nursing Home (the "Home") from October 2009 until June 2010. In April 2010, Ms. Amodeo alleged that during the course of a meeting to discuss a resident's treatment plan, the Director of Care for the Home "shouted at her."[3] Subsequent to that meeting, Ms. Amodeo was issued a written warning for failure to cooperate with the Director of Care and the then

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[1] For the discussion of Bill 168, which amended the Ontario *Occupational Health and Safety Act*, see Charity Law Bulletin No 189 "Ontario Bill 168 Receives Royal Assent: Employers Will Need to Address Workplace Violence and Harassment Prevention".

[2] *Amodeo* v. *Craiglee Nursing Home Limited*, 2012 CanLII 53919 (ON LRB).

[3] *Ibid* at para 5.

Administrator of the Home. Although Ms. Amodeo insisted she did not know about the letter until four months after her dismissal, she still considered the written warning a "form of harassment."[4]

In June 2010, the Home hired a new Administrator, Angela Heinz, who informed Ms. Amodeo that she was to "document and keep on file every conversation she had with a resident's family", for the purposes of any lawsuits that may be brought against the Home.[5] At a subsequent management meeting, Ms. Amodeo raised the issue about the difficulties she had in "keeping up" with the work. Ms. Heinz reportedly responded by advising Ms. Amodeo that she needed to "work harder and to work extra hours if necessary",[6] and informed Ms. Amodeo that if she was incapable of completing her work on time, she could face suspension. In response, Ms. Amodeo proceeded to email her concerns about Ms. Heinz to various senior management representatives. Ms. Amodeo was terminated from her position shortly thereafter.

Ms. Amodeo suspected she was dismissed because the Home's management believed she would report alleged resident abuse to the Ministry of Health and Long Term Care.[7] In response to her termination, Ms. Amodeo made an application to the Board under section 50(1) of the *Occupational Health and Safety Act* (the "Act"), alleging she was dismissed for raising workplace harassment complaints. The Board dismissed the application on September 19, 2012, finding that Ms. Amodeo did not establish that the Home engaged in workplace harassment. Ms. Amodeo then applied to the Board for a reconsideration of that decision, which request was dismissed by the Board on February 28, 2013.[8]

C. WHAT QUALIFIES AS WORKPLACE HARASSMENT?

Workplace harassment involves "engaging in a course of vexatious comments or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome."[9] It includes comments that "demean, ridicule, intimidate or offend"; the circulation or display of "offensive pictures or printed material; bullying and sexual suggestions or advances."[10] However, workplace harassment will not be found to occur in circumstances where an employer, or employee tasked with overseeing other employees,

[4] *Supra* note 2 at para 5.
[5] *Ibid* at para 6.
[6] *Ibid*.
[7] *Ibid*.
[8] *Amodeo* v. *Craiglee Nursing Home Limited*, 2013 CanLII 11253 (ON LRB).
[9] *Occupational Health and Safety Act*, RSO 1990, c O.1, s.1.
[10] *Supra* note 2 at para 12.

ensures rules are being complied with.[11] Individuals may perform their managerial positions poorly, and employees may suffer "unpleasant consequences"[12] in the process, but this does not necessarily mean workplace harassment has occurred.

Importantly, the Board confirmed:

> The workplace harassment provisions do not normally apply to the conduct of a manager that falls within his or her normal work function, even if in the course of carrying out that function a worker suffers unpleasant consequences.[13]
>
> The worst that can be said of what happened is that Ms. Heinz made a blunt, unflattering assessment of the applicant's performance and demanded in no uncertain terms that she fulfill management's work expectations or risk discipline.[14]

The Board further decided that the Director of Care's demands to document discussions with family members, and warning Ms. Amodeo of the consequences if she was unable to keep up with the workload were not a "vexatious course of conduct or comment", and therefore were not workplace harassment.

As the Board determined that no workplace harassment occurred, the complaint was dismissed. The Home did raise additional grounds in its defence. In particular, it took the position that the Board did not have the statutory authority under the Act to deal with reprisal complaints as a result of workplace harassment. While the Board decided it was not necessary to address that jurisdictional issue, other Board decisions have held that the Bill 168 amendments do not provide it with jurisdiction to deal with employee terminations arising from alleged harassment. Therefore, it appears that the only employer obligations relating to harassment under the Act that can be the subject of Board review pertain to employer obligations to have workplace harassment policies and programs in place. Any expansion of this limited jurisdiction will be up to the legislature. However, aggrieved employees still have remedies in civil courts for wrongful dismissal, as well as the right to apply to the Human Rights Tribunal of Ontario (if the harassment is on the basis of a ground prohibited by the *Human Rights Code).*

[11] *Shlomo Conforti v Investia Financial Services Inc and Industrial Alliance Insurance and Financial Services Inc*, 2011 OLRD No 3623 at 25.
[12] *Supra* note 2 at para 16.
[13] *Ibid* at para 12.
[14] *Ibid* at para 16.

D. CONCLUSION

Employers and employees may have differing views on what constitutes workplace harassment. The *Amodeo* decision provides some guidance and comfort to employers. Employers, including charities and not-for-profits, need to be aware of and educate managers and employees as to the differences between workplace harassment and legitimate managerial conduct. However, there are situations where the line between reasonable managerial action and workplace harassment is difficult to draw, especially when employee discipline issues are involved. Therefore, developing and following proper workplace harassment policies will reduce the risk of unresolved harassment complaints being litigated in courts or tribunals.

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