

Update on the Law of Workplace Harassment: Rights and Responsibilities



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AGENDA

- ❖ **Why Address Workplace Harassment**
- ❖ **Sources of Obligations**
 - ❖ *Human Rights Act*
 - ❖ *Occupational Health and Safety Regs (Safety Act)*
 - ❖ *Law Society's Code of Professional Conduct*
- ❖ **Myths and Misconceptions about Workplace Harassment**

Why is it Important to Address Workplace Harassment?

Why Deal With Workplace Harassment?

- **Legal obligations of the organization**

- *Human Rights Act*

- *Safety Act*

- **Legal liability of the organization and of “Directing Minds”**

- Potential breach of the *Human Rights Act*

- Tort?

Tort of Harassment

Failure to address harassment may expose the organization (and potentially the Directing Mind) to a risk of liability

- Breach of the *Human Rights Act*
- Tort of harassment (civil suit): ***Merrifield v. The Attorney General***, 2017 ONSC 1333 (under appeal)
 - Liability of Merrifield's Supervisor:
 - Aggressive, inappropriate, unduly harsh, abuse of authority
 - Created a “dark cloud” over Merrifield
 - Ostracized, resulted in sick leaves and emotional distress

Tort of Harassment

Merrifield v. The Attorney General

- Liability of the organization:
 - Merrifield took “extraordinary steps to contact upper management with the hope of resolving his concerns”; these were largely ignored
 - “The RCMP’s conduct in ignoring [Merrifield’s] email went beyond all standards of what is right or decent.”
- \$100,000 general damages

CANADA

A harassed Mountie prevails

Finding of “outrageous” conduct by RCMP bosses vindicates Sgt. Peter Merrifield, and may spur RCMP union drive

by [Charlie Gillis](#) Mar 1, 2017



Tort of Harassment

Merrifield v. The Attorney General:

- Test for tort of harassment:
 1. The defendant's conduct was outrageous;
 2. The defendant intended to cause emotional stress (or, at least, had a reckless disregard for whether their conduct would cause emotional distress);
 3. The employee/plaintiff suffered severe or extreme emotional distress; and
 4. The defendant's outrageous conduct was the actual or proximate cause of the plaintiff's emotional distress.

Why Deal With Workplace Harassment?

- **Employee productivity & absenteeism**
 - Research shows high correlation between harassment and experiences of workplace stress, demoralization, depression, and absenteeism
- **Growing awareness of employees**
 - #MeToo Era

What are the Sources of the Obligation not to Engage in Workplace Harassment?

Human Rights Act

Human Rights Act, prohibits workplace harassment on the prohibited grounds:

(6) No person shall, on the basis of a prohibited ground of discrimination, harass any individual or class of individuals

...

- (c) in matters related to employment; or
- (d) in matters related to membership in an employees' organization, trade union, trade association, occupational or professional association or society, employers' organization or co-operative association or organization.

Human Rights Act

Prohibited grounds, s. 7:

- race
- colour
- ancestry
- ethnic origin
- citizenship
- place of origin
- creed
- religion
- age
- disability
- sex
- sexual orientation
- gender identity
- gender expression
- marital status
- family status
- pregnancy
- lawful source of income
- a conviction for which a pardon has been granted

Human Rights Act

Section 1 defines “harassment”:

- “to engage in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.”



Occupational Health and Safety Regs

Occupational Health and Safety Regulations, Safety Act:

- S. 34 of the Regs:

(1) In this section, "harassment" means, subject to subsections (2) and (3), a course of vexatious comment or conduct at a work site that:

- (a) is known or ought reasonably to be known to be unwelcome; and
- (b) constitutes a threat at the work site to the health or safety of a worker.



Occupational Health and Safety Regs

Occupational Health and Safety Regulations, s. 34 contd:

(2) To constitute harassment for the purposes of subsection (1), any one of the following must have occurred:

- (a) repeated conduct, comments, displays, actions or gestures; or
- (b) a single, serious occurrence of conduct, or a single, serious comment, display, action or gesture, that has a lasting, harmful effect on the worker's health or safety

Occupational Health and Safety Regs

EXs of harassment:

- Patterns of bullying, intimidation, abuse of authority, insults or unwarranted criticism (especially in front of others)
- Shouting, yelling, excessively confrontational behaviour



Occupational Health and Safety Regs

Examples of harassment:

- Repeated demeaning or derogatory comments about someone to others in the workplace (malicious gossip)
- Consistently disrespectful interactions, e.g. turning your back to someone when they are speaking, interrupting repeatedly, using a sarcastic or mocking tone of voice



Occupational Health and Safety Regs

It is not harassment:

(3) For the purpose of subsection (1), harassment does not include reasonable action taken by an employer or supervisor relating to the management and direction of the workers or of the work site.

Occupational Health and Safety Regs

Section 34(5), Employers are required to create a written harassment prevention policy:

- Defines harassment consistent with the Regs
- Take “every reasonable effort” to ensure that workers are not subject to harassment
- Create complaint and investigation mechanisms
- Protect confidentiality
- Inform complainant and respondent of results of investigation
- Take corrective action

Code of Professional Conduct

Chptr 6: Relationship to Students, Employees and Others

6.3 Harassment and Discrimination:

6.3-3: A lawyer must not sexually harass any person.

