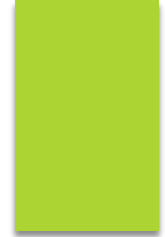




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# Sex Drugs Rock and Role

How to understand your role and not get caught under  
a rock as #MeToo and cannabis legislation  
changes the workplace 2018



## ***Sexual Harassment in the Workplace***

#MeToo and other social media movements have highlighted the widespread and unacceptable prevalence of harassment in the workplace.

Recent statistics provide that 33% of female respondents and 12 % of males say they have been sexually harassed at work<sup>1</sup>

Employers have a positive duty to their employees to “ensure that the work atmosphere is conducive to the well-being of its employees.”



## Legislation:

The Ontario Human Rights Code, R.S.O. 1990, Chapter H.19 defines harassment as:

*Engaging in a course of vexatious comment or conduct that is known, or ought reasonably to be known, to be unwelcome.*

The HR Commission explains that:

Sexual harassment is a type of discrimination based on sex. When someone is sexually harassed in the workplace, it can undermine their sense of personal dignity. It can prevent them from earning a living, doing their job effectively, or reaching their full potential. Sexual harassment can also poison the environment for everyone else. If left unchecked, sexual harassment in the workplace has the potential to escalate to violent behavior.



The **Occupational Health and Safety Act**, R.S.O. 1990, Chapter O.1 also mirrors this same definition of harassment as:

*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.*



**Bill 168** – June 15, 2010 – mandated employers devise workplace violence and harassment policies, develop programs, engage in assessments to measure the risk of workplace harassment.

**Bill 132** – March 8, 2016 – expanded requirements and protections and created additional obligations for employers to conduct investigations into incidents and complaints of harassment.

**Bill 177** – December 14, 2017 – Created harsher penalties for employers failing to prevent workplace harassment – penalties increased from \$25,000 to \$100,000 for individuals and from \$500,000 to \$1,500,000 for corporations convicted of an offence.




## ***Shoan v. Attorney General of Canada, 2016 FC 1003***

This decision is an excellent reminder of the importance of conducting a fair and unbiased workplace investigation.

Shoan was a Commissioner of the CRTC. A colleague filed a harassment complaint against him under the CRTC's Harassment policy, in relation to a series of emails that Shoan sent her that she alleged were humiliating and undermined her credibility.

An external investigator was retained who ultimately found that Shoan's behaviour constituted harassment. The Chairman of the CRTC received and reviewed the Investigation Report and accepted it, and implemented corrective measures against Shoan.



Justice Zinn of the Federal Court granted the JR application, holding that the investigation violated the standards of procedural fairness and the Investigation Report and the decision of the Chairman was set aside.

The basis for the decision was that there was an apprehension of bias on the part of the investigator.

Examples of this were that the Investigator was argumentative and interrupted him, shook her head and frowned openly, and that the other witness gave evidence that they felt from their interviews with the investigator that the outcome of the investigation was predetermined.



## Take Away

Under the OHSA, employers must provide the same rights and courtesies to the complainant as to the respondent

Workplace investigators must also remain neutral and maintain the appearance of neutrality throughout the process, and stick to the mandate provided when retained.




# Constructive Dismissal



When you have harassing behavior directed toward an employee this can constitute grounds for constructive dismissal.

The idea is that when an employer treats an employee in an abusive fashion on a regular basis, and it is reasonable that the behavior is intentional, it is perceived that the behavior is designed to make the workplace so uncomfortable for the employee that they will want to leave.

This is seen as a breach of a fundamental term of employment that "an employer will treat an employee with civility, decency, respect, and dignity."



These cases typically compensate employees with pay in lieu of notice although recently there have been some expanded remedies available to harassed employees that include additional damages, including damages for psychological injuries sustained as a result of the harassment.

# Tort of Infliction of Mental Distress



Courts have adopted a personal injury approach to compensate an employee rendered incapable of working as a result of serious workplace harassment.

In *Sulz v. Canada (Attorney General)* an RCMP officer was harassed by her immediate supervisor to the extent that she became so clinically depressed she had no choice but to accept a medical discharge.

In that case the trial judge held that her supervisor owed her a duty of care which he clearly breached in behaving as he did. The RCMP was found vicariously liable for the behavior and Sulz was awarded damages for psychological harm, past wages lost and lost of future earning capacity.

