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PUBLICATION

Preventing Violence and Harassment at Work – Workers' Compensation Enters the Equation

Date: February 29, 2016
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Original Newsletter(s) this article was published in: Employment Update: February 2016

The modern workplace poses many challenges for employers, and in recent years, one of the more rapidly evolving of those challenges has been the treatment of workplace violence and harassment. Since the implementation of Bill 168, employers have had an obligation to put written policies in place to address both workplace violence and harassment, although the rights and recourse of employees on the receiving end of alleged harassment were not directly affected by the changes in the law that were coming into place. Rather, the implications were left to be developed over time, primarily through decisions of the Human Rights Tribunal of Ontario ("HRTO") and the courts.

Having adopted the necessary policies, employers have been well advised to have workplace investigations carried out to look into allegations of harassment. There is little disputing the point that this has been a positive development and that the risks – both of violence and of harassment in the workplace – are both real and troubling. A component missing from most of the dialogue on the topic to date has been the interaction between these issues and workers' compensation law. Indeed, the violence side of the equation is something that has been clearly and logically addressed by the WSIB since long before Bill 168 even took hold.

While most people, rather logically, conceptualize workers' compensation as a subject triggered by accidents at work, its scope is rather more broad than that. In fact, the expanded definition of "accident" in the *Workplace Safety and Insurance Act* counterintuitively incudes as an accident, "a wilful and intentional act, not being the act of the worker," something that in any other context, is not "accidental" at all.

In this light, injuries occasioned by workplace assaults have resulted in the awarding of WSIB benefits in appropriate circumstances for decades. But these would typically address only matters of physical violence, and result in the compensation only of physical injuries.

Nevertheless, since acts of harassment are plainly wilful and intentional, the door was open to the allowance of such claims, even in the context of no physical contact or physical injury.

In response to decisions of the Workers' Compensation Appeals Tribunal (now the Workplace Safety and Insurance Appeals Tribunal, or WSIAT) in the 1980s and 1990s, that were giving more latitude for psychological entitlement, the Ontario government in 1997 introduced a legislated prohibition on the allowance of benefits for mental stress, except where the mental stress was "an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of … employment". Designed primarily to preserve entitlements for first responders who witness injuries and deaths in the course of their work, this exception was further limited to exclude entitlement in situations where the stress was caused by the employer's decisions or actions relating to the worker's employment, such as changes in working conditions, the imposition of discipline, or the termination of employment entirely.

The traumatic mental stress policy that the WSIB developed after 1998 allowed for psychological entitlement in cases of harassment only where the conduct at issue included threats of physical violence or where the harassment put the worker at personal risk, such as if safety equipment was tampered with.

Nevertheless, as society has, in more recent years, come to a greater understanding of mental illness and injury as something that can be as disabling as any physical illness or injury, WSIAT decisions have come to expand upon that WSIB policy, to a point where personal risk is no longer determinative, and cases of harassment and bullying may now be allowed where the conduct at issue is shown to have caused psychological disability, is seen to be sufficiently closely related to the employment context and is objectively traumatic.

This is not, however, to say that such claims can be successfully launched indiscriminately. To the contrary, while the WSIAT has ruled on a number of cases of harassment to date, no pattern of overly generous allowance of such claims has emerged. A few examples follow.

A miner claimed entitlement for depression and posttraumatic stress disorder as a result of harassment by co-workers that ranged from name calling and sabotaging of his tools, to messages threatening to kill him and his wife. The threats emanated from the workplace and were tied to suggestions that he worked too hard and made others look bad. WSIB benefits for traumatic mental stress were allowed by the WSIAT in 2011. A 2013 case, also involving a miner, went a step further. The harassment came from a single co-worker, and over a period in excess of two years, progressed from verbal harassment, ridicule and accusations, to occasional physical (non-injuring) contact and intimidation. Despite the lack of outright violence or endangerment, the conduct exceeded the sort of give and take that one might anticipate in such a work environment. To the contrary, the aggressor's actions went beyond what could be expected in a workplace and were objectively traumatic. Coupled with independent medical evidence of a resultant condition involving anxiety and depression, the claim was allowed.

In a second 2013 case, however, benefits were denied, despite a positive medical diagnosis of a major depressive disorder with psychotic features, and proven episodes of harassment (a supervisor running his fingers through the worker's hair, as well as demeaning and racist comments), on the basis that the harassment was not objectively traumatic or egregious enough to attract entitlement. Similarly, in a third case decided that year, benefits were denied because the harassment itself was not proven.

The final case of note, from 2015, involved a worker who was subjected to sporadic vulgar graffiti on the employer's premises directed to her personally, but which arose from disputes outside of the workplace entirely. Despite the viewing of this objectively traumatic graffiti by the worker in the workplace, and a resultant posttraumatic stress disorder, neither the comments nor the source of the comments contained in the graffiti were in any way shown to be related to the workplace. Hence, the harassment was not at all incidental to her employment, and benefits were denied.

At the same time as the notion of non-violent workplace harassment giving rise to workers' compensation entitlement was being developed through cases such as these, the WSIAT in 2014 ruled that the limitation on mental stress entitlement that requires an "acute reaction" and a "sudden and traumatic unexpected event" was contrary to the Charter of Rights, and hence, of no effect. While this case undoubtedly broadens the circumstances where mental stress entitlement will be allowed, to date, there are no decisions as yet that demonstrate the extent to which it may expand the range of allowable claims by harassment victims.

Clearly, the provincial government has set a public policy goal of having employers police the workplace to minimize workplace harassment, as demonstrated by the government's recent advertising campaigns aimed at increasing sensitivity toward workplace harassment, and the still recent changes to the Occupational Health and Safety Act. Nevertheless, the law directly written to achieve this imposes little in the way of direct financial penalties for non-compliance. Conversely, WSIB claims arise in a no fault system that can impose substantial six figure financial penalties as a result of just a single claim involving long term psychological disability. Employers need to be aware of the extent to which it is in their economic interest to be alert to the risk of such behaviours being present in their workplaces and should look to ensure prevention, rather than focusing only upon complaint processes and investigations.