LET RIGHT PREVAIL
The Law Society of Upper Canada | Barreau du Haut-Canada

Harassment in the Workplace: Understanding THE NEW OBLIGATIONS

CHAIRS

Daryn Jeffries
Filion Wakely Thorup Angeletti LLP

Jennifer MacKenzie
JMJ Workplace Investigation Law LLP

March 28, 2017

cpd Continuing Professional Development

CLE17-0030601-A-PUB

The Law Society of Upper Canada | Barreau du Haut-Canada

The Law Society of Upper Canada
130 Queen Street West, Toronto, ON M5H 2N6
Phone: 416-947-3315 or 1-800-668-7380 Ext. 3315
Fax: 416-947-3991
E-mail: cpd@lsuc.on.ca
www.lsuc.on.ca

Library and Archives Canada
Cataloguing in Publication

Harassment in the Workplace: Understanding the New Obligations

ISBN 978-1-77094-577-7 (Hardcopy)
ISBN 978-1-77094-578-4 (PDF)

cpd Continuing Professional Development

Harassment in the Workplace: Understanding THE NEW OBLIGATIONS

Co-Chairs:

Daryn Jeffries
Filion Wakely Thorup Angeletti LLP

Jennifer MacKenzie
JMJ Workplace Investigation Law LLP

March 28, 2017
9:00 a.m. to 1:00 p.m.
Total CPD Hours = 3 h 30 m Substantive + 30 m Professionalism (P)

The Law Society of Upper Canada
130 Queen Street West
Toronto, ON

SKU CLE17-0030601

Agenda

9:00 a.m. – 9:05 a.m. **Welcome and Opening Remarks**

Daryn Jeffries, *Filion Wakely Thorup Angeletti LLP*

Jennifer MacKenzie, *JMJ Workplace Investigation Law LLP*

9:05 a.m. – 9:35 a.m. **Update on the Law Against Harassment**

Dolores Barbini, *Hicks Morley Hamilton Stewart Storie LLP*

Ryan Edmonds, *Ryan Edmonds Professional Corporation*

9:35 a.m. – 9:40 a.m. **Question and Answer Session**

9:40 a.m. – 10:05 a.m. **Overview of the Statutory Changes**

Mihad Fahmy, Barrister and Solicitor

Julie McAlpine-Jeffries, Legal Counsel, Labour & Employment, *University of Toronto*

10:05 a.m. – 10:10 a.m. **Question and Answer Session**

10:10 a.m. – 10:50 a.m. **Developing and Revising Policies and Programs**

Ruben Goulart, *Bernardi Human Resource Law LLP*

Carolyn Johnston, Director, Employment Practices (Workplace Investigations), *Walmart Canada Corp.*

Samantha Lamb, *Jewitt McLuckie & Associates LLP*

10:50 a.m. – 11:00 a.m. **Question and Answer Session**

11:00 a.m. – 11:20 a.m. **Coffee and Networking Break**

11:20 a.m. – 12:00 p.m. **Investigations Update** (20 minutes Ⓟ)

Lauren Chang MacLean, Legal Counsel, *Metrolinx*

Monica Jeffrey, *JMJ Workplace Investigation Law LLP*

Ashley Lattal, *Shearer Lattal LLP*

12:00 p.m. – 12:10 p.m. **Question and Answer Session**

12:10 p.m. – 12:50 p.m.	**Delivering Outcomes, Remedies, and Restoration** (10 minutes Ⓟ) Philip Abbink, *Cavalluzzo Shilton McIntyre & Cornish LLP* Mona Staples, Legal Counsel, *Canadian Union of Public Employees* Nadine Zacks, *Hicks Morley Hamilton Stewart Storie LLP*
12:50 p.m. – 1:00 p.m.	**Question and Answer Session**
1:00 p.m.	**Program Ends**

Harassment in the Workplace: Understanding THE NEW OBLIGATIONS

March 28, 2017

SKU CLE17-0030601

Table of Contents

LET RIGHT PREVAIL
The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 1

Harassment in the Workplace: Understanding THE NEW OBLIGATIONS

Update on the Law Against Harrassment

Update on the Legal Issues Relating to Harassment: Helpful Q's and A's

Dolores Barbini
Harriet Yiga (Student-at-Law)
Hicks Morley Hamilton Stewart Storie LLP

March 28, 2017

cpd Continuing Professional Development

Harassment in the Workplace: Understanding the New Obligations

By Dolores M. Barbini and Harriet Yiga, Student-at-Law

What are some actions or behaviour that may, at first blush, not seem like harassment but, in fact, amount to harassment?

Workplace harassment can include:

- written or verbal insults
- abuse or threats
- racial or ethnic slurs
- unwelcome remarks, jokes, innuendoes or taunting
- practical jokes which cause awkwardness or embarrassment, endanger an employee's safety or negatively affect work performance
- unnecessary physical contact
- patronizing behaviour or language

That is a long list. But – not all inappropriate, offensive or disrespectful conduct is harassment. Harassment does **not** include:

- differences of opinion or minor disagreements
- generally "rude" or thoughtless comments or behavior
- unprofessional conduct
- workplace conflict
- the reasonable exercise of management functions including supervisory direction, constructive criticism, or disciplinary action.

Employers should note that certain "routine" communications to their employees, which on their face do not seem to be harassing, may in fact be viewed as harassment by an adjudicator. A case in point is *Prothero v. Ontario (Community Safety and Correctional Services)*, 2016 HRTO 1481 (CanLII).

In *Prothero*, the employee worked as a network administrator in the Investigation and Enforcement Bureau of the Alcohol and Gaming Commission of Ontario. While working on a large project, he suspected an audit was being conducted to undermine him. The Bureau indicated the audit was routine. The employee felt overworked, alleged health problems including panic attacks, sleeplessness and chest pain and went on medical leave.

The employee provided a medical note on December 30, 2010 saying he needed to be off work for a month. His manager sent him a request on that same day asking for additional information on restrictions and limitations to be delivered by January 7, 2011, a date which was later extended to January 12. Despite granting the extension, the manager sent another letter on January 10 requesting information required to process the employee's sick benefits. The letter stated that without medical substantiation of the absence, the sick benefits could be terminated. After receiving the medical information, the manager and employee spoke, at which time the employee understood the manager to say that the employer did not believe he was off work due to illness. The employee testified that the manager indicated if he was not back at work by the end of January, his pay would be cut off. In all, between December 2010 and March 2011, the employee sent six handwritten doctors' notes and three completed doctors' forms.

The employee brought an application before the Human Rights Tribunal of Ontario alleging discrimination and harassment with respect to disability, contrary to the *Human Rights Code*.

The Tribunal found that subjecting the employee to a "flurry" of correspondence and requiring "unnecessary" correspondence amounted to harassment under the *Code*. Employers have the right to make inquiries regarding an employee's limitations and restrictions to facilitate the accommodation process and a return to work. However, the Vice-Chair specified that this right is properly engaged in circumstances where "unclear information" has been provided, which was not the case here. The Tribunal ordered the manager to pay $2,500 to the employee and ordered the employer to pay $25,000. The manager was also instructed to take an online human rights course.

What measures can be implemented in Ontario workplaces to encourage employeesd to report incidents of harassment?

In order to encourage employees to report incidents of workplace harassment, employers should be aware of their obligations under the *Occupational Health and Safety Act* to develop and maintain a workplace harassment program, in consultation with the joint health and safety committee or a health and safety representative, if any. The program must:

- include measures and procedures for workers to report incidents of workplace harassment to the employer or supervisor

- include a reporting mechanism for incidents or complaints of workplace harassment, including a reporting mechanism for when the alleged harasser is the employer or supervisor

- specify how incidents or complaints of workplace harassment will be investigated and dealt with

- specify how information obtained about an incident or complaint of workplace harassment will not be disclosed unless that disclosure is necessary for the purposes of investigating the incident or complaint, taking corrective action, or for a reason otherwise required by law

- specify how the complainant and respondent will be informed in writing of the results of the investigation and any corrective action taken.

Who can be liable?

Under s.46.3(1) of the *Human Rights Code*, the actions of employees of a corporation undertaken in the course of their employment are generally deemed to be acts of the corporation. This deeming provision specifically does not apply to harassment, including harassment under s.5(2) of the *Code*. However, there are circumstances where an employer can nevertheless be liable for harassment committed by an employee.

For example, when a corporate employer is aware that the harassment is happening and condones or takes no action to stop it, the employer can be liable because it has failed in its duty to provide a harassment-free workplace. The corporate employer may also be liable where the alleged harasser is responsible for managing the business, e.g. a “guiding” or “directing” mind of the employer

In *Insang v. 2249191 o/a Innovative Content Solutions Inc*., 2017 HRTO 208 (CanLII), the employee alleged that the personal respondent and direct supervisor harassed him when they used offensive and racist terms and engaged in unwelcome touching.

In this case, the person responsible for the harassment was a supervisor and part of the management team. Another supervisor was aware of the situation and did nothing about the racial harassment, although he did intervene in regard to the sexual harassment. The Tribunal found the employer and supervisor jointly and severally liable for the $12,500 judgment for the harassment.

What about bystander obligations?

Josephs v. Toronto (City), 2016 HRTO 885

The applicant was a paralegal who attended the Court Services Office (CSO) at the Toronto East Provincial Court to conduct business. While at the CSO, the applicant was subjected to a racial slur by an individual member of the public,

V.F. A bystander advised the clerk on duty of what had transpired. The clerk responded “If the altercation escalated into something physical, they would call security, but most people settle their own little verbal disputes just amongst themselves.” At some point, a Court Officer became involved and investigated the matter. The applicant filed a human rights complaint against the City of Toronto and the Toronto Police Services Board.

The Tribunal had to determine what duty, if any, a service provider owes to a customer who has been racially harassed by another customer. The Tribunal ultimately found that the City subjected the applicant to discrimination in relation to the clerk’s initial response which indicated that if the matter escalated into something physical, he would call security. This response was neither reasonable nor effectual, and was “inadequate” in terms of what the *Code* requires. The City, as a service provider, had an obligation to take prompt, effectual and proportionate action when it became aware of the racial slur towards the applicant. The response did not need to be perfect, but it did need to be reasonable in the circumstances. The applicant was awarded $1,500 for injury to dignity, feelings, and self-respect.

The City was also ordered to conduct appropriate human rights training for its CSO staff at the Toronto East Provincial Court which specifically included and addressed how to respond to complaints of discrimination and/or harassment between customers.

Do rules against workplace harassment extend to behaviour on social media?

In a word, “Yes.” Decision-makers have treated social media misconduct very seriously and there are many recent cases in which an employee was terminated for cause as a result of such misconduct. At first blush, this may be somewhat surprising given that the conduct typically happens at home, on personal time, and usually not using the employer’s computer or other resources.

The recognition of the serious impact that this behaviour has on the workplace is reflective of the fact that social media is powerful and difficult to control once that post or tweet or snapchat message is sent or put online. Below are two recent cases dealing with harassment perpetrated against employees and by employees.

Toronto Transit Commission and ATU, Local 113 (Use of Social Media), Re, 2016 CarswellOnt 10550, [2016] O.L.A.A. No. 267

The TTC had two twitter accounts used to provide service updates to riders and to respond to customer service questions and complaints. Some of the tweets received from the public were critical of the service being provided by the TTC

and the manner in which TTC employees performed their duties. The Union, overwhelmed by the amount of racist and homophobic remarks, vulgarity, and death threats, filed a policy grievance alleging that the employer was providing a forum for abuse contrary to its obligation to provide a workplace free from harassment. The employer argued that as the public transit provider for the City, it had a right to establish a social media presence for the purpose of communicating with the public and its users. The TTC also had a robust and broad Workplace Harassment Policy to address any employee complaints.

The arbitrator found that social media sites operated by the TTC can be considered to constitute part of the workplace for purposes of determining whether the *Human Rights Code*, the Collective Agreement and TTC policies had been contravened as a result of harassment. Many of the tweets were harassing and the evidence showed that the TTC had failed to take all reasonable measures to protect union members from this type of harassment.

The Union sought an order requiring the TTC to shut down the account, as well as damages. The arbitrator did not award either remedy, recognizing the employer's right as a public service provider to communicate through social media with its customers and the public at large. However, the arbitrator was nonetheless still concerned about the right of employees to a harassment- and discrimination-free workplace. To this end, the arbitrator made numerous suggestions as to how to ameliorate the otherwise uncontrollable medium of communication, including that the TTC create a social media policy to address the issues raised in the grievance.

Toronto (City) v Toronto Professional Fire Fighters' Association, Local 3888, 2014 CanLII 76886 (ON LA)

Arbitrator Newman was faced with an employee who had posted a litany of comments on his Twitter account, many of which were sexist, misogynist and racist. Some were offensive in their discussion of people with disabilities. Others were offensive in their references to homeless people. The City's policy on Human Rights and Anti-Harassment expressly prohibited employees from engaging in behavior that would constitute discrimination or harassment to members of the public. Harassment included making slurs, derogatory remarks or inappropriate jokes. The City dismissed the employee for his misconduct.

Arbitrator Newman upheld the dismissal, finding that:

> *…the grievor's offensive tweets were damaging to the reputation of his employer as they had been re-printed in a National Post article criticizing the City and inconsistent with the values and objectives of the organization in terms of its recruitment initiatives*.

She accepted that he did not understand that his tweets were “public” but stated:

> *When engaging in social media use, it is my view that the user must accept responsibility when the content of his or her communications is disseminated in exactly the manner promoted by the social media provider. This is what social media is intended to do. Once we use these devices, once we load that gun, it is potentially dangerous.*

LET RIGHT PREVAIL
The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 1A

Harassment in the Workplace: Understanding THE NEW OBLIGATIONS

Update on the Law Against Harrassment

Workplace Harassment in 2016: The Year in Review

Ryan Edmonds
Ryan Edmonds Professional Corporation

March 28, 2017

cpd Continuing Professional Development

RYAN EDMONDS
Workplace Counsel

401 Bay Street, Suite 1600
Toronto, ON, M5H 2Y4
www.TorontoWorkplaceCounsel.com

Workplace Harassment in 2016: The Year in Review

Ryan Edmonds
Ryan Edmonds Workplace Counsel

Table of Contents

Introduction

The law continued to evolve in 2016 with respect to identifying, thwarting, and remedying workplace harassment. Trends over the last year include increased damage awards resulting from civil courts' inherently broad jurisdiction, stricter duties for employers in protecting employees from bullying in the workplace, and decisions which show that mental injuries resulting from harassment can occur regardless of whether the conduct at issue is an isolated incident or a prolonged pattern of vexatious behaviour. With increased responsibility and more severe sanctions, the stakes are even higher for employers to properly delineate what is appropriate management of the workplace and what constitutes harassing behaviour. This paper reviews the latest legislative reform as well as decisions across the various forums in Ontario that are tasked with adjudicating claims of workplace harassment and the resulting mental injuries.

WSIB: Update on Claims for Mental Stress due to Harassment

Overview of Regime

The Workplace Safety & Insurance Board ("WSIB") scheme in Ontario protects employers from civil liability if they are covered by the no fault insurance scheme which compensates workers for illness or injury arising from employment. In recent years there has been action around claims for mental injuries resulting from workplace harassment. In such cases, an employee can claim benefits for health care costs, loss of earnings, and permanent impairment. The claim must fall under the general entitlement provision, however, and compensation for mental stress is limited to events causing "traumatic mental stress."[1] In the decisions this has required an Axis 1 DSM-IV diagnosis, most commonly of Post Traumatic Stress Disorder ("PTSD").

Section 13 of the Ontario Workplace Safety and Insurance Act, 1997 ("WSIA") sets out entitlement and exceptions to benefits for mental stress injuries:[2]

> Insured injuries
>
> 13. (1) A worker who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan. 1997, c. 16, Sched. A, s. 13 (1).
>
> Exception, employment outside Ontario
>
> (4) Except as provided in subsections (5) and 14 (3), a worker is not entitled to benefits under the insurance plan for mental stress. 1997, c. 16, Sched. A, s. 13 (4); 2016, c. 4, s. 1.
>
> Same
>
> (5) A worker is entitled to benefits for mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of his or her employment. However, the worker is not entitled to benefits for mental stress caused by his or her employer's decisions or actions relating to the

[1] *Workplace Safety and Insurance Act*, 1997 S.O. 1997, c. 16, Sch. A, s.13(5) ("*WSIA*").
[2] *Ibid* s.13

> worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the employment. 1997, c. 16, Sched. A, s. 13 (5).

Decisions have drawn a distinction between injuries caused by harassment of a sexual, violent, and "acute" nature, as compared to those which result from "continuous" psychological bullying. Traditionally, workers' compensation adjudicators have viewed this latter type of behaviour as "the usual stresses and strains of the workplace",[3] however recent cases indicate the tide is turning.

Since 2014, the Workplace Safety and Insurance Appeals Tribunal ("WSIAT") has ruled that the bar to claims for "continuous" mental stress were unconstitutional,[4] as the limitations in s.13(4) and (5) of the *WSIA* infringe on a worker's equality rights under s.15(1) of the *Charter of Rights and Freedoms* without proper justification. As a result of this unconstitutionality, where the worker's appeal would have succeeded but for s. 13(4) and (5), the WSIAT has found the worker entitled to benefits for mental stress. Note, however, that the Charter challenges have been restricted to the "acute" mental stress branch of s. 13(5), meaning that the constitutionality of the prohibition on mental stress caused by an employer's actions *per se* has yet to be tested.[5]

[3] See e.g. *D.W. v. New Brunswick (Workplace Health, Safety and Compensation Commission)*, 2005 NBCA 70, where confrontational workplace politics caused an employee to develop "major and resistant depression". The workers' compensation board, reviewing court, and New Brunswick Court of Appeal all agreed that an "acute reaction to a traumatic event" had not occurred within the meaning of the legislation. Rather, the employee's condition was related to the "usual stresses and strains of the workplace" and was therefore not compensable.
[4] Decision No. 2157/09, 2014 ONWSIAT 938 and Decision No. 1945/10, 2015 ONWSIAT 223.
[5] Decision No. 2157/09, 2014 ONWSIAT 938.

"Acute" vs "Continuous" Mental Stress

A number of recent decisions demonstrate how workers' compensation adjudicators have dealt with the legislative distinction between "acute" and "continuous" mental stress. For example, in Decision No. 2157/09,[6] a hospital nurse was subject to harassing behaviour by a doctor over a period of 12 years. The harassment included yelling at her, making demeaning comments towards her, and interfering with her ability to do her job. Eventually the nurse stopped working and was diagnosed with an adjustment disorder, anxiety, and depression, all of which were attributed to workplace stress. Though initially denied benefits on account of not having suffered "acute" mental stress, the nurse successfully challenged the decision which led the *WSIAT* to rule that the legislative distinction violated her constitutional rights.

In 2016, Decision No. 1572/12[7] ruled on the entitlement of a deaf kitchen worker who had been chronically bullied throughout his 30 years on the job. The cruel behaviour inflicted on the worker included locking him in the walk-in freezer, throwing food at him to get his attention, giving him "wedgies", pulling his pants down, making threatening physical gestures towards him, and on one occasion a co-worker hit him. Eventually the worker was diagnosed with PTSD, at which point he stopped working.

While the employer claimed that these actions were done in jest, the WSIAT found that regardless of the intention, the behaviour experienced by the worker was still traumatic. Because of this, even though the harassment took place over a long period of time and was likely still cumulative, it nonetheless met the requirements of s. 13(5) as being an "acute reaction to sudden, unexpected traumatic events". Notably, the Panel also commented that even if they had not been

[6] *Ibid*
[7] Decision No. 1572/12, 2016 ONWSIAT 987.

able to justify the prolonged harassment under the confines of s. 13(5), because the worker also suffered mental stress due to "physical assaults" (i.e. being locked in the freezer, having food thrown at him, wedgies, being hit), he would still be entitled to benefits on this basis.

A recent case from Nova Scotia[8] similarly demonstrates the flexibility adjudicators are starting to show in navigating the distinction between "continuous" and "acute" mental stress. In decision WCAT # 2012-111-AD,[9] released in August 2016, a gay firefighter was awarded entitlement for mental stress after being subjected to homophobic harassment over a period of many years. The harassment consisted of homosexual pornography being distributed anonymously around the fire hall, insulting and humiliating comments as well as threats of physical violence being made against the worker, and the sabotage of his breathing apparatus so that outside air, gases, and smoke could enter his facemask in the event of a fire, something that could have endangered his life.

After being subject to years of this behaviour the worker was diagnosed with "situational adjustment disorder with depressed and anxious mood" and was deemed incapable of returning to work. Although the Worker's Compensation Board ruled that the harassment was cumulative and therefore "continuous", which disentitled him to benefits, the Appeal Tribunal disagreed as it found that the acts inflicted would reasonably cause the worker to perceive a threat of death or serious injury. As a result, the definition of a "traumatic event" was made out which entitled the worker to coverage and benefits.

[8] The worker's compensation scheme in Nova Scotia similarly limits claims for mental stress where the stress is cumulative, and not the result of a single, discrete traumatic event.
[9] 2012-111-AD (Re), 2016 CanLII 59328 (NS WCAT)

Legislative Reform

While appeals tribunals seem sympathetic to victims of "continuous" workplace harassment, they do not have the power to strike down legislation. In Ontario, without a change in the legislation from the government, the WSIB must continue to apply s. 13(4) and (5) of the *WSIA* as written.[10] As a result, unless a worker has the means to appeal their disentitlement to the WSIAT, and in many cases launch a *Charter* challenge, he or she will not receive benefits for mental stress. This situation led to a complaint in 2016 to the Ombudsman of Ontario with respect to the government's failure to remedy the WSIAT's finding that its own legislation was unconstitutional,[11] as well as concerns that Ontario seems to be out of step with other provinces that allow coverage for injury resulting from "continuous" mental stress.[12]

In 2016, the Ontario government changed the law with respect WSIB claims for PTSD for first responders with Bill 163, "Supporting Ontario's First Responders Act (Posttraumatic Stress Disorder)". Bill 163 amended the *WSIA* to create a rebuttable presumption in favour of granting benefits to first responders diagnosed with PTSD,[13] given that they are twice as likely as the general population to suffer from PTSD due to the nature of their jobs.[14] Notably, however, if a first responder's PTSD is a result of performance management-related actions taken by the employer, he or she will still be disentitled to coverage.[15]

---

[10] See Decision No. 665/10, 2016 ONWSIAT 997 and Decision No. 1945/10, 2015 ONWSIAT 223.
[11] "Ombudsman Asked to Probe WSIB Treatment of Mentally Ill", The Toronto Star (November 14, 2016), online: https://www.thestar.com/news/gta/2016/11/14/ombudsman-asked-to-probe-wsib-treatment-of-mentally-ill.html
[12] Aside from Alberta and British Columbia, jurisdictions such as Saskatchewan, Québec, Yukon, Northwest Territories, and Nunavut do not exclude claims for chronic onset psychological injury.
[13] *Workplace Safety and Insurance Act*, 1997, SO 1997, c 16, Sch A, (WSIA) s.14
[14] Ministry of Labour, "Ontario Passes Legislation to Support First Responders with PTSD" (April 5, 2016).
[15] WSIB Operational Policy Manual: Posttraumatic Stress Disorder in First Responders and Other Designated Workers, 2016

Update on Damages for Workplace Harassment: A Tale of Two Forums

Human Rights Tribunals

Despite a number of record-setting decisions, it appears that damage awards by human rights tribunals for workplace harassment have remained relatively restrained.

