Court of Appeal Affirms That Moral Damages May Be Awarded for Employer Misconduct Causing Mental Distress

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On February 15, 2017, the Ontario Court of Appeal released *Doyle v. Zochem Inc.*, 2017 ONCA 130, a significant decision in which the Court affirmed that moral damages may be awarded for termination-related employer conduct that is unfair or is in bad faith and which causes the employee mental distress. Notably, the decision also affirmed that the same employer conduct may justify awards for both moral damages and damages under the Ontario *Human Rights Code* (the "Code") on the basis that these damages serve different purposes.

The Facts

The plaintiff, Melissa Doyle, had worked for Zochem for nine years as plant supervisor in a mainly male-dominated plant. Doyle suffered from depression, of which the assistant general manager (the "AGM") was aware. For a number of years, Doyle was sexually harassed by another employee of Zochem, Rogers, the plant maintenance manager. Some examples of this harassment included:

- Rogers would stare at her breasts and purport to take a picture of them;
- He referred to their private parts as their "little friends";
- He described "bunny ears", meaning her feet up behind her ears (as a sexual position);
- He kept telling her she needed to get "laid", or needed "a little pounding", asking if she was "getting any".

Doyle felt pressured to keep Rogers on her side as his cooperation was required in order for Doyle to be successful in performing her duties; Rogers often unreasonably refused to cooperate with Doyle. Rogers' sexual harassment and general mistreatment of Doyle eventually culminated at a work meeting. During the meeting, Doyle raised legitimate safety concerns relating to operational logistics at the plant, for which Rogers insulted and demeaned Doyle in front of other employees. Subsequently, Doyle reported to the AGM that Rogers had been sexually harassing her for a period of time. The AGM told Doyle to stop being so emotional, criticized her for placing Rogers' reputation on the line, and performed a very cursory investigation of her sexual

harassment complaints. Despite advising Doyle that her employment would not be affected by her complaint, the AGM proceeded to terminate her employment on a without cause basis 5 days later.

Doyle commenced an action for wrongful dismissal and claimed damages for the intentional infliction of mental distress against the AGM personally.

The trial judge found that in leading up to the termination of her employment, Zochem had engaged in a range of offensive conduct, which included:

- Pressuring Doyle not to pursue her claim of sexual harassment to protect Rogers' reputation;
- Misrepresenting to Doyle that her job was safe although the decision to terminate her employment had already been made;
- Recruiting other employees to 'dig up dirt' on Doyle to discredit Doyle in an attempt to justify the termination of her employment; and
- Taking Doyle's keys from her purse without permission in order to bring her car around to the front of the building at the time of her termination.

In addition to wrongful dismissal damages, the trial judge awarded Doyle $25,000 in damages for violations of the Code, finding that Doyle's gender and her sexual harassment complaint were likely the most significant reasons for her termination. The trial judge also awarded Doyle $60,000 in moral damages on the basis of Zochem's conduct both leading up to and following the termination of her employment, including:

- Zochem's cursory investigation and the "insensitive to the point of verging on cruel" dismissal of her sexual harassment complaint against Rogers;
- Zochem's disingenuous advice to Doyle that her employment was not in jeopardy following the complaint even though the decision to terminate her employment had already been made;
- Zochem's after-the-fact attempts to justify the termination on the grounds of concerns with Doyle's performance;
- After the dismissal, Zochem's denial of Doyle's application for Zochem's self-funded short-term disability benefits despite receiving a letter from Zochem's doctor that Doyle qualified for the benefits.

The trial judge highlighted that there was ample evidence that the above-noted conduct resulted in significant mental distress for Doyle. The trial judge further found that because the AGM was aware of Doyle's depression, she should have recognized the effect of her insensitivity with respect to the sexual harassment complaint, as well as the manner of the termination, on Doyle. Although the trial judge found that the AGM's conduct did not rise to the level of the tort of intentional infliction of mental distress, the effect of her actions on Doyle's mental state contributed to the trial judge's award of moral damages.

In upholding the trial judge's damages award, the Court of Appeal rejected Zochem's argument that the $25,000 award of human rights damages for sexual harassment should be deducted from the $60,000 award of moral damages because the same conduct underlay both awards. The Court found that while there was some overlap in the conduct that justified each award of damages, the two types of damages served a different purpose. The Court of Appeal affirmed that human rights damages are

remedial damages, and compensate for the intrinsic value of the infringement of rights under the Code. Such damages are compensation for loss of the right to be free from discrimination and the experience of victimization. The Court of Appeal held that moral damages, on the other hand, are awarded as a result of dismissal where the employer has conducted itself in a manner that is unfair or in bad faith, and which results in mental distress.

Significance of Decision

The Court of Appeal's decision provides important clarification with respect to the types of circumstances that might give rise to moral damages, and its reasoning contains a number of important take-aways:

- Pre- and post-termination employer conduct may give rise to an award for moral damages, if the conduct is in some way related to the manner of dismissal;
- The same employer conduct may justify both human rights damages and moral damages;
- The denial of short term disability benefits without adequate evidence may be considered a breach of an employer's good faith obligation and may be a factor in justifying an award for moral damages.

The *Zochem* decision must also be read in the context of the recently expanded employer obligations under the Ontario *Occupational Health and Safety Act* relating to investigations of workplace sexual harassment, and corresponding employer duties regarding employee psychological health. Both the trial court and Court of Appeal decisions emphasized the psychological impact on Doyle of Zochem's pre- and post-termination conduct in justifying the award of moral damages. As such, the findings in *Zochem* affirm the fact that an employer's failure to consider the mental-health effects of employment-related decisions may result in additional damages, particularly where the employer is aware of an employee's pre-existing mental health condition.

By

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