A Hard Rains's A-Gonna Fall: How Employers Pay for Not Having a Bullying and Harassment Policy

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Employers are facing increasing costs as a result of incidents of bullying and harassment in the workplace, and must be aware of the multiple avenues from which liability can arise. British Columbia's *Human Rights Code* prohibits discrimination against a person regarding employment on a number of grounds, and provides the Human Rights Tribunal with the authority to make financial awards for injury to a complainant's "dignity, feelings and self-respect". In addition, British Columbia's *Workers Compensation Act* extends benefits to employees who suffer from a mental disorder caused by a significant work-related stressor, including bullying and harassment. In Ontario, the courts have also shown a willingness to award increased damages where an employee's termination involves an aspect of harassment, including exercising their authority to award human rights damages.

In a 2013 human rights decision, *Kelly v University of British Columbia* ("*Kelly*"), the B.C. Human Rights Tribunal more than doubled the previous high-water mark of $35,000 for injuries to a complainant's dignity when it awarded $75,000 to a UBC medical student with a mental disability who had been terminated from the school's medical residency program. In 2015, the British Columbia Supreme Court overturned the Tribunal's decision, finding that there was no evidence or principle that supported more than doubling the previous high for a similar injury. However, the Court did refrain from stating that the Tribunal could not award more than $35,000 provided the award was supported by the evidence.

In a 2015 case, *Silvera v Olympia Jewellery Corporation* ("*Silvera*"), the Ontario Superior Court awarded a retail employee more than $312,000 in damages. Before being wrongfully terminated, the employee had been subjected to a series of sexual assaults and incidents of sexual harassment committed by her supervisor in the workplace. In addition to awarding significant damages arising from the dismissal, the Court awarded separate damages against the supervisor and the employer as a result of the supervisor's tortious conduct, breach of his fiduciary duty and human rights

violations. In particular, the court fixed general damages for the supervisor's conduct at $90,000, punitive damages at $10,000, damages under Ontario's *Human Rights Code* at $30,000, and damages for loss of earning capacity at $33,924.75 as a result of the employee's severe discomfort with working with older men moving forward.

Silvera and *Kelly* evidence the formidable damage awards that courts and tribunals are empowered to make in order to ensure that workplaces are free from bullying and harassment. Proactive employers should have clear and comprehensive bullying and harassment policies that define unacceptable forms of behaviour, and outline procedures for training, reporting and investigating. Training of employees and managers in prevention and dealing with harassment is also advisable. Through the use and application of such policies, employers can ensure that harassment of any kind is not tolerated at the workplace and hopefully avoid legal liability.

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