

Sexual Harassment in the Legal Profession

August 10, 2021

Birju Dattani, Director

Amna Bhatti, Human Rights Officer



**YUKON
HUMAN
RIGHTS**
COMMISSION

**COMMISSION
DES DROITS
DE LA PERSONNE**
DU YUKON

Land Acknowledgement

We are honoured to live, work and travel within the traditional territories of all 14 Yukon First Nations. We respectfully acknowledge that Whitehorse is in the traditional territories of Kwanlin Dün First Nation and the Ta'an Kwäch'än Council.

Je reconnais respectueusement que je vis et travaille au sein du territoire traditionnel de la Première Nation Kwanlin Dün et du Conseil Ta'an Kwäch'än



Notice

This presentation is for general informational purposes only. For specific questions, please contact the Yukon Human Rights Commission.

The Yukon Human Rights Commission provides legal information. It does not provide legal advice.





Public Education

We provide helpful, accessible resources and materials for individuals, organisations, and schools. Customised training is available.



Complaint Process

We assist both the complainant and the respondent, making every effort to encourage fair and reasonable settlement.



Research

We have a mandate to do research and share information about equality, harassment, discrimination, and human rights.



Policy Information

We provide policy information, and proactively help individuals, businesses, and organisations prevent discrimination and harassment.



Partnerships

We partner with individuals and institutions to proactively improve understanding of, and respect for, human rights in the Yukon.

The Yukon Human Rights Commission is a statutory agency that promotes equality and diversity through research, education and enforcement of the Yukon *Human Rights Act*.



Agenda

1. Harassment and the Law
2. Sexual Harassment in the Legal Profession
3. Our Responsibilities



Harassment and the Law



What is Harassment under the *Act*?

Harassment means to engage in **a course** of vexatious conduct or to make a demand or sexual solicitation or advance that **one knows or reasonably ought to know is unwelcomed.**

A single serious act or multiple acts may be equally considered harassment.

Would a **reasonable** person:

Consider the behavior out of bounds?
Feel uncomfortable?
Be humiliated?
Be embarrassed?
Feel unsafe?

The harassment must be related to a protected **ground** and a protected **area** to fall under the *Act*.



Workplace Sexual Harassment

In the Supreme Court of Canada decision *Janzen v Platy Enterprises*, 1989 CanLII 97 (SCC) at para 33, Justice Dickson states:

I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment ... Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.



Workplace Sexual Harassment

“a course”

In *Canada (Human Rights Commission) v Canada (Armed Forces)*, 1999 CanLII 18902, the Federal Court stated that “the simple fact that the infringement in question is one of harassment requires an element of persistence or repetition, although in certain circumstances a single incident may be enough to create a hostile work environment... the equation as to the harassing nature of the conduct is calculated according to the ‘inversely proportional’ rule: the more serious the conduct and its consequences are, the less repetition is necessary; conversely, the less severe the conduct, the more persistence will have to be demonstrated” (M. Drapeau in *Le harcèlement sexuel au travail*).



Workplace Sexual Harassment

“one knows or reasonably ought to know is ”

The Ontario Human Rights Tribunal has said that a determination of what is reasonable should take into account the perspectives of both individuals, the relationship between them, and any power imbalance (*AM v Kellock*, 2019 HRTTO 414 at paras. 111-112); and that a reasonable person in this context is someone who does not rely on gender stereotypes and understands what sexual harassment is (*Los Santos Sands v Moneta Marketing Solutions Inc.*, 2016 HRTTO 271 at para 34).



The prohibited grounds of discrimination engaged by workplace sexual harassment:

- Sex including pregnancy and pregnancy related conditions (s.7(f)),
- Gender identity and expression (s.7 (f. 01)) and
- Sexual orientation (s.7(g))

The prohibited area:

- Employment



Workplace Sexual Harassment

In *Budge v Talbot Arm Motel Ltd and Charles Eikland*, 2018 YHRBA at para 37, the Yukon Human Rights Board of Adjudication has recently reiterated the four necessary elements for a finding of sexual harassment in the workplace:

- 1) a course of vexatious conduct;
- 2) a connection with employment;
- 3) conduct that one knows or ought reasonably to know is unwelcome; and
- 4) conduct that treats an individual unfavourably on the prohibited ground of sex.



Sexual Solicitation and Advances

- Unwelcome sexual flirtations
- Requests for sexual favours
- Questions about a person's sex life
- Unwelcome compliments about a person's appearance
- Sexually suggestive looks or staring
- Sexting or sending sexually explicit messages



Sexual Violence

- Unwanted physical contact
Touching, grabbing, pinching, etc.
- Sexual assault or sexualized violence





Gender-Role Based Harassment

- Targeting someone for not following gender-role stereotypes

Poisoned Work Environment

Sexual Images in the Workplace

- Pornography, sexual pictures, cartoons

Unwelcome Remarks

- Slurs, taunts, sexist jokes, name-calling
- Suggestions about a person's body, clothing, etc.

