



RESPECTFUL WORKPLACE

Presented by Joel Deeley
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- This session will outline the legislative foundations underpinning respectful workplace policies, including relevant provisions in *The Human Rights Code*, *The Workplace Safety and Health Act* and *The Workplace Safety and Health Regulation*.
- We will go on to consider critical concepts and principles surrounding harassment, discrimination and the protected grounds under *The Human Rights Code*. We will also consider the distinction between “strong management” and harassment/discrimination.
- The general duties imposed on employers and employees to ensure that a workplace is safe and free from harassment will be explored, including the steps employers must take in developing workplace policies.
- We will conclude by considering procedural fairness requirements when a respectful workplace complaint is raised and an investigation is undertaken, and the Union’s role in offering representation throughout.

Legislative Obligations

- *The Workplace Safety and Health Act, RSM 1987, c W210 ("WSHA")*
- *Workplace Safety and Health Regulations, 217/2006 ("WSHR")*
 - The WSHA and the WSHR set out employer/employee obligations in respect of maintaining a safe workplace. This includes protecting employees against harassment and discrimination.
- *The Human Rights Code, SM 1987-88, c. 45 (the "Code")*
 - The Code protects against harassment (including sexual harassment) or discrimination based on certain protected characteristic.

Workplace Health and Safety Act

The objects and purposes of the *WHS Act* are to:

(a) to secure workers and self-employed persons from risks to their safety, health and welfare arising out of, or in connection with, activities in their workplaces; and

(b) to protect other persons from risks to their safety and health arising out of, or in connection with, activities in workplaces.

This includes protection from harassment and discrimination.



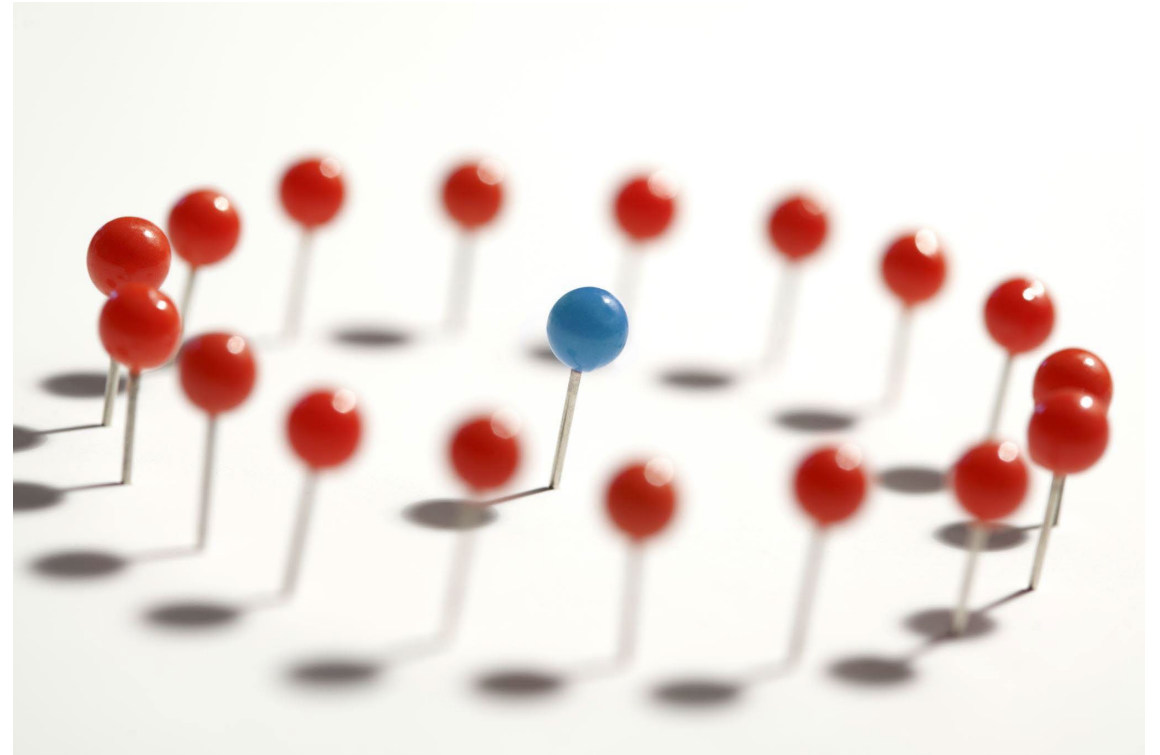
General Duties of Employers

4(1) Every employer shall in accordance with the objects and purposes of this Act

(a) ensure, so far **as is reasonably practicable**, the safety, health and welfare at work of all his workers; and

(b) comply with this Act and regulations

Further duties of employers are set in section 4(2)



What does this mean?

