



# SMHI LEGAL NOTES

STEINBERG MORTON HOPE & ISRAEL LLP

BARRISTERS & SOLICITORS • TRADEMARK AGENTS

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## Ignore Your Employees' Complaints at Your Peril

Wal-Mart recently made headlines, but not for its low prices or its latest grand opening. No, Wal-Mart was in the news because it was on the losing end of a lawsuit brought by a former assistant store manager. One of the world's largest retailers failed this employee and now it is paying dearly. Employers, both big and small, would be wise to learn from Wal-Mart's mistakes.

### The Facts

Meredith Boucher had worked for Wal-Mart for more than 20 years. She was a good employee and during her time with Wal-Mart she had received a number of promotions. In November 2008, she accepted the position of assistant manager at one of Wal-Mart's Windsor stores.

Initially, she got along very well with the store's manager, Jason Pinnock. In fact, he chose her over eight other candidates to be his Lead Assistant Manager. During her first performance evaluation in April 2009, Pinnock described her as a great asset to any team. Boucher was well liked by the other employees, who described her as fun-loving, lively and a positive leader.

In May 2009, Boucher was sent on a month long course at Wal-Mart's Food Academy. In her absence, another assistant manager assumed her duties with respect to the temperaure logs for the food coolers that were part of Boucher's responsibilities. Unfortunately, this person failed to keep the log for one of the departments. Upon her return, Pinnock implied that Boucher should complete the log because he did not want it negatively impacting either his or the store's evaluations.

Boucher refused the request and this led to a complete breakdown in the relationship between her and Pinnock. His first shot at Boucher was a disciplinary "coaching" session. Boucher felt she had been unfairly disciplined and in line with Wal-Mart's workplace policies she decided to use the company's *Open Door Communication Policy*. She and another assistant manager met with the *District People Manager* to express their concerns about Pinnock's behaviour. Nothing happened. Although the meeting was to be a confidential meeting, Pinnock had been made aware of it and was livid. He berated Boucher, using vile and nasty language.

Over the next five months, Pinnock's verbal attacks and humiliation of Boucher escalated. In addition to the profanities, he often belittled and demeaned her in front of other employees and, at times, customers, calling her stupid and an idiot, among other things.

At the end of October 2009, again following Wal-Mart's workplace policies, Boucher met with three senior management representatives to voice her concerns. Although they agreed to investigate and even encouraged her to report any new incidents, they also warned her that she would be held accountable if her allegations were found to have no basis.

Pinnock's abuse continued and Boucher, as directed, reported the incidents to the *District People Manager*.

The investigation by senior management, such as it was, was completed a few weeks later. They met with Boucher to let her know that they found her claims to be unsubstantiated and that she was simply attempting to undermine Pinnock's authority. Further, they intended to discipline her, though they had not yet decided how. Aside from being spoken to about his use of inappropriate language, Pinnock was not disciplined or even cautioned about his behaviour.

A few days later, Boucher reached her limit when Pinnock grabbed her by the elbow and, in front of a group of her co-workers, told her to prove to him that she could count to ten.

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*The articles in SMHI Legal Notes are necessarily of a general nature and cannot be regarded as legal advice. Our firm will be pleased to provide additional details on request.*

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He initiated the count and told her to count out loud with him. The incident concerned ten extra skids of product that had been delivered overnight but that had not been unloaded. Boucher left the store completely humiliated.

In a last ditch effort, Boucher sent Wal-Mart an email stating that she would not be returning to work until her complaints about Pinnock were resolved. Nothing was done and she never returned to work. When Pinnock learned that she was gone, he was overjoyed, having finally accomplished his goal of getting Boucher to quit. A few weeks later, Boucher commenced a lawsuit against Wal-Mart and Pinnock.

### Evidence Presented at Trial

During the trial, Wal-Mart held itself out as a business that regards its employees highly and whose workplace policies reflect this concern for its employees. Those policies included:

- The Open Door Communication Policy, whereby Wal-Mart encourages its employees to report on a confidential basis concerns about how its stores are operated or its employees treated.
- A Prevention of Violence in the Workplace Policy.
- A Harassment and Discrimination Policy, the purpose of which is to protect employees from unwelcome conduct that offends a person's feelings.
- Wal-Mart requires all of its employees to treat each other with dignity and respect.
- Wal-Mart undertakes to take all employee reports of incidents seriously and to protect an employee making a complaint from acts of retaliation.

