

POLICY ON

Preventing

sexual and gender-based harassment



Ontario
Human Rights Commission
Commission ontarienne des
droits de la personne

POLICY ON

Preventing

sexual and gender-based harassment

INTERSECTING GROUNDS
DISCRIMINATION
violence
ABUSE OF
POWER
gender based
BULLYING
SEXISM
sexual harassment
Poisoned environment
EDUCATION
employment



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Summary

What is sexual harassment?

In the Ontario *Human Rights Code* (the *Code*), sexual harassment is “engaging in a course of vexatious comment or conduct that is known or ought to be known to be unwelcome.” In some cases, one incident could be serious enough to be sexual harassment.

The reference to comment or conduct “that is known or ought reasonably to be known to be unwelcome” means that there are two parts to the test for harassment. First, we have to consider if the person carrying out the harassment knew how their behaviour would be received. Second, we must consider how someone else would generally feel about the behaviour – this can help us think from the perspective of a person who is being harassed.

What is gender-based harassment?

Gender-based harassment is one type of sexual harassment. Gender-based harassment is “any behaviour that polices and reinforces traditional heterosexual gender norms” (Elizabeth J. Meyer, “Gendered Harassment in Secondary Schools: Understanding Teachers’ (Non) Interventions,” *Gender and Education*, Vol. 20, No. 6, November 2008, 555 at 555). It is often used to get people to follow traditional sex stereotypes (dominant males, subservient females). It is also used as a bullying tactic, often between members of the same sex.

Example: A grade 9 male student has many female friends and is more interested in the arts than athletics. A group of boys at his school repeatedly call him “fag,” “homo,” “queer” and other names.

Unlike some other forms of sexual harassment, gender-based harassment is not generally motivated by sexual interest or intent. It is more often based on hostility and is often an attempt to make the target feel unwelcome in their environment. In some cases, gender-based harassment may look the same as harassment based on sexual orientation, or homophobic bullying. With the addition of the new grounds of “gender expression” and “gender identity” to the *Code*, many claims alleging gender-based harassment may also cite discrimination and/or harassment based on gender expression. Depending on the circumstances, it may be appropriate to cite gender identity as well.

Forms of sexual harassment

Sexual harassment can include:

- sexual solicitation and advances (your teacher asks for sex in exchange for a passing grade)
- a poisoned environment (pornographic images in the workplace)

- gender-based harassment (targeting someone for not following sex-role stereotypes)
- violence (if inappropriate sexual behaviour is not dealt with, it may move to more serious forms, including sexual assault and other violence).

Examples of sexual and gender-based harassment:

- demanding hugs
- invading personal space
- making unnecessary physical contact, including unwanted touching, *etc.*
- using language that puts someone down and/or comments toward women (or men, in some cases), sex-specific derogatory names
- leering or inappropriate staring
- making gender-related comments about someone's physical characteristics or mannerisms
- making comments or treating someone badly because they don't conform with sex-role stereotypes
- showing or sending pornography, sexual pictures or cartoons, sexually explicit graffiti, or other sexual images (including online)
- sexual jokes, including passing around written sexual jokes (for example, by e-mail)
- rough and vulgar humour or language related to gender
- using sexual or gender-related comment or conduct to bully someone
- spreading sexual rumours (including online)
- making suggestive or offensive comments or hints about members of a specific gender
- making sexual propositions
- verbally abusing, threatening or taunting someone based on gender
- bragging about sexual prowess
- demanding dates or sexual favours
- asking questions or talking about sexual activities
- making an employee dress in a sexualized or gender-specific way
- acting in a paternalistic way that someone thinks undermines their status or position of responsibility
- making threats to penalize or otherwise punish a person who refuses to comply with sexual advances (known as reprisal).

Sexual harassment is against the law

In Ontario, the *Code* prohibits all forms of discrimination based on sex – and this includes sexual harassment. The *Code* applies to five “social” areas:

- services, goods and facilities (including education)
- housing
- contracts
- employment
- membership in vocational associations such as trade unions.

The *Code* prohibits reprisal or “payback” where a person raises issues or complains of sexual harassment. Reprisal includes such things as being hostile to someone, excessive scrutiny (for example, at work), excluding someone socially or other negative behaviour because someone has rejected a sexual advance or other proposition (such as a request for a date).

You do not have to object to the harassment when it happens for there to be a violation, or for you to claim your rights under the *Code*. You may be in a vulnerable situation and afraid to speak out.

Due to the power imbalance that often exists between the harasser and the person being harassed, and worries about what will happen if they object, people may go along with the unwelcome actions. But in these cases, it is still sexual harassment and it is still against the law.

When deciding if sexual harassment has happened, human rights tribunals look at the impact the conduct had on the person, and whether this had a discriminatory effect. The intention of the harasser does not matter. A lack of intent is no defence to an allegation of sexual harassment.

Who is affected?

The *Code* protects both men and women from sexual harassment, but women are more affected than men. International human rights conventions and Canadian legal decisions have recognized sexual harassment as an abuse of power that can reinforce a woman's historic lower status compared to men.

Sexual harassment can happen in all social and economic classes, ethnic groups, jobs and places in the community.

A person may be more vulnerable to sexual harassment if they identify by other *Code* grounds, such as race, sexual orientation, disability, *etc.* Also, sexual harassment can have a worse effect if it is combined with discrimination or harassment based on other *Code* grounds.

Costs of sexual and gender-based harassment

Sexual harassment can limit a person's ability to earn a living, get housing, get an education, feel safe and secure, and take part fully in society. Victims of sexual harassment can have physical and emotional effects, including anxiety, depression, fatigue, weight loss, nausea and stomach problems, inability to sleep, withdrawal from relationships, self-blame, reduced self-esteem, and post-traumatic stress disorder.

The effects of sexual and gender-based harassment on young people may be particularly harsh. As well as feeling the effects listed above, they may stop doing schoolwork and taking part in school-related activities, they may skip or drop classes, or they may drop out of school entirely. They may also abuse drugs and/or alcohol to cope. In extreme cases, they may think about or attempt suicide.

Organizations that do not take steps to prevent sexual harassment can face major costs in decreased productivity, low morale, increased absenteeism and health care costs, and potential legal expenses.

Preventing sexual and gender-based harassment

Organizations and institutions operating in Ontario have a legal duty to take steps to prevent and respond to sexual harassment. Employers, housing providers, educators and other responsible parties must make sure their environments are poison-free and respect human rights. From a human rights perspective, it is not acceptable to ignore sexual harassment, whether or not someone has formally complained or made a human rights claim.

When deciding if an organization has met its duty to respond to a human rights claim, tribunals are likely to look at:

- the procedures in place at the time to deal with discrimination and harassment
- how quickly the organization responded to the complaint
- how seriously the complaint was treated
- the resources made available to deal with the complaint
- if the organization provided a healthy environment for the person who complained
- how well the person who complained was told about the action taken [see *Wall v. University of Waterloo* (1995), 27 C.H.R.R. D/44 at paras. 162-67 (Ont. Bd. Inq.)].

Employers, housing providers, educators and other responsible parties can prevent many cases of sexual harassment by having a clear, comprehensive anti-sexual harassment policy in place. In cases of alleged sexual harassment, the policy will alert all parties to their rights, roles and responsibilities. Policies must clearly set out how the sexual harassment will be dealt with promptly and efficiently. The OHRC's *Policy on preventing sexual and gender-based harassment* includes the suggested contents of an anti-sexual harassment policy.

Everyone should know about the anti-sexual harassment policy and the steps in place for resolving complaints. This can be done by:

- giving policies to everyone as soon as they are introduced
- making all employees, tenants, students, *etc.* aware of them by including the policies in orientation material
- training people, including people in positions of responsibility, about the policies, and educating them on human rights issues.

An effective sexual harassment policy can limit harm and reduce liability. It also promotes the equity and diversity goals of organizations and institutions and makes good business sense.

All responsible parties should monitor their environments regularly to make sure they are free of sexually harassing behaviours. Taking steps to keep a poison-free environment will help make sure that sexual harassment does not take root, and is not given a chance to grow.

The *Policy on preventing sexual and gender-based harassment* provides details on the specific responsibilities that apply to employers, housing providers, educators and other responsible parties.

I think I am being sexually harassed. Who should I contact?

If you believe that you have experienced sexual or gender-based harassment, try, where possible, to resolve the problem through any internal policies or resolutions mechanisms your organization may have. If you are in a union, you may wish to contact your union for assistance. Using an internal mechanism does not always replace your right to file a human rights claim, or to proceed in other ways.

If you are being harassed (including sexual harassment) where you work, you may be able to have action taken under the *Occupational Health and Safety Act*. Contact Ontario's Ministry of Labour for more information.

In more extreme cases, sexual harassment is a criminal offence. It is a crime if the harassment involves attempted or actual physical assault, including sexual assault, or threats of an assault. Stalking is a crime called "criminal harassment." Where sexual harassment includes any of these things, you can contact your local police service.

If you think you have been a victim of sexual or gender-based harassment, you can make a complaint (called filing an application) with the Human Rights Tribunal of Ontario (HRTO). You will need to file this within one year of the last incident of sexual harassment. The Human Rights Legal Support Centre may help you file this application.

1. Introduction

Sexual harassment is a form of discrimination based on sex.¹ The Ontario *Human Rights Code* (the *Code*) prohibits all forms of discrimination based on sex, and includes provisions that focus on sexual harassment. The *Code* offers this protection in five “social” areas: services, goods and facilities; occupancy of accommodation (housing); contracts; employment; and membership in vocational associations such as trade unions.

If left unchecked, sexual harassment can limit a person’s ability to earn a living, get housing, get an education, feel safe and secure, and otherwise take part fully in society. Organizations that do not take steps to prevent sexual harassment from taking place can incur major costs in decreased productivity, low morale, increased absenteeism and health care costs, and potential legal expenses.

The *Code* makes it public policy in Ontario to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. *Code* provisions are aimed at creating a climate of understanding and mutual respect for the dignity and worth of each person, so that each person feels a part of the community and feels able to contribute to it. The goal here is to make sure everyone can live and work free from harassment based on a prohibited ground under the *Code*.

While the *Code* protects both men and women from sexual harassment, women are more affected than men. A broader culture of sexism² plays a major role in the social processes that give rise to and entrench discrimination based on sex. Sexual harassment, as a form of discrimination based on sex, may be understood in this context.

International human rights conventions³ and Canadian legal decisions⁴ have recognized sexual harassment as an abuse of power that may reinforce a woman's historic lower status in relation to men.⁵

¹ The Supreme Court of Canada has ruled unanimously that sexual harassment is discrimination based on sex: *Janzen v. Platy Enterprises*, [1989] 1 S.C.R. 1252. For an earlier human rights tribunal case on the same principle, see *Bell v. Ladas*, (1980), 1 C.H.R.R. D/158 (Ont. Bd. Inq., now the Human Rights Tribunal of Ontario, or HRTO). For a recent case reaffirming this principle, see *Friedmann v. MacGarvie*, 2012 BCCA 445.

² Sexism can be defined as an ideology that either explicitly or implicitly asserts that one sex (generally male) is inherently superior to another sex (typically female). Sexist ideology can be openly expressed in slurs, jokes or hate crimes. However, it can be more deeply rooted in attitudes, values and stereotypical beliefs. These beliefs may be conscious or unconscious. Sexism is a wider phenomenon than discrimination based on sex. While the OHRC seeks to combat sexism through educating the public and advancing human rights, not every example of sexism can be dealt with under the *Code*. The *Code* only prohibits incidents of discrimination based on sex (including sexual harassment) in specified social areas.

³ For more information, see the section entitled “International protections.”

⁴ See, for example, *Bell v. Ladas*, (1980), *supra*, note 1; *Janzen v. Platy Enterprises Ltd.*, (1989) *supra*, note 1; *Sanford v. Koop*, 2005 HRTO 53 (Ont. Human Rights Trib.)

⁵ *Cuff v. Gypsy Restaurant* (1987), 8 C.H.R.R. D/3972 (Ont. Bd. Inq.); see also *Chualvo v. Toronto Police Services Board* (2010) OHRTD No. 2027 (HRTO) at para. 193, in which the tribunal stated that the sexual

One author comments:

Across society – be it the household, educational institution, or workplace – harassment on the basis of sexuality exists. And, in each setting, while unique from one another, the harassment of women by men functions to maintain the domination of men over women, at both the individual and collective levels.⁶

Sexual harassment cuts across socio-economic classes, ethnicities, professions and social spheres. One author notes:

It can happen to executives as well as factory workers. It occurs not only in the workplace and in the classroom, but even in parliamentary chambers and churches.⁷

Increasingly, gender-based harassment is being recognized as a form or subset of sexual harassment. This policy will look at how gender-based harassment is used as a “gender policing” tool to try to reinforce conformity with traditional sex-role stereotypes, or as a bullying tactic, often between members of the same sex.

The effects of sexual harassment can be serious and long-term. Victims of sexual harassment may experience a range of physical and emotional effects, including anxiety, depression, fatigue, weight loss, nausea and stomach problems, inability to sleep, withdrawal from relationships, self-blame, reduced self-esteem, and post-traumatic stress disorder.

The principles set out in this policy will, depending on the circumstances, apply to instances of sexual harassment in any of the social areas covered by the *Code*. However, to reflect the most important recent developments in the law and in social science research, this policy will focus on the areas of employment, housing and education.

This policy will help you understand:

- how to define and identify sexual and gender-based harassment
- how to take steps to prevent sexual and gender-based harassment
- how to address sexual and gender-based harassment when it does occur
- your rights and responsibilities
- where to find further resources.

harassment experienced by the claimant “stripped her of her dignity as a woman.” (Reconsideration request denied in 2011 HRTO 1291.)

⁶ Melissa Sheridan Embser-Herbert, “A Missing Link: Institutional Homophobia and Sexual Harassment in the U.S. Military,” in *In the Company of Men: Male Dominance and Sexual Harassment*, James E. Gruber and Phoebe Morgan, eds. (Boston: Northeastern University Press), 2005, 215 at 237.

⁷ Arjun P. Aggarwal, *Sexual Harassment in the Workplace* (1987, Butterworths Canada Ltd.) at 1, as quoted in *Janzen v. Platy Enterprises Ltd.* (1989), *supra*, note 1. Note, however, as this policy will discuss, that people who identify by more than one *Code* ground are often more vulnerable to sexual harassment.

2. Identifying sexual harassment

2.1 Defining sexual harassment

Section 10 of the *Code* defines harassment as “engaging in a course of vexatious⁸ comment or conduct that is known or ought to be known to be unwelcome.” Using this definition, more than one event must take place for there to be a violation of the *Code*.⁹ However, depending on the circumstances, one incident could be significant or substantial enough to be sexual harassment.

Example: A tribunal found that an incident where a male employee “flicked the nipple” of a female employee was enough to prove that sexual harassment had taken place.¹⁰

The reference to comment or conduct “that is known or ought reasonably to be known to be unwelcome” establishes a subjective and objective test for harassment. The subjective part is the harasser’s own knowledge of how his or her behaviour is being received. The objective component considers, from the point of view of a “reasonable” third party, how such behaviour would generally be received. Determining the point of view of a “reasonable” third party must take into account the perspective of the person who is harassed. In other words, the Human Rights Tribunal of Ontario (the HRTO) can conclude on the basis of the evidence before it that an individual knew, or should have known, that his or her actions were unwelcome.¹¹

It should be understood that some types of comments or behaviour are unwelcome based on the response of the person subjected to the behaviour, even when the person does not explicitly object.¹² An example could be a person withdrawing, or walking away in disgust after a co-worker has asked sexual questions.¹³

Human rights case law has interpreted and expanded on the definition in section 10 of the *Code*. In one of the earliest sexual harassment cases in Canada, a tribunal found that in employment, discriminatory conduct may exist on a continuum from overt sexual

⁸ “Vexatious” conduct or comment refers to actions or words that are annoying, distressing or agitating to the person experiencing them; for example, conduct has been found to be vexatious where the person complaining finds the comments or conduct worrisome, discomfiting and demeaning: see *Streeter v. HR Technologies*, 2009 HRTO 841 at para. 33.

⁹ See *Re Metropolitan Toronto (Municipality) and C.U.P.E., Local 79* [1996] O.L.A.A. No. 774, para. 353.

¹⁰ *Murchie v. JB’s Mongolian Grill (No. 2)*, 2006 HRTO 33 (Ont. Human Rights Trib.). See also, *Haykin v. Roth*, 2009 HRTO 2017; *Wamsley v. Ed Green Blueprinting*, 2010 HRTO 1491; *Ford v. Nipissing University*, 2011 HRTO 204; and *Gregory v. Parkbridge Lifestyle Communities Inc.* 2011 HRTO 1535. In *Dhanjal v. Air Canada* (1996), 28 C.H.R.R. D/367 (C.H.R.T.), the tribunal noted that the more serious the conduct, the less need there is for it to be repeated. Conversely, the tribunal held the less serious the conduct, the greater the need to show its persistence.

¹¹ *Reed v. Cattolica Investments Ltd. and Salvatore Ragusa*, [1996] O.H.R.B.I.D. No. 7 (Ont. Bd. Inq.). See also, *Gregory v. Parkbridge Lifestyle Communities Inc.*, *ibid.* at para. 87.

¹² In *Harriott v. National Money Mart Co.*, 2010 HRTO 353 at para. 104, the tribunal found that the respondent’s continued sexualized and inappropriate comments and conduct were unwelcome in the workplace.

