

Promoting Respect and Dignity in the Workplace

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Overview

- Introduction
- Definitions and Analysis
- Implications
- Liabilities
- Strategies

Introduction

“If an employer wishes to have a successful business, it is incumbent upon the employer to foster congeniality amongst employees by providing a good working environment which results in good employee productivity.”

- *Morland v. Kenmara Inc.* (Ont, S.C.J., 2006)

Introduction

- Bullying and harassment is a prevalent workplace concern
- 40% of employees in the Canadian Prairies reported experiencing psychological harassment or bullying
- Worldwide workplace bullying varies:
 - 4-5% in Norway
 - 10-20% in the United Kingdom and the United States of America

Definitions and Analysis

- Respect in the workplace has many components
- Three of the most frequent occurrences of disrespect in the workplace are:
 - Harassment
 - Bullying
 - Defamation

Harassment

- Harassment is defined in both the Ontario *Human Rights Code* and the *Canadian Human Rights Act* as:
 - A course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome
 - Essentially any behavior that demeans, humiliates, or embarrasses a person and that a reasonable person should have known would be unwelcome

Harassment

- Applies only to the enumerated grounds:
 - Race, colour, ethnic origin, sex, sexual orientation, marital status, family status, age, or disability
 - Additional grounds in the Ontario *Human Rights Code*: ancestry, place of origin, citizenship, creed, sexual orientation, record of offences
 - Additional grounds *Canada Human Rights Act*: race, national origin, religion, conviction for which a pardon has been granted

Sexual Harassment

- Harassment also includes sexual harassment
- Set out s. 7 of the Ontario *Human Rights Code* and s. 14(2) of the *Canadian Human Rights Act*
- Sexual harassment is humiliating or annoying conduct on the basis of sex, gender or sexual orientation
 - Examples include: unwelcome physical contact, leering, display of sexually offensive pictures or cartoons, vulgar language, etc.
- Includes sexual solicitation or “quid pro quo”

Poisoned Work Environment

- Pattern of degrading comments made persistently, continuously, and repeatedly based on a protected ground in the Ontario *Human Rights Code* and the *Canadian Human Rights Act*
- Can be found based on one particularly egregious act

Bullying

- Offensive behavior through cruel, malicious or humiliating attempts to undermine an individual or group of individuals
- Usually unpredictable, irrational, and unfair
- Differs from harassment:
 - Conduct is intentional
 - Includes more than just enumerated grounds

Bullying

- Two types of actions:
 - Deliberate actions with aim to humiliate, intimidate, undermine, or destroy an individual
 - Withholding resources (for example: information, supplies, support, etc.) necessary for an individual to succeed
- Can lead to workplace violence

Bullying

- Examples of bullying include:
 - Signaling out a coworker(s) in front of others
 - Shouting at coworker(s)
 - Acting with condescension
 - Gossiping or spreading rumors
 - Interrupting without care or respect
 - Sending hostile e-mail(s) or other correspondence

Re Universal Showcase Ltd. And U.B.C.J.A. Loc 1072 (Ont.Arb. 2005)

- Grievor shouted comments regarding the company's return to work policy at an Occupational Health and Safety Training Session
- Abusive attitude caused the trainers to become afraid and even breakdown into tears
- Arbitrator indicated that "this sort of bullying behavior is unacceptable in the workplace"
- The 3-day suspension was upheld and the grievance dismissed

Defamation

- Defined in the *Libel and Slander Act*
- An untrue statement that harms the reputation of an individual and lowers that individual in the eyes of a reasonable member of the community
- Two types:
 - Libel: published in written form
 - Slander: published verbally

Defamation

- In order to be successful in a defamation claim, the individual must demonstrate
 - The words used were defamatory
 - The words referred to the individual
 - The words were published to a third party
- In a work or business relationship, the individual does not have to prove that they suffered any losses

