

SEXUAL HARASSMENT INVESTIGATIONS

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OUTLINE

- What is Sexual Harassment
- Workplace Sexual Misconduct Statistics
- Considerations for Sexual Misconduct Investigators
 - Trauma Informed Practice
 - What Does Consent Look Like
 - Recognizing Bias as Investigator
 - Tips for Report Writing

WHAT IS SEXUAL HARASSMENT

In *Jantzen v Platy Enterprises Ltd.*, 1989 CanLII 87 (SCC), the Supreme Court of Canada broadly defines sexual harassment in the workplace 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. It is, as Adjudicator Shime observed in Bell v. Ladas, supra, and, as widely accepted by other adjudicators and academic commentators, an abuse of power. 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.” (para. 56)*

EXAMPLES OF SEXUAL HARASSMENT

Inappropriate Sexualized Behaviour

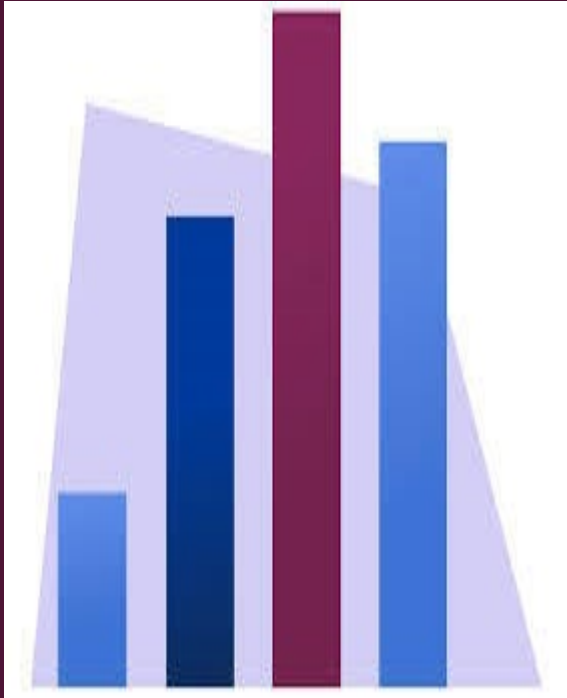
- inappropriate verbal and non-verbal communication
- sexually suggestive, obscene, or degrading comments, questions or gestures of a sexual nature
- displaying, circulating or sharing sexually explicit materials
- unwanted or unwelcome physical contact
- suggested sexual relations, flirtations, advances, propositions
- leering, staring
- express or implied promise or reward in exchange for complying with a sexual request

Discriminatory Behaviour

- discrimination based on a person's gender identity or gender expression and actual or perceived sexual orientation, or because a person is, or is believed to be, transgender.

Sexual Assault

- sexual attacks
- unwanted sexual touching
- sexual activity to which the victim was unable to consent because they were manipulated, coerced, intoxicated or forced in another non-physical way



WORKPLACE SEXUAL MISCONDUCT STATISTICS

SEXUAL MISCONDUCT STATISTICS IN THE WORKPLACE 2020

Sexual Misconduct and Gender-based Discrimination at Work, 2020

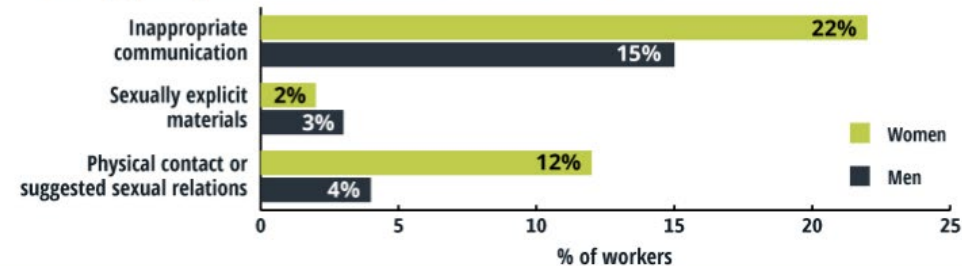
Statistics Canada, August 12, 2021

Sexual Misconduct and Gender-based Discrimination at Work, 2020

25% of women experienced sexual misconduct in their workplace in the previous year.

17% of men experienced sexual misconduct in their workplace in the previous year.

Sexual misconduct includes inappropriate behaviours such as:



Workplace sexual misconduct and gender-based discrimination can occur at the worksite or another location where people associated through work are present.

