

## SEXUAL HARRASSMENT

### PROCEDURAL AND SUBSTANTIVE ISSUES

#### *Procedure Involved In Making a Complaint*

First contact the Human Rights Commission – Complaint must be filed within six months of the last incident of discrimination.

Contact is with the Commissions Inquiry Services Unit. This contact is made by an automated telephone service.

An intake questionnaire must be completed.

A decision is then made whether the issues raised in the complaint are within the mandate of the Human Rights Commission.

If it is determined that that is the case, then a formal complaint must be filed with the Commission.

It is then served upon the Respondent who is then asked to formally respond to the allegations contained therein.

At that point, the Commission has the option of either dealing with the complaint or not dealing with the complaint. Section 34 of *The Act* sets out the criteria under which the Commission will decide not to investigate the complaint.

These issues include the following where the complaint can be more effectively pursued under other legislation where the complaint is trivial, frivolous or vexatious or made in bad faith, where the complaint is not within the jurisdiction of the Commission or where the complaint was filed late.

The parties may mediate their dispute if they both consent – this is generally offered within 90 days from the date the complaint is received and signed. Between 65 and 70 percent of cases are settled in this fashion. The parties cannot resolve their difference through mediation unless the Human Rights Commission accepts their resolution.

If the matter is not resolved through mediation, then it proceeds through the investigative stage at the Human Rights Commission. This is done under Section 33 of *The Code*.

The investigation can consist of interviewing witnesses, ordering production of documents, reviewing documents, and obtaining expert reports.

Once the Commission completes its investigation, the Human Rights Officer will attempt to resolve the dispute as between the parties through conciliation. If the matter is not resolved at this stage, the investigation officer will prepare a case analysis which sets out his recommendation pursuant to Section 36 of *The Code* as to whether or not the Commissioners should refer the complaint to the Board of Inquiry. The parties are invited to make submissions concerning this recommendation.

At that point, the Commission can either decline to send the complaint to the Board of Inquiry or send it to the Board of Inquiry. If it is sent to the Board of Inquiry, a full hearing is held.

### **Substantive Issues Related to Sexual Harassment**

It is defined as “any sexually oriented practice that endangers an individual’s continued employment, negatively affects his/her work performance, or undermines his/her sense of personal dignity”.

This definition changes with each generation. What was acceptable twenty years ago is not acceptable today.

#### ***Impact of Harassment***

- destruction to employees
- effect on employee’s health
- internal conflict
- loss of productivity
- loss of confidence in employer
- time spent in doing investigation
- poisoned work environment
- the effect on law suits given the *Wallace v. UGG* Supreme Court of Canada decision
- human rights complaints under Section 45 of the *Ontario Human Rights Code* or under Section 65 of the *Canada Human Rights Act*
- WSIB claims
- *Occupational Health and Safety Act* violation, Section 23

#### ***Forms of Sexual Harassment***

- touching
- jokes
- propositioning
- love notes

### What to do when your client is required to respond to a complaint

Most arbitrations or court cases result from poor investigations. The quality of an investigation has a direct bearing on the employer's liability.

#### ***Nature of Investigation***

1. Must be fast and effective with fairness to the parties
2. Process must be flexible depending on the circumstances

#### ***What would you recommend your clients do with the parties involved***

1. Send them home with pay during the period of investigation
2. Do not leave them with the perception that you are punishing them
3. Keep matters confidential

#### ***What to do if a client comes to you with a complaint***

1. Ensure that it is in writing, although accept a verbal complaint if that is acceptable in the circumstances
2. Flush out the details
3. Involve third parties
4. Never meet with the complainant and the alleged harasser at the same time
5. Must avoid anonymous complaints

#### ***The Investigation Stage***

1. Have a well trained investigator in the work place
2. Make sure they have enough time to do an adequate investigation
3. Start an investigation immediately
4. Ensure that the investigation does not leave the perception of retaliation as against the complainant
5. Person must have adequate interview techniques
6. Person must have access to all relevant documents and information

#### ***The Investigation Process***

1. Advise the complainant and alleged harasser of process
2. Get details of complaint
3. Allow alleged harasser to respond to the complainant's complaint
4. Get a statement from all involved

