

Discrimination & Sexual Harassment Complaints

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CAUSES OF ACTION

Breach of contract

- Breach of policy which is incorporated into the contract *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [2014]FCAFC 177;
- Breach of an implied or express term *Thomson v Orica Australia Pty Ltd* [2002] FCA 939

Workers Compensation legislation

- Failure to provide a safe workplace

Fair Work Act 2009 (Cth)

- Section 351 Discrimination
- Section 550 Accessorial liability
- Section 789FA-FF Anti-bullying provisions

Anti-Discrimination Act 1998 (NSW)

- Section 22A-D

CAUSES OF ACTION

Sex Discrimination Act 1984 (Cth)

Section 28A(1)

Meaning of sexual harassment

(1) For the purposes of this Division, a person sexually harasses another person (the ***person harassed***) if:

(a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or

(b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed; in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

CAUSES OF ACTION

Sex Discrimination Act 1984 (Cth)

Section 28A(1A)

Meaning of sexual harassment

(1A) For the purposes of [subsection \(1\)](#), the circumstances to be taken into account include, but are not limited to, the following:

(a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;

(b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;

(c) any disability of the person harassed;

(d) any other relevant circumstance.

(2) In this section: "**conduct of a sexual nature**" includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.

CAUSES OF ACTION

Sex Discrimination Act 1984 (Cth)

Section 28B

Employment, partnerships etc.

- (1) It is unlawful for a person to sexually harass:
 - (a) an employee of the person; or
 - (b) a person who is seeking to become an employee of the person.
- (2) It is unlawful for an employee to sexually harass a fellow employee or a person who is seeking employment with the same employer.
- (3) It is unlawful for a person to sexually harass:
 - (a) a commission agent or contract worker of the person; or
 - (b) a person who is seeking to become a commission agent or contract worker of the person.
- (4) It is unlawful for a commission agent or contract worker to sexually harass a fellow commission agent or fellow contract worker.
- (5) It is unlawful for a partner in a partnership to sexually harass another partner, or a person who is seeking to become a partner, in the same partnership.
- (6) It is unlawful for a workplace participant to sexually harass another workplace participant at a place that is a workplace of either or both of those persons.

CAUSES OF ACTION

Sex Discrimination Act 1984 (Cth)

Section 28B

(7) In this section:

"place " includes a ship, aircraft or vehicle.

"workplace " means a place at which a workplace participant works or otherwise carries out functions in connection with being a workplace participant.

"workplace participant " means any of the following:

- (a) an employer or employee;
- (b) a commission agent or contract worker;
- (c) a partner in a partnership.

SEXUAL HARASSMENT V DISCRIMINATION ON THE GROUND OF SEX

- Sexual harassment is a form or a species of sex discrimination *Elliott v Nanda* (2001) 111 FCR 240; *Hall v Sheiban* (1989) 20 FCR 217
- Question whether actions of a *fellow employee* of the person constitutes sex discrimination where there is conduct in the nature of sexual harassment. *Leslie v Graham* [2002] FCA 32; *Ewin v Vergara (No3)* [2013] FCA 1311
- Conduct that falls short of sexual harassment may constitute sex discrimination if it amounts to less favourable treatment by reason of sex.

ELEMENTS OF SEXUAL HARASSMENT

CONDUCT OF A SEXUAL NATURE

- s28A(2) of the SDA defines the term in a non exhaustive manner.
- The term has been interpreted broadly. *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91
- Sexually explicit material and sexually suggestive jokes, inappropriate comments and questions, comments involving sexual innuendo and sexual banter may constitute conduct of a sexual nature. *Shiels v James* [2000] FMCA 2; *Aleksovski v Australia Asia Aerospace Pty Ltd* [2001] FMCA 81; *Johanson v Blackledge* (2001) 163 FLR; *Cate v International Flavours & Fragrances (Aust) Pty Ltd* [\[2007\] FMCA 36](#)
- Looking at breasts, touching one's own genitals while in conversation *Noble v Baldwin & Anor* [2011] FMCA 283
- An objective test is applicable.

ELEMENTS OF SEXUAL HARASSMENT

Unwelcome Conduct

- The conduct must be not solicited or invited by the person. The employee must have regarded the conduct as disagreeable, undesirable or offensive. *Adridge v Booth* (1988) 80 ALR 1
- The test is subjective. *Kraus v Menzies* [2012] FCA 3
- The context surrounding the conduct is relevant such as the power relations between the persons, age difference and physical location.
- The applicant bears the onus to establish that conduct unwelcome.
- Failure to make a complaint or indicate that the conduct is unwelcome does not indicate that the conduct was welcome. *San v Dirluck Pty Ltd* (2005) 222 ALR 91
- The behavior of the applicant is not disqualifying to all conduct complained of. *Horman v Distribution Group Ltd* [2001] FMCA 52

ELEMENTS OF SEXUAL HARASSMENT

SINGLE INCIDENTS

- A one off incident can amount to sexual harassment. It is not necessary to establish a “*continuous or repeated course of conduct*” *Hall v Sheiban* (1989) 20 FCR 217
- Whether a single act would constitute sexual harassment “*depends on the nature or quality of the action or statement*” *Cooke v Plauen Holdings*

ELEMENTS OF SEXUAL HARASSMENT

THE REASONABLE PERSON TEST

- An objective test applies to the determination of whether a reasonable person would have anticipated that the person harassed would be offended, humiliated or intimidated. *Johanson v Blackledge* (2001) 163 FLR 58; *Ewin v Vergara* (No 3)
- The applicant need not be the conscious target of the conduct. An accidental act can constitute harassment.
- It is the actions and not the person who is being assessed and the views of the alleged perpetrator are irrelevant. *Font v Paspaley Pearls Pty Ltd* [2002] FMCA 142
- Crude and vulgar language, disclosure of personal information and display of sexually explicit photographs of the applicant or the other person is behaviour that a reasonable person would find offensive. *Horman v Distribution Group Ltd*.
- The applicant's conduct of also making crude or vulgar remarks is not an excuse. *San v Dirluck Pty Ltd*

VICTIMISATION

S94 of the SDA prohibits victimization.

