

## LAW AND SEXUAL HARRASMENT IN THE WORKPLACE

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**Abstract.** Sexual harassment is a worldwide problem which occurs commonly in organizational cultures like the workplace, schools, and Higher Institutions. We hear about it either through media reports, hearsay from colleagues, friends or neighbours. It can happen in private or public. Though this undesirable behaviour may have been committed, some victims prefer to remain silent thereby escalating the situation. These victims are afraid that if they file a complaint against the harasser, especially when he is a superior to the victims, or a highly-regarded person, some retaliatory actions may be taken against them and this could destroy their future or career. Unfortunately, the society also believes that it is better to keep the mouth shut rather than suffer from any consequences or social pressures. Since this issue is still in dispute and unsettled, the writer wishes to discuss it from the perspective of a few aspects of law and practice in Malaysia especially under the employment law. This paper is actually about sexual harassment at the workplace focusing on three matters. The three matters the writer wishes to highlight are firstly, the situations of sexual harassment, secondly, the law relating to sexual harassment; i.e. what are the possible actions the employees can take when sexual harassment is done by an employer or a co-worker, and finally, some suggestions relating to this matter especially relating to laws which are inadequate to overcome the problem.

### Introduction

It is a common perception that the workplace environment is safe and free from any forms of violence. As an employee it is your right to work in a peaceful, harmonious, conducive and safe system of work environment. However your life may be messed up and your job performance may be slackened by the occurrence of an undesirable or an unwelcome behavior like your colleague sending sexually provocative pornographic pictures or an offensive message through e-mails or SMS or by using cyber stalking or making obscene calls or your employer or supervisor start making body contacts and asking for sexual favours or your superior blackmailing or forcing you to do something which is intolerable. In facing this kind of undesirable and unacceptable incidents; definitely as a victim you will feel panicky, offended, humiliated, embarrassed, angry, fear, depressed and you will also suffer stress as a result of this harassment. Your performance may be affected by poor attention to your job, dread of work and inability to work. In addition, besides suffering from these emotional effects you are may also be suffering physical effects such as loss of sleep, headaches, loss of weight and other ailments.

As a cheerful and productive employee, do you realize that you have been deprived of enjoyment of your employment status? In fact, you are now working in an intimidating, hostile, offensive and hazardous work environment. As a victim how should you react? Should you allow the harasser to go on repeating his disgusting behaviour or should you take active steps to lodge a report that your fundamental rights and dignity as an employee have been violated. Bear in mind, Article 8(1) of the Federal Constitution clearly prohibits sex discrimination. Men and women are not to be treated differently in the workplace because of their gender. If they are sexually harassed, they will equally be protected under the law. Furthermore Article 8(2) clearly forbids gender discrimination in employment. Notably, this is in line with Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which serves to remove the gap of sex discrimination against women in order to ensure that women's human rights are always protected, and Article 1 of the Universal Declaration of Human Rights, which provides all human beings are born free and equal in dignity and rights.

### An Overview of Sexual Harassment

Sexual harassment commonly happens without border, regardless of your marital status, religion, gender or ethnic. It does not only occur among men and women (heterosexual i.e. men to women or women to men) of all backgrounds and job categories<sup>1</sup>, but it can also happen among the same sex <sup>2</sup> (homosexual i.e. men to men or women to women) which may involve a variety of heterosexual economic relationships from slavery to secretarial work. Sexual harassment is an unwanted sexual relation or unpleasant act imposed by superiors on subordinates at work.<sup>3</sup> According to psychologists, usually harassers gain sexual pleasure by targeting victims who are weak. These victims are usually those who have less economic or social power, while the harassers are usually those who are more dominant or with positions of authority and power in the workplace.<sup>4</sup> Therefore the harasser is usually the boss while the victim is a subordinate, or the harasser may be a teacher while the victim is a student, or the harasser is a man while the victim is a woman.<sup>5</sup> It is also usual that the harasser may be a colleague of the victim.<sup>6</sup>

