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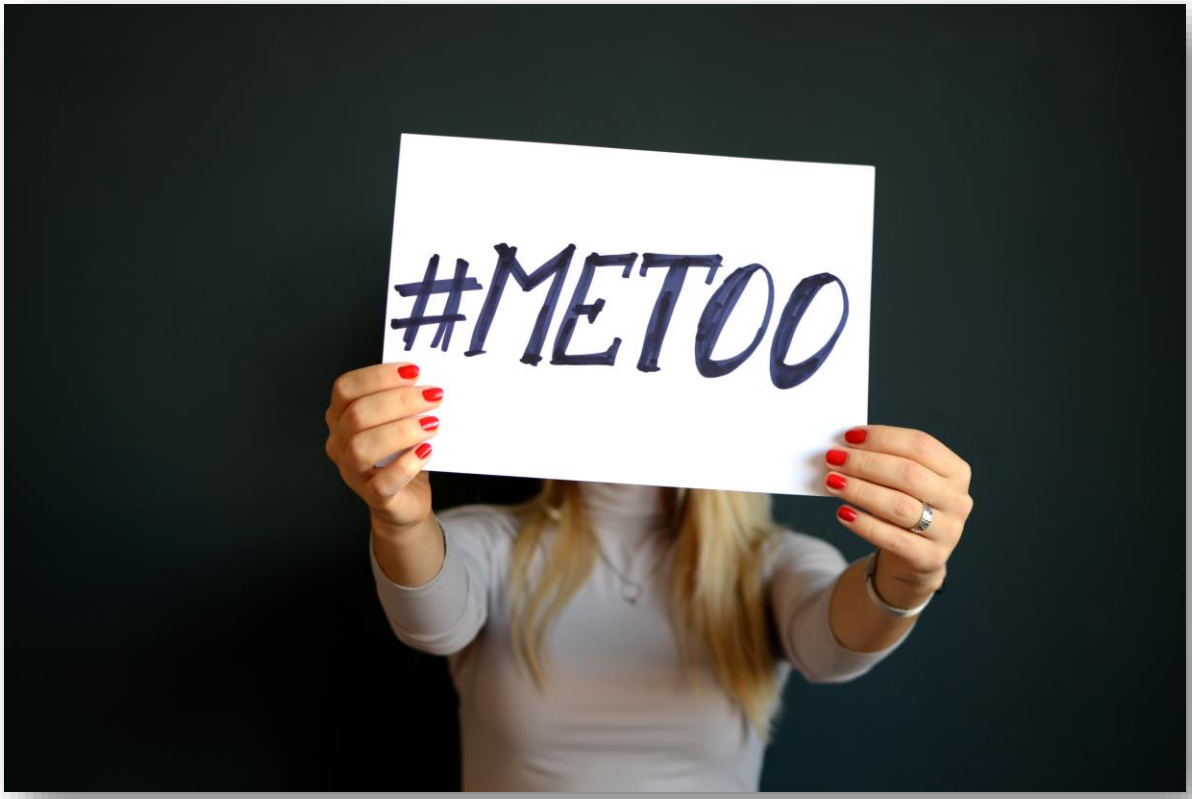

SEXUAL HARASSMENT IN THE WORKPLACE

ILN LABOR & EMPLOYMENT GROUP

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SEXUAL HARASSMENT IN THE WORKPLACE: WHAT DUTCH COMPANIES NEED TO KNOW

What constitutes sexual harassment?

Sexual harassment occurs if someone shows verbal, non-verbal or physical behavior with sexual connotation which aims at and results in the affection of the dignity of the other person. This is in particular so if a threatening, hostile, offensive, humiliating or hurting environment is created. No justification for such behavior exists, which means that sexual harassment is not allowed whatsoever. Whether it is considered to be sexual harassment is to a large extent dependent on the answer to the question whether the behavior was unwanted.

What body of law governs sexual harassment in your jurisdiction?

The prohibition on sexual harassment is included in article 1a Gender Equality Act, an implementation of Directive no. 2002/73/EC. Article 1a of the General Act on Equal Treatment also explicitly includes a prohibition on sexual harassment, an implementation of Directive 2004/113/EC. Apart from that, the prohibition on sexual harassment is laid down in article 7:646 of the Dutch Civil Code.

What actions constitute sexual harassment?

Sexual harassment can be expressed in a number of different ways. For example, by making suggestive remarks, unnecessarily touching, leering, displaying pornographic images at work, sexual assault and rape, but also sexual blackmail can be at issue, to such an extent that the likelihood of promotion and decisions about the work depend on the rendering of sexual services.

Can sexual harassment occur between two members of the same sex?

