Serious Enough? Troubling Civil Courts' Assessments of the Seriousness of Sexual Harassment in Wrongful Dismissal Cases

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This article examines how courts interpret sexual harassment in the employment law arena through a case analysis of court decisions from Alberta and British Columbia in wrongful dismissal cases involving the alleged perpetrator. Focusing on how courts assess what constitutes serious misconduct to justify summary dismissal, we argue that the conventional legal principles governing wrongful dismissal complaints operate to minimize and normalize certain forms and degrees of sexual misconduct in the workplace, particularly, verbal harassment and isolated instances of physical contact. Our analysis reveals the persistent and lingering influence of gender-based myths and stereotypes in judicial reasoning. However, we also identify decisions where courts adopt a more nuanced understanding of sexual harassment and demonstrate greater sensitivity to the operation of gender-based myths. Such cases offer a foundation for future legal approaches that better align with the evolving understanding of workplace sexual harassment, particularly in the wake of #MeToo.

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Le présent article examine la manière dont les tribunaux interprètent le harcèlement sexuel dans le domaine du droit de l'emploi, au moyen d'une analyse de décisions judiciaires rendues en Alberta et en Colombie-Britannique dans des affaires de congédiement injustifié impliquant la personne mise en cause. Après avoir ciblé la manière dont les tribunaux déterminent ce qui constitue une faute grave justifiant un renvoi sans préavis, nous soutenons que les principes juridiques traditionnels régissant les plaintes pour congédiement injustifié ont pour effet de minimiser et de normaliser certaines formes et certains degrés d'inconduite sexuelle sur le lieu de travail, notamment le harcèlement verbal et les cas isolés de contact physique. Notre analyse révèle l'influence persistante et tenace des mythes et des stéréotypes liés au genre dans le raisonnement judiciaire. Cependant, nous relevons également des décisions dans lesquelles les tribunaux adoptent une appréciation plus nuancée du harcèlement sexuel et font preuve d'une plus grande sensibilité à l'égard du fonctionnement des stéréotypes liés au genre. Ces décisions offrent un fondement pour de futures approches judiciaires mieux adaptées à l'évolution actuelle de la compréhension du harcèlement sexuel en milieu de travail, notamment depuis l'avènement du mouvement #MeToo.

I. Introduction

The decade following the advent of the #MeToo movement[1] has produced increasing attention to the issue of sexual harassment and sexual misconduct in law. From the introduction of new legislation to evolving interpretation of legal tests, the ways in which courts, legislators and other legal actors in Canada are understanding the concept of sexual harassment and its operation appears to be shifting.[2] Sexual harassment was first defined in Canada in the 1989 landmark decision *Janzen v Platy Enterprises* as "unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences".[3] This expansive definition encompasses a broad range of behaviours, including both subtle or overt acts that may be verbal or non-verbal and physical or psychological.[4] In this decision, the Supreme Court of Canada (SCC) expressly recognized sexual harassment as a form of sex-based discrimination that poses a barrier to women's equal participation in the workforce.[5] More recent attention to this issue has focused on expanding the legal conceptualization of sexual harassment and ensuring adequate access to and remedies for individuals who experience sexual harassment, such as through legislation outlawing non-disclosure agreements.[6]

Despite this progress, less attention has been paid to how core legal principles address and respond to sexual misconduct outside of the criminal law realm. Growing awareness of the complexity and insidiousness of

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1 In October 2017, actress Alyssa Milano shared her experience of sexual harassment on social media using the hashtag #MeToo, which sparked a global movement and renewed public attention on the issues of sexual harassment and assault. Nadia Khomami, "#MeToo: how a hashtag became a rallying cry against sexual harassment", *The Guardian* (20 October 2017), online: <theguardian.com> [perma.cc/6FCN-YZZU].

2 For an example of legislative reform, see e.g. Bill C-65, *An Act to Amend the Canada Labour Code (harassment and violence)*, 1st Sess, 42nd Parl, 2018 (assented to 25 October 2018), SC 2018, c 22. Shifts in the interpretation of legal tests can be observed, for example, in *Ms K v Deep Creek Store and another*, 2021 BCHRT 158 [*Ms K*], which reflects an updated understanding of the test for sexual harassment under human rights law.

3 *Janzen v Platy Enterprises Ltd*, [1989] 1 SCR 1252 at 1284, 1989 CanLII 97 (SCC) [*Janzen*].

4 For a detailed list of verbal, non-verbal, physical and psychological behaviours constituting sexual harassment, see Arjun Prakash Aggarwal & Madhu M Gupta, *Sexual Harassment in the Workplace*, 3rd ed (Toronto: Butterworths, 2000) at 11–18; Sheryl L Johnson, *Sexual Harassment in Canada: A Guide for Understanding and Prevention* (Toronto: Lexis Nexis, 2017) at 51–58.

5 *Janzen, supra* note 3 *at* 1284.

6 Recent legislation addressing the use of non-disclosure agreements (NDAs) in cases of sexual harassment has been introduced in Prince Edward Island, *Non-disclosure Agreements Act*, SPEI 2021, c 51, and Ontario, Bill 26, *An Act to Amend Various Acts in Respect of Post-Secondary Education*, 1st Sess, 43rd Leg, Ontario, 2022 (assented to 8 December 2022), SO 2022, c 22.

sexual harassment and other forms of sex discrimination in the workplace provides an important basis for investigating the role and response of employment law. Within that realm, little research has examined how employees who engage in sexually harassing behaviour are dealt with from a legal point of view, especially in relation to dismissal.[7] This article aims to fill that gap through an examination of wrongful dismissal cases where the dismissed employee was alleged to have engaged in sexual harassment in the workplace. We analyze how the core legal principles governing wrongful dismissal apply, and whether and to what extent similar gender-based stereotypes that are known to influence legal claims regarding sexual harassment and violence in other contexts are imported into this arena, creating barriers to adequate recognition of and response to sexual harassment in the workplace.

Myths and stereotypes about individuals who experience sexual violence and harassment have historically hindered and continue to undermine the legal responses to these issues.[8] The overarching myth that has been persistently invoked against complainants is the "ideal victim", characterized as a "responsible, security conscious, crime-preventing subject

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[7] There are multiple overlapping areas of law that may apply when a situation of sexual harassment in the workplace unfolds. These areas may include human rights law and occupational health and safety laws, which provide remedies for an individual who has experienced harassment. It is beyond the scope of this article to address those areas of law, which may simultaneously give rise to legal claims by the targeted individual in a workplace sexual harassment scenario, and which contain specific legal definitions, principles and remedies unique to their legislative frameworks and purposes. For commentary on the human rights law framework, see Bethany Hastie, "Workplace Sexual Harassment and the 'Unwelcome' Requirement: An Analysis of BC Human Rights Tribunal Decisions from 2010 to 2016" (2020) 32:1 CJWL 61 [Hastie, "Workplace Sexual Harassment"].

[8] Myths and stereotypes are "assumptions or expectations that are false or faulty and are linked to disadvantaging belief, attitudes, and narratives", Jennifer Koshan, "Challenging Myths and Stereotypes in Domestic Violence Cases" (2023) 35:1 Can J Fam L 33 at 38–39. For an overview of gender-based myths and stereotypes, see Hastie, "Workplace Sexual Harassment", *supra* note 7 at 70–73. For discussions of gender-based myths and stereotypes in the criminal justice context, see Lise Gotell, "Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women" (2008) 41:4 Akron L Rev 865 [Gotell, "Rethinking Affirmative Consent"]; Melanie Randall, "Sexual Assault Law, Credibility, and 'Ideal Victims': Consent, Resistance, and Victim Blaming" (2010) 22:2 CJWL 397 [Randall, "Ideal Victims"]; Isabel Grant, "Intimate Partner Harassment through a Lens of Responsibilization" (2015) 52:2 Osgoode Hall LJ 552; Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montréal and Kingston: McGill-Queen's University Press, 2018) [Craig, *Putting Trials on Trial*]; Elaine Craig, "Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions" (2016) 94:1 Can Bar Rev 45 [Craig, "Section 276 Misconstrued"]; Lise Gotell, "When Privacy Is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records" (2006) 43:3 Alta L Rev 743 [Gotell, "When Privacy is Not Enough"]; Susan Ehrlich, "Perpetuating—and Resisting—Rape Myths in Trial Discourse" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 389.

who acts to minimize her own sexual risk."[9] This stereotype imposes the expectation that women should act as "reaction heroes", constantly anticipating and avoiding sexual assault.[10] Women who deviate from these expectations are often subjected to greater scrutiny, are seen as less credible and are considered to be less deserving of legal protection.[11] The "ideal victim" myth encompasses a range of stereotypes, such as the "hue and cry" expectation which assumes that "good victims" will fight back against their abuser and immediately seek help after a sexual assault.[12] As Randall observes, the "ideal victim" myth portrays sexual assault as "an unusual and dramatic event – a rare deviation from the common experience of most women."[13] Consequently, the "more ordinary, everyday threatening, intrusive, and coercive experiences of unwanted sexual attention and contact become normalized and thus invisible."[14] Women who experience these forms of "normal" sexual advances or contact are often discredited by courts and lawyers as non-authentic victims.[15]

Myths and stereotypes surrounding sexual misconduct can have a profound impact on how courts and adjudicators handle these cases, whether or not the targeted individual is a party to the proceedings. The pervasive impact of gender-based myths is well-documented in the treatment of sexual assault cases in criminal courts, where the targeted individual is not a formal party to the proceedings,[16] and in human rights tribunal decisions regarding workplace sexual harassment, where the formal complainant in the proceeding will be the individual who experienced the harassment.[17] While the relevant parties, interests,

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9 Gotell, "Rethinking Affirmative Consent", *supra* note 8 at 879.

10 Lise Gotell, "Thinly Construing the Nature of the Act Legally Consented to: The Corrosive Impact of *R v Hutchinson* on the Law of Consent" (2020) 53:1 UBC L Rev 53; Gotell, "Rethinking Affirmative Consent", *supra* note 8.

11 Gotell, "Rethinking Affirmative Consent", *supra* note 8; Randall, "Ideal Victims", *supra* note 8 at 409.

12 For a discussion of the "hue and cry" myth, see Elaine Craig, "The Relevance of Delayed Disclosure to Complainant Credibility in Cases of Sexual Offence" (2011) 36:2 Queen's LJ 551 at 553–57; Craig, *Putting Trials on Trial, supra* note 8 at 32–37.

13 Randall, "Ideal Victims", *supra* note 8 at 408.

14 *Ibid*.

15 *Ibid* at 408–09.

