# Wave Of Harassment Cases Coming To OLRB? New Decisions Cause Concern

May an employee, unhappy with how he or she was treated after filing a harassment complaint with the employer, turn to the Ontario Labour Relations Board for a remedy? Up until recently, the answer appeared to be "no". Two recent decisions of the OLRB suggest otherwise.

In a November 2013 decision called *Ljuboja v Aim Group Inc*., Jesse Nyman, a Vice-Chair of the OLRB, rejected earlier OLRB decisions and decided that an employee may complain to the OLRB where he or she has suffered a reprisal for filing a harassment complaint with the employer.

In a decision called *Murphy v The Carpenters' District Council of Ontario*, decided on January 23, 2014, another Vice-Chair of the OLRB, Brian McLean, somewhat reluctantly agreed to follow Vice-Chair Nyman's decision:

"At the time of the hearing of this matter, there had been no settlement in the Board's jurisprudence regarding whether the making of a harassment complaint constitutes the exercise of a right under the OHSA (see *Investia*, 2011 Can LII 6089 and *Kazenel v. Citi Cards Canada Inc.*, 2012 Can LII 9582 etc). In a decision issued after the hearing in the matter before me was completed, the Board (differently constituted) rejected the *Investia* reasoning and found that the making of a complaint under an employer's harassment policy constitutes seeking the enforcement of the Act (see *Ljuboja v. A.I.M. Group Inc.*, 2013 CanLII 26528 (ON GSB), 2013 CanLII 26528). While I have some difficulty with the reasoning in that decision, I recognize that it is within a range of possible results and in the interests of consistent decision making regarding the Board's interpretation of the OHSA, I accept it."

These two recent decisions are concerning. The language of the *Occupational Health and Safety Act* suggests that harassment complaints are to be dealt with internally – by the employer and employee – and not to be brought to the OLRB. The OHSA language suggests that only if an employer has not implemented a harassment policy and program, or not ensured that the program contained the contents required under the OHSA, failed to post the policy, or failed to provide "information and instruction" to employees on the policy and program, may an employee complain to the OLRB. Put another way – and this is often misunderstood – the OHSA does not place a legal obligation on employers to *prevent* harassment, so the OLRB has no authority to hear a complaint that the employer failed to prevent harassment or did not handle a harassment complaint properly.

The two recent decisions effectively permit employees, unhappy with the result of a harassment complaint, to allege “reprisal” and bring the case to the OLRB. If the law indeed allows that, one is concerned that the OLRB will receive a wave of such complaints that should be dealt with internally.

Of course, as before, complaints dealing with harassment because or race, gender, sex and other prohibited grounds of discrimination under the *Human Rights Code* may be brought to the Human Rights Tribunal. The OLRB decisions do not change that.

We will continue to monitor the caselaw and provide updates on this blog.

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