YOUNG ANDERSON
BARRISTERS & SOLICITORS

EMPLOYER OBLIGATIONS:

STAYING OUT OF HOT WATER

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I. INTRODUCTION

Recent case law and changes to the *Workers Compensation Act* in relation to bullying and harassment highlight the increasing obligations on employers. In this paper, we will outline the evolving duty to inquire in the human rights context, employees' right to privacy, the changes to the WorkSafe BC legislation and policies, and the obligation to conduct fair and objective workplace investigations and to be forthright when requiring dismissed employees to sign releases. Being aware of these obligations should assist employers in staying out of hot water.

II. THE DUTY TO INQUIRE

Local governments are well aware of their duty to accommodate employees with disabilities. Now, employers may also have a duty to inquire when an employer is or should be aware of a possible connection between an employee's job performance and a disability or possible disability. This duty to inquire requires employers to consider whether poor job performance or inappropriate is related to a disability before taking action that adversely affects the employee. The duty to inquire was established by the BC Human Rights Tribunal (the "Tribunal") in *Willems-Wilson v. Allbright Drycleaners Ltd* (1997), 32 CHRR D/71.

In *Willems-Wilson,* the employee had a lengthy history of emotional problems, but did not disclose this to the employer. However, the employer was aware that she was receiving counselling for marriage problems, and noticed that she became withdrawn and unfriendly at work. Through a colleague the employer also discovered that she had been crying at work. Later, the employer found her in a sleeping bag in the back of the workplace, upon which the employee disclosed that she felt unsafe at home and was under a lot of stress.

When she was hospitalized for emotional problems and the stay turned indefinite the employer visited the hospital and terminated her for poor job performance and failure to report her absence. Despite the employee not discussing her disability with the employer nor requesting any accommodation, the Tribunal decided that given the information available to the employer, it had an obligation to make inquiries about the possible connection between her mental disability and her performance at work. The employer's failure to do so amounted to discrimination.

In the more recent case of *Mackenzie v. Jace Holdings Ltd (cob Thrifty's)*, 2012 BCHRT 376, the employee was fired for poor performance, disruptive behaviour and insubordination. Prior to her dismissal, the employee's supervisor was aware the employee was on medication and reported that the employee frequently cried during their meetings. However, her supervisor denied knowing that the employee suffered from depression. Thrifty's also knew that the employee was a "chronic claimer" of benefits through her insurer and WCB. The Tribunal

concluded that Thrifty's should have suspected the employee's behaviour was due to her mental disability. Thrifty's failed its duty to inquire, and was liable for discrimination.

The duty to inquire applies equally to mental disabilities and physical disabilities. Whether an employer was under a duty to inquire is assessed by examining the information available to the employer at the time of an alleged discriminatory act: *Gordy v. Painter's Lodge (No 2)*, 2004 BCHRT 225. Conversely, if an employer inquires into an employee's disability and makes a decision, information that becomes available only later cannot be used to question the reasonableness of the employer's decision.

Where an employee is inappropriate or disruptive in his or her communications at work, the duty to inquire will be triggered when his or her tone goes beyond that which would normally be held by a person holding a firm view on a disputed matter. In *Rezaei v. University of Northern British Columbia and another (No. 2)*, 2011 BCHRT 118, a professor alleged that he was refused a tenure track appointment because of conduct that the employer should have known was related to his mental disability. The employee's correspondence was described as inappropriate and unwarranted, and he made unsubstantiated and unfounded accusations against his superiors. It was only two years after his appointment was not renewed that he became aware that he may have been suffering from a mental disability. He filed a claim with the Tribunal soon after.

The Tribunal found that the employer had no duty to inquire. Although the employee's behaviour was disruptive and less than collegial, the Tribunal found nothing in the employee's communications that indicated he was distressed, and nothing that fell very far outside the norms of communication among individuals holding firm views on matters of dispute. The Tribunal also noted that the employer could not be faulted for not making inquiries which the employee did not suggest or undertake on his own behalf.

