**WHAT OPTIONS ARE AVAILABLE FOR DEALING WITH WORKPLACE SEXUAL HARASSMENT?**

**Introduction**

Sexual Harassment, in both legislation and case law, refers to a pattern – or in some severe cases, a single incident – of offensive or unwelcome behaviour which relates to an aspect of the target’s sex, sexual orientation, gender identity or gender expression. The more serious an action and its impact on a target, the fewer events are required to constitute harassment. The perpetrator’s intent is not important if the behaviour is something that they knew or should have known would be unwelcome.Workplace Sexual Harassment (WSH) is sexual harassment in the workplace, in a work-related environment or between colleagues of unequal employment stature.

WSH is a serious issue. It can be obvious or subtle. A target of sexual harassment often feels confused and unsure of what they can do to address their situation. People can contact the Workplace Sexual Harassment Legal Clinic to ask if what they are experiencing is actually workplace sexual harassment, and, if it is, what can they do about it. This paper focuses on the legal avenues for addressing workplace sexual harassment. The options available will depend on the specifics of the individual employee situation.

WSH may be verbal, physical or visual. Verbal harassment includes sexualized language, sexual jokes and invitations to have sex. Physical harassment can range from hugs and light touches to sexual assault. Displaying or sharing sexualized images, like photos or videos, without the consent of those having to view them, or using rude gestures or leering could constitute visual sexual harassment.

WSH is prohibited in Canada under a variety of legislation; case law has served to define it and give it context. Human rights legislation and most collective agreements categorize it as a form of discrimination. It is defined as a workplace hazard under Yukon’s occupational health and safety legislation and the mental and physical results of WSH can be grounds for a workers’ compensation claim. Civil case law considers it a factor that can be considered when determining compensation in personal injury or employment related matters and criminal law has a statute (*Canadian Criminal Code* s. 264) specific to harassment. As well, some sexual harassment may also constitute a sexual assault and may give rise to an assault charge under the Criminal Code.

This paper summarizes the various legal options and remedies available to a target of WSH.

All Yukon employers are subject to occupational health and safety legislation as well as human rights legislation. The offices responsible for those statutes can offer support or advice to those dealing with WSH. Some targets of harassment who are union members may also be able to find appropriate resolution through their Collective Agreement. And depending upon the specific fact situation of the WSH, it may be appropriate to bring an action against the harasser in the courts.

Both the federal and Yukon governments have legislated in respect of WSH and the applicable statute depends upon whether a workplace is under federal or Yukon jurisdiction.

The federal government has jurisdiction over:

* the federal government itself;
* inter-jurisdictional or territorial businesses that are specifically subject to federal regulations, such as trucking companies, airlines, telecommunications, banks; and
* First Nation Governments.

For a complete list of Federally regulated workplaces and industries, see:

<https://www.canada.ca/en/services/jobs/workplace/federally-regulated-industries.html>

Matters that don’t fall under the authority of the federal government are under the authority of the Government of Yukon.

The ***Yukon*** ***Workplace Sexual Harassment Legal Clinic*** provides free and confidential legal information, advice and support in respect of your specific situation as well as each of these potential legal options.

Contact WSH@legalaid.yk.ca or call (867) 393-6219.

**Human Rights Legislation**

The *Yukon Human Rights Act* (YHRA) and the *Canadian Human Rights Act* (CHRA) prohibit discrimination on specific grounds in respect of certain identified areas. If an individual believes they have been discriminated against they can file a complaint under one of these *Acts*. Under both Acts, WSH is considered discrimination on the grounds of sex, sexual orientation, gender expression or gender identity and employment, including the hiring process, is an area in which this discrimination is prohibited.

The processes for making a WSH complaint under these *Acts* are almost identical although there is a very important difference in respect of the time period for making a complaint. The *CHRA* requires a complaint be filed within 12 months from the last incident of harassment providing the basis of the complaint while the *YHRA* time deadline is 18 months. Both *Acts* consider retaliation, as a separate incident of WSH which can affect whether a complaint falls inside or outside the time period.

A complaint is screened by a designated person in the YHRC or the CHRC who reviews the complaint to determine if it meets the test to proceed This test, sometimes referred to as the Moore Test (*Moore* v*. British Columbia (Education)*, 2012 SCC 61), has three basic elements:

1. *The person making a complaint has a characteristic that is protected by the Act*.

In the case of WSH complaints, the protected ground would be either sex, sexual orientation, gender or gender identity.

