

**SEXUAL HARASSMENT IN THE WORKPLACE: A
GENDERED INEQUALITY?**

by

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DECLARATION

I declare that the 'SEXUAL HARASSMENT IN THE WORKPLACE: A GENDERED INEQUALITY?' mini-dissertation hereby submitted to the University of Limpopo, for the degree of MASTER OF LAWS (LABOUR LAWS) has not previously been submitted by me for a degree at this or any other university; that it is my work in design and in execution, and that all material contained herein has been duly acknowledged.

Malatjie, KR (Ms)

Date

DEDICATION

This mini-dissertation is dedicated to my amazing parents Salome Maphefo Malatjie and Rankwe William Malatjie for their unwavering love and support.

AKNOWLEDGEMENT

First and foremost, I would like to give thanks and recognition to God for not only protecting me in all that I do but for also carrying me this far. I would also like to thank my parents who have been my biggest supporters throughout the journey leading up to this point. I'm in awe and complete appreciation of every sacrifice you have made to help me realise my dreams. And to my supervisor Dr. DG Mbajjorgu, your dedication and contribution is wholeheartedly appreciated, thank you for all the teachable moments and the hours you took out of your time to apply your brilliance to guide me through this process.

ABSTRACT

Sexual harassment remains an issue in the workplace as result of ineffective legislative and other measures that fail to recognise sexual harassment as a form of discrimination that is gender orientated. Gender inequality is credited as one of the contributors of sexual harassment, as more women than men suffer sexual harassment in the workplace. Moreover, sexual harassment has adverse effects on the individual who is on the receiving end of it, which are psychological in nature. This alone may lead to the abuse of substances as a form of coping mechanism, to arriving late to work or quitting which also affects productivity. In an attempt to confront the issue of sexual harassment, laws were created over the years, both at national and international level. Although some countries show efficiency in the creation of these laws by responding with urgency, some countries have had a more difficult time formulating appropriate and effective laws, with some countries having very little laws aimed at combatting sexual harassment in the workplace. At the same time workplace sexual harassment policies have proven to be an effective weapon against the gendered inequality that is sexual harassment if implemented effectively.

KEYWORDS

Discrimination; gender inequality; hostile environment; quid pro quo; sexual harassment

LIST OF ABBREVIATIONS

EEA	Employment Equity Act
EEO	Equal Employment Offices
EEOC	Equal Employment Opportunity Commission
EEOL	Equal Employment Opportunity Law
LRA	Labour Relations Act
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
SA	South Africa
SAJHRM	South African Journal of Human Resource Management
SAJIP	South African Journal of Industrial Psychology
USA	United States of America
WHO	World Health Organisation

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CHAPTER ONE

INTRODUCTION

1.1 Introduction

Sexual harassment remains a persistent issue in the workplace environment. The reason being the ineffectiveness of the measures that are adopted to prevent/curb sexual harassment.¹ Gender inequality in the workplace is another aspect that remains rife.² According to Hazel and Kleyman, unlike men, women are less likely to hold management positions.³ Where gender inequality and sexual harassment are concerned as joint forces, a lot of it has to do with the enforcement of power by one gender over the other.⁴

To a large extent sexual harassment is more commonly perpetrated against women by men, especially those who feel threatened by the power of organisational power,⁵ hence, gender inequality in a workplace environment is a major contributor of sexual harassment.⁶ According to McLaughlin, Uggen and Blackstone, where women who hold authority positions in a workplace are concerned, research has indicated that as the paradoxical power-threat model suggests, such women are at a higher risk of being targeted where sexual harassment and discrimination is concerned.⁷ The authors also provide that in instances where women are successful in attaining positions of a leadership nature, gender beliefs coined around stereotypical views regarding their “natural” abilities proceed to create perceptions of their job performance.⁸ Furthermore, the authors highlight that although men receive applause

¹ Quick and McFadyen 2016 *Journal of Occupational Health Psychology* 293.

² Hazel and Kleyman 2019 *Journal of Prevention & Intervention in the Community* 1.

³ Hazel and Kleyman 2019 *Journal of Prevention & Intervention in the Community* 2.

⁴ McLaughlin, Uggen and Blackstone 2012 *American Sociological Review* 625.

⁵ Chamberlain et al 2008 *Work and Occupations* 266.

⁶ McLaughlin, Uggen and Blackstone 2012 *American Sociological Review* 625.

⁷ McLaughlin, Uggen and Blackstone 2012 *American Sociological Review* 626.

⁸ McLaughlin, Uggen and Blackstone 2012 *American Sociological Review* 626.

for glass escalator to positions of a leadership nature, women who are supervisors are often isolated and seen as being undeserving of the positions.

Sexual harassment is named as one of the forms of gender-based violence.⁹ The World Health Organization reports that although workplace sexual harassment research is still in a stage of infancy, the issue is a widespread one especially because more women are entering the workforce.¹⁰ It further provides that surveys have indicated that 40-50 percent of women in the European Union have reported having been recipients of some acts of sexual harassment or unwanted sexual behaviour in the workplace.¹¹

Crus and Klinger¹² highlight that, jobs that pay better and are of a higher status as well as positions that are supervisory in nature are most commonly occupied by men, and the majority of women mainly occupy jobs that pay lower rates and are of a lower status where they have little decision-making power. The authors also provide that the Beijing Platform for Action identified as particularly vulnerable to violence those who belong to minority groups.¹³ This includes women in institutions or detention, indigenous women, women migrants including women migrant workers, refugee women, women in poverty living in rural or remote communities, women in situations of armed conflict, destitute women, female children, women with disabilities, elderly

⁹ World Health Organisation
2012<https://apps.who.int/iris/bitstream/handle/10665/77432/WHO_RHR_12.36_eng.pdf?sequence=1&isAllowed=y>

¹⁰ World Health Organisation
2012<https://apps.who.int/iris/bitstream/handle/10665/77432/WHO_RHR_12.36_eng.pdf?sequence=1&isAllowed=y>.

¹¹ World Health Organisation
2012<https://apps.who.int/iris/bitstream/handle/10665/77432/WHO_RHR_12.36_eng.pdf?sequence=1&isAllowed=y>.

¹² Cruz and Klinger 2011 https://www.ilo.org/wcmsp5/groups/public/---dgreports/--gender/documents/publication/wcms_155763.pdf 17.

¹³ Cruz and Klinger 2011 https://www.ilo.org/wcmsp5/groups/public/---dgreports/--gender/documents/publication/wcms_155763.pdf 17.

women, displaced women, repatriated women, women living in poverty and, foreign occupation, wars of aggression, civil wars, [and] terrorism including hostages.¹⁴

Although sexual harassment is not limited to the workplace environment, the notion of sexual harassment in the workplace clearly provides an indication of how women are more exposed to the risk of being on the receiving end of gender-based violence. Recently there has been an increase in the attention directed towards the problem of sexual harassment against women in the workplace.¹⁵ This has been executed through the use of platforms such as social media and online publications,¹⁶ where different hashtags were created to provide a safe space for women who have been victims of sexual harassment to bring forth their accounts.

As a result, the presence as well as severity of the issue of sexual harassment in the workplace against women has become more evident than in the previous years where, for instance in the case of America, Zalesne¹⁷ provided in a 2002 article: “hostility toward the law is generally fed by the media and by those who likely fear that women are making progress that will threaten their economic and social wellbeing”.¹⁸ With there being a rise in crimes of a sexual nature that are inflicted on women, it is imperative that there should be an adoption and implementation of instruments that are stricter and indicate satisfactory prospects of curbing sexual harassment against women in the workplace.

The Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (hereafter The Code) provides that sexual harassment is “... a form of unfair discrimination and is prohibited on the grounds of sex and/or gender and/or

¹⁴ Cruz and Klinger 2011 https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_155763.pdf 8.

¹⁵ Li *et al* 2021 *Social Science Computer Review* Vol 39(5) 1031.

¹⁶ Manuel *The experience and perception of sexual harassment in the workplace* 1.

¹⁷ Zalesne 2002 *Harvard Women's Law Journal* 148.

¹⁸ Zalesne 2002 *Harvard Women's Law Journal* 148.

sexual orientation”.¹⁹ This definition was applied in *Rustenburg Platinum Mines Ltd v UASA OBO Steve Pietersen and Others*, where the court additionally stated that:

sexual harassment, as per the test formulated in the 2005 Code requires unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account a variety of factors.²⁰

Sexual harassment matters in the South African workplace are regulated by the Employment Equity Act 55 of 1998²¹ and The Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace 1998 and 2005 in that both the Act and Code prohibit harassment on a number of grounds that include sex.²² The Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace goes further to provide guiding principles that outline how sexual harassment matters in the workplace should be dealt with.²³

Overall, the main focus of the study focusses on gender inequality as the main cause of sexual harassment in the workplace. This study additionally makes an analysis of the different legal instruments which have been formulated for purposes of regulating sexual harassment matters. It further provides a look into the historical origins of sexual harassment, as well as its progression over the years. Furthermore, the study provides an analysis of the psychological effects of sexual harassment on the victims who have been subjected to harassment within their work environments. In addition to that, the study provides a comparative analysis of the different laws developed by different countries to combat the issue of sexual harassment.

1.2 Background of the study

The Constitution of the Republic of South Africa 1996 (the Constitution), as the highest law of the land advocates for prohibition of unfair discrimination²⁴ as well as fair labour

¹⁹ Item 3 of The Code.

²⁰ *Rustenburg Platinum Mines Ltd v UASA OBO Steve Pietersen and Others* [2018] ZALCJHB 72 para 33.

²¹ Hereafter EEA.

²² Section 6(1) of EEA, section 3 of the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace.

²³ Section 6(1) – 6(4) of the Code.

²⁴ Section 9 of the Constitution of the Republic of South Africa, 1996.

practice.²⁵ The Promotion of Equality and Prevention of Unfair Discrimination Act (hereafter PEPUDA)²⁶ is the country's comprehensive anti-discrimination law which aims to prohibit unfair discrimination by the government, private organisation and individuals and further forbids harassment. The Constitution further encompasses the promulgation of the Employment Equity Act (hereafter the EEA) 55 of 1998 which makes provision for the prohibition of unfair discrimination and states that: "no person may unfairly discriminate, directly or indirectly, against an employee, in any employment, on one or more grounds, including race, gender, sex...".²⁷ Sexual harassment is discriminatory in its very nature in the sense that it is more commonly based on a variety of focused factors that include race, sexual orientation, gender etc, where individuals that form part of these groups are more at risk of being targeted by perpetrators of sexual harassment²⁸ and in most cases are seen as inferior to the rest.

The EEA goes further to state that "harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1)".²⁹ The Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace of 2005 sets out rules which indicate how it is expected of employers and employees to interact and behave in a work or professional environment.³⁰

The Labour Relations Act 66 of 1995 (hereafter LRA) held the perception that the LRA was more suitable to deal with matters pertaining to sexual harassment. This was in contrast with the requirements of the EEA which held the view that The Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace of 1998 would be the most suitable instrument for addressing matters of sexual harassment in the workplace.³¹ However, both ideas ended up being adopted and therefore, both ideas applied simultaneously.³² Initially there existed The Code of 1998. Later there was an

²⁵ Section 23 of the Constitution of the Republic of South Africa, 1996.

²⁶ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

²⁷ Section 6(1) of the EEA 55 of 1998.

²⁸ Bondestam and Lundqvist 2020
<<https://www.tandfonline.com/doi/full/10.1080/21568235.2020.1729833>.

²⁹ Section 6(3) of the EEA 55 of 1998.

³⁰ Item 5 of The Code.

³¹ Van Wyk 2019 <https://www.golegal.co.za/workplace-sexual-harassment-code/>.

³² Van Wyk 2019 <https://www.golegal.co.za/workplace-sexual-harassment-code/>.

amendment of this code which gave birth to the Amendments to the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace which came about on the 4th of August 2005³³ (hereafter the 2005 Code).

This amendment meant that there was an application of both the original and amended code.³⁴ The 2005 Code brought about several changes by acting as a guiding tool for establishing and identifying factors to be taken into consideration when defining the concept of “sexual harassment”.³⁵ It also outlined all the characteristics of acts of sexual harassment and placed a responsibility on employers to formulate workplace policies which will be consulted when addressing matters of sexual harassment.³⁶ Due to the first code only having been amended, employers and courts, when dealing with cases of sexual harassment, had to apply both codes.³⁷

This meant that for the 2005 Code to apply without interference by the other Code, the 1998 Code would have to be repealed as opposed to simply being amended. The Code of 1998 was later officially repealed on the 19th of December 2018 by the Minister of Labour³⁸ to eliminate confusion as to which Code was to apply when confronting matters pertaining to sexual harassment in the workplace as can be observed in the *Campbell Scientific South Africa (Pty) Ltd v Simmers and others* [2015] JOL 34906 (LAC).³⁹ The decision by the Minister of Labour to repeal the 1998 Code was an important one because it provided the much needed clarity pertaining to which Code was to be applied when faced with matters of sexual harassment within the workplace.

³³ Code of Good Practice on the Handling of Sexual Harassment Cases of 2005 General Notice 1357.

³⁴ See *Campbell Scientific South Africa (Pty) Ltd v Simmers and others* [2015] JOL 34906 (LAC) para 24.

³⁵ Section 5 of the Code of 2005.

³⁶ Section 7 of the Code of 2005.

³⁷ See *Campbell Scientific Africa (Pty) Ltd v Simmers and others* [2015] para 25.

³⁸ Roodt 2019 <https://m.polity.org.za/articles/sexual-harassment-a-quick-guide-for-employers-2019-02-11>.

³⁹ *Campbell Scientific South Africa (Pty) Ltd v Simmers and others* [2015].

This means that employers and courts can now make reference to the 2005 Code without concurrently having to make further reference to the 1998 Code. According to the South African Labour Law Guide:⁴⁰

- The 2005 Code aims to put an end to sexual harassment in the workplace.
- This code provides procedures that are suitable for dealing with the problem of sexual harassment as well as preventing its recurrence.
- This code also promotes and encourages the development as well as implementation of procedures and policies.⁴¹

According to The 2005 Code “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.”⁴² This section is in line with provisions found in the Constitution⁴³ which prohibit discrimination on a various number of grounds and advocates for equality. The Constitution, like the 2005 Code, provides protection against unfair discrimination on various grounds that include grounds such as sex, gender, and sexual orientation.⁴⁴

As already mentioned above, the 2005 Code was created for the purpose of eliminating sexual harassment in the workplace. To have a full understanding of the 2005 Code as well as its purpose and importance, it is imperative to go back to the history of sexual harassment in the workplace.⁴⁵ Before sexual harassment was given its name, it had only existed in reality without a specific term being attached to it. The first recognised use of the term “sexual harassment” is said to have originated back in the mid-1970s at the Cornell University.⁴⁶ The term was created by journalist Lin Farley working together with a group of her colleagues, following an interaction with a group

⁴⁰ The South African Labour Guide date unknown
<<https://www.labourguide.co.za/discipline-dismissal/189-code-of-good-practice-on-sexual-harassment/>>.

⁴¹ See Introduction of The Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace of 2005.

⁴² Item 3 of The Code.

⁴³ Section 9 of the Constitution of the Republic of South Africa, 1996.

⁴⁴ Section 9(3) of the Constitution of the Republic of South Africa, 1996.

