

## **BULLYING IN THE WORKPLACE**

By: Lauren M. Bernardi

Bullying in the workplace is an increasingly important issue to employers and employees alike, particularly in light of some recent, high profile incidents of workplace violence.

This paper explores the legal remedies available to victims of bullying in the workplace. It centres on a fictional case study of a typical victim of workplace bullying.

### **Case Study**

Eric is an accounting supervisor with a medium sized service based organization.

During his first two years with the organization things proceeded quite well. He had 15 years of accounting experience and was able to meet his responsibilities quite successfully. He received good performance evaluations and enjoyed his job.

Six months ago Eric began to report to a new manager, Kim, at which point everything changed for the worse. Kim was very controlling and seemed to believe that management by intimidation was the best way to motivate employees.

Kim was critical with all of her staff but paid particular attention to Eric. She was constantly finding fault with Eric's work and no matter how hard he tried, she was never satisfied with his work.

After a couple of months Kim became more aggressive with Eric. She started yelling at him several times a day for seemingly trivial issues. She called him stupid and incompetent and made these statements in front of Eric's co-workers and his subordinates. Sometimes she got so angry that she banged her fists on her desk and would spit on Eric while she spoke.

Eric's first performance evaluation with Kim put him at the bottom of the scale, which meant he was not entitled to a bonus for the first time since joining the company. She then placed him on a performance plan and required him to report the status of his work four times per day.

Eric overheard Kim telling two members of his staff that she thought he was stupid and incompetent and that she planned to fire him. He felt humiliated and diminished in the eyes of his staff.

During staff meetings, Kim encouraged input from other employees but whenever Eric made a suggestion she ignored him, rolled her eyes or dismissed his suggestion in a patronizing and sarcastic manner.

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Eric was frustrated by this behaviour, which seemed to go unnoticed by senior management. Kim was quite charming and personable when dealing with her superiors who viewed her as an effective, assertive manager.

The stress of working for Kim took its toll on Eric. He began experiencing headaches and back pain. He couldn't concentrate, his self-esteem plummeted and he became clinically depressed. His doctor prescribed medication and recommended that Eric quit his job.

Eric requested that his hours be reduced and that his workload be modified to help him cope with the effects of his depression. For the first three days Kim complied with this request but then became impatient and said she would not give out "special favours to an incompetent employee".

Eric applied for a transfer within the company but was told that his performance had to improve before he could be transferred. Eric believed that as long as Kim was his manager, she would never consider his work satisfactory.

### Statistics

Although this example may seem unusual, it really isn't. One U.S. study found that workplace bullying is more common than racial or sexual harassment and 1 in 5 employees have been the victims of it. Women are targeted more often than men but they are equally as likely to be the bullies. The vast majority (81%) of bullies are in supervisory roles while 14% are at the same level as their targets.<sup>1</sup>

### What is Bullying?

Workplace bullies are really just grown up versions of the schoolyard bully. In an effort to overcome their own insecurities, bullies attempt to dominate and control their victims. They often have poor or non-existent social skills and lack empathy for others.

Broadly defined, bullying is any behaviour that intimidates, humiliates or demeans a person. Sometimes it's directed at one employee in particular; other times it's part of a hostile or poisoned work environment.

Examples of bullying behaviour can range from blatant to quite subtle and include:

- physically abusive or aggressive behaviour such as pushing, hitting, finger pointing or standing close to the victim in an aggressive manner
- verbally abusive behaviour such as yelling, insults and name calling
- persistent, excessive and unjustified criticism and constant scrutiny
- spreading malicious rumours
- excluding or ignoring the victim

<sup>1</sup> Campaign Against Workplace Bullying, [www.bullybusters.org](http://www.bullybusters.org)

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- undermining the victim's efforts by setting impossible goals and deadlines
- sabotaging the employee's work
- impeding an employee's efforts at promotions or transfers
- making false allegations in memos or other company documents

### Effects of Bullying

Bullying has pretty much the same impact on victims as racial, sexual or other forms of discriminatory harassment. For example, victims of bullying may:

- blame themselves and doubt their self-worth
- be seen as weaker or less competent by their co-workers
- be less productive
- suffer from stress-related illnesses, including headaches, inability to concentrate, sleeping and eating disorders, depression, muscle pain and panic attacks
- be at greater risk of alcoholism or suicide
- feel the effects in their home lives as the stress is carried over; or
- be fired, miss out on a promotion, or quit their jobs without having a new job in place

For the employer, allowing bullying behaviour in the workplace can lead to higher turnover and absenteeism, decreased morale, losses in productivity and legal costs incurred to defend the kinds of claims explored in this paper.

