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Occupation Health and Safety: A Failure to Protect the Right of Workers to Participate in Enforcement

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Résumé de l'article

L'article 50 de la Loi sur la santé et la sécurité au travail (*Occupational Health and Safety Act)* de l'Ontario interdit à un employeur de punir un travailleur qui se plaint d'un trouble de santé et de sécurité et qui cherche à exercer son droit de signaler ce problème. Un travailleur qui subit de telles représailles peut déposer un grief s'il est couvert par une convention collective ou faire une demande à la Commission des relations de travail de l'Ontario (CRTO).

Nous avons étudié l'efficacité de cette protection en examinant 688 dossiers de plaintes en vertu de la Section 50, qui avaient été déposés à la CRTO et conclus entre 2006 et 2017. Nous avons interrogé 25 travailleurs qui avaient subi des représailles après avoir rempli une plainte formelle ou un grief.

La majorité des travailleurs avaient déposé des plaintes concernant un danger physique au travail. Il y avait une allégation de harcèlement et/ou de violence dans 45% des cas : la proportion étant du 50% dans les dossiers où la victime était une femme. L'emploi a souvent pris fin lorsque les plaignants avaient exercé leur droit légal de refuser un travail dangereux, d'appeler un inspecteur ou d'agir en tant que représentant des travailleurs en matière de SST.

Bien que les inspecteurs gouvernementaux de SST aient joué un rôle clé dans la plupart des cas lorsqu'ils ont été appelés pour répondre aux problèmes de santé et de sécurité au travail, la politique gouvernementale les a empêchés d'enquêter sur les représailles. Aucune sanction n'était prévue pour les employeurs qui avaient enfreint l'article 50.

Dans la grande majorité des cas, les plaintes ont été réglées sans réintégration du travailleur et avec un règlement moyen de 5 461 $. Le plaignant a dû accepter un accord de confidentialité dans le cadre du règlement.

S'il est peu probable que le système de règlement actuel encourage les travailleurs à exercer leurs droits, il prévoit néanmoins une certaine compensation pour ceux qui les ont exercés. Dans bon nombre des cas que nous avons examinés, les victimes de représailles étaient confrontées à des risques graves pour leur santé et leur sécurité. Souvent, elles ont utilisé des stratégies qui auraient pu être plus efficaces dans un système qui aurait reconnu et défendu leurs droits. Bien que les règlements à l'amiable n'aient pas permis de reconnaître à la fois les droits et les sacrifices des victimes, nombre de ces travailleurs ont bénéficié de cette option. Considérant que des inspecteurs ont répondu à la plupart des plaintes et les ont examinées, il est possible de considérer qu'une application plus efficace des mécanismes de la loi est souhaitable.

Précis

Les travailleurs ont le droit de participer à l'application des règles de santé et de sécurité au travail. À l'aide d'un examen de 688 cas soumis à la Commission des relations de travail de l'Ontario (CRTO) et de 25 entrevues avec des travailleurs qui sont passés par le processus, nous avons examiné la stratégie de l'État pour les protéger contre les représailles de l'employeur lorsqu'ils exercent leurs droits en matière de santé et de sécurité au travail. Nous soutenons que les recours existants sont importants mais limités. Ils devraient être renforcés par une stratégie visant à faire respecter les droits de participation des travailleurs et par des sanctions dirigées contre des comportements spécifiques des employeurs. En particulier, l'État devrait punir le harcèlement patronal qui se fait passer pour de la surveillance.

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Occupation Health and Safety: A Failure to Protect the Right of Workers to Participate in Enforcement

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Summary

Section 50 of the Ontario *Occupational Health and Safety Act* prohibits an employer from punishing a worker who complains about a health and safety concern and who seeks to exercise the right to raise or report this concern. A worker who suffers such a reprisal may file a grievance if covered by a collective agreement or make an application to the Ontario Labour Relations Board (OLRB).

We studied the effectiveness of this protection by reviewing 688 OLRB section 50 complaint cases that had been filed and concluded between 2006 and 2017 and by interviewing 25 workers who had suffered reprisals and completed a formal complaint or grievance.

The majority of the workers had filed complaints about a physical work hazard. There was alleged harassment and/or violence in 45% of the cases. There was harassment in half of the cases involving women. Employment was frequently terminated when the complainants had exercised their legal right to refuse unsafe work, to call an inspector or to act as a worker OHS representative.

Although government OHS inspectors played a key role in most cases when called to address occupational health and safety concerns, they were prevented by government policy from investigating the reprisals. There was no penalty for employers who had violated section 50.

In the vast majority of cases, the complaints were settled without reinstatement of the worker and with an average settlement of $5,461. The complainant had to accept a confidentiality agreement as part of the settlement.

While the current settlement system is unlikely to encourage workers to exercise their rights, it does provide some compensation for those who have exercised them. In many of the cases we examined, the reprisal victims were faced with serious risks to their health and safety. They were not faced with a choice so much as a necessity to act. Often, they used strategies that could have been more effective in a system that recognized and defended their rights. Although the settlements were inadequate in recognizing both the rights at stake and the victims' sacrifices,

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many of these workers did benefit from that option. Given that inspectors had responded to most of the complaints and investigated them, there is a basis for more effective enforcement.

Abstract

Workers have a right to participate in enforcement of occupational health and safety. Using a review of 688 cases submitted to the Ontario Labour Relations Board (OLRB) and 25 in-depth interviews with workers who went through the process, we examined the state's strategy to protect workers from employer reprisals when they exercise health and safety rights at work. We argue that the existing remedies are important but limited and should be enhanced by a strategy of enforcing workers' participation rights through sanctions directed against specific employer behaviours. In particular, the state should sanction employer harassment that masquerades as supervision.

