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 **NORTON ROSE FULBRIGHT**

The Harvey Weinstein effect – What #MeToo means for your business

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What does #MeToo mean for your business?

Bad publicity

Reputational
damages

Human
rights
damages

OH&S
damages

Constructive
dismissal
claims

Bad publicity

\$35M lawsuit alleges racist, sexist and homophobic discrimination at CSIS

Spy agency is taking the allegations from 5 employees 'very seriously,' director says

By Trevor Dunn, CBC News | Posted: Jul 14, 2017 12:25 PM ET | Last Updated: Jul 14, 2017 12:30 PM ET



A lawsuit against the Canadian Security Intelligence Service alleges the spy agency is a toxic workplace in which employees have experienced discrimination based on race, religion and sexuality. (CBC)

Reputational damage

NEWS

The Weinstein Company Is Getting A New Name, Because Obviously

BY JESSICA RAWDEN 1 MONTH AGO 0 COMMENTS



Legal damages

Human Rights:

- On the rise: \$2.5 million awarded to temporary foreign workers in BC
- Tribunals can award damages for loss of dignity and self-respect

OH&S:

- Administrative penalties can be up to \$10,000 per day, per contravention

Constructive Dismissal:

- Employers may be subject to wrongful dismissal damages, punitive, and aggravated damages



Legal obligations

Alberta Human Rights Act

- Prohibits harassment based on a protected ground

Occupational Health and Safety

- Employer is obligated to ensure the health and safety of its workers
- Effective June 1, 2018: additional obligations

Common law

- Constructive dismissal – poisoned workplace
- Aggravated and punitive damages

What is harassment?

- Unsolicited and unwelcome verbal or physical conduct, comments, gestures, or contact which causes offense or humiliation
- Deliberate or unintended
- Subtle or overt
- Single event or continuing series of events
- Does not have to occur on company premises

What is harassment?

- Can take many forms:
 - Personal harassment
 - Psychological harassment
 - Sexual harassment
 - Abuse of power
- Between different parties:
 - Amongst employees
 - Management and employees
 - Customers/clients and employees

What is NOT harassment?

- *Occupational Health and Safety Act:*
 - Harassment... “excludes any reasonable conduct of an employer or supervisor in respect of the management of workers or a work site”
- Examples:
 - Legitimate management intervention
 - Performance evaluations
 - Corrective action
 - General unfairness
 - Consensual banter

Case study: *Amaral v Canadian Musical Reproduction Rights Agency Limited*

- Following failed attempt at a promotion, employee refused to follow manager's direction
- Placed on probation
- Believing her employer wanted her gone, suffered a mental breakdown and never returned to work
- Filed a claim for damages resulting from her breakdown: deliberate or negligent infliction of mental suffering

Court found that the employer's responses to the employee were proportionate and reasonable. Court of Appeal agreed.

Case study: *Lower Mainland Better Hearing Centres v Zhang*

- Employee claimed she was forced to resign due to differences between her and the manager
- Realized this after manager criticized her job performance

Court held that:

- Employee resented criticism of her performance and work habits
- Employer was entitled to criticize its employees in good faith

Harassment vs. management functions

Harassment

- Threats
- Derogatory remarks
- Innuendos
- Jokes
- Insults
- Yelling/screaming
- Practical jokes
- Intimidation
- Condescension
- Pinching
- Requiring person to perform demeaning tasks
- Isolating individuals

Management functions

- Allocating work
- Managing absences
- Performance management
- Disciplining employees
- Taking corrective action
- Terminating employees
- Interrupting colleagues
- Talking loudly in the workplace
- Supervisory mistakes
- Initial workplace conflict
- Stressful work conditions

When to conduct an investigation

- A complaint is received
- Incident in the workplace is observed
- Legal requirement



Why investigate?

