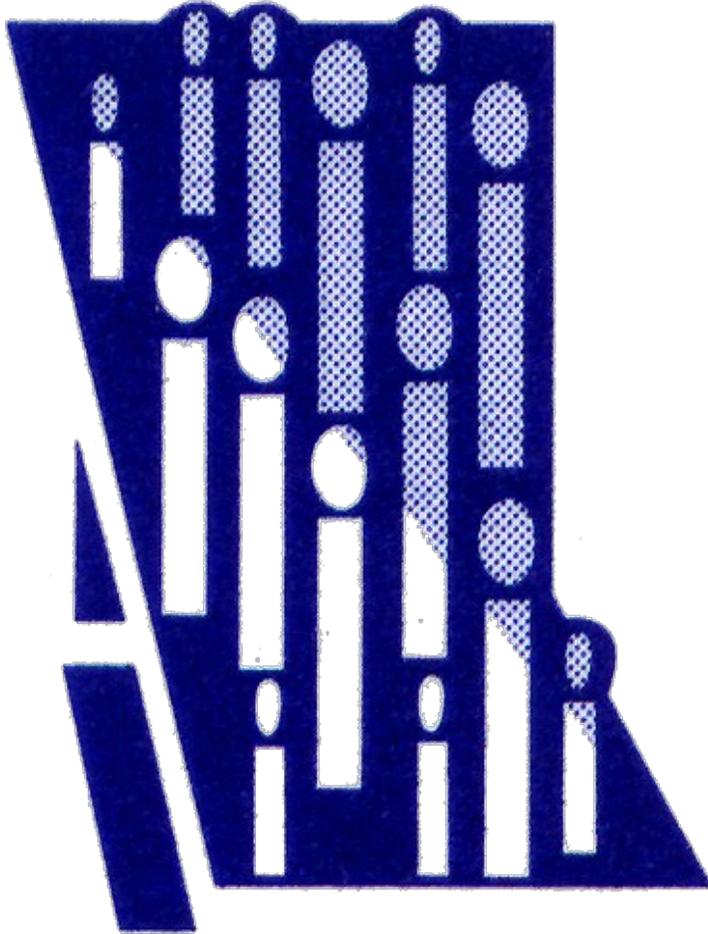


# **Anti-Bullying Legislation**



**BC Human Rights Coalition**

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## **Anti-Bullying Legislation in Canada**

In Canada, four provinces have thus far passed anti-workplace bullying legislation. Bullying has been described as:

the act of intentionally causing harm to others, through verbal harassment, physical assault or other more subtle methods of coercion such as manipulation, including ignoring and isolating the person.

Sometimes bullying is referred to as “psychological harassment” or “personal harassment”.

Typical workplace bullying or psychological harassment is not based on any protected characteristic of the target and is therefore not covered under Canadian Human Rights Legislation. If the workplace bullying occurs as a result of a protected characteristic (race, religion, sexual orientation etc...) then the target would have the protection provided by Canadian human rights legislation. In this paper we are referring to bullying that is not due to a protected characteristic.

Currently someone suffering from workplace bullying has few legal options available to them. The BC Occupational Health and Safety Regulation (the “BCOHSR”), only prohibits physical, violent workplace harassment, not psychological bullying. If the bullying is physical in nature the target can file a complaint with WorkSafe BC and, if warranted, may ask for criminal charges to be laid. Although the BCOHSR allows for someone to be compensated for mental stress, it is only compensable if it is caused by a sudden and traumatic event. Most bullying is subtle in nature and often occurs by isolating or ignoring a target; it often has no physical component.

If the bullying is psychological in nature, the target may complain to management and hope the situation is resolved, or if the situation is intolerable they may quit their employment and allege wrongful dismissal, or possibly file a tort action. Whether or not damages independent of breach of contract in employment are recoverable for injury suffered as a result of bullying in the workplace has not yet been fully decided. In *Haggarty v. McCullough 2002 A.J.No.7 (AB Prov. Ct.)* the plaintiff was awarded damages for psychological injury resulting from bullying at work, separate from the damages for constructive dismissal.

There are currently no simple and streamlined options for targets of psychological harassment/bullying in the workplace in B.C., such as complaining to an administrative tribunal.