16 See e.g. Gotell, "Rethinking Affirmative Consent", *supra* note 8; Randall, "Ideal Victims", *supra* note 8; Craig, *Putting Trials on Trial, supra* note 8; Craig, "Section 276 Misconstrued", *supra* note 8; Gotell, "When Privacy Is Not Enough", *supra* note 8; Ehrlich, *supra* note 8.

17 For a discussion of human rights tribunals' reliance on gender-based myths and stereotypes, see Hastie, "Workplace Sexual Harassment", *supra* note 7; Bethany Hastie, "Assessing Sexually Harassing Conduct in the Workplace: An Analysis of BC Human Rights Tribunal Decisions in 2010–16" (2019) 31:2 CJWL 293 [Hastie, "Tribunal Decisions"]; Bethany Hastie, "An Unwelcome Burden: Sexual Harassment, Consent and Legal Complaints" (2021) 58:2 Osgoode Hall LJ 419 at 425 [Hastie, "An Unwelcome Burden"].

purposes and legal frameworks are distinct in these contexts, there are reasons to be concerned that gender-based myths and stereotypes may similarly influence civil cases involving sexual misconduct, including wrongful dismissal cases related to sexual harassment.

This article examines how gender-based myths and stereotypes operate in the context of wrongful dismissal cases, where the plaintiffs are alleged to have engaged in sexually harassing behaviour. Drawing on cases from Alberta and British Columbia, we examine how such myths may operate to affect the evaluation and determination of the seriousness of the misconduct and whether the misconduct justified dismissal. We problematize the application of conventional legal principles for wrongful dismissal claims in the context of sexual harassment allegations, establishing how these facilitate the introduction of gender-based myths and stereotypes. We further critique the legal principles developed specifically to address summary dismissal based on allegations of sexual harassment as reproducing similar entry-points for gender-based myths and stereotypes to influence the legal analysis and adjudication of such cases. Ultimately, we challenge the underlying legal conventions and values that typically attend wrongful dismissal cases in this context, querying about the appropriateness of their application in situations involving sexual misconduct.

We conducted a qualitative analysis of twelve civil court decisions from Alberta and British Columbia in cases of wrongful dismissal where allegations of sexual harassment formed the basis of the dismissal.[18] Nine cases were from Alberta courts, while three were from British Columbia. These cases were identified through a targeted keyword search in the Canadian Legal Information Institute (CanLII) database. Parameters for the search included a focus on Alberta and British Columbia as jurisdictions, the time period of 2000–2023, and keyword combinations including "sexual harassment", "sexual assault", "sexual misconduct", "wrongful dismissal" and "wrongful termination". We further narrowed the search results to focus on substantive decisions that addressed the merits of a legal claim. A

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[18] *AG Growth International Inc v Dupont*, 2021 ABQB 663 [*Dupont*]; *Brazeau v International Brotherhood of Electrical Workers*, 2004 BCSC 251 [*Brazeau*]; *Calgary (City) v Canadian Union of Public Employees Local 37*, 2019 ABCA 388 [*Calgary (City)*]; *Chen v Moxie's Restaurants Management Inc*, 2016 BCPC 169 [*Chen*]; *Cho v Café La Foret Ltd*, 2022 BCSC 1560 [*Cho*]; *Clarke v Syncrude Canada Ltd*, 2013 ABQB 252 [*Clarke*]; *Foerderer v Nova Chemicals Corporation*, 2007 ABQB 349 [*Foerderer*]; *Hodgins v St John Council for Alberta*, 2007 ABQB 275 [*Hodgins*]; *Leach v Canadian Blood Services*, 2001 ABQB 54 [*Leach*]; *Smith v Vauxhall Co-Op Petroleum Limited*, 2017 ABQB 525 [*Smith*]; *van Woerkens v Marriott Hotels of Canada Ltd,* 2009 BCSC 73 [*van Woerkens*]; *Watkins v Willow Park Golf Course Ltd*, 2017 ABQB 541 [*Watkins*].

total of twelve cases were identified, six of which were decided in the past decade (2016–2022), and six of which were decided in the previous decade (2001–2013). Three of these cases involved appeals by employers challenging a lower court or labour arbitrator's decision that found in favour of the offending employee, while nine were first-instance decisions on a wrongful dismissal claim.

As we discuss in the body of this article, the cases covered a broad range of sexual misconduct including non-consensual physical contact, verbal conduct and visual harassment. The gendered nature of workplace sexual harassment is evident in these identified cases, with all individuals who experienced sexual harassment being identified as female and all alleged perpetrators being identified as male.[19] In seven cases, the offending employee held a position of power and authority over the subordinate employee who was the target of the sexual harassment.[20] In five cases, there were concurring reasons for dismissal, such as poor work performance,[21] dishonesty,[22] insubordination[23] and bullying.[24]

The outcomes of the civil claims varied. In four cases, the court found that the plaintiff had been wrongfully dismissed and awarded general damages.[25] In one of these cases, sexual harassment was not established,[26] while three cases were deemed not serious enough to constitute just cause for dismissal — even though sexual harassment was established.[27] In one of these cases, the court awarded aggravated and punitive damages for the

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[19] This is consistent with research findings, which indicate that while workplace sexual misconduct can involve individuals of any gender, women are typically the targets and men the perpetrators. For example, the 2020 *Survey on Sexual Misconduct at Work* revealed that approximately one in two women, compared to three in ten men, have experienced workplace sexual harassment in Canada. Statistics Canada, *Gender Results Framework: A New Data Table on Workplace Harassment*, by The Daily, Catalogue No 11-001-X (Ottawa: Statistics Canada, 12 February 2024) at 1, online: <statcan.gc.ca> [perma.cc/MQ83-24RZ]. Another study demonstrates that men are more frequently the perpetrators of workplace sexualized behaviours against women: Statistics Canada, *Workers' Experiences of Inappropriate Sexualized Behaviours, Sexual Assault and Gender-Based Discrimination in the Canadian Provinces, 2020*, by Marta Burczycka, Juristat, Catalogue No 85-002-X (Ottawa: Statistics Canada, 12 August 2021) at 18–19, online: <statcan.gc.ca> [perma.cc/S83A-XY9F].

[20] *Cho, supra* note 18; *Foerderer, supra* note 18; *Leach, supra* note 18; *Hodgins, supra* note 18; *Smith*, *supra* note 18; *van Workens, supra* note 18; *Watkins, supra* note 18 In *Brazeau*, *supra* note 18, the complainant was considered a mentor to the victim.

[21] *Chen, supra* note 18.

[22] *Smith*, *supra* note 18; *van Workens, supra* note 18.

[23] *Watkins, supra* note 18.

[24] *Cho, supra* note 18.

[25] *Ibid*; *Brazeau*, *supra* note 18; *Chen, supra* note 18; *Hodgins, supra* note 18.

[26] *Chen, supra* note 18.

[27] *Brazeau*, *supra* note 18; *Cho, supra* note 18; *Hodgins, supra* note 18.

manner of the termination.[28] In one case, the allegations of sexual harassment were not proven, although the claim for wrongful dismissal was unsuccessful for other reasons.[29] In seven cases, the court concluded that the sexual harassment was serious enough to warrant summary dismissal.[30]

This article proceeds in three sections subtitled II, III and IV. In Section II, we review the core legal principles that govern claims of wrongful dismissal. In Section III, we discuss specific criteria developed to assess sexual harassment as a specific basis for summary dismissal, illustrate how these criteria provide entry points for gender-based myths and stereotypes to influence the legal analysis, and create an environment where particular forms or degrees of sexual harassment may be normalized. In Section IV, we turn to the identified case set and analyze how courts have interpreted and applied the legal principles discussed in Sections II and III, focusing particularly on how these principles impacted the determination of the seriousness of the conduct at issue. Here, we establish how the principles may operate in the identified cases to minimize the seriousness of the conduct at issue and normalize certain forms or degrees of sexual harassment in the workplace. We highlight instances where gender-based myths and stereotypes were introduced or relied upon in the adjudication of these claims. We also identify and discuss several cases that demonstrate nuanced understandings of sexual harassment and its impact in the workplace, and which may serve as a basis for future cases and decisions to draw on to further advance a robust understanding of this issue, reflective of contemporary norms and conceptualizations of sexual misconduct at work.

II. Wrongful Dismissal: Core Legal Principles

The general presumption in the Canadian common law of employment is that employers have the right to lawfully terminate an employee with an indefinite-term employment contract at any time, provided they give

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28 *Cho, supra* note 18.

29 In *Smith*, even though the allegations of sexual assault and sexual harassment were not substantiated, Dario J concluded that the defendant successfully established just cause for summary dismissal on the grounds of personal harassment and dishonesty: *Smith*, *supra* note 18 at para 138.

30 *Clarke, supra* note 18; *Foerderer*, *supra* note 18; *Leach, supra* note 18; *van Workens, supra* note 18; *Watkins, supra* note 18; *AG v Dupont, supra* note 18; *Calgary (City), supra* note 18.

"reasonable notice" or payment in lieu of notice.[31] However, the employer is not obliged to provide reasonable notice when an employee has engaged in behaviour that constitutes "a serious or fundamental breach of the contract".[32] The employer's right to dismiss an employee without notice is known as summary dismissal, or just cause dismissal.[33] Considering the power imbalance in the employment relationship and the significant value of employment for individuals,[34] Canadian courts have set a relatively high threshold for finding just cause for dismissal,[35] ruling that only behaviour that constitutes a serious breach of contract and causes irreparable harm to the employment relationship justifies this action.[36] In cases of summary dismissal, the employee can bring a wrongful dismissal claim against their former employer. The court must then determine whether the employee's behaviour amounted to just cause for summary dismissal. If the employer cannot persuade the court that the employee's misconduct justifies summary dismissal, the court will find in favour of the plaintiff-employee, ruling that they were wrongfully dismissed and awarding damages accordingly.[37]

In the context of summary dismissal, the SCC defines just cause as an employee's conduct that causes "a breakdown in the employment relationship".[38] This includes misconduct that "violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer."[39] Similarly, the British

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31 Peter Barnacle, *Termination of Employment and Wrongful Dismissal in Canada* (Toronto: Lexis Nexis, 2020) at 17; David J Doorey & Andrew Hills, "Statutory Unjust Dismissal in Canada: What is the Value of a Lost Job?" (2022) 33:2 King's LJ 318 at 322.

32 David J Doorey, *The Law of Work*, 3rd ed (Toronto: Emond Publishing, 2024) at 179–80 [Doorey, *The Law of Work*].

33 *Ibid*.

34 "The importance of this balance is better understood by considering the sense of identity and self-worth individuals frequently derive from their employment": *McKinley v BC Tel*, 2001 SCC 38 at para 53 [*McKinley*].