Section 4 prescribes general duties on employers under the *WHSA*. This includes ensuring “so far as reasonably practicable”, the safety, health and welfare of work of all their workers.

Under the *WHSA*, “health” means the condition of being sound in body, mind and spirit.

Therefore, the employer’s obligations extend to maintaining a harassment and discrimination free workplace.

Harassment: *Workplace Health and Safety Regulation*

"Harassment" means:

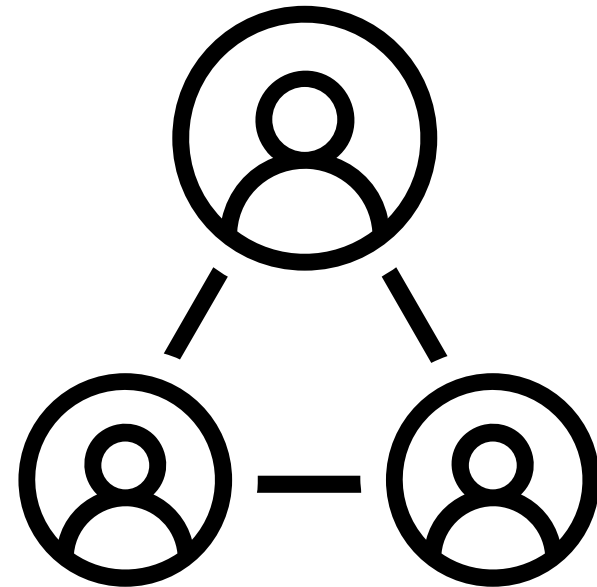
(a) objectionable conduct that creates a risk to the health of a worker; or

(b) severe conduct that adversely affects a worker's psychological or physical well-being

"Harassment" is interpreted as:

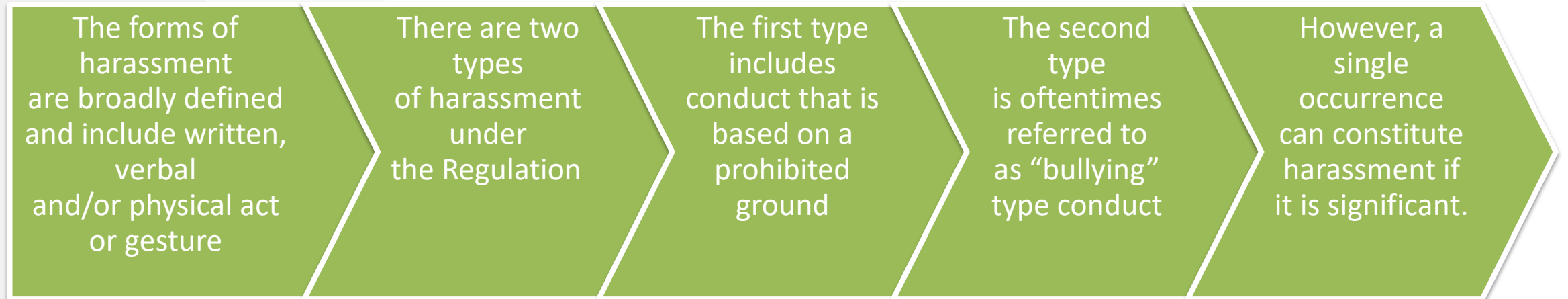
(a) objectionable, if it is based on race, creed, religion, colour, sex, sexual orientation, gender-determined characteristics, marital status, family status, source of income, political belief, political association, political activity, disability, physical size or weight, age, nationality, ancestry or place of origin; or

(b) severe, if it could reasonably cause a worker to be humiliated or intimidated and is repeated, or in the case of a single occurrence, has a lasting, harmful effect on a worker.





What does this mean?



St. Boniface General Hospital and MAHCP (08-028), Re, **2010 CarswellMan 855**

The reasonable conduct of an employer/supervisor in respect of the management of workers is not harassment.

