

FTR Now

Court of Appeal Reduces \$1.45 Million Award to Constructively Dismissed Employee

Date: May 23, 2014

The Court of Appeal for Ontario has released its decision in [Boucher v. Wal-Mart Canada Corp.](#) This case made headlines in 2012 after a jury trial awarded more than \$1.45 million in compensatory, mental suffering, aggravated and punitive damages to Meredith Boucher for her claim that she was constructively dismissed as a result of the bullying and abusive conduct of her store manager.

In its decision, the Court of Appeal reduced the punitive damages awarded against the store manager from \$150,000 to \$10,000, and against Wal-Mart from \$1,000,000 to \$100,000. The rest of the appeal was dismissed.

In this *FTR Now*, we discuss the decision and its implications.

THE BACKGROUND FACTS

Ms. Boucher began working at Wal-Mart in 1999. In November 2008, she accepted a transfer to work at Wal-Mart's Windsor store as an assistant manager, where she reported to the store manager. Initially, Ms. Boucher and the store manager worked well together, but their relationship changed in May 2009 following a dispute about the failure to fill out a temperature log for the coolers where food was kept.

After that incident, the store manager began to bully Ms. Boucher, often in front of other co-workers. Ms. Boucher filed a complaint against the store manager, but the bullying continued until Ms. Boucher left her employment in November 2009. Wal-Mart encouraged her to return to work so the parties could work together to address her concerns; however, Ms. Boucher refused and instead commenced an action against Wal-Mart and the store manager. Notwithstanding Ms. Boucher's refusal to return to work, and the fact that her employment contract limited her termination pay to 20 weeks, Wal-Mart continued to pay Ms. Boucher for eight months.

THE TRIAL AND JURY AWARD

Ms. Boucher's claim against Wal-Mart and the store manager was tried by judge and jury. As is normal for a jury trial, no reasons for the decision were released. The jury awarded Ms. Boucher

damages of more than \$1.45 million comprised of:

- 20 weeks' salary;
- \$200,000 in aggravated damages against Wal-Mart for the manner in which she was dismissed;
- \$1,000,000 in punitive damages against Wal-Mart;
- \$100,000 for intentional infliction of mental suffering against the store manager, for which Wal-Mart was vicariously liable; and,
- \$150,000 in punitive damages against the store manager, for which Wal-Mart was vicariously liable.

This was the highest award for aggravated and punitive damages in Canadian employment law history.

Wal-Mart and the store manager appealed the award challenging both their liability and the quantum of the damages awarded. Ms. Boucher cross-appealed, challenging the dismissal of her claim for loss of income to age 65. The appeals were heard on October 7, 2013.

THE COURT OF APPEAL'S DECISION

THE STORE MANAGER'S APPEAL

The Court of Appeal dismissed the store manager's appeal on liability and quantum with respect to intentional infliction of mental suffering. It found there was ample evidence for a reasonable jury to conclude that the store manager intended to subject Ms. Boucher to his behaviour in an attempt to make her quit her job. The Court concluded that this intention was sufficient to establish liability for this tort. While the Court acknowledged that the \$100,000 damages award was high, it concluded that it was reasonable considering the impact the store manager's conduct had on Ms. Boucher. The Court of Appeal did find that the trial judge erred in her instruction to the jury on the essential elements of the tort of intentional infliction of mental suffering. However, it found that the error was inconsequential and did not result in an injustice.

The Court allowed the store manager's appeal on the quantum of the punitive damages award and reduced the award from \$150,000 to \$10,000. It found that once the tort damages for intentional infliction of mental suffering were upheld, an additional award of \$150,000 in punitive damages was not rationally required. The Court concluded that the tort damages alone were sufficient when combined with a modest award of \$10,000 in punitive damages to provide retribution for Ms. Boucher, denounce the store manager's conduct, and deter others from engaging in similar conduct.

WAL-MART'S APPEAL

Wal-Mart's appeal against liability and quantum of the aggravated damages was dismissed. The majority of the Court rejected its argument that the judge's failure to specifically caution the jury about the prospect of double recovery caused the jury to err and award \$200,000 in aggravated damages against Wal-Mart. It was the employer's position that the jury had already compensated Ms. Boucher for mental suffering when it awarded damages against the store manager for intentional infliction of mental suffering. The majority disagreed, finding that there was sufficient evidence of Wal-Mart's misconduct to ground an award of mental distress damages against the employer itself. Further, the majority found that the \$200,000 awarded, while high, was not so plainly unreasonable as to merit reduction. One justice dissented on this point, and would have reduced the aggravated damages to \$25,000.

Importantly, however, the Court allowed Wal-Mart's appeal against the quantum of the punitive damages award and reduced the amount awarded from \$1,000,000 to \$100,000. It found that the award of \$1,000,000 was not rationally required to denounce or punish Wal-Mart, given the very high aggravated damages award and that the company's misconduct fell well short of the standard required to justify such a large award. The Court noted that Wal-Mart's misconduct lasted less than six months, it did not profit from any wrong committed, and it did not set out to force Ms. Boucher to resign.

The Court also found that the trial judge erred when she instructed the jury on the basis for the award of punitive damages against Wal-Mart. Specifically, she told the jury that a punitive damages award could be awarded based on the store manager's infliction of mental suffering on Ms. Boucher. This was an error because punitive damages cannot be awarded against an employer in the absence of reprehensible conduct specifically attributable to the employer. Despite this error, the Court did not overturn the punitive damages award because there was sufficient evidence to support the jury's award of punitive damages based on the finding that Wal-Mart, among other things, failed to take appropriate steps to address Ms. Boucher's complaint and to protect her from the store manager's misconduct.

MS. BOUCHER'S CROSS-APPEAL

Ms. Boucher cross-appealed and claimed loss of earnings from the date of her constructive dismissal to retirement age. The Court rejected this claim because Ms. Boucher did not suffer an ongoing loss of earning capacity. The evidence established that she recovered from the store manager's conduct in less than two months after she left Wal-Mart. The Court noted that Ms. Boucher did not have guaranteed employment to age 65 and it was always open to Wal-Mart to terminate her employment with notice or with pay in lieu of notice.

RESTORING BALANCE TO PUNITIVE DAMAGES AWARDS

The Court's decision to reduce the punitive damages award against Wal-Mart has restored balance to the quantum of punitive damages awarded in a wrongful dismissal action. The punitive

damages awarded by the jury were almost twice as large as next largest award in a reported employment law case. In fact, punitive damages in the employment law context have rarely exceeded \$100,000 and then only in egregious case involving more serious, and longer-term misconduct than that attributed to Wal-Mart. By reducing the punitive damages award so significantly in this case, the Court of Appeal has reaffirmed the principles of rationality and proportionality that must underlie a punitive damages award.

The decision is also notable because it affirms an award for punitive damages *against an employer* cannot be based solely on an employee's wrongdoing. The employer itself must have engaged in conduct that is harsh, offensive, high-handed, or otherwise warranting punitive damages. Mere negligence by the employer is not sufficient. However, an employer may still be vicariously liable for an award of punitive damages *against an employee* made based on the employee's misconduct.

If you would like further information about this decision, or have any other employment-related inquiry, please contact Shane Todd at 416.864.7026, Samantha Seabrook at 416.864.7024 or your [regular Hicks Morley lawyer](#).

The articles in this Client Update provide general information and should not be relied on as legal advice or opinion. This publication is copyrighted by Hicks Morley Hamilton Stewart Storie LLP and may not be photocopied or reproduced in any form, in whole or in part, without the express permission of Hicks Morley Hamilton Stewart Storie LLP. ©