



CURRENT ISSUES SERIES

The Evolution of Sexual Harassment Case Law in Canada

Deborah Ann Campbell

**Queen's University
Industrial Relations Centre
(IRC)**

School of Policy Studies
Queen's University
Kingston, ON K7L 3N6
Tel: 613-533-6628

Email: irc@queensu.ca

Visit us at: irc.queensu.ca

This document was digitized in 2013 as part of the Queen's IRC Archive Revitalization Project. Originally published by the IRC Press in 1992.

ISBN: 0-88886-351-9

© 1992, Industrial Relations Centre

Printed and bound in Canada

By Hewson & White Printing [Kingston] Ltd

Industrial Relations Centre

Queen's University

Kingston, Ontario

Canada K7L 3N6

Canadian Cataloguing in Publication Data

Campbell, Deborah Ann, 1966-

The evolution of sexual harassment case
law in Canada

(Current issues series)

Includes bibliographical references.

ISBN 0-88886-351-9

1. Sexual harassment — Law and legislation — Canada.

2. Sexual harassment of women — Law and
legislation Canada. I. Queen's University (Kingston,
Ont.). Industrial Relations Centre. II. Title.

M. Series: Current issues series (Kingston, Ont.).

KE8928.C35 1992

344.71'01133

C92-095305-0

KF3467.C35 1992

Contents

Executive Summary	v
Introduction	1
Does Sexual Harassment Amount to Sex Discrimination?	2
Canadian Human Rights Cases	2
Arbitration Cases	4
What Amounts to a Term or Condition of Employment?.....	6
Arbitration Cases	7
The <i>Quid Pro Quo</i> /Abusive Environment Distinction	9
What Conduct Constitutes Sexual Harassment?.....	10
Canadian Human Rights Cases	10
Arbitration Cases	17
What Constitutes Harassment Based on Sex?	23
Emerging Trends in Arbitration	26
Can Conduct Not Directed at the Complainant Amount to Sexual Harassment?.....	28
Conclusion	30
References	33

Executive Summary

The past 15 years have seen a significant change in the way in which we think about sexual harassment. It is now seen as unacceptable behaviour, violating Canadian human rights legislation.

- In the absence of legislation expressly prohibiting sexual harassment in the workplace, it was initially necessary to determine that sexual harassment was a form of discrimination based on sex, which is prohibited by human rights legislation.
- In human rights and arbitration cases on this issue, sexual harassment was found to amount to sex discrimination.
- Case law also established that sexual harassment poisons the work environment, thus creating a discriminatory term or condition of employment.
- Sexual harassment includes a wide range of conduct of both a verbal and physical nature, expressed or implied.
- Amendments to the Ontario Human Rights Code in 1981 provided a more specific definition of harassment.
- Conduct not involving a sexual advance, must be of a certain offensiveness and frequency such that it constitutes a term or condition of employment.
- Arbitration decisions involving allegations of sexual harassment have generally been consistent with those of human rights tribunals.
- Sexual harassment can be found even when the conduct is not of a sexual nature.
- 'Sexual Banter' could constitute sexual harassment if disapproval had been expressed.
- Tribunals have been unwilling to rule that the general use of offensive language constitutes sexual harassment.

Introduction

Sexual harassment has become an important issue in the Canadian workplace. The past 15 years have seen a significant change in the way in which we think about sexual harassment. Once considered to be an accepted part of a woman's job — something she just had to put up with — it has now been labeled by society as unacceptable behaviour.

Reflecting this changed social attitude, sexual harassment is now considered to violate Canadian human rights legislation. This conclusion has not been reached without some debate. Two fundamental and controversial issues have arisen in the development of Canadian sexual harassment case law. One is whether sexual harassment amounts to sex discrimination and the other concerns the types of conduct that can be considered sexual harassment.

Initially, Canadian human rights legislation contained no provision expressly prohibiting sexual harassment in the workplace. It contained only a provision prohibiting discrimination based on sex. Thus, in order to obtain legal recourse from sexual harassment under this legislation, it was necessary to find that sexual harassment was a form of sex discrimination. This finding was made in Canada without much debate and is now well established by the case law. In 1981, however, this approach to sexual harassment became less important as the Ontario Human Rights Code was amended to include provisions specifically prohibiting harassment based on sex. Currently seven Canadian jurisdictions expressly prohibit harassment based on sex: Federal, Manitoba, New Brunswick, Newfoundland, Ontario, Quebec, Yukon Territory.

It is now clear that sexual harassment violates human rights legislation. It is still necessary, however, to determine what actually constitutes sexual harassment. Several questions have arisen under this broad issue and have received considerable attention over the last decade as the case law in this area has developed.

This report traces the evolution of sexual harassment case law in Canada, to illustrate how these two fundamental issues have been resolved. The emphasis is on Ontario human rights cases and Canadian arbitration cases.

Does Sexual Harassment Amount to Sex Discrimination?

In the absence of legislation expressly prohibiting sexual harassment in the workplace, attention was initially focused on the issue of whether sexual harassment was a form of discrimination based on sex that would be prohibited by Canadian human rights legislation. The Canadian case law in this area appears to have been heavily influenced by the large number of cases that arose in Ontario.

Canadian Human Rights Cases

Until the 1981 Ontario Human Rights Code came into effect, sexual harassment cases were heard under s.4(1)(b) and (g) of the 1980 Code. These sections provide that:

4(1) No person shall, ...

(b) dismiss or refuse to employ or to continue to employ any person; ... or

(g) discriminate against any employee with regard to any term or condition of employment.

because of ... sex ... of such person or employee.

The 1981 amendments to the Ontario Human Rights Code contain provisions specifically prohibiting harassment based on sex. Sections 6(2) and 6(3) state:

6(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.

(3) Every person has a right to be free from,

(a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or

(b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to a person.

The Code has not defined 'sexual harassment' *per se*, although it has defined the term 'harassment' in s.9(f) to mean 'engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.'

Case law relating to these amendments did not emerge until 1985. This delay can be explained by the fact that, while these amendments were made in 1981, they did not come into effect until June 15, 1982. As well, there is a delay from the time a claim is filed until the time it is heard by the Board of Inquiry. Thus, a significant number

Until 1980 the Commission took a narrow view of sex discrimination.

of cases were heard under the 1980 Code, which did not explicitly prohibit harassment based on sex, making it necessary to determine whether sexual harassment did amount to sex discrimination.

The question of whether sexual harassment could be included within this definition of sex discrimination provided in s.4, was not formally considered by the Human Rights Commission until 1980. Until that time, the Commission took a narrow view of sex discrimination and discouraged or turned down complaints of sexual harassment (Aggarwal, 1987).

Bell v. The Flaming Steer Steakhouse set the stage for the current way of thinking about sexual harassment in the workplace. In this case, two complainants made allegations against the respondent. The first complainant, Bell, alleged that the respondent subjected her to gender-based insults and taunting and propositioned her and that she was fired for failing to comply with these propositions. The second complainant, Korczak, claimed that the respondent slapped her buttocks more than once, inquired about her personal life and asked her out for drinks and sexual relations.

The Board of Inquiry found that the allegations made by Bell could not be established. Bell was not discharged because she refused to become sexually involved with the respondent. On the balance of probabilities, the Board did not find that the respondent made the statements or propositioned Bell. Regarding Korczak's complaint, the Board found that neither party's testimony prevailed, but because the onus of proof was on the complainant to establish a case, the complaint was dismissed.

There was no finding of sexual harassment in this case, but adjudicator Owen Shime still held that sexual harassment could amount to sex discrimination under the Ontario Human Rights Code. Consider this excerpt from the decision:

Clearly a person who is disadvantaged because of her sex is being discriminated against when employer conduct...exacts some form of sexual compliance to improve or maintain her existing benefits. (p. 155)

Subsequent to this pioneering case, a number of concurring decisions followed. The next case, and the first to rule in favour of the complainant, was *Coutroubis v. Sklavos Printing*, in 1981. In this case, and in several others decided before the 1981 amendments took effect, sexual harassment was found to amount to sex discrimination (see *Mitchell v. Traveller Inn Ltd.*; *Cox v. Jagbrite Inc.*; *Torres v. Royalty Kitchenware Ltd.*; *Hughes v. Dollar Snack Bar*; *McPherson v. Mary's Donuts*; *Aragona v. Elegant Lamp Co. Ltd.*; *Howard v. Lemoignan*; *Graesser v. Porto*; *Pachouris v. St. Vito Italian Food*; *Robinson v. The Company Farm Ltd.*; *Olarte v. Commodore Business Machines Ltd.*; *Giouvanoudis v. Golden Fleece Restaurant*; *Watt v. Regional Municipality of Niagara and Piazza v. Airport Taxicab (Mallon) Association*).

The majority of these cases involved some form of verbal or physical sexual advance, which was usually made by the employer. In a few cases (*Aragona* and *Watt*) the offensive conduct was sexual or gender-based remarks or jokes which did not amount to a

sexual advance. Not all of these cases were successful, but in rendering their decisions, the majority of the Boards cited *Bell as* an authority on the issue of whether sexual harassment does amount to sex discrimination. Some cases referred to other early cases of sexual harassment, in which sexual harassment was actually found (see *McPherson* and *Piazza*). Some cases have also referred to relevant American cases (see *Cox* and *Giouvanoudis*).

The provisions expressly prohibiting sexual harassment did not come into effect until 1982.

The provisions expressly prohibiting sexual harassment, sections 6(2) and (3), did not come into effect until 1982. In the first case in which these provisions could have been interpreted (the commission chose to make a claim under s.4(1)(b) and (g)), the Board of Inquiry stated that 'there can be no room for doubt that, even in the absence of a specific prohibition against sexual harassment in the workplace, the 1980 *Code* supports such a prohibition' (*Piazza v. Airport Taxi Cab*, 3198).

