

IN THE MATTER OF BACZKOWSKI v SUFFESICK
and
IN THE MATTER OF BACZKOWSKI v BROWN & SIGN POST CORNER INC.

DECISION OF THE BOARD

- DECISION SUMMARY -

- REASONS FOR THE DECISION -

April 28, 2000
Whitehorse, Yukon Territory

IN THE MATTER OF THE YUKON HUMAN RIGHTS BOARD OF ADJUDICATION
and the matters of
Baczkowski v. Howard Suffesick
Baczkowski v. Douglas Brown and Sign Post Corner Inc.

April 28, 2000

DECISION OF THE BOARD

1. This Board finds that the comments and conduct of the respondent Howard Suffesick, to the complainant, Tatiana Baczkowski are considered sexual harassment under section 13 of the Yukon *Human Rights Act*. The Board concludes that the comments and conduct by Suffesick were of a vexatious nature and that Suffesick knew or should have known the comments and conduct were unwelcomed.
2. The Board finds that the sexual harassment was in connection with an aspect of employment contrary to section 8(b) of the *Act*.
3. The Board finds further that Douglas Brown's termination of Baczkowski was based in part on Baczkowski's complaint of the harassment to the RCMP. Termination on this ground constitutes a further sexual harassment contrary to section 13(1)(b) of the *Act*.
4. The Board finds that Douglas Brown and Sign Post Corner Inc. are liable for both the sexual harassment by Howard Suffesick and the further sexual harassment by Douglas Brown.
5. The Board orders Douglas Brown and Sign Post Corner Inc. to establish a sexual harassment policy that clearly lays out that sexual harassment will not be tolerated on the premises.
6. The Board orders the respondent to place a sign on the premises in a location accessible by employees, such as the manager's office.
7. The Board orders the respondent to pay to the complainant for actual losses incurred as a result of the sexual harassment from March 9, 1998 until she regained full employment. Monies earned through part time employment will be deducted from the amount payable, but social assistance and unemployment insurance benefits will not be deducted. The board orders the complainant to provide the respondent with documentation in support of actual losses within 10 days. Simple interest is to be calculated on the award for financial loss.
8. The board rejects the request for moving expenses and exemplary damages.
9. The Board awards the complainant \$2,000.00 for injury to dignity, feelings, and self-respect.

IN THE MATTER OF THE YUKON HUMAN RIGHTS BOARD OF ADJUDICATION
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The Complaint

The complainant, Tatiana Baczkowski, filed a Human Rights complaint against Doug Brown and Sign Post Corner Inc., which operates as Tag's grocery, and Howard Suffesick, a contractor with Tags. The complaints were filed separately on June 23, 1998, and July 20, 1998 and were subsequently joined into one action by the written application of the Yukon Human Rights Commission.

The complainant alleges that the respondents contravened the *Yukon Human Rights Act* in the form of harassment (s.13) on the prohibited grounds of sex (s.6(f)), sexual orientation (s.6(g)), and actual or presumed association with other individuals or groups whose identity or membership is determined by any of the grounds listed in section 6 of the *Act* (s.6(l)). The complainant alleges the discrimination was in connection with her employment contrary to section 8(b) of the *Act*.

The respondents jointly dispute that the alleged incidents even took place, or alternatively, that the incidents are not a violation of the *Act*. The respondents Douglas Brown and Sign Post Corner Inc. further dispute liability of the alleged incidents since Douglas Brown was not aware of the incidents until much later, at which time appropriate measures were taken to address the situation.

FACTS

Sign Post Corner Inc. operates in Watson Lake, Yukon as a Tags convenience store. Douglas Brown is listed as the secretary of the corporation, but also acts as the manager of the daily business operations in Watson Lake, including staff hiring and staff relations. Howard Suffesick is either an employee or contractor with Tags. Suffesick is responsible for minor repairs and "handy-man work" required around the convenience store.

Tatiana Baczkowski was hired by Brown in late October 1996 to work at the in-store Greyhound Bus Agency located in the Tags store in Watson Lake. Baczkowski was responsible for preparing bus tickets, handling freight, and office related duties.

