

# FACT SHEET

## SEXUAL HARASSMENT



## INTRODUCTION

By its very nature, the issue of sexual harassment is a complex one, requiring sensitivity in its handling, and until all facts become known around an incident, a delicate balancing act is needed to make sure that the rights of both the alleged victim and alleged perpetrator are protected. HR practitioners will need to help manage any potential disruption in the workplace caused by an allegation of sexual harassment. This is because of the possible impacts on all concerned. For the victim, sexual harassment can be a very personal trauma. Working relationships may be affected as well as general morale and potential reputational risk for the employer. In addition to a formal disciplinary process, the victim can sue the employer for creating a “hostile environment”, and thus can sue both civilly and criminally. The stakes are high and this begs careful and judicious management of any claim of sexual harassment.

There are other obstacles too that present further challenges. Although incidents are treated confidentially, often some of the allegation or indeed the full extent of the allegation may be known to colleagues, who then tend to split into groups as both the victim and the perpetrator lobby their co-workers to support their side of events. In one case, the perpetrator went so far as to accuse the HR practitioner of unprofessional conduct as she left a file with the details of the matter in what he considered a public place and wanted to report her conduct to the CEO. The point is that allegations of sexual harassment can lead to very high emotions on the part of all concerned and these need to be anticipated and managed.

Definitive statistics are hard to come by, but it is sometimes asserted that if you ask a room full of professional women how many have experienced some form of sexual harassment over their career, most will put their hand up. Thus, this problem is highly likely to rear its head in the course of an HR practitioner’s work.

As this Fact Sheet will deal with later, it is highly recommended that the employer have a Sexual Harassment Policy and set of procedures to guide all role players through what can be a difficult journey. It will most likely be the HR practitioner who leads the parties through the requisite process. Thus a detailed knowledge of sexual harassment and its implications are prerequisites for HR practitioners.

### **“Why are women hesitant to take action against sexual harassment?”**

For the same reason as many rapes go unreported in South Africa,” says Ilse Terblanche, Cape Town psychologist. “Women fear that they will be caught in a cycle where the victim gets blamed for what happened or that they will not be taken seriously if disciplinary procedures were to follow. Many women are also hesitant to lay charges, because they are not sure exactly what constitutes sexual harassment. If there is a threat of job loss or a possible loss of privacy, women could also feel that they have a lot to lose by laying charges. But by staying in the situation and not putting an end to it, there is in a way, so much more to lose.”

[www.health24.com](http://www.health24.com)

# DEFINITION AND FORMS OF SEXUAL HARASSMENT

The following definition and descriptions of the forms of harassment come directly from the Department of Labour's Code of Good Practice in respect of sexual harassment (2005)<sup>1</sup>.

Sexual harassment is defined as unwanted conduct of a sexual nature. The word "unwanted" is used to distinguish the behavior from that which is both welcome and mutual. Sexual attention becomes sexual harassment if there are any or all of the following components:

- The behavior is persistent, although a single incident can constitute sexual harassment
- The recipient has made it clear that the behavior is considered offensive
- The perpetrator should have known that the behavior is regarded as unacceptable.

Forms of sexual harassment include the unwelcome physical, verbal or non-verbal conduct and include the following examples:

- Unwanted physical contact of a sexual nature, ranging from touching to sexual assault and rape. This includes a strip search by or in the presence of the opposite sex.
- Verbal forms, including unwelcome sexual innuendos, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults. Also in this category are unwelcome graphic comments about a person's body made in their presence or directed towards them; unwelcome and inappropriate enquiries about a person's sex life; and unwelcome whistling directed at a person or a group of persons.
- Non-verbal forms include unwelcome gestures, indecent exposure and the unwelcome display of sexually explicit pictures and objects.
- Quid pro quo harassment happens when a person undertakes or attempts to influence the processes of employment, promotion, training, discipline, dismissal, salary increments or other benefits of an employee or job applicant, in exchange for sexual favours.
- Sexual favouritism occurs when a person who is in a position of authority rewards only those who respond to his/her sexual advances, whilst other employees who do not submit to any sexual advances are denied promotions, merit ratings or salary increases.

