

Ontario worker's discrimination complaint dismissed for lack of evidence

'An applicant's belief, no matter how strongly held, is not evidence'



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Workplace discrimination involves more than just an employee's belief that it's the reason for unfair treatment, according to Natalie Nicholson, an employment lawyer at Sherrard Kuzz in Toronto.

“To make out a *prima facie* case of discrimination, an applicant must be able to point to facts beyond their own suspicion to connect the alleged unfair treatment they experienced to a ground protected by the [Human Rights] Code,” says Nicholson. “An applicant’s assumption or speculation about why an employer engaged in certain conduct, absent any facts to support their belief, will not suffice.”

The Ontario Human Rights Tribunal backed up this point in a recent decision dismissing a worker’s complaint of discrimination based on various incidents he experienced at work.

The worker was employed by Central Stampings, a commercial and industrial metal stamping company in Windsor, Ont.

On Aug. 17, 2017, a supervisor made an obscene gesture towards the worker. The worker complained about it and claimed that the same supervisor had subjected him to five other incidents of workplace harassment related to the supervisor’s conduct, assignments he had given him, and safety concerns.

Central Stampings held a meeting with the worker to discuss the six incidents. The company didn’t find a solution to the worker’s liking, and he felt that he didn’t receive a detailed explanation about how it handled his allegations.

The worker’s frustration boiled over on Sept. 22 when he used the plant’s radio to broadcast his issues with the supervisor. Central Stampings suspended him for his misconduct.

The worker filed a complaint with the Ontario Human Rights Tribunal, alleging that Central Stampings discriminated against him with respect to employment on the basis of sex. He claimed that the incident with the supervisor’s obscene gesture constituted sexual harassment and the other incidents amounted to workplace harassment. In addition, the suspension was unfair and was a reprisal under the Ontario Human Rights Code, the worker said.

Read more: [False allegations of harassment and discrimination can lead to discipline including dismissal](#), writes Stuart Rudner.

Belief is not evidence: Tribunal

The tribunal noted that the worker clearly believed that he had been unfairly treated in the workplace – he disagreed with the type of job assignments he was given, how the company handled his safety concerns, and his ability to use the plant radio. He also believed that his suspension was unfair.

However, the tribunal found that the worker's belief and assumptions about why he was treated unfairly did not constitute evidence that there were discriminatory reasons. Even if all of the incidents happened as the worker claimed, there needed to be proof that they were the result of discrimination based on a protected ground under the code, said the tribunal.

The distinction between fact and belief is critical and often misunderstood by people who make human rights complaints, says Nicholson.

“An applicant must provide factual evidence that links the alleged conduct to a code ground,” she says. “If the applicant fails to discharge this onus, the claim cannot succeed.”

Although the worker made allegations regarding six workplace incidents, he didn't point to anything that would indicate that the unfair treatment was because of a protected ground, said the tribunal. The worker specifically made an allegation of sex discrimination in relation to the obscene gesture, but there wasn't any evidence that the worker's sex was a factor in the supervisor's actions. It was “simply insulting,” the tribunal said.

“Even though conduct or a comment that is inappropriate, offensive, or insulting is unwanted in a workplace, it will only be discriminatory if sex (or another code ground) was a factor,” says Nicholson.

Read more: An independent contractor was ordered to cover a company's \$20,000 legal costs because of an unsupported discrimination complaint that the Alberta Human Rights Tribunal said [abused the human rights process](#).

By the same token, for the Ontario worker's suspension to be a reprisal, it would have to have been in response to an attempt by the worker to assert his rights under the code. Again, there was a lack of evidence that the worker had done so, said the tribunal.

The tribunal determined that the worker's allegations would have no reasonable prospect of success if they went to a full hearing.

“The tribunal has repeatedly said that an applicant's belief, no matter how strongly held, is not evidence upon which the tribunal might find that discrimination has occurred,” said the tribunal in summarily dismissing the complaint.

While employers should be cautious if an employee feels that they are being treated unfairly, there is a distinction between unfair and discriminatory treatment, says Nicholson.

“More and more often, employers find themselves faced with an allegation of discrimination by an employee who simply disagrees with the way they were treated or a decision made by the employer,” she says. “However, a human rights complaint is not the appropriate forum for an employee to address general allegations of unfairness and an employer should not hesitate to vigorously defend its position when faced with a baseless claim of discrimination.

“Doing so may be an important tool to discourage employees from bringing claims without merit in the future.”

See *Nguyen v. Central Stampings Limited*, 2022 HRTO 485.