

**NEW CHALLENGES:
SHIFTING POWER IN
UNCERTAIN TIMES**
12-14 August 2009



22nd ANNUAL LABOUR LAW CONFERENCE

Workplace bullying: unfair discrimination, dignity violation or unfair labour practice?

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Take the quiz:

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Do any of your leaders

- Disapprove of weakness in their employees? Yes / No
- Raise their voices when they get annoyed? Yes / No
- Spread malicious gossip? Yes / No
- Cause employees to dissolve into tears or walk away when confronted by them? Yes / No
- Use sarcasm? Yes / No
- Criticise junior colleagues in front of clients/customers? Yes / No

Every 'yes' adds to the risk of accepting bullying and losing your best employees

(Paice & Firth-Cozens 2003)

Introduction

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Workplace harassment impacts in different ways:

Sexual harassment impacts on an employee's dignity, bodily integrity, job security and personal safety

Racial harassment impacts on an employee's sense of worth, dignity and empowerment

Workplace bullying has been linked to a feeling of incompetence, to a sense of alienation, to anxiety that there will be no promotion or recognition, to job insecurity, to feelings of inadequacy, to knock-on tensions in personal relationships, and to depression.

Theoretical underpinning

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- The **common law** of Master and Servant
- **Constitutional rights** to dignity, security of the person and fair labour practices
- *Murray v Minister of Defence (2008) 29 ILJ 1369 (SCA): “Developed as it must be to promote the spirit, purport and objects of the Bill of Rights, the common-law of employment must be held to impose on all employers **a duty of fair dealing** at all times with their employees”*

A definition of harassment

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Generally seen as **persistent** and **unwelcome** conduct which is **hostile or offensive** to a **reasonable person** and induces a **fear of harm** and **demeans, humiliates or creates a hostile or intimidating environment** or is calculated to **induce submission** by actual or threatened adverse consequences

Definition of bullying

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Bullying refers to any unfavourable or offensive conduct on the part of a person or persons, which has the effect of creating a **hostile workplace environment**

(Other terms that are used for workplace bullying are corporate bullying, workplace violence, moral harassment, emotional abuse and work rage, mobbing.)

Examples of victimization:

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- **Slandering** or **maligning** an employee and his/her family
- Deliberately **withholding work-related information** or supplying incorrect information of this kind
- Deliberately **sabotaging or impeding** the performance of work
- Obviously insulting **ostracism**, boycott or disregard of the employee
- **Persecution** in various forms, threats and the inspiration of fear, degradation, eg sexual harassment
- Deliberate **insults, hypercritical or negative response or attitudes** (ridicule, unfriendliness etc).
- **Supervision** of the employee **without his/her knowledge** and with harmful intent.
- **Offensive 'administrative penal sanctions'**

PEPUDA

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Adapting the **definition of harassment** in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA):

Workplace bullying may be defined as unwanted conduct in the workplace which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences.

Testing the working definition

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- Physical assault and aggression
- Verbal abuse
- Intolerance of psychological, medical or personal problems
- Humiliating or demeaning conduct
- Marginalisation
- Abuse of disciplinary processes
- Demotion or transfer
- Pressure to engage in illegal activities
- Recommendation to resign
- Creating an unhealthy working environment

Legal protection against workplace bullying

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- **Anti-harassment protection**
- **Unfair labour practice jurisdiction**
- **Health & safety legislation**
- **Delictual claims**
- **Constructive dismissal**

Dealing with bullying

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- Employers can develop their own **policy** or **code of conduct** on bullying
- Employers can **educate managers and employees** on suitable workplace behaviours
- Employers must establish or advertise **grievance procedures**
- **Human resource practitioners** should be educated in effective **investigation processes**
- **Work cultures** of private and public sector organisations should be reviewed
- **Long term absences** from work should be monitored
- **Suitable reporting mechanisms** should be established between human resource departments and senior management to report on workplace bullying
- **Senior management** should actively support the introduction of procedures, policies and practices to alleviate workplace bullying.

Case law

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Unreasonable targets: *Solid Doors (Pty) Ltd v Theron & others* (2004) 25 ILJ 2337 (LAC)

Assault - *Le Monde Luggage CC t/a Pakwells Petje v Dunn NO & others* (2007) 28 ILJ 2238 (LAC) para 5; see also *Ndebele v Foot Warehouse (Pty) Ltd t/1 Shoe Warehouse* (1992) 13 ILJ 1247 (LC); *Puren v Victorian Express* (1998) 19 ILJ 404 (CCMA).

Aggression: *Visser and Amalgamated Roofing Technologies t/a Barloworld* (2006) 27 ILJ 1567 (CCMA).

Verbal abuse: *Visser and Amalgamated Roofing Technologies t/a Barloworld* (2006) 27 ILJ 1567 (CCMA) 1569; *R & C X-Press Freight v Munro* (1998) 19 ILJ 540 (LAC); *Lang v Daliff Precision Engineering (Pty) Ltd* (1993) 14 ILJ 1359 (IC) 1360-1361; *L M Wulfson Motors (Pty) Ltd t/a Lionel Motors v Dispute Resolution Centre & others* (2008) 29 ILJ 356 (LC); *Miladys (A division of Mr Price Group Ltd) v Naidoo & Others* (2002) 23 ILJ 1234 (LAC).

Intolerance of psychological, medical or personal problems *Pedzinski v Andisa Securities (Pty) Ltd (formerly SCMB Securities (Pty) Ltd)* (2006) 27 ILJ 362 (LC); *Wylie and Standard Executors & Trustees* (2006) 27 ILJ 2210 (CCMA) ; *Lombard and KGA Lewens (Pty) Ltd* (2004) 25 ILJ 1770 (CCMA) ; *Marsland v New Way Motor & Diesel Engineering* (2009) 30 ILJ 169 (LC).

Humiliating or demeaning conduct *Maharaj v C P de Leeuw (Pty) Ltd* (2005) 26 ILJ 1088 (LC); *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 981 (LAC).

Marginalisation *Murray v Minister of Defence*(2008) 29 ILJ 1369 (SCA) para 51.

Abuse of disciplinary processes *Gobey v Grinkaer-Lta Duraset* [2007] JOL 19017 (MEIBC).

Demotion or transfer *Steward Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A); *Van der Riet v Leisurenet Ltd t/a Health & Racquet Club* [1998] 5 BLLR 471 (LAC); *Van Wyk v Albany Bakeries Ltd* [2003] 12 BLLR 1274 (LC).

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Mhlambi v CCMA & others (2006) 27 ILJ 814 (LC).

Pressure to engage in illegal activities *Bonthuys and Central District Municipality* (2007) 28 ILJ 951 (CCMA).

Recommendation to resign *Dark and Ex Hex Boerdery (Pty) Ltd* (2008) 29 ILJ 3092 (CCMA) ;
Unilong Freight Distributors (Pty) Ltd v Muller [1998 (1) SA 581 (SCA); *Dalgleish v Ampar (Pty) Ltd t/a Sol Energy* [1995] 11 BLLR 9 (IC); *Dallyn v Woolworths (Pty) Ltd* (1995) 16 ILJ 696 (IC); *Jooste v Transnet Ltd t/a SA Airways* (1995) 16 ILJ 629 (LAC); *Daniels and Cape Promotional Manufacturing (Pty) Ltd* (2006) 27 ILJ 196 (CCMA).

Creating an unhealthy working environment *Naude and Stealth Marine* (2004) 25 ILJ 2402 (BCA).