⁴⁵ Segrave *Sexual Harassment of Women in the Workplace*, 1600 - 1993.

⁴⁶ Swenson 2017 Who came up with term “sexual harassment”?
<https://www.washingtonpost.com/news/morning-mix/wp/2017/11/22/who-came-up-with-the-term-sexual-harassment/>.

of women who had all been subjected to sexual harassment of some form within their line of work.⁴⁷ The term only made its first general appearance in the year 1975 through Farley testifying about the work she had done back at Cornell before the Commission on Human Rights of New York City.⁴⁸

The practice of sexual harassment however, stretches all the way to centuries ago.⁴⁹ In “Prisoners of Poverty: Women Wage Workers, Their Trade and Their Lives”,⁵⁰ Campbell traces the history of the sexual harassment of women back to when African-American women who had been enslaved were subjected to sexual exploitations at the hands of the men who were the heads of the households for which they worked.⁵¹ In addition to that, the author highlights that women working in manufacturing and clerical positions in the late nineties and early twenties century came forth to present accounts of the sexual abuse, both physical and verbal, as well as assaults they have been subjected to by the men with whom they worked.⁵² The author further provides that, although the sexual abuse of enslaved women and domestic servants was solely blamed on the women by the Americans, an equal fraction of attention was directed towards the men the women worked for by the public commentary in an attempt to condemn the sexual abuse and exploitation of these women.⁵³

Publications such as Campbell’s “Prisoners in Poverty: Women Wage Workers, Their Lives and Trade” made a contribution in driving a deeper focus into the degradation that formed part of the package of working as a domestic servant as a woman. Campbell’s book provided an overview of the different types of sexual exploitations

⁴⁷ Swenson 2017 Who came up with term “sexual harassment”? <https://www.washingtonpost.com/news/morning-mix/wp/2017/11/22/who-came-up-with-the-term-sexual-harassment/>.

⁴⁸ Bacchi and Jose 1994 *Women’s History Review* 263.

⁴⁹ MacKinnon and Siegel 2003 *Direction in Sexual Harassment Law* 3.

⁵⁰ Campbell *Prisoners of Poverty: Women Wage Workers, Their Trades and Their Lives* 221-232.

⁵¹ Campbell *Prisoners of Poverty: Women Wage Workers, Their Trades and Their Lives* 221-232.

⁵² Campbell *Prisoners of Poverty: Women Wage Workers, Their Trades and Their Lives* 221-232.

⁵³ Campbell *Prisoners of Poverty: Women Wage Workers, Their Trades and Their Lives* 221-232.

that were faced by the women working in manufacturing and garment industry. It went into detail in painting a picture of how the women were forced to endure sexual abuse.

According to Campbell, the American legal system granted women very little protection against the acts of sexual abuse inflicted on them by men. Although rape was an offence punishable by law, rape laws did not cover or protect slaves. Furthermore, Campbell provides that elements of rape were also outlined in such a highly restrictive manner which did not give these women much hope pertaining to the prospects of their perpetrators being sanctioned by the courts.⁵⁴

Although there has been a development in the laws that have been enacted since then which are aimed at protecting employees from sexual harassment within the workplace, in a vast majority of cases such protection through policy remains a mere idea on paper that lacks proper practical implementation, and is in need of improvement.⁵⁵ Cases of sexual harassment in the workplace continue to be on a climb even with there being laws and policies put in place which were created for the purpose of curbing the very issue, this can be seen with how the Equal Employment Opportunity Commission is reported to have received 7,606 sexual harassment complaints in 2018, which was an annual increase of almost 14 percent.⁵⁶

Additionally, a research agency by the name of Columinate conducted a research in South Africa in the year 2008 with the aim to investigate workplace sexual harassment statistics. What was found was that workplace policies are in dire need of improvement in order for businesses to protect their employees against sexual harassment.⁵⁷ It was found that 30% of women had reported being subjected to unwelcome sexual advances within their respective work environments.⁵⁸ These numbers reflect a necessity for the assessment and improvement of the implementation of policies which

⁵⁴ Campbell *Prisoners of Poverty: Women Wage Workers, Their Trades and Their Lives* 221-232.

⁵⁵ Joubert, Van Wyk and Rothmann 2011 *SAJHRM* 6.

⁵⁶ Keshner 2019 <https://www.marketwatch.com/story/why-workplace-sexual-harassment-complaints-keep-climbing-2019-04-25>.

⁵⁷ Bizcommunity 2018 <https://m.bizcommunity.com/Article/196/607/181307.html>.

⁵⁸ Bizcommunity 2018 <https://m.bizcommunity.com/Article/196/607/181307.html>.

were adopted for the purpose of curbing the issue of sexual harassment in the workplace.⁵⁹

One important aspect that should not be ignored is the effects of being sexually harassed in a work environment. Being sexually harassed does not end with the act being reported, it leaves behind scars invisible to the eye. There are lasting effects that the victim of the harassment is left having to struggle with.⁶⁰ An effective solution would be one that is long term and goes beyond the act itself by looking at the print the mark has left on the victim, this, as Salisbury, Ginorio and Remick⁶¹ recommend, can be done through mechanisms such as group setting counselling which allows victims of sexual harassment to be each other's support system. Being exposed to sexual harassment in the workplace, whether being caused by a work peer or by a person occupying a superior position, can leave the victim with a feeling of shame, unable to do their job effectively or even the lack of desire to return to their place of work.⁶²

Neethling⁶³ has stated in his work that being exposed to sexual harassment has an effect on an individual employee's morale, motivation level, productivity, the performance reflected in their work, their focus at work as well as their effectiveness. Further that it leaves him or her with feelings of disempowerment, insecurity, and powerlessness. It is for reasons such as the above mentioned that it is imperative to formulate workplace sexual harassment policies that will effectively provide a safe environment for employees, by guaranteeing a sexual harassment-free work environment.

However, the effectiveness of workplace sexual harassment policies is a subject that needs to be addressed when discussing ways to combat sexual harassment in the workplace. For example, a research survey conducted on the staff members of 10

⁵⁹ Joubert, Van Wyk and Rothmann 2011 *SAJHRM* Abstract.

⁶⁰ Neethling *The Effects of Sexual Harassment in the Workplace on Employee Wellbeing* 2005 111 gives a full study on the effects of sexual harassment.

⁶¹ Salisbury, Ginorio and Remick 1986 *American Psychological Association* Abstract.

⁶² Hejase 2015 *Journal of Management Research* 111.

⁶³ Neethling *The Effects of Sexual Harassment in the Workplace on Employee Wellbeing* 1.

South African higher education institutions found that the workplace sexual harassment policies in the institutions were ineffective due to a lack of proper implementation.⁶⁴ This is despite sexual harassment policies generally being an effective tool for combating sexual harassment.

This gives off the idea that certain sexual harassment policies are created merely for their existence, with no intention to apply them in practical within the workplace for the protection of employees against sexual harassment. As a result, it is critical to successfully implement sexual harassment regulations in the workplace, which necessitates a greater focus on training women on how to deal with workplace sexual harassment issues.⁶⁵

In the process of their formulation and implementation, it is important to ensure that these policies do not compromise the safety of employees post lodging complaints documenting their accounts. Often times women who have experienced some type of sexual harassment fear coming forward with their accounts due to fear of further victimisation, shame, denial, minimization, consequences, or as Engel⁶⁶ describes it

fear of losing their job, fear they won't find another job, fear they will be passed over for a promotion, fear of losing their credibility, fear of being branded a troublemaker, fear of being blackballed in their industry, fear of their physical safety.⁶⁷

As a result, a large number of occurrences may go unreported or undetected. Consequently, the full scope of the problem may never be fully appreciated because the numbers do not correspond to the regularity with which sexual harassment occurrences occur in the workplace.

1.3 Problem Statement

⁶⁴ Joubert, Van Wyk, Rothmann 2011 *SA Journal of Human Resource Management* 10.

⁶⁵ *Rustenburg Platinum Mines Limited v UASA Obo Steve* para 3.

⁶⁶ Engel 2017 <<https://www.psychologytoday.com/za/blog/the-compassion-chronicles/201711/why-dont-victims-sexual-harassment-come-forward-sooner>>.

⁶⁷ Engel 2017 <<https://www.psychologytoday.com/za/blog/the-compassion-chronicles/201711/why-dont-victims-sexual-harassment-come-forward-sooner>>.

Inequality within the workplace environment contributes as one of causes of sexual harassment against women.⁶⁸ It often appears in the form of men harbouring a sense of superiority over women which leads to them holding a feeling of entitlement over the body of the woman, or a man who holds a higher position unfairly exercising power over women holding lower positions.⁶⁹

Furthermore, women who have been on the receiving end of sexual harassment within the work environments are left having to deal with different psychological effects that must be addressed.⁷⁰ It is not sufficient to simply deal with the sexual harassment itself and fail to look into the damage the employee who has been subjected to the act has suffered. More acknowledgement needs to be made of the physical and psychological trauma victims of sexual harassment are left to endure.

1.4 Significance of the study

This study focuses mainly on the different aspects associated with the sexual harassment women face in the workplace with the main concept being gender inequality. This is imperative for a general understanding of the different factors surrounding sexual harassment against of women in the workplace. It further drives attention to the points that are important but have mostly been neglected such as the effects that sexual harassment has on victims. This study further provides an academic form of awareness on the issue of sexual harassment against women in the workplace.

1.5 Aims and objectives

This study aims to inform the reader about the issue of the sexual harassment of women in workplace environments, as well as provide recommendations on how this issue can be resolved. This requires looking deeper into the different factors that contribute to the existence of sexual harassment, more specifically against women, in

⁶⁸ McLaughlin, Uggen and Blackstone 2012 *American Sociological Review* 626-628.

⁶⁹ Zola *The Depiction of Female Characters by Male Writers in Selected isiXhosa Drama Works* 68.

⁷⁰ Hejase 2015 *Journal of Management Research* 110.

the workplace and presenting ideas on some possible solutions. For this purpose, the study aims to;

- Redress inequality imbalances in the workplace, thus promoting mutual respect as one of the preventative methods against sexual harassment.
- Put forth recommendations on improving the effectiveness of workplace policies that were created for the purpose of addressing sexual harassment in the workplace.
- Recommend ways to address the lasting effects of this problem on the psychological and physical wellbeing of victims.
- Outline the importance of protecting victims from further victimisation upon coming forward with complaints.

1.6 Research Questions

- What can be done to insure the effectiveness of workplace sexual harassment policies?
- What are the effects of sexual harassment in the workplace on the victims?
- Are victims offered enough protection after bringing complaints of being sexually harassed forward?
- What is the link between gender inequality and sexual harassment in the workplace environment?

1.7 Literature Review

Over the past few years, the issue of sexual harassment against women in the workplace has been receiving an increased amount of attention. Several movements have also been created in support of courses aimed at the abolishment of this long-standing issue. Keplinger *et al* in their research observe that societal movements are most vocal in addressing the issue of sexual harassment against women.⁷¹ This includes movements such as the #MeToo⁷² movement and the #TimesUp⁷³ movement

⁷¹ Keplinger, Johnson, Kirk and Bames 2019 *PLOS ONE* 1.

⁷² Me Too date unknown <https://metoomvmt.org/about/#history> "The 'me too, movement was founded in 2006 to help survivors of sexual violence, particularly Black women and girls, and other young women of color from low wealth communities, find pathwaysto healing"

⁷³ Fast Company 2019 <<https://www.healthleadersmedia.com/clinical-care/timesup-movement-coming-healthcare> "... Time's Up, a sprawling initiative to combat workplace sexual harassment.">

which have seen big names such as Harvey Weinstein⁷⁴ be held accountable for their parts in the perpetuation of sexual harassment.⁷⁵

The #MeToo movement was started by Tarana Burke for the purpose of recognizing the experiences of sexual assault and harassment, more specifically by women of colour who form part of low-income communities,⁷⁶ while the Time's Up is an organisation that "coordinates responses to gender discrimination and harassment and develops solutions to address them."⁷⁷ The research by Keplinger *et al* made use of a repeat cross-sectional survey that involved 500 women, whereby a study was conducted on these women in September 2016 and again September 2018.⁷⁸

The purpose of the survey was to determine whether there had been an increase or decline in the occurrences of sexual harassment incidents in the workplace within that space of time. The study provided that the researchers:

found reduced levels of the most erogenous forms of sexual harassment (unwanted sexual attention and sexual coercion) but increased levels of gender harassment in 2018.⁷⁹

According to the study, approximately 80% of US women have reported to have been sexually harassed in the workplace. It goes further to outline the effects of sexual harassment on the victims, which include job withdrawals, negative mood swings, eating disorders, lower overall mental health, lower self-esteem, greater stress, alcohol abuse and greater self-doubt.⁸⁰

It also states that the effects of sexual harassment can still be seen even after more than a decade since the act of sexual harassment took place. According to Ramsaroop and Parumasur,⁸¹ the emotional trauma that comes with being sexually harassed not

⁷⁴ Choo *et al* 2019 *The Lancet* 499.

⁷⁵ Choo *et al* 2019 *The Lancet* 499.

⁷⁶ Murphy 2019 *Journal of Feminist Family Therapy* 63.

⁷⁷ Choo, Byington, Johnson, et al 2019 *The Lancet* 499.

⁷⁸ Keplinger, Johnson, Kirk and Bames 2019 *PLoS ONE*.

⁷⁹ Keplinger, Johnson, Kirk and Bames 2019 *PLoS ONE* 1.

⁸⁰ Keplinger, Johnson, Kirk and Bames 2019 *PLoS ONE* 2.

⁸¹ Ramsaroop, Parumasur 2007 *SAJIP* 25-33. See also Welsh 1999 *Annual Reviews* 170.

only creates an offensive, intimidating, and hostile working environment for the victim but results in the victim distancing themselves from social interactions within that working environment. This could further lead to there being an impediment of productivity for the organisation itself. The authors⁸² acknowledge that although sexual harassment is not exclusively perpetuated against women, men are much less likely to experience acts of sexual harassment.

However, this harbours no intent to disregard the struggles of men with sexual harassment in the workplace as studies have been carried out and published on the subject.⁸³ Gruber and Morgan⁸⁴ state that the focus should be shifted from the women who experienced sexual harassment to the men who committed this act. The purpose of this was to gain an understanding of what drives men to commit these acts, as well as what rehabilitation methods could be effective in such instances. According to Gruber and Morgan, studies have shown that there is a connection between sexual harassment and work environments dominated by one gender, being the male gender.

The authors also provide that “men who exchange employment benefits for sexual favours are using sexual harassment as a tool to achieve personal gratification”.⁸⁵ Further, that men view women as mere objects and as such it may leave them baffled when the women complain about being sexually harassed because they “understand her primarily as an object, and objects do not object”.⁸⁶ Finally, Gruber and Morgan provide that an additional reason why men commit sexual harassment against women in the workplace is the thrill that comes with asserting dominance.

Workplace policies on sexual harassment were introduced for the purpose of curbing these very same sexual harassment issues, and for that reason it is important that there be an understanding of their implementation. This applies to both employers and employees. In their study, Quick and McFadyen⁸⁷ address the necessity of training

⁸² Ramsaroop and Parumasur 2007 *SAJIP* 25-23.

⁸³ See Welsh 1999 *Annual Reviews* 185.

⁸⁴ Gruber and Morgan *In the Company of Men: Male Dominance and Sexual Harassment* 32.

