



Legal Implications of Harassment in the Workplace

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March 22, 2019

Women detail sexual allegations 'House of Cards' harassment, assault

The New York Times

DANCE

The New York Times

DANCE

New York City Ballet Investigates Sexual Harassment Claim Against Peter Martins

Marcelo Gomes Leaves American Ballet Theater After Sexual Misconduct

thestar.com



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- Opinion
- World
- Canada
- Politics
- Business
- Health
- Entertainment
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Matt Lauer, fired Today Show co-host, sexual harassment allegations

Statement issued day after NBC terminates him says he's 'ashamed' but some allegations remain

News · GTA

Albert Schultz resigns on heels of lawsuits, sex assault allegations

Women who are suing the Toronto theatre company and artistic director Albert Schultz say the "sanctity of the theatre...is being violated."

Respectful Workplace Training

Hicks Morley

Generally in Canada:

- Everyone has a right to be free from harassment/bullying and discrimination in the workplace
- Employer has primary responsibility to ensure employees are not subjected to harassment and bullying

The Legal Framework

Ontario Human
Rights Code
(OHRC)

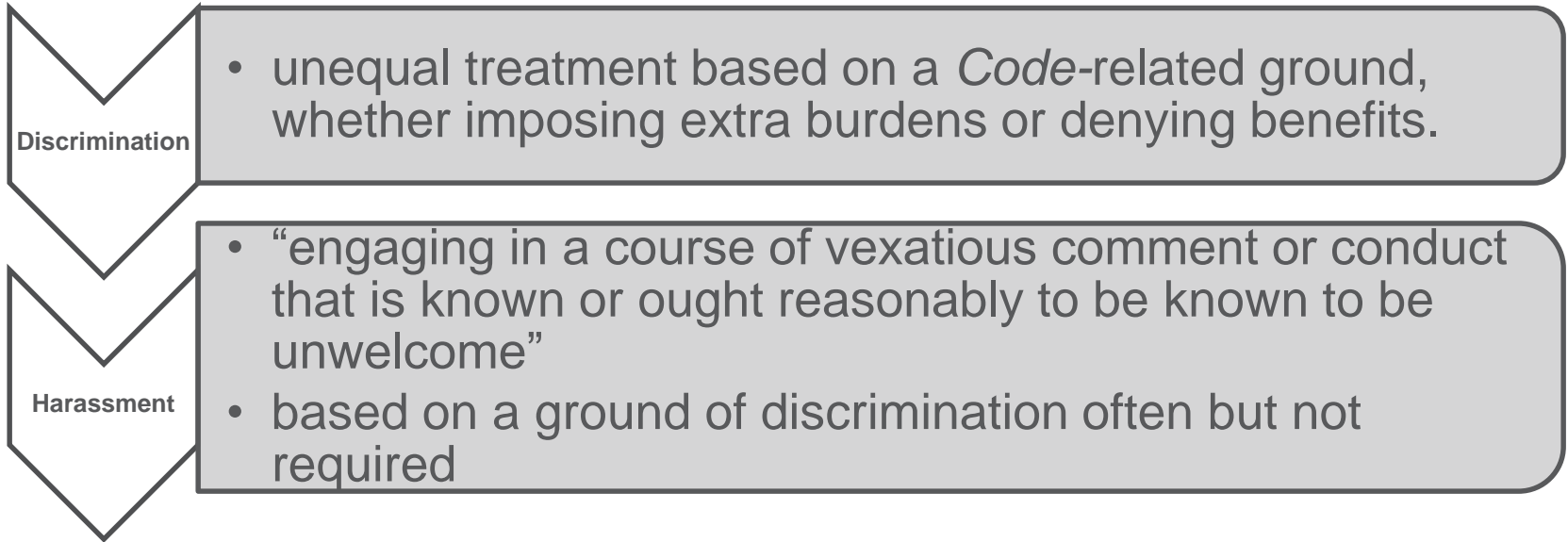
Occupational Health
and Safety Act
(OHSA)

