

to marvel at the fact that cases like this continue to roll out on a daily basis. And I'm forced to admit that, since most people don't report sexual and other forms of harassment, it's much more prevalent than we imagine. Of course, sexual harassment cases aren't always as obvious and damaging as the one noted above.

Here are some of the most frequently asked questions I get regarding workplace harassment, and my thoughts on the downside of not dealing with harassment.

### **Is sexual harassment just about sex?**

In 1989, then-Chief Justice Brian Dixon of the Supreme Court of Canada, in a unanimous decision, said "sexual harassment in the workplace may be broadly defined as *unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment*. It is...an abuse of power...[that] attacks the dignity and self-respect of the victim both as an employee and as a human being."<sup>13</sup> (emphasis added)

Today, the italicized part of that decision serves to define sexual harassment in Canada. To prove sexual harassment, a person needs to show he or she endured unwelcome sexual attention and that it had detrimental or negative consequences. While the consequences can be the classic, "You show me some sexual attention and I'll let you keep your job," they don't have to go that far. A person who endures provocative pictures on the wall, or sexual jokes told in the lunchroom is often a person being subjected to sexual harassment. This is often referred to as a tainted, poisoned or hostile work environment.

### **Tip #26 Sexual harassment isn't just about sex**

Since the courts have ruled that sexual harassment is a form of sex discrimination, treating women negatively while treating men positively can constitute sexual harassment. In other words, if snide or rude comments are made to women but not to men, and they negatively impact the women's workplace comfort level, this is sexual harass-

ment. The reverse is also true if men are the predominant targets.

My advice is to think of sexual harassment as more than the textbook case of a lecherous male boss. Non-sexual negative comments towards one particular gender, or a man harassing a man, or a woman harassing a woman all qualify. That said, it should come as no surprise that most sexual harassment still involves a man sexually harassing a woman.

### **What kinds of harassment are there?**

Since the courts have ruled that sexual harassment is a form of discrimination based on sex (or gender), they have continued to interpret harassment to include other protected forms of discrimination covered under human rights legislation. What other types? Depending on the provincial, territorial or federal human rights legislation, your list is made up from a number of the protected grounds noted below:

Age	Physical disability	Ancestry
Sex	Criminal conviction	Political belief
Race	Aboriginal origin	Marital status
Gender	Social condition	Family status
Colour	Sexual orientation	Language
Creed	Mental disability	Citizenship
Religion	Source of income	Civil status
Ethnicity	Linguistic background	Nationality
Pregnancy	Irrational fear of illness or disease	Place of origin

### **Tip #27 Harassment protections are varied**

If an employee is being harassed, but that harassment doesn't qualify under the protected grounds of discrimination, the human rights commission will not be able to legally assist that employee. The person being harassed and her employer will want to deal with the problem somehow, but it won't be through human rights.

Human rights commissions are designed to take care only of issues under their jurisdictions-not all problems that ails us.

If a provincial, territorial or federal commission does not offer all the protected grounds, be aware that a person can argue a new case to forge new ground. In Alberta, Delwin Vriend was fired from his job because he was gay. Since sexual orientation was not a protected ground in Alberta, Vriend was unable initially to secure protection from the province's human rights commission. But after many appeals, the Supreme Court of Canada "read in" protection of sexual orientation to the province's legislation, and the province did not attempt to overturn the decision. So even though you don't see sexual orientation listed as a category in Alberta, Alberta's Human Rights and Citizenship Commission has made it clear that heterosexual men and women, gay men, lesbians and bisexual men and women will get protection if they have a complaint based on their sexual orientation.

Courts can "read in" new human rights categories, so the legislated list isn't final.

If I were in charge of a business, I wouldn't lose sleep over whether an employee might end up influencing the Supreme Court to change laws, but I would make sure employees don't feel they have to go elsewhere to resolve internal matters. Just because harassment based on hair loss is not protected by law doesn't mean you should allow one employee to call another employee "cue-ball."

**Doesn't someone have to tell me I'm harassing him, before it can be considered harassment?**

No. The legal standard for everyone involved is that harassment may exist even if you don't think of it as harassment.

**Tip #28 Harassment can take place without a complaint**

If an adjudicator thinks you should have known, that's enough to plow full speed ahead, legally. A supervisor, manager or owner who attempts a defense by saying

he didn't know that pictures of nude women or men would be a problem to some employees will get nowhere. Might as well try saying, "I've been living under a rock."

