

FORWARD TOGETHER



MILLER THOMSON
AVOCATS | LAWYERS

WELCOME

VANCOUVER

CALGARY

EDMONTON

SASKATOON

REGINA

LONDON

KITCHENER-WATERLOO

GUELPH

TORONTO

VAUGHAN

MARKHAM

MONTRÉAL



MILLER THOMSON
AVOCATS | LAWYERS

FORWARD TOGETHER

Coffee Talk

Health Industry Seminar Series



VANCOUVER

CALGARY

EDMONTON

SASKATOON

REGINA

LONDON

KITCHENER-WATERLOO

GUELPH

TORONTO

VAUGHAN

MARKHAM

MONTRÉAL



MILLER THOMSON

AVOCATS | LAWYERS

MANAGING COMPLAINTS IN THE #METOO ERA

Kathryn Frelick

Lisa Spiegel

Agenda

- Impact of the #MeToo Movement
- Identifying and managing risk relating to the health industry in the #MeToo era
 - Legislative requirements
 - Whose responsibility is to manage complaints and why?
- Process issues when addressing complaints
 - Importance of conducting an effective investigation
 - Alternatives to managing physician complaints as a “privileging issue”
 - Are there College reporting obligations?
- Proactive Steps and Mitigating Risks

Impact of the #MeToo Movement

- #MeToo movement was established in the fall of October 2017 in an attempt to give a voice to victims of sexual assault and sexual harassment, particularly in the workplace

“Unprofessional behavior in medicine affects not only women, but also goes beyond the individual to cultural and organizational issues that enable these inappropriate behaviours. Organizational factors that lead to unprofessional behaviour in medicine include poor leadership, power imbalances and culture of silence. Implicit (or unconscious) biases within us all, stemming from dominant stereotypes linked to various groups, also play a role.”

CMAJ, “#MeToo and the medical profession”, August 2018

Impact of #MeToo Movement

- Statistics Canada report showing that “the number of sexual-assault complaints filed with police and classified as founded increased sharply in Canada after the #MeToo movement went viral in October, 2017

The Globe and Mail, Nov 8, 2018

- Article references a report that the Law Society of Ontario (regulatory body for lawyers and paralegals) saw a 50% increase in harassment and discrimination complaints in the first half of 2018 compared to the last six months of 2017.

Toronto Star, Nov 3, 2018

- “Wave of sexual harassment complaints that accompanied the #MeToo movement is straining many of the state and local offices tasked with policing workplace discrimination of all kinds.”

October 2018 CBS news report

Impact of the #MeToo Movement

- Increase in number of complaints is not necessarily reflective of an increased rise in acts of sexual assault or harassment
 - The author of the Statistics Canada study noted that this sharp increase “does not necessarily reflect a rise in the prevalence of sexual assaults in Canada, but is likely attributable to a combination of factors, including increased willingness of victims to report to police”.

#MeToo Movement in the Health Industry

- Anecdotally:
 - hospitals are reporting a significant increase in harassment related complaints
 - health professionals have reported feeling constrained in their behavior around the workplace; failing to understand the expectations required of them
 - complainants have demanded responses from employers that are not necessarily reflective of the findings, following a complaint and resulting investigation
 - demands for greater transparency and systemic change
- Rules around workplace safety have **not** changed since the #MeToo movement, however, they do reflect changing societal expectations and attitudes towards issues of workplace violence and harassment

Case – Allegations of gender discrimination

Headline from Globe and Mail (Dec. 16, 2018)

Scrubbed: Ontario emergency room chief faces questions about failing to hire any female doctors in 16 years

- Investigation into allegations of gender discrimination and harassment by ER department chief
- Early 2018 – posting on “closed” Facebook group for female doctors about hiring – small group decided to pursue – conducted a survey of 28 hospitals – Southlake identified as an “outlier” (no female ER physicians)
- March 2018 - letter of complaint sent on behalf of eight anonymous female physicians to Southlake and U of T asking for independent investigations
- Both conducted internal investigations (paper review) - found “no evidence of discrimination”
- G&M started its own investigation after obtaining a copy of the complaint which described the alleged gender discrimination as an “open secret” among emergency doctors in the GTA

Case – Allegations of gender discrimination

- Concerns raised that the hospital ignored complaints and allowed physician to continue
- Freedom of information request and additional questions raised for hospital
- Southlake reopens investigation and retains lawyer to conduct independent investigation into alleged discrimination, harassment and bullying in its ER (still in progress)
- Two female physician hired in the ER since Oct 2018
- January 2019 – physician resigned as Chief of ER
- February 2019 - U of T to conduct an external review of how medical students treated at Southlake
- G&M reports that physician continues to have ER privileges for both hospitals and appointment at U of T

