Mental Health in the Workplace: Legal Framework

UPCE Mental Health Training

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"IT'S TIME TO START THINKING ABOUT MENTAL WELLBEING IN THE SAME WAY AS WE CONSIDER PHYSICAL WELLBEING …. ." [2]

– Louise Bradley, President & CEO, Mental Health Commission of Canada

INTRODUCTION

Members of the Union of Postal Communications Employees ("UPCE"), a component of the Public Service Alliance of Canada ("PSAC"), are governed by the rules and laws established by the Federal Government of Canada. Taken together, the *Canada Labour Code (*the "*Code*") *Part II*[3], *Canada Occupational Health and Safety Regulations*[4], *Canadian Human Rights Act*[5]*, and the Employment Equity Act*[6], create a framework for addressing mental health in the workplace. The collective agreements governing Canada Post (the "Corporation") and Purolator employees also contain provisions for dealing with both health and safety, as well as harassment in the workplace. In order to understand the landscape of mental health in the federal public sector it is important to be familiar with the relevant provisions of each of these acts, and with the collective agreement.

Traditionally, workplace safety legislation has focused on physical harm and hazardous materials. This understanding of workplace safety has relegated mental health to the periphery of workplace safety legislation. However, the current provisions found in federal legislation place employers, employees and unions under an obligation to address issues of mental health in the workplace.

Mental health covers a wide range of conditions, from chronic conditions such as depression and anxiety, to the effects of bullying and harassment in the workplace. The following is an overview of federal workplace safety legislation, and the provisions most relevant to mental health and its relationship to human rights in the workplace.

COLLECTIVE AGREEMENT

The first place an employee should turn to when faced with mental health issues at work is their collective agreement.

Canada Post Corporation

The current collective agreement between Canada Post and PSAC expired on August 31, 2016. Subject to changes negotiated during collective bargaining, this agreement continues to govern the workplace for members of UPCE. Two sections of the collective agreement deal

[2] Mental Health Commission of Canada, National Standard, online: <http://www.mentalhealthcommission.ca/English/national-standard>

[3] *Canada Labour Code*, RSC 1985, c L-2 (the "*Code*")

[4] *Canada Health and Safety Regulations*, SOR/86-304 (the "*Regulations*")

[5] *Canadian Human Rights Act*, RSC 1985, c H-6 ("*CHRA*")

[6] *Employment Equity Act*, SC 1995, c 44 (the "*Employment Equity Act*")

most directly with situations involving mental health in the workplace:

- Health and Safety (Article 15); and
- Harassment (Article 14).

Health and Safety

Under Article 15, the Corporation is responsible for providing and maintaining workplaces which are safe and without risk. The Corporation must inform employees and their representatives of risks relating to their work, as well as ensure that investigations into workplace safety are carried out in cooperation with the Health and Safety Committee.

Health and Safety Committees established in the workplace are empowered under the *Code* to participate in the development of health and safety policies and programs.[7] Areas of participation include:

- the development of health and safety policies and programs;
- the prevention of hazards in the workplace;
- the provision of personal protective equipment; and
  the planning and implementation of changes which might affect occupational health and safety, including work processes and procedures.[8]

Under Article 15.04, the union, in cooperation with the Corporation, is tasked with promoting healthy and safe working conditions. If a representative of the union believes that the quality of the workplace is deteriorating, that representative is obliged to inform the Corporation. Once notified, the Corporation shall:

- carry out any necessary inspection, analyse and investigate in the presence of a union representative, and provide the representative with a copy of the report arising from these inspections, analyses and investigations; and
- place the matter on the agenda of the next meeting of the Joint Work Place Health and Safety Committee.

Purolator

The current collective agreement between Purolator and PSAC expires on December 31, 2017. Two sections of the collective agreement deal most directly with situations involving mental health in the workplace:

- Health and Safety (Article 15); and
- Harassment/Discrimination (Article 13.07).

