

Workplace Bullying: A Legal Reform

by Karolina Dec (June 2010)

INTRODUCTION

A Healthy Workplace: Balancing Interests	41
DEFINING WORKPLACE BULLYING: GENERALLY	42
The International Legal Reform	42
DEFINING WORKPLACE BULLYING WITHIN CANADA	43
Quebec Labour Code Amendment	43
Saskatchewan Occupational Health and Safety Amendment	44
Ontario Occupational Health and Safety Amendment	45
Federal Legislative Initiative	46
DEFINING WORKPLACE BULLYING IN B.C.	47
WHERE TO TURN LEGALLY?	47
Civil Action – Expanding Tort Damages	47
Human Rights Protection	48
Employment Standards Legislation	48
WorkSafe B.C. Legal Reform	50
HOW CAN THE LEGAL REFORM MATERIALIZE?	51
Australia WorkSafe	51
The Worker’s Compensation Board Policy	52

Introduction

Many people participate in the labour market, making the workplace an environment that affects various aspects of their existence. Consequently, the workplace becomes a definitive factor of the individual. These workers, irrespective of their actual job description, are key players in the growth of Canada’s economic sector. The Canadian economy is the driving force behind many laws and underlying policies.

This paper will analyze the absence of law available to protect economic players in the context of “workplace bullying or harassment.” First, the issue around the appropriate definition of workplace bullying for British Columbia will be visited. Next, the suggested legal reform will be considered, having regard to international and domestic movements. Finally, the proposed reform in British Columbia and the role of individual actors within employment will be evaluated.

A Healthy Workplace: Balancing Interests

Numerous different interests coexist within the workplace. In situations of bullying, the target victim, other employees, supervisors and business owners all have something at stake, whether it is their individual livelihood or the sustainability of the company. Employers should be interested in the high costs of workplace bullying. A 2003 survey commissioned by the Workplace Bullying Institute of Bellingham, WA, found that targeted individuals suffer debilitating anxiety, panic attacks,

clinical depression and even post-traumatic stress disorders.¹ The same study shows that in 40% of the cases the target quits, 24% of the victims are fired, and 13% of the targets transfer. Aside from the devastating effects this has on the victim personally, an overall toxic workplace atmosphere is created which undoubtedly affects everyone's morale and productivity.

Apart from psychological well being, there are high economic costs. The ultimate carrier of the costs is the business. In 2002, The Orlando Business Journal stated that a high turnover creates an economic drain on the company. The costs of replacing an employee were estimated at two to three times that person's annual salary.² Other sources of high costs include absenteeism of the victim employees and reduced productivity among these workers.³ Workplace anti-bullying legal reform can serve to remedy to these costs. A healthy workplace dynamic, which seeks to eliminate workplace bullying, can translate into long-term change and accepting coexistence.

Defining Workplace Bullying: Generally

It is a difficult balance to formulate a definition of "workplace bullying" that will function within the context of employment in British Columbia. The targeted behaviour needs to be isolated, distinguished from the types of actions that are seen as a personal grievance or reasonable exercise of managerial and supervisory authority, and reflect not only the physical but also the psychological components. This distinction is important to keep the integrity of the proposed reform. The definition of workplace bullying is not meant to remedy regular social interactions that may amount to rudeness or incivility (otherwise amounting to personal grievances), work criticism and dissatisfaction.⁴ To distinguish non-bullying acts from those that require remedial or punitive provisions, it is necessary to retain some form of repetition and severity, while being mindful that certain acts carry with them consequences or remedies of differing levels depending on the individual target and perpetrator. Workplace bullying is often associated with childish complaints. The targeted behaviours are frequently trivialized and misunderstood; therefore, it is helpful to evaluate how other jurisdictions grapple with defining the elements of this behaviour.

The International Legal Reform

Workplace bullying has been the subject matter behind many international legal reforms; jurisdictions worldwide are becoming aware of its negative effects and prevalence. In an Ordinance of the Swedish National Board of Occupational Safety and Health, Sweden defined workplace bullying as "...recurrent, reprehensible or distinctly negative actions which are directed against individual employees in an offensive manner and can result in those employees being placed outside the workplace community..."⁵ The Ordinance requires that an employer organizes and plans to prevent victimization as far as it is practicable, and shall make it clear that acts of victimization will not be

¹ Zogby International, *US Workplace Bullying Survey* (2007 September), online: Workplace Bullying Institute <http://www.workplacebullying.org/research/WBI-Zogby2007Survey.html>.