Legislative and Legal Requirements

- Common law duty to protect staff and others from harassment and take reasonable steps to protect against workplace violence
- Ontario *Human Rights Code*
- *Occupational Health and Safety Act* and Regulation
 - 2010 Amendments – Bill 168 – workplace violence and workplace harassment
 - 2016 Amendments – Bill 132 – workplace sexual harassment and workplace violence
- *Public Hospitals Act* and Regulation 965: Hospital Management
- *Workplace Safety and Insurance Act*
 - 2018 Amendments – broadens claims for chronic or traumatic mental stress (including claims related to workplace violence and harassment)

OHSA Requirements

- OSHA requires Ontario employers to, among other things:
 - Prepare and review, at least annually, policies with respect to workplace violence and workplace harassment
 - Develop and maintain programs to implement the above policies
 - Assess risks of workplace violence that may arise from nature of workplace, type of work or conditions of work
 - Develop measures and procedures for reporting and managing incidents or complaints of workplace violence or workplace harassment and set out how they will be investigated
 - Conduct investigations into incidents and complaints of workplace harassment appropriate to the circumstances
 - Inform the complainant and alleged harasser in writing of the investigation and of any corrective action that has or will be taken as a result of the investigation

Workplace and Sexual Harassment: Defined

- Workplace harassment is defined in OHSA as “engaging in a course of vexatious comments or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome”
- Sexual harassment has been defined by the Supreme Court of Canada in *Janzen v Platy Enterprises Ltd*, 1989, 1 S.C.R. as:
 - “unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of harassment”

Whose Responsibility to Manage and Investigate Complaints?

- Health organizations have independent legal / legislative responsibilities to address workplace violence and harassment complaints, irrespective of action taken by other institutional bodies, including the Human Rights Commissions, the Patient Ombudsman and Health Regulatory Colleges. (This was so before the #MeToo movement).
- In addition to legislative requirements in addressing complaints of harassment, it is well recognized that disruptive behavior can affect performance and result in ineffective care and poor clinical outcomes.
- In May 2016, the CPSO updated its policy on physician disruptive behavior, noting that beyond being a matter of professional misconduct, such behavior can erode trust, communication and collaboration with the patient care team and with patients and their families.

Process Issues – The Importance of Effective Workplace Investigations

- Comprehensive policies for reporting, addressing and investigating workplace harassment complaints
- Be prompt, manage expectations, communicate about the process and follow through!
- Consider who should conduct the investigation – internal vs external
- Where risk of legal liability, use of legal counsel to conduct investigation and to establish solicitor and client privilege
- Consider broader issues which may trigger multiple processes
- Need for consistency

Parallel process for physician complaints

- Consistency extends to both employees and independent contractors
- For hospitals, where privileges may be affected, subject to statutory requirements under the *Public Hospitals Act* – very blunt instrument
- Other remedial tools may be available to address complaints relating to physicians short of removal/suspension of privileges - voluntary process
- Establish “parallel” process for addressing complaints involving physicians – role of medical staff leadership, human resources, senior leadership

Are there College reporting obligations?

- Mandatory reporting of sexual abuse is required of regulated health professionals and facilities when there is reasonable belief that a member of the same or another regulated health professional College engaged in sexual misconduct (involving a patient)
- Reporting of other conduct related issues may also be required in specified circumstances

Proactive Steps and Mitigating Risks

- Education and training – need to ensure that individuals are aware of and understand issues relating to discrimination, workplace harassment, workplace violence and processes that are in place
- Policies, procedures and training – workplace violence and harassment prevention
- Incident reporting and complaint documentation
- Management and investigation of incidents and complaints, including physician complaints
- Comprehensive workplace investigation process
- By-laws and Credentialing policies to reference behavioural issues, policies, Code of Conduct
- Resource planning processes to address issues of diversity in recruitment, promotion and leadership
- Annual review processes
- Promotion of professional health care culture

Conclusion

- The CMAJ article concludes by saying:
- “It is time that all Canadian medical schools and health care institutions implement and evaluate initiatives aimed at achieving a culture of respect within medicine. The medical profession- and ultimately patient care- will improve for all when we treat each other with respect, regardless of gender, age, race or stage of career.”

Questions?

Kathryn Frelick

kfrelick@millerthomson.com

416.595.2979

Lisa Spiegel

lspiegel@millerthomson.com

416.596.2122

FORWARD TOGETHER



MILLER THOMSON
AVOCATS | LAWYERS

MILLERTHOMSON.COM



© 2018 Miller Thomson LLP. All Rights Reserved. All Intellectual Property Rights including copyright in this presentation are owned by Miller Thomson LLP. This presentation may be reproduced and distributed in its entirety provided no alterations are made to the form or content. Any other form of reproduction or distribution requires the prior written consent of Miller Thomson LLP which may be requested from the presenter(s).

This presentation is provided as an information service and is a summary of current legal issues. This information is not meant as legal opinion and viewers are cautioned not to act on information provided in this publication without seeking specific legal advice with respect to their unique circumstances.

VANCOUVER

CALGARY

EDMONTON

SASKATOON

REGINA

LONDON

KITCHENER-WATERLOO

GUELPH

TORONTO

VAUGHAN

MARKHAM

MONTRÉAL