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## **Termination of a Labor Contract on the ground of “Sexual Harassment”**

### **Case Presentation:**

Mr. Xiao started to work at the Company “X” (the “**Employer**”) in Shanghai on September 18, 2009. The Employee Handbook of the Employer signed by Mr. Xiao stipulated that “*The Employer shall be entitled to terminate the labor contract if: ...; (8) the employee has other faults with serious situations, such as fighting and theft;*”

On October 29, 2014, the Employer issued the following notice letter to the employee: “*Mr. Xiao conducted the sexual harassment to Ms. Zhang, which caused Ms. Zhang fears and is scared to come back to work...*”, and terminated the labor contract with Mr. Xiao by the reason of sexual harassment, which is deemed as other faults.

Further to the issuance of the abovementioned notice letter, Mr. Xiao filed a lawsuit<sup>i</sup> against the Employer and claimed that the termination of his labor contract was unlawful because he considered the alleged facts untrue and requested for economic compensation.

In the process of arbitration and subsequent trial, the Employer mainly presented the following evidences:

- The testimonies issued by the witnesses in writing to prove that Mr. Xiao used to conduct also behaviors considered as sexual harassment to other employees at the Company, not only to Ms. Zhang;
- The testimonies issued by Ms. Zhang and Mr. Wang (Ms. Zhang’s husband) as well as the proof provided by Ms. Chen (the manager of the Employer) in writing to prove that, after the occurrence of the sexual harassment conduct, Mr. Xiao refused to apologize to Ms. Zhang and Ms. Zhang was scared to be come back to work;
- The notice letter and the Employee Handbook to prove that Mr. Xiao’s behavior qualified as other faults (i.e. sexual harassment) is considered a violation of the Employee Handbook, based on which the Employer terminated his labor contract.

During the hearing, Mr. Xiao stated that Ms. Zhang said to him that some dust came into her eyes, so he playfully offered to blow the dust out of her eyes. Although Ms. Zhang refused and pushed him away, he still gripped her arms and turned her around, holding her in his arms. He considers that such behavior was a simple joke between colleagues rather than sexual harassment.

### **Viewpoint of the Judge:**

- Can Mr. Xiao’s behavior be considered sexual harassment?

The Court of second-instance considers that the communications between colleagues shall have the appropriate boundary, which falls into the standard for the proper behaviors in a

company's environment, and comply with the public order and morals. Based on the verified facts, Mr. Xiao conducted some improper behaviors towards Ms. Zhang during the performance of work, pulled and embraced Ms. Zhang without her consent, which caused Ms. Zhang fear to come back to work. This conduct was considered to have already exceeded the aforesaid appropriate boundary.

- Is the early termination of the labor contract lawful?

According to the provisions of the PRC Labor Contract Law, if an employee seriously violates the labor disciplines and internal rules of the employer, the employer shall be entitled to terminate the labor contract. However, the employer has the burden of proof regarding the facts basis of the violation and the legality of the termination procedure.

In this case, the evidences gathered and provided by the Employer successfully formed the evidence link to prove all the alleged facts. Although Mr. Xiao asserted his behavior was just a joke between colleagues, he actually confirmed his active behavior. Furthermore, it is considered that Mr. Xiao's behavior always fell within the scope of "Other Faults".

Since Mr. Xiao was already aware of the contents of the Employee Handbook and carried out anyway behaviors to other employees considered sexual harassment in violation of the Employee Handbook, the Employer was entitled to lawfully terminate the labor contract without paying an economic compensation. Moreover, the Employer also followed the termination procedure provided by law by consulting to the competent trade union before issuing the notice letter.

#### DS Comments:

European countries have been fighting long time against sexual harassment and established the *European Institute for Gender Equity* to protect the rights and interests of both women and children. This Institute released *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, which clearly defines the concept of sexual harassment. According to this Convention, sexual harassment refers to "any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment". And this Convention encourages everyone to take the necessary legal action or other measures to ensure that sexual harassment is subject to criminal or other legal sanctions.

However in China, sexual harassment is still a sensitive topic, on which the society keeps silence. Currently, only the *Law of the PRC on the Protection of Rights and Interests of Women* ("**Women Protection Law**") refers to sexual harassment providing that the sexual harassment against women is prohibited and the female victims shall be entitled to file complaints to the companies and relevant authorities. However, Women Protection Law fails to mention the definition, the scope and the extent of sexual harassment, which always lead to disputes when judging whether a behavior is considered sexual harassment or not.

In such context, when employers terminate labor contracts on the ground of sexual harassment, they face serious risks of being considered unlawful terminations since Chinese courts always apply a strict and heavy burden of proof on the employers while analyzing the behavior considered as sexual harassment, making it very difficult to prove such kind of behaviors. This resumes the actual practice for example in big cities such as Beijing and Shanghai.

