

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

Presented by Kevin Love, Supervising Lawyer,
Community Legal Assistance Society

SHARP WORKPLACES | Sexual Harassment Advice, Response, and Prevention for Workplaces

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Overview

- Prevention: Occupational health and safety.
- Prohibited action (retaliation) complaints.
- WCB benefits.
- The impact of the WCB system on other claims.



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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.



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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.
- All presently under review.



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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.



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Investigations

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



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Investigations

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



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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.



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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.
- This includes sexual assault and harassment.
- Purpose: Incident investigations look at cause and prevention. Not blame and discipline.



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Incident Investigations Required by WCA

- Must include a worker representative if available.
- Employer must make witnesses and others with information available for interview.
- Preliminary report within 48 hours.
- Full report within 30 days, sent to WorksafeBC.
- Reports must be given to joint committee or worker safety rep. If none, must be posted in workplace.
- No requirement to identify individuals.



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Take-Aways on Prevention

- Important to distinguish WorksafeBC's prevention mandate from compensation.
- 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.



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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.
- Does not protect against retaliation based solely on filing a WorksafeBC claim.
- Not a remedy for human rights discrimination, assault, harassment etc.



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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).



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Take-Aways on Prohibited Action

- Pros:
 - Free.
 - WorksafeBC will investigate, can reduce burden.
 - Free assistance from Workers Advisors Office.
 - Access to mediation.
 - Possibly no live 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.
- Cons:
 - You're in the WCB system.
 - Less control over process and evidence.
 - Independently enforcing an order can be challenging.



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WCB Benefits and Compensation

- Historic tradeoff: Workers get no fault insurance paid for by employers; employers get immunity from personal injury suits 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.



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Three Types of Claims

- Personal injury arising out of and in the course of employment.
- Occupational disease due to the nature of any employment.
- Mental disorder.
- Note: There is no free standing claim for assault or harassment independent of these three.



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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.
- Will need info about worker, employer, any third parties, doctors, and earnings for past year.
- Deadline generally one year.



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Mental Disorder Claims

- Requires DSM diagnoses by psychiatrist or psychologist.
- A reaction to one or more traumatic events **OR** "predominantly caused" by significant workplace stressors, including bullying and harassment.
- Not caused by a decision of the worker's employer relating to the worker's employment.
- Note: presumption of causation for certain occupations in cases of trauma related disorders.



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Mental Disorder Claims: Barriers

- Higher causation test for stressors: "Predominant cause" vs. "significant contributing factor".
- Requirement for DSM diagnosis creates delay and may not capture all injuries and disablements.
- Employer decision exclusion interpreted very broadly. Trauma or stress caused by employer response?



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Types of Benefits

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



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Health Care

- WorksafeBC covers health care related to workplace injury, disease, mental disorder.
- New: can now provide preventative health care before claim accepted to prevent serious deterioration.
- This includes claims relating to sexual assault or harassment.



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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.



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General Bar Against Other Actions

- 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*.



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People Outside the WCB System

- Some workplace injuries 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.



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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.



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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 conduct/injuries arose out of and in the course of employment.
- Court then decides impact on civil action.
- Workers can be ineligible for benefits and still barred from civil action: *Downs Construction Ltd. v. Workers' Compensation Appeal Tribunal*, 2012 BCCA 392:



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Wrongful\Constructive Dismissal

- *Deal v Dreyer Davison LLP*, 2020 BCSC 771.
- Application to strike a constructive dismissal claim arising from sexual harassment, argued claim was barred by WCA.
- Employer's application dismissed: Contract claim, not tort claim.
- Also refused to strike related aggravated & punitive damage claim.
- Court notes aggravated damages based on mental distress remain unclear. Application for WCAT certificate still outstanding.
- Application to strike claim against individual defendant granted.
- See also *Lewis v. WestJet Airlines Ltd*, 2019 BCCA 63 – Court refused to strike contract claim based on anti-harassment clause in contract.



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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).



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QUESTIONS



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