Health and Safety

Under Article 15, Purolator is responsible for providing a safe workplace to its employees.

Under Article 15.01, Purolator, in cooperation with the union, is tasked with developing and maintaining a safe workplace.

[7] *Code*, note 3 at s.134.1(4)

[8] *Ibid*

The obligation to provide a safe and healthy workplace is to be given broad interpretation. It includes a workplace free of abusive, harassing, and assaultive behaviour.[9] For example, in *Giorno v Pappass*,[10] the court found that a memorandum circulated to staff and senior managers criticizing an employee's work and indicating that steps were being taken to remove her, resulted in the employer's failure to provide a safe and healthy workplace.

In the event that an employee finds themselves in an unsafe work environment, be it physically or psychologically, employees need to inform their employer in a timely manner of that unsafe working condition and, if necessary, file a grievance for breach of the collective agreement.

Canada Post Corporation

Harassment

Under Article 14.02 of the collective agreement, the Corporation has the primary responsibility for ensuring the workplace is free of harassment. The union also has some responsibilities to ensure the workplace is harassment free, but the primary obligation remains with the employer.

Article 14.01 states that members of UPCE have the right, "to work in an environment that is free from harassment on the grounds of race, sex, sexual orientation, national or ethnic origin, gender identity, gender expression, colour, religion, age, marital status, family status, disability and conviction for an offence for which a pardon has been granted."

Article 14.03 defines harassment as a comment or gesture related to any of the above grounds which is:

- unwanted or may reasonably be considered as unwanted, and
- offensive, humiliating, abusive, threatening, repetitive or which has adverse effects on an individual's employment.

Purolator

Harassment/Discrimination

Under Article 13.07 of the collective agreement, Purolator, in cooperation with the union, has the primary responsibility of ensuring that the workplace is free from discrimination.

Purolator also recognizes the right for employees to work in an environment free from sexual harassment. Article 13.07a) defines sexual harassment as:

- any conduct, comment, gesture or contact of a sexual nature that is likely to cause offence or humiliation to any employee, or that might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment or on any opportunity for training or promotion.

[9] *Tran v Lemerz Canada Inc*, 2005 CanLII 21106

[10] *Giorno v Pappas*, [1999] 42 OR (3d) 626

In general terms, harassment includes actions that an individual knew or ought to have known were offensive. Persistent bullying, berating, using demeaning or patronizing language could be considered harassment. For example, in *Szmukier v Deputy Head*,[11] a two-day suspension for harassment was upheld by the Public Service Labour Relations and Employment Board when the employee referred to her co-worker as "nothing more than just tech support" and berated and yelled at the co-worker. In this case, it was found that the employee was continually referring to her co-worker as "only in charge of filing", referring to her as "clerk" and not her actual name. The Board found that the employee knew or ought to have known that she was acting in such a manner that offended her co-worker to an unreasonable extent.

In another case, *Bisaillion v Canadian Food Inspection Agency*[12], a supervisor, referring to a subordinate's sexuality, made comments such as "so, have you gone over to the other side, have you turned into a queer?" and "no wonder you don't have any luck with women, the way you are" and was found to have committed sexual harassment.

In the event that an employee is subjected to these types of comments or remarks, it is important to discuss these with your union representative and to consider filing a grievance.

Grievance Procedure

Before presenting a grievance, an employee should discuss their complaint with both their immediate supervisor and union representative. If a resolution is achieved between the supervisor and the employee, the grievance process can be avoided. Employees have the right to be accompanied by a union representative during a discussion with their supervisor relating to a complaint. If the employee and the supervisor are unable to resolve the issue, an authorized representative of the union may then proceed to present a grievance.

If a grievance relating to the application or alleged violation of the collective agreement is presented to the Corporation or Purolator and has not been dealt with to the satisfaction of the union, the union may refer that grievance to arbitration.

