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## What is a Reprisal under the Human Rights Code?

**By: Ryan Conlin & Frank Portman**

A recent case from Ontario's Human Rights Tribunal is a stark reminder of how important record keeping can be when managing employee performance and productivity issues.

### The Case

In [McConaghie v Systemgroup Consulting Inc.](#), the employee was a well-performing female salesperson in a predominantly male workplace, in a male-dominated industry. She experienced a divorce, which led to a decrease in her production, but the employer supported her and gave her time and space to return to her previous performance level.

Shortly after the employee's divorce, the employer hired a new Vice-President of Sales. Part of this new VP's strategy was to host certain customer appreciation events.

One of these events was called "Men's Day," and was advertised as "A Day for Men Without Women and Children." The tag line for the event was "Bring your friends, bring your acquaintances, just don't bring your wife." On the list of services offered were "Massage" and "Hooters Girls."

The employee was not invited or told about the event and eventually learned the details of the event from a none-too-impressed customer. She found the nature of the event distressing and demeaning to women and complained to the Vice-President. He dismissed her concerns off-hand. The employee escalated her complaint to the President, who, while responding more diplomatically, did not take any measures to address the complaint. There was no agreement on a final resolution of the complaint, other than an "agreement to disagree."

The employee found herself increasingly socially isolated at work, her interactions with her superiors more awkward and distant, and eventually her employment was terminated.

She filed a human rights complaint alleging that her termination was in response to her complaint about Men's Day, and so was a reprisal for exercising her rights under the **Human Rights Code**. Such a reprisal is, itself, a violation of the **Code**.

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- What is required to show “undue hardship” in the “family status” context; and
- How employers should approach accommodation requests.

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### **The Decision**

The Human Rights Tribunal agreed with the employee and awarded damages against the employer.

The employer claimed that the termination of employment was in response to performance concerns, specifically regarding the employee’s volume of sales and her expected performance. The employee denied these allegations. The employer could not provide convincing evidence of its performance concerns. Consequently, the Tribunal could not determine whether or not any performance standards had been violated. In addition, the employer was unable to offer any explanation as to why the employer’s performance concerns warranted a termination at that particular time, given that the issues had been on-going for at least 6 months prior to the termination.

The Tribunal then looked at whether the termination could be considered a reprisal. Direct evidence of an employer’s motive is not required to show a reprisal. Merely circumstantial evidence can be enough to show a reprisal, unless an employer can demonstrate an alternative reason for the action, in this case, the termination.

Due to the inconclusive nature of the evidence, the Tribunal did not feel that the employee’s performance was a credible alternative reason for the termination. The Tribunal was left with the timing of the termination in relation to the human rights complaint, the evidence of the employee that the workplace had been uncomfortable after the complaint, and the presence of a potentially poisonous workplace. On this basis the Tribunal inferred that at least part of the reason behind the termination was reprisal for the human rights complaint

## **What Employers Should Know**

Events such as “Men’s Day”, which are targeted towards a certain demographic of customers or employees, can be violations of human rights grounds if they are perceived as demeaning or exclusionary, and the employee certainly felt they were. In addition, the employer’s response to the complaint was unsatisfactory. The Tribunal portrayed the employer as dismissive of the employee’s concerns. Employers must take any human rights complaint seriously, investigate and make an objective determination as to its merits. The employer failed to do so in this case and suffered the consequences of its indifference.

Additionally, the inference of reprisal in this case was partly the result of poor record keeping. The timing of the termination was suspect, but had the employer properly catalogued and communicated its performance concerns, and rationale for termination, it would have been in a much better position to defend itself from this complaint. By failing to maintain evidence to support its claims of a non-discriminatory reason for termination, the employer left itself vulnerable to an inference of reprisal.

It is always a best practice for employers to maintain records of performance/productivity management. Absent records, employers will be hard pressed to demonstrate disciplinary action and termination are for legitimate, non-discriminatory reasons.

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