⁸⁵ Gruber and Morgan *In the Company of Men: Male Dominance and Sexual Harassment* 32.

⁸⁶ Gruber and Morgan *In the Company of Men: Male Dominance and Sexual Harassment* 32.

⁸⁷ Quick and McFadyen 2016 *Journal of Occupational Health Psychology* 293.

employees on these policies put in place in their workplaces. The authors state that training results in better educated employees and helps guide them on better ways to approach issues of sexual harassment.

The authors also acknowledge the existence of research proving training to be more harmful than good in certain circumstances, however it goes on to provide a solution to this problem. It states,

“to be effective ‘SH training it must ‘be part of a holistic, committed effort to combat harassment, focused on the specific culture and needs of a particular workplace... live, in-person and customized to your workplace.”⁸⁸

This indicates that training, if done correctly, can be an effective tool of fighting sexual harassment in the workplace. It is important to take a look at the different laws that have been designed by various countries to address sexual harassment in the workplace. An example of a country that has been on the forefront of the cause is the United States of America (hereafter USA) which has had a great impact on sexual harassment laws as we have them today as well as their continued development.⁸⁹ However, in contrast to the action taken by USA, countries such as Japan and Nigeria were not as swift in responding to the persistent problem of sexual harassment in the workplace.⁹⁰ As Huen⁹¹ indicates, in Japan, sexual harassment was only declared a violation of workers’ interests for the first time in 1992 by the Fukuoka District Court .

Another country that has seen a continued struggle in regulating sexual harassment matters in the workplace is Nigeria, which, as Aina-Pelemo *et al*⁹² provides, lacks legislation that is clear-cut and explicitly provides what constitutes “sexual harassment”. The authors⁹³ further provide that Nigeria does not have provisions that allow perpetrators to be held accountable for sexual harassment. This study will make a further comparative assessment of sexual harassment laws that were developed by

⁸⁸ Quick and McFadyen 2016 *Journal of Occupational Health and Psychology* 293.

⁸⁹ Sural and Kilicoglu 2011 *Middle Eastern Studies* 655.

⁹⁰ Sural and Kilicoglu 2011 *Middle Eastern Studies* 655.

⁹¹ Huen 2007 “Workplace Sexual Harassment in Japan: A Review of Combating Matters Taken” 812.

⁹² Aina-Pelemo *et al* 2019 *Journal of Law, Policy and Globalization* 122.

⁹³ Aina-Pelemo *et al* 2019 *Journal of Law, Policy and Globalization* 122.

the abovementioned countries in order to determine what lessons countries could learn from each other in the bid to fight sexual harassment in the workplace.

1.8 Research Methodology

This study makes use of the qualitative research method. Sources of law such as case law, journal articles, textbooks, newspaper reports, legislation and the internet will be used as sources of information. This involves the use of various literature to get a better perspective of the progression of the subject matter over the years.

1.9 Outline of Chapters

Chapter 1 introduces the study, gives a background of the study, significance of the study, the problem statement, research questions, aims and objectives, literature review, research methodology and the outline of the chapters.

Chapter 2 examines the history and causes of sexual harassment in the workplace, further focusing on gender inequality as a major contributor.

Chapter 3 discusses the law governing sexual harassment matters (both international and South African law), and the various psychological effects of sexual harassment on the victims.

Chapter 4 consists of a comparative analysis of the different measures and laws employed by different countries to deal with sexual harassment in the workplace. This chapter will focus on the United States of America, Japan, and Nigeria to demonstrate the urgency with which different countries have developed different laws to address sexual harassment matters in the workplace.

Chapter 5 consists of recommendations and proposes possible reforms and provides a conclusion of the study.

CHAPTER TWO

THE HISTORY AND CAUSES OF SEXUAL HARASSMENT IN THE WORKPLACE: GENDER INEQUALITY AS A MAJOR CONTRIBUTOR

2.1 Introduction

According to Lunenburg,⁹⁴

“Unwelcome sexual advances, requests for sexual favours, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (i) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (ii) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (iii) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating hostile or offensive working environment...”⁹⁵

Johnson, Widnall and Benya⁹⁶ trace the first recognition of sexual harassment all the way back to the beginning of when women would lose their jobs because of having rejected their employers’ overtures. The authors provide that this form of sexual harassment later became known as quid pro quo sexual harassment.⁹⁷ Put in simple terms, quid pro sexual harassment often involves a situation where an individual is required to provide some form of sexual favour to another person.⁹⁸ Usually one person holds a superior position and requires sexual favours from a subordinate in return of another thing such as a job or an educational opportunity.⁹⁹

In the United States of America (hereafter referred to as “the USA”), any act of sexual harassment constitutes a violation of Title VII of the Civil Rights Act of 1964 (hereafter referred to as Title VII). In an attempt to remedy sexual harassment in the workplace, a vast number of laws have been introduced.¹⁰⁰ Some of these laws have come in the

⁹⁴ Lunenburg 2010 *International Journal of Management, Business, and Administration*.

⁹⁵ Lunenburg 2010 *International Journal of Management, Business, and Administration* 2.

⁹⁶ Johnson, Widnall and Benya *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* 23.

⁹⁷ Johnson, Widnall and Benya *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* 23.

⁹⁸ Dickinson 1995 *William & Mary Journal of Women and the Law* 107

⁹⁹ Dickinson 1995 *William & Mary Journal of Women and the Law* 107.

¹⁰⁰ Bondestam and Lundqvist 2020 *European Journal of Higher Education* 2.

form of legislation created by countries individually, that have had the effect of impacting and influencing international laws.¹⁰¹

Case laws of different countries have also played an important role in the development of laws governing workplace sexual harassment matters. This can be seen in the case of *Vishaka v State of Rajasthan* (hereafter the Vishaka case).¹⁰² This is a widely known case from India in which it was provided that “gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognised basic human right”.¹⁰³ The rapid increase in matters of sexual harassment of women in the workplace has also driven countries to develop tailor-made legislation to fit the specific history and nature of these countries respectively, with some examples being South Africa’s EEA 55 of 1998, and The Code.¹⁰⁴

These laws, in addition to various definitions of sexual harassment, deal with the question of what constitutes sexual harassment? This is done for the purpose of differentiating acts of sexual harassment from those which do not qualify as such. In order to fully understand the concept, it is also imperative to look into the different causes of sexual harassment. Bondestam and Lundqvist¹⁰⁵ link the exposure of majority of the world’s women and girls to violence to a number of factors such as the violence of men in general, the violence of men against women specifically sexualised violence and other factors.

The authors further indicate that this encompasses the sexual harassment of women at work, which is established and normalised, and in the same breath problematised and challenged in a number of ways.¹⁰⁶

¹⁰¹ Examples include the Convention on the Elimination of All Forms of Discrimination Against Women; Sexual Harassment of Women at Workplace (Prevention) Bill; Prevention of Sexual Harassment of Women at Workplace, just to name a few.

¹⁰² *Vishaka & Ors vs State Of Rajasthan & Ors on 13 August 1997*.

¹⁰³ Verma date unknown Indian Kanon - <http://indiankanon.org/doc/1031794/>.

¹⁰⁴ Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace of August 2005 (Amendments to the Code of Good Practice).

¹⁰⁵ Bondestam and Lundqvist 2020 *European Journal of Higher Education* 2.

¹⁰⁶ Bondestam and Lundqvist 2020 *European Journal of Higher Education* 2.

2.2 The history of sexual harassment of women in the workplace

According to Siegel,¹⁰⁷ the practice of sexual harassment is centuries old. In providing the history of sexual harassment, the author traces the act all the way back to the days of the slavery of African American women. This refers to a time when African American women were forced into chattel slavery and had no law to protect them.¹⁰⁸ Siegel indicates that free women who were employed in domestic services also regularly faced sexual harassment imposed by the men who were the heads of the households they worked for.¹⁰⁹

Women who were employed in manufacturing and clerical positions are described by the author as not having been exempted from sexual relations imposed by the men they worked for either.¹¹⁰ According to Siegel,¹¹¹ the acts ranged from assault to other unwanted forms of physical or verbal advances. The author further provides that since the antebellum period (the period that came before the Civil War and after the 1812 War),¹¹² Americans often placed the blame on the women who had been faced with sexual predicaments, these women were often seen as immoral and as such said to be responsible for their own downfall.¹¹³

There was no distinction between working women and prostitutes.¹¹⁴ Belarzik¹¹⁵ illustrates this point by describing how women who sold their labour power in the Lowell mills were treated in the same way as prostitutes who sold themselves. The author further outlines that there was a common view all throughout London which followed the idea that the girls working in factories had loose morals, and this was also the case in the United States of America.¹¹⁶

¹⁰⁷ Siegel "A Short History of Sexual Harassment" 3.

¹⁰⁸ Siegel "A Short History of Sexual Harassment" 3.

¹⁰⁹ Siegel "A Short History of Sexual Harassment" 3.

¹¹⁰ Siegel "A Short History of Sexual Harassment" 3.

¹¹¹ Siegel "A Short History of Sexual Harassment" 3.

¹¹² HISTORYNET 2021 <https://www.historynet.com/antebellum-period>.

¹¹³ Siegel "A Short History of Sexual Harassment" 3.

¹¹⁴ See Bularzik "Sexual Harassment at the Workplace: Historical Notes" 119.

¹¹⁵ Bularzik "Sexual Harassment at the Workplace: Historical Notes" 120.

¹¹⁶ Bularzik "Sexual Harassment at the Workplace: Historical Notes" 120.

According to Belarzik,¹¹⁷ various publications were often made in newspapers that told tails of activities that were perceived to be of a despicable nature that were taking place between the women labourers and the men they worked for. Belarzik¹¹⁸ states that the publications would however be met with oppositions by these women refuting their accuracy. Furthermore, these women received some level of support and defence as Siegel describes how press such as the abolitionist press began to shift their focus to issues such as the abuse of female slaves by the men who were their masters.¹¹⁹

This further invoked discussions surrounding sexual relationships taking place between female workers and their male employers. The discussions incited a surge in the number of literature publications that provided accounts of what goes on in the world of domestic and factory work regarding the forms of sexual misconducts that women faced in the workplace environments.¹²⁰

2.2.1 *The legal history of sexual harassment*

According to York and Brookhouse,¹²¹ the foundation of federal case law which recognised sexual harassment as a form of sex discrimination was laid by *Williams v Saxbe*¹²² (hereafter the Williams case). The authors provide that in this case the court held that

the retaliatory actions of male supervisor, taken because the plaintiff declined his sexual advances, constituted sex discrimination under Title VII, and that any rule, regulation, practice, or policy that is applied on the basis of sex alone is sex discrimination.¹²³

York and Brookhouse¹²⁴ further indicate that sexual harassment case law has shifted from having the requirement that there ought to be proof of employment consequences

¹¹⁷ Bularzik "Sexual Harassment at the Workplace: Historical Notes" 120.

¹¹⁸ Bularzik "Sexual Harassment at the Workplace: Historical Notes" 120.

¹¹⁹ Siegel "A Short History of Sexual Harassment" 3.

¹²⁰ Some of these include Helen Campbell's "Women-Wage Workers"; and Upton Sinclair's 1905 "The Jungle".

¹²¹ York and Brookhouse 1988 *Employee Responsibilities and Rights Journal* 228.

¹²² *Williams v Saxbe* 413 F. Supp. 654 (D.D.C) 1976.

¹²³ York and Brookhouse 1988 *Employee Responsibilities and Rights Journal* 228.

¹²⁴ York and Brookhouse 1988 *Employee Responsibilities and Rights Journal* 228.

that are tangible resulting from harassment, to being in acceptance of proof that harassment resulted in a work environment that is hostile. The authors further refer to *Bundy v Jackson* (hereafter the Bundy case)¹²⁵ which is a 1979 case in which the district court had made a ruling that although the plaintiff had succeeded in proving the allegation of improper sexual advances, she had failed to successfully prove sexual discrimination as she had failed to show consequences that were related to employment.¹²⁶

This decision was reversed by the appeals court where the court provided:

that sexual harassment amounts to sexual discrimination in the terms, conditions, or privileges of employment when the employer creates or condones a substantially discriminatory work environment regardless of whether the complaining employee loses any tangible job benefits.¹²⁷

Another important concept which forms part of the history of the law on sexual harassment is a concept known as the “unwelcomeness” standard, which made its first appearance in 1964 following the passing of Title VII of the Civil Rights Act.¹²⁸ It is discussed further below.

2.2.1.1 The history of the law of the “unwelcome” standard

A number of academic publications exist that provide a detailed historical account of the “unwelcome” part of sexual harassment.¹²⁹ Historically, sexual harassment was not legally recognised despite having been experienced by 53.1% of working women. Juliano¹³⁰ provides that sexual harassment only received this recognition around 1976.¹³¹ The author also provides that women who worked in environments that were

¹²⁵ *Bundy v Jackson* 641 F 934 (D.D.Cir 1979).

¹²⁶ York and Brookhouse 1988 *Employee Responsibilities and Rights Journal* 228.

¹²⁷ York and Brookhouse 1988 *Employee Responsibilities and Rights Journal* 229.

¹²⁸ Elliot 1997 *Notre Dame Law Review* 621.

¹²⁹ Elliot 1997 *Notre Dame Law Review* 621.

¹³⁰ Juliano 1992 *Cornell Law Review* 1558.

¹³¹ Juliano 1992 *Cornell Law Review* 1558.

filled with sexually degrading comments and behaviour endured employment injuries that were legally cognisable and therefore had no legal remedies.¹³²

This was because until 1981, courts would only uphold sexual harassment claims when the plaintiff had suffered job detriment which is tangible.¹³³ According to the author, a change came about in 1981 when courts began to recognise sexual harassment as the foundation of a claim pertaining to an environment that is hostile or offensive.¹³⁴ Juliano further indicates that during the 1986 case of *Meritor Savings Bank v. Vinson* (hereafter the Meritor case)¹³⁵ is when the Supreme Court firmly established the claim of hostile environment.

However, this victory came with a condition. The author provides that plaintiffs had the burden of showing that the alleged harassment was “unwelcome” in order to be able to prove a claim of a hostile environment.¹³⁶ According to Juliano, determining whether conduct was “unwelcome” involved the courts admitting evidence that was not relevant to the claim at hand.¹³⁷ The “unwelcomeness” requirement, according to Elliot, forms part of the five-part test, which was formulated by the Eleventh Circuit in 1982.¹³⁸

Elliot further provides that the court provided the definition of “unwelcomeness” indicating “that the ‘conduct must be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive.’”¹³⁹ The *Meritor*¹⁴⁰ case, according to the author, opened the gates to putting the plaintiff on trial where the primary question presented was whether a hostile work environment constituted a form of unlawful discrimination under the Civil Rights Act of 1964.

¹³² Juliano 1992 *Cornell Law Review* 1558.

¹³³ Juliano 1992 *Cornell Law Review* 1558.

¹³⁴ Juliano 1992 *Cornell Law Review* 1558.

¹³⁵ *Meritor Savings Bank v Vinson* 1986.

¹³⁶ Juliano 1992 *Cornell Law Review* 1558.

¹³⁷ Juliano 1992 *Cornell Law Review* 1558.

¹³⁸ Elliot 1997 *Notre Dame Law Review* 623.

¹³⁹ Elliot 1997 *Notre Dame Law Review* 623-624.