5. Establish strict time frames
6. Keep a separate file marked “Personal and Confidential”

### ***Results of the Investigation***

1. Should be summarized in a report
2. Findings as to credibility are necessary
3. A recommendation should be made as to how to proceed
4. Penalties must be considered
5. Do not provide a copy of this report to those involved only provide a summary

### **Resolution**

You must:

1. Stop the harassment
2. Prevent reoccurrence
3. Remedy the effect of the harassment

### ***Options Available***

1. Relocate parties
2. Fire one or both parties
3. Reassign reporting functions
4. Warning
5. Dismissal – with or without pay
6. Suspension – with or without pay
7. Education
8. Offer the Employee Assistance Program
9. Do a workplace audit
10. Criminal charges under Section 372 or 432 of the *Criminal Code*
11. Report to the Human Rights Commission
12. Mediate dispute
13. Compensate complainant
14. Demand an apology
15. Establish a workplace harassment policy – Reference the Supreme Court of Canada Case in *Robichaud*, which said that “an employer who has a sexual harassment policy will fare better than one without in cases where there is an alleged sexual harassment”.

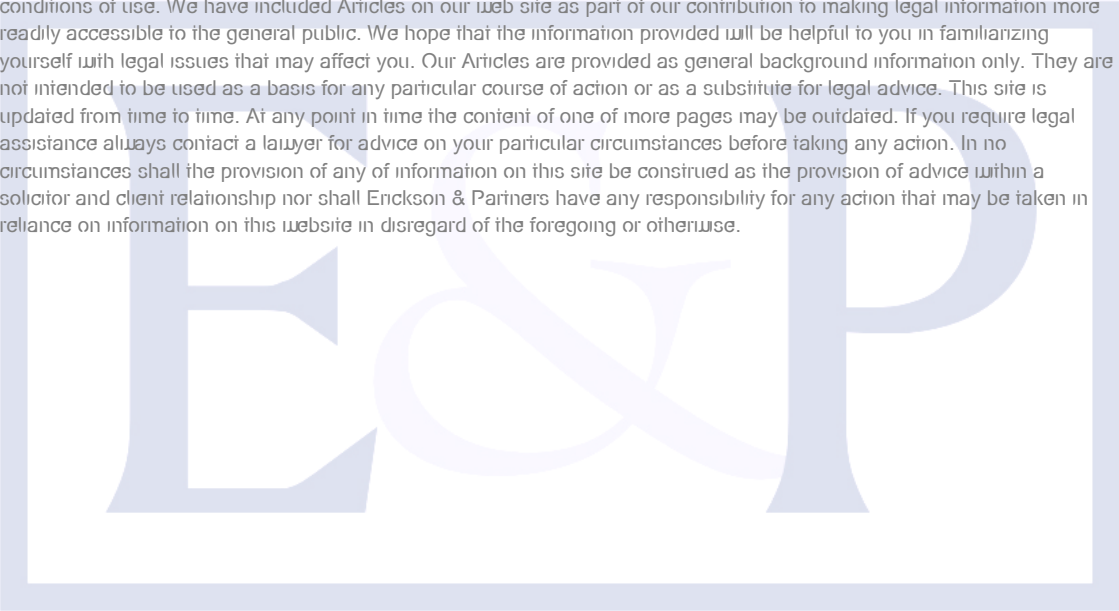
### ***What happens if the Complainant withdraws their complaint***

1. Destroy all notes
2. Do not keep a secret file

### **Final advice to an employer confronted with a claim for sexual harassment**

1. You can't please everyone
2. Don't express your personal opinions
3. Don't make promises you can't keep
4. Keep the investigation confidential
5. Do not appear indifferent
6. Avoid the Human Rights Commission

**\*Disclaimer:** All information and articles on this website are provided to you subject to the following disclaimer and conditions of use. We have included Articles on our web site as part of our contribution to making legal information more readily accessible to the general public. We hope that the information provided will be helpful to you in familiarizing yourself with legal issues that may affect you. Our Articles are provided as general background information only. They are not intended to be used as a basis for any particular course of action or as a substitute for legal advice. This site is updated from time to time. At any point in time the content of one or more pages may be outdated. If you require legal assistance always contact a lawyer for advice on your particular circumstances before taking any action. In no circumstances shall the provision of any of information on this site be construed as the provision of advice within a solicitor and client relationship nor shall Erickson & Partners have any responsibility for any action that may be taken in reliance on information on this website in disregard of the foregoing or otherwise.



E&P