- Necessary to satisfy legal obligations
- To correct behaviour and uphold workplace standards
- Minimize reputational risk/exposure

Pre-investigation considerations

- Assess the complaint
- Review relevant policies
- Is an investigation required and/or recommended?
- If so, who should investigate?
 - internal vs. external
 - lawyer vs. non-lawyer
- If seeking to assert privilege, take due care with retainer documentation before investigation commences
- Conflict considerations

Investigation requirements

- Conducted in a timely manner
- Maintain employee privacy as much as possible
- Thorough and documented information gathering
- Investigation must be “fair”:
 - Unbiased and impartial investigator
 - Respondent/alleged harasser given opportunity to fully respond
 - All individuals who have information should be interviewed

Investigation requirements (cont'd)

- Must come to a conclusion
- Issue a final report – conclusions must be supported by the evidence
- Advise the complainant/victim and the alleged harasser
- Discipline warranted?

Privilege

- Privilege is an exception to the rule of evidence that requires the production of relevant documents by parties to a legal proceeding
- In the context of investigations, “solicitor-client privilege” is often asserted

Solicitor client privilege

- Purpose of ensuring individuals are able to freely disclose all relevant information to their counsel without fear or risk that such information will be used against them
- In context of workplace investigations, law to date suggests that reports by lawyer investigators will only be privileged when the investigator is providing legal services, as opposed to purely investigative services
- Caution in communications with investigator and take care in drafting retainer agreements

Case study: *Durham Regional Police Association v Durham Regional Police Services Board*

- Workplace investigation done by lawyer into allegations of workplace harassment
- Scope of retainer was to conduct investigation and render a written report
- NO mention of legal advice or solicitor-client privilege
- Arbitrator concluded report not protected by solicitor-client privilege

Conflict considerations

- When selecting an investigator be mindful of conflict considerations
- Law Society of Alberta Code of Conduct
- Section 4.02(1): a lawyer who appears as advocate must not testify (unless permitted to do so by law)

Components of a retainer to consider

1. Why retained and when
2. Purpose or mandate
 - workplace audit
 - fact finding
 - provide legal advice and recommendations
 - is the investigation being done in contemplation of litigation
3. Form of report
 - verbal or written
4. Identify source to deliver report
 - internal (i.e., to employer)
 - external legal counsel

Investigations

Effective

- Timely
- Thorough
- Documented
- Unbiased

Ineffective

- Delayed
- No investigation plan
- Unreasonable omissions
 - other persons with knowledge?
 - documents?
- Unreasonable conclusions
 - lacking in evidence
 - subjective views
 - overreliance on demeanour