Baczkowski and Suffesick had little contact until September of 1997, when Suffesick inquired about Baczkowski's sexual orientation. Baczkowski acknowledged that she liked women. Later that month, a female co-worker reported to Baczkowski that Suffesick was making sexually explicit comments about her.

IN THE MATTER OF THE YUKON HUMAN RIGHTS BOARD OF ADJUDICATION
and the matters of
Baczkowski v. Howard Suffesick
Baczkowski v. Douglas Brown and Sign Post Corner Inc.

During the first week of October, 1997, Suffesick approached Baczkowski at her post and said, "I bet you like to be munched on. Do you like it this way or that way?", and made gestures with his mouth. Although Suffesick denies making these or other comments and gestures, this Board finds the complainant's testimony more credible wherever there is dispute. Suffesick was hesitant to answer any question under cross-examination, though he often conceded that he did make certain comments of a sexual nature.

Following the incident in October, 1997, Suffesick's gossip to co-workers about Baczkowski's sexual orientation intensified.

On November 11, 1997, in the restaurant area of Tags, Suffesick grabbed a pot of clam chowder that was about to be cleaned and thrust the pot under the nose of Baczkowski and said "smell this ... it smells fishy, smells like some of the women you've been with!" Baczkowski reacted sharply to Suffesick and walked away upset.

The following week, Baczkowski noticed that Suffesick was "leering" at her body while she was working at Tags. Baczkowski approached Suffesick and told him to quit staring at her body and to leave her alone.

Suffesick was visibly upset by the confrontation with Baczkowski in the restaurant and reported the incident to Brown. Brown then approached Baczkowski and asked Baczkowski to talk to Suffesick to make peace in the workplace. At this point, Baczkowski informed Brown of the other inappropriate comments made by Suffesick. Brown then instructed both Baczkowski and Suffesick to stay away from each other and to stay in opposite ends of the store.

Approximately two days later, under the direction of Brown, Baczkowski approached Suffesick to inform him of the offensive comments that were made. Although Suffesick did apologize, Baczkowski did not believe that the apology was sincere or that Suffesick was taking the situation seriously.

Although Suffesick no longer made comments directly to Baczkowski, co-workers advised Baczkowski that Suffesick was continuing to make comments about her sexual orientation behind her back. For example, Suffesick was warning other female employees to watch out for Baczkowski because she was a "Dyke" and may try to recruit them into her "Dyke Club". Suffesick would also comment that any female associate of Baczkowski was probably also a "Rug-muncher", meaning a lesbian.

IN THE MATTER OF THE YUKON HUMAN RIGHTS BOARD OF ADJUDICATION
and the matters of
Baczkowski v. Howard Suffesick
Baczkowski v. Douglas Brown and Sign Post Corner Inc.

In February of 1998, Baczkowski approached Brown to advise him of the continuing problem with Suffesick. Brown's response to Baczkowski was that since Baczkowski was smarter than Suffesick, that she should figure out how to resolve the problem. Brown also testified that he felt the issue would be resolved if Baczkowski would just stay in her own area. Brown testified that Baczkowski often left her post, despite several reprimands from Brown.

Following the conversation with Brown, Baczkowski contacted the Labour Board and the Human Rights Commission. Baczkowski was directed to contact the RCMP, who advised her that this was not really a police matter. However, in early March, the RCMP constable did agree to have an informal conversation with Suffesick to advise him that his actions may have a legal consequence.

Brown later asked the RCMP constable why he approached Suffesick. Brown was advised that Baczkowski requested the RCMP to look into the matter. Brown reflected on Baczkowski's employment with the company over the weekend. Brown later decided that in light of the conflict between Baczkowski and Suffesick, the complaint to the RCMP, and for other reasons, that Brown would terminate Baczkowski's employment.

Baczkowski was fired on March 9, 1998. Baczkowski then approached the Human Rights Commission and filed two complaints: on June 23, 1998 and July 20, 1998.

