Worker Did Not Object to Harassment Due to Fear of Losing Job

Sexual harassment is a serious matter. But allegations aren't always easy to prove. And sometimes there may be borderline conduct that might be construed as consensual or the worker may not express objections to the conduct right away out of fear of the ramifications. To really avoid liability, employers must be vigilant to identify and prevent any harassing conduct even amongst friendly co-workers. Here's what happened to one employer.

THE CASE

What Happened: A sales clerk claimed the store owner continually made sexually suggestive comments to her and continued to do so despite her objections to some of the comments and related conduct. But the clerk had consented to some instances of contact with the owner. For example, the clerk allowed the owner one time to massage her shoulder when she was in pain from an injury. She also allowed him to put a cream on her back that she had been given by a therapist to treat back pain. The owner followed up these consensual encounters, however, with repetitive sexual innuendo. Another time, without explaining why, the owner told her to sit on a mattress. She did so and he gave her a massage. She didn't object at the time but later texted him that the relationship had to remain professional. The owner persisted, however, with his sexual comments. On another subsequent occasion he took business cards he had ordered for her, grabbed her shirt and stuffed them into her bra. In another incident he put an Easter egg down her shirt. The clerk claimed she didn't object to the conduct more forcefully because she had feared losing her job. Eventually, however, she because stressed by the owner's conduct and suffered panic attacks and left her job. She brought a claim for harassment.

What the Human Rights Adjudication Panel Decided: The human rights adjudicator found the owner had violated the Human Rights Code and the clerk was entitled to damages.

The Adjudicator's Reasoning: The human rights adjudicator stated the remarks "were of a type that no reasonable person would believe a woman would welcome." It also noted the owner was over six feet tall and more than 250 pounds and, as her boss, had power to set her hours, grant raises or fire her. She was a single mother in a small town and depended on the job. The adjudicator found that the owner made "repeated sexual solicitations or advances" and touched her without her consent and noted that a worker doesn't have to object to the harassing actions at the time. Instead, the test is whether a reasonable person would understand the conduct as unwelcome. It also

found that the times the sales clerk consented to being touched were not circumstances that would cause a reasonable person to believe sexual advances were welcome. The adjudicator thus found the owner violated the human rights code and awarded lost income damages for the time she couldn’t work due to the stress from the harassment and damages for injury to dignity and self-respect. It also ordered the owner to attend sexual harassment workshop and directed that the owner’s company develop a sexual harassment policy [*Emslie v Doholoco Holdings Ltd*, [2014] CanLII 71723 (MB HRC), Dec. 3, 2014].

ANALYSIS

In this case, the sales clerk objected to the owner’s conduct on some occasions but did consent to some incidents of physical contact. The clerk said she didn’t object more vehemently because she feared she could lose her job. The adjudicator acknowledged an intimidation factor and said the clerk didn’t have to object at the time of the conduct. The lesson learned is don’t wait until someone objects to conduct as harassing. Make sure your company has a sexual harassment policy, all employees *at every level* are trained regarding the policy and emphasize that it can still be harassment even if no one expressly objects to the conduct at the time.