¹³ See *S.S. v. Taylor*, 2012 HRTO 1839 at para. 71.

behaviour, such as unsolicited and unwanted physical contact and persistent propositions, to more subtle conduct, such as gender-based insults and taunting, which may reasonably be perceived to create a negative psychological and emotional work environment.¹⁴

In another decision, the Supreme Court of Canada stated:

Sexual harassment may take a variety of forms. Sexual harassment is not limited to demands for sexual favours made under threats of adverse job consequences should the employee refuse to comply with the demands. Victims of harassment need not demonstrate that they were not hired, were denied a promotion or were dismissed from their employment as a result of their refusal to participate in sexual activity. This form of harassment, in which the victim suffers concrete economic loss for failing to submit to sexual demands, is simply one manifestation of sexual harassment, albeit a particularly blatant and ugly one...¹⁵

Over time, the definition of sexual harassment has continued to evolve to reflect a better understanding of the way sexual power operates in society. For example, it is well-established that harassment and discrimination based on sex may not always be of a sexual nature. Behaviour that is not explicitly sexual may still amount to harassment because of sex. The situation must be viewed in the overall context.¹⁶

Example: A tribunal found that while the most common understanding of sexual harassment is conduct such as making passes, soliciting sexual favours, sexual touching, etc., the definition of sexual harassment also includes conduct that denigrates a woman's sexuality or vexatious conduct that is directed at a woman because of her sex.¹⁷

Human rights law clearly recognizes that sexual harassment is often not about sexual desire or interest at all. In fact, it often involves hostility, rejection, and/or bullying of a sexual nature. For more information, see the section entitled "Gender-based harassment."

The following list is not exhaustive, but it should help to identify what may be sexual and gender-based harassment:

- demanding hugs¹⁸
- invading personal space¹⁹
- unnecessary physical contact,²⁰ including unwanted touching,²¹ etc.

¹⁴ *Bell v. Ladas* (1980), *supra*, note 1.

¹⁵ *Janzen v. Platy Enterprises Ltd.* (1989), *supra*, note 1 at para. 44447.

¹⁶ *Impact Interiors Inc. v. Ontario (Human Rights Commission)* (1988), 35 C.H.R.R. D/477 (Ont. C.A.); *Drummond v. Tempo Paint & Varnish Co.* (1998), 33 C.H.R.R. D/175 (Ont. Bd. Inq.)

¹⁷ *Shaw v. Levac Supply Ltd.* (1990), 14 C.H.R.R. D/36 (Ont. Bd. Inq.)

¹⁸ *Arias v. Desai*, 2003 HRTO 1

¹⁹ *Harriott v. National Money Mart Co.* (2010), *supra*, note 12.

²⁰ *Harriott, ibid.* Note that girls and women with disabilities (physical or mental) may be particularly vulnerable to unnecessary and unwanted physical contact, and other forms of sexual harassment.

- derogatory language and/or comments toward women²² (or men, depending on the circumstances), sex-specific derogatory names²³
- leering²⁴ or inappropriate staring
- gender-related comment about a person's physical characteristics or mannerisms²⁵
- comments or conduct relating to a person's perceived non-conformity with a sex-role stereotype²⁶
- displaying or circulating pornography,²⁷ sexual pictures or cartoons,²⁸ sexually explicit graffiti,²⁹ or other sexual images (including online)
- sexual jokes, including circulating written sexual jokes (e.g. by e-mail)³⁰
- rough and vulgar humour or language related to gender
- sexual or gender-related comment or conduct used to bully a person
- spreading sexual rumours (including online)³¹
- suggestive or offensive remarks or innuendo about members of a specific gender
- propositions of physical intimacy
- gender-related verbal abuse, threats, or taunting
- bragging about sexual prowess
- demanding dates or sexual favours
- questions or discussions about sexual activities
- requiring an employee to dress in a sexualized or gender-specific way³²

²¹ *Janzen v. Platy Enterprises Ltd.*, (1989), *supra*, note 1; *Impact Interiors Inc. v. Ontario (Human Rights Commission)* (1988), *supra*, note 16; *Olarte v. De Filippis* (1983), 4 C.H.R.R. D/1705 (Ont. Bd. Inq.); affirmed (1984), 49 O.R. (2d) 17 (Ont. Div. Ct.)

²² *Harriott v. National Money Mart Co.* (2010), *supra*, note 12.

²³ Susan Dimock, "Reasonable Women in the Law," *Critical Review of International Social and Political Philosophy*, Vol. 11, No. 2, June 2008, 153 at 160. See also, *Fornwald v. Astrographic Industries Ltd.* (1996), 27 C.H.R.R. D/317 (B.C.C.H.R.); *Farris v. Staubach Ontario Inc.*, 2011 HRTO 979 at para. 164, reconsideration request denied 2011 HRTO 1778, rev'd in part 2012 ONSC 3876, reconsideration on liability 2012 HRTO 182; *Iu v. Markham Marble*, 2012 HRTO 65 at para. 26; *McIntosh v. Metro Aluminum Products and another*, 2011 BCHRT 34 (application for judicial review dismissed, 2012 BCSC 345)

²⁴ *Harriott v. National Money Mart Co.* (2010), *supra*, note 12. Depending on the circumstances, consideration should be given to whether there are other plausible explanations for "inappropriate" staring. For example, a person with a visual or other disability may not be aware of the fact that they are staring.

²⁵ *Shaw v. Levac Supply Ltd.* (1990), *supra*, note 17; *Fornwald v. Astrographic Industries Ltd.* (1996), *supra*, note 24 at D/322. *Farris v. Staubach Ontario Inc.*, 2011, *supra*, note 23.

²⁶ *Farris, ibid.*

²⁷ *Baylis-Flannery v. DeWilde*, 2003 HRTO 28; *Waroway v. Joan & Brian's Upholstering & Interior Decorating Ltd.* (1992), 16 C.H.R.R. D/311 (Ont. Bd. Inq.); see also *Abdolalipour v. Allied Chemical Canada Ltd.* (1996), [1996] O.H.R.B.I.D. No. 31 (Ont. Bd. Inq.); *deSousa v. Gauthier* (2002), 43 C.H.R.R. D/128 (Ont. Bd. Inq.)

²⁸ *deSousa v. Gauthier* (2002), *ibid.*

²⁹ *I.A.M., Lodge 171 v. Fleet Industries*, [1997] O.L.A.A. No. 791 (Ont. Arb. Bd.)

³⁰ *deSousa v. Gauthier* (2002), *supra*, note 27.

³¹ *A. v. Quality Inn*, (1993), 20 C.H.R.R. D/230 (Ont. Bd. Inq.); *Farris v. Staubach Ontario Inc.*, 2011, *supra*, note 23.

³² *Mottu v. MacLeod and others*, 2004 B.C.H.R.T. 67; *Bil v. Northland Properties*, 2010 B.C.H.R.T. 234.

- paternalistic behaviour based on gender which a person feels undermines their status or position of responsibility
- threats to penalize or otherwise punish a person who refuses to comply with sexual advances (known as reprisal).

2.2 When Code grounds intersect

A person may be especially vulnerable to sexual harassment when they are identified by more than one *Code* ground. For example, a young lone mother receiving social assistance who has had trouble finding suitable housing for herself and her child may find it very challenging to move when her landlord continues to proposition her sexually after she has said no. This woman's sex, age, family status and receipt of social assistance all make her vulnerable to sexual harassment. If she is a racialized person or has a disability, her experience of the harassment may change or be compounded.³³

Where multiple grounds intersect to produce a unique experience of discrimination or harassment, we must acknowledge this to fully address the impact on the person who experienced it. Where the evidence shows that harassment occurred based on multiple grounds, decision-makers should consider the intersection when thinking about liability and the remedy available to the claimant.³⁴

Tribunals and courts have been increasingly using an intersectional approach in the human rights cases they hear. For example, in one case alleging sexual harassment in employment, the tribunal recognized the claimant's identity as an Aboriginal lone mother as helpful in understanding the choices available to her when she was trying to keep her job and cope with the respondent's behaviour. The tribunal stated:

[T]he complainant's gender, her status as a single mother and her aboriginal ancestry combined to render her particularly vulnerable to the conduct of the respondent.³⁵

In another case dealing with the sexual harassment of a woman in the workplace, the tribunal stated in its decision:

As for her vulnerability, it was undoubtedly increased by the fact that as a lesbian, she was a member of a marginalized group.³⁶

³³ The OHRC has explored this "contextualized" or "intersectional" approach to discrimination analysis at length in its Discussion Paper entitled *An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims*, available at: www.ohrc.on.ca/en/resources/discussion_consultation/DissIntersectionalityFtns/view. (Retrieved: April 22nd 2013). The concept of "intersectionality" has been defined as "intersectional oppression [that] arises out of the combination of various oppressions that, together, produce something unique and distinct from any one form of discrimination standing alone..." M. Eaton, "Patently Confused, Complex Inequality and *Canada v. Mossop*" (1994) 1 Rev. Cons. Stud. 203 at 229.

³⁴ See, for example, *Baylis-Flannery v. Walter DeWilde* (2003), *supra*, note 27; *SH v. M [...] Painting*, 2009 HRTO 595 (CanLII).

³⁵ *S.H. v. M.*, *ibid.* at para. 5. See also *Iu v. Markham Marble*, *supra* note 23.

³⁶ See *Crozier v. Asselstine*, (1994), 22 C.H.R.R. D/244 at para. 18 (Ont. Bd. Inq.)

The harassment provisions of the *Code* (subsections 2(2), 5(2), 7(1) and (2)) specifically prohibit harassment based on sexual orientation.³⁷

Example: A woman working at a coffee shop was asked out on a date by her employer on her second day at work. She declined the invitation. When her employer learned that she was a lesbian, his interest in her intensified and he tried to persuade her to have a heterosexual relationship with him. A human rights tribunal found that the employer's conduct amounted to harassment because of sexual orientation as well as sexual harassment.³⁸

Research has shown that unmarried women may be more vulnerable to sexual harassment in the labour market than married women, due to a perception that they are less powerful.³⁹ Young women, as well as women with disabilities, may be similarly singled out as targets for sexual harassment due to a perception that they are more vulnerable and unable to protect themselves.⁴⁰

Racial stereotypes about the sexuality of women have played a part in a number of sexual harassment claims. Women may be targeted because of beliefs based on racialized characteristics (for example, they are more sexually available, more likely to be submissive to male authority, more vulnerable, etc.).

Example: A woman of mixed Métis and Black ancestry experienced a serious course of sexual comments by her employer, who repeatedly referred to his preference for Black women and the physical characteristics of Black and African women. She was also subjected to physical touching and pornography. The tribunal found that her employer sexually and racially harassed her because she is a young Black woman that he, as her employer, could assert economic power and control over. He repeatedly diminished her because of his racist assumptions about the sexuality of

³⁷ "Sexual orientation" was added as a ground to these sections as a result of the passage of Bill 33, *Toby's Act (Right to be Free from Discrimination and Harassment Because of Gender Identity or Gender Expression)* in 2012. Before these amendments, however, it was the OHRC's position that the harassment provisions of the *Code* should be read to include sexual orientation. This approach was consistent with human rights case law pre-dating the amendments: see *Crozier v. Asselstine*, (1994), *ibid*.

³⁸ *Crozier v. Asselstine*, (1994), *ibid*.

³⁹ See, for example, Marla H. Kohlman, "Intersection Theory: A More Elucidating Paradigm of Quantitative Analysis," *Race, Gender & Class*, 13:3 4 [2006], 42-53.

⁴⁰ See, for example, Fiona Sampson, "Globalization and the Inequality of Women with Disabilities", (2003) 2 J. L. & Equality 18; Susan Fineran, "Sexual harassment and students with disabilities," (2002) Paper presented at the annual meeting of the Society for the Study of Social Problems, Washington D.C.; and Susan Fineran, "Sexual Harassment Between Same-Sex Peers: The Intersection of Mental Health, Homophobia, and Sexual Violence in Schools," (2002) *Social Work*, 47. Both papers are discussed in James E. Gruber and Susan Fineran, "The Impact of Bullying and Sexual Harassment on Middle and High School Girls," *Violence Against Women*, Volume 13, Number 6, June 2007, 627 at 632.

Black women. The tribunal awarded separate monetary damages for the racial and sexual harassment. The tribunal also found that the intersectionality of the harassment and discrimination made her mental anguish worse.⁴¹

In a similar case, an employer's sexual harassment of a female employee included derogatory references to her race and comments about what he believed to be the sexual habits and preferences of Black women.⁴² Sexuality is sometimes intertwined with racism. People may hold stereotypical and racist views about someone's sexuality based on their ethno-racial identity,⁴³ and these views may be behind some forms of sexual harassment.

A person may also experience sexual harassment or a poisoned environment because they have a relationship with a racialized person. For example, a woman may be subjected to inappropriate sexual comments because she is dating a racialized man.⁴⁴

Women who come to Canada from other countries to work as domestic caregivers (or "live-in caregivers") may be especially vulnerable to sexual harassment. They are typically required to live in the homes of their employers, they are isolated, and they need their employer's cooperation to get citizenship status. For more detailed information, see the section entitled "Sexual harassment in employment."

2.3 Forms of sexual harassment

Sexual harassment may take various forms, and can be said to exist on a range from seemingly mild transgressions⁴⁵ to severe behaviour. In its more subtle forms, sexual harassment may include sexual jokes and innuendo, or unwanted and repetitive gestures of affection. In its more extreme forms, sexual harassment can invade a person's life and escalate to stalking, physical assault, including attempted and actual rape, and murder.

While many forms of sexual harassment take place through person-to-person contact, sexual harassment is also happening at alarming rates through online technology.⁴⁶ Email, blogs, social networking sites, chat rooms, dating websites, cell phone text

⁴¹ *Baylis-Flannery v. Walter DeWilde* (2003), *supra*, note 27.

⁴² *Cuff v. Gypsy Restaurant* (1987), *supra*, note 5.

⁴³ See, for example, *Baylis-Flannery v. Walter DeWilde* (2003), *supra*, note 27.

⁴⁴ Section 12 of the *Code* protects the rights of a person who is associated with a person who is a member of a group identified by the *Code*.

⁴⁵ Note, however, that a person's experience of the sexually harassing behaviour must be considered when deciding how serious the comment or conduct was. Sexual harassment that may seem to be on the less serious end of the spectrum may still have a very negative impact on the person being harassed, and may constitute a violation of the *Code*.

⁴⁶ See *The Road to Health: A Final Report on School Safety*, School Community Safety Advisory Panel (The Falconer Report) (January 2008), available at: www.schoolsafetypanel.com/pdf/finalReport_volume4.pdf (Retrieved: April 22nd 2013). See also, *McIntosh v. Metro Aluminum Products and another*, *supra*, note 23.

messaging, *etc.* are all possible domains for sexual harassment. “Cyber-harassment,” as it is also known, can be carried out by anyone, including a co-worker, a manager, a housing provider, a fellow tenant, a fellow student, a teacher, school staff or a stranger. The growth of technology has created an unprecedented potential for the viral spread of online comment, photographs, video images, *etc.* The anonymity afforded by many forms of online communication may make it a vehicle of choice for harassers. However, organizations covered by the *Code* have a responsibility to maintain poison-free environments. To this end, they must be aware of the potential discriminatory effects when online technology is used on their premises for improper purposes.

2.3.1 Sexual solicitation and advances

Section 7(3)(a) of the *Code* sets out a person's right to be free from unwelcome sexual advances or solicitation from a person who is in a position to grant or deny a benefit. This provision of the *Code* is violated when the person making the solicitation or advance knows, or should reasonably know, that such behaviour is unwelcome.

People who are in a position to confer, grant or deny a benefit or advancement would include an employer, supervisor, manager, job interviewer, housing provider, professor, resident don, teaching assistant, teacher, *etc.* Possible benefits might include employment opportunities, job-related benefits such as a promotion or bonus or favourable working conditions, housing benefits, a good mark in a course or a positive reference, and other favours.⁴⁷

Example: A professor or teacher makes an unwelcome sexual advance to a student and implies or explicitly makes it known that if she or he does not accept, she or he will likely not pass the course.

Example: In a rental housing situation, a building superintendent asks for sexual favours in return for granting a tenant's request to transfer to a larger unit.

Sexual solicitation or advances can also occur between co-workers where one person is in a position to grant or deny an employment-related benefit to the other.

Example: One worker demands sexual favours before sharing important job-related information with a colleague.

Human rights law recognizes that an unequal power dynamic may make it impossible for a person to give real consent. Where a person depends on another for a job, a place to live, a benefit, *etc.*, she or he may feel unable to protest against unwanted sexual activity from the person in a position of power, particularly if she or he is afraid of losing the benefit in question. For more information, see the section entitled “Burden of proof: evidentiary issues.”

⁴⁷ Russel Zinn, *The Law of Human Rights in Canada: Practice and Procedure*, Canada Law Book, at 11-28.

Section 8 of the *Code* prohibits reprisals in general. Sub-section 7(3)(b) specifically prohibits any form of reprisal or threat of reprisal made in the context of a sexual solicitation or advance.

Example: A tribunal found that a male employer had violated section 7(3)(b) when he threatened to dismiss a female employee if she did not accept his dinner and club invitations and then dismissed her after she refused his third request.⁴⁸

2.3.2 Poisoned environment

The Supreme Court of Canada has defined sexual harassment to include conduct that creates a hostile or “poisoned” environment.⁴⁹ Creating or allowing a poisoned environment means that certain people face terms and conditions of employment, tenancy, education, etc. that are quite different from those experienced by people who are not subjected to the comments or conduct. This leads to a denial of equality under the *Code*.

Example: A tribunal found an employer’s repetitive use of terms of endearment such as “sweetheart,” “little lady,” “hun,” “sweetie” and “dear” to be “terms of diminishment,” and that, within the broader context of his other sexualized overtures, the use of these terms created a poisoned work environment and violated a woman’s right to be free from discrimination in employment.⁵⁰

In employment, tribunals have held that the atmosphere of a workplace is a condition of employment just as much as hours of work or rate of pay. A “term or condition of employment” includes the emotional and psychological circumstances of the workplace.⁵¹ Managers who know or should know a poisoned atmosphere exists but permit it to continue discriminate against affected employees even if they themselves are not directly involved in creating that atmosphere.⁵²

⁴⁸ *Pchelkina v. Tomsons*, 2007 HRTO 42. See also *Morrison v. Motsewetsho*, 2003 HRTO 21; *Waroway v. Joan & Brian’s Upholstering & Interior Decorating Ltd.* (1992), *supra*, note 27; *Robinson v. Company Farm Ltd.* (1984), 5 C.H.R.R. D/2243 (Ont. Bd. Inq.); *Mitchell v. Traveller Inn (Sudbury) Ltd.* (1981), 2 C.H.R.R. D/590 (Ont. Bd. Inq.); *Q. v. Wild Log Homes Inc.*, 2012 BCHRT 135 at para. 155, 158.

