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Résumé de l'article

Le présent article expose la politique des gouvernements en matière de harcèlement sexuel au Canada. Toutes les législatures provinciales, de même que le Parlement canadien, ont adopte des lois sur les droits des personnes. Ces lois interdisent la discrimination sexuelle et autres formes de discrimination en matière d'emploi. Bien que certaines lois sur les droits de la personne traitent spécifiquement de harcèlement sexuel comme question prohibée, l'opinion dominante au Canada, c'est que les stipulations juridiques relatives à la discrimination sexuelle peuvent s'interpréter de façon à comprendre tout aussi bien le harcèlement sexuel. Le Code canadien du travail oblige les employeurs assujettis à la compétence fédérale de présenter et de divulguer une politique en matière de harcèlement sexuel et de prévoir un mécanisme de réparation pour ses victimes.

À la suite de débats publics au Canada, on a défini le harcèlement sexuel et on a expose les mesures législatives et administratives sur le sujet aux États-Unis. Les mesures juridiques américaines ont eu une influence sur les décisions rendues par les tribunaux et les commissions administratives canadiennes. Toutes les affaires judiciaires qui ont eu lieu au Canada entre 1980 et 1984 sont analysées tant en ce qui concerne les attitudes discriminatoires spécifiques qui furent considérées comme du harcèlement sexuel que les nombreuses caractéristiques des cas entendus, tels que les faits retenus comme indices de harcèlement sexuel, la durée moyenne des procès, le sexe du plaignant, la répartition industrielle et professionnelle des affaires de même que les sanctions imposées. Les comportements discriminatoires se rapportent au refus d'embaucher, à la fréquence du harcèlement, au congédiement, au congediement implicite, à la nature du milieu de travail et aux conséquences dommageables qui peuvent en résulter pour la sante des victimes. Finalement, l'article examine les consequences qui en découlent pour les employeurs et les syndicats et conclut par des considérations sur l'établissement d'une politique préventive efficace en matière de harcèlement sexuel.

Sexual Harassment in Employment in Canada

Issues and Policies

Harish C. Jain
and
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This paper examines the factors considered in proving sexual harassment and in determining compensation and remedies.

Sexual harassment — unwanted imposition of sexual requirements frequently in the context of unequal power relationships in employment has become a serious and growing problem in the workplace. Increasing female participation rates in the labour force and changing societal values regarding sexuality are contributing factors to this problem. While sexual harassment can take place against both males and females, females are the predominant victims. Surveys in Canada and the United States report that it is perceived to be widespread[1] and deep rooted and cuts across all occupational categories and institutions including the Parliament, churches,

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1 According to a 1983 national survey for the Canadian Human Rights Commission, 1.2 million women and 300,000 men believe they have been sexually harassed at work. (See, *Unwanted Sexual Attention and Sexual Harassment: Results of a Survey of Canadians,* Ottawa, Canadian Human Rights Commission, 1983). In the two surveys by the British Columbia Federation of Labour and the Alberta Union of Provincial Employees, 90 percent and 80 percent of the respondents respectively reported experiencing some form of sexual harassment. (See: *Sexual Harassment in the Workplace: A Discussion Paper,* Vancouver, British Columbia Federation of Labour Women's Rights Committee and the Vancouver Women's Research Centre, March 1980, and Marlene KADER, «The Union and Sexual Harassment», *Canadian Dimension,* Vol. 18, June 1984, pp. 9-10).

For the U.S., see *Sexual Harassment in the Federal Workplace. Is it a problem?* Washington, D.C., U.S. Merit Systems Protection Board; E.G.C. COLLINS and T.B. GLODGETT, «Sexual Harassment, Some See It, Some Won't», *Harvard Business Review,* 1981; Claire SAFRAN, «What Men do to Women on the Job», *Redbook Magazine,* Nov. 1976; M. KELBER, «Sexual Harassment: The U.N.'s Dirty Little Secret», *Ms. Magazine,* November 1977.

academia and trade unions. Several Human Rights Commissions report a continuing increase in the number of complaints in the sexual harassment area. In Ontario, such complaints have increased each year since 1978 and have risen from 35 in 1978 to 122 in 1983. The Ontario Human Rights Commission alone appointed 22 boards of inquiry from 1979 to 1982 to adjudicate sexual harassment cases. In British Columbia and Saskatchewan about one-quarter of all employment discrimination complaints in 1984 and 1983 respectively pertained to sexual harassment[2].

METHODOLOGY

In order to study the factors considered in proving sexual harassment and in determining compensation and remedies in cases where sexual harassment was found, 26 boards of inquiry or tribunal cases were analyzed.

Based on the cases reported in the *Canadian Human Rights Reporter* and personal contact with several Human Rights Commissions, these were all the cases that were adjudicated by boards of inquiry from 1980 to 1984 in all jurisdictions across Canada.

The plan of the paper is to describe public policy on sexual harassment in Canada, define sexual harassment, trace the legislative and administrative developments on this issue in the United States, analyze the legal decisions both in terms of specific discriminatory behaviours which have been considered sexual harassment by Canadian boards of inquiry and tribunals as well as by several characteristics of the cases such as factors considered in finding sexual harassment, average duration of a case, gender of the complainant, industrial and occupational distribution, and remedies. Finally, the implications and responsibilities of both employers and trade unions are explored.