² Liz Urbanski Farrell, "Workplace bullying's high cost: \$180M in lost time, productivity" *Orlando Business Journal* (15 March, 2002), online: <http://orlando.bizjournals.com/orlando/stories/2002/03/18/focus1.html>.

³ *Ibid.*

⁴ Gary Namie & Ruth Namie, *The Bully at Work: What You Can Do to Stop the Hurt and Reclaim Your Dignity on the Job*, 2nd ed. (Naperville, IL: Sourcebooks, Inc., 2009) at 15-16 [*The Bully at Work*]

⁵ Statute Book of the Swedish National Board of Occupational Safety and Health, online: (1993) at 3 www.av.se/dokument/inenglish/legislations/eng9317.pdf.

accepted.⁶ Dr. Gary Namie, Co-founder and Director of the Workplace Bullying Institute in the United States, characterized workplace bullying as “...repeated, health-harming mistreatment of a person by one or more workers that takes the form of verbal abuse; conduct or behaviours that are threatening, intimidating or humiliating; sabotage that prevents work from getting done; or a combination of the three.”⁷ The actions may constitute psychological and illegitimate behaviours. South Australian legislation includes elements of “repeated and unreasonable behaviour directed towards an employee or group of employees that creates a risk to health and safety...”⁸ within its scope. The Australian policy has a large internal remedy component that is instructive in guiding the proposal for legal reform within B.C., and will be discussed within that evaluation. The common underlying thread running through the definitions of workplace bullying integrates repeated conduct with severe consequences on both the target (person toward whom the behaviour is directed) and the overall workplace environment.

Defining Workplace Bullying within Canada

Several Canadian provinces have developed definitions of actions analogous with workplace bullying. Subsequently, various legislative amendments were undertaken in these jurisdictions. The legislative amendments will be considered separately, isolating elements of the range of definitions to determine the strengths and weaknesses of each. In conjunction, an analysis of the statutes will follow, before concluding with a proposal for a definition in B.C.

Quebec Labour Code Amendment

The Quebec Labour Code⁹ was amended to include “psychological harassment,” within Chapter N. 1-1 of the Labour Standards Act¹⁰. Psychological harassment is “...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...”¹¹ Single behaviours which are serious and leave lasting, harmful effects are also included within the scope of this definition.¹² Psychological harassment reflects human dignity and well being, while the focus is on the individual victim. By including a contact and physical integrity element, the Quebec definition captures both “psychological” acts as well as any “physical or violent” conduct. Unfortunately, the behaviour comes in the form of intentional conduct. Many actions that have the damaging effects of bullying are often not done directly with intent to give rise to the harmful consequences. These concerns must be addressed, to ensure a safe environment that furthers the well being of individual employees and creates an accepting work environment. Willful blindness should also encompass the type of behaviour being remedied.

Quebec’s legal reform is the only provincial initiative that addresses employment standards. A positive responsibility is placed on employers to take reasonable action to prevent psychological

⁶ *Ibid.*

⁷ *The Bully at Work*, *supra* note 3 at 3

⁸ WorkSafe Victoria, *Preventing and Addressing Bullying at Work*, S.A., Edition No. 2 (February 2009) at 6 [*WorkSafe Victoria*]

⁹ *Labour Code*, R.S.Q. 2009, c. C-27

¹⁰ *An Act Respecting Labour Standards*, R.S.Q. 2009, c. N. 1-1

¹¹ *Ibid.* art. 81.18

¹² *Ibid.*

harassment and to put a stop to it once it is brought to light.¹³ Reasonable action is not defined under the Labour Code. The reasonableness can perhaps be evaluated on an objective standard, according to how a reasonable person in the position of the employer having regard to all the circumstances would act.

Quebec's legislation does not directly create a positive obligation to implement and ensure compliance with policy regarding psychological harassment. Behaviours falling within the scope of psychological harassment must first manifest, before an employer is required to act. Someone must first be a victim. This fails to recognize the effects that workplace bullying has on individual workers, aside from the target. Bullying creates a toxic workplace environment. Other workers might become anxious with respect to their helplessness or about becoming a victim. A systemic change needs to occur within the workplace environment. Preventative policy measures and initiative on part of employers becomes necessary.