Other cases (*Boucher v. Wal-Mart Canada*) have also been awarded punitive, aggravated damages and damages for intentional infliction of mental distress.

# Tort of Harassment



In *Merrifield v. The Attorney General* the court found the employer liable for the tort of harassment for the first time.

Again, it's the RCMP...

Court set out a four-part test:

1. Was the conduct of the defendants toward the plaintiff outrageous?
2. Did the defendants intend to cause emotional stress, or did they have a reckless disregard for causing the plaintiff to suffer from emotional stress?
3. Did the plaintiff suffer from severe or extreme emotional distress?
4. Was the outrageous conduct of the defendants the actual or proximate cause of the emotional distress?



## Take Away

It is remarkable how fast the remedies for harassment in the workplace have expanded and the expansion of liability for the employer confronted with such allegations under both legislation and common law.

If you are the employer in receipt of a harassment complaint, take it very seriously.



## Drugs

### *The Cannabis Act*, Bill C-45

The act will allow adults to possess and access regulated, controlled legal cannabis and restrict youth access to cannabis – coming into force October 17, 2018.

In anticipation Ontario passed the *Cannabis Act, 2017* which establishes prohibitions relating to sale, distribution, purchase, possession, cultivation, propagation and harvesting of cannabis in Ontario.

There is a separate regime governing medical cannabis, wherein individuals who have an authorization from a healthcare provider to use cannabis for medical purposes and purchase cannabis through a federally licensed producer.



## OHSA

Under the *Occupational Health and Safety Act* the consumption of Cannabis is prohibited in a public place and a workplace.

Exceptions may exist for persons who consume cannabis for medical purposes, subject to any prohibitions under the new *Smoke Free Ontario Act, 2017* and its regulations (in force July 1, 2018)

# What does this mean?

In preparing your workplace for the pending reforms, keep in mind:

1. Employees do not have a right to be impaired in the workplace;
2. Employers have a legal obligation to accommodate medical cannabis; but there is no duty with respect to recreational cannabis use.
3. The Ontario Cannabis Act prohibits cannabis use in the workplace
4. Dependence on recreational cannabis may be, in and of itself, a disability requiring accommodation under the Ontario Human Rights code
5. Presently there is no accurate measurement of cannabis impairment
6. Drug testing in the workplace is permissible in only limited circumstances



## Stewart v. Elk Valley Coal Corp, 2017 SCC 30

In this case, the Supreme Court of Canada upheld that a cocaine-addicted heavy machine operator, who was fired after he got into an accident at work and subsequently tested positive for drugs, was not terminated because of his perceived addiction.

Elk Valley's workplace was considered to be a safety-sensitive environment, and the employer's drug and alcohol policy, which Stewart has previously reviewed and signed, encouraged employees to disclose abuse, dependency or addiction BEFORE an incident occurred by offering treatment rather than discipline in such circumstances. Emphasizing deterrence and safety, the Policy explained that violations would result in termination of employment unless this would be unjust in all of the circumstances. The employee was found to have been terminated for breach of the policy, not because of his addiction.

# Medical Cannabis



Properly prescribed and supported by a drug card, medical marijuana can be a legal form of medication that employers may be required to allow as an employee's drug of choice and therefore permitted in the workplace.

Despite this, employees do not have the right to consume cannabis whenever and wherever they choose, nor do they have the right to be impaired, particularly in safety sensitive positions or workplaces.

# Disability Management & Accommodation



Assessing and meeting the duty to accommodate requires evaluation based on an individualized, employee-specific basis using general criteria.

The courts have recognized disability as it relates to marijuana use both in terms of having a medical condition for which a cannabis product has been prescribed, as well as a substance dependency and drug addiction, which could include cannabis.

Employee must establish that a disability exists for which cannabis is required and that the cannabis has been medically authorized.

Then there must be an assessment and investigation of accommodation options to the point of 'undue hardship', taking into account factors including, but not limited to, cost, outside sources of funding and health and safety requirements.



## Take Away

The newly minted legislative changes necessitate review and updating of policies, procedures and employment contracts.

Safety- sensitive environments will have to carefully balance the tension between safety and privacy interests when it comes to testing and how to manage the risk of impairment in the workplace.

Accommodation in the workplace may be required but only where accommodation requirements are properly raised and if necessary, met, and that safety and performance issues can be adequately addressed while maintaining the privacy, dignity and respect of the employees.



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