Recall that the British Columbia Supreme Court made news in 2015 for overturning an award of $75,000.[16] In 2016, however, the BC Court of Appeal allowed the applicant's appeal and restored the original damages award.[17] While the judicial review judge had found the $75,000 award patently unreasonable since it was twice the amount given in other cases of similar discrimination, the Court of Appeal disagreed,[18] noting that ranges from previous cases should play a "more diminished role" when determining an award for injuries to dignity under the *Human Rights Code* (an echo of concerns raised in 2012's *Pinto Report*[19]). This new high watermark for B.C. comes after the Ontario Human Rights Tribunal set its own new record in 2015 when it awarded $150,000 to a victim of egregious sexual harassment in *O.P.T. v. Presteve Foods Ltd*.[20]

While certainly high, the above awards do not appear to have become trend-setting as of yet, however, as recent damage awards for workplace harassment at the HRTO have still remained in the range of $20,000.

[16] *University of British Columbia v. Kelly*, 2015 BCSC 1731.
[17] *University of British Columbia v. Kelly*, 2016 BCCA 271.
[18] *Ibid* at para 60.
[19] Andrew Pinto, "Report of the Ontario Human Rights Review 2012" (November 2012), online: https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/human_rights/#_Toc436831399.
[20] 2015 HRTO 675.

For example, *Perry v. The Centre for Advanced Medicine*[21] involved ongoing sexual harassment of the applicant by her boss, a naturopathic doctor. The harassment included unwanted hugging, a kiss on the neck, frequent massaging and touching of the applicant's neck and shoulders, as well as rubbing his body up against her when she walked by. The applicant also frequently received sexually charged, though not explicit, text messages from her boss which included "wink" and "tongue sticking out" emojis. After repeatedly refusing his advances, the applicant was terminated. Relying heavily on the text message exchanges, the HRTO did not hesitate to find that the applicant had been a victim of workplace sexual harassment. In terms of damages, the HRTO the awarded the applicant $15,000.00 for injury to dignity and $10,000.00 as compensation for reprisal.

The award in *Perry*, which involved unwanted sexual solicitation over a period of time, can be contrasted with the result in *Granes v. 2389193 Ontario Inc.*,[22] where the applicant was awarded $20,000.00 in human rights damages after enduring one night of sexual harassment by the co-owner of the restaurant where she worked. In *Granes*, the HRTO found that the personal respondent had "touched the applicant's breast, put his arm around her, touched her stomach, rubbed her thigh, attempted to kiss her and used physical force against her."[23]

Civil Court Claims for Harassment

In contrast to human rights tribunals, civil courts have shown a willingness to compensate victims of workplace harassment with significant damages awards. Given the significant flexibility with which employees can plead their cases, this is perhaps not surprising. As a result

[21] *Perry v. The Centre for Advanced Medicine*, 2017 HRTO 191.
[22] *Granes v. 2389193 Ontario Inc.*, 2016 HRTO 821.
[23] *Ibid* at para 58

of amendments to the *Code* in 2007 that allowed plaintiffs to add a human rights claim onto an existing cause of action, employees can now simultaneously seek remedies for workplace harassment under the *Human Rights Code*, breach of contract (i.e. constructive dismissal), or tort (i.e. intentional infliction of mental suffering), while also seeking punitive and/or aggravated damages from the same underlying facts.

For example, in *Strudwick v. Applied Consumer & Clinical Evaluations Inc.*,[24] the Ontario Court of Appeal actually increased the damages awarded to a deaf employee who had been the victim of egregious workplace harassment. The plaintiff was a part-time clerical employee with fifteen years of service who suddenly became completely deaf one year before her termination. Once she became deaf the employer's attitude towards her changed, and a campaign was commenced designed to make her working environment so intolerable that she would quit. The court accepted that the employer was deliberate in its harassment and mistreatment of the employee. For example, the employer would give the plaintiff instructions in a manner that prevented her from lip reading then call her "stupid" for not understanding, she was criticized and called "too cheap" when doctors were unable to identify the exact reason for her hearing loss, and it suggested to her that she should "just quit" and go on disability.

Despite the severity of this misconduct, the lower court made relatively modest awards of $20,000 for violations under the *Human Rights Code*, $18,984 for intentional infliction of mental suffering, and $15,000 in punitive damages. On appeal, however, the Court of Appeal increased these amounts to $40,000, $35,294, and $55,000 respectively, in addition to awarding a new amount of $70,000 for aggravated damages. With regards to the employer's concern about

[24] 2016 ONCA 520.

"double-punishment" and/or "double-recovery", the Court of Appeal held that while such outcomes should be "avoided", they can nonetheless be justified in certain circumstances:[25]

> "It is true that the same conduct that underlies the awards under both punitive damages and damages for conduct in dismissal. However, such will invariably be the situation. What justifies punitive damages ultimately is the conclusion, in exceptional cases, that compensatory damages are simply insufficient to respond to the conduct being addressed.
>
> I agree with the motion judge that this is such a case. In my view, Applied Consumer's conduct in relation to Ms. Strudwick, who the evidence demonstrates was a highly regarded, long-term, faithful employee who became profoundly disabled late in life, can only be described as a marked departure from any conceivable standard of decent behaviour. Such conduct deserves punishment on its own." [Emphasis added]

In total, the Court of Appeal increased the employee's damages award from $113,782.79 to $246,049.92 (inclusive of pay in lieu of reasonable notice).

A similar result occurred in *Doyle v. Zochem Inc.*, where an employee received $60,000 in *Keays*/"moral" damages in addition to $25,000 under the *Human Rights Code* as a result of being terminated five day after making a sexual harassment complaint against the manager of her male-dominated workplace. Among other misconduct, the employer wanted to replace the employee with a male so as to avoid any "gender issues" in the future, went to great lengths to protect the respondent harasser, conducted a meaningless and biased one-day investigation led by an executive who lacked proper training, and concocted unfounded allegations of after-acquired cause. On appeal the employer attacked the apparent overlap in damage awards, to which the Court of Appeal stated that:

> "While there is an overlap of conduct, the conduct relating to the award of moral damages and that relating to *Code* damages for sexual harassment is not identical. […]
>
> What this jurisprudence does illustrate is that when damages vindicate the same interests in law, the courts take care to avoid double-recovery. Moral damages are awarded as a result of the manner of dismissal, where the employer engages in conduct during the course of dismissal that is unfair or is in bad faith, that caused mental distress. … In contrast, *Code* damages are remedial, not punitive in nature, and compensate for the intrinsic value of the infringement of rights under the *Code*.

[25] *Ibid.* at paras 113-114.

> Where, as here, the awards in question vindicate different interests in law, there will be no overlap in the damages awarded although the same conduct is considered." [Emphasis added]

Given the more modest damage awards and constraints on claims at the *HRTO*, as well as the fact that an employer cannot be ordered to pay a successful employee's legal costs, query whether civil courts will become the new forum of choice for cases involving workplace harassment.

Update on Constructive Dismissal: Harassment or "Ordinary" Stress?

The recent case of *Persaud v. Telus Corporation*[26] addressed the reoccurring question of whether the conduct an employee complains of constitutes harassment or is the result of the "ordinary stress" of a given job.

In *Persaud,* the plaintiff was unsuccessful in her claim for constructive dismissal, a she failed to make out either a change in circumstances or a poisoned work environment. The plaintiff worked a high stress job as a software developer at Telus. She resigned and made a claim for constructive dismissal, claiming that the employer had unduly increased her workload and caused her to work in a poisoned work environment. Her evidence with respect to the poisoned work environment consisted of two incidents where superiors raised their voice at her and the general high stress nature of the position.

The court found that the ordinary stress of the position could not be a basis for constructive dismissal and noted that this is especially true in competitive, high-pressure industries, such as IT. The employee's complaints of a poisoned work environment were similarly not made out as there was no pattern of wrongful behaviour, nor any single egregious

[26] *Persaud v. Telus Corporation*, 2016 ONSC 1577

incident.[27] In coming to this conclusion, the court confirmed that "[a] workplace becomes poisoned only where serious wrongful behaviour is demonstrated", [28] and that it is the employee who bears the onus of establishing a poisoned work environment on an objective basis, without regard for his or her "subjective feelings or genuinely-held beliefs". [29]

Update on Legislative Reform in Ontario

On September 8, 2016, "An Act to amend various statutes with respect to sexual violence, sexual harassment, domestic violence and related matters",[30] commonly known as Bill 132, came into force. The new amendments significantly bolster an employer's obligations under the *Occupational Health and Safety Act*[31] with respect to preventing and investigating claims of workplace harassment. Bill 132's changes include:

- Creating a new definition specifically for "workplace sexual harassment;"[32]
- Requiring employers to develop and maintain a program to implement the workplace harassment policy;
- New procedures for reporting workplace harassment when the employer or a supervisor is the alleged harasser;
- New directions with respect to how sensitive information, such as identifying information of the individuals involved in harassment investigations, will be handled so that it is not disclosed unless necessary; and

[27] *Ibid* at para. 47.
[28] *Ibid* at para 48
[29] *Ibid.*
[30] Online: http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=3535&detailPage=bills_detail_the_bill
[31] RSO 1990, c O.1.
[32] *Ibid*, s.1(1).

- New provisions on how the results of an investigation will be shared with the complainant and alleged harasser.

In addition, a general duty was created requiring employers to protect workers from workplace harassment by:

- Conducting investigations into incidents and complaints of workplace harassment;
- Informing the complainant and alleged harasser of the results of an investigation and any corrective action taken; and
- Reviewing the workplace harassment program as often as necessary but at least annually.

To enforce this duty, Bill 132 grants Ministry of Labour inspectors the power to compel an investigation by an impartial third party into allegations of workplace harassment at the employer's expense.

Though not yet passed, Bill 26, "An Act to amend the *Employment Standards Act, 2000* in respect of leave and accommodation for victims of domestic or sexual violence and to amend the *Occupational Health and Safety Ac*t in respect of information and instruction concerning domestic and sexual violence",[33] would also impose new duties on employers. Specifically, Bill 26 would:

- Require employers to train managers and supervisors about domestic and sexual violence in the workplace;

[33] Online: http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=4174

- Create new forms of employee leave under the *Employment Standards Act*, 2000 for employees that suffer domestic or sexual violence personally, or where it is suffered by their children; and
- Require employers to accommodate employees who have experienced domestic or sexual violence by allowing them to change work hours or location.

As with Bill 132, the legislative changes proposed by Bill 26 reiterate that workplace harassment remains a serious issue, and that employers are the entities with primary responsibility for preventing and rectifying it.

Update on the Duty to Protect from "External" Harassment

While much of this paper has focused on workplace harassment as between employees, the arbitral decision of *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission (Use of Social Media Grievance)*[34] spoke to the importance of protecting employees from outside harassment. Specifically, the Union challenged the employer's use of Twitter to solicit customer complaints, and in so doing, "to publish personal information about Local 113 members, to receive and make complaints about Local 113 members, and to solicit public comment with respect to Local 113 members."[35]

The TTC established the Twitter handle @TTChelps in order to communicate with TTC users and as a means of addressing complaints. The tweets received by @TTChelps were often abusive, profane, and derogatory towards TTC workers, and frequently contained identifying information about the particular individual. For example, tweets directed at @TTChelps refer to

[34] *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission (Use of Social Media Grievance)* [2016] O.L.A.A. No. 267
[35] *Ibid* at para 1

TTC employees as: "bitchy bus drivers", "racist asshole bus drivers", "shitty drivers", "cunts", "douchebags", "fucking dicks", "doublefucks", "rudest people on the planet", "grumpy bastard", "rude selfish beastly male TTC subway operator", "another fucking faggot in a not in service bus", "brown son of a gun of a driver", "bald white piece of shit fuck", "racist fuck that needs to get laid", "overweighted ginger with a grouchy attitude", and "bald dude w/ 2 earrings taking tickets at temporary Union entrance is an absolute prick".[36]

The Union argued that by maintaining the account the TTC contributed to a hostile work environment by creating a forum for abuse of employees. The Union also argued that in its responses to customer complaints from @TTChelps, the TTC did not defend employees from such abuse. A further problem was with respect to the publicity of the tweets, as Twitter only allows a tweet to be deleted by its author, even when directed to or containing information about another. Therefore abusive tweets about TTC employees, tweeted at @TTChelps, remained on the TTC twitter page for public view.

Arbitrator Howe found that, even on social media, employers have a legal obligation to prevent harassment of employees. Applying this principle to the facts at hand, he held that in their responses to the tweets the TTC failed to protect its employees. The TTC was also criticized for accepting the truth of the customer complaints without any investigation, and for empathizing with the customer and not the employee. @TTChelp often responded to customer complaints with platitudes such as "sorry to hear that", "that's not good", and "that was not nice at all."[37]

[36] *Ibid* at para 29.
[37] *Ibid* at para 17.

While the Union requested that the TTC shut down @TTChelps, this action was not granted. Instead, Arbitrator Howe ordered the Parties to create a Twitter policy to ensure the TTC would be taking all reasonable measures to protect its employees from harassment, and provided the following as instructional guidance:[38]

> "@TTChelps should not only indicate that the TTC does not condone abusive, profane, derogatory or offensive comments, but should go on to request the tweeters to immediately delete the offensive tweets and to advise them that if they do not do so they will be blocked. If that response does not result in an offensive tweet being deleted forthwith, @TTChelps should proceed to block the tweeter."

He further indicated that harassing tweets should be deleted with the assistance of Twitter, and that if Twitter is unresponsive, use of the @TTChelps account should be reconsidered.

Conclusion

As our society becomes more diverse and more digitized we will continue to see new developments in the law of workplace harassment. As adjudicators and legislators deliver these changes, it is crucial for employers and their counsel to remain up to date on the ever-evolving requirements for preventing harassment and responding to claims from those who have been injured by it.

[38] *Ibid* at para 133.

LET RIGHT PREVAIL
The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 2

Harassment in the Workplace: Understanding THE NEW OBLIGATIONS

Overview of the Statutory Changes

Protecting Ontario Workers from Harassment: Changes to the *Occupational Health and Safety Act* under Bill 132

Co-authored by:
Cassandra Ma, Filion Wakely Thorup Angeletti LLP

Co-authored and presented by:
Mihad Fahmy, Barrister and Solicitor
Julie McAlpine-Jeffries, Legal Counsel, Labour & Employment, *University of Toronto*

March 28, 2017

cpd Continuing Professional Development

Protecting Ontario Workers from Harassment:

Changes to the *Occupational Health and Safety Act* under Bill 132

By Cassandra Ma, Filion Wakely Thorup Angeletti LLP
Mihad Fahmy, Barrister and Solicitor
Julie McAlpine-Jeffries, Legal Counsel, Labour & Employment, University of Toronto

On March 8, 2016, the Legislative Assembly of Ontario passed *An Act to amend various statutes with respect to sexual violence, sexual harassment, domestic violence and related matters* ("Bill 132")[1]. Bill 132 amends several Ontario statutes to better protect individuals from sexual violence and sexual harassment.

This paper will review the effects of Bill 132 on Ontario's occupational health and safety legislation, and discuss the associated impact that Bill 132 may have on employers.

Overview of the Statutory Changes to OHSA

Schedule 4 of Bill 132 makes various amendments to the *Occupational Health and Safety Act* ("OHSA")[2] with respect to workplace harassment. The amendments to OHSA came into force on September 8, 2016. These amendments can be categorized under three main themes: (1) modifications to the definition of "workplace harassment"; (2) increased obligations for employers with respect to workplace harassment; and (3) enhanced requirements for programs that address workplace harassment. Each theme is discussed further below.

(1) Modifications to the definition of "workplace harassment"

Bill 132 created a more expansive definition of "workplace harassment" under subsection 1(1) of OHSA. In particular, the definition of "workplace harassment" was amended to include workplace sexual harassment. Furthermore, subsection 1(4) of OHSA clarifies that workplace harassment does not arise where an employer takes reasonable action relating to the management and direction of workers or the workplace.

The new definition of "workplace sexual harassment" under s. 1(1) of the Act reflects the already existing prohibitions against sexual harassment and sexual solicitation under the Ontario *Human Rights Code* (the "*Code*")[3]. Section 1(1) of OHSA now defines "workplace sexual harassment" as:

> (a) engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome; or
>
> (b) making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome.

The inclusion of workplace sexual harassment in the definition of "workplace harassment" likely does not result in a substantive change to OHSA. Prior to Bill 132, OHSA defined "workplace harassment" as any course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome. This broad definition captured harassment on any *Code*-related ground, including sexual harassment.[4] The amendments under Bill 132 did not alter this core definition of "workplace harassment", but rather, further clarified that employers have an obligation to protect their workers from any incidents of sexual harassment in the workplace.

Despite the foregoing, OHSA's definition of "workplace sexual harassment" should be included in any workplace harassment policy and program in addition to the definition of "workplace harassment".

(2) Increased obligations on employers with respect to workplace harassment

Additionally, the amendments to OHSA under Bill 132 require employers to take steps to protect workers from workplace harassment. Subsection 32.0.7(1) of OHSA outlines three specific duties with respect to protecting workers from workplace harassment. The first two of these duties pertain to: (a) the conduct of investigations with respect to workplace harassment;

and (b) the dissemination of investigation results. The third new duty relates to the workplace harassment program, and will be addressed further below.

The Lieutenant Governor in Council may also prescribe other duties on employers by regulation.[5] However, no such duties are currently prescribed.

(a) Conducting investigations with respect to workplace harassment

Subsection 32.0.7(1)(a) of OHSA requires an employer to investigate incidents and complaints of workplace harassment, as appropriate in the circumstances. In determining whether an appropriate investigation has been conducted, the timeliness, fairness, and thoroughness of the investigation are likely to be relevant considerations. In order to meet its obligations, an employer should to treat the incident or complaint seriously, act upon the incident or complaint promptly, and allow sufficient time and resources to investigate the incident or complaint. An employer should also continually inform the complaint and the alleged harasser about the status of the investigation.

Employers will want to exercise care when determining whether a workplace harassment investigation is necessary, and when choosing an investigator for the investigation, as flaws in the investigation process may result in the Ministry of Labour ordering the employer to conduct another investigation at the employer's expense.

(i) The need to address all incidents and complaints of harassment

Based on subsection 32.0.7(1)(a) of OHSA, an employer must deal with any incident of workplace harassment, regardless of whether a formal complaint has been made. However, it may be that an investigation does not need to be carried out when the allegations, if true, would not meet the definition of workplace harassment. If the employer were to refuse to investigate for any reason, the employee could challenge this decision through the Ministry of Labour.

The Ministry of Labour has explicitly stated that alternative methods of dispute resolution cannot replace the necessity of a workplace harassment investigation.[6] For example, an employer must conduct an investigation even if an allegation may be dealt with through grievance

arbitration. However, once an investigation has been completed, the employer and the complainant may agree to make further attempts at resolution through alternative processes.

(ii) The choice of an internal or external investigator

OHSA does not stipulate whether an employer must use an internal or external investigator. When deciding whether to use an internal or external investigator, an employer may want to consider factors such as expertise, experience, actual or perceived neutrality, speed, and efficiency or resource allocation.[7] Generally speaking, it is recommended that an investigator be at an arm's length from the individuals who are involved in the incident or complaint of harassment. Moreover, an investigator should be familiar with OHSA, the *Code*, and any workplace policies that are relevant to the investigation.

While in many cases an internal investigator may be able to conduct a speedier investigation, an external investigator may be more appropriate when the allegations of harassment are serious or complex, or where the appearance of neutrality is highly important to the involved parties.

Under OHSA, a person who conducts a workplace harassment investigation is not required to have a license to investigate. However, an investigator whose work primarily consists of investigating the character or actions of a person may be required to have a license under the *Private Security and Investigative Services Act, 2005*.[8]

(iii) Investigations ordered by the Ministry of Labour

Under section 55.3 of OHSA, an inspector from the Ministry of Labour may now order an employer to have an investigation carried out by an impartial person possessing specific knowledge, experience, or qualifications.[9] Such an investigation would be conducted at the employer's expense. The Ministry of Labour has clarified that an "impartial person" can be either an internal or external investigator:

> An "impartial person" would be someone who is unbiased, with no conflict of interest, and in good standing with their professional body (if applicable). **<u>While one may expect that an "impartial person" may be someone external to the workplace or</u>**

organization, in some circumstances it could be someone in the organization.[10]

[Emphasis added]

Under the current legislative language, it is unclear whether the inspector's authority in this regard is wholly discretionary, or if an investigation may only be ordered under particular circumstances. Comments made during legislative debates and committee proceedings around Bill 132 suggest that the intention was for particular circumstances to exist before an inspector would order an investigation. Specifically, Ontario legislators suggested that the following circumstances may trigger an investigation order under section 55.3:

- An employer failing to do an investigation;
- An employer conducting an inadequate or improper investigation;
- The uncovering of workplace problems by a Ministry of Labour blitz; and
- Incidents involving the CEO or a senior director of a company where an internal investigation might be ineffective or partial.[11]

Section 55.3 will likely have wider ramifications for smaller businesses. A smaller business may not have internal investigators who are at an arm's length from the matter under investigation, especially if the allegations of harassment are against the owner or an executive of the business. Comparatively, larger businesses have more resources and internal personnel, such that an impartial internal investigation could be easier to carry out. Accordingly, it appears that small businesses may be more likely to face such an order from the Ministry of Labour and as a consequence, bear the cost of retaining an external investigator.

(b) Disseminating the results of an investigation

Subsection 32.0.7(1)(b) of OHSA outlines an employer's obligations regarding the disclosure of investigation results. Specifically, an employer must inform the complainant, in writing, of the results of the investigation. Similarly, if the alleged harasser works for the employer, the employer must inform the alleged harasser, in writing, about the investigation results. In discharging these obligations, the employer need not produce the entire investigation

report to the complainant and the alleged harasser. Rather, it is sufficient to provide the parties with a summary of the findings of the investigation.

Subsection 32.0.7(1)(b) also requires an employer to inform the complainant and the alleged harasser, if the alleged harasser is an employee, about any corrective action that arises from the investigation. The information provided about the corrective action should indicate the steps that the employer has taken or will take to prevent a similar incident of workplace harassment. This information may include details about individual corrective action with respect to a harasser, such as apologies, counselling, reprimands, or job transfers. OHSA does not stipulate whether a complainant must be informed of any discipline, and in particular the level or type of discipline that was imposed on a respondent who was found to have committed workplace harassment. Given the complainant's broad entitlements to information under the Bill 132 amendments, it is reasonable to expect that an employer will be required to at least indicate that the harasser was disciplined, and perhaps provide more detailed information.

For the purposes of OHSA, investigative records must be kept for at least one year after the conclusion of the investigation.