Derogatory Comments:

- Sexual orientation
- Gender identity
- Pregnancy

Abuse of Power



Sexual Harassment in the Legal Profession



What We Know About Sexual Harassment in the Legal Profession

- 2018 IBA Report – Nearly 7,000 individuals from 135 countries responded from across the spectrum of legal workplaces: one in three female respondents had been sexually harassed in a workplace context, as had one in 14 male respondents.
- 2018 Law Society of Ontario Survey of Articling Students – 21% of the 1471 respondents answered “yes” to facing unwanted attention or harassment.
- 2018 Statistics Canada Harassment in the Workplace Survey – Approximately 19% of women and 13% of men reported experiencing harassment in the workplace.
- In Yukon we have very little data but, since its founding in 1987, the Commission has regularly received complaints about workplace sexual harassment. According to our internal data from 2019-2020, the second highest number of accepted complaints were on the ground of sex, and the first highest accepted complaint were in the area of employment.



Sexual Harassment in the Legal Profession – Articling Students

- Power Imbalance

Because of the power imbalance in the supervisor/supervised relationship and the perceived consequences of objecting to a supervisor's behaviour, the supervised may go along with unwelcome conduct (*Simpson (Re)*, 2005 CanLII 93902 (BC EST)).

- Fear of Retaliation

Section 14(1) of the *Act* states: “No person shall [...] (b)retaliate or threaten to retaliate against an individual who objects to the harassment.”

The continued willingness of an employee to work is found not to constitute acceptance of the harassing conduct (*Bell v Korczak*, 1980 1 C.H.R.R. D/155 (Ont. Bd. Inq.)).



Sexual Harassment in the Legal Profession - Clients

The Saskatchewan Human Rights Tribunal has held that “the consideration of harassment of an employee by customers of the employer falls very much into the same category as harassment by one employee of another employee. It is clear that the employer has the obligation to take steps to deal with harassment by other employees once the harassment is known to the employer. Sexual harassment has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment. The employer has an obligation to prevent that from happening and the employee has the right to expect that the employer will take those necessary steps” (*Nixon v Greensides*, 1992 CanLII 8184 (SK HRT)).



Sexual Harassment in the Legal Profession – Workplace Culture

- Factors that inform whether the discrimination has a “sufficient nexus” with the employment context include, “(1) whether the respondent was integral to the complainant’s workplace; (2) whether the impugned conduct occurred in the complainant’s workplace; and (3) whether the complainant’s work performance or work environment was negatively affected” (*British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62 at para 67).
- Workplace culture, if inappropriate, can lead to a poisoned work environment.



IMPACTS

The negative impacts of harassment can be long-term and harmful to the targeted individual and the workplace as a whole.



Employers

- Poisoned work environment
- Reduced productivity
- Decrease in public safety
- Reduced retention
- Reduced attendance
- Financial costs

Employees

- Injury to feelings of dignity and self-respect
- Mental health and wellbeing
- Diminished morale
- Impaired job performance
- Decreased job satisfaction

Our Responsibilities



Employer Responsibilities

Section 35 of the *Act* states that “Employers are responsible for the discriminatory conduct of their employees **unless** it is established that the employer *did not consent to the conduct and took care to prevent the conduct, or, after learning of the conduct, tried to rectify the situation.*”



Employer Responsibilities



Providing a workplace free from discrimination and harassment



Investigating complaints



Employees' behavior & making efforts to fix the situation



Employer Responsibilities – Duty to Investigate

In *Laskowska v Marineland of Canada Inc.*, 2005 HRTO 30 (CanLII), the Tribunal set out the relevant criteria for an employer to consider in its duty to investigate as:

- (1) **Awareness** of issues of discrimination/harassment, **Policy, Complaint Mechanism** and **Training**: Was there an awareness of issues of discrimination and harassment in the workplace at the time of the incident? Was there a suitable anti-discrimination/harassment policy? Was there a proper complaint mechanism in place? Was adequate training given to management and employees;
- (2) **Post-Complaint: Seriousness, Promptness, Taking Care of its Employee, Investigation and Action**: Once an internal complaint was made, did the employer treat it seriously? Did it deal with the matter promptly and sensitively? Did it reasonably investigate and act; and
- (3) **Resolution** of the Complaint (including providing the Complainant with a Healthy Work Environment) and **Communication**: Did the employer provide a reasonable resolution in the circumstances? If the complainant chose to return to work, could the employer provide him/her with a healthy, discrimination-free work environment? Did it communicate its findings and actions to the complainant?



Shared Responsibility

- Workplace safety issue – New OH&S regulations now make harassment an actionable issue.
- Labour relations issue – unionized employees can file a grievance under their collective bargaining agreement which can be advanced to arbitration. Labour Arbitrators have concurrent jurisdiction with the Commission and may award human rights remedies, including general damages (injury to dignity, feelings and self-respect).
- Regulatory issue – Federation of Law Society Model Code of Conduct – Section 6.3 prohibits sexual harassment, harassment and discrimination.
- Bystanders – research is increasingly recognizing the role of bystanders and bystander training is offered by a number of organizations across the country.



Settlement

Complaint → **Not Accepted**

This decision
can be appealed
within 30 days.

Accepted

**Early
Resolution**

The mediation
process is informal
and flexible.

Investigation

Disposition

Settlement

Dismissed

This decision
can be appealed
within 30 days.

Public Hearing

Your complaint may be referred
to the Panel of Adjudicators for
a public hearing.

The Yukon Human Rights Commission's Complaints Process

- Inquiries are free.
- Confidential until Public Hearing.
- The process is remedial, not punitive.

Questions?

info@yukonhumanrights.ca

867-667-6226

Toll Free: 1-800-661-0535

Fax: 867-667-2662

#215 - 305 Main Street

(Upstairs in the Hougen Building)

