

DISCRIMINATORY HARASSMENT IN THE WORKPLACE

A Policy Against Discriminatory Harassment in the Workplace



*Commission
des droits de la personne
et des droits de la jeunesse*

Québec

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INTRODUCTION

A healthy, harmonious working atmosphere cannot be established without the creation of a management policy to combat discriminatory harassment in the workplace. The policy must promote respect for workers' fundamental rights and equality rights, as guaranteed by the Québec *Charter of Human Rights and Freedoms*.

This brochure is aimed to support the policy drafting process. It presents the main provisions of the Québec Charter, outlines how the problem of harassment has been dealt with from a historical perspective, and summarizes jurisprudence in this area.

The second part of the brochure sets out a framework for a typical policy, with its main components and the conditions needed for successful implementation, for use by managers and union leaders.

THE PROVISIONS OF THE QUÉBEC CHARTER OF HUMAN RIGHTS AND FREEDOMS

The Charter is a fundamental law that governs all persons in Québec, including individuals in their private and public dealings with each other, groups and organizations, private businesses, public and private service providers, government administration (at the provincial, municipal and school board levels), and the Québec government and its agencies at all levels.

Among other things, the Charter prohibits harassment based on any of the grounds of unlawful discrimination: race, colour, sex, pregnancy, sexual orientation, civil status, age, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

The Charter also provides remedies in cases of discriminatory harassment. Section 49 of the Charter states as follows:

Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.

In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.

BASIS FOR A POLICY AGAINST DISCRIMINATORY HARASSMENT IN THE WORKPLACE

I HISTORICAL OVERVIEW OF MEANS TO DEAL WITH HARASSMENT

Workplace harassment was first highlighted as a problem when women began to enter the labour market in large numbers. They were the first to be subjected to widespread discrimination, and quickly decided to break the silence surrounding the often dramatic situations to which they were exposed by claiming protection against infringements of their rights. In the late 1970s, the Commission des droits de la personne¹ was asked to examine complaints in which women claimed that they were the victims of discrimination on grounds of sex, following incidents of sexual harassment in the workplace.

At the time, no specific provision of the *Charter of Human Rights and Freedoms* prohibited harassment, and the Commission launched a study to understand the extent of the problem and examine its legal implications. Among other things, it had to determine whether the alleged harassment constituted an infringement of rights guaranteed by the Charter.

Once it had completed its study², the Commission concluded, on the basis of jurisprudence from the United States – the only source at the time – that sexual harassment was a form of sex-based discrimination. Once this legal basis had been established, the Commission was better equipped to deal with the complaints it received.

At the same time, several women's groups, and especially union committees on the status of women, set to work to document incidents of harassment and take steps to combat harassment. This clearly required the passing of specific legal provisions.

The concerted actions of these groups and of the Commission led, in 1983, to the inclusion of section 10.1 in the Charter, to prohibit harassment on any of the unlawful grounds for discrimination listed in section 10. Although women were, and remain, the chief targets of harassment, other people are targeted because of their race, colour, sexual orientation, religion, age or disability.

Much more is known today about sexual harassment and the other forms of discriminatory harassment. Discriminatory harassment can cause enormous harm to the victim: psychological trauma, loss of self-esteem, feelings of guilt, stress, sickness-related absences and, in many cases, loss of employment.

For employers, harassment creates major organizational problems: absenteeism, low motivation and a decrease in productivity among the victims, or an abnormally high rate of staff turnover. In addition, monetary compensation may have to be paid if it can be shown that the employer has failed to maintain a harassment-free workplace.

II JURISPRUDENCE

Only a few of the many different judgements handed down by the courts in the area of discriminatory harassment will be mentioned here. It is important to note that the Québec Human Rights Tribunal, created in 1990, is a significant source of jurisprudence.