### The Link to Violence

Bullying can and does lead to violence.

In April 1999, Pierre Lebrun an employee of OC Transpo in Ottawa went on a shooting spree that resulted in five deaths, including his own by suicide. Lebrun had been subjected to incessant bullying and ridicule by his colleagues for his speech impediment and facial tick.

At the coroner's inquest the jury made 77 recommendations about preventing and responding to workplace violence. One recommendation was a request for federal and provincial legislation to combat violence, including physical and psychological violence from co-workers.

The jury paid particular attention to psychological violence, which it defined as "bullying, mobbing, teasing, ridicule or any other act or words that could psychologically hurt or isolate a person in the workplace". They expressed the need for greater recognition of the effect of verbal abuse on victims. They also stressed that the issue should be viewed from a preventative standpoint and not just seen as a criminal activity that is dealt with after the fact.

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## Legal Remedies

Historically, bullying has gone unchecked. It is often dismissed as a personality conflict, an attitude problem on the part of the employee or a strong or aggressive management style. At other times the bully (who can be quite adept at charming senior management) simply alleges that the victim is incompetent or insubordinate and senior management accepts this characterization without question.

The effects of bullying have also not always been acknowledged. If a supervisor repeatedly kicked or hit an employee the supervisor would be disciplined or fired. But psychological abuse can be just as damaging to an individual's mental and physical health and yet it is still largely tolerated.

There haven't been many legal protections available to assist employees and those that do exist have been underutilized. Those legal protections that are available are explored below.

## Harassment under the Human Rights Code

For behaviours that fall within the protected grounds of discrimination under the Human Rights Code (the "Code") such as race, religion, sex, family status, sexual orientation etc., employees can seek assistance from the Ontario Human Rights Commission. However, if the bullying behaviour is not related to a protected ground, the Code does not apply.

This is often a difficult concept for employees to grasp. They believe they are entitled to protection against harassment, whether or not it is discriminatory in its origin.

In Eric's situation, the bullying doesn't seem to be related to a protected ground of discrimination (i.e., Kim hasn't targeted him because of his race, religion or some other protected ground). His remedies, therefore, primarily lie in other legal avenues.

## Constructive Dismissal

Bullying can constitute constructive dismissal and is one remedy Eric could pursue.

In ***Shah v. Xerox Canada***<sup>2</sup> the Ontario Court of Appeal considered a situation in which an employee had been subject to "inefficient and unreasonable conduct" by his manager. In holding that this type of behaviour could give rise to a claim of constructive dismissal the court said:

In some cases, however, the employer's conduct amounts not just to a change in a specific term of the employment contract but to repudiation of the entire employment relationship.

<sup>2</sup> (2000) 49 C.C.E.L. (2d) 166. See also, *Morgan v. Chukal Enterprises Ltd.*, [2000] BCJ No. 1563 (B.C.S.C.) and *Lloyd v. Imperial Parking Ltd.*, [1996] A.J. No. 1087 (QB) in which bullying was found to constitute a breach of the "implied term of the employment contract that the employee would be treated with civility, decency, respect and dignity".

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For example, in *Whiting v. Winnipeg River Brokenhead Community Futures Development Corp.* (1998) 159 D.L.R. (4th) 18 (Man. C.A.), the trial judge concluded that an employee had been constructively dismissed because of a series of incidents culminating in the imposition of probation. The employer had unjustifiably criticized the employee, leveled vague and unfounded accusations against her, and created a hostile and embarrassing work environment...The case before us is similar. Xerox's treatment of Shah...demonstrated that it no longer intended to be bound by the employment contract, and that it had, therefore constructively dismissed Shah. (Emphasis added)

In the earlier decision of *Paitich v. Clarke Institute of Psychiatry*<sup>3</sup>, the Court of Appeal looked at the effect of bullying in the context of a wrongful dismissal action in which the employer asserted that it had just cause to fire the employee.

Paitich had a satisfactory work record until Dr. Hucker was appointed as Paitich's new manager. Before Hucker even started working at the Clarke he had some pre-existing ideas about Paitich's performance and was predisposed to be critical of him. From the outset Hucker acted in a demeaning and sarcastic way and brought Paitich's integrity into question without cause.

Paitich became increasingly frustrated by Hucker's actions and brought a harassment complaint before the organization's grievance committee. The committee viewed its role very narrowly and dismissed the complaint.