This view has not been so readily accepted by other jurisdictions which lack provisions expressly prohibiting sexual harassment. The Manitoba Court of Appeal, in *Janzen v. Platy Enterprises* (1986), took a more narrow view of sexual discrimination by refusing to recognize that sexual harassment amounted to sex discrimination. The Court concluded that, because only some women are subjected to sexual harassment, it is discrimination based not on sex but on individual characteristics. The cause of the discrimination was found to be the physical attractiveness of the complainants, rather than their sex. It was further inferred that, in the absence of legislation specifically prohibiting harassment based on sex, discrimination could not be found to include sexual harassment.

This decision was appealed to the Supreme Court of Canada. Chief Justice Dickson rejected these arguments and found that sexual harassment did constitute sex discrimination. He stated that gender need not be the sole factor in the conduct for it to be sex discrimination, but need be one factor only. The court ruled that the key factor in the case was that the women were subject to harassment merely because they were women; no male employee in these circumstances would have been subject to the same disadvantage. Dickson concluded that the express prohibition of sexual harassment in some Canadian jurisdictions was intended only to make explicit what had previously been implicit and did not reduce the scope of the more general prohibition of discrimination based on sex. Cases heard after this Supreme Court decision of 1989, have cited and adopted Dickson's arguments (see *McGregor v. McGavin Foods Ltd.* and *Palfy v. Ives*).

Arbitration Cases

Several arbitration cases have involved allegations of sexual harassment. When arbitrators have attempted to determine the merits of a sexual harassment allegation, they frequently turn to human rights decisions for guidance. However, arbitrators have not grappled with the issue of whether to include sexual harassment within the definition of sex discrimination. In cases in which the arbitrators have cited human rights cases such as *Bell*, *Mitchell*, *Cox* and *Hughes*, the arbitrators did not discuss the issue, but seemed to accept the decisions rendered by human rights boards. For example, in *CUPE v.*

OPEIU, arbitrator Swinton stated that the normal response to sexual harassment would be 'under the antidiscrimination clause, since sexual harassment has been held to be a form of sex discrimination' (p. 394), according to the *Bell* case.

In each of these cases, the arbitrators concentrated their efforts on the next stage of the sexual harassment issue, which was to determine whether the conduct complained of did, in fact, constitute sexual harassment. For example, in *Canada Post Corporation and CUPW* arbitrator Norman stated that 'it remains to consider whether an isolated act of unwanted intimate physical contact on the part of an immediate supervisor constitutes sexual harassment' (p. 17).

Other arbitrators have attempted to determine the merits of a sexual harassment claim without reference to any human rights decisions. These cases have also only dealt with the issue of whether the offensive conduct constituted sexual harassment (see *City of Nanticoke and CUPE, Government of the Province of Alberta and AUPE, 1983, Government of the Province of Alberta and AUPE, 1983*).

Arbitrators have not ruled on the issue of whether to include harassment as a form of discrimination perhaps because there is generally no need to make this decision. In the case of *Canada Post Corporation*, in which sexual harassment was the primary issue, harassment based on sex was prohibited in the collective agreement. In the majority of cases, however, the determination of sexual harassment was a secondary issue. It usually arose out of the primary grievance of an unjust discharge. In most cases, the grievor has been discharged for allegedly sexually harassing a female employee. The decision of whether harassment did occur must be made to determine the appropriateness of the disciplinary action.

In these cases, sexual harassment seems to have attained its own legitimacy outside of human rights legislation. It seems to be an extension of 'sexual misconduct' which has been disciplined in earlier cases (e.g. *Government of the Province of Alberta and AUPE, 1982*). Arbitrators look to human rights legislation only to determine what behaviour amounts to sexual harassment.

In one notable case the arbitrator agreed that sexual harassment is a form of sex discrimination.

One notable case stands apart from those mentioned above. In *Quality Inn (Altadore) Woodstock and UFCW, Local 175*, the primary allegation was sexual harassment. The agreement provided only a provision prohibiting discrimination based on sex. The arbitrator agreed that, based on the case of *Janzen v. Platy Enterprises*, sexual harassment is a form of sex discrimination.

The next general issue is the determination of what conduct constitutes sexual harassment and would violate these statutes. Four questions have arisen regarding this broad issue: 1) what amounts to a term or condition of employment; 2) what conduct constitutes sexual harassment; 3) what constitutes harassment based on sex; and 4) can offensive conduct not directed at the complainant constitute sexual harassment. The next four sections will explain and discuss each of these issues.

What Amounts to a Term or Condition of Employment?

Case law in Canada makes it clear that sexual harassment, because it imposes terms and conditions of employment on one sex, which are not imposed on the other, can constitute sex discrimination: the first cases of sexual harassment were of a classic nature, in which the woman was dismissed from her employment for failure to comply with sexual advances. Thus, the employer's conduct had a tangible effect on her employment opportunities and compliance with sexual advances was a term or condition of employment.

The question then arose as to whether sexual harassment could be established in the absence of tangible employment consequences. This is the case in which the employer's conduct is not coupled with a reprisal or threat of reprisal, for noncompliance with sexual advances but, instead, has the effect of poisoning the work environment for the employee. The question is whether the creation of this environment is a term or condition of employment and, hence, also constitutes sexual harassment.

Canada has accepted the psychological damage resulting from a poisoned work environment as a 'term or condition' of employment.

Canada has accepted the psychological damage resulting from a poisoned work environment as a 'term or condition' of employment. In *Bell*, adjudicator Shime recognized the merit of these claims when he included in prohibited conduct, such behaviour 'which may reasonably be perceived to create a negative psychological and emotional work environment' (p.155). In *Cox v. Jagbrite Inc.*, adjudicator Cummings found that sexual harassment, because it poisons the work environment, is a discriminatory term or condition of employment, even if it does not result in adverse employment consequences.

Professor McCamus, in *Watt v. Regional Municipality of Niagara*, stated that the validity of abusive environment claims has been recognized by legislative provisions such as section 4 of the Ontario Human Rights Code. He stated that:

persistent taunting or teasing may be a less straight forward way of attempting to impose sexual demands on an unwilling employee. ...Thus important interests would be served by interpreting the phrase 'term or condition' to embrace abusive environment claims. (p. 2456)

McCamus stated that the same principles involved in racial harassment claims can be applied to abusive environment claims based on sex. He cited *Wells v. Murphy Motor Freight Lines*, *Simms v. Ford Motor Co.* and *Dhillon v. F.W. Woolworth Co.* as examples of racial harassment cases. For example, the Board in *Dhillon* stated:

The atmosphere of the workplace is a 'term or condition of employment,' just as much as more visible terms or conditions, such as hours of work or rate of pay. The words 'terms or conditions of employment' are broad enough to include the emotional and psychological circumstances in the workplace. (p. 743)

McCamus, referring to the analogy between sexual and racial harassment cases, stated that:

There is no reason in principle, of course, why harassment of a similar kind could not be directed at a group identified by gender. Such harassment would no doubt constitute a contravention of s.4 of the *Code*. Thus, for example, a male supervisor who persistently and unfairly criticized the work of female employees in a humiliating way would potentially attract liability of this kind. Similarly, a man who persistently made women the butt of jokes of a demeaning kind would bring himself within the analysis of the *Dhillon* case. (p. 2458)

Guidelines which include the quality of the work environment within the 'terms and conditions of employment' have also been created in Canada, by York University's Presidential Advisory Committee on Sexual Harassment. Sexual harassment has been defined as:

- unwanted sexual attention of a persistent or abusive nature, made by a person who knows or ought reasonably to know that such attention is unwanted;
- implied or expressed threat or reprisal, in the form either of actual reprisal or the denial of opportunity, for refusal to comply with a sexually oriented request; sexually oriented remarks and behaviour which may reasonably be perceived to create a negative psychological and emotional environment for work. (Aggarwal, 1987, 44-45)

These guidelines, however, did not spark the expansion of the definition of 'terms and conditions' of employment as similar guidelines did in the United States. Rather, these guidelines were prepared perhaps to reflect the legal developments which had already occurred in Canada.

Arbitration Cases

Most arbitration cases dealing with sexual harassment have involved conduct which has the effect of creating an abusive work environment.

Most arbitration cases dealing with sexual harassment have involved conduct which has the effect of creating an abusive work environment. Therefore, there definitely has been a need to accept the quality of the work environment as a term or condition of employment. Indeed, arbitrators have generally accepted, without discussion, this type of conduct as amounting to sexual harassment. Often, this is done with reference to Canadian human rights cases.

In *CUPE and OPEIU* and *Famz Foods and CURE*, the abusive work environment type of harassment was implicitly accepted with reference to several Canadian and American decisions. It was concluded in *CUPE and OPEIU* that:

It is the pattern of insults and propositions which is to be regarded as a prohibited condition of employment, because the constant barrage may create a negative working environment. (p. 400)

In *Canada Cement Lafarge Ltd. and Energy & Chemical Workers Union, Local 219*, the grievor, who alleged unjust discharge, was found guilty of sexual harassment for spying on the shower facility used by the sole female working at the plant. With reference to *Bell*, the arbitrator accepted the abusive environment type of harassment with the following statement:

... his attempted voyeurism might well be considered by a tribunal ... as the sort of prohibited discriminatory conduct which may reasonably be perceived to create a negative psychological and emotional work environment. (p. 210)

Conduct not involving a tangible employment consequence can amount to sexual harassment.

In *Canada Post Corporation and CUPW*, of 1987, the arbitrator distinguished between two types of sexual harassment. Type 1 is coercive and involves an attempt by a supervisor or coworker to press sexual requests. Type 2 is sexual harassment aimed not at an employee's sexuality, but at the employee's gender itself. This may be harassment because the employee is of a particular gender, or harassment amounting to degradation of persons of that gender. The two branches of this definition of sexual harassment show that conduct which does not involve a tangible employment consequence, can amount to sexual harassment.

In *Quality Inn and UFCW*, the abusive work environment type of harassment was also legitimized as the arbitrator accepted the definition of sexual harassment given in *Janzen*, which included this type of conduct. Sexual harassment was defined as:

demands for sexual favours made under threats of adverse job consequences; and sexual groping, propositions and inappropriate comments without threats of adverse job consequences.