The presence of power and authority that the one party may have over the other is a common component in sexual harassment cases. A power differential is normally present and it is less common to find that the victim and perpetrator have the same sphere of influence within the workplace. For example, there are many cases of sexual harassment in education settings as the teachers or lecturers wield so much power in respect of their students' experiences and outcomes within the school or tertiary setting.

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<sup>1</sup> [www.labour.gov.za/.../codes.../code-of-good-practice-on-handling-sexual-harassment-cases](http://www.labour.gov.za/.../codes.../code-of-good-practice-on-handling-sexual-harassment-cases)

# THE DIFFERENCE BETWEEN SEXUAL HARASSMENT AND FLIRTING

The ICAS Guide<sup>2</sup> gives a useful set of distinctions between sexual harassment and flirting based on the recipient’s experiences of the advances. This serves to starkly contrast the experiences and presents a quick and useful tool for distinguishing between sexual harassment and flirting.

## EXPERIENCE OF THE RECIPIENT

<b>HARASSMENT</b>	<b>FLIRTING</b>
Bad	Good
One-sided	Reciprocal
Unattractive	Attractive
Degrading	Complimentary
Powerless	In control
Power-based	Equitable
Unacceptable touching	Acceptable touching
Unwanted	Wanted
Illegal	Legal
Invading	Open
Humiliating	Flattering
Distressing	Pleasing

It can be seen from the above table that the distinction lies in the experience of the recipient, and therefore personalities, life histories, power dynamics and other complexities come into play. So an innocent intention to flirt could easily backfire.

<sup>2</sup> Sexual Harassment – An ICAS Guide to managing sexual harassment in the workplace.  
[http://www.icasassist.com/Resources/Sexual Harassment. pdf](http://www.icasassist.com/Resources/Sexual%20Harassment.pdf)

# EFFECTS OF SEXUAL HARASSMENT<sup>3</sup>

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## On the Victim

- Degraded, humiliated, ashamed
- Depression, anxiety, shock, denial
- Low self esteem
- Sexual problems

## On the Company

- Financial losses
- Lack of productivity
- Factionalism
- Tarnished image
- Resignations

## On the Perpetrator

- Image
- Social standing
- Loss of income
- Criminal record

## THE LEGAL CONTEXT

At the heart of an allegation of sexual harassment lies the notion of discrimination. Sexual harassment demonstrates one form of discrimination that may be played out within the workplace. Just this alone means that the legal framework impacting on sexual harassment is extensive, as many of the Acts and Codes involved have as their primary objective the elimination of any form of discrimination.

Added to this is the fact that sexual harassment in the workplace represents a form of misconduct, as well as an unfair labour practice in employment law. However, sexual harassment should not be considered only in the context of employment law.

Thus the following are the major constituents of the legal context:

- The Constitution of the Republic of South Africa, Act 108 of 1996
- The Protection from Harassment Act 17 of 2011
- The Labour Relations Act 66 of 1995
- The Employment Equity Act 55 of 1998
- The Code of Good Practice on Sexual Harassment (2005)

### The Constitution

Simply put, the Constitution ensures that everyone has a right to be treated with dignity and respect, and has the right to privacy. Sexual harassment goes directly against these tenets.

### The Protection from Harassment Act No. 17 2011

The above Act came into play on 27 April 2013. Amongst other things, it introduced two new components to the field of managing sexual harassment. For the first time the concept of

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<sup>3</sup> Promoting the Understanding and Addressing of Sexual Harassment in the South African Workplace. 2004. Cassim, H. Training Manual, The Renaissance Network, 2004



“Harassment” was extended to sexual harassment. The second component is that a protection order can now be obtained in respect of an employer or a co-worker. Previously, protection orders were limited to people with whom one had a domestic or family relationship.

