

WHAT IS “WORKPLACE HARASSMENT?”

THERE’S MORE TO IT THAN YOU
MAY THINK

By Peter V. Matukas, BA, LLB, AWI-CH

Workplace and sexual harassment have recently come to the forefront of international news, discussions around corporate round tables and around the water cooler. But what is “workplace harassment?”

In Ontario, the *Occupational Health and Safety Act, RSO 1990, c O.1* (OHSA) defines “workplace harassment” as: “(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.”

The OHSA 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 to know that the solicitation or advance is unwelcome.”

Further, the *Ontario Human Rights Code, RSO 1990, c H.19* (HRC) clearly states that every employee has a right to freedom from harassment in the workplace because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status, disability or sex by his or her employer, another employee or agent of the employer. It does not matter whether the intention was to offend someone, what matters is whether the offender knew or should have known that the comments or conduct were unwelcome to the other person.

What do these definitions mean? What constitutes workplace harassment or workplace sexual harassment?

Workplace harassment has many forms and can come from all levels of a business



THE EMPLOYER IS REQUIRED, NO MATTER THE SEVERITY OF THE COMPLAINT OR INCIDENT, TO CONDUCT AN IMPARTIAL, TIMELY, FAIR AND THOROUGH INVESTIGATION INTO THE MATTER.

It can include: 1) Written or verbal insults including yelling, name-calling, jokes and innuendo which demean, ridicule or offend; 2) Sabotaging someone else's work; 3) Workplace supervision done in a demeaning or abusive manner; 4) Offensive or intimidating e-mails, texts, phone calls or social media communications; 5) Making false allegations; 6) Staring, glaring and inappropriate gestures or unwelcome physical closeness; 7) Offering a benefit in exchange for a sexual favour; 8) Sexual advances or demands that the recipient does not welcome or want; 9) Distributing sexually explicit email messages or attachments (i.e. pictures and videos); and 10) Physical contact of a sexual nature such as touching or caressing, among numerous other forms of conduct.

However, not all offensive, disrespectful or inappropriate behaviour is harassment. Harassment does not include: 1) DIFFERENCES of opinion; 2) GENERALLY rude or thoughtless comments or behaviour; 3) UNPROFESSIONAL conduct; or 4) WORKPLACE conflict. Further, and perhaps most importantly, the OHSA specifically makes clear that a reasonable action taken by an employer or supervisor to the management and direction of workers or the workplace is not workplace harassment.

Who can be liable for workplace harassment or sexual harassment? It certainly is the person engaging in the conduct, but the employer can also be liable where it is aware of, condones or takes no steps to stop the harassment and thus has failed in its duty to provide a harassment-free workplace as it is required to by the OHSA.

An employer is obligated under OHSA section 32.0.7 to protect a worker from workplace harassment and must investigate incidents or complaints of workplace harassment. The obligation of the employer to investigate is triggered when they become aware of any incident or complaint of workplace harassment – even if no formal complaint is filed. The employer is required, no matter the severity of the complaint or incident, to conduct an impartial, timely, fair and thorough investigation into the matter.

Utilizing a trained third-party investigator is essential as it demonstrates to the complainant – as well as the rest of the employees – that the employer takes the issue seriously. It further provides

the employer with the comfort that the investigation being undertaken will be conducted appropriately, impartially and without bias. Additionally, in the event of litigation, the third-party investigative report will provide the employer with the basis to support its position regarding any action they took. Perhaps most salient for the employer, it demonstrates that the employer adhered to their legal obligations to conduct an appropriate investigation and thus eliminates, or at the very least limits, its exposure. ■

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