Workplace Harassment, Stress, Mental Health Complications & Return to Work Barriers – Redress under the Occupational Health & Safety Act

By: Gary Majesky, *WSIB Consultant & Executive Board Member*

Most construction workplaces are not gentile debating societies where workers are equals, relationships civil, and you have a say in how work is organized. Some supervisors are more sophisticated and manage employee relations in a more enlightened manner. However, I often hear complaints about worker maltreatment that harkens back to a past era. Fortunately, many contractors have evolved their business practices, but some still cling to old ways.

In my experience the usual culprits are not the guy at head office, but in the field. That's where abusive and harassing behaviours mostly manifest. Unfortunately, injured workers seem to bear the brunt of caustic comments, snide innuendo's and unnecessary scrutiny only because they are injured and performing modified work. I could write a book on the litany of harassing conduct.

The union deals with many workplace issues, so it's is important that members understand Ontario's current workplace harassment laws so you are informed on the mechanism, and how to seek a resolution when you or co-workers are being harassed.

Bill 168 now known as Section 32 of the *Occupational Health and Safety Act* (Ontario OHSA) became law on June 15, 2010, and it represents a significant change in how, and to what extent, both workplace violence and workplace harassment are regulated in Ontario.

What are the requirements for Ontario Employers?

Employers must prepare a policy with respect to workplace harassment, and develop and maintain a program to implement the policy. Employers must provide information and instruction to workers on the contents of the policy and program.

The workplace harassment program must include measures and procedures for workers to report incidents of workplace harassment and set out how the employer will investigate and deal with incidents or complaints.

These requirements help employers, supervisors and workers to recognize and deal with workplace harassment promptly, before it escalates into possible workplace violence.

An important consideration is that Health and safety inspectors cannot investigate, resolve or mediate individual cases of workplace harassment. Nor does OHSA require an employer to assess the risk of workplace harassment. However, the union has a key and prominent role in such matters.

Workplace harassment means

- Engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome.

Workplace harassment may include bullying, intimidating or offensive jokes or innuendos, displaying or circulating offensive pictures or materials, or offensive or intimidating phone calls.

OHSA - Extended Definition of Workplace Harassment

Section 32 of the Ontario Occupational Health and Safety Act (Ontario OHSA) broadened and extends the definition of workplace harassment beyond what is presently covered under the Ontario Human Rights Code. The Human Rights Code has long prohibited harassment in the workplace based on race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status, or disability.

Traditionally, harassment that was based on other, non-protected grounds was not actionable, unless the employer had extended additional protection by way of policy or it had agreed, as part of the collective bargaining process with a union, to incorporate broader protection in a collective agreement. Bill 168 changed this because it requires employers to treat harassment based on non-protected grounds in the same manner as harassment based on Code-protected grounds.

Harassment Complaints Must First Be Raised Internally

The purpose of Section 32 (OSHA) is that all Ontario Employers must have a Harassment Policy in place, including a process and mechanism to address workplace harassment when it arises. As the Ministry of Labour points out, this falls under the Internal Responsibility System (IRS), which means workers MUST first bring their concerns forward to the employer for investigation and resolution. However, it is crucial for members to involve the union, either a steward or business representative, even if you are an injured worker, because the union has the ability to file a grievance and enforce unacceptable workplace conduct when warranted.

If the harassing conduct is directed to an injured worker, it may invoke an anti-injured worker animus argument that we can bring forward to the WSIB for investigation. Since each worker has varying resilience to harassment, some workers may develop psychological reaction and become unwell emotionally while for others it's like water off

a duck. In these situations, I must be involved to coordinate WSIB interventions. In a recent case I wrote an opinion that is worth sharing:

> While I was not immediately convinced that the harassment was egregious, one must always be on guard for intonation and inflection versus looking at words on paper or devoid of context. Leaving aside whether the supervisor behaved inappropriately, I'm not convinced these comments to the worker (e.g., pussy, working slowly) trend toward the gross egregious behaviour one sees at the extreme end of the foul language spectrum and I explained to the member that the comment "working slowly" has been a supervisory anthem since the early days of the electrical industry. True the language was improper and must stop however, the member cannot stop working and observe the labour relations process unfold from the sidelines. He should return to work in the meantime since the union and employer are addressing the issue, but critically, the abusive foreman is no longer on site.
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> To the member's credit, he has been very honest and forthcoming and analyzed the political and cultural dynamics of his workplace with considerable introspection. But I remain concerned about potential overreaction and sensitivity to coarse language that even on its face may be improper, but can surely be alibied as shop-talk not uncharacteristic of a construction workplace environment. I have not raised this, but there is settled arbitral jurisprudence regarding salty language in the workplace, and whether such language will attract judicial notice when this language is placed in the context of the norms, customs and practices of a particular workplace environment (i.e., construction).
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> Furthermore, I have given consideration to whether there is a potential anti-injured worker animus argument in connection to the comments made to the member once he was injured, but I'm not convinced the conduct rises to a standard where an Appeals Resolution Officer or Tribunal Vice-Chair would conclude such animus exists towards the injured worker.
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> At the end of the day, these particular unwelcome comments would not be considered ***objectively traumatic*** as that term is defined under the *Traumatic Mental Stress policy*, as these unpleasant comments are not "life threatening" notwithstanding the member's vulnerable or frail spirit in contending with unwelcome comments. Clearly, this is a situation that requires redress through the Workplace Harassment Policy of the contractor.

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