From the outset, in the *Bell* case, Canadian human rights tribunals have included abusive environment claims within the realm of sexual harassment. This approach has never been deviated from, and has been confirmed in many subsequent cases, which were heard before the new Ontario provisions came into effect. The new provisions eliminate the need to come to terms with this issue in Ontario, as they prohibit harassment based on sex by the employer or a coworker, as well as advances, reprisals and threats of reprisals from persons in positions to affect tangible employment opportunities.

Similarly, Canadian arbitrators have also accepted the quality of the work environment as a term or condition of employment. Unlike Canadian tribunals, arbitrators have not resolved this issue directly, but instead, have conveyed this acceptance implicitly, with reference to relevant human rights cases. The bulk of the discussion in arbitration cases has generally been centred on what conduct constitutes an abusive environment, and hence, sexual harassment.

The *Quid Pro Quo* / Abusive Work Environment Distinction

The argument as to whether psychological aspects of the work environment should be included as part of the 'terms and conditions of employment' has sparked the categorization of sexual harassment into two types. A distinction has been made between *quid pro quo* violations, and 'poisoned' or 'abusive' work environment claims. This distinction has been outlined in a *Harvard Law Review* article of 1984 (hereinafter referred to as 'the *Harvard* article'). *Quid pro quo* harassment involves tangible employment consequences which are explicitly or implicitly contingent on compliance with sexual requests. A 'poisoned' work environment claim can be filed where there is persistent subjugation of female employees to an intimidating, hostile, or offensive working environment. MacKinnon (1979, 40) made this distinction clear:

In the *quid pro quo*, the coercion behind the advances is clarified by the reprisals that follow a refusal to comply. Less clear, and undoubtedly more pervasive, is the situation in which sexual harassment simply makes the work environment unbearable. Unwanted sexual advances made simply because she has a woman's body, can be a daily part of a woman's work life. She may be constantly felt or pinched, visually undressed and stared at, surreptitiously kissed, commented upon, manipulated into being found alone, and generally being taken advantage of at work — but never promised or denied anything explicitly connected with her job.

Abusive environments foster a sense of degradation that can reduce productivity and discourage the employee from attempting to advance

The *Harvard* article points out that the damage resulting from a 'poisoned' work environment may be less obvious than the tangible consequences of the *quid pro quo* category, but they are not necessarily less serious. Abusive environments lead to psychological detriment. They foster a sense of degradation that can reduce productivity and discourage the employee from attempting to advance her career.

Many sexual harassment cases have been labeled by tribunals and courts as fitting into the *quid pro quo*, the abusive work environment or both types of sexual harassment. However, it is interesting to note that in a recent Supreme Court of Canada decision (*Janzen v. Platy Enterprises*), the *quid pro quo*/hostile work environment dichotomy was deemed to be of little help in forming a decision. Chief Justice Dickson argued that there is no longer a need to categorize harassment into one of these forms. The main issue in sexual harassment cases is that 'unwelcome sexual conduct has invaded the workplace, irrespective of whether the consequences of the harassment included a denial of concrete employment rewards... .' (p. 6227)

What Conduct Constitutes Sexual Harassment?

As discussed in the previous two sections, Canadian human rights tribunals and Courts have determined that sexual harassment does amount to sex discrimination under Canadian human rights provisions. Also, when the conduct has as its consequences, either the denial of tangible employment opportunities, and/or the creation of an abusive work environment, a violation of such provisions can be found. It is now important to determine what conduct actually constitutes sexual harassment and what criteria are used to make this determination. This section will outline the type of conduct that is considered to be sexual harassment.

Canadian Human Rights Cases

In 1983, the Canadian Human Rights Commission, in *Daigle v. Hunter* (at 5673), described sexual harassment as including:

verbal abuse or threats; unwelcome remarks, jokes, innuendos, or taunting; displaying of pornographic or other offensive or derogatory pictures; practical jokes which cause awkwardness or embarrassment; unwelcome invitations or requests, whether indirect or explicit or intimidation; leering or other gestures; unnecessary physical contact such as touching, patting, pinching, punching; or physical assault.

Owen Shime, in *Bell*, outlined the conduct which he considered to be sexual harassment under the Ontario Human Rights Code:

The forms of prohibited conduct that, in my view, are discriminatory run the gamut from overt gender based activity, such as coerced intercourse to unsolicited physical contact to persistent propositions to more subtle conduct such as gender based insults and taunting, which may reasonably be perceived to create a negative psychological and emotional work environment. (p. 155)

The types of conduct which can constitute sexual harassment, as offered by Shime and the Canadian Human Rights Commission, provide some guidance for Ontario Boards of Inquiry to determine the merits of a sexual harassment claim.

Boards gain further guidance from the Canadian Human Rights Commission guidelines. These guidelines help to determine when certain conduct does constitute sexual harassment:

unwanted sexual attention of a persistent or abusive nature, made by a person who knows or ought reasonably to know that such attention is unwanted;

implied or expressed threat or reprisal, in the form either of actual reprisal or the denial of opportunity, for refusal to comply with a sexually oriented request;

sexually oriented remarks and behaviour which may reasonably be perceived to create a negative psychological and emotional environment for work. (Aggarwal, 1987, 44-45)

It is not always easy to assess when conduct is unwelcome or unnecessary.

These definitions and guidelines provide only a framework within which to decide on the merits of a sexual harassment claim. There are several issues which are still open to interpretation. It is not always easy to assess when conduct is unwelcome or unnecessary, nor is it straightforward to determine whether a work environment has become abusive, or when certain conduct has become a term or condition of employment. A discussion of Ontario human rights case law will outline how Boards have grappled with these difficult issues.

To begin, we will look at the types of conduct which have been found to be in violation of the Ontario Human Rights Code, in place before the 1981 amendments, which stated:

4(1) No person shall, ...

(b) dismiss or refuse to employ or to continue to employ any person; ...

(g) discriminate against any employee with regard to any term or condition of employment, because of...sex...of such person or employee.

The early cases of sexual harassment involved some form of sexual advance. This was often in the form of repeated touching, physical restraining, kissing or attempted kissing and sexual remarks and propositions.

A claim of sexual harassment was fairly easy to prove when the complainant was dismissed for a refusal to tolerate or comply with the sexual advances. Several cases illustrate this point (*see Torres v. Royalty Kitchenware Ltd.; Hughes v. Dollar Snack Bar; Olarte v. Commodore Business Machines Ltd.; Giouvanoudis v. Golden Fleece Restaurant; Robinson v. The Company Farm Ltd.; Mitchell v. Traveller Inn Ltd. and Lucy Piazza v. Airport Taxicab (Malton) Association*).

In each of these cases, the complainants were subjected to various forms of physical and/or verbal sexual advances including repeated touching (e.g. stroking, patting, grabbing, massaging), attempted kissing, forced kissing, restraining, and sexual comments.

In each of these cases it was found that the respondents' conduct was a violation of s. 4 of the Ontario Human Rights Code. The Boards of Inquiry found that the complainants were fired because they refused the sexual advances which violates s.4(1)(b). Furthermore, compliance with or tolerance of the sexual harassment was deemed to be a term or condition of employment which violates s.4(1)(g).

All of these cases involved the complainants' dismissal from their employment. In most cases, however, there was no explicit threat of reprisal made if the complainants did not comply with the requests. In only two cases were employment opportunities made contingent on compliance with requests. In *Robinson*, the respondent stated that going to his cottage would be good for her job. In *Mitchell*, the complainant was told that she would lose her job if she did not go to the back room with the respondent.

A finding of sexual harassment can be found in the absence of physical advances or explicit requests for dates or sexual relations. In *Mitchell v. Traveller Inn Ltd.*, the complainant alleged that she was denied employment when she refused the sexual advances of her employer. It was established that the respondent asked the complainant to go to the back room with him. He stated that if she did not comply, she would lose her job. He also offered to drive her home, stating that it would be fun. She interpreted these requests as having a sexual connotation.

Requests for sexual favours need not be explicit.

The Board ruled that the conduct did constitute sexual harassment and gave the following reasons: The requests for sexual favours need not be explicit to be a violation of the Code — this request was implicit. The latter suggestion was nearly explicit in its sexual connotation and in the absence of evidence to the contrary, it constitutes sexual harassment.

In other cases, women have been subjected to sexual advances in the forms of touching, sexual comments, and propositions and were forced to quit because they could not tolerate the harassment (see *Coutroubis v. Sklavos Printing*; *Cox v. Jagbrite Inc.*; *McPherson v. Mary's Donuts*; *Graesser v. Porto*; and *Olarte v. Commodore Business Machines Ltd.*). Ontario boards of inquiry have interpreted this type of conduct as constituting constructive dismissal, and in violation of s.4(1)(b) of the Code.

The boards of inquiry in the above cases decided that compliance with or tolerance of the respondents' sexual advances was a term or condition of employment and that it was for this reason that the employees chose to terminate their own employment. Thus, there was a causal connection between the sexual harassment, and the resignation of these employees and this violates s.4(1)(b). Furthermore, in and of itself, the sexual harassment was found to create an abusive working environment, which is a condition of employment and which violates s.4(1)(g) of the Code.

The cases cited above involved situations in which the complainant either was dismissed or quit her employment because of the sexual harassment. It is important to clarify that neither of these two conditions need be met in order to prove a violation of s.4 of the Code. This point is made clear by the Board in *Torres*, which stated that a complainant need only show that the work environment was poisoned by the harassment, in order to establish a violation of the Code.

Alberta has also been faced with a similar situation. The complainant was subjected to sexual advances, but was not fired and did not quit. In this case (*Diesting v. Dollar Pizza*), the complainant was grabbed, kissed repeatedly, physically retained, and

subjected to shoulder massage and at one point, she was the victim of a near sexual assault. The Tribunal found that this did amount to sexual harassment and violated s.6(1)(b) of the Individual Rights Protection Act.

