

Sexual Harassment Policy Can Save Employers Money

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The costs of sexual harassment in the workplace are both tangible and non-tangible. Some potential costs for employers include increased use of sick time, low morale and productivity, absenteeism, high staff turnover and damages in the event of a successful complaint. According to the Alberta Human Rights Commission, sexual harassment complaints “are among the most frequent complaints received by human rights agencies and the most costly for employers who fail to have effective policies or do not treat such complaints from their employees or customers and clients seriously”. Sexual harassment is an important issue for all employers as the Alberta Human Rights Commission reports that approximately 70% of women and 15% of men are the victims of sexual harassment.

What is sexual harassment?

In *Janzen v. Platy Enterprises Limited*, the Supreme Court of Canada broadly defined sexual harassment as **“unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of harassment.”** Sexual harassment violates human rights legislation because it is discrimination on the basis of sex. Not all work-related conduct that includes a sexual element is harassment; to constitute sexual harassment, the conduct must be unwelcome. The test to determine whether the conduct is unwelcome is objective, that is, would a reasonable person in the circumstances have known or ought to have known that the victim would object to the conduct. Conduct that could be found objectionable includes things such as sexist jokes, displaying material of a sexual nature, using sexually suggestive gestures, using sexually derogatory or degrading words, innuendos, inquiries, requests or demands of a sexual nature, and leering, pinching, patting or other physical contact.

Why is the employer liable?

Employers have an obligation to provide a workplace that is free of discrimination and are therefore liable for sexual harassment that occurs at work or is work-related. The objectionable conduct does not have to occur in the workplace as long as it occurs in the course of employment. The employer's liability for the actions of managers and supervisors towards subordinates is clear and the Supreme Court of Canada in *Robichaud v. Queen* left room for liability to be extended to co-workers in some situations.

How can the employer limit liability?

Implementing a policy prohibiting harassment in the workplace is the first step in limiting liability. The policy should be aimed at prevention and should encourage employees to come forward with complaints, provide a clear definition of harassment, provide a guideline to seek advice about making a complaint, maintain confidentiality to protect complainants from retaliation, provide for an

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investigation procedure, designate a person or persons to hear the complaint, provide for disciplinary consequences if harassment has occurred and for making frivolous complaints. The complainant and the alleged harasser should be treated fairly and sensitively in any investigation and should be advised of their right to retain legal counsel.

Is a policy enough?

No. There must be communication of the policy to all employees and training of employees, particularly for those in supervisory roles. The policy should form part of the employer's personnel policies and be posted in the workplace. If there are complaints, the employer should deal with the matter promptly and must conduct a thorough and fair investigation. In some cases, it may be advisable to hire an independent investigator to conduct the investigation and provide the employer with a report and recommendations. If the investigation is conducted internally, it should be done by someone with training in investigations and with legal advice. Insofar as is possible, confidentiality should be maintained throughout the process. If the policy is breached, there must be consistent disciplinary action.

In determining appropriate discipline, the employer should take into account the seriousness of the misconduct, any prior complaints, whether the harasser is a supervisor, whether the harasser admits to the conduct and the wishes of the complainant. In serious cases of sexual harassment, termination of employment may be the only proper remedy. A harassment policy can be particularly helpful to employers in upholding discipline and termination of employees who have violated the policy.

Termination for just cause

In *Leach v. Canadian Blood Services*, CBS dismissed Mr. Leach for sexual harassment on the basis of two complaints by employees involving unwanted touching and kissing. CBS had a harassment policy in place and, as a supervisor and member of the CBS management team, Mr. Leach was responsible for enforcing the policy. The court dismissed Mr. Leach's argument that he could not be dismissed for non-hour or off-duty conduct, stating that in a case involving "just cause" for dismissal, the employee suffers the consequences of his own behaviour, whether in the workplace or not, if that behaviour prejudicially affects his employer or is incompatible with his duties as an employee. The Court also considered whether the

failure of the complainants to object at the time of the conduct was relevant and found that the mere fact that the sexual conduct was unwelcome was sufficient to constitute harassment. The reasons why an employee did not raise objection after the conduct occurred were not relevant, other than perhaps in relation to credibility.

In a recent Ontario Court of Appeal decision, *Simpson v. Consumers Association of Canada*, the Court dealt with a claim for wrongful dismissal. Simpson was dismissed as a result of taking a female colleague to a strip bar and engaging her, unwillingly, in sexually intimate conversations, carrying on an overt sexual affair with a female employee, skinny-dipping with employees and touching female employees in an inappropriate manner. The trial judge dismissed the claim stating that much of the conduct complained of occurred outside the workplace and was consensual conduct among friends. The Court of Appeal overturned the decision of the trial judge holding that it is an artificial distinction to say that simply because an interaction between a supervisor and an employee occurs after work, it cannot constitute work-related sexual harassment. In this case, the meetings where the sexual harassment had taken place were meetings that the staff had been required to attend. In addition, regarding the trial judge's conclusion that Simpson's conduct could be excused as consensual conduct among friends, the Court of Appeal explained that "consensual" does not necessarily mean "welcome". In some situations an employee may go along with conduct because he or she is afraid to object. The Court of Appeal held the employer had just cause to dismiss Simpson.

These cases illustrate that the Courts take sexual harassment in the workplace very seriously and will uphold terminations of managers for just cause even when there has been no prior warning. These cases also illustrate how proactive employers can ultimately save money by implementing and enforcing policies prohibiting sexual harassment.

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