

Developments in the Law of Harassment: What an EPL Insurer Needs to Know

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What is Harassment?

- The concept is evolving:
 - sexual
 - bullying
 - cyber
 - over-managing
 - annoying

What is Harassment?

- *Human Rights Code*
- *Occupational Health & Safety Act*
 - amended by Bill 132
- Common Law

Human Rights Code

- Section 5(2) – Harassment in employment
- Section 7(2) – Harassment because of sex in workplace
- Section 7(3) – Sexual solicitation by a person in a position to confer benefit, etc.

Human Rights Code

- Section 46.3(1) – Acts of officers, etc.
- For the purposes of this Act, except subsections 2(2), 5(2), Section 7 and subsection 46.2(1), any act or thing done or omitted to be done by an officer, official, employee or agent... shall be deemed to be an act or thing done or omitted to be done by the corporation, trade union, trade or occupational association, unincorporated association or employer's organization

Procedure

- Application to Human Rights Tribunal of Ontario
 - Direct access model
 - Jurisdiction
 - enumerated grounds
 - social areas
 - Limitation period – one year (unless series of incidents or if delay incurred in good faith)
 - Pre-hearing disposition
 - summary hearing
 - mediation

Remedies

- Monetary compensation for losses arising out of the infringement, including compensation for injury to dignity, feelings and self-respect
- Restitution, other than through monetary compensation, including restitution for injury to dignity, feelings and self-respect
- “Public Interest” remedies

Occupational Health & Safety Act and Bill 132

- New definition of workplace harassment (September 2016)
- “workplace harassment” means
 - (a) 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, or
 - (b) workplace sexual harassment
- “workplace sexual harassment” means:
 - (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 sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person known or ought reasonably to know that the solicitation or advance is unwelcome

Occupational Health & Safety Act

- No remedial scheme to compensate individuals for complaints of individual harassment experienced at work
- OLRB has limited jurisdiction
- Unchanged by Bill 132
- Only remedy available is to require employer to develop policy and programs regarding workplace harassment

Occupational Health & Safety Act

- Reprisal s. 50(1)
- OLRB has not decided ultimately the issue of whether worker can bring harassment complaint before it as a reprisal application

Civil Claims: Are They Common?

- Harassment-type claims are becoming a more common feature of civil actions brought by employees and former employees
- Often incidental to other employment based claims such as wrongful dismissal/constructive dismissal
- Section 46.1 of *Human Rights Code* allowed joinder of civil action with human rights complaint

Civil Liability

- Presently there is no recognized civil cause of action for harassment
- Courts in Alberta, Saskatchewan and British Columbia have found that employees are barred from pursuing civil claims for harassment
 - in each case court found that workers compensation regimes have exclusive jurisdiction

But That's Not The Full Story...

- Other similar/related claims
 - constructive dismissal
 - claims for mental distress
 - intrusion upon seclusion
 - punitive, aggravated or exemplary damages

Questions?