⁴⁹ *Janzen et al v. Platy Enterprises Ltd.* (1989), *supra*, note 1.

⁵⁰ *Colvin v. Gillies* 2004 HRTO 3

⁵¹ *Dhillon v. F.W. Woolworth* (1982), 3 C.H.R.R. D/743 (Ont. Bd. Inq.); *Naraine v. Ford Motor Company* [1996], [27 C.H.R.R. D/23014](#) (Ont. Bd. Inq.); *aff’d* [34 C.H.R.R. D/405](#) (Ont. Div. Ct.); *rev’d* (2001), 209 D.L.R. (4th) 465 (Ont. C.A.); leave to appeal refused [2002] S.C.C.A. No. 69 (QL).

⁵² *Ghosh v. Domglas Inc. (No.2)* (1992), 17 C.H.R.R. D/216 at para. 76 (Ont. Bd. Inq.).

Example: When a co-worker ended a romantic relationship with him, a man showed intimate cell-phone photographs of her to several people in their workplace. His supervisor heard that other people had seen the pictures, but he did not see them himself, and chose not to intervene in what he saw as a personal matter – even though he had a legal duty to do so under the *Code*.

While the idea of a poisoned environment has arisen mainly in employment, it can also happen in housing, education and other social areas covered by the *Code*.

Example: A professor held academic meetings with a potential graduate student. These meetings included “seductive music, low lighting, candles, a burning fireplace, dinner, wine, rides home and personal and intimate conversation.” The tribunal found this was sexual harassment, because a vulnerable student who wished to discuss her academic future with someone in a position of authority was subjected to this type of sexually charged environment, where that conduct was objectively known to be unwelcome.⁵³

Educators, employers, housing providers and other responsible parties have a duty to keep a positive non-discriminatory environment that is free from sexual harassment. Not addressing a sexualized atmosphere may open the door for more egregious sexual behaviour. In one case, a tribunal commented:

[T]he creation of a poisoned or sexualized work atmosphere had the effect of increasing the vulnerability of [the claimant] to more direct sexual advances by blurring the lines of appropriate conduct...⁵⁴

Further, not addressing sexual harassment may in itself cause a poisoned environment.

A poisoned environment may be based on the nature of the comments or conduct and the impact of these on an individual rather than on the number of times the behaviour occurs.⁵⁵ In some cases, a single statement, if bad enough, can have an impact on a person by creating a poisoned environment.⁵⁶

Example: A poisoned environment can result from a single action such as a statement by a union representative that women in general, or women of a certain race or ethnic background, are not suitable as union representatives. Similarly, a poisoned environment may be created by

⁵³ *Mahmoodi v. Dutton*, (1999), 36 C.H.R.R. D/8 (B.C. Hum. Rts. Trib.) at para. 242.

⁵⁴ *Curling v. Torimiro* [1999] O.H.R.B.I.D. No. 17 at para. 77 (Ont. Bd. Inq.)

⁵⁵ See *Moffatt v. Kinark Child and Family Services* (1998) 35 C.H.R.R. D/205 (Ont. Bd. Inq.) and *Kharoud v. Valle-Reyes* (2000) BCHRT 40.

⁵⁶ As noted earlier, in *Dhanjal v. Air Canada*, *supra*, note 10 at para. 209, the tribunal noted that the more serious the conduct, the less need there is for it to be repeated, and the less serious it is, the greater the need to show its persistence.

male students distributing or publishing written materials on a college campus that include threatening or intimidating content towards women.⁵⁷

A poisoned environment can be created by the comments or actions of any person, regardless of his or her position of authority or status. Therefore, a co-worker, supervisor, co-tenant, housing provider, member of the Board of Directors, fellow student, teacher, contractor, client, *etc.* might all do something that creates a poisoned environment. Whoever is involved, the person in charge has a duty to deal with it.

Other examples of situations that could be seen as a violation of the *Code* by creating a poisoned environment include:

- a supervisor, teacher or housing provider telling an employee, student or tenant: “women should be barefoot and pregnant in the kitchen, not in the boardroom/classroom/living alone,” *etc.*
- comments, signs, caricatures or cartoons displayed in a workplace, common living area, educational facility, service environment (such as a store or restaurant), *etc.* that show women in a demeaning way⁵⁸
- sexualized or gender-related graffiti or images that are tolerated and not promptly removed by an employer, housing provider, educator or other responsible party
- sexual or gender-related remarks, jokes or innuendo about an employee, client, student, customer, tenant, *etc.* In addition, sexual or gender-related remarks, jokes or innuendo made about other people or groups may create worry for bystanders that similar views are held about them.

When a person’s employment is terminated within a poisoned work environment, the environment must be considered when deciding whether the termination was discriminatory.⁵⁹

Behaviour does not have to be directed at any one person to create a poisoned environment. As well, a person can experience a poisoned environment even if he or she is not a member of the *Code*-protected group that is the target.⁶⁰ In one study, researchers adopted the term “ambient harassment” to describe the spill-over effects that the harassment of one person may have on other people in the environment. The researchers reported that in the workplace, “ambient sexual harassment had detrimental influences on both job satisfaction and psychological well-being.”⁶¹

⁵⁷ *Saskatchewan (Human Rights Commission) v. Engineering Society* (1989), 10 C.H.R.R. D/5636 (Sask. Bd. Inq.).

⁵⁸ *J.D. v. M.G.* [2002] O.H.R.B.I.D. No. 9 (Ont. Bd. Inq.).

⁵⁹ *Smith v. Mardana Ltd.* (2005), CHRR Doc. 05-094 (Ont. Div. Ct.), rev’g in part (2002), 44 C.H.R.R. D/142 (Ont. Bd. Inq.); *Naraine v. Ford Motor Company of Canada* (1996), *supra*, note 51 at paras. 98 and 99.

⁶⁰ *Lee v. T.J. Applebee’s Food Conglomeration* (1987), 9 C.H.R.R. D/4781 (Ont. Bd. Inq.)

⁶¹ As discussed in Margaret S. Stockdale, “The Sexual Harassment of Men: Articulating the Approach-Rejection Theory of Sexual Harassment,” in *In the Company of Men: Male Dominance and Sexual Harassment*, *supra*, note 6, at 135.

Example: A hiring team at a law firm was conducting interviews for articling student positions. A senior partner walking by the room where candidates were waiting to be interviewed, pointed at a young female candidate and said to a female member of the hiring team “hire her, she’s easy on the eyes.” This comment created a poisoned environment for both the potential candidate and the woman on the hiring team.

Inappropriate comment or conduct does not just poison the environment for the people targeted – it is offensive to everyone.

Example: In a male-dominated work environment, a tribunal held that a “locker room” mentality is not an excuse for sexually vexatious behaviour, even if some of the participants accept or even seem to enjoy it.⁶² The tribunal rejected the employer’s argument that “men in male-dominated workplaces are expected to tolerate crude and lewd environments [and stated]... that it is contrary to the purpose of the *Code*, which seeks to promote and protect the mutual respect, inherent dignity and worth of every person.”⁶³

Every employer, housing provider, education provider or other responsible party must make sure that their environments are free from this sort of behaviour, even if no one objects, and even if there is widespread participation in the behaviour.⁶⁴ Under human rights law, it is not a defence to say that other employees were treated in the same negative way as the complainant.⁶⁵

2.3.3 Gender-based harassment

Gender-based harassment may be defined as “any behaviour that polices and reinforces traditional heterosexual gender norms.”⁶⁶ It includes harassment for gender non-conformity, and often will look the same as harassment based on a person’s sexual orientation or perceived sexual orientation. As mentioned earlier, the OHRC sees gender-based harassment as a form, or sub-set, of sexual harassment.

In 2012, the *Code* was amended to include “gender expression” as a new ground (the new ground of “gender identity” was also added at the same time). While the *Code* does not define “gender expression” (or “gender identity,” for that matter), gender expression can be interpreted to include the external attributes, behaviour, appearance, dress, *etc.*, by which a person expresses themselves and through which others perceive

⁶² *Smith v. Menzies Chrysler Inc.* 2009 HRTO 1936; (reconsideration request denied in 2009 HRTO 2270).

⁶³ *Ibid.*, at para. 156.

⁶⁴ See *Smith v. Ontario (Human Rights Commission)*, (2005), [52 C.H.R.R. D/89](#) (Ont. Div.Ct.) and *Naraine v. Ford Motor Company* (1996), *supra*, note 51.

⁶⁵ See *Hughes v. Dollar Snack Bar* (1981), [3 C.H.R.R. D/1014](#) (Ont. Bd. Inq.).

⁶⁶ Elizabeth J. Meyer, “Gendered Harassment in Secondary Schools: Understanding Teachers’ (Non) Interventions,” *Gender and Education*, Vol. 20, No. 6, November 2008, 555 at 555.

that person's gender. Therefore, many, if not most, forms of gender-based harassment would now be prohibited under the ground of gender expression as well. A person experiencing gender-based harassment may file a sexual harassment claim with the HRTO. Depending on the circumstances, their claim may also allege a violation of their right to be free from discrimination and/or harassment based on gender expression, and, in some cases, sexual orientation, and/or gender identity as well. Gender-based harassment can be carried out by men or women, and its target may be male or female. It can happen in any of the social areas covered by the *Code*.

It is well-established that sexual harassment may include behaviour that is not overtly sexual in nature.⁶⁷ It may include comment and conduct that relates to a person's gender, and is meant to demean or cause personal humiliation and/or embarrassment.⁶⁸ Human rights case law continues to evolve to recognize a more nuanced understanding of the ways that sexual harassment may involve gender-based negative treatment. For example, in a recent case, a tribunal stated:

The *Code* provides that all persons have a right to be free of discrimination... and harassment in the workplace... "because of sex." There can be no doubt that the reference to "because of sex" captures the concepts of gender, sexuality and sexual categories, as well as sexual characteristics and, therefore, includes sexually-related discrimination and harassment. The focus of a sexual harassment inquiry is not strictly on the gender or sexual orientation of the parties. It is a multi-faceted assessment that looks at the balance of power between the parties, the nature, severity and frequency of impugned conduct, and the impact of the conduct. The key indicia (and harm) of sexual harassment is the use of sex and sexuality to leverage power to control, intimidate or embarrass the victim.⁶⁹

Gender-based harassment is not generally motivated by sexual interest (note, however, that motive is irrelevant in a discrimination analysis: see the section entitled "Burden of proof" for more information). In fact, it is more often based on gender-based hostility and is often an attempt to make the target feel unwelcome in their environment. In many cases, gender-based harassment "undermines, humiliates, or rejects a target on the basis of sex with sexual and sexist remarks, jokes, materials or pranks."⁷⁰

⁶⁷ In *Wagner v. Bishop*, 2010 HRTO 2546 at para. 25, the tribunal stated that "it is not necessary to show sexual attraction in order to establish 'harassment because of sex.'" See also *Shaw v. Levac Supply Ltd.* (1990), *supra*, note 17, in which the tribunal ruled that not all harassment because of sex necessarily involved pressure to engage in sexual activity.

⁶⁸ See *Bell v. Ladas*, (1980) *supra*, note 1; *Demars v. Brampton Youth Hockey Association*, 2011 HRTO 2032.

⁶⁹ *Smith v. Menzies Chrysler Inc.* (2009), *supra*, note 62 at para. 150.

⁷⁰ Jennifer L. Berdahl, "The Sexual Harassment of Uppity Women," *Journal of Applied Psychology*, 2007, Vol. 92, No. 2, 425-437 at 426. See also, *Demars v. Brampton Youth Hockey Association*, *supra*, note 68.

Gender-based harassment is often used to reinforce traditional sex-role stereotypes, (masculine dominance and female subservience). One author notes:

Gender ideals involve both physical and personality characteristics. Personality characteristics desired in men include assertiveness, independence, and dominance; those desired in women include modesty, deference, and warmth.⁷¹

People who do not conform to traditional understandings of “appropriate” sex-role behaviour may be singled out for harassment as “gender-role deviants.”⁷² Another author notes:

Sexual harassment is a tool to maintain a masculine hierarchy that rewards men who possess the requisite masculine traits. Women are in a double bind in situations controlled by men with a propensity to harass. If they attempt to break traditional female gender roles, such as entering traditionally male occupations, they may be targeted for harassment as a means of dissuasion. If they conform to traditional feminine gender roles, such as dressing in feminine ways or occupying traditionally female jobs, they may evoke sexual attention, which shifts attention from their worker status to a sexual playmate status. Both forms of harassment against women serve to maintain the status quo of male dominance.⁷³

Subjecting a woman to negative treatment because of a perception that she is not physically attractive and does not measure up to a stereotypical ideal of feminine beauty has been found to constitute sexual harassment.

Example: A tribunal found that an employee’s repeated and negative comments to a co-worker about her physical appearance and the fact that he thought she was overweight amounted to sexual harassment. The tribunal held that the co-worker’s comments had no other purpose but to show that the woman was physically unattractive and sexually undesirable. The Board referred to this behaviour as “sexual harassment in the form of an inappropriate comment of a sexual nature.”⁷⁴

Example: In a similar case, where a co-worker told the claimant to “get off your fat ass, you bitch,” a tribunal stated that “the term ‘fat ass’ is an insult generally levelled against a woman who does not conform to the stereotype of the physical size that an attractive woman should be.” The tribunal went on to state that “in the context of the respondent’s workplace,

⁷¹ Berdahl, *ibid.* at 425. See also, *Demars v. Brampton Youth Hockey Association*, *ibid.*

⁷² Berdahl, *ibid.*

⁷³ Margaret S. Stockdale, “The Sexual Harassment of Men: Articulating the Approach-Rejection Theory of Sexual Harassment,” *supra*, note 61, at 117.

⁷⁴ *Shaw v. Levac Supply Ltd.* (1990), *supra*, note 17, at para. 139.

the term took on a gender-specific character and was applied exclusively as [a] sexist insult to [the claimant] because she is a woman...The term 'bitch' is used exclusively in reference to women."⁷⁵

Assertive, independent women who defy gender norms may be especially vulnerable to harassment. One study on gender-based harassment showed that "the more a woman deviated from traditional gender roles – by occupying a 'man's' job or having a masculine personality – the more [she was] targeted for sexual harassment."⁷⁶

Example: A successful female real estate agent was criticized for being "aggressive," "a woman in a man's environment" and "much like a man." She was called bossy and condescending, often because of behaviour that was no different from the behaviour of the male real estate agents in the same office. Agents at the company referred to her in language that disparaged her based on her sex, and there was a false sexual rumour spread among her colleagues that she was having a relationship with one of the managers.⁷⁷

Example: A female police officer, who was also a bodybuilder, found vibrators, a urinal device and a soiled condom and sanitary napkin in her mailbox at work. She was also subjected to sexually explicit noises and materials.⁷⁸

Example: An outspoken, high-performing woman in a male-dominated professional accounting office was denied partnership and told to learn how to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewellery."⁷⁹

Women may be subjected to unsolicited advice based on gender-based ideas about how women should look, dress or behave.

Example: A teacher repeatedly makes comments to a female student about her choices of clothing. He tells her that she should wear skirts more often because they make her look "feminine" and that she looks "prettier" when she wears her hair down.

⁷⁵ *Fornwald v. Astrographic Industries Ltd.* (1996), *supra*, note 23 at D/322. See footnote 23 for additional recent cases where sexually demeaning, gendered language was used in the course of sexual harassment.

⁷⁶ Jennifer L. Berdahl, "The Sexual Harassment of Uppity Women," *supra*, note 70 at 434.

⁷⁷ *Farris v. Staubach Ontario Inc.*, 2011, *supra*, note 23 at paras. 56-58.

⁷⁸ *Sanchez v. City of Miami Beach*, 720 F. Supp. 974 (S.D. Fla. 1989).

⁷⁹ *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989), as discussed in Jennifer L. Berdahl, "The Sexual Harassment of Uppity Women," *supra*, note 70 at 426. See also *Farris v. Staubach Ontario Inc.*, 2011, *supra* note 23.

Men may also be subjected to gender-based harassment, often by other men, for not conforming to stereotypical notions of masculinity. One author writes:

[S]exual hierarchies among men are rigidly enforced according to norms of masculinity. Men are singled out for sexual violence and harassment based on their failure to conform to this norm, disproportionately so if they are also physically or mentally disabled or a member of an otherwise marginalized community.⁸⁰

Male-to-male gender-based harassment is often aimed at men who appear to be effeminate, gay, young, inexperienced, or otherwise “insufficiently” masculine.⁸¹ | The harassment will often involve homophobic slurs and taunting, no matter what the victim’s sexual orientation.

Example: Male co-workers mocked a man due to infertility issues he and his wife were having. His masculinity was ridiculed and he was repeatedly called “bati boy,” a pejorative slur used to describe gay, bisexual or effeminate men.⁸²

Men may experience gender-based harassment for not taking part in sexualized behaviour, or for not taking an adequate interest in sexually explicit humour or material.⁸³

Example: A tribunal found that a man was singled out, subjected to “sexual harassment fused with workplace bullying,” and ultimately fired due, in part, to his refusal to view pornography during work hours with his supervisor and co-workers.⁸⁴

Example: A man was sexually harassed by his co-workers when he would not engage in sexual conversations with them and because he disapproved of their use of foul language.⁸⁵

In these ways, men may perpetrate gender-based harassment not only to harm their targets, but also to reinforce masculine dominance⁸⁶ and to “prove” their own masculinity to other male onlookers.⁸⁷

⁸⁰ Janine Benedet, “Same-Sex Sexual Harassment in Employment”, (2000), 26 Queen’s L. J. 101 at para. 83.