From a study of researches done, sexual harassment mostly involves a male offender and a female victim. It is an unwelcome one sided behaviour and it is done intentionally and repeatedly. A further study indicates that sexual harassment is most likely to be aimed at certain groups of women, who are usually young, unmarried or divorced. These women are more

likely to receive unwelcome looks, gestures, teasing, dirty jokes, touching and unwelcome phone calls.<sup>7</sup> In fact, these men treated these women as sex objects. No occupation is immune to sexual harassment but women who work isolated from others and who are always with their bosses, like secretaries or personal assistants are more likely to be exposed to this kind of unpleasant misconduct. Women who are working in factories or women who work as social escorts, dancers or waitresses<sup>8</sup> are also similarly exposed. Studies have also found that women experience a higher rate of sexual harassment, with figures ranging from 40 to 80 percent of female employees reporting sexual harassment on their jobs committed by their male colleagues or supervisors (Aggarwal, 1992; Earle and Madek, 1993; ILO; 2001). In Malaysia, the first survey on sexual harassment was conducted by the Women's Section of the Malaysian Trade Congress (MTUC) in 1987. The study found that 11 to 90 percent of the female respondents experienced sexual harassment in the workplace (cited in Sabitha 2000). In the 1990s, a survey of 586 public administrators (422 men and 164 women) in the northern states of peninsular Malaysia reported that 43.4 percent of men and 53 percent of women faced at least one form of sexual harassment (Sabitha, 1999)<sup>9</sup>.

Actually the intention of harassing, is to frighten or shock the victim, to impress or to offend the victims.<sup>10</sup> Regrettably women are more often victims of sex discrimination or sexual harassment. Employers should not discriminate in respect of conditions of employment, and sexual harassment constitutes a condition of employment that penalizes women.<sup>11</sup>

According to the Minister of Human Resources; Datuk Seri Dr. Fong Chan Onn, the number of sexual harassment cases in the workplace has increased to 247 cases since the Code of Practice on the Prevention and Eradication of Sexual Harassment was introduced in 1999. It was reported that the highest number of complaints was received in 2000. Due to the increased number of this incident and lack of attention and slow response by the employer in adopting the Code and implementing the policies, Datuk Seri then suggested that something must be done to the Employment Act 1955 so that an employer can take a prompt action in solving this matter.<sup>12</sup>

#### Definition and Types of Sexual Harassment

It is necessary to have a clear definition of what behavior or comments can be construed as sexual harassment. This is because some behaviour or comments that are acceptable to some people may be offending to others. Men and women may have different perceptions over the same behaviour or comments. For example men may consider body-contacts at workplace as merely social touching, but women may view them negatively as sexual touching. Furthermore, men enjoy making and sharing obscene jokes<sup>13</sup>, but women on the other hand may view these jokes very negatively. If the employees are happy having a good time exchanging sexual jokes then it cannot be considered as sexual harassment<sup>14</sup>. Since it is quite difficult to determine whether a particular behaviour can be considered as sexual harassment due to difficulty of measurement, certain circumstances will be taken into account like the victims' upbringing, culture, socioeconomic and religious sensitivities<sup>15</sup>. The important thing is that the alleged acts must be offensive, severe, intimidating, severe, undesirable, pervasive and unwelcome. In *Reed & Bull Information Systems v Stedmen*<sup>16</sup>, the Employment Appeal Tribunal pointed out that the essential characteristic of sexual harassment is that it constitutes conduct or words which are unwelcome to the victim. This depends upon the victim to decide what is acceptable and what is unwelcome or offensive, provided that a reasonable person would understand him or her to be rejecting the conduct or whatever that he/she is complaining about. Then, a continuation of this conduct would be regarded as sexual harassment.

Thus, sexual harassment is an unwelcome conduct in the workplace if a victim does not solicit or initiate the conduct; and when a victim regards such conduct as undesirable and offensive, and serious in nature. In Tokyo; a man who repeatedly asked a female co-worker, to pull-out strands of his beard hair was found guilty by the court for sexual harassment. He and his employer had to pay damages for US \$5,000 (RM18,000) to the victim<sup>17</sup>.

