
**THE OTTAWA REGION
Charity & Not-for-Profit Law Seminar**

Ottawa – February 2, 2012

**Workplace Harassment:
What Employers Need to Know**

By Barry W. Kwasniewski, B.A., LL.B.


bwk@carters.ca
1-866-388-9596

© 2012 Carters Professional Corporation

CARTERS

Carters Professional Corporation / Société professionnelle Carters
Barristers · Solicitors · Trade-mark Agents / Avocats et agents de marques de commerce
www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca

Ottawa · Toronto
Mississauga · Orangeville
Toll Free: 1-877-942-0001



BARRISTERS
SOLICITORS
TRADEMARK AGENTS

**THE OTTAWA REGION
Charity & Not-for-Profit Law
Seminar
Ottawa – February 2, 2012**

**Workplace Harassment:
What Employers Need to Know**

By **Barry W. Kwasniewski, B.B.A., LL.B.**
bww@carters.ca
1-877-942-0001

© 2012 Carters Professional Corporation

CARTERS PROFESSIONAL CORPORATION Ottawa Toronto Mississauga Orangeville
TOLL FREE: 1-877-942-0001 www.carters.ca www.charitylaw.ca www.anti-terrorismlaw.ca

2

A. WHAT IS WORKPLACE HARASSMENT?

- Workplace harassment is broadly defined as “engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known as unwelcome”
- Two different statutes use this definition in establishing an employer’s obligations: the *Ontario Human Rights Code* and the *Ontario Occupational Health and Safety Act*
- This presentation will define workplace harassment, provide an overview of workplace harassment under both statutes and common law, and will explain what employers can do to reduce their liability risk in this area

www.charitylaw.ca www.carters.ca

3

B. WHY IS THIS ISSUE IMPORTANT FOR CHURCHES, CHARITIES AND NOT-FOR-PROFITS?

- Because churches, charities and not-for-profits are also usually employers
- Because employers have new obligations under the *Occupational Health and Safety Act*
- Because harassment can occur in any workplace
- Because any employer can be held liable for the actions of its employees, under the right circumstances
- Because taking early steps to address workplace harassment helps to create a safe and productive working environment

www.charitylaw.ca www.carters.ca

4

C. WHAT IS WORKPLACE HARASSMENT UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT?

- In June 2010, new requirements relating to workplace harassment and violence came into force under the OHSA
- Employer requirements relating to workplace violence are much greater than those relating to harassment – they will not be covered in this presentation

www.charitylaw.ca www.carters.ca

5

- The definition of workplace harassment under the OHSA is “engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known as unwelcome” : s.1
- Workplace harassment can involve unwelcome words or actions that are offensive, embarrassing, humiliating, or demeaning to a worker or group of workers

www.charitylaw.ca www.carters.ca

6

- Comments or conduct typically happen more than once, over a short or long period of time
- This definition relates to harassment against a worker in a workplace
 - A “worker” means a person who performs work or supplies services for monetary compensation
 - A “workplace” means any land, premises, location or thing at, upon, in or near which a worker works

www.charitylaw.ca www.carters.ca

7

D. EXAMPLES OF HARASSMENT UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

- Comments or jokes that demean, ridicule, intimidate or offend
- Displaying or circulating offensive pictures in print form or electronically
- Bullying
- Undue and hostile criticism, or berating
- Offensive or intimidating phone calls or e-mails
- Inappropriate touching, advances, suggestions or requests
- Any actions that qualify as harassment under the *Human Rights Code*

www.charitylaw.ca www.carters.ca

8

E. WHAT IS WORKPLACE HARASSMENT UNDER THE HUMAN RIGHTS CODE?

- Harassment under the *Code* follows the same basic definition of “engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known as unwelcome”: s.10(1)
- However, workplace harassment under the *Code* relates only to behaviour that targets a person or group of people because of a particular characteristic – these characteristics are known as “prohibited grounds”

www.charitylaw.ca www.carters.ca

9

- The prohibited grounds of harassment in employment are:
 - Race
 - Ancestry
 - Place of origin
 - Colour
 - Ethnic origin
 - Citizenship
 - Creed
 - Age
 - Record of offences
 - Marital status
 - Family status
 - Disability
 - Sex

