

Harassment and Bullying at Work – Help!

Over the years I have been asked to help many different workplaces concerning allegations of harassment and bullying. Whether my involvement is as an investigator or as a mediator, I am frequently struck by the level of emotional pain and anguish experienced by people in this situation – the person complaining, the alleged harasser and others who work with them both. Harassment and bullying are very serious in any workplace.

There have been hints with the recent economic downturn that harassment and bullying issues may have dropped in priority because employees may not want to “make waves” by complaining. There is a perception that people are desperate to keep their job if they have one.

Whether you are an employer or an employee, the bad news is that harassment and bullying have not gone away over the last year. The good news is that by being aware and forward-thinking we may be able to limit the amount of pain and anguish experienced in our workplaces.

First of all, **what is harassment?** As an example, for Ontario-regulated workplaces the Ontario Human Rights Code in s. 5 (2) states that

Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or disability.

Harassment because of sex in the workplace is contained in section 7(2).

Some employers have additional policies which add to the Human Rights Code provisions for example by adding other prohibited grounds such as same-sex partnership status or adding to the prohibited activities such as “any objectionable, unwelcome conduct or comment that serves no legitimate work-related purpose and has the effect of creating an intimidating, demeaning or hostile working environment whether or not the behaviour is based on the prohibited grounds.”

Harassment is defined in the Ontario Human Rights Code to mean, “engaging in a course of vexatious comment or conduct that is known or ought to be known to be unwelcome.” What is “**a course of vexatious comment or conduct**”? Vexatious is sometimes defined as “distressing” in this context. The Shorter Oxford English Dictionary definition is somewhat longer: “Causing or tending to cause vexation, annoyance, or distress; annoying, troublesome.”

“Course” suggests more than one event. How many times does the “vexatious comment or conduct” need to occur? There have been cases which found that even one serious incident could constitute a “course” of conduct and conversely cases where less serious conduct must be shown to be persistent.

In Ontario “vexatious” has been interpreted to include a subjective component: was the comment or conduct vexatious to the complainant? One case noted that “account must be taken of the

personality and character of the complainant: a shy reserved person, or in some cases a younger, less experienced, or more vulnerable person, is less likely to manifest her annoyance, irritation or agitation with the respondent’s behaviour than a self-confident, extroverted individual.”

The requirement that **the behaviour is “known or ought reasonably to have been known to be unwelcome”** adds an objective component. The alleged harasser may be found to have known that her or his comment or conduct was unwelcome. In addition the comment or conduct may be found objectively to have been unwelcome regardless of the alleged harasser’s state of mind.

... the “ought to have known” alternative recognizes that the responsibility for appreciating the offensiveness of certain behaviour does not rest entirely with the complainant. ...In general, the legislative enunciation of the right to be free from ...harassment... indicates a public awareness of the unacceptable nature of this behaviour and carries with it an expectation that this understanding is shared by the members of the community.”

Bullying is one particular type of workplace harassment. A helpful definition is set out by Barry Kuretzky and Jennifer Mackenzie in “Human Resources Guide to Managing Workplace Harassment”. “Bullying is the result of cumulative conduct with the effect that each incident which is heaped upon the target builds on the last. Bullying is the persistent use of offensive behavior which gradually undermines a person’s self-esteem and self-confidence.” Usually the target is less powerful than the bully.

In their article “The Emotionally Abusive Workplace”, authors Michele Koonin and Thomas Green list the 10 most common forms of workplace aggression including:

(Harassment and Bullying... cont’d next page)

Applause!

Kathryn Munn has recently achieved recognition as an IMI Certified Mediator.

IMI, the International Mediation Institute, is an international body created by three leading non-profit dispute resolution organizations from the Netherlands, Singapore and the United States for the purpose of certifying high standards of mediators throughout the world, encouraging usage of mediation, and aiding users to find suitable competent mediators quickly. For more information see www.imimmediation.org.

(Harassment and Bullying... cont'd)

2. Interrupting others while they are speaking or working
3. Flaunting status or authority, acting in a condescending manner
4. Belittling someone's opinion to others...
7. Yelling, insults and shouting...
10. Intentionally damning with faint praise

This more subtle form of abuse is pervasive in some workplaces. Many workplace harassment policies do not refer to inappropriate behaviours such as giving negative performance feedback within the hearing of others, or gossiping, which could be as distressing for an employee to experience as physical violence.

Supervisor's conduct: Kuretzky and Mackenzie also note that harassment does not include "the proper exercise of responsibility or authority related to the provision of advice, assignment of work, counseling, performance evaluation, discipline and other supervisory functions. Where performance feedback is provided by a supervisor in a constructive manner, it is not harassment."

Generally employees do not like receiving negative performance feedback. The question is: when has a supervisor's conduct crossed the line between exercising appropriate authority in relation to assignment of work, performance evaluation, discipline or other supervisory functions so that it has become conduct that amounts to harassment? As Robert Sutton observed in "The No Asshole Rule", people who occasionally act badly, or who are "gruff, outspoken and insist on applying high standards to their own work and everyone else's" are not necessarily abusers.

Employer action: Any harassing behaviour subjects an employer to the risk of liability for damages to an employee where the employer has failed to adequately protect the employee. Having policies is not enough; the employer is required to enforce the policies. Get the word out. All employees need to know the standards in this particular workplace. What behaviours are and are not acceptable? Supervisors or managers need to understand how to give feedback appropriately. Those with responsibility to implement the harassment policies need to understand their duties and take action as soon as they become aware of a possible harassment situation.

Employee action: For employees, sticking your neck out by making a complaint of harassment may seem especially risky in times of economic hardship when there are lay-offs and companies going bankrupt. As an employee considering this challenge if you hesitate to approach your manager, human resources staff, or named person under the policy, you might consider approaching a mentor, or other senior employee with whom you have rapport, to help you decide what steps to take.

i Cuff v Gypsy Restaurant (1987) O.H.R.B.I.D. No. 28, at para 97.

ii Ibid., at para 102.

Munn-thly Memo

Q. As a manager in my company, I have received a complaint from an employee that he is being harassed by a supervisor. Our company harassment policy states that mediation is the first step in resolving a harassment complaint if both people agree. I have spoken with both and they agree to mediation but the complainant does not want to meet with the supervisor. Please help.

A. Even though face-to-face is often the format for a mediated meeting, there is no requirement for a meeting in person. In this situation my practice is to speak with both employees and find out what form of meeting is appropriate for them. In a situation where a face-to-face meeting is not comfortable for both, I have conducted telephone meetings. If speaking with the other person is not comfortable, I have also had separate meetings with each person and acted as the conduit for their negotiations. If there are concerns about safety or schedule restrictions, the meetings with each person can be at different times and places or, for more immediacy, the people can be in different rooms in the same building at the same time.

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Please call 519-660-1242

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I am pleased to fill requests for presentations about mediation and negotiation at meetings of professional and business groups. Call or email to make the arrangements.

Electronic Common Ground

If you prefer to be on our e-mailing list please send us an email.

Kathryn Munn, LL.B., Cert.ConRes., C. Med., is a mediator, arbitrator, facilitator and lawyer. Through her firm Munn Conflict Resolution Services she works exclusively in alternate dispute resolution from a base in London, Ontario. She is a Roster Mediator, Ontario Mandatory Mediation Program - Toronto / Ottawa / Windsor, a mediator under contract to the Farm Debt Mediation Service of Canada, insurance industry ombudservices and for Canadian government departments.

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