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Workplace Law
& Advocacy

Bill 14: Bullying and Harassment

Kacey A. Krenn
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Kacey A. Krenn

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**PROFILE**

Kacey takes a calm, quiet and practical approach. She finds great enjoyment in a challenge, and specializes in solving seemingly intractable problems. She methodically digs into information to uncover the underlying issues, then armed with that knowledge, creates a solution. She balances her detail-oriented nature with a genuine enjoyment of the people and relationship aspects of the work, which means she builds and maintains strong, long-term relationships with her clients.

Kacey advises and represents private and public employers on all aspects of the employment relationship. In particular, she focuses on wrongful dismissal, discrimination claims, policy reviews, employment agreements, contracts, human rights and privacy issues. Kacey has experience with labour arbitration and human rights matters, as well as general civil litigation. She has appeared before the Supreme Court of British Columbia and BC Court of Appeal, as well as the BC Labour Relations Board, Canada Industrial Relations Board and BC Human Rights Tribunal.

Kacey has over a decade of experience working with small, medium and large federal and provincial clients, mostly in the post-secondary, film and television, high tech sectors. Before joining Harris in 2006, she practised employment and labour law and commercial litigation at the Vancouver office of a national firm.

Recent Experience

- Acted on behalf of a college in successfully having a complex human rights complaint dismissed, as well as a related section 12 complaint dismissed by the BC Labour Relations Board.
 - Acted on behalf of a college in successfully mediating a resolution to a grievance involving a psychological risk assessment of a faculty member.
 - Acted for film industry employers in proceedings before the BC Labour Relations Board regarding the inclusion of individuals in an industry-wide bargaining unit.
 - Conducted an evaluation of employment positions across a large high-technology company to ensure compliance with employment standards legislation.
 - Acted on behalf of an employer in a complex common employer matter before the BC Labour Relations Board.
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Publications

- Employment Law, Lexis Practice Advisor Canada (contributor), 2015.
- "Social Media in Workplace Screening and Investigations", Canadian Bar Association, Employment and Labour Perspective, February 2012.
- "Family Responsibilities Discrimination", Human Rights Continuing Legal Education, 2009.

Presentations

- "Law and the Architect: Employment Law Basics," Architectural Institute of British Columbia, 2005 – present.
- "Performance Management in the Workplace", Human Resources Management Association, May 2014.
- "Duty to Accommodate and Mental Health Issues", Managing Risks in Education Sector Conference, November 2012.

Professional and Community Involvement

- Member, Labour, Employment and Human Rights sections, Canadian Bar Association, BC Branch
- Member, Human Resources Management Association
- Past PAC president, Alderwood House School
- Member, Advisory Committee, YWCA Women of Distinction Awards, 2013 – 2015

Education

LLB, Queen's University, 2001

BA, History, University of British Columbia, 1997

Credentials

Called to the British Columbia bar, 2002

Scott A. McCann

Partner

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**PROFILE**

Scott's practice focuses on solid, common sense, day-to-day advice. He's a good listener, patient and careful, and speaks to all people as equals. This attentive and inclusive approach makes him very successful at dealing with a wide variety of people, and means he becomes absolutely clear on his clients' perspectives and needs. Scott takes a proactive approach with his clients to improve their workplace situations, educating them, so they can solve problems as they arise.

Scott advises and represents employers in all areas of labour and employment law. His practice focuses on human resources, terminations, policy development and human rights. Scott has experience appearing before arbitration boards and a variety of administrative tribunals including the Human Rights Tribunal and the BC Labour Relations Board. He has also appeared as counsel in the Provincial Court of British Columbia, Supreme Court of British Columbia and BC Court of Appeal.

He acts for a broad spectrum of clients in both the public and private sector, including employers involved in the areas of construction, high tech, mining, gaming, manufacturing, education, health care, small business, accounting, food service and not for profit. As a member of the Aboriginal Employment Law Practice Group, he provides legal advice, policy development and training seminars for a number of Bands, First Nations and other Aboriginal organizations in British Columbia, Alberta, Yukon and Northwest Territories.

