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## **EMPLOYMENT HARASSMENT BY FACEBOOK POSTS**

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*By Barry W. Kwasniewski\**

### **A. INTRODUCTION**

With the popularity of social media sites, courts and tribunals continue to deal with disputes and claims regarding the harm that may be caused by online postings. The latest case in this developing area of law is the Ontario Human Rights Tribunal (the “Tribunal”) decision in *Perez-Moreno v Kulczycki*<sup>1</sup>. In this application, the Tribunal dealt with the issue of an employee’s disparaging statements regarding a co-worker outside of the workplace, specifically on a virtual Facebook wall. The Tribunal found the respondent worker liable to the applicant co-worker for breach of the workplace harassment provisions of the Ontario *Human Rights Code*<sup>2</sup> (the “Code”). This *Charity Law Bulletin* discusses this decision and its implications for charities and not-for-profits as employers.

### **B. THE FACTS**

Oscar Perez-Moreno, the applicant, and Danielle Kulczycki, the respondent, both worked at the Cranberry Golf Resort. Mr. Perez-Moreno was the manager of the Resort and Ms. Kulczycki was his co-worker. On August 1, 2012, there was a dispute between Ms. Kulczycki and another co-worker, who was in a relationship with Mr. Perez-Moreno. Mr. Perez-Moreno intervened in the dispute, which had occurred in the workplace. On August 3, 2012, Ms. Kulczycki created a post on Facebook stating that she had been “written up at work” because she had called Mr. Perez-Moreno a “dirty Mexican”. She also made derogatory and racial verbal statements to her co-workers about Mr. Perez-Moreno.

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<sup>1</sup> *Perez-Moreno v Kulczycki*, [2013] OHRTD No 1080, 2013 HRTO 1074.

<sup>2</sup> *Human Rights Code*, RSO 1990, cH19.

Mr. Perez-Moreno was upset by the derogatory remarks and felt that they were humiliating and damaging to his character and work life. He also stated that the remarks affected him emotionally, socially, and mentally. Since Facebook posts are public postings, his son's classmate also saw Ms. Kulczycki's offensive post. Consequently, Mr. Perez-Moreno filed an Application under s.34 of the *Code*, alleging harassment in the workplace on the grounds of race, ancestry, place of origin, citizenship and ethnic origin. Ms. Kulczycki was the only respondent to the Application as the employer was not a named party. Ms. Kulczycki, did not file a Response to the Application, and was therefore deemed to have accepted all the allegations against her.

## **C. THE HUMAN RIGHTS CODE**

Under s.5(2) of the *Code*, every employee has a right to a workplace environment that is free from harassment because of one's race, ancestry, place of origin, ethnic origin, citizenship, colour, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status, and disability. The *Code* s.10(1) defines "harassment" as a course of vexatious comment or conduct that is known or should reasonably be known to be unwelcome.

## **D. THE DECISION**

The Tribunal held that the postings and comments constituted harassment in the workplace contrary to the *Code*, as they were vexatious and related to an incident that occurred in the workplace. The respondent knew or ought reasonably to have known that her comments were unwelcome to the applicant. The applicant did not seek monetary compensation for injury to his dignity, but instead requested to have the respondent removed from the shared work environment. As the employer was not a party, the Tribunal was not prepared to apply that remedy, because it would have affected the interests of the employer. Therefore, the Tribunal decided that the respondent could remain in the workplace, but she must complete the Ontario Human Rights Commission's on-line training course within thirty days. It was also recommended that the employer consider providing human rights training to all its employees.

## E. CONCLUSION

This Tribunal decision demonstrates that disparaging postings on social media sites, such as Facebook, Twitter and blogs regarding co-workers could result in liability under the *Code*. Therefore, employees must be aware they cannot use these social media sites to vent about their workplace and co-workers. Employees may consider that what they post on social media sites is private and will not be subject to review by our courts or human rights tribunals. Employers should make it clear that there is no such immunity, and employee postings may result in negative consequences. Many employers, including charities and not-for-profits, have developed social media policies to educate employees about the proper and improper use of social media in the workplace. The developing case law in this area highlights the importance of social media policies, both to educate employees and to reduce the risk of employer liability.