SEXUAL HARASSMENT IN THE WORKPLACE

In terms of the Employment Equity Act, No 55 of 1998 (Act), harassment of an employee is a form of unfair discrimination and it is prohibited on any one or combination of grounds of unfair discrimination listed in the Act.

Sexual harassment is a form of unfair discrimination based on the grounds of sex, gender and/or sexual orientation.

It has been characterised by the Labour Appeal Court as “the most heinous misconduct that plagues a workplace”.

WHAT IS SEXUAL HARASSMENT?

The 2005 Amended Code of Good Practice: Sexual Harassment Cases (the Amended Code) sets out the test for sexual harassment as follows:

“Sexual harassment is unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all of the following factors:

• Whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation
• Whether the sexual conduct was unwelcome
• The nature and the extent of the sexual conduct
• The impact of the sexual conduct on the employee”

WHO?

WHO CAN BE A VICTIM OR PERPETRATOR OF SEXUAL HARASSMENT?

Although the Act deals with the relationship between employer and employee, not only employees can be victims of sexual harassment in the working environment. The victim and perpetrator of the sexual harassment do not have to be co-workers.

The ambit of who may be a victim or a perpetrator of sexual harassment includes persons such as:

- Owners
- Employers
- Managers
- Supervisors
- Employees
- Job applicants
- Clients
- Suppliers
- Contractors
- Others having dealings with a business
MUST THE SEXUAL HARASSMENT TAKE PLACE ON THE EMPLOYER’S PREMISES OR WITHIN WORKING HOURS IN ORDER FOR THE EMPLOYER TO TAKE DISCIPLINARY ACTION?

No. In Campbell Scientific Africa (Pty) Ltd v Simmers and Others (CA 14/2014) [2015] ZALCCT 62 (23 October 2015), the sexual harassment occurred away from the employer’s premises and after working hours. The Court held that the employer was entitled to discipline the employee as the sexual harassment occurred in the context of a work related social event and affected the employment relationship.

MUST THE PERPETRATOR OF THE SEXUAL HARASSMENT HOLD A MORE SENIOR POSITION TO THE VICTIM?

No. Sexual harassment is not limited to any hierarchical system. It may be perpetrated by a co-worker, a supplier and even by a subordinate on a superior.

THE CONDUCT

MUST THE CONDUCT BE UNWELCOME IN ORDER FOR IT TO AMOUNT TO SEXUAL HARASSMENT?

Yes. There are a number of ways that an employee can indicate that the sexual conduct is unwelcome. An employee may indicate this through verbal means (by telling the perpetrator that the conduct is unwelcome) or through non-verbal means such as walking away from or removing oneself from the presence of the perpetrator in the face of sexual harassment.

WHAT IF THE SEXUAL CONDUCT WAS PREVIOUSLY WELCOMED?

The fact that the parties may previously have welcomed or participated in the conduct does not mean that conduct remains welcome. An employee is not precluded from lodging a sexual harassment complaint against a perpetrator when the attention becomes unwelcome even if the employee was previously in a relationship with the perpetrator.

MUST THE CONDUCT BE OF A SEXUAL NATURE?

Yes. This type of conduct may include physical, verbal and non-verbal conduct.

Physical conduct may include unwelcome physical conduct ranging from touching to sexual assault and rape.

Verbal conduct includes unwelcome innuendos, suggestions, hints, sexual advances, comments with sexual overtones, sex related jokes, inappropriate enquiries about a person’s sex life, whistling of a sexual nature and the sending of electronic means or otherwise of sexually explicit text.

Non-verbal conduct includes unwelcome gestures, indecent exposure and the display or sending of sexually explicit pictures or objects.

WHAT IS SEXUAL FAVOURITISM?

Sexual harassment includes sexual favouritism. This occurs when a person in authority favours those who respond to his or her sexual advances. Victimisation often occurs where an employee fails to submit to these advances.

WHAT IS QUID PRO QUO HARASSMENT?

Quid pro quo harassment occurs where a person influences or tries to influence an employee’s employment circumstances (usually promotion or increases) by forcing or attempting to force the employee to surrender to sexual advances.

CAN A SINGLE INCIDENT OF UNWELCOME SEXUAL CONDUCT CONSTITUTE SEXUAL HARASSMENT?

Yes.

WHAT MEASURES MUST EMPLOYERS PUT IN PLACE?