Notably, a report that is produced in respect of a workplace harassment investigation is not subject to an employer's general obligations regarding reports that concern occupational health and safety. Typically, an employer must provide the results of any occupational health and safety report to its joint health and safety committee or health and safety representative.[12] Employers may also have to provide the results of a general report regarding occupational health and safety to any worker who requests this information.[13] However, according to subsection 32.0.7(2) of OHSA, a report with respect to a workplace harassment investigation does not constitute the type of report that must be shared with a joint health and safety committee or other employees in accordance with existing general provisions of OHSA.

(3) Enhanced requirements for programs that address workplace harassment

Bill 132 amended OHSA to enhance the requirements for workplace harassment programs. In particular, new requirements were added to OHSA regarding: (a) the development

and maintenance of a workplace harassment program; (b) review of the workplace harassment program, and (c) the contents of a workplace harassment program.

(a) Developing and maintaining a workplace harassment program

Subsection 32.0.6(1) of OHSA is a new procedural requirement with respect to workplace harassment programs. Specifically, an employer must now consult with its joint health and safety committee or health and safety representative when developing and maintaining a workplace harassment program. As part of this requirement, the employer must provide the committee or representative with any information that is relevant to the program and allow the committee or representative to comment on the program. These comments may be received in either oral or written form, and must be considered in good faith. Employers should also record details of any meetings or correspondence involving the joint health and safety committee or the health and safety representative with respect to the program.

The procedural requirement under subsection 32.0.6(1) likely complements the existing obligations for joint health and safety committees under OHSA. Under subsection 9(18) of OHSA, a joint health and safety committee is entitled to:

- identify situations that make be a source of danger or hazard to workers;
- make recommendations to an employer for the improvement of workplace health and safety, including recommendations about establishing, maintaining, and monitoring health and safety programs; and
- obtain information from an employer in respect of potential or existing workplace hazards.

The involvement of a joint health and safety committee in developing and maintaining a workplace harassment program thus parallels the responsibilities of the committee, as listed above. Nevertheless, questions may arise as to whether a joint health and safety committee is qualified to assess a program for workplace harassment. In larger organizations, joint health and safety committees may deal more with hazards related to physical space, chemicals, or equipment. Thus, an employer may wish to provide support to the committee to ensure that its

members have sufficient knowledge of issues of workplace harassment to comment on the program.

(b) Review of workplace harassment programs

Subsection 32.0.7(1)(c) of OHSA requires an employer to review its workplace harassment program on an annual basis, so as to ensure that the program adequately implements the employer's workplace harassment policy. When reviewing workplace harassment programs, employers should focus on the currency of the measures and procedures within the program. Additionally, employers should look for any deficiencies or gaps within the program's measures and procedures.

A more frequent review of the workplace harassment program may be necessary if an investigation reveals deficiencies or gaps within the program. An employer may also need to review its workplace harassment program if, within 12 months of the last review, it found that measures and procedures were not followed in a particular incident of harassment.

(c) The contents of a workplace harassment program

Subsection 32.0.6(2) of OHSA outlines the substantive requirements for programs that address workplace harassment. Bill 132 added three new requirements to this subsection; these requirements must be addressed in the contents of a workplace harassment program.

The first new requirement addresses incidents or complaints of harassment where an employer or supervisor is the alleged harasser. Under subsection 32.0.6(2)(b), a workplace harassment program must include measures and procedures for workers to report incidents of workplace harassment to someone other than the employer or supervisor if the employer or supervisor is the alleged harasser. The individual receiving the complaint could be either internal or external to the organization. However, the individual must not be under the direct control or supervision of the alleged harasser.

The second requirement deals with the confidentiality of information. A workplace harassment program must explain how information—including identifying information about any

individuals—about an incident or complaint of workplace harassment will not be disclosed unless disclosure is permitted under subsection 32.0.6(2)(d). Subsection 32.0.6(2)(d) states that disclosure may be permitted for the purposes of investigating or taking corrective action with respect to the incident or complaint of workplace harassment, or as otherwise required by law. Situations where disclosure may be required by law would include disclosure obligations under rules of civil procedure or arbitration procedure. Disclosure may also be required by law if a collective agreement entitles a union to obtain investigation information from the employer.

The third requirement addresses an employer's obligation to disseminate the results of an investigation to the complainant and the alleged harasser. Specifically, under subsection 32.0.6(2)(e), a workplace harassment program must set out how the complainant and the alleged harasser will be informed of the investigation results. The workplace harassment program must also explain how the complainant and the alleged harasser will be informed of any corrective action that arises from the investigation.

Impact of the Changes on Occupational Health and Safety

Overall, the Bill 132 amendments represent a substantial shift in the extent to which the employer's response to workplace harassment incidents and complaints is mandated by law, and as an extension of that, the extent to which the Ministry of Labour may be involved in incidents/complaints of workplace harassment. Employers are now legally required to play a more active role in investigating incidents/complaints of workplace harassment, and the MOL has jurisdiction to enforce the employer's role in investigations.

Prior to Bill 132, OHSA only required an employer to have a policy and program for dealing with harassment complaints. Consequently, an employer would meet its obligations with respect to workplace harassment as long as it had a policy and program that satisfied OHSA's specified requirements. Beyond putting in place the policy and program, the employer had no procedural or substantive obligations with respect to workplace harassment. Similarly, prior to the OHSA amendments, the Ontario Labour Relations Board ("OLRB") did not have the jurisdiction to assess the employers' response to allegations of workplace harassment. Thus, if a complainant was

dissatisfied with how his or her complaint was investigated, he or she would have to pursue recourse through arbitration (if the complainant was represented by a union), the Human Rights Tribunal of Ontario (if the complaint related to a prohibited ground of discrimination), or the civil court system.

The limits upon the OLRB's oversight of an employer's response to workplace harassment were initially set out in *Investia Financial Services Inc and Industrial Alliance Insurance and Financial Services Inc,*[14] as follows:

> **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.
>
> **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**.
>
> [Emphasis added]

Subsequent to *Investia*, the OLRB issued a preliminary decision in *Aim Group Inc and General Motors of Canada Limited*,[15] which has generally been viewed as broadening the scope

of the OLRB's jurisdiction with respect to workplace harassment. In *Aim*, the OLRB found that it had jurisdiction over a worker's allegation that the employer had engaged in a reprisal against him when it terminated his employment for filing a workplace harassment/violence complaint. The OLRB framed the issue as (para. 28): "whether a worker who is making a complaint of workplace harassment to his or her employer is seeking enforcement of the Act or acting in compliance with the Act." If that question were answered in the affirmative, then terminating the worker's employment for making the complaint would constitute a reprisal. The OLRB analyzed the OHSA requirement that an employer develop and maintain a program to implement its workplace harassment policy, finding that it imposes an obligation on the employer to "actively carry out the policy" (para. 58). Therefore, the OLRB found (para. 58) as follows: "there is an obligation on an employer to enable workers to make complaints about incidents of workplace harassment." The OLRB refused to follow *Investia* to the extent that it applied to allegations of reprisal for filing complaints. However, it reinforced the following principal from *Investia* (para. 61): "In particular, the Act places no obligation on employers to provide a harassment free workplace or to provide any specific type of investigation or outcome of a harassment complaint."

Given the broadened scope of employer obligations under Bill 132, it seems clear that the OLRB's jurisdiction with respect to workplace harassment has also been somewhat expanded, and it appears that the limits on the OLRB's jurisdiction set out in the above decisions will no longer apply. In particular, Ontario employers must now do more than simply create a workplace harassment policy and program. Employers now have a positive obligation to address harassment in their workplaces and provide an appropriate investigation process. By extension, a worker may report his or her employer to the Ministry of Labour if he or she believes that an incident or complaint of workplace harassment was inadequately investigated (or not investigated at all). As stated previously, an inspector of the Ministry of Labour may then assess the investigation and, if necessary, order the employer to conduct another investigation. In addition to reprisal allegations, it appears likely that issues relating to the adequacy and fairness of workplace harassment investigations may also now be adjudicated at the Board. It is unlikely, however, that the OLRB's jurisdiction will be expanded to include determinations of whether harassment

actually occurred in the workplace.[16] Accordingly, complainants who are unsatisfied with the substantive result of a harassment investigation continue to have the same options that existed pre-Bill 132, namely the grievance process and/or the Human Rights Tribunal depending on the workplace and the nature of the complaint.

APPENDIX: Cited Sources

[1] SO 2016, c 2.
[2] RSO 1990, c O.1.
[3] RSO 1990, c H.19.
[4] See Ontario Human Rights Commission, *Policy on preventing sexual and gender-based harassment* (Toronto: OHRC, 2011) ("the definition of harassment in the *OHSA* is broader than the one in the *Code*, in that it includes any form of harassment, not just harassment based on one of the *Code*'s protected grounds" at §6.3).
[5] OHSA, *supra* note 2, s 32.0.7(1)(d).
[6] Ontario, Ministry of Labour, "Workplace Violence and Harassment: Understanding the Law", Health and Safety Guidelines (Toronto: MOL, September 2016) at 37 ["Health and Safety Guidelines"].
[7] See *Board of School Trustees of School District No.63, Re*, 2004 CanLII 45529 (BC IPC) at para 62.
[8] SO 2005, c 34. Section 2 defines "private investigator" as follows:

> **Private investigators**
> **(2)** A private investigator is a person who performs work, for remuneration, that consists primarily of conducting investigations in order to provide information.
> **Same**
> (3) Examples of the types of information referred to in subsection (2) include information on,
> (a) the character or actions of a person;
> (b) the business or occupation of a person; and
> (c) the whereabouts of persons or property.

[9] OHSA, *supra* note 2, s 55.3.
[10] Health and Safety Guidelines, *supra* note 5 at 32.
[11] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl, 1st Sess, No 130 (3 December 2015) at 7033 (Peggy Satler).
[12] OHSA, *supra* note 2, s 25(2)(l).
[13] *Ibid*, s 25(2)(m).
[14] 2011 CanLII 30897 (ON LRB) at paras 16-17.
[15] 2013 CanLII 76529 (ON LRB).
[16] See *Anne Anderson and the University of St. Michael's College*, 2015 CanLII 27353 (ON LRB) at paras 23-28.

~ Blank Page ~

LET RIGHT PREVAIL
The Law Society of Upper Canada | Barreau du Haut-Canada

Harassment in the Workplace: Understanding THE NEW OBLIGATIONS

Overview of the Statutory Changes

Occupational Health and Safety Act Amendments
Side by side comparison: Amendments in Bill 132, Schedule 4 vs Current OHSA

Julie McAlpine-Jeffries, Legal Counsel, Labour & Employment
University of Toronto

March 28, 2017

cpd Continuing Professional Development

Occupational Health and Safety Act Amendments

Side by side comparison: Amendments in Bill 132, Schedule 4 vs Current OHSA

NOTE: all new provisions are in **bold**

Section	Bill 132, SCHEDULE 4 *OCCUPATIONAL HEALTH AND SAFETY ACT*	CURRENT *OCCUPATIONAL HEALTH AND SAFETY ACT*	NOTES
1(1)	Definitions "workplace harassment" means, (a) engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome, or **(b) workplace sexual harassment**; **"workplace sexual harassment" means,** **(a) engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or** **(b) making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome;**	"workplace harassment" means engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome;	Amended definitions to add workplace sexual harassment as a category of workplace harassment. Paragraph (a) is effectively the definition of sexual harassment under the *Human Rights Code*. Paragraph (b) is effectively the definition of prohibited sexual solicitation under the *Human Rights Code*.

1(4)	**Workplace harassment** **(4) A reasonable action taken by an employer or supervisor relating to the management and direction of workers or the workplace is not workplace harassment.**	NEW	Clarifies that reasonable management action is not workplace harassment.
32.0.6(1)	Program, harassment (1) An employer shall, **in consultation with the committee or a health and safety representative, if any,** develop and maintain a written program to implement the policy with respect to workplace harassment required under clause 32.0.1 (1) (b).	Program, harassment An employer shall develop and maintain a program to implement the policy with respect to workplace harassment required under clause 32.0.1 (1) (b).	New requirement to consult with JHSC re workplace harassment program.
32.0.6(2)	Contents (2) Without limiting the generality of subsection (1), the program shall, (a) include measures and procedures for workers to report incidents of workplace harassment to the employer or supervisor; **(b) include measures and procedures for workers to report incidents of workplace harassment to a person other than the employer or supervisor, if the employer or supervisor is the alleged harasser;** (c) set out how incidents or complaints of workplace harassment will be investigated and dealt with; **(d) set out how information obtained about an incident or complaint of workplace harassment, including identifying information about any individuals involved, will not be disclosed unless the disclosure is necessary for the purposes of**	Contents (2) Without limiting the generality of subsection (1), the program shall, (a) include measures and procedures for workers to report incidents of workplace harassment to the employer or supervisor; (b) set out how the employer will investigate and deal with incidents and complaints of workplace harassment; and (c) include any prescribed elements.	Paragraphs (b), (d) and (e) are 3 new requirements for workplace harassment programs. Nothing is really being repealed here – the provisions are moved as follows: The old 32.0.6(2)(b) becomes 32.0.6(2)(c) The old 32.0.6(c) becomes 32.0.6(2)(f)

	investigating or taking corrective action with respect to the incident or complaint, or is otherwise required by law; **(e) set out how a worker who has allegedly experienced workplace harassment and the alleged harasser, if he or she is a worker of the employer, will be informed of the results of the investigation and of any corrective action that has been taken or that will be taken as a result of the investigation; and** (f) include any prescribed elements.		
32.0.7	**Duties re harassment** **(1) To protect a worker from workplace harassment, an employer shall ensure that,** **(a) an investigation is conducted into incidents and complaints of workplace harassment that is appropriate in the circumstances;** **(b) the worker who has allegedly experienced workplace harassment and the alleged harasser, if he or she is a worker of the employer, are informed in writing of the results of the investigation and of any corrective action that has been taken or that will be taken as a result of the investigation;** **(c) the program developed under section 32.0.6 is reviewed as often as necessary, but at least annually, to ensure that it adequately implements the policy with respect to workplace harassment required under clause 32.0.1 (1) (b); and** **(d) such other duties as may be prescribed are carried out.**	Information and instruction, harassment An employer shall provide a worker with, (a) information and instruction that is appropriate for the worker on the contents of the policy and program with respect to workplace harassment; and (b) any other prescribed information.	Section (1) introduces 3 new duties on employers with respect to workplace harassment. Section (2) clarifies that an investigation report into workplace harassment does not need to be provided to the JHSC or workers. The old 32.0.7 is the new 32.0.8

	Results of investigation not a report **(2) The results of an investigation under clause (1) (a), and any report created in the course of or for the purposes of the investigation, are not a report respecting occupational health and safety for the purposes of subsection 25 (2).**		
32.0.8	Information and instruction, harassment An employer shall provide a worker with, (a) information and instruction that is appropriate for the worker on the contents of the policy and program with respect to workplace harassment; and (b) any other prescribed information.		The new 32.0.8 is the old 32.0.7.
55.3	**Order for workplace harassment investigation** **(1) An inspector may in writing order an employer to cause an investigation described in clause 32.0.7 (1) (a) to be conducted, at the expense of the employer, by an impartial person possessing such knowledge, experience or qualifications as are specified by the inspector and to obtain, at the expense of the employer, a written report by that person.** **Report** **(2) A report described in subsection (1) is not a report respecting occupational health and safety for the purposes of subsection 25 (2).**	NEW	Subsection (1) is a new provision allowing an inspector to order the employer to engage an investigator for a workplace harassment investigation. Subsection (2) is to the same effect as the new 32.0.7(2), above.

The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 3

Harassment in the Workplace: Understanding THE NEW OBLIGATIONS

Developing and Revising Policies and Programs

Harassment in the Workplace: Sample Policy

Ruben Goulart
Bernardi Human Resource Law LLP

With special thanks to Rachel Goldenberg and Pamela Connolly

March 28, 2017

cpd Continuing Professional Development

Harassment in the Workplace: Sample Policy

Ruben R. Goulart, Bernardi Human Resource Law LLP

With special thanks to Rachel Goldenberg and Pamela Connolly

On September 8, 2016, Bill 132 came into force amending the Occupational Health and Safety Act ("OHSA") with respect to sexual harassment and violence in the workplace.

The Ministry of Labour recently released a Code of Practice ("COP") designed to help employer's meet their obligations with respect to the new workplace harassment provisions under the OHSA.

While the COP is not legally binding, the Ministry of Labour will likely measure an employer's actions and policies against those recommended by the COP in determining compliance with the OHSA.

Section of 32.01 of the OHSA requires an employer to prepare and review a policy on workplace harassment at least annually.

According to the COP, an OHSA compliant policy must contain the following seven elements:

1. *The employer's commitment to health and safety*
2. *OHSA definitions of harassment and sexual harassment with examples*
3. *The scope of the policy*
4. *Encouragement for workers to report harassment, whether victim or witness to it*
5. *Commitment to investigate in a fair/timely manner and confidentially*
6. *No penalty for reporting an incident or participating in an investigation*
7. *Other available resources (e.g., union health and safety rep, EAP, Human Rights Legal Support Centre, etc.)*

1. Policy Statement

The Employer is committed to providing and maintaining a work environment that is based on respect for the dignity and rights of everyone in the corporation. It is the Employer's goal to provide a healthy and safe work environment that is free of any forms of harassment or disrespectful behaviour.

The intention of this policy and its procedures is to prevent harassment from taking place and, where necessary, to outline how the Employer will act upon incidents and complaints of such behavior.

A statement such as this demonstrates the employer's commitment to addressing workplace harassment, which is one of the 7 minimum policy requirements.

2. Scope

This policy applies to all employees of the Employer as well as contractors, consultants and volunteers. It applies in any location in which you are engaged in work-related activities. This includes, but is not limited to:

- the workplace
- during work-related travel
- at restaurants, hotels or meeting facilities that are being used for business purposes
- in Employer owned or leased facilities
- during telephone, email and other communications, including but not limited to social media
- dialogue that extends from the workplace, related to work or workplace relations as well as comments made on social media pertaining to or associated with workers, work or the workplace
- at any work-related social event, whether or not it is sponsored by the Employer
- harassment which occurs outside the workplace but which may adversely impact employee relationships, which may also be workplace harassment

This policy also applies to situations in which you are harassed in the workplace by individuals who are not employees of the Employer, such as customers and suppliers. However, the available remedies may be constrained by the situation and the fact that these individuals are not Employer employees.

Outlining the policy's scope (who it applies to) is one of the minimum policy requirements under the COP.

Under the OHSA "workplace" means places where employees are paid or directed to work. This has been interpreted broadly to include spaces beyond the four corners of the workplace which could mean office parties, drinks after work between employees, dinner with colleagues, or union meetings).

3. Definitions

It is one of the minimum requirements for the policy to include the definition of, harassment and sexual harassment from the applicable legislation as well as relevant examples.

Workplace Harassment and Bullying

Workplace harassment is a health and safety issue that is covered under the *Occupational Health and Safety Act*.

Workplace harassment is defined as:

Engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome.

Some examples of workplace harassment are:

- verbally abusive behaviour such as yelling, insults, ridicule and name-calling, including remarks, jokes or innuendos that demean, ridicule, intimidate or offend
- workplace pranks, vandalism, bullying and hazing
- gossiping or spreading rumours, regardless of whether they are malicious
- excluding or ignoring someone, such as persistent exclusion of a particular person from workplace-related social gatherings
- workplace supervision done in a demeaning or abusive manner
- humiliating someone
- sabotaging someone else's work
- displaying or circulating offensive pictures or materials
- offensive or intimidating phone calls, emails, texts or social media communications
- a supervisor/manager impeding an individual's efforts at promotions or transfers for reasons that are not legitimate
- making false allegations about someone in memos or other work related documents
- menacing behaviours including staring, glaring, inappropriate gestures or unwelcome physical closeness

Harassing comments or conduct can poison someone's working environment, making it a hostile or uncomfortable place to work, even if the person is not being directly targeted. This is commonly referred to as a **poisoned working environment** and it is also a form of harassment.

Some examples of actions that can create a poisoned work environment include:

- displaying offensive or sexual materials such as posters, pictures, calendars, websites or screen savers
- distributing offensive e-mail messages or attachments such as pictures or video files
- practical jokes that embarrass or insult someone
- jokes or insults that are offensive in nature

Sexual and Gender-Based Harassment

Sexual harassment includes conduct or comments of a sexual nature that the recipient does not welcome or that offend him or her. Sexual and gender-based harassment also includes negative or inappropriate conduct or comments that are not necessarily sexual in nature, but

which are directed at an individual because of his or her gender or sex. Comments or conduct of a sexual nature or that are based on gender or sex that are not necessarily directed at a particular individual but are unwelcome or offensive to an individual or group can also constitute sexual or gender-based harassment.

The *Occupational Health and Safety Act* defines workplace sexual harassment as:

> *(i) Engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or*
>
> *(ii) Making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome.*

Bill 132 has expanded the definition of workplace harassment in the OHSA to include workplace sexual harassment. Bill 132-compliant policies must include this definition.

Examples of those "in a position to confer, grant or deny a benefit or advancement to the worker" include supervisors, managers, senior leaders, officers, lead hands, team leads, and union executives in some cases.

Both men and women can be victims of sexual or gender-based harassment, and someone of the same or opposite sex can harass someone else. Some examples of sexual or gender-based harassment are:

- sexual advances or demands that the recipient does not welcome or want
- threats, punishment or denial of a benefit for refusing a sexual advance
- offering a benefit in exchange for a sexual favour
- leering (persistent inappropriate staring)
- displaying sexually offensive material such as posters, pictures, calendars, cartoons, screen savers, pornographic or erotic websites or other electronic material
- distributing sexually explicit e-mail messages or attachments such as pictures or video files
- sexually suggestive or obscene comments or gestures
- unwelcome remarks, jokes, innuendoes, propositions or taunting about a person's body, clothing or sex
- persistent, unwanted attention after a consensual relationship ends
- physical contact of a sexual nature, such as touching or caressing

- gossip or rumours regarding a person's sexual activities or relationships, regardless of whether they are malicious; and
- sexual assault

What Isn't Harassment

The *Occupational Health and Safety Act* states:

> *A reasonable action taken by an employer or supervisor relating to the management and direction of workers or the workplace is not workplace harassment.*

Bill 132 attempted to clarify what employer behaviour will not qualify as workplace harassment. This may be a welcome addition to the OHSA for employers, who have found that some employees label any behaviour they do not appreciate as being workplace harassment.

Workplace harassment should not be confused with legitimate, reasonable management actions that are part of the normal work function, including but not limited to:

- measures to correct performance deficiencies, such as placing someone on a performance improvement plan
- imposing discipline for workplace infractions
- requesting medical documents in support of an absence from work
- enforcement of workplace rules and policies

It also does not include normal workplace conflict that may occur between individuals or differences of opinion between co-workers.

Micromanagement is usually not considered harassment or bullying, unless the person is being singled out unfairly or in a discriminatory way.

The Test of Harassment

It does not matter whether you intended to offend someone. The test of harassment is whether you knew or should have known that the comments or conduct were unwelcome to the other person. For example, someone may make it clear through their conduct or body language that the behaviour is unwelcome, in which case you must immediately stop that behaviour.

