



ONA Position Statement

Photography, Video and Audio Taping of ONA Members Providing Care

Need for Employer Policy

The Ontario Nurses' Association (ONA) takes the position that all employers should have a Photography, Video and Audio Tape Recording Policy. This policy will include the following principles:

- Video and audio tape recording and photography are strictly prohibited by individuals in any setting without express consent.
- A statement of risk such as the following:
 - Breach of individual privacy.
 - Breach of privacy legislation.
 - Breach of other legislation, including the *Occupational Health and Safety Act* and *Ontario Human Rights Code*.
 - Compromise of employer security policies and procedures.
 - Intimidation tactics that may affect staff performance.
 - Violations of regulatory college requirements, e.g. nurse-client therapeutic relationship.
- No staff member or volunteer will be photographed, electronically recorded or interviewed without their consent.
- All patients/clients/residents will be made aware of the employer's policy, e.g. client handout/handbook, client contract, sign posted in obvious place. The employer may withdraw care/services of a patient/client/resident were there is failure to comply with the policy and/or the ONA members believe their safety to be at risk.
- If an ONA member is video/audio taped in the workplace, the employer will ensure the video/audio tape is confiscated and not in the public domain. This may require the employer's use of legal action on behalf of their employee.

ONA members can independently access the Federal Privacy Commissioner and/or take legal action through civil court.

Background

It is a new world of technology in the workplace. This is particularly true when ONA members are in community settings, visiting/providing services in client's homes, videotaping the birth of a baby in a hospital or in other settings. ONA members are now experiencing violations of their professional privacy and integrity through the use of cyber-bullying.

Issues experienced by ONA members include:

- Uninvited invitations to "friend" clients/patients on Facebook.
- Unknown video/audio taping of ONA members providing care in a home. The video was subsequently posted on YouTube.
- The videotaping of ONA members in the hospital setting, e.g. Emergency Room or Labour and Delivery performing their work. This has sometimes resulted in an ONA member being disciplined.
- An ONA member has been the victim of negative texting/Facebook entries that have irreparably harmed her employment relationship.

What is Cyber-Bullying?

Cyber-bullying is personally attacking or intimidating someone through the use of a computer. This takes place in social networks or internet tools, such as:

- Facebook
- MySpace
- Twitter
- E-mails
- Blogs
- Chat rooms
- YouTube

What Does Cyber-Bullying Look Like?

Sometimes the bullying is limited to hurtful, mean or malicious words. However, a growing trend is using photographs to bully another person. Private photographs or photos that have been altered are being used to humiliate others.

Source: <http://www.suite101.com/content/dealing-with-cyberbullying-a167356>

Cyber-bullying can be much more severe in its effects than offline bullying because the targets feel they have no escape. Also, because of the wide scope of the internet, there can be many more witnesses to the bullying.

Perpetrators may be more likely to engage in bullying behaviour online because they can't see or hear the effects of their actions and because it's possible to be anonymous online.

Forms of Cyber-Bullying

Insulting: Posting or spreading false information about a person that will cause harm to that person or that person's reputation.

Targeting: Singling someone out and inviting others to attack or make fun of her or him.

Identity theft: Pretending to be someone else to make it look like that other person said things he or she doesn't believe or that aren't true about him or her.

Uploading: Sharing images of a person, particularly in an embarrassing situation, without her or his permission, or sharing e-mails without the writer's permission.

Excluding: Pressuring others to exclude someone from a community (either online or offline).

Harassment: Repeatedly sending someone nasty, mean and insulting messages.

What is not bullying?

Differences of opinion or negative comments on a website, blog, YouTube or a Facebook page is not necessarily bullying, particularly where the comments are not directed at any one individual. For example, a patient's comment on a Facebook page that criticizes a nurse's skills or abilities is not sufficient to establish a finding of cyber-bullying. Bullying generally denotes a pattern of targeted behaviour intended to cause emotional or psychological harm to an individual or group of individuals. Intention is not a necessary requirement to prove bullying where the pattern of behaviour ought reasonably be known to be unwelcome.

Problems with Video/Audiotaping

Like video-surveillance, there are problems in principle with video and audio taping:

- There is no context for the issue/incident being taped. The video/tape will only be 30 seconds long.
- The video/audio tape is only a snapshot in time. It shows a specific time frame only, nothing leading to the issue or the results.
- The video/audio tape can be edited, altered and/or falsified.
- Violation of individual privacy and dignity.
- There is no requirement at law that a person must give consent to having their image posted on the internet.

Example

Syndicat des travailleuses et travailleurs de CSS du Sud de Lanaudière (CSN) v Lalande (Quebec Superior Court, March 23, 2010)

This case involved a nurses' aide working at a Quebec nursing home. The aide was terminated for alleged patient abuse. During the course of the arbitration, the home sought to introduce video surveillance from a camera hidden in the patient's room by her daughter. The camera was placed in the room after the daughter noticed bruising on her father's arms. The video showed the aide dragging the patient along the floor by his arms after a fall. The Arbitrator admitted the evidence and upheld the aide's termination. On appeal to the Quebec Superior Court, the union argued the video surveillance should never have been admitted as evidence as it violated the privacy rights of the employee. The Court rejected the union's argument, ruling employees had minimal expectation of privacy in the workplace and the daughter had a reasonable basis to conduct the surveillance.

