Protect Against Liability Under New Online Harassment Tort



Employees who get bullied and harassed online may now be able to sue for money damages

Current laws don't expressly protect people from internet harassment, although victims may have legal remedies if they experience the harassment at work, including discrimination complaints if harassment is based on sex, race, religion, age, disability, nationality and other protected characteristics under human rights laws. But if a new Ontario court ruling holds up, victims of online harassment will be able to sue their tormentors for money damages. And that may include employee lawsuits against their employers if the online harassment is committed by a co-worker or another person connected to the workplace.

The *Caplan* Case

The court case, *Caplan v. Atas*, 2021 ONSC 670 (CanLII), January 28, 2021, was actually 4 lawsuits pitting an organization against its ex-employee. But in a bit of a role reversal, it was actually the employer suing the employee for waging a long-running campaign "of malicious harassment and defamation" and using the internet to "disseminate vile messages globally, across multiple unpoliced platforms." The ex-employee had a long history of being, well, difficult and uncooperative and even spent 74 days in jail for contempt of court after being found to be "a vexatious litigant." Because she was also bankrupt, she was also "judgement-proof." But the point wasn't to take her money but to basically shut her up and send a strong message to prevent others from engaging in this kind of behaviour.

The question is what tort worked best? Defamation, i.e., deliberately publishing lies to hurt a person's reputation, wasn't enough because the ex-employee deliberately set out to harass her victims and their loved ones. Intentional infliction of mental suffering didn't work because the organization couldn't show that the conduct "result in visible and provable illness." The torts of invasion of privacy and "intrusion upon seclusion" also didn't fit. What was needed was a new tort. So, the court created one: internet harassment.

But the court also set the bar high. To prove internet harassment, an alleged victim would have to show 3 things:

1. The defendant maliciously or recklessly engaged in communications conduct so outrageous in character, duration, and extreme in degree so as to go beyond all possible bounds of decency and tolerance;
2. They acted with the intent to cause fear, anxiety, emotional upset or to impugn

the victim’s dignity; and
3. The victim actually did suffer such harm.

Implications for HR

Theoretically, employees who suffer online harassment at the hands of managers, co-workers and others connected with their company would be able to sue their employers for failing to protect them. However, it won’t be easy for an employee to prove the 3 parts of the test, especially if the employer doesn’t engage in the harassment directly and deliberately.

Employers might also have another layer of defence, namely, the workers compensation rule that bans employees from bringing lawsuits for money damages against their employers for work-related injuries. This issue didn’t arise in the *Caplan* case because the employer sued the employee rather than the other way around.

Even so, refraining from and preventing other employees and staff from harassing employees online is something all employers should already be doing since it’s required by OHS and other laws. So, make sure you have a clear written policy banning cyberbullying and online harassment.