

Workplace Bullying and Harassment: Costly Conduct

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Introduction

As media scrutiny over schoolyard and cyberbullying pervade the news, allegations of workplace harassment and bullying are on the rise. Media reports reveal the deleterious and even deadly impact that bullying can have on children in our communities. Unfortunately for employers, adults in our workplaces sometimes engage in similar transgressions. While the popularization of the terms “bullying” and “harassment” has both educated and empowered employees to assert the right to a respectful workplace, it has conversely sometimes resulted in overuse of the terms and meritless complaints in relation to reasonable management measures. Employers are left with the difficult task of managing all competing interests to ensure a safe, respectful and productive work environment.

One Canadian professor previously estimated that a whopping 40% of Canadians experienced one or more acts of workplace bullying at least once a week.¹ Although it is difficult to determine exactly how much harassment and bullying actually occurs in Canadian workplaces, we can be certain of the impact of such conduct. Workplace bullying and harassment create a toxic work environment resulting in many negative effects which may include: decreasing productivity, increasing employees’ use of sick days, damaging employee morale and causing attrition of good employees. It can also result in significant legal liabilities. Considering all of these potential impacts, the tangible and intangible costs of workplace harassment and bullying can be high. This should be reason enough to motivate employers to expeditiously address such issues; however, for those not motivated by practical business measures or healthy employee relations, we should also consider the expansion of Canadian laws to protect workers from harassment and bullying, and the significant liabilities that can arise when such issues are not properly addressed.

The Law

Historically, Canadian laws generally required employers to maintain a safe workplace, often through general duty provisions in occupational health and safety legislation. Human rights laws have also protected employees from harassment, but with some limitations as human rights legislation does not extend to protect persons from harassment if such conduct is not linked to a protected ground (such as race, religion, disability, sex, sexual orientation and so forth). Over the last decade, we have seen enhanced protections in relation to workplace violence and harassment as many provinces now have explicitly legislated protections in relation to violence, harassment and/or bullying.

Canadian jurisdictions that have specific workplace violence prevention legislation include: British Columbia; Alberta; Saskatchewan; Manitoba; Ontario; Nova Scotia; Newfoundland and Prince

¹ 40% of Canadians Bullied At Work, Expert Says. (2011, December 6). CBC News Windsor. Retrieved from <http://www.cbc.ca/news/canada/windsor/40-of-canadians-bullied-at-work-expert-says-1.987450>

Edward Island. There are also specific protections under the *Canada Labour Code*² applicable to federally-regulated workplaces. Quebec laws address “psychological harassment”, which may include forms of workplace violence.

Ontario expanded protections in relation to workplace violence and harassment via Bill 168 which came into force in 2010. Bill 168, titled: “*An Act to amend the Occupational Health and Safety Act with respect to violence and harassment in the workplace and other matters*” amended Ontario’s *Occupational Health and Safety Act*³ (the “OHS”) by adding specific definitions of workplace violence and workplace harassment. Bill 168 amendments also include requirements for employers to: prepare and post written policies on workplace violence and harassment;⁴ develop a program to implement such policies;⁵ take reasonable precautions to protect workers from domestic violence in the workplace;⁶ provide workers with appropriate information and instruction on the contents of the policy and the program;⁷ and conduct a risk assessment of violence in the workplace⁸ amongst other things.

More recently, in 2013, three Occupational Health and Safety policies came into effect in British Columbia. The policies explain the duties of employers,⁹ workers,¹⁰ and supervisors¹¹ to prevent and address workplace bullying and harassment. The policies work in conjunction with existing occupational health and safety legislation that addresses violence in the workplace.¹²

Canadian jurisdictions are also starting to explicitly implement protections against cyberbullying. In 2013, Nova Scotia passed the *Cyber-Safety Act*¹³, the first Canadian legislation to specifically address cyberbullying and hold perpetrators civilly liable. The Act was passed following the death of teenager Rehtaeh Parsons who committed suicide after she was subjected to online bullying including circulating naked pictures. While victims of cyberbullying could always attempt to bring forward criminal complaints, criminal complaints are pursued by the police, who can choose if and when to lay charges, and cannot result in monetary damages. The *Cyber-Safety Act* allows victims to pursue monetary damages.

