Guidelines on Sexual and Gender-Based Harassment in the Workplace

(As of June 1, 2015)

Guidelines are not law. These guidelines reflect the Newfoundland and Labrador Human Rights Commission’s interpretation of the provisions of the Newfoundland and Labrador Human Rights Act, 2010 (“the Act”) and various legal decisions from across Canada with respect to sexual and gender-based harassment in the context of employment. They are subject to decisions by Boards of Inquiry (called Tribunals in some provinces) and the Courts and should be read in conjunction with such decisions and with the specific language of the Act. Readers should be aware that as with all areas of law, legal obligations may evolve as new decisions emerge. If there is any conflict between these guidelines and the Act, the Act will prevail. Any questions regarding these guidelines should be directed to Commission staff. These guidelines should not be substituted for legal advice.

INTRODUCTION

Sexual harassment is prohibited in all jurisdictions throughout Canada, however, specific reference to it is not found in the human rights legislation in each province. Where there is no specific reference to sexual harassment, it is included in sexual discrimination and therefore protected under human rights legislation.1.

The Human Rights Act, 2010 prohibits harassment of a person, or class or persons, who is an occupant of a commercial or residential dwelling unit because of sex.2. The Act also prohibits harassment of another person “in an establishment” on a prohibited ground, including the sex of that person.3. The Act specifically prohibits unwelcome sexual solicitation by a person who is in the position to “confer, grant or deny a benefit or advancement to another person”. It is also prohibited to penalize, punish or threaten with reprisal a person because of the rejection of a sexual solicitation or advance.4.

As the majority of sexual harassment cases arise in the workplace environment, this guideline is meant to address workplace sexual and gender-based harassment specifically. However, as sexual harassment is also prohibited in other areas such as housing and rental accommodations and in the provision of services and facilities available to the public, the general principles and the behaviors that constitute sexual and gender-based harassment will be equally applicable in those contexts.
WHAT IS SEXUAL OR GENDER-BASED HARASSMENT?

The term “sexual harassment” is not found or defined in the Act. However the term “harass” is defined at section 2(j) of the Act as follows:

*to engage in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome*

The terms “sexual solicitation” or “sexual advance” are not defined in the Act, but have been interpreted to mean “such comments or conduct which would expressly or impliedly infer that sexual favours are being sought by the person making the sexual solicitation or advance”.

Sexual harassment in the workplace has been broadly defined as “unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment. When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.”

Sexual harassment usually requires a course of conduct of sufficient seriousness and repetition to detrimentally affect the work environment. Therefore, one incident of a relatively minor impact (e.g. name-calling) would not likely be sexual harassment. However, an isolated incident of inappropriate touching may well be.

Gender-based harassment is not defined in the Act. Unlike other forms of sexual harassment, gender-based harassment is generally not motivated by sexual interest or intent. It is often based on hostility and its purpose is to make the target feel unwelcome or ridiculed. Since the addition of “gender identity” and “gender expression” as new grounds for discrimination under the Act, it may be appropriate to also cite one or both of these grounds in a complaint based on gender-based harassment.

Where an individual is dependent on another person for a job, a place to live or any other benefit, that individual may tolerate unwanted sexual harassment from the other person if they are fearful of losing the benefit that other person may secure for them. Tolerance of the unwanted behavior is not the same as consenting to it. In the context of the workplace, the power imbalance between the parties is often used by the harasser to obtain the result they are seeking.
Sexual harassment may include but is not limited to:

- Unwelcome sexual invitations or requests;
- Sexually oriented jokes or innuendoes;
- Gender-based insults or sexist remarks;
- Derogatory name calling and vulgar humor/language;
- Comments of a sexual nature about weight, body shape, size or figure;
- Unnecessary physical touching, patting or brushing against a person's body;
- Leering, ogling or other gestures with suggestive overtones;
- Visual displays of sexual images perceived to be degrading or offensive;
- Unwanted, persistent suggestive communication and stalking;
- Verbal abuse or threats of a sexual nature; and
- Sexual touching and assault.

WHAT ARE EMPLOYER’S OBLIGATIONS WHERE SEXUAL HARASSMENT HAPPENS IN THE WORKPLACE?

Human Rights legislation imposes statutory liability on employers, for all acts of their employees, “in the course of employment”, by placing responsibility for an organization on those who control it and are in a position to take effective remedial action to remove undesirable conditions. Sexual harassment in the workplace if not properly addressed creates a hostile or “poisoned work environment”. The law therefore places a positive onus on employers to maintain a healthy and harassment free work environment.

This obligation extends beyond those clearly within a traditional employee-employer relationship. Relationships characterized as self-employment or independent contractors under taxation or other legislation are covered by the employment provisions of human rights statutes. Live-in caregivers, other personal service providers as well as migrant workers for whom housing is provided by the employer are particularly vulnerable to sexual harassment.

