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CANADIAN HR LAW GUIDE

Workplace Harassment: It's Never Okay

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For decades, workplace bullying and harassment were all-too common.

Employers had relatively free reign to yell, scream, and intimidate employees at their whims, with little or no consequence. Managers regularly took advantage of power imbalances, belittling employees and colleagues, with little recourse. Worst of all, workplace sexual harassment was rampant at all levels, with female employees regularly assaulted, excluded, or not hired at all simply because of their gender. Careers could be made or destroyed due to an individual's refusal to accept requests for sexual favours from those in power.

While it would be naive to pretend that such behaviour has been eradicated, it is certainly no longer acceptable. In many respects, this change has been driven more by societal evolution than legal development. The reality is that many organizations used to see any potential impact of protecting a harasser as a "cost of doing business," and chose to overlook any wrongdoing, particularly where the wrongdoer was someone in power and the victim was "disposable." In many cases, while no one will admit this and there is no "formal" analysis, it was essentially an economic decision. The "powers that be" explicitly or implicitly determined that the "costs" arising out of the harassment were worth absorbing due to the benefits the harasser brought. Those benefits might be sales (for example, the rainmaker who brings in a substantial portion of the organization's revenue), an ideal profile (for example, the "star," such as Jian Ghomeshi), or the "genius" who creates the product/content.

In Canada, things began to change with the Jian Ghomeshi scandal, which brought bullying and harassment into the public eye and encouraged more victims to come forward. After the Harvey Weinstein scandal broke a few years later, the social climate changed so quickly that any hint of a scandal caused companies to immediately dismiss or cut all ties with the accused. The #MeToo movement saw countless women come forward with allegations of sexual harassment, and this has impacted many workplaces.

As societal norms have changed, our laws have evolved.

Even before the Weinstein scandal, amendments to the *Ontario Occupational Health and Safety Act* expanded employers' obligations, with respect to dealing with workplace sexual harassment. Now, if an employer becomes

This paper will examine what constitutes bullying and harassment, including workplace sexual harassment. It will address some of the legal requirements for employers across Canada and will look at the need to conduct a full and impartial investigation whenever allegations arise.

aware that a problem may exist, even if a harassment complaint is not filed, the employer is obligated to investigate the matter thoroughly.

Moreover, investigations should be conducted in a reasonable and objective manner; otherwise, the Ministry of Labour can order that a third party conduct an investigation at the employer's expense.

While this applies in Ontario, the reality is that employers risk liability (as well as public condemnation) in other jurisdictions if they fail to address allegations of sexual harassment.

While there is consensus across Canada as to what broadly constitutes harassment, the legislation across the provinces provides a variety of definitions.

What is harassment?

> ***The federal public service website defines harassment as "improper conduct by an individual, that is directed at and offensive to another individual in the workplace, including at any event or any location related to work, and that the individual knew or ought reasonably to have known would cause offence or harm.***

It comprises objectionable act(s), comment(s), or display(s) that demean, belittle, or cause personal humiliation or embarrassment, and any act of intimidation or threat." This definition also includes a prohibition against harassment that is based upon protected grounds under the *Human Rights Act*, including race, colour, age, sex, family status, or disability, to name a few.

Ontario's *Occupational Health and Safety Act* provides a similar definition, stating 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." As of 2015, the law was amended to include in its definition workplace sexual harassment, which is harassment specifically based on sex, sexual orientation, gender identity, and gender expression, and also, "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."

Other provinces include similar definitions. Alberta's *Occupational Health and Safety Act* is similar to the Ontario and federal versions, but also includes conduct, "that the person knows or ought reasonably to know ... adversely affects the worker's health and safety." WorkSafeBC notes conduct that, "would cause the worker to be humiliated or intimidated." The Province of Quebec, which recently amended its laws to require all employers to have a written harassment policy, defines "psychological harassment" in its *Act Respecting Labour Standards* as, "any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions, or gestures, that affects an employee's dignity or psychological or physical integrity and that results in a harmful work environment for the employee. For greater certainty, psychological harassment includes such behaviour in the form of verbal comments, actions, or gestures of a sexual nature."

