

Ontario, Canada Court Confirms Sexual Harassment Not An Independent Tort



- Employee filed action against company vice president for sexual harassment and sexual assault, and against company for vicarious liability for the sexual harassment.
- Court confirmed that sexual harassment is not an independent tort in Ontario and an employer cannot be held vicariously liable for sexual harassment.
- A plaintiff may not seek a civil remedy in court for a breach of the Ontario Human Rights Code, unless it is sought in connection with another independent civil action.
- If, however, an employee makes a claim relating *only* to a breach of the Code, that claim must be made before Ontario's Human Rights Tribunal.

In [*Incognito v. SkyService Business Aviation Inc.*](#), 2022 ONSC 1795, an employee made a claim for damages against her employer's Vice-President of Sales (VP) for sexual assault and sexual harassment, and against the employer for vicarious liability for sexual harassment. She asserted that the employer did not provide her with a safe work environment or have an appropriate code of conduct, and ignored her complaints about the VP's behaviour.

The employer made a motion to strike the allegations against it in the Statement of Claim with respect to vicarious liability for sexual harassment, primarily on the basis that in Ontario the tort of vicarious liability for sexual harassment is not a recognized tort that can support a cause of action. The court agreed and granted the motion.

Employer's Position

The employer argued:

- The tort of vicarious liability for sexual harassment is not a recognized tort in Ontario;
- The court's jurisdiction to deal with damages arising from sexual harassment is ousted by Ontario's *Human Rights Code* (Code); and
- It could not be vicariously liable for the VP's sexual harassment of the employee because s. 46.3 of the Code expressly excludes vicarious liability for sexual harassment by an officer or employee of a corporation and prevents findings of vicarious liability against an employer in respect of a claim of

sexual harassment.

Employee's Position

The employee argued:

- Although a violation of the Code cannot, in and of itself, be a cause of action, s. 46.1 of the Code permits a claim for sexual harassment for additional damages in a civil court if another cause of action grounds the civil claim.
- A claim for sexual harassment would increase the amount of damages sought for the tort of sexual assault.
- In [*Merrifield v. Canada \(Attorney General\)*](#), 2019 ONCA 205 (discussed [here](#)), the Ontario Court of Appeal (OCA) did not “foreclose the development of a properly conceived tort of harassment that might apply in appropriate contexts.”
- The inability to sue for a tort of sexual harassment runs contrary to the “Me too” movement, which offers a compelling policy rationale to recognize vicarious liability for sexual harassment as a tort in Ontario.

Decision

In conducting its analysis, the court reviewed the following provisions of the Code:

- Section 7 provides that employees are entitled to freedom from:
 - sexual harassment in the workplace by their employer or agent of the employer or by another employee;
 - an unwelcome sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to them; and
 - a reprisal or a threat of reprisal for a rejection of that unwelcome sexual solicitation.
- Section 46.1 expressly allows a plaintiff to seek a civil remedy in court with respect to a breach of the Code, but only in connection with another wrong.
- Section 46.3 expressly excludes vicarious liability for sexual harassment by an officer or employee of a corporation and prevents findings of vicarious liability against an employer in respect of a claim of sexual harassment.

The effect of these provisions is that a Code-based claim made in a civil court must be connected to a cause of action that is unrelated to the Code. For example, if a plaintiff makes a civil claim for constructive dismissal, a claim under s. 7 of the Code for sexual harassment in the workplace may be attached to it. If, however, an employee makes **only** a claim that they were sexually harassed in the workplace in contravention of s. 7 of the Code, that claim must be made before the Ontario's Human Rights Tribunal (Tribunal). Furthermore, since s. 46.3 of the Code prevents a finding of vicarious liability against an employer in respect of sexual harassment in the workplace, any such claim must be brought against the individual alleged to have engaged in such conduct.

The court also referred to [*Seneca College v. Bhaduria*](#), 1981 CanLII 29, 2 S.C.R. 181, noting that in that decision the Supreme Court of Canada established the following principles:

- The Code forecloses any civil action that is based directly upon a breach of the Code and excludes any common law action based on an invocation of the public policy expressed in the Code.

- A plaintiff is precluded from pursuing a common law remedy when human rights legislation contains a comprehensive enforcement scheme for violations of its substantive terms.
- A breach of the Code does not constitute an actionable wrong.
- The Code allows a plaintiff to advance a breach of the Code as a cause of action in connection with another wrong; however, monetary compensation is restricted to loss arising out of the infringement, including any injuries to dignity, feelings and self-respect.

The court also emphasized that Ontario courts have consistently held that sexual harassment is not an independent tort that can support a cause of action.

In applying these findings to the case, the court confirmed that there is no independent tort of sexual harassment in Ontario. Although the court acknowledged that in *Merrifield* the OCA did not foreclose the development of a tort of harassment that might apply in appropriate contexts, it stressed that the OCA found that the tort does not exist. Furthermore, the court emphasized that the nature of the harassment under consideration in *Merrifield* was not covered by the Code, and the court in *Merrifield* did not discuss the principles set out in *Bhadauria*.

The court concluded that applying the *Bhadauria* principles, the claim of vicarious liability for sexual harassment had no reasonable prospect of success and it must be struck. The court also denied leave to amend with respect to alleging the tort of sexual harassment or vicarious liability for infringements of s. 7 of the Code.

The court found, however, that the facts pleaded in relation to the alleged sexual harassment could potentially support a claim for monetary compensation under s. 46.1 of the Code in relation to the infringement of provisions of the Code that are not excluded by s. 46.3. Accordingly, the court emphasized that its reasons should not be interpreted as preventing the employee from amending the Fresh as Amended Statement of Claim for monetary compensation under s. 46.1 of the Code based on alleged infringements of provision(s) of the Code other than ss. 5(2) and 7.

Bottom Line for Employers

The decision of the court in *Skyservice* reinforces that sexual harassment is not an independent tort in Ontario capable of supporting an independent cause of action, and an employer cannot be found vicariously liable for the sexual harassment of one of its employees by another. Employers facing claims that they are vicariously liable for such sexual harassment should seek legal advice from employment counsel about making a motion to strike the allegation from the employee's pleadings.

Skyservice also reinforces that, as per s. 46.1 of the Code, a plaintiff may not seek a civil remedy in court with respect to a breach of the Code (the Code has its own enforcement scheme) unless it is sought in connection with another independent civil action. Moreover, any such claim made by an employee must not be inconsistent with the Code. In *Skyservice*, for example, the employee's claim that the employer was vicariously liable for the VP's sexual harassment of her was inconsistent with s. 46.3 of the Code, which expressly excludes vicarious liability in respect of a claim of sexual harassment.

It is important for employers to note, however, that, as we discussed [here](#) in our Insight about *A.B. v. C.D.*, 2022 HRTO 890, if management employees fail to take appropriate action to prevent discriminatory harassment in the workplace once they know of the offending conduct, they are creating a poisoned work environment and they may be found personally liable for infringing an employee's right to a workplace free

from sex discrimination under s. 5(1) of the Code. The employer may be found vicariously liable for this violation. If the individual responsible for the harassment is a directing mind of the employer, the employer can also be held liable for the individual act of harassment.

Finally, employers should take note that it remains critical that they continue to take all reasonable steps to prevent workplace harassment (including sexual harassment), including but not limited to providing training, having appropriate workplace policies and investigating any incident or complaint of harassment, as required to do so under occupational health and safety legislation and in compliance with obligations under the Code.

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