Saskatchewan Occupational Health and Safety Amendment

In 2007 the Saskatchewan Occupational Health and Safety Act¹⁴ was expanded to include a broad definition of "personal harassment." This inclusion effectively broadened employer responsibilities as well as worker expectations. Personal harassment captures both intentional and reckless behaviour. It includes conduct committed by a person, aimed at a personal characteristic belonging to the target or based on a human rights protected ground. In addition, the definition includes conduct that adversely affects the worker's psychological or physical well being. Harassment must constitute a threat to the health and safety of the target worker, if the perpetrator knows or ought to reasonably know the effects of their behaviour.¹⁵ The Saskatchewan Act contemplates that a broad definition of personal harassment can capture behaviours that do not constitute workplace bullying, especially in the realm of actions necessary for the everyday management of employer's workers and place of employment. Reasonable actions taken by an employer, or persons performing authoritative duties, relating to management and direction of the employer's workers or the place of employment are excluded from elements which constitute personal harassment.¹⁶

Employers are responsible for the creation of programs regarding "occupational health and safety" in accordance with committee and regulations. These programs must be made available to listed interested parties.¹⁷ "Occupational health and safety" is defined to include among other things the promotion and maintenance of a working environment that is free of harassment.¹⁸ A possible concern can arise with respect to actual program implementation and maintenance. To ensure that the programs are effective and target personal harassment at the root, meaning before it transpires into actual victimization and lasting harm, mechanisms must exist to serve as a system for checks and balances. Sincere attempts by employers to implement and maintain the specified programs must be balanced with the consequences in their failure.

¹³ *Ibid.* art. 81.19

¹⁴ *Occupational Health and Safety Act*, S.S. 1993, c. O-1.1. [*Saskatchewan OHSA*]

¹⁵ *Ibid.* ss. 2(1), 2(3)

¹⁶ *Ibid.* s. 2(4)

¹⁷ *Ibid.* ss. 13(1), 15

¹⁸ *Ibid.* s. 2(1)(p)(v)

The major weakness in the scope of this definition is found within its failure to address non-acts of targeted psychological harm. An invisible warfare can exist within the workplace environment. A single perpetrator or ringleader within a pack of individuals can silently create the psychologically harmful effects targeted by the legal reforms. Ostracism, neglect and direct denial of benefits like promotions and training opportunities associated with the workplace, can escape the scope of the definition. A target can see these as personally directed and intentionally driven to carry with them the consequences of harm and denial. The legal reform is not a means to remedy personal grievances. It is necessary to include a defense for miscommunication and misunderstandings that from one perspective are seen as bullying, while from the other are necessary measures to balance the competing interests found within the workplace. An argument can arise that a blanket defense is created for those who are misusing their authority. This concern can be addressed once an investigative process is underway.

Ontario Occupational Health and Safety Amendment

Ontario is the third province to legally address the concept of “workplace bullying” with the passing of Bill 168 on Dec. 12, 2009 proposing amendments to Ontario’s Occupational Health and Safety Act.¹⁹ The definition is two-fold. “Workplace harassment” includes vexatious comments or conduct against a worker, in the workplace where it is known or ought to be known that the behaviour is unwelcome.²⁰ “Workplace violence” pertains to physical force committed against a worker, in a workplace, which causes physical injury. Attempted physical force, or a statement(s) and behaviour(s) that can be reasonably interpreted as a threat is also incorporated within the definition.²¹ The definition captures psychological and physical conduct. The psychological aspect contemplates recklessness and willful blindness on the part of the perpetrator. It is not as broad as Saskatchewan’s definition of “personal harassment”, because it narrowly addresses ‘unwelcome actions;’ therefore, only overt and obvious forms of harassment are captured by the definition. An objective standard is also interjected in the definition of “workplace violence” where it must be reasonable to interpret the actions as a threat. This places a burden on the target to recognize the effects of the conduct. The target is required to show that the violent acts projected at them are what a reasonable person in their circumstances would consider as threatening. Crafters of B.C. legislation should be aware of the burden placed on targets by terms such as ‘unwelcome behaviour’ and ‘reasonableness of the interpretation of conduct’.

