2012 CarswellOnt 8965, 2012 HRTO 1393, 2012 C.L.L.C. 230-022

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Taylor-Baptiste v. O.P.S.E.U.

Mariann Taylor-Baptiste (Applicant) and Ontario Public Service Employees Union and Jeff Dvorak (Respondents)

Ontario Human Rights Tribunal

David A. Wright Adjud.

Judgment: July 16, 2012
Docket: 2009-04368-I

Counsel: Selwyn A. Pieters for Mariann Taylor-Baptiste

Danny Kastner, Linsay Scott for Respondents, Ontario Public Service Employees Union, Jeff Dvorak

Subject: Constitutional; Employment

Human rights --- What constitutes discrimination — Harassment

Workplace harassment — Respondent correctional officer, who was also president of local respondent union (local president), posted comments about applicant jail manager on blog directed at local union members during collective bargaining — Comments alleged nepotism and made reference to applicant's common law spouse, who was Deputy Superintendent at jail, and applicant's former husband, who was president of union local at different jail — Applicant brought application alleging that blog comments constituted discrimination and harassment in workplace contrary to s. 5 of Human Rights Code — Application dismissed — In circumstances, blog comments were not harassment "in the workplace" under s. 5(2) of Code — Comments were made on blog identified with union that, while open to public, was directed at communication between union members and their leadership — There was no evidence local president made postings while at work for employer — There may be circumstances in which postings in cyberspace are sufficiently connected that they are "in the workplace" — However, even giving words broad interpretation, s. 5(2) could not apply to present blog, in context.

Human rights --- What constitutes discrimination — Sex — Employment — Miscellaneous

Respondent correctional officer, who was also president of local respondent union (local president), posted comments about applicant jail manager on blog directed at local union members during collective bargaining — Comments alleged nepotism and made reference to applicant's common law spouse, who was Deputy Superintendent at jail, and applicant's former husband, who was president of union local at different jail — Applicant brought application alleging that comments constituted discrimination and harassment in workplace contrary to s. 5 of Human Rights Code — Application dismissed — Applicant's Code right to be free from workplace discrimination and harassment had to be balanced with respondents' rights under Charter of Rights and Freedoms to express themselves on matters of concern in union-management relationship when determining whether there was discrimination under s. 5(1) of Code

— Respondents did not discriminate against applicant with respect to employment — Comments fundamentally related to union's and local president's role as representative of members of bargaining unit in their relationship with employer — Such commentary is at core of constitutional protections of freedom of association and expression and union's right to operate independently of employer — Comments did not lead to any Code-related effects in workplace.

Human rights --- What constitutes discrimination — Marital status — Employment

Respondent correctional officer, who was also president of local of respondent union (local president), posted comments about applicant jail manager on blog directed at local union members during collective bargaining — Comments alleged nepotism and made reference to applicant's common law spouse, who was Deputy Superintendent at jail, and applicant's former husband, who was president of union local at different jail — Applicant brought application alleging that comments constituted discrimination and harassment in workplace contrary to s. 5 of Human Rights Code — Application dismissed — Applicant's Code right to be free from workplace discrimination and harassment had to be balanced with respondents' rights under Charter of Rights and Freedoms to express themselves on matters of concern in union-management relationship when determining whether there was discrimination under s. 5(1) of Code — Respondents did not discriminate against applicant with respect to employment — Comments fundamentally related to union's and local president's role as representative of members of bargaining unit in their relationship with employer — Such commentary is at core of constitutional protections of freedom of association and expression and union's right to operate independently of employer — Comments did not lead to any Code-related effects in workplace.

Cases considered by *David A. Wright Adjud.*:

Alberta v. A.U.P.E. (2008), 2008 CarswellAlta 796, [2008] L.V.I. 3774-1, (sub nom. *Alberta and A.U.P.E. ("R") (Re))* 174 L.A.C. (4th) 371 (Alta. Arb. Bd.) — considered

Alberta v. A.U.P.E. (2009), 2009 ABQB 208, 2009 CarswellAlta 484, (sub nom. *Alberta Union of Provincial Employees v. Alberta)* 473 A.R. 151, (sub nom. *A.U.P.E. v. Alberta)* 183 L.A.C. (4th) 1, (sub nom. *AUPE v. R.)* 2009 C.L.L.C. 220-025 (Alta. Q.B.) — referred to