According to the current judgments already published online, the success rate of an employer terminating the labor contract on the ground of sexual harassment is only 30%, which is very low. It is

also more effective if the employer provides evidences which can prove a physical behavior (e.g.: physical contact, such as touching, embracing, grabbing and pushing someone) than just words (e.g.: some meaningful words which may cause uncomfortable feeling to others, such as someone saying “*I would like to be your psychologist*”, “*you always appear in my dreams*”). In some cases, although the employers can provide specific recordings and messages, the courts still hold the opinions that only improper words cannot be regarded as sexual harassment. Besides, it shall also be noted that once the termination of a labor contract on the ground of sexual harassment is judged unlawful, the employer faces an additional risk that the concerned employee may file a lawsuit for infringement of his reputation.

This case is a good example because the Court confirmed the alleged facts based on the complete and sufficient evidences provided by the Company and supported the Company’s assertion that the early termination of the labor contract was lawful. The Employer was able to successfully terminate the labor contract because of the satisfaction of the following conditions:

- Provision support: according to the Employee Handbook, sexual harassment is a conduct included in “*Other Faults*” and any behavior falling within the scope of “*Other Faults*” shall be deemed as a serious violation of the Employee Handbook, which entitles the Employer to immediately terminate the labor contract. In addition, since the Employee Handbook has already been duly implemented at the Company, its provisions are valid and binding on all the employees. Consequently, the Employer actually has the basis to lawfully terminate the labor contract.
- Evidence support: Based on the statement of Mr. Xiao as well as the ones of the testimonies provided by the Employer, Mr. Xiao’s intentional behavior of pulling and embracing Ms. Zhang is confirmed. After receiving the complaint, the Employer conducted the investigation and kept all the records. The evidences in this case are sufficient to build the case.
- Lawful termination procedure: Before issuing the notice letter, the Employer has consulted the trade union and served the notice letter directly to Mr. Xiao.

#### **Tips for DS clients:**

In order to provide the employees with a work environment that is free from all forms of harassment, not only sexual harassment, and protect the employer’s right to terminate the labor contract by any such reason, we advise you to consider the following points:

- Formulate an anti-harassment policy in the internal rules of the company or add a provision in the labor contract, which shall include the definition, the scope, the extent and the procedure of any kind of harassment:

*“The company is committed to providing a work environment that is free from all forms of discrimination and conduct that can be considered harassment, coercive or disruptive. Actions, words, jokes or comments, based on an individual’s gender, race, color, national origin, age, religion, disability, sexual orientation or any other legally protected characteristics, shall not be tolerated. All the employees, including the management of the company, shall be subject to disciplinary action up to termination of the employment contract for any violation of the aforesaid policy.”*

- Add also a specific clause related to sexual harassment:

*“Sexual harassment refers to any unwelcome sexual advances, requests for sexual favors and any verbal or physical conduct of sexual nature, during the recruitment of an employee and/or during his/her employment at the Company, creating an intimidating, hostile, or offensive work environment. Any sexual harassment, conducted by an employee or by the management of the Company, shall be deemed as a serious violation of the company’s internal rules. Once verified, the company shall be entitled to immediately terminate the labor contract of the concerned employee without assuming any legal liability.”*

- After the occurrence of the sexual harassment conduct leading to a complaint, the company shall promptly investigate, collect and safely keep the evidences, including but not limited to collect the statement of the victim, the testimony of other witnesses, messages, recordings, emails, videos and records from the police station (if any). Please note, it is also important to have a talk with the employee accused of conducting sexual harassment immediately after receiving the complaint, for the purpose of obtaining the first-time evidence and leaving such employee no chance to change his statement.
- Comply with the employment termination procedures provided by PRC laws when dismissing the employee accused of conducting sexual harassment, the termination notice shall be served to the employee himself and the wording describing the sexual harassment conduct shall be cautious. Otherwise, it may leave the employee a chance to claim against the employer on the ground of infringement of reputation. Furthermore, the termination notice shall not be published or spread for the purpose of avoiding potential reputation disputes.

The references and procedure described here above can also be applied to any case of terminating the labor contract on the ground of harassment.

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<sup>i</sup> In China, we implement the system of “one arbitration, two trials” and “labor arbitration should be firstly lodged”. That is, firstly the claim shall be submitted to the labor arbitration committee for arbitration and, afterwards, either party is entitled to file litigation before the people’s court if it is unsatisfied with the arbitration award issued by the labor arbitration committee. Moreover, either party shall also be entitled to file an appeal before the people’s court if it is unsatisfied with the first instance judgment.