⁸¹ Margaret S. Stockdale, “The Sexual Harassment of Men: Articulating the Approach-Rejection Theory of Sexual Harassment,” (2005), *supra*, note 61.

⁸² *Shroff v. Tipco* 2009 HRTO 1405, (reconsideration request denied in 2009 HRTO 1660).

⁸³ Michael S. Kimmel and Tyson Smith, “The ‘Reasonable Woman’ and the Unreasonable Man,” Gendered Discourses in Sexual Harassment Litigation,” in *In the Company of Men: Male Dominance and Sexual Harassment*,” *supra*, note 6 at 144.

⁸⁴ *Smith v. Menzies Chrysler Inc.* (2009), *supra*, note 62 at para. 150.

⁸⁵ *Polly v. Houston Lighting & Power Co.* 825 F. Supp. 135 (S. D. Tex. 1993). See also the U.S. landmark same-sex sexual harassment case: *Oncale v. Sundowner Offshore Services*, 118 S. Ct. 998 (1998).

⁸⁶ See *Wagner v. Bishop*, 2010 HRTO 2546, *supra* note 67 at para. 26.

People who identify as transgender may be especially vulnerable to gender-based harassment. By not conforming to traditional sex-role stereotypes, transgender people may be subjected to gender-policing and other forms of sexually harassing behaviour.⁸⁸

Example: In a warehouse, a transgender female employee is repeatedly made the brunt of practical jokes and called a “freak” by her co-workers.

The *Code*’s prohibition against sexual harassment includes all forms of gender-based harassment.

2.3.4 Sexual harassment and violence

Inappropriate sexual behaviour often develops over time, and if left unchallenged may progress to more serious forms.⁸⁹ Violence is often the culmination of ongoing acts of harassment. This connection is quite clear in the case of sexual harassment and violence. In many ways, sexual harassment and sexual violence exist on the same continuum of negative attitudes toward girls and women.

Example: An employer’s repeated sexual touching of and commentary toward a female employee over a three- to four-month period in the workplace culminated in his gaining entry into her home one morning and threatening to rape her.⁹⁰

The United Nations’ *Declaration on the Elimination of Violence Against Women*, which complements and strengthens the *Convention on the Elimination of All Forms of Discrimination Against Women*⁹¹ specifically recognizes “sexual harassment and intimidation [of women] at work, in educational institutions and elsewhere” as a form of violence against women.⁹²

⁸⁷ Margaret S. Stockdale, “The Sexual Harassment of Men: Articulating the Approach-Rejection Theory of Sexual Harassment,” *supra*, note 61 at 125.

⁸⁸ See *Vanderputten v. Seydaco Packaging Corp.*, 2012 HRTO 1977 (reconsideration request denied in 2012 HRTO 2165). For more information, see the OHRC’s *Policy on Discrimination and Harassment Because of Gender Identity*, available at: www.ohrc.on.ca/en/policy-discrimination-and-harassment-because-gender-identity (Retrieved: April 22, 2013).

⁸⁹ In *Cugliari v. Clubine*, 2006 HRTO 7, at para. 23, Dr. Sandy Welsh, an associate professor in the Department of Sociology at the University of Toronto, testified that “there is often an escalation in behaviour from initially grey behaviour into more directed comments and physical or sexual touching.”

⁹⁰ *Quebec (Commission des droits de la personne) v. Larouche* (1993), 20 C.H.R.R. D/1 (Que. Trib.) For Ontario cases, see *Hughes v. 1308581 Ontario*, 2009 HRTO 341 (Ont. Human Rights Trib.) in which the respondent also pled guilty to a charge of criminal harassment; *Baylis-Flannery v. DeWilde*, (2003), *supra*, note 27; *Domingues v. Fortino*, 2007 HRTO 19; *Arias v. Desai*, (2003), *supra*, note 18.

⁹¹ *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 U.N.T.S. 13, Can. T.S. 1982 No. 31 (entered into force 03 September 1981, accession by Canada 09 January 1982).

⁹² *Declaration on the Elimination of Violence Against Women*, Resolution A/RES/48/104 adopted 20 December 1993, Article 2(b).

In three notable cases, acts of workplace sexual harassment escalated to violence and ultimately resulted in murder. The 1997 Theresa Vince Inquest, the 2002 Gillian Hadley Inquest and the 2007 Lori Dupont Inquest looked at the tragic murders of these women – Vince and Dupont at the hands of their colleagues, and Hadley who faced workplace harassment from her in-laws and was eventually murdered by her ex-husband. Bill 168, *An Act to amend the Occupational Health and Safety Act with respect to violence and harassment in the workplace and other matters*, was enacted at least in part as a result of organized efforts to build awareness after these tragic events.⁹³

Like other forms of sexual harassment, gender-based harassment may also escalate to violent behaviour. The targets of this violence may be male or female.

Example: In the first same-sex sexual harassment case heard in the United States, an offshore oil-rig worker was subjected to constant ridicule and derision by his co-workers. This behaviour culminated in him being sexually assaulted in a locker room.⁹⁴

The *Occupational Health and Safety Act* requires employers in workplaces with five or more employees to prepare written policies on workplace violence and workplace harassment. The policies must be reviewed at least annually. Employers must also develop a program to implement the workplace violence policy. The *OHSA* also contains provisions that require employers to do risk assessments to prevent workplace violence.

Along with the requirements of the *OHSA*, employers will need to take steps to account for the interrelated dimensions of sexual harassment and violence through efforts to assess risk and protect workers. Under the *Code*, employers must ensure their environments are free from harassment. One way to do this is by monitoring the environment on an ongoing basis. Any prevalence of harassment found becomes a risk factor that employers need to consider in their duty to assess and address the risk of workplace violence under the *OHSA*.

High rates of sexual harassment and sexual violence in Toronto's schools have been well-documented by *The Road to Health: A Final Report on School Safety* (the Falconer Report) released in 2008.⁹⁵ After the Falconer Report, the Minister of Education asked a Safe Schools Action Team to review incidents of student-to-student gender-based violence, homophobia, sexual harassment and inappropriate sexual behaviour, including any barriers to reporting that may exist in Ontario's publicly funded schools. In its report, the Safe Schools Action Team cited the influence of media, particularly electronic

⁹³ Development and passage of the Bill was influenced by the efforts of Barbara Dupont (the mother of Lori Dupont) and others who lobbied members of provincial parliament, got thousands of signatures on petitions, and along with the family members of Theresa Vince and Lori Dupont, testified at Queen's Park to gain public support for legislative change.

⁹⁴ *Oncale v. Sundowner Offshore Services*, (1998), *supra*, note 85.

⁹⁵ "The Falconer Report," *supra*, note 46, as referenced by the Ontario Women's Justice Network at: www.owjn.org/owjn_2009/index.php?option=com_content&view=article&id=54&Itemid=67 (Retrieved: April 22, 2013).

media, in perpetuating negative stereotypes, modeling unhealthy relationships, and in showing widespread gender-based violence as “highly relevant to issues of sexual harassment.”⁹⁶ The Report states, “...some of the most popular video games contain graphic violence in which violence (particularly against women) is normalized.”⁹⁷ The Report cites research showing that:

[P]rolonged exposure to such material can encourage imitation, stimulate violent or aggressive behaviour, cause emotional desensitization towards victims, and reduce the inclination to intervene to help victims or seek help on their behalf.⁹⁸

The potential for sexual harassment and violence increases if a person is identified by more than one *Code* ground. For example, research shows that girls and young women living with disabilities experience violence four times more often than the national average.⁹⁹

Educators, employers, housing providers and other responsible parties should take immediate steps to address inappropriate sexual behaviour that may lead to a poisoned environment and potential violence. Not addressing a sexualized atmosphere may lead to more serious sexual behaviour. Educators, employers, housing providers and other responsible parties need to know the potential links between sexual harassment and violence, and must reflect this knowledge in policies, programs and procedures.

3. Sexual harassment in employment

While unequal power relationships exist in many sectors of society, they tend to appear the most in the workplace, where hierarchies are common. Both women and men may experience sexual harassment in employment, but women tend to be more vulnerable to harassment by men, because relative to men, more women hold lower-paying, lower-authority and lower-status jobs. At the same time, even women in positions of authority are not free from sexual harassment or inappropriate gender-related behaviour.¹⁰⁰

Example: A disgruntled employee spreads rumours about his female director, stating that she is having an affair with the company president and that she is only successful because she “slept her way to the top.”

⁹⁶ Safe Schools Action Team, *Shaping a Culture of Respect in Our Schools: Promoting Safe and Healthy Relationships*, (December 2008), available at: www.edu.gov.on.ca/eng/teachers/RespectCulture.pdf . (Retrieved: April 22, 2013).

⁹⁷ *Ibid* at 12.

⁹⁸ *Ibid* at 7.

⁹⁹ S. Razack, “From Consent to Responsibility, From Pity to Respect: Subtexts in Cases of Sexual Violence Involving Girls and Women with Developmental Disabilities,” *Law and Social Inquiry*, 19 (4) (Fall 1994): 891-922, p. 900.

¹⁰⁰ See, for example, *Ford v. Nipissing University*, 2011, *supra*, note 10, in which a university professor was sexually harassed by a student.

Whatever her position, portraying a female worker in a sexual way can diminish her status and image in the eyes of other employees. In at least one human rights decision, an employer was liable for the conduct of employees towards a supervisor.¹⁰¹

Spreading degrading sexual rumours and/or gossip about a female employee in an attempt to undermine her credibility and professionalism has been found to be sexual harassment.

Example: A respondent was held to have sexually harassed a woman after spreading false rumours that she “was spreading her legs for money.”¹⁰²

Sexual harassment can also endanger the continued employment of the harassed person by negatively affecting work performance, undermining a sense of personal dignity, and in some cases causing physical and emotional illness. As previously mentioned, sexual harassment, if left unchecked, may escalate to violent behaviour. In some cases, this violence has resulted in sexual assault and murder. See the section entitled “Sexual harassment and violence” for more information.

The *Code*'s prohibition against sexual harassment in “employment” should be interpreted broadly to include the interview stage,¹⁰³ volunteer work, internships, etc.

Example: A 17-year-old female answered an ad to pose as a nude model. The photographer touched her sexually. The tribunal found that sexual harassment had occurred because the photographer was in a position to confer a benefit since he had outlined to her all the opportunities he could make available if she agreed to pose nude for him.¹⁰⁴

As mentioned previously, section 7(3)(a) specifically sets out a person's right to be free from an unwelcome sexual advance or solicitation in the workplace by a person who is in a position to grant or deny a benefit to the person.

Several sections of the *Code* prohibit sexual harassment “in the workplace.” Legal decisions have established that “in the workplace” applies not just to comment or conduct that occurs in the physical work environment during work hours, but rather, is broad enough to capture conduct that has work-related consequences, regardless of where it occurred.¹⁰⁵ See section 8.1, “Preventing and responding to sexual harassment: Employers” for more information.

¹⁰¹ See *Broadfield v. De Havilland/Boeing of Canada Ltd.* (1993), 19 C.H.R.R. D/347 (Ont. Bd. Inq.).

¹⁰² *A. v. Quality Inn*, (1993), *supra*, note 31. See also, *Farris v. Staubach Ontario Inc.*, 2011, *supra*, note 23.

¹⁰³ *Morrison v. Motsewetsho* (2003), *supra*, note 48.

¹⁰⁴ *Daccash v. Richards*, (1992), 20 C.H.R.R. D/208 (Ont. Bd. Inq.); reversed on other grounds (November 24, 1994), No. 361/92 (Ont. Div. Ct.).

¹⁰⁵ See *Simpson v. Consumers' Assn. of Canada* (2001), 209 D.L.R. (4th) 214, (Ont. C.A.); leave to appeal refused [2002] S.C.C.A. No.83, 300 N.R. 199 (note), (S.C.C.); *Tellier v. Bank of Montreal* [1987] O.J. No. 2379 (Ont. Dist. Ct.); *Cugliari v. Clubine* (2006), *supra*, note 89; *Hughes v. 1308581 Ontario*

While sexual harassment occurs across different occupations and industry sectors, research suggests that it is more common in certain types of employment. For example, sexual harassment complaints are high in traditionally male-dominated work environments, such as the military,¹⁰⁶ policing,¹⁰⁷ firefighting,¹⁰⁸ mining¹⁰⁹ and construction work.¹¹⁰

Women who perform jobs that are perceived to be subservient may also experience high rates of sexual harassment. For example, women who work in the health care profession have reported experiencing high rates of unwanted sexual touching and other forms of sexual harassment.¹¹¹ Massage therapy, waitressing and bartending are also occupations where women may be subjected to unwanted sexual behaviour.¹¹² Due to the stigma associated with the sex trade, sex trade workers may be subjected to high rates of sexual harassment and other forms of differential treatment, including when dealing with the police.¹¹³

Women who work in relative isolation with few, if any, co-workers also appear to be highly vulnerable to sexual harassment.¹¹⁴ For example, as mentioned earlier, research shows that live-in caregivers experience high rates of sexual harassment, exploitation and possible abuse.¹¹⁵ Their vulnerability increases when they do not have full

(2009), *supra*, note 90 at para. 75. In *Baylis-Flannery v. DeWilde* (2003), *supra*, note 27, the tribunal found that an employer's unexpected and uninvited visits to the claimant's home constituted sexual advances within the meaning of section 7(3)(a) of the *Human Rights Code*. The tribunal stated that "While these incidents took place at her home, they stemmed directly from her workplace relationship with the respondent..." (para. 142) See also, *Taylor-Baptiste v. Ontario Public Service Employees Union*, 2012 HRTO 1393 at para. 25 (CanLII), (reconsideration request denied in 2013 HRTO 180); and *S.S. v. Taylor*, 2012, *supra*, note 13 at paras 53-54.

¹⁰⁶ Melissa Sheridan Embser-Herbert, "A Missing Link: Institutional Homophobia and Sexual Harassment in the U.S. Military," *supra*, note 6 at 215-242.

¹⁰⁷ Susan Harwood, "The Hidden 'Extras' for Women in Policing: Sexual Harassment, Discrimination and Workplace Bullying," (2009) available online at: www.acwap.com.au/journal/issue23.pdf (Retrieved: April 22 2013), and *Chualo v. Toronto Police Services Board* (2010), *supra*, note 5.

¹⁰⁸ Dave Baigent, "Fitting In: The Conflation of Firefighting, Male Domination, and Harassment," in *In the Company of Men: Male Dominance and Sexual Harassment*, *supra*, note 6 at 45-64.

¹⁰⁹ Kristen Yount, "Sexualization of Work Roles Among Men Miners: Structural and Gender-Based Origins of 'Harassment'" in *In the Company of Men: Male Dominance and Sexual Harassment*, *ibid.* at 65-91.

¹¹⁰ Carrie N. Baker, "Blue-Collar Feminism: The Link Between Male Domination and Sexual Harassment," in *In the Company of Men: Male Dominance and Sexual Harassment*, *ibid.* at 258-262.

¹¹¹ Health Canada, *Nursing Education and Violence Prevention, Detection and Intervention*, (2002) available online at: http://publications.gc.ca/collections/collection_2008/hc-sc/H72-21-185-2002E.pdf (Retrieved: April 22, 2013); Jill Rafuse, "Sexual Harassment is a Significant Health Care Issue, Canadian Medical Association Committee Says," (1993) *Can Med Assoc J* 1993; 148 (10)

¹¹² Lisa C. Huebner, "It is Part of the Job: Waitresses and Nurses Define Sexual Harassment," (Fall 2008), *Sociological Viewpoints*, 75.

¹¹³ Melissa Farley, (ed). *Prostitution, Trafficking and Traumatic Stress*. (2004) (Binghamton, NY: Haworth Maltreatment & Trauma Press).

¹¹⁴ See, for example, *SH v. M [...] Painting*, *supra*, note 34.

¹¹⁵ Sandy Welsh, *et al.*, "'I'm Not Thinking of it as Harassment': Understanding Harassment Across Race and Citizenship," *Gender & Society*, Vol. 20 No. 1, February 2006, 87-107 at 100.

citizenship rights and depend on their employer for continued employment and to help them become Canadian citizens.¹¹⁶

Sexual harassment, including gender-based harassment, may be used in the workplace to reinforce traditional gender roles, and to repel challenges to masculine privilege and dominance.

Example: In an environment dominated by older police officers, a supervising police sergeant subjected a young female constable to sexual innuendo, sexual comments about her clothing when she was not in uniform, comments about the way that her body looked in her clothing, and a possessive interest in her whereabouts. When she did not return his interest and tried to avoid him, he reacted with anger and hostility. He began to over-scrutinize her work performance, accusing her of incompetence. Instead of addressing her with the title of “PC,” he referred to her in front of her colleagues as “Mrs.”¹¹⁷

A person does not have to explicitly refer to another person's gender or be explicitly sexual for the behaviour to violate the *Code*. For example, someone could target a female employee in his area, with the intent of discouraging or driving her away from continuing to work in a position, because she is a woman.¹¹⁸

Example: A supervisor may continuously interrupt a female employee during meetings or comment on her physical appearance in a way that sets her apart from male employees as not being a fully participating equal in the organization, or by making such statements as "women don't belong in the boardroom."

¹¹⁶ Live-in caregivers are people who are qualified to provide care for children, elderly persons or persons with disabilities in private homes without supervision. Under the rules of Canada's Live-in Caregiver Program, caregivers must live in the private home of their employer for at least two years as a condition of their stay in Canada. These conditions make women highly vulnerable to harassment and/or abuse, and make it very hard for a woman who experiences negative treatment to leave or to seek help. On April 1, 2011, the federal government implemented new rules to better protect live-in caregivers from potential abuse and exploitation. Under the new rules, employers who have been found to have violated worker rights may be refused authorization to hire a foreign worker. The new rules also provide for the emergency processing of new work permits for caregivers already in Canada who face abuse, intimidation or threats in their current jobs. See press release, available online at www.cic.gc.ca/english/department/media/releases/2010/2010-08-18.asp, and backgrounder, available online at www.cic.gc.ca/english/department/media/backgrounders/2010/2010-08-18a.asp (Retrieved: April 22, 2013).

