ONTARIO LABOUR RELATIONS BOARD

0956-11-OH K. Annette Harper, Applicant v. **Ludlow Technical Products Canada Ltd. (cob Covidien),** Responding Party.

BEFORE: Susan Serena, Vice-Chair.

DECISION OF THE BOARD: November 18, 2011

1. This is an application under section 50 of the *Occupational Health and Safety Act*, R.S.O. 1990, c.O.1, as amended (the "OHSA").

2. In its response and letter of September 14, 2011, the responding party takes the position that the application should be dismissed for failing to make out a *prima facie* case of a breach of the OHSA. That is, the responding party contends that even if all of the facts alleged in the application are assumed to be true and provable, the Board could not conclude that the OHSA has been breached because complaints regarding product safety are not governed by the OHSA and the alleged harassment of the applicant was not perpetrated by the responding party or any person acting on the responding party employer's behalf.

3. By decision dated October 6, 2011, I sought submissions from the applicant regarding the employer's assertion that this application ought to be dismissed for failing to raise a *prima facie* violation of section 50 of the OHSA. More specifically, the applicant was directed as follows:

> 8. The applicant is therefore directed to deliver to the responding party and file with the Board by no later than 5:00 p.m. on October 31st, 2011 a written submission responding to the issues raised in the employer's response and the letter from the responding party dated September 14, 2011 and explain why this application should not be dismissed for failing to state a *prima facie* case of a contravention of section 50(1) of the OHSA.

4. On October 24, 2011 the applicant filed full submissions in accordance with the above direction and I have reviewed her submissions carefully for the purpose of determining whether or not this application should be dismissed without a hearing on a *prima facie* basis.

5. In her application and submissions to the Board the applicant asserts as follows:

a) she was harassed in the workplace by co-workers who circulated a petition regarding the applicant's activities regarding a product safety issue;

b) on November 15, 2010 the applicant filed a complaint with the employer alleging she had been harassed in the workplace;

c) the employer failed to investigate her harassment complaint and did not comply with either its posted harassment policy or the

procedure set out in the company's Employee Handbook regarding investigations of harassment complaints;

d) since filing the harassment complaint on November 15, 2010 the employer has failed to properly process the applicant's claims for short term disability and WSIB benefits.

6. Rule 39.1 of the Board's Rules of Procedure describes the circumstances in which the Board will dismiss an application for failure to state a *prima facie* case:

> **39.1** Where the Board considers that an application does not make out a case for the orders or remedies requested, even if all of the facts stated in the application are assumed to be true, the Board may dismiss the application without a hearing or consultation. In its decision, the Board will set out its reasons.

7. Further, the Board has the discretion to dismiss an application without inquiring further into the merits of the application where, for example, the Board concludes that it could not issue the remedy sought by the applicant or any other meaningful remedy even if the applicant successfully convinced the Board that the OHSA was contravened.

8. In assessing whether the application should be dismissed for failing to raise a *prima facie* case, the Board must accept the allegations made in the application as true and provable and determine whether there are sufficient facts pleaded, when taken together with the reverse onus under section 50(5) of the OHSA, to establish a *prima facie* case of a violation of section 50(1).

9. Accordingly, the Board is required to review the application to determine whether the applicant has pleaded sufficient facts upon which the Board could conclude she was engaged in an activity that is protected by section 50 of the OHSA and that the responding party employer treated the applicant in a manner prohibited by section 50 because the applicant engaged in a protected activity.

10. The essence of the applicant's complaint is that the employer did not comply with its obligations under Part 111.0.1 of the OHSA to investigate her complaint of workplace harassment and after she filed her harassment complaint the employer failed to properly process her claims for short term sickness and WSIB contrary to section 50 of the OHSA.

11. Section 50(1) of the OHSA reads as follows:

> **50.** (1) No employer or person acting on behalf of an employer shall,
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> (a) dismiss or threaten to dismiss a worker;
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> (b) discipline or suspend or threaten to discipline or suspend a worker;
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> (c) impose any penalty upon a worker; or
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> (d) intimidate or coerce a worker,
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> because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the

> regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the *Coroners Act*.

12. In *Investia Financial Services Inc*., 2011 CanLII 60897 (decision dated September 23, 2011, Board File No. 3990-10-OH) the Board thoroughly examined the Board's jurisdiction with respect to an alleged reprisal for making a harassment complaint. In that decision the Board stated as follows:

> 10. With respect to the first issue, it is not at all clear that the conduct complained of here – being discharged for making a harassment complaint – is a violation of the OHSA. In this regard, the Board must find its jurisdiction with respect to an application in the legislation, in this case the OHSA. The Board's authority to deal with a matter under s.50 of the OHSA arises when a worker complains that he or she has been subject to dismissal or discipline, threat of dismissal or discipline, intimidated or threatened or coerced by employer's because the worker has "acted in compliance with the Act"; when a worker has given evidence, or when a worker "has sought the enforcement of the Act or regulations". The Board cannot take jurisdiction over something unless the OHSA or another piece of legislation says it can. Section 50 of the OHSA tells the Board when it can take jurisdiction over health and safety reprisal complaints. There are three bases upon which the Board can take jurisdiction under section 50 of the OHSA: - when a worker has "acted in compliance with the Act"; when a worker has "given evidence"; or when a worker "has sought the enforcement" of the Act or the regulations. In my view, the latter basis is the only one that applies in the "typical" harassment complaint situation as in this case.
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> 11. In this regard, section 32.0.1(b) of the OHSA requires an employer to create a policy with respect to workplace harassment. Sections 32.0.6 and 32.0.7 of the OHSA require an employer to develop and maintain a program to implement the policy with respect to workplace harassment, and to provide a worker with information and instruction that is appropriate for the worker on the contents of the policy and program with respect to workplace harassment. The Applicant makes no allegations that the Respondent has not fulfilled these obligations or that he was discharged for seeking to enforce these provisions of the OHSA.
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> 12. The OHSA provides no further duties or obligations with respect to workplace harassment. Harassment and workplace violence provisions were only recently added to the OHSA. The language of the new amendments to the OHSA appears to specifically omit an obligation to prevent workplace harassment from further duties and obligations where new obligations were created with respect to workplace violence issues:
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> > (a) Section 32.0.3, which addresses the requirement for a risk assessment in respect of workplace violence, states in subsection (4): "An employer shall reassess the risks of workplace violence as often as is necessary to ensure that the related policy under clause 32.0.1 (1) (a) and the related program under subsection 32.0.2 (1) continue to protect workers from workplace violence."
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> > (b) Section 32.0.5(1) states: "For greater certainty, the employer duties set out in section 25, the supervisor duties set out in section 27, and the