Generally sexual harassment is broadly defined as a form of violence against women and as a discriminatory treatment. While national laws focus more on the illegal conduct, the United Nations General Recommendations 19 to the Convention on the Elimination of all Forms of Discrimination Against Women defines sexual harassment as such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has been reasonably disadvantaged in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment. The International Labor Organization (ILO) has stressed sexual harassment as a prohibited form of sex discrimination. It is a safety and health problem and an unacceptable working condition, which can be considered as violence primarily against women.<sup>18</sup> However the European Union (EU), and the Council of Europe (COE) considered sexual harassment as illegal behaviour. It is defined as unwanted conduct of sexual nature, or other conduct based on sex affecting the dignity of women and men at work. This includes unwelcome physical, verbal or non-verbal conduct. This conduct can be construed as sexual harassment under three conditions namely; 1) the behaviour must be unwanted, improper and offensive, 2) refusal or acceptance of behaviour influences decisions concerning a job, 3) the behaviour in question creates a working climate that is intimidating, hostile or humiliating for the person.<sup>19</sup> United States is one of the first countries to define sexual harassment as a prohibited form

of sex discrimination that violates Civil Rights Act.<sup>20</sup>

The American Psychological Association defines sexual harassment as making deliberate or repeated comments, gestures or physical contacts of super nature which are unwanted by the recipient. It is something to do with power and sex. It is coercive, exploitative and an improper use of power for sexual gratification.<sup>21</sup> In *Chief Constable of Lincolnshire Police v Stubbs*,<sup>22</sup> sexual harassment has been defined as unwanted conduct of sexual nature or conduct based on sex affecting the dignity of women and men at work.

Though there is a lack of standard definition of sexual harassment, it is agreed based on all the definitions available, that sexual harassment constitutes a prohibited behaviour that is unwanted and causes harm to the victim. For this behaviour to be considered as sexual harassment, there are certain conditions to be met. First, the action is related to sex or sexual conduct. Second, the conduct is unwelcome, not returned or not mutual, and third, the conduct affects the terms of conditions of employment which includes the work environment.

Sexual harassment involves a very wide range of situations, one of which involves tangible benefits. This type of harassment is known as quid pro harassment, and it is the most common. It involves the exchange of benefits by supervisor or employers for sexual favors from a subordinate employee. In such a situation, the superior demands sexual consideration in exchange for employment benefit(s). For example when a boss threatens to fire his personal assistant because she refuses to have sexual relations with him. The second type of sexual harassment involves conducts that contribute to a hostile or offensive working environment. For instance, when the working environment has been polluted by verbal and physical abuses.<sup>23</sup> It can be inflicted by both supervisor and co-workers. For such behaviour to qualify as sexual harassment, it must be unwelcome and the offending behaviour must be sufficiently severe and pervasive, so as to create an environment that a reasonable victim would find hostile or abusive.<sup>24</sup> Whether a conduct is hostile or abusive can be determined by looking at all the circumstances. These may include the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating or mere offensive utterance; and whether it unreasonably interferes with an employee's working environment. The effect on the employee's psychology is of course relevant in determining whether a victim actually finds the environment abusive.<sup>25</sup> The following instances can be construed as sexual harassment such as sexually tainted jokes, physically molesting female staffers by touching their bodies, sending pornographic materials in order to embarrass the victims and verbal advances and suggestions of a lewd and sexual nature.<sup>26</sup>

#### Malaysian Law and Sexual Harassment in the context of Working Relations

The problem of sexual harassment can become worse when the victims hesitate to make a complaint to their superior. They might consider it a personal matter. Some victims prefer to ignore it by avoiding the harassers or put a blame on them or may be personally confront them. Other reasons are probably because they are ignorant about the law, confused whether the alleged behaviour can be construed as sexual harassment, and worried that they might be considered as exaggerating a story or making false charges or afraid that they will be a target of retaliatory action by the boss like being transferred or being denied their promotions and/or their employment benefits. Or perhaps several reports have been made to the management but nothing was done. Each of these may be a real case that happened in a workplace. There is no doubt that sexual harassment is rampant and cannot be avoided unless and until the management adopt, implement and follow proper rules. Otherwise, the victims will definitely feel that they cannot enjoy the same rights and benefits like other colleagues. They will feel that unequal treatment persists. However, one thing that these victims should remember is that simply ignoring the behavior is not effective in combating this problem. On the contrary, it may be considered as condoning or encouraging the harasser to keep on repeating his offensive act.

