WHAT DOES

MEAN FOR LAWYERS?

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THE DHC'S REPORT SPECIFICALLY CITES THE **#METOO MOVEMENT** AS A CONTRIBUTING FACTOR IN THE INCREASED NUMBER OF COMPLAINTS.

It has now been over a year since the infamous tweet encouraged people to come forward and share their experiences of sexual harassment. This tweet ultimately became a catalyst for what has come to be described as the #MeToo movement.

The #MeToo movement has drawn much-needed attention to the systemic nature of sexual harassment in society and has opened the door for individuals, and particularly women, to come forward and disclose their experiences of sexual harassment. In this respect, the movement has been a positive step towards reducing the stigmatization that previously impeded such disclosure.

Statistics Canada's most recent report on police-reported sexual assaults indicates there has been a spike in the number of police-reported sexual assaults across Canada following the rise of the #MeToo movement. Specifically, the report finds that the average number of police-reported sexual assaults increased from 59 per day in the three months before the #MeToo movement, to 74 per day after the #MeToo movement. The report notes that the sharp increase does not necessarily reflect an increase in the prevalence of sexual assaults but, rather, is likely a result of the growing awareness brought about by the #MeToo movement regarding what constitutes sexual assault. The increase is also likely a consequence of more people feeling encouraged to come forward as a result of seeing others do so.

The #MeToo movement has also impacted Canadian workplaces. Many employers have indicated that they have seen an increase in the number of reported incidents of sexual harassment. A recent report on the state of harassment in Canadian workplaces released by the Human Resources Professionals of Canada confirms employers' findings. The report found that 20 percent of Canadian workplaces experienced an increase in the number of reported incidents of sexual harassment after the rise of the #MeToo movement, and that by the end of 2018, it is expected that every industry in Canada will be affected by the #MeToo movement.

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The #MeToo movement's impact has also been felt in the practice of law. A recent report released by the Discrimination and Harassment Counsel ("**DHC**"), an organization created by the Law Society of Ontario to, amongst other things, track and report incidents of discrimination and harassment in the practice of law, found that there had been a 50 percent increase in complaints in the first half of 2018 as compared to the first half of 2017. The DHC's report specifically cites the #MeToo movement as a contributing factor in the increased number of complaints.

A recent survey conducted by the Law Society of Ontario further underscores concern that about harassment in the legal profession. The survey, which asked articling students – amongst the most vulnerable individuals at law firms – whether they had been subject to harassment, found that over 20 percent of respondents had been subject to unwanted attention and harassment at some point over the course of their articling term.

The above findings suggest that the practice of law is not immune to issues of sexual harassment in the workplace. As such, it is crucial that law firm employers understand their obligations in dealing with sexual harassment. This article will discuss the general steps that law firms should adopt in dealing with claims of sexual harassment and will discuss how law firms can mitigate the potential for such claims.

Employer Obligations – Sexual Harassment

The *Occupation Health and Safety Act* (OHSA) requires employers to have policies in place pertaining to the handling of sexual harassment claims. The policy must include, at a minimum, a manner and process for resolving allegations of sexual harassment.

The 'process' must include a procedure for employees to report incidents of workplace harassment and should be clearly established in writing and made available to all employees. This is especially important in the practice of law, where law firms often have hierarchal structures that act to dissuade younger associates and other employees from coming forward and submitting formal complaints. If a firm has a policy pertaining to workplace harassment and it is not made readily available to its employees, it could prevent the firm from subsequently relying on the policy to demonstrate that it has taken reasonable steps to protect its employees.

Law firm employers must also be cognizant of the fact that allegations of sexual harassment may come in a variety of forms. The OHSA expressly provides that employers must investigate all 'incidents' or 'complaints' of sexual harassment. Case law makes clear that the language used in the OHSA is broad enough to capture informal complaints, including where an employee merely suggests that another employee has engaged in conduct that could amount to sexual harassment. Accordingly, law firms should investigate all allegations of sexual harassment, irrespective of the formality of the complaint.

The OHSA also requires employers to promptly investigate allegations of harassment. This does not mean, however, that investigations should themselves be conducted promptly, but rather, that the investigatory process should be commenced in a timely fashion. A comprehensive investigation of the facts underlying the claim will always be more important than a prompt determination of the claims and will ultimately help to prevent allegations that the investigatory process was inadequate or uncomprehensive.

With respect to the investigatory process, it is extremely important that employer law firms choose a person to investigate allegations of sexual harassment that is seen at all times to be independent and objective and should not be in a position of direct authority over any person involved in the complaint. Given the structure of many law firms, it may be most appropriate to hire an independent third party investigator. This is especially true in

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smaller firms where there are fewer lawyers and, therefore, greater concern of bias in the investigatory process.

Once an investigation into an alleged incident of sexual harassment is completed, both the employee alleging harassment and the alleged harasser have a right under the OHSA to be informed in writing, within 10 days of the conclusion of the investigation, of the results and to know what, if any, corrective actions have been undertaken. Although the parties have a right to know the outcome of the investigation, the OHSA does not require the investigator's report to be shared with either party. Of note, law firms should be aware of potential privacy concerns that may arise in disclosing the disciplinary steps that have been undertaken to address the harassment.

Sexual Harassment - Educational and Training Policies

The OHSA also requires that employers implement preventative measures with respect to sexual harassment, including, amongst other things, educational and training programs pertaining to sexual harassment. Having comprehensive and well-designed programs in place is crucial to reducing the prevalence of sexual harassment in law firms.

