

Meyer, Elizabeth J. (2006) paper presented at the annual meeting of the Canadian Association for the Practical Study of Law in Education, Montreal, QC. May 1, 2006.

Lessons from Jubran: Reducing school board liability in cases of student harassment

Elizabeth J. Meyer, Ph.D. (Cand.)
McGill University, Montreal, QC

Bullying and harassment are problems that students face daily in schools. The damage caused by such harassment has been well-documented by researchers and includes: poor academic performance (Sharp 1995, Kosciw 2001, California Safe Schools Coalition 2004), chronic absenteeism & school avoidance (Sharp 1995, Kosciw 2001, Coggan 2003, CSSC 2004), emotional problems such as depression and anxiety (Slee 1995, Bond 2001), loneliness (Bond 2001), low self-esteem (Coggan 2003, Bond 2001) and suicidal ideation (Slee 1995, Kosciw 2001). Students who have been targets of bullying in school have also been shown to have poorer physical health (Slee 1995), and are at greater risk for substance abuse (Kosciw 2001, CSSC 2004). In spite of these well-documented impacts, students have often been left to try to cope with a school-life filled with bullying and harassment with little support from teachers and administrators.

Although some people may argue that peer harassment is a simple reality of growing up, the recent British Columbia Supreme Court decision in the case of Azmi Jubran shows that in the case of discriminatory harassment, schools have an obligation to act in a way that will curb such behaviors in order to create a learning environment free of discrimination. These questions have not been addressed in Canadian courts until quite recently and the Jubran case provides the first opportunity to consider these questions in the Canadian context (Howard, 2002, p. 32). For this reason, it is important to examine the court's decision carefully in order to help school boards better understand their obligations in incidents of student peer harassment and discrimination. This paper will present the facts of the case *School District 44 v. Jubran* [2005], with a view to educating school administrators and legal counsel about their responsibilities to "provide a learning environment free of discrimination" and in turn protect themselves from liability in such incidents. The Jubran case provides many interesting opportunities for school leaders to better understand their roles in addressing such matters.

Facts

Azmi Jubran was repeatedly harassed by his peers over a period of 5 years (1993-1998). Much of the harassment included anti-gay slurs and was combined with physical acts such as being spit on, kicked in the hallways and slammed into lockers (Williams, 2005). Jubran repeatedly complained to school administrators, but the harassment continued. He finally took action against the school and filed a complaint with the British Columbia Human Rights Tribunal in June of 1996 for "discriminating against him regarding an accommodation, service or facility customarily available to the public because of his sexual orientation" ("*School District No. 44 v. Jubran*", 2003). The Human Rights Tribunal decided in Jubran's favor and awarded \$4,500 in damages for injury to dignity, feelings and self-

Meyer, Elizabeth J. (2006) paper presented at the annual meeting of the Canadian Association for the Practical Study of Law in Education, Montreal, QC. May 1, 2006.

respect. This decision was appealed to the Supreme Court of British Columbia which quashed the Human Rights Tribunal's decision due to the interpretation that the behavior in question fell outside of s. 8 of the British Columbia Human Rights Codes. The judge in this decision concluded that the fact that Jubran "is not a homosexual and the students who attacked him did not believe he was a homosexual" meant that Jubran should not be accorded the protections offered by the code ("School District No. 44 v. Jubran", 2003, p. par. 5). This decision was appealed to the Court of Appeal for British Columbia.

Issues

The issues before the Court of Appeal centered on two major questions: "Must a person who complains of discriminatory harassment on the basis of sexual orientation actually be a homosexual or perceived by his harassers to be a homosexual? Is a School Board responsible where the conduct of students violates the Code?" ("School District No. 44 (North Vancouver) v. Jubran", 2005) par. 1). These two questions are central in establishing the responsibilities of school boards to create safe learning environments. Second, the proper application of the court's decision by school administrators has the potential for significant impacts on transforming how schools interpret and apply their obligations outlined under provincial human rights codes.

Decisions and Reasoning

The judge writing the opinion, Madam Justice Levine, took up the first question of who is protected by human rights codes by establishing the purpose of such codes in Canada. As has been found in several earlier decisions, Justice Levine asserted that human rights codes must have a "broad approach" in application in order to best achieve the goals of such legislation (par. 29). In several cases she cited, judges have found that human rights codes "must be given such fair, large and liberal interpretation as will best ensure the attainment of their objects" (para. 30 (*Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 ("*O'Malley*"); *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 144; *Miron v. Trudel*, [1995] 2 S.C.R. 418 at para. 132; *Quebec (C.D.P.D.J.) v. Montréal (City)*, [2000] 1 S.C.R. 665)).