Although it is commonly the case, the harasser does not necessarily have to have power or authority over the recipient. Harassment can occur from co-worker to co-worker, supervisor to employee and employee to supervisor.

Respect in the workplace is everyone's responsibility. Any acts that demean, harm or exclude are counter to our culture and should be addressed promptly in accordance with the procedures set out below.

4. Preventing Harassment

It is the mutual responsibility of all workplace parties to ensure that we create and maintain a harassment free workplace. This includes addressing harassment from all possible sources (including customers, clients, employers, supervisors, workers, strangers and domestic/intimate partners). All workplace parties have a responsibility to ensure that their own behaviour and interaction are respectful and not in contravention of this policy.

All workplace parties have obligations under the OHSA with respect to workplace harassment. These should be set out in the policy.

The Employer's Commitment

The Employer will do its part by not tolerating or condoning harassment in the workplace. This includes making everyone in our organization aware of what behaviour is and is not appropriate, investigating complaints and imposing suitable corrective measures.

Duties of Supervisors and Management

Supervisors and members of management are expected to assist in creating a harassment-free workplace and to immediately contact Human Resources ("HR") if they receive a complaint of workplace harassment, or witness or are aware of harassing behaviour.

Duties of All Employees

You must do your part by ensuring that your behaviour does not violate this policy and by fostering a work environment that is based on respect and is free of harassment.

You can assist in achieving this environment by reporting to your supervisor, any other supervisor, or any member of management, the existence of any workplace harassment of which you become aware.

It is one of the minimum requirements for a policy to include a statement encouraging workers to report workplace harassment to the appropriate person.

5. Procedure for Resolving and Investigating Harassment Incidents and Complaints

A key change to the OHSA from Bill 132 is that an employer is now required to conduct an "appropriate" investigation into "incidents and complaints" of workplace harassment (s. 32.0.7,

OHSA).

If the employer, supervisor, any member of management becomes aware in any manner (or ought reasonably to be aware) of any "incident or complaint" of workplace harassment, then the duty to conduct an "appropriate" investigation is triggered.

What is "appropriate" is subjective and will be shaped as the law develops.

Informal Procedure

If you believe that you are being harassed, the first thing to do is to tell the person to stop. Do so as soon as you receive any unwelcome comments or conduct. Although this may be difficult to do, telling the person you don't like their actions is often enough to stop the behaviour.

Some of the things you can say that might stop the behaviour include:

"*I don't want you to do that."*

"Please stop doing or saying…"

"It makes me uncomfortable when you…"

"I don't find it funny when…"

If the harassment continues after you have confronted the individual, you may want to provide him or her with a written statement of the situation.

You can also report the incident(s) to your manager/supervisor, your Human Resources Department ("HR"), or any other member of management. Where appropriate, the Employer will assist you with implementing the appropriate de-escalation techniques.

Employers must ensure that supervisors and managers are trained on the law of harassment and on how to identify and respond to "incidents and complaints" of workplace harassment so that they are not missed or overlooked.

It helps to keep a record of any incident(s) that you experience. This includes when the harassment started, what happened, whether there were any witnesses and what your response was.

If you believe that someone who is not an employee of the Employer (e.g., a customer, supplier, contractor, etc.), has harassed you, please report the incident(s) to your manager/supervisor, HR, any other member of management or the CEO. Although the Employer has limited control over third parties, we will do our best to address the issue and prevent further problems from arising.

Formal Procedure

If the incident or complaint cannot be resolved informally or if it is too serious to handle on an informal basis, you may bring a formal complaint to HR. If the matter involves HR, the complaint can be brought to the CEO.

This provision upholds s. 32.0.6(2) of the OHSA, which requires that employees have a mechanism for reporting incidents of workplace harassment to a person other than the employer or supervisor in cases where the alleged harasser is the employer or supervisor.

The person who receives a workplace harassment complaint should not be under the alleged harasser's direct control.

When bringing a formal complaint forward, as much written information as possible will be needed, including the name(s) of the person(s) you believe is harassing you, the place, date and time of the incident(s) and the names of any possible witnesses.

The complainant should be encouraged to include as much information as possible on the complaint report, including relevant and supporting documentation.

The complaint form may be filled out by the reporting contact as well as the worker alleging harassment. Assistance should be provided in completing the form where necessary.

It is important that you provide your complaint as soon as possible so that the issue doesn't escalate or happen again. Once we receive your complaint, we will initiate an investigation. The investigation may be informal or formal as deemed necessary and appropriate by the Employer.

Harassment is a serious matter. Therefore, even if a decision is made not to make a formal complaint by an individual, an investigation may still need to occur and steps may need to be taken to prevent further harassment. For example, an investigation may need to be conducted if the allegations are serious or if there have been previous complaints or incidents involving the same individual(s).

Investigation

The policy should spell out that the employer will use discretion as to when an informal (internal) vs. formal (external) investigation is required. This practical tip is in light of the OHSA's requirement for an "appropriate" investigation.

Tips for selecting an appropriate investigator:

<u>Internal Investigator</u>

- *less serious*
- *single incident*
- *issues are clear*

External Investigator

- *serious allegations*
- *high level management*
- *HR too close*
- *multiple incidents*
- *PR issues*
- *police are involved*
- *employer has a vested interest in outcome*
- *ordered by MOL (Bill 132)*

It is advisable not to use an internal HR person who has been responsible for discipline/termination or a lawyer who typically represents the employer as an investigator.

The person conducting the investigation (whether internal or external) should not be directly involved in the incident or complaint and must not be under the direct control of the alleged harasser.

The investigator should have knowledge and expertise regarding how to conduct an investigation appropriate in the circumstances.

It is notable that s. 55.3(1) of the OHSA now allows an MOL inspector to order an employer to have an investigation and report completed by an impartial person at the employer's expense.

This will likely need to be triggered by a complaint to the MOL that an employer did not investigate or did not complete a proper investigation into an incident or complaint.

An investigation will be undertaken as quickly as possible. We may choose to use an internal or external investigator to conduct the investigation, depending on the nature of the incident or complaint. The Employer will determine whether an external investigator is required.

The investigation may include:

- interviewing the complainant and respondent to ascertain all of the facts and circumstances relevant to the incident or complaint, including dates and locations
- interviewing witnesses deemed relevant by the investigator, if any
- reviewing any related documentation
- making detailed notes of the investigation and maintaining them in a confidential file

Once the investigation is complete, the investigator(s) will prepare a report of the findings for review by the Employer, which will determine what action should be taken as a result of the investigation.

A good tip for any Bill 132-compliant policy is to outline the investigation procedure, as demonstrated above. It is advisable to keep the procedure very flexible since different situations require different approaches. An Employer with investigation requirements that are too detailed and stringent may have difficulty following its own policy, which could undermine or negate the results of the investigation.

The COP outlines 7 requirements for an investigation:

1. *Investigator must ensure the investigation is kept confidential and identifying information is not disclosed unless necessary to conduct the investigation or as required by law.*
2. *The investigator must thoroughly interview both the worker who has allegedly experienced workplace harassment and the alleged harassers, if the alleged harasser is a worker of the employer. If the alleged harasser is not a worker of the employer, the investigator must make reasonable efforts to interview the alleged harasser.*
3. *The alleged harasser must be given the opportunity to respond to the specific allegations raised by the worker.*
4. *The investigator must separately interview any relevant witnesses employed by the employer who may be identified by either the worker who has allegedly experienced workplace harassment, the alleged harasser(s) or as necessary to conduct a thorough investigation.*
5. *The investigator must collect and review any relevant documents.*
6. *The investigator must take appropriate notes and statements during interviews with the worker who has allegedly experienced workplace harassment, the alleged harasser and any witnesses.*
7. *The investigator must prepare a written report summarizing:*
    - *the steps taken during the investigation*
    - *the complaint*
    - *the allegations of the worker claiming harassment*
    - *the response from the alleged harasser*
    - *the evidence*
    - *findings of fact*
    - *conclusion regarding whether workplace harassment was found*

The complainant and respondent will be made aware of the findings and provided with a

letter stating whether or not the incident or complaint constituted harassment. If a finding of harassment has been made, the complainant will also be provided with information regarding corrective measures taken to prevent a recurrence.

The Employer will determine the appropriate amount of information to be shared with the complainant and respondent.

Notably, Bill 132 introduced the requirement that employers must provide the parties with the investigation findings in writing as well as information about any corrective measures imposed.

Employers need not provide a copy of the investigation report but must provide information about whether or not the complainant's allegation of harassment was substantiated.

Historically, employers have been concerned about providing information about corrective measures, such as discipline, since it could be interpreted as a breach of the employee's privacy. However, in light of the requirements in Bill 132, Employers are now required to inform the complainant in writing about corrective measures imposed on the respondent although there are still questions about how much detail ought to be shared.

The goal is to complete any investigation and communicate the results to the complainant and respondent within a reasonable time frame after becoming aware of an incident or a complaint is received and, where possible, within 90 days. The timeframe within which an investigation can be completed varies depending on the circumstances of each investigation.

The COP indicated that an investigation should be completed within 90 days, unless extenuating circumstances. Example of extenuating circumstances include: more than five witnesses, key witness unavailable due to illness, or complex investigation.

6. Record Keeping

The employer will keep records of all complaints or incidents of workplace harassment including:

- A copy of the complaint or details about the incident
- A record of the investigation including notes
- Copy of witness statements, if taken
- Copy of the investigation report, if any
- Copy of the results of the investigation that were provided to the worker who reported the harassment and the alleged harasser
- Copy of any corrective action taken to address the complaint or incident of WP harassment

These records will be kept for 1 year after the investigation is complete.

7. Corrective Action

If a finding of workplace harassment is made, the Employer will take appropriate corrective measures, regardless of the respondent's seniority or position at the Employer.

Corrective measures may include but are not limited to one or more of the following:

- discipline, such as a verbal warning, written warning or suspension without pay
- termination with or without cause
- referral for counselling, coaching or training, anger management training, supervisory skills training, or attendance at educational programs on respect in the workplace
- demotion or denial of promotion
- reassignment or transfer
- financial penalties such as the denial of a bonus or performance related salary increase
- any other disciplinary action deemed appropriate under the circumstances.

According to the COP, the respondent should be informed of the corrective action imposed within 10 days after investigation ends.

8. Confidentiality of Complaints and Investigations

Due to the sensitive nature of workplace harassment complaints, these complaints will be kept confidential to the extent possible. We will only release as much information as is necessary to investigate and respond to the incident or complaint, to take corrective action with respect to the incident or complaint or if required to do so by law.

It is necessary to include a confidentiality provision such as this in any workplace harassment policy, as per s. 32.0.6(2)(d) of the OHSA and the COP's minimum policy requirements.

Out of respect for the individuals involved, it is essential that the complainant, respondent, witnesses, and anyone else involved in or aware of the investigation maintain complete confidentiality throughout the investigation and afterwards.

You may have the assistance of a support person throughout the investigation process, as long as they are not a witness or potential witness and agree to maintain strict confidentiality. The role of the support person throughout the investigation process is to observe and provide support.

All employees, representatives and support persons are required to fully cooperate in the investigation process and to not in any way impede, obstruct or behave in a manner that potentially jeopardizes the integrity of the investigation. Breaching confidentiality or acting in a manner that obstructs, impedes or affects the integrity of the investigation is subject to discipline up to and including termination of employment.

Best practices for maintaining confidentiality:

- *Don't disclose to witnesses who the complainant and respondent are (i.e. do not say that you are being interviewed about a complaint by 'x' against 'y')*
- *Don't disclose who else is being interviewed*
- *Set expectations regarding confidentiality with each person involved. As a practice tip, it's recommended that employees sign a confidentiality agreement indicating that they will not disclose information related to the incident or investigation to anyone (other than HR, a union rep/lawyer, or as required by law).*
- *Coach supervisors/managers on confidentiality – i.e. discretely handing out letters to witnesses for meetings, being alert to any conversations among workers about the investigation and putting an end to them, not talking to workers themselves about the investigation or doing anything to confirm or infer who is involved or what it is about*
- *Impose disciplinary consequences if confidentiality is breached*
- *Keep investigation file separate and apart from individual personnel files*

9. What to Do if You are Accused of Harassment

If you are asked by a co-worker to stop behaviours which could reasonably constitute harassment, evaluate your behaviour. Even if you did not mean to offend, your behaviour has been perceived as offensive. Stop the behaviour that the person finds offensive and apologize. Failure to stop this behaviour will leave you more vulnerable to disciplinary action if it is determined the behaviour is inappropriate or constitutes harassment. If you believe the incident has been reported or the complaint has been made in bad faith or is malicious in nature, discuss this with HR, your supervisor or any member of management.

10. Protection from Retaliation or Reprisal

No worker can be penalized, reprimanded, or in any way criticized when acting in good faith while following the procedures for addressing situations involving workplace harassment.

The Employer will not tolerate retaliations, taunts, or threats against anyone who reports an incident or complains about harassment or takes part in an investigation. Any person who taunts, retaliates against or threatens anyone in relation to a harassment incident or complaint may be disciplined, up to and including termination of employment.

If you report an incident or make a complaint in good faith and without malice, regardless

of the outcome of the investigation, you will not be subject to any form of discipline. The Employer will, however, discipline or terminate anyone who brings a false and malicious complaint.

This statement highlights that a worker is not to be penalized for reporting an incident or participating in a workplace harassment investigation. Penalizing a worker for exercising their rights under the OHSA is prohibited.

11. Training

All staff will receive training and communications on this policy and any related program. All staff will receive this policy and a copy of this policy will be posted on the Health and Safety bulletin board.

S. 32.0.8 of the OHSA states that employers must provide their workers with information and instruction that is appropriate for that worker(s)on the contents of both the policy and program.

"Worker" includes, but not limited to, regular workers, new hires, contract, casual, temporary, part-time and student workers.

Training for workers should include: how and to whom to report, how employer will investigate and deal with incident or complaint, how employer will report the results, and substantial changes to policy or program.

Training for supervisors and managers should also include additional information and instruction on how to recognize workplace harassment and how to handle an incident or complaint.

Investigators must be trained on how to conduct an appropriate investigation and the associated confidentiality obligations.

12. Worker Support

If Employer staff have witnessed or experienced a traumatic event, special support may be required. The Employer will accommodate this need on a case-by-case basis.

The COP requires employers to provide information in their policies about other resources for a worker to consult to address workplace harassment.

13. Review

The Employer will review this policy as often as necessary or at least annually.

LET RIGHT PREVAIL
The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 3A

Harassment in the Workplace: Understanding THE NEW OBLIGATIONS

Developing and Revising Policies and Programs

Bill 132 Mandatory Workplace Harassment Programs Taking the Ministry of Labour's program from paper to practice.

Samantha Lamb
Jewitt McLuckie & Associates LLP

The author gratefully acknowledges the research assistance of Joshua Nutt, Articling Student.

March 28, 2017

cpd Continuing Professional Development

BILL 132 & MANDATORY WORKPLACE HARASSMENT PROGRAMS

Taking the Ministry of Labour's program from paper to practice.

By Samantha Lamb

The author gratefully acknowledges the research assistance of Joshua Nutt, articling student, in preparing these materials.

All original ideas, writings, and most importantly, errors, are solely those of the author.

Prior to Bill 132, the biggest complaint about Bill 168, and particularly the sections on harassment, were that they lacked teeth with respect to enforcement. An employer complied with the *Occupational Health and Safety Act*, R.S.O. 1990, CHAPTER O.1, merely by having a policy, with no companion obligation to comply with the policy once it was created and the Ontario Labour Relations Board lacked the necessary delegated authority to address the failure to investigate (see *Conforti v Investia Financial Services Inc*, 2011 CanLII 60897 (ON LRB).

While the extent to which the Ministry of Labour will commit resources to enforcement remains to be seen, employers are now required to implement their policy in the form of a published program with consequences either if the program is not followed or if following the program fails to yield a proper investigation. A more detailed summary of the changes introduced by Bill 132 is the focus of earlier panels and therefore is not addressed here but, in the briefest possible terms, Bill 132 has raised the bar not only for employers but also for legal counsel advising employers and employees.

In order to assist with meeting the new requirements, the Ministry of Labour has published an excellent guide: Code of Practice to Address Workplace Harassment under Ontario's *Occupational Health and Safety Act* (https://www.labour.gov.on.ca/english/hs/pubs/harassment/). The Code of Practice provides helpful information about employers' obligations generally, but in my view the most helpful documents for counsel who do not specialize in harassment issues and workplace investigations are the sample policy and sample program.

Both the sample policy and sample program are general templates that if used as is, meet the basic requirements of the *Occupational Health & Safety Act*. The sample program reflects the requirements of Part II of the Ministry's Code of Practice. When amending the template, employers should review Part II of the Code of Practice to ensure that all of the requirements are still met. While the sample program, as written, complies with the requirements for a written program as set out in Part II, it provides little guidance to an inexperienced employer or union on what a complete investigation involves in practice. What follows is an annotated version of the sample program with practical tips and considerations for how to customize the program to specific workplaces or situations, particularly when moving from written program to implementation.

Schedule D: Sample Workplace Harassment Program

Issued: August 12, 2016

Content last reviewed: August 2016

PDF Version [170 Kb / 33 pages | Download Adobe Reader]

See also: Workplace Violence and Workplace Harassment

This workplace harassment program is a sample. Employers may want to modify their program to meet the needs of the workplace. The program must be developed in consultation with the joint health and safety committee and health and safety representative (if any).

[insert employer name] is committed to providing a work environment in which all workers are treated with respect and dignity. Workplace harassment will not be tolerated from any person in the workplace ***(including customers, clients, other employers, supervisors, workers, and members of the public, as applicable)***.

The workplace harassment program applies to all workers including managers, supervisors, temporary employees, students and subcontractors.

Employers whose employees are regularly in contact with clients, delivery persons, third party contractors, etc. should remember that the duty to protect employees includes protection from third parties. While an employer doesn't have the same control over third parties that it does over its own employees, it can, and must, still take all reasonable steps to properly investigate complaints by employees regarding the conduct of third parties, and where the complaint is founded, take the necessary steps to protect an employee.

In *Wamsley v. Ed Green Blueprinting*, 2010 HRTO 1491 (CanLII), a worker was crying and complained to management after the company's usual photocopy technician "swatted" her on the butt during his visit to the office. She requested that a complaint be made to his employer, Xerox, but her supervisor discouraged her "and asked her if she was sure she wanted to "ruin the man's life over such a stupid mistake"." [para. 14] The technician continued to attend at the workplace despite the worker's ongoing discomfort.

The Ontario Human Rights Tribunal, at para. 26, outlined three criteria they would consider in determining whether an employer had responded appropriately:

a) *Awareness of issues of discrimination/harassment, Policy, Complaint Mechanism and Training*: Was there an awareness of issues of discrimination and harassment in the workplace at the time of the incident? Was there a suitable anti-discrimination/harassment policy? Was there a proper complaint mechanism in place? Was adequate training given to management and employees;

b) *Post-Complaint: Seriousness, Promptness, Taking Care of its Employee, Investigation and Action*: Once an internal complaint was made, did the employer treat it seriously? Did it deal with the matter promptly and sensitively? Did it reasonably investigate and act; and

c) *Resolution of the Complaint (including providing the Complainant with a Healthy Work Environment) and Communication*: Did the employer provide a reasonable resolution in the circumstances? If the complainant chose to return to work, could the employer provide her/him with a healthy, discrimination-free work environment? Did it communicate its findings and actions to the complainant?

The Ministry of Labour has yet to enforce the new requirements and provide its own direction but, in the interim, the Human Rights Tribunal's criteria provide helpful guidance as to how to assess the appropriateness of a harassment investigation. Both at the outset, and prior to closing, of an investigation, employers and unions should review these same questions and ensure that the planned investigation process answers them all in the affirmative.

Employers must also be mindful that the work environment is no longer limited to the immediate physical environment, but includes the social media environment as well. The 2014 labour grievance filed by ATU, Local 113, regarding the TTChelps twitter feed, decided by Arbitrator Howe in *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission (Use of Social Media Grievance)*, [2016] OLAA No 267, took place prior to the implementation of Bill 132 but much of Arbitrator Howe's analysis with respect to what the employer could have, and should have, done differently to protect its employees from online harassment could also have been addressed through a workplace harassment program and the corresponding investigation.

The application of *OHSA* was acknowledged by the employer, as set out in the summary of the employer's submissions at paragraph 112:

> The jurisprudence recognizes that it is not possible for an employer to prevent all behaviour that amounts to harassment or disrespectful behaviour towards employees, and that there are very real limits to the power of an employer to anticipate and control such behaviour. Consequently, the standard is one of reasonableness, not correctness or perfection. The same is true of an employer's obligation under *OHSA*. An employer does not have to take steps to guarantee an employee's health and safety against all possible or conceivable risks; it is only required to take reasonable precautions to provide the appropriate level of protection to employees.

And the findings by Arbitrator Howe at paragraph 133 could have been determined by an effective workplace investigation and better addressed before the TTC had amassed hundreds of problematic tweets:

> It is clear from the totality of the evidence that the TTC has failed to take all reasonable and practical measures to protect bargaining unit employees from that type of harassment by members of the community, as required by the *HRC*, the Agreement, and the Workplace Harassment Policy. The evidence discloses many inadequate responses by @TTChelps to offensive tweets of that type, such as: (1) ignoring the offensive language and merely advising the

> tweeter "You can call us at 416-393-3030 or go to ow.ly/AKsGz to report your experiences"; (2) responding by stating "We understand your concerns however please refrain from personal attacks against employees", but then going on to provide information on how to file a complaint; (3) responding "Can you please refrain from using vulgarity and elaborate on what happened?"; or (4) responding by merely stating that the TTC does not condone abusive, profane, derogatory or offensive comments. To deter people from sending such tweets, @TTChelps should not only indicate that the TTC does not condone abusive, profane, derogatory or offensive comments, but should go on to request the tweeters to immediately delete the offensive tweets and to advise them that if they do not do so they will be blocked. If that response does not result in an offensive tweet being deleted forthwith, @TTChelps should proceed to block the tweeter. It may also be appropriate to seek the assistance of Twitter in having offensive tweets deleted. If Twitter is unwilling to provide such assistance, this may be a relevant factor for consideration in determining whether the TTC should continue to be permitted to use @TTChelps.

Post Bill 132, employers who use social media to connect with customers should be mindful of ensuring their harassment policy and program acknowledge their responsibilities to protect employees from online abuse. Arbitrator Howe's analysis would be equally applicable to a Facebook page, comments section on a business webpage, etc.

1. Workplace harassment

Workplace harassment means engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome or workplace sexual harassment ***(employer may want to insert examples)***.

Workplace sexual harassment means:

a. engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or

b. making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome;

Reasonable action taken by the employer or supervisor relating to the management and direction of workers or the workplace is not workplace harassment ***(employer may want to insert examples e.g. scheduling, annual performance review)***.

The key language here is "reasonable action". The definition of workplace harassment in a harassment program should protect a Supervisor or Manager engaging in legitimate performance management, but still capture humiliating or degrading conduct that might be used. Both the reason for an employer's action, and the way in which it is carried out should be reflected in the definition.