ONA Statement of Beliefs

<http://www.ona.org/documents/File/guides/ONASStatementofBeliefs20112012.pdf>

Occupational Health and Safety

ONA believes it is the right of all its members to work in a healthy and safe work environment. It further believes in the pursuit of the highest degree of physical, mental and social well-being of workers in all occupations. As one of the largest health care unions in the province and in the country, ONA believes it is part of its mandate to exercise a strong leadership role in achieving progressively greater gains in the field of occupational health and safety.

Discrimination, Harassment, Bullying and Accommodation

ONA believes every member has the right to be treated with dignity and respect.

ONA is committed to working toward the elimination of all forms of discrimination and harassment in the workplace and in the union. This includes discrimination and harassment based on grounds prohibited in the *Ontario Human Rights Code*, which are race, ancestry, place of origin, colour, ethnic origin, citizenship, creed (religion), sex (including pregnancy and gender identity), sexual orientation, age, record of offences, marital status, family status and disability. ONA will also work to eliminate personal harassment and workplace bullying (*Code and non-Code* harassment).

Accommodation may be required when dealing with members' needs related to disability, religion, family status, pregnancy or other grounds in the *Human Rights Code*. ONA is committed to pursuing accommodation in the workplace and providing accommodation at union functions.

To achieve its commitment, ONA will strive to:

- Provide educational programs and communications addressing discrimination, bullying, Code and non-Code harassment and accommodation issues.
- Conduct strategic collective bargaining on discrimination, bullying, Code and non-Code harassment and accommodation issues.
- Address breaches of members' rights through the grievance and arbitration procedure.
- Advocate for effective workplace policies and complaint investigation procedures.
- Provide policies and procedures for the investigation and resolution of membership complaints.
- Provide support mechanisms for members experiencing discrimination, bullying and Code and non-Code harassment.
- Provide a supportive and welcoming environment for members requiring accommodation.
- Provide services, organizational structures, activities and policies concerning human rights and equity issues.

Cyber-Bullying and the Law

If an ONA member is the target of cyber-bullying, there are a number of possible legal avenues to consider, including the utilization of any employer policy or program dealing with harassment, the filing of a grievance, human rights complaint, occupational health and safety complaint, bringing a civil action for defamation or pressing criminal charges.

ONA can assist members with the following four legal processes:

1. Employer Policies

Members should be strongly encouraged to utilize any employer policy or program dealing with harassment in the workplace. Article 3.03 (d) of the Hospital Central Collective Agreement states, "The parties recommend and encourage any employee who may have a harassment or discrimination complaint to follow the complaints process as set out in the employer's harassment policies and process."

Article 4.04 (c) of the central Nursing Home language specifies, "An employee who believes that s/he has been harassed, contrary to this provision shall be encouraged by both parties to follow the Employer's policy on harassment and process. Failing resolution, an employee may follow the process set out in the Complaint, Grievance and Arbitration procedure in Article 8 of the Collective Agreement. The employee shall be encouraged by both parties to exhaust these processes prior to filing a complaint with the *Ontario Human Rights Commission*."

Other ONA collective agreements contain a similar provision.

2. Grievance-Arbitration Process

The employer has a duty to maintain a workplace free of harassment. If cyber-bullying targets an ONA member because of his or her race, sex, religion, sexual orientation or other grounds enumerated under the *Ontario Human Rights Code*, a grievance can be filed under the collective agreement if the employer does not take reasonable steps to put an end to the harassment. Such steps may include refusing services (e.g. home visits by CCAC) or refusing family members access to the facility, if the harassing behavior does not cease immediately.

If the harassment is not based on grounds under the *Ontario Human Rights Code*, the legal arguments under the collective agreement may be limited. Nevertheless, grievances may still be filed as some collective agreements contain provisions covering non-Code harassment. The

grievance should also reference the harassment provisions set out in the *Occupational Health and Safety Act (OHS)*, but the rights under that Act are relatively limited. The grievance should also reference the management rights clause as some arbitrators have recognized an implied obligation on employer's to maintain a workplace free of harassment regardless of whether it is Code-based or not.

Grievances that are not resolved at the grievance stage may be referred to arbitration. Be advised grievances will only be referred to arbitration if ONA believes there is merit to the grievance, that is, there is likelihood of success at arbitration. Keep in mind the grievance is filed against the employer and not the harasser. The focus in any harassment case is on the steps the employer took (or failed to take) to address allegations of harassment in the workplace. The onus is on ONA to prove harassment. However, even if the harassment is proven but it is decided the employer took adequate steps to address the events, then no breach of the collective agreement will be found.