This only exacerbated Paitich's frustration and, in response, he became increasingly hostile and wrote a series of inappropriate and critical memos. The employer asked him to withdraw the memos and when he refused, they fired him and alleged just cause. Paitich brought an action for wrongful dismissal.

At trial the judge concluded that the actions by Hucker had been so dreadful that Paitich could have considered himself constructively dismissed months before the employer terminated him. The trial judge found in favour of Paitich and stated that:

...Supervisory staff owe a duty to those working under their authority to treat them fairly and not subject them to individual harassment that renders competent performance of their work impossible.<sup>4</sup>

In upholding the trial judge's decision, the Court of Appeal stated that it would be unfair to allow the employer to rely on Paitich's actions in support of its claim of just cause in light of the "extremely reprehensible behaviour of the administration of the Clarke Institute".

<sup>3</sup> (1990), 30 C.C.E.L. 235

<sup>4</sup> *Supra*, (1988), 19 C.C.E.L. 105 (Ont. H.C.)

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## Intentional Infliction of Nervous Shock

Eric could also sue for intentional infliction of nervous shock. To succeed he would have to prove:

- (i) outrageous conduct by the perpetrator
- (ii) conduct calculated to produce some effect of the kind that was produced (intent)
- (iii) conduct producing actual harm that is a visible and provable illness.<sup>5</sup>

### (i) Outrageous Conduct

The most difficult element of this type of claim is proving that the conduct is “outrageous”. This is a very high test and the kinds of activities that fall under this category have generally been quite limited. This may be changing.

For many years sexual harassment was tolerated in the workplace and many incidents that we would consider outrageous today were in the past, trivialized or simply accepted as an unfortunate consequence of men and women working together. Likewise, we are becoming less accepting of bullying and psychological abuse.

The conduct is more likely to be considered outrageous if the bully is in a position of authority over the victim. It is also more likely to be considered outrageous if the bully exploits a victim who is particularly sensitive or vulnerable to injury through mental distress. For example in *Boothman v. Canada*<sup>6</sup> in finding the employer liable for intentional infliction of nervous shock the court noted that:

...when Mr. Stalinski [the plaintiff’s manager] hired the plaintiff, he was well aware of her mental vulnerability. In my view, Mr. Stalinski did not hire plaintiff (sic) despite that vulnerability as he professed, but because of it. He was looking to hire an employee who would readily submit to his control and plaintiff, because of her apparent fragile state was a fitting candidate. He exploited that vulnerability from the onset, initially to assert his control and domination over the plaintiff and later, when that failed, with the view of causing her to break down and quit her job. (Emphasis added.)

### (ii) Conduct Calculated to Produce Some Effect of the Kind that was Produced

This is about intention. Given the nature of these cases, the courts have frequently imputed an intention to produce nervous shock even if the bully’s actions caused greater harm than he or she anticipated. That’s because bullies generally do not anticipate or appreciate the extent of the harm caused by their actions.

<sup>5</sup> *Rahemtulla v. Vanfed Credit Union*, [1984] 3 W.W.R. 296 (B.C.S.C.)

<sup>6</sup> [1993] 3 F.C. 381 (T.D.)

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### (iii) Conduct Producing Actual Harm That is a Visible and Provable Illness

The kind of harm required goes beyond mere upset feelings. It must result in objective and substantially harmful physical or psychological consequences. As stated above, many victims of bullying do sustain these kinds of injuries, from which it can take years to recover.

A claim of intentional infliction of nervous shock has succeeded in several cases. In *Prinzo v. Baycrest Centre for Geriatric Care*<sup>7</sup>, an employee was subject to a barrage of phone calls while off sick and was accused of harming the clients she served as a hairdresser in a geriatric facility. The actions by her supervisor and other employees of the facility were deliberate and resulted in emotional upset, increased blood pressure, weight gain and an increase in the employee's diabetes symptoms. The court considered this a separate head of damages in her wrongful dismissal action and awarded her \$15,000 plus \$5,000 in punitive damages.

Similarly in *Boothman v. Canada*<sup>8</sup> the employee was awarded damages for intentional infliction of nervous shock. Her supervisor subjected her to numerous and continuous acts of assault and intimidation. She was granted \$5,000 for pain and suffering and \$20,000 for lost earnings. In addition, the court awarded \$10,000 in exemplary damages based on its finding that the defendant deliberately exposed Boothman to risk without justification.<sup>9</sup>

In each of the above cases the employer was held vicariously liable for the bully's intentional infliction of nervous shock on the victim.

