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PRACTICE HANDBOOK FOR JUDGES AND PROSECUTORS IN SEXUAL HARASSMENT CASES



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IN SEXUAL HARASSMENT CASES

Title: Practice Handbook for Judges and Prosecutors in Sexual Harassment Cases

Naslov originalnog djela: Priručnik za sudije i tužioce za postupanje u predmetima seksualnog uznemiravanja

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Acknowledgments

The Atlantic Initiative would like to thank the Embassy of the Kingdom of Sweden to Bosnia and Herzegovina for financial support to the Gender and Justice Project, of which this publication is a product. Meetings of the Editorial Board were also supported by the United States Department of Justice, Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT) funded by the US Department of State (INL/EUR/ACE).

Translation

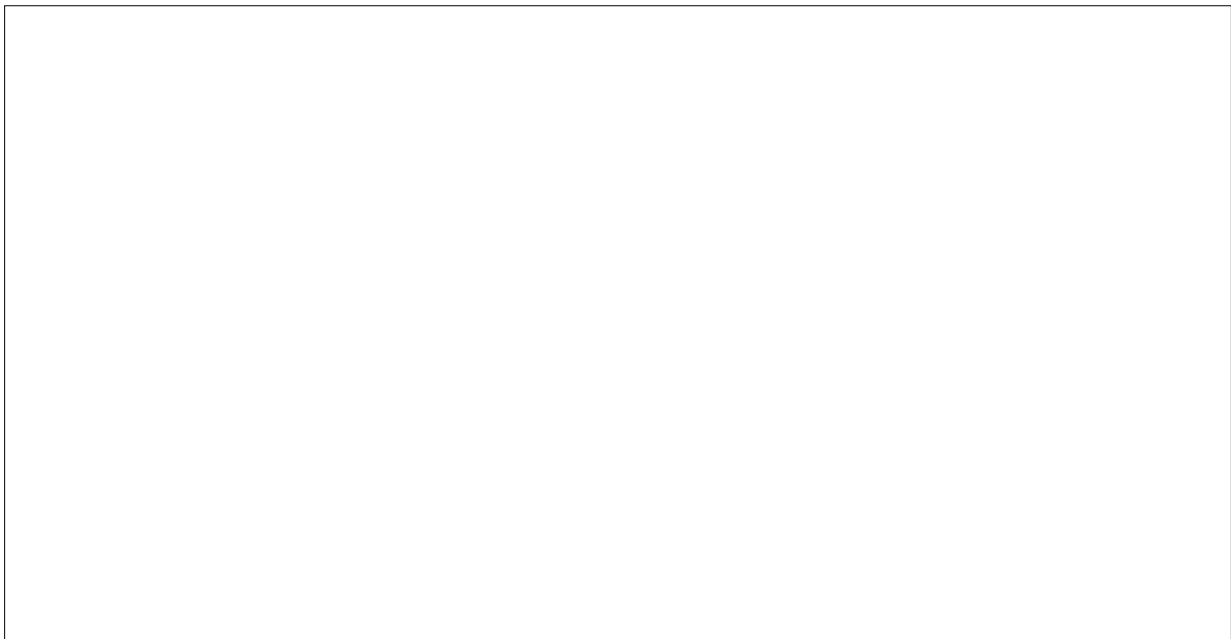
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SARAJEVO, 2019.

INTRODUCTION

From December 2017 through September 2018, as part of the Gender and Justice Project in Bosnia and Herzegovina, the Atlantic Initiative facilitated a panel of thirteen judges and prosecutors who developed this Practice Handbook for handling sexual harassment cases. The work of the panel was supported by the Embassy of the Kingdom of Sweden to Bosnia and Herzegovina and the Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT) of the United States Department of Justice. The panelists primarily considered the legal framework, the case law, and the legal aspects of sexual harassment, but they also analyzed psychological and social theories and studies on sexual harassment that are relevant to a comprehensive understanding of the topic and recognition of the individual and social dynamics related to this issue.

This Practice Handbook, with references to the law in Bosnia and Herzegovina (BiH), as well as international case law and literature, presents the conclusions, recommendations, and key findings of panelists. The Handbook is divided into seven chapters, to be used together and separately as a resource for handling cases of sexual harassment.

- Chapter One presents the causes and consequences of sexual harassment and considers the dynamics of harassment, perpetrator profiles, and myths and stereotypes related to gender.
- Chapter Two outlines the legal framework and case law related to sexual harassment, with respect to establishing liability and presenting evidence in sexual harassment cases.
- Chapter Three discusses the establishment of civil liability for the existence of sexual harassment as a form of discrimination.
- Chapter Four introduces the practical elements of the Handbook.
- Chapter Five and Six present the recommendations of the panel for handling proceedings in *criminal* sexual harassment cases.
- Chapter Seven addresses the recommendations of the panel for *civil* proceedings in sexual harassment cases.
- Chapter Eight discusses minor offence proceedings for a failure to undertake appropriate measures to prevent sexual harassment.

In BiH, sexual harassment was recognized and regulated by law for the first time in 2003 by the Law on Gender Equality, and later by the Law on Prohibition of Discrimination. As of 2016, sexual harassment is also addressed by labor laws at the entity level. However, despite this legislation and numerous activities aimed at supporting gender equality, data from the European Union and the region demonstrate that sexual harassment is a widespread occurrence with serious consequences; and in BiH, sexual harassment receives insufficient attention and is, in many cases, trivialized. Further, because sexual harassment is not appropriately recognized, sexual harassment cases in BiH mostly remain unreported. And though fifteen years have passed since sexual harassment was legally defined in the country, only a handful of cases have been handled by the judiciary, indicating that court practices in this area are inadequately developed.

For all these reasons, the Atlantic Initiative has been working since 2014 to build the capacity of judicial institutions in BiH to prevent and recognize sexual harassment. This has resulted in the establishment of a comprehensive prevention mechanism in all judicial institutions in BiH as well as in several higher education institutions. This work on prevention revealed the need for in-depth consideration of both criminal and civil sexual harassment cases, and also the need to engage in capacity building among judges and prosecutors who handle these cases.

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ACRONYMS

BiH – Bosnia and Herzegovina

CC – Criminal Code

CCBiH – Criminal Code of Bosnia and Herzegovina

CCFBiH – Criminal Code of the Federation of Bosnia and Herzegovina

CCRS – Criminal Code of the Republika Srpska

CoE – Council of Europe

CPC – Criminal Procedure Code

EU – European Union

FBiH – Federation of Bosnia and Herzegovina

LGEBiH – Law on Gender Equality of Bosnia and Herzegovina

LLFBiH – Labor Law of the Federation of Bosnia and Herzegovina

LLRS – Labor Law of the Republika Srpska

LPD – Law on Prohibition of Discrimination

RS – Republika Srpska

UN – United Nations

US – United States

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1. Sexual Harassment: Causes, Psychology, Prevalence & Consequences

Sexual harassment is an unwanted form of behavior, of a specifically sexual nature. Both legal and sociological studies demonstrate that this kind of behavior has been present for centuries, as illustrated by numerous examples throughout history, ranging from the sexual victimization of women during the period of American slavery, to the poorly paid and unregulated work of maid servants, to the conditions for women working in factories in the late nineteenth and early twentieth centuries. Looking back on written accounts of the historical experiences of women in the workplace, Siegel documented that sexual harassment was widespread in the various occupational contexts in which women worked and that its manifest forms were both verbal and physical; but also that the rape of women in such contexts was not unusual.¹

Nonetheless, no attention was paid to protecting women from sexual exploitation and sexual harassment in these contexts, and by 1920, women were simply advised to leave their jobs if they were unable to cope with sexual assaults in the workplace. Indeed, until the 1960s and 1970s, women's complaints about unwanted forms of sexual behavior in the workplace were dismissed as frivolous. But the problem of sexual harassment became increasingly apparent as women were employed in larger and larger numbers.²

Sexual harassment was first legally defined in the 1980s, as an unwanted form of behavior of a specifically sexual nature that occurs in a working context. Catharine MacKinnon, an American law scholar who made key breakthroughs in sexual harassment legal theory, advocated the recognition of sexual harassment in the workplace as a form of discrimination. Her work in 1978 resulted in one of the most influential books in the field, titled *Sexual Harassment of Working Women: A Case of Sex Discrimination*. And her view that sexual harassment is a form of gender-based discrimination was confirmed unanimously in the first case of sexual harassment tried in the US Supreme Court, in 1986, for which MacKinnon was part of the plaintiff's legal team.³

1 Reva B. Siegel, "Introduction: A Short History of Sexual Harassment" in *Directions in Sexual Harassment Law*, edited by Catharine A. MacKinnon and Reva B. Siegel (Yale University Press, 2004).

2 Sascha Cohen, "A Brief History of Sexual Harassment in America Before Anita Hill," *Time*, April 11, 2016.

3 *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). This US Supreme Court case was argued on March 25, 1986 and decided on June 19, 1986.

It was around this same time that serious attention was finally paid to sexual harassment in European countries.⁴ Nowadays, the EU recognizes sexual harassment as a violation of the principle of equal treatment and as a form of discrimination, and EU Member States have an obligation to encourage employers to develop mechanisms for the prevention of and protection from sexual harassment in the workplace.⁵ In fact, sexual harassment is increasingly viewed as a serious form of *violence* as well as a violation of human rights, and thus as a violation of the right to protection against discrimination that is codified by the Universal Declaration of Human Rights.⁶

1.1. The Causes of Sexual Harassment: Myths and Gender Bias

In the past, sexual harassment was widely viewed as a product of sexual desire and attraction that was essentially enjoyed by women and other targets of harassment, even if they were reluctant to admit it openly. In any working environment, it is natural for reciprocal and mutual feelings of affection to develop between co-workers, and these feelings can sometimes get in the way of professional relationships and create conflicts of interest. But the dynamics, causes, and manifestations of such relations are very different from those of sexual harassment. In fact, it has long been established that sexual harassment is based on the need, mostly of men, to demonstrate their domination and power in professional relationships.

Looking back on her own experiences with sexual harassment in an academic environment, Professor Anne Lawton criticizes the model that depicts sexual harassment as an individualized and often sexualized dispute between a harasser and their victim. According to Lawton, this perspective fails to account for the important role employers play in creating hostile working environments, arguing that courts should consider organizational characteristics that increase the likelihood of sexual harassment, such as sex-segregated workforces or job division along gender lines, male-defined jobs, and a generally high level of organizational tolerance for sexual harassment behavior. Lawton notes, too, that victims are disfavored and disadvantaged by the fact that courts of law see employers as objective and competent enough to screen and resolve complaints about sexual harassment, even though they often do not believe victims, much less their reports of continued harassment or retaliation once they have filed an internal complaint.⁷

4 James M. Owens, James F. Morgan, and Glen M. Gomes, “Implementing the E.U.’s New Sexual Harassment Directive: Are Employers Entitled to a Defense?” *Journal of Individual Employment Rights* 11, no. 2 (2003-2004): 89-110.

5 Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23. This Directive repealed and replaced Council Directive 76/207 of 1976. Directive 2006/54/EC stipulates that Member States shall encourage employers to “take effective measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment in the workplace.”

6 Mary Ellen Tsekos, “The New European Union Directive on Sexual Harassment and Its Implications for Greece,” *Human Rights Brief* 10, no. 2 (2003): 31–33.

7 Anne Lawton, “The Bad Apple Theory in Sexual Harassment Law,” *Geo. Mason L. Rev.* 13, no. 4 (2005): 817–868.

Research reveals the complexity of the problem of sexual harassment and also that there are no simple explanations for it; however, some of the behavioral patterns and motives related to this unwanted form of behavior can be differentiated. Such motives are important in the context of judicial intervention, and thus, a brief overview of various theories of sexual harassment follows. These theories, as noted by Kapila,⁸ are grounded in biology, sociology, organizational psychology, and feminism.

The *Natural/Biological Theory* of sexual harassment views the behavior as a function of the natural attraction between men and women, as well as the inherently stronger sex drives of men. From this perspective, men who aggressively pursue women in a sexual manner are motivated not by the desire to harass but by their biologically-driven needs. One version of this theory, which assumes “mutual attraction between men and women, a stronger male sex drive, and men in the role of sexual initiators,” views both genders as responsible for sexual harassment. From this perspective, sexual harassment behaviors are actually a form of courtship meant to achieve male-female relationships. This model therefore situates current conceptions of sexual harassment as erroneous, but it has failed to receive any serious support in the scientific community and has had little influence on mainstream views of the phenomenon.⁹

Organizational Theory frames sexual harassment in terms of power, authority, and hierarchy. As such, sexual harassment is said to be enabled or encouraged through workplace norms and gender bias, and through the power derived from hierarchical structures that place men in management or supervisory positions and women in subordinate positions. This vertical hierarchy directly facilitates *quid pro quo* forms of sexual harassment and makes it incredibly daunting to report any form of sexual harassment. Thus, Organizational Theory posits that “sexual harassment is all about expressions of male power over women that sustain patriarchal relations.”¹⁰

Three other theories of sexual harassment – *Sex Role Spillover Theory*, *Socio-Cultural Theory*, and *Feminist Theory* – explain the phenomenon through a socio-cultural lens. Sex Role Spillover Theory, as the name suggests, assumes that beliefs about gender roles “spillover” into the workplace and that sexual harassment occurs when men seek to place women within the purview of a gender role to which they are accustomed and is traditional for a particular culture. According to this theory, a higher degree of sexual harassment occurs when women work in professions that are perceived as typically male spaces. On the other hand, Socio-Cultural Theory proposes that sexual harassment can occur in the context of any profession because it is a logical consequence of the gender inequality and sexism that exists in society more broadly, and which are inevitably reflected in workplace structures. Traditional gender roles and dynamics are simply played out in the workplace as they are in other aspects of life. Thus, sexual harassment is a way for men to retain their dominance, including by reducing professional women to mere sexual objects of enjoyment.