Alberta v. A.U.P.E. (2010), [2011] 1 W.W.R. 457, (sub nom. *Alberta Union of Provincial Employees v. Alberta)* 482 A.R. 292, (sub nom. *Alberta Union of Provincial Employees v. Alberta)* 490 W.A.C. 292, (sub nom. *A.U.P.E. v. Alberta)* 2010 C.L.L.C. 220-048, 2010 ABCA 216, 2010 CarswellAlta 1181, 8 Admin. L.R. (5th) 23, 29 Alta. L.R. (5th) 273, (sub nom. *A.U.P.E. v. Alberta)* 196 L.A.C. (4th) 371 (Alta. C.A.) — referred to

Baisa v. Skills for Change (2010), 2010 CarswellOnt 11029, 2010 HRTO 1621 (Ont. Human Rights Trib.) — referred to

Brooks v. Total Credit Recovery Ltd. (2012), 2012 HRTO 1232 (Ont. Human Rights Trib.) — referred to

Dallaire v. Les Chevaliers de Colomb (2011), 2011 HRTO 639 (Ont. Human Rights Trib.) — referred to

Fraser v. Ontario (Attorney General) (2011), D.T.E. 2011T-294, 331 D.L.R. (4th) 64, (sub nom. *A.G. (Ontario) v. Fraser)* 2011 C.L.L.C. 220-029, 275 O.A.C. 205, 415 N.R. 200, 91 C.C.E.L. (3d) 1, (sub nom. *Ontario (Attorney General) v. Fraser)* [2011] 2 S.C.R. 3, 233 C.R.R. (2d) 237, 2011 CarswellOnt 2695, 2011 CarswellOnt 2696, 2011 SCC 20 (S.C.C.) — considered

Gurney v. McDonalds Restaurants of Canada (2011), 2011 HRTO 984 (Ont. Human Rights Trib.) — referred to

Janzen v. Platy Enterprises Ltd. (1989), 10 C.H.R.R. D/6205, [1989] 1 S.C.R. 1252, 89 C.L.L.C. 17,011, 95 N.R.

81, 25 C.C.E.L. 1, 47 C.R.R. 274, [1989] 4 W.W.R. 39, 59 D.L.R. (4th) 352, 58 Man. R. (2d) 1, 1989 CarswellMan 158, 1989 CarswellMan 328 (S.C.C.) — considered

Landau v. Ontario (Minister of Finance) (2011), 2011 HRTO 1521 (Ont. Human Rights Trib.) — considered

O.P.S.E.U. v. Ontario (Community Safety & Correctional Services) (August 11, 2008), Doc. 2005-1443, 2005-0530-0022 (Ont. C.E.G.S.B.) — referred to

O.P.S.E.U. v. Ontario (Ministry of Community Safety & Correctional Services) (2011), 2011 CarswellOnt 12111 (Ont. C.E.G.S.B.) — referred to

Ontario (Human Rights Commission) v. Farris (2012), 2012 ONSC 3876, 2012 CarswellOnt 8422 (Ont. Div. Ct.) — referred to

Race v. General Motors of Canada Ltd. (2011), 2011 HRTO 24 (Ont. Human Rights Trib.) — referred to

Romano v. 1577118 Ontario Inc. (2008), 2008 HRTO 9, 2008 CarswellOnt 1749, 64 C.C.E.L. (3d) 305 (Ont. Human Rights Trib.) — referred to

S.G.E.U. v. Saskatchewan (Ministry of Corrections, Public Safety & Policing) (2009), 2009 CarswellSask 913 (Sask. Arb. Bd.) — considered

Whiteley v. Osprey Media Publishing (2010), 71 C.H.R.R. D/195, 2010 HRTO 2152 (Ont. Human Rights Trib.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 2(b) — considered

s. 2(d) — considered

Human Rights Code, R.S.O. 1990, c. H.19

Generally — referred to

s. 5 — considered

s. 5(1) — considered

s. 5(2) — considered

Occupational Health and Safety Act, R.S.O. 1990, c. O.1

Generally — referred to

APPLICATION alleging discrimination and harassment in employment on basis of sex and/or marital status.

***David A. Wright Adjud.*:**

1 The applicant, Mariann Taylor-Baptiste, is a manager at the Toronto Jail ("Jail"), part of the Ontario Ministry of Community Safety and Correctional Services. The respondents are the Ontario Public Service Employees Union ("OPSEU"), which represents employees at the Jail, and Jeff Dvorak, who at the relevant time was an employee and President of the Jail's OPSEU local. The applicant alleges that the respondents discriminated against her through comments Mr. Dvorak posted on a blog directed at union members. The comments contained sexist stereotypes and identified her family status. The blog was generally open to the public, and Mr. Dvorak knew it was being read widely within the Jail.