3. Human Rights Complaint

If cyber-bullying specifically targets an ONA member because of his or her race, sex, religion, disability, sexual orientation or other ground enumerated under the *Ontario Human Rights Code*, the member has the right to file an individual complaint directly to the Human Rights Tribunal of Ontario. Again the focus of the complaint will be on the issue of whether the employer took adequate steps to address Code-based harassment in the workplace. It is unlikely the Tribunal will entertain a complaint made directly against a patient, client or family member. The purpose of the Code is to prevent discrimination and harassment in the context of employment or as against a service provider. Since patients, clients and family members are not service providers, the Tribunal will likely not entertain a complaint against such groups.

Members should bear in mind that if a grievance has been filed regarding harassment, the Tribunal will likely defer the complaint until such time as the grievance-arbitration process is exhausted. If the matter is addressed through the grievance-arbitration process by way of settlement or an arbitration award, the Tribunal has discretion to determine the matter has been appropriately dealt with in another forum and that it need take no further steps to adjudicate the complaint.

ONA does not represent members before the Human Rights Tribunal. If a member is contemplating a Tribunal complaint, she or he will have to obtain or provide their own legal representation.

4. Occupational Health and Safety Complaint

Recent amendments to the *OHS* under Bill 168 address the issues of violence and harassment in the workplace. If cyber-bullying includes threats of violence, a member can contact the Ministry of Labour (MOL) and ask that an inspector investigate the complaint and issue an order against an employer. To that end, a Ministry inspector can issue orders that an employer has failed to take reasonable steps to protect employee(s) safety. An order could possible include a direction that the employer provide more security in the workplace or refuse access to the workplace to persons who engage in such threats (e.g. family members, clients, patients in non-emergency situations). Again, it is important to keep in mind that a Ministry inspector only has authority to issue orders against an employer and not third parties, such as patients.

If cyber-bullying involves harassing behavior but no threats of violence, a member's rights under Bill 168 and the *OHS* are somewhat limited. Bill 168 simply requires an employer have a harassment policy and program in place. The policy and program itself must include

mechanisms to file, investigate and act on complaints. MOL inspectors, however, do not have authority to investigate individual complaints of harassment. The Ministry only has authority to decide if the employer's harassment policy or program complies with the Act.

ONA members on their own behalf can undertake the following two legal processes:

1. Civil Action in Defamation

If cyber-bullying targets members by name and includes inflammatory comments against their character or reputation (including alleging regarding professional practice), a member may arguably bring a civil action against that individual for defamation. The law of defamation is divided into two branches: slander and libel. Slander involves statements that are made in public that lower the reputation of an individual in the eyes of a reasonable person. Libel includes statements made in print or other mediums (e-mail broadcast, personal website, YouTube, Facebook)¹ Cyber-bullying may fall under the category of libel if it includes defamatory statements made in a public forum.

A plaintiff in a libel action must prove:

- The statements are defamatory in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person (e.g. comments about a nurse's professional ability).
- The statements specifically name the member.
- The statements are published or otherwise communicated in a public forum (e.g. e-mail broadcast, Facebook, YouTube).

A person accused of defamation can defend the action on the basis that:

- The statements are true (i.e. the statements are based on true facts).
- The statements represent fair comment.

It is important to note that ONA does not represent members in civil actions brought against third parties (e.g. patient, family member). If a member is contemplating any civil action, she or he will have to obtain or provide their own legal representation.

2. Criminal Harassment

Cyber-bullying in the form of repeated e-mails, phone calls or other harassing behaviours designed to intimidate an individual may constitute criminal harassment under the Canadian Criminal Code. Section 264 of the Criminal Code provides that no person shall engage in conduct such as repeatedly communicating with another person in a manner that causes that person to fear for their safety or the safety of others known to them (e.g. family members). To trigger these provisions of the Criminal Code, the conduct (e.g. repeated e-mails) must include some type of threat or other comments that when taken in their totality would lead the reasonable person to fear for their safety. The Courts have held there does not need to be a direct physical threat to individual for these provisions to be triggered. A fear for one's safety can include a state of anxiety or apprehension or a fear of what someone is capable of doing in light of the totality of their statements.²

¹ See *Nesbitt v. Neufield* 2010 BCSC 1605 (CanLii) a B.C. court awarded \$40,000 for defamation against a husband who made defamatory comments about his former wife in e-mail broadcasts, Facebook and a personal website.

² See *R. v. Weavers* 2009 ONCJ 437 (CanLii) wherein an Ontario Court ruled that repeated e-mails and comments made on an artists' MySpace page from a fan making increasingly bizarre comments regarding his obsession with the musician was sufficient to trigger the provisions.

Cyber-bullying in the form of unflattering comments on Facebook or YouTube would not meet the test for criminal harassment since such statements are typically not threats and do not take the form of repeated communications targeted directly at the individual.

If a member feels she or he is the target of criminal harassment, she or he should contact the police immediately. If the harassing party enters into a restraining order and later breaches that order with further harassing conduct, the police can be contacted to enforce the order and incarcerate the harasser.

Other references: **ONA Tip Sheet on Inappropriate Use of Social Media and Internet Use at Work.** Link: http://www.ona.org/executive_home/executive_documents.html