

MEMORANDUM

Date: October 26, 2017

File: 137.11

RE: Workplace Sexual Harassment and Assault Overview and Definitions

Workplace Harassment

The *Workers Compensation Act* prohibits workplace harassment and places a positive obligation on employers to prevent and address workplace bullying and harassment.¹ The substance of this legal obligation is set out in WorkSafeBC's *Occupational Health and Safety Policies ("OHS Policies")*.² The *OHS Policies* define "bullying and harassment" as a single term, which:

(a) includes any inappropriate conduct or comment by a person towards a worker that the person knew or reasonably ought to have known would cause that worker to be humiliated or intimidated, but

(b) excludes any reasonable action taken by an employer or supervisor relating to the management and direction of workers or the place of employment.

The WorkSafeBC policy guidelines provide a list of examples of conduct that may constitute "bullying and harassment" for the purposes of the *OHS Policies*:³

- Verbal aggression or insults;
- Calling someone derogatory names;
- Sabotaging a person's work;
- Spreading malicious gossip or rumours about a person;
- Engaging in harmful or offensive initiation practices;
- Physical assault or threats (this could also constitute "violence" or "improper activity or behaviour" under the *Occupational Health and Safety Regulation*);
- Making personal attacks based on someone's private life and/or personal traits;
- Making aggressive or threatening gestures; and
- Engaging in targeted social isolation.

Harassment in the workplace is further prohibited at law where the harassment targets an individual or group because of a personal characteristic protected by the *BC Human Rights Code* (the "Code").⁴ Enumerated grounds protected by the *Code* in respect of employment are "race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or

¹ *Workers Compensation Act*, R.S.B.C. 1996, c 492, ss. 115(1)(a), 115(1)(e), 116(1)(a), 117(1)(a).

² British Columbia, WorkSafeBC, *Occupational Health and Safety Regulation Policies*, D3-115-2, D3-116-1, and D 117-2 <www.worksafebc.com>.

³ British Columbia, WorkSafeBC, *Guidelines for Workers Compensation Act – Part 3, Division - General Duties of Employers, Workers and Others*, G-D3-115(1)-3 <www.worksafebc.com>.

⁴ *Human Rights Code*, R.S.B.C. 1996, c 210.

mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person”.⁵

Workplace Sexual Harassment

Sexual harassment is sex discrimination for the purposes of the *Code*.⁶ The *Code* provisions prohibiting discrimination on the basis of sex creates an obligation on employers to abstain from, prevent, and address sexual harassment in the workplace.⁷

There are two basic forms of workplace sexual harassment:

- (i) *Quid Pro Quo* harassment, in which the employer or supervisory employee required an employee to submit to sexual advances as a condition of obtaining or maintaining employment or benefits;⁸ and
- (ii) *Poisoned Environment* harassment, in which an employees of a particular gender is subjected to a workplace that is hostile, offensive, or intimidating.⁹

Both forms of sexual harassment are prohibited by the *Code*.

The Supreme Court of Canada in *Janzen*, the authoritative case on sexual harassment in Canada, defines workplace sexual harassment as:¹⁰

- (1) unwelcome conduct;
- (2) of a sexual nature;
- (3) that causes detrimental effects on the work environment or leads to adverse job-related consequences.

Unwelcome Conduct

Analysis of alleged sexually harassing conduct must be conducted on a case-by-case basis, and in an objective manner: whether a reasonable person in the circumstances would perceive the conduct to be sexual in nature.¹¹

A power imbalance need not exist for sexual harassment to have occurred. Sexual harassment in the workplace may be as between superior and subordinate as well as between co-workers.¹²

⁵ *Ibid* at s. 13(1).

⁶ *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, [1989] S.C.J. No. 41 [*Janzen*].

⁷ *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, at 17.

⁸ See for example: *Zarankin v. Ian Johnston, carrying on business as Wessex Inn* (1984), IV C.H.R.R. D/2253 (B.C. Board of Inquiry).

⁹ *Janzen*, *supra* note 6.

¹⁰ *Ibid* at 1284.

¹¹ *Dupuis v. British Columbia (Ministry of Forests)* (1993), 20 C.H.R.R. D/87 (B.C.C.H.R.) in *Mahmoodi*, *infra* note 13, at 140-141.

¹² See for example *Truong v. Regency Auto Group*, [2011] B.C.H.R.T.D. No. 364.

Unwelcome conduct is conduct that a reasonable person, in all the circumstances, would know was not welcome by the complainant. A complainant is not required to expressly object to the conduct. Subtle indications of unwelcomeness are sufficient.¹³

A sexualized workplace culture may absolve the harasser of his or her conduct, if the complainant participates in that culture to an extent that his or her participation in the otherwise sexually harassing conduct would appear as condonation to a reasonable person.¹⁴ However, it is presumptively unwelcome conduct for a superior to subject a subordinate to a “sexualized environment”.¹⁵

Conduct of a Sexual Nature

Harassment of a sexual nature comprises a broad spectrum of conduct, including verbal, physical and psychological harassment. Tremblay-Lamer J. summarizes this range in *Canada (Human Rights Commission) v. Canada (Armed Forces)*:¹⁶

Verbally sexual harassment may include

- Unwelcome remarks;
- Jokes that cause awkwardness or embarrassment;
- Innuendos or taunting; and
- Gender-based insults or sexist remarks.

Physically, the recipient employee may be the victim of:

- Displaying pornographic or other offensive or derogatory pictures;
- Telephone calls with sexual overtones;
- Pinching;
- Grabbing;
- Hugging;
- Patting;
- Leering;
- Brushing against;
- Touching; and
- Kissing.