Aside from the new definitions, Ontario’s legal reform scheme places positive obligations on employers to develop and maintain an implementation program that addresses workplace harassment and violence. Additional duties include the assessment of possible risks, having respect to all the circumstances, and presentation of results after a risk assessment has been completed.²² These program and risk assessment procedures may be directive features to consider in a B.C. legal reform. Positive obligations on the part of employers, holding them legally accountable to discharge their legislative duties, addresses the goal of creating an overall change within the workplace dynamic. Programs can be formulated according to the specific needs of an occupational setting. The greatest concern arises with respect to program maintenance and accountability. This will be addressed within the analysis of a suggested B.C. legal reform.

¹⁹ *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1

²⁰ *Ibid.* s. 1(1)

²¹ *Ibid.*

²² *Ibid.* ss. 32.0.1 – 32.0.7

Federal Legislative Initiative

The Federal government has undertaken legislative amendments with respect to workplace bullying in the areas of health and safety and employment standards. This change, while effective, is limited by way of jurisdiction. Employment is a provincial issue over which the provincial government has power to legislate. The federal initiatives, although enforceable only against federally incorporated corporations and Crown agencies, can serve as instructive tools.

The Regulations regarding Occupational Health and Safety Act²³ have been amended, and effectively expanded to include Part XX – Violence Prevention in the Workplace. “Workplace violence” is limited to conduct committed by a person toward another, within the workplace, which can be reasonably expected to cause harm, injury or illness to the employee.²⁴ This definition is subject to similar limitations as Quebec, with respect to intentional elements and an objective inquiry. The amendments place a positive duty on the employer to identify risk factors that can contribute to workplace violence, and implement systemic controls to minimize these risks.²⁵ It is instructive to note the proactive approach to isolate, assess and remedy risks before the effects of workplace violence transpire. The purpose of these amendments is to prevent accidents and injury to health, with respect to federally regulated employees, specific to workplace violence. These risks are identified as translating to economic and societal costs.²⁶ The National Labour Operations Division, in their June 2005 report stated that the economic benefits of the above mentioned program implementations include lowered risk of injury and mortality, lowered economic losses from illness and accidents, with an increase in labour relations, workers’ morale and productivity. The associated costs include resource output on the part of employers with respect to implementation and administration of the programs.²⁷ This report is helpful when considering the benefits versus costs analysis for a B.C. legal reform.

Bill C-276, the Workplace Psychological Harassment Prevention Act, which was first introduced as Bill C-451 in 2003, is an amendment to the Canada Labour Code²⁸ and applies to the public service of Canada. This amendment prohibits “psychological harassment.” The most relevant element of this definition, for the purpose of this analysis, constitutes the abuse of authority.²⁹ Inappropriate use of authority, while undermining employee’s job performance and endangering their job security, falls within the scope of psychological harassment. This addresses concerns around actions that can be defended as necessary in carrying out managerial duties of employment. In an attempt to balance interests, a positive duty is placed on both the employee victim and employer to address any issues arising out of psychological harassment. A burden is placed on the victim to ensure that the perpetrator is notified of the harassment they are accused of.³⁰ The duty on the employer is to create a policy against psychological harassment with the appropriate remedies and disciplinary actions

²³ *Canada Occupational Health and Safety Regulations*, R.S.C. 2000, c. 20, SOR/86-304

²⁴ *Ibid.* s. 20.2

²⁵ *Ibid.* ss. 20.3 – 20.6

²⁶ *Regulations Amending the Canada Occupational Health and Safety Regulations* (8 May 2008), online: Canada Gazette <http://www.gazette.gc.ca/rp-pr/p2/2008/2008-05-28/html/sor-dors148-eng.html>

²⁷ *Ibid.*

²⁸ Canada Labour Code, R.S.C. 1985, c. L-2

²⁹ Bill C-451, *An Act to prevent psychological harassment in the workplace and to amend the Canada Labour Code*, 2nd Sess., 37th Parl., 2003 (as passed 1st reading by the House of Commons Bill C-276 29 January 2009). Online: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2333333&Language=e&Mode=1/>

³⁰ *Ibid.* s. 3(2) at 5

to be taken.³¹ This legislative change is useful when considering appropriate reform in B.C., because it is the first amendment within the area of employment standards that places a positive duty on employers in implementing and maintaining a program that targets behaviours analogous to workplace bullying.

Defining Workplace Bullying in B.C.