The Act allows for a special process where an initial court order can be made without the knowledge of the alleged harasser, based only on the evidence of the complainant – as long as there is prima facie evidence that the person applying for the order is being or may be harassed. The court order then has the power to prohibit a person from engaging in harassment or committing any other act specified in the order.

In this Act, there is a wide ambit in terms of what constitutes harassment. Examples include loitering near buildings where the complainant lives, works or studies. It also includes electronic communication as well as the use of letters, packages and e-mails. In addition the concept of “harm” is broad and includes the dimensions of mental, psychological, physical and economic harm.

### **The Labour Relations Act 66 of 1995**

In terms of the Labour Relations Act, sexual harassment is a form of discrimination and is thus classified as an unfair labour practice. It also constitutes misconduct on the part of the perpetrator and would be covered under the Code of Good Practice for Dismissal. In addition, the Labour Relations Act encourages employers to have policies and procedures in place to deal with sexual harassment in the workplace. Finally, the Act promotes Codes of Good Practice and thus the Department of Labour published a Code of Good Practice on the handling of sexual harassment cases in 2005.

### **The Employment Equity Act 55 of 1998 (EEA)**

Section 6 (3) of the EEA recognizes “harassment” as a form of unfair discrimination and prohibits this behavior across a broad range of grounds, including race, colour, gender, sexual orientation, pregnancy, marital status, family responsibility, age, disability, political opinion, culture and language. Once the employer has been notified of such behaviour, it is required to consult all relevant parties and to take necessary steps to put an end to the alleged conduct. If the employer fails to do this, the employer will be deemed to have contravened the provisions of the EEA<sup>4</sup>.

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<sup>4</sup> Do you have a bully in the workplace? 2013. Viljoen, D. Forensics Ensignt, 11 June 2013

# DEALING WITH SEXUAL HARASSMENT

In a comprehensive report on allegations that sexual harassment was endemic at the University of the Witwatersrand, an independent committee found that<sup>5</sup>:

**“There is indeed a problem of sexual harassment at the University. It must be stated, however, that there is no one person or office responsible for this phenomenon. Our inquiry revealed that there is a deficient system, comprising well-meaning individuals who have no training and limited resources to address this systemic problem. Our recommendations similarly seek to address this.”**

This report should be required reading for every HR practitioner as it covers many aspects of a complex phenomenon and sets out practical recommendations which, although specifically written for the University, can be adapted by any organisation.

One of the findings of the report is that, although the university had a Sexual Harassment Policy, it was too vague and not supported by clearly operationalized procedures.

It is recommended that every employer have a Sexual Harassment Policy with a set of Procedures, guided by the Code of Good Practice on the Handling of Sexual Harassment. The objective of the Policy would be to prevent sexual harassment at the workplace as well guide parties in dealing with cases as they arise.

The Code of Good Practice sets out a Policy Statement as well as Procedures. These are copied directly from the Code as set out below.

## Policy statements

1. As a first step in expressing concern and commitment to dealing with the problem of sexual harassment, employers should issue a policy statement which should provide that:
  - a. All employees, job applicants and other persons who have dealings with the business, have the right to be treated with dignity.
  - b. Sexual harassment in the workplace will not be permitted or condoned.
  - c. Persons who have been subjected to sexual harassment in the workplace have a right to raise a grievance about it should it occur and appropriate action will be taken by the employer.

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<sup>5</sup> <http://blogs.wits.ac.za/vc/wp-content/uploads/sites/3/2013/10/Final-Report-Independent-Inquiry-into-Sexual-Harassment-at-Wits-University-3-September-2013.pdf>

2. Management should be placed under a positive duty to implement the policy and take disciplinary action against employees who do not comply with the policy.
3. A policy on sexual harassment should also explain the procedure which should be followed by employees who are victims of sexual harassment. The policy should also state that:
  - a. Allegations of sexual harassment will be dealt with seriously, expeditiously, sensitively and confidentially.
  - b. Employees will be protected against victimisation, retaliation for lodging grievances and from false accusations.
4. Policy statements on sexual harassment should be communicated effectively to all employees.

