RISKING MORE THAN JUST A BAD REVIEW: EMPLOYER FOUND VICARIOUSLY LIABLE FOR ACTS OF EMPLOYEE IN PROVIDING SERVICES

Posted on October 9, 2024

Categories: Insights, Publications, Uncategorized

Employers are used to dealing with claims of harassment or discrimination in the workplace between employees, but are they focused on claims of harassment or discrimination by employees against members of the public who are receiving services from the employer? As the employer in *Abdi v K2 Martial Arts Kickboxing*, 2024 HRTO 1282 (*"Abdi"*), found out, employers can be vicariously liable for the acts of their employees when their employees interact with members of the public.

In *Abdi,* the Human Right Tribunal of Ontario (the "**Tribunal**") found that a gym member was sexually harassed by an employee of K2 Martial Arts Kickboxing ("**K2**") while receiving services from K2. The K2 employee was found personally liable, but since the Tribunal found that the employee harassed the gym member in the course of the employee's employment, the Tribunal also found the employer vicariously liable.

What Happened?

The gym member claimed that they were sexually assaulted by an employee at K2. They reached out to K2's site manager, who assured them that the employee would not be allowed at the gym and asked to escalate this complaint to the co-owners of K2. However, ten days later, the site manager warned the member that the employee would be working during their class and the employee continued to work at the gym. The site manager told the member that the employee denied the allegations but had instructed the employee to not stay alone after class with clients.

Frustrated with K2's lack of action, the complainant proceeded with an application to the Tribunal against both the employee and K2.

The Decision

Section 1 of the *Human Rights Code* (the "**Code**") states that "every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status,

family status or disability."[1] The Tribunal has previously held that while sexual harassment in relation to services is not specifically outlined in the *Code*, unwanted touching can be regarded as a form of sex discrimination, finding that sexual harassment in services may qualify as discrimination based on sex under section 1 of the *Code*.[2]

The Tribunal found that the complainant was sexually harassed by the employee and that the employee infringed on the complainant's right to be free from sex-based discrimination under the *Code*, including the right to be free from sexual harassment.

The Tribunal also found that K2 was the employer of the employee, and the employee provided services to the complainant in the course of employment by keeping the gym open when the complainant stayed after hours. While employers are generally not liable for an act of sexual harassment in the workplace, service providers can be found liable under section 1 of the *Code*.

Even though the Tribunal found that K2 fulfilled its duty and took reasonable steps in this matter once it became aware of the complaint, K2 was still found to be vicariously liable for the actions of the employee under section 46.3(1) of the *Code*. Section 46.3(1) provides that employers are liable for any act done by their employees or agents in providing services. Since the employee was found to have breached section 1 of the *Code*, K2 was vicariously liable for the employee's actions.

The Tribunal found K2 and the employee jointly and severally liable for discrimination with respect to services because of sex, and they were ordered to pay the student $10,000 as compensation for injury to dignity, feelings and self-respect under the *Code*.

Takeaways for Employers

Employers may focus on providing training and instruction to their employees about conduct that could constitute workplace harassment and discrimination they may experience but are they doing enough to train their employees on not engaging in inappropriate conduct with customers or clients of the business?

Section 46.3(1) of the *Code* does not provide the Tribunal with any discretion to not hold an employer liable:

> any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent of a corporation….shall be deemed to be an act or thing done or omitted to be done by the corporation.[3]

The Tribunal can take a broad view of what it means for an employee to be acting "in the course of his or her employment" and what it means to be providing services, so employers have to be diligent in training employees on what conduct constitutes harassment and discrimination under the *Code* and the

consequences. It is not difficult to come up with scenarios where an employee is in the act of providing services (attending a sales conference with customers, providing customer service over the phone, visiting a customer worksite to install or service equipment, etc.) that could attract liability for the employer.

It is therefore critically important that employers provide ongoing training and instruction to its employees on harassment and discrimination, respond promptly to any allegations from members of the public that allege that an employee engaged in inappropriate conduct and ensure that it maintains records of its efforts to confront misconduct.

[1] *Human Rights Code*, RSO 1990, c H 19, section 1 [*Human Rights Code*].
[2] *Umanski v Gagnon*, 2022 HRTO 261 at para. 10.
[3] *Human Rights Code*, section 46.3(1).

By Dave McKechnie and Meena Shanmuganathan (Articling Student)

A Cautionary Note