¹⁴⁰ *Meritor Savings Bank v Vinson* :: 477 US 57 (1986).

2.3 Causes of sexual harassment

According to Hersch¹⁴¹ “a body of literature identifies organisational characteristics that create an environment in which sexually harassing behaviour can exist.”¹⁴² The author indicates that the key characteristics include the gender composition in a specific workplace, the tolerance of an organisation pertaining to sexual harassment.¹⁴³ Additionally, other factors that are looked at include whether a specific occupation is traditionally considered male and the gender of the supervisor.

Sexual harassment, according to Hersch, is more commonly existent in organisations that are largely made up of power differentials in the hierarchical structure, as well as structures that are male dominated such as the military.¹⁴⁴

2.3.1 Gender inequality as a major contributor of sexual harassment

Sexual harassment in its nature encompasses an aspect of gender bias and inequality.¹⁴⁵ This form of harassment is most commonly perpetuated against women more than it is against men.¹⁴⁶ Nana¹⁴⁷ provides that, it is estimated that at least half of working women have indicated having faced sexual harassment in the workplace. Years later, in a study by Bondestam and Lundqvist¹⁴⁸ which brings attention to the frequency with which sexual harassment is perpetuated against women in the workplace, the authors indicate that:

in the EU member states, between 45 and 55 per cent of women (corresponding to around 100 million women) have experienced exposure to sexual harassment during their working

¹⁴¹ Hersch 2015 <https://wol.iza.org/uploads/articles/188/pdfs/sexual-harassment-in-workplace.pdf?v=1>.

¹⁴² Hersch 2015 <https://wol.iza.org/uploads/articles/188/pdfs/sexual-harassment-in-workplace.pdf?v=15>.

¹⁴³ Hersch 2015 <https://wol.iza.org/uploads/articles/188/pdfs/sexual-harassment-in-workplace.pdf?v=15>.

¹⁴⁴ Hersch 2015 <https://wol.iza.org/uploads/articles/188/pdfs/sexual-harassment-in-workplace.pdf?v=15>.

¹⁴⁵ Perrin *et al* 2019 *Conflict and Health* 6.

¹⁴⁶ Nana 2008 “Sexual Harassment in the Workplace in South Africa: The Unlimited Vicarious Liability of Employers?” *Journal of African Law* 245.

¹⁴⁷ Nana 2008 “Sexual Harassment in the Workplace in South Africa: The Unlimited Vicarious Liability of Employers?” *Journal of African Law* 245.

¹⁴⁸ Bondestam and Lundqvist 2020 *European Journal of Higher Education* 2.

lives (Latcheva 2017). Nine out of ten of the world's countries have laws against sexual harassment in working life today...¹⁴⁹

Johnson, Widnall and Benya¹⁵⁰ make reference to some of the factors that contribute to the sexual harassment of women in the workplace. According to the authors, organisational tolerance for sexual harassment and environments that are dominated by males are some of the conditions that contribute to the increase of the risk of sexual harassment being perpetrated against women in fields such as academia.¹⁵¹

They report that the higher education environment is viewed as one that enables sexual harassment.¹⁵² This is because the individuals who come forward to report having been sexually harassed are either ignored or retaliated against.¹⁵³ The authors also provide a report on one of Research Triangle Institute (RTI) International's¹⁵⁴ interview with female faculty members in the fields of medicine, engineering and sciences who had been sexual harassment victims. The report revealed that the behaviour of male colleagues whom faculty or administrators of higher ranking regarded as "superstars" within their respective areas, was often made to look insignificant or even plain ignored.¹⁵⁵

They further provide that even the men who did not have this status were still granted preferential treatment and their behaviour of gender bias and sexual harassment was still excused.¹⁵⁶ The situation was so dire that the women faculty had developed bonds through dialogue that were aimed at disclosing or warning each other about behaviours of sexual harassment. The authors further highlight that due to the fact that

¹⁴⁹ Bondestam and Lundqvist 2020 *European Journal of Higher Education* 2.

¹⁵⁰ Johnson, Widnall and Benya 2018 "Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine" 53.

¹⁵¹ Johnson, Widnall and Benya 2018 "Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine" 53.

¹⁵² Johnson, Widnall and Benya 2018 "Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine" 53.

¹⁵³ Johnson, Widnall and Benya 2018 "Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine" 53.

¹⁵⁴ An independent, non-profit institute that provides research, development, and technical services to government and commercial clients worldwide.

¹⁵⁵ Johnson, Widnall and Benya 2018 "Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine" 53.

¹⁵⁶ Johnson, Widnall and Benya 2018 "Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine" 53.

many American universities were created for the purpose of educating men, they go on to be the dominant gender in a vast number of fields of academia.¹⁵⁷

For example, in the medical profession it was found that even though women have been obtaining medical degrees in increasing numbers that are equivalent to those of men for a number of decades, medical school faculty members who are female are not advanced as rapidly as their male colleagues, and neither are they compensated as well.¹⁵⁸ Prekel¹⁵⁹ provides that the manner in which men and women were raised to see themselves and those around them also plays a major role in how they behave. The author provides that:

“Men who were brought up with macho beliefs like ‘real men pinch bottoms’, ‘girls were made to hug and kiss’, ‘the more, the merrier, easily carry these social values into the workplace, and treat their female colleagues accordingly. Such men often think that women take their harassment as a compliment.”¹⁶⁰

Such viewpoints create a climate that allows sexual harassment to take place.

2.3.2 *Other causes of sexual harassment in the workplace*

To a large extent, a lack of gender equality in a workplace environment is the most common and biggest contributor of sexual harassment.¹⁶¹ However, although a major contributor, gender inequality is not the only cause of the sexual harassment of women in the workplace. According to McDonald and Charlesworth,¹⁶² other contributory factors of sexual harassment in a work environment may include policy agendas, job

¹⁵⁷ Johnson, Widnall and Benya 2018 “Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine” 53.

¹⁵⁸ Johnson, Widnall and Benya *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* 52.

¹⁵⁹ Prekel 2001 https://www.westerncape.gov.za/text/2004/4/sexual_harassment_2nd_upload.pdf.

¹⁶⁰ Prekel 2001 https://www.westerncape.gov.za/text/2004/4/sexual_harassment_2nd_upload.pdf.

¹⁶¹ McDonald and Charlesworth 2019 “Academic Evidence on the Causes, Manifestations and Responses to Workplace Sexual Harassment” 5.

¹⁶² McDonald and Charlesworth 2019 “Academic Evidence on the Causes, Manifestations and Responses to Workplace Sexual Harassment” 5.

design, physical features of the workplace, gendered identities, and supervisory power.

Where gender stereotypes that are supported by attitudinal and structural barriers to gender equality are concerned, the authors are of the view that certain factors are responsible for everyday sexism, sex-based bullying, sexual harassment, and predatory power.¹⁶³ They further list a number of additional contributory factors of sexual harassment of women in the world of work that should be taken note of, this includes norms of gender or sexuality that are conservative such as;¹⁶⁴

- subordination of women in traditionally feminine roles
- sexualisation
- entitlement
- associated lack of accountability for one's actions
- celebrity status entitlement
- attitudes which are violence supportive
- excessive use of drugs and alcohol
- Initiation ceremonies that are abusive and humiliating and are targeted at newcomers; and
- little to no access to work or career penalties that are flexible and are associated with using them

To a large extent the presence of sexual harassment problems in a work environment can sometimes be driven by different power dynamics where one individual has superior powers over another due to the job positions they hold respectively.¹⁶⁵ As Prekel puts it:

social and political changes in recent years have changed power relationships. Some men feel threatened by the career advancement of women and people of colour or are uncomfortable with women's new-found independence and assertiveness at home and /

¹⁶³ McDonald and Charlesworth 2019 "Academic Evidence on the Causes, Manifestations and Responses to Workplace Sexual Harassment" 5.

¹⁶⁴ McDonald and Charlesworth 2019 "Academic Evidence on the Causes, Manifestations and Responses to Workplace Sexual Harassment" 5.

¹⁶⁵ Prekel 2001 https://www.westerncape.gov.za/text/2004/4/sexual_harassment_2nd_upload.pdf.

or at work. Other men who have recently gained positions of power (possibly after decades of discrimination) may also try to prove themselves by harassing women subordinates.¹⁶⁶

The author also lists and discusses additional causes of sexual harassment against women in the workplace. According to the author, these include divorce and cultural differences, moral values, aggressiveness or bravado, credibility, and victim-blaming and finally, lack of company policy.¹⁶⁷ These specified factors highlight the vast causes of sexual harassment in a workplace.

2.4 Conclusion

To this end, the discussion above indicates that “sexual harassment” should be viewed within the broader scope of gender-based violence. The reason being that sexual harassment emanates from the same social factors that condone gender stereotyping within the society and eventually find its place within the work environment. As a result, it is imperative that workplace legislation and policies provide an all-encompassing protection against sexual harassment that looks beyond the work environment but aim to prevent discrimination in its broadest forms.

¹⁶⁶ Prekel 2001 https://www.westerncape.gov.za/text/2004/4/sexual_harassment_2nd_upload.pdf.

¹⁶⁷ Prekel 2001 https://www.westerncape.gov.za/text/2004/4/sexual_harassment_2nd_upload.pdf.

CHAPTER THREE

WORKPLACE LAW AND SEXUAL HARASSMENT IN SOUTH AFRICA

3.1 Introduction

As described by Hejase¹⁶⁸, sexual harassment is a global problem that keeps on recurring.¹⁶⁹ He also provides that different nations have adopted certain measures that are aimed at dealing with the effects that come as a result of such a problem.¹⁷⁰ Some of these measures involve the creation of laws that aim to address sexual harassment matters.¹⁷¹ An example of this is India's Handbook on Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2003.

The Handbook was created for the purpose of ensuring "that the citizens of India are aware of their rights and obligations in terms of creating a safe workplace environment for women."¹⁷² Another important law that has played a vital role in the development of sexual harassment laws is Title VII.¹⁷³ It declares "sexual harassment" as a form of sexual discrimination. Some of these laws make mention of the different acts that constitute forms of sexual harassment.

An illustration of this can be seen in The Code which provides that "Sexual harassment may include, but is not limited to, victimisation, quid pro quo harassment and sexual favouritism."¹⁷⁴ Another important aspect to look into is the effects sexual harassment has on the victims who have been on the receiving end of it. It will be discussed in detail later on in the study.

¹⁶⁸ Hejase 2015 *Journal of Management Research Abstract*.

¹⁶⁹ Hejase 2015 *Journal of Management Research Abstract*.

¹⁷⁰ Hejase 2015 *Journal of Management Research Abstract*.

¹⁷¹ Hejase 2015 *Journal of Management Research Abstract*.

¹⁷² *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 14 of 2013*.

¹⁷³ Title VII of the *Civil Rights Act of 1964*.

¹⁷⁴ Item 5.3.2 of The Code

This chapter also uses the development of sexual harassment at international law to show how international standards have shaped the development of sexual harassment law in South Africa.

3.2 International law and the notion of sexual harassment

Various international laws have been developed for the purpose of combating the issue of sexual harassment in the workplace.¹⁷⁵ The Convention on the Elimination of All Forms of Discrimination Against Women¹⁷⁶ is one of the laws put in place at an international level to eliminate the discrimination of women in the workplace environment. According to Geetha,¹⁷⁷ this convention shows support for the concept of equality.

It also requires that countries who elect to ratify this convention must formulate legislation aimed at ensuring the protection of the enjoyment of rights and freedom of women the same way men enjoy them.¹⁷⁸ It further provides that sexual harassment is a violation of the rights to equality, life, and liberty of women. Where international case law with great influence may be concerned, reference is made to the Indian case of *Vishaka v State of Rajasthan* (hereafter the Vishaka case)¹⁷⁹ where the Supreme Court recognised sexual harassment as being a violation of rights

This decision was taken in solidarity with women and for protection of their right to equality.¹⁸⁰ Another international instrument that has had a great influence on sexual harassment law is the UN Committee on the Elimination of Discrimination against Women (CEDAW).¹⁸¹ CEDAW outlines a number of guidelines and tasks that are to

¹⁷⁵ A few examples of these include Australia's "Sex Discrimination Act 1984"; Article 14 of the Constitution of India; India's "Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Bill of 2006"; and Philippines' "Anti-Sexual Harassment Act of 1995".

¹⁷⁶ It was adopted on the 18th of December 1979 by the United Nations General Assembly, with the aim of promoting women's rights.

¹⁷⁷ Geetha 2012 *Economic and Political Weekly* 18.

¹⁷⁸ Geetha 2012 *Economic and Political Weekly* 18.

¹⁷⁹ *Vishaka v State of Rajasthan* 1997 6 SCC 241.

¹⁸⁰ Geetha 2012 *Economic and Political Weekly* 18.

¹⁸¹ This is a body comprising of independent experts whose function is the monitoring of the implementation of the Convention on the Elimination of All Forms of Discrimination Against Women.

be followed and performed by the states that elect to ratify the Convention. It also provides a definition of 'discrimination against women' stating that it shall refer to

"any form of 'distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."¹⁸²

Furthermore, CEDAW requires the following of all the State Parties who elect to ratify it;

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization, or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs, and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.¹⁸³

Additionally, Article 11 requires that States Parties take all measures that are appropriate in order to eliminate discrimination against women in the employment field so as to ensure that men and women are afforded the same rights on a basis of equality.¹⁸⁴

¹⁸² Article 1 of Convention on the Elimination of All Forms of Discrimination against Women of 1979.

¹⁸³ Article 2 of Convention on the Elimination of All Forms of Discrimination against Women of 1979.

¹⁸⁴ Article 11 of Convention on the Elimination of All Forms of Discrimination against Women of 1979

In her work, Geetha¹⁸⁵ tracks the beginning of legislative efforts adopted for the purpose of tackling the issue of sexual harassment in the workplace all the way back to the year of 2000 with specific reference to the Sexual Harassment of Women at the Workplace (Prevention) Bill of 2000. Geetha provides the following in terms of the Bill:

It imposed a series of obligations on the employer to initiate criminal action where the act of sexual harassment amounted to a specific offence under the IPC or under any other law, initiate disciplinary action where there is misconduct, create complaint mechanism, etc.¹⁸⁶

Following the formulation and adoption of the Sexual Harassment of Women at the Workplace (Prevention) Bill of 2000, the Prevention of Sexual Abuse of Women at Workplace came about a year later in 2001.¹⁸⁷ The Bill contains within it, the definition of sexual harassment which can be found in clause 2(c).¹⁸⁸ The Bill also provides the definition of sexual abuse and the minimum term of punishment as well as the fine amount.¹⁸⁹ Later, another Bill was introduced in 2002 known as the Prevention of Sexual Abuse and Harassment and Girls at Workplace Bill.

The aim of the Prevention of Sexual Abuse and Harassment and Girls at Workplace Bill was to protect women and girls against sexual harassment, sexual abuse and other similar acts by their employers or colleagues.¹⁹⁰ The 2002 Bill also provided the definition for sexual harassment in the workplace, furthermore it made provision for the terms of imprisonment accompanied by a fine.¹⁹¹ The Bill that followed was the Sexual Harassment at the Workplace (Prevention) Bill of 2003.¹⁹² However, none of the Bills referred to were passed and this was concluded with the introduction of the Protection of Women at Workplace Bill of 2007.¹⁹³

¹⁸⁵ Geetha 2012 *Economic and Political Weekly* 19.

