

Will proposed Equality Act 2010 changes help employers?

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Employment analysis: Proposed amendments to the Equality Act 2010 would remove provisions that can render an employer liable for failing to act where an employee has been sexually harassed by a third party. But with doubts raised over whether these changes would help employers, Nicholas Lakeland, head of the Employment Law Practice at Silverman Sherliker, offers his views of the potential implications.

Original news

Press Release: Law Society--Removing provisions from the Equality Act will not help employers

Government proposals to remove provisions from the Equality Act 2010 will not help employers, warns the Law Society. They argue that ss 40 (employers' liability where an employers has been harassed by a third party) and 138 (relating to claimant questionnaires in discrimination claims) can be helpful to both employers and employees, and that business concerns would be better addressed through improved guidance on how to deal with third party harassment and how to answer questionnaires.

What key changes are being proposed?

The main change releases employers from the potential liability of failing to act where an employee suffers sexual harassment from a third party under the Equality Act 2010.

What existing problems are the changes designed to address, and will they be effective?

The problem the provisions were aimed at was the situation where an employee, for example, a shop assistant, is sexually harassed by a customer due to the fact the employer had not taken reasonable precautions to prevent the harmful behaviour. In fact, I believe research conducted by the Department for Business, Innovation and Skills revealed there had only been about one such case brought under the Act. So while this initiative can be seen as a tidying up exercise, you could also ask why the government decided to bother, as in practice it had not generated litigation. I would argue that the government's time would be better spent devising a proper industrial policy for the future -- which we have not had for years.

Are there any issues legislators should have considered?

Doing away with this provision will not eliminate the possibility of employee action. Employees still have a right of action at common law in negligence if the harmful behaviour could have been foreseen and prevented by the employer taking reasonable measures. Action can also be taken under the Protection from Harassment Act 1997, which provides for both civil and criminal liability for harassment. There is also the possibility of charges of assault. So good employers will probably be taking action anyway to ensure their staff are protected; not only from sexual harassment, but other forms of unwelcome or harmful behaviour. This could include measures like installing CCTV cameras in work premises.

What do lawyers need to consider when advising their clients?

Employers can still be liable for the harassment suffered by employees under common law and the Protection from Harassment Act 1997. There are several cases in the area too which are relevant, including the decision by the House of Lords in *Majrowski v Guy's and St. Thomas' NHS Trust*, which established that employers can be vicariously liable for the actions of their employees under the Act, and which was followed by the High Court in *Green v Deutsche Bank Group Services*. Lawyers need to bear these cases in mind when advising employers.

Are there any patterns or trends emerging in the law in this area?

I don't think we've seen a great rise in sexual harassment cases, but I believe we could see a rise in general discrimination claims. This is likely as a result of the changes under the Employment Rights Act 1996, s 209, which has been operational since April. Now employees must have been in continuous employment with an employer for a minimum of two years before they can bring a claim of unfair dismissal. Formerly the qualifying period was one year. Disgruntled employees will be looking at other means of pursuing a remedy against employers against whom they have a grievance, and these could include claims of sexual discrimination.

Interviewed by Diana Bentley.

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