

Equality and Diversity Forum response to the consultation on employer liability for harassment of employees by third parties

The Equality and Diversity Forum (EDF) is a network of national organisations committed to equal opportunities, social justice, good community relations, respect for human rights and an end to discrimination based on age, disability, gender and gender identity, race, religion or belief, and sexual orientation.¹ Further information about our work is available at www.edf.org.uk.

Our member organisations represent and support people who have any or all of the characteristics protected in the 2010 Equality Act and one of our key concerns is that every individual should have access to the same rights to access to justice regardless of their age, disability, gender and gender identity, race, religion or belief, and sexual orientation (unless there is a good reason why this is not appropriate).

Section A: What are your experiences of third party harassment?

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.

Some of our member organisations have done so.

¹ A list of EDF members is attached as Annex 1.

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

Question 4: Do you agree or disagree that the third party harassment provision should be repealed?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

We do not agree that this provision should be repealed for both practical and legal reasons.

As to practical reasons, the EDF considers that people should be able to work in an environment in which they are free of harassment whether from fellow workers, managers or employers or (as is specifically relevant to this provision) from customers or clients of their employers or others who come onto their employers' premises. Clearly, the government accepts that it is necessary to provide protection from harassment in relation to fellow workers, managers or employers. It is not obvious why employees should have to invoke the Prevention from Harassment Act 1997 in relation to harassment by customers or clients of their employers or others who come onto their employers' premises and have to sue in the County Court as they would be forced to do if this provision is repealed.

We recognise that third party harassment is more likely to be an issue in some kinds of workplace than in others: for example, it is more likely to be an issue in the catering and hospitality and in the care sectors than in the kind of office where customers or clients are rarely present. However, there is undoubtedly an issue that needs to be addressed and moreover the people who are most likely to be affected by the abolition of this provision are some of the most vulnerable and poorly paid people in the workforce who are least able to defend themselves. For instance, a recent report which examined a number of examples of third party harassment in the treatment received by care workers, comments:

... there is evidence relating to all service users, not only older people. A survey of public sector social services staff found ethnic minority staff had experienced racist verbal abuse from service users; inappropriate questioning of their authority by users or relatives; users not wanting to be touched by them or asking to be dealt with by a White person (most frequently occurring in the user's own home); and physical attacks perceived to be racially motivated. Inappropriate remarks from colleagues were also experienced (Brockmann et al. 2001).²

One of EDF's observer organisations, Equality South West, also cited an example of third party racial harassment from their research. The man in question had a manual job with a local authority and was allocated specific geographical areas within which to work. Whilst working there he was exposed to verbal racial abuse and threatening behaviour culminating in an incident when drunken local residents shouted racially insulting comments. The worker complained to the management and asked to be re-assigned to other areas where racial abuse was less likely to occur. This resulted in

² *Migrant Care Workers in Aging Societies – Report of research Findings in the UK*, A Cangiano, I Shutes, S Spencer & G Leeson, COMPAS, University of Oxford, 2009, p143 at http://www.compas.ox.ac.uk/fileadmin/files/Publications/Research_projects/Labour_markets/Migrant_care_workers/MCW%20report%20-%20final%20-%20website%20version.pdf

the management putting the employee in question under investigation for resisting an instruction to continue to cover the originally assigned areas. The stress of this disciplinary action combined with the stress caused by the original harassment led to the employee having to take sick leave. It was a number of weeks before confirmation was received that no disciplinary action would be taken.³

Disabled people also already face high levels of discrimination in the workplace. It is vital that disabled people are protected in the workplace from all forms of harassment, whether this comes from colleagues, managers, employers or indeed, as this provision covers, from a third party such as customers or members of staff from another organisation.

Having established that third party harassment is a real issue with damaging consequences for people, the next question is what liability employers should have for the behaviour of clients, customers and others on their premises. The Equality Act provides that an employer has a defence against a harassment claim if the employer can show that they took all reasonable steps to prevent or deal with the alleged harassment. One criticism of the third party harassment provision has been that it makes employers responsible for the conduct of people over whom they have no direct control and that this is unreasonable. However, the current provision only provides employees with protection after repeated acts of third party harassment. EDF members, almost all of whom are themselves employers, know that it is perfectly possible for employers to take reasonable steps to reduce the risk of third party harassment and to deal effectively with it should it arise. Making employers liable for failing to tackle repeated harassment of their staff is therefore entirely reasonable.