1. Definition of discriminatory harassment

In its 1989 decision *Janzen*³, the Supreme Court of Canada gave an explicit definition of sexual harassment in the workplace, establishing a strong legal basis in this area. In 1998, in the decision *Lippé*⁴ in connection with sexual harassment, the Human Rights Tribunal focused on the notion of a "hostile workplace" to decide whether sexist harassment was present. In 1999, a judgment made in the *Habachi*⁵ case established that a single grave act could constitute harassment.

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Other judgments have been made in cases of harassment based on other grounds of unlawful discrimination within the meaning of the Québec *Charter of Human Rights and Freedoms*. For example, in *Kafé*⁶, a teacher alleged harassment founded on race and in *Provigo*⁷, the harassment was founded on ethnic or national origin.

In Canada, some courts have begun to use an “intersectional” approach that recognizes discrimination based on multiple grounds, taking into account the social, economic and historic background to the alleged discriminatory actions. The *Olarte*⁸ case, in which the victims were women immigrants (grounds of sex and ethnic origin), is one example. Another is the *Crozier*⁹ case, in which the defendant had attempted to have sexual relations with the lesbian plaintiff while promising benefits for her if she gave in to his advances (grounds of sex and sexual orientation).

It was recognized, in these cases, that socially vulnerable victims are more deeply affected by harassment and that, as a result, it is important to seek remedies that take multiple or interconnected grounds into account. The “intersectional” framework for analysis provides for stiffer penalties, marking the start of a new era in the treatment of complaints of discriminatory harassment.

2. Legal responsibility of employers

In *Robichaud*¹⁰, a decision by the Supreme Court of Canada, it is clearly recognized that an employer can be found to be responsible for the acts committed by employees, if they are connected in any way to their employment.

This means that employers can be found responsible for acts committed by their employees in contravention of the *Charter of Human Rights and Freedoms*. Employers are also governed by other legislative provisions. In the 1984 case *Foisy*¹¹, the Québec Superior Court found that the employer had a responsibility under article 1053 of the Civil Code of Lower Canada (now article 1457 of the Civil Code of Québec, adopted in 1991).

Similarly, in *Béliveau Saint-Jacques*¹², the Supreme Court of Canada ruled that sick leave taken following an industrial accident caused by discriminatory harassment in the workplace was governed by the *Act respecting industrial accidents and occupational diseases* and that, in the case under consideration, the remedy had to be sought from the Commission de la santé et de la sécurité du travail (CSST). In *Beaudet*¹³, the Québec Court of Appeal issued a similar ruling.

It is important to remember that the *Charter of Human Rights and Freedoms* makes not only employers, but also unions, responsible for taking action against discriminatory harassment. In addition, several collective agreements contain clauses to the same effect.

III THE TIP OF THE ICEBERG

It should be noted that, on an ongoing basis, 15% to 20% of the complaints dealt with by the Commission involve allegations of discriminatory harassment, and that most of the harassment centres on the victim’s sex. On an annual basis, these cases sometimes amount to one-half of all the workplace discrimination cases. In addition, the complaints received by the Commission represent only the tip of the iceberg compared to the number of actual cases of workplace harassment.

The Commission’s mandate is to promote and uphold, by every appropriate measure, the principles enunciated in the Charter (section 71), and it pursues this objective in collaboration with its partners, including employers and unions.

The Commission considers that one of the most appropriate ways to fulfill its mandate in this area is to encourage and provide support for the establishment of policies against discriminatory harassment in the workplace. The introduction of a policy reflects the intention of the employers, institutions and unions concerned to assume their responsibilities by establishing effective dissuasive measures that are both preventive and corrective, in other words that include both assistance measures and remedies.

DRAFTING A POLICY AGAINST DISCRIMINATORY HARASSMENT IN THE WORKPLACE: THE MODEL PROPOSED BY THE COMMISSION

I BASIS FOR A POLICY AGAINST DISCRIMINATORY HARASSMENT

A policy against discriminatory harassment is based primarily on a series of principles: respect for individuals' physical and psychological integrity, respect for their dignity and privacy, the right of individuals to enjoy fair and reasonable working conditions that do not endanger their health or safety, and the right to be treated equally, without discrimination or harassment on grounds of sex, race, colour or any other unlawful ground of discrimination.

