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"SHOW ME YOUR HANDS!" Analyzing a Critical Element in Qualified Immunity

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INSIDE CANADA

By: MONICA CIRIELLO,
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Pride Month, Reasonable Accommodation, Site Plan Denial, and More

Pride Month: Tribunal Sanctions Township and Mayor for Discrimination

Borderland Pride v. Corporation of the Township of Emo, 2024 HRTO 1651 https://canlii.ca/t/k81ws

The Applicants, Borderland Pride, a not-for-profit organization supporting the LGBTQ2 community, filed an application against the Township of Emo ("Township") for discrimination under the *Human Rights Code*, R.S.O. 1990, c. H. 19 ("*Code*"). The application stemmed from the Township's refusal to declare June as "Pride Month" and display the Pride Rainbow Flag.

The Applicants argued that this refusal amounted to discrimination under the Code based on sexual orientation, gender identity, gender expression, creed, and family status. The Township raised a preliminary objection, arguing that Borderland Pride, as a corporation, lacked standing to bring the application.

HELD: The Township and Mayor discriminated against the Applicants.

DISCUSSION: The Tribunal dismissed the Township's preliminary objection, relying on *Pride Hamilton v. Hamilton Police Services Board*, 2022 HRTO 1427, which confirmed that corporations, including not-for-profit entities, qualify as "persons" under the Code and may file applications under section 34(1). On the substantive issues, it was undisputed by both parties that the Applicants made two requests to the Township, and municipal council denied the Pride Month proclamation and never voted on the request to fly or display the Pride Rainbow Flag.

To successfully establish discrimination, the onus is on the Applicant to prove on a balance of probabilities that their protected characteristic under the Code was a factor, in the Township's actions. In reviewing the council meeting evidence, the Tribunal found no evidence that the Township's failure to accommodate the flag request—due to a lack of a flagpole—was motivated by discriminatory intent. However, the Tribunal found that the Township's denial of the Pride Month proclamation was influenced by the remarks made by the Mayor about the absence of a flag for straight people. The Tribunal held that the Mayor's remarks were demeaning to the LGBTQ2 community and found that discriminatory intent was a factor in his vote against a Pride Month proclamation. Since this vote influenced the Township's overall decision, the Tribunal found the denial of the proclamation constituted discrimination under the *Code*. The Tribunal ordered the Township to pay $10,000 in damages to the Applicants, that the Mayor to pay $5,000 personally, and required the Mayor to complete human rights training. The Township has filed for judicial review.

Claim for Site Plan Denial is Dismissed

Meffe v. City of Toronto, 2024 ONSC 6994 https://canlii.ca/t/k8c1x

The Plaintiff, a land developer, applied for site plan approval, which included requests for minor variances, all of which were denied by the City of Toronto ("City"). After unsuccessfully appealing to the Toronto Land Appeal Board, the Plaintiff submitted a revised application and initiated legal action against the City seeking costs and damages following the denial of the site plan approval application. The Plaintiff claimed that the City acted in bad faith and contrary to municipal policies, the Official Plan, the Zoning By-law, and provincial legislation. The City moved to strike the action pursuant to Rule 21.01(1)(a), and 21.01(3)(b) and (d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

HELD: Action dismissed.

DISCUSSION: It was the Plaintiff's position that the City had a duty to provide him with information related to the planning process for which the site plan application was denied. The Court noted that negligence claims require the Plaintiff to prove the existence of a duty of care, a breach of that duty, and harm resulting from the breach. The Court found that the Plaintiff failed to demonstrate that the City owed him a duty of care, noting that it is difficult to establish such a duty in the context of a land-use planning application, as the City's role is to act in the public interest, not to provide specific advice to developers. A duty of care could place the City in a conflict of interest, as it would create a potential liability for lost opportunities that might have arisen from the Plaintiff's own decisions.

The City moved to dismiss the claim as an abuse of process. The Court determined that the Plaintiff's claim was an abuse of process, as it sought to hold the City liable for harm resulting

from the Plaintiff's own actions, including his decision to pursue the legal action instead of continuing with his revised application. Additionally, the Plaintiff lacked legal standing to bring the action, as he did not own the property involved in the application—the property was owned by a corporation. The Court ruled that the Plaintiff's claim was a collateral attack on administrative decisions made in relation to the site plan approval process. Therefore, the City's motion to strike the action was granted, and the claim was dismissed.

