



What's New in HR Law

Mitigating Risks in the Face of Mental Distress Claims

April 26, 2019

Bottom Line

The Ontario Court of Appeal decision in *Colistro v Tbaytel* suggests that accommodation by an employer can help defeat an employee's future claim of intentional infliction of mental distress.

The Facts: Employer attempted to accommodate an employee after rehiring an individual who had sexually harassed her ten years earlier

In *Colistro v Tbaytel*, the Ontario Court of Appeal considered an appeal in a claim for constructive dismissal and intentional infliction of mental distress. The plaintiff, Ms. Colistro (the "Plaintiff"), was a long-term employee of Tbaytel, a municipal services board which operates under the City of Thunder Bay (the "Employer").

In the trial decision, the judge accepted that the Plaintiff had been sexually harassed in 1995 by Mr. Benoit, her immediate supervisor at the time. The Employer terminated Mr. Benoit without cause at the time but rehired him ten years later.

Following the rehiring, the Employer attempted to accommodate the Plaintiff by offering her a position in the adjacent building. She refused the offer, went on disability leave, and was eventually diagnosed with post-traumatic stress disorder. The Plaintiff sued her Employer for constructive dismissal, bad faith damages, and intentional infliction of mental distress.

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To sustain a finding of intentional infliction of mental distress, the Plaintiff was required to prove that the Employer's conduct was:

- (i) flagrant and outrageous;
- (ii) calculated to produce harm; and
- (iii) resulted in a visible and provable illness.

The trial judge awarded damages for constructive dismissal and bad faith damages, but dismissed the claim for intentional infliction of mental distress. "Calculated to produce harm" has been defined as *subjective* knowledge that that *kind* of harm was substantially certain to result from the conduct. The trial judge found that the Plaintiff had not established that the Employer's conduct was calculated to produce harm.

Court of Appeal: The Employer's attempt to accommodate the Plaintiff suggested that the Employer did not subjectively know that the Plaintiff's psychological injury was substantially certain to occur

The Plaintiff appealed the findings on intentional infliction of mental distress and sought leave to appeal the trial judge's costs order. The Court of Appeal dismissed the appeal and refused the leave to appeal.

This appeal decision suggests that attempting to accommodate an employee can mitigate the risk of a finding of intentional infliction of mental distress at trial. In this case, the Employer sought to accommodate the employee by offering her an equivalent position in an adjacent building away from Mr. Benoit.

The accommodation offer helped establish that the Employer lacked subjective knowledge that serious psychological injury was substantially certain to follow. The Court specifically found that the Employer was open to accommodating the Plaintiff for the purpose of "avoiding the imposition of mental suffering on her". While the accommodation offer was not acceptable to the Plaintiff, the Court noted that it may have been acceptable to others in a similar position. This evidence did not support the inference that the Employer subjectively knew that the serious psychological injury which ensued was substantially certain to occur.

Check the Box

When faced with a potential claim for intentional infliction of mental distress, employers should:

- Consider potential avenues of accommodation that could diminish the mental distress of the employee.
- Consider whether the Human Rights Code imposes a legal duty to inquire whether an employee may have a previously-undisclosed mental health condition that is negatively affecting his or her performance and whether that employee can be accommodated.

- Seek legal advice from counsel to help guide you through the accommodation process in order to avoid complaints under the Human Rights Code and/or potential tort claims such as intentional infliction of mental distress.

Date: March 13, 2019

Forum: Ontario Court of Appeal

Citation: [Colistro v Tbaytel, 2019 ONCA 197](#)

Need more information?

Should you need more information, please contact [Laura Freitag](#) at 416-408-5505, or your regular lawyer at the firm.



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