

**A CRITICAL EXAMINATION OF THE PANDEMIC OF
SEXUAL HARASSMENT IN THE SOUTH AFRICAN
WORKPLACE**

BY

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**THIS RESEARCH PROJECT IS SUBMITTED IN PARTIAL FULFILMENT OF THE
REGULATIONS FOR THE LL.M DEGREE OF THE UNIVERSITY OF KWAZULU-
NATAL**

DECLARATION

I,do hereby declare that unless specifically indicated to the contrary in this text, this dissertation is my own original work and has not been submitted to any other university in full or partial fulfilment of the academic requirements of any other degree or other qualification.

Signed at Pietermaritzburg on this the day of

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STATEMENT OF ORIGINALITY

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DEDICATION

This dissertation is dedicated to my late aunt and cousin Saraswathie and Prathna Ramsundhar. Their support, love and constant unfailing encouragement throughout my life and academic career has been truly humbling. It has been a privilege to have you both in my life and I truly hope that you both are proud of the woman I have become.

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ABSTRACT

South African just like many international countries is a country sadly marked by severe violence especially violence against women. Women face violence both at home in the form of domestic violence as well as in the workplace in the form of sexual harassment. Many studies have been conducted over the years showing us that the statistics surrounding sexual harassment in the workplace is on the increase.

Women face sexual harassment no matter the role they may play within the workplace. However, the Constitution the highest law in the land states that no person may be discriminated or harassed in any form within their place of work. This sadly does not decrease the high percentage of sexual harassment cases that do not get reported over time. This is due to women being afraid to report the sexual harassment. This may be for an array of reasons such as fear of losing their jobs or being labelled as trouble- makers.

Sexual harassment has over the years in various legal contexts had different definitions however; the South African definition states that the attention that sexual harassment derives must be unwanted. Harassers may range from the ordinary co-worker, to the employer and even a third party such as a client or customer can be the harasser. It is also possible that any innocent acts can also be misconstrued to becoming an act of sexual harassment therefore it is important that readers are aware of what acts constitute sexual harassment and what does not within the working environment. This can also be possible by looking to international law to gauge an international perspective regarding sexual harassment.

In an employment context employers are obliged to have sexual harassment policies in place in order to protect their employees from any unwanted sexual harassment. Employees who are faced with sexual harassment are not necessarily female as male employees also face sexual harassment therefore policies and procedures are open to protecting all employees facing unwanted sexual attention or harassment or the employer will be liable to the employee in the form of damages. However, damages are not the only remedy available to employees facing unwanted sexual harassment because the sexual harassment can lead to the employee whose productivity at the workplace or health condition has deteriorated to the extent the complainant suffers from post-traumatic stress disorder or whose emotional well-being had been affected due to the harassment.

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CHAPTER ONE

INTRODUCTION

1.1.THE TITLE

A Critical Examination of the Pandemic of Sexual Harassment In the South African Workplace

1.2.THE INTRODUCTION

On a daily basis South African women face various forms of discrimination and violence such as rape or domestic abuse. Women in the workplace face the same predicament in the form of sexual harassment either by their co-workers, employers or supervisors and third parties who have a link to the workplace. However, “sexual harassment is not limited to the workplace because it may occur in the classroom, in parliamentary chambers and churches.”¹ Importantly sexual harassment is not directed at women only, “it is accepted that more women than men are the victims of sexual harassment”² but that does not erase the fact that male employees also face sexual harassment. Sexual harassment does also take place between members of the same sex however, women are predominantly the victims.

Sexual harassment is said to be a “systematic, arbitrary abuse of male power and authority used to extract sexual favours, remind women of their inferior ascribed status, and deprive women of employment opportunities and equality.”³ This form of power play by the perpetrator makes the working environment unpleasant for the victim. Power therefore plays a central role in sexual harassment cases and reflects an “unequal relationship that is exploitive.”⁴ However, it is reiterated that not all sexual harassment victims are female and male employees also face sexual harassment within the workplace.

Women regardless of age or profession have the right to choose their sexual partners because by doing so this allows them to exercise control over their lives instead of being pressured to

¹ AP Aggarwal *Sexual Harassment In The Workplace* 2nded (1992) 1

² A Basson ‘Sexual Harassment In The Workplace: An Overview of Developments’ (2007) 18(3) *Stellenbosch Law Review* 425

³ AP Aggarwal (Note 1 above): 7-8

⁴ DM Mello ‘The Pathology of Sexual Harassment In The South African Public Service’ (2007) 42(5) *Journal of Public Administration* 124

form a sexual relationship with a person in an authoritative position. This form of abuse of power will intimidate a victim into not reporting the harassment out of fear of not being believed.

At the turn of the century sexual harassment has been once again thrust into the spotlight therefore it is concerning to note that “many people are surprised and shocked to learn how widespread and deep-rooted the practice of sexual harassment is in the workplace.”⁵ This could possibly be because many women do not report the sexual harassment out of fear of being victimized. In modern society many women’s organizations such as POWA were formed and whose mission it has become to “openly demand equity, fairness, and justice in the workplace and in their social life.”⁶ It is largely through these women’s empowerment organizations that sexual harassment has come into the forefront due to studies being conducted in various workplaces regarding sexual harassment on female employees. It is due to these studies that it was discovered that a large percentage of women have experienced some form of sexual harassment in their lifetime.

1.3.THE BACKGROUND

A South African study referred to revealed that “68 per cent of women are exposed to sexual harassment at least once in their lifetime, which could be regarded as an extrapolation of the broader violence in the country.”⁷ This statistic can be considered accurate since violence against women in South Africa is a prevalent transgression that occurs not only at home but in the workplace as well.

The Constitution⁸ the highest law in the land states that no person may be discriminated against or harassed at their place of work. However, “researchers estimate that 80 to 90 per cent of sexual harassment cases go unreported.”⁹ South African statistics are equally problematic. It is estimated that “76 per cent of all women are exposed to sexual harassment at some point during their careers and professional lives.”¹⁰ Most female employees fail to report the sexual harassment as they fear losing their jobs or being seen by others in what many would term as being “loose women”.

⁵ AP Aggarwal (Note 1 above): 6

⁶ AP Aggarwal (Note 1 above): 2

⁷ DM Smit & DJ Viviers ‘Vicarious Liability of the Employer in Sexual Harassment Cases: A Comparative Study’ (2016) 1(1) *Journal of Business* 2

⁸ The Constitution of the Republic of South Africa 108 of 1996

⁹ E Snyman-Van Deventer & J De Bruin ‘Sexual Harassment in South African and American Law’ (2002) *Acta Academica Supplementum* 197

¹⁰ Ibid

This dissertation will focus on the laws and legislation that are in place such as The Employment Equity Act,¹¹ The Labour Relations Act,¹² and The Codes of Good Practice on the Handling of Sexual Harassment Cases (both the 1998 and 2005 codes)¹³ inspect how these prime examples of legislation deals with the scourge of sexual harassment occurring in many of South Africa's workplaces. The dissertation will look at international laws and how these law deal with the on-going transgression of sexual harassment abroad.

1.4.THE STATEMENT OF PURPOSE

The definition of sexual harassment in a South African context was established in the landmark case of *J v M Ltd*¹⁴ which stated that sexual harassment was unwanted attention in the employment environment.¹⁵ This definition and other various definitions regarding what constitutes sexual harassment will be carefully looked at. Any myths or misconceptions surrounding what type of behaviour or conduct constitutes sexual harassment will be examined closely in respect of the legislation within the dissertation. This will help the reader to understand what sexual harassment entails and what the legislation considers to be sexual harassment in a South African context. However; international law will also be looked at to give an alternative view to this growing problem.

The purpose of the dissertation is to look at the legislation and the sexual harassment policies that employers have in place to protect employees both male and female from any form of sexual harassment.

In summary this dissertation will consider all avenues that involve any form of sexual harassment and how employer's deal with the transgression by utilizing the available legislation to combat sexual harassment. The dissertation will then look at who is liable for the harassment (the harasser who can be either the employer, co-employee or a third party or is it the employer's omission regarding the harassment that makes the employer liable) and what remedies are available to the complainant/victim whose productivity at the workplace or health condition have deteriorated to the extent the complainant suffers from post-traumatic stress disorder or whose emotional well-being has been affected due to the sexual harassment.

¹¹ The Employment Equity Act 55 of 1998

¹² The Labour Relations Act 66 of 1995

¹³ The Code of Good Practice on the Handling of Sexual Harassment Cases of 1998 (GG 19049 of July 1998) and The Code of Good Practice on the Handling of Sexual Harassment Cases of 2005 (GN 27865 GG 482)

¹⁴ *J v M Ltd* (1989) ILJ 755 (IC)

¹⁵ Ibid

1.5.THE RATIONALE OF THE STUDY

The research undertaken in this dissertation endeavours to establish what forms and behaviours constitute sexual harassment within the working environment that many female and occasionally male employees' encounter. The research undertaken in this dissertation will attempt to establish where liability lies in respect of the sexual harassment the employee may encounter. The dissertation research will also focus on employer sexual harassment policies, what the sexual harassment policy should entail and whether or not they are effective in bringing forth remedies to the victim or if the victim has to pursue the matter through the court system.

1.6.THE RESEARCH QUESTIONS

As previously stated in the chapter the dissertation aims to take a closer look at the pandemic of sexual harassment in the workplace and to scrutinize whether the legislation in place is sufficient to fight this transgression since statistics are not favourable in the fight against sexual harassment in South Africa. The following questions/objectives will be considered within the dissertation:

- i. What is the legal definition of sexual harassment in a South African context?
- ii. What are the most prevalent forms of sexual harassment within the workplace?
- iii. Can the employer be held liable when an employee is sexually harassed at the workplace? Will the employer also face liability if the perpetrator is falsely accused?
- iv. What are the remedies available to the victim of sexual harassment and how potent are these remedies?

1.7.THE RESEARCH METHODOLOGY

There will be no information gathered from any third parties through interviews or questionnaires regarding this dissertation. In respect of this dissertation qualitative research methods will be utilized. Simply put this dissertation will feature desktop research in the form of journal articles, books, case law, statutes and legislation in place. These various forms of knowledge will be gathered from Google, Google Scholar, the Juta and Lexis-Nexis websites, Sabinet Online, Hein Online and West Law.

1.8. THE LITERATURE REVIEW

In preparing the topic of sexual harassment in the workplace for this dissertation the literature was varied and gathered from various textbooks and books from the libraries. A large variety of sources and authors work within the field have been consulted to provide an insight to the topic. Prominent authors have been consulted within this body of work both nationally and internationally and this work will be used to contrast the international perspective to the South African prospective. This would help to see if there are any gaps within the South African understanding of sexual harassment.

