



The WCB System's Role in Preventing, Investigating, and Compensating Workplace Sexual Assault and Harassment

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SHARP
WORKPLACES

Sexual Harassment Advice,
Response, and Prevention for
Workplaces

Overview

- Prevention: Occupational health and safety.
- Prohibited action (retaliation) complaints.
- WCB benefits.
- Duty to maintain an injured worker's employment.
- The impact of the WCB system on other claims.

WorksafeBC

- Corporate name of the Workers' Compensation Board.
- Two broad functions:
 - **Prevention:** occupational health and safety.
 - **Compensation:** benefits for injured workers.
- Some provinces separate these functions between two agencies.
- In BC, WorksafeBC does it all.

Prevention

- Occupational Health and Safety Regulation.
- WCB's Prevention Manual.
- “Policy” in the WCB world is binding.
- Regulation and policy exists governing workplace violence, bullying and harassment, and improper conduct.
- These policies are still under review.

High Level Requirements

- Employers have an obligation to prevent violence, bullying, harassment, and improper conduct.
- Implement procedures, policies, training, and other work arrangements.
- Assess, address, and investigate.

Investigations

- Can mean many things in many contexts.
- Non-WCB investigations:
 - Criminal investigations.
 - Employer investigations for disciplinary purposes.
- WCB investigations:
 - WorksafeBC officers investigate to enforce law and policy.
 - Employer incident investigations required by WCA.
 - WCB adjudicators investigate to assess benefits.

Investigations

- Employers often don't identify (or even know!) the purpose of the investigation.
- Workers are often unclear as to the purpose of an investigation by WorksafeBC or their employer.
- The boundaries between many of these investigations remains unclear.

Investigations by WorksafeBC Officers

- Purpose: Enforce WCA, OHS Regulation, WCB policy.
- WorksafeBC officers generally do not investigate harassment or assault directly.
- Has the employer implemented necessary policies, procedures, training etc.?
- Worker does not get compensation just because employer violated law or policy.
- Can call WorksafeBC to report unsafe conditions.

Incident Investigations Required by WCA

- Section 69 of WCA: Employers must investigate any incident:
 - resulting in injury requiring medical treatment; or
 - that had a potential for causing serious injury.
- Purpose: Incident investigations look at cause and prevention, not blame and discipline.
- The application of s. 69 to psychological injury is a little unclear.
- Clarity should be coming?

Take-Aways on Prevention

- Important to distinguish WorksafeBC's prevention and compensation mandates.
- Important to distinguish different types of investigations.
- Investigations by WorksafeBC officers enforce WCB law and policy. No personal remedy/discipline.
- Incident investigations by employer under WCA raise some challenging privacy and procedural concerns.

Prohibited Action

- Sections 47-50 of the *WCA*.
- Protection against retaliation for exercising an OHS right or raising a safety concern.
- Rare case where worker can get a remedy directly against employer in the WCB system.
- Current interpretation is that prohibited action does not protect against retaliation based solely on filing a WCB claim.
Controversial.
- Not a remedy for human rights discrimination, assault, harassment etc.

Prohibited Action: Remedies

- Wide range of remedies. Reinstatement is possible.
- Wage loss not limited to employment law damages.
- No injury to dignity, pain, suffering, punitive damages, etc.
- Deadline is generally one year (some exceptions).

Take-Aways on Prohibited Action:

Pros

- Free.
- WorksafeBC can investigate.
- Free assistance from Workers Advisors Office.
- Access to mediation.
- Flexibility with respect to adversarial hearing, at least at WorksafeBC level.
- Burden of proof reverses onto employer if worker establishes *prima facie* (basic) case.
- WCB may help enforce award.
- Decisions anonymous.
- Do not need to show nexus with protected ground.

Take-Aways on Prohibited Action:

Cons

- You're in the WCB system.
- Less control over process and evidence.
- Sometimes you may want enhanced procedural safeguards and formality.
- Sometimes you may want greater control over discovery.
- Independently enforcing an order can be challenging.

WCB Benefits and Compensation

- Historic tradeoff: Workers get no fault insurance paid for by employers; employers get immunity from personal injury lawsuits by workers.
- You can't sue for personal injury, disablement, or death arising out of and in the course of employment.
- No fault system (mostly).
- Governed by *Workers' Compensation Act* and related policy.
- Rehabilitation Services and Claims Manual ("RSCM").
- Non-binding practice directives ("PD")

Three Types of Claims

- Personal injury or death arising out of and in the course of employment (*WCA*, s. 134).
- Occupational disease due to the nature of any employment (*WCA*, s. 136).
- Mental disorders (*WCA*, s. 135).
- Note: There is no free-standing WCB claim for assault or harassment independent of these three.

