LAW360™ Canada

Law360 Canada | 111 Gordon Baker Road, Suite 900 | Toronto, ON, M2H 3R1 Canada | www.law360.ca
Phone: (800) 668-6481 | customerservice@lexisnexis.ca

No complaint required to trigger harassment investigation obligation, Ontario Court of Appeal confirms

By **Frank Portman**

Frank Portman

Law360 Canada (July 15, 2025, 2:06 PM EDT) -- In a significant ruling, the Court of Appeal for Ontario has upheld Metrolinx's decision to dismiss five employees for sexual harassment. The case, *Metrolinx v. Amalgamated Transit Union*, *Local 1587*, 2025 ONCA 415, highlights that employers are obligated to investigate potential workplace harassment allegations even without a formal complaint or the participation of the alleged victim. Equally important, this ruling has major implications for executives as well, affecting every executive employment lawyer as well as those lawyers who conduct workplace investigations.

The case began when Metrolinx, a regional transportation provider, dismissed five employees who were members of the Amalgamated Transit Union, Local 1587 for making derogatory and sexist comments about other employees in a private WhatsApp group. The union grieved the dismissals and the arbitrator initially allowed the grievances, ordering the reinstatement of the employees.

However, Metrolinx applied for judicial review, and the Divisional Court quashed the arbitration award, concluding that the award was unreasonable. The union was granted leave to appeal the decision. In its ruling, the Court of Appeal dismissed the union's appeal, affirming the Divisional Court's decision.

Ontario Court of Appeal found mistakes in arbitrator's approach

The Court of Appeal's judgment emphasized several key errors in the arbitrator's approach:

1. **Authority over off-duty conduct:** The arbitrator held that because the WhatsApp messages had been sent outside of the workplace, with no intention on the part of the employees to make those messages available within the workplace, the situation did not have a sufficient connection to their employment to permit discipline. The Court of Appeal agreed with the Divisional Court that this was an error; Metrolinx had the authority to discipline the employees for their off-duty conduct.

   The court noted that the employees' comments, although made on personal cellphones outside of work, had a negative impact within the workplace, which was sufficient to permit discipline.

designer491: ISTOCKPHOTO.COM

2. **Requirement to investigate without formal complaint:** In his decision, the arbitrator found that the complainant's refusal to file a formal complaint was determinative, and Metrolinx should not have pursued the matter further. Both the Divisional Court and the Court of Appeal found this finding erroneous, pointing out that the *Occupational Health and Safety Act* (OHSA) requires investigations not just into harassment *complaints*, but also harassment *incidents* more broadly.

As a result, once Metrolinx became aware of a potential harassment situation, its obligation to investigate was triggered even though no complaint was ever filed.

3. **No conclusion to be drawn from refusal to complain:** The Court of Appeal disagreed with the arbitrator's conclusion that the victim's refusal to complain about the WhatsApp group indicated an absence of negative workplace impact. The Court of Appeal highlighted that the victim was indeed aware of the WhatsApp messages while at work and had been distressed by them.

Furthermore, the Court of Appeal noted that there are multiple reasons why victims of workplace harassment might hesitate to file formal complaints, thereby undermining the evidentiary significance of the failure to lodge a complaint.

The Court of Appeal also took issue with certain evidentiary decisions by the arbitrator.

As a result of these errors, the Court of Appeal sent the matter back to a new arbitrator to rehear the matter and determine afresh whether the dismissals were warranted.

'Lessons learned' for executives

The Metrolinx case holds significant implications for executives, both in their capacity as senior management responsible for addressing workplace harassment adequately using workplace investigations, and as potential subjects of harassment complaints.

1. ***Metrolinx v. Amalgamated Transit Union*** **highlights the importance of executives investigating both official complaints and incidents of harassment.** The Court of Appeal noted that Metrolinx was required by law to investigate the incident even without a formal complaint.

Workplace harassment is broadly defined, including not only sexual harassment but any course of vexatious comments or conduct against a worker that is known, or should reasonably be known, to be unwelcome. Given this broad definition, it is crucial for executives aware of workplace conflicts to assess whether their policies or the OHSA require a formal investigation.

2. **Executives may also be the subjects of harassment complaints themselves.** They are responsible for making difficult decisions and ensuring optimal performance from their

workforce. This often involves providing constructive criticism and feedback. The OHSA does not consider reasonable management or direction of workers as harassment. An executive employment lawyer can explain how a harassment complaint may affect an executive in terms of executive employment contracts, workplace investigation processes and entitlements.

It is worth noting, however, that executives and executive employment lawyers have seen, on occasion, employees who cite workplace harassment when they disagree with management practices. Goes with the territory.

3. ***Metrolinx v. Amalgamated Transit Union*** **brings to the fore once again the question of what is considered "off duty" as contrasted with "on duty."** Given that an executive's position is seldom "off duty," this executive employment lawyer believes that executives would be wise to consider their employment contracts to be "on duty" the vast majority of the time. Act accordingly.

4. **Executives involved in a workplace investigation alleging harassment should exercise caution and consult an executive employment lawyer.** The outcomes of a workplace investigation can be substantial, such as termination with cause, affecting executive compensation and equity.

Additionally, executives subject to workplace investigations have fewer rights compared to those facing criminal or regulatory inquiries (see Respondents have severely limited rights in workplace investigation, Feb. 29, 2024). It is important for executives to be aware of their rights in these situations; an experienced executive employment lawyer can assist you.

Frank Portman is an employment lawyer at Massey LLP. His specialty is executive employment law where he assists presidents, vice-presidents and other C-level executives and the organization seeking to hire their talents to complete the deal through effective executive employment contracts.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the author's firm, its clients, LexisNexis Canada, Law360 Canada or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

Interested in writing for us? To learn more about how you can add your voice to Law360 Canada, contact Analysis Editor Peter Carter at peter.carter@lexisnexis.ca or call 647-776-6740.