On the educational front, law firms should provide a clear definition of sexual harassment and should also outline the sorts of behaviors that could lead to a claim of sexual harassment being brought against an employee. The Ontario Human Rights Commission's *"Policy on Preventing Sexual and Gender-Based Harassment"* (the "**Policy**") is an excellent resource for law firms that are putting together educational materials on sexual harassment.

The Policy, which adopts the definition of sexual harassment as set out in the Ontario Human Rights Code (the "**Code**"), defines sexual harassment as "engaging in a course of vexatious comment or conduct that is known or ought to be known to be unwelcome." The Policy also outlines the sorts of behaviors that could be considered sexual harassment, including:

- invading personal space;
- making unnecessary physical contact, including unwanted touching;
- sex-specific derogatory names;
- making gender-related comments about someone's physical characteristics or mannerisms;
- showing or sending sexual pictures or cartoons, sexually explicit graffiti, or other sexual images;
- sexual jokes, including passing around written sexual jokes;
- rough and vulgar humour or language related to gender; or
- acting in a paternalistic way that someone thinks undermines their status or position of responsibility.

Failure to implement educational and training programs pertaining to sexual harassment could lead to substantial fines under the OHSA. As such, law firms should ensure that their programs are in line with OHSA requirements.

Expanding Employer Liability and Sexual Harassment

Liability in respect to sexual harassment in the workplace extends beyond fines prescribed under the OHSA. Under the Code, employees have the right to a workplace that is free of sexual harassment and violence. Accordingly, an employee that has experienced sexual harassment in the workplace can bring a human rights complaint against the alleged harasser and their employer at the Human Rights Tribunal of Ontario (the HRTO).

Law firms should be aware of two recent decisions at the HRTO which opened the door to far greater damage awards in respect of workplace sexual harassment. In both *G.M. v. X Tattoo Parlour,* 2018 HRTO 201 and *A.B. v. Joe Singer Shoes Limited,* 2018 HRTO 107, the tribunal moved away from the relatively modest damage awards traditionally seen at the HRTO – previously ranging from $10,000 to $15,000 for breaches of the Code – and

awarded general damages of $75,000 and $200,000 respectively in relation to workplace sexual harassment claims.

Although these cases involved egregious conduct, they should be of great concern for employers, including law firms, as they have the potential to greatly expand employer liability in future cases pertaining to workplace sexual harassment at the HRTO.

Furthermore, these decisions may also encourage more individuals to come forward and file complaints with the HRTO, as the traditionally modest damage awards often acted to discourage individuals from filing complaints.

In addition to filing a complaint at the HRTO, as a result of a recent Ontario Superior Court of Justice decision, law firm employers may also be held civilly liable for workplace harassment.

It has traditionally been the case in Ontario that remedies for harassment fell outside of the purview of the courts and, instead, were within the exclusive jurisdiction of the HRTO. As a result of the Ontario Superior Court of Justice decision in *Merrifield v. The Attorney General* 2017 ONSC 1009, employees have now been given the go-ahead to bring civil actions in respect to workplace sexual harassment.

In *Merrifield v. The Attorney General,* the plaintiff, who was a member of the Royal Canadian Mounted Police (the RCMP), was subjected to harassment after he ran for political office. Amongst other things, the plaintiff alleged that the RCMP falsely accused him of engaging in criminal conduct, launched a baseless investigation against him, damaged his reputation, and impeded his career advancement, all of which caused him to develop severe depression.

The Court reviewed the case law with respect to the tort of harassment and ultimately held that the tort of harassment does exist.

In recognizing the tort of harassment, the Court set out the following test:

(a) Was the conduct of the defendants toward the plaintiff outrageous?
(b) Did the defendants intend to cause emotional stress or did they have a reckless disregard for causing the plaintiff to suffer from emotional stress?
(c) Did the plaintiff suffer from severe or extreme emotional distress?
(d) Was the outrageous conduct of the defendants the actual and proximate cause of the emotional distress?

In applying the test to the case at hand, the Court found that the plaintiff had been subject to harassment and awarded general damages of $100,000.

Although the tort of harassment has not been affirmed at the appellate level,

the *Merrifield v. The Attorney General* decision, at least for the time being, opens the door to employers being civilly liable for damages for sexual harassment in the workplace.

Beyond formally recognizing the tort of harassment, the Court in *Merrifield v. The Attorney General* also established precedent for significant damages in respect to harassment. This case serves to further warn employer law firms of the potential for significant liability with regards to workplace harassment.

Also of note is *Watson v. The Governing Council of the Salvation Army of Canada and David Court,* 2018 ONSC 1066 (CanLII) where, after the termination of her employment, the plaintiff signed a release of all claims "which arise out of or which are in any way related to or connected with" her employment but was still permitted to pursue a subsequent claim for intentional infliction of emotional harm arising from sexual misconduct by her superior. On a summary judgment motion to dismiss the plaintiff's claim based on the release, the Court found that the release was not "all inclusive" because its scope was the employment relationship and, while many of the incidents occurred at the place of employment and perhaps because of the employment, sexual harassment, intimidation and other improper conduct were not connected to employment. The Court said these were clearly separate matters and the conduct fell outside of the employment relationship. In view of this case, counsel is well advised to include very specific language pertaining to sexual harassment/misconduct in releases in order to effectively bar future claims.

Given the #MeToo movement's impact on reported incidents of sexual harassment in the legal profession, law firms should take proactive steps to prevent sexual harassment in the workplace and should promptly and effectively respond to all allegations of sexual harassment. Failure to do so could lead to significant liability for law firm employers.

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