



# THE EMPLOYERS'Edge BULLETIN

## Alarming Expansion of Employer Liability for Abusive Supervisory Conduct: Court Awards Over \$500,000.00 to Employee

We report on a recent and alarming Ontario Superior Court of Justice decision in *Piresferreira & Scott v. Ayotte & Bell Mobility* where the court applied a tort law analysis, as opposed to a contract law analysis, in assessing the employee's damages for abusive supervisory treatment and resulting mental distress. The expansive damage award in *Bell Mobility* far exceeds what the plaintiff would have been entitled to in a traditional constructive dismissal claim and the new test for assessing damages for mental distress recently formulated by the Supreme Court of Canada in *Honda Canada v. Keays*.

In *Bell Mobility*, the plaintiff, Piresferreira, sued her former manager, Ayotte, and Bell Mobility, for damages for constructive dismissal and several intentional torts, including assault and battery, intentional infliction of emotional distress and negligent infliction of emotional distress. Piresferreira's partner, Scott, was also a plaintiff, claiming damages for loss of guidance, care and companionship as a result of Piresferreira's injuries, pursuant to the *Family Law Act*.

Piresferreira was an account manager with Bell Mobility whose performance met or exceeded expectations until 2004 when her performance and sales started to decline for reasons found to be outside of Piresferreira's control. The trial judge found her to be an overly sensitive person and particularly vulnerable to emotional stress given the rough and ready male dominated environment in which she worked, the external business challenges she was facing and her status as lesbian person.

Ayotte had an aggressive and confrontational management style and was prone to swearing and yelling in the workplace. His abrasive style of management grew worse in response to Piresferreira's perceived performance deficiencies.

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In May 2005, Ayotte yelled and swore at Piresferreira in response to her inability to arrange critical client appointments, despite having been tasked with the responsibility one week in advance. Ayotte's abrasive confrontation with Piresferreira ultimately resulted in a physical assault of Piresferreira in which Ayotte pushed her backwards. Following the confrontation, Ayotte failed to apologize to Piresferreira and placed her on a severe performance improvement plan ("PIP"). The trial judge found that the PIP was a disingenuous and bad faith tactic on Ayotte's part to deflect responsibility for his abusive conduct and assault.

A complaint to Bell's human resources department by Piresferreira resulted in a "disciplinary warning" to Ayotte and a purported direction for him to attend communication and conflict resolution training, which he had earlier taken as an online course. Despite Bell Mobility's apparent discipline of Ayotte, it nevertheless affirmed his imposition of the PIP. The court found Bell Mobility's discipline to be entirely inadequate and superficial.

Piresferreira took sick leave from her job during which her emotional distress continued to worsen. During her absence, no one from Bell Mobility called her to see how she was doing, offer apologies or discuss a possible return to work under circumstances that would be acceptable to her. Ultimately, Piresferreira was diagnosed with post-traumatic stress disorder and a major depressive condition, which, according to the Court, was caused by Ayotte's abusive conduct and his assault.

Ayotte was found liable for assault and battery and the tort of intentional infliction of emotional distress. Bell Mobility, for having taken steps to address the Plaintiff's complaint, was found not to have committed the tort.

Bell Mobility was, however, vicariously liable for the supervisor's intentional infliction of mental distress and his assault and battery of the plaintiff. Effectively, the Court found that the supervisor's actions were committed in the course of his employment duties and Bell Mobility, as the supervisor's employer, was responsible for his actions. The Court held that in conferring responsibility on Ayotte to completely manage Bell Mobility's Ottawa office, Bell Mobility had to assume legal liability for Ayotte's management of the Ottawa office and how he dealt with personnel.

The Court also found that the supervisor and Bell Mobility had committed the tort of "negligent infliction of emotional distress". Ayotte committed the tort because he should have known that his abusive conduct was likely to cause harm to Piresferreira, whose vulnerability made her susceptible to psychological injury if treated abusively. Bell Mobility was vicariously liable for Ayotte's negligence.



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Bell Mobility was also found to have negligently inflicted emotional distress because it took insufficient steps to address and remedy the supervisor's actions, failed to apologize and follow up with Piresferreira during her sick leave and insisted that Piresferreira follow through with the PIP despite the fact that it was imposed without basis and in an attempt by Ayotte to avoid responsibility for his abuse and assault. Bell Mobility's expectation that Piresferreira would continue to report to Ayotte was also negligent.

The award of damages comprised \$45,000.00 in general damages for assault and over \$450,000.00 for loss of past and future income, plus special damages amounting to approximately \$5,000.00. Though the plaintiff was found to have been constructively dismissed as a result of the tortious conduct, no damages for pay in lieu of reasonable notice were awarded, because doing so would have constituted double recovery. \$15,000.00 was awarded to Piresferreira's partner, Scott, for the loss of guidance, care and companionship resulting from Piresferreira's injuries.

The extent of damages awarded in the *Bell Mobility* decision is alarming and represents a significant expansion of damages that may be available to employees who allege a constructive termination of employment due to an intimidating or abusive style of management or supervision. Specifically, employees can now ground their claim in the law of torts as opposed to the law of contracts, which is the conventional domain of employment relationships.

We understand that the case is currently under appeal by Bell Mobility and we will continue to monitor the case as it progresses through the courts. In the meantime, employers would be well advised to mitigate the risk of similar liability by addressing and eliminating inappropriately abusive management styles or practices and responding to complaints of inappropriate supervisory conduct in a pro-active, thorough and genuinely sympathetic manner.