No Jurisdiction on Motion to Intervene as Friend of the Court
Heegsma v. Hamilton (City), 2024 ONCA 865 https://canlii.ca/t/k845w

The Ontario Human Rights Commission ("OHRC") appealed the dismissal of its motion for leave to intervene in an application before the Ontario Superior Court of Justice. The application concerns individuals ("Applicants"), who set up tents in various public parks throughout the City of Hamilton ("City"). The City evicted the Applicants from those encampments under several municipal by-laws.

The Applicants are currently challenging the constitutionality of these by-laws under sections 7 and 15 of the Canadian Charter of Rights and Freedoms. The OHRC sought to intervene as a friend of the court under Rule 13.02 of the Rules of Civil Procedure 1990, Reg. 194 ("Rules"), with the Applicants consenting and the City not opposing the motion. The application judge denied the motion, concluding that the OHRC had little to add since the Applicants were well-represented. The OHRC appealed the decision, alleging errors in the application of the law.

HELD: Appeal quashed for lack of jurisdiction.

DISCUSSION: The Ontario Court of Appeal quashed the OHRC's appeal, ruling that it lacked jurisdiction to hear an appeal from a decision denying a motion for leave to intervene as a friend of the court. The OHRC acknowledged that the dismissal of a motion to intervene is typically considered a final order, citing *Maybank Foods Inc. Pension Plan v. Gainers Inc* (1990), 77 D.L.R. (4th)236 (Ont. C.A.). However, it relied on Bedford v. Canada (Attorney General) 2009 ONCA 669, where the Court had granted an appeal from the denial of intervener status as a friend of the court. The Court of Appeal distinguished the two types of intervention: party intervention and friend of the court intervention. While both are discretionary, the Court of Appeal emphasized that party interventions are concerned with ensuring that non-parties with substantive interests can participate in litigation, whereas friend of the court interventions focus on whether the proposed intervention will assist the court in resolving the issue at hand. The Court of Appeal concluded that a decision to deny a motion for leave to intervene as a friend of the court does not impact substantive rights, and thus, there is no jurisdiction to appeal such a decision. The Court of Appeal noted that while *Bedford* involved a similar scenario, it did not address the jurisdictional issue and should not be taken as establishing a precedent to appeal motions for leave to intervene as a friend of the court. The Court of Appeal quashed the application for lack of jurisdiction.

Court Upholds Decision to Strike Harassment Claim
Kantoor v. City of Hamilton, 2024 ONSC 6991 https://canlii.ca/t/k8c1t

The Plaintiffs sued the City of Hamilton ("City") and a property standards officer, seeking $14,000 based on allegations of harassment and bad faith. The Deputy Judge struck the Plaintiffs' claim finding that they did not plead a reasonable cause of action and that the Small Claims Court lacked jurisdiction. The Plaintiffs appealed.

HELD: Appeal dismissed.

DISCUSSION: The Court found that while the Deputy Judge erred in determining that the Small Claims Court lacked jurisdiction, it properly dismissed the claim. The Deputy Judge had found that the Plaintiff's appeal of the property standards order to Small Claims Court was improper. The Court disagreed, finding it was proper as City did not establish that the Plaintiffs were served properly with the property standards order, therefore the normal route for appeal, first to the committee then to the Superior Court of Justice under the Building Code Act, 1992, SO 1992, c.23 was not engaged. Therefore, the Court found it was reasonable for the Plaintiffs to appeal to the Small Claims Court. Nevertheless, the Court held that the appeal was properly dismissed by the Deputy Judge due to the Plaintiffs' failure to plead a reasonable cause of action. Appeal dismissed.

Reasonable Accommodation or Discrimination
Bixby v City of Medicine Hat, 2024 AHRC 147 https://canlii.ca/t/k88gs

The Complainant, an employee at the City of Medicine Hat ("City"), filed a complaint alleging discrimination in employment on the grounds of mental and physical disability under section 7 of the Alberta Human Rights Act, RSA 2000, c A-25.5. The Complainant claimed that the City's

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Inside Canada *cont'd from page 19*

process of accommodating her disabilities resulted in stress from co-workers' questions about her modified duties which constituted discrimination. The Complainant followed the City's process and filed a complaint with the Director of the Commission ("Director"). The Director found that the Complainant had physical and mental disabilities that required an accommodation, but dismissed the complaint, finding that the City had reasonably accommodated the disabilities in both a temporary and permanent capacity. The Complainant requested a review of the finding.

