

HARASSMENT AND BULLYING IN THE WORKPLACE

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May 2004 — The issue of harassment in the workplace has received much attention throughout the 1990's. Today the issue of workplace harassment continues to evolve and expand and now encompasses such conduct as violence in the workplace, psychological harassment and bullying. This article will focus primarily on one of the broadening concepts of harassment, namely bullying. We identify the relevant issues surrounding bullying in the workplace and the potential legal consequences for employers.

BULLYING

We recommend that workplace violence be defined not only as physical violence but also as psychological violence, such as bullying, mobbing, teasing, ridicule or any other act or words that could psychologically hurt or isolate a person in the workplace.¹

The above quote is Recommendation #4 from the jury in the O.C. Transpo Coroner's Inquest. There were 76 other recommendations made. The facts of the case are tragic. In 1999, an employee of O.C. Transpo in Ottawa shot and killed four employees and then turned the gun on himself. The employee had been the victim of repetitive bullying and ridicule by his co-workers. Although this is an extreme case, it illustrates the causal linkage between bullying and violence in the workplace.

Some statistics indicate that bullying in the workplace may be more common than racial or sexual harassment, with one in six employees reporting themselves as victim. The vast majority of alleged "bullies" (approximately 80%) are in supervisory roles. Interestingly, both men and women are equally likely to be bullies.²

Bullying is a type of workplace harassment and, as such, many of the elements that define other forms of harassment (i.e., sexual or racial) also apply to it. For example, bullying covers behaviour that is known or ought to be known to be unwelcome. Similarly, bullying can transcend an individual by fostering a more generalized poisoned or hostile workplace environment. However, unlike other forms of harassment, bullying is almost always intentional in nature. Its purpose is to intimidate, demean or humiliate.

Many have preconceived notions that the victim of a bully is someone who has low self-esteem, is weak and lacks in social skills. In reality, these are usually the traits of a workplace bully. Conversely, the typical victim is usually a good employee who gets along with others and is very loyal. The Canada Safety Council reports that bullies are most likely to pick on people that are non-confrontational in their interpersonal style and have the ability to cooperate in the workplace.³

PROFILE OF A BULLY

Bullying behaviour can range from the subtle to the obvious. Some examples are as follows:

- Publicly or privately picking on co-workers.
- Shouting or being verbally abusive towards staff.
- Using reprisal techniques, such as removing responsibilities, giving trivial tasks or overloading an individual with work and reducing time-frames.
- Speaking with a condescending attitude.
- Demeaning, belittling or harassing others.
- Emotional tirades, displays of temper, tantrums.
- Spreading rumours, gossip about or trying to damage a co-worker's reputation.
- Interrupting others.
- Threats to job security.⁴

THE EFFECTS OF BULLYING

Harassment in the workplace can have significant human, monetary and legal consequences for an employer. Bullying, like other types of harassment, can lead to lost productivity, higher absenteeism, increased turnover and a dysfunctional working environment. In the most extreme cases, a violent

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episode may be the tragic result. The bullying of an intended victim may manifest into medical problems, such as depression or other stress-related illnesses.

LEGAL RECOURSES

In addition to the human consequences, bullying in the workplace can expose an employer to a variety of legal consequences and costs. The legal recourses available to a victim of bullying may differ depending on whether the victim works in a unionized or non-union environment. Some legal recourses are common to both union and non-union employees.

(i) Non-Union Employees

Wrongful Dismissal

The victim of bullying may be able to quit his/her employment and sue an employer for constructive dismissal. Canadian courts have found that it is an implied term of the employment contract that the employee be treated with civility, decency, respect and dignity.⁵

In Great Britain, the British High Court recently awarded nearly £1 million in damages and legal fees to an employee for the treatment he received at the hands of his boss. The employee, who was the former senior managing director of a large U.S.-owned brokerage firm, testified that he had been subjected to regular verbal abuse and bullying by the company's president.⁶

Other Common Law Remedies

In addition to suing an employer for constructive dismissal, other common law remedies may be available to the employee who has been victimized by a workplace bully. The torts of intentional infliction of nervous shock, mental distress, defamation and negligence all have potential application.