Other forms of literature such as case law, journals, legislation and statutes such as South Africa's own Employment Equity Act will be referred to throughout, and will help to illustrate crucial points regarding the topic both nationally and internationally. These various sources will help clarify various myths regarding sexual harassment in the workplace.

1.9. STRUCTURE OF THE DISSERTATION

i. Chapter 1 (Introduction)

This chapter includes the following headings; introduction, background, rationale, purpose of study, research question, research methodology and literature review.

ii. Chapter 2 (Introduction to Sexual Harassment)

This chapter includes an introduction to what sexual harassment is. The chapter will also investigate the various definitions of what sexual harassment is both locally and internationally and in respect of case law in conjunction with the Codes of Good Practice (both the 1998 and 2005 Code). The various forms of sexual harassment such as physical, verbal and non-verbal conduct will also be looked at.

iii. Chapter 3 (Liability)

This chapter will focus on liability. The chapter will also focus on an employer's liability to an employee who faces harassment by third parties or co-employees. Another aspect to be focused on will be the employer's liability to an employee who has been wrongfully accused of sexual harassment.

iv. Chapter 4 (Measures the Employer takes to Combat Sexual Harassment)

This chapter will focus on the various measures an employer may take when attempting to curb harassment in the workplace. The various measures that will be inspected include the grievance procedure, formal and informal complaint systems, sexual harassment policies and policy statements to name a few.

v. Chapter 5 (The Employees Recourse/Remedies Against Offenders)

This chapter will focus on the various recourses/remedies the employee can seek against their employer or harasser. These remedies include damages in delict, resigning and claiming constructive dismissal, laying of criminal charges to name a few examples.

vi. Chapter 6 (Conclusion)

This chapter focuses on summing up the arguments made in the previous chapters by stating the impact that sexual harassment has on the victims (both male and female) regarding their personal and professional lives. The impact that sexual harassment has on the employers business is looked at if the employer is the harasser or continues to allow the harassment of the employee by other employees or third parties to continue instead of curbing the problem. In conclusion this chapter attempts to illustrate within the dissertation that sexual harassment within the workplace is an ever-growing concern that needs to be curbed urgently.

CHAPTER TWO

INTRODUCTION TO SEXUAL HARASSMENT

2.1. INTRODUCTION

When one pictures a woman the image that is conjured is that of a mother who represents a nurturing figure to her loved ones. However, there are many who will attest that this is a stereotypical view. Women are not only caregivers and mothers but excel in the corporate world as well. However, within the confines of society women are considered a vulnerable group. This is due to the increase of violence against women in the form of rape, domestic violence and even sexual harassment in the workplace. A study utilized by Smit and Viviers mentioned in the previous chapter provides a statistic that is considered relevant within the current South African climate. This is because violence against women is a prevalent transgression that occurs both at home and in the workplace. However, it is important to note that this is not only a national transgression but is also an international hindrance.

Under the South African Constitution¹⁶ s9 states that no person may be discriminated or harassed at their place of work. The Constitution of the Republic of South Africa affords its citizens various rights regardless of race and gender. This right encompasses both male and female employees although most victims are usually female. There is, however, a high rate of unreported harassment cases due to female employees fearing the loss of their jobs. This is because female employees have “a fear of not being believed, of victimisation, of stigmatisation, of being blamed and a fear of the disciplinary process involved are further reasons for the low reporting rate and the small incidence of false reports of sexual violence and sexual harassment.”¹⁷ It therefore encompasses the word of the victim versus the word of the accused.

Sexual harassment therefore has proven to not only be “an attack on the equal rights of women; it also violates her right to integrity of her body and personality.”¹⁸ This is a right that is afforded to every citizen of the country. The seriousness of woman’s rights being violated

¹⁶ Note 8 above

¹⁷ S Jagwanth, PJ Schwikkard & B Grant *Women and the Law* (1998) 40-41

¹⁸ J Linnegar & K McGillivray *Women and the Law in South Africa* (1989) 169

due to sexual harassment was aptly pointed out in *Motsamai v Everite Building Products (Pty) Ltd*¹⁹ where the court held that:

‘sexual harassment is the most heinous conduct that plagues the workplace, not only is it demeaning to the victim it undermines the dignity, integrity and self-worth of the employee harassed’

2.2. DEFINITION OF SEXUAL HARASSMENT

Halfkenny herself explains that “South Africa has no specific laws prohibiting sexual harassment.”²⁰ It is also further identified that there is no exact definition in legislation of what sexual harassment is. Although the ILO Convention (which South Africa is a member) in terms of equality the Discrimination (Employment and Occupation) Convention 111 of 1958 prohibits unfair discrimination on the specific grounds of sex, gender and sexual orientation however, there is also no specific reference to sexual harassment.

The ILO then employed a Committee of Experts on the Application of Conventions and Recommendations who stressed that although sexual harassment is not explicitly mentioned in the convention it should be considered as a form of sexual assault.

On a closer inspection of the South African legislation enacted s6(3) of the Employment Equity Act (herein referred to as EEA) harassment is only mentioned under s6(1) as a ground of unfair discrimination. There is no mention of sexual harassment in particular. This lack of statutory definition regarding sexual harassment may leave victims feeling exposed.

In one of the very first South African cases dealing with sexual harassment *J v M Ltd*²¹ the court defined sexual harassment to be unwanted sexual attention in the employment environment. Smit and Van Der Nest at page 522 of their article quote the abovementioned case but pointed out that the court stated that “in its narrowest form, sexual harassment occurs when a woman is expected to engage in sexual activity in order to obtain or keep her employment, or obtain promotion or other favourable working conditions.”²² The authors’

¹⁹ [2011] 2 BLLR 144 (LAC)

²⁰P Halfkenny ‘Legal and Workplace Solutions to Sexual Harassment in South Africa (Part 2): The South African Experience’ (1996) 17(2) *Industrial Law Journal* 215

²¹ (1989) *ILJ* 755 (IC)

²²N Smit & D Van der Nest ‘When Sisters are Doing for Themselves: Sexual Harassment Claims in the Workplace’ (2004) 1(3) *TSAR* 522

further state on the same page that in its wider form sexual harassment would be “any unwanted sexual behaviour or comment, which has a negative effect on the recipient.”²³

The act of sexual harassment “occurs across the lines of age, marital status, physical appearance, race, class, occupation, and any other factor.”²⁴ Sexual harassment victims often feel degraded and humiliated therefore they are “generally sensitive and considered private, women feel embarrassed, demeaned, and intimidated by these incidents.”²⁵ The victims “feel afraid, despairing, utterly alone, and complicit”²⁶ because this is not the sort of experience once discusses readily²⁷. Many victims tend to keep quiet or not report the sexual harassment to higher authorities out of fear of the perpetrators retaliation.

It is possible that an employer “used his/her power over the employee to demand a sexual favour”²⁸ hence the employees silence. It is important to note that power is central to sexual harassment²⁹ therefore “sexual harassment reflects an unequal relationship that is exploitive.”³⁰ Snyman- Van Deventer and De Bruin highlight the exploitive aspects of a working relationship to be “threatening an employee with failure to hire, demotion, termination, unfavourable transfer, a decrease in responsibilities or some other negative impact.”³¹

Although *J v M Ltd*³² was one of the very first cases that defined sexual harassment the concept has various interpretations. Grobler et al state that “sexual harassment constitutes behaviour of a sexual nature that leads to, and perpetuates, a working environment in which it becomes unpleasant to work, and if allowed to go unchecked, will lead to the underperformance of the company’s human capital.”³³ The authors state at page 36 that sexual harassment manifests itself into psychological and physiological effects such as “depression, frustration, decreased self-esteem and fatigue which, in turn, lead to decreased

²³ Ibid

²⁴ CA Mackinnon *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979) 28

²⁵ CA Mackinnon (Note 24 above): 27

²⁶ Ibid

²⁷ Ibid

²⁸ E Snyman- Van Deventer & J De Bruin (Note 9 above): 199

²⁹ DM Mello (Note 4 above): 124

³⁰ Ibid

³¹ E Snyman- Van Deventer & J De Bruin (Note 9 above): 199

³² Note 14 above

³³ PA Grobler, BJ Erasmus & RK Kolkenbeck-Ruh ‘A Model for the Management of Sexual Harassment in South African Companies’ (2003) 12(1) *Management Dynamics* 36

productivity and increased absenteeism.”³⁴ This reiterates that “sexual harassment denies one the opportunity to study or work without being subjected to sexual exactions.”³⁵

Due to the *J v M* case and South Africa ratifying the ILO’s Convention in 1997 the National Economic Development and Labour Council (herein referred to as NEDLAC) prompted the creation of the Code of Good Practice on the Handling of Sexual Harassment cases of 1998 which was later revised in the 2005 code on the ILO’s specifications. According to the Code of Good Practice of 1998 item 3(2) stipulates that:

‘sexual attention (which on the face of it is regarded as acceptable) will amount to sexual harassment (the unacceptable form of attention) when the attention has been received on a continuous or repetitious basis (although the code recognizes that a single incident of sexual attention has made it clear that the sexual harassment if it’s serious enough), and/or if the recipient of the attention has made it clear that the sexual advances are not welcome and/or the party making the advances was aware or should have reasonably been aware that his conduct is unacceptable’

The 1998 Code reiterates that sexual harassment entails unwanted conduct of a sexual nature³⁶. The 2005 Code unlike its predecessor the 1998 Code is able to “provide better guidance in sexual harassment cases across the board, regardless of the relevant circumstances (whether it is a matter of sexual harassment as a form of misconduct for dismissal purposes or a matter of unfair discrimination in terms of the EEA).”³⁷ Within the 2005 Code Item 3 states that “sexual harassment in the working environment is a form of unfair discrimination and is prohibited on the grounds of sex and/or gender and/or sexual orientation.”³⁸

A leading difference between the two codes is that the act of sexual harassment is deemed to be an unwelcome act. Item 5.2 of the 2005 Code states that “there are various methods a recipient of such conduct can utilize to communicate to the perpetrator that his or her advances are welcome, whether it is done verbally or implicitly.”³⁹ The 1998 Code does not mention what reaction is needed from the victim regarding sexual harassment unlike the 2005 Code.

³⁴ Ibid

³⁵ CA Mackinnon (Note 24 above): 25

³⁶ A Botes ‘Identifying Sexual Harassment in the Workplace? Do Not Forget to Remember the Code of Good Practice’ (2005) 36 *Industrial Law Journal* 7

³⁷ A Botes (Note 36 above): 10

³⁸ Ibid

³⁹ A Botes (Note 36 above): 11

In respect of international law, the European Code of Practice⁴⁰ defines sexual harassment as:

‘unwanted conduct of a 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.’

The European Code of Practice’s definition unlike the South African definitions an employer recognizes that both men and women may face harassment from either an employer or co-worker. In respect of another international perspective from our own continent African countries such as Namibia, Zimbabwe and Lesotho on the other hand cover sexual harassment under their labour legislation as discrimination.