35 Doorey, *The Law of Work*, *supra* note 32 at 180. Also, see *Payne v The Kimberley Academy Ltd*, 2020 BCSC 506 at 24–28; *Chu v China Southern Airlines Company Limited*, 2023 BCSC 21 paras 59–65; *McDonald v Sproule Management GP Limited*, 2023 ABKB 587 at paras 63–70.

36 Doorey, *The Law of Work*, *supra* note 32 at 180. Summary dismissal is often described as the "capital punishment" of employment law and is therefore justified only by the most serious misconduct. See e.g. Randall Scott Echlin & Matthew L O Certosimo, *Just Cause: The Law of Summary Dismissal in Canada* (Aurora, Ont: Canada Law Book, 1998); Howard A Levitt, *The Law of Dismissal in Canada* (Aurora, Ont: Canada Law Book, 1992) at 122; *Kerr v Arpac Storage Systems Corporation*, 2018 BCSC 704 at para 57, citing *Henry v Foxco Ltd*, 2004 NBCA 22 at para 109; *Payne v The Kimberley Academy Ltd*, 2020 BCSC 506 at 28; *McDonald v Sproule Management GP Limited*, 2023 ABKB 587 at paras 63–70.

37 Doorey, *The Law of Work*, *supra* note 32 at 217–219.

38 *McKinley, supra* note 34 at para 48.

39 *Ibid*.

Columbia Supreme Court has defined just cause in *Leung v Doppler Industries Incorporated* as "[…] conduct on the part of the employee incompatible with his or her duties, conduct which *goes to the root of the contract* with the result that the employment relationship is too fractured to expect the employer to provide a second chance" [emphasis added].[40] The Alberta Court of Queen's Bench referred to just cause in *Foerderer v Nova Chemicals Corporation* as conduct that "[…] amounts to a breakdown in the employment relationship - misconduct that so fractures the relationship to the point that the employer is not expected to give the employee a second chance."[41] Each of these definitions reflects a core element of the kind of misconduct that justifies summary dismissal: conduct that irreparably breaches the trust at the foundation of the relationship between employer and employee, such that the employment relationship cannot continue.

In *McKinley v BC Tel*, the SCC established a two-step test for determining just cause in cases of wrongful dismissal. First, courts must establish on a balance of probabilities that the employee has breached the terms and conditions of the contract of employment.[42] Second, applying a contextual approach, the courts must determine whether the misconduct is serious enough to render the continuation of the employment relationship impossible.[43] This second step requires courts to consider all the surrounding circumstances, including "the seriousness of the misconduct, the harm to the employer's business interests",[44] "the employment history, the employee's role and responsibilities, the type of business or activity, the policies and practices, and the level of trust reposed in the employee", [45] among others. Mitigating factors must also be considered to assess whether the decision to summarily dismiss an employee was a proportionate response to the identified misconduct, such as whether there was provocation, whether the employee was experiencing personal or physical challenges at the time of the wrongful act, whether the act was premeditated and planned or an impulsive decision and whether the employer had previously ignored similar misconduct.[46] This principle of proportionality was explicitly introduced to ensure balance between the severity of the

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40 *Leung v Doppler Industries Incorporated*, 1995 CanLII 2530 at para 26 (BCSC).
41 *Foerderer, supra* note 18 at para 63(f).
42 *McKinley, supra* note 34 at para 49.
43 *Ibid*.
44 Doorey, *The Law of Work, supra* note 32 at 182.
45 *Molloy v EPCOR Utilities Inc*, 2015 ABQB 356 at para 142 [*Molloy*].
46 Doorey, *The Law of Work, supra* note 32 at 182.

misconduct and the resulting disciplinary measure.[47] The onus to demonstrate just cause lies with the employer.[48]

This test for wrongful dismissal has been widely adopted by provincial courts and bodies, occasionally with some modification in its articulation.[49] For example, in Alberta, the test for wrongful dismissal has been articulated as including three elements: a determination of the nature and extent of the alleged misconduct; a consideration of the surrounding circumstances, including employment history, employee's roles and responsibilities, the type of business, policies and practices in the workplace, and the level of trust extended to the employee; and an assessment of proportionality between the misconduct and resulting disciplinary measure, having regard to whether the misconduct was so incompatible with fundamental terms of the employment relationship that it warrants dismissal.[50] Though articulated somewhat differently, these three elements, in essence, mirror the two-step test from *McKinley*, querying about the particular misconduct at issue, its severity (assessed contextually) and the proportionality of the disciplinary measure.

In light of this test, determining what constitutes serious misconduct that justifies summary dismissal is complex and fact-specific, as it depends on the nature and consequences of the misconduct, the nature of the employment relationship and the employee's status.[51] Yet, some common grounds for summary dismissal can be identified from existing case law, such as dishonesty and conflict of interest; gross incompetence and safety violations; breach of faithful service to the employer; insubordination and insolence; harassment; violence and threats of violence; absenteeism and lateness; off-duty conduct that potentially threatens the employer's business interests; inappropriate use of employer technology; and intoxication at

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47 *McKinley, supra* note 34 at para 53.

48 Levitt, *supra* note 36 at 121; Echlin & Certosimo, *supra* note 36 at 23.

49 Doorey, *The Law of Work*, *supra* note 32 at 180–82. See also *Dowling v Ontario (Workplace Safety and Insurance Board)*, 2004 CanLII 43692 (ON CA) at paras 46–53; *Thomas v Saskatchewan Indian Gaming Authority Inc*, 2021 SKCA 164 at para 21; *Baker v Weyerhaeuser Company Limite*d, 2022 ABCA 83 at paras 27–29; *Scorpio Security Inc v Jain*, 2018 BCSC 978 at paras 48–53; *Cicalese v Saipem Canada Inc*, 2018 ABQB 835 at paras 17–19; *Klassen v Rosenort Cooperative Limited*, 2020 MBQB 116 at paras 49–50; *Sobolewski v Advanced Completions Technology Services Ltd*, 2026 ABKB 10 at paras 44–45.

50 *Molloy*, *supra* note 45 at para 142. This three-step test has been also applied in other cases, see e.g. *Cicalese v Saipem Canada Inc*, 2018 ABQB 835 at para 20.

51 Levitt, *supra* note 36 at 124.

work.[52] In *McKinley*, the SCC also provides examples of misconduct that courts typically regard as justifying summary dismissal, such as theft, misappropriation and serious fraud.[53]

In assessing the severity of misconduct and whether summary dismissal is justified, courts are also at times confronted with the question of single instances versus a pattern of misconduct. In other words, a relevant factor in the court's analysis is whether the employee's misconduct consists of a single instance of misbehaviour or an accumulation of wrongful acts. Generally, a single instance of misconduct will only ground just cause dismissal in exceptional circumstances, where it is extremely serious in nature.[54] Misconduct that has been found to justify summary dismissal based on a single instance includes outright refusal to perform the job; theft; fraud; violations of privacy or confidentiality; secretly competing against the employer; and single acts of violence, harassment or violation of safety rules that puts the employer or others at risk.[55]

As can be seen from the above, the legal principles governing wrongful dismissal favour the employee-plaintiff, creating a high bar for employers to justify summary dismissal in only the most serious of circumstances. As such, the legal framework focuses almost solely on the relationship between the employee and employer, with conduct that creates a safety risk to others being the only factor which explicitly accounts for third parties in considering whether the employment relationship is irreparably harmed,

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52 Doorey, *The Law of Work, supra* note 32 at 186–93. Although noting the complexity of determining just cause and acknowledging that the categories change over time, Levitt enumerates twelve categories that have been traditionally recognized as grounds for just cause dismissal: "fraudulent misrepresentation as to qualifications; serious misconduct; sexual harassment; breach of duty or fidelity; conflict of interest; wilful disobedience; revelation of character; theft; fraud and dishonesty; insolence and insubordination; absenteeism or lateness; illness; intoxication; undermine the corporate culture; outside activity; breach of rules or company policy; serious incompetence; frustration." Levitt, *supra* note 36 at 130.

53 "Where theft, misappropriation or serious fraud is found, the decisions considered here establish that cause for termination exists." *McKinley, supra* note 34 at para 51. See also *Geluch v Rosedale Golf Assn*, 2004 CanLII 14566 at para 87 (ONSC) [*Geluch*]. It is important to note that although these acts are generally considered as serious misconduct, they do not automatically constitute just cause for dismissal. Whether summary dismissal is a proportionate response to the employee's behaviour depends on the specific circumstances of each case.

54 Barnacle, *supra* note 31 at 82–83.

55 Doorey, *The Law of Work*, *supra* note 32 at 183. See also *Poirier v Wal-Mart Canada Corp*, 2006 BCSC 1138, where dishonest manipulation of payroll accounts and further dishonesty were deemed egregious acts justifying dismissal with cause; *Steel v Coast Capital Savings Credit Union*, 2015 BCCA 127, where improper use of confidential documents was sufficient to justify dismissal; and *Mejia v LaSalle College International Vancouver Inc*, 2014 BCSC 1559, where an instructor's enticement to students to complain against the school and criticisms of the school management grounded dismissal with cause.

and therefore whether the summary dismissal can be justified. Yet, despite a recognition of violence, harassment and other misconduct as giving rise to such safety concerns, how this is interpreted and applied in practice remains in flux.

III. Sexual Harassment and Wrongful Dismissal: A Review of Legal Principle

As noted in the introduction, sexual harassment is defined as "unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences".[56] As a form of harassment and violence, workplace sexual harassment may give rise to employers' liability.[57] Employees have a right to a workplace free from sexual harassment, and employers have a correlated obligation to prevent and protect workers from being subjected to sexual harassment.[58] When an employer knows about sexual harassment by an employee, they must respond "quickly and effectively" to stop the sexual harassment, remedy the situation and prevent it from occurring in the future.[59] In addition to potential legal liability to, and remedies for, those who experience sexual harassment in the workplace, where there is a finding that an employee has engaged in sexual harassment of another employee, the appropriate response includes taking disciplinary action regarding the employee who committed the misconduct, such as by dismissing the employee with just cause.[60]

Despite the availability of summary dismissal in response to sexual harassment in the workplace, utilizing this tool may be seen as risky based on the wrongful dismissal principles elucidated in the previous section. A terminated employee can challenge their summary dismissal on two primary bases: first, whether the misconduct can, itself, be established; and second, whether it was severe enough to justify summary dismissal. Where a court finds that the misconduct was not established by the employer, or where that misconduct was not severe enough to justify summary dismissal, the employer will be liable to compensate the terminated employee for the

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56 *Janzen, supra* note 3.

