

Workplace Bullying & Cyberbullying: The Employer's Liability Risks



An estimated 2 of 5 Canadians suffer from workplace bullying at least once a week. Although public awareness of workplace bullying has grown, digital technology has reinvented the problem and made it harder to deal with. In addition to creating a whole new range of bullying tactics, the internet has democratized bullying. The internet or “cyberbully” can be male or female, management, co-worker or subordinate, and even a customer or member of the public. And because cyberbullying isn’t confined to the 4 corners of the workplace, bullies can target employees from their homes or any remote location.

Regrettably, legal protection against workplace bullying in general and cyberbullying in particular remains spotty at best. Here’s an overview of the current state of regulation in Canada—such as it is.

What Is Bullying?

Bullying is a form of psychologically, and sometimes physically violent conduct designed to intimidate, offend, humiliate, degrade or demean. Rather than a single incident, bullying typically unfolds on a continuing basis.

What Is Cyberbullying?

Cyberbullying means engaging in such behaviour via the internet or other electronic means. Common examples:

- Sending nasty, hostile or threatening emails, texts or other electronic messages directly to the victim;
- Cyberstalking, sexting or repeatedly sending the victim text or email messages to the point of harassment;
- Saying derogatory things about the victim on blogs, chat boards and other social media sites;
- Starting rumors or spreading gossip online;
- Impersonating the victim online, e.g., via creating a fake online profile;
- Stealing the victim’s password and logging into his/her accounts;
- Signing up the victim to instant message marketing lists from pornography sites or junk mailers;
- Posting embarrassing photos or videos of victims without their consent.

Effects of Bullying

Workplace bullying, both conventional and cyber-, causes psychological harms such as low self-esteem, stress-related illnesses, headaches, sleeping and eating disorders, depression, muscle pain and panic attacks, drug abuse, alcoholism and even suicide. Workplace bullying is also a business problem costing employers billions of dollars per year by:

- Driving up absenteeism;
- Reducing productivity;
- Increasing employee turnover;
- Lowering morale; and
- Creating a poison workplace environment.

Liability for Bullying & Cyberbullying

After decades of neglect, the modern consensus is that employers are responsible for preventing bullying in all forms. The problem is that the current laws don't specifically say this. Absent express legislation, courts and arbitrators have to find the duty to prevent bullying and cyberbullying as an implied obligation under existing laws—typically OHS or human rights laws.

The Use of Social Media Grievance Case

There have been literally dozens of cases finding a duty to prevent workplace bullying. But cases involving cyberbullying are few and far between. Perhaps the most dramatic case on the subject is the recent ground breaking Ontario case of September 2016 upholding a labour grievance against the Toronto Transit Commission (TTC) for failing to stem the torrent of abusive tweets targeting employees on the TTC's customer service account. The duty to protect employees from workplace bullying and harassment under human rights and OHS laws includes not just the physical facility but the social media sites it operates, the arbitrator found [*Amalgamated Transit Union, Local 113 v. Toronto Transit Commission (Use of Social Media Grievance)*, [2016] O.L.A.A. No. 267, July 5, 2016].

Cyberbullying Legislation

Only in the past 3 years has there been legislation specifically banning cyberbullying. In 2013, Nova Scotia became the first province to take the plunge. Adopted in response to the notorious case of Rehtaeh Parsons, a teenager who committed suicide after being cyberbullied, gives victims of cyberbullying, including employees, the right to sue for money damages. But while ground breaking, the Nova Scotia *Cyber-Safety Act* remains the only provincial cyberbullying law on the books.

In 2015, cyberbullying became a crime when a federal law called the *Protecting Canadians from Online Crime Act* (aka Bill C-13) took effect. The law criminalizes publication or distribution of intimate images online without consent. **Result:** Workplace conduct that a few years ago might have been dismissed as a mere prank can now be a ticket to jail.

Example: A financial advisor whose advances were rebuffed by a co-worker refused to take no for an answer, texting her every day until she finally called the police. To get even, the advisor sent an e mail, purportedly from the co-worker, to 9 other workers. The e mail degraded the co-worker professionally,

sexually and physically. Several years later, he used the same tactic to target an ex-girlfriend by sending a degrading e-mail to her HR director and attaching a naked photo. Result: The advisor was convicted of criminal mischief and harassment under Bill C-13 [*R. v. Dewan*, 2014 ONCA 755 (CanLII), Oct. 30, 2014].

