

# Sexual Harassment in the Workplace: What does it look like?

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Recently, our firm conducted a workshop on conducting investigations involving harassment and bullying. During our talk, we also gleaned over the topic of sexual harassment. From our discussion, we noted that it is a subject that lends itself to a multitude of interpretations and definitions. This article will focus on providing greater clarity on this topic, especially as it relates to the workplace. What is sexual harassment? The recent plethora of allegations against employers, celebrities and media moguls made #MeToo, and sexual harassment in general, has brought this subject front and centre in terms of workplace conduct in the work environment of today. It is hard to elude the topic given its almost daily exposure via various forms of mass media.

In this new world of legal challenges and uncertainty, how confidently can you affirm that you fully understand what constitutes sexual harassment in the workplace?

A good place to start in fully understanding the subtleties attributed to sexual harassment, it is important that we look at a generally accepted definition of what constitutes sexual harassment. Generally speaking, there are two (2) forms of sexual harassment. The first is powerplay; which is often referred as the "quid pro quod". This Latin term commonly refers to a situation when someone in

authority tries to elicit sexual favours for some kind of career promotion or opportunity. The other form of sexual harassment is broader in nature and involves a toxic work environment, in which someone (a group of workers) sexualizes the workspace by making sexual remarks or comments or engages in inappropriate contact. In this latter situation, the sexualized work culture is condoned as simply being the norm.

From our vast experience in this field, we find that most often the perpetrators of sexual harassment are males. Some industries or sectors are more susceptible to incidents of sexual harassment – primary due the gender composition of its work force.

Given the above backdrop, the complexity and multitude of human interactions in the workplace creates many grey areas of concern when it comes to what constitutes sexual harassment among peers and co-workers. This reality requires employers to be very mindful and cognizant of behaviours that could lead to instances of complaints of sexual harassment. As an employer, it is important to make it very clear as to what does and does not constitute sexual harassment, along with very clear consequences for wayward members of the workplace.

The widely-accepted definition is that sexual harassment is the act of engaging in a course of vexatious comment or conduct that is known or ought to be known to be unwelcome. And despite the fact that in any case involving sexual harassment, the alleged harasser immediately raises the "***I did not mean it that way***" line of defence, intent is not a good defence under the circumstances. In other words, it doesn't matter whether the person intended the behaviour to be unwelcome – decisions from the courts and

arbitrators have long held that as long as the conduct is unwelcome, the fact that it wasn't intended to be so is irrelevant. In support of this jurisprudence, courts and arbitrators have held the harasser to the standard of an objective person, which would beg the question... would an objective person know that this kind of conduct would be unwelcome in the workplace? If the answer is yes, then the harasser would be found to be at fault and the whole intent of defence falls by the wayside.

Sexual harassment could be as subtle as a hug or putting an arm around an employee and dragging them into a photo with co-workers. It could even include someone commenting about an employee's hair and/or clothing – these kinds of commentary in the workplace are simply not acceptable. Often time, it could come down to the way a compliment is conveyed that could be perceived as harassment. If someone is ogling a co-worker up and down and making sexually suggestive comments while complimenting the person's attire, then this would draw the person closer to being challenged for sexual harassment. Conversely, if the same person offers a compliment in a non-sexually suggestive or charged manner to a co-worker, this would likely not attract a sexual harassment complaint.

So, what advice could we provide to employers attempting to prevent and insulate themselves from potential lawsuits, human rights complaints, occupational health & safety complaints and/or arbitration. A combination of human resources policies and training of the workforce can go a long way.

First, it is highly advisable that as an employer, you need to develop and implement proper policies/procedures that clearly set out the expectations in terms of appropriate employee conduct in their work environment.

Second, employers are advised to consider training for all members of its workforce.

Training can help inform employees in instilling a better understanding of how their comments and/or conduct could make a colleague feel uncomfortable.

On a personal note, I have always professed during any training on the matter that all persons have the right to be treated professionally and this should be an expectation that must be upheld in any workplace. It is often observed in some workplaces, employees making remarks regarding a particularly attractive co-worker, but it does not make it right. I have often asked employees to ask themselves this introspective question: "Would you be okay if a member of your family or a close friend was being subjected to sexually salacious and/or suggestive types of comments at the workplace." If the answer is no, then it is important that you treat everyone with respect/dignity and conduct yourself accordingly. Ultimately, this will allow everyone to feel more welcome in their work environment.