¹¹⁷ See *Chuvato v. Toronto Police Services Board* (2010), *supra*, note 5, in which the tribunal held that the respondent breached the applicant's rights under sub-section 7(3)(b) and section 5 of the *Code*. The respondent should have known that his advances would be unwelcome and his later hostility when she did not return that interest was reprisal.

¹¹⁸ *Shaw v. Levac* (1990), *supra*, note 17.

Example: A tribunal held that an employer sexually harassed an employee when he made repeated comments to her about her physical appearance, such as “Oh, don’t you look pretty today; Oh you shouldn’t wear that dress, it doesn’t do much for you; Those nylons don’t go with that skirt; Let’s run off and get married...”¹¹⁹

See the section entitled “Preventing and responding to sexual harassment” for information on employer and union responsibilities in this regard.

4. Sexual harassment in housing

Section 7(1) of the *Code* states that every person who occupies housing has a right to freedom from sexual harassment by their landlord, an agent of their landlord, or someone who lives in the same building.

Section 7(3)(a) of the *Code* also specifically prohibits sexual solicitation of a tenant by a person in a position to “confer, grant or deny a benefit” where the person making the solicitation “knows or ought reasonably to know that it is unwelcome.” In private rental housing, the person in a position to confer or deny a benefit would most likely be a landlord, superintendent, building manager, *etc.* of a residential dwelling. In the case of social or co-op housing, it might be a service manager, board member, *etc.*

A housing provider has access to highly personal information about tenants, often including information about their relationship status, financial situation, occupation, work address, *etc.* Housing providers who live on-site are also in a position to monitor the comings and goings of a tenant. As a result, female tenants “lack privacy and personal space.”¹²⁰ Further, it is typical for housing providers to hold a key to a tenant’s apartment. This means they could potentially enter a person’s home at any time of the day or night. For all of these reasons, a person who is being sexually harassed in or around their home may feel profoundly vulnerable.

Sexual harassment in housing may include any of the behaviours set out in the section entitled “Defining sexual harassment.” It may also include uninvited visits to a person’s unit (either when they are home or not home), refusals to make needed repairs and/or do maintenance, threats to cut services, and threats of eviction.

Sexual harassment may be subtle. For example, depending on the context, it may include unwanted prying into a tenant’s personal life.

¹¹⁹ *Garrow v. Vanton*, (1992), 18 C.H.R.R. D/148 (B.C.C.H.R.), application for judicial review dismissed 21 C.H.R.R. D/492, 25 Admin. L.R. (2d) 253, *sub nom. Vanton v. British Columbia (Council of Human Rights)* (B.C.S.C.)

¹²⁰ Griff Tester, “An Intersectional Analysis of Sexual Harassment in Housing,” *Gender & Society*, Vol. 22 No. 3, June 2008 at 362.

Example: A single woman lives in a co-op. Other co-op members ask her intrusive questions about her single status such as: “Are you seeing anyone?” and “When are you going to settle down and have kids?” When she expresses her discomfort with these questions, she’s told to “lighten up.”

While some men (especially men who identify or are perceived as gay, bisexual or transgender) do experience sexual harassment in rental housing, women are most often affected. The typical power imbalance that exists between landlords and tenants is often heightened by gender inequalities. In one case, the Human Rights Tribunal of Ontario commented on this power imbalance:

A superintendent is in a position of power over tenants. They can make the living situation of a tenant uncomfortable or unbearable. An abuse of this power can have a significant effect on a tenant's enjoyment of her living space. When the superintendent is an older male inappropriately exerting power over a younger female in the form of sexual harassment, this undermines her expectation of peaceful occupation of her home.¹²¹

A lack of affordable housing options makes women with low social and economic status particularly vulnerable to sexual harassment by housing providers. In a housing consultation in 2007, the OHRC heard that women who depend on rent supplement programs and who live in private housing are especially vulnerable to threats and sexual harassment from their neighbours or housing providers.¹²² Some housing providers may sexually harass low-income female tenants by seeking sexual favours instead of rent if they have fallen into arrears, to prevent eviction or if they need maintenance services.

Example: A tribunal found that a landlord engaged in sexual harassment, sexual solicitation and reprisal contrary to the *Code* when he evicted a young, lone mother for rejecting his sexual advances.¹²³

Often, sexual harassment in housing will take place based on more than one *Code* ground. Young women, women from racialized groups, women with disabilities, women receiving social assistance, lone mothers and lesbians may be targeted for sexual harassment.

Example: A property manager and property management company were found liable for the sexual harassment of a young female tenant due to the manager’s inappropriate behaviour toward her. As well as making unwanted sexual comments, he tried to impose a friendly relationship

¹²¹ See *Kertesz v. Bellair Property Management* 2007 HRTO 38 at 57, and *Reed v. Cattolica Investments Ltd.* (1996), *supra*, note 11.

¹²² In 2007, the OHRC held a province-wide public consultation on discrimination issues in housing. In July 2008, the OHRC released a consultation report entitled *Right at Home: Report on the Consultation on Human Rights and Rental Housing in Ontario*. This document reported what the OHRC heard and included recommendations to responsible parties for addressing discrimination in rental housing.

¹²³ *Hill-LeClair v. Booth*, 2009 HRTO 1629 (reconsideration request denied in 2009 HRTO 2065)

on her, and his “open door” policy included leaving his door open into a common hallway while he was having sex.¹²⁴

Women may be reluctant to report sexual harassment occurring in their home for fear of retaliation, loss of shelter, and/or concerns about the safety of themselves and their families.¹²⁵

Women who reject the sexual advances of their housing provider may be subjected to surveillance and other forms of harassment by the housing provider if they are involved or become involved with another man.

Example: When a woman who lived in a housing complex rejected her landlord’s repeated requests for dates,¹²⁶ she was given written warnings about her use of a parking spot when a male friend stayed overnight. Many other residents in the complex also used the same parking spot for their overnight guests without repercussions.

See the section entitled “Preventing and responding to sexual harassment” for the responsibilities of housing providers in this regard.

5. Sexual harassment in education

Education, in its broadest sense, is a “service” under the *Code*.¹²⁷ Section 1 of the *Code* guarantees the right to equal treatment in services, without discrimination on the basis of sex. Sexual harassment, as a form of sex discrimination, is therefore prohibited in education settings.¹²⁸

Sexual harassment may be carried out by administrators, trustees, educators, school staff, students, third-party service providers, visitors and others. Sexual harassment will further contravene the *Code* where it results in a poisoned environment for students or school staff. The scope of “educational services” includes primary, secondary and post-secondary education, as well as co-instructional activities such as school-related sports, arts and cultural activities, school functions and field trips, and tutoring.

Education is vitally important in a young person’s life. It provides opportunities for personal, social and academic development and is important for future employment and integration in society. The school setting is one of the first places that children learn to relate to and interact with one another. It is often in relation to their peers that children begin to perceive themselves and the world around them. A student’s experience in

¹²⁴ *Kertesz, supra*, note 121.

¹²⁵ Griff Tester, “An Intersectional Analysis of Sexual Harassment in Housing,” *supra*, note 120 at 350.

¹²⁶ In *Radloff v. Stox Broadcast Corp.* (1999), 36 C.H.R.R. D/116 (B.C. Hum. Rts. Trib.), a B.C. human rights tribunal found that persistent sexual advances after being told “no” is sexual harassment.

¹²⁷ *Peel Board of Education v. Ontario (Human Rights Commission)* (1990), 12 C.H.R.R. D/91 (Ont. S.C.)

¹²⁸ *Janzen v. Platy Enterprises Ltd.*, (1989) *supra*, note 1.

school can have a major effect on his or her self-image and self-esteem, and on his or her development later in life.

It is, therefore, of great concern that sexual harassment appears to be widespread in Ontario's schools. Evidence from several sources shows that sexual harassment, including gender-based harassment, happens often. For example, a province-wide survey by the Ontario Secondary School Teacher Federation in 1995 showed that over 80% of female students reported that they had been sexually harassed in a school setting.¹²⁹ In the Falconer Report, an advisory committee looking at schools in the Toronto District School Board cited a study of 4,200 girls between the ages of 9 and 19 that showed that 80% had experienced sexual harassment, many on a daily basis.¹³⁰ These findings are consistent with similar studies conducted in the United States.¹³¹ It is of equal concern that according to the Falconer Report, most incidents of sexual harassment in schools, and even instances of sexual assault, go unreported.¹³²

There have been many reports of sexual harassment in post-secondary schools.¹³³ Women may experience sexual solicitation and advances from male professors, teaching assistants, university staff, students, *etc.* Sexual harassment, and harassment because of sexual orientation, can also occur as part of school rituals, such as initiation of new students, new players in team sports, or new members of sororities or fraternities, when students have to take part in sexually explicit rites as part of hazing activities.¹³⁴ Other forms of violence against women, including date rape and other types of sexual assault, continue to be issues of concern on university and college campuses across the country.¹³⁵

The culture of an educational setting will usually mirror the values and attitudes of the broader society it exists in. Young people who are regularly exposed to sexualized, often degrading images of girls and women, and to rigid sex-role stereotyping, may not recognize sexual harassment when they see it, and may participate in it without realizing the implications. However, Canadian law has long established that intent or

¹²⁹ As referenced by David A. Wolfe, "Sexual Harassment and Related Behaviours Among Youth from Grade 9 to Grade 11," (2008), Centre for Addiction and Mental Health, available online at: www.researchgate.net/publication/228586234_Sexual_Harassment_and_Related_Behaviours_Reported_Among_Youth_from_Grade_9_to_Grade_11 (Retrieved: April 22, 2013).

¹³⁰ "The Falconer Report," *supra*, note 46 as referenced by the Ontario Women's Justice Network at: www.owjn.org/owjn_2009/index.php?option=com_content&view=article&id=54&Itemid=67 (Retrieved: April 22, 2013).

¹³¹ For example, the American Association of University Women conducted two studies of sexual harassment in U.S. schools in 1993 and 2001 which showed that 81% of students experienced some form of sexual harassment during their school years: see David A. Wolfe, "Sexual Harassment and Related Behaviours Among Youth from Grade 9 to Grade 11," *supra*, note 129.

¹³² "The Falconer Report," *supra*, note 46 at 10-11.

¹³³ See, for example, Rachel L. Osborne, "Sexual Harassment in Universities," available online at: <http://pi.library.yorku.ca/ojs/index.php/cws/article/viewFile/10495/9584> (Retrieved: April 22, 2013).

¹³⁴ Daniel Drolet, "When Rites Go Wrong," (2006) available online at: www.universityaffairs.ca/when-rites-go-wrong.aspx (Retrieved: April 22, 2013).

¹³⁵ See Danielle Webb, "Sexual Violence Still Rampant," (2010) available online at: <http://oncampus.macleans.ca/education/tag/sexual-assault/> (Retrieved: December 23, 2010)

motive to discriminate is not needed for a finding that discrimination took place. It is enough that the conduct has a discriminatory effect.¹³⁶

As mentioned earlier, the Safe Schools Action Team set up in the wake of the findings of the Falconer Report expressed particular concerns about the influence of media, particularly electronic media, and the way that it perpetuates negative sex-role stereotypes, models unhealthy relationships, and showcases widespread gender-based violence. These influences filter into Ontario's schools.

One source listed the following unwanted and unwelcome behaviours from other students or adult school personnel as examples of sexual harassment specific to education:

[S]exual comments, jokes, gestures, rumours, or looks; showing of sexual pictures, photographs, or illustrations; written sexual messages, notes or graffiti on bathroom walls or in locker rooms; being called gay or lesbian in a malicious manner; being spied on while dressing or showering at school; being "flashed" or "mooned"; being touched, grabbed, or pinched in a sexual way; having clothing pulled off or down in a sexual way; being intentionally brushed up against by someone in a sexual way; being blocked or cornered in a sexual way; and being forced to kiss someone or experience some other unwelcome sexual behaviour other than kissing. Sexual harassment may also include "spiking" or pulling down someone's pants; "snuggies," [or "wedgies"] where underwear is pulled up at the waist so it goes between the buttocks; and/or being listed in "slam books" that identify students' names and have derogatory sexual comments written about them that are circulated by other students.¹³⁷

There are many possible effects of sexual harassment on students. A student experiencing sexual harassment may disengage from the curriculum and all school-related activities. They may skip or drop classes, or they may drop out of school entirely. Psychological effects may include anxiety, depression, disrupted sleep, loss of appetite, inability to concentrate, lowered self-esteem, loss of interest in regular activities, social isolation, and feelings of sadness, fear and/or shame. Some students may abuse drugs and/or alcohol to cope. In extreme cases, students may think about or even attempt suicide.¹³⁸

¹³⁶ *Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536.

This was again confirmed in *Smith v. Mardana Ltd.* (2005), *supra*, note 59.

¹³⁷ James E. Gruber and Susan Fineran, "The Impact of Bullying and Sexual Harassment on Middle and High School Girls," *supra*, note 40 at 629. For additional examples, see the more detailed list included in the section entitled "Defining sexual harassment."

¹³⁸ See University of Western Ontario, "Info sheet: sexual harassment," available online at: www.uwo.ca/equity/docs/info_sheet_sexual_harassment.pdf (Retrieved: April 22, 2013).

A student's vulnerability to sexual harassment may be heightened if they identify by other *Code* grounds, such as race, sexual orientation, disability, *etc.* Similarly, a person's experience of sexual harassment may be made worse if the harassment intersects with discrimination and/or harassment based on other *Code* grounds.

As in employment and housing, sexual harassment in a school setting may be used to enforce conformity with sex-role stereotypes. Gender-based harassment can be particularly damaging to adolescent students who are struggling with their identities, and trying to come to terms with their sexuality, peer pressure, and a desire to fit in. Students who are perceived as not conforming to stereotypical gender norms may be particularly vulnerable to gender-based harassment.

Gender-based harassment in schools is often used as a form of bullying. This seems to happen regularly in primary, middle and high school. Students may use sexual information to gain control and power over another person.

Example: In an attempt to ostracize a perceived rival, a girl starts a rumour that another girl is sexually promiscuous and performs sex acts on boys behind the school.

Similarly, sexist and homophobic name-calling, jokes and conduct may be used as part of a broader strategy to bully and shun a person.¹³⁹ In some cases, gender-based harassment may look the same as harassment based on sexual orientation, or homophobic bullying.

What is homophobic bullying?

Homophobic bullying is any hostile or offensive action relating to one's sexual orientation. These actions might be:

- verbal, physical or emotional harassment (social exclusion)
- insulting or degrading comments
- name calling, gestures, taunts, insults or "jokes"
- offensive graffiti
- humiliating, excluding, tormenting, ridiculing or threatening
- refusing to work or co-operate with others because of their sexual orientation or identity.

Homophobic bullying is often present in an environment that fails to challenge and respond to homophobia.

Information adapted from *Stance Against Homophobic Bullying* (2007) available at: www.stance.org.uk/page114.asp (Retrieved: April 22, 2013).

¹³⁹ See, for example, Elizabeth J. Meyer, "Gendered Harassment in Secondary Schools: Understanding Teachers' (Non) Interventions," *supra*, note 66 at 556.

Example: A grade 9 male student who has many female friends and is more interested in the arts than athletics is repeatedly called “fag,” “homo,” “queer,” etc. by a group of boys in the school.

Anti-gay slurs are used as put-downs in many educational settings, regardless of the target’s sexual orientation.¹⁴⁰ Anti-gay epithets and homophobic comment and conduct are prohibited by the *Code*’s protection against discrimination because of sexual orientation, no matter what the target’s sexual orientation is, or is perceived to be.¹⁴¹ Also, depending on the circumstances, such behaviour may also be seen as a form of sexual harassment (gender-based harassment) for the purposes of filing a human rights claim under the *Code*.

The impact of discrimination and harassment on lesbian, gay, bisexual and transgender youth

- 30% of suicides are LGBT
- 43% of trans-identified people attempt suicide
- 26% of LGBT youth are told to leave home
- LGBT youth are more likely to become homeless.

Information taken from PFLAG Canada’s website: www.pflagcanada.ca/en/index-e.asp
(Retrieved: April 22, 2013).

Bullying in public schools has received much attention in recent years in the media and in education policy. However, while sexual harassment may be used as a bullying tactic, it is important that sexual harassment not be overshadowed by broader understandings of bullying or anti-bullying strategies.¹⁴² When sexual harassment is fused with bullying, the emphasis tends to be on a person’s sexuality, their sexual characteristics, their sexual reputation, and/or on gender and sexual stereotypes. This focus makes it

¹⁴⁰ *Ibid.* at 557; “*The Falconer Report*,” *supra*, note 46; and, Safe Schools Action Team, *Shaping a Culture of Respect in Our Schools: Promoting Safe and Healthy Relationships*, *supra*, note 96.

¹⁴¹ *Jubran v. North Vancouver School District No. 44*, (2002), 42 C.H.R.R. D/273, 2002 BCHRT 10, leave to SCC refused, 2005 BCCA 201 (No. 30964). Citing *Jubran*, a recent decision noted that “[c]omments and conduct that are derived from derogatory stereotypes of gay men, lesbians, bisexuals and transgendered people are captured by the prohibited ground of sexual orientation, regardless of the complainant’s sexual identity or the perception of the respondent”: see *Selinger v. McFarland*, 2008 HRTO 49 [CHRR Doc. 08-480] at para. 23. For more information, see the OHRC publication, *Policy on Discrimination and Harassment Because of Sexual Orientation*, available at: www.ohrc.on.ca/en/resources/Policies/SexualOrientationPolicyEN (Retrieved: April 22, 2013).