Recent Experience

- Negotiated collective agreements for a First Nation with the BC Government & Service Employees' Union (BCGSEU).
 - Successfully applied to have a number of human rights complaints dismissed on a preliminary basis.
 - Acted on behalf of a government agency on a number of human resource related matters including a wrongful dismissal claim in Supreme Court. Able to successfully resolve a number of difficult issues.
 - Acted as co-counsel in Supreme Court and in the Court of Appeal with respect to a transportation client appealing a decision of the Human Rights Tribunal with respect to an attendance management program.
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- Successfully defended a publicly traded employer in the high tech sector in alleging just cause in a wrongful dismissal claim in the Supreme Court of British Columbia.
- Reviewed and revised personnel policy and procedure manuals for numerous Aboriginal employers.

Publications

- "Human Rights, in Due Diligence," Canadian Legal Education Book, yearly.
- "Human Resources PolicyPro" (legal editor), BC edition.

Presentations

- "Governance and Administration in First Nation Governments; Conflict of Interest Policies and Guidelines and Aboriginal Employment Law 101," Aboriginal Financial Officers Association, Alberta, January 2012.
- "The Duty to Accommodate: What Are the Limits?" and "'You're Fired!' : Terminating Employment," Aboriginal Employment Law Workshop, Aboriginal Financial Officers Association, Alberta 2011.
- "Conflicts of Interest: Best Practices; and Policy Workshop," Conflict of Interest Workshop, Aboriginal Financial Officers Association, Alberta 2011.
- "Unjust Dismissal and Progressive Discipline" and "Human Rights and Duty to Accommodate: A Brief Overview", Aboriginal Financial Officers Association, BC, 2011.
- "Governance Versus Administration" and "Conflicts of Interest," 9th Annual General Meeting and Governance Conference, Aboriginal Financial Officers Association, Alberta 2011.
- Guest lecturer on various labour and employment topics, Yukon College, 2011.

Professional and Community Involvement

- Member, Labour, Employment, Human Rights and Aboriginal Law sections, Canadian Bar Association, BC Branch
- Former Vice President and Captain of the University of British Columbia (UBC) Law rugby team, and current player for the East Vancouver Scribes

Education

LLB, University of British Columbia, 2002

BA (Hons), Criminology, Simon Fraser University, 1998


Credentials

Called to the Yukon bar, 2008

Called to the British Columbia bar, 2003

**Bill 14:
Bullying and
Harassment**



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Agenda

- Introduction: Legal Obligations
- WorkSafe BC Prevention Policies
- Bullying and Harassment Defined
- Discrimination & Sexual Harassment Defined
- Local Government Examples





Bullying and Harassment



Legal Obligations

Bullying and harassment as a workplace health and safety concern

- Section 5.1 – Mental disorder claims
- Potential physical and mental health issues
- Distraction can lead to accidents, injuries and death




Workers Compensation Act

Duties of Employers and Supervisors

- Ensure health and safety
- Inform, instruct, train and supervise
- Take reasonable steps to prevent and/or remedy hazardous conditions

.....bullying and harassment




Workers Compensation Act

Worker Duties

- Protect own safety
- Protect safety of others
- Take reasonable steps to prevent and address hazardous conditions
 -bullying and harassment


■ Note: "workers" do not include elected officials



OH&S Regulation

Part 4 – General Conditions

- Prohibits "improper activity or behavior" by workers
- Prohibits "violence in the workplace" by non-workers
 - Both include threatening statements or behaviour
 -bullying and harassment



Prevention Policies

Effective November 1, 2013

Define Bullying and Harassment

Describe reasonable steps to address bullying and harassment




Definition

Bullying and Harassment includes

Inappropriate conduct or comment → By a person → Towards a worker


That the person knew or **reasonably** ought to have known would cause that worker to be humiliated or intimidated



But Excludes


Reasonable action by employer or supervisor

- To manage or direct workers
- To manage or direct the workplace



Recognizing Bullying & Harassment

- Verbal aggression or insults
- Vandalizing worker's belongings
- Spreading gossip or rumours
- Harmful or offensive initiation practices
- Cyber bullying
- Aggressive threatening gestures
- Sabotaging work
- Targeted social isolation
- Personal attacks based on private life, personal traits
- Physical assault or threats



Recognizing Bullying & Harassment

- Severity vs. frequency of conduct
- Isolated incident, or repeated occurrences?
- Focus on **effect**, not **intent**



Recognizing Bullying & Harassment

Reasonable Employer/Supervisor Actions that are **not** bullying and harassment include decisions on:

- | | |
|--|---|
| ■ Job duties or work to be performed | ■ Work instruction, supervision, feedback |
| ■ Workloads and deadlines | ■ Work evaluation |
| ■ Lay offs, transfers, reorganizations | ■ Performance management |
| | ■ Discipline, suspension, termination |



Who is Responsible?

