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**TACKLING A  
SILENT EPIDEMIC**  
*HARASSMENT, BULLYING AND  
HUMAN RIGHTS*

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# TOPICS OF DISCUSSION

- > Defining harassment and bullying;
- > Proactive steps;
- > Recognizing, Documenting and Investigating cases of harassment and bullying;
- > Emergency response plans.



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# DEFINING HARASSMENT AND BULLYING

- > **“Workplace Harassment”** means 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;
  
- > **“Workplace Violence”** means,
  - (a) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker,
  - (b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker,
  - (c) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

*Source – Occupational Health and Safety Act*



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# DEFINING HARASSMENT AND BULLYING

- > The OHS Act is public welfare legislation that is designed to be remedial and prevent harm;
- > It is to be interpreted liberally in a manner that will give effect to its broad purpose and objective;
  - ▶ See *Blue Mountain Resorts Ltd. v. Den Bok et al.*, 2013 ONCA 75.



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# PROACTIVE STEPS

- > **Policies, violence and harassment:**
- > 32.0.1 (1) An employer shall,
  - (a) prepare a policy with respect to workplace violence;
  - (b) prepare a policy with respect to workplace harassment; and
  - (c) review the policies as often as is necessary, but at least annually.



# PROACTIVE STEPS

- > **Program, violence**
- > 32.0.2 (1) An employer shall develop and maintain a program to implement the policy with respect to workplace violence required under clause.
- > **Contents**
  - ▶ (2) Without limiting the generality of subsection (1), the program shall,
    - (a) include measures and procedures to control the risks identified in the assessment required under subsection 32.0.3 (1) as likely to expose a worker to physical injury;
    - (b) include measures and procedures for summoning immediate assistance when workplace violence occurs or is likely to occur;
    - (c) include measures and procedures for workers to report incidents of workplace violence to the employer or supervisor;
    - (d) set out how the employer will investigate and deal with incidents or complaints of workplace violence; and
    - (e) include any prescribed elements.



# PROACTIVE STEPS

- > **Assessment of risks of violence**
- > 32.0.3 (1) An employer shall assess the risks of workplace violence that may arise from the nature of the workplace, the type of work or the conditions of work.
  
- > **Considerations**
- > (2) The assessment shall take into account,
  - (a) circumstances that would be common to similar workplaces;
  - (b) circumstances specific to the workplace;
  - (c) any other prescribed elements.



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# PROACTIVE STEPS

- > **Information**
- > (2) An employer shall provide a worker with,
  - (a) information and instruction that is appropriate for the worker on the contents of the policy and program with respect to workplace violence; and
  - (b) any other prescribed information or instruction.





# PROACTIVE STEPS

- > **Program, harassment**
- > 32.0.6 (1) An employer shall develop and maintain a program to implement the policy with respect to workplace harassment required under clause 32.0.1 (1) (b).
  
- > **Contents**
- > (2) Without limiting the generality of subsection (1), the program shall,
  - (a) Include measures and procedures for workers to report incidents of workplace harassment to the employer or supervisor;
  - (b) set out how the employer will investigate and deal with incidents and complaints of workplace harassment; and
  - (c) include any prescribed elements.
  
- > **Information and instruction, harassment**
- > 32.0.7 An employer shall provide a worker with,
  - (a) information and instruction that is appropriate for the worker on the contents of the policy and program with respect to workplace harassment; and
  - (b) any other prescribed information.



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# PROACTIVE STEPS

- > At minimum, a workplace violence and harassment policy must fulfill the requirements of the OHSA;
- > A policy should set out the manner and structure in which incidents should be reported, the role of the parties in the investigation, and set out how the investigation will be conducted, as well as outline the circumstances when external authorities will be notified.



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# PROACTIVE STEPS

- > An employer must educate its employees on harassment and/or workplace violence;
- > An employer should clearly outline the roles and expectations of its employees, and the consequences of an employee's failure to adhere to the workplace harassment and violence policy;
- > It is recommended that training be documented and employees sign the policy to signify their understanding of the policy and the consequences of their failure to adhere to same.



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# RECOGNIZING, DOCUMENTING AND INVESTIGATING COMPLAINTS

- > Once reported, complaints should be investigated:
  - > Competently;
  - > Impartially; and
  - > Quickly.



# INVESTIGATION

- > The following inquiries should be made before an investigation is undertaken:
  1. What is the nature of the complaint?
    - > bullying, harassment, sexual, violence, etc., or some combination thereof?
  2. What is the objective of the investigation?
    - > What does the employer hope to achieve?
    - > What does the complainant hope to achieve?
  3. What is the issue that must be determined?
    - > One must know the question before setting out for the answer
    - > Asking the wrong question will lead to and improper investigation
  4. What is at stake?
    - > Reprimand, termination, criminal consequences, company image/goodwill, etc?
    - > What will the consequences be for the parties?
    - > Consequences of an incomplete, unfair or improper investigation?
  5. What is the scope of the investigation?
  6. Can the investigation be done internally or externally?
    - > Can there be impartiality with an internal investigation?



