

Bullying and Harassment: Tips, Traps and Trends in the Tourism Industry

BC Tourism Industry Conference

February 23, 2017

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The Topic

Why is this relevant?

- Risk Management
- Legal liability – employees have recourse
- It's in the news – Retail Action Network
- Societal norms shifting
– #IfTrumpCanSayIt

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Agenda

What we hope you leave today knowing

- What is and is not workplace bullying and harassment?
- What is a poisoned work environment?
- Why does it matter?
 - Impact on the bottom line
 - Actual and potential liabilities
- What are the legal duties?
- Complaints and investigations
- Next steps

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WorkSafeBC statistics

Just the facts please

- From July 1, 2012 – December 31, 2015
 - Received 8,890 mental disorder claims
 - Accepted 135 claims for bullying & harassment
 - The hospitality sector had the most accepted claims and the fourth most reported claims (14%)
 - The reported bullies were
 - co-workers (28%);
 - supervisors (20%);
 - Manager (28%);
 - Owners (7%); and
 - customers or members of the public (17%)

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WorkSafeBC Mental Disorder Claims in General

July 1, 2012 to December 31, 2015

	Count	Percent
Allowed	1,402	15.77%
Disallowed	3,860	43.4%
No adjudication required	639	7.19%
Pending	295	3.32%
Rejected	48	0.54%
Suspended	2,646	29.76%
Total	8,890	100.0%

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WorkSafeBC Bullying and Harassment Claims

July 1, 2012 to December 31, 2015

Decision	Count	Percent
Allowed	135	4%
Disallowed	1851	60%
No adjudication required	121	4%
Pending	91	3%
Rejected	2	0%
Suspended	891	29%
Total	3091	100%

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WorkSafeBC

What is bullying and harassment?

- WorkSafe BC considers bullying & harassment an occupational hazard
- Can be a single serious event but most often is a pattern of conduct
- Employers have a legal duty to address and reduce hazards, including bullying & harassment
 - Must have policies in place
 - Must investigate complaints
 - Must provide training/education

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WorkSafeBC

Definition of bullying and harassment

- An objective test, although the target's subjective experience is a factor
- Defined as "any inappropriate conduct or comment by a person towards a worker that the person knew or reasonably should have known would cause that worker to be humiliated or intimidated"
 - The inappropriate conduct can come from supervisors, co-workers, customers or clients

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Bullying and harassment

Examples

- Spreading rumours or gossip about the target
- Excluding or isolating the target
- Making offensive jokes or comments about the target
- Using profanity, yelling or screaming
- Calling the target names, subjecting him or her to insults or putting him or her down
- Intimidating the target through body language (e.g. rolling eyes, making offensive gestures, or standing too close)
- Invading privacy of the target, or tampering with his or her equipment or belongings
- Customers making lewd or derogatory comments to employees
- Yelling or screaming at employees

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What is not bullying and harassment?

Inappropriate or unprofessional behaviour

- Unpleasant behaviour, while inappropriate, should be addressed as a breach of expected workplace behaviour or code of conduct policies.
- The following is not usually considered bullying or harassment:
 - Difference of opinion (even a passionate one);
 - Minor one-off incidents like losing your temper, shouting or swearing;
 - An unskilled manager handles a difficult conversation badly; or
 - Poor communication or disagreements between employees
 - Asking employees for medical information when they request a workplace accommodation

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What is not bullying and harassment?

Employee Management Exclusion

- Workplace bullying and harassment does not include reasonable action taken by an employer or supervisor relating to the management and direction of workers or the place of employment
 - Constructive feedback on work performance issues
 - Taking reasonable action to manage a worker's performance, transfer a worker or assign work
 - Taking reasonable disciplinary action including termination

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What is reasonable action?

Some case examples

- Criticizing an employee for incompetence, being frustrated when the feedback is not received, and then requiring the employee to attend a disciplinary or investigative meeting when stressed out (WCAT-2016-00876)

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What is unreasonable action?