¹⁸⁶ Geetha 2012 *Economic and Political Weekly* 19.

¹⁸⁷ This Bill seeks to protect against the sexual abuse of women in the workplace environment by either employers or their colleagues and any other matters that may be related to the subject.

¹⁸⁸ Sing *Industrial Relations* 355.

¹⁸⁹ Geetha 2012 *Economic and Political Weekly* 19.

¹⁹⁰ Singh *Industrial Relations* 355.

¹⁹¹ Geetha 2012 *Economic and Political Weekly* 19.

¹⁹² This Bill did not only cover women under employment, but women who are self-employed and female students in institutions of learning.

¹⁹³ Geetha 2012 *Economic and Political Weekly* 19.

3.4 Sexual harassment law in South Africa

From the above-mentioned Bills, and the influence of the laws that were adopted by the different countries, a better understanding of the development of legislation created to deal with matters of sexual harassment in the workplace becomes apparent. To bring focus closer to home, it is important to also take a look at the development of South African law where sexual harassment in the workplace is concerned.

3.4.1 *The notion of sexual harassment in South Africa*

According to Chicktay,¹⁹⁴ evidence has indicated that 68% of women have been victims of some form of sexual harassment at least once at work. The author provides that the power imbalance in the South African workplace environment is responsible for exposing women to being more vulnerable to being sexually harassed.¹⁹⁵ Additionally, the author credits the frequency with which South African women performing unskilled labour are sexually harassed to the high rate of unemployment and poverty in South Africa.¹⁹⁶

Within the South African context, defining the actions that may constitute sexual harassment has not been an easy task for commentators and courts.¹⁹⁷ According to Nana, the actions may vary ranging from, but not limited to, gender-based insults or punishments or even non-verbal conduct.¹⁹⁸ The Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace of 2005 assists with the abovementioned issue of difficulties in defining the actions that may constitute sexual harassment. It does this by providing some form of clarity as to what constitutes sexual harassment.¹⁹⁹

¹⁹⁴ Chicktay 2010 *Journal of African Law* 283.

¹⁹⁵ Chicktay 2010 *Journal of African Law* 285.

¹⁹⁶ Chicktay 2010 *Journal of African Law* 285.

¹⁹⁷ Nana 2008 *Journal of African Law* 246.

¹⁹⁸ Nana 2008 *Journal of African Law* 246.

¹⁹⁹ Item 4 of the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace, 2005.

The Code provides in item 4 that sexual harassment is “unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace.”²⁰⁰

3.4.2 *The Constitution of the Republic of South Africa, 1996 and the notion of sexual harassment*

In 1994, South Africa took a step to adopt a democratic constitution which provided fundamental rights to all South Africans with race, for the first time, not being a deciding factor.²⁰¹ Found in section 1 of the Constitution of the Republic is the proclamation that the Constitution is based on two fundamental principles namely, equality and dignity.²⁰² It further provides that it is founded on non-sexism.²⁰³

The Constitution further emphasises these values in both sections 39(1) and 36.²⁰⁴ Section 39(1) provides that in the interpretation of the Bill of Rights, there must be a promotion of primary values of equality, dignity, and freedom. In support of this, section 36 provides that:

the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors...²⁰⁵

According to Chicktay,²⁰⁶ sexual harassment poses a serious challenge to the aforementioned values. The author highlights that first, section 9 of the Constitution grants every South African the right to equality as well as the right to not be discriminated against. Further that although both men and women can be subjected to sexual harassment, women are more commonly the victims of the act of sexual harassment.

²⁰⁰ Item 4 of the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace, 2005.

²⁰¹ Chicktay 2010 *Journal of African Law* 284.

²⁰² Section 1(a) of the *Constitution*.

²⁰³ Section 1(b) of the *Constitution*.

²⁰⁴ Chicktay 2010 *Journal of African Law* 284.

²⁰⁵ Section 36 of the Constitution of the Republic of South Africa, 1996.

²⁰⁶ Chicktay 2010 *Journal of African Law* 284-285.

3.4.3 *The various labour laws and related legislation and sexual harassment*

Most jurisdictions around the world have legislation that is aimed at dealing with sexual harassment matters in the workplace.²⁰⁷ South Africa forms part of these jurisdictions and has over the years promulgated the following legislation to confront the issue of sexual harassment in the workplace:

3.4.3.1 Promotion of Equality and Prevention of Unfair Discrimination (PEPUDA)

Section 1(1) of PEPUDA defines harassment as:

... unwanted conduct, which is persistent or serious and demeans, humiliates, or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to-

- (a) sex, gender, or sexual orientation, or
- (b) a person's membership or presumed membership of a group identified by one or more of the prohibited groups or a characteristic associated with a group.

Furthermore, section 8 provides that "no person may unfairly discriminate against any person on the ground of gender...". To this effect section 11 of PEPUDA prohibits subjecting any person to harassment. According to Olivier,²⁰⁸ PEPUDA was enacted to give effect to the important right to equality.²⁰⁹ The author indicates that this Act will only apply in cases where the Employment Equity Act 55 of 1998,²¹⁰ is not applicable. For this reason, the applicability of PEPUDA is limited where harassment in the workplace is concerned.

Olivier²¹¹ further highlights that parties such as learners, clients, independent contractors, and suppliers who have been harassed by a subsequent employee may make use of PEPUDA to bring their grievances forward. This is because they cannot

²⁰⁷ Nana 2008 *Journal of African Law* 245.

²⁰⁸ Olivier 2018 "Sexual harassment in the workplace: A critical analysis of the unwelcome element" 17

²⁰⁹ Olivier 2018 "Sexual harassment in the workplace: A critical analysis of the unwelcome element" 17.

²¹⁰ Hereafter EEA.

²¹¹ Olivier 2018 "Sexual harassment in the workplace: A critical analysis of the unwelcome element" 17-18

make use of the EEA as it only protects those individuals recognised as employees while the aforementioned categories are not recognised as employees.²¹²

3.4.3.2 Labour Relations Act 66 of 1995

One of the purposes of the LRA 66 of 1995,²¹³ is to give effect to, as well as regulate the important rights that are granted by section 27 of the Constitution. Section 27 provides that

- (1) Everyone has the right to have access to—
 - (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment²¹⁴

The LRA offers protection to all employees excluding National Intelligence Agency employees, and members of the National Defence Force.²¹⁵ The LRA is to be interpreted in compliance with the Constitution.²¹⁶

Section 187(f) of the LRA prohibits the direct or indirect discrimination of an employee by an employer on the grounds of a number of any arbitrary reasons. This includes, but is not limited to, the ground of gender or sex.²¹⁷ According to section 186(1)(e) of the LRA, if an employee terminates their employment contract (with or without giving notice) as a result of the employer making the employee's continued employment intolerable, this will constitute dismissal.

²¹² Olivier 2018 "Sexual harassment in the workplace: A critical analysis of the unwelcome element" 17-18

²¹³ Hereafter LRA.

²¹⁴ Section 27 of the Constitution of South Africa, 1996.

²¹⁵ Section 2(a) – (c) of the LRA.

²¹⁶ Section 3(b) of the LRA.

²¹⁷ Section 187(f) of the LRA.

It is important that the employee be able to prove an existence of sexual harassment as was demonstrated in the case of *Bandat v De Kock and Another* (JS832/2013) [2014] ZALCJHB 342 where the court provided:

It is therefore clear that in considering the respondents' absolution application, I need to consider if the applicant has produced sufficient evidence to at least, and on her own case so far, reasonably established *prima facie* existence of a dismissal and of sexual harassment. In simple terms, did the applicant's evidence properly back up her claims?
...²¹⁸

This was supported in *Motaung v Wits University (School of Education)* (2014) 35 ILJ (LC) where the court provided:

In view of the nature of the applicant's claim, it has to be established whether the applicant has adduced sufficient evidence supporting the facts required to back up her claim, and upon which this court might give judgment against the respondent.²¹⁹

3.4.3.3 Employment Equity Act 55 of 1998

The EEA is one of the Acts which has been employed in South African law to deal with matters pertaining to sexual harassment in the workplace. The EEA prohibits, amongst other grounds, discrimination on the basis of sex and gender.²²⁰ The Act also provides that sexual harassment of an employee in its nature constitutes a form of unfair discrimination whether it be based on one or multiple grounds mentioned in section 6(1) mentioned above.²²¹ As such the EEA prohibits the sexual harassment in the workplace.

The Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace of 2005²²² which forms part of the EEA is another important portion of the

²¹⁸ *Bandat v De Kock and Another* (JS832/2013) [2014] ZALCJHB 342 para 6.

²¹⁹ *Motaung v Wits University (School of Education)* (2014) 35 ILJ (LC) para 13.

²²⁰ Section 6(1) of the EEA.

²²¹ Section 6(3) of the EEA.

²²² Hereafter the Code of 2005.

South African law which has played a vital role in the governance of sexual harassment matters in a workplace environment.²²³ It states that “

sexual harassment is a form of unfair discrimination on the basis of sex and/or gender and/or sexual orientation which infringes the rights of the complainant and constitutes a barrier to equity in the workplace.²²⁴

The Code firmly provides that sexual harassment in the workplace constitutes an unfair discrimination and as such the victim of the harassment has the recourse of following internal formal and informal procedures which are provided for in items 8 and 9 of the Code.²²⁵ The Code also places a responsibility on employers to ensure that:

customers, suppliers, job applicants and others who have dealings with the business are not subjected to sexual harassment by the employer or its employees.²²⁶

Employers are expected to adopt a policy aimed at addressing sexual harassment, which would take cognisance of the Code as well as be guided by the provisions of the Code.²²⁷ Section 60 of the EEA refers to the liability of employers.²²⁸ The section states that:

if it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by the employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.²²⁹

Section 60 of the EEA further provides that in an even where an employer is unable to take the precautionary steps that are necessary as provided for by subsection (2), and proof is provided indicating that the employee has failed to act in compliance with the relevant provision, the employer will be deemed to have also been in contravention

²²³ The *Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace* 1998 and 2005.

²²⁴ Item 7.4.1.

²²⁵ Nana 2008 *Journal of African Law* 248.

²²⁶ Item 6.3.

²²⁷ Item 7.1.

²²⁸ Employment Equity Act of 1998.

²²⁹ Section 60 (1).

of that provision.²³⁰ Section 60 of the EEA goes further to provide an exception to the employer's liability concept. It states that if the employer is able to prove that upon being made aware of the occurrence of a sexual harassment incident committed by an employee, he/she acted with the utmost care and "did all that was reasonably practicable", the employer will not be absolved from liability emanating from the employee's conduct.²³¹

The adoption of a policy aimed at addressing sexual harassment as well as the communication of its contents to employees, will, in conjunction with other relevant factors, be considered when establishing whether the employer has in fact fulfilled his/her obligation as required by section 60(2) of the EEA.²³² For a resolution of the problem to be reached where there has been an event of a sexual harassment, the incident may be reported to the employer by a number of parties.²³³ It could be the employee who has been sexually harassed, a friend, human resources or a colleague where such an employee has expressed a wish that the employer be made aware of the issue.²³⁴ It is important that utmost care and confidentiality be observed in dealing with matters of sexual harassment. Employers and employees have a responsibility to ensure that the identities of the parties involved are protected when addressing grievances pertaining to sexual harassment.²³⁵

3.4.3.4 Policies on sexual harassment

Section 5 of the EEA requires that every employer take measures "promote equal opportunity in the workplace through the elimination of unfair discrimination" in any employment practice or policy.²³⁶ Employers stand to lose a great deal in the event that "they fail to create and maintain a work environment" that is safe from sexual

²³⁰ Section 60 (3).

²³¹ Section 60 (4).

²³² Item 7 of the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace.

²³³ Item 8.1.2 of the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace.

²³⁴ Item 8.1.2 of the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace.

²³⁵ Item 9.1 of the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace.

²³⁶ Section 5 of the Employment Equity Act

harassment.²³⁷ Joubert, Van Wyk and Rothmann,²³⁸ provide that failure by employers to guarantee a safe environment may result in unfavourable consequences for organisations and further make itself apparent by bringing personal harm to victims negatively affecting their productivity, including costs and legal implications for employees.

Item 7.1 of The Code requires that employers adopt a sexual harassment policy which takes awareness of and is led by the provisions found in the 2005 Code.²³⁹ Item 7.2 further requires that the contents of the said sexual harassment policies ought to be conveyed thoroughly to all the employees. Amongst its requirements, the 2005 Code requires that the sexual harassment policies contain the definition of what sexual harassment is.²⁴⁰

The 2005 Code grants complainants who have allegedly been sexually harassed with the right to make use of the procedures that are contained in the policy and outlines that appropriate action must further be taken by the employer.²⁴¹ Furthermore, the 2005 Code provides that the victimisation or retaliation against an employee who makes a complaint in good faith will be a disciplinary offence.²⁴² According to Joubert, Van Wyk and Rothmann,²⁴³ some authors²⁴⁴ hold a view in unison that the simple existence of a sexual harassment policy does not guarantee its effectiveness.²⁴⁵

The authors further indicate that in order for it to be of any value and not just another document that is formulated simply as a formality, it is imperative that a policy be implemented effectively.²⁴⁶ In order to gather insight into the effectiveness of sexual

²³⁷ Joubert, Van Wyk and Rothmann 2011 *SA Journal of Human Resource* 1.

²³⁸ Joubert, Van Wyk and Rothmann 2011 *SA Journal of Human Resource* 1.

²³⁹ Item 7.1 of The Code.

²⁴⁰ Item 7.4.1 of The Code.

²⁴¹ Item 7.4.3 of The Code.

²⁴² Item 7.4.4 of The Code.

²⁴³ Joubert, Van Wyk and Rothmann 2011 *SA Journal of Human Resource* 3.

²⁴⁴ Laabs, 1998; Orlov & Roumell, 1999; Owens, Gomes & Morgan, 2004; Paludi, 1996.

²⁴⁵ Joubert, Van Wyk and Rothmann 2011 *SA Journal of Human Resource* 3.

²⁴⁶ Joubert, Van Wyk and Rothmann 2011 *SA Journal of Human Resource* 3.

harassment policies in the institutions, Joubert, Van Wyk and Rothmann²⁴⁷ conducted a survey on the employees of 10 South African higher education institutions.

The results indicated that the general majority of participants, which is 97.4% of the participants, agreed that a policy that engages the subject of sexual harassment did exist within their institution.²⁴⁸ However, worryingly, implementing these policies appeared to be problematic as-as few as 31% of the academic staff indicated having a copy of the policy in their possession.²⁴⁹ Furthermore, only 24% of the staff members had been trained how to use the policy.²⁵⁰ Finally, the policy had only been elaborated to a group that is even smaller that consisted of 7.9% of the respondents. This reflected how even though sexual harassment policies are created in workplaces, the implementation of them remains an area that requires reassessment and improvement.

In their work, Fusilier and Penrod²⁵¹ made reference to a survey conducted in South Africa that reflected what happens when a workplace sexual harassment policy is implemented effectively. According to the authors, the survey was conducted with South African staff members being the subjects of it.²⁵² The results of the survey indicated that 97.8% of the staff members stated that there was a sexual harassment policy in place at their place of work which was a higher institution.²⁵³ Furthermore, more than 80% claimed that a policy is an effective tool for reducing the issue of harassment.²⁵⁴ The results of the survey seem to highlight what happens when an employer sets out to implement a policy that actually works in an effort to address the issue of sexual harassment.

