

Government Equalities Office

Equality Act 2010 – employer liability for harassment of employees by third parties

Response from Thompsons Solicitors

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About Thompsons

Thompsons is the most experienced trade union, employment rights and personal injury law firm in the country with 28 offices across the UK. On employment and industrial relations issues, it acts only for trade unions and their members.

Thompsons represents the majority of UK trade unions and advises on the full range of employment rights issues through its specialist employment rights department.

Question for employees

Question 1: a) Have you experienced conduct that you consider would count as third party harassment at work? b) If you have, did you make a claim to an employment tribunal against the employer? If yes, please give details; if you did not, please say why.

N/A

Question for employers

Question 2: Has an employee ever made a claim against you because they said they had experienced conduct which would count as third party harassment at work? If yes, please give details.

N/A

Question for those advising or acting for employers/employees

Question 3: Have you ever advised or acted for a) an employer who has had an allegation of third party harassment claim brought against it; or b) an employee claiming to have been the subject of conduct which would count as third party harassment? If yes, please give details.

We have advised and represented unions and union members in third party harassment claims.

We represented three claimants who were constantly racially abused by patients in a mental health hospital where they worked as nurses. The perpetrators were two specific individuals on a specific ward. The claimants requested to work shifts where they would not come into contact with the two individuals. The employer refused to change the claimants' shifts or take any action against the perpetrators.

The claims were settled prior to the full hearing for £3,000 for each claimant with an undertaking from the NHS Trust that action will be taken to protect the claimants' from further acts of harassment.

We represented an American teacher who was subjected to anti-American abuse by students in the immediate aftermath of the 9/11 bombings. The school failed to stop the abuse or discipline the students. Her claim was settled.

Our transport union clients are regularly asked to advise when members have been subjected to racist abuse by passengers.

In our experience, the vast majority of these type of claims, as with most employment cases, settle prior to the full hearing. We note the figures provided in paragraph 3.4 of the consultation are for discrimination cases generally. We take it from that, and from the comment that the Equalities Office does not have the information from which to draw conclusions, that figures for third party harassment claims are not available.

And yet the consultation does draw a conclusion. It assumes that because just one case is known to have been ruled on by an employment tribunal, there is no need for the protection of section 40.

Of the 32,510 discrimination cases disposed of in the year to March 2011, any number could have been s 40 cases. What the official statistics show is they simply did not reach an employment tribunal hearing.

As such, we do not understand the nature of the burden that it is said is created for employers. The consultation paper provides no evidence of it. Employers have a duty to create and maintain safe workplaces. Perhaps s 40 has acted to encourage employers to be more proactive in this regard. It is not unreasonable to expect them to take this duty seriously.

Section B: what might be the impact of repealing this provision? (for all respondents)

Repealing the provision will mean that employers will escape from their responsibility to protect employees from harassment on grounds of their protected characteristic.

It cannot be right that an employer has no responsibility to protect and support an employee who complains of persistent harassment by a third party

The assertion that an employer has no control over harassment perpetrated by a third party is simply wrong. An employer has the right to say where an employee will work and to control who and what an employee is exposed to.

That right must be accompanied by the responsibility to ensure that exposure to harassment is not harmful, and for there to be redress if it is.

An employer can take practical steps such as by including sanctions for unacceptable behaviour in service level agreements with contractors and issuing warnings to service users and customers. And they can provide support for employees who are the victim of harassment, such as by moving them to another part of the business while the issues are resolved.

Claims will be brought under this provision as a last resort, when employers simply ignore their responsibility to their employees. Repealing this provision, whether or not it is one that has been much used, will leave employees with protected characteristics vulnerable to harassment from customers/service users and contractors.

While responsible employers will, it is assumed, not ignore complaints about harassment because the complainant has no legal redress, rogue employers will.

Other legal avenues

The Government Equalities Office is simply wrong when it states that there are other legal avenues employees can seek for protection against harassment perpetrated at work by a third party.

A personal injury claim requires an employee to prove that he or she suffered a physical or psychological injury resulting from the employer's negligence. Civil court cases are much more costly to bring than employment tribunal proceedings so we would be surprised if the government would want to encourage employees down that route.

Most victims of discrimination are compensated for an injury to their feelings. So suggesting that victims of third party harassment pursue discrimination claims defeats the government's purpose of minimising legal costs to employers.