Some cases

- Unreasonable action has included:
 - Screaming at and spitting at a worker and telling her to obey while threatening to terminate her (WCAT 1602517)
 - Blocking an employee's attempt to leave and grabbing her wrist (WCAT 2014-01468)
 - Yelling and swearing (telling a worker to stop being a f***ing baby and get back to f*** work) (Review R0155958)
 - Removing worker's duties, failing to communicate important information, calling worker and home and sending emails critical of her work, all ending in a transfer to a lower-level facility where employer provided no evidence (WCAT-2016-00642)

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Who is a typical target?

Not who you might think

- 75% of workers have been bullied at some point
- 40% of Canadians have experienced one or more acts of workplace bullying in the last 6 months
- 40% of Canadian workers say that they have experienced bullying on a weekly basis
- It is far more common than sexual harassment
- Targets are often capable, well-liked and high performers (in other words, a personal or professional threat to the bully)
- By far, the majority of targets (80%) are women

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Who is a typical bully?

Also not who you might think

- Can be one person or a group
- The majority (3/4) of workplace bullies are in positions of actual or perceived authority or a higher rank than the target
- This can include customers
 - In the hospitality industry, customers may feel that they are superior or of a higher rank due to the perceived subordinate nature of employment or the fact that they are paying for a service

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How do workplace bullies abuse their actual authority?

Some examples – conduct can be subtle or obvious

- Make unreasonable demands, constantly change work guidelines or establish "impossible to meet" deadlines, and deliberately interfere with the completion of work
- Blame, scold or criticize work ability and belittle others
- Discount accomplishments and steal credit or do not give credit where it is due
- Withhold necessary information or deliberately give wrong information
- Under-assign work, remove areas of responsibility, micro-manage or performance manage without good reason
- Block requests for training, leave or promotion without good reason
- Apply made-up rules inconsistently, issue undeserved discipline, or threaten job loss
- <http://www.cbc.ca/news/business/workplace-bullying-a-major-concern-in-canada-says-woman-who-sued-wal-mart-1.2673109>

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The hospitality industry

Is the customer always right?

- Employees often have a high frequency of interpersonal interactions with customers
 - "Customer is always right" mantra may prevent them from reporting
- Can experience aggression from customers
 - yelling, rudeness, threats, racist/sexist comments;
 - Physical aggression
 - Sexual harassment
- <http://motto.time.com/4281308/brewery-owner-facebook-post-sexist-customer/>

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Bullying & harassment in the hospitality industry

A unique environment

- Often a sexualized environment
 - Alcohol is often a factor
- Female dominated industry
 - High prevalence of minority workers
 - Subservient roles
- "Customer always right" principle
- <http://www.cnn.com/2016/12/22/us/mall-racist-rant-trnd/index.html>

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Costs of bullying & harassment

To the employer and the organization

- Direct costs
 - Litigation costs - vicarious liability for employee's conduct; arbitration grievances; human rights complaints
 - Increased costs of disability and WCB premiums;
- Indirect costs
 - The great enemy of productivity (presenteeism);
 - Increased absenteeism & sick leaves
 - Increased turnover
 - Decreased morale
 - Reputational costs

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Costs of bullying & harassment

Harm to the individual & witnesses

- Being the target of workplace bullying can affect a person's physical and mental health and well-being
 - 45% of individuals who are targeted suffer stress-related health problems, including anxiety, panic attacks and clinical depression
- Vicarious trauma or the bystander effect can have similar effects on witnesses to bullying

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Telltale signs you have a bully at work

Red flags

- Increase in turnover or consistently high turnover in a particular department
- Increase in absenteeism or sick days by the target individual or group
- Reduced productivity in the target individual or group
- Internal complaints (grievance arbitrations) and/or external complaints (e.g. to the B.C. Human Rights Tribunal)
- WorkSafeBC claims