A policy can only be successfully implemented if the employer and union, if any, recognize that:

- the implementation of a policy against discriminatory harassment reflects a shared desire to cause discriminatory harassment to cease; and
- the policy reflects a desire to maintain a healthy workplace relationship and improve the management of human resources.

II STEPS IN THE DRAFTING AND IMPLEMENTATION OF A POLICY

- Give one or more senior managers responsibility (with input from the union, where applicable) for drafting a policy against discriminatory harassment.
- Once the first draft is completed, the employer must schedule a consultation period (management, union, status of women committee, health and safety committee) and ensure that the policy is formally accepted by the decision-making authorities. Given that discriminatory harassment is a problem with repercussions for labour relations, it is recommended that the union, and any other association within the business or institution, be involved in each step of the drafting and implementation process.
- Inform all personnel members of the employer's intention to combat discriminatory harassment, in accordance with the law, and of the responsibility given to a designated person or persons. Inform all personnel members of the contents of the policy, stating clearly the name and contact details of the person or persons responsible, and the procedure for filing a complaint.
- Training for the designated persons is a crucial step in the implementation process. No policy, however elaborate, can be effective if the people responsible for applying it have not received adequate training. It is important to make them aware of the issues, tell them what constitutes sexual, racial, homophobic or other forms of harassment, and discuss the other legal aspects. Management staff must also be properly informed of their specific responsibilities under the policy.
- It is also important to make all employees aware of the question of discriminatory harassment, taking into account the makeup of the work-force. Very few employers, whatever their size and regardless of the percentage of female employees, have never had to deal with sexual harassment. In some businesses, the emphasis should be placed on harassment based on race or ethnic or national background, if some employees belong to a minority group. A change in attitudes and behaviour patterns is the best way to eradicate discriminatory harassment.
- The criteria used to select the persons responsible for drafting and implementing the policy are extremely important. The designated person or persons must, in particular,
 - be aware of all aspects of harassment: victim behaviour, and the vulnerability of people from minority groups, such as women immigrants and people from visible minorities;
 - be sympathetic to the problems of people who experience harassment;
 - have listening skills;
 - be able to establish a strong aiding relationship;

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- have experience in the area of conflict resolution;
- be credible (concerning confidentiality issues, for example).
- The designated persons must also have the power to intervene. They must have clear responsibility for
 - raising awareness among all personnel members concerning the question of discriminatory harassment, and informing them of the policy;
 - training managers in their responsibilities;
 - meeting with people who need information or who are facing harassment;
 - advising and supporting people as required;
 - receiving complaints, conducting investigations, and referring cases to the harassment committee if necessary;
 - ensuring that corrective action is taken, as needed.
- The designated persons must be supported by the employer to allow them to receive the training they need, especially in the areas of legislation and jurisprudence.

III CONTENT OF THE POLICY AGAINST DISCRIMINATORY HARASSMENT

A policy normally states:

- the principles on which it is based;
- the employer's commitment with regard to discriminatory harassment;
- its objectives;
- a definition of discriminatory harassment;
- the areas in which it applies;
- the actions that may be taken;
- the process for dealing with complaints, and the related procedure;
- the other remedies available to victims.

1. Basic principles of the policy

This policy is based on the following premise:

Discriminatory harassment constitutes an infringement of human rights. As a result, the employer undertakes to take all the necessary steps to prevent infringements and, where necessary, to take corrective action.

This policy is based on the provisions of the *Charter of human rights and freedoms*, which stipulates as follows:

Section 10

Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

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Section 10.1

No one may harass a person on the basis of any ground mentioned in section 10.

Section 1

Every human being has a right to life, and to personal security, inviolability and freedom. He also possesses juridical personality.

Section 4

Every person has a right to the safeguard of his dignity, honour and reputation.

Section 5

Every person has a right to respect for his private life.

