Workplace Bullying And Harassment: To What Extent Does Workers' Compensation Legislation Insulate Employers From Liability?

A number of recent Western Canadian court decisions have found that employees who suffer mental distress as a result of bullying or harassment in the workplace are barred from suing their employer for damages if their workplace is subject to workers' compensation insurance. Despite these decisions, employers should not assume workers' compensation offers comprehensive protection against liability for bullying and harassment in the workplace. This is far from the case.

In *Ashraf v. SNC Lavalin ATP Inc.,* a 2013 Alberta trial decision, the Plaintiff alleged that his coworkers systematically and continuously said and did things to demean and marginalize him, and that his employer did nothing to stop the harassment despite his numerous complaints. The Plaintiff alleged he suffered stress and anxiety as result of the harassment, which in turn caused or aggravated a number of physical ailments, ultimately preventing him from

returning to gainful employment. As a result, he went off work and was approved for long-term disability benefits. He subsequently sued his employer, seeking damages for his pain and suffering, as well as loss of income and benefits calculated to his 65th birthday. However, his claim was not allowed to proceed because the Alberta Court of Queen's Bench determined that his claim related to injuries arising in the course of employment, and was therefore statute-barred by the provisions of Alberta's *Workers' Compensation Act*.

In *Clarke v. Federated Co-operatives Limited*, a 2013 Saskatchewan appellate decision, the Plaintiff alleged that he was subjected to harassment and verbal abuse by his superior at work, including racial and religious slurs, as well as false accusations of dishonesty. He resigned from his employment and commenced a lawsuit against his employer and superior for intentional infliction of mental and emotional distress. Although he did not apply for workers' compensation benefits, the Saskatchewan Workers' Compensation Board ("**WCB**") determined that his claim was barred by the Saskatchewan *Workers' Compensation Act*. The Saskatchewan Court of Appeal upheld this decision on the basis that the Plaintiff's claim related to alleged injuries that arose in the course of employment.

Finally, in *Downs Construction Ltd. v. Workers' Compensation Appeal Tribunal*, a 2012 decision of the British Columbia Court of Appeal, the Plaintiff alleged that her supervisor berated, demeaned and humiliated her on numerous occasions in front of coworkers and customers. She left work after one such incident and never returned. She sued her employer and supervisor for negligence and breach of contract, seeking damages for personal injury, including mental distress. She also filed a claim with the British Columbia WCB seeking compensation for post-traumatic stress disorder and emotional stress. The WCB ultimately rejected her claim as not meeting the legislated criteria to receive compensation for a mental disorder. The Court of Appeal nonetheless held that her alleged injuries arose in the course of employment and she was therefore barred by the British Columbia *Workers' Compensation Act* from pursuing her civil claim against her employer and supervisor.

Workers compensation legislation is a trade-off

The reasoning in all three cases is rooted in the "historic trade-off" underlying workers' compensation legislation: workers are guaranteed no-fault compensation for workplace injuries in exchange for losing the ability to sue their employer for greater compensation. Similarly, employers are forced to contribute to a mandatory insurance scheme, but obtain protection from potentially crippling liability for workplace injuries. But when the above decisions are put into their proper context, it becomes apparent that workers' compensation legislation is a dubious shield against liability for bullying and harassment in the workplace.

As a starting point, it should not be forgotten that participation in workers' compensation insurance is not mandatory in all industries. Those employers who do not participate in the insurance scheme enjoy no statutory protection from lawsuits relating to workplace injuries.

It must also be appreciated that these cases do not address an employer's potential liability for constructive dismissal arising from harassment or abuse in the workplace. Such constructive dismissal claims are premised on the notion

that it is an implied term of any employment relationship that the employer will treat the employee with decency, respect, and dignity, and any employer who departs dramatically from this standard of conduct is in effect demonstrating an intention to no longer be bound by the essential terms of employment. In such cases, liability for constructive dismissal ultimately boils down to whether the employer's conduct has gone so far beyond the boundaries of reason so as to make continued employment intolerable when evaluated from the perspective of a reasonable person in the shoes of the employee.

It is clear that workers' compensation legislation does not immunize employers from such lawsuits, which, at a minimum, bring exposure to liability for reasonable notice damages: i.e. all the remuneration the employee would have received had the employer given reasonable notice of termination to allow the employee to secure alternative employment. Depending on the relevant circumstances, such as the nature of the employee's position, his or her length of service, age and prospects for future employment, the reasonable notice period for a constructively dismissed employee can be lengthy. For example, 24 months' notice is the generally accepted ceiling for the most senior, longest serving employees with little prospect of finding alternate employment. In this sense, an employer's exposure to constructive dismissal claims for reasonable notice can be significant in and of itself.