57 Aggarwal & Gupta, *supra* note 4 at 249–314; Karen Schucher, "Achieving a Workplace Free of Sexual Harassment: The Employer's Obligations" (1994-1995) 3:1 CLELJ 171.

58 Aggarwal & Gupta, *supra* note 4 at 249–314; Schucher, *supra* note 57; *Robichaud v Canada (Treasury Board)*, 1987 CanLII 73 (SCC) [*Robichaud*].

59 *Robichaud, supra* note 58.

60 Doorey, *The Law of Work, supra* note 32 at 188. See also, Schucher, *supra* note 57 at 192.

wrongful dismissal. This, again, relates back to the underlying nature of the development of wrongful dismissal principles discussed earlier.

Courts appear particularly attentive to the impact that allegations of sexual harassment may have on the terminated employee: "[t]he charge of sexual harassment is a personal matter which has the power to jeopardize a person's professional reputation, job assignments, and family relationships."[61] This is perhaps unsurprising given that, in a wrongful dismissal case, the offending employee is the plaintiff and potentially seen as the "victim" of an employer's wrongful conduct. Thus, the terminated employee, and the harm that flowed from their termination, is at the heart of the analysis.[62] This focus, while understandable from an employment law perspective, becomes complicated in cases where wrongful dismissal stems from allegations of sexual harassment, as the person who (allegedly) experienced the sexual harassment is not a party to the proceedings, and thus not positioned as a centrally impacted actor (or "victim") in the court's analysis.[63] The impact on that individual is potentially obfuscated in the analysis of a wrongful dismissal suit, which may in turn limit the court's understanding of the broader context in which the offending employee's misconduct irreparably harms the employment relationship. As we will examine in this and the following section, this obfuscation and the focus on the impact or harm to the offending employee may operate to create an entry point for gender-based stereotypes and myths in parties' arguments and courts' analyses in cases of wrongful dismissal where the plaintiff is alleged to have engaged in sexual harassment.

Sexual harassment as a basis for summary dismissal has given rise to the creation of exceptional and additional criteria used to assess the severity of the misconduct and proportionality of the disciplinary measure, including:

- whether the impugned conduct *amounts to sexual harassment;*

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61 Aggarwal & Gupta, *supra* note 4 at 301.

62 This stands in contrast to human rights complaints filed in response to workplace sexual harassment, where the person targeted by sexual harassment is the complainant and the offending employee is the respondent. Since the purpose of human rights law is to compensate the affected person for the harm caused by sexual harassment, the impact on them is central to the legal principles and remedies applicable in the human rights complaint process. See also *supra* note 7 for a brief explanation of the overlapping legal claims and vehicles for redressing workplace sexual harassment.

- the *degree and nature* of the conduct amounting to sexual harassment;

- the *nature of the employment relationship between the offending employee and the victim employee(s),* and whether the offending employee was in a *position of authority* over the victim(s), such that the degree and nature of the conduct was, thereby, exacerbated by a particularly offensive abuse of power;

- whether the offending employee *was told* that the impugned conduct was unwelcome or offensive;

- whether the offending employee *continued or repeated* the unwelcome or offensive behaviour, after being told that the conduct was unwelcome;

- whether the employer *warned* the employee that the misconduct was inappropriate and that dismissal was a possible consequence of further similar misconduct;

- whether the employer had a formal, and known, sexual harassment *policy,* which was enforced by the employer;

- *the nature of the employment relationship between the offending employee and the employer*, including *length of service and position*, and whether there were *implied or express terms of the employment contract* which gave rise to additional obligations on the employer's part, such as with respect to warnings or the opportunity to respond; and

- whether the impugned conduct was condoned by the employer [emphasis added].[64]

While the above criteria may have been developed by courts in order to provide additional clarity and assistance in evaluating wrongful dismissal claims based on allegations of sexual harassment, many of the above factors provide a possible entry point for gender-based myths and stereotypes to be introduced or relied upon in that analysis. For example, numerous factors

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[64] *Alleyne v Gateway Co-operative Homes Inc*, 2001 CanLII 28308 at para 28 (ONSC). These factors have been adopted by courts in BC and Alberta; see e.g. *Brazeau, supra* note 18 at para 218; *van Woerkens, supra* note 18 at para 178; *Foerderer, supra* note 18 at para 91.

above essentially question whether the offending employee was told or warned about the inappropriateness of their conduct. When considering the offending employee as the potentially wronged party in the suit, as noted earlier, this factor may be seen as a helpful guide to assessing the proportionality of their summary dismissal. However, these factors problematically normalize sexually harassing conduct and place the onus of responsibility with an individual who experienced that conduct to actively object to it or otherwise avoid it,[65] or with an employer to provide notice to the offending employee that their conduct is inappropriate in the workplace, thereby alleviating responsibility from the offending employee. This replicates problematic reasoning identified in other areas of law which similarly relies on gender-based myths and stereotypes to alleviate individuals who engage in sexual misconduct from responsibility. For example, in human rights law, the legal principles governing sexual harassment complaints require establishing that a respondent "knew or ought to have known" that their conduct was unwelcome, which has been found to invite scrutiny of a complainant's response to sexually harassing conduct rather than focusing on the conduct itself.[66] Yet, a growing body of cases in that field recognize that, "in today's environment, it should not be necessary to articulate that such conduct is unwelcome"[67] and that a "reasonable person" would presumptively know that conduct of a (broadly defined) sexual nature is unwelcome in the workplace.[68] Despite the distinct legal framework governing human rights complaints, the parallel demonstrated here highlights the deep entrenchment of gender-based myths and stereotypes across different legal contexts, and their similar impact in evaluating legal claims where sexual harassment or misconduct is at issue.

In the context of a wrongful dismissal case, criteria that suggest an offending employee must be warned of the inappropriateness of sexually

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65 See e.g. Hastie, "An Unwelcome Burden", *supra* note 17; Hastie, "Workplace Sexual Harassment", *supra* note 7 at 70–73. A striking example of how Canadian courts continue to perpetuate myths and stereotypes about victims' responses to sexual misconduct is found in *R v Wagar*, where Judge Robin Camp asked the complainant, "why couldn't you just keep your knees together?", *R v Wagar*, 2014 CarswellAlta 2756, (Transcript of Proceedings at 20, lines 17–18).

66 See e.g. Hastie, "An Unwelcome Burden", *supra* note 17; Hastie, "Workplace Sexual Harassment", *supra* note 7. As discussed in footnotes 7 and 62, there are salient differences in the applicable legal frameworks in human rights law and employment law.

67 *Balikama obo Others v Khaira Enterprises and Others*, 2014 BCHRT 107 at para 611, cited also in Hastie, "Workplace Sexual Harassment", *supra* note 7 at 76.

68 See e.g. Hastie, "Workplace Sexual Harassment", *supra* note 7 at 75−76.

harassing behaviour by a co-worker or employer operates to normalize such conduct in the workplace and alleviate the offending employee of active responsibility. Rather than beginning from a premise that the offending employee, as with any employee, knows that sexually harassing conduct is not appropriate in the workplace and knows what constitutes sexually harassing conduct, these criteria operate on an assumed lack of knowledge about appropriate workplace conduct. This is problematic as a starting point in the twenty-first century workplace, particularly given the increasing prevalence of formal workplace policies concerning sexual and other forms of harassment. By beginning from a premise of a lack of knowledge or an understanding of the nature and impact of their behaviour, these criteria alleviate responsibility for the offending employee and instead place that responsibility with the co-worker experiencing harassment to actively protest or object, similar to the "hue and cry" myth discussed earlier, and with the employer to warn the offending employee that their behaviour is not appropriate.

Other criteria for evaluating the severity of sexually harassing conduct in wrongful dismissal cases focus on drawing explicit attention to assessing the "degree and nature" of the sexually harassing conduct;[69] yet, this invites outdated understandings of the nature of sexual harassment in any form, and of the impact that such conduct can have on an individual who experiences sexual harassment. A focus on the "degree and nature" of misconduct implicitly privileges physical misconduct over verbal misconduct,[70] and suggests that incidents of sexual harassment are not all serious, or serious *enough* to warrant dismissal, as will be further explored in the next section. This fundamentally misunderstands the gravity and impact of sexually harassing conduct in the workplace, again operating to normalize at least certain forms or degrees of sexual harassment[71] by creating a hierarchy or spectrum of sexually harassing behaviours that implicitly accepts certain behaviours by placing them on the low end of the spectrum or, in other words, identifying them as not serious.

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[69] Hastie, "Tribunal Decisions", *supra* note 17 at 304–07.

[70] See e.g. Hastie, "Tribunal Decisions", *supra* note 17 at 304–07. Gallivan's review of judicial and arbitral decisions reveals that overtly sexual physical behaviour is more readily accepted as meeting the threshold of sexual harassment, while verbal harassment faces stricter scrutiny. Kathleen Gallivan, "Sexual Harassment after *Janzen v. Platy*: The Transformative Possibilities" (1991) 49:1 UT Fac L Rev 27 at 40–44.

[71] See Hastie, "Tribunal Decisions", *supra* note 17 at 298, citing also Kaitlyn Matulewicz, "Law and the Construction of Institutionalized Sexual Harassment in Restaurants" (2015) 30:3 CJLS 401 at 402; Aggarwal & Gupta, *supra* note 4 at 11; Fay Faraday, "Dealing with Sexual Harassment in the Workplace: The Promise and Limitations of Human Rights Discourse" (1994) 32:1 Osgoode Hall LJ 33 at 37.

Under human rights law, tribunals have recognized that sexual harassment may take many forms, and that verbal harassment may be just as damaging as physical touching.[72] Moreover, in this arena, verbal harassment has been recognized as including not just *quid pro quo* sexual advances or hostile comments, but also "verbal innuendoes, […] repeated social invitations, and unwelcome flirting",[73] as well as "comments about a woman's appearance or sexual habits."[74] Ensuring the full range of conduct that constitutes sexual harassment is recognized and understood in terms of its gravity is imperative to "addressing sexual harassment as a form of sex inequality by recognizing the myriad ways in which harassment can pose 'a barrier to women's equal participation in employment'",[75] and the significance of sexual harassment, whether physical or verbal, as a barrier in this regard. Again, despite differences between human rights and employment law, these understandings are relevant to critically evaluating whether and to what extent the principles developed in the context of wrongful dismissal law fully capture and understand the range of conduct that constitutes sexual harassment, the seriousness of sexual harassment in any form, and the impact of sexual harassment in many forms on both targeted individuals and the broader work environment.

