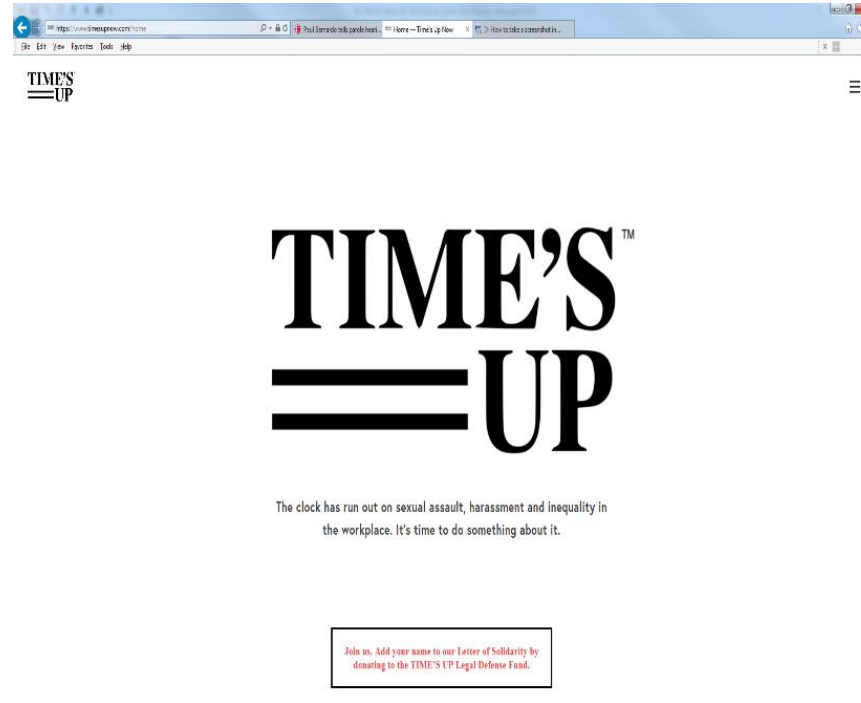




Update: Harassment changes to Occupational Health & Safety Legislation

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#METOO & TIME'S UP



Google employees around the world walk out to protest sexism, inequality



Worldwide rolling walkouts began in Asia and moved west to include Canada

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Thousands of Google employees around the world briefly walked off the job today to protest how the company has dealt with sexual harassment claims. (Noah Berger/Associated Press)

Hundreds of Google engineers and other company workers worldwide — including in Canada

Harassment complaints

- Traditional areas of recourse:
 - Human rights complaint (if harassment based on an enumerated ground)
 - Grievance (if unionized)
 - Policy
 - Claim of constructive dismissal
- New areas
 - OH&S
 - Tort of harassment

Occupational Health & Safety changes

- New definition of “workplace harassment”
- Risk assessment and violence prevention procedures
- Workplace “harassment prevention plan”
- Harassment training

*coming into force on **January 1, 2020**



OHS Regulations, 2012: Section 22

22. (1) In sections 23 and 24, “violence” means the attempted or actual exercise, ~~by a person other than a worker~~, of physical force to cause injury to a worker and includes threatening statements or behaviour which gives a worker reason to believe that he or she is at risk of injury.

(2) In this section and section 24.1, “**workplace harassment**” means inappropriate vexatious conduct or comment by a person to a worker that the person knew or ought to have known would cause the worker to be humiliated, offended or intimidated.

(3) In sections 24.1 and 24.2, “**harassment prevention plan**” means a plan developed, implemented and maintained by an employer in accordance with section 24.1.

(4) A reasonable action taken by an employer or supervisor relating to the management and direction of workers or the workplace is not workplace harassment.

22.1 (1) An employer shall conduct a risk assessment which shall include consideration of

- (a) previous experience in the workplace;
- (b) occupational experience in similar workplaces;
- (c) the location and circumstances in which work may take place;
- (d) workplace characteristics including demographics, culture and the presence of new workers; and
- (e) issues raised by the occupational health and safety committee, the worker health and safety representative or the workplace health and safety designate.

(2) Where an employer obtains personal information in the course of conducting a risk assessment under this section, the employer shall **keep the personal information confidential** and shall not disclose the personal information except for the purpose of an investigation or where required by law.

OHS Regulations, 2012: Section 23

23. (1) Where a risk of injury to workers from violence is identified by an assessment performed under section 22.1, the employer shall

- (a) establish procedures, policies and work environment arrangements to eliminate the risk to workers from violence; and
- (b) where elimination of the risk to workers is not possible, established procedures, policies and work environment arrangements to minimize the risk to workers.