Namibian labour legislation has no definition regarding sexual harassment although it prohibits any forms of sexual and racial harassment. Section 107(1) of the Namibian Labour Act “prohibits unfair discrimination or harassment in employment or occupation based on sex, race, colour, ethnic origin, religion, creed, social or economic status, political opinion or marital status or sexual orientation, family responsibilities or disability.”⁴¹ The Act therefore covers both the discriminated and the discriminator. However, from the time the act was implemented till now no sexual harassment cases have been brought forward under this Act.

Zimbabwe on the other hand has no case law or statute law regarding the problem of sexual harassment. However, a claim for sexual harassment may be made through Public Service Regulations which “include sexual harassment as one type of misconduct for which a person may be disciplined.”⁴² Lastly, Lesotho labour law “prohibits discrimination in the employment or occupation based on race and sex, among others, with a specific prohibition of sexual harassment.”⁴³

It is clear that each country has their own labour legislation governing sexual harassment accordingly and their definitions tend to vary. However, it is unfortunate that “without a statutory or case law definition of sexual harassment in any of the above countries, it is difficult to assess the benefit these laws will provide”⁴⁴ in respect of a comparison to South African legislation.

⁴⁰P Halfkenny ‘Legal and Workplace Solutions to Sexual Harassment in South Africa (Part 1): Lessons from Other Countries’ (1995) 16(1) *Industrial Law Journal* 12

⁴¹ Ibid

⁴² Ibid

⁴³ Ibid

⁴⁴ P Halfkenny (Note 38 above): 14

2.3. FORMS AND BEHAVIOUR CONSTITUTING SEXUAL HARASSMENT

In the case of *J Mampuru v PUTCO*⁴⁵ the Industrial Court stated that:

‘Sexual harassment may take many forms. It may be trivial, it may be verbal but gross, or it may be physical, again varying from trivial or gross. It may be a single act or an act may be repeated. The actions as such disclose a total disregard for the feelings and the integrity of the recipient’

As per the abovementioned statement it highlights that sexual harassment may be trivial act or it can morph into a serious act that threatens the victim’s wellbeing. Item 4 of the 1998 Code describes what actions constitute sexual harassment such as verbal, non-verbal, quid pro quo harassment and sexual favouritism. However, within the 2005 Code the same forms of sexual harassment as per Item 4 of the 1998 Code are found in Item 5.3 with the addition of victimisation as another form.

2.3.1. PHYSICAL CONDUCT

Physical conduct is associated with sexual harassment encompasses touching to sexual assault and unfortunately even rape. In *J v M Ltd*⁴⁶ the applicant had “sexually harassed another complainant a much older woman, by caressing and/or slapping her buttocks and fondling her breasts.”⁴⁷ And in *Ntsabo v Real Security CC*⁴⁸ the applicant was employed as a security guard claimed her supervisor had harassed her on a regular basis and had even assaulted her. Physical conduct also includes being strip-searched by someone of the opposite sex in presence of the opposite sex.

2.3.2. VERBAL CONDUCT

Verbal conduct includes the following behaviour “innuendos, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults, graphic comments about a person’s body made to that person or in their presence, enquiries about a person’s sex life or even whistling at a person or group of persons.”⁴⁹ The following medley of South African cases provides examples of verbal sexual harassment. In *Simmers v Campbell*

⁴⁵ Unreported, Industrial Court No NH 11/2/2136

⁴⁶ Note 14 above

⁴⁷ C Sutherland ‘Paying for Stolen Kisses: Sexual Harassment and the Law’ (1992) 1

⁴⁸ (2004) 1 BLLR 58 CC

⁴⁹ AC Basson et al *Essential Labour Law* 5th (2009) 223

*Scientific Africa (Pty) Ltd and Others*⁵⁰ it was alleged by the complainant that Mr Simmers made advances towards her and proceeded to invite her to his room after inquiring if she had a boyfriend. In *Mokone v Sahara Computers (Pty) Ltd*⁵¹ the applicant propositioned the complainant on numerous occasions requesting her to begin a sexual relationship with him and proceeded to touch her. In *Gregory v Russells (Pty) Ltd*⁵² the staff of the respondent alleged that a male colleague walked around the store with pornographic material and attempted to coax a female colleague to look at the pornography with him. Finally in *Gaga v Anglo Platinum Ltd*⁵³ the applicant was found guilty of sexually harassing his assistant for two (2) years by continually making unwelcome sexual advances, making suggestions of a sexual nature, requesting sexual favours and even suggesting they become sexually involved.

2.3.3. NON-VERBAL CONDUCT

This form of conduct includes “gestures, indecent exposure or the display of sexually explicit pictures and objects.”⁵⁴ Landman and Ndou in their article at page 82 state it also includes “following, watching, pursuing or accosting the complainant or a related person, or loitering outside of, or near, the building or place where the complainant or a related person resides, works, carried on business, studies, or happens to be.”⁵⁵ The authors’ further states on page 82 that this conduct involves the “sending, delivering or causing the delivery of letters, telegrams, packages, facsimile, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to or brought to the attention of, the complainant or a related person.”⁵⁶

2.3.4. QUID PRO QUO HARASSMENT

This form of harassment “occurs when a man or woman is forced into surrendering to sexual advances against his or her will for fear of losing a job related benefit (such as an increase in salary or even promotion).”⁵⁷ This type of coercion can also be used to get the victim a job benefit in the first place. Snyman-Van Deventer and De Bruin concur with Basson et al on page 199 when they state that “quid pro quo harassment occurs when a supervisor or

⁵⁰ (2014) 35 ILJ 2866 (LC)

⁵¹ (2010) 31 ILJ 2827 (GNP)

⁵² (1999) 20 ILJ 2145 (CCMA)

⁵³ CCMA 6 January 2009 Case No GAJB 25798-04 Unreported

⁵⁴ AC Basson et al (Note 49 above): 223

⁵⁵ AA Landman & MM Ndou ‘The Protection from Harassment Act and its Implications for the Workplace’ (2013) 22(9) *Contemporary Labour Law* 82

⁵⁶ Ibid

⁵⁷ AC Basson et al (Note 49 above): 223

employer threatens to inflict a work-related disadvantage on an employee if he or she fails to respond positively or invitingly to sexual advances.”⁵⁸ In the American case of *Williams v Saxbe (Bell)*⁵⁹ Williams was a black female employee who alleged that she previously had a good working relationship with her supervisor who was a black male until she had refused his sexual advances and therefore lost her job. Her supervisor then alleged that her poor work performance during this time period was the reason for her dismissal and not the sexual harassment.

This is also the same conclusion that Crain and Heischmidt came to regarding this form of harassment. The authors’ state on page 300 that this form of harassment is straightforward because “the employee accuses the harasser of denying job benefits such as promotion, salary increase, or a favourable assignment, or the harasser is accused of taking away job benefits by actions such as demotion or discharge because sexual favours were not granted.”⁶⁰ The following medley of foreign case law will attempt to show the reader what quid pro quo sexual harassment entails.

In the case of *Tomkins v Public Service Electric & Gas Co*⁶¹ Adrienne Tomkins at the time was a secretary who was invited to lunch by her boss ostensibly to discuss his recommendation of her for a promotion. At the bar her boss then began to drink heavily. When Tomkins realized that her work and promotion was not going to be discussed she asked to return to her work. Due to physical threats against her by her boss she was kept at the bar for several hours against her will. Her boss then expressed his desire to have a sexual relationship with her saying that it was necessary for there to be a satisfactory working relationship between the two.

In *Meritor Savings Bank, FSB v Vinson*⁶² Vinson was an assistant branch manager at Capital City Federal Savings and Loan Association. She claimed that while she was employed there her assistant branch assistant Sidney L Taylor had demanded sexual relations as compensation for hiring her and she had submitted to the demands because she was afraid that if she did not agree she would lose her job. She claimed the sexual harassment encompassed Taylor caressing her, following her into the ladies room, exposing himself to

⁵⁸ E Snyman- Van Deventer & J De Bruin (Note 9 above): 199

⁵⁹ 413 F. SUPP. 654, 660 (D.D.C. 1976)

⁶⁰ KA Crain & KA Heischmidt ‘Implementing Business Ethics: Sexual Harassment’ (1995) 14(4) *Journal of Business Ethics* 300 (BECOME FOOTNOTE61)

⁶¹ 422 F. SUPP. 553, 556 (D.N.J 1976)

⁶² 106 S. Ct. 2399 (1986)

her on several occasions and even going as far as raping her. Four years into the employment Vinson took indefinite leave and was later terminated after a few months due to an excessive use of leave. When Vinson brought the claim against Taylor the employer denied the claims and stated the sexual relationship was consensual and not due to her keeping her job.

2.3.5. HOSTILE WORK ENVIRONMENT

This harassment occurs if there is an abuse of the working relationship between the victim and perpetrator. This may affect the victim employees work performance thereby hampering the employee from performing their job adequately. A hostile work environment would be “created by jokes, sexual propositions or other sexual innuendos which are offensive to an employee but not necessarily directed against the employee as a person.”⁶³

While it is presumed that “the victim is not forced to leave as a direct result of such conduct, she may feel compelled to quit because her daily working conditions are made intolerable.”⁶⁴ The following foreign case presents a case of a hostile working environment. In *Corne and De Vane v Bausch & Lomb*⁶⁵ the applicants worked for the respondent had alleged they experienced repeated verbal and physical sexual advances and were propositioned by male colleagues who made their job intolerable therefore forcing them to resign while women who were sexually compliant had enhanced their employment status.

2.3.6. SEXUAL FAVOURITISM

This form of sexual harassment “exists where a person who is in a position of authority rewards only those who respond to his/her sexual advances, whilst other deserving employees who do not submit themselves to any sexual advances, are denied promotions, merit-ratings or salary increases.”⁶⁶ This is similar to quid pro quo harassment.

2.4. CONCLUSION

It is concerning that there still seems to be lack of definite definition for what sexual harassment entails. This unfortunately has allowed for this type of conduct to continue as a silent scourge for years (since many women and men do not report the matter). This silent denial to the problem is concerning.

⁶³ AC Basson et al (Note 49 above): 223

⁶⁴ SS Nel ‘A Comparative Review of the Law Regarding Sexual Harassment in the Workplace’ (1993) 36(1) *De Jure* 247

⁶⁵ 390 F.SUPP. 161, 163 (D Ariz. 1975)

⁶⁶ M Finnemore *Introduction to Labour Relations in South Africa* 10thed (2009) 340

As previously mentioned sexual harassment comes in various forms from a hug to the more serious acts such as physical assault or rape. This was illustrated from the use of foreign case law utilized in this section. The various forms and acts that constitute sexual harassment should be taken seriously because violence against women in South Africa is a crime on the increase therefore being educated about sexual harassment and how it is combatted in foreign jurisdictions allow for future victims to be alert for what acts constitute sexual harassment. It is indeed possible that innocent acts can be construed as sexual harassment when in fact it is not. It is also reiterated that there are male victims although most victims are predominantly female. However, regardless of whether the victim is male or female sexual harassment statistics regarding this problem is increasing and therefore needs to be curbed.