There have been numerous attempts, as yet unsuccessful, to pass workplace anti-bullying legislation in various states in the United States. This has been done by way of providing an exception to the exclusive remedy (by way of OHS legislation) and making bullying a

separate actionable tort. Under this statute the injured employee would be allowed to bring an action in circuit court against the employer and/or co-worker. An example of this is Wisconsin's Bill 894.<sup>1</sup>

### **The need for anti-bullying legislation**

Workplace bullying is of great concern to employers and employees alike. The issues have attracted significant media attention, and attention from governments in various Canadian jurisdictions. Momentum is growing to support anti-workplace bullying legislation. Three provinces and many other countries have already addressed the issue by passing legislation.

In British Columbia, an 800 house telephone survey found 28% of households had experience with the phenomenon of workplace bullying.<sup>2</sup>

According to recent research in the U.S. almost 75% of surveyed employees had experienced workplace bullying as either a target or a witness<sup>3</sup>. As reported on the UK website, Bully Online, “[r]esearch by Professor Cary Cooper and colleagues at UMIST published in February 2000 reveal that out of 5300 employees in 70 organizations, 47% reported witnessing bullying in the last five years, 1 in 10 (10.5%) said they'd been bullied in the last six months and 1 in 4 (24.4%) said they'd been bullied in the last 5 years. Those who reported being bullied within the last six months consistently reported the poorest health, the lowest work motivation, the highest absenteeism figures as well as the lowest productivity compared to those who were not bullied. Those who witnessed bullying at work were also more likely to report poor health and low morale than those who worked in bullying-free environments.<sup>4</sup>”

According to a 2002 newsletter from the Association of Professional Engineers, Scientists & Managers in Australia, “[a] model was developed to estimate the cost of workplace bullying based on a very low 3.5 percent prevalence rate. It was found that the cost to the Australian economy is likely to be somewhere between \$6 billion and \$13 billion per annum. The cost of workplace bullying to the victim is of even more concern. In one study 75 percent of victims of long term bullying displayed symptoms of post-traumatic stress disorder. Despite evidence that workplace bullying is destructive to

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<sup>1</sup> See attached from: [www.healthyworkplacebill.org](http://www.healthyworkplacebill.org)

<sup>2</sup> <http://www.lornemayencourtmla.bc.ca/EN/3874/68298?PHPSESSID=5cda6fc97117d648143edc106441d344>

<sup>3</sup> *Aggressive Behavior: Workplace Bullying and Its Effect on Job Satisfaction and Productivity*, doctoral dissertation by Dr. Judith Lynn Fisher-Blando, University of Phoenix, 2008.

<sup>4</sup> Bully Online: <http://www.bullyonline.org/workbully/costs.htm> (retrieved Oct. 5, 2009)

employees, employers and the economy, it has only recently become an issue being researched and explored within Australia.<sup>5</sup>

Increasingly, workplace bullying is recognized as a contributing factor to workplace addiction problems, workplace violence, high turnover and recruitment costs, an increase in long term stress disability claims, absenteeism and “presenteeism” (where workers show up but don’t do any productive work), low overall productivity rates, and the development of chronically toxic workplaces.

### **Legislation in other Canadian jurisdictions**

As of June 15, 2010 three Canadian jurisdictions have implemented workplace anti-bullying legislation; they are Quebec, Saskatchewan and Ontario. Up until 2008 there was an inequity due to the bifurcated jurisdictional structure; only those employees working in provincially regulated workplaces benefited from these protections. Employees in federally regulated workplaces did not enjoy similar protection against psychological harassment. Since 2008 they have been covered under federal OHS legislation.<sup>6</sup>

There are many approaches to dealing with bullying. In the United States, which as of yet has not passed any legislation, the approach has been to attempt to have it passed at a State level with legislation defining bullying as a tort. The other options are to incorporate anti-bullying legislation into Occupational Health and Safety (WCB), Employment Standards, or Human Rights legislation.

#### **Quebec**

In June 2004, Quebec became the first North American jurisdiction to introduce new provision into its labour standards law – a general prohibition of psychological harassment in the workplace.

Quebec decided to incorporate their bullying legislation in their Act Respecting Labour Standards, their equivalent of our Employment Standards Act. Sections of that act dealing with bullying are incorporated in their Labour Code for protection of unionized workers.