2 The issue in this Decision is whether the blog posts violate the protections in s. 5 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), against "discrimination with respect to employment" and "harassment in the workplace" on the grounds of marital status and/or sex. While the facts are straightforward, they raise difficult and challenging issues and conflicting interpretive values. In what circumstances are statements outside work hours, on line, "with respect to employment" or "in the workplace"? In what circumstances, if any, can a manager make a *Code* claim against the union or its leaders for statements directed at union members about the workplace relationship?

3 The hearing was held on December 2, 16, and 20, 2011, and I heard oral evidence from several witnesses and extensive argument from the parties. My analysis turns principally, however, on the undisputed facts and the law.

Background

4 The applicant became the Deputy Superintendent of Programs at the Toronto Jail for the Ontario Ministry of Community Safety and Correctional Services (the "Ministry") in December 2008. Her common law spouse is Scott Gray, who is the Deputy Superintendent, Administration at the Toronto West Detention Centre. Her former husband is Alan Taylor-Baptiste, who is the president of the OPSEU local at the Ontario Correctional Institute, a different jail.

5 The respondent, Jeff Dvorak, is a correctional officer and was President of OPSEU Local 530 at the Toronto Jail from February 2008 to November 2009. Local 530 includes various employees at the Toronto Jail. OPSEU represents employees of the Ministry and the provincial government across the province.

6 In the fall of 2008, as collective bargaining between OPSEU members and the Province was underway, Mr. Dvorak started a blog about issues in the workplace using the name "wwwJocal530.blogspot.com". He states, and I accept, that its purpose was to communicate with the Local 530 membership, in particular in light of the ongoing negotiations. Other blogs were also started by various OPSEU members across the province at around the same time. Entries in Mr. Dvorak's blog, by both him and others who wrote comments, strongly criticize the employer, individual managers, politicians and journalists. The blog was widely read, commented on, and discussed within the workplace. Word about it spread by word of mouth, and it is clear that both bargaining unit members and those outside the bargaining unit were following the postings.

7 Many posts use strong language, profanity, are offensive and obviously hurtful to the individuals targeted. This was commented on by an anonymous poster on January 7, 2009:

> I would, however, caution against posting offensive language as it only reinforces the negative stereotypes the public and media hold of correctional officers.

> Your blog, unfortunately, is perceived as an extension of local 530. Therefore, we should be mindful of who might be viewing it (public/media/MCSCS Administrators).

These comments were most apt.

8 There is no dispute that the Toronto Jail workplace was very tense at this time for a number of reasons. Racist hate mail had been sent to several employees at the Toronto Jail, and a process for workplace restoration pursuant to orders of the Grievance Settlement Board was underway. See *O.P.S.E.U. v. Ontario (Community Safety & Correctional Services)* [(August 11, 2008), Doc. 2005-1443, 2005-0530-0022 (Ont. C.E.G.S.B.)], 2008 CanLII 70513 . Mr. Dvorak was a part of the three-member coordinating committee that was tasked with oversight, drafting and implementing changes in that process and worked with the applicant on one of the committees. The round of bargaining between the Ministry and OPSEU was extremely tense and described by Mr. Dvorak as "off the charts in terms of hostility". OPSEU felt that the Ministry was trying to "bargain in the media". It also had particular concerns about working conditions at the Toronto Jail.

9 The posts alleged to constitute discrimination against the applicant occurred on January 16, 2009. The first was written by Mr. Dvorak and reads as follows:

> **RO'S STEP Up**
>
> Yesterday our annex staff had a valid concern regarding the conditions they HAVE TO walk through to get to there [*sic*] work stations. Yet there [*sic*] deputy waited hours to call someone else to ask what she should do. First of all if you don't know the answers to something this simple Ms. Baptiste maybe you should call your boyfriend over at his office after all he is the only reason you got the job. Clearly all you have shown is an inability to handle even the easiest of situations or staff relations. Perhaps our senior administration should reconsider there [*sic*] hiring practices for deputy's [*sic*] and change the qualifications from having intimate knowledge off [*sic*] another deputy to something like maybe some experience doing the job, like Mr. Puntillo. Oh yeah I forgot doing the job for three years doesn't even get you an interview. Anyways congratulations to the annex staff well done and keep showing this employer they can't forget about you. I am out of town in Ottawa actually to tell some mp's and senators just what kind of conditions we are working in but will be back tomorrow until then keep up the good fight!!!!!!!!!