CHAPTER THREE

THE EMPLOYER'S LIABILITY REGARDING SEXUAL HARASSMENT IN THE WORKPLACE

3.1. INTRODUCTION

When a prospective employee enters the work environment he or she usually does not expect to face challenges such as sexual harassment from a co-worker, supervisor, manager or from the employer within the workplace. The threat of sexual harassment can however, also be due to the behaviour of third parties such as clients or suppliers. It therefore falls upon the employer (if he or she is not the harasser) to have “a duty to ensure a working environment that is physically healthy and safe for its workers, including their being free from sexual harassment.”⁶⁷

Employers, managers and supervisors “play a leading role in creating and maintaining a work environment in which sexual harassment is unacceptable.”⁶⁸ This entails that employers and managers “conduct should not cause offence and they should discourage unacceptable behaviour on the part of others.”⁶⁹ This implies employers and managers need to deter sexual harassment in the workplace. It is also implied that “this duty also extends to customers, suppliers and other people who have business dealings with the employer.”⁷⁰ It becomes the employer’s duty “to develop policies, procedures and guidelines to prevent sexual harassment in the workplace and their failure to do so might render the employer liable for the sexual harassment perpetrated by an employee.”⁷¹ It must be noted that the various policies, procedures and guidelines an employer may institute within the workplace to combat sexual harassment will be discussed in the forthcoming chapter.

An employer may also be found liable for the sexual harassment an employee faces if they do not investigate the complaint of sexual harassment. In the foreign case of *Heelan v Johns-Manville Corporation*⁷² Mary K Heelan claimed her refusal to have sexual relations with her supervisor Joseph Consigli resulted in her being fired. She claimed the company did nothing regarding her complaints. The court claimed that although Mrs Heelan had not followed the

⁶⁷ J Linnegar & K McGillivray (Note 18 above): 174

⁶⁸ R Le Roux, T Orleyn & A Rycroft *Sexual Harassment in the Workplace: Law, Policies and Processes* (2005) 43

⁶⁹ Ibid

⁷⁰ Ibid

⁷¹ Ibid

⁷² 451 F. SUPP. 1382, 1389 (D. Colo. 1978)

correct channels in making her complaints she had still brought forward complaints and this was crucial in finding the company liable. The court had found that Mrs Heelan had done everything within her power to bring her charges to the attention of top management. The court also stated that the company's investigation regarding the problem was inadequate and they therefore took no notice of the harassment even though Mrs Heelan had brought the problem to their attention.

Although there are various duties placed on an employer to protect his or her employees from sexual harassment many "employers, on the other hand, argue vigorously that they should not be held responsible for sexual harassment of their employees."⁷³ Employers are of the belief that "the perpetrators themselves should be held responsible for the conduct and not their employers"⁷⁴ therefore employer liability needs to be examined.

3.2. EMPLOYERS LIABILITY

3.2.1. EMPLOYERS LIABILITY FOR EMPLOYEES HARASSMENT BY CO-EMPLOYEES

3.2.1.1. VICARIOUS LIABILITY

It is the common assumption that every individual be liable for the wrongful acts they perform. It is therefore presumed that "an employee is also personally liable for the torts he commits while acting for himself or his employer."⁷⁵ This therefore raises vicarious liability. The test for vicarious liability within the employment context states that "an employer may be held liable to a third party for the delictual acts performed by its employees."⁷⁶ However, in order for the employer to be found vicariously liable the following requirements need to be met:

- "There must be an employer-employee relationship at the time the delict was committed"⁷⁷
- "The employee must have committed a delict"⁷⁸
- "The employee must have acted within the scope of his or her employment"⁷⁹

⁷³ AP Aggarwal (Note 1 above): 181

⁷⁴ Ibid

⁷⁵ AP Aggarwal (Note 1 above): 183

⁷⁶ ME Manamela 'Vicarious Liability: Paying for the Sins of Others' (2004) 16 *South African Mercantile Law Journal* 125-126

⁷⁷ ME Manamela (Note 76 above): 126

⁷⁸ Ibid

In terms of sexual harassment cases in a South African context “the employee would have to prove that, when the harassment took place, the perpetrator was acting within the course and scope of his or her employment.”⁸⁰ However, it is very unlikely a perpetrator would willingly admit to sexually harassing another within the course and scope of his employment. In *Grobler v Naspers ‘n Ander*⁸¹ the court had to look at the vicarious liability doctrine in a sexual harassment case. In *Grobler* the employee was a secretary who was being sexually harassed by her supervisor Samuels which resulted in her having an emotional breakdown. The employee claimed the employer failed to provide her with a safe working environment and was therefore vicariously liable. The court found the employer vicariously liable for the sexual harassment of one employee by another.

The case was appealed in *Media24 v Grobler*.⁸² The Supreme Court of Appeal found the employee had suffered sexual harassment. Smit and Viviers in their article at page 10 point out that the SCA stated

“in terms of the common law, the court said, employers owe their employees the duty to take reasonable care of their safety, which duty is not limited to protection from physical harm only, but also from psychological harm, which may manifest in the form of sexual harassment”⁸³.

This is essential because Grobler suffered from psychological problems after the harassment.

In terms of an international perspective Australian law however, holds a different position. The Australian Human Rights Commission (AHRC) states that:

“an employer can be held vicariously liable for the conduct of individual or groups of employees; supervisors or managers; workplace participants; agents; contract workers or persons being paid commission; a partner of the company harassing another partner; members of organizations that grant occupational qualification; a person employed by a trade union harassing a member; as well as a person operating an employment agency who harass someone who uses the agency.”⁸⁴

⁷⁹ Ibid

⁸⁰ S Gule ‘Employers Vicarious Liability for Sexual Harassment’ (2005) 13(2) *Journal of Business Law* 67

⁸¹ (2005) 25 ILJ 439 (C)

⁸² (2005) 6 SA 419 (CC)

⁸³ DM Smit & DJ Viviers (Note 7 above): 10

⁸⁴ DM Smit & DJ Viviers (Note 7 above): 13

Therefore on comparison Australian law allows for an employer to be found vicariously liable for a wider range of persons, not necessarily employees as is the case in the South African legal position.

3.2.1.2. EMPLOYER LIABILITY IN TERMS OF THE EMPLOYMENT EQUITY ACT

There is no definition of what sexual harassment within the EEA entails. The EEA mentions harassment but does not encompass sexual harassment although it's treated as unfair discrimination.

Section 60 of the EEA holds an employer liable for any acts conducted by their employees within the course and scope of their employment if the conduct is in contravention of the EEA. However, in order to hold an employer liable in terms of s60 it needs to be proven that employers "do not address equity in the workplace and do not remedy harm caused in the delictual sense."⁸⁵ However, if the employer's actions result in sexual harassment occurring the employer is held to be liable in terms of s6(1) and not s60. Section 6(1) deals with grounds that are considered unfair discrimination and sexual harassment is considered an offending ground.

In *Ntsabo v Real Security CC*⁸⁶ a female security guard was sexually harassed by her male superior which later turned into a sexual assault. The complainant's brother brought the complaint regarding the sexual assault to the company. The employee alleged her employer did nothing regarding her complaint and caused working conditions to become intolerable therefore she left work. The employee then suffered from psychological trauma due to the harassment. The court stated that the employer had contravened s60 of the EEA because an employee had performed sexual harassment acts on another employee. The court went on to state that although the matter was brought before the employers attention the employer had failed to do anything regarding the matter in respect of s60(2) of the EEA.

As mentioned in *Ntsabo* the employee is limited in holding the employer liable under s60 if the matter is not brought to the employer's attention. In *Makoti v Jesuit Refugee Services SA*⁸⁷ the employee did not inform the employer about the sexual harassment while she was still employed by the employer but only did so when she was dismissed. The employer was not

⁸⁵ DM Smit & DJ Viviers (Note 7 above): 5

⁸⁶ Note 48 above

⁸⁷ (2012) 33 *ILJ* 1706 (LC)

found liable because the complaint only arose during arbitration and was not brought to the employer's attention prior.

An employer may also escape liability if they can prove one of the following defences:

- The first defense is s60(3) whereby “an employer will not be held liable if it consulted with all relevant parties and took the necessary steps to eliminate the conduct and comply with the provision of the EEA”⁸⁸
- The second defense is s60(4) whereby “an employer will not be held liable if it did everything that was reasonable practicable to ensure that the employee would not act in contravention of the EEA”⁸⁹

Importantly an employer may escape liability in terms of s60 “if the employer can successfully prove that the perpetrator of the sexual harassment was not an employee; the victim of the sexual harassment was not an employee; the conduct did not amount to sexual harassment”⁹⁰ and so forth.

3.3. EMPLOYER LIABILITY FOR SEXUAL HARASSMENT BY NON-EMPLOYEES

Sexual harassment in the workplace is not necessarily confined to occur between co-workers therefore making the employer liable. However, in the United States the Equal Employment Opportunity Commission (EEOC) guidelines state that “an employer may be held responsible for sexual harassment caused by non-employees.”⁹¹ Non-employees may include clients and customers.

It is possible that an employer can be found liable for non-employee sexual harassment however, “the employers actual liability depends upon the extent of the employers control over the non-employee and any other legal responsibility which the employer may have with respect to the non-employees conduct.”⁹² Therefore “the employer's liability for non-employee sexual harassment is determined on the basis of the total facts and circumstances in each case, including employer knowledge, corrective action, control and other legal responsibility.”⁹³

⁸⁸ DM Smit & DJ Viviers (Note 7 above): 6

⁸⁹ Ibid

⁹⁰ Ibid

⁹¹ AP Aggarwal (Note 1 above): 219

⁹² Ibid

⁹³ Ibid

The first case to hold an employer liable for non-employee sexual harassment in the United States was *EEOC v Sage Realty Corp.*⁹⁴ In this case a female lobby attendant was forced to wear a particular type of uniform that exposed her thighs and buttocks. Due to the uniform she was sexually propositioned and rude comments were made to her by the people in the lobby. When she complained about the harassment she was told to either wear the uniform or leave the lobby area. When she refused she was dismissed. The employer was found responsible for the sexual harassment due to the uniform the employee was forced to wear.

Another foreign case to find the employer liable was *Lockard v Pizza Hut*.⁹⁵ The employer had failed to respond after an employee complained of being sexually harassed by male customers. The manager was liable because he refused her request to give the table to another waitress.