worker duties set out in section 28 apply, as appropriate, with respect to workplace violence."

(c) Section 43, which addresses the right of a worker to refuse unsafe work, states at subsection (3)(b.1): "A worker may refuse to work or do particular work where he or she has reason to believe that, (b. 1) workplace violence is likely to endanger himself or herself."

13. Therefore, it appears the OHSA only requires an employer to put a workplace harassment policy and program in place and to provide a worker with information and instruction as appropriate. The OHSA does not provide any further requirements and, in particular, does not provide that the duties under ss. 25, 27, and 28 apply with respect to workplace harassment. Further, the OHSA provides no specific rights to a worker with respect to workplace harassment.

14. To look at it another way, the OHSA specifically gives the Board the power to enquire into the situation where an employee is fired for complaining about a missing guard on a machine but does not specifically give the Board the power to enquire into the situation where an employee is fired for complaining about harassment. In the case of an employee who claims that the workplace is unsafe because a machine is lacking a guard, the employee is, when complaining, seeking to force the employer to comply with the statutory obligation to ensure protective devices as prescribed in the Act are provided (section 25(1)(a)) or take every precaution reasonable in the circumstances for the protection of a worker (section 25(2)(h)).

15. In the case of an employee who complains that he has been harassed, there is no provision in the OHSA that says an employer has an obligation to keep the workplace harassment free. The only obligation set out in the Act is that an employer have a policy for dealing with harassment complaints. The legislature could very easily have said an employer has an obligation to provide a harassment free workplace but it did not.

16. If the employer simply ignores its obligations and doesn't create a policy, and a worker asks the employer to do so, and the employer penalizes the worker, then that worker can apply to the Board under section 50 on the basis that he was seeking enforcement under the Act. He or she seeks enforcement of the Act by asking the employer to comply with its obligation. In response to that request, the employee was penalized. A similar argument can be made for the worker who points out to the employer that a specified portion of the statutory requirement has been omitted. If, for example, an employer's policy had no measures and procedures for workers to report incidents of workplace harassment to the employer, and an employee was fired by insisting that the policy be changed to accord with the Act, that person can apply under section 50 on the same basis.

17. What it appears the Board does not have the authority to do is to adjudicate upon the practical application of a policy that otherwise complies with the Act. If an individual complains under an employer's workplace harassment policy and doesn't like the way the employer handled the investigation (i.e. it didn't interview anyone), and then that person complains to the employer about its poor investigation and is fired, the Board appears not to have the authority under section 50 to deal with that situation. The discharge is not a reprisal as defined under section 50, because the Act does not dictate how an employer will actually investigate a harassment complaint

> and protect a worker who complains about that practical task not being performed properly. The Act just does not give us the authority to deal with this situation.
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> 18. The issue comes back to the rules of delegated statutory power. The Board only has the ability to adjudicate on matters that the Legislature, through the Act, tells us we have the authority to adjudicate upon and all powers which are practically necessary for the accomplishment of the statutory objective. Our authority to deal with reprisal complaints is set out in section 50 of the Act. With respect to the new harassment provisions, the Board's authority appears very limited. The Legislature could have very clearly opened up the Board's authority beyond what is there, but it chose not to. The Board has no power to decide otherwise. Individuals who find themselves in situations that the Board cannot remedy will usually have other options, via a grievance or a court action. But if for some reason they don't, the Board does not have the authority to create some free-standing jurisdiction in order to help them.
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> 19. The history of harassment as a health and safety issue also supports this conclusion. Prior to Bill 168 (the Bill which brought the workplace violence and harassment sections into the OHSA), the Board frequently found that there was no protection in the OHSA for workplace harassment, or at least that the Board should not inquire into such complaints. (See Meridian Magnesium [1996] OLRB Rep. Nov/Dec 964, Centro Donne Inc. [1997] O.L.R.D. No. 309, and Amdahl Canada 2000 CanLII 11966 (ON LRB), 2000 CanLII 11966. Ten Star Financial Services 2009 CanLII 28174 (ON LRB), 2009 CanLII 28174).
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> 20. Given that history, in my view the Legislature would have been much more clear had it intended to make complaining about harassment a protected right under the Act. This is especially true given the fact that such an interpretation would likely significantly increase the Board's caseload.

13. I agree with and adopt the above determination that the Board does not have the jurisdiction under either section 50 or Part 111.0.1 of the OHSA over a complaint that alleges the company did not comply with its workplace harassment policy and/or the applicant was subjected to a reprisal after she filed a workplace harassment complaint. That being the case, I find this application does not raise a *prima facie* violation of the OHSA even if all the facts asserted by the applicant are deemed to be true and provable.

14. For the reasons set out above, this application is dismissed.

"Susan Serena"
for the Board