10 Various comments were made to this post. Mr. Dvorak had to approve such comments before they would appear on the blog on the internet. The comment alleged to violate the applicant's rights was made by "Anonymous" on January 21, 2009, at 7:45 AM and reads as follows (the capitals appear in the original):

> EXCELLENT WEBSITE GUYS AND GREAT COMMENTS/EDITORIALS BY YOUR PRESIDENT. GOOD TO SEE THAT THE MINISTRY IS A PROUD SUPPORTER OF THE "PETER PRINCIPLE" — ONE'S LEVEL OF INCOMPETANCE [*sic*] REACHED AND EXCEDED [*sic*] (could apply to all managers). AS A FELLOW CO. I WOULD LIKE TO POINT OUT THAT MR. TAYLOR-BAPTISTE, IS NOTHING LIKE HIS "X" AND SHE COULD ACTUALLY TAKE GUIDANCE FROM HIS WORK ETHIC. HE IS THE UNION SCHEDULING ASSISTANT HERE AT O.C.I. AND PERFORMS HIS DUTIES WITH EXCEPTIONAL COMPITANCE [*sic*]. HE IS ALL ABOUT FAIRNESS AND DOING THE RIGHT THING FOR THE STAFF. IN HIS PRESENT CAPACITY HE HAS TO RELATE TO MANAGERS AND ALWAYS CHAMPIONS STAFF ISSUES AND CONCERNS. HE HAS THE FULL SUPPORT OF ALL THE UNCLASSIFIED STAFF, AS WELL AS THE CLASSIFIED. "T.B." AS HE'S KNOWN, IS VERY DIPLOMATIC WITH ALL THE STAFF HERE, AND I BELIEVE HAS MANAGEMENTS RESPECT. IMAGINE THAT; A C.O. EARNING RESPECT! KEEP UP THE GOOD WORK AND LET MS. BAPTISTE KNOW THAT IF SHE NEEDS ANY HELP MAKING A DECISION IN THE FUTURE, I'M SURE HE WOULD HELP HER. MAYBE SHE

> SHOULD GO BACK TO HER MAIDEN NAME, OR GRAY, SO AS NOT TO BESMERCH [*sic*] THE GOOD "UNION" NAME OF TAYLOR-BAPTISTE.
>
> local 229, O.C.I. C.O.

11 The incident that precipitated Mr. Dvorak's post was a work refusal under the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, related to the non-removal of ice in the parking lot. Mr Dvorak felt that Ms. Taylor-Baptiste had not properly dealt with this issue as a manager. He also believed, even before this incident, that she had obtained her position through nepotism because of her relationship with Mr. Gray and wanted to comment on that, Mr. Dvorak asserts that nepotism is rampant in the Ministry, and that he himself has been the beneficiary of it.

12 Ms. Taylor-Baptiste alleges that the posts stereotype and belittle her on the basis of sex and marital status. They rely, she asserts, on stereotypical views about women who obtain positions of power doing so through sexual relations. They sexualize her through the reference to "intimate knowledge of another deputy". They stereotype her on the basis of marital status by suggesting that she only got the job because of her husband and expose her personal relationships with others working with the Ministry. They paint her, she alleges, as an incompetent woman in contrast to competent men such as her current partner, her ex-husband, and Mr. Puntillo.

13 Management raised concerns with Mr. Dvorak about the blog on several occasions. He was called to a meeting with the Superintendent of the Toronto Jail, Pauline Jones, held on January 26, 2009, and asked to remove references to managers in the blog. Ms. Jones sent Mr. Dvorak a letter dated February 9, 2009 asking him to remove posts that referred to specific managers and noted that aspects of the blog may violate the Workplace Discrimination and Harassment Prevention Policy ("WDHP"). Management did not however, highlight the posts referring to the applicant. Nothing was taken down, as Mr. Dvorak believed it was not appropriate for management to tell him what to put on a union local web site. Mr. Dvorak posted the following on January 26, 2009:

> **We're getting to them**
>
> Today I received a letter from my superintendent asking me to remove any posts from this site that contain a managers name. It was also suggested that I may be in contravention of the ministries wdhp policy. I filed a wdhp in 2005 and still haven't gotten a response so if I'm in contravention I have at least 4 years to wait for my discipline. It was also suggested that I was bordering on defamation of character, yet labelling all correctional officers as abusers and schemers is perfectly alright in the eyes of this ministry. I will stand by anything I have said in this web site and if it hurts someones feelings that's a shame but being labelled a knuckle dragging Neanderthal Racist sick time abuser hurt my feelings and I didn't see anyone from the ministry jump to my defence.