Employers should consider the following to avoid liability under Human Rights Act, 2010:

- Be aware that voluntariness of participation in sexual activity or passive response to sexual harassment does not indicate that the behavior was welcome. Certain conduct is tolerated due to fear of work-related or other reprisals.
- The intent of the harasser is irrelevant in determining whether sexual harassment has occurred. It is the impact of the behavior that determines whether it is sexually harassing. Therefore, jokes and pranks can still be sexual harassment.
Increasingly, sexual harassment is occurring through online technology (eg. chat rooms, texting, e-mails, social networking) which though occurring after work hours, may still be considered in the course of employment.

Employers must take active steps to prevent sexual harassment in the workplace which include having effective policies and procedures in place and conducting ongoing staff education and awareness.

Employers must act immediately and effectively to cease and remedy sexual harassment once the employer knows (or should know) that the behavior is occurring.

Effective actions include conducting a timely investigation involving all involved parties and witnesses to the incident and appropriately disciplining employees who have been found to have engaged in sexual or gender-based harassment.

Employers can attract liability for their failure to investigate even when a violation of the Act has not been made out. 12.

An employee cannot be punished for not accepting the sexual offers or advances made to them by the harasser. Such behaviors are contrary to the Act and can be the subject of a complaint.

It should be noted that these employer responsibilities are limited to those that human rights law require. There may be additional responsibilities under Collective Agreements, Labour Standards legislation, Occupational Health and Safety and the Criminal Code.

CAN AFTER-HOURS ACTIVITY CONSTITUTE SEXUAL HARASSMENT IN THE WORKPLACE?

After-work interaction between a supervisor and other employees that occurs away from the usual place of business may nevertheless constitute employment-related sexual harassment.13

Sexual harassment that occurs during employer-sponsored events such as company retreats may fall within the protection of the Act.14 However, where an employee becomes involved in activities that are “not related to employment” or are “personal in nature”, they no longer are protected under the Act. The criterion for the determining whether or not the activity was employment-related has been set out by the Canadian Human Rights Tribunal.15

The growth in electronic media (such as blogs, texting and social media) and the apparent anonymity provided by many forms of online communication has led to a rapid
growth in online sexual and gender-based harassment. As the line between being on- and off-the-job have been blurred by the dependence of many employers on their employees being easily accessible by technology, the potential for cyber-harassment relating to employment has increased. A sexually harassing text to a co-worker sent after hours may still constitute employment-related sexual harassment. Electronic media can be found to be an extension of the workplace where the sexual harassment that is communicated has work-related consequences.

Where incidents occur outside the normal hours and place of business, such as during social events or online, the employer may still be responsible for any discriminatory effects of the activity. The determination of whether, in any particular case, activity that occurs after-hours or outside the physical confines of the workplace can be the subject of complaint is determined based on the individual facts of the case.

SITUATIONS WHERE SEXUAL HARASSMENT HAS BEEN FOUND TO HAVE OCCURRED IN THE WORKPLACE

Below are some examples where sexual and gender-based harassment has been found in the workplace:

- **Gender-based comments harass others besides the individual targeted and create a “poisoned work environment”**.

  **Example:** A hiring team at a law firm was conducting interviews for articling student positions. A senior partner walked by the room where candidates were waiting to be interviewed, pointed to a female candidate and said to the 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 women on the hiring team.

- **Sexual comments made through blogging and other electronic means to co-workers after hours in relation to another co-worker is sexual harassment.**

  **Example:** A restaurant manager makes repeated and explicit advances and comments of a sexual nature about a waitress employed at the restaurant. Some of the comments are made during an after-hours card game with co-workers present and some were communicated in a text message and voicemail sent while he was at a late night party attended by other male staff members. Comments were found to be workplace sexual harassment.16.

- **Name-calling by other employers and supervisor constitutes gender-based harassment.**

  **Example:** Workers in a packaging company engaged in name-calling by referring to a transgender co-worker as “faggot” and “fruitcake” and asking her “what are you – a man or a woman?” This name-calling, along with other inappropriate behavior towards her, was found to constitute sexual harassment.17.
• **Perceived sexual orientation motivated gender-based harassment of employee**

  **Example:** The employer was found to have harassed, mistreated and bullied an employee primarily because he was perceived as weak and vulnerable due to physical and mental disabilities as well as a perception in the workplace that he was gay.  

  

**RELEVANT PROVISIONS**

**Harassment of occupant prohibited**

13. A person, directly or indirectly, alone or with another, by himself or herself only, or by the interposition of another, shall not harass a person or class of persons who occupies a commercial unit or a self-contained dwelling unit on the basis of a prohibited ground of discrimination.

**Harassment in establishment prohibited**

17. A person in an establishment shall not harass another person in the establishment on the basis of a prohibited ground of discrimination.

**Sexual solicitation prohibited**

18. (1) A person who is in a position to confer, grant or deny a benefit or advancement to another person shall not engage in sexual solicitation or make a sexual advance to that person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome.

(2) A person who is in a position to confer or deny a benefit or advancement to another person shall not penalize, punish or threaten reprisal against that person for the rejection of a sexual solicitation or advance.
Footnotes:

3. Supra, s. 17
4. Supra, s. 18
6. *Janzen*, supra, note 1, at para. 56
8. *Robichaud*, supra 1 at para. 95
9. *Janzen*, supra, note 1
14. *AS v. JRA Inc.*, 2010 HRTO 2421 (CanLII)