Action taken for the sole purpose of demeaning or humiliating someone is clearly offside, but it does not follow that the reverse is true and any action taken to address legitimate workplace concerns cannot be considered harassment

For example: "I need to talk to you about the errors you made on x file. They are unacceptable and further errors will lead to discipline." or "I've noticed lately that your work has been showing less attention to detail, particularly in y and z files. From now on I will be checking your work before it is sent out and further errors will put your employment in jeopardy", would both likely be considered legitimate performance management statements, even though they will almost certainly be unwelcome and stressful for the employee.

On the other hand, "Another mistake! What are you stupid? You are completely useless!" is unlikely to be protected as reasonable performance management even if the comments are made in response to a serious performance error, or even a series of errors. If those same

comments are made to an employee in front of co-workers or customers, or while screaming and leaning into the employee, it is even more likely that they will not be considered "reasonable action."

2. Reporting workplace harassment

A. How to report workplace harassment

Workers can report incidents or complaints of workplace harassment verbally or in writing. When submitting a written complaint, please use the workplace harassment complaint form (see attached). When reporting verbally, the reporting contact, along with the worker complaining of harassment, will fill out the complaint form.

The report of the incident should include the following information:

i. Name(s) of the worker who has allegedly experienced workplace harassment and contact information

ii. Name of the alleged harasser(s), position and contact information (if known)

iii. Names of the witness(es) (if any) or other person(s) with relevant information to provide about the incident (if any) and contact information (if known)

iv. Details of what happened including date(s), frequency and location(s) of the alleged incident(s)

   a. Any supporting documents the worker who complains of harassment may have in his/her possession that are relevant to the complaint.

   b. List any documents a witness, another person or the alleged harasser may have in their possession that are relevant to the complaint.

The mistaken belief that a formal written complaint must be received before the employer is permitted, or required, to investigate is a common mistake that leads to findings that an employer failed to respond appropriately to harassment allegations or to conduct the necessary investigation. Too often employees who bring concerns to management and then express nervousness about putting them in writing are told that nothing can be done until they do so. As reflected in the program, a verbal complaint is sufficient to trigger an investigation.

While the goal at the outset of an investigation is always to collect as much detail as possible, employers should also be mindful of not taking an overly formalistic approach to the initial complaint. While employers are understandably nervous when it appears that a complaint is expanding, incidents of harassment and bullying, particularly when they have happened repeatedly over time, can easily blur together in a victim's memory. Particularly where a victim's initial response to harassment has been to put their head down and try to ignore or repress it, they may not be able to immediately provide particulars as to the dates, times, and words/actions from specific instances, or they may accidentally combine details from different incidents, making their initial report seem suspiciously vague or contradictory.

It is important to remember that the goal when receiving a complaint is to maintain an open mind, while collecting as much information as possible, before determining whether there are prima facie grounds to open an investigation. Reviewing a complaint should not be done from the mindset of looking for reasons to dismiss it, and employers should be careful not to hold complainants to the standard of a perfect victim.

B. Who to report workplace harassment to

An incident or a complaint of workplace harassment should be reported as soon as possible after experiencing or witnessing an incident. This allows the incident to be investigated in a timely manner.

Report a workplace harassment incident or complaint to **[name, position, and contact information]**. If the worker's supervisor or reporting contact is the person engaging in the workplace harassment, contact **[position or name of alternate reporting contact and contact information]**. If the employer (e.g. owner, senior executive, director) is the person engaging in the workplace harassment, contact **[position or name of alternate reporting contact and contact information]**. (Note: The person designated as the reporting contact should not be under the direct control of the alleged harasser.)
Human Resources **[or designated person]** shall be notified of the workplace harassment incident or complaint so that they can ensure an investigation is conducted that is appropriate in the circumstances. If the incident or complaint involves the owner, senior executive or **[list positions as appropriate]** , an external person qualified to conduct a workplace harassment investigation who has knowledge of the relevant workplace harassment laws will be retained to conduct the investigation.

In my experience, decisions about reporting structure are often the most important elements of a harassment program. While compliance with Bill 132 is a goal, the real goals of a harassment policy and program should be setting clear workplace standards of conduct in the hope of minimizing workplace harassment, and effectively and efficiently addressing workplace harassment. Important to achieving both of those goals, is the need for employees to have confidence in the investigation process and in the idea, that there is a genuine openness on the employer's part to acknowledge and address harassment.

Ensuring that the reporting structure both appears, and is in fact, neutral is key to employee and union buy-in and ensuring that complaints are brought forward at the earliest possible opportunity. The axiom that justice must not only be done but be seen to be done applies here as the appearance of bias is just as important as actual bias in determining whether employees will come forward when harassment occurs. The more options employees are given with respect to who they can report to, as opposed to a narrow, hierarchical structure, the better. Too often, when unions and union counsel ask a grievor, or supporting witnesses, why no one reported harassing conduct until the workplace was completely poisoned and/or one or more employees were off on sick leave with severe mental health symptoms, the answer is that they had no faith in the process because of who they were required to report it to and/or who was put in charge of the investigation. While the Ministry's sample program captures the need to be able to report to someone who doesn't have a direct reporting relationship to the alleged harasser, appointing one of the alleged harasser's close friends engenders the same mistrust that a fair investigation will not occur.

If someone's first response upon hearing about the allegation is "I can't believe Jane would do something like that", "I've known her a long time and that just doesn't sound like her", or other words to that effect, the employer should re-consider whether that person can truly conduct a fair and neutral investigation or whether someone else would be a better choice. If those types of comments are made to the complainant and/or other employees, it is a safe bet that the complainant has already lost any faith that there will be a fair process and that other employees will be hesitant to come forward with what they know, even if the investigator will later put those presumptions aside and conduct an impartial investigation.

Employers should also remember that while there are exceptions, bullying and harassment generally flow down the hierarchy, not up, so the fact that someone is always friendly, polite, or respectful to senior staff is not necessarily an indication of how they treat everyone.

All incidents or complaints of workplace harassment shall be kept confidential except to the extent necessary to protect workers, to investigate the complaint or incident, to take corrective action or otherwise as required by law.

Particularly in a unionized workplace, employers should be very careful not to promise a level of confidentiality that they cannot live up to. While confidentiality can, and should, be maintained during the investigation process, grievances may subsequently be filed and all interview notes and evidence will likely have to be produced. Out of a good faith desire to reassure employees, a promise of total confidentiality is sometimes erroneously given and employees are incredibly angry when they find out a union and grievor will get to read what they said, and that they may be summoned to testify.

3. Investigation

A. Commitment to investigate

[insert employer name] will ensure that an investigation appropriate in the circumstances is conducted when the employer, human resources, a manager or supervisor becomes aware of an incident of workplace harassment or receives a complaint of workplace harassment.

Workplaces have long memories and I frequently hear from employees that they did not file a complaint, or do not want to participate in an investigation, because of what happened “last time”, including promises of total confidentiality that were not lived up to, only for me to find out that “last time” happened five years ago. Feel good statements about taking harassment seriously, no matter how earnestly given, don’t carry nearly the same weight as the employer’s actions when faced with an actual complaint. Even if the current complaint seems fairly minor in nature, how it is handled is what employees will remember when they are deciding what to do about a more severe incident; including whether to give the employer, and possibly the union, the chance to intervene early, or whether to move straight into filing a complaint or action through a Court or Tribunal.

B. Who will investigate

[insert name, manager or department] will determine who will conduct the investigation into the incident or complaint of workplace harassment. If the allegations of workplace harassment involve **[insert jobs, positions, levels or departments (e.g. senior leadership, president and above)]**, the employer will refer the investigation to an external investigator to conduct an impartial investigation.

The reality is that most workplace structures are pyramid shaped with very few senior people at the top. Where a complaint is made with respect to senior staff, it will be very hard for the average employee to believe that senior staff, regardless of their formal reporting relationships, don’t all work closely together and won’t be predisposed to protect each other.

Good investigations rely on employee buy-in and the reality is that, regardless of what assurances are given with respect to ‘no reprisals’, it is unlikely that employees will believe that if they provide one senior staff with evidence against another senior staff, that won’t be remembered and held against them the next time they apply for a promotion, or discretionary decisions are made about acting assignments, transfers, overtime, etc.

When deciding at what level of management to bring in external investigators, employers should consider the size of the management structure and how interrelated their roles are i.e. do they all work closely together and any internal investigator would be investigating a colleague or are there distinct silos of work where the manager of one department can be perceived as truly neutral in investigating events in another department.

The greater the sphere of influence a senior staffer has, particularly over discretionary decisions, the more important it is to reassure employees in the written program itself that an external investigator will be brought in. The purpose served here is to reassure employees that it is safe to bring forward complaints against senior staff, which is different than the purpose

served when an employer decides, after reviewing a complaint, that it is particularly complex and would benefit from an external investigator's expertise.

Conducting a workplace investigation requires a specialized skill set. In deciding who to appoint as an internal investigator, employers also need to be mindful of whether the individual has the necessary expertise, and take steps to develop internal expertise by sending staff for specialized training.

Unions can, and in my view, should, ask questions about the training and experience of whoever is appointed to investigate as soon as they find out who it is. While it might be tempting to let an untrained manager muddle through, knowing that any findings flowing from a bad investigation will be easy to challenge at arbitration, a bad investigation can do a lot of damage to a workplace and cause harm, including causing, or worsening existing, symptoms of depression and anxiety, for the employees involved. Workplace harassment is a serious issue, impacting both individual mental health and workplace productivity, and ensuring that those conducting investigations are properly trained to do so is part of demonstrating to employees that unions and employers are committed to doing everything they reasonably can to provide a harassment free workplace for all.

C. Timing of the investigation

The investigation must be completed in a timely manner and generally within 90 days or less unless there are extenuating circumstances (i.e. illness, complex investigation) warranting a longer investigation.

Anyone who has ever been involved in an investigation knows that the longer they go on, the more the investigation becomes a topic of office gossip and the higher the likelihood that confidentiality will not be maintained or that complete misinformation, spread as gossip, will be believed and start influencing office interactions. What can start out as a simple complaint by one individual against another that could have been addressed through early intervention, can result in a poisoned workplace with entire teams or departments divided into hostile sides, if an investigation drags on.

In addition to other factors such as a person's position in the organization, and whether they have the skills/knowledge to conduct a proper investigation, when deciding whether to use an internal employee as an investigator, and which employee to designate, employers also need to be mindful of workload. A skilled and independent manager who would otherwise be a great choice of investigator may not be a good choice this time if they have several time sensitive projects on their plate and the investigation is going to end up being done in fits and starts over a lengthy period.

D. Investigation process

The person conducting the investigation whether internal or external to the workplace will, at minimum, complete the following:

i. The investigator must ensure the investigation is kept confidential and identifying information is not disclosed unless necessary to conduct the investigation. The investigator should remind the parties of this confidentiality obligation at the beginning of the investigation.

ii. The investigator must thoroughly interview the worker who allegedly experienced the workplace harassment and the alleged harasser(s), if the alleged harasser is a worker of the employer. If the alleged harasser is not a worker, the investigator should make reasonable efforts to interview the alleged harasser.

iii. The alleged harasser(s) must be given the opportunity to respond to the specific allegations raised by the worker. In some circumstances, the worker who allegedly experienced the workplace harassment should be given a reasonable opportunity to reply.

iv. The investigator must interview any relevant witnesses employed by the employer who may be identified by either the worker who allegedly experienced the workplace harassment, the alleged harasser(s) or as necessary to conduct a thorough investigation. The investigator must make reasonable efforts to interview any relevant witnesses who are not employed by the employer if there are any identified.

v. The investigator must collect and review any relevant documents.

vi. The investigator must take appropriate notes and statements during interviews with the worker who allegedly experienced workplace harassment, the alleged harasser and any witnesses.

vii. The investigator must prepare a written report summarizing the steps taken during the investigation, the complaint, the allegations of the worker who allegedly experienced the workplace harassment, the response from the alleged harasser, the evidence of any witnesses, and the evidence gathered. The report must set out findings of fact and come to a conclusion about whether workplace harassment was found or not.

While it is not a requirement, a good practice tip is to provide interviewees with a written version of the information they provided to review and sign. This serves three important functions:

i. It provides an opportunity to catch and correct any errors in the investigator's notes with respect to what was said;

ii. Reviewing their statement may further jog an interviewee's memory and allow them to recall more relevant information or provide more witness names, or may draw their attention to errors in their initial recollection;

iii. Interviewees are now committed to the accuracy of a version of events and can't suddenly say the interviewer's facts were wrong after finding out the investigation's outcome wasn't in their favour.

E. Results of the investigation

Within 10 days of the investigation being completed, the worker who allegedly experienced the workplace harassment and the alleged harasser, if he or she is a worker of the employer, will be informed in writing of the results of the investigation and any corrective action taken or that will be taken by the employer to address workplace harassment.

F. Confidentiality

Information about complaints and incidents shall be kept confidential to the extent possible. Information obtained about an incident or complaint of workplace harassment, including identifying information about any individuals involved, will not be disclosed unless disclosure is necessary to protect workers, to investigate the complaint or incident, to take corrective action or otherwise as required by law.

While the investigation is on-going, the worker who has allegedly experienced harassment, the alleged harasser(s) and any witnesses should not to discuss the incident or complaint or the investigation with each other or other workers or witnesses unless necessary to obtain advice about their rights. The investigator may discuss the investigation and disclose the incident or complaint-related information only as necessary to conduct the investigation.

All records of the investigation will be kept confidential.

As previously noted, employers and investigators should be careful not to promise a level of confidentiality they cannot live up to. Investigations and their outcomes could already be

produced at arbitration, or at a human rights tribunal where *Code* protected grounds were involved, but can now also be the subject of a complaint to the Ministry of Labour.

Confidentiality within the workplace during the investigation can and should be enforced but employers and unions must also be mindful of the reality that even if those directly involved maintain confidentiality, that doesn't stop general gossip based on complete speculation. A single employee's complaint against a third party contractor might be investigated without anyone else in the workplace being aware but the more that an investigation involves multiple employees at a worksite whether as complainant, accused, or witnesses, the more that confidentiality is lost because everyone is either directly involved in the investigation or sees a series of co-workers going into a conference room to meet with an investigator and can guess at their level of involvement by how long they are in there.

Where it is clear from the outset that any meaningful confidentiality will be difficult to maintain because of the size of the workplace or the number of people involved, this can be an important consideration in determining the timing of the investigation. For example, the employer may want to ensure the investigator, whether internal or external, has a clear schedule for a few days and can conduct all the interviews, perhaps even back to back, within a short time frame and then have time cleared and set aside to compile that information and produce their report. The more interviews are spaced out here and there over several weeks, the higher the likelihood that confidentiality will be compromised or that inaccurate gossip will gain traction.

Similarly, when dealing with a small team or workplace it may be difficult to maintain confidentiality about who is involved because everyone can see who leaves to speak to the investigator. Where possible, it may be good strategy to interview everyone, even those not specifically named as a potential witness, to protect the identities of those the investigator really needs to speak to. In larger operations, or operations where employees are often out of each other's sight for part of the day for work related reasons, the confidentiality of those involved may be protected simply by conducting the interviews at an alternate location.

G. Handling complaints

[The employer must set out any interim measures that may be taken after the complaint is received and during the investigation. The employer must also set out how they might deal with the complaint of harassment if harassment is found. This may include discipline up to and including termination.]

Depending on the workplace and the nature of the allegations, interim measures might include a transfer to another workplace or a paid investigatory leave. The extent of the interim measures required depends in part on the severity of the allegation i.e. an allegation of a physical or sexual assault is more likely to warrant removing the accused from the workplace during the investigation than an allegation that belittling words were used. The reporting relationship of the parties is also a factor as a complainant is likely to feel intimidated and afraid to continue the complaints process if they are expected to continue reporting to, and meeting with, a boss who has just been informed they have been accused of harassment.

Employers must be mindful of the balance between remembering that the accused has not been found guilty and should not be removed from the workplace simply because any kind of complaint has been filed, and the possibility that they might turn out to be guilty. The employer must assess the level of risk that a harasser could do further harm due to the nature of their position and/or level of unsupervised contact with employees including, but not limited, to the complainant. While removal from the workplace pending the completion of investigation is one option, other options might include changing a reporting relationship, or temporarily halting offsite travel or flexible work hours so that the accused is only in the workplace when higher management is also present both to allay any fears on the part of the complainant or witnesses that the accused will be able to isolate and intimidate them, and to allay any fears on the part of the accused that if they meet with the complainant and/or other employees in the course of carrying out their legitimate responsibilities they are making themselves vulnerable to further false accusations.

4. Record keeping

The employer (human resources or designated person) will keep records of the investigation including:

a. a copy of the complaint or details about the incident;

b. a record of the investigation including notes;

c. a copy of the investigation report (if any);

d. a summary of the results of the investigation that was provided to the worker who allegedly experienced the workplace harassment and the alleged harasser, if a worker of the employer;

e. a copy of any corrective action taken to address the complaint or incident of workplace harassment.

All records of the investigation will be kept confidential. The investigation documents, including this report should not be disclosed unless necessary to investigate an incident or complaint of workplace harassment, take corrective action or otherwise as required by law.

Records will be kept for:

Date created:

Annual review date:

The Ministry of Labour generally recommends keeping records for at least a year, but the statute of limitations for civil suits is two years so keeping records for at least two years is safer.

Where a WSIB claim, grievance, duty of fair representation ("DFR") complaint or human rights complaint has been filed, even if it only touches tangentially on the investigation or hasn't yet been referred to a board or tribunal for hearing, records should be kept until either a decision has been rendered or the related complaint has been withdrawn and any additional appeal time limits have been exhausted. It is easier to keep records of the investigation in storage for a little longer than to later try and recall the information contained therein, or rebut an allegation that the records were destroyed because of their potential relevance to the new proceeding.

Conclusion

The Ministry of Labour has provided helpful resources to assist employers in establishing an investigation structure that will comply with the employer's obligations under *OHSA* to conduct an investigation that is appropriate in all of the circumstances. In deciding how best to customize templates to individual workplaces, employers should be mindful that amendments to the *Act,* and Ministry resource materials, are introduced with the goal of making workplaces safe for employees, not training employers on the bare minimum they can get away with without breaking the law, and it is through that same lens that we need to be advising employers and unions to evaluate policies, programs, and the resulting evaluations.

A program that appears to meet all the requirements of general templates and legislative requirements yet consistently results in poor quality investigations, or workers continuing to be harassed is likely to be found lacking. While inspectors are new to the role of evaluating harassment investigations, labour arbitrators and human rights tribunals have been doing so for decades and regardless of the forum, the jurisprudence that has developed remains substantially similar, and echoes the language now used in the health & safety forum: did the employer take reasonable action.

The standard is not one of perfection, or of whether the employer did everything that anyone could possibly think of, but if a reviewing decision maker can see that there were additional reasonable actions that could have been made, and which would likely have increased a worker's safety, a defense that the effort wasn't made because the employer thought they could get away with doing even less is no defense at all. When advising clients, the question to answer isn't 'do I have to do x' but 'if you did x, how much more effort would that require and what difference could it make to the outcome of worker safety'. The less effort required and/or the greater the impact on worker safety, the greater the onus on the employer to make that effort or risk a negative finding.

LET RIGHT PREVAIL
The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 3B

Harassment in the Workplace: Understanding THE NEW OBLIGATIONS

Developing and Revising Policies and Programs

Harassment in the Workplace: Policy and Program

Carolyn Johnston
Director, Employment Practices, (Workplace Investigations)
Walmart Canada Corp.

March 28, 2017

cpd Continuing Professional Development

Harassment in the Workplace: Policy and Program

Carolyn Johnston, J. D.
Harassment in the Workplace: Understanding THE NEW OBLIGATIONS
Law Society of Upper Canada, March 28, 2017

Practical Considerations for your Client (Ontario)

This paper builds upon the Annotated Harassment in the Workplace: Sample Policy prepared by Ruben Goulart, Bernardi Human Resources Law LLP. The purpose of this paper is to share practical considerations for lawyers who get involved in preparing or reviewing a client's Harassment in the Workplace Policy and Program.

1. Policy Statement

Generally, when preparing or reviewing a harassment policy and program for your client, inquire with your client whether the language used in the policy will be understood by those for whom it is intended. While the definitions cannot be altered, other content can typically be simplified.

2. Scope

If your client's policy will apply to third parties in the workplace, consider the following: how will the policy come to the attention of those third parties? How will your client actually address complaints of harassment between your client's employees and those of a third party? For instance, will your client investigate the allegations? How will the other employer be involved in the investigation? What steps can your client take to ensure the third party participants maintain confidentiality? While these issues do not need to be addressed expressly in the policy and program per se, your client would be well advised to consider these issues and develop an effective process with the third party.

3. Definitions

If your client has workplaces beyond Ontario's jurisdiction and the intention is to create one (1) policy for the Country, ensure you consider all statutory definitions of workplace harassment, bullying, and/or psychological harassment that you may need to include in your policy.

If your client has an overarching Ethics statement, compare the Ethics' definition of harassment with the statutory definitions and consider how to address any differences.

[Note about Discrimination]

If your client has workplaces beyond Ontario's jurisdiction and the intention is to create one (1) policy for the Country against harassment and discrimination, ensure you consider all prohibited grounds under the various human rights legislation. For instance, does your client intend to apply the protected grounds of each province in all provinces?

4. Preventing Harassment

Duties of all Employees

If your client is a large organization, there may be multiple layers of supervisors, managers and human resources managers. It may be prudent for your client to identify within the program who is the most appropriate "manager" within the workplace to contact with concerns of harassment. Additional tip – include who HR can contact if they experience harassment in the workplace.

Duties of Supervisors and Management

Similarly, for large organizations especially, it may be prudent for your client to identify within the program who supervisors and managers should contact if a harassment complaint or incident comes to their attention. This should help to avoid delay in commencing an investigation and maintain confidentiality. For instance, consider how the manager should report these concerns to HR and how quickly should it be reported? You may consider recommending that your client create a separate Process for Management to ensure the reporting obligations for management is as clear as possible and updated regularly. Also, consider with your client whether to include consequences for management who fail to handle harassment concerns in accordance with the policy.

5. Procedure for Resolving and Investigating Harassment and Discrimination Incidents and Complaints

If your client has an overarching Ethics statement/program that overlaps with the Harassment policy and program, consider including this Ethics program as an alternative way to report a concern, if appropriate. However, any differences between how the Ethics program may handle complaints of harassment should be reconciled with provincial law. For instance, if the Ethics program has standardized responses to complainants, is it consistent with the statutory obligation to provide written results and corrective action to the parties involved?

Investigation

Who will investigate?

Consider including a commitment to who is an appropriate investigator rather than a specific position. While not an exhaustive list, consider listing the qualities of an appropriate investigator who will be assigned:

- *trained in how to conduct a fair and impartial investigation*
- *familiarity with the policy and program*
- *able to conduct investigation in objective and timely manner*
- *no involvement in incident(s) at issue in the investigation*
- *does not report to Complainant, Respondent or others involved*

What will be investigated?