The test from *Rezaei* was applied more recently in *Downer v. Alaska Highway Autobody and others*, 2011 BCHRT 144, where the employee was dismissed for exhibiting uncontrollable anger with staff and customers. The employee suffered from a major depressive disorder, but the employer did not know that when it terminated the employee. The Tribunal decided that the employer had no duty to inquire given the employer had no information concerning the employee's mental disability, and that the employee's communications did not fall so far out of the norms of communication among individuals holding firm views on matters of dispute.

An employer's knowledge that an employee is experiencing high stress will also not necessarily trigger the duty to inquire. In *Matheson v. School District No 53 (Okanagan Similkameen)*, 2009 BCHRT 112, the employee resigned from her position as a part time teacher for the hearing impaired. She later complained that her employer discriminated against her. However, the Tribunal found there was no way for her employer to know she had a mental disability. Although she had informed her employer that she suffered from stress, the Tribunal noted that stress in itself is not a disability for the purposes of the Human Rights Code. The Tribunal also

found that her resignation due to high stress and quick withdrawal of that resignation was also not enough to trigger the duty to inquire.

Denial of a mental disability is often a symptom of that disability. Even if an employee denies having a mental disability, the employer may not be relieved of its duty to inquire. However, the employee must suffer from a true disability. In *Geldreich v. Whisper Creek*, 2009 BHCRT 178, an employee of a lumber mill was dismissed for smoking marijuana at work. He alleged that he was addicted to marijuana and that his employer discriminated against him. Prior to being terminated he had twice denied using drugs at work. The Tribunal noted that the employer did not perceive the employee to have a drug addiction, the employee did not claim he had a drug addiction until he launched his complaint, and his denial of addiction was not enough, in the circumstances, to indicate to the employer that the employee might have a problem. The Tribunal concluded that casual drug use did not trigger the duty to inquire.

In *Wilson v. Transparent Glazing Systems* (No 4), 2008 BCHRT 50, the employee had a licence to smoke marijuana for chronic back pain and migraines. The complainant was difficult to work with, threw temper tantrums on the job, and had been the subject of many customer complaints. His employer terminated his employment after receiving a complaint from a site superintendent criticizing his work and questioning whether his actions were impaired by medication. The employee alleged discrimination. The Tribunal found that the employer knew the employee had back problems and that he took some form of medication. Since the employer had knowledge of these facts, they had a duty to make reasonable inquiries into whether the employee's job performance was affected by his disability and the medication he took to address it.

The duty to inquire will not be triggered where there is no indication to the employer that the employee suffers from a physical disability. In *Gallelo v. Holland Landscapers and another*, 2011 BCHRT 70, the employee was terminated after he repeatedly failed to call in to notify the employer of his absences. He alleged his employer discriminated against him based on a physical disability. He had disclosed his prior back problems to the employer when they hired him, and he claimed he was absent due to back issues. However, during his employment the employer observed the employee "energetically performing very heavy physical labour." Furthermore, the employee never requested time off due to his back issues. The Tribunal concluded that the employer had no way to know or suspect that the employee was missing time due to back issues. Consequently, the employer had no duty to inquire whether the employee's absences, and his failure to call in those absences, were due to his disability.

The duty to inquire appears to be gaining traction in labour arbitrations. In *Alberta (Department of Justice)*, [2011] AGAA No 60, the grievor resigned from her position in advance of a meeting at which she believed she would be fired. The grievor suffered from chronic cyclical depression, and had been on short term disability shortly before she resigned. The day after her resignation she emailed her supervisor claiming that at the time she felt resignation was her only option, and that she was having second thoughts. Nonetheless, she followed

through with her resignation. Four months later she contacted her employer to rescind her resignation but the employer refused and the Union filed a grievance.

The Arbitrator allowed the grievance. He found that the grievor lacked the intention to resign, and that the employer's knowledge of the grievor's disability, and the emails she sent the following day should have tempered the ease with which the employer relied on her expressed intention to resign. While the Arbitrator did not refer to the "duty to inquire", the Arbitrator essentially held that the employer should have questioned whether the employee's actions were due to her mental disability before so readily accepting her resignation.