8 Pallavi Kapila, “Theoretical Perspectives to Sexual Harassment of Women at Workplace,” *International Journal of Humanities and Social Science Interventions* 6, no. 9 (2017): 32–35.

9 Ibid.

10 Ibid.

Similarly, male domination is at the root of the Feminist Theory of sexual harassment, which links the behavior to the sexism of patriarchy, which establishes norms of masculinity that view women and effeminate men as inferior.¹¹

Experiences of sexual harassment are often trivialized, or are seen as exaggerated due to myths about the different natures of men and women. Some of these myths persist despite extensive research on the problem of sexual harassment and legal definitions of the behavior, and arise from a social context of gender inequality. This inequality, and these myths, often deter victims from reporting cases of sexual harassment because they feel that no one will trust them and fear that they will compromise their status in the workplace.¹²

The most common myths and attitudes about sexual harassment include:

- Women like to be complimented and courted.
- Women are responsible for sexual harassment.
- By their nature, men are prone to crave women, and there is nothing they can do about it.
- No harm is done if no physical contact is made, and if no one is blackmailed.
- Women tend to exaggerate the severity of sexual harassment.
- Sexual harassment is just harmless flirting.
- If a woman ignores sexual harassment, it will stop.
- Sexual harassment is rare.¹³
- Men cannot be sexually harassed.

1.2. Harasser Psychology

Psychological tests used to understand the phenomenon of sexual harassment assess a subject's tendency to believe stereotypes as well as their opinions about male domination, sexism, and gender roles. In this way, a number of different studies have measured the likelihood that an individual (usually a man) will harass another person sexually. This research has helped psychologists identify a typology of men who sexually harass women. These men fall into one of three broad categories:

1. Men who are naive in their understanding of male-female relationships, and thus tend to misinterpret women's behavior, dress, and attitudes. Such men view intimate relationships in the workplace as appropriate and construe the friendliness of female colleagues as expressions of sexual interest. These harassers may invite women on dates repeatedly, and often initiate discussion about sex.¹⁴

¹¹ Ibid.

¹² Majda Halilović, Callum Watson, Heather Huhtanen, and Mylène Socquet-Juglard, *Gender Bias and the Law: Legal Frameworks and Practice from Bosnia & Herzegovina and Beyond* (Sarajevo: Atlantic Initiative and DCAF, 2017).

¹³ Ibid.

¹⁴ See: William E. Foote and Jane Goodman-Delahunty, *Evaluating Sexual Harassment: Psychological, Social, and Legal Considerations in Forensic Examinations* (Washington, DC: American Psychological Association, 2005).

2. Men who tend to exploit women, demonstrate hostile sexual beliefs, and show an inability to imagine how another person may feel (i.e., lack empathy). These men conform to traditional and stereotypical male roles and perceive themselves as authoritative, and because they are willing to use social power for sexually exploitive purposes and to achieve social domination, tend to commit sexual violence. Such men understand sexual relationships through the prism of power¹⁵ Further, they view women through the lens of stereotypes that lead them to believe women *desire* male domination, even when this implies physical coercion or control.¹⁶
3. Men who are misogynists. For these men, sexual harassment is deeply rooted in hostility towards women, and especially women in the workplace. Their intention is not to develop a sexual relationship, but to humiliate women in the workplace and create a hostile working environment in order to re-establish traditional gender roles. These harassers often view pornography in the workplace, call women insulting and derogatory names, and denigrate and belittle the abilities of women.¹⁷

1.3. The Prevalence of Sexual Harassment

In 2017, multiple accusations of sexual harassment shook Hollywood, sparking a movement of women's transparency about their experiences of harassment, and opening a new chapter in awareness of the phenomenon. Revelations that emerged demonstrated that it is seldom just one person victimized by a harasser, but also that women of all social statuses frequently choose not to report sexual harassment due to stigma and fear. As a result, it has become quite clear that sexual harassment is common, rarely exaggerated, and that it can be incredibly harmful.

Still, while the prevalence of sexual harassment has received little public attention until recently, it has been known since long before 2017. For example, a large-scale study in the EU in the late 1990s showed that between 30 and 50 percent of women, and 10 percent of men, had experienced some form of sexual harassment.¹⁸ Newer studies have revealed an even higher prevalence than this, with the European Union Agency for Fundamental Rights finding in 2014 that between 83 and 102 million (45-55 percent) women in 28 EU Member States reported being exposed to some form of harassment starting at age fifteen, including harassment in the workplace.¹⁹

¹⁵ Ibid.

¹⁶ John B. Pryor and Lynnette M. Stoller, "Sexual Cognition Processes in Men High in the Likelihood to Sexually Harass," *Personality and Social Psychology Bulletin* 20, no. 2 (1994): 163–169.

¹⁷ Ibid.

¹⁸ European Commission, *Sexual Harassment at the Workplace in the European Union* (Luxembourg: Office for Official Publications of the European Communities, 1999).

¹⁹ European Union Agency for Fundamental Rights, *Violence against women: an EU wide survey – Main results* (Luxembourg: Publications Office of European Union, 2015).

In neighboring Croatia, a 2005 study by the Office of the Ombudsperson for Gender Equality found that as many as 74 percent of women had been exposed to sexual harassment in the workplace, directly or indirectly.²⁰ Also, data from the Croatian-based Mobbing Victim Assistance and Education Association (*Udruga za pomoć i edukaciju žrtava mobbinga*) indicates that over 30 percent of women who approached the Association in 2016 did so in relation to cases of sexual harassment, but that employers generally settle these cases to the detriment of female workers.²¹

In BiH, a 2019 study by the OSCE measured the prevalence of sexual harassment among women, finding that 28 percent of women over the age of 15 have experienced sexual harassment at some point in their lives, and that 10 percent had experienced it in the previous 12 months.²² While these numbers are concerning, they are lower than those found in EU countries, and this may be due to social norms in BiH that manifest as an unwillingness among women to discuss issues such as sexual harassment. Nonetheless, a 2013 study assessing the willingness of Bosnian institutions to meet the requirements set under the Law on Gender Equality, adopted that year, also addressed the issue of sexual harassment and found that 16 percent of employees of these institutions reported the occurrence of sexual harassment in their workplaces. Most respondents in that study recognized that sexual harassment occurs in various forms, including as inappropriate non-verbal allusions and sexually offensive jokes.²³

Despite the large number of women (and some men) who are exposed to sexual harassment in BiH and beyond, as well as an increasing awareness of what constitutes sexual harassment, most victims choose not to report the crime for various reasons. They fear their claims will not be believed, that there is a lack of evidence, that they may face retaliation, and that their colleagues (both male and female) will be reluctant to testify on their behalf and potentially compromise their own status at the workplace. Further, many victims experience shame at having been targeted by a sexual harasser. Thus, in most cases, these victims either leave their jobs or continue to suffer harassment.²⁴ This results in under-reporting, and thus in a reported prevalence of sexual harassment that does not reflect the actual scope of the phenomenon.

20 Pravobraniteljice za ravnopravnost spolova RH i Ženske sekcije Saveza samostalnih sindikata Hrvatske (SSSH) “Istraživanje: Zaštita žena od neželjenog ponašanja na radnom mjestu” [“Protection of Women from Unwanted Behavior in the Workplace”], 2005. Available at: <https://www.prs.hr/attachments/article/131/Zastita%20zena%20od%20nezeljenog%20ponasanaja%20na%20radnom%20mjestu.pdf>.

21 Annual Reports (*Godišnje izvješće*) of the Association are available (in local language) at: <https://mobbing.hr/godisnja-izvjesca-udruge/>; see the 2016 report here: <https://mobbing.hr/wp-content/uploads/2014/03/Godi%C5%A1nji-izvje%C5%A1taj-2016.-Udruga-mobbing-izrada.pdf>

22 OSCE, *Well-Being and Safety of Women: Bosnia and Herzegovina Results Report* (Vienna, 2019).

23 Ministry of Human Rights and Refugees of Bosnia and Herzegovina and the Agency for Gender Equality of Bosnia and Herzegovina, “Istraživanje o spremnosti institucija BiH da provode obaveze iz Zakona o ravnopravnosti spolova u BiH” [“Research on the Willingness of BiH Institutions to Meet the Requirements Set Under the Law on Gender Equality in BiH”], 2013. See a summary of the results here: <https://arsbih.gov.ba/istrazivanje-o-spremnosti-institucija-bih-na-provodenje-obaveza-iz-zakona-o-ravnopravnosti-spolova-u-bih/>

24 European Commission, *Sexual Harassment at the Workplace in the European Union*; and Remus Ilies, Nancy Hauserman, Susan Schwochau, and John Stibal, “Reported incidence rates of work-related sexual harassment in the United States: Using meta-analysis to explain reported rate disparities,” *Personnel Psychology* 56, no. 3 (2003): 607–631.

It is important to note that, while studies of sexual harassment have primarily dealt with women's experiences, because women constitute the majority of victims of the offence and offenders are overwhelmingly men, research on the sexual harassment of men shows that a considerable number of male victims are also harassed. Usually, men are harassed by other men, but studies indicate that when women are the perpetrators of harassment, their harassing behaviors vary from those of men. For example, 32 percent of men harassed by women are exposed to unwanted attempts to engage in a sexual relationship, while other male victims of women harassers usually face verbal harassment and sexism. But when men are harassed by men, this mostly manifests in sexual hostility, and less often as unwanted sexual attention. Moreover, both women and men who identify as LGBT²⁵ tend to experience harassment by men, who exhibit hostility due to their sexual orientation. Indeed, homosexual men are rarely harassed by other homosexual men, but rather by heterosexual men who exhibit homophobic attitudes.²⁶

1.4. Consequences of Sexual Harassment

The psychological consequences of sexual harassment in the workplace result from the complex interactions between the victim of sexual harassment, the harasser, and their colleagues and supervisors. In some cases, other factors of vulnerability on the part of the victim may play an important role; meaning, harassment has specific consequences when a victim identifies as LGBT, for example, or belongs to an ethnic minority.²⁷ The effects of sexual harassment on a victim are also influenced by the intensity and duration of the harassment, the relative status of both the victim and harasser, and whether or not the behavior is addressed adequately or at all.

Studies that attempt to quantify the consequences of sexual harassment face a number of challenges, including problems associated with measuring psychological distress as well as the need to differentiate mental and physical pain that results from the experience of sexual harassment, from that triggered by other causes. However, the literature suggests that there are some relatively common psychological consequences of sexual harassment for all victims.²⁸ These include:

- Reduced satisfaction with one's personal life
- A sense of lost control
- Loneliness
- Emotional alienation
- Loss of self-esteem

²⁵ While variations of this initialism are used to refer to collectively to people who do not identify as heterosexual or cis-gender, here the version used commonly since the mid-1990s, referring to lesbian, gay, bisexual, and transgender individuals, is used. It is important to acknowledge that other initials, such as Q for queer or questioning, A for asexual, and I for intersex are sometimes included in this collective reference and may better align with the way some individuals who appear in the courtroom self-identify.

²⁶ Foote and Goodman-Delahunty, *Evaluating Sexual Harassment*.

²⁷ Sharyn Ann Lenhart, *Clinical Aspects of Sexual Harassment and Gender Discrimination: Psychological Consequences and Treatment Interventions* (New York: Brunner-Routledge, 2004), 76.

²⁸ Foote and Goodman-Delahunty, *Evaluating Sexual Harassment*.