OTHER LEGAL SOURCES

I – Human Rights

Canadian Human Rights Act

The *Canadian Human Rights Act* ("*CHRA*") is guided by the principle that all individuals should have equal opportunities and their needs accommodated.[13]

Disability is one of the protected grounds under the *CHRA,* and mental illness is a subset of this ground. [14] This means that individuals suffering from mental illness have the right to be free from discrimination and harassment in the workplace.

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[11] *Szmukier v Deputy Head (Correctional Service of Canada)*, 2015 PSLREB 37

[12] *Bisaillion v Canadian Food Inspection Agency*, 2002 PSSRB 16

[13] *CHRA*, note 5 at s.2

[14] *CHRA*, note 5 at s. 3(1)

The *CHRA* defines harassment as[15]:

14 (1) It is a discriminatory practice,

(a) in the provision of goods, services, facilities or accommodation customarily available to the general public,

(b) in the provision of commercial premises or residential accommodation, or

(c) in matters related to employment,

to harass an individual on a prohibited ground of discrimination.

Harassment, under the *CHRA*, is seen as a form of discrimination. It involves any unwanted physical or verbal behaviour that offends, threatens or intimidates or humiliates a person such as touching, patting, unwelcome remarks or jokes about your race, religion, sex, age, disability or any other of the protected grounds of discrimination, including mental health.

Personal harassment, on the other hand, is behaviour that humiliates, intimidates, excludes, and isolates an individual or group, is not based on one of the protected grounds of discrimination, but which is nonetheless unwanted and demeaning.

In addition to the prohibition against discriminatory harassment, human rights law may also require employers to take steps to ensure that all employees can participate fully in the workplace despite any limitations they may have that are linked to their disability. This is because human rights laws in Canada require employers to take positive steps to eliminate or reduce barriers in the workplace.

In the employment context, an employee may be in need of accommodation while at work or while attempting to return to work after a leave of absence. In such cases, an employer may be required to accommodate the employee by providing additional assistance or by making changes to the physical environment or workplace culture, or even by providing the employee with an exemption from a workplace rule or standard. Whether or not the employer must accommodate the employee in such a manner will depend on the employee's particular situation, and on their particular needs.

Examples of possible accommodations could be:

- An employer may be required to provide employees with modified duties if they can no longer perform their original work duties due to a disability.
- An employer may be required to modify productivity or work performance standards where an employee cannot meet existing standards due to a disability.
- An employer may be required to allow for alternative work arrangements, such as compressed hours, flexible hours or a flexible place of work to accommodate an employee's disability.

Duty to accommodate - Responsibilities of the parties involved:

The employer's responsibilities:

Where there is reasonable cause to believe an employee is dealing with a

[15] *Ibid* at s. 14

mental health condition, the employer has a responsibility to inquire and determine whether accommodation is necessary and, if so, to work with the employee and the union to provide the most appropriate accommodation for the employee. In some circumstances, it may be necessary for the employer to speak with the employee privately to assess whether mental illness may be a factor in a workplace performance issue and, if so, to encourage the employee to seek help and/or initiate a request for accommodation.

If an employee requests an accommodation, the employer may ask the employee for further information—such as documentation, a medical opinion or expert advice—when reasonably required to develop an accommodation plan. In requesting documentation, expert advice or a medical opinion, the employer should:[16]

- keep the information private;
- refrain from asking for a specific diagnosis;
- refrain from asking for information about the history of the illness or its treatment; and
- work with the employee and their union, if requested, to identify accommodation options and an accommodation plan appropriate to that employee.

Employers are required to first look at accommodating their employees in their current workplace before looking to transfer an employee. The Canadian Human Rights Tribunal has found, in one instance, that an organization had discriminated when it failed to provide stress leave to an employee with anxiety and depression. The organization responded to the accommodation request by requiring the employee to either retire or transfer to another province. The organization failed to consider the impact that the transfer would have on the employee's family situation and mental health.[17]

In *Bertrend v Golder Associates*,[18] it was held that an employer has a duty to accommodate an employee to a reasonable degree when it discovers that the employee is suffering from depression. In this case, the British Columbia Human Rights Tribunal found that the employer did not need to obtain medical evidence of the depression to confirm its existence. Instead, it would have been reasonable to infer the existence of such a condition from observation and from the testimony of the other employees. The Tribunal went on to confirm that at no point was it acceptable to use signs of depression as a reason for terminating or otherwise penalizing the employee, as this constitutes discrimination on the grounds of mental disability.