ANALYSIS AND DECISION

Sexual Harassment

In *Janzen v. Platy Enterprises Ltd.* (1989), 10 C.H.R.R. D/6205 [at D/6227, para. 44451] the Supreme Court of Canada defined sexual harassment as "unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment". The Supreme Court also ruled unanimously in *Janzen* that sexual harassment is discrimination on a basis of sex.

In the Yukon *Human Rights Act*, section 13 provides:

- 13.(1) No person shall
 - (a) harass any individual or group by reference to a prohibited ground of discrimination,
 - (b) retaliate or threaten to retaliate against an individual who objects to the harassment.
- (2) In subsection (1), "harass" means to engage in a course of vexatious conduct or to make a demand

IN THE MATTER OF THE YUKON HUMAN RIGHTS BOARD OF ADJUDICATION
and the matters of
Baczkowski v. Howard Suffesick
Baczkowski v. Douglas Brown and Sign Post Corner Inc.

or a sexual solicitation or advance that one knows or ought reasonably to know is unwelcome.

The prohibited grounds of discrimination are provided in section 6 of the *Act*. The relevant sections in this case are:

6. It is discrimination to treat any individual or group unfavourably on any of the following grounds:
- ...
 - (f) sex, including pregnancy, and pregnancy related conditions,
 - (g) sexual orientation,
 - ...
 - (l) actual or presumed association with other individuals or groups whose identity or membership is determined by any of the grounds listed in paragraphs (a) to (k).

When interpreting Human Rights legislation, the Board of Adjudication must be mindful of the words of the Supreme Court of Canada in *Robichaud v. Canada (Treasury Board)*, [1987] 8 C.H.R.R. D/4326 that the intent of the harassment is not essential. At para. 33937, the court provides:

Since the Act is essentially concerned with the removal of discrimination, as opposed to punishing anti-social behaviour, it follows that the motives or intention of those who discriminate are not central to its concerns. Rather, the *Act* is directed at redressing socially undesirable conditions quite apart from the reasons for their existence.

Only after the Board determines whether or not the claim of sexual harassment has been established is it necessary to determine liability and damages.

Vexatious Conduct

In *Matthews v. Memorial University of Newfoundland*, [1992] 15 C.H.R.R. D/399 [at D/404, para. 47, the Newfoundland Board of Inquiry established a twofold test to determine if an individual has been the subject of harassment:

The first portion of the test is subjective and requires a determination as to whether the course of comment or conduct was vexatious to the complainant. It is the position of this Board that a course of comment or conduct implies something more than an isolated incident and this position is consistent with the findings in *Boehm v. National System of Baking Ltd.* (1987), 8 C.H.R.R. D/4110 (Ont. Bd. Inq.) and an unreported decision of a Newfoundland Board of Inquiry in *Avik v. Ashbourne* (1990) [reported 12 C.H.R.R. D/401].

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IN THE MATTER OF THE YUKON HUMAN RIGHTS BOARD OF ADJUDICATION
and the matters of
Baczkowski v. Howard Suffesick
Baczkowski v. Douglas Brown and Sign Post Corner Inc.

[49] The second portion of the test is both subjective and objective requiring that the respondent knew or ought to have known his course of comment or conduct was unwelcome.

Thus, in determining whether the conduct was vexatious, the Board must apply a subjective test to determine, based on the facts, whether the complainant felt that they are being subjected to vexatious comments or conduct.

The case law clearly establishes that there may be a range of conduct that may be considered sexual harassment. The Ontario Board of Inquiry in *Bell v. Ladas* (1980) 1 C.H.R.R. D/155 found that discriminatory conduct may run the gamut from overt gender-based activity, such as intercourse, unsolicited physical contact and persistent propositions, to more subtle conduct, such as gender-based insults and taunting, which may reasonably be perceived to create a negative psychological and emotional work environment.¹

In this case, the complainant has clearly established that the comments and conduct of the respondent Suffesick was making her uncomfortable, and creating a negative psychological and emotional work environment.