As set out above, the test for wrongful dismissal and principles developed specifically in relation to allegations of sexual harassment invite scrutiny of, and a focus on, the behaviour of the employee who allegedly experienced the harassment, as well as the employer's response. This, in turn, deflects some attention away from the offending employee. Moreover, the principles developed to assess allegations of sexual harassment in a wrongful dismissal suit may contribute to normalizing certain forms or degrees of sexual harassment by placing different forms of sexual harassment on a spectrum of severity or seriousness, rather than understanding all forms of sexual harassment as serious misconduct. As we will illustrate in the next sections, this provides numerous entry points for gender-based stereotypes to influence the parties' arguments and court's

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72 For examples of human rights tribunals recognizing the serious adverse impact of verbal harassment, see *Penner v Irish Pub Holdings Inc. o/a Molly Malone's Irish Pub,* 2017 AHRC 15 at paras 35–36; *Ms K, supra* note 2 at paras 128–29. See also Hastie, "Tribunal Decisions", *supra* note 17 at 298; Hastie, "An Unwelcome Burden", *supra* note 17 at 425–26.

73 Hastie, "Tribunal Decisions", *supra* note 17 at 298, citing *Mahmoodi v UBC and Dutton*, 1999 BCHRT 56 at paras 135–36.

74 Hastie, "Tribunal Decisions", *supra* note 17 at 298.

75 *Ibid*, citing Gallivan, *supra* note 70 at 29.

analysis in a case of wrongful dismissal based on sexual harassment in the workplace. The next section will draw on the identified case sets from British Columbia and Alberta to illustrate these issues in practice.

IV. Critically Analyzing the Evaluation of the "Seriousness" of Sexual Harassment as a Basis for Summary Dismissal: A Review of British Columbia and Alberta Decisions, 2000-2023

As discussed earlier, where the misconduct is established as having occurred, two criteria ground the analysis of whether summary dismissal was justified: first, an assessment of the seriousness of the misconduct; and second, a determination of the proportionality of the employer's response in dismissing the plaintiff, in light of the nature of the misconduct and other factors. Each of these two criteria have given rise to issues in cases involving allegations of sexual harassment. First, numerous decisions in the identified case set reveal a lingering influence of gender-based stereotypes and myths concerning sexual harassment which operate to, at times, minimize the gravity of the misconduct at issue, and in turn, can affect the proportionality analysis. Second, the proportionality analysis may further engage reasoning that privileges the plaintiff's position over the overall safety of the workplace and impact on the individual who experienced the harassment, further compounding issues arising from minimizing the severity of the misconduct. While, as noted earlier, the offending employee-plaintiff is at the heart of the analysis in a wrongful dismissal case, where the misconduct at issue concerns harassment or violence in the workplace, there are reasons to be concerned that this focus displaces a clearer and more nuanced understanding of the ways in which that misconduct irreparably harms the employment relationship and work environment, which may justify summary dismissal.

As noted earlier, the more serious the misconduct at issue, the more likely that summary dismissal will be justified. Traditionally, and as discussed in Section II, the seriousness of the misconduct examines, at its core, whether the employee had irreparably breached the trust of the employer, such that the employment relationship can no longer continue. Today, many workplaces have policies proscribing sexual harassment and

other forms of discrimination or harassment in the workplace.[76] These policies may be "zero-tolerance", meaning that employees may be summarily dismissed for engaging in such behaviours, even in isolated incidents. However, as will be discussed below, even these cases may be subject to challenge. In the identified case set, evaluating the seriousness of the misconduct often turned on how the sexual harassment was characterized: as physical or verbal; whether the conduct was repetitive or isolated; and whether the plaintiff was warned or given notice (by either the employer or employee against whom the alleged harassment occurred) that the plaintiff's conduct was inappropriate or unwelcome.

Cases that involved verbal misconduct, particularly that which can be characterized as romantic invitations, often presented greater challenge in establishing that summary dismissal was justified. This mirrors similar issues previously identified in human rights law decisions, where physical misconduct is privileged over verbal misconduct in evaluating and identifying the severity of the harassment and its impact on an individual.[77] Again, despite the differences in this field, the parallels demonstrate a deeper entrenchment of gender-based stereotypes and myths that give rise to concern in any legal context. Moreover, as will be seen from the case analyses below, many judges rely on human rights law principles in describing and evaluating sexual harassment in wrongful dismissal suits, demonstrating further cross-over between these fields.

In *Hodgins v St John Council for Alberta*,[78] a 2007 Alberta Court of Queen's Bench decision, Justice Clackson was tasked with determining whether verbal comments made over the course of one evening were sufficiently serious to warrant summary dismissal as a form of sexual harassment. In

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[76] Employment and Social Development of Canada notes that approximately seventy-six per cent of survey respondents indicated that their workplace had a sexual harassment policy, see Employment and Social Development Canada, Harassment and sexual violence in the workplace: what we heard (ESDC, 2017) at 15–16, online (pdf): <canada.ca> [perma.cc/YE9D-ZFR5]. Additionally, as of October 2025, all Canadian jurisdictions impose an obligation on employers to implement workplace anti-harassment policies: see 2025 Legislative Update: Blakes Means Business, Workplace OHS Anti-Harassment Policies Across Canada, (10 November 2025), online: <blakes.com> [perma.cc/THJ2-396Y]. See e.g. Work Place Harassment and Violence Prevention Regulations: SOR/2020-130, s 10; Occupational Health and Safety Code, Alta Reg 191/2021, part 27, s 390 (1) (Violence and harassment prevention plan); Occupational Health and Safety Act, RSO 1990, c O.1, s 32.0.1; Occupational Health and Safety Act, SNS 1996, c 7, s 27.2; WorkSafeBC, Policies for the Workers Compensation Act, "Policy Item P2-21-2 Employer Duties - Workplace Bullying and Harassment", online: <worksafebc.com> [perma.cc/U27X-9VQ5].

[77] See, e.g. Hastie, "Tribunal Decisions", *supra* note 17 at 304–12. See also Gallivan, *supra* note 70 at 40–43.

[78] *Hodgins, supra* note 18.

that case, the plaintiff, who held a managerial position with the defendant employer, hosted the company Christmas party. Four allegations of verbal sexual harassment were made by a female employee arising out of the plaintiff's conduct that evening, including: that a female employee who drove the plaintiff to the party was "the youngest person to get his clothes off that fast in a long time";[79] repeatedly complimenting the female employee's hair and one instance of touching her hair;[80] putting his arm around the female employee and telling her she "should ditch her husband and come home with him";[81] and repeating a comment made by the female employee's husband that "with an ass like that you can do anything".[82] The female employee testified that she did not initially complain, despite the existence of a sexual harassment policy, because she feared for her job.[83]

In his analysis, Justice Clackson began by reviewing the company's sexual harassment policy and the definition of sexual harassment laid out in *Janzen*.[84] He then noted that such definitions focus on the "victim" and their perception of the events, but that in employment litigation, allegations of sexual harassment are a "black mark" against the offending employee and assessing whether conduct constitutes sexual harassment must therefore incorporate an element of "reasonableness", or an objective standard.[85] On that basis, Justice Clackson found that the first comment did not constitute sexual harassment. Although he acknowledged that "it is clear that the innuendo was sexual", he found that the plaintiff's explanation "tempers the innuendo" and that, because the comment was made to a third party (although about the female employee) and that party did not complain, it was not evidently offensive, nor would it "reasonably be seen as likely to detrimentally affect the work environment or lead to adverse job related consequences for" the female employee.[86] The justice then found that the unwanted touching, although "quite minor", did constitute sexual harassment, as did the subsequent two comments.[87]

In his analysis of whether the conduct at issue constituted sexual harassment, Justice Clackson appeared to focus substantially on whether the

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79 *Ibid* at para 9. The plaintiff offered the explanation that he was referring to the short timeframe he had to get ready for the party.
80 *Ibid* at para 10.
81 *Ibid* at para 11.
82 *Ibid* at para 12.
83 *Ibid* at para 14.
84 *Ibid* at para 33.
85 *Ibid* at paras 34–36.
86 *Ibid* at para 39.
87 *Ibid* at paras 40–44.

complaining party had experienced material adverse consequences in her work environment. This could be read as misunderstanding the offence to dignity that sexual harassment causes individuals who experience it. In other words, experiencing sexual harassment is, itself, the adverse consequence for the affected party.[88] Moreover, by treating each of the four allegations as separate and distinct incidences rather than as a cumulative series of events, the justice may have inadvertently minimized the severity and impact of that behaviour on the female employee, as well as the impact such conduct would have on other employees insofar as it models behaviour at work for others, especially in light of the fact that the plaintiff held a managerial position. Again, a more nuanced understanding of the concept of adverse impacts in the workplace may have led to a fuller consideration of how such comments, viewed collectively and in context, could create adverse impacts in the workplace, if not material negative consequences such as job loss. This, in turn, may have led to a more nuanced consideration of whether and how the employment relationship was irreparably harmed.

Although acknowledging that sexual harassment is a serious employment offence,[89] Justice Clackson ultimately determined that this conduct was not serious enough to warrant summary dismissal.[90] In the proportionality analysis, Justice Clackson looked to context, but did not appear to consider the managerial position and authority that the plaintiff held, and therefore, whether and to what extent his conduct was a model for others. Rather, Justice Clackson focused on "the circumstances in which the acts occurred or the words were spoken, the intent of the offender, the reaction of the victim, and the reaction of others who have seen or heard the offending behaviour."[91] Focusing on these criteria operates to alleviate responsibility for the offending employee (who may express "good intentions" or a simple lack of awareness of the nature and impact of their conduct) and instead place it with the parties affected (who must react "appropriately", such as by expressly protesting, in order to convey that the conduct was unwelcome). This problematically allows for the "ideal victim" narrative and gender-based myths, discussed earlier, to influence the proportionality analysis and operate to minimize the seriousness of the

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88 See e.g. *Ms K, supra* note 2.
89 *Hodgins, supra* note 18 at para 50.
90 *Ibid* at paras 51, 56.
91 *Ibid* at para 51.

conduct in respect of determining whether summary dismissal was warranted.

Ultimately, Justice Clackson characterizes the plaintiff's conduct as falling at the "lower end of the spectrum".[92] This characterization, combined with the fact that the female employee testified that she thought he should not be fired and appeared to be able to continue to work with the plaintiff, were noted as factors impacting the determination that the plaintiff had been wrongfully dismissed.[93] Notably, relying on the fact that the female employee was able to continue working with the plaintiff and did not expressly call for his dismissal, again places responsibility with her to demonstrate "ideal victim" characteristics in order to convey the true or full impact of sexual harassment in the workplace, rather than maintaining a focus on the offending employee's conduct and circumstances, such as holding a position of authority. As will be further discussed below, other cases also consider whether and what weight to afford to the targeted employee's response to experiencing sexual harassment at work.