In order to best understand the phrase "the attainment of their objects", it will be helpful to follow Justice Levine's reasoning through a careful analysis of the British Columbia human rights legislation. She cited the following section of the code for the purposes of this discussion: (para 111).

The purposes of this Code are as follows:

Meyer, Elizabeth J. (2006) paper presented at the annual meeting of the Canadian Association for the Practical Study of Law in Education, Montreal, QC. May 1, 2006.

- a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
- b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
- c) to prevent discrimination prohibited by this Code;
- d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;
- e) to provide a means of redress for those persons who are discriminated against contrary to this Code;
- f) to monitor progress in achieving equality in British Columbia;
- g) to create mechanisms for providing the information, education and advice necessary to achieve the purposes set out in paragraphs (a) to (f).

This detailed list of objectives provides an outline from which to develop a deeper understanding of the Code. In her analysis of these objectives, Justice Levine concludes that, as found in O'Malley, the purposes of human rights legislation were, "the removal of discrimination" and to "provide relief for the victims of discrimination". This led her to conclude that Jubran's complaint is within the objectives of the code which aim to "address human dignity and equality and the elimination of persistent patterns of inequality" (at para. 38). This could be interpreted to mean that any behavior that perpetuates patterns of inequality or reinforces discriminatory attitudes in Canadian society such as verbal and physical harassment goes against the objectives of human rights codes. This reasoning is important for school boards to understand as it provides a very wide scope of interpretation for human rights protections and establishes that any behavior in schools that serves to support or reinforce "persistent patterns of inequality" is subject to appropriate complaints under the Code.

The second important question taken up by this court is the issue of school board liability. The school board tried to argue that it could not be held responsible for the conduct of its students (para. 66). Justice Levine found that although the school administrators took a disciplinary approach that was "effective vis-à-vis individual students who were identified and dealt with, it was not effective in reducing the harassment of Mr. Jubran" (para. 68). She cited earlier relevant cases of school board liability and relied heavily on *Ross v. New Brunswick School District No. 15* [1996] 1 S.C.R. ("Ross") in her reasoning in this case. In the *Ross* case, the Supreme Court of Canada found that "a school board has a duty to maintain a positive school environment for all persons served by it" (at para. 42). In this case, the Tribunal concluded that a school board was liable for the

Meyer, Elizabeth J. (2006) paper presented at the annual meeting of the Canadian Association for the Practical Study of Law in Education, Montreal, QC. May 1, 2006.

discriminatory conduct of its students because of its duty to maintain a non-discriminatory environment. In a similar case in Quebec, *Kafé et Commission des droits de la personne du Québec c. Commission scolaire Deux-Montagnes* (1993), 19 C.H.R.R. D/1, the Tribunal found,

It is the statutory responsibilities of school boards as well as the compelling state interest in the education of young people (Jones), and the school board's obligation to maintain a non-discriminatory school environment for students (Ross) which gives rise to the School Board's duty respecting student conduct under the Code.

As a matter of legislation and case authority, there is a legitimate state interest in the education of the young, that students are especially vulnerable, that the School Board may make rules establishing a code of conduct for students attending those schools as part of its responsibility to manage those schools. Given this, and the quasi-constitutional nature of the Code, I find that the School Board has the duty to provide students with an educational environment that does not expose them to discriminatory harassment. (underlining Justice Levine's) (at para. 115-116) (Que. Trib.).

In his analysis of the case, Paul Howard defends the school board and argues that “the Tribunal’s analysis does not show that the educators’ breach of their duty [let’s assume there was breach] caused the harm suffered by Jubran” (2002b). However, I believe that Justice Levine clearly establishes this connection. In order to meet this requirement, Justice Levine supported the Tribunal’s reasoning and analysis. She shows causation by asserting that the school board’s failure to implement certain policies and procedures “that could reasonably be required to create a discrimination-free school environment” (para. 97) could have provided some relief for Jubran. She refers to the Tribunal’s decision where it listed various potential remedies the school could have provided to meet its duty [par. 89]. This section is important to examine in depth as it can provide a model for steps that schools must take in order to meet the standard of accommodating their students to the point of undue hardship. The Tribunal wrote,

Although Handsworth's administration did turn their minds to Mr. Jubran's situation, and discussed different approaches to dealing with it, the School Board did nothing to address the issue of homophobia or homophobic harassment with the students generally, nor did it implement a program designed to address that issue. Neither Mr. Rockwell nor Mr. Shaw were given any guidance or direction by the School Board on how to deal with the situation. I find that the administration had inadequate tools to work with, and insufficient training and education to deal with the harassment. The

Meyer, Elizabeth J. (2006) paper presented at the annual meeting of the Canadian Association for the Practical Study of Law in Education, Montreal, QC. May 1, 2006.