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Legal exposure

Legal liabilities

- Human rights complaints
 - Sexual harassment
 - Harassment based on another protected ground (i.e. race, ethnicity etc.)
- WorkSafeBC claims for mental disorder
- Civil action
 - constructive dismissal claims
 - Negligence claims (know about harassment and do nothing, intentional infliction of mental distress)
 - Claims for aggravated and/or punitive damages

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Constructive dismissal

Poisoned work environment

- An employee can treat the employment contract as at an end where an employer permits an employee to be bullied or harassed
 - Entitles the employee to notice
- A fundamental implied term in any employment contract is that the employer will treat the employee with civility, decency, respect and dignity and will provide an appropriate work environment
- http://www.chicagotribune.com/business/ct-costco-harassment-lawsuit-1224-biz-20161223-story.html?utm_content=buffer6de8&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer

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Children's Hospital of Eastern Ontario v. Public Service Employees' Union, 2015 O.L.A.A. No. 342

Termination not upheld but reinstatement impossible

- The cumulative effect of a social worker's "sustained pattern of behaviour" created a poisoned work environment
 - Rolled her eyes during discussion;
 - Refused to make eye contact
 - Turned her back on people
 - Aggressive and dismissive tone of voice
- Resulted in staff believing they could not express their views on patient care and workplace processes where teamwork was essential

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Steps to take

What can we do?

- Employers are legally obligated to take reasonable steps to prevent or minimize workplace bullying and harassment
- Workers compensation legislation requires that employers implement policies to deal with bullying and harassment at work
- The biggest challenge for employers is to ensure that policies are followed and consistently enforced and applied

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Consequences for knowing and doing nothing

Proper investigations matter

- Employers have a legal duty to investigate workplace hazards, including bullying & harassment
- Can be consequences for flawed or biased investigations

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Complaints and investigations

The Employer must investigate

- Once a complaint is received, the employer must investigate
 - It does not have to be a “formal” complaint
 - Constructive notice is sufficient
- Things to think about:
 - Internal or external investigation?
 - How much will this cost?
 - Is there any specialized skill or set of skills required?
 - What is the likelihood of bias?
 - Privilege and confidentiality

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Investigations – what do I ask?

Get the facts

- Start asking open-ended questions
 - Get as much detail as possible
 - Ask open-ended questions – who, what, when, where and why
- Credibility assessments
 - We're not very good at spotting deception
 - Nervous people act like they are lying
 - Practiced liars will look you in the eye
 - Traumatized people won't tell coherent stories

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Neen v. Cobble Hill Grocery Ltd., 2006 BCSC 1494

For cause termination for bullying upheld

- Manager was well-liked and had an exemplary work record
- Confidential staff survey revealed serious concerns about his MGMT style
- Employer enrolled him in a MGMT course, warned him further complaints would lead to dismissal
- One year later received another complaint
- Investigation revealed he had never modified his behaviour

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What can be done?

If the bully is an employee

- After a comprehensive investigation
 - Dismissal
 - Discipline – verbal and written warnings or perhaps disciplinary transfers or suspensions (where permissible)
 - Non-disciplinary transfers (where permissible)
 - Resignation or voluntary separation

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What can be done?

If the bully is a customer

- Prevention is the key
 - Educate your employees
 - Ensure the culture supports reporting
- Address it promptly & directly with the customer
- Refuse service
- Ban a repeat offender
- <http://motto.time.com/4281308/brewery-owner-facebook-post-sexist-customer/>

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What can be done?

If the victim is the organization?

- Cyber-bullying of organizations on social media is a real concern
 - Can go to the site and ask to have comments removed
 - Cease and desist letter
 - <http://www.cbc.ca/news/canada/british-columbia/negative-online-reviews-led-to-threats-of-legal-action-from-targeted-businesses-1.2803572>
- Corporations can sue an individual for defamation
 - publishing false and injurious statements or
- Tort of injurious falsehood
 - publication of false and malicious statements intended to induce others not to deal with him

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Questions?