A survey of 3,139 female respondents, revealed experiences of sexual harassment ranging from sexual remarks to pressures for dates and attempted or completed rape. The survey revealed that forty six percent of the victims asserted that they were not interested to ask or to tell their harassers to stop, 12 percent tried to avoid their harassers, 11 percent reported the incidents to a higher authority. Only 2.5 percent lodged complaints through formal channels.<sup>27</sup> Recently, a research reported that 56.9 percent of women harassed in a private sector workplace directly told their harassers that they disliked what the harassers were doing, 69.5 percent sought advice or support, while 75 percent avoided their harassers and thirty five percent talked to their supervisors or union representatives<sup>28</sup>. Other researches indicate similar results.<sup>29</sup>

It is undeniable that the occurrence of sexual harassment definitely violates the fundamental principles of human rights, namely the right to a safe and healthy working environment. It should be borne in mind that though victims may not be objecting to acts of sexual harassment, it does not mean that there is consent on their part or sexual harassment does not exist at all.

**(i) What are the steps to be taken by victims?** In facing incidents of sexual harassment, victims and potential victims can minimize its damaging effects by taking steps to prevent or deal with this problem. These steps can either be taking formal or informal actions against the harassers. If the harassment does not concern physical abuse or threat, victims can

use informal actions like talking to the harasser or sending notes to him. If this step proved to be ineffective, they can get help from their colleagues or superiors. Victims can detail up each incident. They have to keep the evidence such as notes or phone messages or photographs sent by the harassers and make all complaints and reports in writing. If such a report has been made; fair, thorough and confidential investigation must be conducted. This investigation can help to prevent retaliation against the victims. However, if these efforts too proved ineffective, then victims are advised to take a formal action against the harasser. They have to identify the laws and rules, or the workplace procedures that the harasser has violated. They also need to try to get witnesses who can corroborate their complaint.<sup>30</sup>

In relation to sexual harassment at the workplace, there are certain laws available, such as law of contract, tort, criminal and employment. In some industrialized countries sexual harassment victims can take action against the perpetrators under the contract law such as they may claim for damages or injunction or claim harassment in tort for interference with an employee's contract, invasion of privacy amounting to emotional distress, negligence, false imprisonment, and in fact they can even treat this matter as criminal charges which can be applied to severe cases like rape, battery or extortion. Some states used to apply general labor laws to cases relating to harassment. Therefore sexual harassment is not only a criminal offence but a tortious wrong and labor violations.

**(ii) Code of Practice on the Prevention and Eradication of Sexual Harassment at the Workplace and The Penal Code.** In Malaysia we don't have a specific Act dealing with sexual harassment. We have Code of Practice on the Prevention and Eradication of Sexual Harassment at the Workplace. This Code of Practice provides guidelines for employers to set up in-house mechanisms which consist of a policy statement prohibiting sexual harassment in the organization, a definition of sexual harassment, a complaint or grievance procedure, disciplinary rules and penalties imposed on the harasser and against those who make false accusations, protective and remedial measures for the victims and promotional and educational programmes. This code is meant for educating and fostering awareness, ensuring that a working environment is free from sexual harassment and teach victims how to lodge a complaint to their management. This code is only a guideline of proper conduct at the workplace, to be observed by the employers or employees. It is not binding and it depends on each employer to adopt their own policy based on this Code.

As regards to the definition of sexual harassment, article 4 of the Code of Practice on the Prevention and Eradication of Sexual Harassment states that sexual harassment is any unwanted conduct of sexual nature having the effect of verbal, non-verbal, psychological or physical harassment: (i) that might, on reasonable grounds, be perceived by the recipient as placing a condition of sexual nature on her/his employment or (ii) that might, on reasonable grounds, be perceived by the recipient as an offence, humiliation, or a threat to her/his well-being, but has no direct link to her/his employment.