Key words: occupational health and safety; worker participation; worker representation; worker health and safety rights; enforcement; reprisal; discipline

Résumé

L'article 50 de la Loi sur la santé et la sécurité au travail (*Occupational Health and Safety Act)* de l'Ontario interdit à un employeur de punir un travailleur qui se plaint d'un trouble de santé et de sécurité et qui cherche à exercer son droit de signaler ce problème. Un travailleur qui subit de telles représailles peut déposer un grief s'il est couvert par une convention collective ou faire une demande à la Commission des relations de travail de l'Ontario (CRTO).

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comportements spécifiques des employeurs. En particulier, l'État devrait punir le harcèlement patronal qui se fait passer pour de la surveillance.

Mot-clefs: Santé et sécurité au travail; participation des travailleurs; représentation des travailleurs; Droit de la santé et la sécurité au travail; représailles; discipline

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Introduction

Launched along with the civil rights movement, the women's rights movement and the environmental movement in the 1960s, worker participation promised workers a say in the conditions of work independently of their employer. Supported by unions in the workplace, there was a blossoming of worker health and safety activism and representation in the 1970s. By the late 1980s, however, political and economic forces had slowed progress to a crawl through a combination of changes in work organization, government deregulation and cooptation. Unions, which were a key support for worker occupational health and safety (OHS) representatives, declined in influence as political and economic changes undermined the opportunities to organize. Together, these changes have left the future of worker participation in occupational health and safety in doubt.

The workplace is only one space through which workers can advance their participation in health and safety. Workers can also appeal directly to the state for protection. Few studies have looked at state practices for enforcing workers' rights to participate. This paper will describe the experiences of workers with such enforcement in Ontario. Drawing from government policy and practice, from Ontario Labour Relations Board (OLRB) case files and from interviews with workers, we will describe a system that provides limited sanctions against employers who resist worker participation and who undermine the workers' role in health and safety matters.

Drawing on David Walters and Eric Tucker in particular, Part 1 will review the history of worker participation to make the case for examination of state enforcement of the right to participate. In Part 2, we will examine the Ontario case by outlining workers' rights, by identifying the state's powers, by documenting the state's policy of limited enforcement of the prohibition against reprisals and by describing the OLRB's role in adjudicating complaints by victims of reprisals. Part 3 will be in two parts. The first part will explore the experiences of victims who had filed for OLRB compensation, through a review of 688 closed case files of reprisal complaints. The second part will be an analysis of 25 interviews with workers who had filed and completed a complaint. Part 4 will be a discussion followed by conclusions.

Part 1: History of Worker Participation in Occupational Health and Safety

Worker participation became central to occupational health and safety only in the 1970s. Previously, in developed countries with English law backgrounds, the legal regime was *volente non fit injuria*; workers voluntarily undertook the risks and therefore the consequences of the hazards in their employment. When individual workers sought remedies for damages through the legal process, judges regularly overturned jury awards. Only after considerable social activism by workers and unions around the turn of the 20th century did this start to change. Governments initiated limited direct regulation of workplaces and passed workers' compensation laws for injured workers and their survivors (Tucker 1990). This system remained in place until the 1970s (Tucker 1995). A health and safety movement emerged through radicalization of union activists with outreach to community-based organizations, progressive academics, physicians and others. In the United States, Tony Mazzocchi inspired an entire generation to bring about the Environmental Protection Act and the Occupational Health and Safety Act (Leopold 2007). In Great Britain, Australia and Canada, royal commissions were appointed in response to extensive efforts by unions and would play a key role in transforming the demands of workers into a legislated

structure of participation (Robens 1972; Ham 1976). Similar struggles for worker participation took place in Sweden, Germany, Italy and other European countries (Ponce Del Castillo 2016). The successes launched a wave of activism by union health and safety representatives (Walters 2006).

Worker participation was justified as good policy and practice on several grounds. Workers have a moral claim to safe work. “We came here to work, not to die” was a powerful rallying cry that still resonates. Participation rights convey an expectation that workers would be informed and could participate in identifying and recommending change, and that their employer would act on their concerns. Worker participation quickly became a part of international law and has since become enshrined in international human rights (Hilgert 2012). There are practical grounds as well. Worker participation makes it easier to identify hazards and rectify them. Employers benefit from reduced costs and penalties, improved employee satisfaction and a good reputation in the community. Society benefits because improved health and safety reduces social costs such as health care and welfare, not to mention the personal impacts on families and communities (Tucker 2013; Spieler 2016).

It soon became apparent that neither governments nor employers nor unions were prepared to give workers or their representatives more say over working conditions. Employer pushback and government wariness were evident from the beginning (Sass 1989). Worker participation has always been limited by the dominant paradigm of an employment relationship in which a worker is subordinated to the employer. With the adoption of new laws encouraging worker participation, there nonetheless began a rise in health and safety activism. In Ontario, the labour movement was able to leverage funding for two resources: the Workers Health and Safety Centre (WH&SC), which provides worker representatives with OHS training, and the Occupational Health Clinics for Ontario Workers (OHCOW), which provide workers with technical and diagnostic skills. Many unions and union centrals run schools and organize conferences for worker OHS representatives.

David Walters has explored the effectiveness and challenges of worker OHS representation in several major studies. In 2004, he pointed to its effectiveness in a compelling argument for stronger legislative support of such representation in the UK. Evidence from multiple sources has shown that trained representatives with union support can bring about significant improvements. The existing UK law does provide a framework for participation and worker representation, but long-term improvement requires enforcement of those rights, and the decline in union representation has left many workers unrepresented on OHS matters (Walters 2006). The potential and challenges of worker OHS representation were further reviewed in 2007 in a collection edited by Walters and Nichols.

