

# Bullying Legislation Outline

Dec. 2010

1. Purpose of the Act
  - a. Broad overview of legislation (OHS – ESA – stand alone – Tort)
2. Scope of the Act (with respect to bullying)
  - a. To address workplace conduct.
  - b. Requirement that Eers have employment code of conduct (Dignity at Work Policy)
    - i. Code of conduct (deemed) to import Hr Code and/or bullying leg.
3. General Definitions
  - a. Jurisdiction
    - i. Parties
      1. Definition of C
        - a. Definition of employee
          - i. Statutory definition – or broadened for bullying
          - ii. Include management
        - b. Does C have to be alive
          - i. Does heirs and family of C have rights
          - ii. Impact on family
        - c. Can C be a client/ member of the public
        - d. Can C be a group
      2. Definition of R
        - a. Distinction between Corp and Individual
          - i. If Corp any limitations on liability
          - ii. Is Corp R indemnified or exempted from legislation
            1. Third party as R
              - a. Customers, invitees,
        - ii. Subject Matter (Bullying/harassment)
          1. Affirmative and negative acts or omissions
          2. Grounds based included
          3. Personal Characteristic but not HR Ground (Canuck fan)
        - iii. Geography
          1. Worker hired by Canadian Company working overseas, call centre in another country, over the internet.
        - iv. Union and/or non Union workers
        - v. If Formal – Election Requirement - that C make an election to proceed either under this act or another but not both (e.g. if files HR Complaint cannot also file here, should they be able to proceed if Grievance file)
          1. If WCB can C also file other action
            - a. Against Corp and/or individual C
            - b. Would the C give up the right to civil remedy (Wrongful dismissal) (would this be a consequence if OHS based leg)

- b. Time limit
  - i. Extension when repeated incidents of the same kind,
  - ii. Where informal complaint was made to Employer
  - iii. Where informal apology was made by R but behaviour did not change.
  - iv. Where grievance filed
  - v. Where investigation undertaken
    - 1. Where result of investigation not available till after limitation period.
- 4. Specific Definitions (specific to offense if amending other leg)
  - a. Definition of Harassment/Bullying
  - b. Definition of Complainant (if not already identified in leg or if needs to be modified, (i.e. to include independent contractors, those excluded specifically by ESB etc...should it include managers, should it include Unionized workers) (see 3 (ii) supra)
    - i. Representative or Group complaints.
      - 1. Defenses to bad conduct – C’s retaliation, violence.
  - c. Definition of Respondent
  - d. Definition of Employer (if different than general definition)
- 5. Duties
  - a. General duties of the parties under the leg.
  - b. Vicarious liability
    - i. Limits on liability of Corp
      - 1. by way of 27(d)
      - 2. By way of legislation
- 6. Management rights
  - a. Specifically articulated
  - b. Defined by overall legislation
- 7. Rights
  - a. Right of parties to have representation
    - i. Paid for by each of the parties or provided under leg
  - b. Right of C and R to have matter resolved within a set time.
  - c. Rights of parties during investigation
    - i. Paid leave, change of schedule, separation of parties.
    - ii. Rights of C when “illness or injury”
- 8. Proofs
  - a. Level of Proof.
    - i. Beyond Reasonable Doubt
    - ii. Preponderance of the evidence
    - iii. Balance of Probabilities
    - iv. Reasonable person test (Objective)
  - b. Complainant
    - i. Evidence of actual harm, physical affect, psychological consequence (subjective) or reasonable person test

- c. Respondent (individual)
  - i. Need for intent, malice, negligence, reckless disregard
    - 1. Punitive damages if proved
  - ii. No need for intent just proof of harm

## 9. Process

- a. General process to include
  - i. Mandatory mediation
  - ii. Mandatory investigation
  - iii. Written Submissions
  - iv. Interviewing witnesses
  - v. Rulings and appeals.
  - vi. *Timelines to move process forward.*
    - 1. *Investigation to take place within x time*
    - 2. *Response to complaint made within x time*
    - 3. *Results of investigation made known within x time*
    - 4. *Disclosure*
    - 5. *Interlocutory applications within x time*
    - 6. *Statement of remedy made within x time*
- b. Process for Complaint
  - i. Formal or informal
  - ii. If Formal – Election Requirement - that C make an election to proceed either under this act or another but not both (e.g. if files HR Complaint cannot also file here, should they be able to proceed if Grievance file)
  - iii. If Filed under OHS does C give up the right of civil suit for Wrongful termination resulting from Bullying.
  - iv. Any prior requirement (i.e. to tell R to stop) (to notify Mgmt)
- c. Disclosure process
  - i. Right to information not employer owned.
  - ii. Waiver of Privileged information
- d. Privacy
- e. Investigation
  - i. Rights of parties during investigation
    - 1. Right of C
    - 2. Right of R to know C's identity
    - 3. Right of R to know names of witnesses and their statements
    - 4. Right of R to know charges
    - 5. Right of R to receive copy of legislation
    - 6. Right of C to refuse to work
  - ii. *Rights to refuse work during investigation*
    - 1. *With pay*
    - 2. *Without pay*
      - a. *One or both parties*
- f. Finding
  - i. If finding of no Bullying
    - 1. Appeal process
      - a. Punitive against C if improper motives bad faith

- ii. If finding of Bullying
  - 1. Appeal process
  - 2. limit on punitive action against R

#### 10. Deferral

- a. Interaction with other legislation – LRB, Grievance, WCB, ESB, HR.
  - i. Extension of time for filing if C engaged in another proceeding.

#### 11. Remedy

- a. Statutory limits on Remedy – Does legislation have to be amended.
  - i. Limit on non pecuniary losses – availability of I2D
  - ii. Limit on pecuniary losses
    - 1. ESB wage loss 6 months,
    - 2. WCB wage loss, pain, PTSD
  - iii. Subrogation by other legislation – i.e. if Bullying policy is ESA and C files and gets WCB for same injury will damages be subrogated.
- b. Types of remedies - Cease and desist, Reinstatement, separating C and R, Loss of Pay, Loss of benefits or cost of replacement, Injury to dignity, Punitive (against Individual and/or Corp) legal fees, loss of opportunity (promotion), loss of reputation, amend C's Employment file, Tax gross up, Training for R's,
- c. Costs (Schedule or actual)
  - i. For disclosure, evidence, for other.
- d. Damages
  - i. Requirement that Tribunal look at specific factors of damage
    - 1. Torres Factors. Etc...

#### 12. Appeal

- a. Process - Review, appeal or JR.
- b. Time limits
- c. Costs
  - i. As per (new) forum's rules.
  - ii. As per BSC schedule
  - iii. Nominal
  - iv. Only when improper conduct
  - v. Actual legal costs

#### 13. Retaliation

- a. Protection for C for filing Complaint
- b. Protection for Individual R (if no breach – likely not necessary as covered under Employment Common Law – Eer fires because of complaint even though no breach)