SHOULD EMPLOYERS HAVE A SEXUAL HARASSMENT POLICY?

Yes.

WHAT SHOULD THE SEXUAL HARASSMENT POLICY STATE?

The sexual harassment policy should be guided by the Amended Code. It should record matters such as reporting, the obligations of the employer, advice and assistance available to a victim of sexual harassment, what procedures should be followed when sexual harassment has been reported, and the possible disciplinary sanctions if the perpetrator is found guilty of sexual harassment.

The sexual harassment policy must include at least the following statements:

• Sexual harassment is a form of unfair discrimination based on sex and/or gender and/or sexual orientation which infringes the rights of the complainant and constitutes a barrier to equity in the work place

• Sexual harassment in the workplace will not be permitted or condoned

• Complainants in sexual harassment matters have the right to follow the procedures in the policy and appropriate action must be taken by the employer

• It will be a disciplinary offence to victimize or retaliate against an employee who in good faith lodges a grievance of sexual harassment

Employers must effectively communicate the contents of the sexual harassment policy to their employees. If applicable this must be included in any employee orientation, and education training programmes.

Allegations of sexual harassment should be dealt with seriously, expeditiously, sensitively and confidentially.

WHY IS IT IMPORTANT TO HAVE A SEXUAL HARASSMENT POLICY?

A sexual harassment policy assists in the elimination of sexual harassment in the workplace. It educates employees, provides for appropriate procedures to deal with sexual harassment and to prevent its recurrence. The contents of the sexual harassment policy and how it is communicated to employees are among the factors that will be considered when determining whether an employer took the necessary steps to eliminate sexual harassment and comply with the Act.
EMPLOYER’S OBLIGATIONS WHEN SEXUAL HARASSMENT OCCURS?

WHEN MUST SEXUAL HARASSMENT BE REPORTED TO THE EMPLOYER?

The Act requires that the sexual harassment be reported immediately.

The Amended Code states that the word immediately means that the sexual harassment must be reported “as soon as reasonably possible in the circumstances and without undue delay, taking into account the nature of the sexual harassment, including that it is a sensitive issue, that the complainant may fear reprisals and the relative positions of the complainant and the alleged perpetrator in the workplace”.

WHAT SHOULD THE EMPLOYER DO ONCE IT IS AWARE OF THE SEXUAL CONDUCT?

As soon as the complaint of sexual harassment is brought to the employer’s attention the employer should:

- Investigate and consult all relevant parties
- Take the necessary steps to address the complaint according to the amended code and the employer’s sexual harassment policy
- Take the necessary steps to eliminate sexual harassment. This would include steps to assist and protect the victim and other employees to ensure that the perpetrator does not sexually harass or continue to sexually harass the victim or any other employees
- Take all reasonable and practical steps to ensure that employees do not commit any act of sexual harassment
WHEN THE EMPLOYER RECEIVES THE SEXUAL HARASSMENT COMPLAINT WHAT SHOULD THE EMPLOYER DO?

The steps an employer should take as soon as it receives a complaint include, but are not limited to the following:

• Inform the complainant of the procedures available to them to deal with the sexual harassment (both informal and formal procedures). Explain what the procedures entail and that they may choose which procedure to follow. Confirm that the complainant will not face adverse consequences if they choose to follow a particular procedure.
• Offer advice, assistance and counselling where reasonably practicable to the complainant in accordance with the Amended Code.
• Inform the complainant that the complaint will be dealt with confidentially should he or she so choose.

WHAT ARE THE INFORMAL PROCEDURES?

Informal procedures may be appropriate in cases of less serious sexual harassment. The complainant may prefer to remain anonymous.

Where the identity of complainant is revealed either the complainant or an appropriate person can explain to the perpetrator that the conduct is unwelcome, offensive to the complainant and interferes with the complainant’s work.

Where the identity of complainant is not revealed an appropriate person can explain to the perpetrator that certain forms of conduct are unwelcome, make employees uncomfortable, amount to sexual harassment and interfere with the work of other employees.

WHAT ARE THE REQUIREMENTS FOR A FORMAL PROCEDURE?