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<sup>5</sup> Article: [http://www.apesma.asn.au/women/articles/workplace\\_bullying\\_may\\_02.asp](http://www.apesma.asn.au/women/articles/workplace_bullying_may_02.asp) (retrieved Oct. 5, 2009)

<sup>6</sup> Federal Labour Regulations – May 2008 20.2 In this Part, “work place violence” constitutes any action, conduct, threat or gesture of a person towards an employee in their work place that can reasonably be expected to cause harm, injury or illness to that employee.

The act states;

For the purposes of this Act, “psychological harassment” means 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.

And...

A single serious incidence of such behaviour that has a lasting harmful effect on an employee may also constitute psychological harassment.

And...

Every employee has a right to a work environment free from psychological harassment.

Vexatious behaviour is defined:

It is a conduct that is humiliating or abusive for the person who suffers it, that hurts them in their self-esteem and causes them substantial distress. It is a behaviour that exceeds what a reasonable person considers appropriate at work.

The employer is required to provide employees with an environment that is free from psychological harassment. However, this is an [obligation of means](#) and not of results. In other words, the employer cannot guarantee that there will never be any psychological harassment in his enterprise, but must:

1. prevent any psychological harassment situation through reasonable means,
2. act to put a stop to any psychological harassment as soon as is informed of it, by applying the appropriate measures, including the necessary sanctions.

“Obligation of means” is defined as;

Obligation for a person to take reasonable measures in the execution of their duties, considering the probability and gravity of risks normally foreseeable.

Various options exist for different groups of employees. Unionized employees may file a grievance since the legislation reads protection against psychological harassment into all collective agreements regulated pursuant to Quebec labour law. Non-unionized employees may file complaints with the Labour Standards Commission, which is then required to investigate the complaint. If no settlement is reached between the parties, the complaint may be referred to the “Commission des relations du travail” (similar to a labour board) for adjudication. Public service employees not governed by a collective agreement, including members and heads of agencies, file complaints with the Public Services Commission. There is a 90-day time limit for filing complaints.

One year following the coming into force of the new law, the Labour Standards Commission reported that it had received 2500 complaints of psychological harassment, and that less than 1 per cent of these complaints were considered frivolous.

Remedies for violation of the provisions on psychological harassment include the following:

1. ordering the employer to reinstate the employee;
2. ordering the employer to pay the employee an indemnity up to a maximum equivalent to wages lost;
3. ordering the employer to take reasonable action to put a stop to the harassment;
4. ordering the employer to pay punitive and moral damages to the employee;
5. ordering the employer to pay the employee an indemnity for loss of employment;
6. ordering the employer to pay for the psychological support needed by the employee for a reasonable period of time as determined by the Commission;
7. ordering the modification of the disciplinary record of the employee.

The legislation contemplates comprehensive and effective remedies. It is important to note, however, that in cases where the psychological harassment results in illness, the monetary remedies are more limited because the no-fault workers' compensation provisions for monetary compensation are brought into effect.

### **Saskatchewan**

The Government of Saskatchewan proclaimed legislation expanding the definition of harassment under *The Occupational Health and Safety Act, 1993* effective October 1, 2007.

The new definition of harassment includes language to address personal harassment in the workplace, such as abuse of power and bullying. The legislation also allows for the appointment of an independent adjudicator to hear appeals arising from harassment complaints.

Saskatchewan termed bullying "harassment". The legislation defines harassment as;

"any inappropriate conduct, comment, display, action, or gesture by a person: that either adversely affects the worker's psychological or physical well-being and that the person knows or ought reasonably to know would cause a worker to be humiliated or intimidated..."

To constitute harassment there must be;

- (a) repeated conduct, comments, displays, actions or gestures must be established; or
- (b) a single, serious occurrence of conduct, or a single, serious comment, display, action or gesture, that has a lasting, harmful effect on the worker must be established.

Personal harassment may include:

1. Verbal or written abuse or threats
2. Insulting, derogatory or degrading comments, jokes or gestures
3. Personal ridicule or malicious gossip
4. Unjustifiable interference with another's work or work sabotage
5. Refusing to work or co-operate with others
6. Interference with or vandalizing personal property

Harassment can exist even where there is no intention to harass or offend.

Harassment does not include anything that falls within legitimate management rights such as;

Reasonable action that is taken by an employer, or a manager or supervisor employed or engaged by an employer, relating to the management and direction of the employer's workers or the place of employment.