Article 5 addresses various categories of sexual harassment which can be divided into sexual coercion and sexual annoyance. Sexual coercion is sexual harassment that results in some direct consequence to the victim's employment. An example of sexual harassment of this coercive kind is where a superior, who has the power of salary and promotion, attempts to coerce a subordinate to grant sexual favours. If the subordinates accedes to the superior's sexual solicitation, job benefits will follow. Conversely, if the subordinate refuses, job benefits are denied. On the other hand, sexual annoyance is sexually-related conduct that is offensive, hostile or intimidating to the recipient, but nonetheless has no direct link to any job benefit. However, the recipient will have to tolerate an annoying conduct and a bothersome working environment in order to continue working. A sexual harassment by an employee against a co-employee falls into this category.

Article 6 mentions sexual harassment at the workplace which includes any employment-related sexual harassment occurring outside the workplace as a result of employment responsibilities or employment relationships. Situations under which such employment-related sexual harassment may take place includes, but is not limited to: (i) at work-related social functions; (ii) in the course of work assignment outside the workplace; (iii) at work related conferences or training sessions; (iv) during work-related travel; (v) over the phone; and (iv) through electronic media.

Article 7 then further states that sexual harassment refers to sexual conducts which are unwanted and unwelcome by the recipient. It also includes a sexual conduct which is imposed on and unsolicited or unreciprocated by the recipient.

Article 8 encompasses various conducts of a sexual nature which can manifest themselves in five possible forms, namely, (i) verbal harassment such as offensive or suggestive remarks, comments, jokes, jesting, kidding, sounds, questioning; (ii) non-verbal /gestural harassment such as leering or staring with suggestive overtones, licking lips or holding or eating food provocatively, hand signal or sign language denoting sexual activity, persistent flirting; (iii) visual harassment for example showing pornographic materials, drawing sex-based sketches or writing sex-based letters, sexual exposure; (iv) psychological harassment such as repeated unwanted social invitations, relentless proposals for dates or physical intimacy; (v) physical harassment for example inappropriate touching, patting, pinching, stroking, brushing up against the body, hugging, kissing, fondling and sexual assault.

Article 10 to 12 of the Code further states about the policy statement prohibiting sexual harassment. From these provisions,

the company should introduce a policy statement which contain the following matters: a declaration prohibiting sexual harassment in the organization, a caution stating that sexual harassment constitutes a breach of the company's policy and will incur disciplinary actions up to and including dismissal and a directive stating that supervisors and managers have a positive duty to implement the policy and to demonstrate leadership by example.

Article 15 to 18 deal with complaint/ grievance procedure. Since sexual harassment complaints are of sensitive and personal nature, article 16 provides that employers should develop a separate complaint procedure to deal specifically with such complaints. The normal complaint procedure is often unsuitable for sexual harassment complaint. Article 17 then states that a complaint procedure should provide measures to protect victims from further embarrassment in the course of reporting and investigating the complaint. Article 18 further provides a complaint procedure which should contain the following elements such as (i) a step by step procedure for reporting and processing of a complaint with a suitable time limit for each step; (ii) an investigation procedure; and (iii) an appeal procedure to enable dissatisfied party to appeal against outcome of an investigation to a higher authority.

Article 18 to 20 further provides for disciplinary rules and penalties. To ensure that a policy and a mechanism to prevent sexual harassment is effective, the offenders should be disciplined. This is stated in article 18. Article 19 of the Code then stresses that the disciplinary rules should set up the penalties to which the harasser will be liable if the offence is committed. The nature and type of penalty depend upon the severity of the offence. Article 20 then mentions that since sexual harassment is a form of misconduct, any disciplinary action against the accused employee should be preceded by a proper domestic inquiry. Article 21 further provides that in order to deter false and fabricated accusation, the rule set out disciplinary penalties against those who make such accusations.

Article 23 to 26 deal with protective and remedial measures for the victims. In order to encourage victims to report sexual harassment, article 23 of the Code states that there should be adequate measure to ensure maximum confidentiality so as to minimize embarrassment to the victim especially at the time of reporting and in the course of investigation into the complaint. In a case where the victim has suffered loss such as a demotion or a denial of a promotion then article 24 further provides that it is appropriate to restore such person to his or her proper position on the job. Hence, article 25 mentions that the victim should also be compensated for any monetary loss arising out of a denial of employment-related benefits which were rightfully due to him or her. Article 26 states that where the complaint is found to be unjustified and baseless, appropriate remedy should be granted to the accused if he has suffered any loss.