(2) Where an employer becomes aware, or ought reasonably to be aware, that family violence that would likely expose a worker to physical injury may occur in the workplace, the employer shall take every precaution reasonable in the circumstances for the protection of the worker.

(3) In this section “family violence” has the same meaning as in section 3 of the *Family Violence Protection Act*.



OHS Regulations, 2012:

Addition of Sections 24.1 and 24.2

- Added immediately after existing Section 24;
- New Section 24.1 requires the development of a **written harassment prevention plan**, which shall include, among other things:
 - Statements that workers entitled to workplaces free from harassment, and employer is committed to eliminating/minimizing workplace harassment (24.1(a,b));
 - Investigative procedures to follow after a complaint of workplace harassment received (24.1(f));
 - Statement that personal information obtained related to workplace harassment will not be disclosed unless required by law (24.1(g));
 - Statement that employer will protect workers from retaliation (24.1(j));
- Section 24.1(5) requires employers to **investigate complaints** of workplace harassment;
- Section 24.2 requires employers to participate in and provide **training regarding harassment prevention** and the harassment prevention plan.

Is there a tort of harassment?

- *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205
- Related to claims of harassment and bullying from 2005 to 2012 by the RCMP management of Merrifield, a junior RCMP Constable (who became a Corporal in 2009 and a Sergeant in 2014);
- Merrifield ran for nomination to be the Conservative Party's candidate in a 2005 federal election without complying with the applicable RCMP policies; it was decided that running put him in a conflict of interest with his position on the Threat Assessment Group, a unit responsible for protecting federal politicians;
- Later in 2005, Merrifield was interviewed on a radio show as a "terrorism consultant"; his manager responded with a memo reminding him of the relevant RCMP media policies;
- In October 2005, Merrifield was refused assignment to the Special Operations Centre, and in January 2006 he was transferred to Customs and Excise, at which time he commenced sick leave and accused his manager of misconduct in the manager's audit of Merrifield's corporate credit card usage;
- In June 2006, the Manager commenced a formal instigation into Merrifield's corporate credit card usage and concluded he had contravened administrative policy;
- In June 2007, Merrifield commenced this action against the Crown on behalf of the RCMP and individual RCMP members, seeking damages for mental distress suffered from managerial bullying and harassment

Ontario Court of Appeal rejects tort of harassment

- Trial Judge determined that the tort of harassment existed in Ontario, and cited two prior cases as support, though she dedicated only 8 paragraphs of her 896-paragraph judgment to determining whether the tort existed;
- She set out 4 elements (as submitted by the Plaintiff) to establish entitlement to damages for harassment:
 - (1) Was the conduct of the defendants toward Merrifield outrageous?
 - (2) Did the defendants intend to cause emotional distress or did they have a reckless disregard for causing Merrifield to suffer from emotional distress?
 - (3) Did Merrifield suffer from severe or extreme emotional distress?
 - (4) was the outrageous conduct of the defendants the actual and proximate cause of the emotional distress?
- The Trial Judge found these 4 elements to be met, and also found that Merrifield had established the tort of Intentional Infliction of Mental Suffering
- Attorney General of Canada, on behalf of the RCMP, appealed;

Ontario Court of Appeal rejects tort of harassment

- **Takeaway:** The Ontario Court of Appeal refused to recognize the proposed tort of harassment, though counsel for the employee indicated may appeal to SCC;
- **Held:** The Court found that the trial judge’s decision regarding the tort of IIMS being established arose from palpable and overriding fact-finding errors and the incorrect application of the legal test, and allowed the appeal and dismissed Merrifield’s cross-appeal.
 - Court of Appeal noted that the prior authorities did not support recognition of a tort of harassment, and explained “This is not a case whose facts cry out for the creation of a novel legal remedy”;
- **IIMS:** Court of Appeal cited to tort of intentional infliction of mental suffering (“IIMS”) as already addressing conduct that constitutes harassment;
- **#MeToo:** Court rejected Merrifield’s argument that new tort was required because of increased societal recognition that harassment is wrongful conduct.



These materials are intended to provide brief informational summaries of legal developments and topics of general interest.

The materials should not be relied upon as a substitute for consultation with a lawyer with respect to the reader's specific circumstances. Each legal or regulatory situation is different and requires review of the relevant facts and applicable law.

If you have specific questions related to these materials or their application to you, you are encouraged to consult a member of our firm to discuss your need for specific legal advice relating to the particular circumstances of your situation.

Due to the rapidly changing nature of the law, Stewart McKelvey is not responsible for informing you of future legal developments.