The Costs of a Disrespectful Workplace

- A workplace permeated with occurrences of harassment, bullying, and defamation can cost the employer greatly
 - Tangible costs
 - Intangible costs

Tangible Costs

- Higher rate of employee absenteeism
- Higher rate of sick leave and short-term disability leave
- Reduced productivity and reduced profitability
- Increase in employee turnover
- Increase in workplace stress
- Potential litigation costs

Intangible Costs

- Difficulty in recruitment and retention of employees
- Decreased workplace morale
- Strained workplace relationships
- Reduced corporate image and customer confidence
- Poor public relations
- Decrease in trust placed in management

Liabilities

- In addition to costs, harassment, bullying, and defamation pose great liabilities to employers
 - Human Rights Complaints
 - Constructive Dismissal Claims
 - Occupational Health and Safety Violations
 - Actions for Negligence
 - Actions for Intentional Infliction of Mental Suffering
 - Actions for Defamation

Human Rights Complaints

- Human Rights Tribunals have the authority to compensate the complainant for all losses they sustained as a result of the harassment they endured
 - Includes lost salary, medical costs, an order to write an apology
- Ontario Human Rights Tribunal can also award:
 - Up to \$ 10,000 for mental anguish where the infringement has been engaged in wilfully or recklessly
 - An order requiring the person to take whatever sanctions or steps reasonably available to prevent any further continuation or repetition of the infringement of the right

Human Rights Complaints

- Tribunal under the *Canadian Human Rights Act* can award:
 - That the discriminatory practice be ceased and measures to redress the situation be taken
 - Any rights, opportunities or privileges that were discriminatorily withheld
 - Wages
 - Any costs/expenses incurred by the victim
 - Compensation for pain and suffering up to \$ 20,000
 - Compensation of up to \$ 20,000 for willful or reckless discriminatory practice

Constructive Dismissal

- Generally, constructive dismissal occurs when an employer makes a unilateral change to a term or condition of an employment contract without providing notice of the change
- Bullying can breach an implied employer obligation:
 - *A fundamental implied term of any employment relationship is that **the employer will treat the employee with civility, decency, respect, and dignity**. The standard that has to be adhered to by the employer is dependent upon the particular work environment. This appears to be part of the trend to establish a duty upon an employer to treat employees "reasonably" in all aspects of the labour process.*

Constructive Dismissal

- If an employee can show they have been subjected to unfair treatment and bullying, the employer may have difficulty proving “just cause”
- A finding of constructive dismissal could cost the employer in terms of:
 - Reasonable notice
 - An increase in reasonable notice for bad faith conduct
 - Punitive damages

Morland v. Kenmara Inc. (Ont.S.C.J., 2006)

- Employee, a sales representative claimed that her Supervisor constantly used fowl language towards her, threatened her job security, yelled, and was continuously abusive
- The Court indicated that the employer had a duty to foster a good working environment which it failed to do in this case
- Awarded 3 months salary plus 1 additional month for the bad faith conduct

Occupational Health and Safety

- There are no specific provisions governing bullying, harassment, or defamation in the Ontario *Occupational Health and Safety Act*
- Employers have a general duty under section 25(2)(h) of the Ontario Occupational Health and Safety Act to: “*take every precaution reasonable in the circumstances for the protection of a worker*”

Occupational Health and Safety

- It is unclear whether this includes protection of a worker from bullying, harassment, or defamation
 - In a recent case the Labour Relations Board indicated:
“In my view, section 25(2)(h) of the Act requires the Employer to take all reasonable measures for the protection of workers, including taking steps to ensure the orderly, professional and safe conduct of all individuals working within the facility and steps to address any violence in the workplace.”
- Legislation amending the OHSA may be forthcoming as a draft Bill has received first reading in the Ontario Legislature

Occupational Health and Safety

- Under the *Canada Labour Code* Part II, employers have the following obligations:
 - “Every employer shall ensure that the health and safety at work of every person employed by the employer is protected”
 - “Take the prescribed steps to prevent and protect against violence in the work place”
- No specific provisions regarding bullying or psychological harassment