The most effective definition of “workplace bullying” will balance interests of the affected parties (target victim, general employee population and employers) having regard to the economic context. Ultimately, the goal is to eliminate acts that threaten the target individually, and the workplace generally. Legal reform in B.C. should include “personal harassment” with elements of: conduct that is either intentional or negligent (willful blindness), severity and repetition, physical violence as well as non physical acts (conduct, gestures, verbal), with a clear and demonstrably negative effect on the target. An added element can embrace acts that would be reasonably known or expected to be humiliating.³² The definition should not be restricted to repetitive acts, when severity and effects are lasting and extreme; however it would be beneficial to retain a general requirement of “persistence and repetition” to filter out conduct which more reasonably falls under a personal grievance category.

The Saskatchewan reform provides guidance on how to address the issue of what bullying is not by excluding from prohibition acts that are reasonable and necessary to manage workers and the employment. Silent warfare could be included within the scope of the definition in the form of abuse of authority, as was seen Federally.

In order to effectively balance the competing interests of workers and employers, a defense should be provided for employers who are sincere in their attempt to discharge their duties with respect to personal harassment. The elements outlined are a fair attempt to balance the interests of the victim target, affording the definition a broad scope, while at the same time some distinguishing between common human interactions and actual harmful conduct.

Where to turn legally?

The next step in this analysis is to determine an avenue for the B.C. legal reform. Legal areas most suitable for this discussion include: a new civil remedy as is being considered in the USA; amendments within human rights legislation; amendments within employment standards or occupational health and safety legislation. Each area of the law will be discussed below, with an analysis of the scope and possible effects.

Civil Action – Expanding Tort Damages

There is a legal movement in the USA that is gaining momentum. The Healthy Workplace Bill (HWB) has been introduced in seventeen states since 2001. The HWB proposes to create a

³¹ *Ibid.* ss. 3(3)(a – g) at 6

³² WorkSafe B.C., *Harassment Policy: The Worker’s Compensation Board of B.C. & the Compensation Employees’ Union* (2007) at 5, online: www.worksafeB.C.com/contact_us/bid.../harassment_policy.pdf. [WorkSafe B.C.]

workplace bullying claim as an actionable wrong against a person.³³ Worker interests are balanced with those of employers under this proposal. A claimant must prove that harm was suffered, is expected to finance the costs of legal representation, and can claim damages.³⁴ The HWB protects conscientious employers when internal correction and prevention mechanisms are in effect; however vicarious liability is extended onto employers who stand idly by without discharging their duties. Holding employers vicariously liable can act as a deterrent and promote the implementation of anti-bullying programs. However, absent a mandatory and legally enforceable requirement, there are no guarantees that employers will discharge their civil duties. Another limitation is the need for actual workplace bullying to take place before an action arises. Intentional or negligent infliction of mental suffering exists in Canada as an action in tort. It requires the claimant to prove that there was outrageous, or extreme conduct that was calculated to produce mental suffering, or would produce mental suffering in a reasonable person.³⁵ The claimant bears a very high onus of proving the elements of the conduct and must also show that a mental illness or harm followed. This action is very similar to that proposed by the HWB. It does not address the greater goal of preventing bullying before it escalates to actual harm. These are significant limitations to a civil reform.

Human Rights Protection

The Human Rights Code³⁶ (Code) was implemented to foster a fully free and participatory society in B.C. with respect to economic, social, political and cultural life.³⁷ One of the main purposes outlined in the Code is to prevent discrimination based on one or more of the prohibited grounds.³⁸ The Code does not address personal harassment, nor does it address toxic work environments, unless they are directly related to a prohibited ground based on a protected personal characteristic.³⁹ In order to expand the recourse available to victims of workplace bullying, there would need to be an amendment to the Code. However, illegal harassment is often not based on status; rather it cuts across boundaries of status membership.⁴⁰ There is no single characteristic that would be sufficient to include as an amended ground. Another criticism is that the behaviour must occur before there can be a claim. The target must be a victim before they can have access to legal recourse, and take the initiative to sue. Further, there is no duty placed on employers to implement and maintain programs that address workplace bullying, in an attempt to positively change the workplace dynamic.

