

#MeToo/Time's Up— The “Weinstein Effect” in Canada

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In fall 2017, after the shocking revelations that exposed Hollywood mogul Harvey Weinstein for multiple acts of sexual harassment, other Hollywood leading men began to fall like dominoes, as they began to learn that their “Time’s Up.” What started in Hollywood soon became a world-wide movement, as brave women and men everywhere began to feel empowered and energized about stamping out sexual harassment. As a result, *Time Magazine* named the #MeToo movement “Person of the Year.”



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Just like Hollywood across the border, the #MeToo/Time’s Up movements have gained momentum in Canada. Daily news headlines repeatedly report other prominent Canadians within their organizations similarly being exposed for allegations of harassment and sexual harassment, as the movement continues to grow.

In the Canadian workplace, the Angus Reid Institute reports that:

- 28% of Canadians have experienced sexual harassment at work or during a work-related function;
- 48% of people who have been harassed experienced between two and five instances of harassment;
- 25% of Canadians sexually harassed at work felt management was unresponsive and dismissive;
- only 40% of the time, serious and impartial investigations were conducted that resulted in appropriate action.¹

Given the recognition and awareness that the #MeToo/Time’s Up movements have created, these statistics hopefully should start to decline. However, there is no doubt that sexual and workplace harassment are the number-one employment law issues faced by employers today.

Sexual Harassment: One of the Most Significant Risks for the Workplace Today

Sexual harassment left unreported, or sexual harassment that is reported but ignored, are significant risks for any organization. Not only could these risks leave the organization exposed publicly—both in the general media, and from social media damaging the company’s reputation—they could also leave the organization liable for hundreds of thousands of dollars of extraordinary damages in the event of a lawsuit.

Reputational Damage

One only has to view the national news to determine the extent to which a corporation's reputation may be eviscerated when organizations know about sexual harassment, but fail to address it. The media, and the manner in which information is transferred today with the click of a button, ensures that stories are carried quickly and to a significantly larger audience than ever before. If an organization has failed to address a situation of sexual harassment, either reported or unreported, the organization will be held responsible.

Low Morale and Low Productivity

Complaints of sexual harassment or harassment left unaddressed can not only lead to high staff turnover as employees become despondent and disengaged, but also to low productivity and low morale. More importantly, failure to address sexual harassment in the workplace will leave the company at risk for a lawsuit.

Extraordinary Damages

If the employee decides to sue an employer for having failed to investigate a sexual harassment complaint, the damages can be devastating. Courts are not shy to award significant extraordinary damages where they see fit.

The most recent example of this is the *Galea v. Wal-Mart* case, argued by the author of this article. The court awarded \$250,000 to Ms. Galea for her bad faith dismissal and \$500,000 for the "reprehensible" manner in which the court found the employer to have acted with Ms. Galea, which offended the court's sense of decency.²

Although this case did not involve sexual harassment, *Galea* is the leading case in Canada to have awarded these significant amounts of compensation against an employer for the manner in which they treated the employee. In *Galea*, the issue was the fact that the employer had mistreated the employee throughout an extended period of time. When an employer mistreats an employee by failing to address and investigate a case of sexual harassment, the damages awarded *Galea* could easily be awarded. In a sexual harassment case, however, not only may extraordinary damages be awarded against the organization, but if HR fails to investigate the allegations, damages like this may also be awarded against the individual who failed to investigate.

What Is Sexual Harassment?

Both federal and provincial human rights legislation have always recognized sexual harassment as one of the forms of discrimination that can be found in the workplace. In Ontario alone, Bill 132 was created in an effort to ensure that the definition of sexual harassment was included within the definition of workplace harassment outlined in the *Occupational Health and Safety Act*. The definition of workplace harassment was created following Bill 168, which previously had only addressed workplace violence and harassment, but had strangely omitted sexual harassment.

Pursuant to Ontario's *Occupational Health and Safety Act*,³ workplace sexual harassment is defined as:

- a) engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity, or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome; or
- b) making a sexual solicitation or advance where the person making the advance is in a position to confer, grant, or deny a benefit or advancement to the worker and the person knows/ought reasonably to know that the [gesture] is unwelcome.

