

CASE IN POINT: SEXUAL HARASSMENT

On guard against sexual harassment

Legal and social developments have changed what's acceptable in the workplace and a proactive approach is a good idea for employers

BACKGROUND

The risk of assuming retirement

WORKPLACE ENVIRONMENTS where casual sexual teasing and harassment took place, such as those depicted in period shows like *Mad Men*, are a thing of the past. Social mores have changed and the law has changed to reflect them. And for the past thirty years, sexual discrimination has been a protected ground in human rights legislation. But it still happens.

So what's the best way for employers to protect employees? HR lawyer Laura Williams discusses how employers can keep their employees safe from sexual harassment -- and themselves from legal liability.

| BY LAURA WILLIAMS |

IT'S NO secret employment law in Canada is in a constant state of evolution, as everything from our collective values to workplace expectations shift and adjust to suit changing cultural perceptions and practices.

Nowhere is this more evident than when considering the issue of sexual harassment in the workplace. There was a time not long ago when a pat on the behind, suggestive banter or even outright discrimination were part of many Canadian workplaces. In fact, it wasn't until 1983 that protections against sexual discrimination were entrenched in the Canadian Human Rights Act. Workplace cultures slowly began to change, jettisoning their discriminatory practices in favour of more inclusive policies where men and women were deemed equal and both parties were provided with opportunities to work in an environment free from harassment.

Supreme Court defined sexual harassment

In the 1989 case *Janzen v. Platy Enterprises Ltd.*, the Supreme Court of Canada provided a formal definition of sexual harassment to help guide every-

one from employers to law-makers: "Sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment." That could include a range of behaviours, from touching or unwanted physical contact to sexual advances or comments, among many others — none of which are limited solely to the workplace or specific workplace interactions. Harassment can occur at work-related events, for example, and can affect men and women, executives and rank-and-file employees. In other words, its reach is virtually unlimited, making the enforcement of anti-harassment policies an ongoing challenge.

Once the federal government took steps to prohibit workplace sexual harassment, provincial governments soon followed, enshrining sexual harassment provisions in local human rights and employment legislation. Sexual harassment was no longer simply morally questionable, it was illegal — and the onus was placed firmly on employers to provide safe and secure workplaces for their employees. In turn, employers began re-writing their policy manuals to prohibit sexual

harassment across their workplaces, but cultures take time to transform. As with any shift in employment-related legislation, some employers were faster — and more inclined — to comply.

Therein lies the challenge. Managing workplace sexual harassment is complicated because it involves monitoring, reinforcing and disciplining specific behaviours. As organizations grow, that task becomes increasingly difficult and complex; because harassment incidents often go unreported, it's also more challenging to identify and address. As such, there are no recent, conclusive studies quantifying the scope of the problem in Canada. Those of us in the legal profession rely instead on anecdotal evidence and mounting caseloads to remind us sexual harassment persists across industries. Recent allegations of sexual harassment across select divisions of the Royal Canadian Mounted Police, for example, remind us that the problem can plague any organization and is far from resolved.

Of course, some employers may wonder why they should even bother to address the problem, when they could instead opt to take their chances and simply gamble that sexual harassment will go unnoticed and unreported in their workplace.

Beyond the fact that employers are legally obliged to provide harassment-free environments for their employees, many organizations face steep legal costs when dealing with sexual harassment or human rights complaints. The direct bottom-line impact, in other words, can be significant. But the costs don't end there. Employees that are harassed often feel humiliated, isolated and confused — many wonder if their

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Workplace policies can build a culture where harassment isn't tolerated

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path to advancement within the organization will be limited or restricted outright — leading to increased absenteeism, decreased productivity, increased turnover, as well as deep cultural ramifications and even damage to the organization's employer brand or its ability to attract, retain and engage top talent.

Proactive approach

These are all reasons why employers must take a proactive approach when designing HR law policies and build a culture where employees understand that harassment simply won't be tolerated. Educating managers and employees on those policies, then ensuring their enforcement, is the key to the effective cross-organization implementation and adoption of any policy.

Of course, the major impetus here is legislative — employers must take steps to prevent sexual harassment in their workplace. If an employee files a complaint with a provincial human rights tribunal, several factors will be assessed to determine whether the workplace policies and practices meet the requirements of local employment legislation. Some of those factors include:

- Whether the organization has policies and procedures to manage the harassment complaint.
- Whether management took the complaint seriously and dealt with it within a reasonable time frame.
- Whether management devoted the necessary resources to investigate the complaint.
- Whether the complainant was ostracized or pressured as a result of filing their sexual harassment grievance.

Having a comprehensive HR policy manual and infrastructure is a crucial first step to preventing workplace sexual harassment, and it's one that many Canadian employers fail to take. Those

policies should outline not only the behaviours that are deemed unacceptable, but also define a clear procedure for handling complaints. The policy should specify the management personnel responsible for investigating complaints, outline detailed steps to manage said investigation, and ensure confidentiality, as well as providing tactics to ensure the investigation is completed within a reasonable time-frame.

But there is no point having policies if they're not followed. Every organization's employee orientation process should educate new recruits (from C-suite executives to junior hires) on acceptable workplace conduct, as well as provide an overview of applicable human rights legislation. Managers themselves need proper training to deliver this kind of education, particularly in situations where they may have been promoted through the ranks.

Then it's a question of enforcement. Building an inclusive, welcoming culture that does not tolerate any sort of discrimination helps to mitigate the threat of workplace sexual harassment. While the question of how to build just such a culture is broad, it starts with an organization being intentional about cultivating the type of workplace culture it wants to have, rather than defaulting into an undesirable one. While any workplace, no matter how strong the culture, could be faced with an incident of sexual harassment, organizations that address the issue and resolve it swiftly by investigating allegations and disciplining perpetrators, have a far better chance to remain productive and inviting places to work where individuals feel secure and free to do their jobs.

For employers, the lesson is clear: addressing sexual harassment before it becomes an issue in their workplaces is a far more favourable and cost-effective strategy than trying to manage an issue after it occurs and spirals out of control. That's when litigation may

become necessary, penalties and fines could be imposed and lawyer's fees escalate dramatically. And that's not factoring in the potential negative media coverage that an organization may experience should a sexual harassment matter become public knowledge.

The workplaces of the 21st century are very different from the ones in which our parents or grandparents cut their teeth. Inclusiveness, safety, respect and accountability are employment law and HR priorities, not to mention expectations held by the workforce. Employers, if they haven't already taken notice, need to embrace this reality and work to prevent issues, including sexual harassment, from damaging their workplace cultures and bottom-line business success.

For more information see:

■ *Janzen v. Platy Enterprises Ltd.*, 1989 CarswellMan 158 (S.C.C.).



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