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# Workplace Harassment: Risky Business for Employers

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## Overview

- What is Harassment?
  - Tort of Harassment
  - OHS
  - Human Rights
  - Constructive Dismissal
- Risks faced by Municipalities due to Harassment of Officials/Staff
  - Tort of Harassment
  - OHS
  - Constructive Dismissal
  - Human Rights
  - Collective Agreements
  - LTD/STD
- Strategies to Address Harassment

## What is Harassment?

### ***Alberta Health Services v Johnston, 2023 ABKB 209***

“A problem with establishing a tort of harassment is defining what constitutes harassment. Difficulty with defining a concept does not prevent it from being actionable. As detailed earlier in these Reasons, this Court regularly deals with the concept of harassment in the context of restraining orders. Harassment is a concept like negligence that takes its meaning from the context in which it occurs. As with negligence, the law cannot provide a bright line between what is harassing and is not harassing behaviour – it must be determined on a case-by-case basis.”

## What is Harassment?

### Occupational Health and Safety Act, SA 2020, c O-2.2

- “harassment” means any single incident or repeated incidents of objectionable or unwelcome conduct, comment, bullying or action by a person that the person knows or ought reasonably to know will or would cause offence or humiliation to a worker, or adversely affects the worker’s health and safety, and includes

(i) conduct, comment, bullying or action because of race, religious beliefs, colour, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status, gender, gender identity, gender expression and sexual orientation, and

(ii) a sexual solicitation or advance,

but excludes any reasonable conduct of an employer or supervisor in respect of the management of workers or a work site;

- “violence”, whether at a work site or work-related, means the threatened, attempted or actual conduct of a person that causes or is likely to cause physical or psychological injury or harm, and includes domestic or sexual violence;

## What is Harassment?

### Human Rights Law

- Unwelcome verbal or physical conduct, including unwanted physical contact, attention, demands, jokes, or insults (based upon a protected ground).
- Sexual Harassment is unwelcome sexual conduct.

### Constructive Dismissal Context

- Any conduct whatsoever that an employee is subjected to (regardless of the source) which would make continued work in that environment intolerable or unreasonable.
- Very broad.

## What is Harassment?

### Examples:

- Verbal or physical abuse, threats, derogatory remarks, jokes, innuendo or taunts about appearance or beliefs;
- Intimidation, leering or other objectionable gestures;
- Unwanted physical contact such as touching, patting, pinching, punching and outright physical assault;
- Stalking, unwanted following and taking pictures/videos;
- Continuous unwanted contact, through emails/text/in person visits/social media messaging
- Cyberbullying
  - The use of electronic communication to bully a person, typically by sending messages of an intimidating or threatening nature
  - Most commonly found on social media platforms

## Risks Arising from Workplace Harassment

- Tort of Harassment
- Occupational Health and Safety Obligations
- Constructive Dismissal
- Human Rights Violations
- Breach of Collective Agreement
- LTD/STD Claims

## Tort of Harassment

### ***Alberta Health Services v Johnston, 2023 ABKB 209***

#### Tort of Harassment:

- (1) engaged in repeated communications, threats, insults, stalking, or other harassing behaviour in person or through or other means;
  - (2) that he knew or ought to have known was unwelcome;
  - (3) which impugn the dignity of the plaintiff, would cause a reasonable person to fear for her safety or the safety of her loved ones, or could foreseeably cause emotional distress; and
  - (4) caused harm.
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- **Damages for Harassment in *Johnston*: \$100,000.00.**

## Safe Workplace (OHS)

- Employers have both statutory and common law obligations to provide a safe workplace for their employees
- Occupational Health and Safety Act requires employers do everything they reasonably can to protect the health and safety of their employees.
- Harassment and Violence are workplace hazards under OHS legislation.

## Safe Workplace (OHS)

- OHS Complaints
  - Dealing with the investigation/complaint itself
    - Site Visits/Inspection
    - Investigation
    - Interviews
  - Orders
    - Fines
    - Imprisonment

## Safe Workplace (Constructive Dismissal)

- Liability for Constructive Dismissal
- Can arise from a series of acts that show the Employer “no longer intended to be bound by the contract”
- Most commonly arises in cases of toxic workplaces/workplace harassment
- Remedy:
  - Employee has been terminated and not given any notice
  - Employee entitled to compensation in lieu of notice after the fact
  - Wrongful dismissal litigation.

## Safe Workplace (Human Rights)

- Harassment with regards to a protected ground is discrimination under the *Alberta Human Rights Act*.
- Employers can face liability under the human rights complaint process for merely allowing their employees to be discriminated against.
- Successful complaint:
  - Reinstatement
  - Lost wages
  - General Damages

## Safe Workplace (Breach of Collective Agreement)

- **Unionized environment:**
  - Collective agreements often require the employer to provide a workplace free from harassment/discrimination
  - Failure to do so can result in a grievance.
  - Remedies:
    - Declarations
    - Damages
    - Injunctions
  - Human Rights Violations in the Unionized Sector

## Safe Workplace (STD & LTD)

- Employee's who are subject to harassment/bullying may go on STD and, ultimately, LTD
- Return to work for these employees can be a long, drawn out process
- Often results in employees and employers being stuck in limbo (or a stalemate)
- Can result in termination/payout
- Or, alternatively, a human rights complaint

What can a Municipality do to address harassment?

- Establish Policies
- Always investigate reported or suspected harassment
- Take action to address the harassment
  - Internal vs External Harassment

## Policies and Procedures

- Establish appropriate policies or procedures to refer to acceptable conduct
- Examples:
  - Personnel policies re bullying/harassment
  - Social media use policy
  - Disciplinary and investigation policy

## Investigations

- Upon learning of harassment:  
Investigate and document.
- Types of workplace investigations:
  - In house or 3<sup>rd</sup> party

## Take Action

- It is important to address the harassment, at least as well as possible.
- Different strategies for internal harassment vs external.

## Take Action

- Internal Harassment:
  - Investigate
  - Notify and Discipline (including termination)
  - Reduce contact between employees
  - Training
  - Amend Policies

## Take Action

- External Harassment:
  - Cease and Desist Letters
  - Restraining Orders
  - Trespass Notices
  - Bylaws



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