Only a single incident of prohibited conduct is necessary to constitute a violation, as long as the conduct constitutes a condition of employment. In *Mitchell*, the complainant was subjected to a single incident of harassment, but this resulted in tangible employment consequences (i.e. dismissal). In *Coutroubis*, both complainants were subject to a single incident of physical and verbal advances. The Board found that this created conditions of employment which violated s.4(1)(g) of the Code.

It has been more difficult to prove a case of sexual harassment when the offensive conduct does not involve a sexual advance.

Common to all of the above cited cases is that each of them involved some form of sexual advance, either physical or verbal, expressed or implied. As mentioned previously, a violation of the Code can also be found in the absence of an impact upon tangible employment opportunities when the harassment has the effect of poisoning the work environment. However, it has been more difficult to prove a case of sexual harassment when the offensive conduct does not involve a sexual advance. Cases in which the established conduct is insulting or offensive comments or jokes illustrate this point.

In *Aragona v. Elegant Lamp Co.*, the complainant alleged that she was persistently harassed with comments of a sexual nature. She claimed that she quit her job because she could not tolerate the harassment. The complainant described several comments of a sexual nature, several invitations to go out, and one incident when the respondent put his hands on her shoulders. Some of the comments indicated an expressed interest in sexual activity. This case involved two issues. One was whether the sexual advances did occur. The other was whether the established conduct, not amounting to a sexual advance, constituted sexual harassment.

Dealing with the first issue, the Board rejected the bulk of the allegations stating that she either overreacted to the comments, exaggerated them, or that they were unfounded. One allegation involved the respondent stating that he would like to go fishing with the complainant without his wife. The Board concluded that 'by any reasonable standard, Mrs. Aragona totally over-reacted to the comments about going fishing' (p. 1111). This belief was then used to reject most of the rest of her testimony as being 'exaggerated' and 'coloured.' Thus, the complainant could not establish that the sexual advances occurred.

Regarding the second issue, the Board found that there was, no doubt, considerable banter and teasing in the workplace, as well as comments with sexual connotations. However, the employees were willing participants. There was no independent evidence to suggest that Aragona objected to the comments, although she insisted that she did object. The Board concluded that Aragona was not singled out for any special treatment. The 'banter and teasing' could not reasonably be perceived to create a negative psychological and emotional work environment. Thus, the established conduct of sexual jokes was not sufficient to constitute sexual harassment.

A negative ruling in a sexual harassment case sometimes provides more information about the criteria used to determine the merits of a case. The Board in *Aragona* set out a general standard for proving abusive environment cases. It stated that in cases where the conduct is of a more subtle nature, the objective standard must be met. The issue is how the conduct may reasonably be perceived. It further argued that

The line of sexual harassment is crossed only where the conduct may be reasonably construed to create, as a condition of employment, a work environment which demands an unwarranted intrusion upon the employees' sexual dignity as a man or woman. (p. 1110)

As we saw in *Aragona*, banter, teasing and remarks with sexual connotations do not constitute sexual harassment, if it is participated in by the employees, and if the complainant does not object.

A similar case further illustrates these points. In *Watt v. Regional Municipality of Niagara*, the complainant alleged that the respondent directed two jokes at her, one of which was insulting, the other sexual. The Board in *Watt* provided a lengthy discussion of what constitutes sexual harassment, in cases of verbal insults. The Board relied on US criteria outlined in the 1984 *Harvard* article which was referred to in the previous section. In this article, it was argued that a successful abusive environment claim rests on the conclusion that the offensiveness of the environment has become a 'term or condition' of employment. In making this determination, two questions must be addressed:

When is harassment pervasive enough to constitute a violation? From whose viewpoint is the factual determination made: the objective one of a reasonable defendant, the objective one of a reasonable plaintiff, the subjective one of the reasonable defendant, or the subjective one of the reasonable plaintiff?

An isolated incident would not normally constitute a violation.

In addressing the first question, it was argued that an isolated incident would not normally constitute a violation. The following quotation from this article neatly presents this view:

In order to establish a *prima facie* case of abusive environment sexual harassment, a plaintiff should have to prove that more than one isolated incident of sexually offensive conduct has occurred. Unlike *quid pro quo* sexual harassment, abusive environments are characterized by multiple, though perhaps individually nonactionable, incidents of offensive conduct. The greater injury results not simply from a single offensive act or comment, but from the risk of repeated exposure to such behaviour. (p. 1458-59)

The basis for this contention is that courts have wanted to maintain what they see as fairness to the defendant. They have been reluctant to penalize conduct that was not known or intended to be wrongful. The determination of what constitutes 'more than an isolated incident' has been made by considering both the frequency and offensiveness of the

Men and women may have different perceptions as to what constitutes offensive behaviour.

conduct. The *Harvard* article argued that the threshold for determining whether there has been repeated exposure should vary inversely with the offensiveness of the incidents.

In addressing the second question, this article suggested that the standard of determining what constitutes offensive behaviour should be the *objective* one of the reasonable *victim*. The standard is that of the 'reasonable victim' (rather than the perpetrator) because of the belief that men and women may have different perceptions as to what constitutes offensive conduct. The standard is objective (i.e. would be based on the perceptions of the gender group rather than the victim herself) to maintain fairness to those respondents whose victims are 'unusually sensitive.' This seems to provide protection for the man who had no intention of harassing the victim, nor realized that his actions were offensive. However, the 'sensitive' woman also receives protection in that a man will be found in violation if he persists in his behaviour in spite of her expressed objections. In conclusion, this standard leads to the theoretical result that a man would not be held liable for conduct not obviously offensive to a reasonable woman unless the victim had clearly communicated her disapproval to him.

In *Watt*, McCamus drew upon the standards outlined in the *Harvard* article to determine whether the alleged conduct amounted to a 'term or condition' of employment. McCamus made these remarks in making his decision:

Insults or taunting of this kind must, through a combination of offensiveness and frequency, reach a level at which the victimized employee reasonably believes that continued exposure to such conduct is a condition of the job and it must also be the case, of course, that other employees are not subject to the same conditions. (p. 2467)

The Board concluded that although the two jokes were quite offensive, they appeared to be isolated incidents, rather than a part of a continuing pattern of harassment through the use of profane humour. As well, similar conduct was directed toward other employees, including males. This precluded a finding of sexual harassment. The Board conceded that if the harassment had been more frequent, or was objected to by the complainant, it would pass the threshold into the realm of sexual harassment.

Although the cases of *Aragona* and *Watt* had similar outcomes, the rationale behind the decisions were different. In *Aragona*, the Board found that the banter and teasing of a sexual nature did not constitute sexual harassment because it was participated in by the employees and the complainant did not object. Unlike *Watt*, there was no mention of a frequency/offensiveness standard, although it was implied that the established conduct lacked the requisite offensiveness. In *Watt*, the jokes were found to be offensive, and would have amounted to sexual harassment if they had been more frequent.

One case decided under the Canadian Human Rights Act, illustrates that a favourable finding can be awarded by tribunals, in the absence of sexual advances. In *Potapczyk v. MacBain*, the complainant alleged that she was subjected to a humiliating work environment. The respondent was said to have made sexual comments, and persistently subjected

the complainant and other female employees to unnecessary physical closeness. The Tribunal found that a reasonable person would have known that these actions were not welcome. Although the complainant never objected to the harassment, the respondent persisted in his behaviour after a male coworker said that his actions would get him into 'trouble.'

Conduct which does not involve a sexual advance, must be of a certain offensiveness and frequency, such that it constitutes a term or condition of employment.

It can be concluded from an examination of these cases decided under the old Ontario Human Rights Code that sexual advances, if they can be established, do constitute sexual harassment in violation of s.4. Conduct which does not involve a sexual advance, even if established, may not constitute a violation of the Code. The conduct must be of a certain offensiveness and frequency, as judged by a reasonable person, such that it constitutes a term or condition of employment, in order to constitute sexual harassment. In the absence of the requisite offensiveness and frequency, a favourable decision may be awarded if the complainant establishes that she objected to the offensive conduct.

Ontario boards of inquiry that have heard sexual harassment cases after the new provisions came into effect, have awarded decisions consistent with those rendered under the old provisions. The same types of conduct are considered to be a violation of the Code. Most of these cases involved a sexual advance of some form. In two cases, the complainants were fired for refusing the sexual advances of their employers (see *Bishop v. Hardy* and *Cuff v. Gypsy Restaurant*). In one case (*Sharp v. Seasons Restaurant*), the complainant quit because she could not tolerate the harassment. In two cases (*Morano v. Nuttall et al.* and *Hall v. Sonap Canada*), the complainants were forced to endure repeated physical advances and sexually suggestive comments. Neither complainant was fired nor quit her employment.

Like the boards of inquiry operating under the old provisions, each of these boards found that the conduct complained of did constitute sexual harassment under s.6 of the Ontario Human Rights Code. However, because s.6 and s.9(t) provide more specific provisions prohibiting harassment based on sex, the approach taken by some of these boards in making their decisions has been different, depending on which subsection of s.6 they were interpreting.

The approach to interpreting s.6(3)(b) is similar to that used when interpreting s.4(1)(b). The first case to interpret s.6(3)(b) of the new provisions was *Bishop v. Hardy* of 1986, a classic case of sexual harassment. The respondent requested sexual favours from the complainant, implying that this would be good for her job. When she refused, he fired her. The Board concluded that Hardy did request sexual favours from the complainant as a condition of keeping her job, which is in breach of s.6(3)(b).

The case of *Cuff v. Gypsy Restaurant*, in 1987, was the first to interpret section 6(2) of the Code:

6(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.

Because of the definition of harassment offered by s.9(f), the approach to interpreting this section is different from that used in interpreting s.4(1)(b). In order to interpret s.6(2), the Board in *Cuff* had to also interpret s.9(f), which gives the definition of 'harassment' as 'a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.' The Board dissected this definition, and interpreted each segment:

'course' involves some degree of repetition (i.e. more than one event); 'vexatious' means annoying or distressing (the question to be asked is whether the conduct was vexatious to the complainant); 'comment or conduct' implies that either form alone could give rise to harassment; and 'known or ought reasonably to be known to be unwelcome' imports an objective element into the definition of harassment [in *Cuff*, the Board asked from whose perspective the reasonableness requirement is to be framed, and suggested using the standard of the reasonable victim].