1. *The complainant experienced an adverse impact within an area identified by the legislation*.

In the case of WSH the identified area is employment, including all aspects from hiring to termination.

1. *The complainant’s protected characteristic was a factor in the adverse treatment they received*.

There must be a connection between the way the person was treated and their protected characteristic e.g. sex, sexual orientation, gender expression or gender identity.

If all of these elements are established, the Commission will then consider whether or not the person bringing the complaint (the Complainant) has exhausted “grievance or review procedures which are otherwise reasonably available or procedures provided for under another Act”. If another option exists e.g. through a Collective Agreement grievance procedure or an existing civil law suit the complaint may be rejected and the Complainant told to use one of those other processes instead.

If the complaint meets the test and it is not better dealt with in another forum, the human rights complaint is moved to the next stage: investigation. The YHRC or the CHRC assigns an investigator to the complaint. The investigator contacts the people or organizations that are the subject of the complaint (the Respondent) to obtain their perspective on the complaint. They interview the Complainant, the Respondent and any witnesses to the incidents. They may present the possibility of a mediated settlement.

The investigator will, depending on the results of their investigation, recommend the complaint be dismissed or that it proceeds to adjudication. That decision is made by the appointed members of the relevant human rights commission. A Panel of Adjudication (which can be one individual adjudicator or multiple adjudicators) will review the recommendation, examine the facts, consider the complaint, weigh the evidence provided by witnesses, scrutinize any documentary evidence (including electronic documents such as text messages), and apply the law. The Panel will then decide whether discrimination did or did not take place.

If the Panel finds that discrimination did take place it has the legal authority to make the employer take steps to correct the discrimination including paying the costs that the Complainant incurred as a result of the discrimination. The Panel can also impose requirements on the employer and determine reasonable compensation for the discrimination the Complainant experienced. If either the Complainant or the Respondent believes that the Panel’s decision has misapplied the relevant law, they can appeal the decision to either the Yukon Supreme Court (YHRC decision) or Federal Court (CHRC decision).

**Workers Compensation and Occupational Health and Safety Legislation**

Yukon *Workers Safety and Compensation Act (WSCA) – Occupational Health and Safety Regulations*

*WSCA* is an amalgamation of two previous pieces of legislation, the Workers’ Compensation Act and the Occupational Health and Safety Act. This legislation retains all of the regulations under the previous two Acts. The *Occupational Health and Safety* regulations require all Yukon employers to have a workplace safety policy, to provide training on the policy and to ensure that the workplace is free of hazards, including the risk of WSH.

The policy must set out a complaint process, including identifying to whom a complaint is made, and how an investigation into a complaint is conducted. Failure to have a policy is an offence under the legislation. This link will direct you to information about harassment prevention on the WSCA website: <https://www.wcb.yk.ca/web-0044/resources/web-0051>

The regulations clarify that harassment, including sexual harassment, is a workplace hazard. Any hazard that is brought to the attention of the employer and is not adequately addressed, can be reported to the Safety Branch of the Yukon Workers Safety and Compensation Board. They will investigate the employer’s actions in dealing with the hazard. The Safety Branch does not, however, investigate a specific complaint of WSH itself nor decide whether harassment actually took place.

Any reprisal or retaliation against a person by an employer because they complained about a workplace hazard is prohibited. A person who has been retaliated against has the right to complain of the reprisal incident. There are time limitations depending on the situation. Contact the Workplace Safety and Compensation Board at worksafe@gov.yk.ca or 867-667-5645 or toll free 800-661-0443.

If a person experiences WSH and, as a result has a physical or psychological injury, they can apply for compensation to the Workers’ Safety and Compensation Board, which provides coverage to almost all Yukon employers even those which are federal enterprises. An applicant for workers compensation benefits (the claimant) must identify their injury and the workplace event (hazard) that caused it. The applicant will be assessed by the Board’s medical professional to determine the nature and extent of their injury and its connection to the workplace hazard. In making this assessment the Board will consider whether harassment did take place and its impact upon the injury. If the application for compensation is accepted, the claimant usually receives a portion of their salary while they are unable to work as well as approved health care costs. In some cases, support for retraining may also be provided.

The compensation received under the WCSA does not address injury to dignity arising from discrimination. A person who has suffered WSH can also complain to the Yukon or the Canada Human Rights Commission however they cannot receive damages in respect of harm that has already been compensated under the Workers Safety and Compensation Act. In most situations they are also unable to bring a lawsuit against the employer – or another employee - unless the Workers Safety and Compensation Board approves the lawsuit.