In this regard, employers should be aware of the concept of vicarious liability, which means that employers can be held liable for the wrongful acts of employees that are carried out in the course of employment. Further, if the bully happens to be a member of management and is seen as part of the directing mind of the corporation, his/her acts may be deemed the acts of the employer itself.

In *Boothman v. Canada*,⁷ the Court found that a manager knowingly hired an employee with mental vulnerability so that he could control and abuse the employee. In this case, the Court awarded damages for intentional infliction of nervous shock.

In *Prinzo v. Baycrest Centre for Geriatric Care*,⁸ the plaintiff, who was employed as a hairdresser in a geriatric facility, received harassing phone calls from management while on sick leave and was falsely accused of harming the clients she served. The Court awarded \$15,000 in damages for intentional infliction of nervous shock, as well as \$5,000 in punitive damages.

In *Clark v. Canada*,⁹ the Court found that an RCMP officer's supervisor was negligent in refusing to exercise his authority to put an end to harassing conduct. The officer also, on occasion, participated in the behaviour.

(ii) Unionized Employees

Collective Agreement

Unionized employees are covered by collective agreements which provide an employee and/or the union with the right to file a grievance and pursue that grievance to binding third party arbitration. Many collective agreements contain "no discrimination" and/or "no harassment" clauses. In addition, Canadian courts have ruled that arbitrators have the jurisdiction to interpret and decide breaches of collateral employment legislation, such as the human rights or occupational health and safety legislation.¹⁰ As the jurisdiction of an arbitrator can encompass a wide array of legal issues, the issue of harassment and bullying has been making its way into the labour arbitration jurisprudence.

Some cases involve employers who have taken disciplinary action against workers alleged to be bullies or harassers in the workplace. The jurisprudence indicates that arbitrators are now treating violence in the workplace, both physical and psychological, as serious misconduct that may warrant a serious disciplinary response up to and including discharge depending on the particular circumstances involved.¹¹

In other cases, grievances have been filed alleging a collective agreement violation on the ground that the employer has not provided a harassment-free work environment. For example, in *Teamsters Canada, Local 419 v. Tenaquip Ltd.*,¹² the union sought disciplinary relief against a particular supervisor who engaged in inappropriate discipline, intimidation tactics and harassment. The union asserted that the supervisor created an unsafe working condition. The employer in this matter readily acknowledged the supervisor was a bully, but argued the arbitrator had no jurisdiction to grant the relief the union sought against the supervisor. The arbitrator agreed that disciplining a member of management would normally be outside the jurisdiction of an arbitrator. However, the arbitrator did go on to conclude that she had authority to remedy unsafe conditions in the workplace, even if the remedy had a consequential disciplinary impact on another person.

(iii) Union and Non-Union Employees

Outlined below are various pieces of legislation that may give rise to statutory rights or remedies for victims of bullying, whether they are unionized or non-union employees. As mentioned earlier, the recent Supreme Court of Canada decision in *Parry Sound* may allow unionized employees to seek redress for breach of these statutory rights from an arbitrator appointed under their collective agreement.

Human Rights Legislation

If the harassment tactics utilized by a workplace bully do not relate to a prohibited ground of discrimination (such as sex, sexual orientation, race, disability, etc.), there is no legal recourse under Ontario's *Human Rights Code*. On the other hand, if a bully uses racial slurs or picks on a victim's handicap in the course of his/her harassment, a complaint may be grounded in human rights. It should also be noted

that where the actions of a bully have resulted in either physical or mental illness to a victim employee, the *Human Rights Code* may require the employer to accommodate the victim up to the point of undue hardship.

Occupational Health and Safety Legislation

Each province has occupational health and safety legislation imposing numerous statutory obligations on employers in order to ensure employers provide a “safe” workplace for their employees.

If you are a federally regulated employer, Part II of the *Canada Labour Code* is the applicable health and safety legislation. Part II of the *Canada Labour Code* was amended in June of 2000 to add a new specific employer duty requiring an employer to take prescribed steps to prevent and protect against violence in the workplace.¹³ To date, prescribed regulations have yet to be issued. Recently, a Private Members Bill, Bill C-451, *Workplace Psychological Harassment Prevention Act*, was introduced by the Bloc Québécois, proposing to amend the *Canada Labour Code*. The amendments provide that an employee covered by the legislation is entitled to employment free of psychological harassment and provides a complaint mechanism for investigating allegations and determining fault.

