



Bennett Jones



# Harassment Investigations

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# Today's Discussion

## **Part 1**

- › What is Harassment?

## **Part 2**

- › Legal Landscape

## **Part 3**

- › Best Practices in Investigations

## **Part 4**

- › Finalizing an Investigation

## **Part 5**

- › Legal Outcomes

## **Part 6**

- › Questions

# Scenario

- › At work Jaq comes in and closes the door – visibly upset
- › Jaq tells you that a month ago they were on a business trip with Alex, her boss
  - › She thinks comment was overheard by another colleague
- › During that trip, Alex told Jaq that she was “sexy” and asked whether she was married
- › Jaq told you that she rebuffed Alex
- › This morning, Jaq received a bad performance review from Alex
- › Jaq does not want you to say anything
  - › Wants to quit because she believes she has been a good performer
- › What next?

# Part 1: What is Harassment?



# What is Harassment?



<sup>1</sup> Angus Reid Institute Poll 2018

<sup>2</sup> Government of Canada Survey 2018 and "Harassment and Sexual Violence in the Workplace Public Consultations -What We Heard Report" 2018.

<sup>3</sup> Canada Gazette, part 1. Vol. 153, number 17: Workplace Harassment and Violence Prevention Regulations

## Why employees Do Not Report:

41% concerned that employer will not try to resolve  
34% worried about being regarded as a troublemaker  
27% fear retaliation by harasser

## Impact on Workplace Productivity:

A reduction of 1.8% in prevalence of workplace harassment and violence will increase productivity by 9 cents per hour worked or GDP growth of 840 million in Canada<sup>3</sup>

# Linkages to Other Workplace Issues

## Employer Policies:

- › Diversity in the workplace is positively correlated with diminished harassment
- › Employee wellness and mental health policies assists with building resilience in workplace
- › Staff engagement levels inversely correlated with levels of harassment

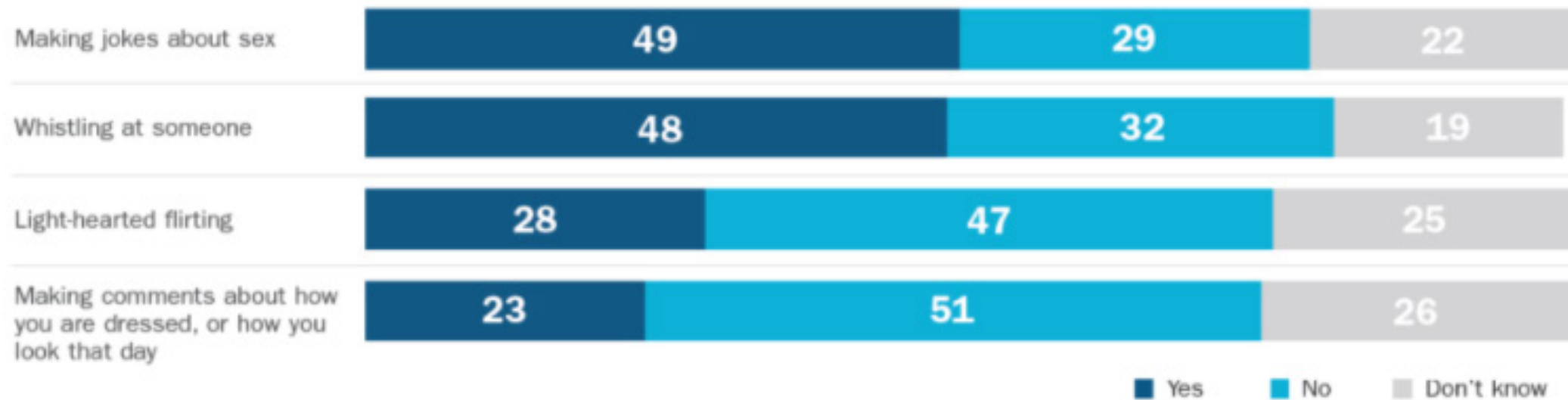
## Related Legislation that assist women in the workplace:

- › New employment standards with personal leaves, leaves for victims of family violence, work-life balance, part time and temporary agency worker protections
- › Pay and employment equity increase status of women in workplace
- › Transparency of wage gaps

