

## SEXUAL HARASSMENT IN THE WORKPLACE: WHAT AUSTRIAN COMPANIES NEED TO KNOW

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### What constitutes sexual harassment?

Sexual harassment is a behavior towards another human being where the abuser harms the dignity of the victim and creates an intimidating, hostile or humiliating working environment. The victim feels shock, horror, fear, revulsion, indignation, anger or shame. Sexual harassment can appear in all forms of verbal abuse, as well as physical actions. Whereas physical actions are always forbidden, verbal or also nonverbal abuses are not punished if they don't happen at the workplace. Ordering someone to harass someone is a form of sexual harassment as well as discriminating someone because of their sexual orientation or sex in general.

### What body of law governs sexual harassment in your jurisdiction?

There are two relevant Acts covering the prohibition of sexual harassment in Austria. Paragraph 218 of the Austrian Criminal Code concerns sexual harassment and sexual actions in public, whereas the Federal Law on Equal Treatment implements rules against the discrimination at workplaces.

### What actions constitute sexual harassment?

Sexual harassment is reflected in various forms, including for example:

- Unwelcomed and degrading remarks about a person's appearance, relationships and/or sexual orientation;
- Sexual assaults;
- Demand for sexual acts under threat of disadvantages and for dismissal at work;
- Stalking, tracking and/or monitoring a person;
- Sexualized jokes and reflections;
- Unwanted invitations and/or gifts;
- Exhibitionism;
- Mobbing (in this case a continuous action is required).

### Can sexual harassment occur between two members of the same sex?

Yes - there's no requirement that the harasser has to be a person of the opposite sex. Although most complaints about harassment affect members of the opposite sex, women especially are a target of sexual abuse.

### Are employers required to provide sexual harassment training for their employees?

There is no legal requirement to provide sexual harassment training at workplaces. However, the employer has a duty of care towards his employees. As part of this duty of care, the employer has to take appropriate corrective measures immediately after sexual harassment becomes known, so that the employee is not exposed to any further attacks.

### What are the liabilities and damages for sexual harassment and where do they fall?

Any person who has violated the law regarding sexual harassment may be held liable under both civil and criminal charges.

In criminal proceedings, pursuant to Paragraph 218 of the Criminal Code, the offender is punished with imprisonment for up to six months or a fine of up to 360 daily sentences.

In civil proceedings, pursuant to Paragraph 12 (11) of the Federal Law on Equal Treatment, the victim has Claims for compensation against the harasser. As long as the disadvantage does not only consist in a loss of assets, the person concerned shall be entitled to reasonable compensation, but at least EUR 1,000,-- to compensate for the personal impairment suffered.

As mentioned above, employers have a duty of care to ensure that harassment ceases immediately. The prerequisite for this is the knowledge or know must of sexual harassment. In several cases, the Austrian Courts have confirmed that an obligation to pay compensation for sexual harassment is also possible if the harassment takes place at a time when the person that has been harassed was no longer employed. In connection with labor law, it should be mentioned that sexual harassment creates an incriminating working environment which has a lasting effect on the working ability of the affected person. Therefore, sexual harassment is a good reason for the immediate termination of the employment by the employee.

### What does an employee who believes they've been sexually harassed have to prove for a successful claim?

Within 3 years, claims for damages must be filed at court by the harassed person. Then the victim has to make it credible that sexual harassment has occurred.

### Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

Austrian law does not distinguish whether the perpetrator of sexual harassment is a supervisor or a co-worker.

### What are the potential defences employers have against sexual harassment claims?

In principle, the employer must ensure a trouble-free working environment that protects employees from sexual harassment. Otherwise, the employer may be called in for compensation.

An employer should take concrete protective measures to prevent future sexual harassment, including, but not limited to, the following:

- Inclusion of the topic in training and further education programmes, team meetings, workshops and so on;
- Inclusion of a corresponding "no tolerance clause" in employment contracts;
- Offering or arranging self-defence courses.

The corrective measures must be carried out in accordance with the principle of proportionality. Each case must be examined separately in order to determine which measure is appropriate. Therefore, this spectrum ranges from the admonition, the transfer and as a last resort ("ultima ratio") the dismissal of the harasser.

### Who qualifies as a supervisor?

Supervisors or managerial employees are qualified by the fact that they have been assigned decisive leadership responsibilities on their own responsibility. Supervisors may decide freely on arranging their own working hours and may give their subordinate employees instructions regarding the content and organization of their activities. Although, supervisors are not completely free of instructions.

### How can employers protect themselves from sexual harassment claims?

The most important thing is to take all possible steps to protect employees from sexual harassment. In addition to the legal remedies mentioned above, the employer may also write internal guidelines and policies on this matter to demonstrate that no sexual harassment is tolerated in the company and that it will be prosecuted immediately.

### Does sexual harassment cover harassment because of pregnancy?

There is no rule that would exclusively apply to the sexual harassment of pregnant women. However, the Federal Law on Equal Treatment prohibits any discrimination due to pregnancy or maternity.

### Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

Austrian law prohibits any gender-specific distinction. Therefore, homosexuals, lesbians, bi-sexuals and transsexuals have the same rights as everyone else.

### What is prohibited retaliation?

Austrian law does not foresee any possibility for employers to take any adverse action against an employee for reporting an incident of sexual harassment or for participating in an investigation of a sexual harassment claim.

### Can a consensual relationship between a supervisor and a subordinate be considered sexual harassment?

In a consensual relationship, it does not matter whether someone is a supervisor or a subordinate of the other. Consensual relationships can therefore never be considered sexual harassment.

### Can an employer be liable for the actions of a third party (e.g. The public, clients, vendors)?

Yes, that is possible. Employers may be held liable for the conduct of their employees, if they don't take appropriate actions to end sexual harassment at the work place as soon as it occurs.

### What is the #metoo movement?

Having its origin in the United States, the metoo Movement quickly became a worldwide women's rights movement. The idea was to challenge men who had sexually harassed women. With the public appeal of the abusers, the movement tried to strengthen women who were afraid to tell their stories. The ensuing major public discussion also prompted companies to educate their employees about sexual harassment.

### How is the #metoo Movement impacting the law in your jurisdiction?

The #metoo Movement has put sexual harassment in the spotlight and was the top issue both in politics and in society. However, the Austrian Government did not see the immediate need to act. This is also due to the fact that the laws prohibiting sexual harassment were already tightened in 2015.

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*For more information, contact Valentina Philadelphy at ILN member, BKP Rechtsanwälte at [v.philadelphy@bkp.at](mailto:v.philadelphy@bkp.at).*