4. Legal responsibility for human rights at work

a) Employers

Employers have the primary obligation to make sure their workplace is free from discrimination and harassment. Employers are expected to proactively provide a workplace where human rights are respected and employees afforded equal opportunities. This includes working with unions to negotiate collective agreements that are consistent with the *Code*.

Despite proactive measures to prevent human rights complaints, human rights issues will arise from time to time. Employers must respond to allegations of human rights violations in a timely and effective manner. For more information, see Section IV-1 – "Creating a workplace that complies with the *Code*" and Section IV-12 – "Resolving human rights issues in the workplace."

Employers violate the *Code* when they:

1. directly or indirectly, intentionally or unintentionally infringe the *Code*
2. constructively discriminate
3. do not directly infringe the *Code* but rather authorize, condone, adopt or ratify behaviour that is contrary to the *Code*.

When an employee contravenes the *Code* in the course of employment, the employer may be liable. Under section 46.3 of the *Code*, this only applies to discriminatory conduct and not to cases of harassment. Under this "vicarious liability" provision in the *Code*, the employer can be responsible even if it did not know of the discriminatory conduct or, did not condone it, and even if it actively discouraged that conduct. However, proactive steps on the part of an employer will be taken into account by a Tribunal when ordering remedies. This can result in the company having to pay less in damages even when it is deemed to be "vicariously liable." Also, an employer may be vicariously liable for the acts of third parties, such as consumers, visitors and customers, who discriminate against its employees.[26]

The employer is also liable for the acts of an employee who is a "directing mind" of a corporation, who discriminates against or harasses anyone in a way contrary to the *Code*, or who knew of the harassment and did not take steps to remedy the situation.

In general terms, an employee who performs management duties is part of the "directing mind" of a company. Even employees with only supervisory authority may be viewed as part of a company's "directing mind" if they function, or are seen to function, as representatives of the organization.

Non-supervisors may be considered part of the "directing mind" if they have assumed supervisory authority or have significant responsibility for guiding employees. For example, a member of the bargaining unit who acts as a lead-hand may be considered to be part of the "directing mind."

An employer's liability for harassment or discrimination committed by its employees and agents is not necessarily limited to the workplace or work hours. Human rights law includes the notion of the "extended workplace." Employers could be liable for behaviour or actions that occur away from the physical workplace, but that have implications or repercussions in the workplace. For example, staff may be held liable for discriminatory incidents taking place during business trips, company parties or other company-related functions. An organization providing services to the public may be found responsible for an employee's off-duty actions if they lead to a poisoned environment and a denial of the right to equal treatment in services.[27]

> **Example:** A school board does not discipline a teacher for public anti-Semitic comment and conduct during his free time. This was found to have poisoned the education environment for the Jewish students, given the teacher's position of trust and influence within the school. The infringement of the teacher's Charter right to freedom or religion was justified.

Employers cannot contract out of the protections in the *Code* with employees or with unions. An employer, jointly with employees and (if applicable) the union, is responsible for finding the most appropriate way to accommodate employees' needs that are protected by the *Code*. The fact that a union is not cooperating in providing accommodation does not relieve the employer of its own responsibility to accommodate. This obligation is limited only by undue hardship. See also Section III-4d) – "Unions" and Section IV-12f) – "Contracting out versus settling a complaint."

b) Senior managers

Senior managers are part of the "directing mind" of the employer, and their actions are considered to be those of the organization itself. Therefore, an employer is liable for any breach of the *Code* committed by a senior manager.

If a senior manager knew of workplace harassment or a "poisoned environment" and did not take steps to remedy the situation, the organization could also be held liable. Upon becoming aware of harassment, a senior manager should take prompt and appropriate steps to remedy the situation. This may involve arranging for an independent professional to mediate, to set up dialogue between the parties or to conduct an investigation and, if warranted, to suggest appropriate discipline. Having a clear and effective anti-discrimination policy that is regularly reinforced through training can help a senior manager know what to do in these situations. See also the Commission's newly revised policy, "Guidelines on Developing Human Rights Policies and Procedures" and Section IV-12 – "Resolving human rights issues in the workplace."

c) Employees

Employees have a legal responsibility to treat fellow employees in a way that is consistent with the *Code*. A co-worker who infringes a right of another employee can be named as a personal respondent in a human rights complaint. This may include co-workers who are at the same level in the organization, and also discriminatory treatment by any employee against any other employee in the organization, regardless of their level.

An employee would also be expected to take part in good faith in human rights training and educational activities. Employees should also know that the Commission has recommended that organizations collect data as a means of proactively identifying, preventing and addressing racial discrimination. When they follow the principles set out in the Commission's policies, measures such as employee surveys can improve the workplace for all employees, and should not be opposed by employees without justification. Employees who have concerns about an employer's approach to data collection can refer the employer to the Commission's Guidelines for Collecting Data on Enumerated Grounds Under the Code. Inappropriate data collection could be the
basis for a human rights complaint.

An employee who seeks accommodation for a need related to a ground in the *Code* must give enough information to the employer to verify the need, and must specify what accommodation is required. For example, an employee requesting accommodation for a disability or pregnancy-related need may be expected to provide information from a qualified professional confirming the existence of a need, and identifying the accommodation that would be appropriate. An employee with a caregiving need arising from family status may, in some cases, legitimately be asked to provide documentation about his or her needs.

> **Example:** An employee has a lengthy history of absenteeism, and has in the past been disciplined for failing to provide valid reasons for absences. When this employee requests flexible start and finish times to address a new eldercare responsibility, the employer asks for more information to verify that the need exists.