- Shame, anger, and frustration
- Feelings of vulnerability and helplessness
- Increased alcohol consumption, to reduce stress
- Anxiety and depression (especially in cases of persistent harassment)

At the heart of these consequences lies an increased level of *stress*. The longer the stress of sexual harassment persists and the more intense it is, the greater the likelihood that its consequences will be more difficult to manage. In fact, studies show that women and men who frequently experience sexual harassment in the workplace suffer significantly more depression than their colleagues who are not harassed, and also that individuals who are victimized by sexual harassment in an early career stage may suffer long-term depression that extends through their later life.²⁹ The high levels of stress typically experienced by victims of sexual harassment also have adverse impacts on their physical health, exacerbating problems such as high blood pressure, insomnia, and pain.³⁰

Additionally, an analysis by Cortina and Berdahl of over a dozen sexual harassment studies found that sexual harassment in the workplace has serious negative consequences not only for the victims of harassment but also for individuals across the entire organization in which harassment occurs. Research suggests that there is a phenomenon of ever-increasing social withdrawal in workplaces where sexual harassment is not addressed; and it is quite easy to see how a harassed employee may decide to remain in their job, for a variety of pragmatic reasons, but lose interest and withdraw socially. This may manifest as absenteeism from the workplace, fatigue while on the job, or neglect of duties, all of which are aimed at avoiding further exposure to sexual harassment.³¹ For this reason, sexual harassment is also associated with a lack of commitment on the part of victims to the workplace, considerably reduced levels of performance and productivity, the breakdown of team relationships, and frequent conflicts within teams, particularly when the perception is that justice for victims is inadequate or nonexistent.³²

These consequences affect men and women differently, however, due to culturally conditioned gender roles and gender inequality. Women overwhelmingly experience sexual harassment as a threat, having been taught from early childhood to fear for their personal security and to protect their sexuality. Men, on the other hand, tend to harbor less fear of sexual predation because they do not see themselves as potential victims, especially of women. Men are also aware that their

29 Jason N. Houle, Jeremy Staff, Jeylan T. Mortimer, Christopher Uggen, and Amy Blackstone, “The Impact of Sexual Harassment on Depressive Symptoms during the Early Occupational Career,” *Society and Mental Health* 1, no. 2 (2011): 89–105.

30 Rachael Rettner, “6 Ways Sexual Harassment Damages Women’s Health,” *Live Science*, November 9, 2011, <http://www.livescience.com/16949-sexual-harassment-health-effects.html>

31 Lilia M. Cortina and Jennifer L. Beardahl, “Sexual harassment in Organizations: A Decade of Research in Review” in *The SAGE Handbook of Organizational Behavior*, vol. 1, *Micro Approaches*, edited by Julian Barling and Cary L. Cooper (London: Sage Publications, 2008), 469–497.

32 Sharon K. Parker and Mark A. Griffin, “What Is So Bad About a Little Name-Calling? Negative Consequences of Gender Harassment for Overperformance Demands and Distress,” *Journal of Occupational Health Psychology* 7, no. 3 (2002): 195–210.

exposure to harassment is unlikely to compromise their status at the workplace; therefore, sexual jokes or touches generally do not hold the same weight and meaning for men compared to women.³³ Still, it is important to understand that, while men report sexual harassment less often than women, men can be the victims of persistent and intense harassment that disrupts their lives and deeply affects them psychologically, especially if they identify as LGBT.³⁴

33 Christopher Uggen and Amy Blackstone, “Sexual Harassment as a Gendered Expression of Power,” *American Sociological Review* 69, no. 1 (2004): 64–92.

34 Foote and Goodman-Delahunty, *Evaluating Sexual Harassment*.

2. The Legal Framework and Case Law: Establishing Liability and Proving Sexual Harassment Claims

2.1. General Considerations

In BiH, sexual harassment is prohibited by law, and actions that constitute sexual harassment may trigger both criminal and civil liability. Criminal liability is foreseen under the Law on Gender Equality in BiH and the Criminal Code of the RS (CCRS), and civil liability under the Law on Prohibition of Discrimination as well as a number of other statutes, especially those regulating employment. The first law in BiH to define sexual harassment was the Law on Gender Equality (Official Gazette of BiH, 16/03, 102/09, 32/10). In amendments made to the Law in 2009, sexual harassment was further defined as a form of gender-based discrimination.

According to Article 5, paragraph (2) of the 2010 consolidated text of the Law:

Sexual harassment shall be considered every unwanted form of verbal, non-verbal or physical behavior of a sexual nature that aims to harm the dignity of a person or group of persons, or has such effect, especially when this behavior creates an intimidating, hostile, degrading, humiliating or offensive environment.

In defining sexual harassment, legislators in BiH relied on an analysis of the international legal framework; but it is the EU's 2006 Recast Directive that seems to have had the most influence, as the definitions applied in BiH methodologically followed the approach laid out therein. Hence, the Law on Gender Equality in BiH requires employers to take effective measures to prevent sexual harassment and discrimination on the basis of gender in the workplace and in employment and stipulates that no measures may be taken against an employee due to the fact that they have brought forth a claim of harassment, sexual harassment, or discrimination on the basis of gender. The Law provides for court protection and criminal liability in Article 23, and specifies a sentence of imprisonment for a term between 6 months and 5 years in Article 29.

Article 23

(1) Every person who considers to be victim of discrimination or finds that a certain right has been violated due to discrimination shall be able to seek for protection of that right in the procedure in which this right shall be decided as a main issue, and shall be able to seek for protection in special proceedings for protection from discrimination in compliance with the Law on

Prohibition of Discrimination ("Official Gazette of Bosnia and Herzegovina" No, 59/09).

(2) A victim of discrimination according to provisions of this Law shall have the right to compensation according to regulations defining obligations.

Article 29

A person who, on the grounds of sex, commits violence, harassment or sexual harassment that endangers serenity, mental health or bodily integrity shall be punished with a fine or imprisonment for a term of six months up to five years.

This sanction is largely reflective of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.

Given that the Law on Gender Equality in BiH exists at the federal level, the Court of BiH is competent for adjudicating criminal cases of sexual harassment.³⁵ On top of this, at the entity level, the CCRS (Official Gazette of the RS, 64/17) provides for criminal liability in cases of sexual harassment. In Article 170, the CCRS stipulates sanctions for the offense, and defines sexual harassment:

Article 170

(1) Whoever is engaged in sexual harassment of another person who is his/her subordinate or who is in a situation of dependence with respect to him/her, or who is particularly vulnerable due to his/her age, illness, disability, addiction, pregnancy, or serious physical or mental disorder, shall be punished by imprisonment for a term not exceeding two years.

(2) Sexual harassment shall include any verbal, non-verbal or physically unwanted behavior of a sexual nature aimed at violating the dignity of a person in the sphere of his/her sexual life, which causes fear or creates an intimidating, hostile, degrading or offensive environment.

(3) Prosecution for the offense referred to in paragraph (1) of this Article shall be undertaken following the submission of a motion.

While paragraph (2) of this Article defines the criminal offense of sexual harassment in similar terms as the Law on Gender Equality in BiH, paragraph (1) introduces additional elements related to whether a victim is a "subordinate" of a harasser, is "in a situation of dependence," or is "particularly vulnerable." However, the CCRS prescribes a sentence of imprisonment up to two years, which is a milder sanction than that foreseen under the Law on Gender Equality in BiH, which does not

³⁵ Law on the Court of Bosnia and Herzegovina (Official Gazette of BiH, 29/00, 16/02, 24/02, 3/03, 37/03, 42/03, 4/04, 9/04, 35 / 04, 61/04, 32/07).

include these elements. The regular courts of the RS are competent for adjudicating sexual harassment cases conducted in accordance with the CCRS.

Sexual harassment as a form of discrimination is also prohibited by a number of other laws in BiH, including the Law on Prohibition of Discrimination and laws governing employment. These laws allow for a victim to file a discrimination lawsuit in civil proceedings as well as for declaratory and restorative claims and claims for damages, and draw heavily on the Law on Gender Equality in BiH. They all comply with EU legal standards.

The Law on Prohibition of Discrimination (Official Gazette of BiH, 59/09 and 66/16) defines sexual harassment in **paragraph (2) of Article 4:**

Sexual harassment shall be considered to be any form of unwelcome verbal, non-verbal or physical behavior of a sexual nature which aims at or results in a violation of a person's dignity, especially when it creates an intimidating, hostile, degrading, humiliating or offensive environment.

As the issue of sexual harassment is clearly regulated under various laws in BiH providing for both criminal and civil liability, this Practice Handbook addresses the specific features of different proceedings related to proving the existence of sexual harassment.

2.2. Establishing Liability for the Criminal Offense of Sexual Harassment

In accordance with the federal-level Law on Gender Equality in BiH as well as the entity-level CCRS, sexual harassment is a criminal offense. In the context of sexual harassment, the parties to the proceedings are the person who has been harassed (the victim) and the harasser (the accused). As a victim, any person who is harassed enjoys protections and has the right to expect that the purposes of criminal sanctions will be satisfied. The accused person is also entitled to rights under criminal law. Prosecutors are key actors in any criminal proceeding, because the principle of accusation stipulates that such proceedings may be initiated and carried out only upon the motion of a competent prosecutor. In criminal prosecution, the principle of legality requires a prosecutor to prosecute if there is evidence that a criminal offense has been committed, unless otherwise instructed by law. Other actors also appear in proceedings, such as defense counsel for the accused, expert witnesses, fact witnesses, and more.

Still, it is the role of the prosecutor that is crucial in prosecuting perpetrators of criminal offenses, and it is thus necessary to consider all the challenges prosecutors may face when addressing the criminal offense of sexual harassment. The nature of sexual harassment as a form of gender-based violence and discrimination is such that it usually takes place exclusively between a person who

is harassed and a harasser, without other people present, which can raise numerous challenges for prosecutors. Indeed, collecting and presenting evidence related to these cases can be particularly difficult. Thus, in their investigations of cases of sexual harassment, prosecutors should focus primarily on gathering the evidence necessary to successfully prove the essential elements of the criminal offense. These essential elements, laid out in the legal definitions offered above, are analyzed at length in the following sections, which discuss the specificities of proving each of these essential elements in accordance with both the Law on Gender Equality in BiH and the CCRS.

Article 5 of the Law on Gender Equality identifies *four essential elements* that must be proved in order for a behavior to be considered sexual harassment: (1) unwantedness, (2) the type of act, (3) the nature of the act, and (4) consequences. Each of these elements must be examined to determine whether a certain behavior constitutes harassment.

2.3. Unwantedness

According to Article 5 of the Law on Gender Equality in BiH, the subject of the criminal offense of sexual harassment is a person who “**intends**” or whose behavior “**has such effect**” by engaging in acts that are experienced as “**unwanted**.” Hence, the interpretation of this interaction unavoidably depends on the personal experience of the people involved, and is therefore very subjective. In this context, it is necessary to consider the issue of intent as fundamental to determining guilt in a criminal proceeding, and to account for the question of unwantedness on the part of the victim as an essential element of the criminal offense.

When it comes to the intent of the subject of the criminal offense of sexual harassment, the accused **may perpetrate** the offense **with direct or indirect intent**. This conclusion is derived from analysis of **Article 5 of the Law on Gender Equality**, which stipulates that **these offenses exist when the perpetrator “aims to harm” or “has such effect.”** This is a very important legal specificity that legislators in BiH included in order to set a high threshold for protection against these offenses, fully in line with international standards. In practice, the difference between direct and indirect intent is evaluated in relation to all the circumstances of the case. Therefore, an argument that a person did not know that a certain behavior constitutes harassment is *not* exculpatory.

When it comes to establishing unwantedness as an essential element of the criminal offense of sexual harassment, it is necessary to present direct or circumstantial evidence confirming that certain conduct was unwanted by the victim. The unwantedness of a specific type of behavior depends on the subjective experience of a victim and is dependent on time, the environment, and other subjective and objective influences. Thus, **unwantedness is established on a case-by-case basis**, as a function of available evidence from which the fact of unwantedness can be derived.

Evidentiary proceedings in cases of sexual harassment may follow two paths: (1) proving that certain behavior could be presumed as unwanted; (2) proving that there was an outward or expressed reaction on the part of the victim.³⁶

2.3.1. Proving that Conduct was Unwanted

The presumption in cases of sexual harassment is that unwanted conduct encompasses behaviors of a sexual nature, as well as inappropriate behaviors directed toward people on the basis of their sex or gender. Therefore, the limits of unwanted behavior must be established in each case and in the context of various social interactions. Indeed, upon entering into a social interaction, every person should be aware of whether their behavior may create an intimidating, hostile, degrading, humiliating, or offensive environment for people around them. Yet when it comes to physical behavior of a sexual nature, the presumption that such behavior is unwanted is particularly pronounced; and the absence of an outward reaction from a person suffering unwanted harassment does not mean that there is no consequence.

In one case, in which the Court of BiH found the defendant **guilty**:

*In the period between 2004 and 2008, as the immediate superior to a female employee in the Rudnik mrkog uglja [coal mine], he sexually harassing her on multiple occasions, stalking her down the corridors and using vulgar language and making remarks about her having nice breasts and buttocks, making insulting remarks in verse, and on multiple occasions suggesting she have sexual intercourse with him and, if she refused, that she would be dismissed or forced to resign, which he also shared with his other employees; and in the course of 2007, he asked the aforementioned female employee if her husband was capable of having sex with her given that he had undergone a heart surgery; all of which resulted in her feeling constant stress, a lack of safety in the workplace, physically and emotionally threatened, and subject to a humiliating and offensive environment.*³⁷

In this case, the Court did not consider whether conduct of a *verbal* nature constituted unwanted behavior, because the facts established during the proceedings allowed for presumption beyond any doubt that the *actions* proved in the case did constitute unwanted behavior. Likewise, in another case, the Court relied on and fully accepted the testimony of the victim, finding it to be compelling, completely honest, and comprising sufficient detail to be given full credence, especially as it clearly pointed to the fact that the conduct to which she had been subject constituted

³⁶ In addition, the success of proving this essential element also depends on establishing the consequence of the criminal offense. In some instances, evidence of the existence of a consequence may be sufficient to establish that a certain behavior is unwanted.