The duty to inquire will continue to evolve as the Tribunal considers the complicated issues that arise when an employee alleges that the employer should have known that the employee's conduct was related to a disability. For now, employers who ignore conduct that is out of the norm for an employee or the fact that the employee suffers from a disability and take action against an employee potentially do so at their peril.

III. INVESTIGATIONS

Employers may need to conduct investigations for a variety of reasons. They may need to conduct an investigation when a complaint of harassment has been made against an employee or when the employer suspects that an employee has engaged in some type of misconduct. The Supreme Court of Canada in *McKinley v. BC Tel,* 2001 SCC 38, was clear that an employer must consider all of the facts prior to making the determination of whether there is just cause. We also recommend that employers conduct investigations whenever they are considering imposing discipline. We recommend this for two reasons. The first is to ensure that you have all of the information prior to making a decision. The second is to determine whether an employee is forthright about the misconduct and whether they show any remorse. These are important elements in determining the appropriate discipline and, in particular, whether an employer has just cause. Conducting a proper investigation whenever an employee is alleged to have engaged in misconduct will help ensure that any discipline imposed will withstand challenge.

Employers will want to ensure that the investigation is as objective and fair as possible, particularly when the employer will be relying on the results of the investigation to establish just cause. The investigation process was one of the main issues in the case of *Vernon v. British Columbia (Liquor Distribution Branch)*, 2012 BCSC 133, in which the employer had terminated the employment of a long service employee. The employee in this case, Ms. Vernon, had started working for the employer soon after graduating from high school and had spent her whole career there. At the time of her dismissal, Ms. Vernon was a store manager.

Ms. Vernon described herself as a "no-nonsense manager". An employee who was supervised by Ms. Vernon submitted a written complaint to the employer about Ms. Vernon's conduct. The complainant stated in her written complaint that there had been various incidents that had

made her feel harassed, embarrassed, humiliated, and uncomfortable at work. After receiving this complaint, the employer conducted an investigation, which involved interviews with the complainant, Ms. Vernon, and various witnesses. After reviewing the results of the investigation, the employer decided to terminate the employment of Ms. Vernon for just cause.

At the dismissal meeting, the employer told Ms. Vernon that they had concluded that she had engaged in gross workplace misconduct including bullying, harassing and intimidating conduct. They also told her that her actions had embarrassed the organization and they were terminating her employment for just cause. The employer also offered the employee the opportunity to tender her resignation with a reference letter rather than a just cause dismissal.

In assessing the evidence at trial, the Court noted that Ms. Vernon had worked for the employer for 30 years without a single complaint being made against her and with very favourable performance reviews. The Court stated that until the written complaint was received, Ms. Vernon was not aware that her management style was in any way unacceptable. As well, the Court found several serious problems with the investigation process. The employee who conducted the investigation was Ms. Vernon's labour relations advisor. Just two weeks prior to the complaint being received by the employer, Ms. Vernon and the investigator had a lengthy conversation about the complainant. One of the employer's witnesses testified that if a labour relations advisor had a prior involvement in a matter, a different advisor should handle any investigations arising out of the matter. Therefore, the Court concluded that the labour relations advisor should not have been put in charge of the investigation.

The Court was also of the view that after interviewing the complainant, the investigator appeared to have been convinced of Ms. Vernon's wrongdoing. The Court felt that the investigator put together a list of employees to interview, who she knew would likely have negative things to say about Ms. Vernon. The Court also had concerns with the investigation interview of Ms. Vernon, which it described as follows:

> Ms. Vernon thought she was meeting with her labour relations advisor and area manager to discuss at an informal setting a complaint that had been made against her. Instead she was the subject of an intense interrogation. The person who she had relied on as her labour relations advisor was now her interrogator. Ms. Vernon was upset at the meeting. She had good reason to be.

The investigator concluded that Ms. Vernon had denied all of the allegations against her. The Court felt that this was not an accurate conclusion to draw from this meeting. However, this mistaken accusation was included in the investigator's report and had serious consequences to Ms. Vernon. Based on this report, all persons involved in the investigation proceeded on the basis that Ms. Vernon was denying all of the allegations, when in fact that was not so. The two individuals who made the decision to dismiss Ms. Vernon for just cause gave evidence that one

of their main reasons was their mistaken belief that she did not admit to any wrongdoing.