### Procedures

Employers should develop clear procedures to deal with sexual harassment. These procedures should ensure the resolution of problems in a sensitive, efficient and effective way.

1. Advice and Assistance

Sexual harassment is a sensitive issue and a victim may feel unable to approach the perpetrator, lodge a formal grievance or turn to colleagues for support. As far as is practicable employers should designate a person outside of line management whom victims may approach for confidential advice. Such a person:

  - a. could include persons employed by the company to perform inter alia such a function, a trade union representative or co-employee, or outside professionals;
  - b. should have the appropriate skills and experience or be properly trained and given adequate resources;
  - c. could be required to have counseling and relevant labour relations skills and be able to provide support and advice on a confidential basis.
2. Options to resolve a problem
  - a. Employees should be advised that there are two options to resolve a problem relating to sexual harassment. Either an attempt can be made to resolve the problem in an informal way or a formal procedure can be embarked upon.
  - b. The employee should be under no duress to accept one or the other option.
  - c. Informal procedure
    - i. It may be sufficient for the employee concerned to have an opportunity where she/he can explain to the person engaging in the unwanted conduct that the behaviour in question is not welcome, that it offends them or makes them uncomfortable, and that it interferes with their work.
    - ii. If the informal approach has not provided a satisfactory outcome, if the case is severe or if the conduct continues, it may be more appropriate to embark upon a formal procedure. Severe cases may include: sexual assault, rape, a strip search and quid pro quo harassment.



- d. Formal procedure  
Where a formal procedure has been chosen by the aggrieved, a formal procedure for resolving the grievance should be available and should:
    - i. Specify to whom the employee should lodge the grievance.
    - ii. Make reference to timeframes which allow the grievance to be dealt with expeditiously.
    - iii. Provide that if the case is not resolved satisfactorily, the issue can be dealt with in terms of the dispute procedures contained in item 7(7) of this code (see point e below).
3. Investigation and disciplinary action
- a. Care should be taken during any investigation of a grievance of sexual harassment that the aggrieved person is not disadvantaged, and that the position of other parties is not prejudiced if the grievance is found to be unwarranted.
  - b. The Code of Good Practice regulating dismissal contained in Schedule 8 of the Labour Relations Act, reinforces the provisions of Chapter VIII of the Act and provides that an employee may be dismissed for serious misconduct or repeated offences. Serious incidents of sexual harassment or continued harassment after warnings are dismissible offences.
  - c. In cases of persistent harassment or single incidents of serious misconduct, employers ought to follow the procedures set out in the Code of Practice contained in Schedule 8 of the Labour Relations Act.
  - d. The range of disciplinary sanctions to which employees will be liable should be clearly stated, and it should also be made clear that it will be a disciplinary offence to victimise or retaliate against an employee who in good faith lodges a grievance of sexual harassment.



4. Criminal and civil charges
- A victim of sexual assault has the right to press separate criminal and/or civil charges against an alleged perpetrator, and the legal rights of the victim are in no way limited by this code.

### 5. Dispute resolution

Should a complaint of alleged sexual harassment not be satisfactorily resolved by the internal procedures set out above, either party may within 30 days of the dispute having arisen, refer the matter to the CCMA for conciliation in accordance with the provisions of section 135 of the Labour Relations Act. Should the dispute remain unresolved, either party may refer the dispute to the Labour Court within 30 days of receipt of the certificate issued by the commissioner in terms of section 135(5) of the Act.

### 6. Confidentiality

- a. Employers and employees must ensure that grievances about sexual harassment are investigated and handled in a manner that ensures that the identities of the persons involved are kept confidential.
- b. In cases of sexual harassment, management, employees and the parties concerned must endeavour to ensure confidentiality in the disciplinary enquiry. Only appropriate members of management as well as the aggrieved person, representative, alleged perpetrator, witnesses and interpreter if required, must be present in the disciplinary enquiry.
- c. Employers are required to disclose to either party or to their representatives, such information as may be reasonably necessary to enable the parties to prepare for any proceedings in terms of this code.
- d. The relevant provisions of section 16 of the Labour Relations Act will apply to the disclosure of information in terms of this code.

