



Sexual Harassment in the Legal Profession – Creating a Safe Workplace Environment

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About #EnoughAlready:

- ▶ Coalition Partners include: the Saskatoon Industry Education Council; the SK Chamber of Commerce, Sexual Assault Services of SK; CREATE Justice, College of Law, the University of Saskatchewan, and the SK Human Rights Commission.
- ▶ Project Initiatives
- ▶ Enoughalreadysk.ca

Focus of our presentation:

- ▶ **Focus of our presentation**
- ▶ Building awareness of sexual harassment in the legal profession
- ▶ Best practices for being proactive in preventing sexual harassment in your workplace
- ▶ What to do if sexual harassment does occur in your workplace (employee experiencing, employer, bystander)
- ▶ Potential Liability of a Law Firm/Lawyer if sexual harassment complaints are not dealt with appropriately

What is sexual harassment?

- ▶ Sexual harassment can be:
 - ▶ Non-verbal
 - ▶ Looks, whistles, posting pornographic material, e-mails, text messages
 - ▶ Verbal
 - ▶ Jokes with sexual overtones, comments on physical appearance, questions about someone's private life, threats, unwelcome advances, requests for sexual favours
 - ▶ Physical
 - ▶ Rubbing, touching, sexual gestures
- ▶ FIRST POLLING QUESTION

Sexual Harassment in SK:

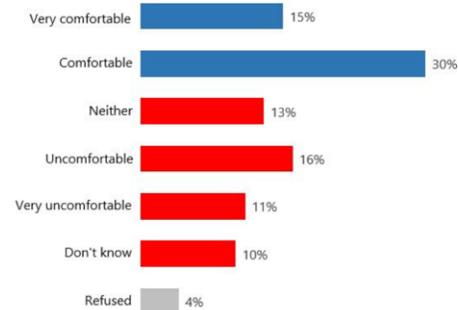
Beyond this, OHS reports that they are getting more than one sexual harassment complaint per day.

Workplace Sexual Harassment Prevention - Omnibus survey results (December 19th, 2019)

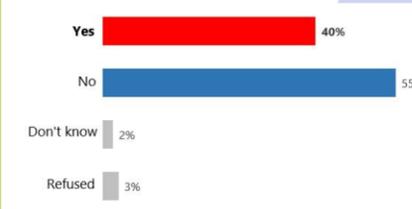
Overall Results

In total, **402 people living in Saskatchewan** responded to **six questions** about sexual harassment in the workplace. The purpose of this survey was to establish a baseline for future measurement of the Workplace Sexual Harassment Prevention Program and to help guide future program activity design. **Below are the main results:**

A combined **45%** reported that they were either **very comfortable** or **comfortable** with **recognizing sexual harassment in the workplace**, but a **combined 50%** were either **neutral**, **uncomfortable**, **very uncomfortable**, or **didn't know**.



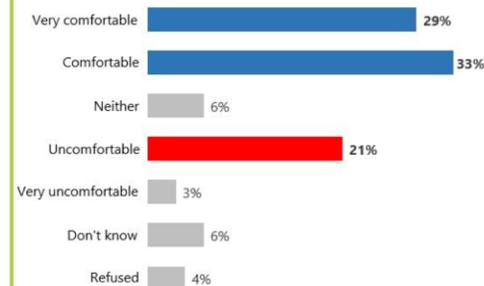
40% of respondents said that they, or someone they know, **have been a victim of workplace sexual harassment**.



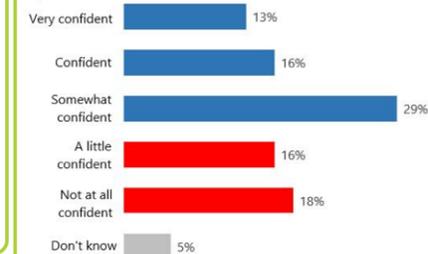
When asked what percentage of Saskatchewan employees they think experience sexual harassment in the workplace, the average response was...

34% of all Saskatchewan employees

The **majority** of respondents reported **feeling comfortable** with **reporting sexual harassment in their workplaces**, but **21% of respondents** reported that they were **uncomfortable**.



Many respondents were **at least somewhat confident** in the **legal steps to take** if they (or someone they knew) experienced sexual assault in the workplace. However, a **combined 34%** were **less confident** in the legal steps to take.



The Legal Profession

- ▶ Law Society of Saskatchewan *Articling Program Assessment Research Report*, September 5, 2019. This study was a joint project between AB, SK, and MB.
- ▶ About **one-third** of Saskatchewan students and new lawyers (32%) **report experiencing discrimination and harassment** during recruitment and/or articling.
- ▶ **Only 9%** of those who experienced discrimination and/or harassment **know about the resources available** to help deal with these issues.

SK Legal study results:

- ▶ Primary types of discrimination and harassment experienced:
 - ▶ Fewer articling positions offered to females and those educated abroad
 - ▶ Women being asked about marital status, plans for having children, and ability to balance balance familial obligations with work during recruitment interviews
 - ▶ Sexist jokes
 - ▶ Clients expressing preference for male lawyers
 - ▶ Unwillingness to hire young students due to their perceived naiveté and immaturity

International Bar Association (IBA) Report on Bullying and Harassment in Legal Workplaces

- ▶ In 2019, the International Bar Association (“IBA”) released its Report on bullying and harassment in legal workplaces: *Us Too? Bullying and Sexual Harassment in the Legal Profession*.⁶
- ▶ Surveyed 6,980 respondents from 135 countries
- ▶ 1 in 3 female respondents and 1 in 14 male respondents had been sexually harassed at work
- ▶ In 75% of sexual harassment cases the incident was never reported
- ▶ Reasons for not reporting include the status of the perpetrator and fear of repercussions.