The Court was also concerned about the interviews with the witnesses and described them as follows:

> The interviews were not simple question and answer affairs. They were interrogations. They were not carried out in an impartial manner. Witnesses who spoke favourably about Ms. Vernon were accused of lying. I accept the evidence of Ms. Whynot and Ms. Rondeau that the interviewers chided and yelled at them when they gave answers that supported Ms. Vernon.

Not surprisingly, the Court concluded that there was no just cause. The Court concluded, "The investigation was flawed from beginning to end. It was neither objective nor fair."

The employer argued that it had no choice to dismiss Ms. Vernon as it owed a duty to its other employees to remove her from the workplace. The Court agreed that the employer did have an obligation to investigate when the complainant came forward. However, the Court felt that a fair investigation would have resulted in the conclusion that Ms. Vernon's management techniques could use some improvement, which training the employer would have been able to provide her. As a result of the evidence given at the trial, this was the Court's conclusion about the conduct of Ms. Vernon:

> While Ms. Vernon's use of language and her treatment of employees may at times have been problematic, and possibly have warranted some form of discipline, her conduct did not strike at the root of or amount to a repudiation of her employment contract. As in *Rodriques* most of the allegations went to the manner in which she criticized her staff. While some of her conduct may have been inappropriate, she was at all times trying to improve the performance of her employees. At their worst, some of her actions amounted to poor performance of the management responsibilities that she was attempting to fulfill.

Given that the Court concluded that there was no just cause, the employee was entitled to pay in lieu of reasonable notice. As well, the court awarded both aggravated and punitive damages. Aggravated damages are intended to be compensatory in nature, while the purpose of punitive damages is simply to punish. The reason the Court awarded punitive damages in this case was because of the employer's conduct in advising Ms. Vernon that she could resign rather than be dismissed for just cause, and the employer would provide her with a reference letter. The Court felt that this offer was "reprehensible" because the purpose was to avoid paying reasonable notice. In awarding punitive damages in the amount of $50,000, the Court made the following comments:

> …At the time the proposal was made, Ms. Vernon could not have been more vulnerable. She had just been told she was being terminated from her job of 30 years. She knew that without a reference, she would have little chance of finding suitable new employment. The LDB knew that if she voluntarily resigned, it could avoid a possible lawsuit for wrongful termination in which it would have to justify its treatment of a 30 year employee.

This case highlights the importance of conducting investigations in a fair and objective manner so that the employer can rely on the results in the investigation to justify any discipline, particularly just cause. Firstly, you will want to ensure that the appropriate individual is leading the investigation. This might be the human resources manager, another member of the senior management team, or a third party investigator. As well, the investigator will need to ensure that they do not jump to conclusions during the investigation process and carry out interviews in a neutral and objective manner.

After the interviews of the employee and witnesses have been conducted, the investigator will need to make findings of fact and determine what actually happened. This can be a very difficult task as there are often conflicts in the evidence. It is important to recognize that an investigator does not need to accept any evidence or explanations at face value. The investigator(s) must determine on a balance of probabilities what is the most likely scenario. Accordingly, during the interviews, witnesses should be observed very carefully and attention should be paid to their demeanour. Investigators should also be cognizant of any self-interest or bias on the part of the witness.

IV. PRIVACY OBLIGATIONS

The Supreme Court of Canada recently released the decision of *R. v. Cole*, 2012 SCC 53, about whether a teacher had a reasonable expectation of privacy in personal materials stored on a work-issued laptop. The issue in this case was whether the police had breached section 8 of the *Charter of Rights and Freedoms* when it viewed the contents of the teacher's laptop and created a mirror image of the hard drive for forensic purposes without a warrant. Section 8 of the *Charter* guarantees the right of everyone in Canada to be secure against unreasonable search or seizure.

The teacher in this case was charged with possession of child pornography and unauthorized use of a computer. He had been provided with a work-issued laptop and was permitted to use it for incidental personal purposes. A technician who was performing maintenance activities on the laptop found a hidden folder containing nude and partially nude photographs of an underage female student. The technician notified the principal and copied the photographs to a compact disc. The principal seized the laptop and school board technicians copied the temporary Internet files onto a second disc. The laptop and both discs were given to the police.