### Negligence

Eric could also claim negligent infliction of nervous shock. To succeed in a claim based on negligence, he would need to show:

- (i) His employer owed him a duty of care;
- (ii) The employer breached the standard of care;
- (iii) Damage resulted from the breach; and
- (iv) The damage was foreseeable and not too remote.

In *Clark v. Canada*<sup>10</sup> the plaintiff, an RCMP officer, sued for negligent and intentional infliction of nervous shock. She had been harassed by her male colleagues and suffered a mental crisis as a result. Her superiors failed to come to her assistance.

<sup>7</sup> [2000] O.J. No. 683, (Ont. SCJ)

<sup>8</sup> *Supra*.

<sup>9</sup> See also *Bogden v. Purolator Courier Ltd.*, [1996] A.J. No. 289 (QB) in which a claim of nervous shock was upheld. The court described the defendant's management style as "confrontational, brash, in your face, and filled with sarcastic responses to the plaintiff and those for whom the plaintiff was responsible". Purolator was ordered to pay Bogden \$20,000 for nervous shock.

<sup>10</sup> (1994), 20 C.C.E.L. (2d) 172 (Fed. Ct.)

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In reviewing Clark's claim for negligence the court said:

I am satisfied that the evidence also established negligence that engages the Crown's vicarious liability. In my view there is no doubt that as the plaintiff's immediate supervisor, **Cpl. Mazur owed the plaintiff a duty of care and breached that duty consistently. I find that over a lengthy period, he deliberately refused to exercise his authority to put an end to the conduct of harassment of which he was well aware and which he in fact participated in on occasion, thus condoning that behaviour.** He further neglected utterly to respond to the plaintiff's distress signals, as his position of responsibility required him to do. And, as mentioned earlier, superior RCMP officers failed to come the plaintiff's assistance.

In my view the circumstances of this case present no issue of remoteness or foreseeability. Cpl. Mazur was not an unconcerned bystander without authority to exert control over the behaviour of his subordinate: **his negligence played a direct causative role in the damage suffered by the plaintiff, and he was clearly acting in the course of his employment.** (Emphasis added.)

The court awarded Clark \$88,000 in special damages for lost earnings and \$5,000 in general damages for nervous shock.

As for Eric, the facts of his case meet the tests set out for negligence and he would likely be able to sustain such a claim.

### Duty to Accommodate

In Eric's situation, as in so many, the bullying was so extreme that it resulted in both physical and mental illnesses. These illnesses would most likely be considered handicaps under the Human Rights Code. This would trigger the employer's duty to accommodate Eric short of undue hardship. Accommodation might include a transfer away from the bully or modified duties to allow him to cope with the effects of his illnesses.

Kim's statement that she would not show favouritism to Eric demonstrates a flagrant disregard for the Code and could lead to a finding that she and the company violated its provisions.

### Health and Safety

In some provinces, such as B.C., health and safety regulations explicitly cover threatening and abusive behaviour from co-workers. In Ontario, the situation is not quite as clear.

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Employees have argued that harassment constitutes an occupational health and safety hazard and have attempted to seek redress under the Occupational Health and Safety Act (the “Act”). While the door has been opened to these types of claims, they have been met with some reluctance.

In *Au v. Lyndhurst Hospital*<sup>11</sup>, although the Ontario Labour Relations Board (“OLRB”) did not decide the issue, it speculated that since harassment can be damaging to an employee’s health it could be a health and safety hazard. However, the OLRB suggested that this issue might be more properly addressed under human rights laws.

In the subsequent decision of *Meridian Magnesium Products Limited*<sup>12</sup>, the OLRB stated that where the harassment is discriminatory and the employee has a remedy under the Human Rights Code, the matter should be deferred to the Human Rights Commission.<sup>13</sup>

In *Sharon Moore v Barmaid’s Arms*<sup>14</sup> the OLRB held that a worker in a tavern was entitled to refuse to work where the “hazard” was an abusive customer. Board Member Correll dissented, in part because he believed that a violent customer could not be a hazard in the sense intended by the Act.

*Ontario Public Service Employees’ Union (Re)*<sup>15</sup> involved a supervisor in a correctional facility who behaved abusively towards a correctional officer in front of the inmates the officer guarded. The adjudicator considered whether “the Act could be applied to a situation where the source of the alleged threat to a worker’s health and safety is another employee at the workplace”. The adjudicator stated that if the behaviour constituted assault then the criminal process is preferable but acknowledged that there might be situations involving the violent behaviour of a co-worker in which the Act would apply. She did not provide guidance as to what these situations might be.