School Board did not seek assistance from those with particular expertise in the field of harassment, homophobic or otherwise, until Mr. Jubran filed his human rights complaint. By that time, Mr. Jubran was in his fourth year of high school at Handsworth, and the harassment he was experiencing was continuing.

Despite the efforts of Handsworth's administration in dealing with the harassment, when viewed as a totality, I conclude that the School Board has failed to discharge its burden of demonstrating that it accommodated Mr. Jubran to the point of undue hardship. (underlining Justice Levine's) (paras. 160-161)

Lessons for School Boards

School Boards and administrators must learn from this decision as it provides a very clear message about their role in protecting students from discriminatory harassment. In addition to outlining who can claim protections under human rights codes, this case provides a blueprint for schools on what steps to take in order to meet the duty of providing a positive learning environment free of discrimination. Many educators might not be clear on what types of interventions would have helped reduced the school board's liability in this case; therefore I will outline several below. Specific interventions that would have helped this school board demonstrate that it had met its obligations are outlined in detail in the section below.

The first area discussed is that of educating the entire student body -- not just those identified as perpetrators. Possible ways to do this include:

- a. invite outside speakers or performance groups to address the student body or particular classes of students
- b. encourage teachers to integrate issues of sexual orientation and gender expression in the curriculum: History, Art, Moral & Religious Education, English, Science, Drama, etc.
- c. host a human rights week and teach about the *Charter* and equality rights in Canada
- d. create and talk about the school's code of conduct with students and teachers and post it visibly throughout the school
- e. order library materials that give accurate information on sexual orientation and gender expression (books, magazines, films)
- f. show films and facilitate class discussions on homophobia and other discriminatory behaviors and how to report and respond to them

Meyer, Elizabeth J. (2006) paper presented at the annual meeting of the Canadian Association for the Practical Study of Law in Education, Montreal, QC. May 1, 2006.

The second recommendation included implementing an educational program that explicitly covers issues related to homophobia and harassment. Many bullying prevention programs do not talk about equity issues and discriminatory harassment and would not meet this standard. Be sure to incorporate educational programs that explicitly talk about the related issues of social power that come into play in incidences of racial, sexual, and homophobic harassment. The third area for improvement was to provide guidance for school administrators on how to address issues of discriminatory harassment and homophobia in school. Ways to do this include:

- a. Develop clear policies and suggested staff interventions
- b. Create reporting mechanisms and track how incidents are handled
- c. Revise/write codes of conduct so that they explicitly address the complicated issue of homophobia and other forms of discrimination and how staff should respond.

The fourth suggestion was to provide specific tools and training opportunities for school administrators and teachers on how to address issues of discriminatory harassment and homophobia in school. This can be done by creating or seeking out professional development speakers and workshops for school staff and supporting their participation in such events by offering release time or funding to attend. Some school boards have hired full-time personnel to provide such training and support for teachers and administrators.

Finally, the fifth recommendation from the tribunal was for school boards to seek assistance from experts in the field of harassment and homophobia in schools. There are several national and provincial programs that are highly equipped to address issues of homophobia in schools and several models on successful initiatives in North America. In order to locate experts and resources in your region, there are many helpful organizations available online. The following list is a brief sampling of sites to assist educators in connecting with experts familiar with the issues in your area:

- a. www.glsen.org U.S. based education and advocacy organization with the largest library of lesson plans, resource lists, links to local networks, and model school policies.
- b. www.galebc.org British Columbia-based organization that offers an excellent list of informative files for download and links to local resources.
- c. www.algi.qc.ca/asso/gris-quebec A Quebec group that does anti-homophobia workshops in schools and provides links to other support and information initiatives in Quebec.

Meyer, Elizabeth J. (2006) paper presented at the annual meeting of the Canadian Association for the Practical Study of Law in Education, Montreal, QC. May 1, 2006.

- d. www.teachtoronto.ca A Toronto group that offers youth-led workshops on understanding homophobia and heterosexism.
- e. www.nspirg.org A social justice organization based in Halifax that has a working group addressing issues of homophobia and heterosexism.