Ontario workers have faced similar challenges (Tucker 2013). In the 1980s and early 1990s, union leaders pushed for formal bipartism in the expectation that OHS could be jointly overseen by management and labour (Bernard 1995). The idea was embraced by liberal and social democrat governments but viewed less sympathetically from the mid-1990s onward with the election of a conservative government that embraced neo-liberal policies (Tucker 2003). Within the union movement, there were debates over how to respond to this policy shift, the underlying issue being a conflict in strategy over how worker OHS representatives should deal with the employer. One strategy assumed that labour and management had a common interest in OHS and could work together to solve health and safety problems. In Ontario, this joint approach was formalized around *the internal responsibility system* or IRS, which left management in control. With the increasing dominance of management safety systems, working together came to mean workers doing what they were told. Another strategy was overtly political and would sometimes lead to the employer being confronted and publicly denounced; it had played a major role in securing legislative change in the first place. Training and information were thus seen as important but not sufficient (Hall et al. 2006). Between these two strategies, there emerged a middle ground that retained a political approach while pushing for independent research, education of coworkers

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about alternatives and full use of workers' rights to participate. Dubbed "knowledge activism," a subsequent survey demonstrated these worker representatives were more effective than those who followed a more legalistic and technical approach to health and safety (Hall et al. 2016). Walters and Wadsworth's review of worker participation in Europe highlights this divergence of approaches. In a large qualitative study of practices in 143 establishments in seven countries, they found that a minority of union OHS representatives employed "knowledge activism." The majority were confronted with indifferent management, marginalized by management safety systems and often incorporated as agents of management (Walters and Wadsworth 2020).

Worker OHS representation and participation still has limited impacts, as shown by research ten years after participation rights had been adopted in Ontario. In the unlikely event of a worker reporting a health and safety concern, it would more likely be reported to the supervisor than to a worker OHS representative (Walters and Haines 1988). Knowledge of rights correlated only with a willingness to report hazardous work and not with health and safety concerns (Walters and Denton 1990). Most workers were silenced by fear of confrontation and fear of loss of work. As employment security weakened during that time, this fear became widespread among precariously employed workers (Lewchuk 2012). Instead of becoming more confident, they used patience as a strategy, preferring to use less confrontational alternative strategies if the concern was serious enough to warrant action (Gray 2011). Some workers conformed to the behaviour of a "good worker" and lowered their health and safety expectations (Zoller 2003). With a decline in solidarity due to technological change, workers were increasingly working alone with less control over what they were doing (Richardson 2008). From the interpersonal relationship between worker and manager to the "unwritten rules" of how work should be done, there were risks of discipline and termination if the level of participation rose above mere compliance. Although "knowledge activists" identified the importance of educating and organizing co-workers, many worker representatives did not see those tasks as their responsibility (Hall et al. 2006; Hall et al. 2016; Ollé-Espluga et al. 2019).

Right to Participate and Fear of Reprisals

Workers enjoy the legislated right to participate in health and safety matters only when they can engage with employers without fear of reprisals. The government has protected and extended participation rights only to a limited degree. Even labour-friendly governments have been unwilling to strengthen workers' protections from reprisals or extend their representation to give them a voice at work. Whenever this has been done, the changes have been reversed by subsequent right-wing governments.[1] As a result, individual workers and their representatives remain at risk of employer reprisals for enforcing their participation rights.

There are few studies of state action to protect workers against reprisal. Two of them have shown that this protection has been narrowly interpreted by tribunals that do not want to impede management's overall control of what workers do (Walters 1991; Harcourt and Harcourt 2000). In a study of "whistleblower" protection under American OSHA legislation, Spieler (2016) demonstrated a systemic failure at the federal level to investigate and pursue workers' complaints and called upon state OSHA authorities to act. She concluded that the federal law provided workers with no encouragement to report unsafe conditions (Spieler 2016). Rozen (2013) examined state and federal legislation in Australia. In addition to compensation mechanisms, he identified criminal sanctions and described a successful prosecution of an employer for discriminating against a worker for raising a health and safety concern. There were too few cases from which to draw any conclusion as to the effectiveness of such legal action (Rozen 2013).

In 2009, the Ontario Federation of Labour (OFL) commissioned a law student to investigate complaints that workers' rights to participate were not being enforced in Ontario. The resulting report called "A Culture of Fear" was submitted to an expert health and safety panel that the

government convened after 4 workers had fallen 30 metres to their deaths following the collapse of a swing stage attached to the side of an apartment building. Recommendations were made and adopted to provide representation to any worker who had no union and who claimed to have suffered a reprisal. With the adoption of this recommendation in 2012, responsibility was assigned to the Office of the Worker Advisor (OWA), a government department that represented injured workers in workers' compensation cases. A coalition of worker OHS representatives, occupational health clinic staff and researchers called LOARC conducted a study of worker representation and confirmed earlier findings that knowledge activism was an effective strategy for worker participation (Hall et al. 2016). They approached the OWA, the OFL and the OLRB to carry out more detailed research on the experiences of workers who claimed to have suffered reprisals. Funding for the study came from the Ontario Ministry of Labour.[2]

Part 2: The Occupational Health and Safety Act and Reprisal Complaints: The Ontario Case

The *Occupational Health and Safety Act*[3] (OSHA) imposes responsibilities on employers[4] and enforces them through an inspectorate it created.[5] Inspectors have the power to inspect, investigate, order specific actions and prosecute.[6] They have two sanctioning powers: shutting down unsafe work[7] and prosecuting contraventions of the Act and failures to comply with their orders.[8] Under Canadian constitutional law, these are called regulatory offences although they function like criminal sanctions. Criminal law sanctions are available but seldom utilized and also controversial (Bittle 2012).

Workers have to comply with the *Act* and report any defects in equipment or hazards that come to their attention.[9] They are entitled to know the hazards they face, to participate in prevention and to refuse unsafe work.[10] Representation is determined in one of two ways. Employers with 20 or more regularly employed workers are required to have joint health and safety committees, and the workers must choose half of the committee members.[11] Employers with 6 to 19 regularly employed workers are required to have a worker OHS representative chosen by the workers.[12] The legislation prohibits an employer from disciplining a worker in any way for actions taken under the Act, including filing a complaint, exercising a right provided by the Act, attempting to get the employer to address a hazard or providing training or any other duty prescribed by the legislation.[13] This is the reprisal prohibition examined in our paper.

