



Harassment complaints and anti-reprisal provisions

What penalties can arise from breach of the Occupational Health and Safety Act?

Originally, the Ontario Labour Relations Board took the position that a workplace harassment complaint did not engage the anti-reprisal provisions of the Occupational Health and Safety Act. Recently, the OLRB seems to have changed its mind in this area.

A 2015 decision sheds light on an employer's obligations with respect to reprisal pursuant to the OHSA and the penalties that can result from a breach of the Act.

Section 50 of the OHSA prohibits an employer from dismissing, disciplining, penalizing, intimidating, or threatening to do any of these things, because an employee:

- complies with the OHSA;
- seeks to enforce the OHSA; or
- gives evidence in a proceeding at the OHSA.

TO FIND REPRISAL:

- the OLRB must be satisfied the employee was engaged in the exercise of his rights pursuant to the OHSA; and
- that the exercise of his statutory rights was a motivating factor, no matter how small, for the decision to terminate or discipline the employee. [*Barton v. Commissionaires (Great Lakes)*]

The onus is on the employer to convince the OLRB that it did not engage in reprisal. To do so, the employer will need to produce evidence of some other activity that warrants termination or discipline. If the OLRB finds reprisal, it has broad powers to reinstate the employee, provide compensation, or other remedies to redress the reprisal.

HISTORY

In 2010, Bill 168 added provisions to the OHSA regarding workplace harassment. Among other things, employers were required to prepare policies with respect to workplace violence and harassment. Originally, the OLRB took the position it did not have jurisdiction to deal with disputes where a complainant alleged she was subject to reprisal for making a workplace harassment

complaint. [*Investia Financial Services Inc., and Ludlow Technical Products Canada Ltd.*] This remained the case until November 2013 when the OLRB released *Ljuboja v. Aim Group Inc.* In that case, the OLRB rejected earlier decisions and held that an employee could complain to the OLRB if he suffered reprisal for filing a harassment complaint.

Three months later, the OLRB followed *Ljuboja* in *Murphy v. The Carpenters' District Council of Ontario*, finding that making a complaint pursuant to an employer's harassment policy was tantamount to seeking enforcement of the Act.

Recently, the OLRB decided *Constance Saumur v. Commissionaires Ottawa*. In that case, the employee successfully argued she was fired in retaliation for making a complaint of workplace harassment. She made an internal complaint to human resources about two things: (1) her belief that her supervisor was having an affair with a subordinate; and (2) her own workplace harassment from her supervisor.

The employer conducted an investigation into the affair, but ignored the applicant's complaint of workplace harassment. When the investigation concluded that the affair was unfounded, the applicant received a disciplinary letter for making an unfounded allegation.

The employee continued to experience workplace harassment from her supervisor. She reported the harassment to human resources and was fired shortly thereafter.

The OLRB examined the circumstances, the investigation, and the employer's assertion the employee was fired due to bad fit and performance issues. At the hearing, the employer did not provide any evidence to substantiate its claims. The OLRB applied the two-part "test" for reprisal, concluding the employer was unable to prove the complaint was not "a motivating factor, no matter how small" in the applicant's termination.

The employer was ordered to reinstate the employee and provide a year's worth of back pay and benefits. This decision is concerning because it seems an allegation of workplace misconduct, even if unfounded, is afforded protection from reprisal pursuant to the OHSA. Further, the employee likely received more money than if she had pursued a remedy through the civil courts.

Be careful to investigate all claims of workplace harassment and be cognizant that terminations after a complaint or escalation to HR will likely draw attention querying the real reason for termination. If the termination is truly unrelated to the complaint, have evidence to support the reason for termination. ■

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