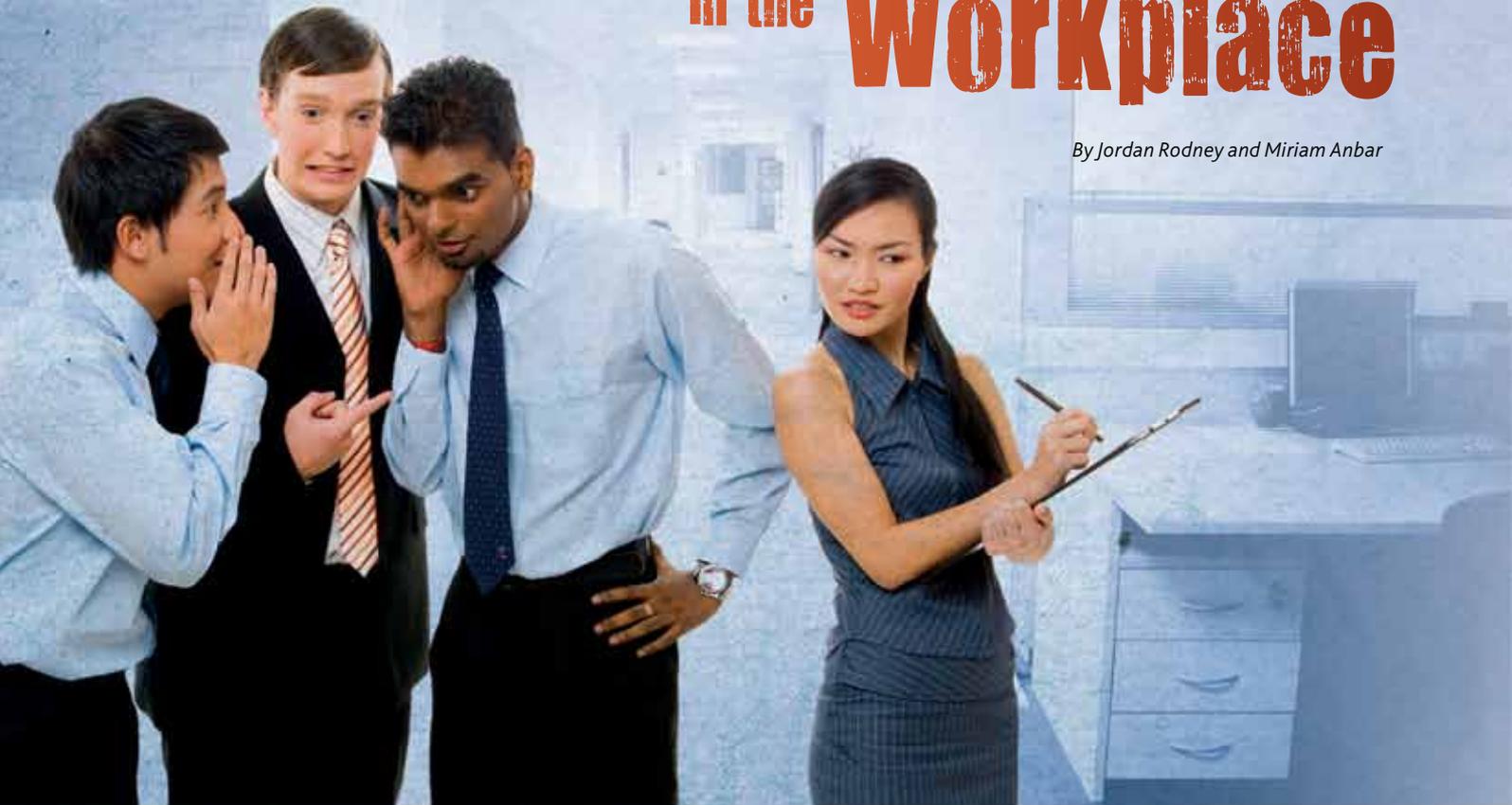


The Changing Landscape of Harassment in the Workplace

By Jordan Rodney and Miriam Anbar



One of the most significant workplace changes in recent years is the increase in harassment-related complaints and how organizations handle them. The difficulty in dealing with such complaints has created a minefield for both payroll and human resource professionals. However, ignoring these issues may come at a high cost: Canadian courts and tribunals have awarded damages varying from \$20,000 to \$950,000 to employees who have been victims of workplace harassment and bullying.