How To Claim

- Can file claim:
 - By calling teleclaim: 1.888.967.5377
 - Online at worksafebc.com
 - By downloading and faxing in form
- Claims relating to sexual assault/harassment generally done by phone.
- WorkSafeBC has worked hard to improve services for sensitive claims.
- Will need info about worker, employer, any third parties, doctors, and earnings for past year.
- Deadline generally one year.

Psychological Injury and Mental Disorder Claims

- Three types of mental disorder claims:
 - Mental disorder or psychological injury caused by another accepted injury.
 - Mental disorder caused by traumatic work-related events.
 - Mental disorder due to significant workplaces stressors, including bullying and harassment.
- All have different requirements

Caused by Another Accepted injury

- Example: Pain from a work-related back injury causes depression.
- Usual rules related claim acceptance and compensable consequences apply.
- Did the compensable injury contribute significantly to the new condition?

Mental Disorder Claims

- Mental disorder claim means a claim for mental disorder that is unrelated to a previously accepted condition.
- Section 135 of *WCA*.
- Requires a DSM diagnoses by a psychiatrist or psychologist.
- Claim excluded if mental disorder caused by a decision of the worker's employer relating to the worker's employment.
- Mental disorder claims are then divided into two subcategories:
 - Mental disorders caused by one or more traumatic events.
 - Mental disorders “predominantly caused” by significant workplace stressors, including bullying and harassment.

Mental Disorder Claims: Trauma

- Traumatic event generally means “an emotionally shocking event”. (RSCM Vol. II, policy #24.00)
- Usual “causative significance” standard applies.
- There is a presumption of causation for workers that develop a traumatic condition following trauma exposure in certain occupations [WCA s. 135(2)–(5) and *Mental Disorder Presumption Regulation*, B.C. Reg. 122/2024].
- Example: firefighter develops PTSD after witnessing a coworker get seriously injured in a fire.

Mental Disorder Claims: Significant Stressors

- Significant stressors means “excessive in intensity and/or duration from what is experienced in the normal pressures or tensions of a worker’s employment” [RSCM Vol. II, policy #24.00].
- Bullying and harassment is a significant workplace stressor [WCA, s. 135(1)(a)(ii)]
- Bullying and harassment generally means “conduct that is intended to, or should reasonably have been known would, intimidate, humiliate or degrade an individual” [PD #C3-3]
- Interpersonal conflict generally not a significant stressor unless threatening or abusive [RSCM Vol. II, policy #24.00]
- Importantly, the significant workplace stressors must be the “predominant cause” of the mental disorder [WCA, s. 135(1)(a)(ii)].

Mental Disorder Claims:

Some Progress

- Clarity that “predominant cause” means work is the most important cause, not necessarily that work is > 50% (PD #C3-3, *Pickering v Workers’ Compensation Board*, 2025 BCSC 376).
- Employer decision exclusion is now limited to decisions about generic work processes, actions made in good faith (*Pickering v Workers’ Compensation Board*, 2025 BCSC 376).
- Board can now provide some benefits before claim is formally accepted using “preliminary determinations” [PD #C3-3].
- Can provide health benefits before claim is accepted to prevent deterioration in the worker’s condition [WCA, s. 156(1.1)].
- List of occupations that benefit from presumption for trauma related disorders has expanded.
- Baseline for “significant workplace stressors” should soon be changed from worker’s specific employment to employment generally.

Types of Benefits

- Temporary disability benefits.
 - Permanent disability benefits.
 - Health care.
 - Vocational rehabilitation.
 - Others.
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- **No** general compensation for suffering, injury to dignity, punitive damages, etc.

Health Care

- WorksafeBC covers health care related to workplace injury, disease, mental disorder.
- Can now provide preventative health care before claim accepted to prevent deterioration[*WCA*, s. 156(1.1)].
- This includes claims relating to sexual assault or harassment.

Appeal System

- First level decisions made by WorksafeBC.
- Internal review to Review Division (usually 90-day deadline).
- External appeal to Workers Compensation Appeal Tribunal (usually 30-day deadline).
- Some exceptions
 - Prohibited action appeals go straight to WCAT.
 - Voc rehab decisions cannot be appealed to WCAT.
 - Deadline for review about OHS matters is 45 days.