¹⁴² In James E. Gruber and Susan Fineran, “The Impact of Bullying and Sexual Harassment on Middle and High School Girls,” *supra*, note 40 at 640, the authors argue that “[a]ntibullying programs in schools have far outpaced sexual harassment prevention training, and this difference may be to the detriment of girls’ well-being and educational achievement.”

different from other types of bullying, and unique strategies must be used to address it. The Falconer Report cites research that suggests that

[A]nti-bullying programs have little effect in preventing violence against girls. The programs tend to be gender-neutral and treat youth as a uniform group... Successful outcomes in this area involve developing effective initiatives, including gender-based peer education programs, that examine the roots of violence against girls, healthy relationships, and equality among marginalized groups, as well as the creation of 'safe space' programs that use peer facilitators to lead open discussion among girls and other vulnerable groups.¹⁴³

Online technology, such as e-mail, blogs, social networking sites, chat rooms, dating websites, cell phone text messaging, etc., provides new frontiers for the sexual harassment of youth.

Example: The Ontario College of Teachers revoked a 29-year-old teacher's license because he sexually harassed a female student through e-mail. The teacher used a false name and sent messages to the student that included information about what she had been wearing that day, what route she took to school, and overt sexual propositioning.¹⁴⁴

Many young people are avid users of online technology, often without adult supervision or monitoring, so they may be particularly prone to being targets of online sexual harassment,¹⁴⁵ and to doing it themselves. Social networking sites, for example, provide a possible forum for public humiliation and may be used for any number of sexually harassing behaviours, including posting sexual pictures and videos, personal messages of a sexual nature, and spreading sexual rumours and gossip.

While there are sometimes complex jurisdictional issues around the legal regulation of cyber-harassment, educators may be liable for a poisoned environment caused when online communications containing comment or conduct that would amount to sexual harassment are accessed through school technology, or by private electronic devices used on school premises.¹⁴⁶ School Codes of Conduct often state that disciplinary action may be taken to address student behaviour that takes place outside of the school's premises, but has an impact on school climate. See the section entitled "Preventing and responding to sexual harassment" for the responsibilities of education providers in this regard.

¹⁴³ "The Falconer Report," *supra*, note 46 at 11-12.

¹⁴⁴ As discussed in Arjun P. Aggarwal and Madhu M. Gupta, *Sexual Harassment in the Workplace*, 3rd ed. (Toronto and Vancouver: Butterworths, 2000) at 17.

¹⁴⁵ For more information, see Kimberly J. Mitchell, *et al.* "Are Blogs Putting Youth at Risk for Online Sexual Solicitation or Harassment?", *Child Abuse & Neglect*, 32 (2008) 277 at 279.

¹⁴⁶ The same principle would apply to other social areas, such as employment. See *Foerderer v. Nova Chemical Corps.* [2007] A.B.Q.B. 349; *Frolov v. Mosregion Investment Corporation*, 2010 HRTO 1789 (CanLII); *Davison v. Nova Scotia Safety Assn* (2005), 55 C.H.R.R. D/327(N.S. Bd. Inq.); *Dastghib v. Richmond Auto Body* [2007] BCHRT 197.

6. Ways to address sexual harassment

When a person believes that she or he has been sexually harassed, she or he should try, where possible, to resolve the problem through any internal policies or resolution mechanisms the organization may have in place. However, while many companies now have internal human rights claim-resolution mechanisms, these procedures do not always replace a person's right to file a human rights claim with the HRTO, or to proceed in other ways.¹⁴⁷ But even if a person has decided to pursue a remedy outside of an internal procedure, an organization must still investigate and respond appropriately to the incident, from both an individual and a systemic point of view.

6.1 Internal policies

Employers, housing providers, educators and other responsible parties have a legal duty to prevent and remedy incidents of sexual and gender-based harassment. Organizations must develop and adopt in-house anti-sexual harassment policies and make sure that responsible parties are properly informed and educated about the nature, effects and cost of this type of behaviour. See the section entitled “Preventing and responding to sexual harassment” for the suggested contents of an Anti-Sexual Harassment Policy. For more guidance, see the OHRC’s publication, *Guidelines on Developing Human Rights Policies and Procedures*.¹⁴⁸

6.2 Collective agreements

More and more collective agreements include specific clauses on preventing and resolving incidents of discrimination and sexual harassment in the workplace. In many cases, collective agreements incorporate the terms of the Ontario *Human Rights Code* in full, giving bargaining unit members the right to file grievances on alleged breaches of the *Code*. Many employers and labour representatives recognize their legal obligations under the *Code*, and their shared responsibility to keep workplaces free from sexual harassment. Therefore, a person who has experienced sexual harassment in the workplace may be able to file a grievance under an existing collective agreement.

6.3 OHS Act claim

Where a person believes they have been sexually harassed in the workplace, they may have recourse under the *Occupational Health and Safety Act*.¹⁴⁹ The *OHS Act* defines “workplace harassment” as “engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome.” This definition includes both an objective and subjective component, like the definition of “harassment” in the *Code*. However, the definition of harassment in the

¹⁴⁷ See *Maurer v. Metroland Media Group Ltd.* (c.o.b. Hamilton Spectator), 2009 HRTO 200 (Interim Decision) at para. 11. (Application subsequently dismissed in 2010 HRTO 2056).

¹⁴⁸ The OHRC’s publication, *Guidelines on Developing Human Rights Policies and Procedures* is available at: www.ohrc.on.ca/en/resources/Policies/gdpp/view (Retrieved: April 22, 2013).

¹⁴⁹ *Occupational Health and Safety Act*, R.S.O. 1990, Chapter O.1

OHSA is broader than the one in the *Code*, in that it includes any form of harassment, not just harassment based on one of the *Code*'s protected grounds (such as sex, race, disability, *etc.*). Contact Ontario's Ministry of Labour for more information.

6.4 Other administrative bodies

The Supreme Court of Canada has made it clear that administrative decision-makers who have the power to consider questions of law also have the power to decide if another statute is inconsistent with the *Code*. If there is an inconsistency, the *Code* prevails unless the other statute expressly states that it overrides the *Code*.¹⁵⁰ This means that if a person brings a claim before an administrative body (that is authorized to consider questions of law) and that action includes a component of sexual harassment, the administrative body must deal with the sexual harassment allegation.

Example: After months of rejecting her landlord's requests to become intimate, a woman is evicted from her apartment suddenly and without warning. She files a claim with the Landlord and Tenant Board to challenge the eviction. The Landlord and Tenant Board has a responsibility to apply the *Human Rights Code* in its decision-making, and to consider the possibility that the eviction might be a reprisal by the landlord for the tenant rejecting his sexual advances, and thus a violation of the *Human Rights Code*.

6.5 Criminal charges

In more extreme cases, sexual harassment will be criminal in nature. This will be the case where the harassment involves attempted or actual physical assault, including sexual assault, or threats of an assault. It will also include situations of stalking, otherwise known as "criminal harassment." Criminal harassment is obsessive behaviour directed towards another person. Section 264 of the *Criminal Code* defines criminal harassment as repeatedly following a person from place to place or repeatedly trying to contact that person over a period of time. The legislation also covers such behaviours as watching or keeping watch over someone's home or workplace, and making threats against another person known to the victim. As a result of such behaviour, the victims have reasonable cause to fear for their safety or that of someone close to them.¹⁵¹ Where sexual harassment includes any of these components described above, people may want to contact their local police service.

¹⁵⁰ See *Tranchemontagne/Werbeski v. Director, ODSP* [2006] 1 S.C.R. 513.

¹⁵¹ For more detailed information, see Statistics Canada, "Measuring Violence Against Women: Statistical Trends 2006", available at: www.statcan.gc.ca/pub/85-570-x/85-570-x2006001-eng.pdf. (Retrieved: April 22, 2013).

6.6 HRTO application

Where a person believes that they were subjected to sexual or gender-based harassment, they can file an application with the HRTO. A human rights application should be filed within one year of the last incident of sexual harassment. The Human Rights Legal Support Centre may help people file human rights applications. Contact information is listed at the end of this policy.

7. Burden of proof: evidentiary issues

Under the *Code*, the claimant – or the person making a claim – has the onus of proving an allegation of sexual harassment. A claimant must show a human rights tribunal that, on a "balance of probabilities," there appears to be a contravention of the *Code*. The burden of proof for showing harassment under the *Code* is not as strong as the "beyond a reasonable doubt" standard required for establishing guilt in criminal cases.

Proving a case on a "balance of probabilities" is a civil burden of proof, meaning that there is evidence to support the allegation that the comments or conduct "more likely than not" took place, and that the behaviour was sexual harassment within the meaning of the *Code*.

Sexual harassment does not often occur in full public view. Since there are often no witnesses or material evidence to these comments or conduct, issues of credibility often arise in sexual harassment claims.¹⁵² Human rights tribunals have accepted that it is difficult sometimes to make a finding based on credibility only, but acknowledge that tribunals often have to rely on subjective evidence presented by the parties involved.

Repeated conduct directed at one person is not needed. A pattern of conduct directed at several female employees may also be sexual harassment.¹⁵³ Where credibility is at issue, similar fact evidence¹⁵⁴ may be introduced to show that a pattern of behaviour might have occurred. Similar fact evidence could include testimony from others who state that they have been treated in the same way by the alleged harasser.

Example: A tribunal found that an employer misused "his business and his position of power within it to sexually solicit, harass and intimidate young women on job interviews and in their employment relationship with him." The tribunal found this behaviour was "a highly distinctive pattern, or "signature" of discriminatory conduct toward young women who responded to job advertisements at his place of business." On this

¹⁵² See *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.).

¹⁵³ *Simpson v. Consumers' Assn. of Canada* (2001), *supra*, note 105.

¹⁵⁴ "Similar fact evidence" is evidence of past similar conduct by the alleged harasser that may be relied on to support an allegation of harassment. The usefulness of this kind of evidence in supporting a claim of harassment depends mostly on whether the past incidents were similar enough to the kind of harassment the claimant is alleging. For example, did the respondent subject other female employees to similar comments or treatment? See *Morrison v. Motsewesho* (2003), *supra*, note 48, and *SH v. M [...] Painting*, *supra*, note 34.

basis, the tribunal allowed evidence of multiple claimants to be entered as similar fact evidence.¹⁵⁵

Previous allegations or complaints of sexual harassment against an individual may be evidence that the person should reasonably have known that similar behaviour in the future is not welcome.¹⁵⁶

As mentioned earlier, human rights law has established that the intention of the harasser does not matter when deciding if sexual harassment has occurred. The Supreme Court of Canada has held that a lack of intention is no defence to an allegation of discrimination. It is enough if the conduct has a discriminatory effect, and the focus should be on the impact of the questionable behaviour.¹⁵⁷

Example: A manager's special attention to a new female employee starts out as mentorship. However, his behaviour soon takes on overly personal overtones that include questions about her relationship with her boyfriend and her sexual past. The employee becomes more and more uncomfortable and tries to avoid being alone with her manager. Eventually, unsure of what else to do, she quits her job.

Note that a person does not have to object to the harassment at the time it happens for there to be a violation, or for the person to claim their rights under the *Code*.¹⁵⁸ A person who is the target of harassment may be in a vulnerable situation and afraid to speak out. Employers, housing providers, educators and other responsible parties must maintain an environment that is free of discrimination and harassment, whether or not anyone objects.

Courts and tribunals have also recognized that, due to the power imbalance that often exists between the harasser and the person being harassed, and the perceived consequences of objecting to the harassing behaviour, the person may go along with the unwelcome conduct.¹⁵⁹ In *The Law of Human Rights in Canada: Practice and Procedure*, Russel Zinn notes:

The complainant's apparent passivity or failure to object overtly to sexual advances does not necessarily signal consent or welcomeness. This is particularly prevalent where there is an imbalance of power between the

¹⁵⁵ *Morrison v. Motsewetscho* (2003), *ibid.* at paras. 183-184.

¹⁵⁶ See *Daccash v. Richards* (1992), *supra*, note 104.

¹⁵⁷ *Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd.*, (1985), *supra*, note 136; *Action travail des femmes v. Canadian National Railway Co.* (1987), 8, C.H.R.R.D/4210 (S.C.C.). This principle was again confirmed in *Smith v. Mardana Ltd.* (2005), *supra*, note 59.

¹⁵⁸ See *McNulty v. G.N.F. Holdings Ltd.* (1992), 16 C.H.R.R. D/418 (B.C.C.H.R.); *Quebec (Commission des droits de la personne) v. Larouche* (1993), *supra*, note 90; *Wagner v. Bishop*, 2012, *supra*, note 67 at para. 31.

¹⁵⁹ See *Simpson v. Consumers' Association of Canada* (2001), *supra*, note 105. This principle was applied in *Harriott v. National Money Mart Co.*, (2010), *supra*, note 12.

parties, such that the victim's dependence on the harasser's goodwill makes her more apt to tolerate unacceptable behaviour.¹⁶⁰

Even though a person being harassed may take part in sexual activity or other related behaviour, this does not mean they welcome it.¹⁶¹ Courts and tribunals have found that a power imbalance in a relationship can negate consent to sexual activity.¹⁶² This approach is consistent with the approach in other jurisdictions.¹⁶³

Where a person in a position of power is intent on pursuing an intimate relationship with an employee, tenant, student, *etc.*, they are expected to go to great lengths to make sure the behaviour is welcome.¹⁶⁴ Where a person is particularly vulnerable (for example, they are young,¹⁶⁵ a probationary or temporary employee,¹⁶⁶ *etc.*), the responsibility of the person in a position of power is even greater.¹⁶⁷

Past consent to sexual activity does not equal present consent when it is made clear that one party does not welcome further sexual interaction.¹⁶⁸

Human rights case law has found that depending on the circumstances, negative behaviour, including poor performance, outbursts, insubordination, *etc.* may be an understandable reaction to discrimination or harassment.

¹⁶⁰ Russel Zinn, in *The Law of Human Rights in Canada: Practice and Procedure*, *supra*, note 47 at 11-15-16.

¹⁶¹ See *Simpson v. Consumers' Association of Canada* (2001), *supra*, note 105; *Harriott v. National Money Mart Co.*, (2010), *supra*, note 12; *Dupuis v. British Columbia (Ministry of Forests)*, (1993), 20 C.H.R.R. D/87 (B.C.C.H.R.); *Howard v. deRuiter*, 2004 HRTO 8, at para. 108.

¹⁶² See *Van Berkel v. MPI Security Ltd.* (1996), 28 C.H.R.R. D.504 (B.C.C.H.R.); *Dupuis v. British Columbia (Ministry of Forests)*, (1993), *ibid.*

¹⁶³ For example, the U.S. Supreme Court has held that "the fact that sex-related conduct was 'voluntary' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit...The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome'...While the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact, the District Court in this case erroneously focused on the 'voluntariness' of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary": see *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), at 2406.

¹⁶⁴ Note that there are situations in which sexual advances and sexual behaviour are never appropriate, such as when a person lacks the capacity to give consent.

¹⁶⁵ See, for example, *Bruce v. McGuire Truck Stop* (1993), 20 C.H.R.R. D/145 (Ont. Bd. Inq.), in which the tribunal held that the young age of the complainant made the respondent's behaviour more vexatious, and weighed heavily against the possibility that the respondent did not know or could not reasonably be expected to know his comments and conduct were not welcome.

¹⁶⁶ In *Cugliari v. Clubine* (2006), *supra*, note 89 at para. 196, Dr. Sandy Welsh, an associate professor in the Department of Sociology at the University of Toronto, testified that "workers in probationary or temporary positions are more vulnerable than a full-time employee, and less likely to report harassment... [and are] more likely to use tolerance and endurance as coping strategies."

¹⁶⁷ See *Cugliari v. Clubine*, *ibid.* at para. 226.

¹⁶⁸ See *Radloff v. Stox Broadcast Corp.* (1999), *supra*, note 126; See also, *McIntosh v. Metro Aluminum Products and another*, *supra*, note 23.

Example: After enduring months of unwanted attention from her professor, including numerous requests for dates, a university student begins to skip her classes, and ultimately fails her final examination.

Before taking punitive measures after such reactions, employers, housing providers, educators and other responsible parties should consider, where appropriate, whether the behaviour is in response to sexual harassment and should adjust their sanctions accordingly.¹⁶⁹

8. Preventing and responding to sexual harassment

The ultimate responsibility for maintaining an environment free from sexual harassment rests with employers, housing providers, educators and other responsible parties covered by the *Code*. From a human rights perspective, it is not acceptable to choose to stay unaware of sexual harassment, whether or not a human rights claim has been made.¹⁷⁰

Organizations and institutions operating in Ontario have a legal duty to take steps to prevent and respond to breaches of the *Code*, including sexual harassment. Employers, housing providers, educators and other responsible parties must make sure they maintain poison-free environments that respect human rights. This takes commitment and work, but is worth it.

Employers, housing providers, educators and other responsible parties violate the *Code* where they directly or indirectly, intentionally or unintentionally infringe the *Code*, or where they do not directly infringe the *Code* but authorize, condone or adopt behaviour that is contrary to the *Code*.

There is a clear human rights duty not to condone or further a discriminatory act that has already happened. To do so would extend or continue the life of the initial discriminatory act. This duty extends to people who, while not the main actors, are drawn into a discriminatory situation through contractual relations or in other ways.¹⁷¹ Depending on the circumstances, employers, housing providers, educators and other responsible parties may be held liable for the actions of third parties (such as customers, contractors, *etc.*) who engage in sexually harassing behaviour.¹⁷²

¹⁶⁹ See *Naraine v. Ford Motor Co. of Canada* (1996), *supra*, note 51. See also, *Morrison v. Motsewesho* (2003), *supra*, note 48 at para. 170.

¹⁷⁰ *Re Dupont Canada Inc. and Kingston Independent Nylon Workers Union* [1993] O.L.A.A. No. 426 at para. 67; *Alberta v. Alberta Union of Provincial Employees (Banack Grievance)* [1999] A.G.A.A. No. 74 at para. 86.