Remedies

- ▶ Within the firm:
 - ▶ Partners;
 - ▶ Office manager/Human Resources;
 - ▶ OH&S Committee
- ▶ Law Society
- ▶ OH&S complaint
- ▶ Saskatchewan Human Rights Commission
- ▶ Constructive Dismissal claim
- ▶ Tort claim
- ▶ Grievance (in a unionized workplace)

Code of Professional Conduct:

- ▶ 6.3 Harassment and Discrimination
- ▶ 6.3-1 The principles of human rights law and related case law apply to the interpretation of this rule.
- ▶ 6.3-2 A term used in this rule that is defined in human rights legislation has the same meaning as in the legislation
- ▶ **6.3-3 A lawyer must not sexually harass any person.**
- ▶ **6.3-4** A lawyer must not engage in any other form of harassment of any person.
- ▶ **6.3-5** A lawyer must not discriminate against any person

Occupational Health & Safety

- ▶ *The Saskatchewan Employment Act, Part III:*
 - ▶ S. 3-8: *“Every employer shall...ensure, insofar as reasonably practicable, that the employer’s workers are not exposed to harassment with respect to any matter or circumstances arising out of the workers’ employment...”*
 - ▶ S. 3-10: *“Every worker while at work shall...refrain from causing or participating in the harassment of another worker...”*
 - ▶ S. 3-35: anti-retaliation section
- ▶ Investigations and complaints (under workplace policies and under Part III)
- ▶ Notices of Contravention/Compliance Undertakings (Div. 6)

The Saskatchewan Human Rights Code

- ▶ Sexual harassment is considered sex discrimination under *The Saskatchewan Human Rights Code, 2018* and other human rights legislation: *Janzen v Platy Enterprises Ltd* [1989] 1 S.C.R. 1252
- ▶ Discrimination on the basis of sex exists where there is a "practice or attitude which [has] the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic related to gender": *Janzen*
- ▶ A human rights complaint can proceed if the complainant can prove a link between the harassing conduct and their sex.

Constructive Dismissal

- ▶ An employee may claim they have been “constructively dismissed” (a.k.a. “quitting for cause”) if an employer
 - ▶ (a) harasses an employee (e.g. abuse by a manager), or
 - ▶ (b) enables or condones harassment in the workplace.
- ▶ Examples of (b) might include:
 - ▶ Choosing to hire an employee who had sexually harassed an existing employee at another workplace (*Colistro v. Tbaytel*, 2019 ONCA 197);
 - ▶ Not taking action where the employer knows sexual harassment is taking place;
 - ▶ Discouraging complainants from proceeding;
 - ▶ Not engaging in good faith investigation of complaints;
 - ▶ Disciplining the complainant(s) rather than the person(s) complained of.
- ▶ Can give rise to aggravated and/or punitive damages (e.g. *Boucher v Wal-Mart*, 2014 ONCA 419)

Tort

- ▶ There does not appear to be a free-standing “tort of harassment”:
Merrifield v Canada (Attorney-General), 2019 ONCA 205.
- ▶ Intentional Infliction of Mental Suffering is the tort most likely to be raised in sexual harassment cases.
 - ▶ (Battery may also be raised where there is non-consensual touching)
- ▶ Individuals may be sued as well as employer (potential vicarious liability)

Preventing Harassment

- Ensure that managers and supervisors set a good example
- Review your anti- harassment policy.
- Is this a highlighted piece of your orientation for new staff.
- Communicate the policy to employees in a variety of ways such as posting the policy, including it in memos and newsletters
- Letting employees know that penalties will follow sexual harassment, including written or verbal reprimands, suspension, and termination
- If there is a complaint, this must be investigated in good faith.
- Have clear lines of communication. Ensure staff know who to talk to to report.
- Review turnover of staff. Are you asking relevant questions in your exit interviews?



Engage the Enough Already Campaign

Responding to Sexual Harassment Complaints:

- ▶ Set up a confidential complaint process for people who have experienced sexual harassment
- ▶ Take all complaints seriously and investigate in good faith. Workers should never be discouraged from pursuing or resolving a complaint in accordance with the harassment policy.
- ▶ Protect the worker from reprisal and retaliation.

If you experience harassment:

- ▶ Record every detail you can, witnesses, time, date, location. Sign and date it.
- ▶ Report it to your supervisor/HR department and/or union.
- ▶ Everyone reacts in different ways after experiencing harassment. Be gentle on yourself.
- ▶ Listen Project: listen.plea.org/

If you observe sexual harassment:

- ▶ The first step is to assess the situation, is everyone safe?
- ▶ Your first priority is your safety and the second is the safety of the targeted person.
- ▶ Distract. Call the harasser away. Spill your coffee.
- ▶ Practice saying things that could make the conversation cease.

Additional Resources:

- ▶ Canadian Bar Association podcast on sexual harassment and sexual assault:
- ▶ <http://www.cba.org/Sections/Women-Lawyers/Resources/Resources/Not-just-a-bystander>
- ▶ Federation of Law Societies 2020 Consultation on Proposed Amendments to the Model Code.
- ▶ <https://flsc.ca/national-initiatives/model-code-of-professional-conduct/>

If you need assistance:

- ▶ SK Human Rights Commission
 - ▶ shrc@gov.sk.ca.
 - ▶ (306) 933-5952. 1-800-667-9249
- ▶ OHS Office
 - ▶ 1-800-567-7233
- ▶ Equity Office
 - ▶ lawsociety.sk.ca/for-lawyers-and-students/equity-office/
 - ▶ 1-866-444-4885 Email: equity@lawsociety.sk.ca
- ▶ Listen Project
 - ▶ listen.plea.org/

Thank you!

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