www.charitylaw.ca www.carters.ca

10

- The Code has three provisions that deal with workplace harassment:
 - Section 5(2) provides that an employee has a right to be free from harassment in the workplace by an employer or an employee on the prohibited grounds previously discussed
 - Section 7(2) provides that an employee has the right to be free from harassment in the workplace because of his or her sex
 - Section 7(3) provides that an employee has the right to be free from sexual solicitation from a person in a position to deny or confer benefit AND from reprisal for the rejection of the sexual solicitation

www.charitylaw.ca www.carters.ca

11

- As with harassment under the *Occupational Health and Safety Act*, harassment requires a "course of conduct" such as a pattern of behaviour
- However, one significant incident can be offensive enough to constitute harassment
- Whether harassment has occurred is determined on a subjective and objective basis: how would the conduct be viewed by a reasonable person, taking into account the perspective of the person being harassed
- The subjective view of the alleged harasser will not determine whether or not harassment occurred

www.charitylaw.ca www.carters.ca

12

F. WHAT DO SOME OF THESE PROHIBITED GROUNDS ACTUALLY MEAN?

- While some of the prohibited grounds of harassment are straightforward, others encompass more than people often think
- What does harassment on the basis of "race" mean?
 - Includes physical characteristics associated with a group, such as skin colour or shape and size of physical features
 - Includes other characteristics that are related to race, such as:
 - Language
 - Accent
 - Name
 - Clothing/grooming
 - Diet
 - Beliefs and practices
 - Leisure preferences

www.charitylaw.ca www.carters.ca

13

- What does harassment on the basis of “creed” mean?
 - “Creed” is broadly defined as religion, and includes faith, beliefs, observances or worship
 - It includes any religious beliefs, practices and observances, as long as they are sincerely held
 - Creed is not limited to beliefs in a single deity or multiple supreme beings. For example, the Ontario Human Rights Tribunal recently held that the practice of “Falun Gong” is a creed:
Huang v. 1233065 Ontario Ltd. 2011 HRTO 825

www.charitylaw.ca www.carters.ca

14

- What is harassment on the basis of sex?
 - Harassment on the basis of sex includes inappropriate gender related conduct or comments and sexual harassment
 - In *Janzen v. Platy Enterprises Ltd. (1989)*, the Supreme Court of Canada defined sexual harassment as follows:
 - “sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment”

www.charitylaw.ca www.carters.ca

15

- Inappropriate gender related conduct or comments may relate to
 - Gender-based ideas about how men or women should look, dress or behave
 - Gender identity
 - This refers to a person’s identification as a particular gender, and may or may not be related to sexual orientation
 - Sexual Orientation

www.charitylaw.ca www.carters.ca

16

G. WHAT IS NOT WORKPLACE HARASSMENT?

- Employers may sometimes be concerned that they are not able to question or reprimand an employee for fear of a claim of workplace harassment
- It is not workplace harassment for an employer to:
 - Be critical of an employee for unsatisfactory work
 - Try to remedy unsatisfactory employee performance through disciplinary measures
 - Investigate workplace misconduct – so long as there is a basis for it
- In a recent British Columbia case, *Grewal v. Khalsa Credit Union*, 2011 BCSC 648, the court held that an employer had just cause to terminate an employee who made false claims of harassment

www.charitylaw.ca www.carters.ca

17

H. THE LAWS AGAINST WORKPLACE HARASSMENT: THE *OCCUPATIONAL HEALTH & SAFETY ACT (OHSA)*

- The OHSA requirements relate to development and implementation of workplace harassment policies – they are intended to resolve allegations of harassment in the workplace
 - Employers must prepare a policy with respect to workplace harassment and review it as often as necessary, but at least annually (Section 32.0.1)
 - The policy must be written and posted in a conspicuous place if 6 or more workers are regularly employed at the workplace (Section 32.0.1)

www.charitylaw.ca www.carters.ca

18

- Employers must develop and maintain a program to implement the workplace harassment policy (Section 32.0.6)
- The program must
 - Include procedures for workers to report incidents to the employer or supervisor; and
 - Set out how the employer will investigate and deal with complaints
- Employers must provide workers with information and instruction that is appropriate for the worker on the contents of the policy and the program (Section 32.0.7)