3.4.4 Case law on sexual harassment

²⁴⁷ Joubert, Van Wyk and Rothmann 2011 *SA Journal of Human Resource* 4.

²⁴⁸ Joubert, Van Wyk and Rothmann 2011 *SA Journal of Human Resource* 5.

²⁴⁹ Joubert, Van Wyk and Rothmann 2011 *SA Journal of Human Resource* 5.

²⁵⁰ Joubert, Van Wyk and Rothmann 2011 *SA Journal of Human Resource* 5.

²⁵¹ Fusilier and Penrod 2015 *Employ Respons Rights* 49.

²⁵² Fusilier and Penrod 2015 *Employ Respons Rights* 49.

²⁵³ Fusilier and Penrod 2015 *Employ Respons Rights* 50.

²⁵⁴ Fusilier and Penrod 2015 *Employ Respons Rights* 50.

There are numerous South African cases which have demonstrated how the South African judiciary deals with matters pertaining to workplace sexual harassment. The following are some examples:

3.4.4.1 *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* [2015] JOL 34906 (LAC)

This case gives extensive definitions of sexual harassment in terms of both The Code of 1998²⁵⁵ and 2005²⁵⁶. The Labour Appeal Court highlighted the distinctions that exist between the definition contained in the Code of 1998 and the definition contained in the Code of 2005.²⁵⁷ The Code of 1998 provides that sexual harassment refers to unwanted conduct that is of a sexual nature.²⁵⁸ According to the Code of 1998; the 'unwanted nature' of sexual harassment is what distinguishes from behaviour that both mutual and welcome.²⁵⁹ The Code of 1998 also provides that sexual attention becomes harassment if: the behaviour is of a persistent nature (however a single incident may still qualify as sexual harassment); the individual on the receiving end of the harassment has made it clear that they find the conduct offensive; and/or the person committing the harassment ought to have known that the behaviour is considered unacceptable.²⁶⁰

The Code of 2005 on the other hand provides that sexual harassment refers to conduct that is unwelcome and that is of a sexual nature and that has the effect of violating 'the rights of an employee and constitutes a barrier to equality in the workplace'.²⁶¹ In addressing the conduct, the Code of 2005 takes the following factors into consideration: whether the harassment is based on grounds that are prohibited such as sex, gender, and/or sexual orientation; whether the sexual conduct was one that

²⁵⁵ Para 22.

²⁵⁶ Para 23.

²⁵⁷ Para 22.

²⁵⁸ Para 22.

²⁵⁹ Para 22.

²⁶⁰ Para 22.

²⁶¹ Para 23.

was not welcomed; the nature as well as extent of the sexual conduct; and the impact the sexual conduct had on the employee.²⁶²

Furthermore, the court in this case provided that:

"The treatment of harassment as a form of unfair discrimination in s6(3) of the Employment Equity Act 55 of 1998 recognises that such conduct poses a barrier to the achievement of substantive equality in the workplace. This is echoed in the 1998 Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (the 1998 Code), issued by NEDLAC under s203(1) of the Labour Relations Act 66 of 1995 (LRA), and the subsequent 2005 Amended Code on the Handling of Sexual Harassment Cases in the Workplace (the Amended Code), issued by the Minister of Labour in terms of s54(1)(b) of the Employment Equity Act 55 of 1998. At its core, sexual harassment is concerned with the exercise of power and in the main reflects the power relations that exist both in society generally and specifically within a particular workplace. While economic power may underlie many instances of harassment, a sexually hostile working environment is often '...less about the abuse of real economic power, and more about the perceived societal power of men over women. This type of power abuse often is exerted by a (typically male) co-worker and not necessarily a supervisor. By its nature such harassment creates an offensive and very often intimidating work environment that undermines the dignity, privacy and integrity of the victim and creates a barrier to substantive equality in the workplace. It is for this reason that this Court has characterised it as 'the most heinous misconduct that plagues a workplace'."²⁶³

3.4.4.2 *Masemola v Commission for Conciliation, Mediation and Arbitration and Other* [2016] ZALCJHB 183

In this case the applicant was alleged to have sexually harassed an employee (Ms D).²⁶⁴ The applicant had indicated that he would erase nude pictures of the applicant that he had on his phone only after receiving sexual favours from her.²⁶⁵ The applicant tried to extort sexual favours out of the employee threatening to post the nude photos if she refused to comply.²⁶⁶

After a disciplinary hearing was conducted against the applicant, he was found guilty of sexual harassment resulting in him being dismissed.²⁶⁷ The court highlighted that the employer owes a duty towards his or her employees to protect them from sexual

²⁶² Para 23.

²⁶³ Paras 19-21.

²⁶⁴ Para 3.

²⁶⁵ Para 4.

²⁶⁶ Para 7.

²⁶⁷ Para 8.

harassment.²⁶⁸ It went on to provide that the duty exists even if the harassment does not take place on work premises or within recognised working hours.²⁶⁹

Through dismissing the applicant, the duty to protect employees was complied with. Upon appeal of the matter by the applicant, the court held that the decision to dismiss the applicant was an appropriate sanction due to the fact that the applicant showed no remorse.²⁷⁰ In dealing with the matter at hand the court made reference to the *Campbell*²⁷¹ case which deals extensively with South African law pertaining to sexual harassment in the workplace.

3.4.4.3 *Ntsabo v Real Security CC* [2003] 12 (LC) C259/2000

In this case a security guard who was a female had been sexually harassed by her superior. Even though she had made a complaint to the company, there was never any action taken to protect her which prompted her to resign.²⁷² Following the resignation by the employee, she lodged an action against her employer for both patrimonial damages in terms of the EEA and “unfair dismissal and automatically unfair dismissal” under LRA.²⁷³ The Labour Court found that she had in fact been sexually harassed which led to her successfully claiming under the EEA.

Additionally, according to the court her dismissal had constituted constructive dismissal and was as such unfair.²⁷⁴ This finding by the Court stemmed from the fact that due to the sexual harassment she had been subjected to at work, it had made life at work intolerable which forced her to resign.²⁷⁵ However, according to the Court, her dismissal was not automatically unfair. It made an order to the effect that compensation be made to the employee for unfair dismissal for 12 months.²⁷⁶

²⁶⁸ Para 33.

²⁶⁹ Para 33.

²⁷⁰ Para 36.

²⁷¹ *Campbell Scientific Africa (Pty) Ltd v Simmers and Others*.

²⁷² Page 2.

²⁷³ Page 4.

²⁷⁴ Page 81.

²⁷⁵ Pages 80-81

²⁷⁶ Page 81.

However, there was a rectification of this judgment in the case of *Christian v Colliers Properties* referred to below.

3.4.4.4 *Christian v Colliers Properties* [2005] ZALC 56

In this case an employee had claimed to have lost her employment as a result of the sexual victimisation she had been subjected to.²⁷⁷ The court, upon considering various factors, provided that her sexual harassment constituted a form of discrimination on the basis of sex and consequently ordered that her full compensation be paid for by the employer for a period of 24 months.²⁷⁸ According to Chicktay:

The *Christian v Colliers Properties* judgment correctly regarded sexual harassment as a form of sex discrimination, declaring the dismissal to be automatically unfair and justifying a 24-month compensation order. It provides victims of workplace sexual harassment dismissal with significant protection.²⁷⁹

3.4.5 *Types of sexual harassment recognised by South African and international law*

As defined by the Code “sexual harassment in the working environment is a form of unfair discrimination...”.²⁸⁰ For the purpose of accurately classifying an act as sexual harassment and setting it apart from what is considered as sexual attention, it is important that the recipient make it clear that they consider the actions as being offensive, added to that, the perpetrator is well aware that their actions are unacceptable.²⁸¹ In his work, Nana²⁸² states:

... conduct results in harassment where such conduct creates an intimidating work environment for the recipient. This may include victimization and quid quo pro harassment.²⁸³

He further goes on to state that the Employment Equality (Sex Discrimination) Regulations 2005 of the United States identifies three types of harassments that are

²⁷⁷ Page 1.

²⁷⁸ Page 4.

²⁷⁹ Chicktay 2010 *Journal of African Law* 295.

²⁸⁰ Item 3.

²⁸¹ Nana 2008 *Journal of African Law* 247.

²⁸² Nana 2008 *Journal of African Law* 247

²⁸³ In Nana 2008 *Journal of African Law* 247.

prohibited, namely harassment on the grounds of sexual re-assignment,²⁸⁴ sex-based harassment and harassment that is of a sexual nature. It is not necessary for a perpetrator to have inhibited all these acts collectively for there to be a case of sexual harassment. According to The Code “a single incident of unwelcome sexual conduct may constitute sexual harassment.”²⁸⁵

According to Welsh²⁸⁶ sexual harassment can be distinguished in terms of two types of behaviours, being quid pro quo harassment and hostile work environment harassment. She also defines each as follows:

quid pro quo harassment involves sexual threats or bribery that are made a condition of employment or used as the basis for employment decisions. Hostile environment harassment captures those behaviours, such as sexual jokes, comments, and touching, that interfere with an individual's ability to do her/his job or that create an 'intimidating', hostile or offensive working environment.²⁸⁷

Title VII encompasses even those acts that do not contribute towards an employee's economic injury. This means that sexual harassment that causes non-economic injury remains a violation of Title VII and as such is an offence.²⁸⁸ Lunenburg provides examples of acts that constitute sexual harassment and states that they include sexual jokes, pornographic pictures, sexually oriented comments concerning the physical appearance of a person, lewd comments and displaying objects that are sexually oriented.²⁸⁹

According to Nana, for an act to constitute sexual harassment it does not necessarily have to be driven by sexual desire.²⁹⁰ The author also states that it may even be insults or punishments that are gender based or even conduct that is non-verbal. Concerning the severity of sexual harassment that is perpetrated against women, Singh²⁹¹ states that women working in certain professions such as those who are new recruits in

²⁸⁴ Ishak and Haneef 2014 *Journal of Religion and Health* 522.

²⁸⁵ Item 5.3.3.

²⁸⁶ Welsh 1999 *Annual Review of Sociology* 170.

²⁸⁷ Welsh 1999 *Annual Review of Sociology* 170.

²⁸⁸ *Meritor Savings Bank v Vinson* 58.

²⁸⁹ Lunenburg 2010 *International Journal of Management, Business, and Administration* 3

²⁹⁰ Nana 2008 *Journal of African Law* 246.

²⁹¹ Singh 2016 *Journal of International Women's Studies* 104-105.

organisations that are private and women working within the modelling and film industries are more likely to be the subjects of menace of sexual harassment.

Welsh²⁹² states that these acts of hostile sexual harassment include different forms of gender harassment such as put-downs and hazing that is gender based. To a large extent sexual harassment contains a characteristic of the exertion of power, often the male over female type. An example of this can be seen in an instance where an employee holding a lower-level job position seeks to exert dominance over a female holding a higher-level job position in a work environment, as highlighted by Lunenburg.²⁹³

To put the above-mentioned instance into practicality, Lunenburg²⁹⁴ highlights situations whereby male subordinates will harass a woman who holds a senior position such as that of being a supervisor for the simple purpose of exerting male dominance over them. This could be done by placing focus on traditional gender stereotypes, such as displaying the woman by showing them in a light of being helpless, passive, and a lack of career commitment which would then reflect negatively on the woman.

Hostile environment sexual harassment is an offence punishable by a civil suit as actionable under Title VII.²⁹⁵ The distinction of certain types of acts helps to draw a line between what constitutes an act of sexual harassment and what doesn't. It is important to make the line a clear one as there is a wide variety of acts which may qualify as those of a sexual harassment nature.²⁹⁶ For this purpose, it is necessary to mention the different types of acts of sexual harassment for a more in-depth understanding.

²⁹² Welsh 1999 Annual Review of Sociology 170.

²⁹³ Lunenburg 2010 *International Journal of Management, Business, and Administration* 1.

²⁹⁴ Lunenburg 2010 *International Journal of Management, Business, and Administration* 2.

²⁹⁵ *Meritor Savings Bank v Vinson* 63-69.

²⁹⁶ Elias, Gibson and Barney *The Role of Social Power in Sexual Harassment and Job Discrimination* 178-194.

Kristen, Banuelos and Urban²⁹⁷ observe that sexual harassment acts range from a number of actions such as physical, verbal, and visual harassment, including sexual advances that are unwanted. Singh²⁹⁸ states that “any act, action or behaviour with an underlying sexual connotation done to intimidate or humiliate a victim can be classified as sexual harassment”. Further that an act to be regarded as sexual harassment it may comprise of one or more acts, and the intention of the perpetrator is not of relevance.

The above statements act as an indication that there can never be a constant and precise list of acts provided and labelled as the only examples of acts of sexual harassment. The misconception that presents the idea that sexual harassment can only be present where there has been overt physical acts remains just a misconception.²⁹⁹

According to Singh:

certain common instances of sexual harassment include: leering at a female colleague's body, passing distasteful comments on her character or about the way she dresses, indulging in inappropriate sexual humour in the workplace to the discomfort of female colleagues, sexually suggestive gestures, displaying visual material with sexual content in the form of graffiti, cartoons, pin ups etc., calling up a female colleague late at night or persistently insisting her for lunch or dinner dates thereby making her uncomfortable or any other such verbal or physical conduct.³⁰⁰

From the literature referred to above that there is no fixed formula for what collective actions constitute sexual harassment. However, they commonly have similar effects on the victims, this will be demonstrated below.

3.5 The psychological effects of sexual harassment

According Geetha³⁰¹ not only does sexual harassment against women in the workplace have the effect of creating an insecure environment but has the effect of

²⁹⁷ Kristen, Banuelos and Urban 2015 *Berkeley Journal of Employment and Labour Law* 172.

²⁹⁸ Singh 2016 *Journal of International Women's Studies* 104.

²⁹⁹ Singh 2016 *Journal of International Women's Studies* 104.

³⁰⁰ Singh 2016 *Journal of International Women's Studies* 104.

³⁰¹ Geetha 2010 *Economic and Political Weekly* 1.

creating an environment that is hostile too. Geetha reports that the result is that the women are discouraged from participating in work, which further, to a large extent, affects their social and economic empowerment as well as the goal of inclusive growth.³⁰²

This form of harassment is one that is commonly referred to as the hostile environment sexual harassment.³⁰³ It includes a pattern consisting “of unwelcome and offensive conduct that interferes with an individual’s work performance” or causes an offensive or intimidating work environment.³⁰⁴ Lunenburg highlights that sexual harassment in the workplace may further have the effect of making the workplace environmental unbearable.

According to the author this could escalate to the extent of the victim going to work late or completely refraining from going, or even going so far as causing them to look for another job.³⁰⁵ According to Welsh, victimised employees may be reluctant to define their accounts as those of sexual harassment due to the desire to be seen as competent and team players.³⁰⁶

Welsh further provides:

respondents who were the objects of unwanted sexual behaviours, regardless of whether they labelled their experiences as sexual harassment, experienced more negative psychological and work-related outcomes than respondents who did not experience any unwanted sexual behaviours.³⁰⁷

In its nature sexual harassment is objectionable and as such it has the effect of not only having an effect on the victim’s personal life but also further damages the abilities and dignity of the victim severely.³⁰⁸ Often times sexual harassment matters go

³⁰² Geetha 2010 *Economic and Political Weekly* 1.