It has been difficult to succeed with a case not involving a sexual advance.

The Board then applied this definition to the facts of the case. Since the *Cuff* decision, several other cases have followed the example set by this Board (see *Sharp v. Seasons Restaurant*; *Morano v. Nuttall*; and *Hall v. Sonap Canada*).

In accordance with pre-amendment cases, it has been difficult to succeed with a case not involving a sexual advance. For example, in *Chu v. Persichilli*, the complainant had initially alleged a sexual advance, and several sexually demeaning comments, but the bulk of these accusations could not be established. The proven conduct included the use of off-colour language and one sexual remark which was directed at the complainant. The Board found that the use of this off-colour language did not, in itself, amount to harassment. The one proven sexually demeaning comment was a single incident, which was not sufficient to constitute a violation of s.6(2). This Board referred to the *Cuff* decision which outlined that more than one incident is required before s.6(2) is violated.

In summary, the types of conduct that are prohibited under the new provisions are consistent with those under the old provisions. The only difference is that, with the new Code, a more specific definition of harassment is provided, leading to a different framework to be used in the deliberation process.

Arbitration Cases

Arbitration decisions dealing with sexual harassment have been generally consistent with those heard under human rights legislation. However, there have been some arbitration cases which seem to go against the current state of sexual harassment case law. This is perhaps because the primary mandate of arbitrators is to determine whether the collective agreement has been violated, rather than to comply with human rights legislation.

In many, but not all arbitrations, reference has been made to Canadian human rights decisions. In many of these cases, their rulings have been consistent with human rights decisions. However, such reference does not guarantee that the decision will reflect the current thinking on sexual harassment. Sometimes the arbitrator will make reference to only one or two cases, which may give an incomplete picture of sexual harassment case law. Conversely, some arbitration cases which cite no human rights decisions, make rulings which are consistent with current human rights decisions. Arbitration cases involving some allegation of sexual harassment will now be discussed and compared, where appropriate, to Canadian human rights decisions.

Conduct involving some form of touching generally constitutes sexual harassment.

Allegations of offensive conduct which involved some form of touching, which may or may not involve a sexual advance, have generally been found to constitute sexual harassment. Three cases illustrate this point (*City of Nanticoke and CUPE, Local 246*; *Government of the Province of Alberta and AUPE*; and *Canada Post Corporation and CUPW*). It should be noted, however, that in some cases, conduct which is found to be disciplinable is not labelled sexual harassment, but may be labelled sexual misconduct or not labelled at all.

Two cases are similar in that they both involved grievances of unjust discharge for physical conduct towards a female employee. In *City of Nanticoke and CUPE, Local 246*, it was alleged that the grievor called a female employee profane names, touched and slapped her buttocks, tickled her ribs, punched her shoulder and shoved her. In *Government of the Province of Alberta and Alberta Union of Provincial Employees*, of 1982, the grievor was discharged for unwanted physical contact of a sexual nature.

In the former case, the arbitrator did not cite human rights cases, and made no determination of whether sexual harassment had occurred. However, this was implied when the arbitrator stated that 'young girls should not be expected to work while putting up with the adolescent graspings and comments which seem to frequently occur' (p. 68). The arbitrator stated that the grievor's conduct was serious and that discipline was in order. However, the arbitrator found no just cause to terminate the employee due to mitigating circumstances. It was found that much of this employee's conduct had been condoned and other male employees engaged in similar conduct without penalty. Thus, a more appropriate penalty in this case would have been a three day suspension. No award of compensation was granted at the time of this ruling.

In the latter case, the grievor was found guilty of sexual misconduct, which was defined as ranging from 'simply the use of profane or suggestive language to actual overt sexual advances' (p. 277). It was further concluded that 'females should not be put in situations where they have to submit to the unwanted advances of their coworkers' (p. 278). However, due to several mitigating circumstances, discharge was amended to six months suspension with loss of wages and benefits for that period. The arbitrator qualified this decision with these statements: 'In making these findings however we do not want to convey the impression that this board would downplay the significant gravity of this type of incident. Certainly we all agree that employees in the workforce must be

Canadian Human Rights Commission guidelines state that sexual harassment may involve a single incident or a series of incidents.

protected from sexual advances by fellow employees' (p. 280). Nevertheless, the amending of the penalty was found to be justified.

As in human rights decisions, a single incident of physical contact has been found to constitute sexual harassment. In *Canada Post Corporation and CUPW* of 1984, the arbitrator ruled that a single incident of unwanted intimate physical contact constituted a violation of the collective agreement, which prohibited harassment based on sex. The grievor submitted that on one occasion, her supervisor placed his hands on her hips and put bodily pressure on her buttocks. Statements issued by the Canadian Human Rights Commission in 1983 were used in the deliberations. Among other things, these guidelines state that sexual harassment may involve a single incident, or a series of incidents. It was concluded that the supervisor engaged in an act of unwelcome intimate physical contact with the grievor, since a reasonable person ought to have known it was unwelcome. The arbitrator concluded that the collective agreement had been violated and therefore, the grievance was sustained. She received \$100 damages for emotional turmoil.

Not all cases which involve some form of touching have been found to constitute sexual harassment. In *Government of the Province of Alberta and AUPE*, of 1983, the grievor claimed unjust discharge, in part, for conduct towards female employees. He was accused by four women of repeated and unwanted physical contact or closeness, and inappropriate language. Each woman found the conduct very distressing and attempted to avoid the grievor whenever possible.

The arbitrator dismissed outright some allegations of conduct which was said to have happened 1.5 years before the complaints were filed. The occasion of unnecessary physical closeness was deemed not to constitute sexual harassment, without any discussion of what does constitute harassment. Repeatedly placing his arm around one woman did not constitute sexual harassment, even when it was alleged that he touched her breast. It was found that he may have touched her breast, but this was not intentional or malicious. Repeatedly placing his arm around another woman, patting her buttocks and calling her 'love' and 'dear' was found to be inappropriate but did not constitute sexual harassment. In this case the discharge was found to be unjust and the grievor was reinstated with full pay.

The arbitrator, however did not take a rigorous approach to establishing whether the conduct constituted sexual harassment. No other cases were cited, no discussion of what constitutes sexual harassment was provided. It was not even established whether, in fact, the grievor did pat one employee's buttocks.

This case deviates from the current state of human rights sexual harassment case law. For example, in the case of *Potapczyk*, unnecessary physical closeness was found to violate the Canadian Human Rights Act. At the time that *Government of the Province of Alta.* was adjudicated (1983), however, there were no similar cases in the human rights case law. All of the cases involved some form of sexual advance. Thus, the arbitrator

It is more difficult to establish sexual harassment in arbitration cases involving conduct not amounting to a sexual advance.

would not have had much guidance in the case law to decide this case. However, one arbitration case (*City of Nanticoke*), of 1981, was similar in that the grievor engaged in touching which was not interpreted as a sexual advance. This was found to warrant discipline. Thus, had the arbitrator in this case examined *City of Nanticoke*, the grievor's conduct may have been found to constitute harassment.

As in human rights cases, it is more difficult to establish sexual harassment in arbitration cases involving conduct not amounting to a sexual advance. Two cases illustrate this point. In the first case (*Famz Foods Ltd. and CURE, Local 88*), the grievor claimed that he had been unjustly discharged for making a single crude and sexual gesture at a female employee. The arbitrator referred to the previously mentioned cases of *CUPE and OPEIU, City of Nanticoke and CUPE*, and *Bell v. The Flaming Steer Steakhouse*. The arbitrator then stated that each of these cases dealt with allegations of a pattern of behaviour and did not address the situation in this case — a single sexual gesture. The arbitrator concluded that this gesture did not form part of any pattern of conduct toward Ms. Uz, and that this single gesture fell far short of sexual harassment. It was conceded that sexual harassment may have been found had the employee been repeatedly exposed to this conduct and reasonably viewed it as unwelcome. It was concluded that discharge was not warranted for this gesture. However, it was also concluded that the conduct did warrant a severe disciplinary response. Thus, the grievor was reinstated without back pay, but with full seniority. The period between discharge and this decision was to be regarded as a suspension.

In the second case (*CUPE and OPEIU*), the grievor alleged that she was unjustly discharged for failure to report to work. She claimed that she had been exposed to a sexually harassing work environment and that this was a good reason for her absence. The alleged conduct involved sexually harassing behaviour in the form of sexual comments and crude jokes. She was also engaged in discussions of sexual matters such as rape, conduct which she insisted was unwelcome. The arbitrator outlined several of the early Ontario human rights cases. It was concluded that the rape discussion and crude jokes did not amount to sexual harassment. Furthermore, there was found to be no constant stream of gender-based insults and comments, creating a sexist and discriminatory environment. This position was clarified in the following statements:

While H's comments appear unpleasant to her and his opinions sexist, they are far from forming a pattern of insults to women similar to those in cases in which relief has been granted. (p. 400)

A standard of reasonableness is required in reviewing the verbal conduct, both as to the offensiveness and whether it creates a harassing and negative condition of work. What we find ... is that H may be somewhat crude and even insensitive, but this is not sexual harassment. (p. 401)

Therefore, there was no finding of sexual harassment, although the grievor was reinstated and was considered to have been on an absence without pay, a form of sick leave from the day she failed to report.

Another case (*Quality Inn Woodstock and UFCW, Local 175*) involved a series of insulting and sexual comments toward a female employee. This employee alleged that this conduct constituted sexual harassment. While the collective agreement provided no provision which prohibits sexual harassment, it did contain a prohibition against discrimination based on sex. The arbitrator agreed that based on the Supreme Court of Canada decision (*Janzen v. Platy Enterprises*), sexual harassment does amount to sex discrimination and proceeded to define sexual harassment with reference to *Janzen*. The comments were then analyzed to determine whether they could fit this definition. Several of the comments were found to possibly constitute sexual harassment. However, in the final analysis, the arbitrator did not determine whether the comments amounted to sexual harassment. Instead, the complaint was dismissed, because the comments were not found to amount to discrimination based on sex. Regarding the offensive conduct, the arbitrator stated that 'sexual or not, the evidence shows that both male and female employees were subjected to it' (p. 436). Hence, no discrimination was proved.