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Tom Roper is a founding partner of Roper Greyell, a firm of 28 lawyers who practice exclusively in the areas of labour, employment and administrative law. He represents employers in the public and private sectors and professional associations. In 1992, Tom was appointed by the British Columbia Minister of Labour to a Committee of Special Advisors to recommend an overall labour relations strategy for British Columbia, and was one of three Special Advisors responsible for drafting the Labour Relations Code. He was appointed Queen's Counsel in 1998.

He is a past President and current member of the BC Human Resource Management Association. He is a member of the Board of Governors of the Business Council of British Columbia. He has written numerous articles, has lectured for Continuing Legal Education and is a regular guest speaker on various labour and employment law matters.

Tom is listed in Lexpert's "Leading 500 Lawyers in Canada"; he is ranked at the highest level in Chambers Global, and is listed in the International Bar Association's "The International Who's Who of Management Labour & Employment Lawyers" as a leading employment and labour lawyer. He is recognized by Best Lawyers in Canada and in 2014 was named Lawyer of the Year for Labour and Employment Law in Vancouver.

In November 2014 Tom was the recipient of the Peter S. Hyndman Mentorship Award, awarded by the Vancouver Bar Association to a member of the legal profession who has distinguished himself as having been an outstanding mentor.

In April 2015 Tom was awarded the Honorary life membership by HRMA. It celebrates industry leading professionals who have made a significant impact in the human resources community



Education

LL.B., University of British Columbia

Year of call

British Columbia, 1975
Queens Counsel, 1998

Membership/Affiliations

Canadian Bar Association
BC Human Resources Management Association
Canadian Association of University Solicitors
Canadian Labour Law Association
International Society for Labour and Social Security Law
American Bar Association
Selection Committee for the Bora Laskin Award, University of Toronto
Board of Governors, Business Council of British Columbia
Fellow, College of Labor and Employment Lawyers (U.S.)

Listings/Rankings

Best Lawyers, Lawyer of the Year (Vancouver), 2014
Lexpert's "The Leading 500 Lawyers in Canada"
International Bar Association's "Who's Who of Management Labour & Employment Lawyers"
Bestlawyers.com's "The Best Lawyers in Canada"
LexisNexis Martindale-Hubbell: AV Preeminent ranking
Chambers Global, 2013- 2016
Chambers Canada, 2016, 2017
Vancouver Bar Association, Peter S. Hyndman Mentorship Award, 2014
HRMA Honorary Lifetime Membership, 2015
Best Lawyers in Canada, 2006- 2017 (Employment and Labour Law)
Who's Who Legal, 2015, 2016 – Labour, Employment and Benefits
Lexpert-Ranked Lawyer, 2016

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Julie Menten practices in all areas of employment, labour, human rights, and privacy law at Roper Greyell LLP. Combining her legal expertise with more than a decade of professional experience counselling people with mental health issues, she brings a unique skill set and perspective when advising employers who are addressing complex issues in the workplace, particularly those relating to workplace bullying and harassment, mental health disabilities and drug and alcohol problems.

Julie's blend of skills and expertise make her particularly adept at conducting effective and comprehensive investigations into complex workplace issues such as allegations of bullying and harassment, sexual harassment or discrimination. The services Julie provides to her clients include strategic advice to manage workplace absences and disability accommodations, and skillful representation in administrative tribunals, including human rights and labour arbitration proceedings, as well as civil proceedings including wrongful and constructive dismissal claims.

Prior to joining Roper Greyell, Julie clerked at the British Columbia Court of Appeal. She received a Bachelor of Arts from the University of Victoria in Child and Youth Care with distinction, and a Master of Science in Couple and Family Therapy from the University of Guelph. She received her Juris Doctor from Western University with distinction, winning several moot and trial advocacy competitions while studying there.



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Membership/Affiliations

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