³⁰³ Ramsaroop and Parumasur 2007 *SA Journal of Industrial Psychology* 25-26.

³⁰⁴ Lunenburg 2010 *International Journal of Management, Business, and Administration* 3.

³⁰⁵ Lunenburg 2010 *International Journal of Management, Business, and Administration* 4.

³⁰⁶ Welsh 1999 *Annual Review of Sociology* 174.

³⁰⁷ Welsh 1999 *Annual Review of Sociology* 174.

³⁰⁸ Singh 2016 *Journal of International Women’s Studies* 105.

unreported and this is due to a number of reasons such as guilt and shame.³⁰⁹ Therefore, it is crucial that there ought to be a space designated towards making employees who have been sexual harassed feel safe enough to come forward with their accounts.

Lunenburg³¹⁰ is of the view that there is a need for ensuring that there is someone outside of their immediate supervisor that employees can reach out to such as someone from the human resources department. Kristen, Banuelos and Urban³¹¹ state that even though sexual harassment affects between 50 and 80 percent of women, only about 25% actually come forward and tell someone, and only 5% will go further to make a formal complaint. In some instances, sexual harassment matters are not reported due to cultural reasons. For example, Huen³¹² indicates that from childhood, Japanese women are given a directive to go with the flow and do as their peers do.

According to Huen:

... This emphasis on group ethos rather than individualism makes it difficult for women to speak up about their sufferings related to sexual harassment and other forms of gender discrimination.³¹³

Because of the cultural odds that are often stacked against these women, when harmed they are often under overwhelming pressure by society to stick to the social order; failing which there would be shame and embarrassment. Huen³¹⁴ reports that the women who come out into the open to complain about having been sexually harassed in the workplace are regarded as disruptors. In most cases they are forced to retire and in some instances it gets to an extent where they are fired.

³⁰⁹ Foster 2018 *Basic and Applied Social Psychology* Abstract.

³¹⁰ Lunenburg 2010 *International Journal of Management, Business, and Administration* 5.

³¹¹ Kristen, Banuelos and Urban 2015 *Berkeley Journal of Employment and Labour Law* 171.

³¹² Huen 2007 "Workplace Sexual Harassment in Japan: A Review of Combating Measures Taken" 813.

³¹³ Huen 2007 "Workplace Sexual Harassment in Japan: A Review of Combating Measures Taken" 813.

³¹⁴ Huen 2007 "Workplace Sexual Harassment in Japan: A Review of Combating Measures Taken" 813.

Accordingly, because Japanese culture is fixated on the principle of conformity and does not recognize gender equality, the emotional and social costs of instituting a lawsuit gravely exceed the benefits that could come to a Japanese woman coming forward alleging having been sexually harassed. As a result, these women usually avoid filing a claim when they have been sexually harassed.

3.6 Critique: Sexual harassment as a gender inequality in South Africa

As Chicktay highlights, section 39(2) of the Constitution specifically requires that the South African Bill of Rights be interpreted in compliance with international law.³¹⁵ Specific reference is made to the Discrimination Employment and Occupation Convention (DEOC)³¹⁶ which was adopted by the International Labour Organization (ILO). According to Article 1(a) of the DEOC, discrimination includes any form of:

any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation...³¹⁷

According to Chicktay³¹⁸, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) in interpreting the DEOC indicated that the sexual harassment is a form of sex discrimination that has the effect of severely infringing upon equality rights of women.

South African law has effectively and sufficiently done its bid to recognise sexual harassment as a form of gender inequality. Just as Nana puts it, "it may be seen as a form of unfair discrimination...".³¹⁹ This has been done in line with the request by international bodies such as the CEACR who, in the process of interpreting the DEOC, indicated that the sexual harassment is a form of sex discrimination.³²⁰

³¹⁵ Chicktay 2010 *Journal of African Law* 285.

³¹⁶ *Discrimination Employment and Occupation Convention of 1958*.

³¹⁷ Article 1(a) of the DEOC, 1958.

³¹⁸ Chicktay 2010 *Journal of African Law* 285.

³¹⁹ Nana 2008 *Journal of African Law* 247.

³²⁰ Chicktay 2010 *Journal of African Law* 285.

In order to demonstrate this recognition by the South African legal system, reference can be made to a number of legislations which point to sexual harassment being a form of gender inequality. Firstly, section 187(f) of the LRA prohibits the direct or indirect discrimination of an employee by an employer on the grounds of a number of any arbitrary reasons which includes, but is not limited to, gender or sex.³²¹

Secondly, the EEA prohibits, amongst other grounds, discrimination on the basis of sex and gender.³²² Thirdly, section 1(1) of PEPUDA,³²³ contains within its definition of harassment “unwanted conduct which is related to sex, gender or sexual orientation” which indicates an acknowledgement of harassment as an act which can be sexual and which can come as a result of gender inequality.

These legislations have come in handy for the purpose of offering protection against sexual harassment in the workplace. This has been demonstrated in several cases such as *Campbell Scientific Africa v Simmers and Others* where the court employed the provisions of several legislations such as the section 6(3) of the EEA and The Code.

Conclusion

This chapter indicated how different countries have promulgated laws aimed at addressing the problem of sexual harassment in the workplace. Examples at an international level include India’s Handbook on Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2003 and Title VII of the Civil Rights Act of 1964 at an international level. At a national level, reference is made to legislations such as the EEA, LRA and PEPUDA.

Additionally, there is a plethora of cases in which courts have had to decide on issues pertaining to sexual harassment in the workplace, the outcome of which greatly

³²¹ Section 187(f) of the LRA.

³²² Section 6(1) of the EEA.

³²³ Hereafter PEPUDA.

influenced sexual harassment laws as we have them today. Some examples of these include the Indian Supreme Court case of *Vishaka v State of Rajasthan* where it was declared that sexual harassment was a violation of gender equality and therefore a violation of rights.³²⁴

Nationally, reference can be made to the case of *Campbell* case which amongst other things, gave the definition of sexual harassment.³²⁵ This case also featured a discussion based around sexual harassment as a form of unfair discrimination in terms of section 6(3) of the EEA.³²⁶ To this end, sexual harassment laws and policies play a critical role in ensuring that perpetrators are held accountable for their conduct and that victims obtain the requisite protection and assistance.

³²⁴ Vashney 2018 *Law Times Journal*.

³²⁵ *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* para 23.

³²⁶ *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* para 19.

CHAPTER FOUR

COMPARATIVE ASSESSMENT OF SEXUAL HARASSMENT LAWS DEVELOPED BY DIFFERENT COUNTRIES

4.1 Introduction

Sexual harassment is one issue that a lot of western countries such as the United States of America have been working on resolving through the passing of laws for a long time.³²⁷ However, in countries such as Japan and Nigeria, it is an area of study that is relatively new.³²⁸ The following discussion provides a comparison of the different approaches these three different countries have taken in order to develop laws that regulate sexual harassment matters in the workplace.

The three countries selected are namely the United States of America, Japan, and Nigeria. The reason for the selection of these countries is to highlight the different developmental stages of each country as well as to highlight the lessons South Africa could learn from each one of them in respect of sexual harassment laws.

4.2 UNITED STATES OF AMERICA

The progression of sexual harassment laws in the United States of America (USA)

The discussion to follow examines some of the laws that have had significant impact on sexual harassment matters through the years in the USA. In 1964, there was an introduction of the Civil Rights Act of 1964 (CRA).³²⁹ This Act was against discrimination on a number of grounds which included discrimination on the grounds of race, colour, sex, religion, or national origin. Title VII of the Act dealt with employment, as such the Act has been given the name "Title VII".³³⁰ In the year 1972 several amendments were made to the Act including the introduction of the Education

³²⁷ Sural and Kilicoglu 2011 *Middle Eastern Studies* 655.

³²⁸ Sural and Kilicoglu 2011 *Middle Eastern Studies* 655.

³²⁹ Brown 1964 *Washington University Law Review* 527.

³³⁰ Brown 1964 *Washington University Law Review* 528.

Amendments, more specifically Title IX.³³¹ These specific amendments are against sex discrimination in schools that are recipients of Federal funding.

In 1980, the Equal Employment Opportunity Commission³³² was introduced. This commission issued out proposed guidelines which intended to provide clarification on what constitutes harassment.³³³ According to Robert and Greenlaw,³³⁴ it further provided guidelines on what obligations employers have in the prevention and elimination of harassment.³³⁵ Later on, in 1986, a landmark decision by the Supreme Court was delivered in the *Meritor Savings Bank v. Vinson* (1986) 477 U.S 57 case.³³⁶ This decision stated that sexual harassment constituted sex discrimination that is prohibited by Title VII.³³⁷

In 1991, the Civil Rights Act of 1964 was amended, this gave birth to the Civil Rights Act of 1991 as amended. A modification of Title VII was made by the Congress for the purpose of providing more protection against workplace discrimination. This Act made it possible for discrimination and harassment plaintiffs to get a trial before a jury in a Federal Court. Furthermore, for the first time, it made provision for the collection of compensation and punitive damages with the size of the employer being taken into account.

One of the most important aspects in Title VII of the Civil Rights Acts is that it makes provision for holding employers liable for sexual harassment matters. This is a great tool to ensure that employers take cognisance of what goes on in the workplace.³³⁸ Failure to monitor what goes on in the workplace could lead to employers being vicariously liable for the actions of the perpetrator.

³³¹ Title IX of the Education Amendments of 1972.

³³² Equal Employment Opportunity Commission of 1980.

³³³ Robert and Greenlaw 1995 *Public Administration Review* 357.

³³⁴ Robert and Greenlaw 1995 *Public Administration Review* 357.

³³⁵ Robert and Greenlaw 1995 *Public Administration Review* 357.

³³⁶ *Meritor Savings Bank v. Vinson*.

³³⁷ Section 703(a)(1) and (2) of Title VII of the *Civil Rights Act of 1964*.

³³⁸ Back and Freeman 2018 *Congressional Research Service* 7.

The Government Accountability Act³³⁹ was passed by Congress in 1995. The effect of this is to make the members of Congress to be subjected to employment laws that are similar to those governing everyone else.³⁴⁰ The discussion above indicates that the government of the USA takes sexual harassment in the workplace seriously and has made evident effort to develop and update sexual harassment laws through the years.

4.2.1 Sexual harassment in the workplace: United States of America

According to Keplinger *et al*:

approximately 80% of women in the US report experiencing sexual harassment in the workplace, with one study showing that 50% of women had been harassed within the last year alone.³⁴¹

The United States is one of the countries that has had a significant influence on the development of sexual harassment legislation.³⁴² The USA has majorly been on the forefront of developing laws addressing the issue of sexual harassment in the workplace.³⁴³ It is responsible for well-known initiatives such as the #MeToo and #TimesUp campaigns, both of which were founded to combat sexual harassment and assault of women..³⁴⁴

Keplinger *et al*³⁴⁵ conducted a survey on 500 women in September 2016 and September 2018, the findings reveal that although the most egregious forms of sexual harassment are on the decrease, there still exist increased levels of gender harassment. The authors provide that the changes in sexual harassment are most likely as a result of the increase in the scrutiny surrounding the topic.³⁴⁶ It is important

³³⁹ Government Accountability Act of 1995.

³⁴⁰ Nolo (date unknown) <https://www.employmentlawfirms.com/resources/employment/workplace-safety-and-health/sexual-harassment-law.htm>.

³⁴¹ Keplinger *et al* 2019 *PLoS ONE* 2.

³⁴² Sural and Kilicoglu 2011 *Middle Eastern Studies* 655.

³⁴³ Nurhan and Kilicoglu 2011 *Middle Eastern Studies* 655.

³⁴⁴ Keplinger *et al* 2019 *PLoS ONE* 1.

³⁴⁵ Keplinger *et al* 2019 *PLoS ONE* 1.

³⁴⁶ Keplinger *et al* 2019 *PLoS ONE* 1.

to reflect on the laws which were created over the years in an attempt to flatten the sexual harassment curve.

4.2.1.1 Liability under Title VII of the Civil Rights Act of 1964

As of 1986, the U.S Supreme Court has recognised workplace harassment as a claim that is actionable against an employer under Title VII of the CRA.³⁴⁷ This Act was passed in an attempt to end the harmful discrimination that was being inflicted against minorities.³⁴⁸ Title VII of the CRA makes it:

an unlawful employment practice for any employer - to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to their terms, conditions, or privileges of employment, because of such individual's race, colour, religion, sex, or national origin..."³⁴⁹

The prohibition against discrimination on the basis of sex was a last-minute addition to Title VII on the floor of the House of Representatives.³⁵⁰ Section 2000e-2(2) further

prohibits an employer from limiting, segregating, or classifying his employees or applicants for employment in any manner which would deprive any individual of employment opportunities or otherwise adversely affect their status as an employee, due to such individual's race, colour, religion, sex, or national origin.³⁵¹

The impact, influence, and importance of Title VII in sexual harassment matters will further be demonstrated in the cases discussed later in the study.

4.2.1.2 Employer liability under the Equal Employment Opportunity Commission in terms of Title VII of the Civil Rights Act of 1964.

The EEOC, is provided for in section 2000e-4 of the CRA of 1964. The EEOC is made up of five members.³⁵² Amongst some of its other functions, the EEOC serves to assist "individuals who historically have been victims of employment discrimination and have

³⁴⁷ Gelms *Washington Law Review* 249.

³⁴⁸ Seidenfeld *Cardozo Law Review* 1319.

³⁴⁹ Section 2000e-2(a)(1) of the Civil Rights Act of 1964.

³⁵⁰ *Meritor Savings Bank, FSB v. Vinson*, 477 US 57 para 63.

³⁵¹ Section 2000e-2(a)(2) of the Civil Rights Act of 1964.

³⁵² Section 2000e-4(a) of the Civil Rights Act of 1964.

not been equitably served by the Commission”.³⁵³ It does so by carrying out educational and outreach activities.³⁵⁴ This includes disseminating information in languages other than English.³⁵⁵ Furthermore, it serves to assist individuals on whose behalf the EEOC is authorised to enforce any other employment discrimination that prohibits the law, concerning obligation and rights under section 2000e-4 of the Civil Rights Act or such law, as the case may be.³⁵⁶

According to section 2000e-4(g)(6) of Title VII, the Employment Equal Opportunity Commission has powers to intervene in civil actions that are “brought under section 2000-5 by an aggrieved party against a respondent other than a government, governmental agency or political subdivision.”³⁵⁷ Section 2000-5(a) states that the EEOC has powers to prevent any person from taking part in any unlawful employment practices.³⁵⁸ Furthermore, section 2000-5(b) provides for charges by aggrieved persons or member of the Commission for unlawful employment practices by an employer.³⁵⁹ It states that:

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labour organization, or joint labour management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labour organization, or joint labour-management committee (hereinafter referred to as the “respondent”) within ten days, and shall make an investigation thereof.³⁶⁰

According to section 2000e-5(e)(3)(A) its states that:

...an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is

³⁵³ Section 2000e-4(h)(2)(A) of Title VII of the Civil Rights Act of 1964.

³⁵⁴ Section 2000e-4(h)(2) of Title VII of the Civil Rights Act of 1964.

³⁵⁵ Section 2000e-4(h)(2) of Title VII of the Civil Rights Act of 1964.