# But how is “harassment” defined?

- › News/recent events
- › Familiar with the term “harassment” but what does it mean?
  - › 66% of Canadians describe themselves as having a “good understanding” of sexual harassment
  - › 7% have “poor understanding”\*\*

# Yet...



Navigator: Sexual Harassment in the Workplace:  
The Public's Perspective (March 13, 2018)

# Gender Differences In Perceptions of Harassment

- › Women (88%) than men (74%) feel it was a serious or very serious issue
- › 24% of Canadians reported that they had experienced sexual harassment in the workplace
- › Women are considerably more likely than men to report that they have been victims of harassment
  - › Women (34%) > than men (12%)
- › 61% of men believe pendulum has swung too far while only 48% of women agree

# Part 2: Legal Landscape



# What is Harassment?

In Ontario, it is a defined legal term under:

- › the *Human Rights Code* (the “Code”); and
- › the *Occupational Health and Safety Act* (“OHSA”)

# The Human Rights Code

- › Prohibits discrimination in certain areas: services, accommodation, contracts, vocational associations and **employment**
- › In Ontario, Code provides protection in employment from **discrimination** due to a protected ground
- › What is “**discrimination**”?
- › What is a **protected ground**?
  - age, ancestry, colour, race, citizenship, ethnic origin, place of origin, creed, disability, family status, marital status (including single status), gender identity, gender expression, record of offences, sex (including pregnancy and breastfeeding), sexual orientation

# *Occupational Health and Safety Act (“OHSA”)*

- › Similar definition to the Code
- › EXCEPT broader application (i.e. no protected grounds)
- › Includes “sexual harassment”

# Legal/Policy Definition: Harassment

“[...] engaging in a course of vexatious comments or conduct against an employee in a workplace that is known or should be reasonably known to be unwelcome.”

“[Every employee has a right to be free from workplace harassment.]”

Includes “sexual harassment”

# What do these terms mean?

- › What do these terms mean?
  - › “engaging in a course”
    - › Is it always “engaging in a course”?
  - › “vexatious”
  - › “should be reasonably known”
  - › “every employee has a right to be free from workplace harassment”
  - › “sexual harassment”

# Legal/Policy Definition: Workplace Sexual Harassment

“[...] engaging in a course of vexatious comments or conduct against an employee in the workplace because of sex, sexual orientation, gender identity, where the course of comment or conduct is known or should be reasonably known to be unwelcome. Workplace sexual harassment also includes making a sexual solicitation or advance, where the person making the solicitation or advance is in a position to confer, grant or deny a work-related benefit or advancement to the recipient, and the person making the solicitation or advance knows or reasonably ought to know that it is unwelcome.”

# What is sexual harassment?

## Quid pro quo vs toxic work environment

- › different sex
- › same sex
- › non-identifying gender

# What is the “Workplace”?

- › work-related travel
- › restaurants, hotels or meeting facilities being used for business purposes
- › facilities owned or leased by company
- › telephone, e-mail, social media and other communications
- › at any related social event

# What is not considered Harassment

- › Reasonable person (in position of applicant)
- › Person shows interest—other does not object—not harassment
- › Workplace direction (even if negative consequences)
- › Performance management

# What is an investigation?

***Taylor v. International Financial Data Services (Canada) Ltd.* (Ontario Labour Relations Board, May 2018)**

VS

***Stone v. CPA Ontario* (Ontario Labour Relations Board, October 2018)**

# Federal Definition of “Harassment”

- › **Bill C-65** defines **harassment** and violence as any action, conduct or comment, including of a sexual nature, which can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment.

# Legal Landscape: Federal Approach Based on Three Pillars

## **Prevention:**

- › Policies, mandatory training, leadership at the top, report and track

## **Respond:**

- › Who can complain
- › Who can complaints come to
- › When responding, what different approaches on a spectrum of formality are permissible
- › Timely redress and privacy considerations

## **Support to Parties:**

- › Soft resources
- › Ongoing communications
- › Financial resources?