14 Following the expression of further concerns by the employer and advice from OPSEU and its lawyer, Mr. Dvorak stopped making new postings on the blog on February 12, 2009, and several days later made the blog inaccessible without a password. According to Mr. Dvorak, he did not provide the password to anyone else, and at that point the comments were no longer available. Ms. Taylor-Baptiste suspects, however, that others may have accessed the blog after that time. There is, however, no evidence of this.

15 Mr. Dvorak was not disciplined for the blog. After the collective agreement was concluded, the union and employer agreed that employees who had made blog postings during negotiations and had not already been disciplined would not be disciplined. The agreement was captured in a letter dated March 1, 2009 from David Logan, Assistant Deputy Minister of the Employee Relations Division, HR Ontario, Ministry of Government Services, to Warren (Smokey) Thomas, the President of OPSEU, as follows:

> The Employer shall not seek to impose any further discipline in respect of any employee who has been identified pursuant to Article 23 2 3.1 (Central Agreement), if any, or any employee who has been identified as making any

> inappropriate entries on an internet blog forum that is managed or operated by or under any OPSEU local during the parties' Collective Agreement negotiations from November 4, 2008 to March 1, 2009 unless the disciplinary action had been imposed before March 1, 2009.

16 Ms. Taylor-Baptiste filed a WDHP complaint against Mr. Dvorak, although it was never provided to Mr. Dvorak by the employer. The complaint, however, was not pursued as a result of the agreement between the employer and the union. On July 27, 2009, Ms. Jones, the Superintendent of the Toronto Jail, wrote to the applicant as follows:

> Following up on our earlier meeting regarding the resolution of this complaint, and the decision not to pursue further action, this formal response is in regards to your letter/complaint in which you express concerns over entries on the OPSEU Local 530 web-blog signed by the Local 530 President in which he wrote inappropriate comments towards you.
>
> On January 26, 2009 senior management at the Toronto Jail requested that the inappropriate comments be removed from the blog/website and that the Local 530 President cease from allowing further comments to be posted.
>
> Senior management at the Toronto Jail was not satisfied with the manner in which the Local 530 President responded to the January 26, 2009 letter. Senior management then moved to take Direct Management Action as per the Workplace Discrimination and Harassment Prevention (WDHP) Policy.
>
> However, on March 1, 2009 the Assistant Deputy Minister (ADM), Employee Relations Division, HR Ontario, Ministry of Government Services wrote to the OPSEU President to advise that the Employer shall not impose discipline in respect of any employee who has made inappropriate entries on an internet forum operated by OPSEU during the Collective Agreement negotiations between November 4, 2008 and March 1, 2009.
>
> I met with you and advised you of the letter issued by the ADM's office and that no further action would be forthcoming.
>
> As a result of this agreement, senior management is not authorized to follow through with the Direct Management Action deemed appropriate in this situation. Nevertheless, the Local 530 President has been made well aware that the Employer will not tolerate any further actions of this nature and senior management requests that you bring forward any future entries of a similar nature on the blog/website.

17 On July 28, 2009, Mike Conry, Regional Director, Adult Institutional Services, Central Region wrote to Ms. Taylor-Baptiste as follows:

> Thank you for your Workplace Discrimination and Harassment Prevention (WDHP) Policy complaint dated Feb. 5, 2009, in which you expressed concerns over negative BLOG entries containing inappropriate comments made against you which were authored by the Local 530 President on the OPSEU Local 530 BLOG website.
>
> On January 26, 2009, Senior Management at the Toronto jail took action by requesting that the OPSEU Local 530 President remove the inappropriate comments from the OPSEU Local 530 BLOG web-site and that the OPSEU Local 530 President cease from allowing any further negative and/or inappropriate comments to be posting on the respective BLOG web-site.
>
> When Senior Management's January 26, 2009 request was not adhered to by the administrators of the OPSEU 530 BLOG website; Senior Management at the Toronto Jail moved to take direct management action as per the WDHP Policy.

> As you are likely aware the Employer and OPSEU successfully negotiated the Correctional Bargaining Unit Collective Agreement on March 1, 2009. In doing so, the Parties agreed that the Employer would not seek to impose any further disciplinary action against OPSEU employees for any inappropriate conduct with regards to but not limited to the inappropriate use of web-sites, emails and BLOG entries which occurred during the 2008-2009 round of Collective Bargaining.
>
> The Ministry has therefore met its obligations in reviewing, investigating, and acting on your complaint dated February 5, 2009. This letter will confirm that the Ministry acknowledges that the BLOG entries made against you by the Local 530 President on the OPSEU Local 530 BLOG website were inappropriate and that the Employer took appropriate action to address your concerns as outlined in your complaint.

