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# Navigating Workplace Conflict and Addressing Equality Issues in a #Hashtag Era



Presented by:  
Susan Crawford, Kelsey Orth and  
Mike MacLellan

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# Agenda

- Recent Trends
- Legal Requirements to address harassment and promote equity in the workplace.
- The explosion of increased liability for failing to meet legal obligations.
- Best practices and policy development to promote workplace harmony.



# Recent Trends

- Human Resources Professionals Association described sexual harassment as an “epidemic” in workplaces in April 2018.
- Yet other studies indicate that vast majority of company executives don’t believe sexual harassment is an issue in their workplace.
- The number of harassment complaints has risen as a result of social movements like #metoo, #timesup and #blacklivesmatter.
- Increase in the number of social media harassment/bullying complaints.



# Recent Trends

## The “Stats” on Social Media Use

- In 2016, 88% of Canadians were internet users.
- 67% of Ontario residents are using social media platforms.
- Canadian users, on average, spent **40** minutes daily on Facebook.
- 87% of Facebook users are aged 18-29 and 77% of Facebook users are young females.
- Most popular social media platforms:

- Facebook (71%)
- YouTube (49%)
- Twitter (27%)
- Pinterest (23%)
- Google (21%)

- Instagram (20%)
- LinkedIn (12%)
- Snapchat (9%)
- Tumblr (5%)
- Reddit (5%)



## Recent Trends (cont'd)

- Provincial and federal governments trying to keep pace with social movements by promulgating more onerous anti-harassment and investigation obligations on employers.
- Courts, tribunals and arbitrators ordering record damages awards and creating new heads of damages to employers who fail to take action and individuals who engage in inappropriate behavior.



# Legislative Requirements / Obligations

## 1. Bill 168 *OHSA* Revisited

- Bill 168 was introduced in the legislature on April 20, 2009.
- The legislation imposes significant obligations for employers to develop and implement policies to address workplace violence and harassment, and to assess the risk of violence in the workplace.



## 1. Bill 168 (cont'd)

- The Bill also imposes a duty on employers to address domestic violence in the workplace, requires certain procedures that must be followed if a violent incident occurs in the workplace, and requires that workers be informed if a person has a history of violence.
- Workers will have the right to refuse to work if they feel they believe they are the target of workplace violence.
- Bill 168 only applies to workplaces in Ontario.



## **2. Bill 132 *Sexual Violence and Harassment Action Plan Act***

- Came into effect September 2016.
- Introduced definition of “workplace sexual harassment” into OHSA.
- The Bill bolstered existing duties regarding how complaints of harassment will be received, investigated, and reported by an employer in conjunction with workplace JHSC.
- Also bolstered confidentiality requirements regarding allegations and investigations related to workplace harassment and sexual harassment.
- Empowers Ministry of Labour Inspectors to order employers to conduct workplace investigations and/or pay for third party investigations.





# 3. Human Rights Legislation

## Prohibited grounds of discrimination:

- Age
- Disability
- Citizenship, Place of Origin or Ethnic Origin
- Creed / Religion
- Family Status / Marital Status / same-sex partnership status
- Race / Colour / Ancestry
- Record of Offences
- Sex / Pregnancy / Sexual Orientation
- Gender identity, Gender expression



## 3. Human Rights Legislation (cont'd)

- Positive obligation to prevent harassment on prohibited grounds in the workplace.
- Positive obligation to address allegations of harassment / discrimination appropriately.
- Employers, supervisors, co-workers, third-party contractors, volunteers, interns can all be named as respondents.
- Far-reaching remedies if discrimination found – reinstatement with full back-pay, damages, mandatory training, formal apologies.



## 4. Common Law Obligations / Liability

- Contractual obligations to promote a safe, harassment-free workplace and not to dismiss employees for exercising their right to be free from bullying and harassment.
- Failure to properly investigate allegations of harassment condonation of inappropriate behaviour can lead to:
  - punitive damages claims
  - claims for mental distress
  - tort claims – assault, tort of sexual harassment, intentional infliction of mental suffering
  - moral damages



# 5. *Pay Equity Act* and *ESA* “Equal Work for Equal Pay”

## Pay Equity

- Establishing and maintaining compensation practices that provide for pay equity in an establishment.
- Generally, the *Pay Equity Act* (the “Act”) requires employers to pay female job classes the same wages as those male job classes in its organization that are of equal or comparable value. Job class is valued by assessing the skill, effort, responsibility and working conditions of the job.
- Comparing female and male job classes of equal value to determine if compensation practices are equitable.