# Prevention: Building a Culture of Respect

## Policy Contents

- › Definition of harassment and how to distinguish from performance management
- › Options and steps an employee can take
- › Due process for alleged harassers
- › Who can complain
- › Training available
- › Role of various workplace committees
- › Times lines
- › Confidentiality
- › Definition of the workplace
- › Domestic Violence that comes into workplace
- › Types of Discipline that can result
- › Reporting requirements on employer

## Training

- › Mandatory for employers, managerial and supervisory staff, employees, workplace committees, health and safety representatives
- › List of components of training will be set out in regulations
- › Training every 3 years or when assigned a new task where there is increased risks

# Respond: Employer Duty to Meaningfully Attempt to Resolve a Complaint

## Who can complain

- › Employee or *Bystander* can complain. Employee may have left employment for up to three months.
- › Regulations provide that *employee can have a representative*

## Where to complain

- › Immediate supervisor or where that is person being complained of then *another designated person by the employer*, eg. HR rep.

## Process for Resolution

- › Determination of whether to investigate. *Resolution can be informal*, with aid of a mediator or conciliator or move to a formal investigation.

## Responding to an Investigator Report

- › Need not do everything investigator recommends but must *implement as much as reasonably practical*.

# Support : Least Developed Part of Toolkit

- › Ongoing communications with parties as to status
- › Separation of complainant and alleged harasser
- › Medical and psychological benefit support
- › Assistance with WCB claims
- › Local community resources available
- › Potential for peer support or workplace committee support or union to help disseminate information
- › In federal sector, 1-800 tel number for information

# Part 3: Best Practices in Investigations



# Framework for Investigating Complaints

- › Internal or External Investigator?
- › Who should retain the investigator?
- › Interim Steps?

# Best Practices: Statutory Time Lines

## General

- › Often, the faster the resolution, the better to avoid poisoned workplaces.
- › Employer can be excused from deadlines where there is a valid reason, e.g. one party is not available

## Timelines

- › Employer to acknowledge receipt of complaint no later than **5 days** of receipt
- › Parties to receive **monthly** updates on status of complaint
- › Parties to agree as soon as possible but no later than **2 months** on investigator
- › Investigator to move as expeditiously as possible but no later than **6 months** to provide parties with a copy of report
- › Employer is supposed to implement recommendation as soon as possible but no later than **6 months**

# Governance and Strategic Considerations

What happens if complaint involves CEO/President or Board member?

- › What is internal counsel's role?
- › Should internal counsel recuse themselves?
- › When/how to recommend striking an internal board committee?

# External Resources

## Law firms

- › Advice on governance
- › Who should investigate

## Media relations/communications

- › Who to involve?
- › When?

# Part 4: Finalizing an Investigation



# How to Report Findings

- › To the Complainant
- › To the Alleged Wrongdoer
- › Possible Corrective Measures

# Part 5: Legal Outcomes



# Legal Outcomes

- › Scenario where complainant having performance concerns
  - Strategic considerations (cause / not cause)
  - Reprisal complaints
  - Forum
  - Law
- › Defamation lawsuits
- › Class actions

# Avoiding Multiple Proceedings

## **Appeals Under Occupational Health and Safety Regime:**

- › At any stage an employee can appeal a breach of the statute, eg. missed time frames, absence of any training, employer failure to implement.
- › However, the appeal cannot be simply about do not like recommendations of the report as the Labour Program will not be second-guessing recommendations.
- › Minister has the power not to investigate where there are other processes ongoing or where it is an abuse of process

## **Other Avenues for Redress:**

- › **Labour grievances**
  - Concern about Arbitrator redoing the harassment investigation because the report is either not of good quality or regarded as hearsay
  - Arbitrator may have particular harassment complaint as only one part of reason for discipline
- › **Human rights complaints**
  - Cannot stop filing of a complaint but can ask Commission to hold investigation in abeyance pending outcome of processes used elsewhere

# Other Legal Outcomes

On Court of Appeal ruling that there is no tort of harassment  
› Merrifield v. Canada (Attorney General) March 2019

Injunctive relief

› At least two cases to consider, but unsuccessful

# Recent expansion of entitlement to damages in harassment cases:

1. Watson v Governing Council of Salvation Army ([Ont.SC](#), 2018)
2. AB v Joe Singer (HRTO, 2018)

# Non-Legal Outcomes

## Loss of control

- › Individual
- › Organization

## Costs

- › Personal
- › Organizational
- › Money and reputation

# Revisiting Scenario..

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- › Jaq tells you that a month ago they were on a business trip with Alex, her boss
  - › She thinks comment was overheard by another colleague
- › During that trip, Alex told Jaq that she was “sexy” and asked whether she was married
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# Part 6: Questions