The Court concluded that there was a reasonable though diminished expectation of privacy in the laptop in these circumstances. Therefore, the police infringed the teacher's rights under section 8 of the Charter. However, the Court also concluded that the conduct of the police officer in this case was not an egregious breach of the Charter and the admission of this evidence would not bring the administration of justice into disrepute. Therefore, the Court deemed the evidence admissible and ordered a new trial.

In its discussion of whether the teacher had a reasonable expectation of privacy, the Court inferred that he had a subjective expectation of privacy in the informational content of his computer. Therefore, the issue for the Court to determine was whether the teacher's subjective expectation of privacy was objectively reasonable. While there is no definitive list of considerations, the Court reviewed the employer's policy regarding computer use, the ownership of the laptop, the context in which personal information was placed on the employer-owned computer and the nature of the information.

The employer's policy was clear that the employer owned the hardware and data stored on it but it also allowed employees to use work-issued laptops for personal purposes. In weighing the considerations and, in particular, the nature of the information on the laptop, the Court determined that the teacher had a reasonable expectation of privacy in the laptop but that the ownership of the laptop and the employer's policies and practices diminished that expectation.

In its reasons, the Court was clear that it was not commenting on the issue of an employer's right to monitor computers issued to employees. It was dealing with the conduct of the police and whether the teacher's rights under section 8 of the Charter were breached. However, the Court stated it agreed that the principal had a statutory duty to maintain a safe school environment and "…by necessary implication, a reasonable power to seize and search a school board-issued laptop if the principal believed on reasonable grounds that the hard drive contained compromising photographs of a student."

While this case does not directly address the issue of an employer's right to conduct a search of an employee's activities on workplace computers, it highlights the importance of internet use policies that explicitly set out the ownership of materials stored on employer technology and sets limits on personal use of such technology by employees. This case also confirms the rights of employers to conduct reasonable searches of personal information on workplace computers for legitimate business purposes.

Issues that were not decided by the Court but that will likely be the subjects of future litigation include:

1. when is an employer justified in contacting the police about suspected criminal activity on the part of an employee;

2. the extent of an employer's ability to investigate suspected misconduct of its computer equipment and information networks; and

3. the extent of an employee's right to privacy where the suspected criminal activity or misconduct is work related but is on a user device owned by the employee (ie, smart phone or laptop).

Under of the *Freedom of Information and Protection of Privacy Act*, public employers are restricted in their ability to disclose personal information about employees to third parties. Pursuant to s. 33.2 (i) of FOIPPA, public bodies can disclose personal information to a law enforcement agency in respect of a particular investigation. In the case of of *R. v. Cole*, however, it was the employer who approached the police. The Court did not seem to take issue with the fact that the School District approached the police. It was the conduct of the police in obtaining evidence without a warrant that was the issue in this case.

Future case law regarding the extent to which employers will be able to monitor an employee's use of employer information technology where there is no internet use policy in place or where the policy allows for personal use will also be interesting. Although the Court left that question for another day, we still recommend that local governments implement internet use policies that clearly establish that all material stored on employer equipment or information networks is the property of the local government. The policy should also be clear that an employee cannot expect absolute privacy over any personal material stored on this equipment or information networks. Finally, local governments should only allow employees to take laptops home where the employee truly requires the use the laptop outside of working hours. Whatever policies are implemented by local governments should reflect operational realities.

There was also an arbitration decision in 2011 in which a union employee was dismissed for just cause based on his involvement in the circulation of pornographic material while at work using the employer's computer (*Vancouver School District No. 39* (2011), 212 LAC (4^{th}) 248 (Sanderson)). In this case, there were no formal policies regarding the use of computers but the employer did have a sexual harassment policy that listed the display of pornographic materials or pictures as an example of prohibited conduct. The human resources manager had received an anonymous telephone call from a person who refused to identify himself. This individual told her there was pornographic material being displayed on computers at the work site and identified a particular employee. Not surprisingly, the human resources manager commenced an investigation.