Day-to-day management or supervisory decisions involving work assignments, job assessment and evaluation, workplace inspections, implementation of appropriate dress codes and disciplinary action are not considered to be harassment even if they sometimes involved unpleasant consequences. However, managerial actions must be carried out in a manner that is reasonable and not abusive.

Other situations that do not constitute harassment include:

1. Physical contact necessary for the performance of the work using accepted industry standards
2. Conduct which all parties agree is inoffensive or welcome
3. Conflict or disagreements in the workplace that are not based on one of the prohibited grounds

“Every employer shall ensure, insofar as is reasonably practicable, that the employer's workers are not exposed to harassment with respect to any matter or circumstance arising out of the workers' employment”

Implementation began with the creation of a new harassment prevention unit within the Occupational Health and Safety Division of Saskatchewan Labour. The new unit was to focus on enforcing the anti-harassment legislation and educating workplaces on the new definition and complaint process.

The Act indicates that every employer has a general legal obligation to ensure, as much as reasonably practicable, that workers are not exposed to harassment with respect to any matter or circumstance arising out of employment.

“Every employer shall ensure, insofar as is reasonably practicable, that the employer's workers are not exposed to harassment with respect to any matter or circumstance arising out of the workers' employment”

The employer's duty extends to harassment that involves a matter or circumstance arising out of the worker's employment. This will include incidents occurring in the workplace as well as incidents outside the workplace if the event or circumstances arise out of the worker's employment.

This duty extends to:

1. Incidents that occur at the workplace or during work hours
2. Conduct perpetrated by another employee (i.e. co-worker or supervisor) or the employer
3. Incidents that occur outside of the usual workplace or after work hours that arise out of or are connected to a worker's employment, such as a work-sponsored social event or conference
4. Conduct perpetrated by someone other than an employee, but with whom the worker is required
5. to be in contact with, including clients, the public or people from contracting businesses

Where it is found that harassment took place the employer must take corrective action with any person who harasses another in the workplace to meet the requirements of section 36(1) of the OHS Regulations. When an investigation determines that harassment has taken place, they need to decide what they will do to stop, prevent and deter harassment.

Options may include action against persons in the workplace and third parties, including customers, clients and contractors.

The employer must ensure that:

1. The action is effective in stopping harassment and preventing its recurrence
2. The action is effective in protecting the complainant or others from reprisal
3. The action protects the privacy of the complainant and the harasser as much as possible
4. The action does not go against the collective agreement or any worker's employment contract
5. Any discipline imposed on a worker is appropriate

Employers should not fail to take the action necessary to stop the harassment because they fear the trouble and expense that may result from defending the decision. An employer's action will be defensible if it is based on a fair and competent investigation.

### Remedy

If an Officer concludes that harassment is taking place, they can direct that appropriate action be taken to stop the harassment and prevent its recurrence. An Officer cannot order how this is to be done but may make recommendations to the employer. An Officer will follow up with the employer and worker to ensure the harassment has stopped. If the harassment does not stop because an employer has failed to take reasonably practical action to stop the harassment, the Occupational Health and Safety Division may

recommend prosecution. The penalties would be the same as for other breaches of the Occupational Health and Safety Act.

### **Ontario**

On April 20, 2009, the Ontario government introduced Bill 168 in the legislature. The legislation amended the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 (“the *OHS Act*”) with respect to violence and harassment in the workplace. That act came into effect on June 15, 2010. The Ministry of Labour oversees OHS in Ontario.

"Workplace harassment" is defined in Bill 168 as "engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome".

The act states that;

An employer shall,

- prepare a policy with respect to workplace harassment; and
- review the policies as often as is necessary, but at least annually
- the policies shall be in written form and shall be posted at a conspicuous place in the workplace
- an employer shall develop and maintain a program to implement the policy with respect to workplace harassment.
- an employer shall provide a worker with information and instruction that is appropriate for the worker with respect to workplace harassment
- include measures and procedures for workers to report incidents of workplace harassment to the employer or supervisor;
- set out how the employer will investigate and deal with incidents and complaints of workplace harassment;

The remedies available are those available under the OHS regulation. It would appear that in order for the harassment to be compensable that the employee would have to establish an illness or injury that resulted in the course of employment, and which would be covered by OHS as part of its usual mandate.