Article 27 to 30 deal with promotional and educational programmes. Prevention is the most effective tool an employer can use to eradicate sexual harassment at the workplace. Article 27 states that preventive actions include communication, education and training. Merely developing a corporate policy and preventive mechanism on sexual harassment is not sufficient. Then article 28 of the Code further provides that it is the dissemination of the policy and mechanism among the employees in the organization that is of paramount importance. In addition to the need for communication, article 29 states that the employer should provide a programme by which employees and supervisors could be educated in the area of sexual harassment. In fact the employer should also provide special training sessions for supervisory and managerial staff to train them

If the nature of the offence committed by the harasser is serious or involves physical injury; there are certain provisions available under the Penal Code such as committing an offence by using criminal force without the victim's consent,<sup>31</sup> the offence of assault or use of criminal force to a person with intent to outrage his/her modesty,<sup>32</sup> assault or criminal force with intent to dishonour a person,<sup>33</sup> rape,<sup>34</sup> unnatural offences against a person for example having carnal intercourse against the order of nature,<sup>35</sup> outrages on decency,<sup>36</sup> criminal intimidation,<sup>37</sup> and uttering any word or making gestures intended to insult the modesty of a person<sup>38</sup>.

**(iii) Duties of Employers under Employment Law.** The question arose whether employers will be automatically liable for the sexual harassment acts done by his employees? What is the situation if the employers do not have policies against sexual harassment? The next question is whether the employers' ignorance of harassment done by his employees automatically relieve them from liability? The answer to these questions depends on whether the harasser was a co-worker or supervisor of the victim, whether the victim suffered job detriment and whether the company had sexual harassment policies, training and grievance procedure. Generally, it should be borne in mind that, employees have the right to a safe working environment. Under a general rule of employment law, it is the duty of an employer to provide such environment. Employers are strictly liable and they can be sued for harassment done by the employees or co-workers whether they are aware or should aware of it. Especially if they were, and yet took no action to stop or prevent it.<sup>39</sup>

Under common law, it is the general duties of employers towards his employees to safeguard the health and welfare of the employees at work.<sup>40</sup> There are three fundamental policies that must be observed by the employers. These are : 1) the safety of employees are paramount 2) every effort must be made to reduce the possibility of accidents 3) safety will take precedence over expediency.<sup>41</sup> Employers also have a legal responsibility to eliminate foreseeable or preventable hazards

from the work environment.<sup>42</sup> In Malaysia, there is no specific legislation dealing specifically with sexual harassment at the workplace. Basically there are three laws outlining the rights and obligations of employers and employees at the work place such as The Employment Act 1955, Industrial Relations Act 1967 and The Occupational Safety and Health Act 1994. Although these Acts do not specifically mention the word sexual harassment, they can be used as a guideline to be observed by every employer and employee in taking an action against the harasser. The laws relating to safety, or certain measures concerning safety have been introduced namely the Occupational Safety and Health Act 1994. Section 15(1) of the Act clearly mentions that it is the duty of an employer or self employed person to ensure the safety, health and welfare activities of all his employees at the workplace. In such a case, if an employee complains to a higher management that she has been a victim of sexual harassment committed by her supervisor or her colleague, the employer must take a prompt action by investigating such complaint. In *Melewar Corporation Bhd. V Abu Osman*,<sup>43</sup> the Industrial Court pointed out that an employer, who receives credible information or complaint that one of his employees is a victim of sexual harassment of another of his employees, has the duty to inquire into the allegation of misconduct. If pursuant to a due inquiry, the allegation of sexual harassment is found to have been proven, the employer has the duty to act firmly against the errant employee. An appropriate disciplinary punishment meted against such an employee by the employer can hardly be tantamount to constructive dismissal. The court further stated that in law, an employer owes a contractual obligation to his employees, female or otherwise, to ensure that he provides a safe and conducive working environment in which they can function.

In the context of the problem of sexual harassment at the workplace it cannot be emphasized strongly enough that the employer would be in breach of a fundamental and essential term of the employment contract existing between the employer and his employees if he fails to take steps to put a stop to acts of sexual harassment which has been duly brought to his attention. Such a breach would indeed be a basis for the employee who has been sexually harassed to down tool and leave her job. She would then have the right to deem that the employer has, by his repudiatory breach, constructively dismissed her from her employment. In such a circumstance, it would be the employee who has been sexually harassed who is entitled to call in aid the doctrine of “constructive dismissal”, and to seek her remedies in law.