Known or Ought to have known Conduct is Unwelcome

In determining the second portion of the test, the Board must determine whether the respondent either knew, or ought to have known that the conduct was unwelcome. In cases where the complainant expressly warns the harasser that their conduct is unwelcome, the respondent can not claim that they thought their conduct was welcome.

However, in other cases, the complainant, for many reasons may be unable to expressly state that the harasser's conduct is unwelcome. To show that the complainant did not welcome the harasser's conduct, the complainant may show that their own conduct consistently demonstrated, either explicitly or implicitly, that the sexual conduct is unwelcome², or the complainant can show that an express warning would have likely been ineffectual.³ However, as this Board

¹See *Sexual Harassment Case Summaries*, C.H.R.R. Website, April 2000.

²*Dupuis v. British Columbia (Ministry of Forests)* (1993), 20 C.H.R.R. D/87 at D/94, para. 48 (B.C.C.H.R.)

³*Johnstone v. Zarankin*, (1984), 5 C.H.R.R. D/2274 at D/2276, para. 19170 (B.C. Bd. Inq.); aff'd (1985), 6 C.H.R.R. D/2651 (B.C.S.C.)

IN THE MATTER OF THE YUKON HUMAN RIGHTS BOARD OF ADJUDICATION
and the matters of
Baczowski v. Howard Suffesick
Baczowski v. Douglas Brown and Sign Post Corner Inc.

stated in *Bergeron v. B.Y.G. Natural Resources Inc.*, inconsistent conduct that fails to clearly communicate that the sexual conduct is unwelcome will not be enough to meet the burden.

In this case, the Board finds that the complainant established that the respondent engaged in vexatious conduct that they knew, or should have known was unwelcome. Baczowski clearly and expressly communicated to both Suffesick and Brown that Suffesick's conduct and comments were not welcomed or appreciated.

Furthermore, Brown's subsequent decision to terminate Baczowski, based in part on her reaction to the sexual harassment, constitutes a further act of sexual discrimination on the part of the employer as set out in section 13(b) of the *Act*. The Nova Scotia Board of Inquiry in *Cameron v. Georgio & Lim Restaurant* (1993) 21 C.H.R.R. C/79 goes further and states that even where a case of sexual harassment has not been made out, a termination based on the complainants reaction to perceived sexual harassment is enough to constitute sexual harassment.

EMPLOYER LIABILITY

The Supreme Court of Canada in *Robichaud, Supra*, at D/4332 held that under human rights legislation, employers should be held liable for their employees' discriminatory actions, so long as the conduct is work-related. This is primarily because the employer is in the best position to remedy the ill effects of harassment and provide a healthy work environment.

Section 32 of the *Act* further provides:

32. Employers are responsible for the discriminatory conduct of their employees unless it is established that the employer did not consent to the conduct and took care to prevent the conduct or, after learning of the conduct, tried to rectify the situation.

The Ontario Board of Inquiry has established that an employer may be either directly or indirectly responsible for the harassing conduct.⁴ An employer may be directly responsible for the conduct if they are aware of the offensive conduct but choose to ignore it, and they may be indirectly responsible if they fail to provide a healthy workplace by not addressing a problem they should be aware of.

Once an employer becomes aware of offending conduct, there is a requirement that they take all

⁴*Shaw v. Levac Supply Ltd., Supra.*

IN THE MATTER OF THE YUKON HUMAN RIGHTS BOARD OF ADJUDICATION
and the matters of
Baczkowski v. Howard Suffesick
Baczkowski v. Douglas Brown and Sign Post Corner Inc.

reasonable steps to rectify the situation and provide a healthy work environment.

In this case, Brown's response to Baczkowski was not to take the situation seriously. Brown initially asked Baczkowski to address the situation herself. When this did not work, Brown asked Baczkowski and Suffesick to stay away from each other. Brown's final response to Baczkowski's concern was to terminate her employment when she complained to the RCMP.

These responses by Brown can not be considered an attempt to "rectify the situation" as stated in the *Act*. On the contrary, as stated above, Brown's termination was a further act of discrimination that establishes additional liability.

