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Preventing Violence and Harassment in the Workplace: We're just getting started...

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On November 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 protect Ms. Dupont. At that time, with the exception of Quebec, no jurisdiction in North America had laws to specifically address violence or harassment in the workplace.

The Lori Dupont murder triggered legislation in Ontario (Bill 168) recognizing harassment and violence as pressing and important social problems, and requiring employers to create policies, train employers and perform risk assessments. Other Canadian jurisdictions followed suit, such that, today, few question the seriousness of workplace harassment, and caselaw has increasingly recognized harassment as being as harmful and destructive as actual violence.

Unfortunately, as we have seen too often, legislative rules and workplace policies will be insufficient where management does not play a responsible role. As well, the Internet and 'viral' videos have heightened the risk for employers, virtually ensuring misconduct will be broadcast outside the workplace and around the world.

Within the context of this new and growing awareness of harassment and violence in the workplace, let's look back on the lessons learned in 2015, and forward to the year ahead.

POLICIES AND PROTOCOLS DO NOT SUPPLANT THE ROLE OF MANAGEMENT

Perhaps the most notorious harassment story of the year, in the Ghomeshi scandal 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. An investigation report identified systemic weaknesses at the CBC even though the broadcaster appeared to have in place all required policies, procedures and safeguards. The cause of this failure was found to be rooted in "host culture", which elevated Ghomeshi to the status of media star, and enabled him to be exempted from the rules which governed others.

The lessons learned from this scandal are primarily as follows:

1. If an organization has a code of conduct (or equivalent), it must be enforced, consistently and transparently. Management cannot allow anyone to be elevated to a special status in which fundamental, non-negotiable rules applicable to the 99%, are relaxed or abandoned for the few.
2. A complaint does not have to be in writing. Liability is created when an employer knows, or ought reasonably to know, there has been a breach.
3. If any member of *management* knows, the *employer* is deemed to know.
4. Wilful blindness is never a winning strategy. Several CBC managers were aware of some kind of misconduct on Ghomeshi's part yet chose to do nothing. This turning a blind eye attracted the harshest criticism, resulting in a finding the CBC *condoned* Ghomeshi's conduct.

THE INTERNET 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 shouted sexist obscenities at a TV reporter on-air, which became a viral incident when released to the Internet. Aside from the issue of how this type of behaviour reflects on an employer's public reputation, such conduct can raise concerns of co-workers who may develop apprehensions about working alongside a person who reveals such hostility and menace, bordering on violence.

Bottom line: More and more employers are developing and enforcing general codes of conduct which include guidance regarding conduct *outside the workplace*. Because of the immense harm that can be triggered by a 30-second video clip, waiting until an event happens before devising rules is not a prudent option.

RAISING THE CEILING FOR SEXUAL ASSAULT DAMAGES

One might think Ghomeshi, Hydro One and the other issues addressed in this article would be sufficient reason for an employer to be concerned. Yet, none of those incidents have led to a financial damage award against an employer (at least nothing announced publically).

However, the fact is employers have good reason to be concerned that workplace harassment can lead to substantial financial liability. Last 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, 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 injury to their dignity, feelings and self-respect.

In another recent decision the Ontario Superior Court awarded a plaintiff almost $300,000 arising from her wrongful dismissal, sexual assault (groping) and sexual and racial harassment. The award included $90,000 in aggravated damages and $42,750 for future therapy, and a further $15,000 to the plaintiff's daughter who claimed the trauma inflicted on her mother resulted in loss of guidance, care and companionship.

While it may be tempting to dismiss those incidents as examples of extreme sexual misconduct, consider that sexual assault is not a requirement for substantial civil liability to arise. In another recent decision an abusive supervisor misconducted himself over the period of a single week including yelling, profanities and one incident of forceful pushing. The Court of Appeal for Ontario assessed the worker's claim at $55,000, for battery and mental distress damages (the worker developed post-traumatic stress disorder), 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 protection and employer obligation. At the end of October 2015, the Government of Ontario 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 rules about the investigation of complaints
- Elimination of the statutory limitation period for civil proceedings based on sexual assault (currently two years)

The key to protecting a workplace is on-going **education**, responsible **leadership**, and the **development** and **consistent enforcement** of **skillfully prepared workplace policies and protocols**. In practical terms, this means when a worker makes a harassment complaint, even though legislation may 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, depending on the circumstances); interviewing witnesses; making findings and implementing discipline, where appropriate. An employer that fails or refuses to take these steps enhances the chances it will become the subject of the next viral video or a defendant in a ruinous legal proceeding.

2015 was a busy year and 2016 is likely to continue the trend. The time to act is now.

ABOUT THE AUTHOR

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