³⁷ Court of Bosnia and Herzegovina, Judgement No. S1 3 K 004822 11 Kž 2, 5 April 2012.

unwanted behavior.

Law or Code	Liability	Competent Court	Procedure
Law on Gender Equality	Criminal	Court of BiH	Criminal Procedure Code of BiH
Criminal Code of RS	Criminal	Basic Courts	Criminal Procedure Code of RS
Law on Prohibition of Discrimination	Civil	Basic and Municipal Courts	Civil Procedure Codes (depending on the competent court)

In some settings, such as the workplace, people may tolerate or accept behaviors they would not accept in other settings, due to a variety of pressures and power dynamics. However, if *at any point* a person feels that conduct to which they have been subjected constitutes unwanted behavior, even if they have previously tolerated the behavior, they retain the right to refuse to accept such conduct and seek redress.

2.3.2. The Fact of an Outward or Expressed Reaction

Given that unwantedness is a subjective element and no universal rules of social behavior exist, a presumption of unwantedness cannot be the only way to establish that behavior has in fact been unwanted. Often, when people experience unwanted behaviors, they feel a need to express this to the outside world. This may manifest as both verbal or non-verbal communication that makes it clear the conduct is unwanted.

In one case, in which the Court of BiH found the defendant **guilty**:

*The defendant approached an underaged girl in a restaurant, where after briefly flirting with her, he placed his hand on her leg, at which point the girl, feeling scared, left the cafe and set out toward her home; he followed her in a car, catching up with her in the street across from the high school, where he got out of his vehicle and told her to get into the car with him, and when she refused, he took his shirt off and told her that he liked her while he laid his arms on her shoulders, whereupon she pulled away and began running toward her home.*³⁸

In this case, the non-verbal reactions of the victim served as a clear communication that the conduct of the defendant was unwanted. Had the defendant stopped behaving in this way upon the victim's initial reaction (leaving the restaurant to avoid further contact with him), the court would likely have found him not guilty of a criminal offense.

³⁸ Court of Bosnia and Herzegovina, Judgement No. S1 3 K 003967, 18 February 2011.

In some circumstances and environments, the limits of acceptable behavior may shift, and in such cases the presumption of unwanted behavior cannot be applied. Hence, it is necessary to determine the extent to which these limits have shifted and whether an alleged victim of unwanted behavior has made it clear through an outward or expressed reaction that such conduct is unacceptable.

<p>Law on Gender Equality in Bosnia and Herzegovina (consolidated text, Official Gazette of BiH, 32/10)</p>	<p>Criminal Code of the Republika Srpska (Official Gazette of the Republika Srpska, 64/17)</p>
<p>Article 5</p> <p>(2) Sexual harassment shall be considered every unwanted form of verbal, non-verbal, or physical behavior of a sexual nature that aims to harm the dignity of a person or a group of persons, or has such effect, especially when this behavior creates an intimidating, hostile, degrading, humiliating or offensive environment.</p> <p>Article 29</p> <p>A person who, on the grounds of sex, commits violence, harassment or sexual harassment that endangers serenity, mental health, or bodily integrity shall be punished with imprisonment for a term of six months up to five years.</p>	<p>Article 170</p> <p>(1) Whoever is engaged in sexual harassment of another person who is his/her subordinate or who is in a situation of dependence with respect to him/her, or who is particularly vulnerable due to his/her age, illness, disability, addiction, pregnancy, or serious physical or mental disorder, shall be punished by imprisonment for a term of up to two years.</p> <p>(2) Sexual harassment shall include any verbal, non-verbal or physically unwanted behavior of a sexual nature aimed at violating the dignity of a person in the sphere of his/her sexual life, which causes fear or creates an intimidating, hostile, degrading or offensive environment.</p> <p>(3) Prosecution for the offense referred to in paragraph (1) of this Article shall be undertaken following the submission of a motion.</p>

In one case, in which the Court of BiH Appellate Division **decided against the appellant:** *The Appellate Panel found the argument that the first-instance court drew the wrong conclusion regarding the intent behind perpetration of the criminal offense unsubstantiated. The Panel found that the reasoning in the contested judgment from the first-instance court had been specific and accurate on all decisive facts, and had satisfactorily considered the probative value and admissibility of all presented evidence, both documentary and from the testimonies of witnesses, and had, only based on such findings, rendered the conclusion that the defendant had described the injured party in a humiliating and offensive manner, violating her dignity, whereby all essential elements of the criminal offense referred to in Article 27 in conjunction with Article 4 sub-paragraph (d) of the Law on Gender Equality of BiH were met.*³⁹

³⁹ Court of Bosnia and Herzegovina, Judgement No. Kž-08/09, 24 April 2009.

In this case, the Appellate Panel refused to uphold the appeal because it found that the first-instance court had established all elements under the Law on Gender Equality.

In another case, the second-instance court **upheld an appeal**:

*The Court found, inter alia, that although the first-instance court had noted that the defendant acted with intent, i.e., he was aware that his actions constituted unwanted physical behavior of a sexual nature, the Court failed to specify this intent (Article 5 refers to “aim”) as an additional subjective element required for the existence of the criminal offense, which together with the objective part of the offence and actions undertaken provides for the criminal quantity required for the existence of the criminal offense. Therefore, the second-instance court found that the offense described in the indictment and judgment did not contain all the legal elements of the criminal offense referred to in Article 29 in conjunction with Article 5, paragraph (2) of the Law on Gender Equality.*⁴⁰

In this case, the second-instance court narrowly interpreted the definition of sexual harassment under Article 5 by focusing on the need to prove the intent implied in the words “aims to,” and failing to establish the existence of an alternative to this element as implied by the words “or has the effect of.” It is important to note that *intent is not an essential element* of the criminal offense of sexual harassment.

2.4. The Act of Perpetration

The act of perpetration that results in sexual harassment is always an act of doing. In this context, the act of perpetration includes *three basic actions taken on the grounds of sex or gender, or which are of a sexual nature: verbal, non-verbal, and physical behavior.*

Verbal behavior refers to words or sounds expressed by a perpetrator orally and in writing, including jokes, questions, and indirect remarks. In cases analyzed for the purposes of developing this Handbook, verbal behavior consisted of *comments that a victim had “nice breasts and buttocks,” suggestions of sexual intercourse, threats of dismissal in the event of a refusal to engage in sexual intercourse, and offering money to female passers-by on the street in exchange for sexual services.* Continuing to make such comments even when the victim has made it clear that such behavior is unwanted also constitutes verbal behavior in this context.

Non-verbal behavior, on the other hand, includes any communication on the part of the perpetrator that does not include words or sounds, such as facial expressions or hand gestures.

⁴⁰ Court of Bosnia and Herzegovina, Judgement No. S1 3 K 005297 12 Kž, 29 March 2012.

In one case, in which the Court of BiH found the defendant **guilty**:

The injured party entered [the defendant's] shop and kindly asked if she could make a phone call from her cellphone inside, as it was noisy outside, and he agreed, but while she was talking on the phone, he jumped up off his chair, opened his overalls, and turned toward the injured party to show her his genitals, creating an intimidating environment resulting from unwanted sexual behavior and harassment.⁴¹

Physical behavior refers to any conduct on the part of the perpetrator that involves bodily contact with the victim. In this context, any such behavior must be unwanted by the victim and imposed by the perpetrator. In practice, this usually refers to contact such as hugging, attempts to engage in kissing, and touching of the buttocks thighs, or breasts.

In one case, in which the Court of BiH found the defendant **guilty**:

When the injured party came to look for glasses frames at the optician's shop in which the defendant worked, he approached her from behind, kissed her on the cheek once, and put his hand on her left shoulder while trying with his right arm to hug her, slowly moving his hand toward her breasts, resulting in her feeling extremely frightened, so that she pulled away, evaded him, and refused his offer to fix her glasses for free, before leaving the shop.⁴²

In case law, as a rule, the courts have established the act of sexual harassment on the basis of testimonies of witnesses, police records, confessions of defendants, and recordings.

2.5. The Nature of the Act

It is the nature of the act that makes sexual harassment substantively different from other criminal offenses. Thus, in the event that the existence of this element cannot be determined, it is possible another criminal offense has been committed. The offense at hand may have other elements that are the same or similar to elements of sexual harassment, but if the three basic actions noted above are lacking, these elements may instead constitute, for example, harassment in the workplace, a threat to safety, or an offense against sexual freedom and morality.

Sexual harassment is harassment that is perpetrated on the grounds of sex or gender. Sexual harassment can therefore be recognized in sexual offers, blackmail, violations of bodily integrity, comments on the physical characteristics or sexual life of a person, and insults, remarks, and insinuations of a sexual nature.

⁴¹ Court of Bosnia and Herzegovina, Judgement No. 44/09, 23 October 2009.

⁴² Court of Bosnia and Herzegovina, Judgement No. S1 3 K 007749, 16 January 2012.

In one case, in which the Court of BiH found the defendant **guilty**:

On 14 December 2005 in the period between 11:00 and 12:00, near the Ciglane Market in Sarajevo, an anchorman of the TV OBN show "Niko kao ja" ["One Man Show"], preparing a feature for this show intended to depict a woman in a degrading, humiliating, and insulting manner, sought a man who would touch the buttocks of a woman for BAM 20.00, and having made this offer to several male passersby, had his offer accepted by [the defendant] who, as the injured party came toward him, approached her and stopped in front of her, preventing her from walking ahead for a moment with his body, and uttered the words "where have you been Sanela?" before stepping to the left; and when the injured party continued walking, he grabbed her buttocks, causing people in the vicinity to laugh and making the injured party feel humiliated, a feeling that was intensified after TV OBN broadcast this episode on 1 June 2006.⁴³

2.6. Consequence

The consequence of sexual harassment is reflected in an injury to the protected object; that is, to the dignity of a person or group of persons, or resulting from the creation of an intimidating, hostile, degrading, humiliating, or offensive environment. Consequence is an objective element of harassment and, hence, it is necessary to produce evidence from which a conclusion can be drawn about the consequence of the offence. This can be determined by multiple evidentiary means, including the testimony of the injured party and other compelling circumstantial evidence (objective and subjective). So far, as a rule, the courts have determined consequence as one of the elements of harassment by relying on the evaluation of victims by certified court experts in the medical field.

*In the case described above, **the court gave full credence to the findings and opinion of an expert in neuropsychiatry**, who testified that the victim showed symptoms of posttraumatic stress, including insomnia and anxiety. This led to her experiencing a reduced ability to focus, as well as to actively avoiding situations and people that reminded her of the traumatic event. Following the event, the victim responded by isolating herself and limiting social contact with people, even her friends and relatives, and she felt fear when going out into public due to possibility that her symptoms of stress and anxiety would intensify and she would not be able to get help.⁴⁴*

⁴³ Court of Bosnia and Herzegovina, Judgement No. K-03/08, 24 November 2008.

⁴⁴ Ibid.

It is important to note that expert evaluation alone does not constitute the necessary evidentiary means for establishing consequence in cases of sexual harassment. On the other hand, it is useful to apply the findings of experts in order to adequately assess the severity of consequences, as well as to decide on a claim of damages. Existing practice is such that prosecutors rarely determine the facts required for deciding on a claim of damages in a criminal proceeding, although it is stipulated as their duty in accordance with the relevant articles of the criminal procedure codes.⁴⁵ This is especially evident in the case of offenses in which the injured party has suffered non-pecuniary damages, such as in case of sexual harassment.

2.7. Subordination, Dependence, or Vulnerability as an Additional Element in the CCRS

In Article 170, paragraph (2) of the CCRS, the definition of the criminal offence of sexual harassment includes the same elements stipulated by the Law on Gender Equality in BiH. However, in paragraph (1), the CCRS identifies additional elements, namely the conditions of being “subordinate” or “in a situation of dependence” or of being “particularly vulnerable.” In other words, subordination, dependence, or particular vulnerability may constitute an additional element that the court is required to consider. The CCRS specifies some forms of subordination, dependence, or vulnerability including age, illness, disability, addiction, pregnancy, and severe physical or mental disorders.

⁴⁵ See: Articles 35 and 197 of the CPCBiH (Official Gazette of BiH, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13); Articles 45 and 211 of the CPCFBiH (Official Gazette of FBiH, 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09, 12/10); Articles 43 and 107 of the CPCRS (Official Gazette of RS, 53/12, 91/17); and Articles 35 and 197 of the consolidated text of the CPCBDBiH (Official Gazette of BDBiH, 33/13, 27/14).

3. Establishing Civil Liability for Sexual Harassment as a Form of Discrimination

Apart from the Law on Gender Equality, sexual harassment is also defined as a form of discrimination by the Law on Prohibition of Discrimination as well as by labor laws. These laws govern protection against discrimination in civil proceedings, and this chapter will explain the basic and specific considerations of these cases in those proceedings.