DAMAGES

The Board, having found the claim of sexual harassment and liability against the respondents, hereby orders the following in accordance with section 23 of the *Act*. This Board will remain seized of this matter for a period of 30 days in which any party may bring a written application for clarification or enforcement of these orders.

Rectify any condition that causes the discrimination

Although the complainant no longer works for Sign Post Corner Inc. this Board feels Sign Post Corner Inc. has an obligation to all current and future employees to guarantee them a safe working environment free of sexual harassment. The Board orders Doug Brown and Sign Post Corner Inc. to establish a policy that clearly lays out that sexual harassment will not be tolerated on the premises and establishes a procedure for dealing with sexual harassment. This policy will be brought to the attention of all current employees and to the attention of new employees.

The Board orders a sign to be posted indicating that sexual harassment at the work place will not be tolerated in a place accessible by employees, such as in the manager's office.

Pay damages for financial loss suffered as a result of the discrimination

The Board orders that the respondent pay the complainant for actual losses incurred by the complainant from the date of leaving the employment of Sign Post Corner Inc. on March 9, 1998 until she regained full employment. As stated in *Shaw v. Levac Supply Ltd.* (1990), 14 C.H.R.R. D/36 (Ont. Bd. Inq.) [at D/62, para. 200], "the operative principle is restitution/compensation, the purpose being to restore the complainant to the position he or she would have been in had it not been for the infringement."

IN THE MATTER OF THE YUKON HUMAN RIGHTS BOARD OF ADJUDICATION
and the matters of
Baczkowski v. Howard Suffesick
Baczkowski v. Douglas Brown and Sign Post Corner Inc.

The complainant has a duty to mitigate her losses by looking for a new position at a similar salary as soon as reasonably possible. In this case, Baczkowski has shown that she sought employment immediately in a similar position. The respondent has the duty to show that the complainant failed to mitigate her losses, and in this case, no evidence was tendered.

Although monies earned during part-time employment are to be deducted from the amount the complainant would have received, this Board orders that any social assistance benefits and unemployment insurance benefits are not deducted from that amount. The Board therefore orders the Commission and the complainant to provide the respondents, within 10 days, documentation in support of what the complainant's actual losses were.

The Board further orders that simple interest is to be calculated on the award for financial loss.

The complainant also requested moving expenses in the amount of \$597.53. This Board rejects this request since it is not disputed that the complainant was already seeking employment outside of Watson Lake prior to her termination. In this Board's opinion, the complainant would have eventually incurred these expenses as part of her move from Watson Lake.

Pay damages for injury to dignity, feelings, or self-respect

As a result of the sexual harassment, Ms. Baczkowski suffered from feeling depressed, emotionally confused, isolated, bitter and anti-social. The Board takes into consideration that the nature of the harassment was not physical but emotional and the frequency of the sexual harassment was minimal. The Board finds Mr. Brown's attempt to rectify the situation by telling Ms. Baczkowski to make peace in the workplace to be unsatisfactory in meeting the psychological needs of the complainant.

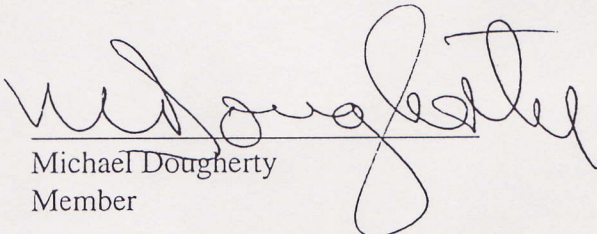
The Board awards Ms. Baczkowski \$2,000.00 for injury to dignity, feelings, and self-respect.

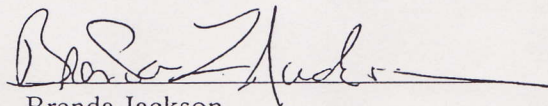
IN THE MATTER OF THE YUKON HUMAN RIGHTS BOARD OF ADJUDICATION
and the matters of
Baczowski v. Howard Suffesick
Baczowski v. Douglas Brown and Sign Post Corner Inc.

