Workplace Law Bulletin

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Workplace Harassment – Evolving Obligations for Employers

By Lorenzo Lisi

Recent high-profile sexual harassment cases demonstrate the devastating impact on individual employees, as well as the fallout to an organization when a culture of harassment is permitted to exist.

In the 2014 decision of the Divisional Court of Ontario in *Hamilton-Wentworth District School Board v. Fair,* the panel upheld the Human Rights Tribunal of Ontario's decision that had held that the School Board had not adequately accommodated the employee, Ms. Fair, who suffered from generalized anxiety disorder. The Divisional Court upheld the Tribunal's decision that the employee be reinstated and provided with $420,000 in back wages. The case set the high-water mark for damage awards of this kind in Canada.

In *Silvera v. Olympia Jewellery Corporation,* the employee, Ms. Silvera, had been terminated by her employer after a two-week absence from work due to dental surgery. She brought an action against her former employer and supervisor for damages for wrongful dismissal and for sexual assault, sexual harassment and racial harassment. The Ontario Superior Court found that the employee had been wrongfully terminated and that the supervisor had engaged in sexual assault, sexual harassment and racial harassment. Ms. Silvera was awarded (i) $90,000 for general and aggravated damages, (ii) $10,000 for punitive damages, (iii) $30,000 for breach of the Human Rights Code, (iv) $42,750 for costs of future therapy care, (v) $33,924.75 for future lost income, and (vi) $90,344.63 for wrongful termination.

Coupled with this high tide of damage awards is the legislative response to the issue of workplace harassment. The Ontario government passed Bill 132, also known as the *Sexual Violence and Harassment Action Plan Act* (Supporting Survivors and Challenging Sexual Violence and Harassment), which will come into effect in September 2016.

The legislation broadens the definition of workplace harassment to include "sexual harassment" and expands the obligations on employers with respect to workplace harassment policies. Employers are required to review and update their written policies and/or programs to ensure that they deal with how investigations and privacy concerns will be balanced. Requirements include how information about an alleged incident is to be obtained (including information about any individuals involved); when and how any information will be disclosed; how the worker and the alleged harasser (if the latter is a worker of the employer) will be informed of the results of the investigation; any corrective action that has been or will be taken; and the inclusion of measures for the reporting of harassment where the individual designated by the employer for the reporting of the harassment is the alleged harasser.

Perhaps of greatest interest is the power which Bill 132 provides inspectors with respect to investigations. Inspectors can order an employer to retain an impartial third-party investigator, at the employer's expense, to conduct an investigation into a complaint of workplace harassment.

Investigations are often critical in determining whether an allegation of harassment can be sustained. They provide an impartial third-party review and inquiry of the circumstances involved in an allegation of harassment and, depending on the nature of the retainer, a summary of factual and/or legal conclusions.

However, the obligation to provide an investigation in most if not every case raises real practical concerns, such as cost, timing and the impact on other employees, to name a few. The precise threshold required for a formal investigation is unknown and employers may feel a significant human resource strain.

What is clear is that for both employers and employees, the stakes have never been higher. Failure can result in a workforce which may lose faith in the employer's ability to provide a harassment-free working environment, which leads to poor morale, higher absenteeism and employee disengagement. For employers, there is the possible legal liability of an improper or insufficient investigation and the litigation that it may create.

The legislative changes are a sign that there is the support and political will to address workplace harassment. The best approach is to be proactive, ensure compliance and implement a process which is fair, responsive and will assist in protecting against frivolous claims and charges.

Time will tell how the courts and administrative tribunals judge employers' efforts in this area, but in the meantime, here are some helpful tips:

- **Be Compliant:** Review and implement any legislative requirements. Assess risk for all forms of harassment, violence and domestic violence in the workplace;
- **Improve/Develop a Policy:** Address each risk and how it will be dealt with while respecting the privacy rights of all employees involved (even the alleged harasser). Bring in the joint health and safety committee, workers, supervisors and experts if necessary;
- **Develop an Action Plan:** It should address the process for the investigation of complaints, the assessment of risks and the consequences of non-compliance;
- **Understand the Investigation Process:** The risk of conducting a flawed or improper investigation is considerable. In Ontario, an officer may order an investigation based on his/her review of the circumstances. Where appropriate, this may mean a third-party investigator at additional cost;
- **Don't Pre-Judge:** Like many situations where allegations of improper conduct are made, consider the evidence carefully. Don't assume. Make rational decisions based on available information and evidence; and
- **Be Compassionate:** Allegations of harassment/violence are difficult to make and can be devastating on both the victim and the alleged harasser.

If you have questions regarding any aspect of workplace law, please contact any member of the Aird & Berlis LLP Workplace Law Group:

Lawyers:

Fiona Brown	416.865.3078	fbrown@airdberlis.com
Meghan Cowan	416.865.4722	mcowan@airdberlis.com
Lorenzo Lisi	416.865.7722	llisi@airdberlis.com
Barbra H. Miller	416.865.7775	bmiller@airdberlis.com
David S. Reiter	416.865.4734	dreiter@airdberlis.com
Cynthia R.C. Sefton	416.865.4730	csefton@airdberlis.com

AIRD & BERLIS LLP

Barristers and Solicitors

Brookfield Place
181 Bay Street, Suite 1800
Toronto, Ontario, Canada
M5J 2T9
T 416.863.1500 F 416.863.1515
www.airdberlis.com