1 in 5 LGBTQ2+ workers experienced workplace discrimination based on their sexual orientation or gender identity



SEXUAL MISCONDUCT STATISTICS IN THE WORKPLACE 2024

Canada - February 12, 2024

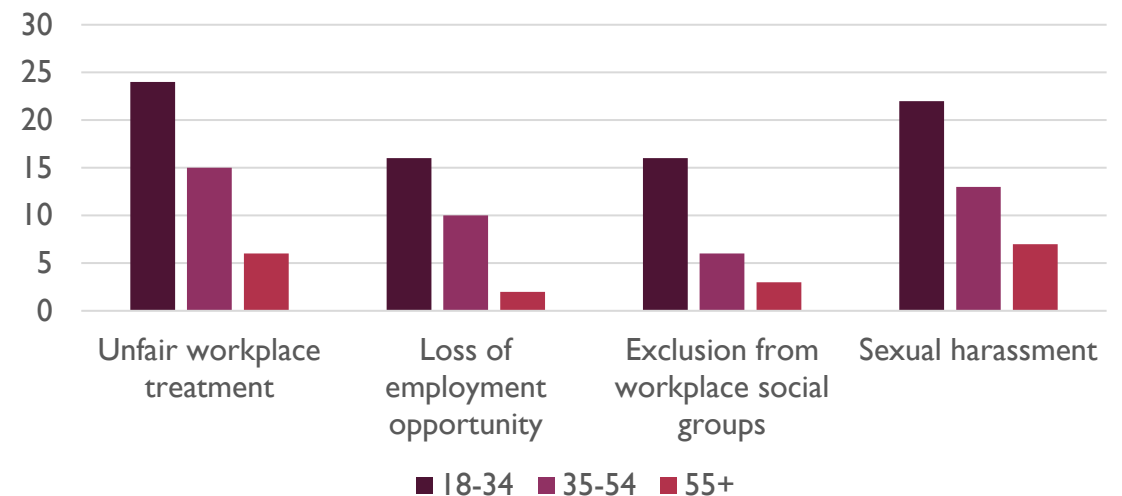
- In Canada, 31% of men and 47% of women reported ever experiencing some form of harassment or sexual assault in the workplace.
 - Workers with disabilities: 41% of men and 58% of women
 - Workers without disabilities: 28% of men and 41% of women
 - Indigenous workers: 30% of men and 43% of women
 - Non-indigenous workers: 31% of men and 48% of women
 - Racialized workers: 20% of men and 35% of women
 - Non-racialized workers: 35% of men and 51% of women
- Highest rates of sexual harassment/assault in 25 years-34 years age group
- Women who work in traditionally male-dominated occupations (trades, transport, equipment operators) are more likely to experience inappropriate sexualized behaviours

DISCRIMINATION STATISTICS REPORTED BY WOMEN (2022)

British Columbia, 2022 [Research Co. Poll]

- 58% of BC women reported experiencing gender based discrimination
 - 25% “small” amount
 - 19% “moderate” amount
 - 8% “significant” amount

Gender-based discrimination by age



CONSIDERATIONS FOR SEXUAL MISCONDUCT INVESTIGATORS

- Trauma Informed Investigation
- What Does Consent Look Like
- Recognizing Bias
- Report Writing Tips

TRAUMA
INFORMED
PRACTICE.

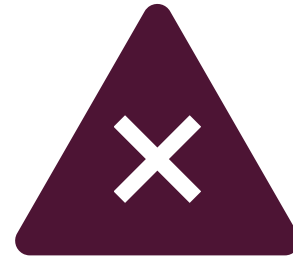


TRAUMA INFORMED PRACTICES

- Why its important for investigators to consider



Trauma impacts the way experiences are remembered and explained



Golden rules:

Don't mistake trauma for lack of credibility
Don't mistake evidence of trauma as proof
Do no harm

TRAUMA INFORMED PRACTICES

■ Signs of Trauma in the Evidence

Fragmented, narrative
does not flow

Inability to recall
details or sequence

Multiple versions

Memory loss

Lack of focus

Emotional reactivity

Demeanour shows a
lack of emotion,
“odd” or
“inappropriate” affect

Sensory memories
may be more detailed

Range of emotions –
fear, self-blame,
shame

Fear of victim
blaming can result in
a victim “saving face”

TRAUMA INFORMED PRACTICES

■ Conduct of interviews

- Participants evaluate the investigator to determine if capable of a compassionate and professional response
- Be very clear about process and safeguards – transparency builds trust and feelings of safety
- Build rapport
- Gather evidence in a respectful and fair manner
- Ask about the experience not just the events



TRAUMA INFORMED PRACTICES

■ Conduct of interviews

- Preparation is essential.
 - Use trauma informed questioning skills.
 - Be mindful of how you ask and what you ask.
 - Set and Manage Expectations of Participants
- Avoid:
 - Victim blaming
 - Why did you? Why didn't you?
 - Help me understand why you didn't do / waited so long...?
 - Questions that frustrate lack of linear memory
 - What happened next?