In *Lane v ADGA Group Consultants Inc*,[19] the Ontario Human Rights Tribunal decided that the right of persons with a mental health disability to be appropriately accommodated in the

[16] Canadian Human Rights Commission, *Policy and Procedures on the Accommodation of Mental Illness*, October 2008, online: <http://www.chrc-ccdp.ca/sites/default/files/policy_mental_illness_en_1.pdf>

[17] *Stevenson v. Canadian Security Intelligence Service* (2001), 41 C.H.R. R. D/433 (CHRT)

[18] *Bertrend v Golder Associates*, 2009 BCHRT 274

[19] *Lane v. ADGA Group Consultants Inc. of Ottawa* [2007] O.H.R.T.D. No. 34

workplace must be upheld, in spite of the complainant's failure to advise his employer that he was living with a bipolar disorder prior to or at the time of hiring[20].

In its decision, the Tribunal held that management terminated Mr. Lane because of his disability and perceptions related to his disability, with virtually "no investigation as to the nature of his condition or possible accommodations within the workplace."

The Tribunal further found that ADGA had failed "to engage in a fuller exploration of the nature of bipolar disorder... and to form a better prognosis of the likely impact of (Mr. Lane's) condition in the workplace."[21]

On appeal, the Ontario Divisional Court confirmed that the general duty to accommodate is not diluted by virtue of the fact that the complainant does not declare his or her existing mental disability before, or at the time of hiring.[22]

All employees have the responsibility to:

- take all appropriate measures to safeguard their own mental health and those of others in the workplace;
- respond respectfully and responsibly when observing behaviours that may indicate the presence of mental illness, and bring such behaviours to the attention of their supervisor;
- engage in positive practices and behaviours that prevent discrimination and stigma; and
- cooperate in the implementation of accommodation measures, where required.

How to request accommodation?

An employee who requires accommodation is normally responsible for requesting accommodation when they need it, by speaking or writing to their immediate supervisor and identifying what type of accommodation is required, if possible.

There are a number of steps an employee should take in order to request appropriate accommodation from their employer:

- While employers will sometimes be under an obligation to inquire into whether an employee needs accommodation, it is generally the employee's responsibility to communicate their need for accommodation to the employer. Ideally, the employee should make this request for accommodation in writing, explaining why they need accommodation. In the request, the employee should also provide information regarding the functional restrictions and limitations they are experiencing.
- An employee requesting accommodation for a disability has

[20] *Ibid.*

[21] Tracking the Perfect Legal Storm; conveying systems creates mounting pressure to create the psychologically safe workplace; Martin Shain, May 2010

[22] *ADGA Group Consultants Inc. v. Lane*, 2008 CanLII 39605 (ON S.C.D.C.)

an obligation to provide medical documentation explaining their functional restrictions and limitations to the employer. That being said, employers are entitled to only the information necessary to determine what accommodations are required, not the employee's entire medical file.

- After the employee has made the request, the employee is required to participate and cooperate with their employer in identifying the best ways to accommodate their restrictions and limitations. This may involve providing additional information to help the employer understand what it needs to do to provide accommodation.
- Finally, employees may be required to accept accommodations that appropriately address their needs, even if the accommodations are not ideal or exactly what the employee has asked for.

Once accommodation has been provided, an employee has a responsibility to continue to work with their manager/supervisor to ensure that the accommodation remains effective.

What if the employer fails to accommodate?

