Member's Quarterly Fall 2018 Edition

Feature

# Employers' Obligation to Provide Safe Work Environments

*Contracting out is not an option*

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There is little doubt that the allegations against Harvey Weinstein and the avalanche of others that followed have shaped a broad conversation around workplace sexual assault, harassment, gender bias and discrimination, among others. But the allegations have also shone a spotlight on employers' roles in creating a healthy and respectful workplace. The Weinstein Company found its own conduct and reputation as the focus of intense scrutiny for its alleged handling of Harvey's past and future behaviour. This raises many questions around employers' own conduct or misconduct, as the case may be.

I've never seen Harvey's contract. But for the sake of creating an interesting case study, let's assume the following facts are true: It is alleged that the Weinstein Company knew of decades of allegations against Harvey of sexual harassment and assault against women. It is further alleged that the Weinstein Company financially contributed toward settlements with several of those victims. What is perhaps most troubling is the rumour that the Weinstein Company, in an effort to contain or manage his conduct, consequently entered into an employment agreement with Harvey in 2015 which contained the following terms:

- If Harvey is sued for sexual harassment, the Weinstein Company will pay for the settlements or judgments against Harvey;
- In that case, Harvey could keep his job but would have to reimburse his employer for settlements and judgments paid on his behalf; and
- Harvey would also pay penalties to the Weinstein Company on an escalating scale: $250,000 for the first offence, $500,000 for the second, $750,000 for the third and then $1,000,000 for each offence thereafter.

Shortly after the story broke in 2017, Harvey alleged he had a sex addiction and was seeking treatment. Facing intense public and industry pressure, the Weinstein Company allegedly terminated Harvey. Then speculation began about whether Harvey might sue the very company he founded for wrongful dismissal. There is some argument that by allegedly entering into such a penalty clause, the Weinstein Company cannot later terminate Harvey for allegations of sexual harassment or assault provided that he continued to reimburse the company for settlements/judgments and pay the escalating penalties. Fascinating, to say the least.

**Ignoring known misconduct or criminal activity.** Although these facts play out in an American jurisdiction, employers in Alberta and likely all Canadian jurisdictions have a duty to provide a safe working environment that is free from discriminatory practices. In our case study above, the Weinstein Company not only knew that Harvey was engaged in serious misconduct but actually condoned that activity by crafting a "get out of jail free" clause in the employment contract. It would certainly appear contradictory in law for the Weinstein Company to on one hand allow Harvey to purchase forgiveness from his employer, while on the other hand relying upon that misconduct as a ground for his termination.

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**Further, employers cannot be willfully blind to employees' conduct.** It is hard to imagine the Weinstein Company taking the position that they were unaware of Harvey's alleged behaviour, but even absent glaring information, employers cannot be willfully blind to their employees' conduct. If an employer has a reasonable basis to suspect that an employee is creating an unsafe or toxic work environment, the employer has an obligation to make reasonable inquiries and possibly even conduct an investigation into the matter. "I didn't know" is unlikely to be a successful defence for employers if they ought to have reasonably known of the situation. Sure, making inquiries or conducting an investigation may not be conclusive, but at least you can say you exercised your due diligence and did what you reasonably could.

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**As an employer, you have a duty to reasonably accommodate medical issues, not jerks.** In Alberta and throughout Canada, there is substantial case law establishing an employer's duty to accommodate employees with disabilities, which may include sex addiction. However, having a sex addiction does not give Harvey the "right" to sexually assault a woman, nor would a sex addiction do anything to erode or limit the Weinstein Company's duty to provide a safe workplace to women and others that is free from discrimination, sexual harassment and sexual assault if this had occurred here. In Alberta, if Harvey has a sex addiction, then he has a corresponding duty to cooperate with his employer such as by seeking treatment. Further, the Weinstein Company has a duty to provide reasonable accommodation to Harvey, but only to the point of undue hardship. If this had occurred in Alberta, it seems apparent that both the employer and employee in our scenario have lost their legal way.

No doubt, we will examine the demise of Harvey Weinstein and the Weinstein Company from a vast array of perspectives and issues for years to come. These issues are but the tip of the iceberg. However, at minimum, employers must engage with the realities they face. Turning a blind eye, condoning or hiding misconduct or even criminal activity can easily lead to liability on part of employers for the actions of their employees.

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