### 7. Additional sick leave

Where an employee's existing sick leave entitlement has been exhausted, the employer should give due consideration to the granting of additional sick leave in cases of serious sexual harassment where the employee on medical advice requires trauma counseling.

### 8. Information and education

- a. The Department of Labour should ensure that copies of this code are accessible and available.
- b. Employers and employer organisations should include the issue of sexual harassment in their orientation, education and training programmes of employees.
- c. Trade Unions should include the issue of sexual harassment in their education and training programmes of shop stewards and employees.
- d. CCMA commissioners should receive specialized training to deal with sexual harassment.

## THE ROLE OF HR

As this Fact Sheet noted in its introduction, the issue of sexual harassment at the workplace is a complex one that requires very sensitive handling. One of the challenges for HR practitioners, and other role players in the workplace, is to create an environment conducive to the reporting of sexual harassment cases. This is a particular challenge in a country such as South Africa where the levels of sexual crime are so high and yet there is the under-reporting of crimes such as rape. In the workplace, there could be a fear that the reporting of sexual harassment incidents may be played down or not taken seriously. People may rationalize the behaviour and feel that they are making a mountain out of a molehill. Some may choose to tolerate the advances or request to be moved to another position.

**“It should also be noted that sexual harassment complaints were very rarely a once-off incident. There was usually a continuum of conduct that was initially uncomfortable, developing over time into a more invasive version of harassment. The slow progression of harmful behaviour means that many people do not identify themselves as victims of sexual harassment until there is an extreme incident of sexual harassment at which point many feel that they are to blame or somehow complicit.”**

Report of the Independent Inquiry into Sexual Harassment, University of the Witwatersrand

As can be seen from the content of this paper the role of the HR practitioner is onerous. While HR practitioners may not have the full responsibility for all of the tasks listed hereunder, they would play a role in each of them.

- Work on creating a culture of gender equality and inclusion and pay attention to the abuse of power within the organisation. This will help to prevent cases of sexual harassment.
- Ensure that the requisite policy and set of procedures are in place and are understood by employees.
- Handle complaints in a sensitive and confidential way.
- Ensure that in HR/IR there are both male and female representatives who can deal with complaints and that these people have the appropriate skills and knowledge to do this, and are given the required resources.
- Assist in managing disruptions and highly emotional behaviour.
- Have a detailed knowledge of the subject of sexual harassment from both a legal and workplace management perspectives.

- Organise a thorough investigation into a complaint and oversee the process going forward. Deal with the case as a disciplinary rather than a grievance if the evidence points to wrongdoing.
  - Organise sexual harassment awareness programmes in induction and other training opportunities.
  - Emphasize the ethical stance of the company towards sexual harassment – that all complaints will be investigated and that no sexual harassment will be tolerated.
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### CASE STUDY 1

A complaint was made to the HR Manager. She called in an independent outside person to chair an investigation into the matter. She and the outside person interviewed all concerned, including the victim, perpetrator and potential witnesses. It became evident, although the perpetrator denied any involvement, that a number of witnesses were able to corroborate the version of the victim. The Chairperson recommended that the serious nature of the allegations highlighted the need for charges to be put to the perpetrator and a disciplinary inquiry be held, as opposed to following the grievance procedure. Such an inquiry was held and the perpetrator was dismissed. There was a gaping power differential between the victim and the perpetrator as the latter monitored student apprentices and had a say in who remained on as employees within the company and who did not. This was based on sexual favours. Even though the victim had left the employment of the company she returned for the inquiry as she felt that strongly about the nature of the misconduct. Throughout the investigation, the HR Manager emphasized the “zero tolerance” attitude of the company towards sexual harassment.