Amendments to the Quebec *Labour Standards Act* have resulted in Quebec becoming the first province in Canada to statutorily impose a duty on employers to take reasonable action to prevent psychological harassment whenever the employer becomes aware of such behaviour. The amendments to the *Labour Standards Act* are to take effect June 1, 2004. “Psychological harassment” is defined in the legislation as “any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures, that affects an employee's dignity or psychological or physical integrity and that results in a harmful work environment for the employee”. The Quebec legislation also indicates that a single serious incident of such behaviour could constitute psychological harassment if it has a lasting harmful effect on the employee. These provisions on psychological harassment are deemed to form an integral part of any collective agreement, thereby giving arbitrators jurisdiction over this issue.

Other provinces such as British Columbia and Saskatchewan have amended their respective occupational health and safety acts to specifically deal with workplace violence. To date, Ontario has not similarly amended its *Occupational Health and Safety Act*. However, with the recent change in government, future amendments may be on the horizon. When the Ontario Liberal Party was the opposition, it tabled a Private Member's Bill which sought to amend the *Occupational Health and Safety Act* and impose duties on employers, supervisors and workers in connection with acts of workplace violence. Workplace violence was defined in the Private Member's Bill as follows:

Workplace violence means acts of violence that persons commit in a workplace and includes acts of physical or psychological violence, including bullying, mobbing, teasing, ridicule and any other acts or use of words that can reasonably be interpreted as designed to hurt or isolate a person in the workplace.¹⁴

Although Ontario occupational health and safety legislation has not incorporated such amendments, employees presently have the ability to refuse unsafe work and to have such issues adjudicated by the Ontario Labour Relations Board (“OLRB”). There have been a number of cases where employees have argued that harassment constitutes an occupational health and safety hazard and have sought redress with the OLRB. While the OLRB has acknowledged that harassment can be damaging to an employee's health and therefore a possible health and safety hazard, it has preferred to defer the cases to the Human Rights Commission when the harassment relates to a prohibited ground of discrimination.¹⁵

Another piece of legislation may also impact on the issue of bullying from an occupational health and safety perspective. The recent passage of Bill C-45 (otherwise known as the “Westray Bill”) holds corporations, senior officers and directors criminally liable for reckless endangerment of the safety of employees in the workplace. Due to potential criminal liability, corporations may now wish to proactively consider adopting workplace policies or codes of conduct that deal with violence, both physical and psychological, even though their particular province has not yet passed specific occupational health and safety legislation on workplace violence.

Workers' Compensation Legislation

Workers' compensation legislation may also be relevant to the issue of workplace harassment and bullying. If employees who are the victims of bullying develop physical or mental illnesses, they may be entitled to compensation for those injuries if they can establish a connection to the workplace. Proving entitlement could be tough. Subsections 13(4) and (5) of the *Workplace Safety and Insurance Act, 1997* state that a worker is not entitled to benefits for mental stress unless the mental stress has arisen due to an acute reaction to a sudden and traumatic event arising out of and in the course of employment. Therefore, repetitive bullying conduct which is cumulative but may not be “sudden or traumatic” is arguably not covered under this provision. The legislation goes on to provide that a worker is not entitled to benefits for mental stress caused by an employer's decision or actions relating to the worker's employment, including a decision to change the work performed or the working conditions, to discipline the worker or to terminate the employment. In other words, if a supervisor bullies an employee by deliberately giving an employee trivial or demeaning work, thereby altering the employee's job functions, this provision could operate to nullify entitlement.

However, due to a recent Supreme Court of Canada decision in *Workers' Compensation Board of Nova Scotia v. Martin*,¹⁶ the ability of a province to limit eligibility for mental stress claims under workers' compensation legislation may be open to challenge. In *Martin, supra*, two injured workers challenged the Nova Scotia workers' compensation legislation that restricted their entitlement to disability benefits for chronic pain on the basis that it violated subsection 15(1) of the *Canadian Charter of Rights and Freedoms*. The Supreme Court of Canada found that workers' compensation appeals tribunals do have the jurisdiction to interpret and apply the *Charter*, and found that the provisions limiting entitlement to chronic pain were discriminatory and infringed subsection 15(1) of the *Charter*.