### **Manitoba**

Manitoba has made changes to its Workplace Health and Safety Act which will come into effect February 1, 2011. Those changes include protection from workplace bullying which is termed “harassment”

It should be noted that the Regulation only provides protection for employees in the conduct of their work in the workplace. The Regulation’s definition states that objectionable conduct or comment has to be directed at a worker in the workplace.

The legislation amends the definition of harassment by replacing the definition "harassment" with the following: "harassment" means

- (a) objectionable conduct that creates a risk to the health of a worker; or
- (b) severe conduct that adversely affects a worker's psychological or physical well-being

Interpretation: "harassment"

1.1.1(1) For the purpose of the definition "harassment" in section 1.1, conduct is

(a) objectionable, if it is based on race, creed, religion, colour, sex, sexual orientation, gender-determined characteristics, marital status, family status, source of income, political belief, political association, political activity, disability, physical size or weight, age, nationality, ancestry or place of origin; or

(b) severe, if it could reasonably cause a worker to be humiliated or intimidated and is repeated, or in the case of a single occurrence, has a lasting, harmful effect on a worker.

1.1.1(3) In this section and in the definition "harassment" in section 1.1, conduct includes a written or verbal comment, a physical act or gesture or a display, or any combination of them.

It is interesting to note that the definition here overlaps with the definition of discrimination (based on a personal characteristic) under human rights legislation. It is not clear what effect this will have with respect to choice of venue, remedies, res judicata – issue estoppel, or deferral.

The legislation also speaks to the issue of management rights,

1.1.1(2) Reasonable conduct of an employer or supervisor in respect of the management and direction of workers or the workplace is not harassment.

The Regulation requires all employers in Manitoba to:

Develop and implement a written harassment prevention policy; and ensure that employees comply with the policy.

The harassment prevention policy must:

Be developed in consultation with a workplace's safety & health committee or the safety & health representative or the employees — whichever applies;

Include a specific definition of "harassment" that is spelled out in the Regulation and include content statements and basic procedures for complaining. The Policy must be posted in a prominent location.

### **Considerations for BC**

Should BC have anti bullying legislation?

If so, what should that legislation look like – should it be a tort, an amendment to the WCB Act, Employment Standards Act, or Human Rights Act?

Would it automatically be read into collective agreements?

How broad should the legislation be, e.g. who is covered, is it all workers, (what about exceptions under Employment Standards Act)?

Would it protect managers?

If it protected against bullying in employment how broadly should employment be defined?

Would it require affirmative acts by employers in advance of any complaints of bullying?

Would it only be compensable if there was an “injury” (as defined by WCB) or should there be damages akin to injury to dignity?

For a fuller consideration of these questions see the attached paper, Bullying Legislation Outline and Considerations by Robyn Durling

### **BullyFreeBC ([www.BullyFreeBC.ca](http://www.BullyFreeBC.ca))**

BullyFreeBC is a group of individuals and organizations mounting a campaign aimed at eliminating workplace bullying. The goal of the campaign is to create awareness about bullying in the workplace, provide links to resources dealing with bullying, and ultimately assist with the development and drafting of workplace anti-bullying legislation.

BullyFreeBC has been an aggregator of content dealing with bullying. One of the major areas of emphasis has been on research with respect to the possible implementation of workplace anti-bullying legislation. There are essentially four options when drafting anti-bullying legislation; the legislation can create a tort, amend Occupational Health and Safety acts, Employment Standards Acts, or Human Rights Acts. BullyFreeBC is doing research on how the legislation would fit in each of these areas. A paper by Karolina Dec on the possibility of amending the BC Workers Compensation Act to include anti-bullying language is attached. Currently research is being done how the BC Employment Standards Act could be amended include anti-bullying provisions.

Also attached is a copy of a draft outline for legislation. This is intended as a broad overview of the various considerations when determining what to include in the legislation.

BullyFreeBC has received a Small Projects grant from the Law Foundation of British Columbia to do outreach and get feedback from potential stakeholders with respect to anti-bullying legislation.

Anyone wanting to become involved with BullyFreeBC can contact Diane Rodgers at 604-689-8474 ext 215. Email: [info@BullyFreeBC.ca](mailto:info@BullyFreeBC.ca)