In addition, employers can take steps to reduce the risk of staff being harassed by customers and clients by having a policy on all instances of harassment that sends a clear message to their customers and to people using their services that it is not an acceptable form of behaviour. Many employers already do this by, for example, placing notices on their premises reminding service users that the business's staff have the right to carry out work without facing abuse. A business has influence as well as moral responsibility with contractors, consultants and clients and this Equality Act provision is a point of reference that helps businesses persuade others not to allow harassing and discriminatory behaviour. By taking away the requirement for employers to take responsibility for repeated harassment and discrimination against their staff that comes from customers or service users, this will send the opposite message. This may well contribute to an environment where people feel that discriminatory behaviour and attitudes are acceptable and therefore levels of stigma and discrimination may increase.

Turning to the legal reasons for not removing this protection, the EDF is concerned that the abolition of this provision would contravene European law.

There is no doubt that employees have a right to be protected from harassment in relation to the protected characteristics. The European Directives do not limit the persons in relation to whom that right exists to simply employers. Rather the Directives speak of the contexts within which the protection is necessary. The Directives each have a scope provision such as Article 3 of the Race Directive which sets the context within which protections must be afforded to workers. This

³ See Black and Minority Ethnic voices: Dimensions of Inequality in Somerset, Somerset Equality Officers' Group (Public Sector E&D Officers), December 2010. Available from Equality South West.

scope provision does not provide for any exclusion in relation to harassment by third parties.

This point is crucial to understanding the erroneous approach of the government to this proposed amendment. Workers are entitled to be protected from harassment by any one at all in those contexts which fall within the scope provisions of the relevant Directives. Taking the Race Directive as an example this says as follows –

Article 3 Scope

1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

(c) employment and working conditions, including dismissals and pay;

(d) membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;

(e) social protection, including social security and healthcare;

(f) social advantages;

(g) education;

(h) access to and supply of goods and services which are available to the public, including housing.

It would be no more permissible for a local authority to deny access to housing by permitting harassment of tenants by neighbours than it would be permissible for employers to deny safe and appropriate working conditions by permitting harassment of employees by third parties such as customers and clients.

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.

We oppose this provision being removed. However, if it is removed, the evidence shows that there would still be a need for action to protect vulnerable workers. Preventative measures and good practice needs to be put in place so that vulnerable workers such as care workers, catering staff and disabled workers feel able to report abuses and have their concerns taken seriously.

We would suggest that a dialogue is initiated between the Government Equalities Office, the Equality and Human Rights Commission and the Care Quality Commission with a view to producing written guidance for employers. This dialogue should also involve considering the views of employers, unions and, given the particular concentration of migrant worker in high risk sectors, migrant workers' representatives.

This guidance should include consideration of how instances of harassment might be prevented and addressed, including ensuring that managers and staff have appropriate training on equal opportunities in employment and service provision, written guidance on best practice to refer to and that there is a mechanism in each work place for workers to have their concerns addressed appropriately.

In the context of the care of older people employing home carers, they and their families need to have guidance on their responsibilities as employers in home care. Those care users and families who are not initially comfortable with care provision by migrant workers also need to be helped to understand the essential contribution which migrants now make to care services and that staff, like older people, have both a moral and a legal right to be in an environment that respects their dignity and self worth.

Equality and Diversity Forum members

Action on Hearing Loss

Advice UK

Age UK

British Humanist Association

British Institute of Human Rights

Children's Rights Alliance for England (CRAE)

Citizens Advice

Disability Rights UK

Discrimination Law Association

End Violence Against Women

Equality Challenge Unit

EREN – The English Regions Equality and Human Rights Network

Fawcett Society

Friends, Families and Travellers

JUSTICE

Law Centres Federation

Mind

National AIDS Trust

Press for Change

Race on the Agenda (ROTA)

Refugee Council

RNIB

Runnymede Trust

Scope

Stonewall

The Age and Employment Network (TAEN)

Trades Union Congress (TUC)

UKREN (UK Race in Europe Network)

UNISON

Women's Budget Group

Women's Resource Centre

A full list of Members and Observers/Associate Members is available at

http://www.edf.org.uk/blog/?page_id=889

Equality South West, Equanomics UK and Macmillan Cancer Support are Observer/Associate Members of EDF and have signed up to this response.