During the trial, evidence was tendered by Boucher regarding the effect Pinnock and Wal-Mart's behaviour had on her:

- She could not eat or sleep.
- She had abdominal pain.
- She lost weight and began vomiting blood.
- Her doctor diagnosed the symptoms as stress-related.
- Her doctor referred her to a psychiatrist.
- Her co-workers testified that she went from a fun-loving leader to a defeated and broken person.

### The Jury's Decision

Although jury trials are not common in Canada, Boucher elected to have her case heard by judge and jury. The jury found that both Pinnock and Wal-Mart were liable for the treatment of Boucher and that both had to pay monetary damages totalling \$1.45 million. The breakdown of the damage

awards was as follows:

- Equivalent of 20 weeks salary, as specified in her employment contract.
- \$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 Pinnock (for whom Wal-Mart is vicariously liable as Pinnock's employer).
- \$150,000 in punitive damages against Pinnock (for whom Wal-Mart is vicariously liable as Pinnock's employer).

### The Court of Appeal

Wal-Mart and Pinnock appealed the decision with respect to both liability and the amount of damages.

One of the difficulties of a jury trial is that the jury's deliberations are private and, unlike in a trial by judge alone, reasons for their decision are not provided. Therefore, the appellate court must decide whether the evidence tendered by the parties could reasonably support the jury's findings of liability and, if so, the quantum of damages.

#### *Intentional Infliction of Mental Suffering by Pinnock*

There are three elements that Boucher had to prove with respect to the intentional infliction of mental suffering:

1. The defendant's conduct was flagrant and outrageous;
2. The defendant's conduct was calculated to harm the plaintiff; and
3. The defendant's conduct caused the plaintiff to suffer a visible and provable illness.

The court concluded that the evidence tendered did support each of the three elements of the tort. It found that the evidence demonstrated that Pinnock's conduct was flagrant and outrageous and that as a result Boucher suffered physical symptoms, which were confirmed by her doctor. The court also found that the evidence supported Boucher's contention that Pinnock wished to cause her so much stress that she would quit her job.

With respect to the \$100,000 damages award, the court agreed that it was very high. However, the court was not persuaded that it was an unreasonable amount given the severe harm to Boucher as a direct result of Pinnock's actions. The court stated, "The jury represents the collective conscience of the community. The magnitude of their award shows that they were deeply offended by Pinnock's mistreatment of Boucher. We are not justified in substituting our own award unless we

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are satisfied the jury's award is so inordinately high as to be plainly unreasonable. On this record I am not so satisfied."

### *Aggravated Damages Against Wal-Mart*

Wal-Mart had breached its employment contract with Boucher. It had treated Boucher unfairly, particularly in its failure to deal with Pinnock's misconduct or Boucher's complaint, both of which led to Boucher's constructive dismissal.

The court concluded that Wal-Mart's own conduct justified a substantial award for aggravated damages and while \$200,000 was also very high, it was not unreasonably so.

### *Punitive Damages*

The amount of the punitive damages, however, was another matter.

Many people's understanding of punitive damages comes from south of the border, where punitive damage awards are often in the millions. Not only are such awards in Canada substantially less, punitive damage awards are the exception and not the rule.

The Supreme Court of Canada has stated the following in regards to punitive damage awards. "They are meant to punish the defendant in exceptional cases where the defendant's conduct has been 'malicious, oppressive and high-handed' and 'represents a marked departure from the ordinary standards of decent behaviour'". However, "if the award of punitive damages when added to compensatory damages, produces a total sum that is so 'inordinately large' that it exceeds what is 'rationally' required to punish the defendant, it will be reduced or set aside on appeal."

With respect to Pinnock, the appellate court found that his misconduct met this exceptional standard of malicious and oppressive conduct. But the Court of Appeal concluded that an additional award of \$150,000 against an individual employee was not rationally required to punish Pinnock, given the substantial award for intentional infliction of mental suffering. Therefore, the punitive damage award against Pinnock was reduced to \$10,000, thus giving modest effect to the jury's view of his behaviour.