PUBLIC POLICY

All provincial legislatures and the Parliament have enacted human rights statutes. These statutes prohibit discrimination in employment on the basis of race, national origin, colour, religion or creed, sex, marital status

2 Several other commissions have reported sexual harassment complaints as follows: Alberta 43 in 1983-84; Québec 44 in 1983; Manitoba from 1 complaint in 1978 to 27 in 1983; New Brunswick 44 since 1976 to 1984; 5 in Newfoundland in 1984 and 4 in Prince Edward Island in 1983.

and age. Physical and mental handicap is proscribed in several jurisdictions. Several other prohibited grounds are also included, depending on the jurisdiction concerned.

These statutes apply to employers, employment agencies, and trade unions. Discrimination is prohibited with respect to advertising, and terms and conditions of employment including promotion, transfer and training[3].

SEXUAL HARASSMENT

In 1980, adjudicator Own Shime in *Cherie Bell and Ann Korczak* v. *Ernest Ladas and the Flaming Steak House Tavern* case interpreted the Ontario Human Rights Code provision prohibiting discrimination on the basis of sex to include sexual harassment. This has become the prevailing view throughout Canada. Since 1980, the federal, Newfoundland, Ontario and Québec jurisdictions have incorporated specific provisions banning harassment on all prohibited grounds in general and sexual harassment in particular. In addition, the Alberta, Nova Scotia and the federal Human Rights Commissions have established policy guidelines on sexual harassment; the Prince Edward Island Commission has adopted the federal guidelines. In other jurisdictions, even through sexual harassment in the workplace is not specifically mentioned or defined in the relevant legislation, it is being interpreted as a violation of the Human Rights statutes[4].

Both the relevant specific legislation and policy guidelines hold co-workers as well as supervisor or an agent of the employer including the employer responsible for acts of sexual harassment[5].

Recent amendments to the *Canada Labour Code,* (which came into effect on March 1, 1985), have made it mandatory for employers under federal jurisdiction to develop and issue a sexual harassment policy, and provide a redress mechanism for the victims of sexual harassment.

DEFINITION

Sexual harassment is a complex issue involving perceptions and behaviours and includes physical, psychological and verbal harassment, both implicit and explicit.

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3 Harish C. JAIN, «Race and Sex Discrimination in Employment in Canada: Theories, Evidence and Policies», *Relations Industrielles,* Vol. 37, 1982, pp. 344-366.

4 *1984 Canadian Women and Job Related Laws,* Ottawa, Labour Canada, 1985.

5 «New Policy on Sexual Harassment», *Alberta Human Rights Journal,* Fall 1984, p. 4. For a discussion of the Ontario Human Rights Code, see Judith KEENE, *Human Rights in Ontario,* Toronto, Carswell, 1983.

The Equal Employment Opportunity Commission in the United States has defined sexual harassment in its guidelines issued on November 10, 1980, as follows:

«Unwelcome sexual advances, requests for sexuai favours, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.»

The range of behaviour that can be considered to be forms of sexual harassment are discussed by Leah Cohen and Constance Backhouse. According to the authors, «Sexual harassment can manifest itself physically and psychologically. In its milder forms it can involve verbal innuendo and inappropriate affectionate gestures. It can, however, escalate to extreme behaviour amounting to attempted rape and rape. Physically, the recipient may be the victim of pinching, grabbing, hugging, patting, leering, brushing against and touching. Phychological harassment can involve a relentless proposal of physical intimacy, beginning with subtle hints which may lead to overt requests for dates and sexual favours.» The authors suggest that in work setting, «it can poison a woman's work environment to the extent that her livelihood is in danger. There is the implicit message from the harasser that non-compliance will lead to reprisals.»

«These reprisals can include threatened demotions, transfers, poor work assignments, unsatisfactory job evaluations, sabotaging of woman's work, sarcasm, denial of raises, benefits, and promotions, and in the final analysis, dismissal and a poor job reference...»[6]

Thus, sexual harassment can be physical, psychological and verbal. It must be unwelcome to the recipient and explicitly or implicitly known to be so by the person making the advances. Rejection of such advances has employment related consequences for the victim. Finally, creation of an intimidating, hostile and offensive work environment is also sexual harassment. These factors are now a part of the jurisprudence of sexual harassment cases. The co-workers, supervisors or an agent of the employer including the employer are responsible for acts of sexual harassment[7].

6 Constance BACKHOUSE and Leah COHEN, *The Secret Oppression: Sexual Harassment of Working Women,* Toronto, Macmillan of Canada, 1978, pp. 32-33.

7 Judith KEENE, *op. cit.,* p. 203.

THE LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS IN THE U.S.

Before one examines the sexual harassment cases in Canada, one needs to look at the legislative and administrative developments in the U.S. since the guidelines and court decisions made in U.S. guide the Boards of Inquiry in Canada dealing with sexual harassment. The major U.S. legislation prohibiting discrimination in employment on the basis of race, sex and other categories is the *Title VII* of the *Civil Rights Act of 1964*. Despite the fact that *Title VII* had been in place for approximately ten years, prior to 1974, sexual harassment cases rarely proceeded to court, and those that were filed typically had arisen because of serious inroads on the privacy and dignity of working women. Cases of sexual harassment often included explicit demands by male supervisors for sexual favours, coupled with retaliation in the form of dismissal or demotion for those women who tried to remain on the job after refusing to meet those demands. These cases were usually quite blatant examples of sexual harassment and were of a serious variety. On the other hand, situations involving a supervisor merely flattering an employee, might not have been considered as serious. It was often difficult for courts to distinguish between a case which should prompt an action under *Title VII* and one which should not warrant such an action.