We have also witnessed a growing trend toward regulating harassment and violence in the workplace. In June 2010, Ontario's Bill 168, *An Act to Amend the Occupational Health and Safety Act*, was introduced to explicitly recognize employers' obligation to ensure a harassment and violence-free workplace. Prior to Bill 168, there was no specific law in Ontario in this area, only a "general duty" to protect workers under existing health and safety legislation. Bill 168 now brings Ontario in line with most other provinces.

WHAT IS WORKPLACE HARASSMENT?

"Workplace harassment" is defined under the Ontario *Health and Safety Act* as "engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome." This expands on the earlier Human Rights definition that required the comments or conduct to be based on a prohibited ground of discrimination (e.g., ethnic origin, religion, gender, etc).

Offensive Employee Harassment

Human Rights Innuendos

Victims Intimidation
Safety Jokes Bully
Advancements Sexual
Workplace Rights Conduct
Claim Harrasment
Complaints Innuendos

Workplace harassment may include, but is not limited to, bullying, intimidating or offensive jokes or innuendos, displaying or circulating offensive pictures or materials, or offensive or intimidating. Although we are still in the early stages, the impact of the expanded definition above may result in a higher number of harassment-related complaints, which may not have previously met the legal test for harassment.

Identifying harassment may be the easy part; the real challenge occurs when a harassment-related claim lands on your desk and you need to conduct a workplace investigation. This question is addressed in two cases outlined below, both of which reference issues of harassment and irregularities in the investigation process.

Money Mart harassment case

In 2010, Marjorie Harriott, a customer service representative with Money Mart in Toronto, suffered sexual harassment from her male manager, Desmond Wade. Wade was accused of leering at female employees and clients, offering unwelcome advances, and sometimes touching them against their wishes. Harriott was the target of one such advance at work.

Money Mart employees wear "panic buttons" around their necks, in case of an emergency or robbery. Wade approached Harriott to "fix her panic button" and proceeded to massage her neck. The incident caused Harriott serious stress and grief, and she suffered from a panic attack, vomiting, headaches and sleepless nights as a result. Wade's actions had caused Harriott and other female employees to feel extremely uncomfortable at work, resulting in a poisoned work environment.

Harriott reported the incident to Money Mart; however, the employer failed to adequately investigate and remedy the employee's complaint of sexual harassment. The case reached a human rights tribunal, which ruled that Money Mart

had an obligation to ensure a harassment-free workplace. The employer was found liable for harassment and discrimination, and ordered to compensate Harriott for injury to her dignity, feelings and self-respect. Money Mart and Wade were ordered to pay Harriott \$30,000.

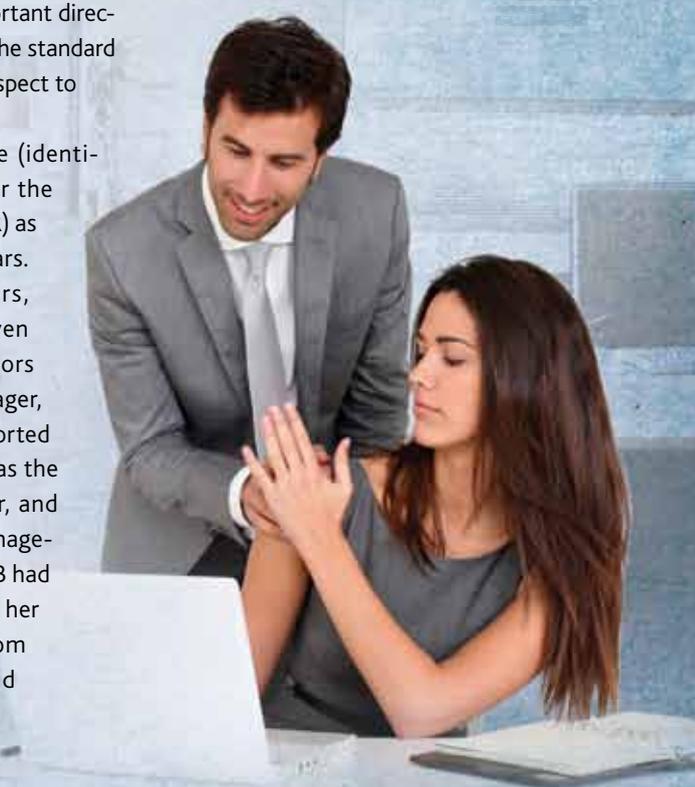
In its decision, the tribunal emphasized that Money Mart had "completely failed" to investigate the complaints. Money Mart was also ordered to change its harassment policy and conduct training with all managers throughout Ontario.

The Money Mart case emphasizes the importance of ensuring that a workplace investigation is properly carried out. Unfortunately for employers, overlooking the obligation to investigate or conducting a flawed investigation may result in significant consequences for the company.