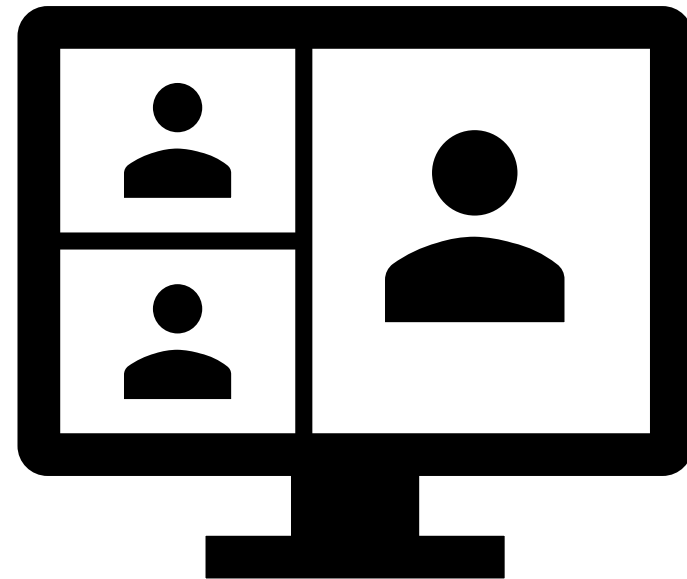
16 **It is well established in arbitral law that the employer's supervisory role over employees must be considered in assessing whether conduct by a manager amounts to harassment. A supervisor's bona fide action may trigger a confrontation with the grievor but the interaction retains a legitimate workplace purpose.** This principle applies whether or not a managerial exception is expressly included in the relevant collective agreement clause. Workplace tensions and personality clashes do occur between supervisors and bargaining unit employees [citations omitted].

17 Moreover, as stated in *Cara Operations*, supra, "Not every supervisor is a 'good' one, but not all 'bad' supervisors are abusive ..." (at para. 24). **While managers exhibit many different styles and their performance may fall below optimal at times, or often, this per se does not establish harassment:** *Surrey Now*, supra, at para. 110-122. On the other hand, if management is "asserting and demonstrating power and control," rather than acting in good faith, then an exercise of employer authority may constitute harassment: *Re Beachcomber Hot Tubs Inc. and Teamsters, Local 31* (2008), 176 L.A.C. (4th) 1 (Dorsey) at para. 215.

Harassment Prevention Policies

Under the *WSHR*, an Employer has a variety of duties that include the development and enforcement of harassment prevention policies. This includes:

- The policy must be developed in consultation with the committee or the representative or the workers.
- The policy must provide information on how to make a complaint, how a harassment complaint will be investigated, and how the complainant and alleged harasser will be informed of the results.
- An employer must also post a copy of the policy in a conspicuous place in the workplace.



The Harassment prevention policy must include the following language:

- (a) every worker is entitled to work free of harassment;
- (b) the employer must ensure, so far as is reasonably practicable, that no worker is subjected to harassment in the workplace;
- (c) the employer will take corrective action respecting any person under the employer's direction who subjects a worker to harassment;
- (d) the employer will not disclose the name of a complainant or an alleged harasser or the circumstances related to the complaint to any person except where disclosure is
 - (i) necessary to investigate the complaint or take corrective action with respect to the complaint, or
 - (ii) required by law;
- (e) a worker has the right to file a complaint with the Manitoba Human Rights Commission;
- (f) the employer's harassment prevention policy is not intended to discourage or prevent the complainant from exercising any other legal rights pursuant to any other law.

Discrimination under *The Human Rights Code*

Discrimination under the *Code* is treating a person or group differently, to their disadvantage and without reasonable cause, on the basis of a group characteristic.

Failure to reasonably accommodate a special need that is based on a protected characteristic, such as disability or religion, is also discriminatory.

The *Code* prohibits unreasonable discrimination in all aspects of employment.

Harassment based on a protected characteristic is prohibited as well.



Protected Grounds under the *Code*



- ancestry, including colour and perceived race;
- nationality or national origin;
- ethnic background or origin;
- religion or creed, or religious belief, religious association or religious activity;
- age;
- sex, including sex-determined characteristics or circumstances, such as pregnancy;
- gender identity;
- sexual orientation;
- marital or family status;
- source of income;
- political belief, political association or political activity;
- physical or mental disability;
- social disadvantage.

Employment and the *Code*

The *Code* prohibits unreasonable discrimination in any aspect of employment unless the discrimination is based upon *bona fide* and reasonable requirements or qualifications for the employment or occupation.

“Any aspect” includes:

- (a) the opportunity to participate, or continue to participate, in the employment or occupation;
- (b) the customs, practices and conditions of the employment or occupation;
- (c) training, advancement or promotion;
- (d) seniority;
- (e) any form of remuneration or other compensation received directly or indirectly in respect of the employment or occupation, including salary, commissions, vacation pay, termination wages, bonuses, reasonable value for board, rent, housing and lodging, payments in kind, and employer contributions to pension funds or plans, long-term disability plans and health insurance plans; and
- (f) any other benefit, term or condition of the employment or occupation.