- Victimisation is an act or threat of an act that would subject that person to any detriment.
- S94(2) Victimisation is prohibited where the person makes or proposed to make a complaint, initiate a proceeding, provides information, attends or proposes to attends a conference, appears as a witness, asserts or proposes to assert of a right or makes as allegation in regard to the Australian Human Rights Commission Act 1986 (Cth).
- S 94(2) requires that the relevant detriment be “*on the ground that the other person*” has done or proposed to do one of the things listed.
- Victimisation is prohibited if the person believes that the other person has done or proposes to do an act or thing referred to in s94(2)
- The prohibited reason needs to be the substantial or operative factor in causing the alleged detriment. *Obieta v NSW Department of Education & Training* [2007] FCA 86

VICARIOUS LIABILITY

S106

(1) Subject to subsection (2), where an employee or agent of a person does, in connection with the employment of the employee or with the duties of the agent as an agent:

(a) an act that would, if it were done by the person, be unlawful under Division 1 or 2 of Part II (whether or not the act done by the employee or agent is unlawful under Division 1 or 2 of Part II); or

(b) an act that is unlawful under Division 3 of Part II;

this Act applies in relation to that person as if that person had also done the act.

(2) Subsection (1) does not apply in relation to an act of a kind referred to in paragraph (1)(a) or (b) done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing acts of the kind referred to in that paragraph.

VICARIOUS LIABILITY

ONUS OF PROOF

The applicant bears the onus of proof in establishing that there is a relationship of employment or agency and that the alleged act of discrimination occurred '*in connection with*' the employment of an employee or duties of an agent. *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91

An employer or principal who seeks to rely on the defence in s106(2) bears the onus of proof of establishing that it took all reasonable steps to prevent the alleged acts taking place.

VICARIOUS LIABILITY

'IN CONNECTION WITH' EMPLOYMENT

A broader meaning than 'in the course of' or 'in the scope of' *McAlister v SEQ Aboriginal Corporation*. [2002] FMCA 109

For example, in the early hours of the morning in a serviced apartment during attendance at a work related conference. *Leslie v Graham*

In staff accommodation quarters while off duty *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402

Where applicant invited to after work drinks by another employee *Lee v Smith* [2007] FMCA 59; *Ewin v Vergara (No 3)* [2013] FCA 1311

Applies to victimisation *Lee v Smith*

VICARIOUS LIABILITY

'ALL REASONABLE STEPS'

- The defence under s106(2)
- The respondent does not need to be aware of the incident of sexual harassment to be liable. *Aldridge v Booth*
- The onus is on the employer. The assessment is rigorous. *Johanson v Blackledge*
- The requirement of reasonableness applies to the nature of the steps actually taken and not to determine whether it was reasonable to have taken steps in the first place.
- The size of the employer will be relevant.
- Steps taken include documents provided eg contract, policies, training, effective complaint handling process. *Richardson v Oracle Corporation Australia Pty Limited* [2013] FCA 102

ACCESSORIAL LIABILITY

S105 Aiding or permitting an unlawful act

A person who causes, instructs, induces, aids or permits another person to do an act that is unlawful..

S105 requires a degree of knowledge or willful blindness or recklessness in the fact of the known circumstances. *Howard v Northern Territory* (1995) EOC 92-672; *Elliott v Nanda*

REMEDIES

s46PO(4) of the Australian Human Rights Commission Act 1986 (Cth)

- (a) an order declaring that the respondent has committed unlawful discrimination and directing the respondent not to repeat or continue such unlawful discrimination;
- (b) an order requiring a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by an applicant;
- (c) an order requiring a respondent to employ or re-employ an applicant;
- (d) an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent;
- (e) an order requiring a respondent to vary the termination of a contract or agreement to redress any loss or damage suffered by an applicant;
- (f) an order declaring that it would be inappropriate for any further action to be taken in the matter.

DAMAGES

Redress any loss or damage suffered by an applicant

- Where discriminatory conduct was a contributor to the onset of an illness but not the sole cause, an appropriate sum of damages award may not provide full compensation. *Qantas Airways Ltd v Gama* [2008] FCAFC 69
- Pain and suffering and loss of enjoyment of life. Includes humiliation and distress as well as impact on social and intimate relationships *Richardson v Oracle Corporation Australia P/L* [2014] FCAFC 82
- General standards prevailing in the community impact on the amount of the award of damages.
- Awards of damages should be comparable to amounts in other jurisdictions such as defamation, negligence, personal injury and breach of contract . In *Richardson* an award of \$100 000 was made for non economic loss and \$30 000 for economic loss.
- Aggravated and exemplary damages are available. *Elliott v Nanda*

DAMAGES

Redress any loss or damage suffered by an applicant

Objective circumstances must be regarded, including the applicant's understanding and perceptions of the circumstances. If there is a causal link between the applicant's act of resigning because of the unlawful conduct, economic damages flow. There is no requirement for a finding of constructive dismissal.

Richardson v Oracle Corporation Australia P/L [2014] FCAFC 82 (Majority of Besanko and Perram JJ) Reliance being placed on *Medlin v State Government Insurance Commission* (1995) 182 CLR 1

CHOOSING A JURISDICTION

Cost v no cost jurisdiction

Onus of proof

Cap on damages

Time period in which a complaint
must be made

Objective v subjective

Time and procedure