However, employers are not always found liable for their employee's harassment by non-employees. In another foreign case *Windemere v Little*⁹⁶ an employee was raped by a client whose account was said to be lucrative to the employer. The rape occurred after hours and at a different location. When the employee reported the rape a senior employee told her that reporting the rape would result in bad employment action due to the client's importance. When she reported the matter to the company president she was demoted. The court stated that the rape of the employee by the client should be considered a severe enough discrepancy illustrating how drastically the employee's working condition had become altered.

The United States position regarding liability states "an employer will be liable for third party or non-employee harassment on the basis of negligence if the employer knew or should have known that harassment took place and did not take prompt action."⁹⁷ An employer is found liable when he remains passive therefore it is put forward that the employer in *Windemere* should have been liable for their lack of action regarding the employee's rape.

By comparison the South African position is different. South Africa has no precedent for to hold an employer directly liable for the sexual harassment its employees may face from non-employees. Calitz on page 422 of her article is of the opinion that South African legislation such as the EEA or the Code of Practice also does not address the problem of holding

⁹⁴507 F.Supp. 599, 25 E.P.D

⁹⁵ 162 F.3d 1062 (10th Cir 1998)

⁹⁶ No 99-35668 (9th Cir January 23, 2002)

⁹⁷ KB Calitz 'The Liability of Employers for the Harassment of Employees by Non-Employees' (2009) 20(3) *Stellenbosch Law Review* 412

employers liable for the sexual harassment faced by its employees by either co-employees or third parties. It is important to note that “in principle, there is no reason why an employer cannot be held liable if an employee is discriminated against (harassed) by a non-employee and the employer does not protect the harassed employee.”⁹⁸

3.4. EMPLOYERS LIABILITY TO THE FALSELY ACCUSED HARASSER

It is possible that the person being accused of sexually harassing another may in fact be innocent. It is also possible that an innocent action or comment can be misconstrued to be a form of sexual harassment. Therefore if a person is falsely accused of sexually harassing another person an employer may face “liability for damages to the harasser in the event that allegations of sexual harassment are found false.”⁹⁹

A charge of sexual harassment is serious therefore employers need to be certain of the facts surrounding the allegation because “a person who is wrongfully accused or punished for sexual harassment suffers the same righteous indignation felt by an innocent.”¹⁰⁰ An employer therefore has a double responsibility “to protect both the sexually harassed and the falsely accused sexual harasser”¹⁰¹ because both parties deserve the right to a fair hearing.

If the employer proceeds to take the complainants side “and passes judgement prematurely upon the alleged harasser may find itself faced with a court action.”¹⁰² The employer has a duty to investigate all claims regarding sexual harassment at the workplace and should allow the alleged harasser the opportunity to tell their side to the claim. Importantly the courts are adamant that both parties be offered the opportunity to state their side of the story.

3.5. CONCLUSION

It is the employer’s duty to promote a safe working environment for its employees free from sexual harassment. However, if a case of sexual harassment does occur then it is for the employer to investigate the claim before assigning the blame. Sometimes it’s possible that employers refuse to take responsibility for the sexual harassment faced by an employee. This allows for the court to step in and hold the employer liable and force the employer to

⁹⁸ KB Calitz (Note 97 above): 422

⁹⁹ AP Aggarwal (Note 1 above): 224

¹⁰⁰ AP Aggarwal (Note 1 above): 225

¹⁰¹ Ibid

¹⁰² Ibid

compensate the employees. Importantly an employer will be liable if he or she has known about the harassment but did not take any steps to curb the problem.

Sexual harassment tends to cause severe emotional and psychological problems for employees and employers may face liability for allowing the conduct to continue. However, as mentioned above as per the EEA if the employer is able to meet certain requirements they may escape liability. Employers may also escape liability in South African law for the sexual harassment of their employees because many argue that South African laws are not on par with international standards such as the EEOC guidelines. Even if that may be the case the South African common law is still on hand to be utilized to hold an employer liable for sexual harassment that his or her employee's may face.

CHAPTER FOUR

MEASURES AN EMPLOYER MAY TAKE TO PREVENT SEXUAL HARASSMENT

4.1. INTRODUCTION

It was mentioned in the previous chapter that it is the employer's duty to provide its employees with a safe working environment free of sexual harassment. It stands to reason that "from a business point of view, it is in the employers interests to ensure that women work in an environment which is conducive to their productivity."¹⁰³ However, it is reiterated that male employees also face sexual harassment that may hamper their productivity within the workplace therefore it is an employer's duty to take steps to prevent the sexual harassment from affecting an employee's productivity regardless of gender.

Linnegar and McGillivray at page 174 of their book state that "in accordance with the spirit of the Constitution, we suggest that every employer, however small business, should be required to adopt strict and express policies prohibiting any form of sexual harassment."¹⁰⁴ This is also the position of both the 1998 and 2005 Codes of Good Practice. However, it is not only valid policies that employers require but a valid grievance complaint system for employees to be able to lodge their complaints regarding sexual harassment. The authors hold the belief that "such a code of conduct should serve to prevent members of either sex from being harassed, intimidated or subjected to any other form of discriminatory, unfavourable or humiliating practices on the basis of their gender."¹⁰⁵

By employers engaging themselves with employee complaints or producing policies to curtail harassment the employer can be in the position to avoid liability for sexual harassment claims. However, that is only if the employers company's sexual harassment policy is clear on what constitutes sexual harassment and if the policy has prevention measures to curb sexual harassment and offers the victim remedies if they experience any form of sexual harassment. The topic of remedies will be covered in the forthcoming chapter.

¹⁰³ J Linnegar & K McGillivray (Note 18 above): 174

¹⁰⁴ Ibid

¹⁰⁵ Ibid

4.2. SEXUAL HARASSMENT POLICIES IN THE WORKPLACE

Item 7 of the 2005 Code (in accordance with the 1998 Code) “expressly requires employers, subject to any existing collective agreements and applicable statutory provisions in respect of sexual harassment, to adopt a sexual harassment policy in line with the Code and to communicate the policy effectively to all employees.”¹⁰⁶ Item 7.1 places a duty on the employer to “adopt a sexual harassment policy informed by the provisions of the 2005 Code.”¹⁰⁷ The 2005 Code states that a sexual harassment policy should include the following:

“A statement that sexual harassment constitutes a form of unfair discrimination; on the basis of sex and/or gender and/or sexual orientation and that it constitutes a barrier to equity; that sexual harassment in the workplace will not be permitted or condoned; that the complainants of sexual harassment have a right to follow procedures in the policy; that the employer must take appropriate action and finally; that victimisation of a complainant who lodges a complaint in good faith will be a disciplinary offense.”¹⁰⁸

Grogan states on page 252 of his textbook that the guiding principles of a workplace sexual harassment policy should state that “employers and employees should not only refrain from sexual harassment; they should also discourage such conduct by others, including customers, job applicants and suppliers.”¹⁰⁹ Therefore “management is required to discourage sexual harassment by issuing policy statements and by emphasising the need to treat employees and customers with dignity.”¹¹⁰

Item 7.2 of the Code requires that employers distribute the policy to their employees throughout the workplace so that employees know about the policy. It is therefore imperative that “a clear well-formulated policy is an indication to all employees (and these include potential victims and would-be harassers) that the management of the company is concerned about sexual harassment and is communicated to deal with any occurrence swiftly and justly.”¹¹¹

Aggarwal at page 320 of his book states that “employers should have a clear, precise, and comprehensive written policy on sexual harassment, not only to avoid legal liability court

¹⁰⁶ A Basson (Note 2 above): 446

¹⁰⁷ R le Roux, T Orleyn & A Rycroft (Note 68 above): 44

¹⁰⁸ Ibid

¹⁰⁹ J Grogan *Dismissal* 2nded (2014) 252

¹¹⁰ Ibid

¹¹¹ M Finnemore & R Van Rensburg *Contemporary Labour Relations* 2nded (2002) 432

action, but also to restore human dignity in the workplace.”¹¹² A well formulated sexual harassment policy will emphasise that “employees are reminded that company policy strictly prohibits unwelcome sexual advances, physical or verbal conduct of a sexual nature or any other conduct tending to create a hostile work environment and that strict sanctions will be imposed for any violation of this policy.”¹¹³

In the case of *Samuels v Telkom SA Ltd*¹¹⁴ a manager was dismissed after being accused by three different women for sexual harassment. On being dismissed he challenged his dismissal as being unfair. The company claimed that they had acted according to their zero tolerance policy and therefore the dismissal was deemed fair. The abovementioned case indicates how a company by implementing a sexual harassment policy can be used to protect its employees from sexual harassment.

According to Aggarwal on page 321 of his book he states that all sexual harassment policies should include the following requirements:

- “A strong statement of the employers philosophy and commitment concerning sexual harassment”¹¹⁵
- “A clear and detailed definition of sexual harassment which includes examples of behaviours constituting verbal, non-verbal, gestures, visual, physical and psychological sexual harassment”¹¹⁶
- “A redress mechanism, including a complaint procedure i.e. guidelines for reporting incidents of sexual harassment, assurance of confidentiality, and protection from reprisal or retaliation and an investigation process”¹¹⁷
- “Penalties for the harasser”¹¹⁸
- “Remedies for the victim”¹¹⁹
- “A provision for appeals”¹²⁰
- “A plan for implementation and prevention which should include on-going communication, education and training”¹²¹

¹¹² AP Aggarwal (Note 1 above): 320

¹¹³ KA Crain & KA Heischmidt (Note 60 above): 306

¹¹⁴ [2006] 2 BALR 1998 (CCMA)

¹¹⁵ AP Aggarwal (Note 1 above): 321

¹¹⁶ Ibid

¹¹⁷ Ibid

¹¹⁸ Ibid

¹¹⁹ Ibid

¹²⁰ Ibid

Thereafter when “the employer has been informed of the harassment, the employer should consult all relevant parties, take the necessary steps to address the complaint in accordance with the Code and the employer’s policy and take the necessary steps to eliminate the sexual harassment.”¹²² However, it is unfortunate if there is no sexual harassment policy or if it not communicated appropriately to all employees the employer can face liability if there is an incidence of sexual harassment.

In *SACCAWU obo Willie Sebatana and Dions*¹²³ Mr Sebatana was a trainee sales manager who was counselled for sexually harassing four female employees was dismissed after a disciplinary hearing. The commissioner accepted the evidence that Mr Sebatana did indeed sexually harass the women. However, the commissioner found the employer did not have a policy on sexual harassment which led to the matter being mishandled and a harsh action being brought against Mr Sebatana. It was decided the dismissal was unfair and should be substituted with a final warning. The employer was compelled to reinstate Mr Sebatana and remunerate him according to what he would have earned from the date of the dismissal to reinstatement.