The formal procedure should address at least the following:

• With whom the grievance or complaint should be lodged.
• The internal grievance procedures that must be followed in dealing with the complaint, including the outcome desired by the complainant.
• Time frames to deal with the grievance expeditiously.
• That the CCMA can be approached if the complaint is not satisfactorily resolved, or if the alleged perpetrator is not satisfied with disciplinary action taken by the employer against him or her.
• It will be a disciplinary offence if a complainant is victimised or retaliated against for lodging a sexual harassment grievance in good faith.

WHAT IF THE COMPLAINANT DOES NOT WANT TO FOLLOW A FORMAL PROCEDURE?

The employer should still assess the risk to other persons in the workplace. The assessment must take into account all relevant factors including the severity of the sexual harassment, and whether the perpetrator has a history of sexual harassment. If it appears that there is a significant risk of harm to other persons in the workplace, the employer may follow a formal procedure, irrespective of the wishes of the complainant, and advise the complainant accordingly.
NON-COMPLIANCE

WHAT ARE THE CONSEQUENCES IF THE EMPLOYER DOES NOT TAKE THE NECESSARY STEPS TO ELIMINATE THE SEXUAL HARASSMENT?

In terms of the Act, an employer is deemed to have contravened the Act where it is proved that the employee (the perpetrator) contravened the Act and the employer failed to take the necessary steps to eliminate the sexual harassment. This means that the employer, in terms of the Act can be liable to pay damages or compensation to the victim of the sexual harassment. An employer will not be liable if it is able to prove that it did all that was reasonably practicable to ensure that there was no sexual harassment in the workplace.

WHAT CAN AN EMPLOYEE DO IF SHE OR HE IS DISSATISFIED WITH THE STEPS TAKEN BY THE EMPLOYER?

The Act obliges employers to eliminate unfair discrimination in any employment policy or practice. If an employee is not satisfied with the steps taken by the employer, then he or she may refer a sexual harassment dispute to CCMA. If the dispute remains unresolved after conciliation, the sexual harassment dispute can be referred to arbitration at the CCMA or to the Labour Court. If the sexual harassment is proved, the payment of compensation and damages can be awarded against the employer.

Where a dispute is referred to the CCMA it may not award damages in excess of the earnings threshold, currently R205,433,30.

DISCIPLINARY ACTION AGAINST THE PERPETRATOR

WHAT IF IT IS FOUND THAT THE ALLEGATIONS OF SEXUAL HARASSMENT ARE FALSE?

The Amended Code requires that employers and employees must ensure that grievances about sexual harassment are investigated and handled in a manner that ensures that the identities of the persons involved are kept confidential. This also applies to the disciplinary proceedings. Sexual harassment policies should also make it clear that it is a disciplinary offence to bring false complaints of sexual harassment against any person and that this type of misconduct may warrant dismissal.

IF THE VICTIM ACCEPTS THE PERPETRATOR’S APOLOGY FOR THE SEXUAL HARASSMENT, IS THE EMPLOYER PRECLUDED FROM TAKING DISCIPLINARY ACTION?

No. The resolution of a dispute between the parties does not prevent the employer from taking disciplinary action against an employee who has perpetrated sexual harassment. The employer is obliged to eliminate sexual harassment in the workplace and, where it does occur, to prevent its recurrence.

MUST A PERPETRATOR ALWAYS BE DISMISSED IF FOUND GUILTY OF SEXUAL HARASSMENT?

No. There are a range of appropriate sanctions proportionate to the seriousness of the sexual harassment. Warnings may
be issued for minor instances of sexual harassment. In appropriate circumstances a perpetrator may be transferred to another position. Where the sexual harassment is serious then summary dismissal may be appropriate.

IS AN EMPLOYER OBLIGED TO TAKE DISCIPLINARY ACTION AGAINST SOMEONE WHO IS NOT AN EMPLOYEE?

No. The employer should however make it clear that such conduct will not be tolerated in its workplace. It may wish to report the person’s conduct to their employer or some other appropriate body.

CAN THE VICTIM OF SEXUAL HARASSMENT BRING SEPARATE CHARGES?

Yes. The victim may bring separate civil and/or criminal charges.

If the sexual harassment is proved the payment of compensation and damages can be awarded against the employer.
MARKET RECOGNITION

Our Employment team is externally praised for its depth of resources, capabilities and experience.


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Best Lawyers International 2019 listed Jose Jorge for employee benefits law.


ILO Client Choice Awards 2015–2016 named Michael Yeates the exclusive South African winner in the employment & benefits category. In 2018, he was named the exclusive South African winner in the immigration category.
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