As part of this investigation, the manager carefully went through the identified employee's email and found extensive pornographic materials that were graphic and offensive. With the assistance of the IT department, the employer then searched the email accounts of all identified employees and a list was produced of the emails that were found. The employer then retained a forensic services firm to conduct a further investigation. The information obtained was carefully reviewed and catalogued as to its origin, where on the computer it was

found, and to whom it was sent. Investigative meetings were then set up with all of the 15 identified employees.

As a result of the investigation and the individual meetings with the various employees, the employer decided to terminate the employment of four employees, including the grievor, for just cause. The remaining employees were given suspensions ranging from one to ten days, and one employee was given a written warning. In deciding to dismiss the grievor, the human resources manager felt that the grievor was not honest with her about his involvement in receiving and distributing pornography and would not answer her questions directly. She also felt that he tried to minimize his own involvement and to deflect responsibility onto others. Unlike other employees, the grievor showed no remorse or personal regret.

Even though the employer did not have a specific internet use policy, the Arbitrator agreed with past arbitrators who said that it was common sense that someone working at a school board should not use workplace computers to receive, send, and store pornographic material. The Arbitrator also agreed with the employer's assessment that the grievor was uncooperative in the investigative meeting and deliberately tried to minimize his own involvement and avoid responsibility for his actions. As noted by the Arbitrator:

> In this case, the grievor provided no evidence that he has accepted personal responsibility, rather, he blames others and insists he is a victim of enablers.

Therefore, the Arbitrator upheld the dismissal. The Arbitrator makes no mention of privacy issues in the decision. Like in *R. v. Cole*, the employer did not find the offending material as a result of routine surveillance or fishing expeditions. In this case, the employer was provided an anonymous tip. We are of the view that the employer had the right to then conduct an investigation based on that anonymous tip. It appears in this case that the employer took a very focused approach in its investigation. In these types of investigations, employers will want to ensure that they undertake any investigations of alleged misuse of information networks in the least privacy intrusive way possible.

V. RELEASES

In cases where employees have been dismissed without just cause, employers owe employees reasonable notice or pay in lieu of such notice. Employers will often require a release of all claims in return for payment in lieu of such notice in order to avoid future litigation. In general, employers can rely on releases as a defence to litigation. However, there are situations where courts will find that a particular release is unenforceable. One such case was *Reuben v. Home Depot Canada Inc*., 2012 ONSC 3053.

In this case, the employee was 63 years old and had approximately 20 years of service at the time of his dismissal without cause. The employee attended a meeting in which his employment was terminated. At that meeting, he was offered a severance package that was conditional on signing a release. However, the severance offered was only two days above what he would have been entitled to under the employment standards legislation. The employee had been caught off guard at the meeting and the letter provided to the employee was not clear that the employee was entitled to severance under this legislation even if he did not sign the release.

The employee did sign the release but later commenced litigation. Home Depot tried to rely on the release in arguing it owed no further severance pay to the employee. However, the Court struck down the release as the Court felt that the Home Depot knowingly took advantage of the employee's vulnerability by not advising him of what he would receive if he did not sign the release. The Court felt that the letter implied that the employee would not be paid anything at all if he did not sign, which was not true. Furthermore, the notice offered was grossly inadequate in view of the employee's age and length of service. The Court went on to award the employee 12 months' pay in lieu of notice, including the value of benefits for the notice period.

The City of Delta, on the other hand, was able to successfully rely on a release in defence of a human rights claim filed by a former employee (*Mielke v. Delta and others*, 2010 BCHRT 170). In this case, an employee had been dismissed without just cause and accepted a severance package based on six months' compensation. As part of this package, he signed a release. After his dismissal, this former employee applied for a newly advertised position at the City. He was informed that his application was not processed because he had been dismissed and given a severance package. In response, the former employee filed the human rights complaint alleging that he had been discriminated against because of a physical disability and age.

