Sexual Violence and Harassment Act in Force in Ontario

June 01, 2016

As my colleague Kate Dearden first reported in our October 2015 issue, the Ontario Government introduced the *Sexual Violence and Harassment Action Plan Act* (Supporting Survivors and Challenging Sexual Violence and Harassment, 2016 (Bill 132 for short) on October 27, 2015. On March 8, 2016, Bill 132 received Royal Assent in Ontario. Bill 132 amends a number of existing statutes, including the *Limitations Act,* 2012, the Ministry of Training, Colleges and Universities Act and the *Occupational* Health and Safety Act (the "OHSA").

Bill 132 takes a comprehensive approach to sexual violence and harassment in Ontario society. It builds on the harassment and bullying reforms introduced in 2009 under the OHSA. It seeks to address sexual violence and harassment in college, university and private college settings, requiring these institutions to implement sexual violence policies. It eliminates the statutory limitation period for civil sexual assault claims. The preamble to Bill 132 announces:

The Government will not tolerate sexual violence, sexual harassment or domestic violence. Protecting all Ontarians from their devastating impact is a top Government priority and is essential for the achievement of a fair and equitable society.

All Ontarians would benefit from living without the threat and experience of sexual violence, sexual harassment, domestic violence and other forms of abuse, and all Ontarians have a role to play in stopping them.

To achieve this laudable intention, the Government requires employers to do their part in the workplace. For employers, the most significant amendments are those to the OHSA. The significant changes include:

- The existing definition of workplace harassment, established under Bill 168, is expanded to include the new workplace sexual harassment definition.
- The new workplace sexual harassment definition is:

  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 a 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 knows or ought reasonably to know that the solicitation or advance is unwelcome.

- Employers will have an obligation to advise employees who allege workplace harassment by a supervisor of the measures and procedures that they can follow.
- Procedures will have to be put in place to maintain the confidentiality of information obtained about an incident or complaint of workplace harassment, unless the disclosure is necessary for the purposes of investigating or taking corrective action with respect to the incident or complaint, or is otherwise required by law.
- Policies will need to be updated to set out how an employee who has allegedly experienced workplace harassment and the alleged harasser, if he or she is an employee, will be informed of the results of the investigation and of any corrective action that has been taken or that will be taken as a result of the investigation.
- The general obligation to protect employees from workplace harassment has been strengthened. In addition to the above, employers must ensure that an investigation is conducted into incidents and complaints of workplace harassment that is appropriate in the circumstances.
- Finally, Ministry of Labour inspectors are given new and interesting powers. An inspector may order an employer to cause an investigation into workplace harassment to be conducted, at the expense of the employer, by an impartial person possessing such knowledge, experience or qualifications as are specified by the inspector and to obtain, at the expense of the employer, a written report by that person.

These changes come into force on September 8, 2016. In the near term, employers will have to amend their existing workplace violence and bullying policies and procedures to reflect the above changes by September 8, 2016. Those policies and procedures must now be reviewed on an annual basis after September 8, 2016.

The OHSA is also amended to provide the employer with a quasi-defence to claims of workplace harassment. The OHSA expressly provides that a reasonable action taken by an employer or supervisor relating to the management and direction of employees or the workplace is not workplace harassment. Consequently, claims that a manager is harassing an employee because of a negative performance review, for example, will not constitute workplace harassment, although employers presumably will have to investigate those complaints to make this determination. A claim that a negative performance review amounts to workplace harassment will just have to continue to be dealt with in the traditional manner: with water-cooler grumbling and extended stress leaves.

In 2015, the Human Rights Tribunal of Ontario ordered the employer of two women who had been abused, harassed and sexually assaulted by the owner and principal of the employer to pay them $150,000 and $100,000 respectively for injuries to their dignity, feelings and self-respect. The women, temporary foreign workers from Mexico with little or no command of English or their legal rights, were forced to engage in numerous

unwanted sexual acts, all the while being threatened with deportation if they did not comply. The case shows that sexual harassment and sexual violence continues to occur in workplaces in Ontario. Bill 132 should go some distance to stopping this type of conduct once and for all.

By

Robert Weir

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Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749