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SEXUAL HARASSMENT IN THE WORKPLACE

Introduction

In this guide, Calvin Lau, Founder of Ace Legal will consider the problems that can arise with sexual harassment in the work place and what employer should do to minimize liability against them.

Sexual Harassment

Currently, Hong Kong's Law of Sexual Harassment is governed by the Sex Discrimination Ordinance ("SDO"). SDO provide protection in the workplace environment to employees including applicants for jobs, employers themselves, contract workers, commission agents and domestic helpers.

SDO also applies to work in trade unions, qualifying bodies, providers of training that is employment related and employment agencies.

What constitutes Sexual Harassment?

Under s.2(5) (a) of the SDO, sexual harassment is defined as "an unwelcome conduct of a **sexual nature** in relation to a person, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person would be offended, humiliated or intimidated. "Conduct of a sexual nature" includes "making a statement of a sexual nature to a woman, or in her presence, whether the statement is made orally or in writing". S.2 (5)(b) of SDO applies to work-related harassment and states that a person sexually harasses women if "*the person, alone or*



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together with other persons, engages in conduct of a sexual nature which creates a sexually hostile or intimidating work environment for her”.

In the case of 皇上皇集團有限公司, the Company was ordered to pay compensation to B (“the Plaintiff”) for injuries to feelings and to pay for legal costs of Plaintiff and a written apology to Plaintiff within 28 days of judgment. The Plaintiff was under employ of Company and worked at its restaurant at the material time. On 14 May 2008, a dim sum chef, also under employ by the Company touched the chest of the Plaintiff and called made offensive sexual remarks to her when she walked past him. In this case, the court held that such acts constituted “Conduct of a Sexual Nature” and that a reasonable person would anticipate that the Plaintiff would be offended and humiliated. The Company was held liable for the staff’s action.

It is important to note the meaning of conduct of sexual nature. Under Section 2(7), it states that “conduct of a sexual nature” includes “making a statement of a sexual nature to a woman, or in her presence, whether the statement is made orally or in writing”. This includes examples such as the following: - asking a woman during employ whether she has a boyfriend, about her sexual life constitutes sexual nature.

Further, it does not need to be directly at the women as long as it is sexual in nature. For example, creating a sexually hostile/intimidating work environment or making insulting sexual comments about a woman’s body in the presence of a colleague which would create a sexually hostile/ intimidating work environment.

Voyeurism could also constitute a sexual harassment. In an employment situation, the attempt to spy on a woman in a bathroom or film her in a state of undress out of sexual desire is examples of sexual harassment as the conduct of a sexual nature. In



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criminal law, this would be indecent assault.

Application to Men

Section 2(8) of the SDO states that “Provision of Part III or IV framed with reference to sexual harassment of women shall be treated as applying equally to the treatment of men” and that the relevant provisions must be interpreted by the court “with such medications as are necessary” meaning that men are equally protected from sexual harassment.

But for same-sex, i.e. sexual harassment by a male to a male, it does not provide a clear picture.

Vicarious Liability for Sexual Harassment against the Company

The SDO does not require employers to institute policies prohibiting sexual harassment in their establishments. Instead the Ordinance tries to create an incentive for employers to do so by making the employer vicariously liable for acts of sexual harassment unless the employer can prove that it took all practical steps to prevent the unlawful acts.

In the event an employee of the company contravenes s.2 (5) of the SDO during in the course of his/her employment, the company, as an employer, will be **Vicariously Liable** pursuant to s.46 (1) of the SDO which stated that “anything done by a person in the course of his employment shall be treated for the purposes of the SDO as done by his employer as well as by him, whether or not it was done with the employer’s knowledge or approval”.



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However, the employer can raise the defence that it took “such steps as were reasonably practicable” to prevent his employee or agent from committing the unlawful act. The Sex Discrimination Ordinance Code of Practice on Employment provides recommendations on what employers should do to prevent and address harassment. For example, it suggest that employers should establish a clear policy against sexual harassment, including examples of the kind of conduct that must be avoided. The employer should then actively promote the policy, through notices, staff meetings, and training courses and also designate a co-coordinator to receive complaints. The complaints procedures must assure potential victims that they will not suffer any retaliation if they make complaints.

In the case of *Raychen v Taramus Rus and IBM (HK) Ltd*, [2000] HKDC, a male employee of a company alleged that he had been sexually harassed by a female project manager and was dismissed by the company after he complained about the harassment. The judge found out that the company would not have been vicariously liable because it has taken reasonable steps to prevent sexual harassment and thus could establish the defense in section 46(3) of the SDO. The judge noted that the company had provided clear guidelines on sexual harassment and required employees to sign a certificate declaring that they had read and understood them.

Steps to take for an Employer

If the Employer have shown that and proved that it took such steps as were reasonably practicable to prevent the employee from doing the act, there is a great chance that liability against the employer could be struck out.



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It is suggested that employer has a clear policy and guideline on sexual harassment at all times and such polices should be easily accessible to its employees. Besides having an established policy in place, employers can conduct workshop on a regular basis.