ADVICE FOR THE EMPLOYER

There are a number of proactive steps that an employer can take to prevent and minimize workplace bullying. As the legislative direction in Canada supports greater statutory protection against workplace violence, consideration should be given to creating a specific workplace violence policy or Code of Conduct. The anti-violence policy or Code of Conduct should be given the same importance as the no-discrimination or harassment policies an employer may already have in place. The policy should provide a mechanism by which concerned employees can raise issues of bullying in either a formal or informal manner.

Any new policy must be clearly communicated and understood. Therefore, proper training on violence and bullying should accompany the introduction of any new policy or Code of Conduct. Managers, supervisors and employees must be made to understand that such conduct is unacceptable and that significant consequences can arise to both the victim, the bully and the employer.

Obviously, once an employer is made aware of an issue of bullying in the workplace, a proper investigation must be conducted, similar in manner to that conducted for other allegations of discrimination or harassment. An employer is also well-advised to monitor areas such as high absenteeism or lateness or reduced productivity or morale to ascertain whether bullying in that particular group of employees or department may be a contributing factor. Other proactive tools, such as employee surveys or exit interviews with departing employees may reveal information concerning workplace bullying.

- ⁵ *Lloyd v. Imperial Parking Ltd.*, [1996] A.J. No. 1087 (Q.B.); *Morgan v. Chukal Enterprises Ltd.*, [2000] B.C.J. No. 1563 (B.C.S.C.); *Shah v. Xerox Canada*, [2000] 49 C.C.E.L. (2d) 166 (Ont. C.A.); and *Paitich v. Clarke Institute of Psychiatry*, [1990] 30 C.C.E.L. 235 (Ont. C.A.).
- ⁶ *Horkulak v. Cantor Fitzgerald International*, [2003] E.W.H.C. 1918 (Q.B.), (31 July 2003).
- ⁷ [1993] 3 F.C. 381 (T.D.); see also *Bogden v. Purolator Courier Ltd.*, [1996] A.J. No. 289 (Q.B.).
- ⁸ [2000] O.J. No. 683 (Ont. S.C.J.).
- ⁹ [1994] 20 C.C.E.L. (2d) 172 (Fed. Ct.).
- ¹⁰ *District of Parry Sound Social Services Administration Board v. OPSEU, Local 324*, [2003] 2 S.C.R. 157.
- ¹¹ *Thompson Products Employees' Assn v. TRW Canada Ltd. (Caroselli Grievance)*, [2002] O.L.L.A. No. 45 (Q.L.) (Barrett), [2003] O.J. No. 541 (Ont. Div. Ct.).
- ¹² Unreported, October 23, 2002 (Vandervende).
- ¹³ Paragraph 125(1)(z.16) *Canada Labour Code*.
- ¹⁴ Private Member's Bill 51.
- ¹⁵ *Au v. Lyndhurst Hospital*, [1996] OLRB Rep. May/June 456; *Meridian Magnesium Products Limited*, [1996] OLRB Rep. November/December 964; *Sharon Moore v. Bar Maids Arms*, [1995] OLRB Rep. March 229; *Re Ontario Public Service Employees Union*, [1996] OHSAD No. 53; *Pieters v. Toronto (City) (Board of Education)*, [2000] O.J. No. 4314 (Div. Ct.); *Amdahl Canada Ltd.*, [1997] O.L.R.D. No. 4102.
- ¹⁶ [2003] S.C.R. 504.

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¹ Recommendation #4 from O.C. Transpo Coroner's Inquest, released February 2000.

² Campaign Against Workplace Bullying, www.bullybusters.org.

³ "Bullying in the Workplace", Canada Safety Council, www.safety-council.org.

⁴ Human Resources Guide to Managing Workplace Harassment, (2003) Aurora Professional Press, Kuretzky and MacKenzie at p. 32.

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