With respect to Wal-Mart, the court also found that the evidence reasonably supported a finding that Wal-Mart's own conduct, apart from Pinnock's, was reprehensible, thus supporting an award of punitive damages. However, "its misconduct falls far short of the gravity and duration of the misconduct in other cases that have attracted high punitive damages awards." In addition, Wal-Mart is not only responsible for its damage awards, but is also vicariously liable for Pinnock's. In addition, there were substantial trial costs. Based on the fore-

going, that the misconduct lasted less than six months, that Wal-Mart did not profit from the wrong and that it had not set out to force Boucher's resignation, the punitive damages award was lowered from one million dollars to \$100,000.

### **The Lessons**

Although the amount of the punitive damages was substantially reduced, it is important to note that the Court of Appeal's decision did not exonerate either Wal-Mart or Pinnock. In fact, in upholding the jury's finding on the issue of liability, the court was quite scathing in its comments about how Wal-Mart and Pinnock conducted themselves.

Perhaps the most egregious behaviour on the part of Wal-Mart was its utter failure in these circumstances to follow its own poli-

cies. In previous issues of *SMHI Legal Notes*, we have written about the types of policies that a workplace is legally required to have. But it is not sufficient to simply prepare and forget about these documents. They must be implemented.

In addition, it is incumbent upon the employer to ensure that its employees, especially its managers, understand the policies and how to put them into practice.

Another lesson from this case is the importance of a proper, fair and impartial investigation when a complaint is brought forward by an employee. This is particularly important when the alleged harasser is a manager.

Being an employer is not easy. There are so many things that an employer must be aware of. This is why professional assistance is so valuable. Our law firm is well versed in employment and corporate law. We would be pleased to be part of your team. ☞

The following are a few of the articles we've published in the past and that touch on some of the topics raised in this article. In addition, we have written extensively about termination of employment in various circumstances.

**Constructive Dismissal Part I**  
(Winter 2007)

**Constructive Dismissal Part II**  
(Summer 2007)

**Damages: A Brief Overview**  
(Spring 2009)

**Violence and Harassment in the Workplace**  
(Winter 2010)

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# Canada's New Anti-Spam Law

Earlier this month, you may have begun receiving a barrage of emails asking you to confirm that you wished to continue receiving email from the sender. These emails were prompted by Canada's newest law: Canada's Anti-Spam Legislation (CASL)

CASL is this government's attempt to deal with the plethora of unwanted emails, from those wanting your banking information to requests for money from a Nigerian prince to ads for medications to aid with every kind of ailment.

The main thrust of the legislation is to prohibit the sending to an electronic address a commercial electronic message unless the recipient has consented to receiving it, whether the consent is express or implied. Further, the commercial electronic message must include the following:

- the identity of the person who sent the message and the person, if different, on whose behalf it is sent;
- information, which must be valid for at least 60 days, enabling the recipient to readily contact one of the senders;
- an unsubscribe mechanism.

Commercial activity is very broadly defined in the Act as "any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, whether or not the person who carries it out does so in the expectation of profit."

Charities soliciting donations are specifically exempted from the above requirements, but it appears that the local

PTA who wants to invite parents to a fundraising BBQ may not be able to send out an invitation by email without specific permission from the recipients.

If you are a business and have an existing email list that you regularly send to, you *may be* ok. The exemption applies if you have an existing business relationship with those on your list. In this case you are considered to have the recipients implied consent. An existing business relationship is defined as one where the recipient has purchased or leased something from your business within the last two years or has made an inquiry in the last six months.

A further exemption from the requirement for express permission to send out a commercial electronic message is if you have a personal or family relationship with the recipient. That the drafters of this legislation felt it necessary to spell this out, demonstrates how sweeping this law is.

Aside from its far reaching application, this Act sets out significant financial penalties for non-compliance. For individuals the penalties can reach up to one million dollars and for corporations they can reach up to ten million dollars per violation. In addition, beginning July 1, 2017, this legislation will allow individuals to sue those they feel have affected them by a contravention of the CASL.

If you, your business or your organization are not sure if you are subject to the CASL, our lawyers can help you figure it out. We can also assist you in drafting a plan for compliance. 

## A Legal Comedy for a Summer Night

Not all lawyer movies are serious. For a lighter look at the law consider this oldie but goodie: *Legally Blonde*. When Elle is dumped by her boyfriend she decides to follow him to law school to get him back. Once there, she discovers she has a knack for the law.

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