*Federal Workers Compensation and Occupational Health and Safety Legislation*

*Canada Labour Code*

Part II of the *Canada Labour Code* defines harassment as “any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment.”

The *Work Place Harassment and Violence Prevention Regulations* under the Canada Labour Code requires an employer to have a workplace safety policy and procedures which address WSH. They also require that someone who is dealing with WSH, and who wishes to complain to a Canada Labour Board Health and Safety Officer, must first attempt to address the WSH through an internal resolution process at their place of employment. The internal resolution process includes an employer’s obligation to have a policy and procedures in place to address WSH. The policy would generally provide that the employer, upon receiving a complaint, must have a preliminary inquiry and attempt a negotiated resolution. If the matter is not successfully resolved at this stage, the complaint moves to the investigation stage. An investigator, who will have been identified in the policy, will investigate. The investigator may be an employee such as a Human Resources Officer or the employer may hire an outside investigator, depending on the circumstances. The investigator is tasked with providing a detailed report, including recommendations, to the employer. It is then the responsibility of the employer to take the steps necessary to ensure that the complainant and all employees will be safe in the workplace.

If the claimant is not happy with the outcome of the employer’s internal resolution process, a complaint may be brought to Labour Canada. Labour Canada’s authority is different than that of the Yukon’s Occupational Health and Safety Branch which does not address the specifics of any actual complaint of harassment. A complaint to Labour Canada must be made within 6 months of the most recent incident of harassment. A person files a Complaint registration with an Occupational Health and Safety Officer at the Labour Board. The email address for Yukon complaints is: NA-NWPR-OHS-SST-LS-NT-GD@labour-travail.gc.ca If the Officer at the Labour Board determines your complaint is warranted they can direct the employer to address the issues as required; direct the employer and employee to resolve the matter themselves; determine if a danger exists and issue direction to the employer specific to the danger.

*Government Employees Compensation Act*

The *Government Employees Compensation Act (GECA*) appliestofederal workers who are injured in the workplace. In Yukon, the federal government partners with the Alberta Workers Compensation Board to provide compensation to injured workers.

However, unlike Provincial and Territorial compensation *Acts*, the *GECA* gives injured workers the option to ***either*** apply for compensation or make a legal claim (pursue a lawsuit) against the person who caused the injury if the person that caused the injury is a third party, for example a contractor (not the federal government). Under *GECA* workers can apply for compensation for physical or psychological injury that resulted from WSH.

If an injured federal government employee applies for compensation under GECA, the department that employs the injured worker must provide the required information to the Federal Workers’ Compensation Service and the injured worker submits an application to the Alberta Compensation Board along with a physician’s Report completed by your health care provider. The Alberta Compensation Board decides whether or not to accept the application.

**Collective Agreements**

A Collective Agreement is a negotiated contract between an employer and a union representing employees. It sets out the employee’s and employer’s rights and responsibilities in respect of the employment relationship. Yukon workers who are members of a union are party to the working conditions and wages and benefits found in their specific Collective Agreement. Collective Agreements commonly incorporate anti-discrimination provisions including prohibitions on WSH.

A Collective Agreement includes a grievance (complaint) procedure to be followed when there is a violation of the Collective Agreement or a breach of a federal or territorial law incorporated into the Collective Agreement. WSH would be a violation of a Collective Agreement containing anti-discrimination provisions and could give rise to a grievance, which is brought by the union and not the person who has suffered harassment. The grievance would present the facts around the harassment, demand that the harassment be stopped and, in some cases, ask for damages so that the target of harassment’s physical, mental and monetary suffering is made good.

Once brought forward, the grievance will follow the procedures and processes set out in the Collective Agreement. This may include several stages of review and hearings. In some cases, the Collective Agreement may address harassment cases outside of the grievance process.

Decisions in respect of grievances can be appealed to a Labour Arbitrator but the decision as to whether to appeal, like the original decision to grieve is made by the Union and not by the person who has suffered harassment. Arbitration can result in requiring the employer to implement specific changes.

**The Courts**

Depending on the specific circumstances of a WSH matter, a person who has suffered WSH may pursue civil litigation, criminal charges and sometimes both.

*Civil Litigation*

There is little precedent in Canada for successfully pursuing civil litigation solely for damages arising from WSH; that is because WSH is a form of discrimination and courts across Canada have found that discrimination is a wrong that is properly addressed in the tribunals and processes established by legislation for that process, such as human rights commissions.