The Ministry of Labour (MoL)[14] is responsible for OSHA and employs the inspectors, who are guided by MoL policy. At the time of our study (2015-2019) this policy was set out in the Ministry of Labour Operations Division Policy and Procedures Reference Manual.[15] The policy on reprisals begins as follows:

> The prohibition of reprisal in Section 50 is fundamental to the functioning of the Internal Responsibility System. Inspectors must respond to reprisal allegations on a priority basis.
>
> 4.11.7.1

This response has limits, however:

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> When notified of a reprisal allegation, inspectors attend the workplace and issue appropriate orders for any underlying health and safety violations that may have led to the reprisal complaint. Inspectors shall not investigate the issue of whether there has been a reprisal. They shall not make a determination as to whether a reprisal has been committed, nor shall they take any enforcement action with respect to any alleged act of reprisal.
>
> 4.11.7.2

Nor can the inspector issue orders under the Act:

> To avoid unnecessary duplication of proceedings at the OLRB, the inspector shall not issue any orders under OHSA Section 50 with respect to the alleged reprisal.
>
> 4.11.7.3

On the one hand, the inspector must treat a reprisal complaint as a priority and investigate the underlying health and safety concern. On the other hand, the inspector cannot address that complaint or collect evidence that could be used for prosecution.

The Ontario Labour Relations Board and Reprisals

The OLRB was created in 1948 to administer the *Labour Relations Act* (*LRA*), which governs collective bargaining between employers and trade unions.[16] In 1976, it was given responsibility to hear workers' complaints about health and safety reprisals.[17] It does not investigate health and safety claims and has no health and safety expertise or experience. It receives representations from the different parties. In the case of reprisals, the parties are individual workers and their employers. Since 2012, non-union workers have been able to receive OWA help for representation in reprisal cases.[18]

When addressing reprisal complaints, the OLRB is directed to utilize the same procedure and principles that are set out in the *Labour Relations Act* to determine labour relations issues.[19] First, a Labour Relations Officer is appointed to mediate and attempt a settlement.[20] Settlement is the preferred form of resolution in labour relations where both parties have an ongoing relationship.[21] Its use in resolving reprisal cases has received less study. When a settlement cannot be reached, the OLRB may hold a hearing at which the complainant and the employer present witnesses and legal arguments and the tribunal makes a decision. In reprisal cases, the OLRB has the authority to order reinstatement of the worker to the position held before the reprisal and compensation. Reinstatement with full compensation is presumptively the appropriate remedy in cases where employment has been terminated.[22] If reinstatement is not possible, the appropriate remedy is payment of lost wages from the date of the incident to the date of the hearing. The OLRB has no jurisdiction to punish the employer or award punitive damages.[23] The worker has a duty to mitigate her or his losses if the reprisal was termination (such as looking for and finding other employment).[24] The OLRB holds mediation meetings and reprisal hearings only in Toronto and does not award legal costs.

Vivienne Walters reviewed decisions from the 1980s in cases where the OLRB heard complaints about reprisals carried out because the complainant had exercised the right to refuse hazardous work. She described the challenges the Board faced. The OLRB relied on the existing social relations of the workplace as the frame within which it considered how the worker acted and the reasons for doing so. It recognized the importance for the employer in maintaining control of work and production and considered how the worker acted in that light (Walters 1991).[25] The result was

a narrow and restrictive interpretation of worker rights, which has continued. Raising concerns through foul language or yelling, for instance, can lead to reduced wages even when the worker was justified in refusing unsafe work.[26]

Hearings are the exception, rather than the rule, in cases where workers claim they have suffered reprisals for having exercised their right to participate. Since 2016/17, the OLRB has received over 200 reprisal complaints each year. In 2017/18, for example, only 47 decisions were based on hearings out of 278 cases closed. Workers won 8 and lost 39.[27] These proportions have remained relatively stable. In 2020/21, the OLRB made only 32 decisions out of 222 cases closed. Workers won 5 and lost 27. Generally speaking, the worker loses when the OLRB makes the decision. This is consistent with Vivienne Walter's analysis and with the disproportionate resources of the employer versus those of the worker. The majority of the reprisal complaints are not lost, however. In 2021, 92% of cases closed were settled in agreement with the complainant.[28] The terms of settlement are not publicly reported. The OLRB considers case files to be confidential, disclosing only the names of the parties and the decision.[29]

In reprisal cases, the OLRB requires each party to fill out forms in which all the facts are set forth, as understood by that party. The forms must be served by the applicant on the respondent within a specified time and then filed with the OLRB. Failure to comply will lead to rejection of the complaint. The form filed by the complainant must disclose a minimal or *prima facie* explanation of how the worker's rights were violated.

Part 3(1): The Experience of Reprisal Victims: OLRB Case Files

We reached an agreement with the OLRB for access to files of closed cases of reprisal complaints filed between 2007 and 2017 on the condition that we maintain strict confidentiality by anonymizing any information we retain. We took note of the types of hazards raised, which worker rights were involved, the employer's reaction and the findings of any investigation, as well as available demographic information. The final disposition of the case was recorded along with details of the terms of settlement. We had a list of 1,280 complaints. Because our original goal of reviewing all the files proved to be impossible, given the time constraints and the amount of material to be reviewed, we randomly selected 688 cases for review: half had been filed between 2007 and 2013 and the other half between 2014 and 2017. We collected the data for entry into STATA software and analysis.

Complainants and Respondents

Our sample had a wide range of workers with very different characteristics. There were twice as many men as women. Workers who reported reprisals tended to be younger (<35), have less seniority, have lower incomes and be less often in permanent full-time positions. A significant number were over fifty-five years of age, earned more than $50,000 or were temporary employees.