The duty to accommodate is not limitless. Even where it seems like the employer may have failed to provide necessary accommodation, the employer may nonetheless justify its policy, practice, or expectation. For instance, employers may be able to establish that accommodating an employee would cause the employer such significant hardship that it should not be required to provide accommodation.

Examples of undue hardship can include changes that endanger the employee's health and safety or the health and safety of others, or changes that impose a financial cost that is so significant that it threatens the viability of the employer's business. That being said, the standard on the employer is high and will usually not be met unless the employer has exhausted every reasonable and available step it could take to provide accommodation.

What can an employee do if they are being harassed at work?

The first thing to do is to report the harassment to your union representative and employer. You should keep detailed written notes of the incidents, times, places and witnesses.

In the event that an employee's rights under the *CHRA* are not being respected, either if the employer has failed to properly accommodate the needs of the individual or if the employer has harassed or failed to stop the harassment at work, that employee should consult with their union to discuss possible legal approaches, which could include presenting a grievance or filing a complaint to the Canadian Human Rights Commission.

II – Occupational Health and Safety

Workplace Safety under the *Canada Labour Code*

Part II of the *Code* deals primarily with workplace safety in terms of physical

dangers and hazardous material. However, the *Code* is preventative and remedial in nature and must be given a broad interpretation in line with this overarching purpose. [23] Thus, the *Code* applies both to the physical workplace environment, as well as to aspect of psychological safety in the workplace. For instance, refusal to work based on allegations of harassment and racial discrimination that occurred while at work, which could aggravate the complainant's alleged mental illness, have been found to fall within the protection of the *Code*.[24]

Employer obligations

The *Code* aims to prevent accidents and injury to health arising out of, linked with, or occurring in the course of employment.[25] In order to fulfill their obligations under the *Code,* employers are required to ensure that the health and safety of every employee is protected.[26] Employers are required to spread awareness of the rights afforded to workers in every workplace controlled by the employer and for any work activity carried out by an employee.[27]

Employee obligations

Employees are required to take all reasonable precautions to ensure the health and safety of themselves, other employees, and any person likely to be affected by their acts.[28] Employees must comply with all instructions provided by their employer relating to the health and safety of employees. Employees must report to their employer anything in the workplace that is likely to be hazardous to the health or safety of the employee, other employees, or any other person granted access to the workplace by the employer.[29]

Procedure when there is a contravention of the *Code*

An employee who believes that there has been a contravention of the *Code* is required to make a complaint to their supervisor before pursuing another course of action.[30] In order to resolve the complaint, the employee and the supervisor are required to resolve the complaint between themselves as quickly as possible.[31] If the complaint remains unresolved, either party can refer the complaint to the chairperson of the Health and Safety Committee or to the health and safety representative.[32] The employer is under a duty to inform the employee of the result of any investigation, as well as to inform in writing the person who investigated the complaint regarding how and when the matter will be resolved.[33]

Moreover, section 128(1) of the *Code* contains a clause which empowers an employee to refuse to work in a place if they have reasonable cause to believe that "a condition exists in that place that constitutes a danger to the employee."[34] Employees may refuse to work if a

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[23] *Canadian Firefighters Ltd.* (November 27, 2001), Decision No. 01-025; *St. Lawrence Seaway Management Authority* (October 10, 2002), Decision No. 02-020

[24] *Tench v National Defence –Maritime Forces Atlantic, Nova Scotia* (January 27, 2009), Decision No. OHSTC-09-001

[25] *Code*, note 3 at s. 122.1

[26] *Ibid* at s. 124

[27] *Ibid* at s. 125(1)

[28] *Ibid* at s. 126(1)(c)

[29] *Ibid* at s. 126(1)(d) and (g)

[30] *Ibid* at s. 127.1(1)

[31] *Ibid* at s. 127.1(2)

[32] *Ibid* at s. 127.1(3)

[33] *Ibid* at s. 127.1(6)

[34] *Ibid* at s. 128(1)(b)

condition or activity presents a danger to the employee or another employee.[35]