Section 14 (1) of the Employment Act 1955, entitles the employer the right to punish an employee for misconduct. An employee who committed a sexual harassment can be dismissed, downgraded, or imposed any lesser punishment if found guilty after due inquiry. Subsection (3) then mentions that an employee may terminate his contract of service without notice if he is threatened with danger, violence or disease.

Dismissal is the last resort to be taken if the harasser has committed serious or major misconduct or when he repeatedly committed minor cases. Whether a particular act is a serious one, depends on the circumstances of the case.<sup>44</sup>

If the company has grievance procedure which requires the employee to file a grievance at the moment a supervisor or a colleague sexually harassed him or her, he or she should solve the problem inside the company by bringing this matter to a higher management before going to the Ministry for Human Resources. The Ministry can only intervene unless a victim is dismissed from work. A Labour officer can only advise the employers to investigate the case as misconduct. However, sometimes some of the employers refused to conduct an inquiry.<sup>45</sup> Section 20 of the Industrial Relations Act 1967 entitles a victim of sexual harassment to challenge his/her employer’s action by taking the initiative to leave his/her employment when the actions and behaviour of the employer are unacceptable or unreasonable and which amount to breach of contract. This type of termination is known as constructive dismissal. By virtue of section 20, an employee can make a representation in writing to the Director General if he/she considers he/she has been dismissed from the service without just cause or excuse. The representation must be done within sixty days from the date of dismissal. The officers of the Department will try to settle the dispute through the process of conciliation. If they fail, the dispute will be sent to the minister of Human Resource who may then send the case to the Industrial Court for arbitration.

Since sexual harassment in employment is a serious and pervasive problem, the writer would like to share some suggestions. Perhaps these suggestions can suppress or reduce the widespread of this incident at the workplace.

### Suggestions

1. Since the existing laws and the procedures have not sufficiently protected victims for example the Code of Practice on the Prevention and Eradication of Sexual Harassment at the workplace is only a guideline to be followed by the employers and there is no legal force so as to make it binding and compulsory for them to adopt the Code and implement it; therefore a special Act, specifically dealing with sexual harassment, must be framed similar to the Domestic Violence Act 1994 which has been enforced specifically for legal protection in situations of domestic violence incidental thereto. Due to the vague definition of sexual harassment stated in the Code of Practice, the proposed Act should provide a specific legal definition of sexual harassment so that everybody knows exactly what are the acts which amount to sexual harassment. The Act must also take into account the occurrence of sexual harassment in all other places and not only restricted to the workplace. This is because the incidents may happen not only in private but also in public. The Act must also detail

out a grievance procedure when dealing with sexual harassment complaints. This is important for any potential victim or victims to make a proper report to the parties concerned. Perhaps by having this Act, the employer can be compelled to implement and adopt anti-sexual harassment policy, it will protect victims from being re-victimized or at least it will control the violation of women’s human rights and dignity. More importantly, the harasser will be accountable for his act. It should be borne in mind that the absence of this Act and the loopholes of the existing policies commenced by the organizations, will affect and undermine the victim’s physical and economic activities and no doubt it will restrict their productivity and social development to the loss of their organizations as well as their nation.

2. Every workplace must establish grievance procedures and must respond to all rumors and complaints promptly. Every employer must examine each case individually, considering evidence and judging it reasonably and fairly. An appropriate corrective action must be taken so that it will prevent a recurrence of the action of the harasser and to rectify the harm caused to victims. Certain considerations must be taken into account for example the position of the employee, the acts involved, duration of the acts, the seriousness of the actions, by looking at the employer’s anti-sexual harassment policy, the harasser’s past record; his prior history of sexual harassment and other methods used to deter sexual harassment. The punishment does not necessarily amount to dismissal. It depends much on how serious is the act committed by the harasser. The punishment should fit the crime. Perhaps the offender can be disciplined according to the seriousness and the frequency of his conduct. All these guidelines must be observed by the employer. This is so because it is important to build and maintain the rapport between employers and employees so that a victim will not lose confidence and the employer will not lose his credibility when an alleged misconduct is reported. Furthermore, this will help the employer to establish gender equality where no sex discrimination is being practiced by the work force. In fact it can establish a zero-tolerance policy regarding sexual harassment committed against the employee. It is also hoped this will stop retaliatory actions on the employer’s part like transferring, firing or letting the victim quit her job. It is costly to hire and to train a new employee in order to replace the victim. If the harasser is still working at the place in question, replacement employees are likely to experience the same kind of harassment and with the same results.