HELD: Decision to dismiss complaint upheld.

DISCUSSION: The Human Rights Tribunal of Alberta ("Tribunal") reviewed the Director's findings and determined that the City had fulfilled its duty to accommodate, both on a temporary and permanent basis and further found the Complainant's dissatisfaction with the accommodations, which included her preference for a particular modification, did not rise to the level of discrimination. Notably, the Tribunal emphasized the Complainant's responsibility to engage in the accommodation process, noting that delays in submitting her resume and other information hindered its timely resolution. The Tribunal also found that the Complainant's arguments did not demonstrate a breach of her dignity or substantiate her claims of financial loss. The Tribunal concluded that the complaint lacked merit and was unlikely to succeed at a hearing. Furthermore, the Tribunal noted that such issues might be more appropriately addressed through grievance arbitration in a unionized workplace, although this point was not fully explored in this decision. Consequently, the decision to dismiss the complaint was upheld. ML

Amicus *cont'd from page 23*

actions with respect to [the inmate] were undoubtedly within the scope of activities for which he was to set policy."[19]

The Tenth Circuit majority found support in a Texas decision where a county sheriff raped an attempted murder suspect after an interrogation at her home. There, although the County argued that "the Sheriff's actions did not constitute a policy of the County . . . because they violated well-established County policy,"[20] the Fifth Circuit found to the contrary, holding that the Sheriff's actions were "those of the County" because "the County Sheriff is the County's final policymaker in the area of law enforcement."[21]

A dissent in *Sedgwick County* rejected the proposition that Sheriff Hanna's actions were those of the County:

> Hanna advanced a purely personal agenda in committing the sexual assault and acted outside his authorized law-enforcement 'realm' of setting policy for the transportation of prisoners . . . the majority opinion goes too far for me in approving as municipal policy a rogue sheriff's one-time, *secret* action that is unquestionably outside of the sheriff's realm and legitimate policymaking authority.[22]

Importantly, the dissent argued that characterizing the Sheriff's acts as those of the County in this circumstance amounts to *respondeat superior*—a principle clearly disqualified by the Supreme Court in *Monell*, where the Court held that:

> Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor -- or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.[23]

Sedgwick County was settled before petitioning for Supreme Court review. As such, the Tenth Circuit holding, as well as the Fifth Circuit opinion and others cited by the majority, stand to encourage additional litigation arising out of unauthorized, rogue--and even criminal--acts by "final policymakers," significantly challenging *Monell's* admonition against *respondeat superior* liability for state and local governments.

***Trumbull County v. Purdue Pharma, LP*: Public Nuisance Abrogated by Product Liability Statute (Ohio Supreme Court)**

In August 2022, Ohio's Trumbull and Lake Counties were awarded $650 million in abatement funds by District Court Judge Dan Aaron Polster after a federal jury found that three pharmacies--Walgreens, CVS, and Walmart—had contributed to the opioid crisis due to irresponsible filling of illegitimate opioid prescriptions, failure to maintain accurate dispensing records, and other shortcomings.[24] That setback for the defendants was among the more recent outcomes arising from hundreds of local government cases consolidated in the multidistrict litigation before Judge Polster in Ohio's Northern District: *In re National Prescription Opiate Litigation*, no. 17-MD-2804 (N.D. Ohio).

Central to the *Trumbull* and *Lake* wins was a cause of action widely deployed by governmental plaintiffs against the opioid manufacturers, distributors, prescribers, and retailers: common law public nuisance, defined in the Restatement of Torts as "an unreasonable interference with a right common to the general public."[25] While public nuisance has been held to be inextricably limited to real property-related actions in some jurisdictions, including Oklahoma and North Dakota, it has been widely effective in many opioid cases, helping to force opioid defendants to sign settlements yielding more than $60 billion in abatement funding, increments of which are already being disbursed to communities around the nation.

The pharmacy defendants in *Trumbull* and *Lake* moved to dismiss based on the Ohio Product Liability Act (OPLA), which was "intended to abrogate all common law product-liability claims or causes of action."[25] The Ohio legislature amend-