One component of this complaint was related to the former employment and a second component was related to the denial of the application for new employment. With respect to the component of the complaint that was related to the former employment, the City relied on the release signed by the former employee. The Tribunal granted the City's application to dismiss this portion of the complaint based on the fact that the former employee had negotiated a severance package and signed a release. The Tribunal noted that the former employee was given the opportunity to consult with legal counsel and negotiated for further severance. As well, the Tribunal noted that no time limits were imposed on the employee for returning the release. The Tribunal concluded that there was nothing unfair about the consideration given in exchange for the release. While the former employee stated that he signed the release with reservations, there was no evidence of coercion, mental incapacity, or fraud. The Tribunal also dismissed the other portion of this claim related to the application for new employment.

In order to ensure that a release will be enforceable, local governments will want to ensure that they clearly explain the severance package, including what the employee is entitled to under employment standards, or a written employment contract, if applicable. Local governments must provide some consideration in return for the release that is above employment standards minimums or contractual entitlements. Finally, local governments will want to give employees adequate time to consult legal counsel and consider the offer.

VI. WORKSAFE BC AMENDMENTS – MENTAL STRESS

Due to recent amendments to the *Workers Compensation Act*, RSBC 1996, c. 492, employees who feel they have been harassed and bullied at work and suffer a mental disorder as a result can now file a claim. Prior to these amendments, WorkSafe BC only compensated workers for mental stress that was an acute reaction to a sudden and unexpected traumatic event in the workplace. Therefore, claims of harassment and bullying in the workplace were generally denied by WorkSafe BC. In order to file a claim, employees must show that they have a mental disorder that has been diagnosed by a psychiatrist or psychologist. A note from the employee's GP will not suffice.

WorkSafe BC published a draft Occupational Health and Safety policy on workplace harassment and bullying (the "Policy"). At the time of writing, WorkSafe BC was considering feedback on the Policy. In the Policy, the definition of workplace harassment and bullying is inappropriate or vexatious conduct or comments, made by a person to a worker, that the person knew or reasonably ought to have known would cause that worker to be humiliated, offended or intimidated. Note that the definition provides that the offender need not be an employee.

The definition specifically excludes reasonable actions taken by an employer or supervisor concerning management or direction of workers or the place of employment. Furthermore, the Policy does not apply to circumstances unrelated to a worker's employment. Therefore, harassment that occurs during a social gathering of co-workers outside of work not sponsored by the employer will not be covered.

The Policy states that WorkSafe BC will consider an employer to have met their obligations by taking the following steps:

1. Performing a risk assessment of the workplace;

2. Developing and implementing written policies to eliminate or minimize risks;

3. Developing and implementing procedures for workers to report incidents of workplace bullying and harassment;

4. Reviewing those policies and procedures periodically;

5. Informing workers of the nature and extent of the risk, how to recognize bullying

and harassment, the policies and procedures in place, and the appropriate response to bullying and harassment;

6. Investigating and documenting complaints and incidents of bullying and harassment while maintaining confidentiality;

7. Taking necessary corrective action to eliminate or minimize the risks of bullying; and

8. Advising victims of bullying and harassment to consult a physician of their choice.

The Policy also imposes duties on supervisors and employees. Supervisors must apply and comply with the policies and procedures that the employer has implemented to prevent workplace bullying and harassment. Employees must take reasonable care to protect the health and safety of themselves and other workers. They must not engage in bullying and harassment, comply with the employer's procedures, and report experiences and observations of workplace bullying and harassment.

WorkSafe BC has created a separate work group to deal with these types of claims. It will be interesting to see how many claims WorkSafe BC receives over the next year and how many claims are accepted given the fine line between what one might consider bullying or harassment and another consider legitimate workplace supervision. The fact that an employee will be required to show that the employee has a mental disorder will make it more difficult for these types of claims to be successful.

Regardless of how these claims are adjudicated, local government employers need to continue their commitment to harassment and bullying-free workplaces. All employers should have harassment policies in place and provide regular training to their employees, particularly supervisors. As well, employers need to take seriously any complaints of harassment or bullying and undertake an investigation where necessary to determine whether there is any merit to the concerns raised by an employee. By addressing issues of harassment and bullying in a consistent and pro-active manner, employers lessen the risk that employees will file claims with WorkSafe BC, other tribunals and the courts.