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CHART 1

Complainants

Gender	68% male		32% female		
Age	10% 25 or younger	21% 26-35	21% 36-45	35% 46-55	13% 46-55
Status	71% permanent full-time	18% temporary, contract		11% permanent part-time	
Salary (per year)	72.2% less than $30,000	13% $30-40,000	9% $40-50,000	6.4% over $50,000	
Union	19.9%				
Service (at time of reprisal)	15.4% on probation	49% < 1 year	21% 1-2 years	13% 3-5 years	17% 5 years

Sixty percent of the complainants were represented in their complaint at the OLRB. They were most often represented by the OWA (26.7%), followed by a legal representative (23.7%) and a union representative (8.9%). The OWA first represented complainants in 2013, after which it represented just over one-third of all complainants (34.6%). Only 20% of the complainants were union members.

Employers in the sample were also diverse. The majority were private for-profit corporations, with only 15% from the not-for-profit and/or public sector. Surprisingly, almost half were large (>500 workers) and only a third were small (<100). Only 40% were local businesses. In this sample, the problem of reprisals was not limited to small local businesses or a particular kind of business. Representation for employers was twice as frequent as that of workers, with more than half of them being represented by lawyers, a difference reflecting the overall disparity in resources.

CHART 2

Respondents

Type	85% private for-profit organizations	15% not for profit/public			
		52% Gov	34% PS	8% Charity	4% Union	1% Temp
Size	45% large	24% medium	31% small		
Representation	82% (56.4% by lawyers)				
Scale	41% local	20% regional	6% provincial	11% national	22% international
Sector	42% services	29% manufacturing	15% construction	14% public	

Nature of Complaints

In 84% of the cases, the reprisal had been termination of employment. Overwhelmingly, non-union complainants had suffered termination as the reprisal (92.4%), as opposed to only half of the union complainants (50.4%). The rest had complained about a negative change in working conditions. Reprisal complaints fell into two broad categories: work hazards (safety, chemical, biological, lack of training etc.) and violence and/or harassment. In 2010, violence and harassment were specifically added to the OHSA as workplace hazards with procedures that differed from those for physical hazards.[30] Many reprisal complaints were for violations of rights exercised by the workers, including refusal to do unsafe work, acting as a worker OHS representative and/or calling or threatening to call an inspector. Influenced by Gray's observations on formal and informal rights (Gray 2011), we divided the unsafe work refusals into two categories: those where the steps set out in the legislation had been followed (formal violation) and those where they had not been (informal violation). In the case of an informal violation, the worker was usually fired immediately or shortly after refusing work, without an investigation and without the employer contacting an inspector as required by the legislation. We also divided the worker representatives into two categories: those whose status as a worker representative was explicit (formal violation) and those who, while acting on behalf of coworkers, had no formal status (informal violation).

CHART 3

Stated Reasons for Reprisals by Complainants

Type of Reprisal	Number of Cases	% of 688
Hazard (93%)		
Work hazard	459	66.7
Harassment	213	31
Violence at work	94	13.7
Workers' Rights (43.2%)		
Was acting in an OHS role	153	22.2
Formal	62	9
Complainant called inspector	199	28.9
Work refusal	191	27.8
Formal	56	8.1

Almost 45% of the cases involved harassment and violence, both of which disproportionately affect women. In our sample, 48.1% of the women and 23.4% of the men complained about harassment, which most often took the form of intimidation (65.0%) or criticism (47.0%). Researchers have identified the challenges that these and other psychosocial hazards present for worker representatives (Ollé-Espluga et al. 2014; D. Walters 2011).

Right to Participate and Reprisals

Workers would frequently say they were terminated because they had exercised their right to participate, as defined by existing legislation. Often, termination was due to the insistence with which the worker raised the concern, sometimes together with the worker refusing to do the perceived unsafe work or threatening to call an inspector to resolve the matter. Representation

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made a difference. Complainants who were also worker representatives were less likely (67.6%) to be terminated than those who were not (85.9%). Complainants who were helped by a worker representative were more likely (37.5%) to report changed employment conditions as the reprisal than those who were not helped by a worker representative (17.3%). However, there were only a few cases where the complainant mentioned help from a worker representative or joint committee.

Respondent employers denied that they had carried out a reprisal against the complainant. In 83% of the cases, they acknowledged the complainant's description of the events. Two-thirds of them (68.6%) admitted to at least part of the complaint. They most often explained the alleged reprisal by saying that the worker had been insubordinate (37.6%). In 45.5% of the cases, the employers said they had been justified in disciplining the complainant.

Workers have the ultimate right to contact an inspector to address what they believe are hazards at work when their employer is unwilling to address them. Almost half (48%) of the complainants in our sample had contacted an inspector. When contacted, the inspector came to the workplace 88% of the time. Of those who came and conducted an inspection, a field report was filed in 75% of the cases. In the reports, the inspectors described their investigation into the health and safety complaint. Of the field reports filed, 73% described the problem leading to the complaint. The reprisal was mentioned in only 37% of the filed reports. In those cases, the inspector mentioned the enforcement activity of giving the employer a pamphlet outlining the prohibition against reprisals. Inspectors issued at least one order in 40% of the cases they had been asked to investigate. Orders included improved worker training in 44.3% of the cases and an order to establish a joint OHS committee in 32.0% of the cases.

How the OLRB Settled Reprisal Complaints

Only a small number of the cases in this sample were either closed by the OLRB on procedural or *prima facie* grounds (10%) or resolved by an OLRB hearing (5.8%). In almost 86% of the cases, the OLRB dismissed the complaint because of a settlement or with the complainant's consent. In 79.2% of the settled cases, the terms of settlement had been filed and an agreed-upon sum of money was stated. The terms of settlement were in standard legal language and often used a standard form. The employer did not admit liability and the worker agreed that the settlement, and anything else related to the employer, would remain confidential. If the worker failed to keep the settlement terms confidential, the agreement would be nullified and the money returned.

