

Barry Schwartz
DDS MHS

Gary Srebrolow
BSc DDS JD

#MeToo and the Potential for Sexual Harassment Claims in Dental Workplaces

The reporting of workplace sexual harassment is one of the biggest trending phenomenon on social media, characterized by the hashtag “#MeToo.” *Time Magazine’s* choice for Person of the Year for 2017 was a group of women collectively called the “Silence Breakers,” which highlighted the #MeToo movement, through which millions of women in 85 countries have posted about their experiences of sexual harassment (1). Women have begun coming forward to report being victimized by powerful men. What started in October 2017 with movie mogul Harvey Weinstein being accused of sexual misconduct, has led to a recent *New York Times* report of 34 other famous men being accused of the same. The list includes actors Kevin Spacey and Jeffrey Tambor, comedian Louis C.K., anchormen Matt Lauer (NBC News) and Charlie Rose (CBS and PBS), and politicians Al Franken (U.S. Senator) and Roy Moore (Alabama judge) to name a few (2). Importantly, dental offices and dentists are not immune to sexual-harassment claims, and the purpose of this article is to explore the repercussions and consequences of such claims in the context of the present and highly charged environment.

Ostensibly, as a result of the Jian Ghomeshi sex assault scandal at the CBC in 2014 and other high-profile cases of sexual harassment in the workplace, the Ontario government introduced new legislation, or Bill 132, the *Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment)*, 2016, which made amendments to the *Occupational Health and Safety Act, 1990*. Bill 132 aimed to combat sexual violence and harassment in the workplace by redefining workplace harassment and setting out requirements to conduct reasonable and proportional investigations (3). For its part, our dental regulator has, for some time, regularly advised dentists about workplace harassment, including definitions of what workplace harassment entails, with links to health ministry publications focussed on prevention (4,5).

The Ontario Human Rights Commission (OHRC) defines sexual harassment as “engaging in a course of vexatious comment or conduct that is known or ought to be known to be unwelcome” (6). They also provide examples of sexual harassment, including:

- Asking for sex in exchange for a benefit or a favour
- Repeatedly asking for dates, and not taking “no” for an answer
- Demanding hugs
- Making unnecessary physical contact, including unwanted touching
- Using rude or insulting language or making comments toward women or men
- Calling people sex-specific derogatory names
- Making sex-related comments about a person’s physical characteristics or actions
- Saying or doing something because you think a person does not conform to sex-role stereotypes
- Posting or sharing pornography, sexual pictures or cartoons, sexually explicit graffiti, or other sexual images (including online)
- Making sexual jokes
- Bragging about sexual prowess.

Turning to dental practices, a U.S. study involving dental hygienists in Virginia found that 54 per cent of respondents had experienced sexual harassment in the workplace (7). In 2010, *The Journal of the American Dental Association (JADA)* reported that more than 12,000 charges of workplace sexual harassment were filed with the U.S. Equal Opportunity Employment Commission resulting in \$51.5 million in damages paid by employers (8). The conclusion: “as business owners, dentists must live up to their responsibilities to their employees, patients and themselves [and] need to set the right example by providing the team with appropriate sexual harassment prevention training” (8).

These types of situations can be complex. For example, a 2004 article in *RDH* (the U.S. national magazine for registered dental hygienists) described a situation in which a hygienist wrote that she had her breast grabbed by a male patient during treatment, when the patient was under nitrous oxide. It turned out that the patient was a prominent city councillor and a friend of the dentist. The hygienist stated that when she reported the incident to the dentist, he downplayed it, saying it was likely an accident, and that because the patient was under nitrous oxide, he probably didn't know what he was doing. According to the author, the dentist created a hostile environment for sexual harassment by not dealing appropriately with this incident (9).

Dentists, while providing four-handed dentistry, work in close physical proximity to dental assistants. Sometimes, there can be a mutual attraction in such situations. Before a dentist begins a close personal relationship with a staff member, the dentist should be mindful of the potential pitfalls to any such relationship and how it can disrupt the office climate and be uncomfortable for other co-workers, who may feel that favouritism is related to the personal relationship. Also, if such a relationship breaks down, the split can lead to wrongful dismissal lawsuits and harassment complaints (10).

An interesting case came out of the Supreme Court of Iowa in 2012 (11): a dental assistant was fired for being "a big threat" to the dentist's marriage. It is reported that the dentist, at his spouse's insistence, fired the dental assistant for being too attractive. The assistant sued for gender discrimination, and lost. The Ontario Family Law lawyer who wrote about this case noted that U.S. laws are very different from those in Canada and "it would be very interesting to see how this case would play out in this country" (12).