Human Rights claim against a manager in the City of Hamilton

In September 2013, *City of Hamilton v Amalgamated Transit Union, Local 107*, provided an interesting example of a flawed investigation and important direction for employers regarding the standard that may be expected with respect to workplace investigations.

In this case, an employee (identified as "AB") had worked for the Hamilton Street Railway (HSR) as a transit inspector for 23 years. The HSR had 14 inspectors, who reported to one of seven supervisors. These supervisors reported to the Transit Manager, and the Transit Manager reported to the Transit Director. AB was the HSR's only female inspector, and there were no women in management positions at the HSR. AB had initiated a complaint against her direct supervisor arising from derogatory comments and inappropriate conduct.



The complaint was investigated by a human rights specialist employed by the City; however, AB was unhappy with the outcome of the investigation and felt that it left her vulnerable to further harassment. AB filed a grievance to her union and eventually filed a formal human rights application.

Both complaints were heard by an Arbitrator, who found that AB had been subject to workplace harassment in the form of pornographic emails, unwanted touching, sexualized comments and gestures, profane emails, and derogatory comments and salutations. The Arbitrator said there was no question that the conduct AB was subjected to by her supervisor was egregious and prolonged and that the ongoing harassment effectively caused AB's work environment to be poisoned. The Arbitrator added that the facts that the supervisor was AB's immediate supervisor and that she was the only woman at her level of the organization rendered the conduct "even more reprehensible."

The Arbitrator described the City's conduct in the aftermath of AB's complaint as "unpardonable," providing an important message to all employers with respect to proper conduct, investigations and remedies in these situations.

First, the City did not respond properly to the employee's complaint. The Transit Manager failed to support the employee by not taking up the matter in a serious way with her supervisor nor reporting her complaint to the Human Rights Specialist as required.

Second, the workplace investigation itself was seriously flawed. The Arbitrator's decision notes no witnesses were interviewed, allegations were left unresolved, and no written report was provided to the alleged victim or transit managers.

Finally, the City got it wrong with respect to wrap-up and remedies. According to the Arbitrator, communication with AB as to the outcome of the investigation and the measures taken to resolve the issues were "sorely lacking." Her supervisor remained in his position and was not even compelled to take the City's harassment and discrimination prevention course, while AB was. The Arbitrator found that

AB's belief that nothing had been done to remedy her situation was reasonable, concluding that the "damage to AB's dignity, feelings and self-respect was only exacerbated by the City's half-hearted and insensitive response."

The employee in this case was awarded \$25,000 in damages. The City was ordered to have an evaluation done of its human rights training program, and post notices about reporting discrimination and harassment in the HSR offices.

HELPFUL HINTS FOR EMPLOYERS

Cases like *Money Mart* and the *City of Hamilton* demonstrate the importance for employers to conduct adequate, comprehensive workplace investigations, which focus on both the *substantive* as well as the *procedural* aspect. Given that the standards for workplace investigations are higher now than ever before and employees are increasingly knowledgeable about their rights, employers ought to be extremely mindful of their method and conduct when carrying out a workplace investigation. A company's response to situations involving harassment is crucial and can inevitably make or break the case!



Here are a few key points for employers and supervisors to keep in mind when performing a workplace investigation:

PREPARING for the Workplace Investigation:

- ▶ Identify the type of workplace investigation required: internal or external investigator?
- ▶ Plan how workplace investigation will unfold.
- ▶ Review company policy and procedure to determine if any violation has occurred.

ENGAGING in the Workplace Investigation:

- ▶ Ask the 5 Ws: Who? What? When? Where? Why?
- ▶ Evaluate whether a third-party witness is necessary in the circumstances.
- ▶ Always remember the importance of due process regardless of your own perception.
- ▶ COMMUNICATE! COMMUNICATE! COMMUNICATE!

WRAPPING UP the Workplace Investigation:

- ▶ Make an objective determination based on the findings of your investigation.
- ▶ Complete a comprehensive investigation report.
- ▶ Communicate the investigation outcomes to all parties.
- ▶ Implement any remedial measures to ensure due diligence for your organization.

Incidents of harassment in the workplace are unfortunate and tricky to tackle. The manner in which an organization responds to these situations is extremely important, as it will often be scrutinized down the road.

It is in an employer's best interest to plan properly, engage effectively and respond reasonably. It is often wise to consult with an employment lawyer or HR expert to weigh suitable options, create an investigation plan and/or carry out the workplace investigation on the organization's behalf. ■



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