The right to refuse work must be exercised in circumstances where there is a "reasonable cause" for such belief. A "genuine belief" is insufficient to refuse work.[36] However, the threshold for "reasonable cause" is low and distinct from whether an actual danger exists. Even if the evidence later shows that the employee was mistaken, reasonable cause may have existed.[37]

In addition, belief that an "imminent danger" exists is subjective and requires an assessment of a series of subjective impressions, feelings and claims put forward by the complainant and fitting them into the facts of the case.[38]

There is no burden of proof on the employee to establish reasonable cause when reporting the danger. Once reported, the safety officer must then decide on the matter using her own expertise.[39] If such a situation arises, the employee should contact their union representative as soon as possible.

If a refusal to work has not been satisfactorily dealt with by the employer or the Health and Safety Committee, the matter may be referred to the Minister of Labour for investigation. If the Minister is of the opinion that a dangerous condition exists, the employer and the employee must be notified of the condition and directions issued to remedy the condition.[40]

If the Minister is of the opinion that a provision of Part II has been contravened, the Minister may direct the employer or the employee, or both, to:[41]

- terminate the contravention within the time that the officer may specify; and
- take steps, as specified by the officer and within the time that the officer may specify, to ensure that the contravention does not continue or re-occur.

Canada Occupational Health and Safety Regulations

Part XX of the *Canada Occupational Health and Safety Regulations* (the "*Regulations*") requires the employer to carry out its obligations with the participation of the policy committee, the workplace committee, or the health and safety representative.[42] Workplace violence is defined as "any conduct, threat or gesture of a person towards an employee in their workplace that can reasonably be expected to cause harm, injury or illness to that employee."[43] Whether or not harassment constitutes workplace violence is dependent on the circumstances in a given case.[44] The Federal Court found that workplace violence may encompass harassment, and that psychological

[35] *Ibid* at s. 128(1)

[36] *Canada Post Corp. V. Jolly* (1992), 16 CLRBR (2d) 300, 87 di 202

[37] *Court v John Grant Haulage Ltd*, [2010] CIRB no. 498

[38] *Mckye v Canadian Pacific Railway* (1983), 4 CLRBR (NS) 167, 52 di 118

[39] *David W. Davis*, [2000] CIRB no. 72

[40] *Code*, note 3 at s. 145(2)

[41] *Ibid* at s. 145(1)

[42] *Regulations*, note 4 at s. 20.1

[43] *Ibid* at s. 20.2

[44] *Public Service Alliance of Canada v. Canada (Attorney General)*, 2014 FC 1066

harassment can reasonably be expected to cause harm or illness in some circumstances.[45]

The employer is required to develop and post a Workplace Violence Prevention Policy setting out the obligations of the employer to address factors that contribute to workplace violence.[46] Factors such as bullying, teasing, and abusive and aggressive behaviour are outlined in this section. This is not an exhaustive list. The employer is required to identify factors that contribute to workplace violence, such as the location and circumstances in which the work activity takes place and the employees' reports of workplace violence.[47] The employer is under a duty to assess the workplace for violence using the factors under section 20.4.[48]

Once an assessment of potential workplace violence is carried out under section 20.5, the employer is required to:

- develop and implement controls to eliminate or minimize workplace violence to the extent that is reasonably possible;[49]
- develop and implement the controls no later than 90 days after which the risk of workplace violence has been assessed under section 20.5;[50] and
- review and update the measures at least every three years.[51]

The review must include:

- consideration of workplace conditions and work locations and activities;
- workplace inspection reports;
- the employees' reports and the employer's records of investigations into workplace violence or the risk of workplace violence;
- workplace health and safety evaluations; data on workplace violence or the risk of workplace violence in the employees' workplace or in similar work places; and
- the observations of the Policy Committee, or if there is no policy committee, the Workplace Committee or the Health and Safety Representative.[52]