VII. CRIMINAL RECORDS AND REFERENCE CHECKS

The Information and Privacy Commissioner (the "Commissioner") recently released a report on the use of employment-related criminal records checks. The Commissioner concluded that criminal records checks are among the most invasive of pre-employment screening measures, and where used inappropriately could result in employers unfairly denying an individual employment. When used, employers must respect the privacy rights of the subjects of the criminal records checks.

The Commissioner released a best practices guideline for criminal records checks by public sector employers. Some of the Commissioner's recommendations include:

1. Conduct criminal records checks, not police information checks. Police information checks contain information about any adverse police contact. It is unlikely that a public body will have authority under the *FOIPPA* to collect the information contained in a police information check;

2. Collect only the minimum amount of personal information necessary to conduct criminal record checks and do not retain a copy of an individual's identification;

3. Conduct criminal record checks only for positions with access to valuable resources and sensitive information. Employers should create a list of potentially relevant convictions for positions that they will subject to criminal record checks;

4. Employers must not refuse to employ or to continue to employ an individual because that person has a criminal record that is unrelated to their employment. Employers must also consider the amount of time that has passed since any conviction;

5. Conduct criminal record checks on prospective employees only after a public body has made a conditional offer of employment. Public bodies should not perform criminal record checks at any earlier stage of the hiring process;

6. Conduct certified criminal record checks only where criminal record checks are inconclusive;

7. Criminal records check results should go to the individual before they are disclosed to the public body. This gives the individual a chance to check the record for accuracy, and if inaccurate, an opportunity to challenge the results before he or she discloses the results to the public body. This also gives individuals an opportunity to abandon their pursuit of a job where they do not wish to disclose the results of a record check to the public body;

8. Do not require unnecessary additional checks on employees who change positions within the public body unless the new position is one with substantially different responsibilities and risk factors;

9. Do not automatically require employees to submit to ongoing criminal record checks even where an initial criminal record check prior to hiring is justifiable. Public bodies should require ongoing checks only where an employee exercises a particularly sensitive function that requires ongoing scrutiny;

10. Where possible, assign responsibility for the criminal records check process to the human resources department rather than to the supervisor of the prospective employee. Members of the working group for a prospective employee do not need to know the specifics of the individual's criminal history.

VIII. SOCIAL MEDIA BACKGROUND CHECKS

The Office of the Information & Privacy Commissioner also released guidelines for social media background checks. A social media background check can be a convenient way to screen and monitor prospective and current employees, volunteers, and candidates. However, there are serious privacy concerns.

First, a social media background check may unearth more information than the public body is authorized to collect. The *FOIPPA* permits public bodies to collect personal information about an individual only if that information relates directly to and is necessary for an operating program or activity of the public body. Accessing a Facebook account will likely uncover information far exceeding those limited purposes.

Second, since the information is not collected directly from the individual, *FOIPPA* requires that the individual consent to the collection of the information. However, the individual can withdraw consent at any time, and if withdrawn, the public body cannot use that information to make a decision about that person. Furthermore, the information collected with consent must be related to an operating program or activity of the public body. Third, the public body might inadvertently collect information about a third party without the third party's consent.

The Office of the Information and Privacy Commissioner recommends that employers not:

1. perform social media background checks from personal accounts in an attempt to avoid privacy obligations,

2. contract a third party to carry out background checks in an attempt to avoid privacy obligations, and

3. perform a social media background check under the assumption that individuals will never be able to find out about it – a computer savvy individual could use web analytics to determine the IP address from which their personal information was accessed.

IX. CONCLUSION

While employers' obligations seem to be ever expanding, employers who treat their employees fairly will be able to avoid much of the workplace conflict and litigation described above. Employers must not ignore obvious signs that an employee's conduct is related to a disability. Not only are there are good legal reasons to conduct a proper investigation, it is also a good

human resources practice to do so. Employers who are seen to be taking advantage of employees in the context of releases risk a court finding that the release is unenforceable. Employers will also want to pay careful attention to the upcoming changes to their obligations under the Occupational Health and Safety Policy guidelines regarding harassment and bullying. Finally, employers must be cognizant of their privacy obligations in relation to employees suspected of mis-using employer computers or information networks and to prospective employees in criminal records and social media checks.