Once the earlier cases found their way into court during the mid-1970's, all were initially dismissed at the trial court level. The courts developed a variety of judicial reasons to support the results. For example, the courts held that the supervisor was merely attempting to satisfy his personal urges *(Corve* v. *Bausch and Lomb, Inc.);* the employer could not be held liable for unauthorized sexual misconduct on the job *(Barnes* v. *Train)*; or the incident was not job-related, even though it had happened at work *(Tomkins* v. *Public Service Electric & Gas Co.)*. The message appeared to be that working women could not invoke the aid of *Title VII* to protect themselves or their jobs against sexual harassment because sexual harassment was not an actionable form of sex discrimination. It has been suggested that the absence of Committee hearings on the sex provisions left the Equal Employment Opportunity Commission (EEOC) without specific guidelines for resolving problems of interpretation and it is possible that this was one reason why courts did not accept sexual harassment as a form of sex discrimination when sexual harassment was first brought to the public's attention.

With the appearance in 1976 of Judge Richey's opinion in *Williams* v. *Saxbe*, the tide began to turn. That case held that a plaintiff could recover for discrimination that impaired her access to job opportunities if she could prove that her supervisor's retaliation following her rejection of his sexual

advances was the reason for her termination. The rationale was that the supervisor's conduct created an artificial barrier to employment which was placed before one gender and not the other, despite the fact that both genders were found to be similarly situated.

By 1979, the restrictive lower court decisions all had been reversed on appeal. This resulted in a new view being firmly established — that the sexual harassment of women at work was a violation of the particular provisions of *Title VII* of the *Civil Rights Act* of 1964 that prohibit sex-based discrimination in employment. Thus, it was recognized that sexual harassment could be remedied by a suit brought under *Title VII* provided that sexual harassment was recognized by the courts as sex discrimination. This seemed to be more a problem of social attitude than a legal problem of proof. Obviously, the charges in all lawsuits must be proven if the complainant is to succeed. Yet, it will do a harassed employee little good to prove her dismissal was based on her sexual non-compliance unless sexual harassment was recognized as sex discrimination because *Title VII* applied only to sex discrimination, but not, on its face, to sexual harassment.

One major reason why support for this dramatic change in the law appeared was due to Catherine A. Mackinnon and her book, *Sexual Harassment of Working Women: A Case of Sex Discrimination,*[8] which was widely circulated as early as 1975 among many of the lawyers who were working on cases of sexual harassment prior to its publication. One of Mackinnon's primary goals was to establish that sexual harassment of working women constituted sex discrimination within the statutory meaning of *Title VII.* Also, Mackinnon aimed to define the law of sex discrimination by analogizing it to the law of race discrimination, in the hope that sex discrimination law would have the capacity to identify and eliminate inequality between social groups (for example, women and men, blacks and whites) rather than merely redress differences in treatment between individuals who were different only because of their sex or race. In the area of race discrimination law, the courts have long recognized that minority group members, and blacks in particular, have been subjected to systematic discrimination — not because of any real differences from whites, but simply because of their race. As Mackinnon recognized, no comparable judicial insight had yet arrived for women. Her partial explanation for this oversight was that because women do have biological differences from men, courts were confused about how these functional differences should have been treated. Furthermore, male judges, like many other males, simply have not perceived that their treatment of women was sexist.

8 Catherine A. MACKINNON, *Sexual Harassment of Working Women,* New Haven, Yale University Press, 1979, pp. 126-128.

In summary, following an initial false start, the courts in the U.S. began to recognize sexual harassment as an actionable form of sex discrimination within the meaning of *Title VII* when three conditions were met: (1) a demand for sexual favours was imposed on a subordinate employee as a term or condition of employment; (2) the demand was imposed, either directly or vicariously, by the employer; and (3) the demand would not have been imposed, but for the employee's gender (see *Miller* v. *Bank of America, Tomkins* v. *Public Service Electric & Gas Co.,* and *Barnes* v. *Costle*).

Cases between 1975 and 1979 which outlined the conditions necessary before a successful action may be brought under *Title VII* dealt primarily with situations in the context of employment retaliation for refusal of sexual favours. If a female's continued employment was conditioned upon her submission to sexual advances from her male supervisor, she could have strengthened her case by demonstrating the presence of a variety of factors. For example, if she was able to show that the submission to sexual advances was a term or condition of employment; that this reality substantially affected her employment, that employees of the opposite sex were not similarly affected by such actions (that is, sexual advances were based on gender); that she did everything possible to bring the allegations to the attention of top management; that the scope and depth of any subsequent investigation was either insufficient or non-existent (employer failure to investigate complaints of sexual harassment was often viewed as giving tacit support to the harassment); that the sexual harassment was persistent; and that other employees of the same sex were similarly sexually harassed.