18 The blog postings of January 16 were extremely upsetting to Ms. Taylor-Baptiste. She testified that they made her question herself as an individual. She was under extreme stress after they appeared, in particular because Mr. Dvorak was working in an office very close to hers. Her car's engine light came on and she thinks there is a strong possibility that Mr. Dvorak had tampered with her car, in light of the fact that employees had been found on video slashing managers' tires. She felt that people in the workplace knew her name and who she was because of the blog posting, and associated her primarily with that posting. She sought assistance from the Employee Assistance Plan and was treated for pain in her jaw from teeth grinding directly attributable to stress.

19 Mr. Dvorak testified that he feels regretful about the blog and how it made Ms. Taylor-Baptiste feel. He said that when he looks at the blog now, his posts appear to him to have been written by an "asshole". He qualifies this, though, by saying that one has to "understand what was going on and what was going on with me personally as well".

Analysis

General

20 Section 5 of the *Code* read as follows at the relevant time (it has since been amended to add new grounds that are not relevant to this Application):

> 5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.
>
> (2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or disability.

21 The approach to interpreting the *Code* must be purposive and contextual. As stated in *Landau v. Ontario (Minister of Finance)*, 2011 HRTO 1521 (Ont. Human Rights Trib.), at para. 12:

> While it may be helpful to refer to particular rules of statutory interpretation, the fundamental principle in interpreting any statute, including the *Code*, is to take a purposive and contextual approach. Statutes are interpreted in "their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament": see R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 1; *Rizzo v. Rizzo Shoes Ltd, (Re)*, [1998] 1 S.C.R. 27 at para. 21; *Ontario Human Rights Commission v. Christian Horizons*, 2010 ONSC 2105 at para. 42, In applying this principle in the context of the *Code*, rights are to be interpreted broadly and exceptions narrowly.

Harassment Under s. 5 (2)

22 Section 5(2) applies to harassment "in the workplace". In this regard the wording is different from s. 5(1) which applies to discrimination "with respect to" employment. The respondent argues that comments on this blog were not "in the workplace"

23 The applicant asserts that the blog is an extension of the workplace, and that social media, including blogs, Facebook and Twitter are integrally woven into the fabric of the modern workplace. It is well-established that employees can be disciplined or dismissed for off-duty conduct where it impacts on the employer: *O.P.S.E.U. v. Ontario (Ministry of Community Safety & Correctional Services)* [2011 CarswellOnt 12111 (Ont. C.E.G.S.B.)], 2011 CanLII 83721.

24 Counsel for the applicant draws an analogy to the decision in *Alberta v. A.U.P.E.* (2008), 174 L.A.C. (4th) 371 (Alta. Arb. Bd.) (Ponak), in which the discharge of an employee who made insulting blog postings about her co-workers and their actions at work was upheld. Although counsel did not point this out, I note that the decision was subsequently overturned on judicial review, on the basis that the arbitrator had made an unreasonable decision in relation about whether the disciplinary meeting complied with the collective agreement: see 2009 ABQB 208 (Alta. Q.B.); 2010 ABCA 216 (Alta. C.A.). The applicant also relies upon *S.G.E.U. v. Saskatchewan (Ministry of Corrections, Public Safety & Policing)*, 2009 CarswellSask 913 (Sask. Arb. Bd.), in which the discharge of correctional officers who made racist posts about residential school settlements on a Facebook page was upheld. The grievors had accessed the site at work on government computers, and some had made postings from such computers.

25 I agree with the applicant that employers can discipline employees for actions they take in cyberspace, and that the *Code* may apply to workplace-related postings on the internet. It is not open to serious doubt, in my view, that in 2012 postings on blogs and other electronic media may be part of or an extension of the workplace and that the *Code* may apply to them.

26 However, I agree with the respondents that in the circumstances of this case, the blog comments themselves were not harassment "in the workplace" under s. 5(2). They were made on a blog identified with the union that, although open to the public, was directed at communication between union members and their leadership. There is no evidence that Mr. Dvorak made the postings while at work for the employer, There may be circumstances in which postings in cyberspace are sufficiently connected that they are "in the workplace". However, even giving them a broad interpretation, the words of s. 5(2) cannot apply to this blog, given the context.

