

Duty of employers to prevent sexual harassment at the workplace

Did you know that the sexual harassment of an employee constitutes unfair discrimination in terms of the Employment Equity Act (the Act) and that same is prohibited? And also, that there is a duty on employers to proactively prevent sexual harassment in their workplace?

Sexual harassment is defined in the 1998 Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (“the Code”) as “unwanted conduct of a sexual nature”. The nature of sexual harassment distinguishes it from behaviour that is welcome and by mutual consent.

What measures must employers take to protect their employees against sexual harassment?

Employers should amongst others have a sexual harassment policy in place to eliminate incidents of sexual harassment in the workplace and to educate employees. In terms of the Act, an employer is deemed to have contravened the Act where it can be proven that a perpetrator contravened the Act and that the employer failed to take the necessary steps to eliminate the sexual harassment.

This means that the employer, in terms of the Act, can be held liable to pay compensation to the victim of sexual harassment. This is due to the fact that the contents of a sexual harassment policy and how it is communicated to the employees are among the factors that will be considered by a court when determining whether an employer took the necessary steps to eliminate sexual harassment and to comply with the Act.

An employer will not be held liable if it can be proven that he or she took all reasonable steps to ensure that there was no sexual harassment in the workplace.

All sexual harassment policies are to be guided by the Code. The policy must record the obligations of the employer, the advice and assistance available to a victim, procedures to be followed when sexual harassment has been reported and

the possible disciplinary actions.

A sexual harassment policy must furthermore include the following statements, namely that:

- Sexual harassment is a form of discrimination;
- Sexual harassment will not be condoned at the workplace;
- Complainants have the right to follow the procedures mentioned in the policy and appropriate action must be taken;
- It is a disciplinary offence to victimise or retaliate against an employee who in good faith lodges a grievance of sexual harassment;
- Allegations of sexual harassment must be dealt with confidentially.

Provision must be made for both an informal and formal procedure for a sexual harassment grievance.

The formal procedure must address the following:

- Specify to whom the employee should lodge the grievance;
- Make reference to timeframes which allow the grievance to be dealt with expeditiously;
- That the CCMA can be approached if the complaint has not been solved satisfactorily, or if the alleged perpetrator is not satisfied with the disciplinary action taken against him or her;
- It will be a disciplinary offence if a complainant is intimidated or retaliated against for lodging a sexual harassment grievance.

The informal procedure may be used in less serious cases in which case it is sufficient for an appropriate person to explain to the perpetrator that certain forms of conduct are unwanted.

It is furthermore advised that employers should include the issue of sexual harassment in orientation, education and training programmes of employees.

Refilwe Masia and Motheo Moatshe, Van Velden-Duffey Inc.