

Conciliation Case

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It Doesn't Exist If No One Knows

THE COMPLAINT

"The thought of Mr. Wong still gives me the creeps," said Brenda. For Brenda, who had been working with a well-established local firm for many years, the past two years had been a nightmare. "My immediate boss, Mr. Wong, may look professional on the surface, but for me, he is a sly fox. He would cast demeaning comments about my performance in front of my colleagues, only as an excuse to personally follow up on my performance. It is however these 'private sessions' with him that I really dreaded..."

"When we were alone in his office, he had a well-established routine that started with him expressing disappointment with my work performance or attitude. Then he would ask me how I could improve. Let me assure you, he was never really interested in my work performance. It all began one time when he summoned me into his office and began criticizing me on some trivial work matters. Then, he demanded me to undress! All of a sudden he hugged me really tight and kissed me on my lips. I didn't know how to react to this surprise attack and was completely dumbfounded and shocked."

At first Brenda believed that she had no choice but to put up with Mr. Wong; she had worked hard to get to the position where she was and she was certainly not prepared to forfeit her career. But after agonizing over the issue for two years, she decided that she could no longer tolerate Mr. Wong's attitude and behaviour. Brenda resigned.

WHAT THE EOC DID

Brenda lodged two complaints with the Equal Opportunities Commission (EOC): one against Mr. Wong for the individual liability of sexually harassing her and the other against the company for vicarious liability of Mr. Wong's acts of sexual harassment. Brenda felt aggrieved that although the company had a sexual harassment policy, she was not aware of its existence and did not know where to seek help.

When approached by the EOC, Mr. Wong denied having kissed Brenda but readily admitted having said all the alleged offensive comments to Brenda, even though he had never intended to put them into action. In the end, he acknowledged that his demeanor had been offensive and humiliating to Brenda and agreed to write Brenda an apology letter, and offered her monetary compensation.

The company claimed to have no knowledge of Mr. Wong's behaviour and stressed that they would not have allowed it if they had been aware of it. Through conciliation, the company agreed to issue Brenda an apology letter and to take disciplinary action against Mr. Wong.

WHAT THE LAW SAYS

Sexual harassment in employment is unlawful under the Sex Discrimination Ordinance. It generally refers to an unwelcome conduct of a sexual nature which the person on the receiving end would find offensive, humiliating or intimidating.

Apart from individual liability, the law also imposes vicarious liability on an employer for unlawful discrimination or harassment done by its employees in the course of employment, unless the employer could demonstrate having taken reasonable and practicable steps to prevent discrimination and harassment from happening in the workplace. Both Brenda and Mr. Wong did not seem to have knowledge of the policy. By merely having a sexual harassment policy like the employer in this case is insufficient to qualify for the defence of having taken reasonable steps, it is important that the policies are well communicated. Actual implementation of such policy, for example through providing training to employees at all levels, is essential.

和解案例

通訊 2006 年 10 月 第 39 期

形同虛設

投訴內容

阿藍說：「至今，一想起這個黃先生仍使我毛骨悚然。」阿藍在本地某大公司工作多年，但過去兩年的日子就如惡夢一場。「我的直屬上司黃先生雖然外表看來很專業，但對我來說，他簡直是頭狡猾的狐狸。他在同事面前數落我的工作表現，無非想製造機會，與我單獨見面，假裝指導我如何改善工作。但是，這些『私人會面』確實使我提心吊膽...」

「當我單獨在他的辦公室時，他就施出一套慣技，先是對我的表現或態度表示失望，然後便問我如何改善；但其實他對我的回應或工作表現根本毫不在意。有一次，他叫我到他的辦公室，然後藉一些瑣碎事務對我大肆批評。接著命令我脫下衣服，說罷他就緊緊摟住我，又吻我的嘴唇。他突如其來的施襲令我一時之間不知如何反應，登時被嚇呆了。」

起初，阿藍覺得自己別無選擇，惟有啞忍黃先生的所為。她認為已付出了不少努力才能進升至今天的職位，不想就此放棄。可是，經過兩年的折磨，她實在忍無可忍，最終提出請辭。

平機會的行動

阿藍向平等機會委員會(平機會)提出兩項投訴：一項是要求黃先生為自己的性騷擾行為負上個人責任；另一項則要求黃先生任職的公司為其性騷擾行為負上轉承責任。雖然公司已訂立性騷擾政策，但她對此毫不知情，亦不知怎樣取得公司的內部協助，阿藍因此感到忿忿不平。

