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## **Court of Appeal in Wal-Mart Case Scales Back Historic Punitive Damages Award**

**By: Jeremy Schwartz & Frank Portman**

We have [written before](#) that heightened fears of US-sized punitive damage awards in employment law decisions may not, on closer inspection, be the current trend in Canada. Set against that backdrop, the employment law community waited with bated breath for the release of the Ontario Court of Appeal's decision in [Boucher v Wal-Mart Canada](#). Released late last week, the Court reduced the record \$1Million punitive award at trial to \$100,000.

### **The Trial**

The Plaintiff, Ms. Bouchard, was the assistant manager of a Wal-Mart location. She was a hard-working and high-performing employee who was well thought of by her superiors and peers. Following a vacation, she was asked by her manager to alter a log book that would otherwise reflect poorly on the store. The employee refused.

Her manager did not take this refusal well. He began a campaign of harassing treatment against the employee, including belittling and demeaning her in front of other employees. This conduct apparently lasted for months.

Ms. Bouchard attempted to engage Wal-Mart's "open door policy," and brought her concerns to the attention of higher management. Management investigated the complaint; however, despite corroborative accounts from several employees, not only did Wal-Mart conclude that her allegations were unsubstantiated but it notified her that she would be "held responsible" for making the complaint.

After another incident of abuse, the employee resigned her position. She brought an action against Wal-Mart for constructive dismissal and against her manager for intentional infliction of mental suffering.

At trial, the jury awarded her 20 weeks' notice in accordance with her written employment contract. In addition, she was awarded \$250,000 against her manager and \$1,200,000 against Wal-Mart. Of those two awards, \$150,000 and \$1,000,000 were in punitive damages, respectively.

Not surprisingly, the defendants appealed.

### **The Court of Appeal**

Although it was a jury that issued the damages awards at trial, jury verdicts are shown a great deal of deference on appeal. Appellate courts only alter those awards which are outside of the range of what a reasonably instructed jury would award.

In this case, the Court found that the jury's awards for punitive damages were too high. Punitive damages are intended to condemn particularly egregious behaviour. They are appropriate where the other damages awarded are insufficient for the purposes of retribution, denunciation and deterrence. The Court found that in light of the total amounts awarded to the plaintiff, including in non-punitive damages, those purposes were served with lesser punitive awards. As such, the Court reduced the punitive damages awards against her manager and Wal-Mart to \$10,000 and \$100,000, respectively.

This is not to say that the defendants got off lightly. The Court refused to alter the awards against the manager for intentionally causing mental distress or against Wal-Mart for aggravated damages for the manner in which it treated the employee. Both of those awards were, according to counsel, the highest of their type in employment law in Canadian history.

This leaves the total damages, in addition to the employee's wages for the notice period, at \$110,000 as against the manager and \$300,000 as against Wal-Mart.

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In one of the most significant decisions in recent memory, the Workplace Safety and Insurance Appeals Tribunal has declared that most of the legal restrictions placed on Workplace Safety and Insurance Board traumatic mental stress claims are unconstitutional. The Tribunal essentially held that imposing restrictions on eligible mental conditions which are not imposed on physical injuries violates the equality provision of section 15 of the **Charter of Rights and Freedoms**.

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- Best claims management practices for stress claims

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## What Do Employers Need to Know

Punitive damages awards are rare in Canadian employment law, and typically issue only in the context of unique and egregious facts. Nonetheless, there are still lessons to be learned from the treatment of this case by the Court.

Often, having appropriate policies on workplace harassment can spare employers from liability for the actions of employees, or limit exposure, provided the guilty employee's actions were plainly outside the ordinary course of employment (i.e. assault). Unfortunately, its failure to live by the words of its own policy appears to have supported a finding of liability against Wal-Mart, instead of supporting a defence.

It is essential that workplace investigations are conducted fairly and impartially, and that only in the clearest of cases of bad faith complaints should employers threaten or impose sanctions against complainants.

Imposing sanctions against complainants when their allegations prove unsubstantiated sends the message to others not to invoke the employer's internal conflict resolution system – motivating employees instead to take their complaints to external regulators and the courts. Further, imposing sanctions may give rise to liability against the employer where otherwise only the harasser was guilty of misconduct.

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