Employment Standards Legislation

To determine whether employment standards is an appropriate avenue for the proposed legal reform regarding workplace bullying, the scope and purpose of the requisite Act must be

³³ Healthy Workplace Bill, *Quick Facts About the Healthy Workplace Bill*, (2010), online: The Workplace Bullying Institute www.healthyworkplacebill.org/bill.php.

³⁴ *Ibid.*

³⁵ *Wilkinson v Downton* [1897] 2 Q.B. 57. See also Jennifer Law Conkie, Q.C. and Julia M. Dmytryshyn, *Psychological Bullying in the Workplace: a frontier for expanding tort damages* (Paper presented to the Employment Law Conference of British Columbia, May 2009) [unpublished] at 8.1.12 [*Psychological Bullying in the Workplace*]

³⁶ *Human Rights Code*, R.S.B.C. 1996, c. 210

³⁷ *Ibid.* s. 3(a)

³⁸ *Ibid.* s. 3(c)

³⁹ *Psychological Bullying in the Workplace*, *supra*. Note 35 at 8.1.7

⁴⁰ *The Bully at Work*, *supra*. note 3 at 9

examined. The purpose behind the B.C. Employment Standards Act⁴¹ (Act) is to ensure that employees in B.C. receive appropriate standards of compensation and conditions of employment. The Act seeks to facilitate dialogue between employers and employees while ensuring that there is fair treatment between both.⁴² The provisions anticipate a power imbalance that exists between employees and those in positions of authority. The scheme of the Act creates a sense of contractual rights and expectations with respect to holidays, pay, and maximum hours worked, among other things.⁴³ Remedial provisions are also provided which address issues like hiring practices, wages, and termination. Quebec's legislative reform occurred within the employment standards sector, placing psychological harassment amidst absences and termination provisions. With respect to the B.C. legislation, the most appropriate placement of personal harassment would seem to fall adjacent to the termination grievance provisions. Personal harassment would address the purpose of facilitating appropriate conditions of employment.

The biggest shortfall with respect to the Act is that there are no positive duties imposed on employers to create and maintain programs that facilitate an appropriate employment environment. Duties do not extend onto employees either. The amendment could address this concern by imposing a duty on employers to ensure a work environment free from personal harassment, while extending the duty onto employees as well. An example can be drawn from the recent Federal legislative amendments in the area of employment standards discussed previously. However, the provisions of the Act are primarily financial in orientation, more so than the provisions of the Quebec Labour Code and the Canada Labour Code. The employment standards legislation in B.C. sets an interpretive tone unique to the jurisdiction. The expectations and rights created under the Act encompass obligations that are entered between employers and employees. Furthermore, the Employment Standards Self-Help Kit, which is utilized by employees and employers to solve disputes, directly addresses concerns regarding unpaid wages, vacation time, break hours, and other conditions within similar components.⁴⁴ With respect to complaints, investigations, and determinations under Part 10 of the Act, a complaint must be made in writing and delivered within six months of the occurrence, giving the Director of Employment Standards ultimate responsibility for its investigation.⁴⁵ Section 76 is permissive, in that the Director "may" conduct an investigation to ensure compliance with the Act. Discretion is reserved for the director to determine whether the employee has taken requisite steps specified in order to facilitate a resolution.⁴⁶ These requisite steps can be traced back to the Self-Help Kit. The nature of the investigative process places a heavy burden on a victim to prove their case.

In the event that amendments within the area of employment standards gave rise to positive duties imposed on both employees and employers to facilitate an environment free of personal harassment, and create recourse for those affected by personal harassment, another limitation arises with respect to scope. Who are the possible claimants? And who are the respondents? The Act defines employees as persons entitled to wages for work performed, and who normally perform work for another person. This seems to have a broad application to anyone in the services of another person. However, the Ministry of Labour excludes independent contractors and self-employed persons from the definition.⁴⁷ Unless the contractor or self-employer person can show that they fall within the requisite amount of control to qualify as an employee, they are not protected under the Act. Many workplaces

⁴¹ *Employment Standards Act*, R.S.B.C. 1996, c. 113 [*Employment Standards*]

⁴² *Ibid.* ss. 2(a - d)

⁴³ *Ibid.* Part 4 through 8

⁴⁴ Ministry of Labour Employment Standards Act Self-Help Kit

⁴⁵ *Employment Standards*, *supra* note 41 s. 76

⁴⁶ *Ibid.* s. 76(3)(d)