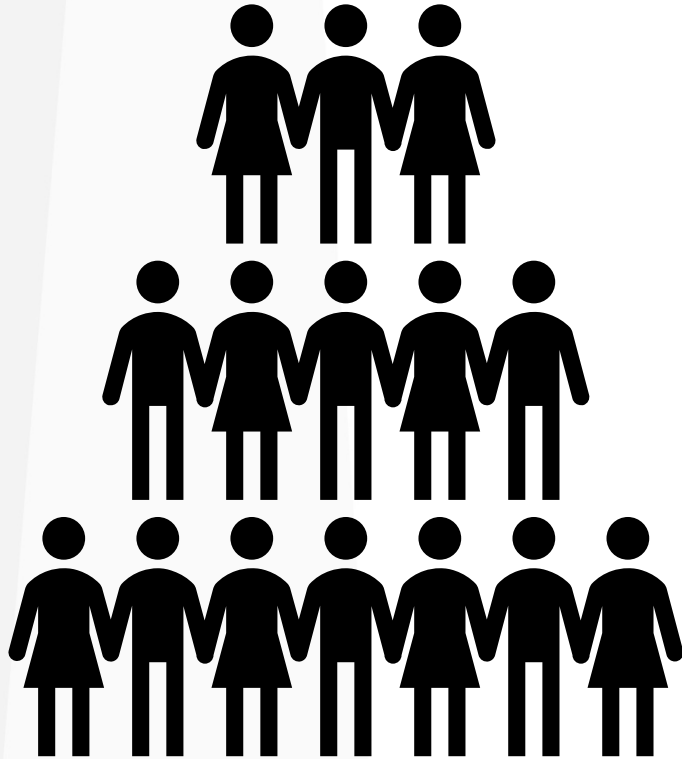
Human Right Protection from Harassment

Employers are responsible for providing a harassment free work environment. If an employer is aware of a concern of harassment, they must take reasonable steps to investigate the concern and stop the harassment.

In the *Code*, harassment is defined as follows:

- (a) a course of abusive and unwelcome conduct or comment undertaken or made on the basis of any characteristic referred to in subsection 9(2); or
- (b) a series of objectionable and unwelcome sexual solicitations or advances; or
- (c) a sexual solicitation or advance made by a person who is in a position to confer any benefit on, or deny any benefit to, the recipient of the solicitation or advance, if the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
- (d) a reprisal or threat of reprisal for rejecting a sexual solicitation or advance.

Human Right Protection from Sexual Harassment



Under the Code Sexual harassment is harassment based on sex. It is a prohibited form of sex discrimination and employer's have a duty to create a harassment-free workplace. They must take reasonable steps to investigate concerns and stop the harassment.

Sexual harassment is defined in three ways:

1. Unwanted/unwelcome sexual solicitation;
2. Sexual solicitation made by person who can confer or a deny a benefit if they ought to reasonably know the advance would be unwelcome;
3. A reprisal or threat for rejecting a sexual advance.

Definition of Sexual Harassment

"Sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment... When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being."

SCC in *Janzen v Platy Enterprises Ltd.*, 59 DLR (4th) 352.

Manitoba Lotteries Corp and MGEU (MacAuley) (Re), [2002] MGAD No 70

Harassment, including sexual harassment can be grounds for termination.

The authorities hold that discharge for harassment should be upheld where the conduct is serious and there is no reasonable prospect of restoring a safe and healthy work environment involving the grievor.

Often it is said that the grievor "doesn't get it". In such instances, even a long and clear service record will not save the grievor.

On the other hand, where the offending conduct is more moderated and the grievor is a good candidate for reform, a suspension may be substituted, even without long and clear service.