## 5. *Pay Equity Act* and *ESA* “Equal Work for Equal Pay” (cont’d)

### Equal Pay for Equal Work

- The equal pay provisions of the *Employment Standards Act* require that men and women receive equal pay when doing the *same job or substantially the same job*.
- “*Substantially the same work*” means the same kind of work that involves about the same levels of skill, effort, responsibility and working conditions. The duties do not have to be exactly the same to be substantially the same.
- Bill 148 has extended equal pay for equal work to part-time / casual staff and temporary help agencies.



## 6. Recent Case Law

- Of note, recent case law has shown us the following in awards by both the courts and Tribunals:
  - Increased Damages
  - Importance of Proper Investigation
  - Tort Claims for harassment



# Increased Damages

- *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419
  - Constructive dismissal based on harassment/bullying claim that was never properly addressed.
  - \$200K in aggravated damages, \$100K punitive damages.
  - \$100K intentional infliction of mental distress, \$10K punitive damages against manager.



## Increased Damages (cont'd)

- *Doyle v. Zochem Inc.*, 2017 ONCA 130
  - Employee raised a sexual harassment claim and was dismissed shortly thereafter.
  - \$25K sexual harassment damages, \$60K for moral damages.





# Proper Investigation

- *Canadian Union of Public Employees, Local 2723 v. City of Burlington, 2017 CanLII 31797*
  - Grievor reinstated after Arbitrator found Complainant was motivated by Union politics to make complaint.
  - Employer's view of harassment to be commended, but must still be alive to workplace politics.



## Proper Investigation (cont'd)

- *Zambito v. LIUNA Local 183*, 2015 HRTO 605 (CanLII)
  - HRTO dismissed claim of discrimination where proper investigation had taken place.
  - Evidence demonstrated an investigation and a resolution, Applicant's evidence at HRTO hearing was not credible.
  - Highlights the importance of proper documentation of any investigation.



## Proper Investigation (cont'd)

- *Morgan v. Herman Miller Canada Inc.*, 2013 HRTO 650 (CanLII)
  - Despite no finding of discrimination with respect to either his employment or his termination, damages awarded where the Employer did not investigate after allegations were made and instead fired the Applicant.
  - Decision cites both the failure to properly address a complaint of discrimination and the act of reprisal for terminating employment after a complaint was raised.
  - Even though no actual discrimination occurred, damages for both lost wages and injury to dignity and self-respect were awarded.



# Tort of Harassment

- *Merrifield v. the Attorney General*, 2017 ONSC 1333
  - Employee awarded \$100K in damages for harassment and mental suffering.
  - The Court determined that someone can sue for harassment if he or she meets the following four-part test:



## ***Merrifield* (cont'd)**

1. Was the conduct of the defendant(s) outrageous?
2. Did the defendant(s) intend to cause emotional stress or did they have a reckless disregard for causing the plaintiff to suffer from emotional stress?
3. Did the plaintiff suffer from severe or extreme emotional distress?
4. Was the outrageous conduct of the defendant(s) the actual and proximate cause of the emotional distress?



## Tort of Harassment (cont'd)

- *Watson v. The Governing Council of the Salvation Army of Canada*, 2018 ONSC 1066
  - Full and Final Release signed by the Plaintiff upon the termination of her employment did not prevent her from claiming damages for claims related to sexual harassment by her former Manager.
  - Although this decision was only in the context of denying a Summary Judgment motion, it highlights the need to have comprehensive Release language – consider specifically addressing harassment under *OHSA* and the *Human Rights Code*.



# What to do as an Employer???

- Take complaints seriously!!
- Investigate as appropriate.
- Implement workplace policies to address behaviour expectations (use of social media, codes of conduct, anti-harassment policies).
- Train your employees.
- Counsel/Discipline improper behaviour.
- Lead by example.
- Document to address behaviour and support or defend possible claims in the future.
- Don't ignore off-duty incidents involving co-workers.



# Questions?



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