In this case, the arbitrator found no violation of the collective agreement. This finding was not based on a conclusion that the sexual comments did not amount to sexual harassment (because this was never determined), but that these comments did not amount to discrimination based on sex. This conclusion was formed because male employees were subject to similar remarks. This represents a marked departure from the state of sexual harassment case law both for human rights tribunals and arbitrators, as well as a new twist in the approach taken to resolve this issue. A critical analysis of this case will be provided in the next section.

The previous three cases involved either a gesture or verbal conduct which was not interpreted as a sexual advance. In the two cases which made the determination, the conduct was not found to amount to sexual harassment because it did not form part of a pattern of behaviour. One case has taken a different approach to allegations of this nature.

In *Canada Post Corporation and CUPW* of 1987, the grievance was for unjust dismissal for harassment of fellow employees. On one occasion, the grievor made two insulting comments of a sexual nature. The arbitrator referred to both the Canada Human Rights Act and the corporate policy, which prohibits harassment based on sex. It was found that the grievor's conduct went far beyond what one employee should be required to take from another. The comments were directly related to the employees gender and were likely to be unwelcome. It cannot be a term of employment to be degraded in this way. Even by the standards of that workplace, the conduct went too far. Therefore, sexual harassment was established.

In accordance with this finding, the arbitrator stated that the employer was entitled to take disciplinary action against the grievor. However, there were several mitigating circumstances which made discharge an inappropriate penalty. One of these factors is of note. It was found that a female employee did participate in some of the teasing and did not object until this incident. This would have led the grievor to think that the conduct

was not as serious as it actually was. In the final analysis, the arbitrator reinstated the grievor with full compensation.

Several cases attest to the need for a pattern of behaviour before sexual harassment is proved.

This case does not conform to the approach taken by both human rights tribunals and arbitrators. Several cases attest to the need for a pattern of behaviour before sexual harassment is proved. Interestingly, this case is strikingly similar to *Watt v. Regional Municipality of Niagara*, in which the complainant was subjected to two jokes of an insulting and sexual nature. In *Watt*, however, the Board found that while the conduct was offensive, it was not a part of a continuing pattern of verbal harassment, and therefore, did not constitute sexual harassment.

In summary, arbitration decisions involving allegations of sexual harassment have generally been consistent with those of the human rights tribunals. In general, it has been more difficult to prove a case which does not involve a sexual advance. Some rulings have deviated from the norm. In one case, repeated touching was not considered to be sexual harassment. In another, an isolated incident of sexual comments was found to be sexual harassment. In yet another, sex discrimination was not found to be present because male employees were also subjected to similar conduct.

What Constitutes Harassment Based on Sex?

The issue of whether verbal insults not of a sexual nature and similar types of offensive conduct amount to harassment based on sex has not been put before human rights tribunals until recently. This is perhaps because the majority of sexual harassment cases have involved a fairly clear, if not obvious connection between the offensive conduct and the sex of the complainant. Thus, it has not been necessary to determine whether or not the harassment was based on sex.

The majority of sexual harassment cases to date have involved either sexual advances, physical contact or unnecessary physical closeness. In these situations, the connection between the sex of the victim and the conduct has been obvious, in that such advances would not have been made to a male employee.

Few cases have been heard dealing with inappropriate comments alone. In these cases, the connection between the comments and the sex of the employee has been less obvious, however, the comments were still of a sexual nature or gender based. Thus, the connection of this conduct to the sex of the complainant was still fairly easy to draw.

A recent case was the first to raise and discuss the issue of whether insulting comments which were not obviously gender-related constituted sexual harassment.

A recent case (*Shaw v. Levac Supply*) was the first to specifically raise and discuss the issue of whether insulting comments which were not obviously gender-related constituted sexual harassment under the Ontario Human Rights Code. The Board of Inquiry also dealt with the issue of whether one aspect of the conduct was sexual and, therefore, amounted to sexual harassment.

The complainant alleged that the respondent (HR) continually harassed her for 14 years because she was a woman. The harassment consisted of continuous teasing and lampooning which made reference to her obesity, her sick leave while recovering from a broken ankle, and her children. The respondent argued that the teasing was not restricted to the complainant and was not harassment based on sex.

The Board of Inquiry stated that in order to find a violation of s.6(2), the conduct must amount to harassment as defined by s.9(f) and it must be based on sex. It was found that HR did harass the complainant. It remained to be established whether this harassment was based on sex.

The commission argued that the comments referring to the complainant's obesity were of a sexual nature, in that they demeaned her sexuality. The Board of Inquiry confirmed this contention and stated that:

to express or imply sexual unattractiveness is to make a comment of a sexual nature. It is verbal conduct of a sexual nature, and it is sexual harassment in the workplace if it is repetitive and has the effect of creating an offensive working environment. (p. 16,181)

Sexual harassment can be found even when the conduct is not of a sexual nature.

The Board concluded that the respondent's comments were sexual put-downs and were, therefore, of a sexual nature. The conduct was found to be sexual harassment, and therefore, harassment because of sex.

The Board of Inquiry found that, standing alone, the comments regarding her obesity amounted to sexual harassment. However, it was also determined whether, even if the comments were not sexual, these and other comments were harassment based on sex. The Board agreed with the commission that sexual harassment can be found even when the conduct is not of a sexual nature, as long as the harassing conduct was based on the sex of the complainant. In this case, there was little direct evidence that the complainant was harassed because she was a woman. The Board found, however, that this conclusion could be reached based on inference.

The Board of Inquiry concluded that the sexual put-downs directly appeared to be made to the complainant because she is a woman. Regarding the remarks about her children, the Board concluded that similar remarks would not likely have been made to a man. Furthermore, it was found that the teasing on this topic that was engaged in with other women was quite different from that with male coworkers. This added cumulative weight to the contention that he treated Shaw inappropriately because she was a woman. The Board concluded that on the balance of probabilities, the conduct was harassment because of sex. The conduct was consistent with this interpretation, and inconsistent with any of the other explanations put forward.

This case represents a significant step forward in expanding the scope of what constitutes sexual harassment. It established two things. One is that comments relating to a person's physical unattractiveness can be interpreted as sexual and hence, constitute both sexual harassment and harassment based on sex. The other is that even comments which are not sexual can be a violation of s.6(2), if they can be shown to be based on the sex of the complainant. In the absence of direct evidence, this allegation can be established by inference. In *Shaw*, harassment based on sex was inferred based on the belief that similar comments would not have been made to male employees, and that the teasing of female employees, including Shaw, was different from that directed at male employees.

Another recent case indirectly examined the issue of what constitutes harassment based on sex. In *Quality Inn Woodstock and UFCW, Local 175*, as mentioned in the previous section, the allegation was of sexual harassment based on a series of comments directed at the complainant. These comments were definitely of a sexual nature. Accordingly, the arbitrator found that some of them could possibly amount to sexual harassment according to the definition provided in *Janzen v. Platy Enterprises*. This definition stated that inappropriate comments fall within the definition of sexual harassment. However, the arbitrator also argued that not all sexual harassment is discriminatory. Consider these excerpts:

Janzen does not stand for the broad proposition that all sexual harassment is discrimination on the basis of sex... (p. 436)

...it is discrimination on the basis of sex if all the employees of one sex are in the criticized group and all the employees of the other sex are in the other group. (p. 436)

Harassing conduct consisting of pestering various employees to engage in sexual acts with a supervisor is classic sexual harassment: but it is surely not discrimination on the basis of sex if the propositions are distributed indiscriminately among employees of both sexes. (p. 436)

The Quality Inn case was a step backward for the issue of sexual harassment.

The arbitrator did not determine whether sexual harassment had occurred. It was merely concluded that there was no discrimination because of sex, because the inappropriate comments were neither exclusively made to, nor exclusively made about, female employees.

This case is a significant step backward for the issue of sexual harassment. By stating that all sexual harassment is not harassment based on sex, this case undermines the notion of sexual harassment that has evolved over the past decade. Previous cases have taken for granted that sexual harassment is harassment based on sex. This implicit belief was made explicit in *Shaw* when the Board stated that the broad definition of sexual harassment offered in *Janzen* should be applied to s.6(2) of the Code, in the context of determining the full meaning of harassment based on sex. Furthermore, the Board did find that comments of a sexual nature, which amounted to sexual harassment, also amounted to harassment based on sex. Thus, the position taken by the arbitrator in *Quality Inn* is in direct contradiction to that taken in the *Shaw* case. In that case and in other boards' decisions this issue was never questioned.

In these two cases, although they had different outcomes, somewhat similar approaches were taken in the determination of what constitutes harassment because of sex. In *Shaw*, harassment based on sex was established because it was believed that similar comments would not have been made to a male. In *Quality Inn*, no discrimination on the basis of sex was found because both male and female employees were found to be subjected to similar treatment.

However, *Quality Inn* can be criticized on the grounds that no determination was made as to what constitutes 'similar' treatment. The arbitrator did not consider the frequency or the offensiveness of the conduct which was directed at each of the sexes. It was merely argued that for discrimination to occur, 'all the employees of one sex must be in the criticized group and all the employees of the other sex are in the other group' (p. 436). This could be interpreted as meaning that any teasing of male employees would be considered 'similar' to teasing of female employees, precluding a finding of discrimination based on sex, in any workplace in which some form of teasing occurs.

The determination of what is 'similar' is, of course, to some extent subjective. It would not be unreasonable, however, to argue that many of the statements in *Quality Inn* would not have been stated to male employees. The majority of the comments were either of a sexual nature or gender based. Many of the comments were, in fact, quite vulgar. Indeed, some statements were found by the arbitrator to be inappropriate and possibly amounting to sexual harassment. It could be argued that it is unlikely that statements of the nature reported in this case would also have been made to male employees.