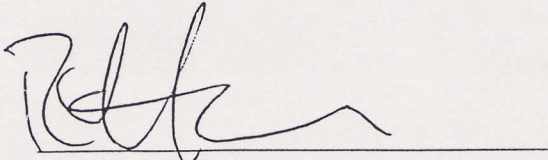
Exemplary damages

The Board rejects the Commissions submission that the termination of Baczowski was done maliciously and therefore exemplary damages are forthcoming. The Board finds that the intent of the termination was done in part due to Baczowski's complaint to the RCMP, but there were other reasons as well. Although Brown's actions may have contributed to the harassment and liability, exemplary damages should be reserved for clearer cases where a malicious intent is obvious.

The Decision of the Yukon Human Rights Board of Adjudication has been made this 28 th day of April, 2000 at the City of Whitehorse in the Yukon Territory.


Michael Dougherty
Member


Brenda Jackson
Member


Lee Francoeur, Chief Adjudicator

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IN THE MATTER OF THE YUKON HUMAN RIGHTS BOARD OF ADJUDICATION

and the matters of

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ORDER OF THE BOARD

SUPREME COURT OF THE
YUKON TERRITORY
JUN 21 2000

WHEREAS:

- (a) This matter proceeded to a hearing on March 28th, 29th and 30th, 2000;
- (b) The written decision of this Board was issued on April 28th, 2000, indicating that we would remain seized of these matters for a period of thirty (30) days, during which any party may bring a written application for clarification or enforcement of the Board's orders; and
- (c) We are advised by the Human Rights Commission that the Complainant has provided the Respondents, via express post, further particulars and documentation in support of her claim for actual losses, as ordered;

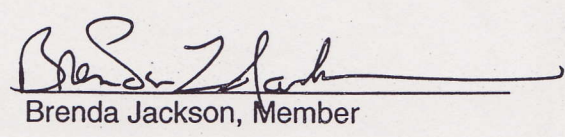
THIS BOARD ORDERS:

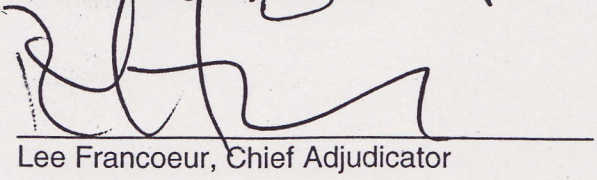
1. The Respondents, Howard Suffesick, Douglas Brown and Sign Post Corner Inc., are jointly and severally liable for sexual harassment against the Complainant, Tatiana Baczkowski.
2. The Respondents must pay to the Complainant an amount for actual losses incurred as a result of the sexual harassment on March 9th, 1998 until she regained full employment, which sum totals \$7,099.83.
3. The Respondents must further pay to the Complainant interest on the actual losses of \$7,099.83 at the rate of 6.5 % per annum from March 9th, 1998 until April 28th, 2000, for total interest of \$987.46.
4. The Respondents must pay an award to the Complainant of \$2,000.00 for injury to dignity, feelings and self-respect.
5. The total sum due from the Respondents to the Complainant is:

a)	Actual losses	\$ 7,099.83
b)	Interest	\$ 987.46
c)	Award	<u>\$ 2,000.00</u>
	TOTAL	\$10,087.29
6. The Respondents, Douglas Brown and Sign Post Corner Inc., must establish a sexual harassment policy which clearly lays out that sexual harassment will not be tolerated on the work place premises known as Watson Lake Tags and establishes a procedure for dealing with sexual harassment.
7. The Respondents, Douglas Brown and Sign Post Corner Inc., must place a sign in the location accessible by employees, indicating that sexual harassment in the work place will not be tolerated.

This Order of the Yukon Human Rights Commission has been made this 29th day of May, 2000 at the City of Whitehorse, in the Yukon Territory.


Michael Dougherty, Member


Brenda Jackson, Member


Lee Francoeur, Chief Adjudicator