Once cases clearly established that sexual harassment constituted a form of sex discrimination under *Title VII,* certain cases (such as *Bundy* v. *Jackson*) suggested that *Title VII* also provided a right to a work environment free from the emotional and psychological harm which flowed from an atmosphere of discrimination. Essentially, this theory proposed that *Title VII* should be interpreted in such a way so as to protect the quality of the work environment in a similar manner as was discussed by courts in the context of racial discrimination cases (for example, see *Rogers* v. *EEOC*, at p. 238).

U.S. Courts (for example, see *Brown* v. *City of Guthrie*) began to recognize that in the context of sexual harassment, *Title VII* should not only prohibit specific discriminatory practices of economic impact (that is, hiring, firing and promotional policies), but that the prohibition should also encompass more subtle practices which may have an emotional or psychological impact upon an employee, regardless of whether the complaining employee lost any tangible job benefits as a result of the

discrimination. However, several courts have required plaintiffs to allege the presence of employment ramifications as well as harassment (for example, *Fisher* v. *Flynn* and *Walter* v. *KFGO Radio*).

In addition to the activity of the Federal Circuit and District Courts during the late 1970's, in 1979, the Subcommittee on Investigations of the House Committee on Post Office and Civil Service held hearings on sexual harassment in the U.S. federal government. These hearings established the need for guidance from the EEOC with respect to this issue. Activity in the courts indicated that both public and private employers were in need of help in understanding and defining their liability for acts of sexual harassment in the work place and in determining how to mitigate their liability. Therefore, the EEOC decided that guidelines should be issued to give employers notice of the guidance and to give them an opportunity to comment along with other members of the public and federal agencies.

The EEOC guidelines stated unequivocally that harassment on the basis of sex was a violation of *Title VII,* and that the employer had an affirmative duty to maintain a workplace free of sexual harassment. The EEOC took the position that sexual harassment, like racial harassment, generated a harmful atmosphere, and under *Title VII,* employees should be afforded a working environment free of discriminatory intimidation whether based on sex, race, religion or national origin. Thus, the EEOC viewed sexual harassment as unlawful, not just when it resulted in employment retaliation, but also where it had the effect of creating a hostile or offensive working environment. This view was adopted by several cases during the past few years (for example, *Bundy* v. *Jackson* and *Henson* v. *City of Dundee*) and has represented a significant step forward in the development of sexual harassment litigation in the U.S.

THE BOARD OF INQUIRY AND TRIBUNAL DECISIONS IN CANADA

The EEOC guidelines and court decisions made in the U.S. have influenced the sexual harassment complaints in Canada. Discriminatory behaviours which have been considered as sexual harassment by adjudicators are as follows:

Refusal to Hire

Refusal to hire because of noncompliance with sexual advances is discrimination based on sex and is sexual harassment. (*Mitchell* v. *Traveller Inn,* 1981). In this case, the complainant had received an offer of employ-

ment from the respondent. She then spoke to the manager of the motel who made certain remarks that she took to be sexually suggestive and that indicated that sexual compliance was to be a condition of employment. The board of inquiry stated, «...harassment does not have to be explicit to be contrary to the Human Rights Code. Harassment can be effected by implication». Thus, the law proscribes conduct as subtle as implicitly suggestive remarks.

Persistence or Frequency

Sexual harassment need not be persistent. A single or isolated event may constitute sexual harassment. In *Cherie Bell and Anna Korczak* v. *Ernest Ladas and the Flaming Steak House Tavern* (1980), adjudicator Owen Shime declared that, «...persistent and frequent conduct is not a condition for an adverse finding under the Code because a single incident of an employee being denied equality of employment because of sex is also prohibited activity».

In *Canada Post* v. *CPWU* (1983) arbitrator Ken Norman held that an incident of sexual advance by an immediate supervisor amounted to sexual harassment consistent with the policy statement (1983) of the Canadian Human Rights Commission on this issue.

Thus, the sexually harassing conduct need not be persistent and frequent in order for it to be against the law.

Dismissal or Termination of Employment

An employee cannot be dismissed for refusing to submit to sexual advances. In *Rosanna Torres* v. *Royalty Kitchenware Ltd. and Francesco Guercio* (1981), the complainant was employed as a secretary. She was repeatedly verbally and physically harassed and then fired because she refused her employer's advances.

Several other boards of inquiry have rendered such conduct to be a violation of the law. These include *Allison Hughes, Lorry White* v. *Dieter Jeckel,* (1981); *Karen Deisting* v. *Dollar Pizza (1978) Ltd. and A. Papaconstantion and P. Nickolakis,* (1982); *Barbara Robinson* v. *The Company Farm Ltd. and Wilson Nuttall,* (1981).

Constructive Dismissal

When an employee is forced to quit her job because she could no longer tolerate the harasser's sexual advances, it is tantamount to «constructive dismissal» or termination of employment. In *Josephine McPherson, Vanessa Ambo and Laurie Morton* v. *Mary's Donuts and Hachilk Doshoian,* (1982), Ms. Ambo worked at Mary's Donuts while she was on a temporary absence from jail. A condition of her remaining out of jail was that she retain her employment. Her employer knew this and sexually harassed her. Ms. McPherson was also subjected to propositions for sex. The employer embarrassed and taunted them in front of customers when they refused to comply. They subsequently quit their jobs since they could no longer withstand sexual harassment. Similarly, in *Graesser* v. *Porto,* (1983), the board of inquiry found that Ms. Graesser's decision to quit rather than to continue to submit to the employer's sexual harassment amounted to constructive dismissal of the complainant.