² R.S.C., 1985, c. L-2, Part II, Section 125(1)(z.16)

³ *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1.

⁴ *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, Section 32.0.1

⁵ *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, Section 32.0.6

⁶ *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, Section 32.0.4

⁷ *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, Section 32.0.7

⁸ *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, Section 32.0.3

⁹ Policy Item D3-115-2, RE: Employer Duties - Workplace Bullying and Harassment.

¹⁰ Policy Item D3-116-1 RE: Worker Duties - Workplace Bullying and Harassment.

¹¹ Policy Item D3-117-2 RE: Supervisor Duties - Workplace Bullying and Harassment.

¹² *Occupational Health and Safety Regulation*, BC Reg 296/97.

¹³ *Cyber-safety Act*, S.N.S. 2013, c 2

While Nova Scotia's *Cyber-Safety Act* is general and addresses bullying in any context, the Act specifically provides individuals with the right to sue for vicarious liability in relation to cyberbullying.¹⁴ This means employers could be responsible for actions of its employees in relation to cyberbullying, which could include online harassment amongst co-workers. Even without this legislation, employers could be held vicariously liable for harassment and bullying in various circumstances, including under applicable human rights legislation or in a civil action.

In 2014, the federal government passed Bill C-13, which among many other things, addresses cyberbullying by amending the *Criminal Code* to include a new offence of non-consensual distribution of intimate images, as well as complementary amendments to authorize the removal of such images from the internet. It is clear that our society and legislatures are moving towards enhancing the rights of persons to be free from harassment and bullying, both inside and outside of the workplace.

Consequences for the Perpetrators

Following the Bill 168 *OHS*A amendments in Ontario, employers' responsibilities for workplace safety clearly extend to the safety risks posed by violence in the workplace; however, since the inception of Bill 168, arbitral jurisprudence has recognized that the legislation does not mandate a particular disciplinary consequence for violent behaviour, nor displace a just cause analysis. Further, it has affirmed the application of these considerations in determining whether discharge is appropriate. More importantly, however, the jurisprudence has also recognized that Bill 168 has changed the landscape of violence in the workplace.

Kingston (City) v. Canadian Union of Public Employees, Local 109 (Hudson Grievance), [2011] OLAA No 393, came out shortly after Bill 168 came into effect. Arbitrator Elaine Newman considered the impact of Bill 168 on discipline for violence in the workplace, and stated at paragraphs 251-252:

I interpret the Bill 168 amendments to cause an additional factor to be added to the list of those usually considered when assessing the reasonability and proportionality of the discipline. That factor is workplace safety.

In the past, this aspect of the evidence has traditionally been considered part of the question "to what extent can this employment relationship be repaired?" It is my view that a separate and distinct question must now focus that analysis. That question is this: "To what extent is it likely that this employee, if returned to the workplace, can be relied upon to conduct himself or herself in a way that is safe for others"? Put another way, "to what extent is it

¹⁴ *Cyber-safety Act*, SNS 2013, c 2, Section 23

predictable that the misconduct demonstrated here will be repeated?"

More recently, in *Tenneco Canada (Cambridge Facility) v. United Steelworkers, Local 2894 (Teixeira Grievance)*, July 18, 2013 (unreported) (Davie), Arbitrator Louisa Davie similarly noted that an employer's duties under Bill 168 must be considered when addressing discipline for workplace violence or harassment. In that case, the grievor was terminated for cause following an altercation with a fellow employee. The employer's investigation revealed, and Arbitrator Davie found, that the grievor sought out a fellow employee in an attempt to intimidate him. The situation escalated, and when the employee pushed the grievor away, the grievor responded by punching the employee repeatedly until he fell to the ground, and then repeatedly kicking him. As a result of this incident, the employer terminated the grievor for cause. The union argued that termination was an excessive penalty.