Everyone has responsibilities for preventing bullying

- Employer
- Employees
- Supervisors



Employer Duties Include

- Policy statement
- Prevent or minimize bullying and harassment
- Reporting procedures
- Investigation/response procedures
- Training workers and supervisors
- Enforcing policies and procedures



Employer Liability

- Employers are responsible for the acts of employees in the course of employment
- Important to take action to prevent Bullying & Harassment and deal with complaints promptly



Employer Liability

To avoid liability, employer must show:

- It did not consent to the harassment/ bullying
- It exercised all due diligence to prevent the harassment/ bullying
- It exercised all due diligence to mitigate or avoid the effect of harassment/ bullying



Employer Liability

Employer must prevent or minimize bullying and harassment

- Like any other health and safety hazard
- Employer must be proactive not reactive



Employer Liability: Implications

- WorkSafe complaints / investigation
- Legal action – i.e., constructive dismissal
- Human Rights complaints



Employee and Supervisor Duties Include


- Not bullying and harassing
- Reporting bullying or harassment
 - Experienced
 - Observed
- Complying with policy and procedures
- Be proactive



Local Government Example

Fact Scenario

- Municipal employees are performing well
- An elected official reviews and overrules employee decisions
- The official continues this behaviour despite repeated warnings to cease



Responding to Complaints

- Advise employees that harassment, including sexual harassment, and bullying will not be tolerated
- Implement confidential complaint mechanism



Responding to Complaints

- Managers and supervisors must respond appropriately to report of harassment/ bullying
- Must take complaints seriously



Responding to Complaints

Procedure – Informal

- Direct request for informal resolution – not mandatory
- Discussion / mediation with complainant and respondent
- Resolution?



Responding to Complaints

Procedure – Formal

- Formal complaint or grievance
- Appointment of mediator/investigator
- Investigation – witness interviews
- Confidential file: complaint, report and resolution



Investigation Procedures


- How and when investigation will be conducted
 - All complaints will be promptly investigated
 - Investigation will be confidential & objective
- What steps will be included
 - Interviews with complainant, respondent and witnesses
 - Review evidence – emails, notes, photos



Local Government Example

Fact Scenario

- An elected official treats senior employees poorly
- Makes unreasonable demands
- Fails to communicate
- Justifies behaviour based on senior employees' high salary



Local Government Example

Fact Scenario

- Employee responsible for hiring is "encouraged" to hire certain individuals
- Employee knows they are not qualified
- Implied to employee by official that they will be terminated unless certain individuals hired



**Human Rights:
Discrimination and
Sexual Harassment**



BC Human Rights Code

- Covers employment, accommodation, and services ordinarily available to the public (among other things)
- s. 13 A person must not
 - a) refuse to employ or refuse to continue to employ a person, or
 - b) discriminate against a person regarding employment or any term or condition of employment



BC Human Rights Code

Because of . . .

- | | |
|-------------------------------|--------------------|
| physical disability | mental disability |
| sex | age |
| unrelated criminal conviction | sexual orientation |
| family status | race |
| colour | ancestry |
| place of origin | political belief |
| religion | marital status |



BC Human Rights Code

Except, a refusal, limitation, specification or preference may be based upon a *bona fide* occupational requirement



Discrimination Prohibited

- The workplace must be a level playing field for all employees
- Discrimination includes harassment
- The workplace must be free of harassment based on the prohibited grounds of discrimination



Harassment

- Harassment is a form of discrimination
- If the harassment is based upon irrelevant criteria – e.g., colour, religion, race, sex – then it is discrimination contrary to human rights law



Local Government Example

Fact Scenario

- There is a vote on a motion
- The individual who brought the motion confronts her colleague who voted against it
- The colleague is told that the next time they bring a motion, they will know what it feels like to have it voted down



Sexual Harassment

- Conduct or comment of a sexual nature that is unwelcome
- Conduct must detrimentally affect work environment or lead to adverse job-related consequences



Local Government Example

Fact Scenario


- An individual closely shadows a colleague
- The individual frequently gets in the personal space of the colleague and tends to make comments or jokes of a sexual nature
- Without warning, the individual will make physical contact with the colleague



Conclusion

- Recognizing Bullying & Harassment, Discrimination
- Potential Liability of the Local Government as an Employer
- How to Respond to Complaints
- How to Deal with Conduct Between Officials



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