Similarly, Newfoundland and Labrador recently announced revisions to the *Occupational Health and Safety* Regulations, 2012. Effective January 1, 2020, the new regulations mandate employers to develop, implement, and maintain a written harassment-prevention plan to address "workplace harassment," which is defined as:

> ***inappropriate vexatious conduct or comment by a person to a worker that the person knew or ought to have known would cause the worker to be humiliated, offended, or intimidated.***

An employer's harassment-prevention plan must include the following procedures, among other things:

- procedures for employees to report instances of harassment;
- procedures to be followed after a complaint of workplace harassment is received and the manner in which a complaint is investigated; and
- procedures regarding notification of results of investigations and any actions to be taken as a result of an investigation.

The changes also follow jurisdictions like Ontario in requiring that employers investigate complaints of workplace harassment and providing for occupational health and safety officers to order that an impartial third party investigate such workplace complaints, at the sole expense of an employer. As well, employers must participate in training related to harassment prevention and provide training to employees on the issue and the employer's harassment-prevention plan.

Harassment can take many different forms, but examples may include:

- Yelling at a person, constantly interrupting them, or preventing them from speaking
- Making rude or derogatory remarks
- Making intimidating gestures or uttering threats
- Spreading malicious rumours or gossip about a person
- Making an individual perform tasks that are belittling or demeaning
- Intentionally isolating a person from social contact within the office
- Making fun of a person's beliefs or values
- Making sexualized comments about an individual or leering at them
- Inappropriate and unwelcome touching

This list is not exhaustive, and harassment can take many different forms. It can also be a single incident, or a pattern of incidents, depending on the nature and severity of the conduct.

The law is also clear on what does *not* constitute harassment. While the language differs slightly, various provincial legislation confirms that reasonable direction or instruction from management in the ordinary course of business does not constitute harassment. This point addresses one unfortunate side effect of the increased discussion about harassment: some have formed the opinion that any negative interaction is inappropriate and unlawful. That is not the case.

> ***Employers should not be afraid to issue constructive feedback or progressive discipline, as circumstances may require. However, it does not give them license to do so in a belittling or abusive manner.***

Similarly, a friendly social relationship between colleagues, especially when both individuals welcome it, should not give rise to a complaint of harassment. A recent study out of the United Kingdom suggested that a majority of British workers were in favour of banning handshakes in the workplace, out of concern that any physical contact may be misconstrued. While we would not recommend a ban on all physical contact, there should be a clear, common-sense line between shaking hands with a new client and inappropriate touching that is completely unsolicited.

When and where does harassment occur?

> ***While the law sets out some clearer standards, harassment and bullying do not wear a "one-size-fits-all" label.***

In some workplaces, it may be as omnipresent as TV and movies would suggest. A tyrant boss booms at subordinates, throwing office supplies in a fury, belittling perceived underlings, and just being an absolute nightmare around the office. These individuals are not uncommon in some workplaces, and so often have scared their colleagues into submission that the behaviour may never be reported to either a higher power within the company or outside authority who may prompt an investigation.

Harassment does not always include violence, but it is sometimes one aspect of the behaviour. When tempers flare, fists can fly in the heat of the moment. **Though it may be an isolated incident rather than a pattern of behaviour, no violence in the workplace is acceptable.** Even if those involved in an altercation brush off the incident, any workplace violence should come with serious consequences.

Arguably, most bullying occurs behind closed doors and is far more subtle. It can be snide comments a colleague makes after a co-worker's presentation which, while possibly eliciting laughs, are an attempt to undercut and belittle them. It can be the spreading of a false or salacious rumour throughout the office in an effort to humiliate a colleague. It can also be a group of co-workers making a concentrated effort to isolate or exclude an individual, either by ignoring them in social situations or excluding them altogether from conversations, activities, etc.

Most often, it is the new employer or manager who sets a certain individual within their crosshairs and refuses to let go until the individual is no longer with the team. Behaviour may include micromanaging the individual when they have proven themselves competent to perform in their role and criticizing their work at every turn. The manager may be making ad hoc policy changes at whim or applying the rules differently to single out the individual. They may go so far as to tamper with a person's belongings or their physical workstation. Frequently, they are simultaneously intimidating the victim and discouraging them from reporting the harassment, saying that no one would believe their version of events because of the workplace hierarchy.

As employment lawyers, we see these situations every day, and they can make for an incredibly toxic work environment. While no job is fun every, single day, the workplace should be a warm, welcoming environment where

an individual can feel valued and productive. **Workplace bullying and harassment can make coming into work a miserable experience, and leave the victims demoralized and unmotivated to achieve any professional success.**

Employers should take note of the fact that the "workplace" is defined broadly in this context. All-too often, we hear stories of employers turning a blind eye to allegations of harassment because the alleged behaviour occurred after hours, or online, or somewhere outside the four walls of the physical workplace. The reality is that an incident can be deemed to be workplace harassment so long as there is a connection to the workplace, and employers that fail to prevent or address it risk liability.

