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## **EMPLOYEE SUCCESSFULLY SUES EMPLOYER FOR HARASSMENT**

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*By Barry Kwasniewski\**

### **A. INTRODUCTION**

Until recently it has remained unclear whether one could sue for the tort of harassment in Ontario. However, on February 28, 2017, the Ontario Superior Court of Justice (the “Court”) released its decision in [\*Merrifield v The Attorney General\*<sup>1</sup>](#) (“*Merrifield*”), which held that an employee *can* successfully sue their employer for harassment, provided that the aggrieved employee satisfies a four part test. In *Merrifield*, not only did the plaintiff, Mr. Merrifield, sue his employer (the Royal Canadian Mounted Police, or the “RCMP”) for harassment, but he also sued for intentional infliction of mental suffering. Interestingly, in his harassment claim, Mr. Merrifield did not allege harassment under any of the enumerated grounds in s. 5(2) of the Ontario *Human Rights Code* (*i.e.*, race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status, or disability). One of the defendant’s positions was that no such right of action was recognized at law. The Court, in allowing the claim, agreed with Mr. Merrifield’s position that a right of action for harassment should be recognized, and awarded him a judgment of \$100,000 for general damages as a result of the harassment so found.

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<sup>1</sup> *Merrifield v The Attorney General*, 2017 ONSC 1333 [*Merrifield*]. A Notice of Appeal was filed with the Ontario Court of Appeal on March 30, 2017 as well as a cross-appeal on April 20, 2017.

## B. RELEVANT FACTS

This action was heard over 35 days between November, 2014 and April, 2016. The facts of the case are complex and are detailed in the 178 page decision. To briefly summarize, Mr. Merrifield was a long-time employee of the RCMP who had served in various units and tasks forces over several years. He sued the RCMP for what he claimed was harassment over an extended period of time. Mr. Merrifield also had an interest in politics and at one point chose to run in a federal election, for which he took a leave of absence from the RCMP. This is what, according to Mr. Merrifield, was the root of the ensuing problems and the beginning of several more disastrous years within the force. Despite Mr. Merrifield's exemplary performance reviews and advancements throughout his career, on numerous occurrences Mr. Merrifield was the subject of internal investigations and reprimand by the RCMP. In his lawsuit Mr. Merrifield made numerous allegations of harassment by his superiors within the RCMP, which are set out in the decision.

In the lawsuit, Mr. Merrifield alleged that he was bullied by the RCMP; the RCMP made several unjustified decisions based on incorrect and unfounded allegations; the RCMP failed in its obligation to rationally consider Mr. Merrifield's actions; it "stood down" Mr. Merrifield from work (which he was more than qualified to do) during a national security emergency; it subjected Mr. Merrifield to investigations; and eventually it forced Mr. Merrifield to transfer out of his job thereby causing him to suffer a "permanent stain on [his] reputation"<sup>2</sup> and making it difficult, if not impossible, for him to move forward with his career. Accordingly, Mr. Merrifield had to take a significant period of time off of work, he became very unhealthy and depressed, and also had to seek the assistance of a psychologist and other medical treatment.

## C. COURT'S ANALYSIS

The Court reviewed the case law to determine whether or not the tort of harassment was or should be recognized in Ontario. In doing so the Court stated:

"The four cases relied upon by the plaintiff show that the tort of harassment was considered as early as 2006 (*Mainland Sawmills*) in which the British Columbia Superior Court defined the elements of the tort. Subsequently, in 2013 (*Savino*), the Ontario Superior Court of Justice allowed for the possibility that the tort did exist. In both 2014 (*McHale*) and 2015 (*McIntomney*) the Ontario Superior Court

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<sup>2</sup> Ibid at 762.

of Justice adopted the elements of harassment as set out in *Sawmills*. In *McIntomney*, the plaintiff was awarded damages for harassment.

*Mustapha* (2008) and *Healy* (2011), relied upon by the defendants, were decided after *Sawmills* (2006) and before *Savino* (2013). The law has evolved since 2011 as shown in *McHale* (2014), *McIntomney* (2015) and *John v Cusack* (2015).<sup>3</sup>

In this regard, the Court determined and explicitly stated that the tort of harassment *does* exist and that plaintiffs are capable of successfully suing for the tort of harassment provided they are able to satisfy a four part test. The Court reiterated the test for the tort of harassment, as was laid out in *McHale* and *McIntomney*, is as follows;

1. Was the conduct by the defendant outrageous;
2. Did the defendants intend to cause emotional stress or did they have a reckless disregard for causing emotional stress;
3. Did the plaintiff's suffer from severe or extreme emotional distress; and
4. Was the defendant's outrageous conduct the actual and proximate cause of the emotional distress?<sup>4</sup>

In determining what constitutes "outrageous behavior" the Court referred to *The Canadian Oxford Dictionary*. That source defined "outrageous" behaviour as behaviours that are deeply shocking and unacceptable; grossly cruel; immoral and offensive; and highly unusual or conventional. Referring to *Boucher v Wal-Mart Canada Corp.*,<sup>5</sup> the Court also held that flagrant and outrageous conduct could include behaviour that belittles, humiliates or demeans a person. Additionally, the Court stated that outrageous conduct must be grossly offensive.<sup>6</sup>

With respect to what constitutes emotional stress or a reckless disregard for causing emotional distress, the Court noted, "the actor must desire to produce the consequences that follow, or the consequences must be known by the actor to be substantially certain to follow"<sup>7</sup>. The term "reckless" means "proceeding in

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<sup>3</sup> *Ibid* at 716-717.

<sup>4</sup> *Ibid* at 719.

<sup>5</sup> *Boucher v Wal-Mart Canada Corp.*, 2014 ONCA 419.

<sup>6</sup> *Supra* note 1 at 723.

<sup>7</sup> *Ibid* at 720-723.

the face of subjective awareness that harm of the kind that resulted was substantially certain to follow...[the] consequences must be known by the actor to be substantially certain to follow.”<sup>8</sup> The Court further stated that, “[s]evere emotional distress means ... emotional distress of such a substantial quantity or enduring quality that no reasonable person in a civilized society should be expected to endure it.”<sup>9</sup>

The Court determined that Mr. Merrifield had satisfied the four part test for harassment - the RCMP’s conduct toward the Mr. Merrifield was outrageous, the RCMP had a reckless disregard of causing Mr. Merrifield to suffer emotional distress, Mr. Merrifield’s emotional distress was severe, and the RCMP’s outrageous conduct was the actual and proximate cause of Mr. Merrifield’s emotional distress. As a result, the Court ordered the RCMP to pay \$100,000 in general damages for harassment and intentional infliction of mental suffering, as well as \$41,000 in special damages.

## D. CONCLUSION

In light of the *Merrifield* decision, it is important for employers, including charities and not-for-profits, to understand that employees may sue for the tort of harassment, and provided they can satisfy the above-noted tests, harassment claims could result in large damage awards against them. Charities and not-for-profits need to implement and enforce effective workplace harassment policies to mitigate the risks of harassment claims. Assuming the appeal proceeds, there will likely be clarifications from the Court of Appeal with respect to the tort of harassment in Ontario, which will be reviewed in future Bulletins.

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<sup>8</sup> *Ibid* at 731.

<sup>9</sup> *Ibid* at 732.