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ESAP2

USING MEDIATION TO DEAL WITH SEXUAL HARASSMENT CASES AT THE WORKPLACE

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Outline of Presentation

1. CONTEXT

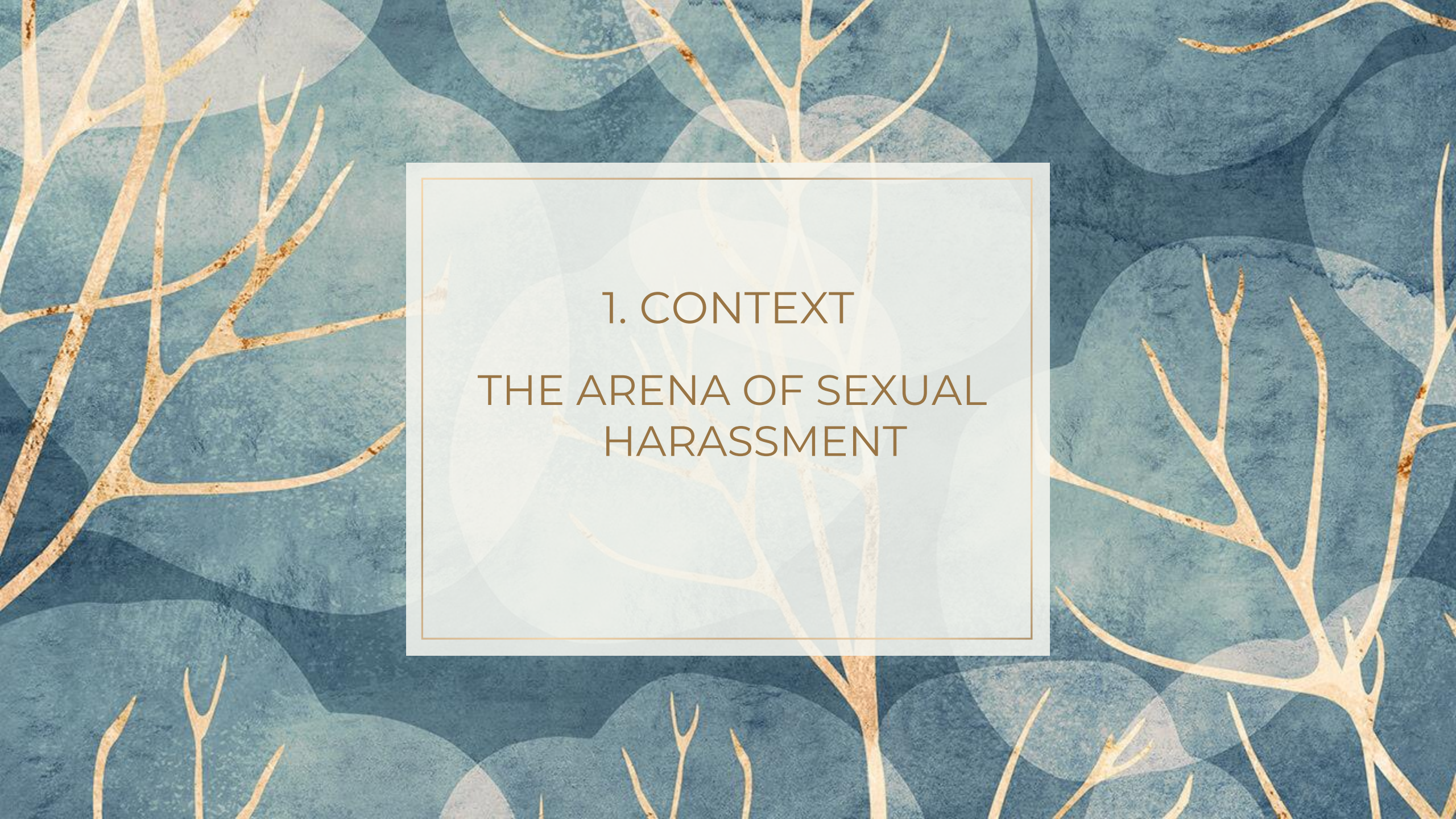
- THE ARENA OF SEXUAL HARASSMENT
- THE ARENA OF ALTERNATIVE DISPUTE RESOLUTION

Outline of Presentation

2. THE PROMISE OF MEDIATION IN SEXUAL HARASSMENT CASES
 - GENERAL ADVANTAGES
 - TWO MODELS

Outline of Presentation

3. LIMITS OF MEDIATION
4. A CRITIQUE OF MEDIATION



1. CONTEXT
THE ARENA OF SEXUAL
HARASSMENT

The Arena of Sexual Harassment: Four Themes

Emotional

Complex

Divisive

Disruptive

Brief Description of Sexual Harassment

Unwanted/Unwelcome behaviour of a sexual nature

Definition of sexual harassment

Sexual harassment includes the following behaviours:

- Touching, sexual assault, rape
- Sexual innuendos, suggestions, hints, sex related jokes
- Unwelcome enquiries about a person's sex life
- Display of sexually explicit pictures and objects
- Quid Pro Quo
- Sexual favouritism

Implications of a continuum of behaviour

- Subjective and Objective test
- Minimising or Trivialising
- Intent vs impact

Challenges

- Silencing of the victim
- Confidentiality
- Dealing with the fallout
- Competing Rights of the Victim and Accused
- Single witness scenario



1. CONTEXT

THE ARENA OF
ALTERNATIVE DISPUTE
RESOLUTION

Limits of Litigation or Formal Adjudication Processes

- Backlogs/Delays
- Huge costs
- Strict Rules of Evidence
- Adversarial – Winner and Loser

Arbitration

- Can be Adversarial or Inquisitorial
- Parties can choose the Arbitrator
- Reduced Costs
- Speedy Resolution


Mediation

A process in which an impartial third party assists participants to reach a resolution to their dispute.

- Some principles
 - Voluntary
 - Confidential
 - Without Prejudice
 - Parties create their own resolution

Restorative Justice

- Started as a form of Mediation in the criminal context
- Victim and Perpetrator face each other to Right Wrongs
- Offenders: Recognise harm they have caused and realise their potential for rehabilitation
- Victims: Therapeutic benefits by having questions answered and obtaining an apology



2. THE PROMISE OF
MEDIATION IN SEXUAL
HARASSMENT CASES

GENERAL ADVANTAGES

General Advantages (1/2)

- Flexibility - e.g., Timing, Shuttle Diplomacy, Caucuses
- Future Focus, as opposed to who is to blame/who has the better case
- Expeditious and discreet
- Relationship can be restored
- Protects the employer from liability
- Victim protected from secondary trauma

General Advantages (2/2)

- Tailor-made solutions unique to the parties
- Encourages venting/describing the full versions of each
- Win/win outcome vs winner/loser
- Perpetrators have more understanding of the impact of their behaviour – an adversarial process may incline the alleged perpetrator to deny or minimise the impact of their behaviour

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“Taking sexual harassment seriously does not mean dealing with it formally but dealing with it effectively.”

David Whincup



2. THE PROMISE OF MEDIATION IN SEXUAL HARASSMENT CASES

TWO MODELS

Two Models of Mediation for Sexual Harassment Intervention (Whittenburg)

The Four Phase
Process Model

The Settlement
Conference
Model

Two Models of Mediation for Sexual Harassment Intervention (Whittenburg)

The Four Phase Process Model

Intentions/Goals

- Disputants understand each other's point of view
- Frustrations are aired in a positive manner
- Their own views are validated
- They arrive at their own resolution

Four Phases Model

1

Opening Statements from both telling their stories directly to the mediator.

Mediator elicits the interests and concerns that each party needs addressed through the mediation process

Four Phases Model

2

Parties face each other to share their understanding of the other party's perspective

During the first 2 phases the mediator or parties may request a caucus to move past an impasse or to obtain hidden information

Four Phases Model

3

Help parties acknowledge their understanding of each other's perspective, even though they may not agree

Four Phases Model: Resolution

Mediator:

4

- Lets parties come up with their own suggestions
- Helps parties stay focused and reality check their suggestions
- Facilitates brainstorming

Four Phases Model

When to **use** this Model:

- The problem is reversible
- Person just wants the behaviour to stop
- No selfish or malicious intentions
- Behaviour can be corrected
- Harasser does not deny the conduct

Four Phases Model

When to **not** to use this Model:

- Quid pro Quo
- Behaviour physically severe
- Behaviour maliciously motivated

If this is the case, the employer must take immediate action to end the behaviour, regardless of the desires of the reporting employee.