Consider with your client whether there is a benefit to include further information about the type of complaints or conduct that will be investigated. For instance, including a commitment to investigate an anonymous complaint provided there is sufficient information to commence an investigation.

Who will be interviewed?

If your client will include terms such as Complainant and Respondent in the policy and program, consider providing an easy to understand definition of those terms. The meaning of these terms is not familiar to many people. Also, your client will be well advised to ensure it is clear in the program that the respondent will be interviewed. Where this is not clear to complainants, it can complicate the investigation if they have different expectations/ strong preferences.

What are the obligations of the Complainant, Respondent and Witnesses in the investigation?

Consider including a section setting out the obligations for those who will participate in the investigation, and if appropriate, the consequences for non-compliance. For instance,

- *cooperate in the investigation process and honestly present facts*
- *maintain confidentiality during investigation, including no discussions about allegations or investigation with anyone unless seeking professional advice or counselling*
- *provide names of witnesses who may have relevant information to the investigation and provide relevant documents*
- *do not destroy any relevant documents, such as emails, texts, pins, voicemails, etc.*

A section like this can be easily reviewed with a party at the outset of the investigation. It can also be copied into investigation related correspondence as a timely reminder.

What documents will be collected or prepared during the investigation?

As described in the Code of Practice, the policy should include a commitment to collect and review all relevant documents. The investigator will take appropriate notes during interviews. After an assessment of all of the information submitted by those involved, the investigator will prepare a Confidential Investigation Report summarizing the steps taken during the investigation, the complaint, the allegations of the person claiming harassment, the response from the respondent , the statements of any witnesses and evidence gathered.

If you are to provide your client with a Template Investigation Report to be completed by an internal HR representative who is trained in how to conduct workplace investigations, ensure the Template is tailored to meet the needs of those who will use it and that they receive training on how to complete it. In particular, consider including charts to help the investigator include all relevant information to the investigation process that was followed. Also, consider including instructions within the template.

What will the parties receive at the end of the investigation?
Your client must provide the parties with the investigation findings in writing as well as information about any corrective measures imposed. While this can be accomplished by way of a letter, consider the benefits of preparing a written results form for your client to complete when an investigation is conducted internally. This will help ensure the required information is provided in writing and that it is delivered in a timely manner. Also, discuss with your client how to address this requirement with former employees and third parties.

6. Record Keeping

Your client should provide instruction to all managers who may be involved in investigations as to where the confidential investigation files should be kept. Also, consider whether an electronic and physical file will be kept. If there is an electronic file, consider where it will be kept and who will have access.

Also, if your client may be involved in investigations with third parties, consider the implications for record keeping commitments related to the investigation as well as confidentiality requirements related to any investigation documents.

7. Corrective Action

Discuss with your client the level of detail that you recommend should be shared with the complainant with respect to any corrective action taken. For instance, will your client limit it to "discipline in accordance with the discipline policy"? How will your client report that a respondent has left the business?

Importantly, if your client has workplaces beyond Ontario's jurisdiction and the intention is to create one (1) policy for the Country, consider with your client how they intend to deliver results in other provinces and specify within the policy any differences to Ontario.

8. Confidentiality of Complaints and Investigations

As an alternative to asking employees to sign a confidentiality agreement, it can be useful to confirm the confidentiality obligation of the complainant, respondent and witness in any investigation letter to them.

Also, if your client may be involved in investigations with third parties, consider an appropriate confidentiality agreement for third parties involved in the investigation.

9. What to Do if You are Accused of Harassment or Discrimination

It can be beneficial to include in any introductory investigation letter to a respondent a reminder that no decision has been made about the alleged conduct. Also, as noted under section 5 above, consider specifying whether there are any consequences for refusing to participate in an investigation.

10. Protection from Retaliation or Reprisal

In addition to including a no reprisal section in the policy and program, it is prudent for your client to include this reminder in all investigation related communications, including investigation letters and written results.

11. Training

If advising your client on an appropriate information and instruction strategy, consider the needs of the following categories of employees and what they need to know to comply with the policy and program:

- *All employees*
- *All managers/supervisors*
- *All managers who may conduct investigations*

With respect to workplace investigations training, there are a wide variety of vendors who offer this. Confirm with your client that any training program offered to persons who may conduct internal harassment investigations for their organization is appropriate for this type of investigation.

12. Worker Support

If your client has an employee assistance program, include reference to the EAP in the policy as well as all investigation related letters.

It is also prudent for your client to include safety related information for employees who may have concerns during an investigation. For instance, who should an employee contact with safety concerns during an investigation? An employee may be inclined to contact the investigator and yet it may be more appropriate to contact a manager in the workplace in accordance with other workplace policies.

13. Review

It is a good idea to recommend that your client solicit feedback from those that use the policy to determine whether there is any confusion in the program or lack of understanding. Gaps may be identified within the first few months to a year of rolling out an updated program and should be addressed appropriately.

LET RIGHT PREVAIL
The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 4

Harassment in the Workplace: Understanding THE NEW OBLIGATIONS

Investigations Update

Lauren Chang MacLean, Legal Counsel, *Metrolinx*

Monica Jeffrey, *JMJ Workplace Investigation Law LLP*

Ashley Lattal, *Shearer Lattal LLP*

March 28, 2017

cpd Continuing Professional Development

Harassment in the Workplace: Understanding the New Obligations

Investigations Update

Monica Jeffrey, JMJ Workplace Investigations Law LLP
Ashley Lattal, Shearer, Lattal LLP
Lauren Chang MacLean, Metrolinx

Program Materials

1. Excerpt from Bill 132 (changes to the Ontario *Occupational Health and Safety Act*)
2. Checklist for conducting an Effective Workplace Investigation in the New World of Bill 132
3. Employer Checklist for Implementing Policy Changes Required by Bill 132, Effective September 2016
4. Checklist: DOs and DON'Ts for Workplace Investigations
5. TIPS for Conducting Effective Investigation Interviews
6. Sample Investigation Report Table of Contents
7. Case Law Update – $70,000 Fine: The Cost of Failing to Comply with OHSA Workplace Harassment and Violence Requirements
8. Ministry of Labour Court Bulletin: Security Service Fined $70,000 for Failure to Meet Workplace Harassment and Violence Prevention Training Requirements

Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment), 2016, S.O. 2016, c. 2 - Bill 132

[...]

Schedule 4
Occupational Health and Safety Act

1. (1) The definition of "workplace harassment" in subsection 1 (1) of the *Occupational Health and Safety Act* is repealed and the following substituted:

"workplace harassment" means,

(a) engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome, or

(b) workplace sexual harassment; ("harcèlement au travail")

(2) Subsection 1 (1) of the Act is amended by adding the following definition:

"workplace sexual harassment" means,

(a) engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or

(b) making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome; ("harcèlement sexuel au travail")

(3) Section 1 of the Act is amended by adding the following subsection:

Workplace harassment

(4) A reasonable action taken by an employer or supervisor relating to the management and direction of workers or the workplace is not workplace harassment.

2. (1) Subsection 32.0.6 (1) of the Act is repealed and the following substituted:

Program, harassment

(1) An employer shall, in consultation with the committee or a health and safety representative, if any, develop and maintain a written program to implement the policy with respect to workplace harassment required under clause 32.0.1 (1) (b).

(2) Clauses 32.0.6 (2) (b) and (c) of the Act are repealed and the following substituted:

(b) include measures and procedures for workers to report incidents of workplace harassment to a person other than the employer or supervisor, if the employer or supervisor is the alleged harasser;

(c) set out how incidents or complaints of workplace harassment will be investigated and dealt with;

(d) set out how information obtained about an incident or complaint of workplace harassment, including identifying information about any individuals involved, will not be disclosed unless the disclosure is necessary for the purposes of investigating or taking corrective action with respect to the incident or complaint, or is otherwise required by law;

(e) set out how a worker who has allegedly experienced workplace harassment and the alleged harasser, if he or she is a worker of the employer, will be informed of the results of the investigation and of any corrective action that has been taken or that will be taken as a result of the investigation; and

(f) include any prescribed elements.

3. Section 32.0.7 of the Act is repealed and the following substituted:

Duties re harassment

32.0.7 (1) To protect a worker from workplace harassment, an employer shall ensure that,

(a) an investigation is conducted into incidents and complaints of workplace harassment that is appropriate in the circumstances;

(b) the worker who has allegedly experienced workplace harassment and the alleged harasser, if he or she is a worker of the employer, are informed in writing of the results of the investigation and of any corrective action that has been taken or that will be taken as a result of the investigation;

(c) the program developed under section 32.0.6 is reviewed as often as necessary, but at least annually, to ensure that it adequately implements the policy with respect to workplace harassment required under clause 32.0.1 (1) (b); and

(d) such other duties as may be prescribed are carried out.

Results of investigation not a report

(2) The results of an investigation under clause (1) (a), and any report created in the course of or for the purposes of the investigation, are not a report respecting occupational health and safety for the purposes of subsection 25 (2).

Information and instruction, harassment

32.0.8 An employer shall provide a worker with,

(a) information and instruction that is appropriate for the worker on the contents of the policy and program with respect to workplace harassment; and

(b) any other prescribed information.

4. The Act is amended by adding the following section:

Order for workplace harassment investigation

55.3 (1) An inspector may in writing order an employer to cause an investigation described in clause 32.0.7 (1) (a) to be conducted, at the expense of the employer, by an impartial person possessing such knowledge, experience or qualifications as are specified by the inspector and to obtain, at the expense of the employer, a written report by that person.

Report

(2) A report described in subsection (1) is not a report respecting occupational health and safety for the purposes of subsection 25 (2).

Commencement

5. This Schedule comes into force on the later of,

(a) six months after the day the *Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment), 2016* receives Royal Assent; and

(b) July 1, 2016.

SHEARER LATTAL LLP

A law firm specializing in workplace investigations, mediation, and training

Checklist for conducting an Effective Workplace Investigation in the New World of Bill 132

By: Gillian Shearer[1]

1. Is an Investigation "appropriate in the circumstances?"

- Has there been a formal complaint of harassment?
    - If true would the allegations amount to harassment?
- Is the employer aware of the existence of an incident, which if true, would be characterized as harassment/sexual harassment?
    - Did a manager/co-worker witness possible harassment? Has there been an informal complaint?
- Are there other reasons to investigate?
    - Be seen by employees to be responding to a concern?
    - Series of anonymous concerns?
    - Safety issues?
    - Need to assess legal exposure?
    - Other misconduct to be investigated? Possible disciplinary action or termination contemplated?

2. Interim Measures- Are they necessary?

- Is there evidence to be protected- emails, Internet logs, notes, texts or voicemails? Is there any camera evidence to be secured?
- Do you need to move employees to other work locations/supervisors? Does the complainant report to the alleged harasser?
- Do you need to suspend employees pending outcome of investigation [2]
- Safety protocols need to be implemented?
- Employee Assistance

---

[1] Gillian Shearer is a founding partner of Shearer Lattal LLP, and author of The Law and Practice of Workplace Investigations

[2] Note requirements as outlined in *Potter v New Brunswick Legal Aide Services Commission*, 2015 SCC 10, [2015] 1SCR 500 and *Bhasin v Hyynew*, 2014 SCC 71, [2014]3 SCR 494

3. Who should conduct the Investigation?

Guiding principles:

- Who has the knowledge, experience and qualifications (is competent?)
- Can they be fair & impartial?

Other considerations:

- Do they have the time/capacity/resources?
- How important is it to maintain privilege over the report?
- Cost
- Organizational culture
- Potential profile/impact on corporate reputation
- Personal characteristics of investigator-colour, gender, language.

Some options:

- In house Counsel, Human Resources/Compliance Officer, Front Line Manager?
  - Are they versed in human rights/employment law principles?
  - Are they trained to conduct workplace investigations?
  - Are they able to assess credibility?
  - Do they have the workload capacity to conduct the investigation in 90 calendar days?
  - Are they and will they be seen to be impartial/neutral?
  - Cannot be under the "direct control of alleged harasser"
- Internal Corporate/Risk Investigators?
  - Is their approach appropriate for a human rights/harassment investigation? Interrogation/Admission seeking?
- External Legal Counsel?
  - Are they versed in human rights/employment law principles?
  - If corporate counsel, have they ever conducted an investigation before?
  - Is cost a concern?
  - Are they likely to be the litigator in any resulting litigation? If yes, consider an alternative.
  - Could conducting the investigation impact ongoing solicitor client relationships?

- External Neutral Workplace Investigator

    - Are they familiar with the work environment? Industry/internal policies/culture/unionized environment?
    - Are they neutral and will they be seen to be?
    - Do they have the appropriate expertise?
    - How would they fare as a witness in ensuing litigation?
    - Do they have availability to meet your timelines?

4. Privilege- Will it apply?

- Have you engaged a lawyer?
- Have you set up a retainer letter which contemplates the provision of legal advice?
- What is the dominant purpose of the investigation? Has litigation commenced or is it reasonably contemplated? Have you decided to terminate/impose serious discipline?
- Are you required by statute or company policy to conduct the investigation? If so, is the dominant purpose of the investigation nonetheless to protect the client against possible legal exposure/penalty/sanctions?
- Are you seeking to rely on the "neutrality" of the investigator?[3]

5. What is the extent of the Investigation required?

- How serious is the complaint?
- Who is involved?
- Keep in mind that the extent of the investigation is contingent on the context. The standard is that of reasonableness, not perfection [4]
- Have the complainant, respondent and relevant witnesses been interviewed?
- Has relevant documentation/evidence been reviewed?
- Was the respondent afforded a fair and meaningful opportunity to respond to the allegation(s)?[5]

---

[3] *Durham Regional Police Association v Durham Regional Police Services Board* 2015 CanLII 60920 (Trachuk), and *North Bay General Hospital v Ontario Nurses Association*, 2011 CanLII (Parmar)

[4] See *Tessier v Nova Scotia (Human Rights Commission),* 2014 NSSC 65, and *Ditomene c Boulanger*, 2014 QCCA 2108.

[5] See Ontario Ministry of Labour, Code of Practice to Address Workplace Harassment under Ontario's Occupational Health and Safety Act, August 2016, *Francis v Canadian Imperial Bank of Commerce,* 1994 CanLII 1578, 120 DLR (4th) 393

- Have the parties been kept appraised of the status of the investigation where the investigation involves allegations of workplace harassment?
- Are you following your internal policy? [6]

6. Confidentiality/Privacy Requirements

- What does the policy stipulate?
- Should interviews be conducted in the workplace or off site?
- Order of interviews to ensure that parties do not encounter one another
- Consider if normal sign in protocols at work location should be suspended
- Consider how parties and witnesses would like to contacted- preferred contact information
- Have all parties, including witnesses been advised of the expectation of confidentiality? Have you documented this?
- Will party/witness names be used in the report/legal bills/invoices?
- Be cautious about over-committing to limitations around use of evidence- you cannot control if the report/notes will ultimately be disclosed
- Have you ensured that disclosure of the complaint and identifying information about individuals involved limited
    - "unless the disclosure is necessary for purposes of investigating" or "taking corrective action with respect to the incident or complaint" or is "otherwise required by law"

7. Record Keeping

- What does the policy stipulate? Where will complaint forms, notes, reports, evidence be retained? Who will have access to this information?
- Have you documented any corrective action taken?
- Have you retained records for a minimum of one year from the conclusion of the investigation?

(Ont CA) and *Ogden v Canadian Imperial Bank of Commerce*, 2014 BCSC 285, rev'd 2015 BCCA 175.

[6] See *van Woerkens v Marriott Hotels of Canada Ltd*, 2009 BCSC 73, *Stone v Sybron Canada Ltd*, 2006 CanLII 21073 (Ont Sup Ct J), decision upheld on appeal 2007 (ONCA 543) and *Sears v. Honda of Canada Mfg*, 2014 HRTO 45.

8. The Investigative Process

- Consider when and how to notify the parties, and, in particular, the respondent, of the investigation
- Ensure a commitment to confidentiality at the outset-consider having interviewees sign confidentiality statements
- Ensure that the use you will make of information provided to you is made very clear-you will need to provide details to the respondent to allow him/her to respond/you will write a report which will be provided to decision-makers/your report could be disclosed in the course of legal proceedings-don't "dupe" people
- Ensure that the respondent is afforded a meaningful opportunity to respond-this will usually necessitate providing particulars of the allegations in advance of any respondent interviews
- Be cautious about the provision of the actual complaint submitted-these forms are typically riddled with emotional statements rather than facts-if the policy allows, consider instead gathering the particulars of the alleged incident from the complainant and providing a summary of same to the respondent
- Prepare for interviews, make copies of any documents or evidence you wish to put to interviewees
- Interviews should be conducted with an open mind-objectively and not to obtain "admissions"
- Limit the amount of information provided to witnesses to limit office gossip, ensure compliance with OHSA and to better assess witness evidence
- Consider the order of interviews. It is often wise to conduct the interviews in the following order: 1. complainant; 2. respondent 3. Relevant witnesses. Admissions made by the respondent may reduce the number of witnesses to be interviewed and therefore the time/cost/gossip associated with the investigation.
- If a union representative will attend interviews ensure that the representative is not also a witness. If a witness, consider interviewing the union representative first
- Review evidence collected after having interviewed the complainant, respondent and relevant witnesses
- Determine if there are inconsistencies in statements or evidence gathered which necessitate follow up interviews?
- Make assessments of credibility and assign weight to the evidence collected
- Review relevant caselaw/statutes/organizational policies
- Draft your report
- Communicate the outcomes/results

9. Reporting of Results and Corrective Actions

- Have you communicated the "results" to the complainant and respondent in writing within 10 calendar days of the conclusion of a workplace harassment investigation?
- Have you implemented corrective actions within 10 calendar days if workplace harassment was substantiated?
- Have you communicated the corrective action (at least what steps the employer has taken to prevent a recurrence of workplace harassment) to the complainant and respondent within 10 calendar days?
- Have you taken steps to prevent a similar incident?
- Have you written your report recognizing that it may not be protected by privilege?
- Do you want written recommendations within the resulting report if you may not be in a position to implement them?
- Does your report outline the investigative process, the evidence collected, and make factual findings? Have you also determined whether workplace harassment occurred? Have you also provided legal advice?
- Do you wish to waive privilege, and rely upon any resulting report?

SHEARER LATTAL LLP

A law firm specializing in workplace investigations, mediation, and training

Employer Checklist for Implementing Policy Changes Required by Bill 132 Effective September 2016

By Ashley Lattal

Significant changes to the Ontario *Occupational Health and Safety Act* ("OHSA") came into effect on September 8, 2016 regarding workplace sexual harassment and workplace investigations. For those who have not already done so, the following is a checklist aimed at assisting employers in implementing the requisite changes.

To review Bill 132 itself, go to:
http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=3535

1. Include a definition of "workplace sexual harassment" in policy.

Workplace harassment under the OHSA will now include "workplace sexual harassment", as defined in Bill 132. This language should be included in your harassment policy.

Employers may also want to consider adding that reasonable management or supervisory actions do not constitute workplace harassment, as that issue will now be specifically addressed in the OHSA.

2. Set out complaint/investigation process where alleged harasser is supervisor/employer.

If your policy does not cover this issue already, you will need to determine appropriate reporting measures and procedures for situations in which the alleged harasser is a supervisor or employer. This ought to include to whom employees are to raise such complaints and the procedures for dealing with and investigating such complaints. If there is no appropriate internal person to handle such complaints, the investigation may need to be handled by an external investigator.

Some organizations have policies that state that a supervisor is to investigate complaints. An appropriate caveat should be added to such policies providing another avenue for investigation of complaints where the supervisor is the alleged wrongdoer.

3. Set out necessary confidentiality provisions.

Policies will now have to specifically address confidentiality around incidents and complaints of harassment. Bill 132 requires that policies set out measures to ensure that "information obtained about an incident or complaint of workplace harassment, including identifying information about any individuals involved: is not disclosed, unless necessary to an investigation or taking corrective action, or is required by law.

Those handling the complaints will need to understand the confidentiality restrictions, including what information may be disclosed and to whom it may be disclosed.

4. Set out that the parties will be informed of the results and corrective action.

Employers need to now inform parties *in writing* as to the results of an investigation, as well as "any corrective action" resulting from the investigation. The extent of the information that must be disclosed is not clear from the language of the amendments. However, in most circumstances, it will likely be unnecessary to disclose more than a summary of the findings (whether substantiated or not) and if corrective action will be taken. Whether or not the precise corrective action to be taken is not spelled out in Bill 132. However, for purposes of confidentiality and protecting ongoing relationships and reputations, in most circumstances it is likely best to disclose only the fact that corrective action will be taken without specifics. This determination should be made in consultation with your legal counsel.

5. Consider requirement of "appropriate investigation", possible MOL involvement, and where external investigator might be required.

Portions of Bill 132 appear to be aimed at encouraging employers to take their obligation to investigate complaints more seriously. It will be helpful for employers to reflect this in their policies. The Ministry of Labour will have authority to order employers to retain external independent investigators. Employers should consider utilizing external investigators in appropriate circumstances, including where there may be a perception of bias if an internal investigator were to be appointed (e.g., where more serious allegations are raised or where a manager or supervisor is accused of wrongdoing).

A trained internal investigator who will be perceived as unbiased may also be appropriate in the right circumstances so long as they are unbiased (and will be perceived to be unbiased) and are appropriately qualified and trained to conduct workplace investigations.

6. Conduct an annual review.

Your harassment program must be reviewed annually.

7. Conduct training on updated policy.

To ensure management and employees are informed about the new changes, employers should provide training on their harassment program to all employees.

Summary

- Requisite changes to policies and procedures should be made as soon as possible, as Bill 132 came into effect on September 8, 2016.
- It is not yet clear what the practical difference of "workplace sexual harassment" will be but inclusion of this additional definition may help to ensure more thorough investigations when considered with other changes.

- Take care in selecting a qualified investigator—failure to do so may lead to MOL involvement, which may affect claims of legal privilege and generally reduce control over the investigation.
- The fairer your process is, the more likely your investigation is to be useful—both in terms of instilling confidence in employees and withstanding scrutiny in litigation.

This document is not meant to constitute legal advice.

WORKPLACE
INVESTIGATION LAW
LLP

CHECK LIST: DO's AND DON'Ts FOR WORKPLACE INVESTIGATIONS

An increasingly evolving area in workplace law is an employer's obligation to conduct a proper and fair workplace investigation in instances of: misconduct, company policy violations, harassment, bullying, discrimination, threats of violence, workplace accidents, to name a few. This obligation has been scrutinized in recent years as various courts, administrative tribunals as well as employees' lawyers seek to challenge the procedural fairness of investigations conducted internally.

Although it may appear straightforward, there are a number of important factors for a company to consider when conducting a workplace investigation. Here is a list of Do's and Don'ts that will guide employers through the considerations necessary to conduct an internal investigation:

DO: Take every complaint made to management seriously and determine its proper scope for investigation.

DON'T: Avoid being overly dismissive of an employee's "hurt feelings" as the Human Rights Tribunal and other administrative bodies place great emphasis on the subjective feelings of the victim.

DO: Ensure to interview all relevant witnesses as independent corroboration of events is critical to the investigative findings.