Yes. There is sexual harassment if the behavior has a sexual connotation and the other one is affected in his dignity. This can also occur between two employees of the same sex. The concept harassment must be interpreted objectively. The perception of the victim and the intention of the perpetrator are not a determining factor as to whether or not sexual harassment can be assumed.

Are employers required to provide sexual harassment training for their employees?

No, there is no requirement to offer training for prevention of sexual harassment. In article 3 paragraph 2 of the Working Conditions Decree, a specific provision is laid down which is directed at the employer, who has the obligation to pursue a policy aimed at the prevention of, and, if this is not possible, at the protection of employees as much as possible against sexual harassment. Offering training to the employees under certain circumstances could be part of the policy that must be pursued by the employer, but a general statutory obligation for the employer to do so is lacking.

What are the liabilities and damages for sexual harassment and where do they fall?

Should an employee as a result of sexual harassment become unfit for work, the employer must continue to pay 70% of the wages of this employee, in principle over a period of up to 104 weeks. If the employer has failed in his duty of due care towards the employee, as a result of which sexual harassment could occur, then the employee can also claim a compensation from the employer. There can be material as well as non-material damage. Material damage for example can exist of costs incurred by the employee because of psychological help. Under such circumstances there are no fixed amounts granted to the employee as a compensation for immaterial damage he has suffered, but practice has shown that the amount of a compensation - in so far it is paid – is rather low.

If the manner in which the employer has acted can be qualified as seriously imputable, the employee can submit a request to the sub district judge asking to terminate the employment agreement and to grant him a fair compensation. Should the judge do so, then it cannot or hardly be assessed beforehand what the amount of the damages will be, because it is a fairness judgment. The amounts of fair damages that are awarded in practice so far vary from practically nil to € 628,000. - gross.

If an employee commits the offense of sexual harassment, this could be a reason for the employer to terminate the employment. If the employee has acted seriously imputable, this may among other things entail that the employee is not entitled to the statutory severance pay, which amounts to a maximum of € 79,000. - gross or an annual salary.

What does an employee who believes they've been sexually harassed have to prove for a successful claim?

If an employee says that he has been sexually harassed, the following applies. The employee must state facts and give evidence, or at any rate give plausible reasons, that can support the presumption of sexual harassment. If the judge cannot conclude from the alleged facts that there is a presumption of distinction, he will reject the claim or the request. But if the judge can conclude from the alleged facts that actually there is such a presumption, the burden of proof will be reversed. It is then the accused person who will have to prove that there was no sexual harassment.

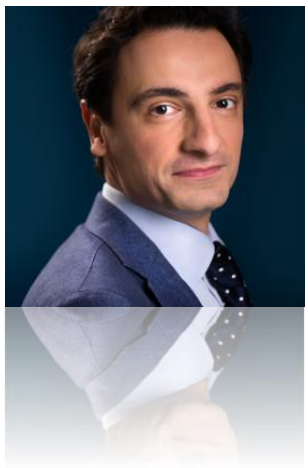
It is dependent on the concrete circumstances of the case which facts must be put forward and which facts must be proven in the event of a defense. It is up to the judge to decide whether certain facts can lead to a presumption of distinction.

If an employee accuses the employer of violation of the duty of due care and wishes to receive a compensation as a result thereof, because the employer did not do enough to prevent and combat sexual harassment, it is up to the employer to show that he complied with the working conditions obligations imposed on him and that he reacted timely and adequately to the harassing behavior and that he took corrective measures. If the facts alleged by the employee give rise to the presumption that the employer violated the obligations imposed on him (pursuant to the Working Conditions Decree), it is up to the employer to prove that he actually acted correctly. Should he fail to do so, it will have been proven that the employer violated the duty of due care.

Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

No. If an employee wishes to put forward a claim against the perpetrator, the employee must make the same facts plausible and the allocation of the burden of proof is the same, irrespective whether the perpetrator was a colleague or supervisor. If the employee wishes to tackle the employer because of a wrongful act or because of violation of the duty of due care, then in principle there is also no difference between a situation in which a colleague or instead thereof a supervisor was the perpetrator. I can imagine though that it may be assumed that the duty of due care was violated by the employer, if the employer could be identified with the supervisor, for example because the supervisor is director/major shareholder.

What are the potential defenses employers have against sexual harassment claims?



If a supervisor or employee has committed the offense of sexual behavior, this is always in conflict with the law. There can be no objective justification for sexual harassment. If the employee claims a compensation from the employer, then the employee can base his claim on various grounds: violation of a duty of due care by the employer, acting in contravention to good employership and/or committing a wrongful act.

An employer may put up a defense against the claim based on violation of the duty of due care by arguing that he took all measures necessary to prevent sexual harassment. Other defenses are that the employee did not sustain the damage during the performance of his work (for example because the sexual harassment took place outside of working hours or outside of the work area), that no damage has been sustained or that the damage was significantly caused by a deliberate act or conscious recklessness of the employee himself. In a situation where sexual harassment is at issue, it is hardly conceivable that the latter defense has any chance of succeeding.