In *Brazeau v International Brotherhood of Electrical Workers*, a 2004 British Columbia Supreme Court decision, the plaintiff brought a wrongful dismissal suit following termination based on allegations of sexual harassment of a co-worker.[94] Between 1993 and 1999, the plaintiff allegedly engaged in sexually harassing behaviour of a co-worker, including sending numerous affectionate messages, giving cards and expensive gifts, invitations to dinner and displays of "overly attentive and intrusive behaviour".[95] Justice Neilson had no difficulty finding that this conduct constituted sexual harassment,[96] but ultimately determined that it did not fall at the "most serious end of the spectrum".[97] Nonetheless, the duration and persistence of the conduct also precluded placing it at the "least serious" end.[98] Moreover, in the course of this analysis, Justice Neilson appeared to minimize the gravity and impact of the ongoing romantic invitations, characterizing this conduct as not "overtly sexual", "minimal" and "inconclusive".[99] Although Justice Neilson acknowledged that the co-

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92 *Ibid*.
93 *Ibid* at para 54.
94 *Brazeau*, *supra* note 18.
95 *Ibid* at para 191.
96 *Ibid*.
97 *Ibid* at para 226.
98 *Ibid*.
99 *Ibid* at paras 219–21.

worker had found this behaviour "disturbing",[100] the analysis seemed to give this little weight in determining the seriousness of the misconduct at issue. As outlined earlier, this assessment risks misunderstanding the gravity and impact that ongoing sexual harassment, which is generally understood as including repeated romantic advances, has on an individual and operates to both minimize and normalize this conduct in a workplace, even for an employee holding a position of seniority or authority in a company.

In addition to characterizing the misconduct as not "at the serious end of the spectrum", Justice Neilson appeared to place some weight on the fact that the plaintiff was not warned that his conduct was inappropriate and could lead to termination even though the company had a sexual harassment policy that clearly captured the conduct at issue and set out termination as a possible consequence.[101] This operates to remove responsibility from the plaintiff-employee by requiring an employer to warn the employee that such conduct is inappropriate, even where a sexual harassment policy exists, and assumes a position that the plaintiff-employee ought not to have known that such conduct is inappropriate in the workplace, implicitly excusing their behaviour in the absence of formal protest, objection or warning. Ultimately, Justice Neilson found that summary dismissal was not justified, given that the conduct was "not at the serious end of the spectrum" and the plaintiff had not received adequate warning from the employer, coupled with the fact that the co-worker "most affected by the events was not demanding his removal".[102] In addition to the issues already discussed around the first and second factors, Justice Neilson's reliance on the fact that the co-worker who experienced the harassment had not made explicit demands for the plaintiff's dismissal, similarly to *Hodgins*, operated to place responsibility with her to protest not only the conduct but also her alleged harasser's continued employment.

Although *Brazeau* was appealed, including on the basis that the trial judge had improperly deemed the conduct as not sufficiently egregious to warrant summary dismissal,[103] the appeal was dismissed.[104] However, in dissent, Justice Saunders noted that a fuller consideration of the nature of

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100 *Ibid* at para 221.
101 *Ibid* at paras 237–38.
102 *Ibid* at para 242.
103 *Brazeau v International Brotherhood of Electrical Workers*, 2004 BCCA 645 at para 18.
104 *Ibid* at para 27.

the employment relationship and the plaintiff's position within the company would have warranted summary dismissal.[105] Justice Saunders noted that the relevant question is whether, considering all the circumstances, the employment relationship has been irreparably harmed, and that in this case, the plaintiff's duties involved protecting and representing employees, including in matters related to sexual harassment.[106] His misconduct, therefore, had significant implications for the employer's reputation and authority to represent others in relation to such matters.[107] On that basis, Justice Saunders would have allowed the appeal.

In *Watkins v Willow Park Golf Course*, a 2017 Alberta Court of Queen's Bench decision, the plaintiff was terminated following an escalated pattern of attempting to "woo" a subordinate employee,[108] similar to the circumstances in *Brazeau*. However, unlike in *Brazeau*, Justice Hollins found this misconduct sufficient to justify summary dismissal. In *Watkins*, the plaintiff "developed romantic feelings" for a subordinate employee, and on this basis, "extend[ed] a number of benefits" to that employee and sent multiple text messages and other communications.[109] When that employee communicated to the plaintiff that she did not have "romantic feelings for him, and wanted their relationship to be only professional, the [p]laintiff began to vacillate between trying to woo her and becoming increasingly aggressive and abusive to her."[110] The defendant employer terminated the plaintiff with cause on numerous grounds, including the verbal and sexual harassment of the other employee.[111]

In the analysis, Justice Hollins appeared to place significant weight on the fact that the plaintiff's conduct occurred over a lengthy period of time: the affected employee was "not the random or temporary object of his inebriated affection (which would not be acceptable in any event) but was rather the target, over many months, of the admitted romantic interest and then subsequent aggression of her direct superior".[112] Specifically distinguishing this case from *Brazeau*, Justice Hollins noted that the plaintiff here was the affected employee's "direct and only supervisor".[113] Moreover,

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105 *Ibid* at paras 41, 45–46, 50–54.
106 *Ibid* at paras 45, 50.
107 *Ibid* at para 50.
108 *Watkins, supra* note 18.
109 *Watkins, supra* note 18 at paras 7, 15–36.
110 *Ibid* at para 7; see also *ibid* at paras 37–42.
111 *Ibid* at para 9.
112 *Ibid* at para 88.
113 *Ibid* at para 89.

Justice Hollins expressly disagreed with the reliance in *Brazeau* on the affected employee's failure to demand termination of the offending employee, stating that this should not be used to "mitigate conduct of this type"[114] and affirming that a lack of protest or objection of this manner is not required: "[i]t is not up to the victim of sexual harassment to determine the proper course of corporate action nor to take responsibility for the future employment prospects of the harasser."[115] In other words, Justice Hollins rejected the "hue and cry" myth discussed earlier in this article, and expressly disapproved of responsibilizing the person who experienced the harassment. Justice Hollins further found that a warning prior to termination is not required in all cases, including potentially "less serious instances of sexual harassment".[116]

Although the outcome in *Watkins* was positive in many respects, the decision nonetheless reifies the troubling distinction between physical and non-physical conduct. By suggesting that a prolonged and ongoing pattern of verbal conduct will be required to justify termination (as opposed to potentially isolated incidences of physical misconduct), the decision may be read as implicitly minimizing the gravity and impact of verbal harassment (characterized as "less serious"). It may also be read as implicitly minimizing the extent to which such conduct ought to be presumptively known to be inappropriate and a violation of the employer's trust, thus creating the potential for irreparable harm in the employment relationship. Moreover, the statement concerning the prolonged nature of the conduct in this case also appeared to dismiss instances of "temporary" or short-term verbal harassment, perhaps in the context of intoxication, as sufficiently serious to warrant summary dismissal. Again, this operates to normalize the occurrence of such conduct in the workplace by characterizing it as falling on the "low end" of a spectrum of sexually harassing behaviour.

Verbal harassment that is characterized as "aggressive" or "hostile" in nature, rather than as a "romantic pursuit", appeared more readily accepted as serious misconduct in a wrongful dismissal suit. In *Foerderer*, a 2007 Alberta Court of Queen's Bench decision, the plaintiff was summarily dismissed following a complaint that he sexually harassed a female

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114 *Ibid*.

115 *Ibid* at para 94.

116 *Ibid* at para 98, citing also *Geluch, supra* note 53 at para 97.

subordinate by using profane language, sexually infused talk and jokes, and displaying pornographic and graphically violent images.[117]

The plaintiff argued that because the female subordinate was an active participant in the sexual talk and jokes,[118] and failed to actively protest or object to the conduct, his conduct was not properly characterized as sexual harassment.[119] In her judgment, Justice Topolniski identified the plaintiff's "excuses" as attempts to minimize his misconduct and blame the female employee.[120] Although the female employee did not set clear boundaries, this "does not mean that she welcomed the sexual conduct, nor does it serve to minimize the seriousness of the [p]laintiff's misconduct, as he suggests."[121] Rather, Justice Topolniski noted that "[t]here are many reasons why a victim of sexual harassment may not speak out or deliver a clear and consistent message that sexually charged conduct is unwelcome".[122] Further, Justice Topolniski affirmed that responsibility lies with the employee who engages, or seeks to engage, in such conduct: "Presumptions that a co-worker enjoys sexual behaviour have no place in modern society or workplaces. It is incumbent on those initiating or participating in the conduct to ensure that it is welcomed by those targeted or other participants."[123] The reasoning in this judgment reflects a clear and nuanced understanding, and rejection, of the pervasiveness and insidiousness of gender-based myths and stereotypes that operate to minimize or dismiss the seriousness of sexual harassment in the workplace and responsibilize individuals experiencing sexual harassment. As such, the seriousness of the misconduct and responsibility of the offending employee to know of the inappropriateness of such conduct in the workplace is properly understood and reflected in the reasoning of this decision.