Arbitrator Davie noted that fighting in the workplace has never resulted in automatic termination, but that arbitrators are required to examine a variety of factors, including the grievor's length of service, disciplinary record, and the context of the incident itself. Arbitrator Davie added an employer's duties under Bill 168 to this list of factors that must be considered. At pages 10-11 she stated:

In my view, to this list of factors, must now be added the impact of Bill 168 and the Employer's statutorily imposed duty to protect employees from workplace violence. In cases of this sort Bill 168, and the Employer's obligation to provide a safe workplace, must also guide arbitrators who may be asked to exercise their discretion and mitigate a penalty of discharge. As noted, the passage of Bill 168 has changed the landscape as violence in the workplace is now statutorily recognized as a matter of safety. Just as employers must ensure that employees are protected from dangerous machinery or substances in the workplace, employers must also act to protect employees from violence in the workplace.

In the past violence between co-workers (as opposed to violence directed at a manager or supervisor) was not viewed as seriously as it has been since Bill 168. Attitudes are changing. In the past employees who engaged in fisticuffs in the workplace were likely to find themselves suspended for a period of time. Now that is no longer necessarily the case and violence in the workplace may lead to immediate, summary dismissal, even for a first offense.

Arbitrator Davie noted that violence in the workplace still does not result in automatic dismissal and that all the circumstances must be examined. Despite this, she went on to note in the same paragraph as follows:

...it can't be over emphasized that violent conduct, bullying or intimidation in the workplace is viewed by employers and arbitrators alike as an unacceptable undermining of the employment relationship. This is in part because it is inconsistent with the Employer's obligation under Bill 168 to provide a safe workplace for all employees.

These arbitral decisions provide employers with helpful guidance on the impact of Bill 168 on the imposition of discipline. Arbitrator Davie's emphasis on the safety concerns that can arise with respect to violence in the workplace is a welcome development for employers and helps to reconcile the arbitral jurisprudence with the amendments to the *OHSA*. Employers can rely on these decisions to demonstrate that, even in the presence of mitigating factors, an employer's obligations under Bill 168 must be considered when the reasonableness of a penalty is assessed.

It is also clear from case law that employees can be disciplined and even discharged for misconduct on social media websites, including threatening or harassing conduct. For instance, in a 2012 case, *Canada Post Corporation v. Canadian Union of Postal Workers (Discharge for Facebook postings Grievance)*,¹⁵ the termination of a grievor for Facebook comments was upheld. The grievor's postings referred to the workplace as "Postal Hell", and made several remarks about running over or otherwise harming a "Voo Doo" doll of the superintendent. Other posts referred to the superintendent as "bitch", "hag" and "cunt". Some of the grievor's Facebook friends included her co-workers. Management ultimately became aware of the postings and investigated. In considering all the circumstances, including that the co-workers were able to view the comments, and that the grievor did not take responsibility, the arbitrator dismissed the grievance, and upheld the termination.

In *United Steelworkers of America, Local 9548 v. Tenaris Algoma Tubes Inc. (D Grievance)*¹⁶, the arbitrator upheld termination of a grievor for making sexually demeaning and threatening remarks about a co-worker on Facebook. The grievor made the offensive postings after he felt unhappy about his co-worker's alleged failure to follow proper procedures. The grievor's Facebook friends included co-workers and his account had no privacy settings, making his page open to the public. The posts at issue made it obvious he was referring to a particular female employee. The arbitrator accepted the employer's characterization of the grievor's posts as threatening, as the grievor suggested that the employee should be sexually assaulted. The arbitrator noted that the grievor likely intended for the

¹⁵ [2012] CLAD No. 85 (Ponak).

¹⁶ [2014] O.L.A.A. No. 180 (Trachuk)

female co-worker to learn about the posts. The arbitrator specifically referred to the employer's duty to maintain a workplace free of harassment under Ontario's *Human Rights Code*¹⁷, the *OHSA* and the collective agreement, and went on to find that the reinstatement of the grievor would be contrary to the employer's goal of eradicating workplace harassment. Considering the above, along with the egregious nature of the Facebook posts, the union's grievance was denied.

In the context of non-unionized employees, the courts have taken a hard stance by awarding significant punitive damages against employers for workplace harassment. For instance, in a recent decision, the court awarded a former Wal-Mart employee significant damages based on a finding that she was harassed in the course of her employment and that Wal-Mart had failed to address her substantiated complaints. The plaintiff was an assistant manager at Wal-Mart. She made several complaints that her manager had engaged in aggressive and harassing conduct. She ultimately resigned when she could no longer endure the working environment, and commenced an action for wrongful dismissal.