CHART 4

How Complaints Were Resolved

	Number	% of 688 cases
OLRB terminated case	69	10%
Terminated no *prima facie*		26.1% (of terminated cases)
Settlement reached	510	74.1%
Terminated with consent	81	11.8%
Settlements filed		79.2% (of settled cases)
Settlements averaged $5,000 or less		68.3% (of settled and filed)
Hearings	40	5.8
Awarded	10	1.4
Dismissed	30	4.4

Most complainants received a monetary settlement of $5,000 or less (68.3%). About one-third (31.7%) received more. The average monetary settlement was $5,461. Generally, workers received larger payments if they had more seniority and higher employment status. The money was characterized as damages in 54.2% of such cases and as wages in 18.0%. The settlement payments were taxable when paid as lost wages but not when paid as damages. Representation was critical to receiving payment as damages instead of as lost wages. Characterization of payment as either damages or lost wages did not appear to influence the amount of the settlement.

Most reported hazards appeared to be legitimate and within the scope of the legislation. Complaints about harassment and violence were significant forms of reprisal, this finding being in line with other research on such behaviour and growing concerns about workers' rights in this context (Lippel 2018). While not amounting to proof, our findings offer a contrast to the view, based only on reported decisions, that most complaints are without merit. Settlement is a success for a complainant on many grounds. However, the pressures to settle are built into the system, and there is no counterweight to the employer's advantages, such as access to legal resources. For this reason, the settlements are generally small and do little to deter employers.

In sum, being officially a worker OHS representative seems to have provided more protection than acting on one's own, and exercising one's rights was the reason for reprisal in a third of the cases. Although employers frequently justified their actions by characterizing the complainant as insubordinate, they also frequently agreed with the complainant's description of the facts; consequently, the real problem may have been the worker's challenge to their authority. Most disconcerting were the cases where the worker was terminated for calling an inspector. The inspector's investigation frequently aligned with what the worker had described. The reports substantially supported the reprisal complaints although they did not appear to influence the amount of the settlement payment or the employer's behaviour toward worker participation.

Part 3(2): Experiences of OHS Victims—Interviews with Workers

While the OLRB case data shed light on the system of compensation in general, interviews with workers helped us explore the motivations and experiences in greater depth. Because of our confidentiality agreement with the OLRB, we could not use case file information to contact complainants. We instead sent out an invitation to participate in our study through the networks of the OFL, the WHSC and the OWA. The inclusion criteria were that the participants had experienced an OHS reprisal and filed a complaint under the legislation, and that the complaint had been concluded.

Fifty-six individuals contacted the researchers. Twenty-six did not meet the inclusion criteria, and thirty were contacted. Twenty-five respondents were interviewed. Five declined to participate or did not respond to a follow-up. Strict confidentiality rules were established to protect participants and to respect confidentiality undertakings that had been given as a settlement condition. Interviewees were identified by number only and asked not to identify themselves, their employer or anyone else involved by name during the interview. If the complaint had been settled, no questions were asked about the terms of settlement. Questions were open-ended. The research protocol had been approved by the McMaster Board of Research Ethics. Interviews were transcribed and reviewed systematically to identify key themes and representative quotes that preserved narrative integrity.

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Of the 25 people interviewed, twelve were women and thirteen were men. Only one interviewee was not represented during the reprisal complaint. Seven workers were represented by their union and 17 by the OWA. All the union member cases were resolved through arbitration. The remaining cases were resolved at the OLRB. Five of the union members (1,4,5,6,8) were worker OHS representatives. Their reprisals included direct interference in their role as OHS representative through harassment and, in two cases, through termination. Of the remaining two union members, one (2) alleged a reprisal because of her refusal to do unsafe work and the other (7) experienced unwanted touching from a supervisor. In the cases of the non-union workers, four (20,21,22,25) suffered reprisals related directly to their speaking out against unsafe conditions, three (14,16,18) were victims of harassment and one (17) was a victim of an employer assault. Two workers (2,9) were wrongly blamed for work accidents and, when they objected, were terminated. Two workers (15,23) refused unsafe work, were relieved of work for the rest of the day and then fired, thus allowing the employer to avoid calling an inspector. Two non-union workers were worker OHS representatives and fired for their activity as representatives. Four interviewees carried out supervisory duties. Three were terminated for trying to enforce health and safety rules. One suffered harassment and was fired. One interviewee was a contractor who was terminated for her efforts to identify the unsafe conditions that led to her injury.

How the Reprisals Were Resolved

None of the terminated workers were reinstated although several stated that they had wanted to be. Worker 6, a union OHS representative with over ten years seniority and strong union support, had expected to be reinstated until he was confronted by the arbitrator assigned to hear his case:

> They tried to get me to settle for whatever they could and when I said, 'No, I want my job back, I'm going back because I did nothing wrong,' they just kept upping the ante and when the arbitrator saw this [he said]: 'You know what? Let's make some sort of a deal here.' They just twisted my arm with more money. Finally, the arbitrator sits in front of me and says: 'Look, if I were you I'd take the money... They want to get rid of you. They're going to get rid of you, whether it's now or later.'

Worker 8, a union-supported OHS representative, was told by his union that they would support him, while warning him about the unlikelihood of reinstatement:

> Not only are you going to have a paper bull's eye but you're going to have it tattooed on your back. They are going to be in there on you, watching you 24/7, 7 days a week.... They would terminate me again and I'm like, 'This is the only time I'm going through this process. I don't want to keep fighting to keep my job for someone who really doesn't want me to work for them.'

Workers 6 and 8 settled without reinstatement. These worker representatives were aware that their employer, by getting rid of them, was sending a message to the other workers. As worker 6 put it:

> The real loss wasn't necessarily me but the fundamental belief that I can stand up for myself on health and safety concerns and not be reprised against because the message that was sent to the entire plant is, 'Here's the head guy. The guy that's the certified member who's talking safety up and down and what happened to him? He got canned.'