In assessing the proportionality of the employer's response, Justice Topolniski acknowledges the "spectrum" of sexual harassment and misconduct, and that not all sexual harassment will justify dismissal.[124] In cases involving non-physical harassment, she cites a number of factors that should be considered, including: "the number of complainants; the frequency, duration and persistence of the misconduct; the tenor of the

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117 *Foerderer, supra* note 18.
118 *Ibid* at para 42.
119 *Ibid* at para 94.
120 *Ibid* at paras 95–96.
121 *Ibid* at para 96.
122 *Ibid* at para 99; See also *ibid* at para 107.
123 *Ibid* at para 108.
124 *Ibid* at para 162.

communications; and the presence of coercive, intrusive or aggressive behaviour."[125] Although Justice Topolniski found that the plaintiff's conduct in this case fell in the "high-middle to low-upper end" of the spectrum,[126] the factors cited nonetheless reveal that a high bar is set to justify summary dismissal in cases of verbal harassment. This operates to reassert the notion that sexual harassment with a physical component is inherently more serious than verbal harassment. Thus, despite the attentiveness of Justice Topolniski in this case, the decision reveals the deep entrenchment of a hierarchical understanding of sexual harassment which operates to minimize, and to a degree, normalize, non-physical forms of sexual harassment at work. Nonetheless, in *Foerderer*, Justice Topolniski found that summary dismissal was justified in light of a combination of factors, including that the plaintiff was warned, the presence and breach of clearly and widely distributed policies and the severity of the misconduct, which was frequent, persistent and resulted in a severe emotional toll on the complainant.[127]

Cases of physical touching may be more readily understood and identified as serious sexual harassment or misconduct in the workplace. Indeed, in many of the cases involving verbal harassment discussed above, judges noted that unwanted physical touching falls further along the spectrum of seriousness as a starting point. For example, in *Clarke v Syncrude*, a 2013 Alberta Court of Queen's Bench decision, the plaintiff was summarily dismissed following allegations of sexual harassment that unfolded during a work-related meeting in Toronto.[128] During a cocktail reception for that meeting, the plaintiff engaged in sexually harassing behaviour towards several female attendees, including making multiple inappropriate comments, slapping or grabbing a colleague's backside, touching another female colleague's knee under a table, and pulling a female employee of another company onto his lap during dinner.[129] During a cab ride back to the hotel that night, the plaintiff engaged in further physical touching of a female employee of another company, including "put[ting] his hand on her right thigh and up under her skirt."[130] Justice Macleod had no difficulty concluding that this was a clear instance of sexual assault, thus

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125 *Ibid* at para 190.
126 *Ibid* at para 193.
127 *Ibid* at paras 158, 192.
128 *Clarke, supra* note 18.
129 *Ibid* at paras 14–18.
130 *Ibid* at para 18.

falling at the serious end of the spectrum of sexual harassment.[131] In examining the overall context, for the purposes of the proportionality analysis, Justice Macleod noted a few mitigating factors, including the lack of a management relationship between the parties, that the events occurred on a single evening and were out of character for the plaintiff, and "the verbal nature of much of the misconduct."[132] However, numerous and substantial aggravating factors were also identified, including the need to decrease tolerance for sexual harassment in the workplace, the fact that the plaintiff occupied a position of seniority in the company and the seriousness of the incidents of sexual touching.[133] As a result, and especially due to the inclusion of a clear instance of sexual assault,[134] the summary dismissal was justified.

In *Leach v Canadian Blood Services*, a 2001 Alberta Court of Queen's Bench decision, the plaintiff was dismissed following allegations of sexual harassment that included comments as well as physical touching of two employees.[135] The physical touching included touching one employee's bottom, and kissing another.[136] The plaintiff denied that the conduct occurred, which made the credibility of the female complainants a central issue.[137] In her analysis, Justice Coutu noted that the failure of the complainants to immediately protest or object to the conduct did not undermine their credibility, especially considering that the plaintiff was in a position of authority.[138] Later quoting from *Bannister v General Motors of Canada*, she noted:

> [i]t is not a question of the strength of mettle of female employees or their willingness to do battle. No female should be called upon to defend her dignity or to resist or turn away from unwanted approaches or comments which are gender or sexually oriented. It is an abuse of power for a supervisor to condone or participate in such conduct.[139]

Expanding on this, Justice Coutu emphasized that the "onus should not be on victims or potential victims to police the work environment."[140] In fact,

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131 *Ibid* at paras 29, 36.
132 *Ibid* at para 36.
133 *Ibid*.
134 *Ibid*.
135 *Leach, supra* note 18.
136 *Ibid* at paras 9, 43.
137 *Ibid* at paras 68–85.
138 *Ibid* at para 80.
139 *Ibid* at para 112, quoting *Bannister v General Motors of Canada Ltd,* 1998 CanLII 7151, (1998), 164 DLR (4th) 325 at 338 (ONCA).
140 *Leach, supra* note 18 at para 113.

the lack of protest or objection, which the female employees explained was the result of being surprised by the inappropriate conduct and unsure of how to respond, was identified as a "common reaction" in cases of sexual harassment.[141] This analysis establishes a clear and deep attentiveness to the ways in which gender-based myths can operate to undermine the credibility of complainants of sexual harassment, and an equally clear rejection of those myths. Rather than relying on the absence of protest or objection to cast doubt on the occurrence of the events, Justice Coutu demonstrates that this absence is not only irrelevant to considering the facts of the case, but a "common" or expected reaction of individuals who experience sexual harassment, an event incongruent with expectations of appropriate conduct in the workplace. Having determined that the conduct did occur, Justice Coutu had little difficulty determining it constituted sexual harassment.[142]

In considering the proportionality of the employer's response, Justice Coutu also had little difficulty determining that the summary dismissal was justified, and cited the following relevant factors: there were two incidents of serious sexual harassment (physical touching); the misconduct was not isolated; the plaintiff was a manager and responsible for enforcing the company's sexual harassment policy; as a supervisor, the plaintiff's conduct had a great impact on staff morale; and the plaintiff maintained denial of the events.[143] Unlike in *Hodgins*, discussed earlier, here the impact of a supervisor's conduct was understood to move beyond immediate, material consequences for the affected individuals, establishing a more robust and nuanced understanding of the concept of "adverse impact" and how sexual harassment, by its very nature, has the potential to create such an impact on the broader work environment. Moreover, rather than minimizing the misconduct as a less-severe form of physical touching, Justice Coutu rightly recognized that, as unwanted physical touching, the conduct was serious.

Nonetheless, in cases involving physical touching, a plaintiff may attempt to introduce stereotypes or myths that operate to place responsibility for the alleged conduct with the targeted individual. For example, in *van Woerkens v Marriott Hotels of Canada Ltd.*, a 2009 British Columbia Supreme Court decision, the plaintiff, a supervisor, was alleged to have engaged in sexual harassment of a female subordinate employee at a work party, including sexually suggestive dancing, kissing, touching and

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141 *Ibid* at para 80.
142 *Ibid* at paras 88–89.
143 *Ibid* at para 138.

fondling her breasts.[144] Testimony established that the female employee was very intoxicated.[145] The plaintiff denied the allegations and testified that it was the female employee who had made inappropriate invitations to him.[146] However, Justice Pearlman noted that this approach appeared to be an attempt to cast the plaintiff in "the best light on his own behaviour, and to portray himself as a victim of false accusations by a complainant whose advances he had rejected".[147]

In *van Woerkens*, Justice Pearlman emphasized the inappropriateness of the plaintiff's conduct, both in light of the established intoxication of the female employee and the fact that she was a subordinate employee. Justice Pearlman expressly found that the plaintiff's conduct "constituted an attack on [the female employee's] dignity and self-respect […] and had the effect of creating an environment which [she] reasonably found to be intimidating and offensive."[148] This is significant as, discussed earlier, not all cases appeared to understand the gravity of the impact of sexual harassment on the targeted individual as an adverse consequence itself. Moreover, Justice Pearlman in this case affirmed that any assumptions that the targeted individual may have welcomed the conduct would be unjustifiable as an excuse, particularly in light of the relationship between parties; the plaintiff's conduct "in fondling a female subordinate who he knew to be highly intoxicated constituted an abuse of power."[149] As with *Watkins*, this decision demonstrates a nuanced understanding of the significance of power dynamics when sexual harassment occurs by a supervisory or managerial employee, and the significance of the offending employee's position of authority in evaluating the seriousness and impact of the misconduct on the ongoing employment relationship and work environment under the established wrongful dismissal principles.

Although the cases above establish a general understanding of unwanted physical touching as a presumptively serious form of misconduct, a few cases appeared to problematically introduce a secondary spectrum or hierarchy for assessing physical sexual harassment. This may operate to minimize the gravity of any or all forms of physical touching in the workplace as serious misconduct. For example, in *Dupont v AG Growth*

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144 *van Woerkens, supra* note 18 at paras 6, 61.
145 *Ibid* at para 127.
146 *Ibid* at paras 43–44.
147 *Ibid* at para 123.
148 *Ibid* at para 170.
149 *Ibid* at para 174.

International, a 2021 Provincial Court of Alberta decision, the plaintiff, Mr. Dupont, solicited another employee, RT, for a date.[150] He "reached over and lifted RT's hoodie and T-shirt, exposing the area of her body extending from her belly-button to her bra, including her bra".[151] According to the trial judge, Judge Yake, Mr. Dupont "did this because he wanted to flirt with and 'hit on' RT, and he wanted to show her that he 'liked her a lot'".[152] In response, RT "immediately swore at Mr. Dupont and slapped his hand away" and Mr. Dupont then "immediately walked away" from RT.[153] Following a brief investigation, Mr. Dupont was summarily dismissed for breaching the company's zero-tolerance sexual harassment policy.[154]

Although Judge Yake found that Mr. Dupont's conduct constituted sexual harassment under law, and violated the company's policy,[155] he nonetheless determined that this conduct – which he defined as unwanted touching – fell at the low end of the spectrum in evaluating the seriousness of the misconduct.[156] This finding appeared to rest largely on the fact that the incident was isolated, and that once RT had communicated that the advances were not welcome, "he did not persist".[157] This evaluation of the seriousness of the misconduct mirrors similar issues identified in human rights decisions that have, at times, historically minimized unwanted physical touching, especially where it is characterized as inadvertent, isolated and not necessarily targeted toward a sexualized part of the body.[158] On appeal, the Alberta Court of Queen's Bench overturned this finding, affirming that, even if isolated and not as serious as other cases, unwanted physical touching constitutes sexual assault, which will always constitute serious misconduct for the purposes of summary dismissal.[159]

Calgary (City), a 2019 Alberta Court of Appeal decision, followed a similar trajectory as *Dupont*, and, in fact, was used as a supporting precedent to justify the dismissal on appeal in *Dupont*.[160] In *Calgary (City)*, the employer

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150 *Dupont v Ag Growth International Inc (AGI-Westeel)*, 2021 ABPC 118 [*Dupont* trial judgement].
151 *Ibid* at para 79.
152 *Ibid*.
153 *Ibid*.
154 *Ibid* at para 80.
155 *Ibid* at paras 81–83.
156 *Ibid* at paras 87–88.
157 *Ibid* at para 87.
158 See e.g. Hastie, "An Unwelcome Burden", *supra* note 17 at 431; Hastie, "Tribunal Decisions", *supra* note 17 at 313–14.
159 *Dupont*, *supra* note 18 at paras 10–14. In that decision, the court also relied on *Calgary (City)*, *supra* note 18.
160 *Dupont, supra* note 18 at paras 10-17.

had terminated an employee following allegations of sexual harassment that involved grabbing and squeezing a co-worker's breast.[161] The employee grieved the termination, and at labour arbitration, Arbitrator Smith had found that dismissal was not justified because the sexual harassment fell at the lower end of the spectrum: "it was a single incident; the complainant did not appear to be traumatized in any significant way; (…) there was no evidence of any persistent conduct that would be properly considered as creating a hostile or unsafe environment."[162] On judicial review, Justice Kubik upheld Arbitrator Smith's decision,[163] and the employer appealed further to the Alberta Court of Appeal.[164]

In overturning Arbitrator Smith's decision, Justice Veldhuis, writing for the majority of the Court of Appeal, centralized the way in which the incident of sexual harassment was characterized, finding that the arbitrator had "downplay[ed] the seriousness of the misconduct. There can be no doubt that the grabbing and squeezing of another's breast without consent is sexual *assault*. Sexual *assault*, by its very definition, is serious misconduct."[165] Justice Veldhuis then affirmed that "a single serious occurrence may constitute sexual harassment".[166]. Moreover, Justice Veldhuis took issue with the contextual analysis of the arbitrator, finding that it was incongruent with "the evolving attitudes of what is acceptable in the workplace."[167] Finally, Justice Veldhuis highlighted the impropriety of relying on an apparent absence of distress by the targeted individual as a "mitigating factor" weighing against summary dismissal.[168] Like in *Leach*, Justice Veldhuis in *Calgary (City)* appeared attentive and sensitive to both the problems arising from a characterization of unwanted physical touching as less than serious, and to the potential myths and stereotypes operating in the background concerning acceptable norms in the workplace and "ideal victim" responses. This appears to have set an important precedent concerning the treatment of physical sexual harassment in all forms in

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161 *Calgary (City)*, *supra* note 18 at para 2.

