Occupational Health and Safety Complaints of Harassment

Who is the Bully?

By Ronald T. Smith

Virtually all jurisdictions have legislation governing occupational health and safety. While the scope and mechanics of these various acts and codes vary, increasingly, many are being amended to include forms of harassment as an occupational hazard.

On June 1, 2018, Bill 30: An Act to Protect the Health and Well-being of Working Albertans, came into effect in Alberta. It introduced a number of substantive changes to the *Occupational Health and Safety Act* (the "Act"), its regulations and the *Occupational Health and Safety Code* ("OHS Code").

The intended purpose of Bill 30, and now a stated purpose of the Act, is to promote and maintain "the highest degree of physical, psychological and social well-being of workers". The Act now offers workers broader protections, greater rights of participation in the development and implementation of health and safety policies and programs, and it imposes greater corresponding obligations on employers.

Now that employers have had almost a year to assess the effect of these changes on their day-to-day operations, there seems to be consensus that the most impactful change to the legislation is the specific protections afforded to workers against harassment in the workplace and the unintended consequences of these changes.

Relevant Amendments

The Act now specifies harassment and violence, including domestic and sexual violence, as workplace hazards. The Act newly defines harassment as:

> "harassment" means any single incident or repeated incidents of objectionable or unwelcome conduct, comment, bullying or action by a person that the person knows or ought reasonably to know will or would cause offence or humiliation to a worker, or adversely affects the worker's health and safety, and includes
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> (i) conduct, comment, bullying or action because of race, religious beliefs, colour, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status, gender, gender identity, gender expression and sexual orientation, and
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> (ii) a sexual solicitation or advance, but excludes any reasonable conduct of an employer or supervisor in respect of the management of workers or a work site;

In addition to defining harassment in the Act, as part of the broader legislative overhaul, Part 27 of the OHS Code was changed to require that every employer have a "violence prevention plan" and a "harassment prevention plan" meeting mandatory content requirements.

Another change was the Disciplinary Action Complaint ("DAC") sections of the Act were amended to prohibit "discriminatory action" by employers against workers in a number of prescribed circumstances, including where the worker takes "reasonable action" to protect their health and safety. The prior prohibition was against "disciplinary action" which was much more narrowly defined.

Discriminatory action is defined as:

> …. any action or threat of action by a person that does or would adversely affect a worker with respect to any terms or conditions of employment or opportunity for promotion, and includes termination, layoff, suspension, demotion or transfer of a worker, discontinuation or elimination of a job, change of a job location, reduction in wages, change in hours of work, reprimand, coercion, intimidation or the imposition of any discipline or other penalty

Where a worker has reasonable cause to believe they have suffered a discriminatory action, they may file a complaint with a government OH&S compliance authority (called "Officers") who will conduct an investigation and make a decision as to whether discriminatory action has occurred.

Importantly, the amended Act now creates a presumption in favour of the worker that, where discriminatory action has occurred, it is *because* the worker took action under the Act. The onus is placed on the employer to establish that the discriminatory action was taken for reasons other than the worker's use of, or participation in, some action under the Act. If the employer fails to rebut this presumption, Officers may impose penalties upon the employer. Officers are given broad authority under the Act to implement fines and other sanctions.

Weaponizing the Process

It goes without saying that employers and workers alike have a vested interest in promoting and maintaining a harassment-free work place. But what happens when employers are faced with alleged victims using these new provisions as a shield against discipline or worse, a sword against managers and other workers?

In some circumstances, it may be that the worker making a harassment complaint is effectively the bully rather than the victim. This can arise in a number of different ways.

One scenario may arise where two or more workers collaborate to file harassment complaints against a newly-hired manager who is brought into the workplace to act as an agent of change and to affect a cultural shift. Long-term workers may resent the manager's new ideas and the potential impact on the workers' positions and historical influence in the company. The workers may make repeated or coordinated complaints to hinder the new manager; if not cause them to leave entirely.

In some cases, a complainant may advance a complaint, based on only minor interpersonal difficulties with coworkers, without making any effort to resolve the matter through basic dialogue or bringing their concerns forward to management. The worker may attempt to leverage the existence of trivial matters by engaging the full harassment mechanisms of the Act to their personal advantage. Such a worker might use the complaint to put to the employer an ultimatum of "either they go, or I do" to either force personnel changes or to springboard departure discussions to extract greater severance than would otherwise be available on the basis of their employment contract alone.

In another scenario, a disgruntled worker may see the "writing on the wall" regarding the coming end of the employment and bring forward a harassment complaint to try and handcuff the employer's ability to terminate the employment or to extract severance concessions. The worker could rely on the reverse onus presumptions of the Act to force the employer to justify their management decisions, even though it is the worker's suggestion there is discriminatory action.

How to Handle the Bully

These scenarios are extremely difficult for employers to navigate. If the employer finds that the worker has weaponized the Act for some purpose and they seek to terminate for that behaviour or other behaviour related to the harassment complaint, they are squarely faced with the presumption and reverse onus hurdles under the Act. So, what does the employer do?

While there is no silver bullet, wooden stake or garlic cure-all, there are some "do's and don'ts" an employer can follow to best position itself to deal a DAC or a bad faith allegation in a lawsuit:

1. It is essential for the employer to have its OH&S ducks in a row in terms of meeting the legislative requirements for policies, plans, committees etc., and to consult and follow those policies and processes;

2. Include clear language in your policy which outlines the consequences to workers should they advance a complaint that is determined to be frivolous, vexation or made in bad faith. Be clear that such a finding will result in discipline up to and including termination of employment;

3. Do not ignore any complaints and conduct a fair, impartial and thorough investigation. The employer has a duty to investigate. Follow your policies, and where appropriate retain a reputable and competent third-party investigator. As part of their mandate, in the event the complaint is found not to have merit, have them evaluate whether the complaint is frivolous, vexatious or made in bad faith;

4. When investigating a complaint, consider interim protective measures that are balanced as between the complainant and respondent. Do not take any steps that are punitive towards either individual(s). Do ensure that all affected individuals are protected from any further harm.

5. Keep an open mind throughout the investigatory process. Do not pre-determine any outcome. Do not be (or be seen to be) dismissive of any complaints despite any suspicions you may have of misuse of the process;

6. If the investigation concludes that a complaint was made frivolously, vexatiously or in bad faith, consider your policy and all of the surrounding circumstances to determine whether discipline is to be imposed upon the complainant and if so, what discipline is appropriate;

7. Remember that a worker may not be disciplined for merely bringing a complaint. They may be disciplined for having made a frivolous, vexatious or bad faith complaint.

8. If the complainant is to be disciplined or terminated as a result of the circumstances surrounding the complaint or as a result of abusing the any harassment complaint process, be certain to document the reasons precisely. The onus may be on you to prove that you did not act in violation of the OH&S legislation.

9. Lastly, if the complaint is made by a former employee (this usually happens shortly after a dismissal), keep in mind that the employer still has a duty to investigate under the Act.

As a final note, this Article is not intended to suggest that there should be any presumption that a complaint made is frivolous, vexatious or advanced in bad faith. This should only be determined after a full, fair and impartial determination of the facts at issue.

Contact the Author
Ronald T. Smith
Neuman Thompson
Edmonton, Alberta, Canada
1-780-733-6572
ron.smith@neumanthompson.com