Working Environment

Creation of an intimidating, hostile and offensive, or a «poisoned», work environment is sexual harassment even if no concrete employment consequences are to be found. In *Robichaud* v. *Brennan,* (1983), a Canadian Human Rights tribunal chaired by Professor Abbott found that when the complainant rejected the sexual conduct of the respondent, his sexual advances stopped. Abbott therefore dismissed the complaint. In doing so, he set out the following criteria of sexual harassment: a) sexual advances must be unsolicited and unwelcomed by the complainant and expressly or implicitly known to be unwelcome by the respondent; b) sexual advances must be persistent or, if not persistent, the rejection of the sexual advances must have adverse employment consequences; and c) if the complainant cooperates with the alleged harassment, it is still sexual harassment if compliance was secured through employment-related threats or promises. Upon appeal, the Review Tribunal did not dispute Professor Abbott's analysis. However, it reached a different conclusion on the facts. It found that the individual respondent had engaged in sexual harassment by reason of his creation of a «poisoned» work environment. The Review Tribunal concluded that Ms. Robichaud had submitted to sexual advances as a result of the intimidation and fear that she had for Mr. Brennan, and that the cumulative effect was the creation of a poisoned work environment for the complainant. Other boards of inquiry reached a similar «poisoned» work environment decision in *Kotyk and Allary v. Canadian Employment and Immigration Commission,* (1983), and several other cases.

Adverse Health Consequences

In a precedent-setting decision, the Québec Workers Compensation Board has ruled that extreme stress, depression and physical symptoms caused by sexual harassment from a male co-worker during working hours is a work-related injury. The Board ordered compensation to a group home worker for five weeks she booked of suffering from severe depression[9]. It has been appealed by the employer to the Québec Social Affairs Commission. In this case, Mrs. Leduc, the victim, testified that she was sexualy harassed by a security guard during a two-year period that began in 1981. The harassment included sexist comments, unwanted touching on her shoulders and arm and an incident in which he embraced her tightly against her will. Her physician presented evidence to indicate that prior to events at work, Mrs. Leduc had no history of psychiatric illness and no social problems that would cause a depression.

Another victim of sexual harassment, Mrs. Robichaud has filed a worker's compensation claim in Ontario for several days she missed at a Department of National Defence facility near North Bay; she claims that harassment by her foreman caused her to lose weight, lose sleep and have a poor attention span.

In an Alberta case, *Karen Deisting* v. *Dollar Pizza* (1982), the victim had suffered emotional injury as a result of sexual harassment. She sought professional help from a psychologist. She was awarded $500 to pursue psychological counselling.

Thus, the adverse consequences of sexual harassment can extend beyond the job or work environment to the complainant's health and well-being and can be taken into consideration by Boards and other government agencies.

QUANTITATIVE ANALYSIS OF THE LEGAL DECISIONS BY CANADIAN BOARDS OF INQUIRY AND TRIBUNALS: 1980 - 1984

Factors Considered (in part) in Finding Sexual Harassment and Awarding of Damages

An analysis of the 26 cases reveals that adjudicators take into account several of the eight factors (see Table 1) in both determining a violation (or

9 Dorothy LIPOVENKO, «Compensation Decision Sets Precedent: Sexual Harassment Ruled Work Injury», *Globe and Mail,* April 11, 1985, pp. 1-2.

otherwise) of the law and in awarding damages. Three factors seem to be the most frequent ones. These are: (1) the nature of the harassment, whether verbal or physical or both, (2) the poisoned work environment, and (3) vulnerability of the victim and psychological impact of the harassment upon the complainant. The age of the victim and the on-going nature of sexual harassment are the next most frequent factors considered and so on.

Table 1

Factors Considered (Partially) in Determining Sexual Harassment and Awarding of Compensation and Damages by Boards of Inquiry/Tribunals 1980-1984

Factors	*No. of Times** Considered*	*Percent*
1. The nature of the harassment-verbal and/or physical	13	13
2. The degree of aggressiveness and physical contact in the harassment	4	7
3. The ongoing nature	6	10
4. The frequency of the harassment	4	7
5. The age of the victim	6	10
6. The vulnerability of the victim and psychological impact of the harassment upon the victim	10	17
7. The mitigation of damages	5	8
8. The poisoned work environment	11	18

* The first 6 factors are set out by the chairman of the Board of Inquiry, Professor Cumming, in *Rosanne Torres* v. *Royalty Kitchenware Ltd.* (1982) case and the 7th factor by Chairman Ratushny in *Meri Courtroubis and Irene KeKatoes* v. *Sklavos Printing,* (1981). Professor Ratushny suggested that in this case the complainants had done everything possible to mitigate their losses including the acceptance of unskilled employment at extremely low wages, far below the wages at Sklavos Printing. The last factor was first enunciated in the U.S. Supreme Court Case in 1981, *Bundy* v. *Jackson* and has been duplicated in a number of cases in Canada.

** More than one factor was considered.

Successful vs unsuccessful cases: Of the 26 cases of sexual harassment that were referred to boards of inquiry between 1980-1984, 20 were upheld, resulting in almost 80 percent success rate for the complainants.

Gender of the Complainant: In 25 of the 26 board of inquiry cases, the gender of the victims was female. Only one case involved a male victim.