162 *Ibid* at para 6.

163 *Ibid* at para 10.

164 *Ibid* at para 12. At the Court of Appeal, the majority overturned Arbitrator Smith's decision as unreasonable, while Feehan J would have upheld Arbitrator Smith's decision as reasonable (see para 141).

165 *Ibid* at para 11 [emphasis in original]. On this point, the dissent appears to agree: see para 126.

166 *Ibid* at para 28. Although the Court of Appeal did not explicitly hold that a single incident of sexual assault can justify summary dismissal, this is implicit in its conclusion that the arbitrator's decision to overturn the termination and impose a lengthy suspension was unreasonable. See *ibid* at para 62, latter part.

167 *Ibid* at para 41.

168 *Ibid* at para 43.

Alberta, evidenced by its use as supporting precedent in *Dupont* discussed above.

Conversely, in *Cho v Café La Foret*, a 2022 British Columbia Supreme Court decision, the court found that unwanted physical touching did not constitute misconduct serious enough to justify summary dismissal.[169] In that case, Mr. Cho, a head baker at the company, was accused by a subordinate female employee, Ms. Lee, of two instances of unwanted physical touching.[170] In the first instance, while working alone, Mr. Cho touched Ms. Lee's upper back, both shoulders and neck area while discussing a massage he had received the previous day.[171] Ms. Lee testified that she attempted to create physical distance between herself and Mr. Cho following that incident, though she did not verbally express objection to the conduct for fear of retaliation.[172] The second incident followed later that day, and involved Mr. Cho "tapping" Ms. Lee on her buttock.[173] At trial, Justice Shergill found that these incidents did occur and did constitute sexual harassment: "[t]hough the touching was brief, it was intentional, unwarranted, and non-consensual. It was a violation of Ms. Lee's bodily integrity, and caused her emotional distress."[174] Despite this, Justice Shergill determined that summary dismissal was not justified.

In evaluating whether the sexual harassment justified summary dismissal in *Cho*, Justice Shergill relied on the factors set out in *Alleyne*, discussed in Section II of this article.[175] The first criterion inquires about the nature and degree of the misconduct at issue. Here, Justice Shergill found that,

> [o]n the spectrum of workplace sexual harassment, the established misconduct was relatively minor. It consisted of a brief light tap on Ms. Lee's left shoulder, followed by a brief open hand pat to her upper back, and a subsequent light tap on Ms. Lee's buttock. The conduct lasted only for a second or two on each occasion, and reflected a gross error of judgment, rather than *mal fide* intentions.[176]

This passage from the judgment illustrates a minimization of unwanted physical touching by creating a second hierarchy or spectrum from which to

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169 *Cho*, *supra* note 18 at para 144.
170 *Ibid* at paras 1–2.
171 *Ibid* at paras 75–76.
172 *Ibid* at paras 77–78.
173 *Ibid* at para 79.
174 *Ibid* at paras 99–100.
175 *Ibid* at para 142.
176 *Ibid* at para 143.

assess different types and degrees of unwanted physical touching, rather than a recognition that all unwanted physical touching should be considered serious. Further, Justice Shergill appeared to draw a distinction on the basis of intent, further minimizing the physical misconduct in respect of assessing the sexual nature of the misconduct and excusing the offending employee from responsibility by characterizing his intent as an "error of judgment".[177]

The decision in *Cho* is troubling both due to the way in which it creates an additional spectrum or hierarchy of seriousness in cases of unwanted physical touching, and how that hierarchy operates to normalize a certain degree of physical contact in the workplace, even where that contact has sexual undertones and occurs between a supervisor and subordinate employee. This reasoning appears directly counter to the approach taken in Alberta in the *Calgary (City)* and *Dupont* decisions, which recognized that unwanted, or unconsented to, physical touching in the workplace is *prima facie* serious misconduct. Moreover, the decision in *Cho* excuses the offending employee's behaviour and minimizes their responsibility by characterizing the incidents as an "error of judgment"[178] rather than identifying this as presumptively inappropriate conduct in a modern workplace.

Overall, the identified cases demonstrate that in applying legal principles for wrongful dismissal, particularly in assessing seriousness and proportionality, courts have established a hierarchy of sexual harassment, privileging certain behaviours as more serious than others. Verbal harassment is often viewed as less severe, with dismissal seen as disproportionate unless the misconduct involves an ongoing pattern or is overtly hostile or aggressive. In contrast, physical sexual conduct is generally privileged as more severe, though courts have, at times, downplayed the seriousness of brief or isolated instances of unwanted physical contact, concluding they do not warrant just cause for dismissal. This differentiation risks minimizing and normalizing certain forms of sexual harassment in the workplace. The proportionality analysis also evidenced, at times, a problematic reliance on gender-based myths and stereotypes, focusing on the targeted individual's response — such as whether they protested the misconduct or sought the harasser's dismissal — when assessing the proportionality of the employer's response in summarily dismissing the offending employee. However, some recent decisions by the

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[177] *Ibid.*
[178] *Ibid.*

Alberta courts, in particular, demonstrate a more nuanced and sensitive approach. These cases recognized the adverse impacts of sexual harassment on both the targeted employees and broader workplace culture, and the effects these have on understanding the potential irreparability of the employment relationship, bringing attentiveness and nuance to recognizing and discussing the influence of gender-based myths and stereotypes in parties' arguments and the application of the relevant legal principles.

V. Conclusion

Sexual harassment is a serious form of misconduct that requires employers to take appropriate disciplinary action, including the possibility of summary dismissal. However, the legal test for wrongful dismissal sets a high bar for employers to establish just cause, and incorporates numerous additional factors to consider in cases of sexual harassment. Justification for summary dismissal is evaluated on the basis of two main criteria, where the misconduct itself has been established: the seriousness of the misconduct, and the proportionality of the disciplinary response. Summary dismissal is deemed proportionate only when the misconduct is of significant severity. Traditionally, this reflects the power that employers hold over at-will employees, and seeks to protect those employees from arbitrary and punitive outcomes in the employment relationship. However, in cases involving sexual harassment and misconduct, this focus can operate to displace or obfuscate a more nuanced understanding of the nature of that misconduct and its impact on the continuing employment relationship and work environment. Moreover, when the dismissal is based on allegations of sexual harassment, courts have developed numerous additional factors to consider in assessing whether summary dismissal was justified. As discussed in Section III, many of these factors, such as the "degree and nature" of the conduct, or whether the employee was warned about their conduct, may provide an entry point for gender-based myths and stereotypes to influence the analysis.

In this article, we examined how courts apply these legal principles in practice by conducting an in-depth analysis of twelve court decisions from Alberta and British Columbia relating to civil claims for wrongful dismissal where sexual harassment allegations formed the basis of the dismissal. Our analysis reveals troubling trends in how courts interpret and apply legal principles for wrongful dismissal in these cases and the persistent influence of gender-based myths and stereotypes in determining what constitutes

sexual harassment serious enough to justify summary dismissal. Multiple cases adopted a narrow understanding of sexual harassment, and appeared to minimize or misunderstand its profound adverse impacts on the individuals who experience the harassment and on overall workplace dynamics and culture. Decision-makers in some cases continue to rely on normalized standards of male behaviour in the workplace, downplaying verbal harassment or conduct deemed "innocuous," such as jokes or off-hand comments, as well as isolated instances of physical touching, concluding in some cases that the harassment was not severe enough to justify summary dismissal. In assessing the seriousness of sexual harassment, courts often relied on a hierarchy of misconduct, prioritizing physical acts over verbal harassment. The threshold for justifying summary dismissal was generally higher in cases of verbal harassment, with courts typically requiring evidence of ongoing patterns or escalating behaviour. This approach risks minimizing and normalizing certain forms and degrees of sexual misconduct in the workplace, in contrast to broader social and legal shifts in the understanding of sexual harassment in the past decade.

Our analysis also highlights that the assessment of proportionality and seriousness was, at times, influenced by the targeted party's reaction, scrutinizing whether she protested, reported the misconduct, or demanded the plaintiff's termination. This reliance on the targeted party's response places undue responsibility on them to resist or report the harassment, reflecting stereotypical expectations of how "ideal victims" should behave. However, in some cases, courts recognized that a targeted party's response and lack of protest should not mitigate the seriousness of the misconduct and rejected the introduction of the "ideal victim" stereotype. Some courts also gave appropriate weight to power dynamics, considering the offending employee's position of power and authority as an aggravating factor when considering the targeted party's response (or lack thereof), and in determining the proportionality of the disciplinary measure.

Despite these concerns, some cases illustrated an attentive and nuanced approach to and understanding of the issues canvassed in this article, acknowledging the gravity of sexual harassment as an "adverse impact" in and of itself on both the targeted party and broader workplace, even in cases involving verbal harassment or a single instance of physical misconduct. Moreover, some cases drew a clear and explicit link between those adverse impacts and the irreparability of a continuing employment relationship, the core question or focus of a wrongful dismissal claim as articulated by the

SCC in *McKinley*.[179] In addition, some decision-makers demonstrated sensitivity to the insidious influence of gender-based myths and stereotypes, identifying and rejecting attempts by plaintiffs to invoke such narratives to downplay the severity of the misconduct or otherwise discredit the targeted party. These cases highlight the potential for a more nuanced approach to the interpretation and application of wrongful dismissal principles — one that aligns with the evolving recognition of sexual harassment, in all its forms, as a serious and pervasive manifestation of gender discrimination in the workplace.

[179] *McKinley, supra* note 34 at para 48.