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### CASE STUDY 2

A female sales representative resigned and then, through a lawyer, sued the employer for constructive dismissal due to severe sexual harassment by her sales manager and she claimed several millions Rands in damages. Upon investigation, the Sales Manager denied the accusations, swearing to the CEO that she was lying. The HR Manager (female) was suspicious, as the Sales Manager had given her the impression that he could be sexually predatory. She asked the IR Manager to interview all the female sales representatives and he discovered that the Sales Manager had harassed many of them in one way or another. The company reached an out of court settlement with the complainant. Unfortunately, the Sales Manager during this time was transferred to an independently managed joint venture and the CEO declined to pursue the matter with the joint venture, thus allowing the perpetrator to preserve his reputation and employment.

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**CASE STUDY 3**

An unhappy state of affairs existed in the administration section of a company, where a female manager reigned supreme and regularly harassed junior men in her department. They each kept quiet and suffered, not knowing that the same thing was happening to others around them. The department struggled to meet its productivity targets and employees' performance ratings were below average, as the manager took her revenge on subordinates who did not respond to her advances. The HR department, although they knew something was wrong, did not investigate further and the status quo remained for years.

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**RECOMMENDATIONS OF THE INDEPENDENT INQUIRY INTO ALLEGATIONS OF SEXUAL HARASSMENT AT THE UNIVERSITY OF THE WITWATERSRAND**

**PILLARS UNDERLYING THE RECOMMENDATIONS**

The Committee has identified three broad pillars underlying its recommendations ("Pillars").

**1. PREVENTION**

Entrenching measures, including training, student engagement and contractual undertakings, to prevent sexual harassment and to counter underlying root causes of sexual harassment, namely, unequal gender relations and socially accepted gender-based discrimination.

**2. INTERVENTION**

Intervening effectively as soon as there is an allegation of sexual harassment in a manner that is meaningful, effective and not overly legalistic.

**3. ACCOUNTABILITY**

Ensuring that all allegations of sexual harassment are addressed effectively, with the complainant and the alleged perpetrator constantly informed as to the status quo, leading to a system of fair, effective and robust consequences for sexual harassment.

## CONCLUSION

Complaints of sexual harassment arising out of employees working together will arise from time to time and HR practitioners must acquire the knowledge and skills to deal properly with the complaints. Sexual harassment can be a significant barrier in achieving employment equity and a culture of inclusion. An organisation which permits sexual harassment to occur cannot be a transformed workplace.

The SABPP's 2014 HR Management Application Standard requires that a sexual harassment policy be in place in all organisations, and HR practitioners must ensure that the policy takes into account the characteristics of the workplace and of employees. For example, a mining company must ensure that underground workers are protected under difficult physical conditions, while a hospital must think about conditions under which sexual harassment could jeopardise not only employees' right to dignity and respect, but also standards of patient care.

The power dynamics at play in workplaces can create and perpetrate either a climate which allows sexual harassment to occur or one in which it is explicitly discouraged and acted upon, should it occur. Positive role modelling and an active pursuit of positive values in the workplace can help to support a healthy climate.

This fact sheet has been prepared by Dr Angela Du Plessis, a labour and family mediator as well as an Organisational Development Practitioner who has taught, practised and written on ER since 1980. She was one of the first commissioners for the Commission for Conciliation, Mediation and Arbitration and assisted with the development of the SABPP 2014 Professional Practice Standards on dispute resolution and collective bargaining.

Suggestions and requests for specific fact sheet topics can be sent to [penny@sabpp.co.za](mailto:penny@sabpp.co.za).

# FACT SHEET

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<b>2013</b>		
February	1	<b>GAINING HR QUALIFICATIONS</b>
March	2	<b>ETHICS, FRAUD AND CORRUPTION</b>
April	3	<b>NATIONAL DEVELOPMENT PLAN</b>
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June	5	<b>EMPLOYMENT EQUITY</b>
July	6	<b>HR COMPETENCIES</b>
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February	1	<b>EMPLOYING FIRST-TIME JOB MARKET ENTRANTS</b>
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