Finding Implied Cyberbullying Obligations under Existing Laws

The new legislation and *Social Media Grievance* case represent where the law is heading. But unless and until specific laws are adopted, employer liability for workplace bullying and cyberbullying must be implied as an extension of duties under existing laws. There are 4 key laws that can be interpreted as requiring employers to protect employees against bullying and cyberbullying.

1. OHS Laws

A decade ago, people began to recognize that workplace safety meant protecting against not just physical, chemical and mechanical dangers but social hazards like violence. Although not mentioned in the OHS laws, workplace violence duties were implied under the “general duty clause,” i.e., part of the statute requiring employers to manage recognized hazards not specifically addressed in the law. In the late 1990s, provinces began adding specific workplace violence provisions to their OHS laws. Today, only 4 jurisdictions (PEI and the 3 territories) still rely on the general duty clause to impose workplace violence prevention duties on employers.

Violence v. Bullying: The argument can be made that bullying is a form of violence and that the OHS duty to prevent workplace violence includes bullying. While the argument would carry weight for bullying involving *physical* behaviour, it would be much less persuasive for non-physical behaviour like cyberbullying. This is especially true in Alberta, BC, Manitoba, Newfoundland and Nova Scotia where violence is defined as an act or threat of *physical* violence. By contrast, federal OHS law defines the term broadly to include acts and threats of both physical and psychological harm. [See the Chart on page x to see where your province stands.]

Harassment v. Bullying: Three provinces require employers to prevent not just workplace violence but also harassment, including: Québec, which has a (Labour Standards) law protecting workers against psychological harassment; Saskatchewan, where employers have an duty to prevent workplace harassment; and Ontario, where Bill 168, requires employers to adopt measures to control both violence and harassment.

Bullying v. Cyberbullying: In all 3 of the above provinces, “harassment” is defined broadly as vexatious conduct inflicting psychological harm. Bullying, both conventional and cyber, would seem to fit this definition. In fact, in Ontario courts and arbitrators *have* interpreted Bill 168 harassment obligations as covering cyberbullying.

Example: Arbitrator upholds firing crane operator for making sexually demeaning and threatening remarks about a co-worker on Facebook [*United Steelworkers, Local 9548 v. Tenaris Algoma Tubes*, [2014] O.L.A.A. No. 180, May 15, 2014].

2. Human Rights Laws

Committing or tolerating workplace harassment and bullying may also constitute discrimination resulting in liability under human rights law. Qualification: The behaviour must be based on race, sex, religion, nationality, sexual preference or other personal characteristics protected by the discrimination law, e.g., the homophobic tweets in the *Use of Social Media Grievance* case noted above. Although it may be unacceptable and illegal under other laws, bullying and harassment directed against all employees and/or groups not protected by the law, e.g., the overweight, doesn't count as discrimination.

3. Constructive Dismissal

If bullying becomes so bad that the victim feels compelled to quit, he could sue you for "constructive dismissal." The theory: Committing or allowing cyberbullying creates a poisonous work environment in violation of the employer's contractual obligation (whether express or implied) to provide employees a professional and psychologically suitable workplace.

The seminal case is a 2001 Ontario ruling involving a constant stream of management criticism against an employee with a stellar record. Employers are allowed to criticize employees for unsatisfactory work. But, the Court added, when the employer's conduct "passes so far beyond the bounds of reasonableness that the employee reasonably finds continued employment to be intolerable," the employer is guilty of constructive dismissal and entitled to damages [*Shah v. Xerox Canada Ltd.*, [2000] CarswellOnt 831; [2000]]. Although the case involved conventional bullying, the same principles would apply equally to cyberbullying.

4. Intentional Infliction of Mental Distress

Victims of cyberbullying can also sue their employers for the intentional infliction of mental distress. To win such a case, the victim must show that:

- > The conduct was "outrageous" and went beyond mere assertiveness or aggressiveness;
- > The bully deliberately tried to hurt the victim; and
- > The victim visibly suffered as a result of the bullying.

Example: A supervisor in Alberta bullied a mentally frail female employee for over 3 years. He humiliated, insulted, manipulated and harassed her at every turn. His language and actions towards the employee grew progressively more violent as she tried to resist his attempts to dominate her. His actions made the employee fear physical harm and, in fact, on one occasion, he did physically hurt her. The employee had a mental breakdown and sued the employer for the intentional infliction of mental distress. The federal court held the employer responsible for the supervisor's actions and ordered it to pay the employee \$35,000 in damages [*Boothman v. Canada*, [1993] 3 FCR 381, 1993 CanLII 2949 (FC)].