Of these civil regulations, the Law on Prohibition of Discrimination puts forth the most detailed provisions on protection against sexual harassment.⁴⁶ The definition of sexual harassment it offers aligns with that of the Law on Gender Equality; and like the Law on Gender Equality, the Law on Prohibition of Discrimination requires that all legal entities ensure effective internal anti-discrimination procedures.⁴⁷ Furthermore, the Law on Prohibition of Discrimination compels all public bodies, as well as individuals and legal entities in both the private and public sector, to refrain from discrimination.

Because protection against discrimination under this law is governed by provisions of the Civil Procedure Code, in this context, a harassed person is referred to as a *plaintiff* and a harasser as a *defendant*. An employer who fails to undertake efficient actions to prevent sexual harassment could be considered a defendant, individually or as a co-defendant. And according to Article 17 of the Law on Prohibition of Discrimination, associations or other organizations that advocate for the protection of human rights or any other rights established in accordance with the law can be the plaintiff in such cases.⁴⁸

It is important to distinguish between collective and joint actions. Collective actions arise from a special procedural mechanism that allows associations or organizations to make a claim against any person who has violated the right to equal treatment of a number of people who predominantly belong to a group whose rights the plaintiff is committed to protecting. Therefore, a collective plaintiff does not take action “on behalf of particular persons” and is not authorized to do so,

⁴⁶ Law on Prohibition of Discrimination (Official Gazette of BiH, 59/09 and 66/16)

⁴⁷ Article 24, paragraph (4) of the Law on Prohibition of Discrimination; and Article 13, paragraph (2) of the Law on Gender Equality.

⁴⁸ Article 17 of the Law reads:

(1) Associations or other organizations established in accordance with the law, dealing with protection of human rights or rights of a specific group of individuals, may file a lawsuit against the person who violated the right to equal treatment of large group of individuals who predominantly belong to a group whose right the plaintiff is protecting. (2) The lawsuit referred to in Paragraph (1) of this Article may include the claim: a) To determine that the respondent violated the right to equal treatment of members of a group whose rights the plaintiff is protecting, b) To prohibit any action that violates or that may violate the right to equal treatment, or to take action to eliminate discrimination or its consequences suffered by members of the group, c) To publish the decision that found violation of the right to equal treatment in the media, at the expense of the respondent. (3) Procedural provisions of this Law shall appropriately apply to the lawsuit referred to in Paragraph (1) of this Article.

but acts on their own behalf in response to discrimination against “an identifiable group.” Article 16 of the Law on Prohibition of Discrimination permits a third-party intervener to be introduced in proceedings, but only on the side of the plaintiff. The intervener may be introduced only upon agreement of the plaintiff, which allows the intervener to participate in and take actions in the proceedings until the plaintiff explicitly recalls the agreement.

In addition to defining different forms of discrimination, the Law on Prohibition of Discrimination also specifies various special procedural rules that apply to anti-discrimination procedures (Chapter V of the Law). These rules include urgency, shared burden of proof, and as noted above, the participation of third parties and the possibility of filing collective lawsuits. Notably, the Law on Gender Equality directs victims to seek protection against discrimination in a special procedure under the Law on Prohibition of Discrimination.⁴⁹

What is unique about the Law on Prohibition of Discrimination is that victims of all forms of discrimination, including harassment, are directed to seek protection of their rights through existing judicial and administrative proceedings, or by filing a special lawsuit for protection against discrimination that may relate to the following: 1) determining discrimination; 2) prohibiting or ending discrimination; or 3) compensating a plaintiff.⁵⁰ Article 54, paragraph (4) of the CPC of the FBiH also provides victims the option of redress by filing a lawsuit to establish a violation of personal rights without filing a claim for compensation or any other claims in accordance with a special law.⁵¹

The Law on Prohibition of Discrimination and labor laws in BiH all define the concept of sexual harassment similarly. As such, it can be concluded that these regulations have been harmonized with the two key EU Directives in this area: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.⁵² The definitions of sexual harassment put forth in both the Law on Prohibition of Discrimination and relevant labor laws contain elements that the parties are required to corroborate in order for the court to determine whether or not these forms of discrimination exist in a given case. These elements, which can help the court assess the facts and evidence presented in proceedings, are outlined below. An emphasis is placed on the specificity of proving these forms of discrimination by applying the rules on shared burden of proof.

Note: The contents of this chapter relating to the determination of elements of sexual harassment and the burden of proof are relevant and may be applicable to proving the elements of

49 See: Article 23 of the Law on Gender Equality.

50 See: Article 11, paragraph (1) and Article 12 of the Law on Prohibition of Discrimination.

51 Civil Procedure Code of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of BiH, 53/03, 73/05, 19/06, 98/15).

52 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJL 180 and Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, published on 02 December, OJL 303

gender-based harassment, given the similarities between *sexual harassment* and *gender-based harassment* as two forms of discrimination, in accordance with the Law on Gender Equality in BiH, the Law on Prohibition of Discrimination, and laws regulating labor relations.

3.1. Elements of Sexual Harassment

The key issue disputed in civil proceedings related to sexual harassment is whether harassment occurred. This question is at the center of all three variants of proceedings for protection against discrimination (establishing discrimination; prohibiting or eliminating discrimination; and compensation). Therefore, the parties are required to present all the facts on which they base their claims and must present the evidence underpinning those facts. The court will consider only the facts presented by the parties and make determinations only on the evidence put forth by them. Notwithstanding the general rule on the burden of proof, in cases initiated under the Law on Prohibition of Discrimination or lawsuits for protection of collective interests, the court shall also apply a special rule on the burden of proof, discussed in section 3.7.

Since sexual harassment is a special form of discrimination with very specific features, the court is governed by the elements of the legal definition of the offence when considering the evidence and determining the facts in order to decide on the issue at dispute. To establish that certain behaviors constitute sexual harassment, the following four decisive facts must be established: (1) unwantedness, (2) the type of act, (3) the nature of the act, and (4) the consequence.

3.2. Unwantedness

In accordance with all legal definitions, sexual harassment must be unwanted. To this end, the plaintiff is required to present facts and propose evidence that make it probable that a specific behavior was unwanted. However, the unwantedness of a particular type of behavior is a subjective perception, and may vary depending on time passed, the environment in which harassment occurs, and other subjective and objective factors. For this reason, unwantedness is determined on a case-by-case basis, from the available facts and any evidence that corroborates the inference that a behavior was unwanted. Analysis of the facts and evidence presented can follow two paths: (1) presumption of unwantedness; or (2) the existence of an outward or expressed reaction.

The presumption of unwantedness

The presumption in cases of sexual harassment is that behavior of a sexual nature is unwanted, as is any conduct directed toward a person or persons solely because of their sex or gender. Unwantedness must be determined in the specific context of each case; yet, every person must consider, upon engaging in social interaction, whether their behavior creates an intimidating, hostile, degrading, humiliating, or offensive environment for the people around them. The presumption of

unwantedness is particularly strong when it comes to *physical* behavior of a sexual nature, and the absence of an outward reaction by a person experiencing unwanted attention of this sort does not mean the behavior has no consequence.

Law on Gender Equality (consolidated text, Official Gazette of BiH, 32/10)	Article 5	(2) Sexual harassment shall be considered every unwanted form of verbal, non-verbal or physical behavior of a sexual nature that aims to harm the dignity of a person or group of persons, or has such effect, especially when this behavior creates an intimidating, hostile, degrading, humiliating or offensive environment.
Law on Prohibition of Discrimination (Official Gazette of BiH, 59/09, 66/16)	Article 4	Sexual harassment shall be considered to be any form of unwelcome verbal, non-verbal or physical behavior of sexual nature which aims at or results in a violation of a person's dignity, especially when it creates an intimidating, hostile, degrading, humiliating or offensive environment.
Law on Labor in the Institutions of BiH (Official Gazette of BiH, 26/04, 7/05, 48/05, 60/10, 32/13)	Article 86(e)	(3) Sexual harassment... shall be considered any form of unwanted verbal, non-verbal or physical behavior of a sexual nature aimed at violating the dignity of a person or a group of persons, especially when such behavior creates an intimidating, hostile, degrading, humiliating or offensive environment.
Labor Law of the FBiH (Official Gazette of FBiH, 26/16)	Article 9	(3) Sexual harassment... shall be any conduct, which by way of words or actions of a sexual nature intends to violate or constitutes a violation of the dignity of an employee or a job seeker, which causes fear, and creates a degrading or offensive environment.
Labor Law of the RS (Official Gazette of RS, 1/16)	Article 24	(3) Sexual harassment... shall be any verbal or physical behavior which intends to violate or constitutes a violation of the dignity of a job seeker or an employee in the sphere of their sexual life, which causes fear, or creates a degrading or offensive environment.

Thus, if the available evidence establishes, for example, that a male worker approached a female colleague and, without seeking permission, embraced her strongly and kissed her, one must infer that this was unwanted. Evidence to be considered would include the testimonies of witnesses who can contribute to the understanding of the court as to the nature of the environment in which the conduct occurred, testimonies of witnesses who can attest to the reaction of the plaintiff to the behavior of the defendant, statements, and other evidence that such attention was unwanted.

In some circumstances, including at the workplace, certain behaviors are tolerated or accepted by a person who would not otherwise do so. In such cases, it is necessary to determine the extent to which a person's boundaries situationally shifted and whether a plaintiff made it clear, through an outward or expressed reaction, that the conduct they experienced was unacceptable. In that regard, the following decision from a case in Croatia is very interesting.

The Court found that:

On the basis of witness testimonies and the statements of the plaintiff and defendant that employees relaxed with each other by telling jokes and casually discussing various topics, including sex, and that the plaintiff herself actively participated and at one point brought an adult book titled "The guide to getting it on" and read parts of it out loud, later lending it to her colleagues... the Court found that the defendant's comments addressed to the plaintiff about her good looks, or even those aimed at establishing intimate contact with her, could not be qualified as sexual harassment, because the first-instance judgement had established that the plaintiff was involved in an intimate relationship with the defendant.⁵³

In this case, the Court found that the conduct of the defendant did not constitute sexual harassment because the plaintiff had participated in behavior similar to the conduct she subsequently labeled harassment.

The existence of an outward or expressed reaction

Because unwantedness is a subjective element and no universal rules of social behavior exist, a presumption of unwantedness cannot be the only way to establish that behavior has been unwanted. While a certain behavior may be acceptable to some people or even to most people, it may be experienced as unwanted by a particular person. For instance, praising a person's style may be understood as a compliment by some people, but if it is not viewed that way by a person who articulates that such praise is unwanted, persisting in doing so could constitute harassment.

When people experience unwanted conduct, they often communicate this to the outside world through verbal or non-verbal means that make their feelings about the conduct clear. In the context of sexual harassment, the outward or expressed reaction of the plaintiff may occur contemporaneously or in the aftermath the experience, or a person may have previously stated or demonstrated that the same or similar conduct is unwanted.

The existence of an outward reaction should especially be assessed when the boundaries of behavior between persons appear to have shifted situationally. In other words, did the person who considers a behavior unwanted clearly communicate that to the person or persons engaging in such conduct. However, even then, it is extremely important to consider the specific circumstances and environment in which the conduct took place, to conclude whether or not such an outward reaction could reasonably be expected.

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3.3. The Act

An act that can lead to sexual harassment is always an act of doing, manifested in three basic forms: verbal, non-verbal, or physical behavior **of a sexual nature**.

Verbal behavior refers to words or sounds that the perpetrator expresses orally or in writing, such as jokes, questions, and remarks of a sexual nature. Hence, verbal behavior includes *comments that a person "has nice breasts and buttocks," suggestions of sexual intercourse, threats of dismissal in the event of refusal to engage in sexual intercourse, and offering money to female passers-by on the street in exchange for sexual services*. Continuing to make such comments to a person even when they have made it clear that such behavior is unwanted also constitutes verbal behavior in this context.

Non-verbal behavior, on the other hand, includes all communications by a perpetrator that do not include words or sounds, such as facial expressions, hand gestures, exposing their genitalia, or displaying content of a sexual nature.

Physical behavior refers to any sexual behavior by the perpetrator and may include bodily contact with the victim. Any such behavior must be unwanted for the victim; meaning, it is imposed by the perpetrator. In practice, this usually refers to physical contact such as hugging, attempts to kiss, or touching the buttocks, thighs, etc.

3.4. The Nature of the Act

The nature of the act is what makes sexual harassment different from other forms of discrimination. Sexual harassment is discrimination because it is motivated by the sexual features or identity of the harassed person. As such, sexual harassment can be recognized in sexual advances, blackmail, or violations of bodily integrity, and involves various offenses of sexual nature, including slurs and insinuations, and comments about the physical features of a person or about their sexual life.

3.5. Consequences of the Act

The consequence of the act of sexual harassment is manifested in the violation of dignity of a person or group of persons that creates an intimidating, hostile, degrading, humiliating, or offensive environment. Consequence as an element of sexual harassment is typically determined by the courts based on the findings of expert witnesses who assess injured parties. However, the consequence of the act can also be determined on the basis of all the other evidence put forth by the parties.