Speaking up about sexual harassment

Harassment and bullying are not new to the workplace. However, with the rise of the #MeToo and #TimesUp social movements to fight sexual harassment and sexual violence, these issues are in the spotlight (and under scrutiny) now more than ever.

While the history of #MeToo could take up an entirely separate paper, its surge to prominence has significantly raised the profile of workplace harassment as a whole. In the United States, #MeToo was widely accompanied by the Time's Up movement, which, while largely equated with Hollywood powerhouses, was a message to all harassers that their unfettered reigns of terror were over.

> ***Now that well-known names have grown increasingly vocal in breaking down the stigma of being subjected to sexual harassment, more and more working Canadians have found the confidence to raise their voices as well.***

Where a manager or colleague may have once felt powerful by forcing employees perceived as being weaker into submission, they are now far more aware that their actions cannot be easily swept under the rug.

Employers are now also being held liable for their employment of harassers. In a recent Ontario case, an employer had hired an executive who, an employee reported, had sexually harassed her when they worked together a decade prior. The employer decided to stand by its decision to hire him, and the employee successfully sued for constructive dismissal. By failing to take the concern seriously and protect the employee, the organization found itself to be liable.

Employer responsibilities

While each employee plays a role in maintaining a safe and respectful workplace culture, the ultimate responsibility when it comes to ending bullying and harassment lies with the employer. While workplace safety used to mean only removing physical dangers such as loose floorboards, it now incorporates a much broader range of issues, including bullying, harassment, and sexual harassment.

Most provinces impose a legal duty on employers to investigate any reported incidents of bullying or harassment within the workplace.

Note that these reports do not need to come from the individual being harassed. If a third-party witness makes management aware of a situation, then the employer's duty to investigate is triggered. Furthermore, some provinces require that incidents be investigated even if no one reports them; the duty is triggered if the employer is (or ought to be) aware of the incident.

The duty to investigate

So, what exactly is the, "duty to investigate?" Generally speaking, it means there are circumstances that require the employer to look into allegations or suspicions of harassment. The challenge, of course, is defining when that duty arises and what, specifically, the employer must do. As we discuss below, "investigation" can mean different things in different contexts.

In Ontario, for example, the *Occupational Health and Safety Act* states that employers shall ensure that, "an investigation is conducted into incidents and complaints of workplace harassment that is appropriate in the circumstances." Similarly, Alberta's Workplace Harassment and Violence policies state that, "employers must investigate any incident of harassment or violence."

What is required of these investigations, though, is open to a broader interpretation. "Appropriate in the circumstances" does not define who needs to be conducting the investigation, who should be spoken to, where it should be done, what questions should be asked, or what the final product or report should look like.

Anything the employer does must be defensible. Employers must be able to demonstrate that they responded reasonably in the circumstances, conducted an appropriate investigation without bias, and in good faith, and reached a justifiable conclusion so that their findings will not be seen as skewed or tainted.

While the legislation may not provide much guidance, the case law has helped us to determine some best practices:

Be Objective — An investigator cannot begin asking questions with their mind already made up. The investigator's job is to conduct all interviews and review all evidence from a neutral and unbiased perspective. Anything that taints their point of view, either before or during an investigation, can compromise the neutrality of the entire process. Remember that it is an investigation, not a prosecution. The goal is to determine what happened, not to prove the accused guilty. Although the #MeToo movement led many employers to swiftly remove anyone accused of sexual harassment, allegations are not evidence and must be proven before discipline is imposed.

Be Thorough — The investigator's role is to determine what really happened. They are responsible for speaking to any relevant witnesses, collecting any background information that may be relevant, and fully exploring the issues at hand. A half-hearted approach to this will not be sufficient.

Ask The Tough Questions — Investigations, especially when they deal with workplace sexual harassment, can be incredibly sensitive in nature. Complainants and witnesses may be uncomfortable during questioning, but it is the investigator's job to ask the difficult questions. This process can be pursued tactfully and professionally, but it must not be avoided, in order to make a full determination of what happened.