6.3-4: A lawyer must not engage in any other form of harassment of any person.

6.3-5: A lawyer must not discriminate against any person.



Popular Myths and Misconceptions about Workplace Harassment

MYTH NO.1: Workplace Policies Have Limited Application

“We weren’t at work anymore...it’s not my employer’s business.”



The “Workplace”

Many workplace harassment policies cover all conduct and comments that negatively impact the workplace, including incidents that occur:

- outside of regular work hours;
- at locations where work is not normally performed (and may not actually be being performed);
- that have a nexus with the workplace and are posted on social media platforms.

e.g. informal after-work social gatherings, office-related sporting events, work-related functions, conferences, award ceremonies, etc.

The “Workplace”

British Columbia Human Rights Tribunal v Schrenk, 2017 SC 62

- SCC: The BC *Human Rights Code* is not “limited to protecting employees solely from discriminatory harassment by their superiors in the workplace” but protects “all employees who suffer discrimination with a sufficient connection to their employment context”
- this may include protection against “discrimination by [a complainant’s] co-workers, even when those co-workers have a different employer”.

MYTH NO. 2: Harassment Always Targets an Individual

“Harassment only occurs where someone targets a specific, vulnerable individual.”

- But harassment also includes disrespectful conduct or comments that are not directed at any particular individual but that are demeaning to an identifiable group of people and that poison a work environment by making others feel uncomfortable.

Toxic Work Environment

e.g. : Derogatory comments in the workplace about transgender persons in general or about the gender identity of a specific transgender celebrity – even though the comments are not directed at a particular trans colleague, and even if there are no openly trans-identified employees in the workplace.



MYTH NO. 3: Harassment Involves Malicious Conduct

“He didn’t mean it, so it couldn’t be harassment.”

- But harassment often results from ignorance, insensitivity, or unconscious bias, rather than malicious intent.
- In law, findings of harassment are based on an assessment of the effects of the impugned conduct. Proof of intent to harass is not required.

Humour and Unintended Harassment

“It was just a joke....”



Self-Deprecating Humour

So why can racialized or Indigenous people, people with disabilities, people from minority religious faiths, lesbians and gays, etc. make self-deprecating comments and jokes about themselves and their own communities

but if someone from outside their community does it, then that's harassment?

Satire

Self-deprecating humour satirizes discrimination

“Satire is traditionally the weapon of the powerless against the powerful. I only aim at the powerful. When satire is aimed at the powerless, it is not only cruel — it’s vulgar.”

-Molly Ivins

Self-Deprecating Language

- When people who are vulnerable to prejudice and discrimination adopt the offensive language of their oppressors, the intent is to remove the “sting” so that it can no longer be used as effectively by those who seek to harm them.
 - e.g.: LGBTQ communities have adopted the label “queer”; it’s no longer an insult.



News · GTA

Massey College professor resigns over 'master' comment to Black student

"What I said was both foolish and . . . hurtful," Michael Marrus says in stepping down as a senior fellow.



MYTH NO. 4: Complainants Must Object

“How could I know? She never said anything.”

- Sometimes, the respondent points to a complainant’s apparent complicity in the offensive behaviour: “He laughed at my jokes” or “She smiled and thanked me whenever I complimented her appearance.”

But: *This is not an excuse at law.*

Complainants are not required to vocalize their objection to the impugned behaviour when it occurs.



Silent Acquiescence

Courts and tribunals recognize that there are many legitimate reasons why a complainant:

- may be silent when confronted with offensive comments or conduct; or
- may even give the impression of “going along with” the offensive behaviour (e.g. laughing at jokes, replying to suggestive or flirtatious emails or text messages, or agreeing to attend social events with the respondent outside of work)

Reasons for Acquiescence

- ✓ fear of reprisal; vulnerability due to precarious employment or power differential in the workplace hierarchy
- ✓ fear of reputational harm or ostracization
- ✓ personal insecurity or lack of confidence (compounded by age difference, lack of maturity, inexperience, etc.)
- ✓ intimidation including perceived physical threat
- ✓ past traumatic or negative experiences with confrontation
- ✓ innate non-confrontational personality
- ✓ cultural and/or gender socialization

Gender Stereotypes

“‘Knees together’ judge resigns after judicial council suggests removal” -Maclean’s



Gender Stereotypes

Findings of Canadian Judicial Council

- Accusation 7
 - *Camp*: On several occasions, he questioned why she didn't fight off her alleged aggressor and her lack of visible reaction to the alleged assault.
 - *CJC*: "The Judge was clearly evaluating the evidence before him by measuring it against a stereotypical view of how a woman should react to a sexual assault, or the threat of one... His comments reflect a classic victim-blaming attitude."

MYTHS NO. 5: Complainants Must Object Politely

“Calm down, and then I’ll listen to you.”

- Not all complainants are silent when exposed to objectionable comments or conduct.
- Their complaints should not be dismissed based on the manner or tone in which the complaints are expressed.



