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# Take harassment **SERIOUSLY**

## BEST TO PREVENT IT, COSTLY TO IGNORE

Court awards \$650,000 for hiring decision that revictimized an employee.

BY ANDREW EBEJER

One are the days when an employer doesn't take seriously a complaint of workplace harassment, particularly of the psychological kind. Beyond the potential for reputational injury and negative employee morale, the financial implications of disregarding all forms of workplace harassment can be substantial. A recent Ontario Superior Court decision underscores this point.

On Jan. 29, 2007, Tbaytel (Thunder Bay's municipal telecommunications services board) announced the rehiring of a former male employee to a senior executive role. He previously worked for the predecessor of Tbaytel, but his employment was terminated in 1996 on a without cause basis, for reasons of sexual harassment, misappropriation of funds and managerial incompetence.

Upon learning of his rehiring, a long-time administrative assistant who worked for him in 1996, was "shocked and very upset". She was one of the subjects of his sexual harassment and advised Tbaytel she did not feel comfortable working with him. She asked Tbaytel not to rehire him.

Tbaytel conducted its due diligence and confirmed what she had alleged. Nevertheless,

it moved forward with the hiring, offering to reassign the administrative assistant to a different building to minimize her interactions with the executive, although it could not guarantee she would have no contact with him.

She did not accept the re-assignment offer and did not return to work. Instead, she commenced a lawsuit alleging constructive dismissal, and sought damages of more than \$3 million for the loss of her job, "intentional infliction of mental suffering", and prospective losses from the resulting post-traumatic stress disorder and major depressive disorder.

### Constructive dismissal

The court agreed the executive's hiring resulted in a constructive dismissal of the administrative assistance, but not that Tbaytel had "intentionally" inflicted her mental suffering. As for the constructive dismissal, the court found the plaintiff was unable to tolerate even incidental contact with the executive, and Tbaytel's decision to proceed with the hiring "re-victimized [the plaintiff] and minimized the past conduct of [the rehired executive] in the eyes of [the plaintiff] and other Tbaytel employees."

However, the evidence did not establish this conduct, although "flagrant and outrageous", was intended, or "substantially certain", to cause her harm. Hence, the tort of "intentional infliction of mental suffering" was not



*Being indifferent to an allegation of sexual harassment can lead to extraordinary damage awards.*

PHOTO: FOTOLIA

made out.

The court awarded damages of \$650,000 breaks down as:

- \$100,000 as general damages for pain and suffering and impairment to quality of life;
- \$193,719 for past income loss;
- \$279,064 for future income loss, premised on the assumption she would have retired at age 60;
- \$14,082 as pay in lieu of notice, setting off the disability benefits and wages already provided to her; and
- \$100,000 for breach of the duty of good faith in the manner of her dismissal, on the basis of Tbaytel's indifference to the allegations of prior sexual harassment as "flagrant and outrageous" and the treatment of the plaintiff "grossly unfair, unduly insensitive and in blatant disregard of her interests."

While this decision may seem extraordinary – particularly the 12-year gap between the allegations of sexual harassment and her constructive dismissal – anxiety, depression and other forms of mental illness have regularly been held by courts and arbitrators to be a consequence

of workplace harassment. An employer that is indifferent to an allegation of sexual harassment, past or present, can be exposed to the potential of extraordinary damages awards.

While the best defense is to avoid incidents of harassment altogether, if and when an incident does occur, it's critical to address it directly and thoroughly. An employer should consider the following:

**Workplace violence and harassment policy.** Have one. Train employees and management on its content and how it works. Enforce it consistently and transparently.

**Risk assessment.** Conduct one at a regular interval (at least once per year). Critically examine your workplace to determine what, if any, factors may put an employee at risk. If appropriate, engage the services of an objective third party to conduct the assessment.

**Be proactive.** Don't let the results of a risk assessment (or internal investigation) sit on the shelf. Where appropriate, take active steps to reduce risks and enhance workplace safety.

**Collective agreement.** If you

have one in the workplace, be familiar with the procedures, if any, for handling a complaint, as they may require an employer to go beyond legislative requirements.

If an incident occurs:

**Investigate.** An important step and, in some cases, mandated by law. If appropriate, engage the services of an objective third party to conduct the investigation.

**Mediate and de-escalate.** Where appropriate, make efforts to mediate and de-escalate animosity among the parties, particularly if they must re-integrate into the workplace.

Some situations are more complex and sensitive than others. When in doubt (or simply to confirm your preferred plan of action), consult with experienced employment counsel who will help navigate these challenging issues.

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**Comments?**

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