Industrial Distribution of Cases: An overwhelming number of cases (65%) belonged to the community, business and personal services industrial sector. This sector included workers such as waitresses, artists, clerks and receptionists in restaurants, offices and other establishments. The next most frequent (19%) industrial sector was public administration and government agencies, followed by manufacturing (8%), transportation, communication and public utilities (4%), and agriculture (4%) (see Table 2).

The employers ranged in size from small restaurants to large multinational companies, government (both federal departments, parliament and municipal) organizations.

Table 2

Industrial Breakdown of Sexual Harassment Cases (N = 26), 1980-1984

Industry	*No.*	*Percent*
Manufacturing	2	8
Transportation, communication and other utilities	1	4
Community, business and personal services	17	65
Public administration and government agencies	5	19
Agriculture	1	4
Total	26	

Remedies: It is obvious from Table 3 that the most common type of compensation is monetary compensation consisting of compensation for lost wages or salary, and for pain and humiliation suffered by the victim.

Other remedies in order of frequency include an order to cease and desist from engaging in sexual harassment (14%), monetary compensation for expenses (8%) and a letter of apology to the victim (7%).

Jurisdictions: of the 26 boards, an overwhelming majority (57%) were appointed in Ontario, followed by the federal jurisdiction (19%), British Columbia (8%), and Alberta, Manitoba, New Brunswick and Saskatchewan, (4% each) (see Table 4).

Average Duration: The average duration of a case, from the time the complaint was filed before a Human Rights Commission and the date of decision by a Board, was 2 years and 9 months.

Table 3

Remedies and Compensation Awarded by Various Boards and Tribunals in All Jurisdictions for Successful Sexual Harassment Cases, 1980-1984 (N = 20)

	Remedy	*No. of Times*	*Percent*
1.	Monetary compensation for lost wages/salary	15	24
2.	Monetary compensation for pain and humiliation suffered	14	22
3.	Order to cease sexual harassment	9	14
4.	Monetary compensation for expenses	5	8
5.	Letter of apology to complainant	4	7
6.	Monetary compensation for interest	2	3
7.	Displaying of human rights	2	3
8.	Compliance with order	2	3
9.	Formulation of anti-sexual harassment policy	1	1
10.	Human rights workshop	1	1
11.	Letter of apology to Human Rights Commission	1	1
	Total	64	

* More than one remedy was ordered in most cases.

Table 4

Number of Boards of Inquiry and Tribunals on Sexual Harassment by Jurisdiction, 1980-1984 (N = 26)

Jurisdiction	*No. of Boards and Tribunals*	*Percent*
Alberta	1	4
British Columbia	2	8
Federal	5	19
Manitoba	1	4
New Brunswick	1	4
Ontario	15	57
Saskatchewan	1	4
Total	26	

Employer Responsibility for Sexual Harassment of Employees

The employer is liable for the actions of supervisors if the employer did not take the complaint seriously, did not take action against the harasser, did not have a sexual harassment policy (*Kotyk* v. *Canada Employment and Immigration,* 1983). In this case, the tribunal found that the manager of a Canada Employment Centre, Mr. Chuba, made unwanted sexual advances to two complainants, Ms. Kotyk and Ms. Allary, both of whom were working under his supervision. The evidence showed that Mr. Chuba had frequently threatened Ms. Kotyk with job loss and other unfavorable employment consequences if she did not have an affair with him and that she did have sexual intercourse with him a few times as a result of such pressure. He persisted in his use of employment-related threats in an attempt to continue the relationship long after she had made it very clear that she wanted to end it. The evidence showed that he acted in a similar way toward Ms. Allary, although much less extensively and persistently.

In addition to finding Chuba liable for sexual harassment, the tribunal also found his employer liable for the harassment. This was because Canada Employment and Immigration a) had no policy on sexual harassment, b) had not instructed the supervisors and employees that sexual harassment was prohibited conduct, and c) did not intervene aggressively to deal with the complaints of the two women when they were made to Chuba's supervisors.

Where an employee is part of the «directing mind», *i.e.* is in a supervisory capacity, of the corporation, the employer itself is personally liable for contraventions of the Code engaged in by that employee (*Olarte et al.* v. *Commodore Business Machines,* 1983; Supreme Court of Ontario, 1984). In this case, an Ontario board of inquiry also considered the issue of employer liability. The board found that a foreman had been guilty of sexual harassment. It ruled that while the employer could not be held vicariously liable for the foreman's conduct, it could be held personally liable because the foreman had managerial authority and therefore his acts of sexual harassment became those of the corporation. Moreover, all of the acts complained of occurred in the course of the carrying on of the employer's business. This decision was appealed to the Supreme Court of Ontario, which upheld the board's decision.

Implications for employers

An employer's responsibility is spelled out by Susan Ashley, the tribunal chairperson in *Kotyk* v. *CEIC,* (1983) as follows:

First managers and supervisors must themselves be aware that sexual harassment is prohibited conduct under the Act. When a complaint is made, it must be dealt with as a serious matter, not by a gentle tap on the fingers, but as a potential breach of a statute. Employers should advise their employees that sexual interplay that has, or may reasonably appear to have, employment consequences — either direct, in the nature of firing, loss of benefits, etc. or indirect, such as an adverse effect on the work environment — is improper. The distinction between flirtation and harassment should be clarified. Complaint mechanisms should be in place, so that complaints can be made confidentially and without fear of reprisals. Employers have a responsibility to advise their supervisory personnel and employees about the significance and consequences of sexual harassment. It is in everyone's interest — employer and employee — that behaviour such as occurred in this case not be permitted to occur again.

