Discrimination Ombudsperson

Sexual harassment — an ounce of prevention ...

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... is worth a pound of litigation — particularly where sexual harassment complaints are concerned. Media attention illustrates that sexual harassment complaints are unhealthy and costly. Educational workshops are "immunizations" — they reduce risk and minimize anxiety. Understanding the legal definition of sexual harassment can make it easier for partners and employees to interact in a healthy and relaxed manner.

The Supreme Court of Canada's *Janzen* decision provides a clear definition of sexual harassment. The three key elements are: 1) unwelcome conduct; 2) of a sexual nature; 3) that detrimentally affects the work environment or leads to adverse job-related consequences.

Do the complaints I receive meet this definition? I hear about inappropriate touching, persistent demands for sexual involvement or repetitive jokes or comments of a sexual nature — behaviours typically described as ongoing and persistent — not as isolated incidents, and definitely not nuisance complaints.

Was the conduct welcome or unwelcome?

This question is answered from the complainant's perspective. To avoid a confrontation, complainants may communicate by their body language or action that the conduct is unwelcome. That may be by moving away from a touch, by being too "busy," or by not laughing at a joke. Even increased absenteeism can be a signal, and a costly consequence, of unwelcome sexual behaviour. The law does not require a person to say "Your behaviour is unwelcome." Paying attention to, and respecting, non-verbal cues is critical to healthy relationships.

If an employee says "yes" to a sexual advance, is it reasonable for the other person to rely on that response and conclude that the advance is "welcome? " The B.C. Council of Human Rights award in the *Dupuis* case illustrates that a person in authority cannot rely on a "yes" response if the advance puts the complainant in a no-win situation.

If an employee participates in sexist jokes with some employees, but not others, is it reasonable for a legal employer to allow the jokes to continue? According to the reasoning in the Canadian Human Rights Tribunal award *Swan* v. *Canadian Armed Forces*, the answer is "no." The employee may feel powerless to object to the jokes for fear of not "fitting in." Partners should not tolerate such jokes in their firms.

Lawyers may be very unaware of their power in the workplace. A lawyer's real or perceived "power" may create such an imbalance that another person cannot say "no." Until the legal profession boasts long-term retention and partnership rates for women, it is women who are more likely to experience power imbalances. In today's world, we are expected to examine our words and actions from the other person's perspective. For example, when men project behaviours that are intended to be amusing or flattering, those behaviours may be perceived by women as offensive or threatening. As a result, the golden rule has changed; it now reads: *"Do unto others as they would have done unto them."*

Was the conduct of a sexual nature?

This question requires a case-by-case analysis. For example, the severity and frequency of sexual jokes and comments, and the nature of the sexual content, are all taken into consideration. Appropriate humour in the workplace can continue. Education can assist people to balance their fear that we must "walk on eggshells" with their need to enjoy their work.

Did the conduct detrimentally affect the work environment or lead to adverse job-related consequences?

If a complainant does not allege or cannot persuade a tribunal that the conduct led to adverse job-related consequences for the complainant, then the third element in the definition may remain unsatisfied. However, if the conduct was not directed at a specific individual, but did detrimentally affect others in the workplace, then a hostile or poisonous work atmosphere may exist. An allegation of harassment may be upheld in this situation.

Intent vs. Impact

"But I didn't intend to hurt the other person!" A lack of intent is not a defence to an allegation of sexual harassment. It's impact that counts — and the reasonableness of the *complainant's* reaction.

That ounce of prevention

Interactive education can bring these legal principles to light in a meaningful way. An educational session can be designed and delivered without cost to your firm. Roll up your sleeve: book your booster shot today. Give me a call at (604) 687-2344.❐