A Protection from Harassment Act civil claim can only be brought against the individual perpetrator when the act/s of harassment amount to a criminal offence. So the employer escapes any responsibility for its inaction or lack of support.

In many cases a claimant at an employment tribunal is unable to enforce a judgment/award against an individual respondent because they may not have the means to pay compensation.

Individuals are unable to enforce breaches of the Health & Safety Act. It is not, in any case, the role of the Health & Safety Executive to protect employees from harassment. This suggestion implies that the government is shifting the cost of protecting employees from harassment from the employer to the tax payer.

We are appalled that the consultation suggests that an employee suffering from harassment should resign from paid employment and bring a claim for constructive dismissal.

It is irresponsible, particularly during such straitened economic times, for a government to suggest that a victim of harassment should give up their job and take their chances with a constructive dismissal claim, rather than that their employer should face sanction for not acting to protect them.

It is crass for a government which is making it more difficult for working people to access the employment tribunal by imposing fees to expect someone to give up their job before they can sue their employer for failing to protect them against harm.

Perhaps the implication is that harassment of this nature is not so serious really and they should either put up with it or leave. If so, then this is hugely insulting.

A victim of third party harassment is effectively twice made a victim – first by the employer's failure to act and then by being faced with little choice but to do the above.

Question 4: Do you agree or disagree that the third party harassment provision should be repealed? Please explain your answer.

We do not agree.

The government's logic for repealing the provision is contradictory. On one hand the consultation states that the provision is a burden on business and on the other hand it states that it is only aware of one case in England and Wales where a claim relating to this provision was determined at an employment tribunal hearing.

Taking into account our experience of third party harassment cases it is obvious that the majority of such claims are settled before a full hearing. Further, the provision has only been in place for all protected characteristics for less than two years. We do not believe the government is in a position to make an assumption on the effectiveness of the provision within such a short period.

Neither do we understand the logic that just because there are not many claims relating to this provision that somehow this is bad law. It is not in the interests of society to remove responsibility from employers for protecting workers against harassment from third parties. Workers should be entitled to carry out their duties and engage with third parties without fear of harassment. Do we really want workers to be exposed to harassment on grounds of one of the protected characteristics, without having the force of statutory protection from such harassment? Surely a nurse treating a patient should be entitled to expect protection from their employer from harassment by the patient on one of the protected grounds.

Losing the provision would be inconsistent with the Equality Directive as per **EOC v Secretary of State for Trade and Industry** in that the Directive sets out associative protection. This would again lead to further litigation.

Even if it could be argued that the current legislation goes beyond the requirements of the Directive, to amend the legislation by removing a provision would breach the non-regressive provisions of the Directives (ie the Equality and Recast Equal Treatment Directives).

Question 5: If this provision were removed, is there any other action that the Government should take to address third party harassment at work? Please explain your answer.

No, please see above.

Question 6: a) Can you provide any further data or examples of costs and benefits which have not already been included in the Impact Assessment? b) Do you have any comments on the assumptions, approach or estimates we have used?

- a) No
- b) The approach taken in the impact assessment to estimate the costs and benefits in repealing the provision is not based on any real or existing data. These calculations are made on various assumptions despite the fact that the government is only aware of one claim relating to this provision in England & Wales that was determined at an employment tribunal. Therefore, we are unable to rely on the estimates and assumptions made in the Impact Assessment.

Question 7: How many third party harassment cases would you expect to be brought each year if the third party harassment provisions were retained? Please explain your answer.

It is not possible to make such an estimate. The issue is not about the number of claims that might be brought, but the fact that the provision provides redress should the employer of a victim of third party harassment fail to take action to protect them from harm.

Question 8: Does the consideration of the impact on equality in the impact assessment properly assess the implications for people with each of the protected characteristics? If not, please explain why.

No

We are extremely disappointed with the Equality Impact Assessment. There has been no attempt to gather any evidence to assess the impact of repealing the provision on employees of a particular protected characteristic. We would have expected the government to also carry out a survey of employees who may be effected by the proposals, as it did with employers.

Question 9: Does the justice impact test in the impact assessment properly assess the implications for the justice system? If not, please explain why.

No

We do not believe that 'alternative protection already exists'. Please see our response in Section 3B.

Further information:

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