Against the claim on account of a wrongful act, the employer can put forward similar arguments. The employer can also defend himself by arguing that there was no increased likelihood of committing a wrongful act (the sexual harassment) because of the instruction the employer gave to the 'perpetrator' (the employee) for carrying out his work – in view of the fact that committing the offense of sexual harassment is entirely distinct from the employee's performance of duties - and/or that the employer under his legal relationship did not have any control over the behavior of the employee that formed the basis for the mistake. The employer can also defend himself by arguing that there is no causal link between the behavior of the perpetrator and the damage that was allegedly sustained.

Who qualifies as a supervisor?

There is an authority relationship between an employer and an employee if the employer has the power to give instructions with regard to the working discipline. Decisive factor is whether the employer can give instructions to the employee with regard to organizational matters, such as the regularity of the

work and the place where the work must be carried out. It is for instance also relevant whether the employer decides on the holiday arrangements and whether the employer can dismiss the employee.

Sometimes it is laid down in the employment agreement who is the supervisor. More often this is mutually agreed upon between the employer and the supervisor involved and apart from that it also appears from the organizational structure within the organization of the employer. A supervisor is someone to whom the authority has been given to request or instruct the employee to carry out certain tasks. The concept “supervisor” is no legal term.

How can employers protect themselves from sexual harassment claims?

Pursuant to the Working Conditions Decree, the employer is obligated to conduct a proper working conditions policy, which must contain a policy aimed at the prevention and, if that is not possible, a limitation of psychosocial workload and therefore sexual harassment. This means that the employer must take preventive as well as repressive measures and that he must act against sexual harassment. A preventive measure is drawing up and displaying a policy about sexual harassment, appointing a person of trust, raising awareness, maintaining a complaints handling scheme et cetera. A repressive measure is taking disciplinary measures if an employee, which it is hoped will not occur, commits the offense of sexual harassment, such as reprimanding or, in extreme cases, dismissal.

Does sexual harassment cover harassment because of pregnancy?

Distinction on the basis of pregnancy, childbirth and motherhood is laid down in Dutch legislation and rules as a separate form of forbidden distinction.

Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

Distinction on the basis of heterosexual or homosexual orientation is laid down in Dutch legislation and rules as a separate form of forbidden distinction.

What is prohibited retaliation?

If an employee submits a claim, the employer must proceed to an investigation. Having an investigation carried out by the employer himself is advised against, because for an employer it is rather difficult to carry out an investigation that is objective and unbiased. Moreover, the outcome will be that the employer must de facto eventually stand on the side of one employee or the other.

If the external investigation shows that there has been sexual harassment, there could be a reason for disciplinary measures or dismissal. It is nonetheless of importance to prevent that the accused is already considered to be the perpetrator before this has been shown by the investigation. Moreover, the employee who reported the sexual harassment may not be put into a disadvantageous position by the employer. The employer must also respect the privacy of the employee and in principle, the data about the report may not be shared with others.

Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

In the event of a consensual relationship there will generally not be a behavior that aims at or results in the affection of the dignity of the other. Also, the behavior with a sexual connotation will normally be wanted if there is a consensual relationship. Because according to the Supreme Court the answer to the question whether or not there is sexual intimidation is significantly dependent on the desirability or undesirability of the behavior from the part of the 'victim', it will be unlikely that there is sexual harassment in the event of a consensual relationship.

Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

Yes.

What is the #MeToo movement?

The #MeToo movement asks attention for men and women who have been sexually harassed and/or face or have faced sexual violence. A lot of victims dare not report this, because they fear not to be believed. For that reason, it was only clear how many men and women faced sexually transgressing behavior. The #MeToo movement is an attempt to alter this and to achieve a reversal.

How is the #MeToo movement impacting the law in your jurisdiction?

Employers, as well as the government, pay more attention to the prevention and combat of sexually transgressing behavior. In 2018, the Ministry of Social Affairs and Employment pays extra attention to raise awareness under employers with regard to sexual harassment and the importance of a secure working culture, amongst other things, by organizing gatherings. An investigation is also carried out at the instruction of the Ministry of Social Affairs and Employment into the strengthening of the role and position of persons of trust and possibilities are looked at to strengthen the position of the person of trust in practice.

In the field of employment law, the #MeToo movement seems to lead to a more stringent approach where sexual harassment is concerned. However, not all forms of sexual harassments may be subject to the heaviest penalty. Practice shows that judges still judge whether the sanction that is imposed is in accordance with the seriousness of the undesired behavior and that all circumstances of the case must be taken into account, such as the company culture, the manner in which supervisors act and the length of the employment.

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