3.6. Damages

In cases that have been initiated by a lawsuit to establish sexual harassment or a lawsuit to prohibit sexual harassment, it is sufficient to establish facts that indicate the existence of sexual harassment; but in a lawsuit for compensation, the court must also determine the degree of damage. As a result of sexual harassment, a plaintiff may suffer both pecuniary and non-pecuniary damages. The existence and scope of both of these forms of damage are generally determined on the basis of all the evidence, as provided for in the Civil Procedure Code.

Pecuniary damages are assessed as a function of the violation of material property that occurs due to sexual harassment. Therefore, the purpose of pecuniary compensation is to re-establish the status of the victim's property before the damage occurred. As a rule, the scope of pecuniary damages is to be determined by expert witnesses from various specialties, documentation, etc.

Non-pecuniary damages suffered by a plaintiff due to sexual harassment can be manifested in the emotional pain associated with the violation of their rights, honor, and reputation, but also in the physical pain, fear, and stress that results from self-isolation or a reduction in life activities. Compensation for non-pecuniary damages is meant to serve a moral purpose and, if possible, to re-establish a sense of safety or emotional security that was distorted by the act. The amount of compensation awarded is to be proportional to the severity and duration of any physical pain, mental pain, and fear experienced by the injured party. Further, analogous to the position of case law regarding the unjustified deprivation of liberty,⁵⁴ mental pain caused by sexual harassment as a form of discrimination represents a unique form of damage that encompasses all the negative non-pecuniary consequences of the offence to the personality of the injured party that result from this violation of rights.

The court awards compensation for non-pecuniary damages by taking into account all the circumstances of the case. Medical examinations by experts are required to determine the existence and amount of non-pecuniary damages only as it relates to certain aspects – such as the degree of emotional pain experienced by an injured party due to a reduction in their life activities, or the extent of their physical pain and fear – but are not necessary to determine compensation for mental harm that results from the violation of *personality* rights.

⁵⁴ “Pain caused by unjustified conviction i.e., unjustified deprivation of liberty is a unique kind of damage that includes all the damaging consequences of non-pecuniary damage related to personality of the injured party resulting from the unjustified conviction i.e., unjustified deprivation of freedom. For this [form of] damages, one sum of compensation is awarded, with the court taking into account all the circumstances of the case (the reputation the injured person had previously enjoyed in his community, the attitude towards the injured party after conviction i.e., the deprivation of liberty, the gravity and nature of the criminal offense, duration of deprivation of liberty and all other circumstances that influenced the nature, weight and duration of mental pain).” See: “Orientation criteria and amount of fair compensation in view of non-pecuniary damage,” adopted by the Civil Department of the Federation Supreme Court, 27 January 2016.

3.7. Burden of Proof

The redistribution of the burden of proof is a novelty in discrimination proceedings. This issue was first regulated in a comprehensive way by Article 15 of the Law on Prohibition of Discrimination, which applies different rules than those generally applicable in civil proceedings.

Article 15

*In cases when a person or group of persons provide facts in all proceedings specified under this Law, based on the evidence available to them, making it probable that discrimination has occurred, **the burden of proof that discrimination has not occurred shall lie with the opposing side.***

Pursuant to this Article, the plaintiff in every case of discrimination is required to demonstrate the probability of his/her claims, while the defendant is required to present evidence supporting that his or her actions were objective, not discriminatory. This is an essential procedural rule and, in accordance with the practice of the Constitutional Court of BiH, reflects the constitutional right to a fair trial.

In case AP 1093/07 the Constitutional Court of BiH concluded: *All the aforementioned facts clearly indicate that the appellant presented evidence before the courts from which it could be presumed that there was discrimination in the application of Article 143 of the Labor Law by the defendant and, accordingly, the court in the present case should have placed the burden of proof on the defendant. However, the courts dismissed the appellant's civil action by which she sought that the courts establish that she was discriminated against in the application of Article 143 of the Labor Law by the defendant; and the courts reasoned that the appellant did not make it possible for the court to form its opinion on the evidence presented to the court. In view of the above, the Constitutional Court holds that the regular courts failed to secure the procedural rights of the appellant so that the appellant had to bear an excessive burden of proving the facts, which were at the disposal of the defendant only and which the appellant had not to prove, but which the defendant should have contested.*

In accordance with this ruling, *the burden of proof is shared.* The plaintiff was required to prove the probability of her factual claims about discriminatory treatment on prohibited grounds (e.g., due to gender or sex). This probability exists if, in a court proceeding, a decision on the existence of discrimination appears more probable than a decision not finding discrimination, and these prospects are based on evidence that underpin the probability of discrimination. Should a plaintiff fail to prove the probability of their claims about treatment by a defendant on the basis of prohibited grounds, the general rule on the burden of proof from civil proceedings applies, leading to the loss of the case.

Hence, in another case, the Supreme Court concluded: *By making an arbitrary claim that “only employees who were close to certain political parties were recruited,” and not indicating even the names of political parties referred to, the plaintiff failed to convince the Court that the defendant committed the act for which he was charged, thus not making it probable that the decision on employment for an indefinite period of time of the said persons constitutes an act of direct or indirect discrimination... Namely, the plaintiff was supposed to prove certain facts underpinning the presumption of direct or indirect discrimination leading to different treatment. After that, the burden of proof would be shifted to the defendant who would need to prove that the equal treatment principle had not been violated.*

As such, if a plaintiff succeeds in proving their claims with a degree of probability, the defendant is then required to present facts and evidence that could lead to the conclusion that no discriminatory treatment has taken place; i.e., that the different treatment of the plaintiff is not related to any feature of their person or personality that is considered a prohibited ground.

Specific application of this rule in cases of sexual harassment as a form of discrimination is reflected in the specificity of these forms of discrimination. The application of this rule to harassment cases was raised in the European Court of Justice in *Coleman v. Attridge* (Case C-303/06), and the Court found that since harassment is a form of discrimination, the burden of proof rule applies to these cases as well.

As to what evidence is sufficient to establish the probability of sexual harassment claims, just as in cases of direct or indirect discrimination, this evidence (and/or well-known facts) must establish the probability of claims of unwanted acts of a sexual nature or acts related to the sexual characteristics of the plaintiff that led to a violation of their dignity. Accordingly, the facts to be established are: 1) the existence of the act, 2) the act of a sexual nature, 3) unwantedness, and 4) the consequence (i.e., a violation of dignity). The burden of proving the probability of these facts lies on the side of the plaintiff.

In sexual harassment cases, it is quite clear that discriminatory treatment is related to sex or gender, and therefore, different treatment need not to be proved. If, however, on the basis of evidence presented by the plaintiff, the court does not find it probable that the abovementioned elements are established to suggest the conduct of the defendant constitutes sexual harassment, it will apply the general rule on the burden of proof. On the other hand, if a plaintiff succeeds in proving their claims as probable, the defendant is required to present facts and evidence on the basis of which it could be inferred that such an act did *not* occur, that it was *not* of a sexual nature, that it was *not* unwanted, and that no prohibited consequence resulted from the act.

When damages are sought in sexual harassment cases, the rule of shared burden of proof does not apply to proving the existence and scope of certain adverse consequences (the duration and degree of fear, the percentage of reduction of life activities, etc.). Instead, the general rule of burden of proof applies in such cases, according to which the burden lies on the side of the plaintiff (the injured party).

3.8. The Liability of Employers who Fail to take Efficient Measures to Prevent Harassment

In BiH, the Law on Gender Equality, the Law on Prohibition of Discrimination, and the federal and entity-level labor laws all cite the responsibility of employers to take effective measures to prevent sexual harassment. But what kind of liability does an employer face by failing to take effective measures? According to the Labor Law of the FBiH, when discrimination is established by a court, the obligation of the employer is to ensure and enable the exercise of the rights of which the employee was deprived and to indemnify him or her for damages caused by discrimination.

For example, in a case concerning mobbing, tried under provisions of the Law on Prohibition of Discrimination, the court evaluated the liability of an employer from which an employee sought protection, finding that the employer regarded the complaint as a private matter and was thus liable.

The Court found that:

Article 24 (4) of the Law on Prohibition of Discrimination imposes an explicit obligation on the employer to undertake a procedure in regard to complaints of discrimination, with clearly identified "parties to the dispute," and even more so because, according to the rules of civil law the employer is liable for the actions and omissions of his or her employees. In the Court's view, the defendant not only failed to take any actions within his power with respect to the plaintiff's complaint of discrimination, but instead introduced a practice of his own to consider such complaints as a private matter of employees.

In this case, the court found that both the employer who failed to take action to ensure effective protection against discrimination, and the employee who carried out the actions that the court considered mobbing, could be sued. In addition, they were ordered to pay the plaintiff compensation, jointly and severally, for pain and fear suffered as well as for violations of reputation and honor.

4. Recommendations for Judicial Office Holders in Handling Cases of Sexual Harassment

The following chapters present recommendations formulated by the panel for handling cases of sexual harassment, and refer to aspects of importance for both prosecutors and judges in the practical consideration of these cases.

Chapter Five discusses actions that can be taken by prosecutors in criminal proceedings to achieve efficient prosecution of these cases, and addresses the process of proving sexual harassment and improving the position of the injured party in these proceedings, as well as different approaches to criminal prosecution according to legislation in BiH.

In Chapter Six, recommendations are presented related to actions taken by judges in criminal proceedings, including the qualification of elements of the offence (according to the LGEBiH), the evaluation of factors relevant for sanctioning, various approaches to interpretation, and deciding on compensation claims of injured parties.

Chapter Seven discusses the actions of judges in civil proceedings and presents recommendations related to the burden of proof, evidentiary means for establishing damages, deadlines for filing a suit, and employer liability.

Finally, Chapter Eight addresses the minor offence liability of employers.

5. Criminal Proceedings: Actions of Prosecutors

Familiarity with the nature of the act of sexual harassment and a sensitive approach in communicating with the injured party are both preconditions to the successful and efficient prosecution of cases of sexual harassment.

5.1. Proving Sexual Harassment

Given the nature of sexual harassment as a form of gender-based violence, and the fact that it most often occurs exclusively between a harassed person and a harasser outside the presence of other people, prosecutors can face numerous challenges and difficulties in prosecuting cases of sexual harassment, especially as it relates to collecting and presenting evidence. Below are specific recommendations for prosecutors that refer to issues identified as problematic in proving sexual harassment. These recommendations can serve as examples of good practice for prosecutors who aim to overcome difficulties in proving sexual harassment in criminal proceedings.

5.1.1. The Injured Party's Statement and Police Actions in Investigations

In most cases of sexual harassment, the injured party is the one who will report the act to authorities. In order to properly qualify the act of sexual harassment from the start, police must adequately take the statement of the injured party. This is crucial, as in most cases, any subsequent investigative actions will be based on collecting evidence that relates to the victim's statement. Further, given the specificity of the act of sexual harassment and the lack of experience among many of the authorities undertaking official actions in an investigation, the police should inform the prosecutor's office of any report of sexual harassment so that the prosecutor's office can issue instructions on future investigative actions. Indeed, even when the police are not obliged to inform the prosecutor's office, according to the law, and bearing in mind the range of the sanctions for the offence, such notification is useful. Finally, if the act of sexual harassment has been committed recently, the injured party should be referred for a psychological examination, if possible.

5.1.2. Evidence in Sexual Harassment Cases

The statement of the injured party is a *sine qua non* in proving sexual harassment. Thus, for the successful prosecution of a sexual harassment case, it is critical that the consistency of the victim's statement is ensured. However, additional evidence should also be collected, especially evidence of the act of perpetration, as well as evidence confirming that the accused and the victim were together or in contact at the time of the act or in the place it occurred (e.g., video surveillance, text messages, etc.). It is necessary to establish whether there are direct witnesses who can testify to

the circumstances of the act; and whether indirect witnesses can testify to the essential circumstances of the act and the wider context of the relationship between the accused and the victim. Interviewing indirect witnesses is of special importance if the act was committed within a collective, such as a workplace, educational environment (school, university), or sports club, given that persons belonging to such collectives may be able to provide important information about the nature of the relationship between the accused and the victim. Also, it is useful in cases of sexual harassment to explore whether other persons in a collective believe they have been exposed to unwanted behavior by the same perpetrator that can qualify as sexual harassment.

5.1.3. Collecting Evidence for the Purpose of Establishing Damages

Existing practice is such that prosecutors rarely determine the facts required for deciding on damages in a criminal proceeding, although it is their duty in accordance with the relevant articles of criminal procedure codes.⁵⁵ This is especially evident in the case of offences in which the victim has suffered non-pecuniary damages, as in cases of sexual harassment. During the course of the investigation, prosecutors should therefore use all means of evidentiary procedure to establish the damages suffered by the victim for the purpose of deciding on compensation for the victim in a criminal proceeding. This evidence allows prosecutors to not only secure sufficient proof for a damages claim but is also relevant to proving the decisive facts of the primary criminal matter.

