

THE ONTARIO HUMAN RIGHTS CODE AND SEXUAL HARASSMENT

Sexual harassment and inappropriate gender-related comments and conduct are complex issues which often involve one person's attempt to assert power over another. **Sexual harassment and unequal treatment based on gender typically, but not exclusively, involves the exercise of power and authority over women, resulting in the reinforcement of a woman's subordinate status in relation to men.** It is important to note that sexual harassment and inappropriate gender-related comments and conduct are prohibited regardless of the gender of the persons involved. The Commission has received complaints by men against women, as well as complaints involving persons of the same sex.



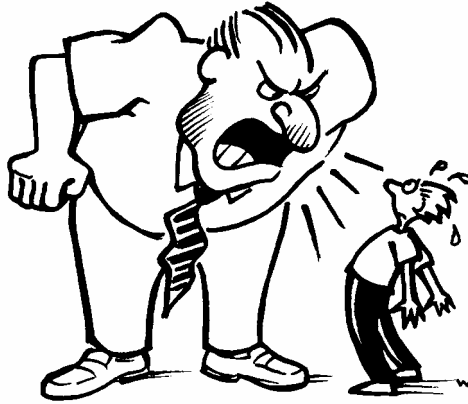
This power relationship can be particularly evident in employment situations. However, women tend to be more vulnerable to harassment by men, because relative to men, more women hold lower paying, lower authority and lower status positions in the workplace. At the same time, even women in positions of authority are not free from sexual harassment or inappropriate gender-related behaviour.

Regardless of her position, this type of behaviour can diminish a woman's status and image in the eyes of other employees. Inappropriate gender-related comments or conduct can also endanger the continued employment of the harassed individual by negatively affecting her or his work performance, or undermining her or his sense of personal dignity, or in some cases causing physical and emotional illness.

THE 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 the areas of services, goods and facilities, occupancy of accommodation, contracts, employment, and vocational associations. As stated earlier, sex discrimination includes inappropriate comments or conduct that are not, narrowly speaking, entirely sexual in nature.

The Code also includes provisions that specifically address sexual harassment in employment and accommodation, as well as sexual solicitation and reprisal for refusing a sexual advance.



1. THE DEFINITION OF "HARASSMENT" UNDER THE CODE

Section 10 (1)(f) of the Code 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.

a) A Course of Vexatious Comment or Conduct

According to the definition of harassment in subsection 10 (1)(f) of the Code, more than one event, or a "course of vexatious(6) comment or conduct" [emphasis added], must take place for there to be a violation of the Code. However, one incident could be significant or substantial enough to be interpreted by the Commission as constituting a breach of sections 1, 2, 3, 5 or 6 of the Code. Such an incident could be interpreted by the Commission as having an impact that is substantial enough to create a -poisoned environment" for some individuals because of their sex.

b) Ought Reasonably To Be Known To Be Unwelcome

Comment or conduct that is known or ought reasonably to be known to be unwelcome-[emphasis added] contains a subjective and an objective element.

First, the harasser's own knowledge of how his or her behaviour is being received is part of the test.

Second, from the point of view of a reasonable third party as well, i.e. how such behaviour might generally be received. In other words, the Commission or the board of inquiry 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.

Traditionally, the standard for judging such knowledge was based on the perspective of a -reasonable person-, with -reasonable person- being drawn primarily from a male perspective. It included stereotypical notions of what forms of behaviour are, or are not, acceptable. The proper objective standard should reflect full substantive equality. The standard used to determine what the harasser ought to know is still gauged from the perspective of the -reasonable person-. However, the concept of the -reasonable person- has evolved to take into account the specific perspective of the person who is harassed: this means considering factors that ought reasonably to be known about the harassed person and his or her perspective as a member of a group protected under the Code.

Example: A supervisor's ongoing questions to a woman about when she is going to marry and start having children may make this employee feel uncomfortable for a number of reasons. Her discomfort may be related to her own cultural background, a fear of losing her job, or to reasons related to other prohibited grounds of discrimination under the Code, such as creed, sexual orientation, or age.

As noted above, other prohibited grounds of discrimination such as race, creed, marital status, or disability, may be intertwined with issues of gender. For persons who are members of more than one protected group certain forms of behaviour could have a particularly adverse impact.

Example: Women with disabilities may feel particularly vulnerable to harassment and sexual assault. Inappropriate comments or conduct related to gender which may not necessarily be considered by some as problematic, may be viewed as particularly offensive or threatening by a woman with a disability.

It can reasonably 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. An example could be a person walking away in disgust after a co-worker has asked questions of a sexual nature.

As previously noted, a person does not have to make explicit reference to another person's gender or be explicitly sexual for the behaviour to be contrary to the Code. Someone could indirectly harass a female employee in his area, with the intent of discouraging or driving her away from continuing her employment in a particular position, because she is a woman.

As earlier indicated, sexual harassment is often interpreted as objectionable comments or conduct of a "sexual" nature. However, **sexual harassment, in the broader context of unequal treatment based on gender, may refer to instances where the behaviour is not overtly sexual in nature, but is related to the person's gender, and demeans or causes personal humiliation or embarrassment to the recipient.**



Examples of sexual harassment and inappropriate gender-related behaviour within the meaning of the Code include, but are not limited to, comments, gestures and nonverbal behaviour, visual materials, and physical contact. The following is not an exhaustive list but should assist in identifying what may constitute sexual harassment or inappropriate gender-related comments and conduct:

- i) gender-related comments about an individual's physical characteristics or mannerisms;
- ii) unwelcome physical contact;

- iii) suggestive or offensive remarks or innuendoes about members of a specific gender;
- iv) propositions of physical intimacy;
- v) gender-related verbal abuse, threats, or taunting;
- vi) leering or inappropriate staring;
- vii) bragging about sexual prowess;
- viii) demands for dates or sexual favours;
- ix) offensive jokes or comments of a sexual nature about an employee, client, or tenant;
- x) display of sexually offensive pictures, graffiti, or other materials;
- xi) questions or discussions about sexual activities;
- xii) paternalism based on gender which a person feels undermines his or her self-respect or position of responsibility;
- xiii) rough and vulgar humour or language related to gender.

A situation could arise in which particular comments or actions might not be intended to offend another person, but result in a violation of that person's rights under the Code. The reason for this is that **intent is not a prerequisite to establishing that the treatment is discriminatory**. Rather, the Commission looks to the effect or the result of the comments or actions on the recipient.

Example: Even the best intentioned "compliments" regarding a woman's appearance, hair, clothes etc., if made on a repeated basis in the work environment, or during a formal business meeting, can set a woman apart as different. Such comments also undermine her credibility as a professional.