

# Workplace Harassment

## SEXUAL HARASSMENT IN THE WORKPLACE —INCLUDING THE VIRTUAL WORLD OF WORK



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## SEXUAL HARASSMENT IN THE WORKPLACE

In terms of the Employment Equity Act 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"*. Sexual harassment also results in losses for employers both in terms of productivity and efficiency and has a detrimental effect on their brand and reputation.

Employers must also take note of the Draft Code of Good Practice on the prevention of Violence and Harassment in the Workplace (Draft Code) which expands upon the definition of workplace harassment and bullying and sets out further obligations for employers in relation to harassment in the workplace. The comment period on the Draft Code has since closed and we await a further draft or a final code from the Department of Employment and Labour.

## 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:



## WHO?

### Who can be a victim or perpetrator of sexual harassment?

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



# STOP



## SEXUAL HARASSMENT

### **E-Learning Offering: A better place to work.**

These times of uncertainty have altered the workplace and have accelerated a changing work order. Technology has not only enabled remote work but has also introduced new forms of sexual harassment in the virtual world of work.

Our Employment Law practice offers you and your employees a virtual learning experience in the form of an e-learning module on how to identify sexual harassment and what to do should it occur.

### **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.

### **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.

## What are the ways in which an employee can indicate that the behavior is not welcome?

An employee may indicate that the sexual conduct is unwelcomed either verbally or non-verbally. Non-verbal conduct indicating that the behaviour is unwelcomed includes conduct such as walking away or not responding to the perpetrator. Where an employee has difficulty indicating to the perpetrator that the conduct is unwelcomed, such employee may seek the assistance and intervention of another person such as a co-worker, superior, counsellor, human resource official, a family member or friend.

## 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.

## Can sexual harassment be perpetrated virtually?

Yes. Technology has not only enabled remote work but has also introduced new forms of sexual harassment. Where the harassment satisfies the definition of sexual harassment, irrespective of the fact that it is perpetuated virtually, the conduct will still constitute sexual harassment.

## What are some examples of behavior that may constitute virtual sexual harassment?

Some of the behaviours which may constitute virtual sexual harassment include inappropriate dress code during online meetings, online stalking, forcing employees to attend video calls well after working hours, making personal remarks on a colleague's social media, sending inappropriate or sexual memes and other multimedia material online and/or sending inappropriate emojis or messages online.

## MEASURES BY EMPLOYERS

### Are employers required to take active steps to mitigate sexual harassment in the workplace?

Yes. In the Labour Court judgement of *Piliso v Old Mutual Life Assurance Co (SA) Limited and Others* (C32/2005) [2006] ZALC 107, the court held that employers must take active steps in advance to prevent unfair discrimination and that employers “may not simply sit back and wait to be informed of its happening before doing something”.

### 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 workplace
- 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 victimise or retaliate against an employee who in good faith lodges a grievance of sexual harassment

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

Employers must ensure that their policies make it clear that sexual harassment perpetuated online is prohibited and punishable. With the world of work becoming remote, it is imperative that employers cater for online sexual harassment in their policies and that employees are made aware of what constitutes online sexual harassment.

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 and consistent 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.

### What other measures can an employer implement to mitigate sexual harassment in the workplace?

It is advisable for employers to train employees on what constitutes sexual harassment and what they should do if it occurs. An employer may also send regular communication to employees regarding the prohibition on sexual harassment and include signage and posters in their respective workplaces regarding the nature and reporting of sexual harassment.

Employers must also make it clear to all contractors, suppliers or any external personnel with whom the business interacts that sexual harassment will not be tolerated at its workplace.





## 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:

- 1 Investigate and consult all relevant parties
- 2 Take the necessary steps to address the complaint according to the amended code and the employer's sexual harassment policy
- 3 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

### 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:

- 1 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
- 2 Offer advice, assistance and counselling where reasonably practicable to the complainant in accordance with the Amended Code
- 3 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 the 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 the 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.



## Who bears the burden of proof?

In terms of section 11 of the Act, where discrimination by the employer on the basis of gender, sex or sexual orientation is alleged, the employer bears the onus of proving, on a balance of probabilities, that it is fair.

## 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.

### Is it possible to refuse employment to a job applicant who has a record of perpetrating sexual harassment?

This point has not been settled in our law. However, a job applicant alleging unfair discrimination on the basis of their history of perpetrating sexual harassment would have to show that the ground for differentiation is arbitrary and unfair, in that it deprives them of their right to dignity. An employer should expressly request job applicants to make such a disclosure during the application process, particularly where the nature of the role requires interaction with persons who may be at greater risk of sexual harassment. A failure on the part of a job applicant to make such a disclosure goes to the employer's ability to assess a candidate's suitability for a position and may constitute a ground for dismissal should an employer later discover that an employee failed to make the relevant disclosure, notwithstanding its request for them to do so.

## MARKET RECOGNITION

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

*Chambers Global 2014–2023* ranked our Employment Law practice in Band 2 for employment. *The Legal 500 EMEA 2020–2023* recommended the South African practice in Tier 1, and our Kenyan practice in Tier 3 for employment.

The way we support and interact with our clients attracts significant external recognition.

**Aadil Patel** is the Practice Head of the Employment Law team, and the Joint Sector Head of the Government & State-Owned Entities sector.

*Chambers Global 2015–2023* ranked him in Band 2 for employment. *The Legal 500 EMEA 2021–2023* recommended Aadil as a leading individual for employment and recommended him from 2012–2020.

*The Legal 500 EMEA 2021–2023* recommended **Anli Bezuidenhout** for employment.

*The Legal 500 EMEA 2020–2023* recommended **Jose Jorge** for employment.

*Chambers Global 2018–2023* ranked **Fiona Leppan** in Band 2 for employment. *The Legal 500 EMEA 2022–2023* recommend her for mining. *The Legal 500 EMEA 2019–2023* recommended her as a leading individual for employment, and recommended her from 2012–2018.

*Chambers Global 2020–2023* ranked **Gillian Lumb** in Band 3 for employment. *The Legal 500 EMEA 2020–2023* recommended her for employment.

*Chambers Global 2021–2023* ranked **Imraan Mahomed** in Band 2 for employment and in Band 3 from 2014–2020. *The Legal 500 EMEA 2020–2023* recommended him for employment.

*The Legal 500 EMEA 2023* recommended **Phetheni Nkuna** for employment.

*The Legal 500 EMEA 2022* recommended **Desmond Odhiambo** for dispute resolution.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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