It is recommended that prosecutors order an *expert evaluation of the consequences of sexual harassment for the victim*. Such an evaluation can be used to prove the credibility of the victim, and as evidence for a claim of damages. Based on an expert evaluation, the legal representative of a victim can formulate a compensation claim in the criminal proceeding.

Case law example: An expert evaluation was performed with respect to the consequences of the offence for the victim, according to which, *the traumatic event significantly undermined the reputation and honor of the injured party [...] which clinically manifested in a reduction of self-esteem, self-confidence, and trust in other people, as well as a reduction of social contact due to shame and feelings of inferiority*. However, the evaluation was not used as grounds for the court to decide on a compensation claim for the victim in the criminal proceeding, in which the guilt of the accused for sexual harassment was established. In line with standard practice, the court referred the injured party to a civil proceeding to claim compensation for damages, despite the fact that the court had the opportunity to establish non-pecuniary damages and determine the amount of compensation based on the finding of the expert.⁵⁶

⁵⁵ See: Articles 35 and 197 of the CPCBiH (Official Gazette of BiH, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13); Articles 45 and 211 of the CPCFBiH (Official Gazette of FBiH, 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09, 12/10); Articles 43 and 107 of the CPCRS (Official Gazette of RS, 53/12, 91/17); and Articles 35 and 197 of the consolidated text of the CPCBDBiH (Official Gazette of BDBiH, 33/13, 27/14).

⁵⁶ Court of Bosnia and Herzegovina, Judgement No. K-03/08, 24 November 2008.

5.1.4. Proving the Intent of the Accused

Sexual harassment is an offence that can be perpetrated with intent.⁵⁷ It should be noted that intent arises from the act of perpetration and the circumstances of the case and is proven by the actions of the accused against the victim.

5.1.5. Consideration of a Pattern (Continuity) of Sexual Harassment in Contrast to Consideration of an Individual Act of Sexual Harassment

Sexual harassment exists even in the case of a single act that violates the protected good. Hence, it is not necessary to prove a pattern, i.e. continuity, of acts of harassment committed by the accused against the victim in a given period of time in order to establish the offence of sexual harassment. It is sufficient that a single act occurred (a so-called incident) which: 1) is of a sexual nature, 2) is unwanted by the victim, and 3) led to the consequence.

5.1.6. Expert Support from a Psychologist during the Victim's Interview

A psychologist may be of assistance to the prosecutor's office in discovering all the circumstances of a case by providing advice to the prosecutor regarding the best way to obtain the victim's statement and by being present during the victim's interview. For example, a psychologist can help the prosecutor's office better understand the reaction of the victim to the act of perpetration in the moment, including whether the victim felt they could react in that moment at all, and whether they were immediately aware of the consequence or later became aware of it.

5.1.7. Issuing an Order for Expert Evaluation

In formulating and issuing an order of expert evaluation of the victim in a sexual harassment case, the prosecutor should consult a psychologist working for the witness support department in the prosecutor's office, in order to define all the essential elements of evaluation in the case. If possible, the prosecutor should define in an order that the expert evaluating a victim provides an opinion with respect to the damages incurred. This will provide the victim a form of assistance and reduce the inflow of court cases (i.e., the number of civil proceedings for compensation of damages), contributing to the efficiency of the judiciary.

An order for neuropsychiatric evaluation of the accused should refer to assessment by a team of neuropsychiatrists and psychologists that can offer an expert finding about the personality of the accused; in this way, the prosecutor's office can ensure more comprehensive evidence with respect to the liability of the accused.

⁵⁷ See the definition of sexual harassment in the Law on Gender Equality in BiH and in the Criminal Code of the RS.

5.2. Improving the Position of the Victim in the Proceeding

Victims in cases of sexual harassment should be provided expert support to confirm their statement during trial in order to achieve efficient prosecution of the case, from start to end. Given that evidence in sexual harassment cases is mostly of a subjective nature, there is a particular need to ensure consistency. Therefore, support from the prosecutor's office to empower the victim to take part in the criminal proceeding and express the whole truth during the main trial is essential.

In line with the capacities of the prosecutor's office, expert support and the presence of a psychologist (through the witness support department in the prosecutor's office) should be ensured when a victim is giving their statement, but also during testimony in the courtroom. Prosecutors should be cautious when making promises to the victim regarding the outcome of the proceeding, especially in assuring an outcome in the victim's favor and the establishment of guilt or the pronouncement of a sanction for the accused. It is useful to inform the victim that the outcome will depend to a great extent on the statement made by the victim, but it is important to stress that an outcome cannot be anticipated with certainty.

5.3. Criminal Prosecution Ex Officio (According to the LGEBiH) in Contrast with Criminal Prosecution upon an Injured Party's Motion (According to the CCRS)

For criminal offences prosecuted upon the motion of an injured party, the prosecutor cannot initiate criminal proceedings without such a motion. This is an exemption from the principle of legality of criminal prosecution. However, when a prosecutor obtains such a criminal prosecution motion, all subsequent actions are equal to those in cases when the criminal proceedings are initiated and carried out upon the request of prosecutors, in accordance with the accusatorial principle.

Criminal legislation in BiH recognizes two different approaches to criminal prosecution of the offence of sexual harassment. On the one hand, criminal prosecution is initiated *ex officio* in accordance with the provisions of the Law on Gender Equality. On the other hand, the Criminal Code of the RS stipulates that criminal prosecution is initiated upon a motion of the injured party. Given these different frameworks for prosecutorial action in the two laws, the question arises as to the possible advantages and disadvantages of the novelty introduced by the CCRS.

The initiation of criminal prosecution upon the motion of an injured party has the advantage of respecting the autonomy of victims to make the decision to initiate proceedings by which the actions of the prosecutor are facilitated, with respect for the fact that the victim demonstrates an interest in prosecution and with the assumption that such a victim will remain true to their statement. On the other hand, such a motion is time-limited and thus, shorter objective and subjective deadlines must be taken into account. For example, the law stipulates the period in which the criminal prosecution motion must be filed (three months from becoming aware, or a year from

perpetration of the offence), constituting an objective limitation to the injured party. The most notable disadvantage of this solution is the increased possibility that a perpetrator may influence a victim to prevent them from filing of a criminal prosecution motion. An additional disadvantage is that the offence may be committed in the context of subordination or dependence between an active and passive subject, and can be committed against especially vulnerable categories of persons listed in the law. Protected groups, such as children or persons with special needs, may have legal representatives authorized to file a criminal prosecution motion, but this legislative solution grants the decision to provide criminal protection to these persons in sexual harassment cases to their legal representatives, which in fact designates these representatives to assess whether a certain behavior constitutes a criminal offence. In addition, the question arises whether criminal protection can be provided in cases when it is these legal representatives of protected categories who are the perpetrators of harassment.

6. Criminal Proceedings: Adjudication by Judges

The aim of a criminal sanction, inter alia, is to offer protection and satisfaction to the victim of a criminal offence.

6.1. Identification and Qualification of the Elements of the Criminal Offence of Sexual Harassment pursuant to the Law on Gender Equality in BiH

As elaborated in Chapter Two, the definition applied in the Law on Gender Equality in BiH stipulates that sexual harassment consists of the following three essential elements: 1) **the act or type and nature** of the act (verbal, non-verbal, and physical actions of a sexual nature), 2) **the subjective element** (intent), and 3) **the consequence** (which implicitly contains the element of unwantedness: *unwanted behavior causing damage to a person's dignity, particularly when such behavior creates an intimidating, hostile, degrading, humiliating or offensive environment*).

These elements must be examined to establish whether a particular act or behavior constitutes sexual harassment. The text below briefly outlines the recommendations of the expert panel for qualifying the elements of the criminal offence of sexual harassment, together with excerpts from the case law of courts of BiH.

6.1.1. Intent

Judgements analyzed from sexual harassment cases indicate inconsistent practice in qualifying intent as an essential element of the act. The brief excerpts from judgements cited below indicate a lack of harmonization within the case law of BiH with regard to the interpretation of the elements defined as required for this specific criminal offence.

a) A *positive* example of qualification:

*"It is possible that the harasser may not be aware of the fact that his/her action, behavior or comment is taken as a harassing one, but it does not justify them. An analysis of this provision shows that **the elements of this criminal offence do not exclusively require intent on the part of the perpetrator**, as claimed by the defendant; it is evident from the text of the provision that it alternatively positions the perpetrator's behavior aimed at prohibited consequences of the act (as a subjective element of the act, intent) or resulting in prohibited consequences of the act (as an objective element of the act, regardless of the perpetrator's intent)."*⁵⁸

b) A *negative* example of qualification:

"Although the judgement at first instance states that the defendant acted with intent, i.e. he was aware

⁵⁸ Municipal Court in Sarajevo, Judgement No. 065-0-K-06-001676, 8 March 2007.

that the action he took at the given moment towards the injured party represented unwanted physical behavior of a sexual nature, the intent of the defendant failed to be stated (the text of the provision in Article 5 paragraph 2 mentions "aim") as an additional subjective element required for this criminal offence which, in conjunction with the objective aspect of the act indicated above, contributes to the actions undertaken, and the criminal degree required for a criminal offence to be established (...); [therefore] the act described in the facts of the case does not contain all the legal elements of the criminal offence."⁵⁹

Commentary: Pursuant to the definition of the act of sexual harassment in the Law on Gender Equality, intention, as a qualified form of intent, does not represent a substantial element of the criminal offence and, hence, need not be considered within the relationship of the perpetrator towards the crime committed. The criminal offence of sexual harassment can be committed with direct or possible intent established on the basis of evidence presented in a specific case.

6.1.2. Establishing the Consequence

The occurrence of a prohibited consequence in cases of sexual harassment can be established by multiple evidentiary means. The statement of the victim as a witness and other credible evidence (both objective and subjective) can be used to establish the existence of consequences in this type of case. It is important to note that expert evaluation does not represent a necessary evidentiary means for establishing consequences in sexual harassment cases; on the other hand, expert evaluation can be instrumentally applied to adequately assess the severity of a consequence.

For instance, the following means, circumstances, and interpretations have been used in practice to establish whether a consequence occurred:

- A **video recording** of the perpetration of sexual harassment can be used as objective evidence of consequence, on the basis of the recorded reaction of the injured party in the moments during or following perpetration of the act of sexual harassment (*Court of Bosnia and Herzegovina, No. K-03/08, 24 November 2008*);
- An **outward or expressed reaction by the victim** that unequivocally indicates consequence (*Municipal Court in Sarajevo, No. 065-0-K-06-001676, 8 March 2007*);
- A **logical inference by the Court as to the existence of a consequence following the causality principle**, or an inference by the Court that the perpetration of sexual harassment, which is unwanted for the victim, leads to consequence on the basis of causality. Causality represents a necessary link between the act perpetrated and the consequence that occurs. Cases in which the Court accepted a plea agreement did not require evidence of a consequence; rather, the Court held that it logically ensued from the perpetrated act (*Court of Bosnia and Herzegovina, No. K-44/09, 23 October 2009*).

⁵⁹ Court of Bosnia and Herzegovina, Judgement No. S1 3 K 005297 12 Kž, 29 March 2012.

6.1.3. Establishing Unwantedness

In cases of sexual harassment, in accordance with the context of a given case, the Court may use the *presumption* of unwantedness. For instance, the Court may start from the presumption that behavior of a sexual nature in the workplace is, in itself, objectively *inappropriate* (objective qualification) and therefore *unwanted* (subjective qualification) from the perspective of the injured party. When necessary, this presumption may be applied even when there is *no outward reaction on the part of the victim* to that directly indicates the unwantedness of the behavior in question.

6.1.4. The Question of Subordination (in the CCRS)

In the Criminal Code of the RS, subordination represents one of the alternatively determined elements to the offence of sexual harassment.

a) A *negative* example of qualification

“There was the issue of whether this criminal offence can be perpetrated by a person who is not in a superior position to the injured party.... Even with a broader interpretation of provisions of the Law on Gender Equality, i.e. that a person outside the employment relationship and the employer-employee relationship may also cause the same consequences – sexual harassment – this Court is of the opinion that the person must have the ability to affect the position of the injured party in the same way that the employer can in order to commit discrimination.”⁶⁰

Commentary: The issue of subordination or superiority in a relationship does not represent an essential element of the criminal offence of sexual harassment referred to in the Law on Gender Equality in BiH, which is why this requirement should not be insisted on to establish the criminal offence.

6.2. The Qualification of Aggravating and Mitigating Factors and their Influence on Sentencing in the Case Law of the Court of BiH

Within the case law of the Court of BiH, mitigating factors were assessed as a whole and automatically in some sexual harassment cases, without the Court offering separate reasoning as to why each specific factor was assessed as mitigating.

For instance, the defendant’s family status, partial confession,⁶¹ or economic status can each be assessed as mitigating, without being directly related to the facts and circumstances of the act, as

⁶⁰ Cantonal Court in Sarajevo, Judgement No. 009-0- Kžk-07’000004, 30 November 2007.