Negligence

- Requires 4 elements to be proven:
 - That the employer owes a duty of care to employees
 - That the employer should have observed a particular standard of care to fulfill that duty and did not observe that standard of care, thereby breaching it
 - Damage that resulted from the employer's breach
 - Damage was foreseeable and not too remote
- Can be held liable for general damages, aggravated damages, and punitive damages

Intentional Infliction of Mental Suffering

- Definition: flagrant or outrageous conduct that is calculated to produce harm and that results in a visible and provable illness
- The victim must prove:
 - Outrageous conduct by the perpetrator
 - Conduct calculated to produce some effect of the kind that was produced
 - Conduct producing actual harm that is visible and provable illness
- Can be held liable for general damages, aggravated damages punitive damages, etc.

Defamation

- Can be held liable for general damages, aggravated damages, punitive damages, and even an apology

Downham v. Lennox & Addington (County) (Ont.S.C.J., 2005)

- Employee's supervisor learned that the employee was helping a reformed sex offender using his role as a subsidized housing officer
- Employer believed that the employee was acting in a conflict of interest
- Employer terminated the employee after drafting a false report
- Supervisor actively informed prospective employers about the circumstances surrounding the employee's termination with the intention to destroy the employee personally and professionally
- Court awarded \$ 1 000 for damages as a result of the defamation
- Also awarded \$ 5 000 for intentional infliction of mental suffering

General Strategies

- Maintain General employer duties:
 - Always maintain a duty of care
 - Remain proactive to avoid liability
 - Keep workplace free from harassment
- Create a written policy to foster respect and dignity in the workplace

What should the policy include?

- Purpose
 - Explain employer's obligations regarding respect in the workplace, harassment and bullying
 - Indicate any legislative obligations to reinforce commitment
- Expectations of employees
 - Outline the conduct which is expected of the employees
 - Provide the criteria of acceptable conduct
- Consequences for violations
 - Indicate the disciplinary action(s) which may arise if an employee breaches the policy
 - Do not be overly rigid so as to maintain flexibility in dealing with issues
 - Follow a progressive discipline approach

What should the policy include?

- Complaint procedure
 - React immediately – handling complaints early and well will help to avoid escalation and future litigation
 - Attempt to resolve any complaints informally
 - Ensure that you speak with both the perpetrator and the victim
 - Investigate the concerns diligently
 - Address the appropriateness of the perpetrators conduct
 - Counsel both individuals of the expectations required of them

What should the policy include?

- Investigation procedure
 - Interview both the complainant and the offender
 - Interview any witnesses
 - Record the description of the incident and any relevant findings
 - Take any necessary disciplinary actions against the perpetrator
 - Remind the perpetrator of the no reprisal policy to protect the victim from further harassment
 - Advise the complainant of any actions taken and of the outcome of the situation

What should the policy include?

- Victim support and/or Employee Assistance Program
 - Outline any services provided by the employer that may be available to the employee
 - Example: Counseling services
- Commitment to Training and Education
 - Statement that the employer will train and educate employees about respect in the workplace, harassment, and bullying
- Monitoring and regular revision
 - Ensure that the policy still fits the corporate culture and business environment
 - Annual updates should achieve this goal

Other Approaches

- Screen all applicants
 - Diligently check employment references, review résumés diligently
- Train and educate employees
 - Provide sessions and documentation regarding harassment, bullying, and respect in the workplace
- Conduct performance evaluations regularly
 - Allows employer to critically address any behavior and reiterate what is expected of the employee

Other Approaches

- Workplace audits
 - Conduct anonymous audits of the workplace
 - Assess job satisfaction, employee stress, interoffice relationships with both coworkers and management
 - Measure indicators of a disrespectful workplace such as absenteeism, sick leave and short-term disability leave, and employee turnover

Questions