Two Models of Mediation for Sexual Harassment Intervention (Whittenburg)

Intentions/Goals

- Reach an agreement which will keep the parties out of court
- The mediator negotiates a settlement between the parties

The Settlement
Conference
Model

The Settlement Conference Model

Pre-mediation Meeting with all parties during which the mediator:

- Step 1
- Introduces themselves and explains the mediation process
 - Requests written summaries of the dispute, and any other relevant documents

The Settlement Conference Model

The Initial Mediation Session

- Step 2
- Each party gives oral statements of their views of the dispute and presents their case

The Settlement Conference Model

Step 3 The mediator meets separately with each party to gather confidential evidence and to present arguments of law

Step 4 The mediator develops and presents settlement proposals to each party, and then engages in shuttle diplomacy

The Settlement Conference Model

When to Use the Settlement Conference Model

- The behaviour is not reversible but is containable
- The parties are polarised so that face to face discussion is impossible
- Parties can still avoid expense/distress and public exposure
- Agreements between parties can become contractual and binding

The background features a watercolor-style pattern. It consists of overlapping, semi-transparent circles in various shades of blue and teal. Superimposed on these circles are delicate, branching structures in a light gold or beige color, resembling coral or seaweed. The overall aesthetic is soft and organic.

3. THE LIMITS OF MEDIATION

The Limits of Mediation (1/3)

- Apologies are not the panacea for all the harm caused by sexual harassment
- The power or charisma of a perpetrator can broker a deal which may not be advantageous to the victim nor society at large
- If terminated prematurely, it would mean wasted time, resources and emotional energy
- The “without prejudice” nature of mediation possibly compromised
- Is it true that most complainants simply want the behaviour to stop and not “punish” the alleged perpetrator?

The Limits of Mediation (2/3)

- Most effective if harassment is a matter of miscommunication, differences in style or cultural expectations (“low-level” behaviour), as opposed to an abuse of power
- Mediation may be less effective if the victim is silenced and/or fears disbelief or trivialisation of their complaint
- Is confidentiality really realistic?
- Demands enormously skilled mediator with expertise in subject matter
- Mediation requires goodwill and good faith – not always possible

The Limits of Mediation (3/3)

- Mediation requires parties to move from positions to interests and needs
- “Voluntary” nature of mediation: can parties be persuaded?
- Not recommended if the sexual harassment has resulted in physical harm or assault
- Not effective if the employer has decided that the harasser must be discharged.

The background is a watercolor-style illustration. It features a pattern of overlapping, semi-transparent blue circles of various shades, ranging from a deep navy to a lighter, dusty blue. Superimposed on this pattern are delicate, golden-brown branches that resemble coral or seaweed, with thin, tapering limbs. The overall aesthetic is soft and organic.

4. A CRITIQUE OF MEDIATION

A Critique of Mediation

Based on the following paper:

- Hippensteele, Susan “Mediation Ideology: Navigating Space from Myth to Reality in Sexual Harassment Dispute Resolution” *American University Journal of Gender, Social Policy and the Law*, 15, no.1 (2006): 43 – 68.

A Critique of Mediation

Her basic premise is that Mediation is a coercive form of pacification as well as a mechanism to make public issues private concerns.

She looks at 5 Resolution Themes inherent in Mediation which she believes “promotes the polite fiction that sexual harassment is a personal, private insult to working women rather than an invidious discrimination”.

A Critique of Mediation

- Sexual Harassment is a uniquely “sensitive” problem that requires attention to the emotional aspects of the situation
- She argues that that while mediation purports to allowing the venting of emotions, in fact the overarching values of cooperation and reconciliation mitigate against dealing with emotional content of the experience of sexual harassment.

1

A Critique of Mediation

2

- Victims of Sexual Harassment want/need to preserve their privacy and avoid the stress of formal, adversarial processes
- This perpetuates the myth that sexual harassment reflects badly on the victim.
- The victim has no chance of exoneration as the person telling the truth is largely irrelevant to the outcome of mediation.

A Critique of Mediation

3

- Sexual Harassment victims want/need to personally confront their harasser
- This is not true as most victims are not in an equal bargaining position, especially if there is a power differential or there has been coercion.
- Confronting the harasser may open the victim to further manipulation or additional abuse.

A Critique of Mediation

4

- Formal Complaints Adjudication disadvantages victims of sexual harassment
- She argues the opposite: if one goes the formal route, clear legal principles may help the victim define their injury in a context where the assertion of rights is legitimate.

A Critique of Mediation

5

- Sexual harassment is an inherently subjective and ambiguous phenomenon
- Sex crimes is the only area of criminality where we judge the offense not by the perpetrator but by the victim.
- This may minimise the subjective impact on the victims who mostly are women who may be stereotyped as emotional, prone to exaggeration and overreaction, unlike men who are stereotypes as “rational”.

A Critique of Mediation

Some Final Thoughts from Hippensteele

- Mediation may mitigate rather than correct the injury from sexual harassment
- Women are socialised to seek non-confrontational relational strategies to dispute resolution
- Mediation may be seen as a process that effectively trades justice for harmony.



Thank you