



the business of blame

BY CRYSTAL STEWART

When a work environment is psychologically damaging—who is legally liable?

Some of the most toxic work environments aren't those that produce hazardous materials or use dangerous chemicals. Poisoned work environments—an ongoing problem in Canadian workplaces—can be created by employees, customers or even by management, often in the context of racial or sexual discrimination or harassment.

Toxic workplaces don't always lead to tragedy—as they did in 1995 when a sexual harassment situation led to murder-suicide at a Chatham, Ont. Sears store. But such events do prompt the following questions: who is responsible when work environments go bad and what can be done to remedy the problem?

The poisoned work environment concept first arose in American sexual harassment cases and was shortly adopted in Canadian case law. It has implications in human rights, occupational health and safety, employment and workers compensation law. Described by the Ontario Human Rights Commission in its 2004 "Human Rights at Work," a poisoned workplace becomes "hostile or unwelcoming" to a person because of "insulting or degrading comments or actions" that have been made about that person or about others. A poisoned workplace is intimidating or oppressive to employees.

The concept generally has application in cases where the comments or conduct amount to discrimination or harassment based on a prohibited ground under the applicable human rights legislation. For example, comments and conduct that create a poisoned environment for women, disabled persons or certain religious or

racial groups would fall under this category.

When a poisoned workplace is a human rights issue, employers will be held liable if they created the environment or helped by action or inaction, to maintain the environment. If an employer has actual or constructive knowledge of the situation, they will be vicariously liable for the results. What this means is that employers may defend claims against them, either in part or in whole, by raising due diligence type defences: we did not consent to the conduct, we exercised all due diligence to prevent the conduct, we tried to mitigate the neg-

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ative effects of the conduct after the fact. If their defence is unsuccessful, employers may be liable for lost wages and damages for humiliation, loss of dignity and mental anguish, among other things.

Employers may also find themselves liable in a health and safety context where the environment threatens the physical or psychological health and safety of employees. In addition, employees have a statutory right to refuse work that is perceived to be unsafe, which is not restricted to physical safety and may come into play when harassment creates psychologically unsafe work situations.

Under human rights legislation, the poisoned environment must have a link to discrimination or harassment based on a prohibited ground.

However, there are often situations where harassment is not based on such ground. In those cases, employees may still have a legal right to fight against the poisoned environment if the harassment and environment are such that they make continued employment impossible.

Workers compensation law can also provide a remedy for employees who have experienced harassment causing a disability or illness. If a sufficient connection to the employment can be made, stress-related illnesses caused by a poisoned work environment may be compensable injuries under workers compensation law.

Here's what employers can do to protect employees and discharge their duties:

- implement confidential sources of emotional, psychological and psychiatric assistance;
- educate employees on recognizing indicators of excessive stress or depression;
- have effective workplace harassment and discrimination policies;
- follow the policies as written, with no distinction between formal and informal, written and verbal complaints; and
- train and update all employees on harassment policies.

The creation and maintenance of a safe and harassment-free workplace will take some dedication by employers to accomplish but the avoidance of liability and protection of employees will be well worth it. **CHM**

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