It is deemed extremely important to have a sexual harassment policy in the workplace but “employers large and small are designing and reviewing harassment policies and procedures and are surprised by the difficulty of the task.”¹²⁴ It is noted by academics that there are no perfect workplace policies or procedures although many have attempted to formulate the perfect policy and procedure to deal with sexual harassment.

However, it is soundly reiterated that employers need to have valid sexual harassment policies that need to be communicated effectively to all employees by means of putting a copy of the policy in employee contracts or putting up copies of the company sexual harassment policy on company premises noticeboards. The policy should serve as a deterrent to employees that they should behave in a particular manner because “a policy also sets the scene for a certain standard of behaviour and creates consistency in the manner in which deviations from the standards are handled.”¹²⁵ Therefore every company should maintain a

¹²¹ Ibid

¹²² A Basson (Note 2 above): 447

¹²³ CCMA Case No FS4517 (20 August, 1999)

¹²⁴ MS Stockdale *Sexual Harassment In The Workplace: Perspectives, Frontiers and Response Strategies* vol 5 (1996) 241

¹²⁵ S Govender ‘Sexual Harassment: The South African Perspective’ (2005) 7(1) *International Journal of Discrimination and the Law* 238

sexual harassment policy because it will “create certainty and consistency, and will help to educate the workplace so that sexual harassment may eventually be eliminated.”¹²⁶

4.3. PROCEDURES WITHIN THE WORKPLACE

It is important that employers have valid procedures in place to combat the sexual harassment of its employees. It is of the utmost importance that “a procedure that operates effectively and timeously may serve as an important outlet for employee frustration”¹²⁷ therefore “problem-solving approaches to grievance may be beneficial to improving company climate, and the fact that employee’s grievances are considered, no matter how trivial they may appear to management, is likely to improve morale.”¹²⁸ It is important that all employers have valid procedures dealing with sexual harassment.

An advantageous grievance procedure “permits the raising of grievances by workers and the settlement of such grievances without fear of retribution or victimisation and, therefore, contributes to a more open and honest relationship between manager and worker.”¹²⁹ An advantageous procedure “allows managers to identify and remove legitimate causes of dissatisfaction or conflict, which might escalate into major unrest.”¹³⁰ When management fails to acknowledge and curb employee grievances the employer may be accused of neglecting and failing to deal with employee grievances.

It is stated that employers should offer the following to their employees:

- “Advice and assistance from a person suitable to perform the function of providing support and counselling on a confidential basis”¹³¹ and
- Options must be provided to resolve the problem and “these include resolving the problem in an informal way, or a formal procedure may be embarked upon”¹³²

¹²⁶ Ibid

¹²⁷ M Finnemore (Note 66 above): 236

¹²⁸ Ibid

¹²⁹ P Joubert & C Van Wyk ‘Grievance Procedures for Dealing With Complaints of Sexual Harassment at Higher Education Institutions in South Africa’ (2010) 34(2) *South African Journal of Labour Relations* 43

¹³⁰ Ibid

¹³¹ M Finnemore (Note 66 above): 340

¹³² Ibid

4.3.1. INFORMAL PROCEDURES AT THE WORKPLACE

There was a clear indication that an informal complaints systems is important because “some women do not want to punish the harasser, but simply want the harassment to stop.”¹³³ The “informal approach usually consists of counselling or mediation, and may be preferred by employees who did not want to disrupt the employment relationship.”¹³⁴ Many women are embarrassed due to sexual harassment and prefer to take the informal route by asking a friend, a family member or even a workplace colleague to speak to the harasser to get them to stop with the harassment. In *Ntsabo v Real Security CC*¹³⁵ the complainant’s brother came to her place of employment to report the sexual harassment she was facing from her supervisor.

Also in the case of *Taljaard v Securicor*¹³⁶ the complainant was harassed by a manager had followed a passive approach by informing a colleague that when the harassment was on-going she had felt helpless and felt that she could not stand up to him due to his position within the workplace. However, it is also possible that “many so-called harassers also do not know that their behaviour has been perceived as offensive and therefore the informal route may be more effective.”¹³⁷

The advantages regarding the informal procedure include the following:

- “It is immediate”¹³⁸
- “It encourages women to report because it follows a quicker route”¹³⁹
- “It shares responsibility for action with the complainant”¹⁴⁰

However, this procedure system has its drawbacks that include the following:

- “No message is conveyed to the rest of the staff that sexual harassment is being tackled”¹⁴¹
- “It leaves the complainant open to victimisation”¹⁴²

¹³³ M Finnemore & R Van Rensburg (Note 111 above): 433

¹³⁴ P Joubert (Note 129 above): 47

¹³⁵ (2004) 1 BLLR 58 CC

¹³⁶ (2003) 24 ILJ 1162 (CCMA) 1175

¹³⁷ M Finnemore & R Van Rensburg (Note 111 above): 433

¹³⁸ Ibid

¹³⁹ Ibid

¹⁴⁰ Ibid

¹⁴¹ Ibid

¹⁴² Ibid

The Codes of Good Practice on the Handling of Sexual Harassment Cases state that the informal procedures employed by employers should be adequate in the handling of sexual harassment cases. However, if the matter cannot be resolved then the formal procedure needs to be contemplated.

4.3.2. FORMAL PROCEDURES AT THE WORKPLACE

A complainant is meant to follow the procedures that are set out by his or her employer. Finnemore and Van Rensburg states that the Codes of Good Practice (both the 1998 and 2005 codes) “recommends that in the absence of an existing procedure, a formal procedure should be established and should, amongst other things, specify with which employee the grievance should be lodged.”¹⁴³ However, “formal grievances are normally set out in writing by the employee on a prescribed form.”¹⁴⁴ It is of vital importance that the “information relating to the nature of the complaint, the date on which the grievance arose, any supporting evidence, and the action desired by the employee to resolve the grievance should be provided.”¹⁴⁵ Therefore “the formal approach requires the complainant to follow the existing procedures that are available in terms of company policies.”¹⁴⁶

Finnemore and Van Rensburg on page 434 of their textbook state a formal procedure is made up of two parts. The first part deals with an investigation of the complaint. This should be done by the human resources department of the employers company. It is recommended by the Code “that care should be taken during the investigation process that the aggrieved person is not disadvantaged and that the position of the other parties is not prejudiced if the grievance is found to be unwanted.”¹⁴⁷ Therefore when the investigation ensues it “must determine when, where and how the harassment took place by obtaining statements from the victim, any witnesses and the alleged harasser.”¹⁴⁸

The second phase of the formal procedure states that “if the investigation finds that the allegations are warranted the provisions of the disciplinary procedure should be invoked.”¹⁴⁹ The code states a wide “range of disciplinary sanctions to which employees will be liable

¹⁴³ M Finnemore & R Van Rensburg (Note 111 above): 434

¹⁴⁴ M Finnemore (Note 66 above): 238

¹⁴⁵ Ibid

¹⁴⁶ P Joubert (Note 129 above): 47

¹⁴⁷ M Finnemore & R Van Rensburg (Note 111 above): 434

¹⁴⁸ P Joubert (Note 129 above): 47

¹⁴⁹ Ibid

should be clearly stated.”¹⁵⁰ It is also possible for employees to be dismissed for committing misconducts within the workplace it is required that the dismissal be just “in terms of Chapter VII of the Labour Relations Act, provided that it is substantively and procedurally fair.”¹⁵¹ In terms of the Code “serious and repeated incidents of sexual harassment after warnings can be dismissable offences.”¹⁵² It is then imperative that a form of discipline be adopted to punish an offender.

There are advantages to following the formal procedure and include the following:

- “It publicises the organisation’s commitment to fighting sexual harassment”¹⁵³
- “It obliges managers to take their responsibility seriously”¹⁵⁴
- “It gives better protection to the complainant against victimisation”¹⁵⁵
- “It allows the organisation to take action against the harasser”¹⁵⁶

As with the informal procedure implemented by employers the formal procedure is not without its disadvantages either. These include the following:

- “It is more stressful for all”¹⁵⁷
- “It is more difficult to maintain confidentiality”¹⁵⁸
- “There can be hostility from other members of staff”¹⁵⁹
- “It can be more difficult to collect evidence”¹⁶⁰

4.4. OTHER MEASURES EMPLOYERS MAY UTILIZE

Another measure that an employer may use according to the Code allows for the placing of the issue of sexual harassment to “be included in a company’s orientation, education and training programmes.”¹⁶¹ This can occur if employers admit that sexual harassment is a growing problem within the workplace and if the companies take actions to curb the harassment by training their employees in respect to this growing problem.

¹⁵⁰ M Finnemore & R Van Rensburg (Note 111 above): 434

¹⁵¹ Ibid

¹⁵² Ibid

¹⁵³ M Finnemore&RVan Rensburg (Note 111 above): 433

¹⁵⁴ Ibid

¹⁵⁵ Ibid

¹⁵⁶ Ibid

¹⁵⁷ M Finnemore& R Van Rensburg (Note 111 above): 434

¹⁵⁸ Ibid

¹⁵⁹ Ibid

¹⁶⁰ Ibid

¹⁶¹ Ibid

However, “this awareness is achieved through entry-level programmes that include a fully developed component on sexual harassment.”¹⁶² This can only be achieved through training because “training is focused on explaining the reasons for the policies – why harassment is wrong and how destructive it is to a healthy workplace environment.”¹⁶³ It is imperative management takes all the steps they can to fight the sexual harassment employees face.

4.5. CONCLUSION

It is essential that employees are knowledgeable in sexual harassment cases that they may follow either the formal or informal route. The decision is theirs entirely. However, “if the employer has established a policy and procedure for the redress of sexual harassment, the victim may utilize the mechanism by filing a complaint in the manner prescribed in the procedure.”¹⁶⁴ This is considered the advisable thing to do “unless the victim has a reason to believe that she would not get a fair hearing.”¹⁶⁵ It is unfortunate that “there have been cases where senior officers, instead of investigating a complaint of sexual harassment, themselves began to make sexual advances to the complainant.”¹⁶⁶ Therefore if a complainant believes their dispute was not handled satisfactorily they may refer the matter to the CCMA within 30 days. If the dispute is not resolved at the CCMA it may be referred to the Labour Court within 90 days of the CCMA ruling.