TRAUMA INFORMED PRACTICES

■ Conduct of interviews

Questioning where memory is fragmented

- Where would you like to begin?
- What else happened?
- What are you able to tell me about your experience?
- What did you see? Hear? Smell? Taste? Touch?

TRAUMA INFORMED PRACTICES

■ Conduct of interviews



Provide breaks and follow up opportunities



Demonstrate human compassion



Get statement in the individual's own words



Try not to interrupt



Ask follow up questions for clarification



Describing sensory memory and peripheral details can improve recollection



Empathy and respect in the process can contribute to healing

WHAT DOES CONSENT LOOK LIKE.

Ongoing

Anyone can change their mind about what they're interested in doing, anytime.

Freely given

Saying yes without pressure or manipulation.

Specific

Saying yes to one act (i.e. kissing) doesn't mean you've said yes to others (i.e. oral sex).

con • sent

Informed

Not deceiving or lying. For example, if someone says they'll use a condom and then they don't, there isn't full consent.

Enthusiastic

It's about wanting to do something, not feeling like you have to or should do something.

ENTHUSIASTIC CONSENT



Active: A clear and unambiguous, enthusiastic agreement expressed verbally or through affirmative actions.



Mutual: Everyone involved must give and receive consent equally.



Ongoing and Continuously Discussed : Consent should be maintained throughout the activity and can be withdrawn at any time.



Informed: All parties should understand what they are consenting to, including any risks or boundaries.

POWER IMBALANCES AND CONSENT

- Power imbalances can...
 - compromise consent → impede the ability to resist or express that behaviour is unwelcome
 - perpetuate the harassment
 - exacerbate impact on harassed person

DETERMINING CONSENT

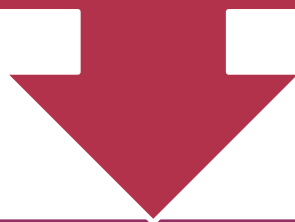
- ***NK v Botuik, 2020 HRTO 345***
 - The Applicant, NK, reported sexual harassment by her supervisor, Mr. Botuik, to her employer. The employer's internal investigation concluded that the conduct did not violate their workplace policies, as sexual activity occurring at the workplace was consensual. However, Mr. Botuik and NK were both dismissed for unacceptable and inappropriate behaviour.
 - NK alleged discrimination with respect to employment because of sex, sexual harassment, and sexual solicitation or advances contrary to the *Human Rights Code*, RSO 1990, c H. 19.
- **Held:** NK's ss. 7(2) and 7(3)(a) rights under the *Human Rights Code* were violated due to persistent and severe sexual harassment and solicitation in relation to the workplace.
 - The relationship between the parties and the sexual assault remained materially tied to the workplace.
 - The tribunal awarded NK \$170,000 as monetary compensation for injury to dignity, feelings and self-respect.

WORKPLACE INVESTIGATION CONCLUSIONS

- Mr. Botuik and NK engaged in inappropriate conduct in the workplace. Their actions had fallen below the standard of conduct expected of a supervisor or staff and that their behaviour failed to demonstrate integrity.
- The sexual activity between the parties was consensual.
- The activities between the parties did not breach the employer's harassment or workplace safety policies.
- Since the employer was not aware of the impugned activity until later, it had not been in a position to take action until then, and behaved appropriately in the circumstances.

“Oddly, despite the alleged sexual assault having been directly reported in the applicant’s September 6, 2020 letter, and the parties also making reference to that circumstance in their later interviews with the investigator, the report does not mention or address that incident in any way.” (*para. 203*)

*“Manufactured consent which is secured by ignoring and overriding objections is not consent at all under the law. In short, **consent under the law does not extend to situations where a party complies because they fear the consequences of refusing.***



Given all of the circumstances, including the respondent’s frequently self-referenced power in the workplace, his efforts to groom the applicant to accept his sexual behaviour, her earlier resistance to his sexual demands, which he ignored and overrode, and her occasionally verbalized desire to end things between them, I find the respondent knew or should have known that further pressing the applicant into a relationship to have been an unwelcome and unwanted course of action” (para 257).