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# INVESTIGATION: GOOD PRACTICES

1. Compile all necessary information and documents regarding the complaint:
  - › Interview the complainant and obtain any documentation;
  - › Interview any and all witnesses separately;
  - › Record all interviews.
2. Fully detail the complaint and provide all information and documents (redacted where necessary to preserve confidentiality) and allow the employee to respond:
  - › Canvass any other witnesses whom may need to be consulted;
  - › Identify any other issues that may need to be addressed.
3. Record and document the investigation.
4. Draft a full and accurate report with recommendations and conclusions that are supported by the facts.
5. Communicate the outcome to the parties.
6. Retain impartiality at all times:
  - › May require an external investigation.



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# CONSEQUENCES OF A POOR INVESTIGATION

- > *Downham v. County of Lenox and Addington* (Ont. S.C.J.)
  - ▶ Employee terminated for cause after internal investigation concluded that employee had engaged in unethical conduct and abused power and trust as Manager of County;
  - ▶ Court concluded that the dismissal was wrongful and awarded damages.



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# DOWNHAM V. COUNTY OF LENOX AND ADDINGTON

- > Commenting on the investigation, the Court noted:
  - ▶ There was no effort to contact Mr. Downham at the outset to ascertain his position and to minimize the damage;
  - ▶ The investigation was biased, shoddy and substantially undocumented (despite the direction to create a paper trail), leading to false and distorted information being included in the report and the inability of Mr. Downham to respond to it;
  - ▶ Mr. Downham was treated unfairly by not being informed of the details of the allegations against him so he could give his version.





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# DOWNHAM V. COUNTY OF LENOX AND ADDINGTON

- > Commenting on the investigation, the Court noted:
  - ▶ The report of Mr. Williams was recklessly prepared and contained numerous statements of fact and conclusions which were unfounded and which would have been discovered to be false if Mrs. Beaudrie had been carefully interviewed;
  - ▶ There was no consideration given to assisting Mr. Downham as an employee. The only focus was on minimizing political fall-out and in justifying his dismissal.



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## ***DISOTELL V. KRAFT CANADA,*** **2010 ONSC 3793**

- > Case involved a failure to investigate a complaint;
- > The employee was subjected to a number of sexually derogatory comments by his co-workers;
- > When the employee complained, he received little support from his supervisors;
- > The employee ended up requiring sick leave.



## ***DISOTELL V. KRAFT CANADA***

- > None of the individuals who were named by the complainant were interviewed, nor were any other employees whom may have witnessed the comments;
- > Only supervisors were interviewed, whom had their own slant on the story;
- > Court found a failure by Kraft to adhere to its own zero tolerance harassment policy:
  - ▶ A policy is “only as effective as the individuals who administer it”;
- > The court found that the complainant had been constructively dismissed by Kraft for allowing the harassment to continue, and ordered damages equivalent to a year’s salary.



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## ***CHANDRAN V. NATIONAL BANK, 2011 ONSC 777***

- > Employee was a bank manager;
- > Results of an employee survey suggested that the manager may have engaged in bullying-like behaviour;
- > Following the results of the survey, the manager was removed from his management position and offered two alternative positions, both of which were considered to be demotions.



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## ***CHANDRAN V. NATIONAL BANK***

- > Court found that manager had been constructively dismissed;
- > The Bank failed to engage in any type of inquiry to determine if the allegations made by the employees against the manager;
- > The manager was not given any opportunity to respond to the allegations;
- > Damages awarded equivalent to 14 months of salary.



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## ***CORREIA V. CANAC KITCHENS,*** **2008 ONCA 506**

- > Employee dismissed after investigation concluded that employee had engaged in criminal conduct and theft at the workplace;
- > Third party investigation firm had been retained to conduct the investigation;
- > Results of investigation led to employee being charged criminally;
- > Employee had been confused with another employee whom had a similar name with similar spelling.



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## ***CORREIA V. CANAC KITCHENS***

- > Appeal from a motion for summary judgment;
- > ONCA held that a third party investigation firm may be found liable for negligent investigation:
  - ▶ While applicable to a third party investigation, it demonstrates the importance of meticulous record keeping during an investigation.
- > ONCA also held that there was a triable issue as to whether the employer had committed the tort of intentional infliction of mental distress.



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# HUMAN RIGHTS

- > *MacLeod v. The Corporation of the County of Lambton*
  - ▶ Investigation of an employee that failed to take into consideration the employee's bi-polar disorder;
  - ▶ The employee was demoted as a result of conduct directly related to the employee's condition and without any consideration of whether the employee's condition could be accommodated without undue hardship.





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## ***MACLEOD V. COUNTY OF LAMBTON***

- > The Human Rights Tribunal of Ontario concluded that the employee's human rights were violated and ordered the employee to be reinstated to his former position with back pay and general damages;
- > The decision is a reminder that an employer must be cognizant of any disability related issues that may require accommodation under the Ontario Human Rights Code;
- > An employee cannot be demoted for disability related behaviour unless accommodating would cause the employer undue hardship.



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# EMERGENCY RESPONSE PLAN

- > Public relations exercise;
- > Good to prepare an “emergency response plan” in situations of a public complaint;
- > A press release defending the integrity of the workplace harassment and violence policies and internal investigations process;
- > Preparation and prevention is the best plan:
  - ▶ A clear and strong workplace harassment and violence policy, which is adhered to and consistently implemented, will go a long way in the Court of “public opinion” and has a better chance of withstanding scrutiny in litigation.



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# CONCLUSION

> Questions?

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Thank You.