An article also appeared in *Dental Products Report* in 2015 detailing a situation in which a dental assistant was allegedly being sexually harassed by her dentist employer at a dental conference in his hotel room. The dental assistant fled the room and for three months did not discuss what happened with her partner or anyone else. She didn't want to press charges for fear of losing her job and being blackballed in her field. Instead she found a new job and kept quiet about the entire episode (13). This begs the question, how typical is this situation and this type of reaction?

Regarding incidents of sexual harassment involving dentists and dental offices in Canada, a recent series of sexual-harassment articles appeared on CBC Toronto (14) and York Region News (15) concerning a dentist who sexually harassed employees who were also patients. One of the employees asked the dentist to stop this behaviour, but after several months she was fired from her job without cause (15). After a complaint, a regulatory

investigation was undertaken to investigate a pattern of sexual harassment. This culminated in the dentist having his license revoked as a result of committing sexual abuse of a patient, which under the *Regulated Health Professions Act, 1991*, has a mandatory penalty of revocation of a certificate of practice upon a finding of sexual abuse of a patient (16). It also resulted in a criminal conviction for the dentist (17). However, even if the sexual abuse occurred with an employee who was not a patient, the dentist likely would have still faced serious repercussions, including perhaps a reprimand, lengthy suspension, an order to take a course (i.e. on boundary violations) and/or practice monitoring.

In addition to facing a regulatory complaint/investigation and/or criminal charges, dentists who sexually harass employees, whether they are patients or not, are subject to a human rights complaint by the employee under the *Human Rights Code*. In a 2005 case heard before the Human Rights Tribunal of Ontario (HRTO) (18), a female patient of a male dentist was invited to become an office manager/dental assistant even though she had no relevant education or experience. It is reported that she was told by the dentist that she was hired because he thought she was "nice" and looked like the actress Sandra Bullock. Over time, and at work, the dentist called her such names as "juicy Lucy," "sweetheart" and "honey," and had also shown her on a computer profiles of naked women and men. He also called her home frequently after work and invited her to basketball games, concerts and trips. During work, he also physically touched her – for example, she was cleaning a dental chair and he approached her from behind and began to make a "moaning or groaning sound" and put his arms around her waist. There was also an incident in which he put his hands on her buttocks.

Regarding the above case, while the HRTO did not agree that all of the acts constituted sexual harassment, they held that there were still many instances of proven sexual harassment, including when the dentist placed his hand on the employee's buttocks; when he called her at home, especially after she had set boundaries about calling her at home; when he made a complaint to the police about her (in the police's view "to keep communication lines open") under the pretext of trying to obtain his office key; and when he kept calling her house after she had resigned from his employment. Upon finding that sexual harassment had occurred, the HRTO ordered the dentist to attend training with respect to anti-discrimination/sexual harassment and ordered him to pay his former employee several thousand dollars, including compensation for sexual harassment, solicitation, mental anguish, reprisal and wage loss. Further, the HRTO decision was published.

The same employee/complainant in the above case also made a complaint to the regulator and police. Regarding the outcome of the above incident before the regulator, the dentist's certificate of practice was revoked as a result of this and other incidents pertaining to his professional practice/professional misconduct, of which he was found guilty. Regarding her complaint to the police, it was determined that a criminal offence had not been committed.

It has also been reported that Harvey Weinstein paid out hundreds of thousands of dollars as hush money to many women who were alleged assault victims (19). There are stories of dentists who paid former employees large settlements after sexual-harassment encounters, so the employees would not pursue wrongful dismissal lawsuits. What may result from the #MeToo phenomenon is that many victimized women, including those who work in dental offices, may now come forward with sexual harassment claims through human rights or workplace safety claims.

Most recently, in Toronto, five women have come forward and accused Soulpepper Theatre and its director, Albert Schultz, with allegations of 30 acts of abuse and harassment. The complainants felt that the workplace harassment policy requiring cast members to report issues in writing to Mr. Schultz's partner would lead to reprisals. Instead, they went public with their claims (20).

All employers, including dentists, according to *Occupational Health and Safety Act, 1990 S. 32.0.1 (b) and (c)*, must prepare and review a policy on workplace harassment at least annually. Dental offices with six or more employees must have workplace violence and harassment policies in place and posted in a conspicuous place that outlines how the employer will investigate and deal with complaints and the procedures for reporting incidents (21).