¹⁶² M Finnemore & R Van Rensburg (Note 111 above): 435

¹⁶³ Ibid

¹⁶⁴ AP Aggarwal (Note 1 above): 235

¹⁶⁵ Ibid

¹⁶⁶ AP Aggarwal (Note 1 above): 236

CHAPTER FIVE

REMEDIES AVAILABLE TO VICTIMS OF SEXUAL HARASSMENT WITHIN THE WORKPLACE

5.1. INTRODUCTION

Sexual harassment as defined by Grogan on page 247 of his textbook states that “sexual harassment may be described as persistent, unsolicited and unwanted sexual advances by one person to another.”¹⁶⁷ The first reported case of sexual harassment was *J v M Ltd*¹⁶⁸ where the court “upheld the dismissal of a senior executive for his amorous habits.”¹⁶⁹ However, there are employees who prefer to remain silent regarding the sexual harassment then to report the sexual harassment. This is usually due to the belief that “most women feel that they will not be believed or will be victimized when they charge a supervisor or co-worker with harassment”¹⁷⁰ and furthermore “some women may believe that charging a co-worker will result in the co-workers dismissal, a penalty some women may feel is too severe.”¹⁷¹

It is unfortunate when victims of sexual harassment are faced with the trauma and emotional scarring of this type of behaviour attempt to seek justice “women are generally not compensated for their injuries and judges often interpret the law in the manner that belittles the emotional damage women suffer in sexual harassment or assault cases.”¹⁷² However, for those brave victims who seek justice there are various remedies at their disposal. Victims are able to utilize remedies under labour legislation or may look to the common law for other remedies against their harassers. Criminal and delictual remedies are also available to the victim.

5.2. COMMON LAW REMEDIES

As mentioned in previous chapters the common law places a duty on employers to provide their employees with a safe working environment free from sexual harassment. In order to be able to obtain relief in terms of the common law one would have to look to the civil court for help because cases that are unable to be settled by the company internally can be referred to the CCMA. If the mediation fails to solve the problem then the matter is referred to the

¹⁶⁷ J Grogan (Note 109 above): 247

¹⁶⁸ Note 13 above

¹⁶⁹ J Grogan (Note 109 above): 247

¹⁷⁰ P Halfkenny (Note 20 above): 228

¹⁷¹ Ibid

¹⁷² P Halfkenny (Note 20 above): 227

Labour Court which allows the victim to claim for damages due to pain and suffering from sexual harassment.

In order to claim damages against the perpetrator due to the sexual harassment the victim may institute a common law claim in delict. According to Mukheibir and Ristow on page 251 of their article “as a general rule a victim of delictual conduct is entitled to an award of damages for both patrimonial and non-patrimonial loss.”¹⁷³ However, the authors go on to state that the amount of damages awarded will depend on the severity of the harm suffered by the victim.

In the case of *Grobler v Naspers Bpk*¹⁷⁴ a thirty seven (37) year old female alleged that she was sexually harassed by her supervisor Samuels. She claimed his behaviour did not constitute behaviour for the working environment. She stated she complained to one Paul De Bruin about Samuels behaviour but he “stated that he was unable to do anything about it.”¹⁷⁵ Grobler then went on to claim from both Naspers and Samuels “for loss of earnings, medical expenses and general damages was based on the fact that she had suffered from severe post-traumatic stress and that she was unable to work because of her condition.”¹⁷⁶ The court found that Grobler indeed suffered with post-traumatic stress disorder and that Samuels was the cause of this situation. The court awarded Grobler compensation for patrimonial loss based on *lex aquila* and non-patrimonial loss amounting to R150 000.

In sexual harassment cases damages are awarded due to psychological trauma as seen in the *Grobler* case. However, on appeal in *Media24 v Grobler*¹⁷⁷ “the court considered the severity of the damage suffered by the victim and drew a clear distinction between psychological trauma and post-traumatic stress syndrome (PTSS) as defined by the American Psychiatric Association”¹⁷⁸ There was a heavy reliance on an earlier Supreme Court of Appeal case namely; *Barnard v Santam Bpk*¹⁷⁹. In the *Barnard* case the court ruled “that damages can be recovered for emotional shock (*senuskok*) only if it manifest in a recognized psychiatric injury (although the court accepted in *Barnard* that such an injury need not always be the

¹⁷³ A Mukheibir & L Ristow ‘An Overview of Sexual Harassment: Liability of the Employer’ (2006) 27(2) *Obiter* 251

¹⁷⁴ (2004) 4 SA 220 (C)

¹⁷⁵ N Smit & D Van Der Nest (Note 22 above): 529

¹⁷⁶ *Ibid*

¹⁷⁷ (2005) 6 SA 419 (CC)

¹⁷⁸ A Mukheibir & L Ristow (Note 173 above): 251

¹⁷⁹ 1999 (1) SA 202 (SCA)

result of emotional shock).”¹⁸⁰ With reference to the *Barnard* case the court in *Media24* “held that the plaintiff would at least have to show that she suffered a recognized psychiatric injury in order to qualify for legal redress.”¹⁸¹ The then went on to state that Grobler suffered with PTSS and liability on Media24 was confirmed because Media24 as the employer had failed to provide a safe working environment free of sexual harassment.

5.3. LABOUR LAW REMEDIES

5.3.1. UNFAIR LABOUR PRACTICE

In terms of s186(2) of the Labour Relations Act¹⁸² an employee may claim for an unfair labour practice in the workplace if the employer fails to curb the sexual harassment. One of the first cases brought before the Industrial Court for an unfair labour practice suit was *Lynne Martin-Hancock v Computer Horizons*¹⁸³ where the applicant was employed by the respondent for two (2) years. She alleged she was sexually harassed by the employer’s manager Hunter between August and September 1992. Although she complained about the harassment the employer ignored the problem. She was then denied a position that was promised to her and was dismissed after a disciplinary hearing. The employer argued that her claims were false and caused dissensus at the workplace. The Industrial Court then looked at whether the dismissal was procedurally and substantively fair.

The court found the dismissal to be procedurally unfair because “the hearing was had without the applicant, disagreement as to who should preside; person presiding was not impartial; and the alleged harasser was able to give evidence in the absence of the applicant.”¹⁸⁴ It was stated by the court that the applicant should have had her claim investigated and charges should have been brought against Hunter.

The court went on to consider the substantive fairness of the applicant’s dismissal by looking at the evidence given by other female employees against Hunter such as rubbing the female employees’ shoulders. The court unfortunately could not come to a decision regarding whether or not the dismissal was substantively unfair.

¹⁸⁰ R Le Roux ‘Sexual Harassment In The Workplace: A Matter of More Questions Than Answers Or Do We Simply Know Less The More We Find Out’ (2005) 10(1) *Law, Democracy & Development* 52

¹⁸¹ A Mukheibir & L Ristow (Note 173 above): 251

¹⁸² Note 12 above

¹⁸³ Case No NH 11/2/14268 (October 1994)

¹⁸⁴ P Halfkenny (Note 20 above): 227

The court went on to find the dismissal to be unfair and therefore constituted an unfair labour practice. The parties were left to negotiate their relief on their own.

In the case of *Piliso v Old Mutual Life Assurance Co*¹⁸⁵ an unknown person was harassing an employee causing her to experience psychological trauma. When she informed her employers they did nothing about the harassment. She then chose to claim damages on three (3) separate grounds from the employer in terms of s60 of the EEA, from the common law and for a violation of her constitutional right to fair labour practices in terms of s23 of the South African constitution.

In terms of her section 60 claim the applicant claimed her employer was vicariously liable for the sexual harassment she was facing. However, the Labour Court stated there was no evidence provided by the applicant proving the harasser worked for the employer. The employer was not found liable in terms of section 60.

In terms of the applicant's common law claim it was alleged by the applicant that the employer failed to provide her with a safe working environment in terms of the common law. However, yet again the court pointed that the applicant had not provided sufficient evidence that the alleged harasser worked for the employer.

In terms of her claim of her constitutional right to a fair labour practice being infringed upon the court stated that the aggrieved employee was entitled to constitutional damages because the employer failed in their position to render a fair labour practice.

According to s186(2) an unfair labour practice entails:

“Any unfair act or omission between an employer and employee involving... unfair conduct by the employer relating to the promotion, demotion, probation... the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee.”¹⁸⁶

An employee will be awarded compensation if he or she is able to prove their unfair labour practice suit. The compensation that will be awarded may not be more than the equivalent of twelve (12) months remuneration as per s194(4) of the LRA. Furthermore it need be the court may order the employees reinstatement if the dismissal is deemed unfair or if an incorrect

¹⁸⁵ (2007) 28 ILJ 897 (LC)

¹⁸⁶ Section 186(2)(a) and Section 186(2)(b) of the LRA

procedure was utilized in bringing forth the dismissal regardless if there was a valid reason for the dismissal.

5.3.2. UNFAIR DISMISSAL/CONSTRUCTIVE DISMISSAL

It is common knowledge that victims of sexual harassment choose to resign from their jobs then report the sexual harassment. This amounts to constructive dismissal in terms of s186(1)(e) of the LRA. This type of dismissal entails “when the employee abandons the contract, either by resigning or by simply leaving his or her place of employment and not returning.”¹⁸⁷ Basson at page 444 of her article states that “according to the LRA, constructive dismissal exists where an employee resigns because the employer resigns because the employer made continued employment intolerable.”¹⁸⁸ It is important to note that “the singular feature of a dismissal in terms of s186(1)(e), is that the employee, rather than the employer, ends the contract with or without notice.”¹⁸⁹

In the case of *Solid Doors (Pty) Ltd v Commissioner Theron*¹⁹⁰ the Labour Appeal Court stated that “employees claiming to have been constructively dismissed must prove that they, not their employers, terminated the contract.”¹⁹¹ The employee must have resigned because working conditions had become intolerable and “the employee must also prove that the employer was in fact responsible for creating the conditions that induced this belief.”¹⁹²

There is an endless list of claims that can allow for constructive dismissal which include “abuse, assault, emotional cruelty and other generally unacceptable forms of conduct by employees’ superiors are the most obvious justification for claims of constructive dismissal.”¹⁹³ Included in this list is the claim for sexual harassment therefore it is imperative that:

“employees must satisfy the court or arbitration that at the time of their termination of the contract they were under the genuine impression that their employers had actually behaved in the manner that they believed rendered the relationship intolerable, and would continue to do so.”¹⁹⁴

¹⁸⁷ J Grogan (Note 109 above): 65

¹⁸⁸ A Basson (Note 2 above): 444

¹⁸⁹ J Grogan (Note 109 above): 65

¹⁹⁰ (2004) 25 ILJ 2337 (LAC)

¹⁹¹ J Grogan (Note 109 above): 67

¹⁹² J Grogan (Note 109 above): 68

¹⁹³ J Grogan (Note 109 above): 70-71

¹⁹⁴ J Grogan (Note 109 above): 69

The following medley of cases highlights constructive dismissal. In *Intertech Systems (Pty) Ltd v Sowter*¹⁹⁵ Mrs Sowter was employed by Intertech Systems when a colleague began to harass her with unwanted phone calls and visits to her home. She informed her superiors of the harassment but they failed to deal with the matter adequately. The perpetrator resigned but was still used as a consultant. The situation became intolerable so she resigned and instituted proceedings for an unfair labour practice. The Industrial Court found the resignation to be a constructive dismissal instead. The court awarded her damages for iniuria in addition to being awarded compensation.