Emslie v. Doholco Holdings Ltd. O/A The UPS Store

#425

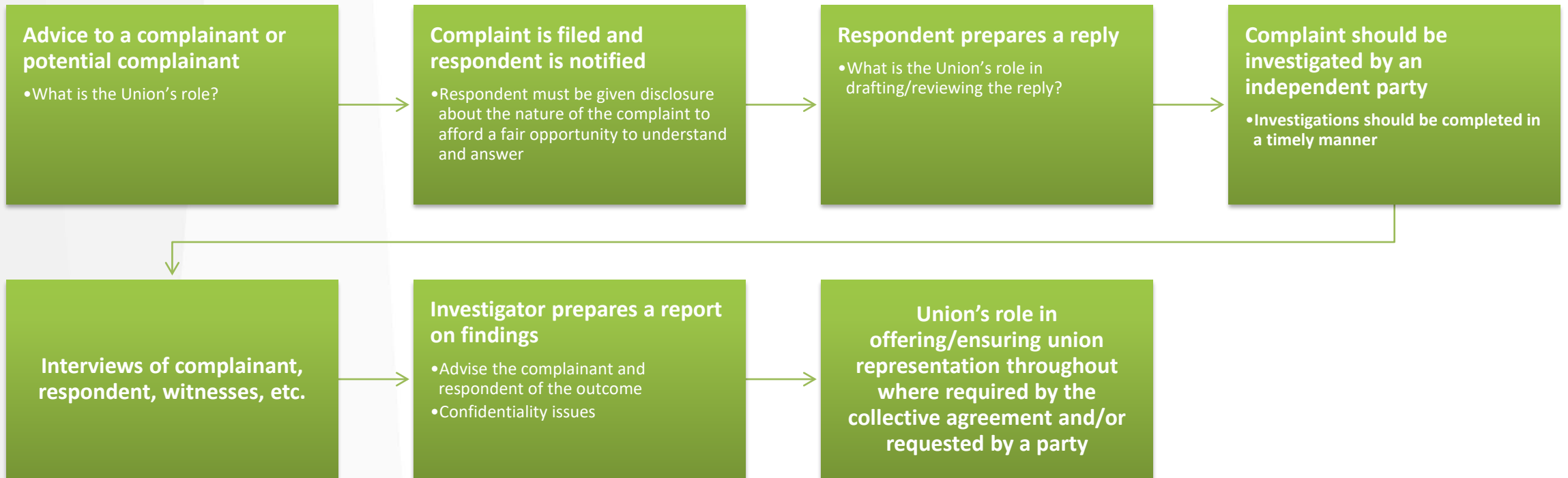
The Employer was the complainant's boss - the power to set her hours or work, give or deny raises and fire her.

Taken by themselves, most of the remarks might only be "mildly offensive". What raised them to the level of harassment was their constant repetition and the relationship of power in which they took place.

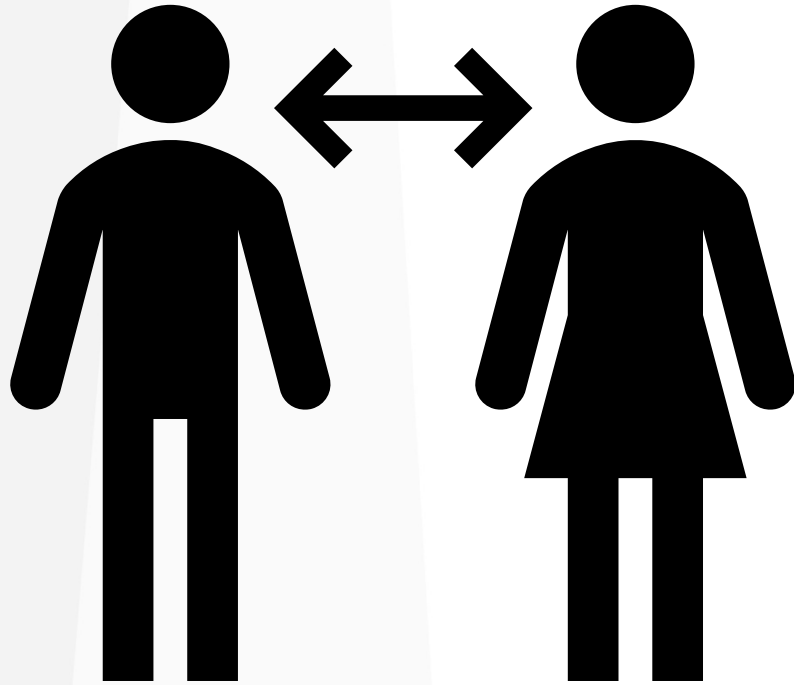
"A complainant in a sexual harassment case does not have to object to the acts of harassment at the time they occur. The test is whether a reasonable person would realize the conduct was unwelcome. In this case, the complainant said that she did tell the respondent that she found his conduct objectionable on a number of occasions but it did no good. She did not protest more forcefully because she was afraid she would lose her job and she needed the income."

Adjudicator Peter Sims

Procedural Fairness Requirements in an Investigation



Member to Member Conduct and Union Representation Obligations



- How to provide representation to two or more members involved in an investigation who are seeking union representation?
 - Union ought to assign different representatives to each party
 - Union must put up walls on information between the representatives, maintaining confidentiality for each member represented
 - Consider seeking legal advice, particularly where a duty of fair representation complaint is foreseeable



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Thank You