DON'T: Do not forget to provide the respondent with a full opportunity to respond to the allegations and provide his or her version of events.

DO: Keep focused and narrow in the pertinent questions relevant to the nature/scope of the complaint.

DON'T: Avoid engaging in a fishing expedition with employees relating to all of their concerns in the workplace.

333 BAY STREET, SUITE 630,
TORONTO, ONTARIO, M5H 2R2
T.416.483.0800

WORKPLACE INVESTIGATION LAW LLP

DO: Take detailed notes during all interviews as the notes will later be used to prepare witness statements for the investigation report.

DON'T: Avoid BIAS and/or the perception of bias; refrain from making any conclusions or findings prior to the completion of the investigation fact-finding (e.g. document review, witness interviews).

DO: Maintain strict confidentiality throughout the investigative process to avoid tainting witness evidence.

DON'T: Avoid conducting an investigation internally where the issues are complex, multi-faceted, sensitive, highly politicized and/or the potential exposure to liability may be significant (ie. senior employee, isolated incident of misconduct).

DO: Seek external assistance when it is difficult to maintain the requisite impartiality.

DON'T: Make "inconclusive" findings in an investigation report!

333 BAY STREET, SUITE 630,
TORONTO, ONTARIO, M5H 2R2
T.416.483.0800

TIPS for Conducting Effective Investigation Interviews

Lauren Chang MacLean

WHERE?

Where possible, use a private meeting room, in the workplace, during working hours. Where there are confidentiality or safety concerns, consider an off-site location. If the complainant requests a reasonable non-worksite location, consider acquiescing to this request.

PREPARE!

Prepare a list of questions in advance to ensure that at the very least, those questions are addressed.

TAKE NOTES

The pace of the interview should permit the investigator and/or any observer to take good notes. Where possible, the interviewee's complete answers should be recorded. Consider permitting the interviewee to review the notes of the interview and sign-off on same.

SEQUENCE

Every investigation is different, and an investigation may deviate from the sequence suggested below out of necessity or for logistical reasons; however, a recommended sequence of interviews is:

1. The complainant
2. Witnesses suggested by the complainant
3. The accused
4. Witnesses suggested by the accused
5. Follow-up meetings for the purpose of clarification, or to put allegations to the complainant
6. Additional follow-up meeting with the accused if outstanding issues arise that were not canvassed in the original meeting and/or require comment of explanation

QUESTIONS

Interrupting the interviewee, using leading questions, and "cross-examination style" interrogations are discouraged. Open-ended questions ("what happened next") are ideal. Once the interviewee has told their full version of events once, go back to the start of the story to ask any clarification or "drill-down" questions. Clarify inconsistencies and focus on what the interview knows "first hand".

INVESTIGATION REPORT

STRICTY PRIVILEGED & CONFIDENTIAL

TABLE OF CONTENTS

SHEARER LATTAL LLP

A law firm specializing in workplace investigations, mediation, and training

OHSA CASE UPDATE

$70,000 Fine: The Cost of Failing to Comply with OHSA Workplace Harassment and Violence Requirements

An employer was recently fined $70,000 for failing to comply with seven OHSA orders issued in 2014 by the Ministry of Labour to develop workplace harassment and violence prevent programs. Specifically, the orders required the employer to assess the risks of workplace violence and harassment, prepare applicable policies, implement programs to manage these issues, and train employees.

On February 6, 2017, Justice of the Peace Gerald Ryan fined the company $10,000 for each count of non-compliance with the orders issued by the MOL.

On the heels of the implementation of Bill 132, which specifically contemplates added MOL involvement regarding investigations, this case is a strong reminder that OHSA requirements and orders to enforce those requirements will be taken seriously. Employers would be well served to ensure that they have adequately complied with their obligations regarding workplace harassment and violence policies and programs under the OHSA.

For more information on this case, see the attached Court Bulletin issued by the Ministry of Labour on February 9, 2017.

Ashley Lattal

Ontario

NEWS

Ministry of Labour

Security Service Fined $70,000 For Failure to Meet Workplace Harassment and Violence Prevention Training Requirements

February 9, 2017 4:45 P.M.

WHITBY, ONTARIO - A company that provided security services for Oshawa City Hall has been fined $70,000 for failing to comply with orders to develop workplace harassment and violence prevention programs for its workers.

By provincial law, employers must put in place policies on workplace harassment and violence and train their workers about these policies. The shortcomings came to light when a Ministry of Labour inspector conducted an inspection following an injury suffered by an employee of Federal Force Protection Agency (FFPA) in October 2014 at the city hall building located at 50 Centre Street South in Oshawa.

The inspector issued 10 orders to FFPA to comply and followed up with three phone calls, as a number of orders became past due. In March 2015 the inspector attended the workplace to verify the status of the orders, and issued a notice of non-compliance as seven of the 10 orders had not been complied with.

The orders required the employer to assess the risks of workplace violence, prepare a policy and develop, maintain and implement a program to deal with it; information and training of workers about the policy and program must also be provided. The same requirements were ordered for workplace harassment.

On February 6, 2017, Justice of the Peace Gerald Ryan agreed that the company had failed to comply with orders issued by a Ministry of Labour inspector and fined the company $10,000 for each count of non-compliance, totaling $70,000. The hearing was conducted "ex parte." An ex parte decision is one decided by a judge without requiring all of the parties to the dispute to be present.

The court also imposed a 25-per-cent victim fine surcharge as required by the Provincial Offences Act. The surcharge is credited to a special provincial government fund to assist victims of crime.

Court Information at a Glance

Location:

Provincial Offences Court/Ontario Court of Justice

605 Rossland Road

Courtroom 103

Whitby, Ontario

Judge:

Justice of the Peace Gerald Ryan

Date of Sentencing:

February 6, 2017

Defendant:

Federal Force Protection Agency

on-site office:

50 Centre Street South

Oshawa, Ontario

Matter:

Occupational health and safety

Convictions:

Occupational Health and Safety Act

Section 32.0.1(1)(a)

Section 32.0.1(1)(b)

Section 32.0.2(1)

Section 32.0.3(1)

Section 32.0.6(1)

Section 32.0.5(2)(a)

Section 32.0.7

Crown Counsel:

Neil Gobardhan

Join the conversation using #worksafeON and #workfairON

Janet Deline Communications Branch
416-326-7405

Available Online
Disponible en Français

LET RIGHT PREVAIL
The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 5

Harassment in the Workplace: Understanding THE NEW OBLIGATIONS

Delivering Outcomes, Remedies, and Restoration

Systemic Remedies Under Bill 132

Philip Abbink
Cavalluzzo Shilton McIntyre & Cornish LLP

March 28, 2017

cpd Continuing Professional Development

Systemic Remedies Under Bill 132

by Philip B. Abbink

Cavalluzzo Shilton McIntyre Cornish LLP

Table of Contents

A. Introduction:

Recent changes to the *Occupational Health and Safety Act*, expanding protections for workers against workplace harassment raise the issue of what remedies might be available for a breach of those obligations. This exercise is necessarily speculative since the amendments are very recent, the issue of workplace harassment in the absence of a human rights breach has been addressed infrequently in the jurisprudence, and when it has, the more typical framework of analysis is personal harassment or an isolated dispute between individuals. This paper addresses what systemic remedies might be available based on the limited case-law regarding non-*Code* workplace harassment, the systemic nature of the amendments, and inferences from human rights case-law, as well as jurisprudence on workplace violence. It appears that where there is a reasonable causal connection between systemic failings and the breach of *OHSA* the typical panoply of systemic are likely to be available. A crucial issue will be the extent to which decision-makers infer substantive obligations from the largely procedural amendments.

B. The Amendments - Briefly

Previously, the *OHSA* contained a definition of workplace harassment, and a requirement employers to prepare a policy and a program. The policy had to be posted and there were modest requirements regarding the contents of the program, as well as instruction for workers. These were largely procedural requirements which led to some rather convoluted case-law as the OLRB attempted to give them some meaningful effect.[1] Substantive obligations were instead drawn from the common law and collective agreements.[2]

In large part, the amendments enhance the systemic requirements by adding requirements for policies and the contents of programs implementing them, as well as investigations of alleged workplace harassment. The result is that the *OHSA* itself now includes a range of systemic requirements, the breach of which will no doubt result in orders for compliance. Some of these statutory requirements clearly overlap with traditional systemic remedies, while other systemic remedies, and the contours of the statutory requirements, will need to be inferred from similar

case-law arising from other sources such as the *Human Rights Code*, the common law, and collective agreements.

C. Jurisdictional Considerations:

The most important element of the amendments is to expand protection for workplace harassment generally, as opposed to *Code*-based harassment. Because much of the case-law arises in the context of the *Code*, it will be necessary to remain alert to any jurisdictional differences in relation to remedial authority.

1. Labour Board:

Access to the OLRB will principally arise through either appeals of Inspectors orders, or reprisal complaints.

The scope of remedies available in reprisal complaints is likely to be more circumscribed than in appeals of inspectors' orders. This is simply because the focus of such complaints is individual, the question being generally whether a worker suffered for attempting to exercise rights under the *OHSA*, and the remedy being designed to reverse any harm.

Notably, inspectors can now order an independent investigation of harassment complaints (s. 55.3). While the scope of an appeal under s. 61 will to some extent be determined by the issues raised during the inspection, it seems fairly uncontentious that in reviewing the Inspector's order the OLRB will be able to remedy all of the systemic issues explicitly covered by the *OHSA*. This is simply because the Board has the powers of an Inspector (s. 61(4)), and an Inspector can order compliance with the Act (s. 57(1)), such as creation of a policy and program, posting of those documents, an investigation, training about the policy, program and statutory rights. What is far less clear is the extent to which the OLRB will consider issuing more creative systemic remedies, such as third-party reviews of policies and programs, in order to enforce the statutory requirements.

2. Labour Arbitration:

The *Labour Relations Act, 1995* explicitly authorizes arbitrators to apply employment-related statutes (s. 14(12)(j)), and gives these decision-makers extensive remedial jurisdiction.

Systemic remedies for workplace harassment (without a *Code* ground) have already been ordered in the absence of clear statutory requirements[3] and at least one arbitrator has decided that their remedial jurisdiction extends to determining where an alleged harasser, who was not an employee (it was a physician with privileges under the *Public Hospitals Act*), would be permitted to be in relation to an alleged victim while she was at work.[4]

D. When Are Systemic Remedies Appropriate?

After the passage of Bill 132, but prior to its taking effect, an Ontario arbitrator commented on the possible impact of the amendments on an employer's obligations regarding workplace harassment:

> There was nothing inherently deficient in the employer's existing policies. The employer failed to conduct an investigation because it believed the grievor and inappropriately determined that no investigation was therefore required. It was also at some loss to know how to combat a rumour in the workplace. Those deficiencies reflect a lack of necessary management skills more than a failure to understand human rights issues. The key managers involved are no longer with the organization. It is hazardous to make assumptions as to what if any training may now be warranted. A clear message to this employer is that in future it need conduct a proper investigation into complaints received. While that involves time and resources, this proceeding also makes clear that a proper investigation with the necessary follow-up is likely to be far less costly in both human and financial terms in the long run. I note as well that amendments to the Ontario Occupational Health and Safety Act further to the recent passage of Bill 132 will take effect on September 8, 2016 and will not only require the employer to conduct a review to ensure that it is in compliance with that new legislation that specifically responds to workplace sexual harassment, but it will also impose new employer responsibilities regarding both investigating and reporting with respect to allegations of sexual harassment under a new definition of

> workplace harassment. Any review will also necessarily include consultation with the union as a participant in any joint health and safety committee.[5]

In that case, partly because of the impending legislative changes, the arbitrator declined to order any systemic remedies, but this passage supports the notion that the amendments themselves impose systemic requirements which parallel traditional systemic remedies in the human rights context.

Put another way, when the mischief transcends individuals, such that it would likely have occurred in the absence of the specific persons involved, systemic remedies are appropriate:

> Thus, although I found that both Mr. Hull and Mr. Garrish fell short in their duty to address AB's poisoned work environment (and were in breach of the Code as a result), their conduct (or, more correctly, inaction) does not warrant an order of damages against them. Their inaction is, more than anything else, symbolic of a systemic lack of awareness and sensitivity around harassment and discrimination issues in this workplace. This deficiency would be best addressed by a more concerted effort by the City to educate HSR staff (managers included) with respect to harassment and discrimination. It is my view that, in the circumstances, holding Messrs. Hull and Garrish liable for damages would be more punitive than remedial.[6]

E. Possible Systemic Remedies:

The scope of systemic remedies available will of course depend on the extent of obligations to prevent or protect against workplace harassment. On the one hand there seems to be a good argument that the statutory definition, requirement of a policy, and requirements for a program, all support some degree of substantive obligation to prevent workplace harassment and protect workers from it. Such an argument would likely rely heavily on the remedial and systemic nature of *OHSA*.

On the other hand, there are some significant differences between the provisions about workplace violence, and those addressing workplace harassment. Unlike workplace harassment, the prevention of workplace violence is explicitly included in the duties of employers, supervisors

and workers (s. 32.0.5), as is protection against domestic violence (s. 32.0.4). Employers are also required to conduct risk assessments (s. 32.0.3), and provide information to workers about the risk of workplace violence in certain circumstances (s. 32.0.5(3)). Finally, the right to refuse unsafe work applies to violence (s. 43(3)(b.1)) but not workplace harassment. The significant substantive provisions regarding workplace violence thus contrast with the absence of similar provisions regarding workplace harassment. This provides the opportunity for an *expressio unius est exclusio alterius* argument that obligations regarding workplace harassment remain more centrally procedural than substantive. Thus, the scope of substantive obligations which emerge will, to a large extent, determine the substantive remedies available.

1. Investigations by Third-parties:

Again, Inspectors now have the power to order a third-party investigation at the employer's expense (s. 55.3). As a result, there can be little doubt that this remedy will be available in an appeal of an Inspector's order (or lack thereof).

In contrast, it is less likely that such an order would be made in labour arbitration for the simple reason that the arbitration process itself functions as an independent review of an employer's investigation. In the disciplinary context, including cases involving sexual harassment, arbitrators have held that flaws in the investigation can be cured with appropriate evidence at arbitration.[7] In addition, even with a very expedited process, the complexity of harassment issues, and thus hearings involving factual disputes, are likely to result in a decision occurring well after an investigation would have been required, rendering an order for another investigation moot.

That said, the question arises when a third-party investigation would be required, or when remedial orders regarding investigations generally will be appropriate. This will no doubt be driven in large part by the quality of the investigation either proposed or conducted, and most importantly, the independence of that investigation. Section 37.0.7(1)(a) requires an investigation that is "appropriate in the circumstances". It seems fairly likely that the elaboration of what this requires will be based to a large extent on jurisprudence regarding the adequacy of investigations in the human rights context. It also appears likely that the more deficient the

investigation, particularly in respect of its independence, the more likely that an external investigator will be required.

The following is a non-exhaustive list of factors likely to be considered in determining whether an investigation was adequate, and thus "appropriate in the circumstances"[8]:

1. How promptly the investigation was commenced;
2. The length of the investigation;
3. Whether the investigation identifies the correct issues;
4. Whether all relevant information was collected and considered;
5. Whether, in unionized workplaces, the union was properly involved in representing any individuals involved in the investigation;
6. Whether the review of the information was reasonable;
7. Whether the integrity of the investigation, including the confidentiality of the information, was preserved;
8. Whether the investigation demonstrates the employer took the allegation seriously;
9. Whether the conduct of the investigation complied with the employers own policies;
10. Whether the alleged victim and the alleged harasser were treated fairly, including being provided with sufficient details of disputed facts so that they could respond;
11. Whether the investigation was impartial; and,
12. Whether the investigation "got it right".

2. Training / Education:

Section 32.0.8 requires the provision of information and training on the contents of the policy and the program. While one hopes that the policy and program are adequately informative in

themselves, this is not quite the same as requiring training about workplace harassment and its effects.

In the human rights context it is commonplace to order those found to have breached the *Code* to engage in further education.[9] This is so routine that the Commission has online materials to which orders routinely direct offenders. In some cases respondents have also been ordered to retain experts to design and conduct training in the workplace.[10]

These remedies in the human rights context typically result from a factual determination that the people in the workplace – those in positions of authority and/or colleagues who ignore or perpetrate the harassment – lack an understanding of the rights protected, the misconduct committed, and the pernicious effect of such behaviour. Again, the extent to which such remedies are available will depend in large part on whether the amendments are interpreted as creating substantive obligations.

The same logic is likely to play a significant role in any order for education and training beyond the statutory requirements regarding programs. In our submission, to the extent that the facts indicate that people in the workplace fail to understand the nature and impact of workplace harassment, orders for training and education are more likely. Whether such resources are reasonably available internally or need to be obtained externally will depend on the facts of the particular workplace.

3. Informational Remedies

Section s. 32.0.1(2) requires the harassment policy to be posted in a conspicuous place. Again, one hopes the policy is adequate but there are clearly informational notices which could expand on the policy itself.

Declarations that either an act or collective agreement have been breached are commonplace, and orders that such declarations be publicized are also fairly routine. The contents of any informational remedies could also include information about harassment generally, the contents of *OHSA* and the rights of workers under that act, and the consequences of workplace

harassment. Since postings and notices serve the same practical purpose as education and training, albeit in a much more passive fashion, it seems that the considerations outlined above militating towards orders for education and training also apply to informational remedies.

4. Amendment of Policies / Programs:

There are now statutory requirements for the programs which implement harassment policies (s. 32.0.6). No doubt Inspectors, the OLRB and arbitrators will all issue orders requiring compliance with statutory requirements.

The more interesting question is whether the jurisprudence will infer requirements for policies and programs beyond those explicitly set out in the statute. Any such inference could be drawn from the definition of workplace harassment, and any substantive requirement for employers to protect workers from workplace harassment, which is uncertain. To the extent that substantive obligations result, it seems that policies will have to be more robust.

F. Conclusion:

The amendments themselves impose systemic requirements which are at the very least procedural. There can be little doubt that those systemic requirements can be imposed as remedies. What remains to be seen is whether more comprehensive systemic remedies are ordered as a result of these amendments. This will depend in large part on whether the amendments are interpreted as enhancing substantive protections against workplace harassment, and if so, to what extent.

In the context of a remedial statute, there are certainly arguments to be made that substantive protection should be inferred. But, given the significant contrast between provisions regarding workplace violence as opposed to harassment, this is far from certain.

In the result it is unlikely that the same ambitious range of systemic remedies seen in human rights law will be applied to workplace harassment as a result of these amendments. This will be

particularly true in the context of remedies such as education and training, external consultations or reviews, and informational orders.

[1] See for example, *Saumur v. Commissionaires Ottawa*, 2015 CarswellOnt 10159 (OLRB); *Ljuboja v. The Aim Group Inc.*, 2013 CarswellOnt 16566 (Nyman).
[2] *Toronto Transit Commission v. Amalgamated Transit Union*, 2004 CanLII 55086 (Shime)
[3] *Ibid.*
[4] *William Osler Health System v Ontario Nurses' Association*, 2013 CanLII 72709 (ON LA) (Albertyn)
[5] *Toronto Community Housing Corporation v Ontario Public Service Employees Union*, 2016 CanLII 21169 (ON LA) (Nairn), at para. 62.
[6] *City of Hamilton v. Amalgamated Transit Union, Loc. 107 (Grievance re AB)*, 2013 CanLII 62266 (ON LA) (Waddingham), at para 163 and also see para. 169.
[7] *Durham (Regional Municipality) v. CUPE, Local 132 (X Grievance)*, [2011] O.L.A.A. No. 410 (Bendel), at para 91; *Oshawa Foods Division v. UFCW, Local 175 (Nadeau and Yourth Grievances)*, [1996] O.L.A.A. No. 471 at para 249.
[8] Newman, E., *Violence and Harassment in the Workplace: A Practical Guide to Ontario's Bill 168 for Employers, Unions and Employees*, Lancaster House, Toronto: 2012, Section 11; Tomlinson, C. and Nikfarjam, P., "Update on the Law of Workplace Investigations," 28 Can. J. Admin. L. & Prac. 203 (2015); *Laskowska v. Marineland of Canada Inc.*, 2005 HRTO 30 (CanLII); *Sutton v. Jarvis Ryan Associates*, 2010 HRTO 2421 (CanLII)
[9] *City of Hamilton, surpa* note 6; *Smith v. Network Technical Sevices Inc.*, 2013 HRTO 1880 (CanLII); *Schildt v. POINTTS Advisory Ltd.*, 2014 HRTO 893 (CanLII).
[10] *City of Hamilton, supra* note 6; *A.B. v. Havcare Investments*, 2014 HRTO 1087 (CanLII).

LET RIGHT PREVAIL
The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 5A

Harassment in the Workplace: Understanding THE NEW OBLIGATIONS

Delivering Outcomes, Remedies, and Restoration

Remedies
Co-Worker Complaints – The Union's Role

Mona Staples
Legal Counsel
Canadian Union of Public Employees

March 28, 2017

cpd Continuing Professional Development

Harassment in the Workplace: Understanding the New Obligations

March 28, 2017

Remedies

Co-Worker Complaints – The Union's Role

Mona Staples

The focus of this paper is co-worker harassment complaints. As you can imagine, co-worker complaints are some of the most difficult for Unions to navigate. The following provides some practical advice for clients who are dealing with co-worker harassment complaints. It will then examine a few recent cases and comment on the outcomes.

Best Practices

Union's are often involved in cases that deal with allegations of harassment and violence in the workplace among co-workers.

Either the complainant or the accused or both may seek out the help of the Union in navigating the complaint process.

The Investigation Stage

Where the allegation is between two Union members the best practice is for the Union to assign a representative to act on behalf the complainant and another representative to act on behalf of the accused.

Where the employer has an internal complaint program, which Bill 132[1] now requires, the Union representative assigned to the complainant will typically help him/her with filing the complaint. They will also attend meetings with the employer regarding the complaint.

The union representative assigned to the accused will also typically attend meetings with the employer. If the Union is concerned that discipline may ultimately result then the representative will likely take an active role advising the accused during the investigation.

[1] Bill 132, *An Act to amend various statutes with respect to sexual violence, sexual harassment, domestic violence and related matters*, 2016 -- the final version can be found at http://www.ontla.on.ca/bills/bills-files/41_Parliament/Session1/b132ra.pdf

Unions who adopt this approach should emphasize the need for confidentiality and ask that the two representatives do not discuss the case with each other.

If the employer finds that there are insufficient reasons to investigate, which would be less likely today in the advent of Bill 132, the Union may be asked by the complainant to file a grievance.

If the investigation results in discipline, then the accused may want to file a grievance.

The Grievance Stage

The *Labour Relations Act* [2] ("LRA") mandates that all collective agreements provide for final and binding arbitration, of all differences between the parties arising from alleged violations of the collective agreement[3]. It also provides that an Arbitrator has the power to interpret and apply human rights and other employment related statutes regardless of any conflict between those statues and collective agreement terms[4].