MYTH NO. 6: If the Complainant is Offended, then it's Harassment

“You obviously upset him....”

- Since well-meaning individuals can be found liable for harassment without proof of any intent to harm, some people mistakenly believe that a complainant's individual reaction determines if the conduct is harassing.

Subjective Feelings of the Complainant

But: If the subjective feelings of each complainant dictated workplace expectations, then any good faith complaint of harassment would automatically result in a finding of harassment.

- What if the complainant is hyper-sensitive and over-reacted to innocuous behaviour by the respondent?
- How could an employer ever establish uniform standards of conduct for its employees?

“Ought Reasonably to Have Known”

- The key question in all harassment complaints is whether the respondent **knew or “ought reasonably to have known”** that his or her conduct was unwelcome.
 - Would a reasonable person, apprised of all the relevant facts and circumstances, have found the conduct to be unwelcome?
 - If “yes”, then the respondent “ought to have known” that his or her behaviour was unwelcome (regardless of what the respondent actually knew or intended).

The “Reasonable Person” Test



The “Reasonable Person” Test

This reasonable person test is contextual:

- The subjective perspective of the actual complainant is not determinative.
- Investigators, tribunals and courts will instead evaluate the objective reasonableness of the complainant’s reaction.
- That evaluation must be done from the perspective of a reasonable person in the complainant’s position.

The “Reasonable Woman” Test

- In sexual harassment cases, judges have been sensitive to the reality that women and men often perceive interpersonal interactions differently based on their gender
 - Courts have applied the standard of a “reasonable woman” (rather than gender-neutral “reasonable person”) in assessing a male respondents’ conduct
 - The “reasonable woman” test was adopted based on expert social science evidence which demonstrated that a gender-neutral standard systematically ignores the unique experiences of women and is therefore male-biased.

MYTH NO. 7: Harassment Requires Egregious Conduct

“What’s he complaining about? He must have a pretty thin skin....”

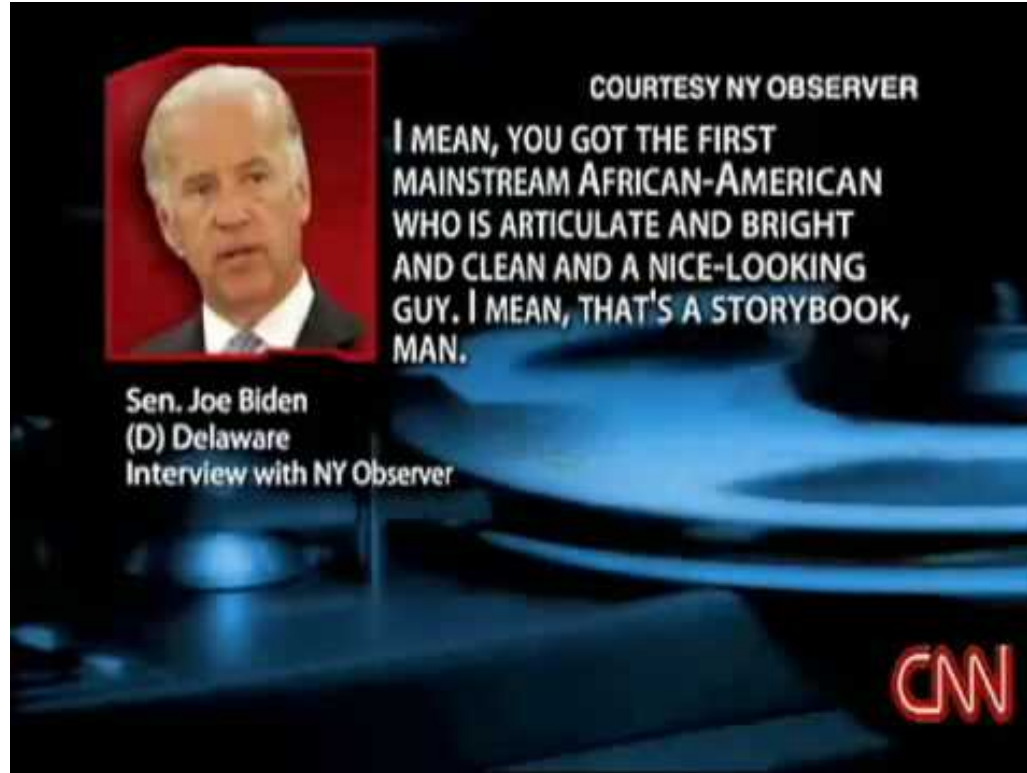
- But A finding of harassment may be made based on the serious cumulative effects of repeated, subtle, small indignities to which a person is subjected.

Micro-Aggressions

What is a “micro-aggression”?

- Brief but frequent comments or gestures that reflect (whether intentionally or not) hostile, demeaning, disrespectful attitudes toward individuals or groups.
- Often well-intentioned.
- Micro-aggressions convey highly nuanced messages, often communicated through body language or tone rather than words.
- *They may be imperceptible to bystanders who witness them.*

Micro-Aggressions



Senator Joe Biden during the campaign for the Democratic nomination, 2008