Ultimately, the lesson to be learned here is that sexual or any other form of harassment in or outside of the workplace is completely unacceptable. There is a need to consistently uphold workplace safety for all employees. Otherwise, dentists who sexually harass their staff may find themselves facing multiple sources of legal jeopardy, including regulatory complaints/investigations, HRTO complaints and/or criminal charges, any or all of which can result in serious consequences. **OD**

REFERENCES

1. Felsenthal E. Silence Breakers TIME Person of the Year 2017: How we chose. *Time* magazine. Dec. 7, 2017. Available at: <http://time.com/time-person-of-the-year-2017-silence-breakers-choice/>
2. Almurkhtar S. After Weinstein: the fallout for 34 men accused of sexual misconduct, from lewd texts to rape. *NY Times*. Nov. 21, 2017. Available at: <https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html>
3. Levitt H. Ontario's new sexual harassment legislation comes up short on substance. *Financial Post*. Aug. 31, 2016. Available at: <http://business.financialpost.com/executive/careers/ontarios-new-sexual-harassment-legislation-comes-up-short-on-substance>
4. RCDSO *Dispatch*. New provincial requirements to address workplace violence and workplace harassment. May/June 2010.
5. RCDSO *Dispatch*. Tools and resources available to help you understand new legislation on workplace violence and workplace harassment. Aug/Sept 2010.
6. OHRC Fact Sheet. Available at: <http://www.ohrc.on.ca/en/sexual-harassment-employment-fact-sheet>
7. Pennington A, Darby M, Bauman D, Plichta S, Schnuth ML. Sexual harassment in dentistry: experiences of Virginia dental hygienists. *Journal of Dental Hygiene*. 2000;74(4):288-95.
8. Levin RP. Sexual harassment and the dental workplace. *JADA*. 2010 Oct 1;141(10):1263-4.
9. Glasscoe D. Sexual harassment. *RDH* March 1, 2004. Available at: <http://www.rdhmag.com/articles/print/volume-24/issue-3/columns/staff-rx/sexual-harassment.html>
10. Zall M. Office romance. *CDS Review* July-Aug. 2001. p12-8.
11. Nelson v. James Knight DDS, No. 11-1857 (Supreme Court of Iowa, Dec. 21, 2012) No. 11-1857.
12. Alexander R. Dental Assistant Fired For Being "A Big Threat" to Dentist's Marriage. Feb. 5, 2013. Available at: <http://familyllb.com/2013/02/05/dental-assistant-fired-for-being-a-big-threat-to-dentists-marriage/>
13. Newberger L. The nasty truth about sexual harassment in the dental practice. Sexual harassment can happen in any setting, but what do you do when that setting is your workplace – and the harasser is your boss? *DPR* June 4, 2015. Available at: <http://www.dentalproductsreport.com/dental/article/nasty-truth-about-sexual-harassment-dental-practice>
14. CBC News Toronto. May 14, 2017. Available at: <http://www.cbc.ca/news/canada/toronto/york-region-dentist-charged-with-3-counts-of-sexual-assault-1.3075149>
15. York Region News June 11, 2015. Available at: <https://www.yorkregion.com/news-story/5673633-vaughan-dentist-s-sex-assault-case-next-in-court-july-8/>

16. RCDSO Discipline Summaries. Decision 3. *Dispatch* 2017 Vol 31 (2)
17. RCDSO. Sclodnick, P. Criminal Conviction Feb.8, 2017 from Register Section
18. Canlii.org. July 11, 2015. <http://canlii.ca/t/1r7b7>
19. Dominus S. Refusing Weinstein's Hush Money, Rose McGowan Calls Out Hollywood. *The NYTimes* Oct. 28, 2017. Available at: <https://www.nytimes.com/2017/10/28/us/rose-mcgowan-harvey-weinstein.html>
20. *Globe and Mail*. January 3, 2018. Soulpepper Theatre's Albert Schultz steps down amid allegations of sexual harassment and sexual abuse. Available at: <https://www.theglobeandmail.com/arts/theatre-and-performance/soulpepper-theatre-sexual-harassment-lawsuits/article37478367/>
21. Occupational Health and Safety Act. Available at: <https://www.ontario.ca/page/understand-law-workplace-violence-and-harassment>



Dr. Barry Schwartz is Course Director for Practice Administration at the Schulich School of Medicine & Dentistry, Western University, London, Ont. Dr. Schwartz can be contacted at barry.schwartz@schulich.uwo.ca.



Dr. Gary Srebrolow is a partner at the law firm Blaney McMurtry, LLP, Toronto, and Chair of the Health Law Group. Dr. Srebrolow can be contacted at gsrebrolow@blaney.com or at 416-597-4875.