As with many bullying scenarios, Eric’s problem does not involve discrimination so the matter could not be deferred to the Human Rights Commission. It also falls short of criminal assault so the criminal justice system is not the preferred course. Therefore, there is a strong case to be made that he is entitled to the protections offered under the Occupational Health and Safety Act.

<sup>11</sup> [1996] OLRB Rep. May/June 456

<sup>12</sup> [1996] OLRB Rep. Nov./Dec. 964

<sup>13</sup> See also, *Pieters v. Toronto (City) Board of Education* [2000] O.J. No.4314 (Div. Ct.) in which this approach was challenged under s.15 of the Charter. The applicant argued that refusing to deal with his racial harassment complaint under the Occupational Health and Safety Act was discriminatory the complaint would have been heard had it not related to discrimination. The Divisional Court disagreed and found it appropriate to defer human rights matters to the Commission.

<sup>14</sup> [1995] OLRB Rep. March 229

<sup>15</sup> [1996] O.O.H.S.A.D. No.53

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This means Eric could refuse to work with Kim if he has reason to believe that doing so is likely to endanger him. This would trigger an investigation by management along with a worker health and safety committee member, or worker representative if there is no committee. During the investigation management and the committee member or representative would be responsible to determine whether the situation is truly unsafe. If the parties don't agree or the worker disagrees with their conclusion, the test becomes whether the worker has reasonable grounds to believe that the work is unsafe. This may involve the appointment of an inspector from the Ministry of Labour.<sup>16</sup>

### Defamation

The statements made by Kim alleging Eric's incompetence would most likely have the effect of lowering the esteem or respect that his co-workers and, especially his direct reports, have for him. This would certainly enable Eric to assert that he was defamed by Kim's comments and would provide a separate claim to add to his considerable list.

### What Should Employers Do?

Due diligence is an important step for employers. They must take bullying seriously and not brush it off as a personality conflict or aggressive management style.

The first step is to create a workable policy. Many employers have either incorporated bullying into their existing harassment policies or have created separate code of conduct policies. There are good reasons for each approach.

The harassment policy is the one most employees think of when faced with this type of problem. That is, they don't make a distinction between racially motivated harassment and plain ordinary bullying. The underlying cause matters not, it's the effect that concerns them.

On the other hand, discriminatory harassment is something that is treated in a specific manner under the Code and the legal tests may not be exactly the same. For example, the test for discriminatory harassment includes determining whether the harasser "knew or ought to have known that the conduct or comments were unwelcome". This element is included because there are times when certain comments or conduct may be considered harassment by one individual and humorous by another. The same is not likely true of bullying. For this reason, using a code of conduct policy may be a better approach and it may provide the employer with greater flexibility in managing the problem. If the employer takes this approach it will need to emphasize that both policies are equally important.

<sup>16</sup> Note: in Ontario Public Service Employees' Union (Re), *ibid*, the Ministry acknowledged that its practice has been not to send an Inspector to investigate a claim of violence in the workplace if violence is occasionally or not normally a risk associated with the workplace. Such matters are left to the police.

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Of course any policy is useless if it is not enforced. Supervisors will need to be adequately trained in effective leadership (i.e., yelling at and humiliating employees tend not to be effective approaches) and educated about the legal consequences of inappropriate behaviour.

If an employer receives a complaint of bullying, it should fully document the incident(s). This includes obtaining written, dated statements from the victim and anyone who can corroborate the victim's allegations. The perpetrator should be given an opportunity to respond and proper notes should be taken. Depending on the outcome of the investigation, the perpetrator should be disciplined or possibly terminated. At all times the employer will need to meet its obligations to both the victim and the perpetrator and must maintain a proper paper trail.

### **Conclusion**

Employees are tired of being abused and we now know more about the effects of psychological abuse on an individual's emotional and physical health. Therefore there will be increasing pressure on employers, courts and government agencies to adopt strategies to prevent bullying and provide an effective response when it occurs.

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## About Lauren Bernardi

Lauren is a lawyer and human resource advisor with the Mississauga firm of Bernardi Human Resource Law. Lauren's advisory, training and educational services help managers direct their human resources in a strategically sound and legally appropriate manner. She is an accomplished and entertaining speaker on management and human resource issues.

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