Discrimination and Poisoned Work Environment: s. 5(1)

27 The conclusion that s. 5(2) does not apply is not, however, the end of the matter. Since *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252 (S.C.C.), it has been recognized that discrimination includes actions that may also fit the definition of harassment. Employers and managers may violate s. 5(1) through a failure to appropriately respond to or prevent harassment, thereby contributing to a "poisoned work environment". See generally, *Ontario (Human Rights Commission) v. Farris*, 2012 ONSC 3876 (Ont. Div. Ct.), at paras. 29-36. Actions of an employee that may not meet the definition in s. 5(2) may nevertheless fall under s. 5(1). See, for example, *Romano v. 1577118 Ontario Inc.*, 2008 HRTO 9 (Ont. Human Rights Trib.); *Brooks v. Total Credit Recovery Ltd.*, 2012 HRTO 1232 (Ont. Human Rights Trib.); *Baisa v. Skills for Change*, 2010 HRTO 1621 (Ont. Human Rights Trib.), at para. 51; *Race v. General Motors of Canada Ltd.*, 2011 HRTO 24 (Ont. Human Rights Trib.), at para. 31. The determination of whether actions constitute discrimination under s. 5(1) involves a consideration of all the relevant circumstances, including the seriousness of the conduct, their significance, their effect on the workplace, the role of the person making them, the effect on the applicant, and the reaction of the respondent to any concerns raised,

28 I emphasize that in this case I need not analyze whether the employer took the appropriate steps in responding to the posting. The applicant chose not to name her employer as a respondent, and the respondents chose not to name it as an additional respondent, I need not address whether the employer was obligated to take actions other than those it did to protect the applicant from a poisoned work environment, and the analysis of whether Mr. Dvorak and the union are responsible is different, in my view, from the analysis of whether the employer did everything it should have done. There are circumstances in which a person's employer must take action to protect an employee from actions that affect the workplace, even if the individual may not be liable under the *Code*. For example, an employer is required to take actions to protect an employee from Code-related comments by a customer, even where the customer may not be liable under the *Code* as a respondent.

29 A consideration of all of the circumstances in this case includes an analysis of the nature of the expression at issue, which was made by Mr. Dvorak in the course of his duties as a local union president. His comments on management are protected, in my view, not only by the right to freedom of expression in s. 2(b) of the *Canadian Charter of Rights and Freedoms* but also the right to freedom of association in s. 2(d). As emphasized, for example, in *Fraser v. Ontario (Attorney General)*, 2011 SCC 20 (S.C.C.), s. 2(d) protects the expression of views on behalf of employees by unions, the representative of the majority of employees in the bargaining unit. Advocacy on such issues falls very close to the core of these rights. The Tribunal has emphasized that ambiguity in the scope of *Code* rights should be resolved in favour of protecting matters at the core of *Charter* rights and freedoms: *Whiteley v. Osprey Media Publishing*, 2010 HRTO 2152 (Ont. Human Rights Trib.), and *Dallaire v. Les Chevaliers de Colomb*, 2011 HRTO 639 (Ont. Human Rights Trib.).

30 This case involves an issue of competing rights: Ms. Taylor-Baptiste's *Code* rights to freedom from discrimination with respect to employment and harassment in the workplace and Mr. Dvorak and the union's core *Charter* rights to express themselves on matters of concern in the union-management relationship. In my view, these rights must be balanced and all the circumstances considered in determining whether there is discrimination with respect to employment under s. 5(1).

31 To the extent that the applicant suggests it was discrimination on the basis of marital status for Mr. Dvorak to merely identify her as being the spouse of Mr. Gray, or as being the ex-spouse of Mr. Taylor-Baptiste, I do not agree. Not every comment that refers to someone's marital status or family status constitutes discrimination: *Gurney v. McDonalds Restaurants of Canada*, 2011 HRTO 984 (Ont. Human Rights Trib.). It would clearly not have been a violation of the Code for Mr. Dvorak, without using language that is humiliating and denigrating, to mention the applicant's relationship with Mr. Gray in the context of raising concerns about nepotism, or to post a comment identifying her ex-spouse, who shares her last name.

32 Of course, it was also not a violation of the *Code* for Mr. Dvorak to suggest, whether fairly or not, that Ms. Taylor-Baptiste had not handled this situation well, or to make comments about her competence as a manager, It also would not be a violation of the *Code* merely to contrast her competence or dedication to union principles with those of other managers.

33 What is of concern about the comments is the use of sexist language to convey the point about nepotism. Mr. Dvorak drew upon frequently used sexist stereotypes about women in positions of power "sleeping their way to the top" through suggesting that her qualification for the job was "intimate knowledge of another deputy". This was not merely a comment about nepotism, but about the sexual relationship between her and her spouse, suggesting that she had obtained her position through sex. Similarly, the comment, "if you don't know the answers to something this simple Ms. Baptiste maybe you should call your boyfriend over at his office" draws upon the stereotype that women get ahead through their relationships with more competent "boyfriends".