⁶¹ See: Municipal Court in Sarajevo, Judgement No. 065-0-K-06-001676, 8 March 2007. In this case, the Court considered a partial confession by the defendant as a mitigating factor. Notably, though, in national case law, this factor is not treated as mitigating; as such, it is necessary to distinguish between a “partial” and “full” confession, which is something that courts may take as a mitigating factor.

can the detention of the defendant after perpetration of the act. Yet, these factors are of an ambiguous nature and can be assessed as both mitigating and aggravating, depending on the context of the case. In order to be assessed as mitigating, they should be related by the Court to the purpose of punishment and special prevention. It is concerning that the Court has given particular significance to mitigating factors in sentencing, citing them as the reason for imposing a “milder” criminal sanction.

On the other hand, it is positive that the Court has considered the extent of the violation of the protected good as an aggravating factor in several cases. For instance, in one case, in addition to considering the psychological consequences for the victim as aggravating factors, the Court also assessed the economic consequences for the victim, who was fired after reporting sexual harassment. In another case, the Court assessed as aggravating the fact that the criminal offence of sexual harassment was committed in a public place, with the public made further aware of the act as the recording was broadcast on a popular television program; the Court concluded that this additionally damaged the dignity and integrity of the injured party. Finally, in yet another case, the first-instance judgement was reversed upon an appeal by the defendant and a hearing was scheduled before a second-instance court, which acquitted the defendant, but the fact that the defendant was himself a judge was assessed as an aggravating factor, given that a judge should be a moral model for others and should not commit criminal offences.

6.3. The Importance of Teleological Interpretation in Sexual Harassment Cases

The application of teleological interpretation that considers the *purpose* of the Law on Gender Equality in BiH as *lex specialis*, i.e., to achieve gender equality in society and eliminate all forms of discrimination on the grounds of gender, represents an additional resource at the disposal of judicial officials in processing cases of sexual harassment. This type of interpretation, starting from the purpose of the law, can be of particular importance in establishing a potentially wider context of an act (e.g., a pattern of humiliating/harassing behavior by the perpetrator towards the victim or other persons as a form of discrimination) and understanding the attitude of the perpetrator towards the consequence caused by the act (when the consequence is denied and dismissed). Teleological interpretation of a norm may also be important for the Court as an additional argument when offering reasoning in the judgement for a case in which sexual harassment has been established.⁶²

⁶² For example, see the teleological interpretation offered in the following judgement, which refers to the purpose and aim of the Law on Gender Equality in BiH: Municipal Court in Sarajevo, Judgement No. 065-0-K-06-001676, 8 March 2007.

6.4. Deciding on Damages to the Victim in Criminal Proceedings

If there is a claim of damages made within the criminal proceedings in a case of sexual harassment, and if evidence is presented (e.g., an expert evaluation related to the consequences for the victim) that enables the Court to establish the circumstances and degree of non-pecuniary damage, the Court should adjudicate this claim by the victim within the criminal proceedings. Otherwise, if the Court refers the injured party to civil proceedings in relation to a claim of compensation, the Court should offer a detailed reasoning in its decision as to why the claim is not adjudicated within the criminal proceedings.

It is important to bear in mind that, when adjudicating a compensation claim by the injured party in civil proceedings, the significance and relatedness of the act of sexual harassment to compensation can be lost, considering that civil proceedings essentially deal only with such a claim and not with the qualification of the act to which the compensation relates.

7. Civil Proceedings: Adjudication by Judges

The purpose of compensation is to offer satisfaction to the injured party.

7.1. Burden of Proof

As sexual harassment represents an instance of discrimination on the grounds of gender, the application of the burden of proof is to be analogous to antidiscrimination procedures; meaning, it is up to the plaintiff to prove the existence of an act of harassment as well as its unwantedness (as the grounds of a claim). In cases of sexual harassment that include a compensation claim, the burden of proof is also on the injured party to prove the existence and scope of detrimental consequences (the duration and severity of emotional pain, etc.).

7.2. Evidentiary Means for Establishing Sexual Harassment and Damage Caused by Sexual Harassment

In civil proceedings, it is important that the parties and, subsequently, the Court recognize the relevant facts to be established or proved in order to apply a certain norm. With regard to proving sexual harassment, as has already been mentioned several times, the following elements of the offence must be established: 1) the act, 2) the nature of the act, 3) its unwantedness, and 4) consequence. *Proceedings for compensation must also establish: 5) the existence of damage, and 6) the scope of damage.*

In principle, all evidentiary means defined by rules of civil proceedings are equal and adequate for clarifying and establishing contested key facts in cases of sexual harassment or cases related to sexual harassment. To establish that behavior constituting sexual harassment occurred, the means most frequently used are testimony of the parties and witnesses, and the inspection of documents, e-mails, or text messages. A conviction in a criminal proceeding, which is binding for the civil court in terms of establishing the existence of a criminal offence and the criminal liability of the perpetrator, significantly simplifies the position of the injured party in civil proceedings for non-pecuniary damage compensation, practically narrowing the subject of dispute and the proof necessary to decide on the amount of compensation for non-pecuniary damages and to clarify certain marginal objections.

7.2.1. The Need For Expert Evaluation

Hearing evidence by means of expert evaluation, i.e., using expert witnesses from various specializations, is necessary when establishing the existence and degree of non-pecuniary damages. Still,

in such cases, medical expert witnesses are necessary only to prove certain types of non-pecuniary damage, such as the extent of the reduction of general physical and mental activity or physical pain and fear, but *not* to prove a violation of personal rights. The Court should apply the standards of an average person in order to assess the damage caused by any emotional harm that resulted from a violation of these rights.

7.3. Compensation for Non-Pecuniary Damages Caused by a Violation of Personal Rights

Emotional pain due to sexual harassment as a form of discrimination represents a singular form of damage that encompasses all the detrimental consequences of non-pecuniary damages related to the personality of the injured party that arise from a violation of personal rights. Compensation awarded for this type of damage should be decided by the Court after taking into consideration all the circumstances of a case.

7.4. Deadlines for Filing a Suit for Damages (Labor Disputes and Legal Action for Protection from Discrimination)

Bearing in mind the different provisions of the Law on Prohibition of Discrimination and those of the federal and entity labor laws with regard to bringing legal action, the more favorable law for the injured party should be applied. When a legal dispute is initiated pursuant to labor laws, the deadlines are shorter than those in the Law on Prohibition of Discrimination. In such cases, provisions of the Law on Prohibition of Discrimination should be applied instead because, if other laws are not harmonized with it, proceedings pursuant to this Law apply provisions of the Law on Prohibition of Discrimination (Article 24, paragraph 1).⁶³

7.5. Employer Liability for Damages Caused to an Employee Resulting from Sexual Harassment

The civil liability of an employer for damages caused to an employee by sexual harassment is established in civil proceedings. In cases where the employer is the defendant, their liability is based on provisions of Article 9, paragraphs (1) and (3), and Article 93, paragraph (1) of the Labor Law of the FBiH (Official Gazette of FBiH, 62/15), or Article 24 of the Labor Law of the RS (Official Gazette of RS, 1/16), in conjunction with the provisions of Article 170, paragraph (1) of the Law on

⁶³ The deadline for bringing legal action is three years from the day of becoming aware of the violation of rights, and no longer than five years from the day of violation, pursuant to the Law on Prohibition of Discrimination (Official Gazette of Bosnia and Herzegovina, 59/09, 66/16). Also see: Article 7 of the Law on Amendments to the Law on Prohibition of Discrimination (Official Gazette of Bosnia and Herzegovina, 66/16).

Obligations. The right to judicial protection is exercised pursuant to Article 12 of the Labor Law of the FBiH and Article 25 of the Labor Law of the RS. If the damages in question were caused before the effectuation of these Laws, employer liability is pursuant to Articles 5 and 85 of the previously applicable Labor Law of the FBiH (Official Gazette of FBiH, 43/99, 32/00 and 29/03), and Articles 111 and 112 of the previous Labor Law of the RS (Official Gazette of RS, 38/00, 40/00, 47/02, 38/03, 66/03 and 20/07), in conjunction with the provisions of the Law on Obligations.

Although the Labor Law of the Brčko District of BiH (Official Gazette of the Brčko District of BiH, 19/06, 19/07, 25/08, 20/13, 31/14, 01/15), unlike the entity labor laws, does not explicitly contain a prohibition of sexual harassment and/or violence on the grounds of sex in labor relations, it does not *ipso facto* mean that such behavior is allowed, as there is a general prohibition of such behavior at the federal level in the Law on Gender Equality in BiH as well as in the Law on Prohibition of Discrimination. These laws can be directly applied in the Brčko District pursuant to Article 1, paragraph (4) of the revised text of the Statute of the Brčko District of BiH (Official Gazette of the Brčko District of BiH, 2/10). Finally, it should be noted that BiH has also ratified relevant conventions in this field, and as such, there is a positive obligation on the part of authorities in BiH to ensure the implementation of these treaties (i.e., the *pacta sunt servanda* rule as a legal doctrine on respecting provisions of treaties is an integral part of international law).

7.6. Proving Harassment

Excerpted from: William R. Tamayo (Attorney, U.S. Equal Employment Opportunity Commission), "Sexual Harassment and Assault in the Workplace: A Basic Guide for Attorneys in Obtaining Relief for Victims under Federal Employment Law," NIWAP, American University, Washington College of Law, 2013.

Harassment is proven in a variety of ways. Even when there is no "third party, eye witness" of the assault, harassment can be proven.

Charging Party: The Charging Party can provide the most important testimony since she is a witness to the harassment. Her testimony should include her description of the harassment (its frequency, any physical contact or assault, verbal harassment, etc.) and any other discrimination she suffered, including threats by harasser or managers, or other forms of retaliation. Other factors include her reaction to the harassment and/or to describing the harassment. Was she crying? Emotionally upset? **The charging party's credibility is the key element.** Employers will generally deny that the harassment occurred and thus, the credibility of the parties involved, the company's response to the complaint of harassment, and the testimony of witnesses will be critical in determining whether harassment occurred.

Corroboration through Witnesses: Testimony from other witnesses is also the key to establishing the charging party's credibility, the facts of the case, and past and present practices of an employer in response to sexual harassment. These witnesses may include co-workers, supervisors, counselors, parents, teachers, doctors, psychologists, actual eyewitnesses, etc. Witnesses might describe:

- changes in the charging parties' behavior;
- how she looked before and after the assault;
- whether other workers have been assaulted or otherwise harassed in the workplace;
- the response of the employer to prior reports of harassment;
- acts of retaliation against persons who complain about harassment or testify on behalf of victims; or
- may provide other important evidence that supports the victim's case.

The Employer's Actions: Ultimately, the key issue is whether the employer, once put on notice of the harassment, adequately protected the victim from harassment and/or assault and, if she was harassed or assaulted, whether the company took prompt and corrective action.

The Harasser's Actions: Ultimately, in sexual harassment cases, the accused harasser can either claim that the sexual harassment did not occur or that the harassment was consensual, that the charging party welcomed the sexual harassment. The accused harasser might portray the victim as the aggressor and harasser, or that she otherwise engaged in the same sexual behavior. The accused harasser may try to deny that harassment occurred by contending that he was nowhere near the alleged harassment, and his co-workers may support his version of the facts. Like the charging party, the accused harasser's credibility is a critical factor for the fact finder in determining "who is telling the truth".

Some Hurdles in Proving Harassment:

The Charging Party:

- May be afraid to tell parents or friends;
- Must deal with stigma, shame, peer pressure, or community pressure;
- Fears that friends, family members, co-workers, or her cultural community will tease her or reject her;
- May be concerned that they will believe that she is having an affair with a co-worker or supervisor;
- Needs the job to support family, pay for basic living expenses, and fears retaliation;
- Is afraid that her parents and family will not believe her and/or will punish her;
- Fears that her husband or boyfriend will not believe her and will harm her or others;
- Might not have known about her rights and did not object;
- May have been so traumatized by the assault that she has difficulty remembering details, or copes with the trauma by burying any memories.

Other witnesses may be fearful about stepping forward because of potential retaliation, including bodily harm, termination, suspension, etc.⁸ Minor Offence Proceedings: Adjudication by Judges

8.1. Minor Offence Liability of Employers/Legal Persons for Failure to Apply Appropriate Measures and Effective Protective Mechanisms to Prevent Sexual Harassment in the Workplace

In Article 30, the Law on Gender Equality in BiH defines the minor offence liability of employers/legal persons for a failure to apply appropriate measures and effective protective mechanisms to prevent sexual harassment in a workplace. However, the legislation does not provide an answer to the question of what constitutes *an appropriate measure* or *an effective protective mechanism* to prevent this form of gender-based discrimination. Thus, as a guideline for judges, the expert panel determined that the following examples of appropriate measures and efficient protective mechanisms (or their lack thereon) can be taken as a standard:

- The knowledge and response of an employer to sexual harassment, i.e., whether the employer was informed and what official actions the employer took;
- When an employer has a rule related to the prevention of sexual harassment in the workplace, whether this rule is implemented in practice and applied in a given case;
- The attitude of the employer towards previous complaints.