www.charitylaw.ca www.carters.ca

19

- Ontario Ministry of Labour health and safety inspectors may check your workplace to ensure employers are complying with these workplace harassment requirements.
- They may issue written orders to comply with the OHSA when violations are found (section 57 OHSA)
- The Ministry may also prosecute an employer, supervisor or worker if a contravention is found or they have failed to comply with an order (section 66(1) OHSA)
- However, the Ministry does not resolve or mediate specific allegations of harassment in the workplace

www.charitylaw.ca www.carters.ca

20

- However, employees may still have recourse for workplace harassment or failure to comply with workplace harassment policies at the Human Rights Tribunal or in court
- Individuals can be fined up to \$25,000 for a contravention of the OHSA
- Corporations can be fined up to \$500,000 for a contravention of the OHSA

www.charitylaw.ca www.carters.ca

21

I. THE LAWS AGAINST WORKPLACE HARASSMENT: THE HUMAN RIGHTS CODE (THE CODE)

- An employee can seek redress for harassment from the Tribunal for up to one year after the violation occurs (or two years if redress is instead sought in court)
- Under section 45.2(1), the Tribunal has the power to order
 - That the party who infringed the right pay monetary compensation to the victim, for his or her loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect
 - That the party who infringed the right make restitution

www.charitylaw.ca www.carters.ca

22

- That any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with the Code
- Employers can also be held liable by the Tribunal for the harassment of their employees if:
 - They knew or ought to have known that harassment was occurring and took insufficient steps to prevent it
 - The harassing employee is a part of the “directing mind” of the organization
 - A “directing mind” is a manager, central decision maker or representative
 - They allowed a “poisoned work environment”
 - This occurs when insulting or degrading comments or conduct have an influence on others and how they are treated

www.charitylaw.ca www.carters.ca

23

J. THE LIABILITY RISKS ARISING FROM HARASSMENT CLAIMS: HUMAN RIGHTS CODE

- Persons, including employers, can also be fined up to \$25,000 for a contravention of the Code: s.46.2(1)
- Proceedings may be commenced on authority of Attorney General of Ontario
- The Code gives authority to the Courts to adjudicate on human rights matters – so long as the matter is not wholly a human rights matter
 - Damage awards tend to be higher in court matters because courts can award legal costs and punitive damages as well as separate awards under the Code

www.charitylaw.ca www.carters.ca

24

K. THE LIABILITY RISKS ARISING FROM HARASSMENT CLAIMS: COMMON LAW LIABILITY

- In addition to liability under statute, employers may face common law liability for harassment under the doctrine of “constructive dismissal”, or “intentional or negligent infliction of mental suffering”
- “Constructive dismissal” might be found where an employee resigns as a result of harassment
 - The law considers such a resignation to actually be a termination where the employer created or allowed intolerable employment conditions
 - As such, an employee who is constructively dismissed will generally be entitled to pay in lieu of termination notice as well as possible damage entitlements under the *Human Rights Code*

www.charitylaw.ca www.carters.ca

25

- In order to determine whether a resignation is a constructive dismissal, the courts apply an objective test:
 - Whether the conduct was such that a reasonable person in the circumstances should not be expected to continue in the employment
- Constructive dismissal need not involve harassment on the on the basis of human rights grounds, but can include other situations where the workplace atmosphere becomes intolerable as a result of employer behaviour

www.charitylaw.ca www.carters.ca

26

- Very serious cases of harassment can result in large damages awards, particularly if a court finds there was infliction of mental suffering by the employer
- In *Sulz v. Canada*, an RCMP officer was harassed by her supervisor, and consequently suffered major depressive disorder, was awarded these amounts by the BC Supreme Court:
 - \$125,000 general damages for pain and suffering
 - \$225,000 for loss of wages up to trial
 - \$600,000 for loss of future income

www.charitylaw.ca www.carters.ca

27

L. HOW TO PREVENT OR MINIMIZE CLAIMS FOR WORKPLACE HARASSMENT

- An employer's prevention of and response to claims of workplace harassment can have a fundamental impact on the employer's liability
- Preventing Liability
 - As previously discussed, an employer will be held liable for harassment if it does not take steps to provide employees with a harassment-free workplace
 - It is therefore extremely important to make sincere efforts to provide a harassment-free environment

www.charitylaw.ca www.carters.ca
