

Is Supervisor Bullying Grounds for Constructive Dismissal?



In a recent survey, 37% of Canadian workers said they've been bullied at work—3 times as many who reported they were sexually harassed. In 71% of the cases, the victims claimed they were bullied by a supervisor. As an HR director, these numbers should make you nervous. Very nervous. Workplace bullying is rapidly becoming a major liability risk for employers with potential consequences under OHS and human rights laws. But most disconcerting of all about having a bullying supervisor in your midst may be the risk of being sued for constructive dismissal by his victims. Here's a look at the danger and how to protect against it.

[Click here for a Workplace Bullying Policy](#)

WHAT'S THE PROBLEM

Constructive dismissal is termination by deed rather than action. It occurs when employers unilaterally impose unfavourable changes to employment. Such changes are as if the employer is tearing up the contract. Rather than accept the changes, employees can treat the contract as terminated at the employer's initiative and sue for wrongful dismissal.

Historically, constructive dismissal has been based on changes to economic conditions like wages, benefits, work hours, responsibilities. But in the past decade, it's been extended to a hostile work environment. The theory: Under every employment contract, employers have at least an implied duty to treat employees with civility, respect and dignity. Allowing the employee to be bullied is a repudiation of that obligation justifying constructive dismissal. And if the bullying is egregious enough to cause the victim mental distress, it can lead to "exemplary" damages including *Wallace* damages for carrying out the termination in bad faith.

The seminal case is a 2000 ruling by the Ontario Court of Appeals called *Shah v. Xerox Canada Ltd.*, 2000 CanLII 2317 (ON CA), March 20, 2000. From the beginning, the soft-spoken, shy technical support analyst who filed the case was uncomfortable with his straight-shooting and asserting supervisor and his "empowerment" approach. For his part, the supervisor quickly became disenchanted with what he perceived to be the analyst's passivity and failure to meet deadlines. Criticisms and warnings followed. The analyst became so stressed out that he began missing work, which only served to make the supervisor even more patient. Upon returning from short-term disability, the analyst received 3 days' probation and an ultimatum: Improve immediately or look for a new job. He opted

for the latter.

The court ruled that the analyst had been constructively dismissed and awarded him 12 months' notice + benefits. The supervisor's conduct was "intolerable" and the analyst's "continued employment in such environment was no longer possible."

What Supervisor Conduct = Bullying?

Conduct by a supervisor is bullying and grounds for constructive dismissal if a "reasonable person" wouldn't tolerate it, i.e., leave the job rather than put up with it. Although it can be the product of a single action, like the assault in the *Hansen* case below, the cases reveal that bullying is most often a pattern of conduct repeated over time. Examples from actual rulings:

CASE	SUPERVISOR CONDUCT JUSTIFYING CONST. DISMISSAL FOR BULLYING
<i>Morland v. Kenmara Inc.</i> , [2006] O.J. No. 657, Feb. 20, 2006	Profanity. Boss's tirades against sales rep including repeated use of "f" word and calling her a "bitch" (4 months' notice)
<i>Stamos v. Annuity Research & Marketing Service Ltd.</i> , [2002] O.J. No. 1865, May 13, 2002	Threats and intimidation. Boss makes threatening comments to, points finger in face of and kicks open employee's door. Culmination of course of abuse causing employee stress. 6 months' notice.
<i>Cooke v. HTS Engineering Ltd.</i> , [2009] O.J. No. 5650, Dec. 18, 2009	Sexual harassment and belittling. Engineering supervisor's makes repeated unwelcome comments about female employee's sex life, breasts and intelligence ("I'll bet you can't get past Question 2 of this" while brandishing an IQ test). 2 months' notice.
<i>Qubti v. Reprodex Ltd.</i> , [2010] O.J. No. 467, Feb. 4, 2010	Name calling and verbal abuse. Palestinian driver puts up with 7 years of being called demeaning names by his supervisors, including "helmet washer" and "Reli" (a combination of "retard" and Elias, his first name). 6 months' notice.
<i>Pannell v. Imperial Paving Ltd.</i> , [2010] B.C.J. No. 2480, Dec. 9, 2010	Coercion and humiliation. Company tries to bully dispatcher into accepting reduction of pay, responsibilities and hours. "You can be a flag girl or flip burgers if you don't like it," says boss. 5 months' notice.
<i>Garneau v. Wabigoon Lake Ojibway Nation</i> , [2002] C.L.A.D. No. 334, July 12, 2002	Isolating and ignoring. Female administrator grows increasingly frustrated at lack of respect shown by her male supervisors. Her numerous notes expressing her concerns are ignored and there's no dispute resolution process she can use. Unilaterally cutting her salary is last straw in constructive dismissal. 8 months' notice.

<i>Saunders v. Chateau Des Charmes Wines Ltd.</i> , [2002] O.J. No. 3990, Sept. 30, 2002	Hostility and aggression. Manager repeatedly yells and swears at sales man for small mistakes and calms down later. But when another little mess-up occurs, the manager goes ballistic and reaches new levels of hostility and anger. The abuse continues without a cooling off period for 2 weeks, after which the supervisor tells the sales man to take a demotion or leave of absence to “clear his head.” 2 days later, he changes the locks on the sales man’s office door. 9 months’ notice.
<i>Hansen v. Elite Lithographers Co. Ltd.</i> , [2004] A.J. No. 35, Jan. 20, 2004	Physical assault. After employee botches a print job, the owner of the company not only hollers at him but grabs him by the shirt and pushes him against the wall. The employee quits on the spot and wins \$38,000 in damages, including 5 months’ notice.