Recent amendments (1984) to the *Canada Labour Code,* as noted earlier, require each employer under federal jurisdiction to have a formal policy on sexual harassment. This would appear to be a sound practice for all employers all across Canada, as well.

Role of the Unions

The responsibility for keeping the place of work free from sexual harassment should be shared by the bargaining agent and the employer. Unions, like employers, are often guilty of ignoring or resisting action on the issue of sexual harassment. A critical factor is the low level of female representation in the union officer positions which reduces the opportunities for bringing the issue in union-management negotiations[10]. However, the Canadian Labour Congress and some of the progressive labour unions have encouraged policy statements and proposals for action on this issue[11]. These proposals include establishing a sexual harassment committee, encouraging women to participate in union affairs and utilization of grievance procedures. When a union establishes a sexual harassment committee consisting of male and female union members to serve as a resource committee to those who need support and advice, this would encourage those sexually harassed to use the services of the union and increase the awareness of union officers and members. Having the union's support in the grievance handling could lead to a faster and informal settlement of sexual harassment claims at the earlier stages of grievance procedures. This would, indeed, be a better remedy for a grievant than going to the Human Rights Commission. The effectiveness of the union's role in dealing with sexual harassment will also depend, in the long run, on more women participating in the union governance.

10 P. ANDIAPPAN and G.N. CHAISON, «The Emerging Role of Women in National Union Governance: The Results of a Canadian Study», *Sixth World Congress of the International Industrial Relations Conference,* Kyoto, Japan, Vol. IV, 1983, pp. 23-44.

11 Marlene KADER, «The Union and Sexual Harassment», *op. cit.,* p. 10.

A PREVENTIVE POLICY

It should not be the aim of a sexual harassment policy to inhibit or curtail normal social and interpersonal relations between fellow workers, but rather to inhibit coerced, forced, compelled, threatening, and unwanted social interactions. As Owen Shime stated in the *Bell* case, (1980) «It is not abnormal, nor should it be prohibited, activity for a supervisor to become socially involved with an employee. An invitation to dinner is not an invitation to a complaint». Thus, there is a fine line to be drawn between acceptable and unacceptable social behaviors in the workplace.

The key to an effective preventive sexual harassment policy should be to stress the fact thay any social contact that is unwanted (explicitly or implicitly) and that can be construed as a term or condition of employment is indeed harassment. Such policies can serve to increase workers' levels of awareness and to sensitize them to this insidious problem.

In addition, the following guidelines should be considered by every employer:

The policy should be posted and action taken to ensure that all employees are aware of it through whatever channels of communication are available in the company. This awareness step is essential for prevention and must be done thoroughly;

If the workers belong to a union, then the same awareness procedure should be followed through union channels;

The topic of sexual harassment should be included in any awareness seminars or workshops for managers;

A complaint/grievance procedure should be clearly outlined along with simple, quick and confidential methods of investigation and compensation;

Care should be taken not to take action against the complainant but rather against the harasser.

Finally, it is important to realize that even with the most comprehensive sexual harassment policy, sexual harassment will not be completely eliminated. One of the best ways to curtail sexual harassment is through awareness that harassment is not «harmless fun» but a violation of human rights and is a certain cause for recourse and penalties under human rights laws.

Canadian Cases

A List of the Sexual Harassment
Decisions made by Human Rights Tribunals
(All are reported in the Canadian Human Rights Reporter: 1980-84)

Cherie Bell and Anna Korczak v. *Ernest Ladas and the Flaming Steer Steak House,* September 20, 1980, Paragraphs 1383-1442.

Coutroubis and Kekatos v. *Skalvos Printing,* August 20, 1981, Paragraphs 4122-4143.

Lynda Mitchell v. *Traveller Inn (Sudbury) Limited,* December 20, 1981, Paragraphs 5389-5410.

Teresa Faye Cox and Debbie Cowell v. *Super Great Submarine and Good Eats,* January 20, 1982, Paragraphs 5513-5601.

Rosanna Torres v. *Royalty Kitchenware Limited and Francesco Guercio,* July 20, 1982, Paragraphs 7597-7770.

Josephine McPherson, Vanessa Ambo and Laurie Morton v. *«Mary's Donuts» and Hachik Doshian,* August — September 1982, Paragraphs 8535-8587.

Allison Hughes and Lorry White v. *Dollar Snack Bar and Deiter Jeckel,* August — September 1982, Paragraphs 9014-9035.

Grace Aragona v. *Elegant Lamp Co. Limited and A. Fillipitto,* November 20, 1982, Paragraphs 9719-9765.

Janice Howard and Edyth Broda v. *Robert Lemoignan and Econocar Canada Limited,* December 20, 1982, Paragraphs 10137-10172.

D.A. Lewis v. *Treasury Board,* March 1983, Paragraphs 10886-10903.

Bonnie Robichaud v. *Dennis Brennan and The Treasury Board,* March 1983, Paragraphs 11035-11059.

