

## Court of Appeal Rejects Recognition of New Negligence-Based Tort of Harassment

*Jed Blackburn*

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In a decision released on March 15, 2019, the Ontario Court of Appeal in *Merrifield v. Canada*, 2019 ONCA 205 overturned a lower court decision that had recognized an independent tort of harassment in the employment context. The case was brought by a former member of the RCMP who alleged that he had been harassed and bullied by his superior officers after they learned he had run for the nomination to be a Conservative Party of Canada candidate in the 2006 federal election without complying with RCMP regulations and first obtaining the requisite approval to take leave without pay for this purpose. Following a lengthy trial, the trial judge found that the employer was liable both for the existing tort of intentional infliction of mental suffering as well as for a new independent tort of harassment.

In overturning the decision, the Court of Appeal held that there was no basis for recognizing an independent tort of harassment in this case and that the trial judge erred in finding the employer liable for intentional infliction of mental suffering.

While the Court of Appeal did not foreclose the recognition of an independent tort of harassment in appropriate circumstances, it found these did not exist in the case at hand and that the existing tort of intentional infliction of mental suffering would have sufficed to cover the alleged conduct at issue. Perhaps most significantly for employers, the Court of Appeal examined the elements of the proposed new tort of harassment and found that they were very similar to, but less onerous than, the elements of the existing tort of intentional infliction of mental suffering. Whereas intentional infliction of mental suffering requires a plaintiff to establish that the defendant intended “to cause the kind of harm that occurred or [have] knowledge that it was almost certain to occur”, the new proposed tort of harassment would have required only that the defendant have a “reckless disregard” for causing the emotional distress. In other words, the proposed new tort would have lowered the threshold for potential liability by an employer to a negligence standard.

This decision is a positive development for employers as the recognition of a negligence-based independent tort of harassment would have gone further than the existing case law and exposed employers to greater potential liability for unintentional conduct. The Court of Appeal’s rejection of a negligence-based tort of harassment in this case is consistent with its prior decision in *Piresferreira v. Ayotte*, 2010 ONCA 384, in which the Court of Appeal similarly rejected the proposed new tort of negligent infliction of mental suffering in the employment context.

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Notwithstanding the *Merrifield* decision, harassment in the workplace remains a significant issue and a potential source of liability for employers, who have significant statutory obligations to take steps to prevent harassment both through the implementation of policies/training and by appropriately responding to any allegations of harassment in the workplace. Employers are well advised to ensure that their harassment policies are up-to-date, and that these policies are carefully followed to minimize the risk of liability.

If you require further information or support in reviewing your workplace harassment policy, please contact Jed Blackburn or any member of the Cassels Employment & Labour Group.

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