¹⁷¹ *Payne v. Otsuka Pharmaceutical Co. (No. 3)* (2002), 44 C.H.R.R. D/203 (Ont. Bd. Inq.) at para. 63: "The nature of when a third party or collateral person would be drawn into the chain of discrimination is fact specific. However, general principles can be determined. The key is the control or power that the collateral or indirect respondent had over the claimant and the principal respondent. The greater the control or power over the situation and the parties, the greater the legal obligation not to condone or further the discriminatory action. The power or control is important because it implies an ability to correct the situation or do something to ameliorate the conditions."

¹⁷² See *Wamsley v. Ed Green Blueprinting*, (2010), *supra*, note 10.

Human rights decision-makers often find organizations liable, and assess damages, based on the organization's failure to respond appropriately to address discrimination and harassment. An organization may respond to complaints about individual instances of discrimination or harassment, but they may still be found to have not responded appropriately if the underlying problem is not resolved. There may be a poisoned environment, or an organizational culture that condones sexual harassment, despite punishing the individual harassers. In these cases, organizations must take further steps, such as training and education, to better address the problem. An organization has a legal duty to respond to a complaint of sexual harassment, and may be found liable for not doing so, even where the complaint is ultimately not made out.¹⁷³

Some things to consider¹⁷⁴ when deciding whether an organization has met its duty to respond to a human rights claim include:

- procedures in place at the time to deal with discrimination and harassment¹⁷⁵
- the promptness of the organization's response to the complaint¹⁷⁶
- how seriously the complaint was treated
- resources made available to deal with the complaint
- whether the organization provided a healthy environment for the person who complained
- how well the action taken was communicated to the person who complained.¹⁷⁷

In its publication entitled *Guidelines on developing human rights policies and procedures*, the OHRC provides more information to help organizations meet their human rights obligations and take proactive steps to make sure their environments are free from discrimination and harassment.¹⁷⁸

¹⁷³ *Lavoie v. Calabogie Peaks*, 2012 HRTO 1237.

¹⁷⁴ These factors are taken from *Wall v. University of Waterloo* (1995), 27 C.H.R.R. D/44 at paras. 162-67 (Ont. Bd. Inq.). These factors help to assess the reasonableness of an organization's response to harassment. A reasonable response will not affect an organization's liability, but will be considered in deciding the appropriate remedy. In other words, a housing provider that has reasonably responded to harassment is not absolved of liability but may experience a decrease in the damages that flow from the harassment. See also *Laskowska v. Marineland of Canada Inc.*, 2005 HRTO 30 for factors the HRTO has looked at in assessing if an employer responded to a complaint of sexual harassment reasonably and adequately.

¹⁷⁵ In *Ford v. Nipissing University*, *supra*, note 10 at para. 72, a tribunal found that the policies and procedures that the respondent university had in place to address matters related to sexual harassment were inadequate, in particular, because the harassment complaint procedures could not be triggered without an identifiable accused. In that case, the sexual harassment took the form of a threatening email sent to a professor by an unknown sender. As the anonymity afforded by cyber and electronic harassment may facilitate the harassment, it is important that procedures designed to respond to sexual harassment consider situations where the harasser may not be identifiable.

¹⁷⁶ In *Harriott v. National Money Mart Co.* (2010), *supra*, note 12 at para. 147, the tribunal stated: "The law imposes an obligation on employers to promptly investigate sexual harassment for a reason: to minimize the length of time that the victim of the harassment is required to endure the harassment."

¹⁷⁷ In *Ford v. Nipissing University*, *supra*, note 10 at para. 73, the tribunal found that the respondent university failed to meet its procedural obligations under the *Code*, in part because "of the failure to sustain communications with the applicant."

¹⁷⁸ The OHRC's *Guidelines on Developing Human Rights Policies and Procedures* is available at: www.ohrc.on.ca/en/resources/Policies/gdpp/view (Retrieved: April 22, 2013).

Anti-sexual harassment policies

Employers, housing providers, educators and other responsible parties can go a long way toward promoting a harassment-free environment for individuals protected by the *Code* by having a clear, comprehensive anti-sexual harassment policy in place. In cases of alleged sexual harassment, the policy will alert all parties to their rights, roles and responsibilities.¹⁷⁹ Policies must clearly set out how the sexual harassment will be dealt with promptly and efficiently.

Everyone should be aware of the existence of an anti-sexual harassment policy and the steps in place for resolving complaints. This can be done by:

- giving policies to everyone as soon as they are introduced
- making all employees, tenants, students, *etc.* aware of them by including the policies in any orientation material
- training people, including people in positions of responsibility, on the contents of the policies, and providing ongoing education on human rights issues.

An effective sexual harassment policy can limit harm and reduce liability. It also promotes the equity and diversity goals of organizations and institutions and makes good business sense.

Employers, housing providers, educators and other responsible parties also need procedures for dealing with sexual harassment by third parties. These procedures should show how people are expected to respond to the harassment, make sure that serious and/or ongoing problems are brought to the attention of those in charge, and also that the people in charge take appropriate steps to assess the situation and take remedial action.¹⁸⁰

In practice, it is very important that all complaints of sexual harassment be taken seriously and dealt with promptly, that the complaint mechanism be applied, and that persons making complaints not be subjected to discipline or reprisal.

All responsible parties should monitor their environments regularly to make sure they are free of sexually harassing behaviours. Proactive steps to maintain a poison-free environment will help make sure that sexual harassment does not take root, and is not given a chance to escalate.

¹⁷⁹ In *Tse v. Trow Consulting Engineers Ltd* [1995] O.J. No.2529, the Ontario Court of Justice (General Division) stated at para. 26 that “The advantages of a written, published, known policy are several, including the educative function of informing employees of what type of conduct is considered sexual harassment (which can manifest itself in various ways), and also that they know the consequences of any transgression. A formal policy that is made part of the contractual terms of employment can mean that there can be a dismissal for any misconduct that is spelled out in that policy as having the consequence of resulting in a dismissal.”

¹⁸⁰ See *C.U.P.E., Local 79 v. Toronto (City)* (1995), 1995 CarswellOnt 1840 (Ont. Arb. Bd.); see also *Clarendon Foundation v. O.P.S.E.U., Local 593*, [2000] L.V.I. 3104-6, 2000 CarswellOnt 1906. 91 L.A.C. (4th) 105 (Ont. Arb. Bd.). While these are arbitration cases, the proactive guidance they contain makes for good human rights practice.

Suggested contents of an anti-sexual harassment policy

- 1) A vision statement setting out the organization's commitment to maintaining a fair and equitable environment free of sexual and gender-based harassment, and stating that the organization will not tolerate sexual and gender-based harassment.
- 2) A statement of rights and obligations under the Ontario *Human Rights Code*.
- 3) A list of the prohibited grounds of discrimination listed in the *Code*.
- 4) The *Code* definition of "sexual harassment" and a definition of "gender-based harassment."
- 5) An explanation of the concept of a "poisoned environment" as a violation of the *Code*, and examples of a poisoned environment that are meaningful in that organization's context.
- 6) A description of unacceptable behaviour, such as:
 - examples of sexual harassment as listed in the OHRC's *Policy on preventing sexual and gender-based harassment*.
- 7) A description of who the policy applies to (such as employers, employees, third party service providers, *etc.*).
- 8) How internal complaints will be handled with details on:
 - who to complain to
 - an assurance that the person handling complaint should be independent, expert, *etc.*
 - confidentiality
 - reassurance that the person making the complaint will be protected from reprisal, or threat of reprisal
 - help that is available for parties to a complaint
 - the availability of Alternative Dispute Resolution, such as mediation, to resolve a complaint
 - how the complaint will be investigated
 - how long the process will take
 - steps that will be taken if it is not appropriate for the person making the complaint to continue working with the person/people being complained about
 - how the organization will deal with the complaint when the harasser is unknown (*e.g.* cyber harassment).
- 9) Remedies that will be available if the claim of sexual harassment is proven, such as:
 - disciplinary measures to be applied (for example, in employment, measures could range from a verbal warning or a letter of reprimand to termination)
 - compensation to the person who made the complaint.
- 10) A statement reinforcing the right of individuals to file other types of complaints, such as:
 - a human rights application with the Human Rights Tribunal of Ontario at any time during the internal process, as well as an explanation of the one-year time limit in the *Code*
 - a complaint under the *Occupational Health and Safety Act*, if applicable
 - a grievance under a collective agreement, if applicable
 - criminal charges, if applicable.

8.1 Employers

Employers have a duty to ensure a poison-free work environment and to take steps to make sure that sexual harassment is not taking place in their workplace. Once they learn of sexual harassment, employers must take immediate action to remedy the situation. If the employer is satisfied the harassment has happened, they must consider both disciplinary action and further prevention steps, such as training or education.

Under section 46.3 of the *Code*, a corporation, trade union or occupational association, unincorporated association or employers' organization will be held responsible for discrimination, including acts or omissions, committed by employees or agents in the course of their employment. This is known as vicarious liability. Vicarious liability may make an employer responsible for discrimination arising from the acts of its employees or agents, done in the normal course, whether or not it had any knowledge of, participation in, or control over these actions.

Vicarious liability does not apply to breaches of the sections of the *Code* dealing with harassment. However, since the existence of a poisoned environment is a form of discrimination, when harassment amounts to or results in a poisoned environment, vicarious liability under section 46.3 of the *Code* will apply.¹⁸¹

In these cases, the "organic theory of corporate liability" may also apply. Under this theory, an organization may be liable for acts of harassment carried out by its employees if it can be proven that it was aware of the harassment, or the harasser is shown to be part of the management or "directing mind" of the organization. In such cases, an organization will be liable for the decisions, acts or omissions of the employee where:

- the employee who is part of the "directing mind" engages in harassment or inappropriate behaviour that violates the *Code*
- the employee who is part of the "directing mind" does not respond adequately to harassment or inappropriate behaviour they are aware of, or should reasonably be aware of.

Generally speaking, managers and central decision-makers in an organization are part of the "directing mind." People with only supervisory authority may also be part of the "directing mind" if they act, or are seen to act, as representatives of the organization. Even non-supervisors may be considered part of the "directing mind" if they in effect have supervisory authority or significant responsibility for guiding employees.

Example: A head chef is responsible for addressing such problems if they arise among the kitchen staff.

¹⁸¹ For a detailed discussion about corporate liability versus personal liability in the context of sexual harassment and a poisoned work environment, see *Farris v. Staubach Ontario Inc.*, 2011, *supra*, note 23. On judicial review, the Divisional Court clarified that the purpose of s.46.3 is to confirm the *parallel* liability of corporations for the actions of their employees, not to replace it. Employees who breach the *Code* should still be held jointly and severally liable with the corporation: see *Ontario Human Rights Commission v. Farris*, 2012 ONSC 3876 at paras. 33-34.

Example: A lead-hand who is part of the bargaining unit would have "directing mind" authority with union members.

Persons who are central decision-makers in an organization, such as members of the Board of Directors, may also be seen as part of the "directing mind."

Employers may also have responsibility for sexual harassment by third parties in the workplace. Third parties may include contractors, customers¹⁸² or clients,¹⁸³ service or repair people,¹⁸⁴ etc.

Example: An employer was found liable for the sexual harassment of its employees in the workplace by a service technician who was on-site to fix office equipment.¹⁸⁵

Note that an employer may also be held liable for sexual harassment in cases involving activities or events that happen outside of normal business hours or off business premises, but are linked to the workplace and employment.

Example: An employer may be held liable for incidents that take place during business trips, company parties or other company-related functions.¹⁸⁶

As mentioned previously, legal decisions have interpreted "in the workplace" (a phrase that appears in several *Code* sections prohibiting sexual harassment in employment) broadly to include comment or conduct that has work-related consequences, regardless of where it occurred.¹⁸⁷ In one case, for example, a restaurant manager made repeated, explicit, and intimate advances and comments of a sexual nature to a waitress. Some of the comments were made during an after-hours card game with co-workers, and some were communicated in a text message and a voicemail sent while he was at a late night party attended by other male staff members. The tribunal in that case concluded that while not all the incidents occurred at work or during work hours, they were sufficiently connected to the workplace to engage the *Code's* protection. The tribunal stated:

Importantly, all of the incidents, regardless of where they occurred, had job-related consequences for the applicant. Perhaps the clearest example

¹⁸² *Ankamah v. Chauhan Food Services*, 2010 HRTO 2024 at para. 32.

¹⁸³ See *Jalbert v. Moore*, (1996), 28 C.H.R.R. D/349 (B.C.C.H.R.)

¹⁸⁴ See *Wamsley v. Ed Green Blueprinting* (2010), *supra*, note 10.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Simpson v. Consumers' Assn. of Canada* (2001), *supra*, note 105; *Tellier v. Bank of Montreal*, *supra*, note 105; *Cugliari v. Clubine* (2006), *supra*, note 89.

¹⁸⁷ See *Simpson v. Consumers' Assn. of Canada* (2001), *ibid.*; *Tellier v. Bank of Montreal*, *ibid.*; *Cugliari v. Clubine* (2006), *ibid.*; *Hughes v. 1308581 Ontario* (2009), *supra*, note 90 at para. 75. In *Baylis-Flannery v. DeWilde* (2003), *supra*, note 27, the tribunal found that an employer's unexpected and uninvited visits to the claimant's home constituted sexual advances within the meaning of section 7(3)(a) of the *Human Rights Code*. The tribunal stated that "While these incidents took place at her home, they stemmed directly from her workplace relationship with the respondent..." (para. 142) See also, *Taylor-Baptiste*, 2012, *supra*, note 105 at para. 25 and *S.S. v. Taylor*, 2012, *supra*, note 13 at paras 53-54.

of this is the applicant's evidence that [she] could not face returning to work at the Restaurant knowing that her boss and some of her co-workers had thought and talked about her as described in the voicemail message.¹⁸⁸

Increasingly, sexual harassment is taking place through electronic media (such as blogs, email, text messages, or social media). Electronic media can be found to be an extension of the workplace where sexual harassment that is communicated electronically has work-related consequences.¹⁸⁹

Unwanted, uninvited visits by an employer, supervisor, manager, co-worker, *etc.* to an employee's home may also be sexual harassment.

Example: A tribunal found that an employer's unwanted phone calls and visits to a woman's home were "all part of a course of conduct that started in the workplace and extended to her home."¹⁹⁰

Depending on the circumstances, such visits may also amount to criminal harassment under the *Criminal Code*.¹⁹¹

In other jurisdictions, employers have also been held liable for sexual harassment where the perpetrator is a member of the employer's family. In a British Columbia case, a female employer was held liable for her husband's sexual harassment of a live-in caregiver, even though she had nothing to do with the harassment herself.¹⁹² Employers in live-in caregiver situations have also been held liable when their children sexually harassed their caregiver.¹⁹³

As mentioned earlier, the *Occupational Health and Safety Act* also imposes requirements on employers. Employers in workplaces with five or more employees must prepare written policies on workplace violence and harassment. The policies must be reviewed at least annually. Employers must also develop a program to put the

¹⁸⁸ *S.S. v. Taylor*, 2012, *ibid.* at para. 56.

¹⁸⁹ See *Taylor-Baptiste*, 2012, *supra*, note 105 at para. 25. While the tribunal in this case decided that the blog comments in that particular situation did not qualify as harassment "in the workplace" under s. 5(2) of the *Code*, it based this conclusion on the fact that the blog was directed at communication between union members and their leadership and that there was no evidence that the union President made the postings while at work for the employer. In both its original and reconsideration decisions, however, the tribunal stressed that with an appropriate factual nexus to the workplace, comments in cyberspace could be covered under s.5(2) of the *Code*. This scope of application was not limited to situations in which the conduct occurred on the employer's property (para. 26).

¹⁹⁰ See *Hughes v. 1308581 Ontario* (2009), *supra*, note 90 at para. 75. See also *Baylis-Flannery v. DeWilde* (2003), *supra*, note 27 in which the tribunal found that an employer's unexpected and uninvited visits to the claimant's home constituted sexual advances within the meaning of section 7(3)(a) of the *Human Rights Code*. The tribunal stated that "While these incidents took place at her home, they stemmed directly from her workplace relationship with the respondent..." (para. 142)

¹⁹¹ See Section 264 of the *Criminal Code* [C-46].

¹⁹² See *Singson v. Pasion*, (1995), 26 C.H.R.R. D/435 (B.C.C.H.R.)

¹⁹³ *Guzman v. Dr. and Mrs. T.*, (B.C. 1997), 27 C.H.R.R. D/349 at D/358 at para. 84.

workplace violence policy into action. The *OHS Act* also contains provisions that require employers to do risk assessments to prevent workplace violence.

Prevalence of workplace harassment is one of the risk factors that employers must examine when assessing the risk of workplace violence under the requirements of the *Occupational Health and Safety Act*. Joint health and safety committees and other representatives should also consider workplace harassment as a risk factor for workplace violence. Workplace Violence Programs should include measures and procedures for workers to report “new risks” that include prevalence of harassment associated with workplace violence. As well, Ministry of Labour Health and Safety Inspectors should assess whether workplace harassment was a contributing factor when dealing with incidents of workplace violence.

Depending on the circumstances, employers who fail to protect their employees from violence in the workplace may also be found criminally responsible. Section 217.1 of the *Criminal Code* states:

217.1 Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

Unions, vocational associations and professional organizations are also responsible for making sure that they do not discriminate against or harass their members. They must make sure they are not causing or contributing to discriminatory actions in a workplace. Just like employers, a union can be held liable for policies or actions that are discriminatory. This includes negotiating a term in a collective agreement that results in discrimination or not taking reasonable steps to address workplace sexual harassment or a poisoned environment.¹⁹⁴

8.2 Housing providers

Housing providers must take proactive steps to make sure that sexual harassment does not take place on their premises. If sexual harassment happens, they must take immediate steps to intervene and respond appropriately. The often dramatic power imbalance between housing providers and female tenants, for example, may mean that women may not report sexual harassment due to fear of retribution, being evicted, or concerns about their physical safety, the safety of their families and/or their personal belongings.