Leave No (Relevant) Stone Unturned — Similarly, being thorough means that uncomfortable topics or details cannot be avoided. They may include graphic details about sexual assault and can be uncomfortable for both the interviewer and the interviewee. The details, however gruesome, are necessary in order to make a determination on the facts. At the same time, there is no obligation to speak to *everyone*. Those accused of sexual harassment often offer a list of people, "you have to speak with because they will confirm I would never do anything like that." Such character witnesses do not have relevant evidence unless they can speak to the specific allegations.

Give the Accused Time To Prepare — This is a crucial point that is often overlooked during sensitive investigations. While all evidence previously gathered may suggest an individual's guilt, they need to be given the opportunity to provide their side of the story in a fair and unbiased environment. This can best be achieved by giving the accused advance notice of the investigation and the nature of the questioning, so that they have time to refresh their memory. Otherwise, an "ambush-style" investigation will only lead to the accused individual becoming confused and agitated, which can mistakenly be viewed as evasive or dishonest.

Make a Decision — The results of a thorough investigation must be definitive. The investigator's mandate is to reach a conclusion as to whether, in their opinion, based upon the evidence available, the allegations have been substantiated. The standard is not "beyond a reasonable doubt" as it is in criminal prosecutions, but rather, it is a "balance of probabilities." This means that the investigator must decide which explanation or version of events is more likely. The investigator cannot always be right (just like a judge), but they must have a reasonable basis for their conclusion. Anything short of a firm determination falls short of a complete investigation.

Lastly, consider leaving it to the pros. **Investigations are not easy to conduct, and they require skill and precision. There are highly skilled investigators across the country, most of whom are specially trained on how to gather the right information and make the tough calls in a delicate situation.** There are many reasons why having a third party conduct the investigation can be preferable, including:

- They have the training and expertise,
- They have the time available, and
- They will not have or be perceived to have a conflict of interest.

In many cases, those in HR do not have the training to conduct a proper investigation and author a comprehensive report, they are overburdened and don't have the time, or they know one party better than the other and may be seen as biased. It is also important to remember that people should never "investigate up;" there are too many issues that arise when someone is asked to investigate their boss or someone "higher up in the organization," and these issues will impact the legitimacy of the investigation.

To be clear, we are not suggesting that the investigator must be a lawyer, let alone your company's lawyer. Contrary to common belief, having a lawyer do the investigation does not mean that it will automatically be privileged or confidential; in many cases, it will not. Furthermore, if your lawyer conducts the investigation, then they may have to be a witness in any resulting litigation, and, as a result, will be precluded from acting as your legal representative. For these reasons, our firm often retains the investigator and oversees the investigation process.

What employers need to know

While there may be some differences in each province, the law across Canada is clear— **bullying and harassment are simply not acceptable** in the workplace. Whether it is coming from a superior, a colleague at the same level, a direct report, or even a customer or client, it is never okay.

Employers bear the responsibility for keeping all individuals safe in the workplace, which includes ensuring they are free from harassment and discrimination. For this reason, it is crucial to have the appropriate policies and procedures in place—not only to set a framework, but also so that managers know how to act when inappropriate situations do inevitably arise. **Courts across Canada have come down severely on employers who did not respond to incidents properly because they did not have adequate policies and plans in place.** In recent years, the amounts that courts are awarding for damages have increased noticeably. Allowing bullying and harassment can cost you valuable workers, impact productivity, lead to negative publicity, and result in substantial liability.

Most importantly, when those situations arise, employers must take the appropriate action to ensure problems are resolved quickly and do not escalate further. A thorough and impartial investigation, and the actions taken as a result of that investigation, can be the best steps to protect your business while keeping everyone safe. Failure to do so will lead to additional liability, including to your workforce.

For more information regarding the legal provisions on harassment in the workplace, consult your provincial legislation.

Alberta: Occupational Health and Safety Act
British Columbia: WorkSafe BC
Manitoba: SAFE Work Manitoba
New Brunswick: WorkSafeNB / Travail Sécuritaire
Newfoundland and Labrador: Occupational Health and Safety NL
Nova Scotia: Work Safe for Life
Northwest Territories and Nunavut: Occupational Health and Safety
Ontario: Occupational Health and Safety Act
Prince Edward Island: Safety Matters @ Work PEI
Québec: Act Respecting Labour Standards / Normes du travail
Saskatchewan: WorkSafeSask
Yukon: Health & Safety

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