Further unpacking this definition, sexual harassment may mean anything from degrading jokes/innuendos, dirty looks, unwelcome flirtation, displaying sexually offensive materials, persistent and unwanted attention, physical contact, leering, and whistling to actual propositioning for sex in exchange for other benefits.

Best Practices for the Workplace of Today

Workplace Policy

It is the law that every workplace must have a sexual harassment policy in place, in addition to a workplace violence and harassment policy. That policy must explicitly outline what will happen in the case of an employee reporting sexual harassment, or a manager who has observed sexual harassment or has knowledge of it. The policy should state that a risk assessment be conducted to make certain that a decision is made as to whether the parties need to be physically moved or other serious action needs to be taken from the outset. Critical to this policy is to ensure that it outlines that an investigation must occur, that both the harasser and harassee will be kept informed of the steps in the process, and that written communications will be provided to both parties, setting out the steps that the company will take. Both parties must know that an individual who makes a sexual harassment complaint cannot be reprimed against, and the policy must make clear that there is to be no reprisal for an individual making a complaint. At the same time, however, the policy should address the fact that if the complaint is made in bad faith, there may be repercussions against the individual who initiated it.

It is also the law that companies must maintain records. Therefore, the policy should also address the issue of record retention. In the case of sexual harassment, although the law requires maintenance for only two years, it is advisable to maintain records for several years, given that a complainant could return years later if the complainant was “not aware” of the offence and only “discovered” it at that time.

Training

Policies are useless without training and the law requires this vital step. Therefore, it is imperative that all senior and junior management be trained on the policy, and on determining what is/is not sexual harassment. Not only must employees be trained once, but on a regular basis, so that they are continually informed of the risk within the workplace. All employees should understand how to recognize sexual harassment, or inappropriate workplace conduct, and what they can do to stop it. The organization must ensure that individual complainants feel safe and secure in making the complaint. The employee must trust that the organization will address it in a respectful, but appropriate manner.

Employers have an absolute duty to protect their employees, and provide a safe and healthy work environment for them. Managers must be trained to appreciate that they are responsible for reporting sexual harassment or any harassment, even if there is no written complaint. They must be trained to know what harassment looks like and understand their duty to address it immediately. They must learn that knowing about sexual harassment, and doing nothing about it, is simply not acceptable.

Conclusion

Every person in the workplace has a responsibility to ensure that the workplace is free from harassment. It must start from the top down, and managers must witness the senior executive branch participating in the training and learning about how to address the issue.

Given the legislation that is currently in place, and given the consequences of sexual harassment not being legally addressed by an organization, companies cannot afford to ignore it. Therefore, organizations must ensure that they follow the CRITICAL steps below:

Create a written policy on sexual harassment, workplace violence, and harassment;

Retain all records and documentation on the sexual harassment complaint;

Investigate sexual harassment and harassment complaints;

Train employees on how to spot harassment and what to do if they encounter it;

Identify what is/is not sexual harassment;

Communicate the findings of a sexual harassment investigation;

Alert your workplace to the issues surrounding harassment;

Live your policy—don't let your policy collect dust. Ensure that it is updated, and use it to guide how your organization handles sexual harassment in the workplace.

Unless you adopt this CRITICAL path to addressing sexual harassment in the workplace, your organization may find itself to be the next front-page news. 🌐



Endnotes

1. Angus Reid Institute, "Metoo: Moment or Movements?" February 9, 2018, <http://angusreid.org/me-too>.
2. Michele Mandel, "MANDEL: Fired Wal-Mart Exec Wins One of Highest Damage Awards in Canada for Retailer's 'Callous, High-Handed, Insensitive and Reprehensible Conduct,'" *Toronto Sun*, January 11, 2018.
3. Ontario, *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, https://www.ontario.ca/laws/statute/90o01?_ga=2.57241258.1627760984.1521053529-921954451.1515857473.