As mentioned earlier, under section 46.3 of the *Code*, a corporation, trade union or occupational association, unincorporated association or employers’ organization will be held responsible for discrimination, including acts or omissions, committed by

¹⁹⁴ *Central Okanagan School Dist. No. 23 v. Renaud* (1992), 16 C.H.R.R. D/425 (S.C.C.); *Mayo v. Iron Ore Co. of Canada* (2002), 43 C.H.R.R. D/65 (Nfld. Bd. Inq.)

employees¹⁹⁵ or agents in the course of their employment. This is known as vicarious liability and it also applies to human rights violations in housing.

Example: A contracted maintenance worker repeatedly makes lewd comments to a young female tenant. The woman complains to her landlord. The landlord has a duty to promptly address the worker's conduct and to make sure the living environment is poison-free.

Vicarious liability may make a housing provider responsible for discrimination or harassment arising from the acts of its employees or agents, done in the normal course, whether or not it had any knowledge of, participation in, or control over these actions.

Vicarious liability does not apply to breaches of the sections of the *Code* dealing with harassment. However, since the existence of a poisoned environment is a form of discrimination, when harassment amounts to or results in a poisoned environment, vicarious liability under section 46.3 of the *Code* will apply.

In these cases the "organic theory of corporate liability" may also apply. Under this theory, an organization may be liable for acts of harassment carried out by its employees if it can be proven that it was aware of the harassment, or the harasser is shown to be part of the management or "directing mind" of the organization. In such cases, an organization will be liable for the decisions, acts, or omissions of the employee where:

- the employee who is part of the "directing mind" engages in harassment or inappropriate behaviour that violates the *Code*
- the employee who is part of the "directing mind" does not respond adequately to harassment or inappropriate behaviour they are aware of, or should reasonably be aware of.

Generally speaking, managers and central decision-makers in an organization are part of the "directing mind." People with only supervisory authority may also be part of the "directing mind" if they function, or are seen to function, as representatives of the organization (for example, an agent of the landlord, board member, superintendent, etc.). Even non-supervisors may be considered to be part of the "directing mind" if they in effect have supervisory authority or have major responsibility.

¹⁹⁵ "Employee" in this context could refer to a landlord, co-o board member, housing agent, housing manager, service personnel, etc.

8.3 Educators

Educators provide a forum for teaching critical thinking, equity, mutual respect and civic responsibility – and they can be agents of positive social change. One author notes:

Schools represent the only formal institutions to have meaningful contact with nearly every young person in Canada and are therefore in a unique position to equip youth with the knowledge and skills necessary to exercise healthy sexuality throughout their lives.¹⁹⁶

Education providers¹⁹⁷ have a legal duty to provide students with an educational environment that does not expose them to discriminatory harassment.¹⁹⁸ Part of the duty to maintain a safe learning environment for students includes addressing bullying and harassing behaviour. Students who are being harassed are entitled to the *Code*'s protection where the harassment creates a poisoned education environment. This protection would apply to:

1. education providers who themselves harass students based on *Code* grounds
2. education providers who know or ought to know that a student is being harassed based on *Code* grounds, and who do not take effective individualized and systemic steps to remedy that harassment.

Educators have a responsibility to take immediate steps to intervene in situations where sexual harassment may be taking place. Educators who know of, or should have knowledge of, the sexual harassment and could take steps to prevent or stop it, may be liable in a human rights claim.

Amendments to the *Education Act*, as a result of Bill 13, the *Accepting Schools Act (An Act to amend the Education Act with respect to bullying and other matters)*, came into effect in 2012. While the *Accepting Schools Act* focuses on “bullying” rather than harassment, it addresses many of the same components as the *Code* prohibition of sexual harassment in education. For example, Bill 13 looks specifically at bullying related to a person’s sex, sexual orientation, gender, gender identity and gender

¹⁹⁶ Canadian Federation for Sexual Health, *Sexual Health in Canada, Baseline 2007* at 10 as quoted in Safe Schools Action Team, *Shaping a Culture of Respect in Our Schools: Promoting Safe and Healthy Relationships*, *supra*, note 93 at 11.

¹⁹⁷ The terms “education providers” and “educators” include, but are not limited to, school boards, school staff, teachers, post-secondary institutions, and where appropriate, government.

¹⁹⁸ See *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, 25 C.H.R.R. D/175; *Quebec (Comm. Des droits de la personne) c. Deux-Montagnes, Comm. Scolaire*, (1993), 19 C.H.R.R. D/1 (T.D.P.Q.); *Jubran v. North Vancouver School District No. 44*, (2002), *supra*, note 141. In *Jubran*, the Tribunal held that the School Board (1) had a duty to provide an educational environment that did not expose students to discriminatory harassment, (2) knew that students were harassing another student, and (3) was liable for not taking adequate measures to stop that harassment. The B.C. Supreme Court quashed the Tribunal's decision on other grounds. However, the B.C. Court of Appeal reversed the Divisional Court decision and also held that the school board was liable for the discriminatory conduct of students and that the board had not provided an educational environment free from discrimination: see *North Vancouver School District No. 44 v. Jubran*, [2005] B.C.J. No. 733 (C.A.), leave to SCC refused, 2005 BCCA 201 (No. 30964).

expression. The Bill's preamble states that all students should have a school climate that is inclusive and accepting of sex, sexual orientation, gender identity and gender expression, among other characteristics. The preamble recognizes multiple actors (e.g. government, educators, staff, parents and students) that need to play a role in "preventing inappropriate behaviour, such as bullying, sexual assault, gender-based violence and incidents based on homophobia, transphobia or biphobia." Bill 13 imposes duties on the Minister of Education, school boards and principals that relate to maintaining education environments free of sexual harassment.

If left unchecked, sexual harassment can impede a student's equal access to education services and ability to fully take part in the education experience.

Example: An 11-year-old girl who entered early puberty was subjected to ongoing, unwanted attention from boys in her classroom. This attention included snapping her bra, "bumping" into her body, and circulating hand-drawn pictures of her with exaggerated sexual characteristics. Although she told her teacher of her discomfort, the behaviour continued. The girl was so upset she refused to go to school.

Educators should take steps to teach students about human rights and put strategies in place to prevent discrimination and harassment. If an allegation of sexual harassment is substantiated, they must take appropriate action. This may include disciplinary action.

It is public policy in Ontario that school boards must:

- provide opportunities for all members of the school community to increase their knowledge and understanding of such issues as bullying, violence, inappropriate sexual behaviour, bias, stereotyping, discrimination, prejudice and hate; critical media literacy, and safe Internet use¹⁹⁹
- conduct anonymous school climate surveys of their students, staff and parents at least once every two years, that include questions on sexual harassment, bullying/harassment related to sexual orientation, gender identity and gender expression²⁰⁰
- adhere to the Ontario *Human Rights Code* when they develop and implement their policies.²⁰¹

School board employees who work directly with students must also respond to any student behaviour that is likely to have a negative impact on the school climate. This behaviour includes all inappropriate and disrespectful behaviour, including sexist comments or jokes.²⁰²

¹⁹⁹ Ministry of Education, *Policy/Program Memorandum No. 145*, (December 2012), available online at: www.edu.gov.on.ca/extra/eng/ppm/145.pdf (Retrieved: May 2, 2013) at 6.

²⁰⁰ *Ibid.* at 7.

²⁰¹ *Ibid.* at 6.

²⁰² *Ibid.* at 7.

Anti-sexual harassment training for educators and school staff is an important first step in creating a climate of mutual respect in an education environment. Such training should include information about gender-based harassment. Educators will then be in a position to appropriately address the various forms of sexual and gender-based harassment that may arise.

Education providers can help to prevent sexual and gender-based harassment before it happens by:

- showing a clear attitude of non-tolerance towards sexual and gender-based harassment
- showing a clear attitude of non-tolerance toward discrimination based on sexual orientation, including homophobic bullying
- having an effective anti-sexual and gender-based harassment policy in place and making sure all students know about it
- communicating clearly to the student body the consequences of all forms of sexual and gender-based harassment, including online sexual and gender-based harassment
- including online harassment prevention measures in sexual harassment and school Internet policies
- teaching students and staff about sexual harassment, including gender-based harassment, sex-role stereotyping, and homophobic comment and conduct
- engaging in role-playing and educational exercises to help students develop increased compassion and a greater awareness of the impact that sexual and gender-based harassment may have on others
- teaching students media literacy to enable them to engage in critical thinking and ask appropriate questions about what they watch, hear and read
- teaching students how to protect themselves from online sexual and gender-based harassment
- respecting the confidentiality of students who report sexual and gender-based harassment and related bullying. This may encourage other students who are being harassed to report it in its early stages
- making sure staff have adequate resources, training and tools to effectively monitor for sexually harassing behaviours, and to identify and report incidents when they do occur.

9. Human rights protection against sexual harassment

9.1 *The Ontario Human Rights Code*

Sections 1, 2, 3, 5, 6 and 9 of the *Code* set out the basic right to equal treatment without discrimination because of sex in services, goods and facilities, housing, contracts, employment and vocational associations.

Sections 7(1) and (2) set out a person's right to be free from harassment based on sex and inappropriate gender-related comment and conduct in housing and employment.

Section 7(1) states:

Every person who occupies accommodation has a right to freedom from harassment because of sex, sexual orientation, gender identity or gender expression by the landlord or agent of the landlord or by an occupant of the same building.

Section 7(2) states:

Every person who is an employee has a right to freedom from harassment in the workplace because of sex, sexual orientation, gender identity or gender expression by his or her employer or agent of the employer or by another employee.

Section 7(3)(a) prohibits sexual solicitation by a person in a position to confer a benefit, etc. It states:

Every person has a right to be free from a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome.

The *Code* contains no set provisions dealing with sexual harassment in services, goods and facilities (section 1), contracts (section 3) or membership in trade and vocational associations (section 6). However, sexual harassment in such situations would be a violation of sections 1, 3 and 6, which provide for a right to equal treatment without discrimination based on sex related to services, goods and facilities, contracts and membership in trade and vocational associations respectively.

Section 10(1) defines "harassment" as meaning "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome."

As mentioned previously, with the addition of "gender expression" as a protected ground to the *Code* in 2012 ("gender identity" was also added at the same time), many, if not most, forms of gender-based harassment would now be prohibited under the ground of gender expression. Depending on the circumstances, the ground of gender identity may

also be applicable. Therefore, a person who has experienced gender-based harassment could file a claim with the Human Rights Tribunal of Ontario alleging sexual harassment, as well as discrimination and/or harassment based on gender expression, where appropriate. Where it applies, they could also cite the ground of gender identity. See “2.3.3 Gender-based harassment” for more information.

9.1.1 Reprisal

Section 7(3)(b) sets out a person's right to be free from reprisal or threats of reprisal for rejecting a sexual solicitation or advance by someone who is in a position to grant or deny a benefit. Section 7(3)(b) states:

Every person has a right to be free from a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

Section 8 provides a broad protection against reprisal for claiming and enforcing any right under the *Code*. Section 8 states that:

Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act, and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.

This section provides protection from reprisals relating to any form of sexual harassment and/or discrimination because of sex.²⁰³

Subjecting someone to hostility, excessive scrutiny (for example, at work), social exclusion, or other negative behaviour because they have rejected a sexual advance or other proposition (such as a request for a date) are all forms of reprisal.

Section 8 (or section 7(3)(b), depending on the circumstances) applies when a respondent's treatment of a claimant is at least in part a reprisal for raising issues of sexual harassment.²⁰⁴

A person is protected from reprisal or the threat of it whether the sexual harassment claim is ultimately proven or not.

²⁰³ See *Demars v. Brampton Youth Hockey Association*, 2011, *supra*, note 68, in which a tribunal found that the respondent hockey association committed reprisal when it removed a mother from a committee as a volunteer because she instituted proceedings under the *Code*. See also *Q. v. Wild Log Homes Inc.*, 2012, *supra*, note 48 at para. 155, in which a tribunal found that filing a civil claim seeking damages for filing a human rights complaint is “a clear, substantive and particularly chilling type of retaliatory conduct against a complainant.”

²⁰⁴ See *Murchie v. JB's Mongolian Grill (No. 2)* (2006), *supra*, note 10; *deSousa v. Gauthier* (2002), *supra*, note 27; *Elkas v. Blush Stop Inc.* (1994), [25 C.H.R.R. D/158](#) (Ont. Bd. Inq.). See also *Q. v. Wild Log Homes Inc.*, *ibid.*

9.2 International protections

Canada has signed and ratified many international covenants that recognize the importance of respecting and protecting women’s rights. These include:

- *The Universal Declaration of Human Rights*²⁰⁵
- *The International Covenant on Civil and Political Rights*²⁰⁶
- *The International Covenant on Economic, Social and Cultural Rights*²⁰⁷
- *The Convention on the Rights of Persons With Disabilities*²⁰⁸
- *The Declaration on the Rights of Indigenous Peoples*²⁰⁹
- *The Convention on the Elimination of All Forms of Discrimination Against Women*²¹⁰
- *The Declaration on the Elimination of Violence Against Women*²¹¹
- *The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.²¹²

The *Convention on the Elimination of All Forms of Discrimination Against Women* speaks directly to the need to remove the barriers in employment, education, health care, housing, etc. that prevent girls and women from becoming full and equal participants in society. The *Declaration on the Elimination of Violence Against Women*, which complements and strengthens the *Convention on the Elimination of All Forms of Discrimination Against Women*, specifically recognizes “sexual harassment and intimidation [of women] at work, in educational institutions and elsewhere” as a form of violence against women.²¹³ The *Declaration* states:

[T]hat violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.²¹⁴

²⁰⁵ *Universal Declaration of Human Rights*, 10 December 1948, General Assembly resolution 217A (III), UN Doc. A/810.

²⁰⁶ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (entered into force 23 March 1976, accession by Canada 19 May 1976).

²⁰⁷ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 (entered into force 03 January 1976, accession by Canada 19 August 1976).

²⁰⁸ *Convention on the Rights of Persons with Disabilities*, 24 January 2007, A/RES/61/106 (ratified by Canada on March 11, 2001).

²⁰⁹ *Declaration on the Rights of Indigenous Peoples*, 2 October 2007, A/RES/61/295 (ratified by Canada on November 12, 2010).

²¹⁰ *Convention on the Elimination of All Forms of Discrimination Against Women*, *supra*, note 88.

²¹¹ *Declaration on the Elimination of Violence Against Women*, *supra*, note 89.

²¹² *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85, (1984) 23 I.L.M. 1027, Can. T.S. 1987 No. 36 (in force 26 June 1987; ratified by Canada 24 June 1987).

²¹³ *Declaration on the Elimination of Violence Against Women*, *supra*, note 89 at Article 2(b).

²¹⁴ *Ibid.*, at Preamble.

As a signatory to these conventions, Canada has agreed to uphold the values and rights guaranteed in them. The challenge for Canada is to make these high-level principles a lived reality for Canadians. All levels of government have a responsibility to take steps to make sure sexual harassment, and other forms of discrimination based on sex, do not prevent girls and women from fully taking part in all sectors of society. Human rights bodies across Canada play a key role in making this happen. In Ontario, the Ontario Human Rights Commission has a special responsibility to help Canada fulfill its international human rights commitments. This policy is one step the OHRC is taking to help Canada do so.

Appendix A: Purpose of OHRC's policies

Section 30 of the Ontario *Human Rights Code* authorizes the OHRC to prepare, approve and publish human rights policies to provide guidance on interpreting provisions of the *Code*. The OHRC's policies and guidelines set standards for how individuals, employers, service providers and policy-makers should act to ensure compliance with the *Code*. They are important because they represent the OHRC's interpretation of the *Code* at the time of publication.²¹⁵ Also, they advance a progressive understanding of the rights set out in the *Code*.

Section 45.5 of the *Code* states that the HRTO may consider policies approved by the OHRC in a human rights proceeding before the HRTO. Where a party or an intervenor in a proceeding requests it, the HRTO *shall* consider an OHRC policy. Where an OHRC policy is relevant to the subject-matter of a human rights application, parties and intervenors are encouraged to bring the policy to the HRTO's attention for consideration.

Section 45.6 of the *Code* states that if a final decision or order of the HRTO is not consistent with an OHRC policy, in a case where the OHRC was either a party or an intervenor, the OHRC may apply to the HRTO to have the HRTO state a case to the Divisional Court to address this inconsistency.

OHRC policies are subject to decisions of the Superior Courts interpreting the *Code*. OHRC policies have been given great deference by the courts and the HRTO,²¹⁶ applied to the facts of the case before the court or the HRTO, and quoted in the decisions of these bodies.²¹⁷

²¹⁵ Note that case law developments, legislative amendments, and/or changes in the OHRC's own policy positions that took place after a document's publication (or update) date will not be reflected in that document. For more information, please contact the Ontario Human Rights Commission.

²¹⁶ In *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 at para. 53 (Ont. Bd. Inq.), the tribunal applied the United States Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (4th Cir. 1971) to conclude that OHRC policy statements should be given "great deference" if they are consistent with *Code* values and are formed in a way that is consistent with the legislative history of the *Code* itself. This latter requirement was interpreted to mean that they were formed through a process of public consultation.

²¹⁷ The Ontario Superior Court of Justice quoted at length excerpts from the OHRC's published policy work in the area of mandatory retirement and stated that the OHRC's efforts led to a "sea change" in the attitude to mandatory retirement in Ontario. The OHRC's policy work on mandatory retirement heightened public awareness of this issue and was at least partially responsible for the Ontario government's decision to pass legislation amending the *Code* to prohibit age discrimination in employment after age 65, subject to limited exceptions. This amendment, which became effective December 2006, made mandatory retirement policies illegal for most employers in Ontario: *Assn. of Justices of the Peace of Ontario v. Ontario (Attorney General)* (2008), 92 O.R. (3d) 16 at para. 45. See also *Eagleson Co-Operative Homes, Inc. v. Théberge*, [2006] O.J. No. 4584 (Sup.Ct. (Div.Ct.)) in which the Court applied the OHRC's *Policy and Guidelines on Disability and the Duty to Accommodate*, available at: www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2

Appendix B: Table of cases

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