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Navigating the dangerous waters

Government measures and large damage awards mean employers had better pay attention to workplace harassment

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NOW MORE THAN ever, an employer must take seriously its obligation to properly respond to and investigate an allegation of workplace harassment. Gone are the days turning a blind eye to bullying and unwanted workplace interaction, whether physical, verbal or psychological.

Government initiatives — such as Ontario's "It's Never Okay" program and Bill 132 — as well as a rash of high-profile cases have heightened public awareness of the issues. An employer that fails or refuses to get on board does so at its peril, risking public embarrassment, brand damage and employee discontent, not to mention a hefty regulatory fine and an award of damages from a court.

Ontario's Bill 132

Bill 132's amendments to the OHSA came into force on Sept. 8, 2016. Prior to the bill, the OHSA required only that an employer implement, and train workers on, a policy and program to respond to a complaint of workplace harassment.

Under Bill 132, this is no longer sufficient. Amendments expand the definition of workplace harassment to include sexual harassment, place on an employer a legal obligation to ensure any complaint of harassment is investigated in a manner "appropriate in the circumstances," and empower a Ministry of Labour inspector to order an employer to retain an impartial, third-party investigator at its own cost.

An employer must ensure its workplace harassment program:

- Includes procedures for a worker to report an incident to a person other than the employer or supervisor, if the latter is the alleged harasser.
- Outlines how an incident or complaint will be investigated.
- Specifies that information obtained about an incident or complaint, including identifying information about anyone involved, will not be disclosed unless necessary to investigate or take corrective action, or as otherwise required by law.
- Explains how the complainant and respondent will be advised of the investigation results and any disciplinary action taken.
- Be reviewed as often as necessary, but at least once a year.

Failure to comply can result in a fine up to $500,000 per incident. Corporate directors can also be found personally liable and fined up to $25,000 and imprisoned for a term of up to 12 months, or both.

Ontario's 'Code of Practice'

The Ontario Ministry of Labour recently published a "Code of Practice to Address Workplace Harassment under Ontario's Occupational Health and Safety Act.," which includes general information, relevant OSHA provisions and practices, key definitions, a sample policy, and an investigation template.

While the practice code does not have legislative effect, it is designed to help employers meet their obligations under the OHSA. For example, it recommends an employer complete an investigation within 90 days of the incident or complaint (subject to extenuating circumstances) and communicate the results within 10 days of its completion.

Duty of good faith

In *Keays v. Honda Canada Inc.*, the Supreme Court of Canada confirmed an employer owes an employee a duty of good faith in the manner of dismissal, which if breached can result in aggravated damages where "the employer engages in conduct during the course of dismissal that is 'unfair or is in bad faith.'" That said, courts have been clear, "the normal distress and hurt feelings resulting from dismissal are not compensable."

In *Boucher v. Wal-Mart Canada Corp.*, the Ontario Court of Appeal appeared to extend the duty of good faith to the manner in which an employer responds to a workplace harassment complaint. The employer's response to a complaint was described by the court as "reprehensible" and a breach of good faith and fair dealing, resulting in aggravated and punitive damages of roughly half-a-million dollars.

Meredith Boucher, an assistant manager of a Wal-Mart in Windsor, Ont., was harassed by her immediate supervisor. She was consistently and increasingly belittled, humiliated and demeaned, often in front of co-workers. When she complained to senior management, they investigated half-heartedly and found the complaints unsubstantiated. After another occurrence of public humiliation, Boucher quit and sued for constructive dismissal.

The trial also determined:

- Wal-Mart had a Prevention of Violence in the Workplace Policy and Harassment and Discrimination Policy which encouraged employees to report incidents, and promised protection from retaliation or reprisal for a complaint.
- Wal-Mart paid lip service to its polices (at least in this case):
  - When Boucher lodged a complaint she was warned she would be held accountable if proven unwarranted
  - In breach of the policies, Boucher's super-

visor was told of her complaints, resulting in intensified humiliation and harassment.
- Wal-Mart did not take steps to end the harassment by:
  - Not taking the complaints seriously
  - Finding the complaints unsubstantiated despite evidence to the contrary
  - Failing to enforce its policies
  - Threatening Boucher with retaliation.
- As a result of the harassment, Boucher's health deteriorated considerably.

A jury found Boucher was constructively dismissed and awarded the following damages:
- The equivalent of 20 weeks' salary, as specified in her employment agreement.
- $1,200,000 against Wal-Mart, including $200,000 in aggravated damages for the manner in which she was dismissed and $1,000,000 in punitive damages
- $250,000 against her supervisor, including $100,000 for intentional infliction of mental suffering and $150,000 in punitive damages (for which Wal-Mart was vicariously liable as the supervisor's employer).

The Court of Appeal reduced the punitive award against Wal-Mart to $100,000, and against the supervisor to $10,000. Still, these awards rank among the highest in Canadian history for employer misconduct of this nature. All told, Wal-Mart was responsible for 20 weeks' salary, plus aggravated and punitive damages of $410,000.

Boucher predates the Bill 132 amendments. If Wal-Mart's conduct had taken place today, the retail giant may not only be liable for breaching its duty of good faith in the manner of dismissal, it may also be charged for violating the OHSA and face significant penalties.

Moral of the story

Gone are the days of unrequited bullying and harassment in the workplace. A worker is entitled to have a complaint properly investigated, and an employer is expected and required to do so.

Every employer should have a written policy and protocol, tailored to the particular workplace, and designed to minimize ad hoc or unintentional missteps which can lead to liability.

A large employer should ensure enforcement is consistent and fair across the organization. This can be difficult when operations are in various jurisdictions, locations and departments, and under many supervisors. A large employer might therefore consider two options, or a combination of both: Have as a standing resource an external investigator who can help determine whether and what type of investigation is "appropriate" and, where necessary, conduct it; and identify and train an internal team whose responsibility it is to respond to a complaint of harassment (with advice from the external investigator, as necessary).

For a smaller employer, which may lack the resources to train a team or conduct an investigation internally, using an external investigator may be prudent.

An external investigator — often a lawyer — is an impartial expert, skilled at identifying what is relevant and eliciting and evaluating evidence (including assessing credibility), and knowledgeable in the law.

For more information see:
- *Keays v. Honda Canada Inc.*, 2008 CarswellOnt 3743 (S.C.C.).
- *Boucher v. Wal-Mart Canada Corp.,* 2014 CarswellOnt 6646 (Ont. C.A.).

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