Psychological harassment can involve:

- A relentless proposal of physical intimacy;
- Beginning with subtle hints which may lead to overt requests for dates;
- Sexual favours; and

¹³ *Mahmoodi v. University of British Columbia*, [1999] B.C.H.R.T.D. No. 52, 36 C.H.R.R. D/8 [*Mahmoodi*].

¹⁴ *Kafer v. Sleep Country Canada*, [2013] B.C.H.R.T.D. No. 289.

¹⁵ *Mahmoodi*, *supra*, note 13.

¹⁶ Arjun P. Aggarwal & Madhu M. Gupta, *Sexual Harassment in the Workplace*, 2 ed (Toronto: Butterworths, 1992), adopted in *Canada (Human Rights Commission) v. Canada (Armed Forces)*, (1999), 24 C.H.R.R. D/140 (Fed. T.D.) at 38.

- Propositioning.

Detrimental Effects

Sexually harassing conduct must cause detrimental effects to the complainant, insofar that it:¹⁷

- Endangers the individual's employment;
- Negatively affects his/her work performance; or
- Undermines his/her sense of personal dignity.

Tortious (Civil) Harassment

The law is uncertain on whether the tort of harassment exists.¹⁸ However, Sinclair-Prowse J. determined in *Mainland Sawmills* that *if* such a tort existed, the elements of the tort of harassment are as follows:¹⁹

1. Outrageous conduct by the defendant;
2. The defendant's intention of causing or reckless disregard of causing emotional distress;
3. The plaintiff's suffering of severe or extreme emotional distress; (i.e., emotional distress of such substantial quantity or enduring quality that no reasonable person in a civilized society should be expected to endure it); and
4. The actual and approximate causation of the emotional distress by the defendant's outrageous conduct.

Criminal Harassment

Criminal Harassment is illegal under the *Criminal Code of Canada*.²⁰ Criminal Harassment is Conduct that causes another to fear for their safety and that the harasser knows or ought to know is harassing conduct.²¹ Criminal harassment is described as:²²

- repeatedly following someone from place to place;
- repeatedly communicating with someone, either directly or indirectly;

¹⁷ *Janzen*, *supra* note 6 at para 49.

¹⁸ Compare *Canadian Tire Bank v. Roach*, 2006 BCPC 120, [2006] No. 783; *Tobin v. Total Credit Recovery (B.C.) Ltd.*, 2001 BCPC 465, [2001] B.C.J. No. 1921 (decided on the assumption of the existence of the tort of harassment) with *510267 B.C. et al. v. Gilmore et al.*, 2005 BCSC 756, [2005] B.C.J. No. 1192 (court specifically found that no such tort exists in B.C.).

¹⁹ *Mainland Sawmills Ltd. v. IWA-Canada, Local 1-3567 Society*, 2006 BCSC 1195, [2006] B.C.J. No. 1814.

²⁰ *Canada Criminal Code*, R.S.C. 1985, c. C-46, s. 264 [*Criminal Code*].

²¹ *Ibid* at s. 264(1).

²² *Ibid* at s. 264(2)



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- besetting or watching a person's house, place of work or business or elsewhere; or
- Engaging in threatening conduct directed at a person or a member of that person's family.

Whether conduct is harassing is both objective and subjective: the victim must have been in a state of being harassed as described above, and they must have felt harassed in a sense of feeling "tormented, troubled, worried continually or chronically plagued, bedeviled and badgered".²³

Further, a single incident can constitute harassing conduct if it is highly threatening and/or persistent.²⁴

Sexual Assault

Sexual assault is a criminal offence under the *Criminal Code of Canada*²⁵ and is described as:²⁶

- non-consensual touching, whether direct or indirect;
- an attempt or threat of non-consensual touching, or causing a victim to believe that the assailant has the ability to carry out non-consensual touching; or
- while openly carrying a weapon, accosting or impeding the victim

in circumstances of a sexual nature such that the sexual integrity of the victim is violated.

The test for determining occurrence of sexual assault is objective; it is dependent on whether a reasonable observer would believe the assault was sexual in nature and includes consideration of such factors as:

- the part of the body touched;
- the nature of the contact;
- the situation in which it occurred;
- the words and gestures accompanying the act; and
- other circumstances surrounding the act including threats.²⁷

It is not necessary for the assailant to have intended the conduct to be of a sexual nature.²⁸ However, the assailant's purpose in carrying out the assault will vary in importance depending on the circumstances.²⁹

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²³ *R. v. Kosikar* (1999), 138 C.C.C. (3d) 217, 178 D.L.R. (4th) 238 (Ont. C.A.).

²⁴ *Ibid*; *R. v. K (K)* (2009), 241 C.C.C. (3d) 284 (Ont. C.A.); *O'Connor* (2008), 234 O.A.C. 135 (C.A.).

²⁵ *Criminal Code*, *supra* note 20 at s. 271.

²⁶ *R. v. Chase*, [1987] 2 S.C.R. 293, 37 C.C.C. (3d) 97, interpreting *Criminal Code*, *supra* note 20, ss. 265, and 271.

²⁷ *Ibid*.

²⁸ *R. v. S. (P.L.)*, [1991] 1 S.C.R. 909, 64 C.C.C. (3d) 193.

²⁹ *R. v. J. (C)*, (1990), 58 C.C.C. (3d) 167, 78 C. R. (3d) 204 (Nfld. C.A.); *R. v. V. (K.B.)* 91992), 71 C.C.C. (3d) 65, 13 C.R. (4th) 87 (Ont.C.A.); *R. v. Bernier* [1998] 1 S.C.R. 975, 124 C.C.C. (3d) 383.