Outcomes

Effective

- Explain process
- Communicate outcomes
- Explain conclusions

Ineffective

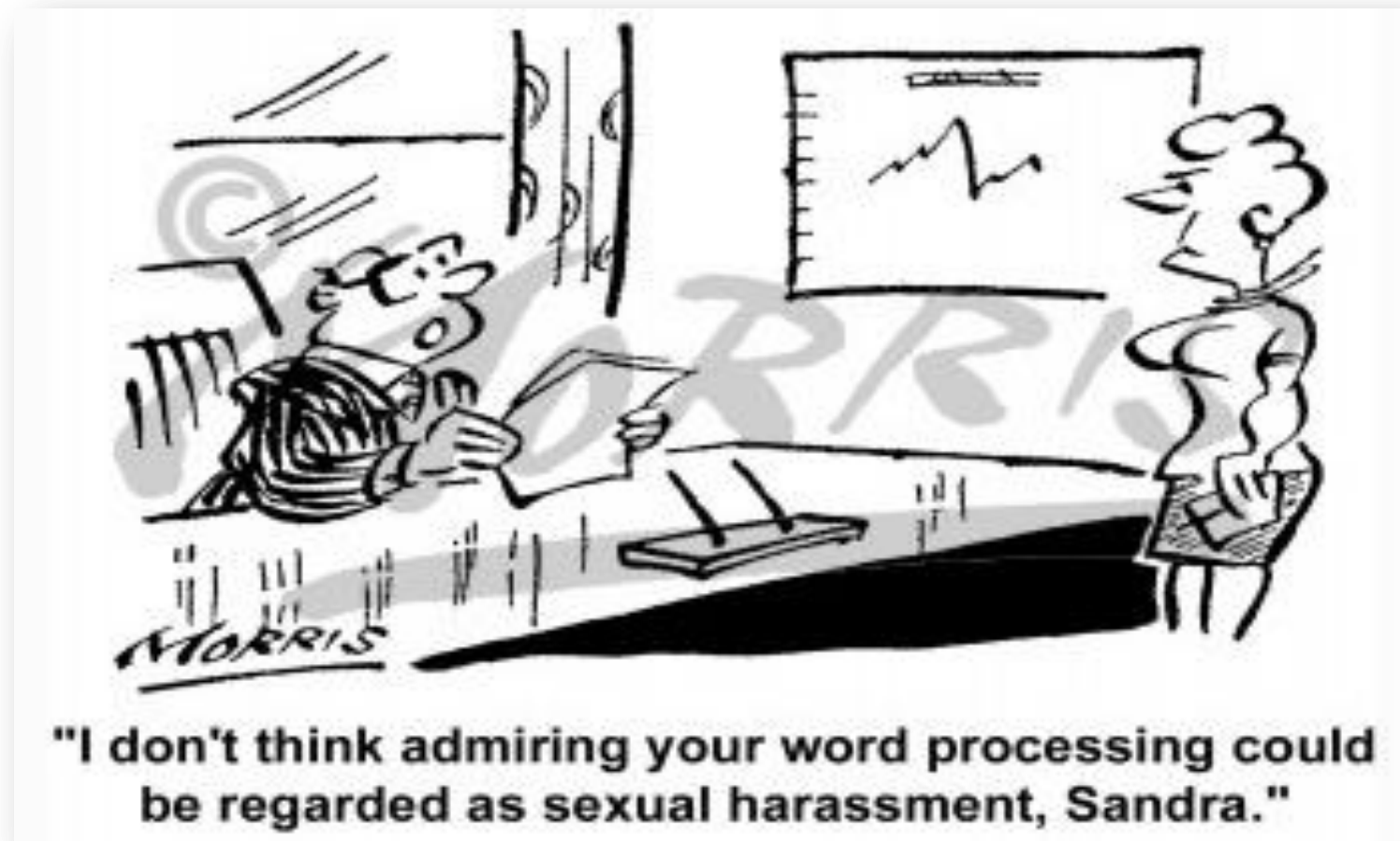
- “Unsubstantiated”
- “Uncorroborated”
- “Did not occur”
- “Unable to substantiate or corroborate”

Consequences of an improper investigation

- Significant aggravated or punitive damages
- Negate corrective action/termination



Dealing with unfounded allegations



Dealing with unfounded allegations

- Individuals now more familiar with their rights
- Increased knowledge = increase in complaints
- False allegations or misunderstanding of meaning of harassment?
- Proper investigation?
- Policy to address truly false allegations (e.g. those made in bad faith)
- Can (will not always) lead to discipline

Case study: *Hotel-Dieu v CUPE, Local 1132*

- Facts:
 - Employee had been denied a promotion
 - Went on a campaign of alleging discrimination
 - Employer had dismissed employee as a result of repeated and frivolous accusations of discrimination by her manager
 - Employee grieved
- Arbitrator found that:
 - Absolutely no basis to the allegations
 - Properly denied the promotion
 - Upheld termination

Establishing an effective workplace harassment policy:

1. Statement of intent
2. Definition of workplace harassment
3. Responsibility in reporting workplace harassment
4. Procedure for reporting workplace harassment
5. Procedure for investigating workplace harassment
6. Consequences for breaching the policy
7. False allegations
8. No retaliation
9. Privacy and confidentiality
10. Other solutions

Establishing an effective workplace harassment policy (cont'd):

Employers must:

1. Regularly train employees on the policy
2. Ensure employees understand the reporting provisions
3. **Consistently enforce the policy**



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The logo consists of a stylized, upward-pointing chevron shape in a gold color, positioned above the first letter of the text.

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