Training and notification

Training is an important tool for mental health safety in the workplace, and employers are under a duty to provide information and training on factors that contribute to workplace violence.[53] The information and training provided by the employer must include:

- the nature and extent of work place violence and how employees may be exposed to it;
- the communication system established by the employer to

[45] *Ibid*, at para 28

[46] *Regulations*, note 4 at s. 20.3

[47] *Ibid* at s. 20.4

[48] *Ibid* at s. 20.5

[49] *Ibid* at s. 20.6(1)

[50] *Ibid*

[51] *Ibid* at 20.7(1)

[52] *Ibid* at 20.7(2)

[53] *Ibid* at 20.10(1)

inform employees about work place violence;
- information on what constitutes work place violence and on the means of identifying the factors that contribute to work place violence;
- the work place violence prevention measures that have been developed under sections 20.3 to 20.6; and
- the employer's procedures for reporting on work place violence or the risk of work place violence.[54]

Employers must also develop and implement emergency notification procedures to call for assistance in response to workplace violence.[55] Employees are to be made aware of the applicable emergency notification procedures, and a text outlining these procedures is to be posted in a location accessible by employees.[56] Measures to assist employees who have experienced workplace violence must be developed and implemented by the employer in addition to the notification and prevention requirements under the *Regulations*.

Procedure when there is a contravention of the Regulations

Once an employer becomes aware of workplace violence or allegations of violence, the employer must resolve the matter with the employee as soon as possible.[57] As noted above, section 20.5 requires an employer to develop and implement controls to eliminate or minimize workplace violence to the extent that is reasonably possible. Should the matter remain unresolved, the employer must appoint a competent person to investigate the incident(s).[58] A competent person is defined as a person who:

- is impartial and is seen by the parties to be impartial;
- has knowledge, training and experience in issues relating to work place violence; and
- has knowledge of relevant legislation.[59]

The appointment of a competent person to investigate unresolved instances of workplace violence does not apply if the incident was caused by a person other than an employee, if it is reasonable to consider that engaging in the incident is a normal condition of employment, and the employer has effective procedures and controls in place involving employees to address the workplace violence.[60]

III – Other Sources

Employment Equity Act

The *Employment Equity Act* (the "*Act*") aims to ensure that no person is denied employment opportunities or benefits for reasons unrelated to ability. In order to correct conditions of disadvantage in employment experienced by disadvantaged groups, such as persons with mental illness, the *Act* recognizes

[54] *Ibid* at 20.10(3)

[55] *Ibid* at 20.8(1)

[56] *Ibid* at 20.8(2)

[57] *Ibid* at 20.9(2)

[58] *Ibid* at 20.9(3)

[59] *Ibid* at 20.9(1)

[60] *Ibid* at 20.9(6)

that employment equity requires more than equal treatment. The *Act* recognizes that special measures and the accommodation of differences are key to the fulfillment of this goal.[61]

Employers are required to identify and eliminate employment barriers against persons in designated groups, including individuals with mental illness, that result from the employer's employment systems, policies and practices that are not authorized by law.[62] The obligation to implement employment equity does not require an employer:

- to take a particular measure to implement employment equity where the taking of that measure would cause undue hardship to the employer;
- to hire or promote persons who do not meet the essential qualifications for the work to be performed;
- with respect to the public sector, to hire or promote persons without basing the hiring or promotion on merit in cases where the *Public Service Employment Act* requires that hiring or promotion be based on merit; or
- to create new positions in its workforce.[63]

Procedure when there is a contravention of the *Act*

The Canadian Human Rights Commission is empowered to designate any person as an Employment Equity Compliance Officer for the purposes of conducting compliance audits of employers.[64] A compliance officer must inform the employer of the non-compliance and attempt to negotiate a written undertaking to remedy the non-compliance, if the officer is of the opinion that the employer:

- has not collected information or conducted an analysis referred to in paragraph 9(1)(a) or conducted a review referred to in paragraph 9(1)(b);
- has not prepared an employment equity plan referred to in section 10;
- has prepared an employment equity plan that does not meet the requirements of sections 10 and 11;
- has not made all reasonable efforts to implement its employment equity plan in accordance with section 12;
- has failed to review and revise its employment equity plan in accordance with section 13;
- has failed to provide information to its employees in accordance with section 14;
- has failed to consult with its employees' representatives in accordance with section 15; or
- has failed to establish and maintain employment equity records as required by section 17.[65]

If an employer breaches the undertaking, the compliance officer must notify the Commission of the non-compliance and

[61] *Employment Equity Act*, note 6 at s. 2

[62] *Ibid* at s. 5(a)

[63] *Ibid* at s. 6

[64] *Ibid* at s. 22(3)

[65] *Ibid* at s. 25(1)

the Commission may issue a direction requiring the employer to take the actions set out in the direction.[66] Should the employer fail to comply with the direction, the Commission may apply to the Chairperson for an order confirming the direction.[67] In order to ensure compliance with subsection 22(1), a Compliance Officer may enter any place in which the officer believes, on reasonable grounds, that there is any thing relevant to the enforcement of the provision and requires production of materials the officer feels are relevant to enforcement.[68]

National Standard on Psychological Health and Safety in the Workplace[69]

The *National Standard on Psychological Health and Safety* in the workplace is a voluntary set of guidelines, tools and resources focused on promoting worker psychological health and preventing psychological harm related to workplace factors. The standard provides a systematic approach to develop and sustain a psychologically healthy and safe workplace, including:

- The identification of psychological hazards in the workplace;
- The assessment and control of the risks in the workplace associated with hazards that cannot be eliminated (e.g. stressors due to organizational change or reasonable job demands);
- The implementation of practices that support and promote psychological health and safety in the workplace;
- The growth of a culture that promotes psychological health and safety in the workplace;
- The implementation of measurement and review systems to ensure sustainability.

The standard specifies requirements for a documented and systemic approach to develop and sustain a psychologically healthy and safe workplace.

Given the voluntary nature of the standard, the standard is not intended to be adopted into federal, provincial, or territorial legislation. It can be used differently by businesses and organizations of all sizes depending upon their needs. Some businesses may use the standard as a starting point and focus on creating policies and processes to promote mental health, while others may determine that several aspects of the standard are already in place and use the standard to build upon their existing efforts. However, there is no obligation for the employer to implement this standard or to respect it, and there is no recourse in the event it is not respected.

CONCLUSION

It is important for employees, employers, and unions to be aware of their rights and

[66] *Ibid* at s. 25(3)

[67] *Ibid* at s. 27(2)

[68] *Ibid* at s. 23(1)

[69] National Standard of Canada, CAN/CSA-Z1003/BNQ 9700-803-2013 *Psychological health and safety in the workplace – Prevention, promotion and, guidance to staged implementation*, prepared by CSA Group and BNQ, commissioned by the Mental Health Commission of Canada, January 2013

obligations in order to ensure a safe and healthy workplace. These rights and obligations are set out in the collective agreement as well as in the laws and cases referenced throughout this pamphlet.

Taken together, these resources outline that employees have the right to be free from abusive, harassing, and assaultive behaviour in the workplace. They also empower employees to grieve or seek other legal recourses in instances where their concerns have not been adequately addressed by the employer.

Creating a safe, harassment free, and healthy workplace is the responsibility of all parties. Employers are responsible for providing and maintaining a workplace for their employees which is safe and without risk. This involves informing employees of the risks related to their work and ensuring that workplace hazards are investigated thoroughly. Employees are responsible to ensure that they are working towards a safer and healthier workplace through their actions and comments. Unions are required to address the concerns of union members, work with the employer to create policies for a safer workplace, and to bring forth grievances calling for corrective action when necessary. Employees with concerns about mental health in the workplace should take steps to inform their union of any such concerns so that the proper steps can be taken to address the situation.