3. Corporations, institutions, and governments should recognize the necessity of formulating and enforcing a sexual harassment policy. A directive approach must be exercised. The policies as well as the discipline procedures must be established and made clear. Effective anti harassment policy must be put in writing and made available to all employees. This includes stating clearly types of conduct considered intolerant behaviour or sexual harassment; and the risks that employees will face should they be involved in these kinds of behavior. The most important consideration here is to protect victims from public pressure. These actions are intended to elucidate the applicable norm while letting it known to the employees that the employer take this matter seriously.

4. Research must be carried out in order to know the prevalence of sexual harassment problem, and to check and monitor how far the employers adopt and implement anti-sexual harassment policy at the workplace. Perhaps some strategies or approaches can be identified to prevent the incidents from occurring.

5. There must be a system for tracking the incidence and outcome of the complaints. This is due to the fact that many victims are reluctant to report such an incident because it might ruin their career. An informal system for complaint or grievance resolution must be set up like a toll free number or hot lines to provide confidential counseling and legal advice. Doing this, can facilitate the organization in obtaining the relevant information on the reported case.

6. Foster and heighten the society’s awareness about sexual harassment. Governmental agencies must establish programmes for the prevention of the prevalence of incidents of sexual harassment. For example like having or organizing programmes and educational initiatives which provide discussion and information about gender roles and relationships. Publicity campaigns must be broadened and a helpline handled by the Ministry of National Unity and Social Department must be established. In fact every employer should be compelled to conduct an energetic and innovative campaign at their workplace.

7. Certain training and induction courses or programmes involving issues of morality, discipline and a standard code of ethics must be organized for and attended by employees. A clear procedure for dealing with the problem of sexual harassment must be explained to ensure that all employees are informed what acts are construed as sexual harassment. Employees must be advised to keep a record or any other evidence of harassment for the investigating committee, should he/ she is a victim. This kind of exposure is very important as guidelines for the employees to derive knowledge and awareness about their professional boundaries; that they can learn how to respect rights, dignity, worth of other employees and the importance of human relationships.

8. Due to the rapid spread of the internet and e-mail, employers should monitor and check the computer activities of their employees. A filtering software can be used to prevent employees from accessing certain websites which contain pornographic or sexually explicit materials. This preventive action should be taken not only for security reasons but also to avoid or to prevent misuse of the company resources for personal purposes or online harassment at the workplace. At

least on the employers' part they have indicated their commitment in restricting their liability for employees' misconduct of sexual harassment and can stop them from causing harm, offending and humiliating others.

### Conclusion

Sexual harassment is a problem that will not only affect a victim but also the management and the organization as a whole. Such a situation, obviously hinders the realization of organizational goals and will greatly affect the productivity of the organization. Ignoring this matter will hinder or deny the contribution of the affected employees' economic and social life to our communities and nation.

Though the occurrence of sexual harassment cannot be fully prevented, the sensitivity of this issue must be taken into consideration. In order to stop this issue from becoming a major social disease at the workplace, and in order to promote gender sensitivity and a just and caring society; all parties involved whether government agencies or non-governmental organizations must engage and work together to combat this problem. Whatever remedial actions suggested and decided upon should be given due and prompt attention. In fact, all organizations must observe, implement and monitor the organizational rules, regulations as well as the procedures against sexual harassment at the workplace. More importantly this is a strong message stating the seriousness of the problem. This is a message that strongly and assertively re-state that the workplace must be free from any offensive, intimidating and hostile environment. Finally, this is a message asserting that prevention is the best tool to eliminate sexual harassment at the workplace.

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