Employer
policies

Respectful Workplace Training

Human Rights Code and Harassment

Definition – Harassment – OHRC



Ontario Human Rights Code

Prohibited Grounds

| Race | Ethnic origin | Sexual orientation | Record of offences |
|------------------------|----------------------|---------------------------|---------------------------|
| Ancestry | Citizenship | Gender identity | Marital status |
| Place of origin | Creed | Gender expression | Family Status |
| Colour | Sex | Age | Disability |

Ontario Human Rights Code

- **s. 5(2) - Harassment in Employment**

“Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee 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 or disability”

- **s. 7(2) – Sexual Harassment in Employment** – similar provision

Definitions - Workplace

- Not limited to 4 walls of the building
- can be:
 - away from the physical workplace (i.e. in ambulance, on scene, at hospital, etc)
 - outside working hours
 - through emails and social media
 - acts done “in the course of employment”

Occupational Health & Safety Act

Occupational Health and Safety Act

Harassment - words or actions that are:



humiliating



demeaning



embarrassing

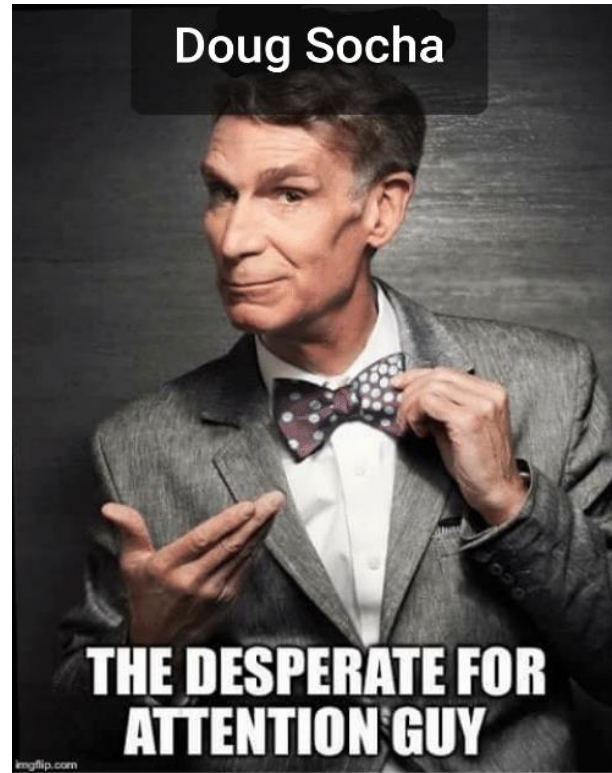
Occupational Health and Safety Act - Examples

- jokes or innuendo
- singling out or isolating
- rumors and gossip
- verbal abuse
- changing expectations
- changing responsibilities
- humiliating employee before others

Occupational Health and Safety Act - Examples

- withholding
- veiled threats
- excessive monitoring
- making unwarranted changes
- setting impossible expectations
- constant negativity
- acting in an arbitrary manner





Definition – Workplace Violence – OHSA

“workplace violence” means,

- a) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker,
- b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker,
- c) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

Harassment – Other Considerations

- Intent is irrelevant
- Not just male vs. female or supervisor vs. employee
- Employee vs. employee harassment and bullying becoming increasingly prevalent in and outside workplace
- Union role?

Human Rights Code:

Discrimination/Harassment is NOT:

| Evaluating and monitoring performance | Setting performance standards | Corrective/ disciplinary action | Conducting Investigations |
|--|--------------------------------------|--|---|
| Constructive criticism | Performance appraisals | Work-related stress | Organizational change for business reasons |

Consequences

Human
Rights Claims

Civil Actions

Consequences – Human Rights Claims

- Damages for injury to dignity and other non-compensatory damages (from \$2,000 to \$50,000)
- Awards for economic loss, including lost wages
- Orders to:
 - cease discrimination
 - prevent future discrimination (e.g. through training)
 - issue an apology
 - develop an anti-discrimination policy
 - reinstatement rare
- Legal fees (but not costs)

Consequences - Civil Actions

Civil Actions

- Constructive Dismissal
- Tort Claims
 - Intentional infliction of mental suffering
 - Assault
 - Defamation
 - No tort of harassment or discrimination

Consequences

- Damages for reasonable notice
- Damages for mental suffering
 - usually up to \$50,000
- Punitive damages
 - usually up to \$100,000
 - can rise to \$1,000,000 in extreme cases
- Aggravated damages
 - usually up to \$50,000
- Costs if unsuccessful
- Legal fees

What Do You Do If Bullying or Harassment is Occurring?