The OWA-represented complainants were advised to settle because they had no prospect of reinstatement. The hearing process would take a long time, witnesses would have to testify, including the complainant, and there was a high risk that the OLRB would decide against them. While this was frustrating, worker 15 was incensed to find out his employer would not be punished:

> I told him [the Mediator], I don't care about the money that I'm going to get. This guy should be fined, put in jail, whatever. He should be—his hands should be wrapped. Put out of business or whatever. Q: When you said that, what was the response? A: 'Well, we can't do that. This is not about that. This is not about that! This is about getting you your settlement and resolving this issue' and I'm thinking, this is a health and safety issue. This guy broke the law!

Initially worker 21 originally wanted to fight his case:

> Q: Why did you not want to settle? Why did you want to fight it out?
> A: Because these things get settled out and nothing ever happens, nothing ever comes out.

He settled when he realized that nothing was going to happen to his employer regardless. Worker 18 had been fired for filing a harassment complaint, and he was surprised by the lack of concern:

> I feel like I was let down by the system... I would rather see I get reinstated back in the company. Mind you I probably wouldn't have stayed but just for principle get reinstated and they have to acknowledge the fact that they were wrong in firing me.

Reprisals and the Right to Participate

Dissatisfaction was acute in those cases where the complainant had been terminated for having contacted the inspector. That was the reason for the termination of ten interviewees who had contacted the Ministry about their health and safety concerns. Five of them were union members (2,4,5,6 and 8), four were non-union (16, 20, 24 and 25) and one was a manager (11). Worker 25 had asked an inspector to investigate a workplace concern. The inspector told the employer in front of her that reprisals were prohibited. Then:

> She [the employer] gave me a working notice that I was fired. That my employment was terminated. Immediately after he [the inspector] had told her not to do that.

Prior to contacting the Ministry, these workers had attempted to address a health and safety issue. Having utilized the IRS to raise the issue and having received no satisfaction, the workers turned to an inspector to break the impasse. In all but two cases, the inspector's assessment of the issue supported the worker. Worker 20, unable to get her manager to address safety concerns about the operating equipment, took photographs and contacted an inspector:

> ... he [the manager] fired me right away after they had to post a report of the inspection. He [the manager] glorified over the fact that he was firing me and I felt very bullied in the office when he did it.

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In these cases, the inspector followed up with the workers to report the outcome of the investigation and, in several cases, advised on how to file a reprisal complaint. In one case, Worker 16 called the inspector a second time to tell him that he had been terminated. The inspector called the employer and explained that such reprisals were prohibited. The employer rehired the worker. However:

> When I did come back, boy, every day he [the owner] was yelling at me. Never before that but afterwards, every day he was out yelling at me and telling me my work was no good. Telling me I was an effing lazy or whatever I was. Effing the dog or whatever it was he was saying.

Workers 1, 4 and 5 were union worker OHS representatives who had experienced a campaign of harassment from their immediate managers for their persistence in addressing health and safety concerns. They filed a complaint, and the arbitrator ultimately settled in their favour. Afterwards workers 4 and 5, although senior and experienced, stopped being active in the union and in health and safety because of stress from the experience. Worker 1 continued with the support of his union in the face of a supervisor's ongoing harassment.

There are noteworthy similarities between the experiences of those who were harassed for raising health and safety issues and those for whom harassment and violence were the health and safety issues. Two women (12,14) and two men (16,18) were harassed and terminated when they complained to management. In each case, the employer was unwilling to deal with the harasser and instead decided to terminate the complainant. As with a reprisal complaint, a harassment complaint would not be investigated, mediated or decided in the same way other hazards would be.[31] Similarly, when workers were harassed by their employer for raising a health and safety concern, the inspector would ignore the behaviour and address only the health and safety concern. Enforcement practice would shield the employer from punitive action in cases where harassment had been used as a tool of management supervision, in much the same way as the OLRB case file decisions discussed above.

Elements of knowledge activism were practised by all the interviewees who were union worker OHS representatives. These workers took a position independent of their employer and utilized the IRS strategically to get their concerns addressed (Hall et al. 2016). Unable to make headway in discussions and meetings with management, they contacted an inspector to settle the dispute and then were harassed and/or fired. In one case, worker 21 had management experience with health and safety, and the employer initially responded to some of his concerns. He was terminated when he started documenting them in writing. In these cases, the workers trusted the approach they were taking because they knew they were following the IRS and knew what the law required. They were surprised when they were summarily fired and were among the most indignant when they learned that there would be no penalty for the employer.

The IRS played a minor role in most non-union cases. There were no joint committees or worker representatives. Even where a committee existed, workers suffered reprisals when they asserted their rights. Two interviewees had been worker OHS representatives when they suffered reprisals. Worker 13's employer had a joint OHS committee, which she had joined after being injured.

> I joined the Joint Health and Safety Committee to try and help out. Prevention is better than cure and, on the committee, I felt like I would have a good platform to bring my concerns and actually be able to do something in order to propel change.

She persisted in her demands through the joint committee to improve personal protective equipment and was terminated despite recently receiving a wage increase and compliments for her customer service. She had to settle because her abrupt termination had left her unable to pay childcare expenses. Worker 16 had been recruited by his employer and took training to be a worker representative. Concerned about inadequate protective equipment, he raised this concern several times but to no avail and finally threatened to call an inspector. His foreman bluntly told him that he would be fired if he did. He made the call, and the inspector came in and confirmed that the equipment was inadequate. Worker 16 was fired after the inspector left.

These 25 workers are not that different from those in our sample of OLRB cases. Our interviewees understood their right to participate and were persistent. Their employers responded by firing them for raising health and safety issues and exercising their right to seek an inspector's help. Worker voice and representation were seen as direct challenges to management, which reacted with harassment and termination. Management was just as insensitive to harassment concerns, even in the most egregious of circumstances. Those who challenged harassment were driven out of workplace health and safety activism or terminated. The employers' actions were protected as an extension of their right to govern and not prosecuted as a violation of health and safety rights.