However, in a civil action brought for damages resulting from a person’s wrongdoing, e.g. an employer dismissing an employee without cause or an employee sexually assaulting a co-worker, WSH may have a substantial impact upon the amount of damages that a court may order. For example, in a wrongful dismissal law suit, the person who was wrongfully fired could bring suit for the loss of wages and benefits, the injury they suffered, the costs they incurred in seeking new employment as well as for general damages to compensate them for the pain and suffering, embarrassment, loss of reputation etc. that the wrongful dismissal caused. The fact that a litigant was sexually harassed in the workplace may increase the pain and suffering they incurred and the damages they are therefore able to be awarded.

Civil Litigation is procedurally complex and while there is no requirement that a litigant have legal counsel, the process is such that litigation is usually expensive, time consuming and complex. A law suit may be brought in the Yukon Supreme Court or in Small Claims Court, depending upon whether the total amount of damages (including specific and general damages) being sought is greater or less than $25,000. The procedural ease of the Small Claims Court is sometimes a factor in a litigant deciding to claim an amount less than $25,000.

*Criminal Court*

Sexual harassment and sexual assault are two types of sexual impropriety. Sexual harassment and sexual assault are not the same thing although there is overlap between the two as a sexual assault is a form of sexual harassment and a sexual assault in the workplace is WSH.

Sexual assault is an offence under the *Criminal Code* of Canada as is attempting a sexual assault or uttering threats to sexually assault. However, sexual assault is not specifically defined in the *Criminal Code*. The federal Department of Justice, which prosecutes sexual assaults in Yukon through the Public Prosecution Service of Canada (PPSC), has stated, in publications, that sexual assault is:

*. . .any unwanted sexual act done by one person to another or sexual activity without one person's consent or voluntary agreement. (Department of Justice, 2010).*

In *R*. v. *Chase*, [1987] 2 S.C.R. 293, McIntyre J., one of the judges hearing the case, referred back to the *Criminal Code’s* definition of assault which currently reads:

s. 265 (1) A person commits an assault when

* (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
* (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose;

And went on to find that a sexual assault is:

. . . an assault within any one of the definitions of that concept [set out in s. 265] which is committed in circumstances of a sexual nature so that the sexual integrity of the victim is violated.

Forcing a person into a sexual act or touching someone for a sexual purpose without their consent or when, through intoxication, they are unable to consent is clearly sexual assault as is continuing with sexual touching or activity when someone expresses by words or actions (including body language) that they do not want to continue.

However, other actions undertaken without consent may also constitute sexual assault including but not limited to:

* A non-violent kiss or hug or caress
* Pulling someone’s pants down or lifting someone’s shirt or skirt up
* an intentional but non-hostile touching of breasts or genitals even when clearly in the context of a joke

A person who has been touched without their consent, assaulted or threatened can go to the RCMP and file a formal complaint.

The RCMP may investigate the incident and, based on the investigation, the Public Prosecution Service of Canada may determine that charges should be laid against the perpetrator. Once criminal charges have been laid, the PPSC is responsible for prosecuting the matter. If the matter goes to trial, as opposed to the accused pleading guilty, a complainant is usually required to be available to provide evidence in court about the sexual assault.

In Yukon, a person who has been sexually assaulted can seek assistance and advice as to available options through the Sexualized Assault Response team (SART) which offers 24/7 support to victims. The support they provide includes assisting the victim through the legal process and ensuring that they are aware of their rights at each step. The SART can be contacted at 1-844-967-7275 at any time of the day or night. The Victim Services branch of the Yukon Department of Justice also sponsors a programme which provides a certain number of hours of independent legal advice to a victim of sexualized or intimate partner violence.

**Conclusion**

Any target of WSH will have legal options they may wish to pursue. The Workplace Sexual Harassment Legal Clinic can help with the first step in determining exactly what those options are. If you or someone you know has experienced what might be considered WSH feel free to reach out the Legal Clinic.

We offer free, confidential advice and we can help you determine if what you experienced is ‘legally’ WSH. We will explain your legal options specific to your experience. Harassment in the workplace can be very disorienting and confusing. Feel free to reach out by email, phone or just drop by.

**The Workplace Sexual Harassment Legal Clinic**

* In person: **#103 - 2131 Second Avenue**

**(Corner of 2nd Ave and Wood Street, across from the courthouse)**

* By email: **wsh@legalaid.yk.ca**
* By phone: **(867) 393-6219 or 393-6236**

Website: **yukonlegalaid.yk.ca**