另一方面，委員會接觸了黃先生，他承認曾向阿藍說過所指稱的無禮言論，但強調他並沒有打算付諸行動，更否認吻過阿藍。最終，黃先生承認他的行為冒犯和侮辱了阿藍，並且答應給予她一封道歉信和對她作出金錢賠償。

黃先生任職的公司聲稱，對他的行為毫不知情，並指如果公司知道的話，決不會讓事情發生。經調解後，公司同意給予阿藍一封道歉信，並對黃先生作出紀律處分。

法理依據

根據《性別歧視條例》，僱傭範疇內的性騷擾是違法的。性騷擾一般是指任何不受歡迎和涉及性的作為，而這些作為會令當事人感到受冒犯、侮辱或威嚇。

除了個人責任外，法例亦訂明，除非僱主能證明，已採取合理可行的措施，防止在工作間發生歧視或騷擾，否則，僱主需為僱員在職期間所作出歧視或騷擾的違法行為負上轉承責任。看來阿藍與黃先生都不知道公司有防止性騷擾政策。像本個案中的僱主，光制定性騷擾政策是不能成功作為「已採取合理措施」的抗辯理由。真正落實推行性騷擾政策，如為各級員工提供培訓，是十分重要的。

和解案例

通讯 2006 年 10 月 第 39 期

形同虚设

投诉内容

阿蓝说：「至今，一想起这个黄先生仍使我毛骨悚然。」阿蓝在本地某大公司工作多年，但过去两年的日子就如恶梦一场。「我的直属上司黄先生虽然外表看来很专业，但对我来说，他简直是头狡猾的狐狸。他在同事面前数落我的工作表现，无非想制造机会，与我单独见面，假装指导我如何改善工作。但是，这些『私人会面』确实使我提心吊胆...」

「当我单独在他的办公室时，他就施出一套惯技，先是对我的表现或态度表示失望，然后便问我如何改善；但其实他对我的响应或工作表现根本毫不在意。有一次，他叫我到他的办公室，然后藉一些琐碎事务对我大肆批评。接着命令我脱下衣服，说罢他就紧紧搂住我，又吻我的嘴唇。他突如其来的施袭令我一时之间不知如何反应，登时被吓呆了。」

起初，阿蓝觉得自己别无选择，惟有哑忍黄先生的所为。她认为已付出了不少努力才能进升至今天的职位，不想就此放弃。可是，经过两年的折磨，她实在忍无可忍，最终提出请辞。

平机会的行动

阿蓝向平等机会委员会(平机会)提出两项投诉：一项是要求黄先生为自己的性骚扰行为负上个人责任；另一项则要求黄先生任职的公司为其性骚扰行为负上转承责任。虽然公司已订立性骚扰政策，但她对此毫不知情，亦不知怎样取得公司的内部协助，阿蓝因此感到忿忿不平。

另一方面，委员会接触了黄先生，他承认曾向阿蓝说过所指称的无礼言论，但强调他并没有打算付诸行动，更否认吻过阿蓝。最终，黄先生承认他的行为冒犯和侮辱了阿蓝，并且答应给予她一封道歉信和对她作出金钱赔偿。

黄先生任职的公司声称，对他的行为毫不知情，并指如果公司知道的话，决不会让事情发生。经调解后，公司同意给予阿蓝一封道歉信，并对黄先生作出纪律处分。

法理依据

根据《性别歧视条例》，雇佣范畴内的性骚扰是违法的。性骚扰一般是指任何不受欢迎和涉及性的作为，而这些作为会令当事人感到受冒犯、侮辱或威吓。

除了个人责任外，法例亦订明，除非雇主能证明，已采取合理可行的措施，防止在工作间发生歧视或骚扰，否则，雇主需为雇员在职期间所作出歧视或骚扰的违法行为负上转承责任。看来阿蓝与黄先生都不知道公司有防止性骚扰政策。像本案中的雇主，光制定性骚扰政策是不能成功作为「已采取合理措施」的抗辩理由。真正落实推行性骚扰政策，如为各级员工提供培训，是十分重要的。