As for the frequency of the conduct, whether or not the comments directed at female employees were more frequent was not considered to be relevant. The arbitrator stated that

...sexual or not, the evidence shows that both male and female employees were subjected to it; it may be that the female employees were more often offended, but it was not mere degree or frequency of offense that prompted Dickson C.J.C. to find discrimination on the basis of sex in the *Janzen and Govereau* case. (p. 436)

However, it seems that if female employees are more frequently the subjects of offensive comments, then discrimination based on sex has occurred.

Contrast this approach with that taken in *Shaw*, in which it was found that the respondent did tease, joke and poke fun at the male employees. However, it was also found, regarding some comments, that they would not have been made to a male. Also, the treatment of the women by the respondent was found to be quite different from the 'badinage' engaged in with his male co-workers. Thus, in this case, while teasing was engaged in with both sexes, there was a difference in the treatment experienced by male and female employees. The standard that all of the criticized must be in one group, as outlined in *Quality Inn*, was not used.

The trend is towards an expanded scope of protection from offensive conduct for all employees.

To summarize, until recently Ontario human rights tribunals and Canadian arbitrators have not considered the issue of what constitutes harassment based on sex. A recent case has dealt with this issue, and found that harassment based on sex can be established by inference, when the conduct is not sexual in nature. Harassment based on sex was found even though male employees were subject to some form of banter. However, an arbitration case of the same year found that the sexually-oriented comments did not amount to harassment based on sex because male employees were also exposed to 'similar' treatment.

Emerging Trends in Arbitration

In making their decisions, human rights tribunals are constrained by the scope of the legislative provisions which they are called upon to interpret and apply. As *Shaw* pointed out, under the Ontario Human Rights Code, it is necessary to determine both whether the conduct was harassment and whether it was harassment because of sex, to violate s.6(2) of the Code. Thus, harassment which is not because of sex does not constitute a violation of s.6(2).

In contrast, the primary mandate of arbitrators is to determine whether a violation of the collective agreement has occurred. Thus, while arbitrators are required to consider human rights legislation in their deliberations, they are not bound by this constraint which faces human rights tribunals. Reflecting this, there has recently been a trend in arbitration towards an expanded scope of protection from offensive conduct for all employees. Two recent and notable arbitration cases have forwarded the notion that harassment in and of itself is disciplinable and can provide just cause for dismissal.

In the first case *Canada Post Corp. and CUPW* of 1987, the grievance was in part for unjust discharge for making two insulting comments of a sexual nature to a female employee. The arbitrator found that this case 'can loosely be described as sexual harassment, but which is of a type that would be offensive even without the overtones of discrimination on the basis of sex which are usually connected with that expression' (p. 28). In this case, although there were no grounds for discharge, the two comments were not found to be acceptable and did warrant discipline. The arbitrator also found that discipline is warranted even when offensive conduct is not on the basis of sex or any other ground. Consider this excerpt from the award:

Indeed, harassment may justify discipline even where the basis for the harassment is not a prohibited ground; if employees have a right to be protected from physical assaults by their fellow employees, they have an equivalent right to be protected from a course of verbal injury, whether that verbal injury has a basis which is a prohibited ground of discrimination, or has some other basis, or even has no basis at all. (p. 44)

In the second case, *ITT Cannon Canada and CAW* of 1991, the grievor alleged unjust discharge for harassment of fellow employees (especially women), making their work time miserable and disrupting the operations of the plant. The arbitrator made it clear in the report that this was not a case of sexual harassment. It was claimed that the grievor stared at several women intently, made sarcastic remarks and posted signs regarding sexual harassment on several machines operated by women (including that of the woman who made a complaint against him). Some women claimed they were scared of him and one woman refused a promotion to avoid working with him.

The arbitrator found that this conduct amounted to harassment as defined in s.9(f) of the Ontario Human Rights Code of 1981, not 'on a sexual basis but in the general sense of undermining the well being of another person with an intent to cause some sort of distress, either mentally or physically, for that person in the work place' (p. 381). The arbitrator referred to the *Canada Post Corp* award which stated that employees are not required to be subjected to verbal injury or that their working life be made miserable by an offensive attitude of another employee. It was found that the employer acted appropriately in its application of progressive discipline, that this discipline had no effect on the grievor's conduct and that no mitigating factors were sufficient to modify the penalty. Therefore, the employer had just cause to terminate the grievor's employment.

Arbitrators have expanded the scope of disciplinable behaviour in the workplace to include general harassment.

Both of these cases support the notion that arbitrators have expanded the scope of disciplinable behaviour in the workplace to include general harassment. In these two cases, the arbitrators were less concerned with the discriminatory aspects of the harassment, than they were with the effects of the harassment on the victims and the efficient operation of the workplace.

Can Conduct Not Directed at the Complainant Amount to Sexual Harassment?

In sexual harassment claims, where verbal or physical behaviour is directed at the victim, the line between acceptable and unacceptable behaviour has, in some cases, been difficult to draw. This line is even more obscure when the behaviour which is found to be offensive by a person, is not directed specifically at them. An example of this occurs when crude jokes or remarks are made by or traded between members of the workplace. This section will examine how Canadian tribunals have dealt with this aspect of sexual harassment case law.

The Code was not meant to be interpreted as inhibiting free speech.

Crude language or jokes, if not directed at the complainant, are generally not considered to be a violation, as explained by Chairperson Cumming in *Torres v. Royalty Kitchenware Ltd.*:

There are some employers (and employees) who simply are very crude and who speak in bad taste in discussing in the workplace their relationships with the opposite sex, or in telling sex 'jokes.' It is not the intent, or the function of the Board of Inquiry, to pass judgment upon such persons. It is only 'sexual harassment' that is unlawful conduct. (p. 861)

Similarly, Professor Ratushny, in *Aragona v. Elegant Lamp Company Ltd.*, argued that the Code was not meant to be interpreted as inhibiting free speech, nor should it prevent discussions of sexual matters in the workplace, or prohibit remarks which are crude or in bad taste.

While this is the general rule, tribunals do take other factors into account before deciding that this type of conduct does not amount to sexual harassment. This has been outlined by Aggarwal (1987):

the working environment of the employees; reciprocity by employees; expressed disapproval by the complainant.

In *Rack v. The Playgirl Cabaret*, a British Columbia case, the use of foul and crude language was not found to amount to sexual harassment because it was deemed to be 'ordinary banter.' This decision was due, in part, to the nature of the workplace, which was a night club consisting of bands and exotic dancers. Furthermore, the use of this language was reciprocated by other employees and was not disapproved of by the complainant. The Tribunal stated that, had she expressed offense, the objective standard of behaviour could have been applied to her and persistent use of the objectionable language might then constitute sexual harassment.

Crude language cases could be decided in the same way as other abusive environment cases

Similarly, in *Daigle v. Hunter*, a New Brunswick case, the Tribunal found that the respondent's conduct did not amount to sexual harassment. While some off-colour remarks were made in the complainant's presence, this was found to be a normal part of the work environment. Furthermore, Daigle did not object to this conduct and participated in conduct of a similar nature.

In both of these cases, it is clear that had the complainant expressed her disapproval in some way, the behaviour may have been found to be harassing. However, it is unclear which of the other factors and in what combination, if present, would lead to a favourable decision. What if crude language was not a normal aspect of the workplace and/or was not reciprocated? Would any of these situations constitute a harassing environment? The answer is not clear based on these two cases.

One Ontario decision (*Cuff v. Gypsy Restaurant*) has promoted the inclusion of crude language within the definition of sexual harassment. Referring to two prior cases, the Board stated:

...those decisions leave open the possibility that the injection of demeaning sexual stereotypes into the work environment by way of comments or jokes which are not directed to the complainant may be of such nature and degree as to constitute harassment... (p. 3981)

In *Cuff*, the Board argued that, while the comments were not directed to the complainant, this fact alone does not appear to remove them from outside the definition of harassment. Unfortunately, because the respondent was found to have engaged in other sexually harassing behaviour, the Board did not rule on the crude language aspect of this case. However, the statements made in this case suggest the potential that crude language cases could be decided in the same way as other abusive environment cases which do not involve a sexual advance.

To conclude, it seems that if 'sexual banter' is found to be a generally accepted aspect of the workplace and/or was reciprocated at times by the complainant, the complainant must establish that she expressed her disapproval of the conduct, before it will be found to constitute sexual harassment. However, one Ontario Board has argued that such conduct definitely could constitute sexual harassment, and that the merits of such a case might be assessed in the same manner as other abusive environment claims.

Conclusion

Canadian sexual harassment case law has been developing for the past decade, following the 1980 case of *Bell v. The Flaming Steer Steakhouse*. Over this period it has been made clear that sexual harassment is conduct that violates Canadian human rights legislation. Several conclusions emerge from this case law:

- Sexual harassment does amount to sex discrimination.
- The quality of the work environment is a term or condition of employment. When this environment is poisoned by sexual harassment, there occurs a violation of Canadian human rights legislation.
- Under the 1980 Ontario Human Rights Code, sexual harassment could be proved in two ways: 1) by establishing a causal connection between the conduct and tangible employment consequences (i.e. dismissal or resignation); or 2) by establishing that the conduct created an abusive working environment.
- Under the 1981 Ontario Human Rights Code, sexual harassment could be established in one of three ways: 1) if the conduct was found to be harassment because of sex as defined in s.9(f); or 2) if the complainant was subjected to an unwelcome sexual advance or solicitation by a person in a position to affect her employment opportunities; or 3) if the employee was subjected to a reprisal or threat of reprisal for the rejection of sexual advances by a person who could affect her employment opportunities.
- Sexual harassment has been relatively easy to establish when it consists of some form of sexual advance. When the conduct is insulting comments not amounting to an advance, it has been more difficult to prove. Such conduct must occur with a certain frequency and offensiveness such that it creates an abusive work environment.
- Remarks referring to a person's unattractiveness can be found to be sexual and, therefore, sexual harassment, if they create a negative work environment.
- Comments of a non-sexual nature can amount to sexual harassment if they were made based on the sex of the employee. In the absence of direct evidence, this can be established through inference, if male employees were not, or would not have been subjected to similar treatment.
- Exposure to offensive conduct such as crude language and jokes is not generally considered sexual harassment. Tribunals do, however, consider the nature of the workplace, reciprocity by employees and disapproval by the complainant, in making this determination.

