

Sexual Harassment in the Workplace: Manitoba Employers Take Note

published 01/19/2015

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Sexual harassment is an uncomfortable topic. It is also a high profile topic. Most business leaders have become aware that the time to get their respectful workplace houses in order is now, and a recent series of human rights adjudication decisions have reinforced the message. Employers, businesses and institutions not only have legal duties to provide an environment free of sexual harassment, but ignoring these duties could cause permanent damage to reputation and the bottom line.



In a decision released in April 2013¹, a Manitoba adjudicator dealt with a complaint involving a retail store employee who had been subjected to a lengthy and ongoing course of sexual harassment by a customer. Both the employee and the store owner agreed that shortly after the customer's conduct began, the employee had asked her employer to end the harassment. The owner spoke to the offending customer, but there was disagreement about whether the harassment ended when the customer was spoken to. The employee's evidence was that the harassment continued. The employer countered that the harassment ended after he spoke to the customer; but that if the harassment did continue, the employee had encouraged the customer's offending behaviour.

The adjudicator accepted the employee's version of events, and ordered the store owner to pay to his former employee \$7,750.00 as damages for injury to dignity, feelings, and self-respect. The store owner was also ordered to take a course about sexual harassment, and provide training to all employees about the store's sexual harassment policy.

The message is that when a business owner allows sexual harassment to occur in the workplace, even if the harassment doesn't come from employer representatives or fellow staff, the business can't (like an ostrich) keep its head in the sand.

In December 2014, another adjudicator released a damage award² which could significantly impact Manitoba employers and others found to either commit or tolerate sexual harassment in their midst.

In *Doholoco*, the business owner was himself the person accused of sexually harassing his employee. Describing the owner's comments as an "ongoing stream of sexual innuendo", the adjudicator said:

"... In other contexts, [the] remarks would simply be vulgar. Taken by themselves, most of his remarks might only be mildly offensive. What raises them to the level of harassment is their constant repetition and the relationship of power in which they took place. [The respondent] was described as over 6 feet tall and over 250 pounds and very imposing ... the complainant is around five feet tall... and [they] ... worked alone most of the time. [The respondent] was 20 or 25 years older than the complainant, ... was the complainant's boss and [had] the power to set her hours or work, give or deny raises and fire her. The complainant was a single mother with limited skills living in a small town."

The employment relationship in *Doholoco* came to a head when the complainant could no longer work due to the health effects of the ongoing sexual harassment.

There had been some debate prior to *Doholoco* about how damages for employment-ending harassment should be remedied. Referring to his powers under *The Human Rights Code*, the adjudicator made it clear that there could be significant financial exposure to a business owner when the effects of sexual harassment on an employee trigger a lengthy period of unemployment.

Depending always on the facts, remedies can be available to terminated employees by bringing court actions for wrongful dismissal (where generally the length of time employed is a critical factor in assessment of damages); or by employment standards proceedings for unpaid wages³. When this complainant left her job due to harassment-related stress, she had been employed for about two and a half years. If the matter had been litigated as a wrongful/constructive dismissal claim through the courts, this complainant may have been awarded two to three months wages. Instead, in *Doholoco*, the adjudicator's approach was a "make whole" order.

The complainant was awarded the equivalent of almost two years' lost wages, subject to deduction for workers compensation benefits earned during her sexual-harassment induced illness. The adjudicator also ordered the business owner to pay his former employee damages for injury to dignity, feelings and self-respect; as well as exemplary damages (available under *The Human Rights Code*) as punishment for malice/ recklessness involved in the human rights violation. The grand total of damages ordered was over \$35,000.00, an amount that would have been significantly larger had the employee not qualified for workers compensation benefits.

There was another key point in the *Doholoco* decision. The employer/business owner did not defend the complaint and did not attend the adjudication hearing. By ignoring the proceedings altogether, given the already troubling set of facts, this employer probably

poured fuel on the fire.

Leaders, managers and business owners take note:

- Have a fulsome respectful workplace/anti-harassment policy. Revisit the policy frequently, educate everyone in your environment, and don't be an ostrich when you see the red flags of harassment in your midst.
- The damage to reputation and the bottom line arising from sexual harassment can be permanent.
- If you receive a complaint, pay attention to it, and respect the legal processes involved.

¹ *Garland v Tackaberry operating as Grape and Grain ("Tackaberry")* 2013 CanLII 21646 (MB HRC, R. Dawson, adjudicator).

² *Emslie v Doholoco Holdings Ltd. O/A the UPS Store #425 ("Doholoco")* 2014 CanLII 71723 (MB HRC, P. Sim, adjudicator).

³ Other than in the case of short periods of employment, as long as the termination of employment was wrongful, court-ordered damages tend to be more generous than unpaid wages orders from employment standards tribunals. However it should be kept in mind that litigating a matter through the courts can be costly and prolonged.

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