Duty to Maintain Employment

- WCA now imposes a duty on employers to maintain an injured worker's employment.
- Applies to:
 - employers who regularly employ 20 or more workers.
 - workers who have been continuously employed with the employer for at least 12 month.
- If worker **can** do essential duties of pre-injury job, employer must offer pre-injury work or comparable alternative work.
- If worker **cannot** do essential duties of pre-injury job, must offer first suitable work that becomes available.
- Overarching all of this is a duty to accommodate an injured worker to the point of undue hardship by making changes to the work and/or workplace.

Duty to Maintain Employment

- An employer who terminates a worker within 6 months of resuming work is deemed (rebuttably) to have failed to comply with duty to maintain employment.
- WorksafeBC can pay up to 12 months of benefits to a worker if the employer breaches duty to maintain employment.
- WorksafeBC cannot order that an employer reemploy the worker.
- WorksafeBC cannot order that the employer pay damages directly to the worker or award compensation for injury to dignity.

Other Claims and Causes of Action

- In most cases, WCB is not “a choice”.
- Workers cannot waive WCB benefits (*WCA*, s. 119).
- Actions for workplace injury arising out of and in the course of employment barred (*WCA*, s. 127).
- Bar against private actions applies to all employers and workers covered by *WCA*.

People Outside the WCB System

- Some workplace injuries are caused by people outside the WCB system (personal drivers, customers, clients etc.)
- Worker may elect to sue or claim WCB for workplace injury caused by 3rd parties.
- If worker claims compensation, WorksafeBC has subrogated claim against 3rd party.

Conduct Outside the WCB System

- Workers and employers can engage in conduct falling outside scope of employment.
- Battery? Assault? Harassment?
- Boundaries are difficult to define.

WCAT Certificates

- WCA, s. 311: Parties to a civil action can apply to have WCAT certify each party's status (worker, employer etc.)
- WCAT can also certify whether injuries, death, or disablement arose out of and in the course of employment.
- Court then decides impact on civil action.
- Whether court can independently dismiss an action remains open, but general process is for court to stay the action so that the matter can be referred to WCAT for a decision under s. 311 (*Pecquery v. Gabriel*, 2025 BCCA 194).
- Workers can be ineligible for benefits and still barred from civil action: *Downs Construction Ltd. v. Workers' Compensation Appeal Tribunal*, 2012 BCCA 392:

Wrongful\Constructive Dismissal

- Wrongful \ constructive dismissal are actions in contract, not personal injury. Generally not barred.
- *Deol v Dreyer Davison LLP*, 2020 BCSC: Court refused to strike constructive dismissal claim arising from sexual harassment in the workplace.
- Other jurisdictions seem to be taking same approach:
 - *Morningstar v. WSIAT*, 2021 ONSC 5576
 - *Ashraf v SNC Lavalin ATP Inc.*, 2015 ABCA 78
- See also *Lewis v. WestJet Airlines Ltd*, 2019 BCCA 63: Court refused to strike contract claim based on anti-harassment clause in contract.
- However, possible that constructive dismissal claim could be barred if it's an injury claims disguised in contract: *Chen v. Ontario (WSIAT)*, 2021 ONSC 7625.

Aggravated and Punitive Damages

- *Deol* also refused to strike aggravated and punitive damage claim, but noted damages based on mental distress remain unclear.
- Other jurisdictions also seem to suggest these damages are at least possible:
 - *Morningstar v. WSIAT*, 2021 ONSC 5576.
 - *Astolifi v. Stone Creek Resorts Inc*, 2023 ABKB 416.
- May depend on basis for seeking aggravated or punitive damage.

Human Rights Complaints

- Some tribunal level authority that *WCA* does not bar human rights complaints even if covered by *WCA*.
- WCAT-2009-03147.
- *Eyerley v. Seaspan International Ltd.*, 2000 CanLII 28898 (CHRT).

WCB Findings that Overlap With Human Rights Complaint?

- *Vancouver Island Health Authority v Safaei*, 2025 BCSC 340.
- WCAT found that alleged mistreatment did not amount to bullying and harassment, denied WCB mental disorder claim.
- Human Rights Tribunal (“HRT”) allowed related complaint to proceed, finding Human Rights Code (“HRC”) engages different issues
- WCAT had not appropriately dealt with human rights complaint.
- Judge on judicial review set-aside decision allowing complaint to proceed. Found WCAT did not need jurisdiction to apply Human Rights Code to appropriately resolve the complaint.
- Under appeal.

QUESTIONS