What Supervisor Conduct ≠ Bullying

Remember that bullying is conduct that a *reasonable person* in the employee’s circumstances would tolerate, not what the actual victim thinks is tolerable. That might sound like a legal technicality but it has enormous practical impact. The reason it’s so important is that it gives leeway for supervisors to exercise legitimate supervisory functions that a thin-skinned employee might *perceive* as bullying without crossing the line. In other words, bullying is not the use but abuse of supervisory authority. Bullying does *not* include:

- Normal exercise of day-to-day management, e.g., issuing orders, criticizing poor performance and legitimate imposition of discipline;
- Work conflicts that can arise in any workplace—although such conflicts can lead to bullying if they’re not managed correctly; and
- Difficult work conditions that can result in causing stress to employees as long as those conditions are non-arbitrary and economically or technologically justifiable.

4 WAYS TO PROTECT YOURSELF

1. Do a Workplace Bullying Hazard Assessment

If you’ve implemented a workplace violence prevention program, dealing with bullying should be relatively simple. Start by doing a hazard assessment. Key steps to finding out if you have a bullying problem at your workplace:

Survey employees: Ask them if they’ve ever been bullied or witnessed a bullying incident at work. Because “bullying” is a judgment call, a good survey should ask employees about specific observed behaviours by supervisors toward subordinates such as:

- Verbal abuse and name-calling;
- Slurs or sexually inappropriate remarks;
- Belittling of a personal nature;
- Excessive and unfair criticism;
- Yelling and screaming;
- Use of profanity;
- Threats of firing or other job actions;
- Physical intimidation, such as getting into an employee’s face;

- Deliberate imposition of impossible demands; and
- Deliberate efforts to undermine the employee's work such as by withholding critical information.

The more bullying behaviours employees say they observe, the redder the flag that should go up. Because employees may be reluctant to provide candid answers, you might want to let them complete the survey anonymously; if knowing the identity of the respondent is important for follow-up, offer assurances of confidentiality and let employees know that they won't be subject to retaliation for reporting problems.

Examine previous incidents: Go back at least 3 years to determine if any bullying has occurred at your workplace. Analyze previous incidents to detect patterns, including who did the bullying, who was the victim, what happened and how was the problem resolved.

Evaluate existing measures: Look at your current workplace violence and harassment measures to determine if they address bullying and, if so, whether they've been effective. This is where input from your company's Joint Health and Safety Committee or health and safety representative can really come in handy.

2. Create a Workplace Bullying Policy

Once you complete your hazard assessment, you must take measures to address any bullying problems you uncover. The first measure is to implement an anti-bullying policy. Although you need to adapt it to your own circumstances, the Model Workplace Bullying Policy in T00LS is a good starting point because it has the basic elements a policy should have, including:

- A statement of the organization's commitment to provide a civilized and respectful workplace;
- A definition of what conduct you consider to be bullying;
- Just as importantly, a definition of the conduct you *don't* consider bullying, i.e., exercise of legitimate management functions like discipline and constructive criticism, which lawyers tell us, helps prevent employees from bringing baseless bullying claims;
- A description of your bullying reporting, investigation and resolution procedures; and
- A statement of the disciplinary consequences of bullying.

3. Implement a Workplace Conflict Resolution Procedure

Having a disagreement or even a personality conflict with an underling doesn't make a supervisor a bully. But left unchecked, it can serve as the basis for bullying behaviour. So one innovative way to prevent bullying is to establish a procedure for resolving workplace conflicts in a fair, respectful and constructive manner.

4. Educate Employees about Workplace Bullying

As with workplace violence, education is crucial to managing bullying risks. At a minimum, you need to instruct employees:

- What behaviours by supervisors are and are not bullying;
- How to report supervisor bullying they're subjected to or witness;

- How the organization investigates such reports;
- The disciplinary consequences of bullying behaviour; and
- The things the organization has done to prevent and provide support to victims of bullying, e.g., the Employee Assistance Program.
- How the company investigates incidents, threats and complaints; and

Conclusion

The preventive measures outlined above will protect your organization not only against supervisor bullying but “mobbing,” or bullying by colleagues. And, in addition to constructive dismissal, the measures will enable you to manage the other liability risks associated with workplace bullying, including:

- Workplace violence and harassment violations under OHS laws (and psychological harassment in Québec);
- Lawsuits for infliction of mental distress (like the \$950,000 supervisor bullying case against the RCMP by a former officer in *Sulz v. Canada (Atty. General)*, [2006] B.C.J. No. 121, Jan. 19, 2006].
- Victims’ claims for work-related stress benefits under workers’ comp; and
- Employment discrimination and harassment where bullying is based on the victim’s sex, race, disability, religion, nationality, sexual preference, etc.