Part 4: Discussion

Our general findings are consistent with other findings on worker participation. Despite the strong official statement of support for worker participation in health and safety matters and a clear prohibition against reprisals, the state has weakly enforced this support and prohibition. When victims of reprisals seek remedies, the state encourages them to accept settlements that leave most of them out of a job and with limited financial compensation.

There was some financial compensation for a large majority of the victims who had filed a formal complaint. The process was easier than it would be in the courts, and representation was available in many cases. There was no compensation for the time spent pursuing the complaint or for the costs of having to come to Toronto for mediation, but for a worker the results were much faster than they would have been through other legal options. The settlements included a guarantee of confidentiality. While our study demonstrated the importance of confidentiality to employers, who always demanded it in the terms of settlement, many workers expressed concerns about future harassment and blacklisting if the employer had not agreed to confidentiality. This point was important to workers and supervisors in sectors where prior work history and references were critical to securing employment.

In almost all cases, terminated workers were offered financial compensation instead of reinstatement. Reinstatement was not an option when the employer no longer wanted the worker. The compensation was minimal and did little to make employers change their behaviour. In our study, it was on average $5,461—less than 3 months of wages in 2016 for a full-time minimum wage job.[32] By characterizing such compensation as damages, an important first step was taken toward framing the worker's loss more broadly. This loss is downplayed when the damages are defined as lost wages. Such a definition fails to recognize the worker's loss of certain rights, such as the right to refuse unsafe work or the right to contact an inspector. When an employer is not penalized for having harassed or terminated a worker who wants to raise a health and safety concern or who wishes to exercise the right to contact an inspector, the employer is not deterred from acting unlawfully, and the system undervalues the worker's role in ensuring occupational health and safety.

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Inspectors played an important role in responding to reprisal victims and providing support for their health and safety concerns. However, their failure to enforce the participation rights of workers and to protect them from reprisals leaves workers with little support in the workplace. Employers know they can fire an inconvenient worker with no penalty and, at worst, have to make a tax-deductible payment after ensuring the worker's confidentiality. Important alternative strategies for enforcement include ticketing of the decision-making individual in management (Gray 2006), administrative sanctions like those used in British Columbia and the United States and prosecution (Tompa et al. 2016).

Conclusions

Workers are reluctant to participate in enforcing occupational health and safety standards because the state makes limited efforts to protect those who suffer reprisals. Although reprisal victims are entitled to financial compensation, this kind of settlement does not deter employers from continuing to carry out reprisals. The system requires further sanctions. When the employer suffers no downside for firing a worker who speaks to an inspector, this absence of punishment depreciates the value of the worker's right to participate in occupational health and safety. Selective prosecution could both deter such abuses and increase the value of this right.

In line with previous research, we note the challenges of psychosocial hazards. Effective enforcement will not be achieved until antisocial behaviour is sanctioned and changed. In the cases of reprisal and harassment, such behaviour is shielded by management's overriding right to use such behaviour as a tool of supervision.

While the current settlement system is unlikely to encourage workers to exercise their rights, it does provide some compensation for those who have exercised them. In many of the cases we examined, the reprisal victims were faced with serious and dangerous risks to their health and safety. They were not faced with a choice so much as a necessity to act. Often, they used strategies that would have been more effective in a system that recognized and defended their rights. Although the settlements were inadequate in recognizing both the rights at stake and the victims' sacrifices, many of these workers did benefit from that option. Given that inspectors had responded to most of the complaints and investigated them, there is a basis for more effective enforcement.

Notes

[1] See Walters (2006). In Ontario, the Liberals brought in legislation in 1990 to create a bipartite agency to oversee workplace health and safety. The agency was operationalized under a social democratic government and then abolished in 1997 by a conservative government.

[2] See King et al. 2019 for the full report.

[3] Occupational Health and Safety Act, R.S.O. 1990, c. O.1

[4] Part III

[5] s 6

[6] Part VIII

[7] s 57(6)

[8] s 66(1)

[9] s 28

[10] Part V

[11] s 9

[12] s 8

[13] s 50 see also (https://www.ontario.ca/page/reprisals-against-workers-employers)

[14] Since 2019, the Ministry of Labour, Training and Skills Development.

[15] Government of Ontario, Ministry of Labour Operations Division Policy and Procedures Reference Manual

[16] *Labour Relations Act*, S.O. 1995, c. 1, Sched. A

[17] *Employees' Health and Safety Act*, S.O.1976, c 79, s 9(2).

[18] *OSHA* s 50.1

[19] *OSHA* s 50(3)

[20] *LRA* s 96

[21] *LRA* s 2.

[22] See *MacBride v. Ambutrans Inc*., 2003 CanLII 2841 (ON LRB)

[23] See *Robert McLaughlin v Bluewater District School Board*, 2016 CanLII 75728 (ON LRB)) and *Musty v. Meridian Magnesium Products Limited*, 1996 CanLII 11127 (ON LRB)

[24] See *United Food and Commercial Workers International Union (A.F.L. -C.I.O.-C.L.C.) v. Jacmorr Manufacturing Limited*, 1987 CanLII 3071 (ON LRB) and *Shaikh v Temperenceco Inc. operating as Chase Hospitality Group*, 2017 CanLII 10567 (ON LRB).

[25] For a recent example, see *Kalac v Corrosion Service Ltd*, 2014 CanLII 15044 (ON LRB), recon: 2014 CanLII 32206 (ON LRB).

[26] Manning v. Hamilton Metal Works Inc., 2008 CanLII 14740 (ON LRB)

[27] Ontario Labour Relations Board Annual Report 2017-2018

[28] Ontario Labour Relations Board Annual Report 2020-2021

[29] The OLRB is subject to FIPPA and there is an ongoing legal battle over this point.

[30] Bill 168, 2009 Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace).

[31] See Ontario Ministry of Labour *Guide to Understand the Law on Workplace Violence and Harassment* (https://www.ontario.ca/page/understand-law-workplace-violence-and-harassment#section-5)

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[32] In 2016, the minimum wage in Ontario was $11.40 per hour.

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