



What's New in HR Law

Employment-related discrimination is not limited to discriminatory conduct by workplace superiors

December 20, 2017

BOTTOM LINE

The Supreme Court of Canada recently confirmed that human rights legislation protects employees from all discrimination in connection with their employment, and not merely discriminatory conduct by employers or supervisors.

Facts: Employee experienced discriminatory conduct by a co-worker who was employed by another company

Mr. Sheikhzadeh-Mashgoul was a civil engineer who was hired to supervise a road improvement project in British Columbia. He had immigrated to Canada from Iran and identified as Muslim. Mr. Schrenk was a site foreman and superintendent who was supervised by Mr. Sheikhzadeh-Mashgoul. The two men were employed by separate companies, despite working on the same project site.

In April 2014, Mr. Sheikhzadeh-Mashgoul filed a complaint with the British Columbia Human Rights Tribunal (the "Tribunal"). The complaint arose from several interactions that had occurred between Mr. Sheikhzadeh-Mashgoul and Mr. Schrenk, where Mr. Schrenk had made

derogatory comments about Mr. Sheikhzadeh-Mashgoul's place of origin, religion, and sexual orientation.

Mr. Schrenk and his employer argued that the Tribunal could not hear Mr. Sheikhzadeh-Mashgoul's complaint, as Mr. Schrenk did not exercise control over Mr. Sheikhzadeh-Mashgoul and did not work for the same employer as Mr. Sheikhzadeh-Mashgoul.

The Decisions Below: Disagreement over the scope of human rights protections against discrimination in employment

The Tribunal found that it could hear Mr. Sheikhzadeh-Mashgoul's complaint. The British Columbia Human Rights Code prohibited "a person" from discriminating against another person "regarding employment". The Tribunal found that this prohibition could apply to the actions of people who were not supervisors or employers.

The Supreme Court of British Columbia upheld the Tribunal's decision.

However, the British Columbia Court of Appeal held that the Tribunal could only address complaints of employment-related discrimination against individuals who could inflict discriminatory conduct as a condition of employment.

Supreme Court of Canada: Discrimination "regarding employment" should be interpreted broadly

The majority of the Supreme Court endorsed a broad interpretation of "discrimination regarding employment". The Supreme Court stated that the Human Rights Code did not dictate who could perpetrate discrimination but, rather, intended to prohibit any discriminatory conduct against an employee, so long as the conduct was sufficiently connected to the employment context.

The majority decision emphasized that all workplace relationships—including those between co-workers—could be a source of discrimination in employment. The Supreme Court noted that power could be exerted in the workplace in ways others than "controlling the paycheck". For example, customers may exert economic power over employees or there may be power imbalances in the workplace along gender or racial lines.

The Supreme Court emphasized that a contextual analysis was necessary to assess whether discriminatory conduct was connected to a person's employment. The following questions would be relevant to this contextual analysis:

- Was the perpetrator integral to the complainant's workplace?
- Did the discriminatory conduct occur in the complainant's workplace?
- Was the complainant's work performance or work environment negatively affected?

The Supreme Court also stated that, while the perpetrator of the discriminatory conduct could be held personally liable, an employer may be found vicariously liable for discrimination by its employees if the employer is aware of and does not take steps to address the discriminatory conduct.

Check the Box

The Supreme Court's decision confirms that an employer's vicarious liability may extend beyond the discriminatory actions of workplace superiors. Employers may be potentially liable for their employees' behaviour toward any individuals in the workplace, even towards individuals who are employed by another company.

To mitigate this risk:

- All employees should receive regular training on appropriate workplace conduct and workplace policies against harassment and discrimination.
- In shared workplaces, all employers at the workplace should collaborate with each other to prevent and address incidents of workplace harassment and discrimination.

Forum: Supreme Court of Canada

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Citation: *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62

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