34 The posting of the comment from the anonymous poster that Mr. Taylor-Baptiste was "besmirching the good union name" of her former spouse also raises issues of sexism. It may be read as suggesting that, because she married and took the name of Mr. Taylor-Baptiste, she is expected to adopt his values, including those of support for trade

unionism, or disassociate herself from them by changing her name. This issue and suggestion targets her as a woman because it was traditionally women who were expected to change their names upon marriage. This is an issue of gender and it singles her out as a woman.

35 I accept the applicant's point that Mr. Dvorak was an active participant on behalf of the union in a process of restoration of a workplace that had been poisoned through racist hate mail and other events, and that these circumstances weigh in favour of the seriousness of the comments. Also of concern is the fact that when the offensive nature of the blog was pointed out to him by management, together with the fact that it may constitute discrimination or harassment contrary to the employer's policy, Mr. Dvorak responded by belittling the concerns, attacking management, and suggesting that his actions were justified because of alleged mistreatment of the union and its membership by the employer. Although no one flagged this particular post, he failed to consider or address at that time the ways in which his posts could violate the *Code* or hurt individuals.

36 In terms of the frequency of events, the applicant was mentioned only once in a blog posting by the individual respondent, and once in a reply to it. The entry was publicly accessible for approximately a month, which makes it more serious than a comment on one occasion. However, I also note that given the volume of commentary, which was frequent during this time, these posts quickly became less prominent as other issues were raised.

37 On the other hand, these were comments made by a local union president on a union blog, explicitly in the context of this role rather than his role as a fellow employee. They dealt with union-management relations. The applicant is a manager, who has the power in the workplace that comes with that role. Viewed objectively, the posts expressed to the union members Mr. Dvorak's and the anonymous poster's opinions on how the applicant had handled the work refusal by union members, her dealing with the health and safety issues raised, and the process for filling management positions. I accept Mr. Dvorak's evidence that he had genuine concerns about nepotism and this was what motivated this comment. Whether or not these underlying concerns had any merit and despite the sexist stereotypes used to express them, they fundamentally relate to the union's and Mr. Dvorak's role as representative of the members of the bargaining unit in their relationship with the employer. They were directed at the union membership and related to the union-management relationship. They are, in my view, analogous to comments on labour-management issues made at a union meeting or a union newsletter. Comments on such issues are at the core of the constitutional protections of freedom of association and expression and the union's right to operate independently of the employer.

38 The applicant did not provide evidence of any comments or other actions in the workplace that resulted from the fact that sexist language was used. She explained that she was extremely distressed by the bringing of her personal life into the workplace and felt that people would think she had slept her way to her job. The principal effects on her as expressed in her testimony, however, were about the bringing of her personal life into the workplace, not the sexist nature of those comments.

39 In terms of actions by others, the applicant emphasized only that various people mentioned to her that they had read about her on the blog, and that when she went to a training session, she felt that many people looked at her when she stated her name because they had read about her on the blog. These effects would have been the case whether the points about nepotism and alleged incompetence were made in the sexist way they were or in a way that did not raise *Code* factors. Strong criticism from the union is often inherent in being a manager in a tense unionized workplace. These are significant factors weighing against a finding that Mr. Dvorak's actions in communicating with union members violated the applicant's rights.

40 Considering all these circumstances, I conclude that Mr. Dvorak did not discriminate against the applicant with respect to employment. His postings were made on issues of union-management concern, and while they relied upon sexist language, they were not gratuitous attacks unrelated to union business, There were no *Code*-based reverberations in the workplace and the applicant's principal concern was about the bringing of her personal life into the workplace. The applicant, as a manager, is a person with relative power in the workplace relationship with employees. Most important, union comments on workplace issues are constitutionally protected expression of opinion and exer-

cise of freedom of association, and close to the core of those rights. Taking all this into account, I find that the respondents did not discriminate against the applicant with respect to employment.

41 Of course, this conclusion does not mean that I have found that the blog posts in question were acceptable, nor does it negate the hurt they caused Ms. Taylor-Baptiste. On the contrary, the wording of these posts was inappropriate and, in my view, harmful to good labour relations.

42 I also emphasize that this decision is not intended to preclude arguments that blog posts in other contexts could fall under s. 5(1), or that expressions of union opinion could constitute discrimination in other circumstances. Most significant to my decision in this case are that the postings were tied to communication to the membership on issues of labour-management relations and the absence of Code-related effects in the workplace.

Order

43 The Application is dismissed.

Application dismissed.

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