Unions have the right to file grievances for violations of employment related legislation including the *Human Rights Code*[5] and the *Occupational Health and Safety Act*.[6] Therefore, a Union can file a grievance if it believes that an employer failed to investigate a complaint of sexual harassment or if it disagrees with the results of the investigation citing breaches of the *Human Rights Code*, Collective Agreement provisions and now also the *Occupational Health and Safety Act* as amended by Bill 132.

In any of these scenarios the Union is in the unenviable position of acting on behalf of one of its members to the potential detriment of the other. If the Union chooses not to

---

[2] *Labour Relations Act*, S.O. 1995, c. 1, Sched. A
[3] *Supra* at section 48
[4] *Supra* at section 48(12)(j)
[5] *Human Rights Code*, R.S.O. 1990, c. H.19
[6] *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1

file a grievance for the complainant or the accused those members can file a complaint at the Labour Board citing the Union's failure to represent (Section 74 of the *Labour Relations Act*).

To ensure that the Union does not breach its obligation to fairly represent its members and as a matter of best practices the Union should have someone other than the representatives assigned to the complainant or the accused decide whether a grievance should be filed. This person should take an objective approach to the matter and assess the merits of the allegations and the likelihood of success should the grievance proceed to Arbitration.

Case Studies

1. FAILURE TO INVESTIGATE

***Re Toronto Community Housing Corp. and OPSEU*[7][8]**

In the *Toronto Community Housing Corp* ("TCHC") case, Ms. Janice Gordon ("the grievor") was the victim of office gossip and rumours that suggested she was in a sexual relationship with a married supervisor.

Ms. Gordon started with the employer in October of 2005, by early 2006 the rumours began. The rumours persisted for years. Particularly troubling were the implications that the grievor was receiving special treatment because of the alleged sexual relationship with the supervisor. One employee who worked with the grievor in 2006 acknowledged that she spoke about her "observations" of the grievor's interaction with the supervisor. Although this employee admitted to sharing her "observations" she never acknowledged that she was spreading rumours or understood that she was

[7] *Toronto Community Housing Corporation (Security Group) v Ontario Public Service Employees Union*, 2015 CanLII 13548 (ON LA) (Nairn)
[8] *Toronto Community Housing Corp. (Security Group) v. Ontario Public Service Employees Union (Gordon Grievance),* [2016] O.L.A.A. No. 163 (Q.L.) (Nairn)

contributing to a poisoned workplace. There were several other employees who confirmed the existence of the rumours.

The grievor learned of the rumours being spread about her and complained to her employer in the summer of 2006 and again in November of 2006. The employer's notes indicate that grievor wanted a full investigation to be conducted.

In February of 2007 the employer indicated to the grievor that an investigation was not necessary because they accepted the fact of the rumours and that they were inappropriate. The employer also acknowledged that the grievor was working in a poisoned work environment. As a remedy the employer suggested that it would deal with the rumours through general education and training.

Ultimately the grievor continued to be the subject of the rumours and she filed a grievance. Other issues were also raised during the 23 days of Arbitration, however ultimately the decision was based on the rumours.

Decision

The Arbitrator had no hesitation in finding that the grievor had been subjected to sexual harassment contrary to the *Code*. With respect to the employer's obligation the Arbitrator found that while not every complaint will require an investigation, those that do not should be the exception. She explains that a formal investigation is still recommended even where the facts are not in dispute to gain a better understanding of the issues.

The employer's decision to address the rumour with systemic training was found to have failed in addressing the harassment. The employer ought to have conducted a formal investigation and taken greater initiative to address the sexual harassment that the grievor was subjected to. She states at para 325:

> Having regard to all of the above, I find that, in meeting its obligation to provide a workplace free from harassment and discrimination, it would have been prudent for the employer to conduct an investigation into the rumours, and the failure to do so in these circumstances was unreasonable. However, even assuming that the employer was not required to investigate the rumours, I find that the actions taken by the employer to address the sexual harassment suffered by the grievor were unreasonable as being both insufficient and untimely. The employer also failed to act reasonably by failing to address in any way the effect or validity of the rumours circulating about the grievor within the CSU.

Remedy

A separate award was issued to address the remedy in this case. The arbitrator found no deficiencies in the employer's policies and did not order any systemic remedies, such as training. She found that the message to the employer had to be that it needed, in future, to conduct a proper investigation into complaints received. She notes that Bill 132 will impose obligations on employers to conduct investigations into complaints of sexual harassment.

She awards $10,500 as general damages to be paid to the grievor within 60 days of the award.

Key Takeaways: The case in my view is a cautionary tale about what could happen if a complaint is not handled appropriately. The employer in this case felt that an investigation was unwarranted because it accepted the fact that the grievor was being sexually harassed. Unfortunately, it did address the harassment directly and believed that additional training would put an end to it, it did not. A formal investigation may have brought home to those spreading the rumours that they were creating a poisoned workplace for the grievor and impressed upon them the need to stop.

Also noteworthy is that this case spanned 24 days of hearing at was surely quite costly to all parties. A formal investigation would likely have saved everyone time and money.

2. DISCIPLINE

The following examines two (2) cases. They each concern somewhat isolated incidents of harassment. In one case the employee expressed remorse and accepted responsibility he was reinstated, despite his relative short service. In the other case, an employee with twelve (12) years of service failed to accept responsibility for his actions, or to apologize, he did not get his job back. The cases demonstrate that where an employee has been found guilty of harassment an arbitrator will be less likely to reinstate them if they cannot accept responsibility or commit to change.

Re *Tembec Enterprises Inc. Forest Products Group (the "Employer") and United Steelworkers Local 1-2010 (the "Union")*[9]

Tembec Enterprises operates a sawmill, Mr. Richard McWatch ("the grievor") had been working for Tembec Enterprises for just less than two (2) years in a temporary Operator position when he was terminated for workplace harassment and violating health and safety standards. The Union agreed largely with the description of the events and that the grievor's conduct was inappropriate. The Union's position was primarily that termination was not the appropriate response arguing that the mitigating factors warranted an exercise of discretion by the arbitrator to substitute a lesser penalty.

On June 24, 2016, the grievor was working with a female co-worker ("SR") and had an altercation with her. He acknowledged that he called her several offensive names including: "old bag", "useless bitch", "fucking cunt" etc. He also moved some material towards her in a dangerous manner which caused her to push the emergency stop on the machine. SR had not been entirely blameless in the altercation, she called the grievor lazy and had made some derogatory comments about his non-permanent employment status (she was a long service employee of 24 years).

[9] *Re Tembec Enterprises Inc. Forest Products Group (the "Employer") and United Steelworkers, Local 1-2010 (the "Union),* 2016 CanLII 77754 (ON LA) (Bernhardt)

At the end of her shift SR complained to the plant supervisor about the altercation. The following day the supervisor approached the grievor who acknowledged that he "lost it" and said some "bad words" he also asked his Supervisor if he should apologize to her.

On June 27, 2016, the employer met the grievor and his Union representative to discuss the events. The grievor acknowledged that he had called SR inappropriate names and that he had broken some safety standards with the machinery. The employer terminated his employment.

Decision

The arbitrator focused her analysis on whether to substitute a lesser penalty. She examines some of the more common mitigating factors and finds that the grievor's clean disciplinary record is neutralized by his short service and that the offence was serious as it involved harassment. While none of these mitigating factors worked in the grievor's favour, the fact that he was remorseful, honest and accepted responsibility for his actions from the moment they occurred augured in his favour.

The arbitrator found that the grievor was unlikely to engage in similar misbehaviour in the future and that he should be given another chance. Her conclusion is largely based on his truthfulness and acceptance of responsibility.

Remedy

The grievor was reinstated to his former position immediately with the interim period considered a suspension without pay.

Re Atlantic Packaging Products Ltd. And International Brotherhood of Teamsters (GCC, Local 100m) (Brar)[10]

The grievor is a towmotor operator with twelve (12) years of seniority. The employer terminated his employment for two (2) incidents of harassing and violent conduct. On December 10, 2015 the grievor approached a co-worker (Mr. Imran Mohamed) on the plant floor and yelled at him saying "if you have a fucking problem, we can take it outside". Several other employees observed the interaction. A supervisor noted the commotion, came out of his office and Mr. Mohamed reported that the grievor had threatened him. When the supervisor asked the grievor if that was the case he replied "yes, I'm fucking threatening him". The supervisor asked the grievor to leave and fifteen (15) minutes later the grievor sent the supervisor a text stating "fuck Imran".

Mr. Mohamed filed a complaint about the December 10, 2015 incident and told the Employer about a prior incident on November 19, 2015 when he and the grievor were alone on night shift. The grievor had yelled at him to the effect of "what the fuck is your problem?" and had blocked him in with the forklift.

The employer's investigation focused on interviews with employees who witnessed the December incident and the grievor. The grievor said nothing happened when questioned during the investigation. The grievor had a similar response to the November incident.

The employer terminated the grievor concluding that he had engaged in abusive and violent behaviour and did not take responsibility for it.

At the hearing the grievor grudgingly admitted that he "may" have yelled at Mr. Mohamed in December, but maintained that nothing happened in November.

---

[10] *Re Atlantic Packaging Products Ltd. And International Brotherhood of Teamsters (GCC, Local 100m) (Brar)*, 2016 CanLII 84460 (ON LA) (Parmar)

Decision

The Arbitrator focused on whether the penalty should be reduced given the grievor's admission of wrongdoing.

The Arbitrator found that at the very least the December incident was inappropriate and merited some discipline. She notes that Bill 168 effectively requires arbitrators to take workplace violence and harassment allegations seriously.

The arbitrator finds the grievor's explanation of the November incident disingenuous and preferred the evidence of Mr. Mohamed.

Ultimately she was not convinced that the grievor had accepted responsibility for his actions. His failure to acknowledge wrongdoing during the investigation meeting and his reluctance to accept "the full scope of his behaviour" as well as his untruthfulness about his conduct in November all weighed against him.

Remedy

The arbitrator held that she could not return the grievor to the workplace as he did not appreciate his role in ensuring the workplace was safe. She finds that discharge was an appropriate response.

Key Takeaways: Bill 168 and now Bill 132 make it clear that allegations of violence, harassment and sexual harassment in the workplace must be taken seriously. Many of us can remember when foul language in the workplace, even when directed at a co-worker was tolerated as a form of "shop talk" or put down to "workplace culture". This is no longer the case. Today the use of vulgar language and insults directed at a co-worker in the workplace will be deemed as an expression of violence which can result in termination. If the employee is viewed as threatening that too can been viewed as a threat to the safety of co-workers and result in termination.

The two cases demonstrate that if discipline or termination is for even isolated incidents of harassment, the employee's acceptance of responsibility and acknowledgement of wrongdoing will likely be determinative of the outcome. Arbitrators tasked with assessing the appropriateness of the penalty are less likely to reinstate an employee who uses threatening language if they are unable to acknowledge wrongdoing and to show remorse despite any other mitigating factors, including length of service with the employer.

3. DUTY OF FAIR REPRESENTATION ("DFR")

Re G.(M.) v. Teamsters, Local 880[11]

Mr. G (the complainant) filed a duty of fair representation complaint against his union when they withdrew his termination grievance. The complainant had worked for the employer, Allied Systems, for 11 years, initially as a yardman and later as a driver. Allied Systems transports new cars to the manufacturers.

In February of 2005 Mr. G was terminated from employment because of complaints received by three female co-workers. The women stated that they were afraid to come to work, they alleged that Mr. G. had engaged in the following behaviour:

- Had driven a car towards them then veered away at the last moment;
- Swore at them;
- Pretended to hit one of them;
- Frightened them by hiding in cars and jumping out at them;
- Told them they had five months to leave the company;
- Used a Chapstick lip balm to simulate masturbation.

The Union filed a grievance for Mr. G's termination and then asked an experienced labour lawyer to investigate the allegations. The lawyer interviewed the three women and spoke with the complainant over the phone twice. Mr. G denied the events

[11] *Mr. G,* 2007 CIRB 399 (CanLII) (Pineau)

described by the women and provided an alternate version of the events that the women had described. The lawyer concluded that the women's version of the events was more credible than the complainant's. The lawyer advised the Union that they were unlikely to succeed at arbitration considering his findings on credibility. The union pointed out to the labour board that Mr. G blamed everyone but himself and turned serous incidents into harmless jokes and then claimed sabotage.

Decision

Ms. Pineau, the Vice-Chair notes that a union's duty towards employees includes representing the bargaining unit as a while. She explains that Unions must make decisions that are in the best interest of all members even when individual members disagree.

She points out that the Board does not evaluate the merits of the grievance and does not stand as an appeal tribunal of the Union's decisions. The Board will review the facts of the grievance to determine whether the Union fully considered the matter objectively having regard the relevant evidence.

The Board acknowledged that Unions are in difficult positions when faced with allegations of workplace harassment made by other employees and must proceed cautiously. Vice-Chair Pineau held that the Union's decision to hire an outside lawyer to review the case and investigate provided an objective assessment of the grievance.

She finds several factors justified the Union's decision not to pursue the grievance to arbitration:

1. The complainant did not recognize during the investigation that he had been dismissed for serious wrongdoing, whether the allegations were true or partially true. She notes that failure to accept responsibility is a factor that carries considerable weight with Arbitrators.
2. Arbitrators are much less tolerant of acts that put employees at risk of emotional or physical harm.

The Board concludes that the Union had met its duty of fair representation in the case and dismissed the Complaint.

Key Takeaways: Cases involving co-worker complaints put unions in the unenviable position of having the pursue the interests of one employee to the potential detriment of another.

This case demonstrates that a Union does not always have to pursue the grievance of a terminated employee if that employee was dismissed for harassing other union members. However, any decision not to pursue that grievance must be made objectively. As mentioned at the beginning of this paper, implementing a practice that provides each employee (the complainant and accused) with representation, and appointing a neutral third representative to evaluate any grievance that may be filed is a sound practice.

***DISCLAIMER**

The views expressed in this paper are those of the author, and may not be those of my employer, the Canadian Union of Public Employees.

LET RIGHT PREVAIL
The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 5B

Harassment in the Workplace: Understanding THE NEW OBLIGATIONS

Delivering Outcomes, Remedies, and Restoration

When managers harass: Dealing with the aftermath

Nadine Zacks
Hicks Morley Hamilton Stewart Storie LLP

March 28, 2017

cpd Continuing Professional Development

When managers harass: Dealing with the aftermath

Nadine S. Zacks

Introduction

Recent case law and legislation clearly demonstrates greater emphasis on and concern for workplace harassment. Decision-makers are holding both employers and employees to higher standards of conduct than in the past. This has resulted in employees advocating more for their rights to a harassment-free workplace, and employers being required to spend more time and resources addressing potential or actual harassment in the workplace. This paper will provide a summary of some of the challenges employers face, both internally and externally, when a finding of harassment is made against someone in management.

Dealing with harassment internally

When, after conducting an internal investigation, an employer concludes that a manager has engaged in harassment of one of its employees, an employer is often faced with a balancing act.

On the one hand, an employer must take sufficient steps to address and correct any inappropriate behaviour of the manager and protect the harassed employee, if still employed in the workplace. Therefore, any response and corrective action must be sufficient to ensure that the harassing behaviour does not continue. Depending on the severity of the incident, this could range from a written letter to the harasser to termination. Whatever action is chosen, it must also be implemented in a timely manner, so as to not allow the harassment to continue once the finding has been made. It must also be effective at ending the inappropriate behaviour to protect the harassed worker (and possibly other workers). Liability can result if an employer does not take prompt and appropriate steps.

An example of the liability that can result due to a failure to properly respond can be found in the case of *Toronto Transit Commission and A.T.U. (Stina),*[1] in which a grievance was filed alleging that an employee had been harassed by a supervisor for a long period of time. The conduct in question included the supervisor ordering the grievor back to work when others were not so ordered, unjustifiably complaining about the grievor's work, restricting the use of the phone when others were not restricted, attempting to discipline the grievor when it was not warranted and making unreasonable demands on the grievor with respect to his work performance.

The arbitration board found both the supervisor and the TTC responsible for the manner in which the grievor was treated. The TTC's liability arose from its approach in handling the grievor's complaints. Essentially, the TTC was indifferent to the grievor's concerns and did not take any steps to investigate or address the matter.

An employer may also be found to contribute to a "poisoned work environment" through a failure to appropriately respond to or prevent harassment.[2]

On the other hand, an employer cannot rush too quickly to excessively discipline or terminate a harassing manager, as employers may also be found liable to the perpetrator of workplace harassment if they respond in an excessive way. Although acts of harassment are serious employment offences, they do not necessarily provide cause for summary dismissal. As with any discipline, a contextual analysis must be applied to the facts.

While courts and arbitrators have upheld just cause dismissals for such behaviour, this is not always the case. In *Toronto (City) v. CUPE, Local 416*[3], the grievor brought a member of the public into a work related dispute to embarrass a fellow employee, made fun of a co-worker, and used racial an otherwise hurtful terms towards an employee even after he objected to them. The arbitrator found that, notwithstanding the grievor's lengthy service, the City had cause to terminate the grievor's employment and upheld his dismissal. To the contrary, in *Re Children's Hospital of Eastern Ontario and OPSEU,*[4] notwithstanding that the arbitrator found that the grievor had engaged in harassment and created a poisoned work environment through sustained non-verbal passive harassing behavior, she ultimately determined that it did not amount to cause for termination.

---

1 (2004), 132 L.A.C. (4th) 225. ["*Toronto Transit*"]

2 See, for example, *Ontario (Human Rights Commission) v. Farris,* 2012 ONSC 3876 at para 33.

3 (2009), 185 L.A.C. (4th) 85.

4 (2015), 260 L.A.C. (4th) 147.

Another issue employers must deal with following a finding of harassment, and which is becoming a more topical issue recently with the passage of Bill 132, is the manner in which to communicate the results of the investigation to the individuals involved. In order to provide closure to an employee at the end of an investigation, sufficient information must be provided to the employee to satisfy the employee that the employer has appropriately dealt with their complaint, particularly where a finding of harassment has been made. Moreover, communication of the results of the investigation and the corrective action taken, if any, is now legislatively mandated to be communicated to employees following a harassment investigation as a result of the passage of Bill 132. While the extent of how much detail should be communicated may depend on the facts of each case, employees are demanding more information than in the past, often demanding to know the exact discipline imposed upon the harasser.

External liabilities and remedies

When an employee is not satisfied with the remedies or outcome of the investigation, or the employer fails to act reasonably or promptly in response to allegations of harassment, employees often turn to external forums to achieve the remedy they are seeking. These cases are most often brought in the courts, through arbitration or to the Human Rights Tribunal of Ontario.

Employers can be found vicariously liable for harassment that occurs in the workplace. The test requires that an employee's wrongful conduct consists of either (1) an act authorized by the employer or (2) unauthorized acts that are so connected with acts that the employer has authorized that they may rightly be regarded as modes - although improper modes –of doing an unauthorized act. Where the act is committed by a supervisory employee, who acts as part of the "directing mind" of the corporate employer, that employee's actions are organically part of the employer's actions and the employer can face liability.

Moreover, employers are generally more criticized and penalized when the harassment is caused by supervisors. In one case, the Canadian Human Rights Tribunal stated as follows:

> …we are prepared to distinguish between the liability of the employer arising from the conduct of supervisory personnel, as opposed to that arising from the conduct between co-workers.
>
> If this same conduct had been done by supervisory personnel rather than by a co-worker, we would have found a contravention of the Act and held him liable.[5]

[5] *Shaffer v. Canada (Treasury Board),* 1984 CanLII 5 (CHRT)

When faced with cases where managers have been found to harass employees, decision-makers have crafted some interesting remedies, in addition to monetary remedies.

For example, in one case in which a supervisor was found to have engaged in discriminatory and harassing conduct which poisoned an employee's work environment by sending her pornographic emails, having sexualized conversations with and about her, and calling her inappropriate names, the arbitrator ordered the employer to retain legal counsel or a consultant having expertise in human rights to evaluate the It *Starts With You* program, and provide human rights, discrimination and harassment training to inspectors, supervisors and managers within six months. This was in addition to a $25,000 award to the grievor for injury to dignity, feelings and self-respect.[6]

In another case, *Smith v. The Rover's Rest*[7], the Tribunal ordered that within 60 days of the decision, the individual respondent must retain a consultant with expertise in sexual harassment and gender discrimination to provide training to him on his obligations under the *Code*.

An interesting issue arises in the unionized context around an arbitrator's ability to impose a remedy that affects a supervisor, notwithstanding that the supervisor is not party to the collective agreement. In *Teamsters Canada, Local 419 v. Tenaquip Ltd. (Vandervende Grievance)*[8], Arbitrator Newman dealt with this exact issue when considering an employer's preliminary objection to the relief requested by the grievor, which included a request to remove the supervisor from the workplace. The employer objected to the remedy on the basis that the arbitrator had no jurisdiction to take disciplinary action against the supervisor. Arbitrator Newman dismissed the preliminary objection, stating that an arbitration board is tasked with dealing with "all disputes and differences between the parties arising expressly or inferentially from the collective agreement, and to grant the labour remedies which will give complete and final effect to the resolution of those disputes and differences. The obligation upon the board to complete that task may, in an unusual case, require that it fashion a remedy which has the effect of limiting a right which management would otherwise exercise, or which has a negative impact upon an individual who is not a party to the collective agreement." Although she confirmed that a remedy which is sought solely to "punish" a supervisor would be outside of an arbitrator's jurisdiction, if the remedy is sought to ensure that the company provides a safe working environment and a specific order against a specific individual is the only way to achieve that, an arbitrator had jurisdiction to consider such a remedy.

---

[6] *City of Hamilton v Amalgamated Transit Union*, Local 107, 2013 CanLII 62266 (ON LA)

[7] 2013 HRTO 700

[8] (2002), 112 L.A.C. (4th) 60.

In *Toronto Transit, supra,* the Board ordered the employer to ensure that the grievor had a harassment free workplace, and more specifically, that the supervisor have no communication whatsoever with the grievor. The Board stated:

> Very often in harassment cases the victim is moved. I do not propose to move the grievor in this case. Rather, I determine that [the grievor] shall be able to move freely among the Commission's various workplaces. If he should bid or be transferred into an area where [the supervisor] is present, the Commission is directed to move [the supervisor] into an area where [the grievor] is not present. In effect, [the grievor] is to have workplace immunity from [the supervisor].

These remedies are of course in addition to the significant monetary remedies that both employers and supervisors can fact as a result of subjecting an employee to harassment in the course of their work.

From a practical perspective, an issue often arises with respect to how to deal with and respond to an external action brought against both the supervisor and the employer when the employer has made a finding that the supervisor has engaged in harassment, but did not terminate the supervisor. In most cases when a supervisor and employer are both named, the parties present a united front in defending the allegations, but this is often not possible when the employer has already made a finding of harassment by the supervisor. Employers are left with the difficult decision of either placing the blame on the supervisor while maintaining that they took all reasonable steps to prevent and remedy the harassment, or siding with the supervisor and admitting harassment.

* * * *

This paper has sought to provide a high-level summary of some of the issues and complexities that arise after a supervisory employee has been found to have engaged in harassment within the workplace. As noted above, it is important for workplace parties to ensure compliance with their legal obligations with respect to harassment in order to avoid the significant ramifications which can flow from a failure to comply.