It should also be noted that the decisions to date in this area of law do not squarely address the question of whether workers' compensation legislation, where applicable, bars claims for manner of dismissal damages relating to harassment and abuse in the workplace. On one hand, it is a well-established principle of Canadian employment law that employers have an obligation of good faith and fair dealing in the manner of dismissal, and employees are entitled to recover additional damages for the mental distress caused by breaches of that duty. On the other hand, workers' compensation legislation applies to intentional and deliberate conduct in the workplace such as assaults, and similar reasoning has been applied to bar claims against employers for intentional infliction of mental harm. There would therefore appear to be no principled reason for courts to allow claims for such damages to proceed outside the workers' compensation insurance scheme simply because the workplace conduct in question supports a finding of constructive dismissal.

Further uncertainty arises when one considers how difficult it can be to determine the boundaries of workplace bullying and harassment. Work relationships often develop into personal relationships, and the emergence of cyber-bullying illustrates how the harassment of co-workers can easily occur at times and places and in media inconsistent with the obligations of employment. Moreover, the increasingly public nature of such work-related harassment also highlights how easily the harm caused can extend beyond psychological injury and into the fray of damage to reputation. The law has yet to clearly delineate the limits of when such harassment claims are barred by workers' compensation legislation, and whether these limits coincide with the limits of employer liability for employment-related harassment at common law and under human rights legislation. Defamation, for example, seems to be a difficult claim to justify statute-barring, as workers' compensation insurance generally does not include compensation for the economic damage caused by defamatory conduct originating in the workplace.

The Limits of Statutory Protection

It is also important to recognize that the limits of statutory protection from lawsuits offered by workers' compensation legislation will vary to some extent from jurisdiction to jurisdiction. Most notably, some Canadian jurisdictions expressly limit the ability of employees to claim mental stress injuries in relation to workplace harassment. For example, Manitoba, New Brunswick and Nova Scotia have legislated to expressly exclude workers' compensation coverage for mental stress injuries not resulting from an acute reaction to a traumatic workplace event, and the Northwest Territories and Nunavut have expressly excluded coverage for mental stress injuries arising out of labour relations between a worker and employer except where the conduct in question was intended to cause harm. Needless to say, in these jurisdictions providing little or no access to no-fault compensation for harassment-induced chronic stress injuries, the courts are much less likely to interpret the applicable workers' compensation legislation as barring workers from bringing claims against their employers for such injuries.

Nor should it be overlooked that employers have an obligation under health and safety legislation to prevent bullying and harassment in the workplace. The Ontario *Occupational Health and Safety Act*, for example, sets out specific minimum preventative measures that employers must put in place to address harassment in the workplace. In those jurisdictions without specific statutory obligations relating to harassment, employers nonetheless remain responsible to prevent injuries stemming from this work-related hazard under the bailiwick of their general obligation to ensure the health and safety of their workers. There is no doubt that workers' compensation legislation offers employers no protection against regulatory prosecutions for failing to take all reasonable steps to prevent bullying and harassment in the workplace.

Addressing harassment and bullying in your safety program

Given the uncertain and incomprehensive protection workers' compensation legislation affords against liability for bullying and harassment in the workplace, employers would be well-served to implement a robust program to address bullying and harassment as part of their health and safety management system. Such a program should provide:

- training and instruction regarding:
  - standards for appropriate workplace conduct and the consequences for failing to adhere to those standards;
  - how to address poor performance and misconduct in the workplace in a constructive, respectful and dignified manner;
  - roles and responsibilities of management and employees in relation to identifying, reporting and investigating potential instances of bullying or harassment in the workplace;
- protection against retaliation for harassment complaints made in good faith;
- strong disciplinary and other remedial measures to address established cases of harassment in the workplace; and
- some form of monitoring to ensure the program is being applied effectively.

A written policy addressing workplace harassment is a good starting point for any employer, and a mandatory one for those in some jurisdictions, such as

Ontario. Given the risk of significant liability for harassment in the workplace, it is also prudent for employers to obtain legal advice when crafting harassment policies and when applying those policies to investigate serious allegations of harassment in the workplace.

Article by Daniel R. Bokenfohr

McLennan Ross LLP