Olarte, Mejia, Biljak, Estrada, Benel and Munoz v. *Commodore Business Machines Limited and Rafael DeFilippis,* June 1983, Paragraphs 12052-12091; Supreme Court of Ontario, 1984.

Jane Kotyk and Barbare Allary v. *Canadian Employment and Immigration Commission and Jack Chuba,* June 1983, Paragraphs 12156-12264.

Karen Deisting v. *Dollar Pizza and Anastassios Papconstantinou and Peter Nickolakis,* July 20, 1982, Paragraphs 7966-7991.

Marilyn Hufnagel v. *Osama Enterprises Limited,* August-September 1982, Paragraphs 8187-8224.

Cynthia Joyce Graesser v. *John Porto,* September 1983, Paragraphs 13506-13566.

Kim Fullerton v. *Davey C's, Glen Relph and Zantav Limited,* October 1983, Paragraphs 13929-13978.

Maria Giouvanoudis v. *Golden Fleece Restaurant and Steve Carras,* Feb./March 1984, Paragraphs 16803-17008.

Cathy Pachouris v. *St. Vito Italian Food and Mike Patera,* Feb./March 1984, Paragraphs 16614-16624.

Sheri Zarankin v. *Ian Johnstone,* September 1984, Paragraphs 19164-19232.

Kristina Potapczyk v. *Alistair MacBain,* September 1984, Paragraphs 19256-19368.

Barbara Robinson v. *The Company Farm Limited and Wilson Nuttall,* September 1984, Paragraphs 18946-18993.

Renée Carignan v. *Mastercraft Publications Ltd.,* September 1984, Paragraphs 19233-19255.

Rodney Romman v. *Sea-West Holdings Ltd.,* October 1984, Paragraphs 19489-19510.

Claudette Phillips (Auger) v. *John Hermix,* Nov./Dec. 1984, Paragraphs 20294-20326.

Linda Watt v. *Regional Municipality of Niagara and Alex Wales,* Nov./Dec. 1984, Paragraphs 20327-20402.

U.S. Cases

Barnes v. *Costle,* 561 F.2d 983 (D.C.C. 1977)

Barnes v. *Train,* 13 F.E.P. 123 (D.D.C. 1974)

Brown v. *City of Guthrie,* 22 F.E.P. 1627 (W.D. Okla. 1980)

Bundy v. *Jackson,* 24 F.E.P. 1155 (D.C.C. 1981)

Corne v. *Bausch and Lomb. Inc.,* 390 F. Supp. 161 (D. Ariz. 1975)

Fisher v. *Flynn,* 598 F.2d 663 (2nd Circ. 1979)

Henson v. *City of Dundee,* 682 F.2d 897 (11th Cir. 1982)

Miller v. *Bank of America,* 600 F.2d 211 (9th Cir. 1979)

Rogers v. *EEOC,* 454 F.2d 234 (5th Cir. 1971) at 238.

Tompkins v. *Public Service Electric & Gas Co.,* 422 F. Supp. 533 (D.N.J. 1976)

Tompkins v. *Public Service Electric & Gas Co.,* 568 F.2d 1044 (3d Cir. 1977)

Walter v. *KFGO Radio,* 518 F. Supp. 1309 (D.N.D. 1981)

Williams v. *Saxbe,* 413 F. Supp. 654 (D.D.C. 1976)

Le harcèlement sexuel en milieu de travail au Canada problèmes et politiques

Le présent article expose la politique des gouvernements en matière de harcèlement sexuel au Canada. Toutes les législatures provinciales, de même que le Parlement canadien, ont adopté des lois sur les droits des personnes. Ces lois interdisent la discrimination sexuelle et autres formes de discrimination en matière d'emploi. Bien que certaines lois sur les droits de la personne traitent spécifiquement de harcèlement sexuel comme question prohibée, l'opinion dominante au Canada, c'est que les stipulations juridiques relatives à la discrimination sexuelle peuvent s'interpréter de façon à comprendre tout aussi bien le harcèlement sexuel. Le Code canadien du travail oblige les employeurs assujettis à la compétence fédérale de présenter et de divulguer une politique en matière de harcèlement sexuel et de prévoir un mécanisme de réparation pour ses victimes.

À la suite de débats publics au Canada, on a défini le harcèlement sexuel et on a exposé les mesures législatives et administratives sur le sujet aux États-Unis.

Les mesures juridiques américaines ont eu une influence sur les décisions rendues par les tribunaux et les commissions administratives canadiennes. Toutes les affaires judiciaires qui ont eu lieu au Canada entre 1980 et 1984 sont analysées tant en ce qui concerne les attitudes discriminatoires spécifiques qui furent considérées comme du harcèlement sexuel que les nombreuses caractéristiques des cas entendus, tels que les faits retenus comme indices de harcèlement sexuel, la durée moyenne des procès, le sexe du plaignant, la répartition industrielle et professionnelle des affaires de même que les sanctions imposées. Les comportements discriminatoires se rapportent au refus d'embaucher, à la fréquence du harcèlement, au congédiement, au congédiement implicite, à la nature du milieu de travail et aux conséquences dommageables qui peuvent en résulter pour la santé des victimes.

Finalement, l'article examine les conséquences qui en découlent pour les employeurs et les syndicats et conclut par des considérations sur l'établissement d'une politique préventive efficace en matière de harcèlement sexuel.