Responding to complaints

1. Response must be prompt

2. Awareness that conduct is prohibited

3. Issue must be dealt with seriously.

4. Must be a complaint mechanism in place.

5. Employer must provide a healthy work environment.

6. Management must communicate its actions to complainant

Payette v Alarm Guard Security Service

Sexual harassment and solicitation allegations. Employee quit. Employer's anti-harassment policy weak and lacked thorough procedures.

\$23,000

Sulz v Canada

Supervisor targets employee. Angry outbursts. Shares criticisms with colleagues. Medical discharge.

\$950,000

Toronto Transit Commission and ATU.

Supervisor targets employee. Shunning. Selective performance management. Alienates employee. Company backs supervisor.

\$25,000

Darvill v Vaughan

Employee claims manager harassed and bullied. Claimed discrimination. Could not connect bullying behaviour to a protected-ground.

Claim Dismissed

Mitchell v 1042735 Ontario Inc

Sexual harassment of female employee. Mostly verbal.
Employer investigated and warned harasser. Employer
actions were reasonable

\$10,000



Workplace Safety and Insurance Benefits Related to Mental Health

Bill 127, *Stronger, Healthier Ontario Act*

- Amended the *Workplace Safety and Insurance Act* to allow entitlement to chronic mental stress for workplace injuries that occur on or after January 1, 2018
- Where employees experience “a substantial workplace stressor” due to workplace conduct or comments that constitute harassment is captured
- Stressor must be the “predominant cause” of an “appropriately diagnosed” mental stress injury

New Policy Comparison Traumatic Vs. Chronic

Traumatic Mental Stress

Involves work-related events that are generally accepted as traumatic in nature

Examples

- A bank teller is held up at gunpoint or is a witness to the event
- A paramedic attends a horrific accident site
- A police officer is placed in a life-threatening circumstances or witnesses horrific events over a period of time

VS.

Chronic Mental Stress

Involves work-related events that are non-traumatic in nature

Examples

- An employee is subjected to humiliating jokes, demeaning conduct, and persistent criticism by a co-worker
- A store clerk is consistently berated by the store manager in front of staff and customers
- Generally, the exposure must be over time to be accepted

Early Decisions.....

- From January to May 2018, only 10 out of 159 claims for CMS were approved
- Early cases suggest a high threshold is being established
- In some decisions, the adjudicator did not defer to findings of harassment by an investigator

Early Decisions....

- Female heavy equipment operator claim denied despite evidence of “sexually explicit language” in the workplace, including members of the public calling her names
- WSIB found the comments “upsetting” and “inappropriate” but didn’t constitute harassment

Early Decisions....

- Staff Sergeant at detention centre – claimed she was “overwhelmed” and in “constant state of anxiety” after experiencing harassment from senior management
- Subject of gossip, harassment, forced to work outside her job description, failure to accommodate pregnancy-related medical needs
- Some harassment found by investigator
- ARO found these to be “disagreements and conflict” between supervisors and subordinates – not unexpected, not egregious or abusive

The Worker Bears the Onus to Show...

- A substantial workplace stressor
- Egregious and abusive behaviour
- Predominant cause of a mental condition that was appropriately diagnosed by a “qualified” medical practitioner in accordance with the DSM standard

No Tort of Harassment... Yet...

- Ontario Court of Appeal decision in *Merrifield v. Canada (Attorney General)*
- RCMP officer argued managers bullied and harassed him throughout the period 2005-2012
- Trial judge recognized new cause of action “tort of harassment” – found repeatedly and intentionally harassed

No Tort of Harassment... Yet...

- Court recognized “evolutionary” nature of change in law
- No foreign jurisdiction judicial authority, no academic authority or compelling policy rationale
- Not a case where the facts cry out for the creation of a new tort
- Other legal remedies available, including “intentional infliction of mental suffering”



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