It works the same way in non-harassment cases. An employer who tells the Workers' Compensation Board, "I didn't know that water on the floor might cause an employee to slip and fall" is wasting her breath.

For those who feel this has an element of unfairness, keep in mind that a finding of harassment rarely spells the end of someone's career; it doesn't even have to entail discipline. It remains a last-resort measure to fire an employee due to harassment.

Need an example? Let's say I like to talk about my sexual exploits with colleagues in the workplace lunchroom. Since no one objects, I assume everyone wants to hear my stories. It also happens that I have a reasonable amount of clout at work, and one of my colleagues dislikes my stories but dares not say so for fear I might retaliate. That colleague may go to our boss and ask him to deal with the issue. When the boss tells me I have to knock off the sexual stories, my ego will feel a bit bruised, but if I agree to stop with the lunchtime stories, it's most likely an end to the problem. The other guy just wants to keep his lunch down; he's not looking to get me fired or himself compensation.

It's a simple example, but for every complex harassment case, there are twenty to forty easily resolved incidents such as this one. That's where you come in. You're the boss being asked to tell Big Mouth me "enough already" on the tacky lunch-hour bragging. You're the one in a position to stop twenty incidents from inflating into workplace dilemmas or legal cases.

## **Tip #29 A complaint shouldn't kill a career**

Your simple response to this one—having a word with me in our example above—also falls within the law. Human rights legislation is referred to as "remedial" legislation, and it aims to find a reasonable remedy acceptable

to most. In fact, if my colleague asked that I be fired for telling a sexual joke, it would be considered out of line from a legal perspective—assuming I wasn't doing anything more serious.

### **What about “third party” harassment?**

So what happens if harassment is overheard by a “third party”—someone to whom the comment or joke wasn't directed? Watch out, because the courts and tribunals aren't interested in creating loopholes.

## **Tip #30 No loopholes for third party harassment**

As per the definition of harassment, if a person hears comments that are unwelcome and cause a negative impact, then you've either got harassment, or the beginnings of harassment. So if you get the sense that your employees assume they can say whatever they want at their desks and in the lunchroom, and tough luck for anyone who happens to be eavesdropping, set them straight. Harassment is harassment and it doesn't matter whether a person is a first, second or third party to the harassment.

### **Need I worry about harassment if my intentions are good?**

Yes. Intentions are irrelevant when deciding if harassment has occurred. My intentions might be to lighten up the workplace by telling sexual jokes, or help myself fit in with the power crowd by belittling people with the same colour skin as mine. I may even think my pictures of nudes—reproductions of classic paintings that people travel to prestigious museums to see—are beautifying our drab workplace walls. But my opinion is my own, and the opinion of my colleagues is what can create harassment at work. *It is the impact, not the intention that matters.*

## **Tip #31 Focus on impact, not intent**

As for employees who tell you, “Oh that's just Stephen; he doesn't mean anything by it,” here's what to keep in mind. Good people can say bad things, and you're

helping no one by allowing them to get away with comments or conduct that violate the basic rights of others. Again, if you focus your attention on the impact, not the intentions, you're modeling good leadership.

Does intention have any influence at all? Actually, once a finding of harassment has taken place, then intention might go a long way in deciding how to resolve it. If, for example, I harass someone with the intention of inflicting harm or humiliation on that person, and do so with complete disregard for her feelings, I'm likely to be subject to disciplinary action,

Intention can play a part in deciding the remedy, but not the finding, of harassment

perhaps even severe discipline. However, if colleagues or investigators are convinced that I never intended a negative impact, perhaps I felt silly when I learned what I'd done and was sincerely apologetic, chances are I will not be disciplined. It was still harassment, but being hauled into my supervisor's office for a "discussion" may be considered action enough.

### **Can my actions be deemed harassment if they occur outside of work?**

Yes. If an employee does something outside of work that has a negative impact back in the workplace, the employer may well find himself or herself dealing with a harassment problem. Otherwise, imagine the loopholes, especially given today's technology. Ed would just have to wait until after work to send lewd e-mails, faxes, and voice mail messages to his co-worker Tricia's home. Or leave sexually explicit messages under her car's windshield wipers.

Back at work, of course, Ed acts like a perfect gentleman. But if Tricia is disturbed by his actions, and we apply the definition of sexual harassment, what have we got? An employee receiving sexual attention she doesn't want, with negative consequences: a tainted work environment. Tricia is on edge all the workday wondering what Ed will pull next.