At trial, the jury awarded the plaintiff significant damages, including but not limited to \$1,000,000 for punitive damages against Wal-Mart and \$100,000 of punitive damages personally against her manager. Wal-Mart appealed the decision, and the Ontario Court of Appeal reduced the punitive damage awards to \$100,000 against Wal-Mart and \$10,000 against the manager.¹⁸ Although the Ontario Court of Appeal reduced the award for punitive damages, it maintained significant damages against both the employer and the harasser. Consequently, the decision provides a strong reminder that employers must seriously inquire and address any matters of harassment or violence in the workplace. The decision also demonstrates that an individual who engages in harassment against a co-worker can be held liable for a significant portion of damages.

Bullying versus Strong Management

While employers must take any allegation of bullying and harassment seriously, not all allegations have merit. Some employees allege they have been harassed or bullied by management, solely by virtue of being subjected to reasonable management actions. This issue was explored by the Ontario Labour Relations Board in the decision of *Amodeo v Craiglee Nursing Home Limited*.¹⁹ The complainant was a social worker who claimed a director harassed her by repeatedly telling her to document conversations with residents' family members and raising other concerns regarding her performance. She received a written warning as a result of these concerns. The complainant was terminated shortly after sending an email to the members of senior management complaining about the director's

¹⁷ R.S.O. 1990, c. H.19.

¹⁸ *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419 (CanLII)

¹⁹ 2012 CanLII 53919 (ON LRB)

treatment of her. She then filed a complaint pursuant to the *OHSA*, alleging the dismissal was a reprisal for her allegation of harassment.

The Ontario Labour Relations Board rejected the complainant's reprisal complaint and held, at paragraph 12:

The workplace harassment provisions do not normally apply to the conduct of a manager that falls within his or her normal work function, even if in the course of carrying out that function a worker suffers unpleasant consequences.

It is always important for employers to make appropriate inquiries into allegations of harassment, which often will include the requirement to conduct some form of investigation. It is important for employees to understand that an employer maintains the right to properly manage the workplace, including the right to assign work, conduct performance reviews, coach employees and implement disciplinary measures, as long as these actions are conducted respectfully, in good faith and for valid reasons.

Final Words

Conflicts will inevitably arise in life and in every workplace. It is the manner in which these issues are addressed that will make the difference. Many jurisdictions require specific policies on workplace violence and harassment. It is always good practice to have such policies, and employers should consider implementing such policies even if not required by law. It is important for each employee to understand his or her rights and to feel comfortable to raise a complaint if required. Employers should consider a solution-based approach which could include workplace mediations and external counselling, if necessary. Every instance should be considered and addressed on a case-by-case basis, with the goal to always create a peaceful and productive workplace.

About the Author



Deborah Hudson represents management in all aspects of labour and employment law, with a particular interest in human rights, accessibility laws and workplace safety and insurance law. Deborah articulated at Filion Wakely Thorup Angeletti LLP, and has worked as an associate at the firm since her call to the bar in 2008. From 2012 to 2013, Deborah spent much of her time over a 12-month period working in-house (on secondment) with the human resources department of a significant Ontario municipality where she gained hands-on human resources experience involving both union and non-union staff. Deborah has authored and contributed to a number of publications touching on various labour relations and employment law matters. Most recently, Deborah was a contributing author of *Accommodation Issues in the Workplace*,²⁰ the *Ontario Human Rights Code: Quick Reference*²¹ and *Halsbury's Labour Laws of Canada*²².

²⁰ Jamie Knight et al, *Accommodation Issues in the Workplace*, (Toronto: Wolters Kluwer Limited, 2014).

²¹ Jamie Knight et al, *Ontario Human Rights Code: Quick Reference*, 2015 ed. (Toronto: Thomson Reuters Canada, 2014).

²² Jamie Knight et al, *Halsbury's Laws of Canada – Labour*, (Toronto: LexisNexis Canada, 2011).

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