⁴⁷ Ministry of Labour Employment Standards, "Employee or Independent Contractor Factsheet (June 2009), online: Government of British Columbia <http://www.labour.gov.B.C..ca/esb/facshts/employee.htm>.

employ contractors and self-employed individuals, meaning that either the person employed would bear the onus to prove they are entitled to protection, or they are excluded altogether. Duties under the Act would also not extend to these individuals. An argument can be made that the Quebec Labour Code extends rights and responsibilities over persons normally excluded by the provisions of the Code, when addressing psychological harassment concerns. This can also occur within the Act; however, such an expansion would run counter to the express intention of the Ministry of Labour. If Parliament intended to extend duties and rights of employment standards legislation onto contractors and self-employed individuals, they would not include the contractor and self-employed exceptions under discussion. In light of the underlying theme, Parliamentary intent, and onerous complaints process, a legal reform within employment standards does not seem promising.

WorkSafe B.C. Legal Reform

Most jurisdictions that have undergone legal reform with respect to workplace bullying have done so in the area of Occupational Health and Safety. To determine whether this would be an appropriate legal avenue for B.C., the Workers Compensation Act (WCA)⁴⁸ must be analyzed. The WCA purpose with respect to occupational health and safety is to promote occupational health and safety of workers and other persons present at the workplace from risk to their health and safety.⁴⁹ An environment that provides health and safety to workers and others is directly promoted; however, “occupational health and safety” is not defined. Workers include any persons under contract for service, which can be either written or implied.⁵⁰ A person can be deemed to be a worker by the Board, further expanding the scope of persons falling under the WCA.⁵¹

General duties of employers and workers are provided for, which was a major shortfall outlined in the analysis of employment standards legislation. Employer’s duties focus on hazardous work environment, while workers are obligated to act with reasonable care to ensure their safety and that of others.⁵² The scope of the WCA seems to be narrowly confined to injury due to the nature of work. An amendment can address this concern to expand the scope and promote a safe working environment. “Occupational health and safety” within the Saskatchewan legislation is defined to include, among other things the promotion and maintenance of a working environment that is free of harassment.⁵³ A similar amendment could arise within the WCA, extending the duties of employers and workers to maintain an environment free of personal harassment (as defined above).

The WCA places a duty onto employers to implement programs, which is similar to the jurisdictions previously analyzed. Again, the interpretation is confined to health and safety regarding work related injury. If a broader definition of occupational health and safety was provided for, then the scope of the duties can be broadened.⁵⁴

A major benefit behind a legal reform within the WCA, is that the Act calls for the assembly of worker’s and Joint Committees. This serves as a system of checks and balances with

⁴⁸ *Workers Compensation Act*, R.S.B.C. 1996, c. 492 [WCA]

⁴⁹ *Ibid.* s. 107

⁵⁰ *Ibid.* s. 1

⁵¹ *Ibid.* s. 1(g)

⁵² *Ibid.* ss. 115-116

⁵³ *Saskatchewan OHSA*, *supra* note 13 s. 2(1)(p)(v)

⁵⁴ *WCA*, *supra* note 48 ss. 3.1, 3.5

respect to the health and safety of workers.⁵⁵ In the event that less than 20 persons are employed, an order to form a committee can be made which creates a legal mechanism to require a committee irrespective of the size of the business establishment.

One major flaw that is found within the WCA, is section 5.1. This section addresses mental stress, limiting compensation for any mental suffering to that which results from an acute reaction to a traumatic event, that is unexpected and sudden arising in the course of employment, or is a diagnosed condition – mental or physical – by a medically recognized psychologist.⁵⁶ Workplace bullying, defined as personal harassment, is often accompanied by stress that is cumulative and acquired over time. A target victim would be denied a mental suffering claim due to long-term mental suffering caused by systematic acts of personal harassment. A possible remedy could come in the form of an exception. Acts that constitute personal harassment could be excluded from the limitation created by section 5.1; meaning, if the claimant is subjected to conduct which satisfies the elements of personal harassment, outlined within the suggested definition section, they would not be limited in a claim for mental suffering by virtue of section 5.1. If the limitations can be addressed by amending the WCA, occupational health and safety would be the most promising area for legal reform regarding personal harassment in B.C.

How can the legal reform materialize?