Section 16

No one may practise discrimination in respect of the hiring, apprenticeship, duration of the probationary period, vocational training, promotion, transfer, displacement, laying-off, suspension, dismissal or conditions of employment of a person or in the establishment of categories or classes of employment.

Section 46

Every person who works has a right, in accordance with the law, to fair and reasonable conditions of employment which have proper regard for his health, safety and physical well-being.

2. Employer's commitment with regard to discriminatory harassment

- The employer undertakes not to tolerate any form of harassment, whether sexual, racial or based on another unlawful ground for discrimination.
- The employer undertakes to protect any personnel member who is a victim of discriminatory harassment, using an internal process for assistance and remedy.
- The employer undertakes to protect all personnel members against discriminatory harassment exercised by outside persons and bodies, in connection with their employment.
- The employer undertakes not to disclose, to any person or body, the names of the individuals involved in a situation of discriminatory harassment, unless the information is required for the purposes of an investigation or the imposition of disciplinary measures.
- The employer undertakes to impose disciplinary measures on the person responsible for the harassment.
- In dealing with and resolving a problem or conflict connected with discriminatory harassment, the employer undertakes to ensure that the victim does not suffer any harm and is not subjected to reprisals.

3. Objectives of the policy

- Maintain a working climate free from discriminatory harassment, with the objective of protecting the physical and psychological integrity of the employees and safeguarding their dignity.
- Help raise awareness among, inform and train employees to prevent behaviour patterns that involve discriminatory harassment.
- Ensure that the victims of harassment receive the support they need, via assistance measures and remedies against discriminatory harassment.

4. Definition and manifestation of discriminatory harassment

DISCRIMINATORY HARASSMENT

Discriminatory harassment is a form of behaviour characterized by repeated and unsolicited words, actions or gestures of a vexatious or contemptuous nature, that could either undermine the dignity or the physical or psychological integrity of the individual or lead to unfavorable working conditions or dismissal, based on any of the grounds enumerated in article 10 of the *Charter of Human Rights and Freedoms*.

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Discriminatory harassment may be manifested in various ways. Racial, homophobic, sexist, or age-based or disability-based harassment may be manifested in the form of:

- caricatures, graffiti;
- jokes, practical jokes, innuendo, humiliating comments, offensive remarks;
- disagreeable comments, insults, abuse;
- isolation, hurtful omissions, contemptuous attitudes, rebuffs;
- dissuasion from applying for a position or promotion;
- vandalism or damage to the victim's property (car, clothing, work tools) or workplace (locker, desk, etc.);
- assault or other forms of aggression.

SEXUAL HARASSMENT

Sexual harassment is a form of behaviour characterized by repeated and unsolicited sexually connotative acts or gestures that could undermine the dignity or the physical or psychological integrity of the individual or lead to unfavorable working conditions or dismissal.

Behaviour that constitutes sexual harassment includes:

- unsolicited demands for sexual favours;
- touching;
- displays of degrading or pornographic material;
- remarks, insults, jokes, comments of a sexual nature;
- promises (promotion) based on the granting of sexual favours;
- intimidation, threats, reprisals, refusals to grant employment or promotion, dismissals and other types of harm inflicted for the refusal of sexual favours.

In general, discriminatory harassment and sexual harassment involve repeated acts. However, a single serious act that has negative consequences may constitute harassment.

5. Scope of policy

- The policy applies to relations between managers and employees, and to relations between employees.
- The policy also applies where personnel members are the victims of harassment exercised by people outside the business (customers, suppliers, sub-contractors, etc.).

6. Actions to combat harassment

- The employer will raise awareness among managers and employees about the issue of discriminatory harassment, and will provide adequate information.
- The employer will give the victims of discriminatory harassment access to an internal process for assistance and recourse, and ensure that managers and personnel members are informed of its existence.

7. Process for dealing with complaints, and related procedure

A) POSSIBLE PROCESSES

The employer chooses one of the following processes:

Process A: **a single individual** is made responsible for dealing with complaints;

Process B: **a committee made up of two or three people** is made responsible for dealing with complaints;

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Process C: **a committee made up of representatives of the employer and union** is made responsible for dealing with complaints.

