

Entitlement To Benefits For Stress Under The WSIA May Bar Constructive Dismissal Claims For Bullying And Harassment



Since January 1, 2018, section 13(4) of the *Workplace Safety and Insurance Act (WSIA)* has provided for entitlement to workers' compensation benefits for chronic and traumatic stress. Recently, in *Decision No. 1227/19*, 2019 ONWSIAT 2324 (*Decision No. 1227/19*), the Workplace Safety and Insurance Appeals Tribunal (WSIAT) rendered a welcome decision for employers in Ontario because it confirmed that when the fundamental nature of a claim for constructive dismissal is harm sustained due to harassment and bullying in the workplace by coworkers and/or management, the employee's right to make a civil claim is removed by the WSIA.

Background

Before the WSIAT rendered *Decision No. 1227/19*, the employee alleged discrimination in employment because of sex and disability and filed an application under the *Ontario Human Rights Code* ("Code") to the Human Rights Tribunal of Ontario (HRTO). The HRTO rendered its decision in *Morningstar v. Hospitality Fallsview Holding Inc. (o/a Hilton Fallsview)*, 2019 HRTO 1222 ("Morningstar").

In her application under the *Code*, the employee alleged:

- Her coworkers harassed and bullied her by making comments relating to her previously diagnosed medical condition. Their comments made her wonder if her medical condition had returned when, in fact, it had not.
- Her supervisor made comments relating to the medical condition amounting to sexual harassment.
- Although the employee took her concerns to the human resources department, the workplace behaviour continued and the employee was put on medical stress leave.

After filing her HRTO application, the employee resigned claiming constructive dismissal and commenced a civil claim seeking damages for the employer's breach of the *Occupational Health and Safety Act* with "bullying, harassment and the creation of a poisoned work environment and/or the tort of harassment." The employee also claimed punitive damages for the employer's "deliberate creation and condonation of a poisoned work environment..." In her statement of claim, the employee did not seek a remedy under section 46.1 of the *Code*, which permits a court to order certain remedies if it finds a *Code* violation in a civil proceeding.

HRT0 Application

In *Morningstar*, the HRT0 considered whether the application alleging discrimination based on sex and disability should be dismissed under section 34(11) of the *Code*, as requested by the employer. Section 34(11) of the *Code* states:

A person who believes that one of his or her rights under Part I has been infringed may not make an application under subsection (1) with respect to that right if,

- (a) a civil proceeding has been commenced in a court in which the person is seeking an order under section 46.1 with respect to the alleged infringement and the proceeding has not been finally determined or withdrawn; or
- (b) a court has finally determined the issue of whether the right has been infringed or the matter has been settled.

The HRT0 concluded that the application and the civil claim raised substantially the same allegations and sought damages for the same violations. Accordingly, the requirements of section 34 (11) were met and the employee's application was dismissed.

WSIAT "Right to Sue" Application

After the HRT0 rendered its decision, the employer filed a section 31 application under the *WSIA* seeking a declaration that the employee's right of action against it was barred by the *WSIA*.

In *Decision No. 1227/19*, the WSIAT noted several provisions of the *WSIA* that were relevant to its analysis:

- Section 26 states that entitlement to workers' compensation benefits are in lieu of all other rights of action in respect of a work accident.
- Section 28(1) states that a worker employed by a Schedule 1 employer is not entitled to commence an action against a Schedule 1 employer, a director, executive officer or worker employed by a Schedule 1 employer in respect of a work injury.
- Since January 1, 2018, section 13(4) of the *WSIA* provides for entitlement to benefits under the insurance plan for chronic and traumatic stress.
- Transitional provisions exist under section 13.1 for mental stress claims occurring on or after April 29, 2014, and which had not been filed with the Workplace Safety Insurance Board (WSIB) before January 1, 2018.

The WSIAT concluded that the employee's claims fell within *WSIA* jurisdiction and in particular within section 13(4), and therefore her right to bring a civil claim against the employer was barred. In arriving at this decision, the WSIAT noted:

- The employer was a Schedule 1 employer.
- The coworkers and managers named in the action were in the course of their employment when the alleged incidents of harassment and bullying occurred.
- The factual basis and fundamental nature of the employee's civil claim of constructive dismissal and the other damages sought were the alleged harassment and bullying in the workplace by coworkers and management. The employee's injury was the harm she claimed she sustained as a result of it and therefore the civil

action was statute barred. The nature of the injury at issue determines whether the right to sue is removed by the WSIA. The manner in which the claim is framed or the remedies sought are not determinative of the question.

Bottom Line for Employers

Employers that receive claims for constructive dismissal from employees who allege they have been bullied and harassed by coworkers and/or managers in the workplace are encouraged to examine the factual basis and fundamental nature of the claim. The question they should ask is: What is the nature of the injury the employee claims to have sustained? As set out in this case, if the answer is harm caused by alleged bullying and harassment in the workplace, employers may consider filing a “right to sue” application pursuant to section 31 of the WSIA seeking a declaration that the employee’s right of action is statute barred.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

by Rhonda B. Levy and George Vassos