The remaining issue is how a legal reform within the area of occupational health and safety would materialize, having respect to legal recourse made available for workers and employers. The ultimate goal, which has been taken as optimal throughout this analysis, is internal change that balances the interests of workers and employers. The change must come from within, meaning an internal mechanism system needs to be available to ensure anti-bullying program maintenance. Claimants must have viable recourse within the employment environment, and not be further victimized for complaining. . It should not be an onerous change to set up an internal resource mechanism similar to the assembly committees under the current WCA, with a commitment to change the workplace environment as a whole. A closer look at the South Australian legal reform, and the Worker’s Compensation Board of B.C. Harassment Policy helps illustrate this proposal.

Australia WorkSafe

The WorkSafe Victoria guidance note on the prevention of bullying and violence at work serves as an example of anti-workplace bullying legislation that is focused on internal change. Workplace bullying prevention is addressed through internal training, monitoring and reviews.⁵⁷ The focus is on changing the workplace environment to facilitate better working conditions and productivity for all individuals involved. The objective is not so much compensatory, but rather focused on education and communication. The reform encourages reporting to be completed by leadership, supervisors and management. These individuals are the driving force in creating and maintaining anti-workplace bullying policies; therefore, it is essential that they positively embrace these responsibilities.⁵⁸ South Australia’s movement is also instructive in their commitment to

⁵⁵ *Ibid.* ss. 125, 130

⁵⁶ *Ibid.* s. 5.1

⁵⁷ *WorkSafe Victoria*, *supra* note 7 at 14

⁵⁸ *Ibid.* at 16

observing principles of fundamental justice. The policy outlines that an accused perpetrator should be seen as innocent until proven guilty, allegations should be investigated in due course and put to the person they are made against. An ability to explain the situation is afforded to both parties, and any disciplinary actions should not be disproportionate to the severity or seriousness of the matter.⁵⁹ The WorkSafe Victoria guidance note effectively balances the interests of both the target victim and accused perpetrator. Duties to eliminate workplace bullying are delegated at the leadership level down to the individual worker.

The Worker's Compensation Board Policy

The Worker's Compensation Board of B.C. and the Compensation Employees' Union passed a policy in 2007 which targets workplace harassment (Policy). The purpose behind this policy is to create a safe, healthy and rewarding work environment that provides due consideration and proper investigation of harassment complaints.⁶⁰ The definitions introduced are similar to those previously mentioned; however, the Policy is most relevant with respect to program implementation. A complaint can be filed with the Vice-President of Human Resources and Facilities. The complaint is investigated to determine whether it can be proven on the facts, and it is not frivolous or vexatious.⁶¹ This investigative process helps ensure that the policy objectives are not abused, and that resources are not expended on personal grievance claims. If there is a finding of harassment, the available means of recourse include: education to facilitate an understanding of harassment and disciplinary measures up to and including dismissal.⁶² The spectrum of remedies allows the investigator to determine an appropriate measure based on severity of the actions. The educational elements allow perpetrators acting without intent but who are negligent to the effects of their actions, to remain employed and become aware of the severe consequences that arise from harassment. Education also facilitates the change in the workplace dynamic that has been consistently advocated. The more extreme remedy of dismissal can be criticized as opening the employer up to union grievance claims. However, an employer is empowered to dismiss a worker with cause. If the perpetrator's behaviour is serious, and contrary to the interests of the company, then the employer can have reasonable grounds for dismissal. Alternatively, contracts for employment can include a condition to abide with policy measures to ensure and healthy and safe workplace environment. A breach would be a termination of the contract.

At present, there is no legal recourse if the Policy is not maintained. However, if employers were held legally accountable to implement policy programs like the one created by Worker's Compensation Board of B.C., then a failure to maintain such programs would create legal consequences for the employer(s). The recourse systems would have to be comprised of objective individuals who are sensitive to the issues of personal harassment and independent from the managerial organism. Complainants must be given the opportunity to voice their concerns without fear and prejudice, while interests of the perpetrators must be balanced to ensure procedural fairness. A legal reform will create pressure; an internal mechanism will provide assurance, making the issue of workplace bullying a legally reprehensible act.

⁵⁹ *Ibid.* at 18

⁶⁰ *WorkSafe B.C.*, *supra* note 31 at 2

⁶¹ *Ibid.* at 8

⁶² *Ibid.* at 9