All complaints will be dealt with in the strictest confidentiality.

B) PROCEDURE

- Any person who is a victim of harassment may file a complaint with the person, or a member of the committee, responsible for dealing with complaints. If necessary, immediate action will be taken to cause the harassment to cease. The person or committee responsible for dealing with complaints may conduct an inquiry, hear the parties and recommend that measures be taken by the administrative authority. The measures may include a requirement to provide a letter of apology or compensate for the injury caused, disciplinary measures such as an entry in a person's record, the transfer of the harasser but not the victim, suspension, dismissal, etc.
- At any meeting called to deal with the complaint, the persons involved may be accompanied by a person of their choice.
- The parties involved will be informed of the measures taken, within a specified time.
- Any person involved in a case of harassment who is not satisfied with the measures taken may appeal the case to the senior management (a person designated by the employer) within a specified time.

8. Other remedies available to victims

The existence of the internal process must not prevent a victim from using the grievance procedure in a unionized workplace, from filing a complaint with the Commission des droits de la personne et des droits de la jeunesse, or from filing a suit before a court of common law.

References

- Commission des droits de la personne. *Orientation de la Commission des droits de la personne face au harcèlement en milieu de travail*, 1987.
- Drapeau, Maurice. *Le harcèlement sexuel au travail*. Les Éditions Yvon Blais inc., 1991.

This book focuses on the following questions: types of sexual harassment, essential elements and means of proof; remedies available to victims; the responsibilities of the employer; and the right to the benefits of social legislation. The type of analysis used can be extended, by analogy, to harassment based on any unlawful ground, such as race, sex, etc.

- Many useful reference documents, in French, are listed in the "Harcèlement" section, accessible via the "Guides" tab on the Commission's website at www.cdpcj.qc.ca.

NOTES

¹ In 1995, the Commission des droits de la personne and the Commission de protection des droits de la jeunesse merged to form the "Commission des droits de la personne et des droits de la jeunesse".

² Commission des droits de la personne. *Le harcèlement fondé sur le sexe* (ou « *harcèlement sexuel* ») et la *Charte des droits et libertés de la personne*. Montréal, 1981, 16p.

³ Janzen v. Platy Entreprises Ltd, [1989] 1 S.C.R. 1252.

⁴ Commission des droits de la personne et des droits de la jeunesse (Lippé) c. Procureur général du Québec, [1998] R.J.Q. 3397 (T.D.P.Q.).

⁵ Habachi c. Commission des droits de la personne, [1999] R.J.Q. 2522.

⁶ Commission des droits de la personne et des droits de la jeunesse (Kafé) c. Commission scolaire des Deux-Montagnes, [1993] R.J.Q. 1297 (T.D.P.Q.).

⁷ Commission des droits de la personne et des droits de la jeunesse (Bahjt Muhtaseb) c. Provigo Distribution Inc., D.E.T. 2002T-1041.

⁸ Olarte c. De Filippis and Commodore Business Machines Ltd., (1983), 4 C.H.R.R. D/1705, (Commission d'enquête de l'Ontario).

⁹ Crozier c. Alsselstine (1994) 22 C.H.R.R. D/244 (Commission d'enquête de l'Ontario).

¹⁰ Robichaud v. Canada (Treasury Board), [1987] 2 S.C.R. 84.

¹¹ Foisy c. Bell Canada, 1984, C.s.1164.

¹² Béliveau Saint-Jacques v. Fédération des employés et employées des services publics inc. [1996] 2 S.C.R. 345.

¹³ C.D.P.D.J. (Beaudet) J.E. 2001, 213.

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SERVICES OFFERED BY THE COMMISSION

The Education and Cooperation division of the Commission des droits de la personne et des droits de la jeunesse offers help and support to organizations wishing to draft and implement a policy against discriminatory harassment.

SERVICES OFFERED :

- documentation;
- advice;
- policy analysis;
- training sessions, (for groups of at least 15 persons).

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