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FLASH REPORT

Country:	Norway
Title:	Claims on compensation and redress for breach of the protection provision against sexual harassment in the Equality Act (GEA) Article 8 and Equality and Anti-Discrimination Act (GEADA) Article 13 sixth paragraph
Date:	22 April 2019
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<u>Context</u>	
Issue at stake:	Sexual harassment in employment
Grounds of discrimination:	Sex
Field of application:	Employment
Source:	National court decision, Judgment from Hålogaland Court of appeal case no. LH-2019-87696 – LH-2019-135298 – LH-2019-135300
Applicable law:	Gender Equality Act (GEA) Article 8 and Article 28 and Gender Equality and Anti-Discrimination Act of 2013 (GEADA) Article 13 and 38

Content

Case: A female mechanic (working in a workshop), filed a lawsuit complaining of sexual harassment in the workplace, demanding damages and compensation from two customers of the workshop, as well as from her former employer due to his inadequate follow-up of the instances of sexual harassment, which led to her giving notice and leaving the job.

Before summer 2017, the female employee contacted her employer and informed them about sexual harassment from two of the company's customers. Subsequently, over the following months, the employer and the female employee had several conversations about this, and the employer also told one of the customers that he was no longer welcome in the workshop. In September 2017, the woman contacted her doctor and told her that she felt unsafe at work because of 'customers touching her'. The doctor advised her to go to the police and set up an hour for consultation. In September 2017, she was declared on sick leave due to 'mental imbalance / crisis reaction'. The sick leave was extended until she resigned from her position in February 2018.

Some of the incidents of harassment had occurred before the Gender Equality and Anti-Discrimination Act (GEADA)¹ had entered into force, and the case was therefore treated in view of both the former Gender Equality Act (GEA)² and the GEADA.

The case against the two customers and against the employer was first treated in Senja District court (Senja District Court in case 18-152424TVI-SENJ). The District court

¹ Gender Equality and Anti-Discrimination Act of 2017-06-16-51.

² Gender Equality Act of 2013-06-21-59.

sentenced the employer to pay damages for loss of income as well as compensation to the female employee, acquitted one of the customers, and sentenced the other. The customer who was sentenced had to pay damages and compensation to the female employee.

Decision of the Court of appeal: The Court of Appeal viewed the cases against the customers and the employer separately.

The Court first stated that one of the customers had not sexually harassed the woman according to the Equality Acts (GEA Article 8 and GEADA Article 13), and he was therefore acquitted. The court argued that the first incident, where the client had touched the woman's back under her sweater from behind while the woman knelt on the floor and worked was not considered sexual attention, and partly that the client was not made aware that the woman experienced the incident as harassment until afterwards. Furthermore, the Court stated that the second incident, reaching out a hand and pretending to touch the woman between her legs, was sexual and obviously bothered the woman, but this was also not considered serious enough for it to be sexual harassment after GEA Article 8 and GEADA Article 13.

However, the Court stated that the second customer had obviously sexually harassed the woman, and he was sentenced to pay damages for lost income as well as compensation after GEA Article 28 and GEADA Article 38. The customer had followed the female employee several times, and stayed close to her and tried to contact her while she was working. He had also, on one occasion, stuck his fingers into her sweater and touched her waist. After this, the client was told by the woman's employer that he was not welcome in the workshop, but he continued to come there. After these incidents, he touched the woman's buttocks at least on one occasion. The employer, however, took no further measures to prevent the client from accessing the workplace or ensuring that his female employee felt safe at work. According to GEADA Article 38 second paragraph, in employment relationships and in connection with an employer's selection and treatment of self-employed persons and hired workers, the employer's liability exists irrespective of whether the employer can be blamed. In cases concerning harassment and sexual harassment, and in sectors of society other than those specified in the first sentence, liability shall exist if the person in charge can be blamed. The wording in GEA Article 28 is similar.

The Court of Appeal stated that the employer had acted negligently for not taking further steps to prevent the sexual harassment of his employee, and he was held responsible for his former employee's financial loss together with the customer who was not acquitted. The Court referred to GEA Article 28 and GEADA Article 38 and stated that the obligation to prevent harassment includes preventive measures such as: internal guidelines, notification routines and clarification of zero tolerance, any concrete measures that are considered relevant or necessary, in proportion to the size of the workplace and the composition of the workforce. The duty to 'prevent' includes addressing the actual instances of harassment that the person in charge is aware of, investigating what has happened and coming to a solution. It is enough that the person in charge (typically the employer) has tried to prevent the harassment. There is no requirement that harassment is actually prevented. In the case at hand, the employer had told one of the customers not to come to the workplace but had not taken any further action beyond that.

The employer was acquitted from paying compensation because the Court did not find his lack of actions for the former employee to meet the terms of 'grossly negligent behaviour' or 'intent behaviour' in the Act on Compensation Article 3-5.

The judgment from the Court of Appeal has been appealed to on the basis that one of the customers was acquitted and the employer was acquitted for claims on compensation. It will now be heard by the Supreme Court. The appellant argues that the Court of Appeal has been too strict when it comes to interpreting what is considered sexual harassment in

Norwegian law. The part of the Court of Appeal's decision which sentenced the second customer is not part of the appeal.

Key points of analysis: The decision is very important as it is one of the rare cases heard by Norwegian courts where an employer is held responsible for its failure to prevent and seek to prevent sexual harassment pursuant to the Equality Acts, and sentenced to pay damages to a former employee.

Internet link source: Only in Norwegian, unfortunately not an open link;
<https://lovdata.no/pro/#document/LHSIV/avgjorelse/lh-2019-87696?searchResultContext=1746&rowNumber=3&totalHits=87>.