In *Pretorius v Britz*¹⁹⁶ the complainant was the personal secretary for the respondent. She resigned after being constantly subjected to sexual harassment and claimed constructive dismissal. This was proven and she was awarded the equivalent of nine (9) months' salary.

A case where constructive dismissal did not apply was in *Daymon Worldwide SA Inc v CCMA*¹⁹⁷ an employee resigned after being sexually harassed by her superior. The employee was transferred back to the head office and after a meeting there the superior apologized to her. The employee was given the choice of either staying at the head office or to report to another manager who was not the alleged harasser. She refused either offer and resigned claiming constructive dismissal. A commissioner agreed that the employee had been sexually harassed and awarded her compensation equivalent to nine (9) months' salary.

However, on review the company argued they had dealt with the matter according to the complainant's wishes (which were to deal with the matter informally). The employee on one hand claimed constructive dismissal because the company did not resolve the issue according to her and then later stated that she would return to her job reporting to her harasser manager instead to another manager. In justifying her resignation she relied on the instruction to remain at head office which her employer told her to do. The court stated the employer on the evidence could not be found guilty for the intolerable working conditions.

5.3.3. THE EMPLOYMENT EQUITY ACT

Sexual harassment is severely prohibited in terms of the Employment Equity Act which also states other grounds for unfair discrimination. According to "s6 of the EEA provides that harassment of an employee is a form of unfair discrimination and is prohibited on any one or

¹⁹⁵ (1997) 2 LLD 166 (LAC)

¹⁹⁶ (1997) 1 CCMA 7.1.94

¹⁹⁷ (2009) 30 ILJ 575 (LC)

a combination of grounds of unfair discrimination listed in subsection (1).”¹⁹⁸ Sexual harassment is one of the mentioned grounds of unfair discrimination.

Section 50(1) of the EEA allows the court to make an award it deems fair according to the EEA for an incident of sexual harassment. It then falls on the Labour Court to decide whether “an employee has been unfairly discriminated against.”¹⁹⁹ The Court will then be entrusted to make an appropriate order that is just and equitable in respect of the circumstances surrounding that particular case. This may range from paying damages and compensation or ordering employers to prevent unfair discrimination within their workplaces.

5.4. CRIMINAL LAW REMEDIES

In terms of South African criminal law sexual harassment can be described as “rape, assault or indecent assault.”²⁰⁰ However, crimes such as *crimen iniuria* and extortion can be included within the ambit of sexual harassment. Criminal law allows for the victim of the sexual harassment to bring about an action against the perpetrator directly. This is a useful tactic to employ when the victim’s harasser also happens to be their employer. However, under criminal law it is harder to hold the employer liable for the acts of third parties such as customers, clients or supervisors.

A disadvantage to using criminal law as a method of redress is that a higher burden of proof is required by the prosecution in order to prove the sexual harassment claims. The degree of proof required has to be beyond a reasonable doubt because “the victim’s testimony is, therefore, quite likely to be regarded as uncorroborated evidence.”²⁰¹ This is likely because when the harassment occurs there are no witnesses to the act and therefore there is no one to corroborate the victim’s claims. Since there usually is no evidence of the sexual harassment incident it usually becomes the word of the victim versus the word of the harasser.

Reddy concludes on page 114 of her article that “the criminal law appears to be a rather blunt instrument, ill-designed to deal with the problems of sexual harassment on the job.”²⁰² Halfkenny is also of the opinion on page 227 of her article states that “criminal law may cover sexual harassment, especially if the action involves physical contact, the law is

¹⁹⁸ KB Calitz (Note 97 above): 420

¹⁹⁹ Section 50(2)

²⁰⁰ M Reddi ‘Sexual Harassment In The Workplace: Do We Need New Legislation?’ (1994) 109 *Acta Juridica* 114

²⁰¹ Ibid

²⁰² Ibid

inadequate”²⁰³ because courts “often interpret the law in a manner that belittles the emotional damage women suffer in sexual harassment.”²⁰⁴

5.5. CIVIL REMEDIES

Unlike criminal remedies civil remedies in terms of sexual harassment claims is easier to access because there is a lower burden of proof required. For a civil remedy to succeed the case would have to be proven on a balance of probabilities. However, to be awarded a civil remedy the victim will have to claim in delict. The victim may make the following claims:

- Damages may be claimed for either patrimonial or non-patrimonial loss.
- Moral damages in terms of an infringement on personality or possibly dignity.
- Damages for pain and suffering as a result of psychological trauma due to the sexual harassment.

5.6. CONCLUSION

It has been previously mentioned that victims of sexual harassment regardless of their gender or race to shy away from speaking out about harassment because they do not want to be perceived as troublemakers. However, what is “even more frightening, the woman who speaks out against her tormentors runs the risk of suddenly being seen as crazy”²⁰⁵ because many are of the belief that the woman wanted the incident to occur. This then forces many women to resign from their employment due to the sexual harassment and then claim relief for the sexual harassment in terms of a constructive dismissal.

Although there are various remedies available to the victim in terms of the common law, criminal law or civil law sexual harassment cases are challenging to corroborate because there normally are no witnesses to the incident and it is up to the victim to prove the sexual harassment as well as the trauma has affected them in some way.

However, on the upside courts are beginning to see what a traumatic experience sexual harassment is because it is not always physical but rather psychological harm can also occur to the victim and are now awarding victims the necessary compensation and damages

²⁰³ P Halfkenny (Note 20 above): 227

²⁰⁴ Ibid

²⁰⁵ CA Mackinnon (Note 24 above): 49

because according to *Bundy v Jackson*²⁰⁶ employees have a right to psychological well-being and a safe working environment.

²⁰⁶ 1981 641 F 2d 934 (Dc Cir)

CONCLUSION

Crimes of a sexual nature against women in South Africa are on the increase and women in the workplace also face the same predicament because the scourge of sexual harassment is on the increase. Sexual harassment therefore becomes a daily occurrence in a woman's working day. It becomes possible that "she may be constantly felt or pinched, visually undressed and stared at, surreptitiously kissed, commented upon, manipulated into being found alone, and generally taken advantage of at work – but never promised or denied anything explicitly connected with her job."²⁰⁷ Therefore when "faced with the spectre of unemployment, discrimination in the job market, and a good possibility of repeated incidents elsewhere, women usually try to endure."²⁰⁸ However, the cost of the victim's endurance may result in her emotional and psychological breakdown.

Society has perceived various myths and misconceptions regarding what behaviour may constitute sexual harassment or not because "sexual harassment is often defended on the basis that the victim invited it or brought it upon himself or herself by his or her manner or dress code."²⁰⁹ However, in the case of *Pick 'n Pay Stores Ltd v An Individual*²¹⁰ the court stated that a woman's clothes and behaviour plays a minor role in the victim's sexual harassment.

Sexual harassment in the workplace impacts "negatively on the affected employees, their productivity, and the institution which employs perpetrators."²¹¹ Employees may suffer from "decreased morale, absenteeism, damage to interpersonal relationships, depression, helplessness, sadness, fear, worry, disruption of lives and decreased motivation are direct consequences of sexual harassment."²¹² Headaches, insomnia, bad sleeping patterns, eating disorders and nausea are some of the physical symptoms the sexually harassed victim encounters. However, these symptoms "are stress related and emanates from the betrayal of trust, self-blame and disappointment."²¹³ This then manifests itself into a form of economic harm for the victim because the victim will be unable to progress within the workplace due to the physical symptoms they experience.

²⁰⁷ CA Mackinnon (Note 24 above): 40

²⁰⁸ CA Mackinnon (Note 24 above): 52

²⁰⁹ PA Grobler, BJ Erasmus & RK Kolkenbeck-Ruh (Note 33 above): 41

²¹⁰ (1994) 3 (1) ARB 2.25.136

²¹¹ DM Mello (Note 4 above): 126

²¹² Ibid

²¹³ Ibid

Unfortunately it is extremely difficult to prove a claim of sexual harassment because it is usually the word of the victim versus the word of the harasser. Even if the victim is able to prove their sexual harassment claim “they have every reason to fear subtle forms of retaliation in their current positions and subtle forms of discrimination if they attempt to secure other positions.”²¹⁴ Sometimes a sexual harassment victim may be highly qualified for the position he or she is applying for he or she but may not receive the position due to the sexual harassment. This brings into the forefront the low reporting rate of sexual harassment. The low reporting rate of sexual harassment is also attributed to the fact that many women hold the belief that reporting the matter jeopardizes their jobs.

Sexual harassment poses a major problem for companies and employers therefore “a successful company requires the existence of good relations among its employees and the people with whom the company does business.”²¹⁵ Sexual harassment may cause an uncomfortable working environment with relationships between employees, clients or employers, managers and supervisors being strained. This is because “one of the greater problems associated with sexual harassment is its acceptance by both men and women as either natural, or at most, a trivial disciplinary offence.”²¹⁶

Another central problem is the fact that many employers do not see the offending behaviour as sexual harassment. It is therefore imperative that “managers should appreciate that for every woman who complains about harassment, there are probably two, or four, or perhaps eight more who are harassed.”²¹⁷ Employers need to also be aware that company harasser may make use of the company’s email or even their own personal email account to harass fellow co-employees and that the internet needs to be monitored by the employer.

An important point to make is that there are very few women who occupy top paying jobs in companies such as Chief Executive Officer (CEO) or Chief Financial Officer (CFO) because many women are in lower paying jobs and earn far less than their male counterparts regardless of the similar education they may both receive. Therefore when a woman rebuffs the sexual attention in order to further her career it has a detrimental effect on her economic and financial status in order to get an alternative job. If the victim complains to the harasser that his behaviour is inappropriate it can be misconstrued that the victim is playing ‘hard to

²¹⁴ VM Feary ‘Sexual Harassment: Why the Corporate World Still Doesn’t Get It’ (1994) 13(8) *Journal of Business Ethics* 653

²¹⁵ KA Crain & KA Heischmidt (Note 60 above): 302

²¹⁶ S Jagwanth, PJ Schwikkard & B Grant (Note 17 above): 40

²¹⁷ MS Stockdale (Note 124 above): 194

get'. However, it is possible that a friendly act may be misconstrued by the other as sexual harassment when it is not.

In conclusion the scourge of sexual harassment in the workplace is an ever growing concern because the number of victim complaints (both male and female) has increased rapidly over the years. In the modern corporate world there are a few brave men and women who are rising up to challenge the sexual harassment that is affecting their working condition, financial and economic situation. Many victims are now finding their voice in the fight against sexual harassment thanks largely to legislation such as the Employment Equity Act or The Codes of Good Practice on the Handling of Sexual Harassment Cases (both the 1998 and 2005 codes). Employers are now also implementing mechanisms to prevent the sexual harassment of their employees in order for them to avoid liability. However, the on-going problem of sexual harassment still exists today.

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