Canadian Employment Law Today
Nov 25, 2015

It's never okay — Preventing violence and harassment in the workplace

The battle against workplace harassment and violence is heating up — on the news, in the courts and in legislatures

By Thomas Gorsky

On Nov. 12, 2005, nurse Lori Dupont was murdered by a physician with whom she worked at a Windsor hospital. The murder did not occur out of the blue. It was the culmination of a series of escalating incidents of harassment which were no secret to hospital management. But management had done little to nothing to protect Dupont. At that time, with the exception of Quebec, no jurisdiction in North America had laws in force to specifically address violence or harassment in the workplace. Today, things have changed.

Historically, employers have tended to diminish the importance of harassment in the workplace. The Lori Dupont murder in 2005 triggered legislation in Ontario — Bill 168 — recognizing harassment and violence as pressing and important social problems. Other Canadian jurisdictions followed suit, such that, today, few question the legitimacy of harassment and the violence to which it can lead as important workplace issues.

In the past, harassment and violence in the workplace was often swept under the rug. But that attitude is changing, both with employers who recognize the importance of a smoothly functioning workplace and happy employees, and with lawmakers who are reflecting a growing sentiment towards worker and human rights which is making harassment and violence unacceptable — both at work and in society as a whole. But recent events in the news and in front of tribunals have shown that there is still a ways to go — and employers must play a part in it.

Recognition of harassment as part of a continuum

Legislated obligations have typically included the following seemingly straightforward requirements:

- Take every reasonable precaution to protect workers
- Provide training and supervision
- Create and maintain a written policy
- Perform an assessment in respect of risks of workplace violence

Following enactment of these rules, confusion arose around the legislated differentiation between workplace harassment and workplace violence. Understandably, employers drew distinctions between violence, s being more serious, and harassment as being less so. This led some employers to question how much attention is truly required to respond to a "mere" harassment complaint, as opposed to a complaint about actual violence in the workplace. However, as was the case for Lori Dupont, the reality is that most situations of violence in the workplace start with a series of comparatively less serious incidents of harassment, which progressively escalate. How seriously an employer responds to an incident of harassment can operate as a valuable deterrent and prevent violence from erupting.

Despite some fuzziness in the wording of legislation and regulations, case law has increasingly recognized harassment as being harmful and destructive as actual violence. Existing legislation is being liberally construed to require employers to treat harassment complaints with the same degree of attention as violence.

In practical terms, this has meant that when a worker makes a harassment complaint, even though legislation does not always clearly spell this out, an employer is generally obliged to take all reasonable steps to investigate the complaint, including:

• Appointing an investigator (internal or external)
• Interviewing witnesses and taking statements
• Making findings and implementing discipline, where appropriate.

By following these basic procedures, an employer can prevent seemingly minor incidents of harassment from spiralling out of control.

The Ghomeshi scandal

Unfortunately, legislative rules and regulations have proven insufficient to prevent a number of spectacular situations, including the Jian Ghomeshi scandal, in which a radio personality's abuse, harassment and sexual misconduct were condoned by the management of an esteemed major public corporation, the CBC, over a long period of time.

Released this year, the Rubin Report — authored by a prominent employment lawyer and workplace investigator — identified systemic weaknesses at the CBC even though the broadcaster appeared to have all required policies, procedures and safeguards in place. The ultimate cause of this failure was found to be rooted in "host culture" which elevated Ghomeshi to the status of media star, and which enabled him to be exempt from the rules which governed others at the CBC.

The lesson employers can learn from this scandal are primarily two-fold: First, an organization cannot allow anyone to be elevated to a special status in which fundamental, non-negotiable rules applicable to 99 per cent of employees are relaxed or abandoned for the few. A code of conduct cannot operate satisfactorily, if not applied to all. Second, once aware of misconduct, management has an obligation to investigate, and cannot turn a blind eye. According to the Rubin Report, several CBC managers were aware of some kind of misconduct on Ghomeshi's part — whether from third parties or their own observation — yet chose to do nothing (or nothing meaningful). This turning a blind eye attracted the harshest criticism, resulting in a finding the CBC condoned Ghomeshi's conduct.

Hydro One and instant infamy

With the Internet and viral videos, one does not have to be a media celebrity to become exposed to public scrutiny. In the recent — and now infamous — Hydro One incident, one of its workers vigourously encouraged shouting sexist obscenities at a TV reporter on-air, which became a viral incident when caught on video and released to the internet. Aside from the issue of how this behaviour reflected on Hydro One's public reputation, such conduct can raise concerns of co-workers who may develop apprehensions about how they can work side-by-side with a person who reveals such hostility and menace, bordering on violence.

More and more employers have developed general codes of conduct, which include guidance regarding conduct outside the workplace. Because of the immense harm which can be triggered by a 30-second video clip, waiting until an event happens before devising rules, is not an option.

***T. (O.P.) v. Presteve Foods*: Raising the ceiling for sexual assault damages**

One might think Ghomeshi, Hydro One and the other issues addressed here would be sufficient reason for an employer to be concerned about consequences resulting from lack of workplace rules or enforcement of those rules. However, those incidents have not led to financial damages awards against employers — at least nothing which has been announced publically.

Aside from physical and psychological harm, employers have good reason to be concerned that workplace harassment can lead to substantial financial liability. This year, setting a new high watermark at the Human Rights Tribunal of Ontario, an employer was found liable for sexual harassment committed against two vulnerable workers. The wrongs included repeated sexual propositioning, repeated sexual contact, forced hugging and

kissing, and, with respect to one worker, three incidents of forced intercourse. One of the workers was awarded $150,000 and the other $50,000, for the injury to their dignity, feelings and self-respect.

As repugnant as the facts were in *T. (O.P.) v. Presteve Foods Ltd.*, sexual assault is not a requirement for substantial civil liability to arise. *Piresferreira v. Ayotte* involved a supervisor abusing an employee over the period of a single week. The abuse included yelling, profanities and one incident of forceful pushing. As a result, the worker was diagnosed with post-traumatic stress disorder. The Ontario Court of Appeal assessed the worker's claim at $55,000 for battery and mental distress damages, in addition to one year's pay for constructive dismissal.

The future — Bill 132

Whatever one thinks about the current law of workplace violence and harassment, there is little doubt it will continue to evolve in the direction of increased worker protections and employer obligations. At the end of October 2015, the Ontario government introduced Bill 132, the Sexual Violence and Harassment Action Plan Act. Of particular pertinence to employers are:

• Enhanced requirements for sexual harassment prevention programs
• Creation of specific duties to protect workers, including more specific rules about the investigation of complaints
• Elimination of the statutory limitation period for civil proceedings based on sexual assault (currently two years)

As 2015 comes to a close, the law relating to workplace harassment and violence in the workplace is still in its infancy. However, employers that ignore recent and impending developments increase the chances they will become the subject of the next viral video or defendant in a ruinous legal proceeding.

For more information see:

• *T. (O.P.) v. Presteve Foods Ltd.*, 2015 CarswellOnt 12338 (Ont. Human Rights Trib.).
• *Piresferreira v. Ayotte* , 2008 CarswellOnt 7733 (Ont. S.C.J.).

Thomas Gorsky is a lawyer with Sherrard Kuzz LLP, a management-side labour and employment law firm in Toronto. He can be reached at (416) 603-0700 (Main), (416) 420-0738 (24 Hour) or by visiting www.sherrardkuzz.com.