**MANUFACTURED
CONSENT**

THE TRIBUNAL'S FINDING

- The relationship was not consensual. It came from the continued leverage by the Respondent as her workplace superior. The Complainant was bullied and mentally beaten down into a state of fearful compliance.
- The Respondent sexually harassed the applicant by engaging in conduct that was known, or ought reasonably to have been known, to be unwelcome.
- “[T]he respondent was able to – and did – credibly threaten the applicant’s employment status even after he was no longer her direct supervisor, I find that both the relationship between the parties and the sexual assault of the applicant by the respondent remained materially tied to the workplace through the time of the sexual assault” (para 262).
- ***L.N. v Ray Daniel Salon & Spa, 2024 HRTO 179.***

MOGHADDAM-
GHADIMI

V.

0704121 BC LTD.
DBA GANDY HVAC
AND OTHERS,

2024 BCHRT 274

As stated in *Jamal v. TransLink Security Management and another (No. 2)*, 2020 BCHRT 146 :

[106] [...] employers have obligations under the *Code* to respond reasonably and appropriately to complaints of discrimination: *Laskowska v. Marineland of Canada Inc.*, 2005 HRTO 30 at paras. 52-53. This includes a duty to investigate. Because the *Code* obliges employers to respond to allegations of discrimination, a failure to do so in a way that is reasonable or appropriate can amount to discrimination: *Beharrell v. EVL Nursery Ltd.*, 2018 BCHRT 62 at para. 24. In particular, an investigation can, on its own, amount to discrimination “regardless of whether the underlying conduct subject to the investigation is found to be discriminatory”: *Employee v. The University and another (No. 2)*, 2020 BCHRT 12 at para. 272.

MS. L V CLEAR PACIFIC HOLDINGS LTD. AND OTHERS, 2024 BCHRT 14

- The Complainant, Ms. L, was employed by Mr. Hayden as a personal assistant from January 2018 to October 2019.
- The employment relationship involved continual sexual, economic, emotional, and physical abuse by Mr. Hayden.
- **Held:** Ms. L's s. 13 rights under the *BC Human Rights Code* were violated, as the employer's discriminatory conduct was connected to Ms. L's sex and substance abuse disorder.
 - The tribunal awarded Ms. L \$100,000 as compensation for injury to her dignity, feelings, and self-respect in addition to other damages for wage loss and expenses incurred as a result of the contravention.
 - The Tribunal accounted for the upward trend in remedial awards.

“All of his abuses were connected to her sex and substance use disorder, which were foundational to the power imbalance that allowed him to continuously sexually harass and humiliate her, manipulate her emotionally, and withhold her wages.” (para. 60)

RECOGNIZING BIAS.

Bias refers to prejudice or misconceptions held against a particular person, group, or outcome, which can cloud judgment and lead to unfair treatment.

RECOGNIZING BIAS

Some types of biases

- *Gender bias*
 - tendency to prefer one gender's evidence over another
- *Perfect victim bias*
 - pre-existing beliefs about how a credible victim should look or behave
- *Confirmation bias*
 - preference for evidence that aligns with expectations and to discount evidence that does not

RECOGNIZING BIAS

Strategies or tools for eliminating bias (and the perception of bias)

- awareness – identify your own unconscious biases, challenge your assumptions
- follow a consistent process
- rely on the evidence, not your gut
- avoid drawing conclusions too soon
- be mindful of your language

TIPS FOR REPORT WRITING.



TIPS FOR REPORT WRITING

- Use the parties' and witnesses' own words
 - ❖ Use quotations where possible
 - ❖ Do not sanitize language used by the complainant and witnesses
- Capture any necessary details about
 - ❖ Pre- post – incident contact
 - ❖ Coercion, threats, force, etc.
 - ❖ Traumatic reaction during and after incident
 - ❖ Sensory experiences of the complainant

TIPS FOR REPORT WRITING

- Document how the experience or behaviours may have changed (from consensual to non-consensual)
 - ❖ How the respondent's behaviour changed
 - ❖ How the complainant demonstrated non-consent
- Account for the role of drugs or alcohol, if any
 - ❖ Include any observations that corroborate the complainant's or respondent's account of events
 - ❖ Document the parties' demeanor (ex: reactive, disengaged)

QUESTIONS?

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