

SECTION: Interpretation

Effective date: December 11, 2013

SUBJECT: HARASSMENT - s.19

Purpose:

This policy is intended to assist in the interpretation of harassment, referred to in section 19 of *The Human Rights Code* ("*The Code*"). Where there is any conflict between this policy and *The Code*, *The Code* will be followed.

Definition of harassment:

A person responsible for an organization or business, such as an owner or a person in a senior management role, may not harass or fail to take reasonable steps to stop harassment of an individual. This includes harassment of a current or prospective employee, co-worker, client or customer. The harassment must be based on characteristics covered by *The Code* such as age, sex, or religion and must occur in employment, housing, or services.

Section 19 of *The Code* ensures that the dignity and value of individuals is respected. It also ensures that individuals who rely on an employer or service provider for compensation or other benefits or services do not feel trapped and have to tolerate harassment. [*Garland v. Tackaberry o/a Grape & Grain*, 2013 MHRBAD 5].

Harassment includes any of the following conduct:

- a course of abusive and unwelcome conduct or comment made on the basis of any characteristic protected under *The Code*. The conduct or comment may include verbal or written comments, emails, jokes, photographs or graphical depictions. A "course of conduct" implies more than one event and some degree of repetition;
- a series of objectionable and unwelcome sexual solicitations or advances;
- one or more sexual solicitations or advances made by a person who is in a position to provide or deny benefits (which may include a supervisor/manager, or person in a position of authority) if that person knows or should know that the solicitation or advance is unwelcome; or
- a reprisal or threat of retaliation for rejecting a sexual solicitation or advance.

The Supreme Court of Canada has confirmed that sexual harassment is a form of sex discrimination:

...discrimination on the basis of sex may be defined as practices or attitudes which have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic related to gender. [*Janzen v. Platy Enterprises Ltd. et al.* [1989] 1 S.C.R. 1242 at 1254]

Sexual harassment is not limited to situations where there is financial loss for failing to give in to sexual demands. It also includes having to tolerate a poisoned or sexually charged work environment that negatively impacts the dignity and self respect of the victim as an employee and as a human being. As a result, sexual harassment may include a person being exposed to the actions or comments, even if they are not the target.

If the complainant participated in the actions or comments, they may have difficulty proving harassment based on a poisoned environment. It has been recognized, however, that individuals may participate because they feel powerless to stop the harassment or as a defense mechanism. [*Swan v. Canada (Armed Forces)* (1995), 99 F.T.R. 250 (Fed T.D.)]

Harassment that occurs outside of work duties but in situations related to work, such as workplace parties or sports teams, is still subject to *The Code*.

The principles applicable to sexual harassment have been transferred to harassment cases based on characteristics other than sex, such as ancestry, race, etc. and are also applicable to other areas covered by *The Code*, such as services (i.e.: sports teams, social clubs, etc.) or housing.

Examples of harassment based on other protected characteristics may include using nicknames or making jokes based on ancestry, store security excessively monitoring people based solely on age or ancestry, racial profiling, making fun of a co-worker's disability or sexual orientation, a manager demeaning employees with lower levels of education, or a landlord making derogatory statements about a tenant's religion.

Harassment does not include the normal duties associated with supervisory responsibilities in employment such as coaching, performance reviews, and disciplinary action. It also does not include voluntary and consensual sexual contact between employees.

Harassment unrelated to a protected characteristic is sometimes referred to as "bullying" or "personal harassment." This type of disrespectful behaviour is not covered by *The Code* but may violate other legislation such as *The Workplace Safety and Health*

Act regulations and/or an employer's internal harassment policy.

Reasonable person tests:

There must be evidence that the harassment occurred, although evidence of an intention to harass is not required. In the case of poisoned environment harassment, the test is an objective one, namely whether a "reasonable person" would conclude that the conduct was harassment:

... the harasser's conduct should be evaluated from the objective standard of a "reasonable person". However, the objective standard should not be applied in a vacuum. The adjudicators should give consideration to the context in which the alleged harassment took place. The trier of fact must adopt the perspective of a reasonable person's reaction to a similar environment under similar or like circumstance. [A.P. Aggarwal & M.M. Gupta, *Sexual Harassment in the Workplace* (3d edition)]

From this it follows that the test is whether a reasonable person would recognize that the conduct was unwelcome, which depends on all the circumstances such as the nature of the conduct and the relationship. Responses to unwelcome conduct will differ and may include only subtle indications or evasive measures, or even tolerance, for various social and economic reasons. This is especially so where the perpetrator is in a position of authority or power over the complainant. [*Bourier v. Phil Can Services et al.* (1999) M.H.R.B.A.D.]

A person who insists that the comments or conduct were welcome is responsible to demonstrate consent. When there is a power imbalance, the responsibility is on a manager or other authority figure to make sure the conduct continues to be welcome over time. [*Dupuis v. British Columbia (Ministry of Forests)* (1993), 20 C.H.R.R. D/87 (BCHRT)]

Obligations of person responsible:

Unless the alleged harasser is responsible for the business or service, the complainant must establish that a person who is responsible (generally, a manager) knew or should have known about the harassment and failed to respond appropriately.

Factors for consideration will include:

- 1) The employer or service provider was aware that harassment is prohibited conduct.
- 2) It had an adequate complaint mechanism in place.
- 3) It acted expeditiously in handling the complaint.
- 4) It dealt with the matter seriously.

- 5) It met its obligation to provide a healthy work environment.
- 6) It met its obligation to inform the complainant of its response.

[*Jones v. Amway* (2001), 39 C.H.R.R.D/480 (Ont.Bd.Inq.)]

APPROVED BY:

"Yvonne Peters"
Chairperson

December 11, 2013
Date