Along with these specific conclusions regarding Canadian sexual harassment case law, three general conclusions can be drawn. First, there has been a consensus within the industrial relations community regarding several issues surrounding sexual harassment in the workplace. In *Bell*, Owen Shime set the course of thinking regarding two key issues.

He declared that sexual harassment did amount to sex discrimination and recognized the abusive work environment type of sexual harassment.

To date, the initial approaches to these two issues have been followed with little controversy. The decision that sexual harassment amounts to sex discrimination was challenged only once in the 1986 decision of *Janzen*, but this Court of Appeal decision was soon quashed by the Supreme Court of Canada in 1989. Similarly, the decision that conduct which creates a hostile or abusive environment for an employee amounts to sexual harassment has never been challenged in Canada.

There has also been general agreement by tribunals and arbitrators as to what conduct constitutes sexual harassment. There is general agreement that sexual advances, either verbal or physical, expressed or implied, constitute sexual harassment. There is also consensus that in the absence of sexual advances, offensive conduct can amount to sexual harassment if it has become a term or condition of employment. In the case of insulting comments, this finding is established when the conduct occurs with a certain degree of offensiveness and frequency, as established by a reasonable person. The criteria for assessing when insulting jokes or comments become a term or condition of employment were established in 1984 with *Watt*, and have since been confirmed in 1988 in *Chu v. Persichilli*. The 1981 amendments provide a definition of harassment as a *course* of comment or conduct, thus supporting the tribunals' decisions on this issue.

Arbitrators have been concerned more with whether harassment in general had occurred, rather than with whether the harassment was based on sex.

Second, the role of the arbitrator in the development of sexual harassment case law has been to follow the lead of human rights tribunals. Arbitrators have taken their cues from tribunals when confronted with a grievance involving sexual harassment. In most cases, the arbitrators have not discussed whether sexual harassment amounts to sex discrimination or the legitimacy of the abusive environment type of harassment. Instead, they have tended to refer to and accept the approaches taken by human rights tribunals on these issues. They have concentrated their efforts on the assessment of whether sexual harassment did occur in the individual cases before them. In making this determination, they have relied on statements from human rights commissions, human rights statutes and sexual harassment case law.

Arbitrators have, however, separated themselves from human rights tribunals by taking a slightly different approach to cases involving general harassment. In at least two recent cases, arbitrators have been concerned more with whether harassment in general had occurred, rather than with whether the harassment was based on sex. Human rights tribunals, in contrast, have been bound by the constraints of the statutes, which dictate that the harassment must be based on sex. The approach taken by arbitrators has provided an expanded scope of protection from harassment for all employees in the workplace.

Finally, it can be concluded that it is at the outer limits of sexual harassment case law where the greatest potential for development exists. Two issues can be said to reside at the forefront of discussion on sexual harassment. One is the question of how to determine whether non-sexual conduct is based on sex. Two recent cases dealt with this

issue. There seems to be agreement that harassing behaviour is based on sex if similar behaviour would not have been or was not directed to a male employee, but opinions seem to differ as to how to make this determination.

Tribunals have been unwilling to rule that the general use of offensive language constitutes sexual harassment.

The second issue is whether offensive conduct not directed at an employee is considered harassment. Currently, there is no protection from this workplace problem in Canada. Tribunals have been unwilling to rule that the general use of offensive language constitutes sexual harassment. They have found that because similar conduct was experienced by employees of both sexes, then harassment because of sex did not occur. It could be argued, however, that exposure to offensive language has an adverse impact on female employees and thus, even though the conduct may be similar, it may only be acceptable in the presence of males and unacceptable in the presence of females. Abella (1984) pointed out that, 'we now know that to treat everyone the same may be to offend the notion of equality' (p. 3). Perhaps males and females should not be expected to tolerate the same type of behaviour, if it has a differential negative impact on one sex. Therefore, even though great progress has been made over the past ten years in the regulation of sexual harassment in the workplace, the potential still exists to expand further the present boundaries of sexual harassment.

References

- Abella, R. 1984. *Report of the Commission on Equality in Employment*. Ottawa: Canadian Government Publishing Centre, Supply and Services Canada.
- Aggarwal, A.P. 1987. *Sexual Harassment in the Workplace*. Toronto: Butterworths.
- Aragona v. Elegant Lamp Co. Ltd.* (Ont. 1982), 3 CHRRD/1109 (Ratushny).
- Bell and Korczak v. The Flaming Steer Steakhouse Tavern Inc.* (Ont. 1980), 1 CHRR D/155 (Shime).
- Bishop v. Hardy* (Ont. 1986), 8 CHRR D/3868 (Soberman).
- Canada Cement Lafarge Ltd. and Energy & Chemical Workers Union, Local 219* (1986), 24 LAC (3d) 202.
- Canada Post Corporation and CUPW* (1984), 11 LAC (3d) 13.
- Canada Post Corporation and CUPW (Gibson)* (1987), 27 LAC (3d) 27.
- Chu v. Persichilli v. Snow City Cycle* (Ont. 1988) cited 19 CLLC at para. 17,005.
- City of Nanticoke and CUPE, Local 246* (1981), 29 LAC (2d) 64.
- Coutroubis v. Sklavos Printing* (Ont. 1981), 2 CHRR D/457 (Ratushny).
- Cox v. Jagbritte Inc.* (Ont. 1982), 3 CHRR D/609 (Cumming).
- Cuff v. Gypsy Restaurant* (Ont. 1987), 8 CHRR D/3972 (Bayefsky).
- CUPE and OPEIU* (1982), 4 LAC (3d) 385.
- Daigle v. Hunter* (N.B. 1989), 10 CHRR D/5670 (Ruben).
- Dhillon v. F.W. Woolworth Co.* (Ont. 1982), 3 CHRR D/743 (Cumming).
- Dhillon v. Treasury Board (Post Office Department)*, 80 CLLC para. 18,007 (Norman) (PSSRB).
- Diesting v. Dollar Pizza* (Alta. 1982), 3 CHRR D/898 (Carhe).
- Famz Foods Ltd. (Swiss Chalet) and Canadian Union of Restaurant Employees, Local 88* (1988), 33 LAC (3d) 435.
- Giouvanoudis v. Golden Fleece Restaurant* (Ont. 1984), 5 CHRR D/1967 (Cumming).
- Government of the Province of Alberta and Alberta Union of Provincial Employees* (1982), 5 LAC (3d) 268.

Government of the Province of Alberta and Alberta Union of Provincial Employees (1983), 10 LAC (3d) 179.

Graesser v. Porto (Ont. 1983), 4 CHRR D/1569 (Zemans). *Hall v. Sonap Canada* (Ont. 1988), 10 CHRR D/6126 (Plaut).

Harvard Law Review 97 (1984). 'Sexual harassment claims of abusive work environment under Title VII, 1149-1467.'

Howard and Broda v. Lemoignan (Alta. 1982), 3 CHRR D/1150 (Welsh). *Hughes v. Dollar Snack Bar* (Ont. 1982), 3 CHRR D/1014 (Kerr). *ITT Cannon Canada and CAW, Local 1090* (1991), 15 LAC (4th) 369.

Janzen v. Platy Enterprises (Can. 1989), 10 CHRR D/6205 (Dickson); appealed from (1986), 8 CHRR D/3831 (Man. CA.); rev'd (*sub nom. Janzen v. Pharos Restaurant*) (1986), 7 CHRR D/3309 (Man. Q.B.); affg (1984), 6 CHRR D/2735 (Man. Bd. Adj.).

MacKinnon, C. 1979. *Sexual Harassment of Working Women*. New Haven: University Press.

McGregor v. McGavin Foods Ltd. (B.C. 1990), 12 CHRR D/15 (Joe).

McPherson v. Mary's Donuts (Ont. 1982), 3 CHRR D/961 (Cumming).

Mitchell v. Traveller Inn Ltd. (Ont. 1981), 2 CHRR D/590 (Kerr).

Morano v. Nuttall (Ont. 1988) cited 19 at para. 17,008.

Olarte v. Commodore Business Machines Ltd. (Ont. 1983), 4 CHRR D/1705 (Cumming).

Pachouris v. St. Vito Italian Food (Ont. 1984), 5 CHRR D/1944 (Dunlop).

Palfy v. Ives (B.C. 1990), 12 CHRR D/483 (Joe).

Piazza v. Airport Taxicab (Malton) Association (Ont. 1985), 7 CHRR D/3196 (Zemans).

Potapczyk v. MacBain (Can. 1984), 5 CHRR D/2285 (Lederman).

Quality Inn (Altadore) Woodstock and United Food and Commercial Workers, Local 175 (1991), 14 LAC (4th) 414.

Rack v. The Playgirl Cabaret (B.C. 1985), 6 CHRR D/2857 (Verbrugge).

Robinson v. The Company Farm Ltd. (Ont. 1984), 5 CHRR D/2243 (Cumming).

Sharp v. Seasons Restaurant (Ont. 1987), 8 CHRR D/4133 (Springate).

Shaw v. Levac Supply Ltd. (1991), 22 CLLC para. 17,007 (Ont. HRC).

Simms v. Ford Motor Co. (unrep. 1970).

Torres v. Royalty Kitchenware Ltd. (Ont. 1982), 3 CHRR D/858 (Cumming).

Vinson v. Meritor Savings Bank, 106 S.Ct. 2399 (1986).

Watt v. Regional Municipality of Niagara (Ont. 1984), 5 CHRR D/2453 (McCamus).

Wells v. Murphy Motor Freight Lines (1980), 488 F. Supp. 381(D.C. Minn.)



Industrial Relations Centre (IRC)
Queen's University
Kingston, ON K7L 3N6
irc.queensu.ca