Conclusion

The Jubran decision should have a strong impact on educators as it holds them accountable for creating a discriminatory learning environment when they do not take affirmative steps to correct such behaviors when they happen. This interpretation is crucially important because in cases of homophobic harassment, it has been repeatedly demonstrated that educators fail to effectively intervene in incidents of anti-gay name-calling and harassment. Additionally, school personnel have been identified by students as perpetrators of such incidents against their students and colleagues (GLSEN 2001; CSSC 2004; Bochenek & Brown 2001). These studies show that homophobic harassment is widespread in North American schools and that many school boards have much work to do in order to meet the minimum standards established by this case.

On April 6, 2005 Court of Appeal for British Columbia restored the Human Rights Tribunal's ruling and the \$4,500 awarded. This reversal was due to the incorrect interpretation of s. 8 of the human rights code by the B.C. Supreme Court judge ("School District No. 44 (North Vancouver) v. Jubran", 2005) par. 5). On October 25, 2005, the Supreme Court of Canada refused to hear an appeal; therefore the original Human Rights Tribunal's decision that was restored by Justice Levine stands. This final step on the long journey of this case effectively gives the endorsement of the highest court in Canada to the decision rendered by Justice Levine. Schools can no longer claim that they are not responsible for student behavior and must take proactive steps in creating a positive learning environment for all students in a school community.

References

- Beran, Tanya N. & Violato, Claudio. (2004) A model of childhood perceived peer harassment: Analyses of the Canadian National longitudinal survey of children and youth data. *Journal of Psychology: Interdisciplinary and applied*. Vol 138 (2) pp 129-147.
- Board of School Trustees of School District No. 44 (North Vancouver) v. Jubran (BCSC 6 2003).
- Bochenek, Michael and Brown, A. Widney (2001) *Hatred in the Hallways: violence and discrimination against lesbian, gay, bisexual, and transgender students in U.S. schools*. New York: Human Rights Watch
- California Safe Schools Coalition and 4-H Center for Youth Development, U. o. C., Davis (2004). *Consequences of Harassment Based on Actual or Perceived Sexual Orientation and Gender Non-Conformity and Steps for Making Schools Safer*. Davis: University of California.

Meyer, Elizabeth J. (2006) paper presented at the annual meeting of the Canadian Association for the Practical Study of Law in Education, Montreal, QC. May 1, 2006.

- Coggan, Carolyn; Bennett, Sara; Hooper, Rhonda; Dickinson, Pauline.(2003) Association between bullying and mental health status in New Zealand adolescents. *International Journal of Mental Health Promotion*. Vol 5(1) Feb 2003, 16-22.
- Kosciw, Joseph G. (2001) *The GLSEN 2001 National School Climate Survey: the School-Related Experiences of Our Nation's Lesbian, Gay, Bisexual and Transgender Youth*. New York: Gay, Lesbian, and Straight Education Network
- Harris Interactive (2001). *Hostile Hallways: Bullying, Teasing, and Sexual Harassment in School*. Washington, D.C., American Association of University Women Educational Foundation.
- Howard, J. P. (2002a). School Board Liability for Student-Peer Harassment and Discrimination: "Deliberate Indifference: and Beyond?" *Education Canada*, 42(1), 32.
- Howard, J. P. (2002b). Following up on Jubran: boards, bullying, and accountability. *Education Canada*, 42(3).
- School District No. 44 (North Vancouver) v. Jubran [2005] B.C.C.A. 201, leave to appeal dismissed (2005), (S.C.C.).
- Sharp, Sonia.(1995) How much does bullying hurt? The effects of bullying on the personal wellbeing and educational progress of secondary aged students. *Educational & Child Psychology*. Vol 12(2) 1995, 81-88.
- Slee, Phillip T. (1995) Bullying: Health concerns of Australian secondary school students. *International Journal of Adolescence & Youth*. Vol 5(4) 1995, 215-224.
- Williams, J. (2005). Homophobic Bullying in School: Interview with Azmi Jubran available online: www.rabble.ca/rpn/rey/45192: Vancouver Cooperative Radio.

About the author:

Elizabeth J. Meyer is a Ph.D. Candidate in the Faculty of Education at McGill University in Montreal, QC and taught for five years in secondary schools in the U.S. and France. She is currently completing research and works with schools on how to improve teacher and administrator responses to various forms of bullying and harassment. She can be reached at: Elizabeth.meyer@mail.mcgill.ca