³⁵⁶ Section 2000e-4(h)(2)(B) of Title VII of the Civil Rights Act of 1964.

³⁵⁷ Section 2000e-4(g)(6) of Title VII of the Civil Rights Act of 1964.

³⁵⁸ Section 2000e-5(a) of Title VII of the Civil Rights Act of 1964.

³⁵⁹ Section 2000e-5(b) of Title VII of the Civil Rights Act of 1964.

³⁶⁰ Section 2000e-5(b) of Title VII of the Civil Rights Act of 1964.

adopted, when an individual becomes subject to a discriminatory compensation decision or other practice,³⁶¹

Paradoxically, the EEOC is viewed as having proven its worth and ability in the implementation of the rights stated in the Civil Rights Act.³⁶² However, it is also considered as not having proven its worth to the extent that some originally expected.³⁶³

4.2.1.3 Sexual harassment in the USA: Case law analysis

For the purpose of demonstrating the approaches the USA took in dealing with sexual harassment in the workplace, it is important to look at some of important cases. These cases will also demonstrate how the USA legal system has developed with regard to sexual harassment.

i. *Barnes v. Costle*, 561 F.2d 983 (D.C.Cir.1977)

This appeal case dealt with the review of an order that had been made by order of the District Court. A summary judgment appeal was awarded on the basis that Title VII of the CRA of 1964³⁶⁴ could not be utilised in a situation where an appellant had indicated that she had received unfair treatment because she rejected the sexual advances that had been made by her male superior.³⁶⁵ The Court indicated that in adopting Title VII of the CRA, the Congress made it illegal for non-governmental employers to discriminate against any individual pertaining to their privileges or conditions of employment on the basis of their sex.³⁶⁶

Following CRA of 1964, Title VII was brought about to eliminate numerous obstructions to equal employment opportunity between the sexes.³⁶⁷ This includes discriminatory seniority systems, insufficiently validated tests, height, and weight

³⁶¹ Section 2000e-5(e)(3)(A) of Title VII of the Civil Rights Act of 1964.

³⁶² Levine and Montcalmo 1971 *Labour Law Journal* 771.

³⁶³ Levine and Montcalmo 1971 *Labour Law Journal* 771.

³⁶⁴ Section 2000e-4(h)(2)(B) of Title VII of the Civil Rights Act of 1964.

³⁶⁵ *Barnes v. Costle*, 561 F.2d 983 (D.C.Cir.1977) para 984.

³⁶⁶ *Barnes v. Costle*, 561 F.2d 983 (D.C.Cir.1977) para 988.

³⁶⁷ *Barnes v. Costle*, 561 F.2d 983 (D.C.Cir.1977) para 987.

standards only for a single gender and weight-lifting requirements.³⁶⁸ Additionally, the amendments that the Equal Employment Opportunity Act of 1972 effected to Title VII extended the protective blanket of the 1964 Act to federal, state and local employees.³⁶⁹

ii. *Bundy v. Jackson, 641 F. 2d 934 - Court of Appeals, Dist. of Columbia Circuit 1981*

This case made reference to the case of *Barnes v. Costle* referred to above. In the *Bundy* case the appellant made claims that were encompassed by the decision made by the Court in *Barnes*.³⁷⁰ The appellant argued that her rejecting unwelcome and offensive sexual advances that were made by a number of supervisors within her agency led to the same supervisors delaying and blocking promotions she was entitled to without justification.³⁷¹

The appellant in this case asked the court to apply the principles adopted in the *Barnes* case which provide that an employer is in violation of Title VII by sexually harassing female employees even in instances where such rejection of the advances made by the employer does not result in the employer to depriving the employee of any real job benefits.³⁷² However, in this case the Court found that the District Court in the *Barnes* case had incorrectly consulted Title VII when dealing with the claim for declaratory and injunctive relief as well as failing to apply the burden of proof analysis necessary when it dealt with the promotion claims.³⁷³

Like with the *Barnes* case, the Court in this case refused to grant Bundy a declaratory and injunctive relief as it was of the view that sexual harassment that does not result in an individual losing any real employment benefits falls short of falling within the

³⁶⁸ *Barnes v. Costle, 561 F.2d 983 (D.C.Cir. 1977) paras 987-988.*

³⁶⁹ *Barnes v. Costle, 561 F.2d 983 (D.C.Cir. 1977) para 988.*

³⁷⁰ *Bundy v. Jackson, 641 F.2d 934 - Court of Appeals, Dist. of Columbia Circuit 1981 para 938.*

³⁷¹ *Bundy v. Jackson, 641 F.2d 934 - Court of Appeals, Dist. of Columbia Circuit 1981 para 938.*

³⁷² *Bundy v. Jackson, 641 F.2d 934 – Court of Appeals, Dist. of Columbia Circuit 1981 para 939.*

³⁷³ *Bundy v. Jackson, 641 F.2d 934 – Court of Appeals, Dist. of Columbia Circuit 1981 para 939.*

scope of discrimination where conditions, terms or privileges of employment are concerned.³⁷⁴

iii. *Meritor Savings Bank v Vinson (1986) 477 U.S 57*

One important case that clearly reflects the steps the USA has taken in confronting sexual harassment matters is *Meritor Savings Bank v Vinson (1986) 477 U.S 57 (Meritor case)*. The *Meritor* case was described as “a major victory for working women throughout the nation.”³⁷⁵ In this case, the Court provided:

a violation of the Title VII may be predicated on either of two types of sexual harassment: harassment that involves the conditioning of concrete employment benefits on sexual favours, and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment.³⁷⁶

The Court further indicated that an employer is liable for sexual harassment inflicted by supervisory personnel, irrespective of whether such employer was aware of the misconduct.³⁷⁷ The Court also indicated that for the purposes of Title VII, a supervisor is an agent of an employer even if he lacks the authority to hire, promote, or fire.³⁷⁸ Furthermore, the Court referred to Title VII of the CRA of 1964 which provides that an employer acts unlawfully if he discriminates against an individual based on a number of grounds including, race, colour or sex.³⁷⁹

iv. *Faragher v City of Boca Raton (1998) 524 U.S 775*

In this case the plaintiff, Faragher, had instituted action against the City as well as her supervisors, alleging that the supervisor had created an atmosphere that is sexually hostile at work.³⁸⁰ Faragher alleged that the supervisor had subjected her and other female employees to touching that was both uninvited and offensive.³⁸¹ She went on

³⁷⁴ *Bundy v. Jackson, 641 F.2d 934 – Court of Appeals, Dist. Of Columbia Circuit 1981 para 942.*

³⁷⁵ Robinson, Kirk and Stephens 1987 *Labour Law Journal* 179.

³⁷⁶ *Meritor Savings Bank, FSB v. Vinson, 477 US 57 para 63.*

³⁷⁷ *Meritor Savings Bank, FSB v. Vinson, 477 US 57 para 63.*

³⁷⁸ *Meritor Savings Bank, FSB v. Vinson, 477 US 57 para 63.*

³⁷⁹ *Meritor Savings Bank, FSB v. Vinson, 477 US 57 para 63.*

³⁸⁰ *Faragher v City of Boca Raton (1998) 524 U.S 775.*

³⁸¹ *Faragher v City of Boca Raton (1998) 524 U.S 775.*

to provide that the supervisor's conduct violated section 2000e2(a)(1) of Title VII of the CRA of 1964.³⁸²

In reliance of the *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, the Court of Appeals found that the defendants were acting outside the scope of their employment when they subjected the plaintiff and other female employees to harassing conduct.³⁸³ Further, the agency relationship they had with the City was not responsible for the said harassment, and that constructive knowledge of the harassment could not be attributed to the City due to its "pervasiveness or the supervisor's knowledge".³⁸⁴

As such, the City was absolved from being liable for negligence for not preventing the harassment.³⁸⁵ The District Court found that the actions of the supervisor constituted harassment of a discriminatory nature that was sufficiently serious to an extent of altering Faragher's employment conditions, and as such constituted a working environment that was abusive.³⁸⁶ In its findings the Court provided that:

an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defence looking to the reasonableness of the employer's conduct as well as that of the plaintiff victim.³⁸⁷

The Court also found that the plaintiff's claim of sex discrimination failed just like her retaliation claim due to the fact that she did not suffer an adverse employment action.³⁸⁸

v. *Newbury v. City of Windcrest, Texas*, 991 F. 3d 672 - Court of Appeals, 5th Circuit 2021

The plaintiff in this case worked as an officer for a police department, however, she resigned during her first probationary year.³⁸⁹ Following her resignation, she sued the

³⁸² *Faragher v City of Boca Raton* (1998) 524 U.S 775.

³⁸³ *Faragher v City of Boca Raton* (1998) 524 U.S 775.

³⁸⁴ *Faragher v City of Boca Raton* (1998) 524 U.S 775.

³⁸⁵ *Faragher v City of Boca Raton* (1998) 524 U.S 775.

³⁸⁶ *Faragher v City of Boca Raton* (1998) 524 U.S 775.

³⁸⁷ *Faragher v City of Boca Raton* (1998) 524 U.S 775.

³⁸⁸ *Newbury v. City of Windcrest, Texas*, 991 F. 3d 672 - Court of Appeals, 5th Circuit 2021 para 680.

³⁸⁹ *Newbury v. City of Windcrest, Texas*, 991 F. 3d 672 - Court of Appeals, 5th Circuit 2021 para 674.

police department for sex-discrimination, retaliation, and constructive-discharge under Title VII as well as Texas law.³⁹⁰ After resigning, she filed a complaint with the EEOC following which she received a letter granting her the right to sue.³⁹¹

She sued the City under several claims one of which was sex discrimination under section 2000e2(a) of Title VII of the CRA of 1964 and retaliation under Title VII.³⁹² In dealing with the matter, the Appeal Court provided that in bringing forth the retaliation argument, an employment action must be materially unfavourable in a manner that would persuade a reasonable employee not to make a complaint of discrimination.³⁹³

In dealing with the aspect of sex discrimination, the Appeal Court provided that:

“in addition to sexual harassment, Newbury alleges sex discrimination. To establish a sex-discrimination claim under Title VII, a plaintiff must show

- (1) that she is a member of a protected class;
- (2) that she was qualified for the position sought;
- (3) she was subject to an adverse employment action; and
- (4) she was replaced by someone outside her protected class or was treated less favourably than other similarly situated employees outside her class.”³⁹⁴

From the cases discussed above, it is evident that the success of a complainant’s case depends on a number of requirements highlighted in the case discussions such as any adverse the existence of adverse employment action. Furthermore, it is evident that employers who fail to take necessary steps to protect their employees from sexual harassment run the risk of being vicariously liable.

4.3 Japan

Article 21 of the Equal Employment Opportunity Law (EEOL) provides that “company management should take measures against sexual harassment”.³⁹⁵ Although the act

³⁹⁰ *Newbury v. City of Windcrest, Texas*, 991 F. 3d 672 - Court of Appeals, 5th Circuit 2021 para 674.

³⁹¹ *Newbury v. City of Windcrest, Texas*, 991 F. 3d 672 - Court of Appeals, 5th Circuit 2021 para 674.

³⁹² *Newbury v. City of Windcrest, Texas*, 991 F. 3d 672 - Court of Appeals, 5th Circuit 2021 para 674.

³⁹³ *Newbury v. City of Windcrest, Texas*, 991 F. 3d 672 - Court of Appeals, 5th Circuit 2021 para 678.

³⁹⁴ *Newbury v. City of Windcrest, Texas*, 991 F. 3d 672 - Court of Appeals, 5th Circuit 2021 para 679.

³⁹⁵ Marikkar Kanagawa *University International Management Review* 124.

of sexual harassment is one that has always been prevalent in the workplace, it was not always considered as being a form of discrimination.³⁹⁶ According to the author, it was perceived as being a private matter between individuals. However, this is no longer the case as Marikkar³⁹⁷ provides that the revised EEOL ensured that sexual harassment is no longer considered as being exclusively limited to the individuals directly involved.³⁹⁸ Additionally, the author holds that employers no longer have protection from being vicariously liable for sexual harassment matters that take place within their workplace.³⁹⁹

Marikkar⁴⁰⁰ further provides that according to the EEOL, sexual harassment is defined as “circumstances under which a female employee is put at a disadvantage in the workplace.” As Huen⁴⁰¹ indicates, it was on the 16th of April 1992, that for the first time in Japan, the Fukuoka District Court provided that *seiteki iyagarese* (which translates to sexual unpleasantness) in the workplace constituted a violation of a worker’s desire to maintain her honour and reputation.

In *Fukuoka, Sexual Harassment Case, Fukuoka District Court, 783 HANREI TAIMUZU 60 (1992)*⁴⁰² (*Fukuoka case*), a female editor had succeeded in suing her former employer who was a small publishing company, as well as her former supervisor for creating a work environment that was hostile.⁴⁰³ Following an increase in the female editor’s salary and decrease in the male editor’s salary, the male editor retaliated by creating a hostile work environment for the female editor.⁴⁰⁴ Before the decrease in the male editor’s salary; the male editor had been making three times what the female editor was making.⁴⁰⁵

³⁹⁶ Huen 2007 “Workplace Sexual Harassment in Japan: A Review of Combating Matters Taken” 812.

³⁹⁷ Marikkar *Kanagawa University International Management Review* 124.

³⁹⁸ Marikkar *Kanagawa University International Management Review* 124.

³⁹⁹ Marikkar *Kanagawa University International Management Review* 124.

⁴⁰⁰ Marikkar *Kanagawa University International Management Review* 124.

⁴⁰¹ Huen 2007 “Workplace Sexual Harassment in Japan: A Review of Combating Matters Taken” 812.

⁴⁰² *Fukuoka, Sexual Harassment Case, Fukuoko District Court, 783 HANREI TAIMUZU 60 (1992)*.

⁴⁰³ Hayashi 1995 *St. John’s Law Review* 47.

⁴⁰⁴ Hayashi 1995 *St. John’s Law Review* 47.

⁴⁰⁵ Hayashi 1995 *St. John’s Law Review* 47.

The male editor created a hostile work environment by spreading rumours about the female editor's sex life; making insinuations that the female editor had been engaging in sexual relations with the supervisor who had made the adjustments to the two editors' salaries; alluded to the female editor having many love affairs as well as other crude rumours.⁴⁰⁶ Later, the publishing company hired a new Chief Executive who, in support of the male editor, demanded that the female editor submit a resignation by the end of the year.⁴⁰⁷ Following the female editor's numerous attempts to get assistance with the issue of harassment by the male editor, and intimidation by the executives who could have helped her, the female editor was forced to resign.⁴⁰⁸

The *Fukuoka* case was the first case in which an employee's right to work in an environment that was free from hostility was recognised. In this case, a District Court made a ruling that a company and the actions of one of its male employees had constituted a violation of the rights of a woman because of offensive commentary that forced her to terminate her own employment.⁴⁰⁹

According to Huen, the decision in this case led to the term "sexual harassment" receiving popularity through the media.⁴¹⁰ Surveys aimed at looking into sexual harassment in the workplace environment were conducted which resulted in a revelation of widespread sexual harassment.⁴¹¹ Huen also provides that this compelled the government to formulate measures that promote the prevention of sexual harassment.⁴¹² Therefore, the EEOL is considered an important legislation that brought to the fore the issue of sexual harassment in Japanese jurisprudence.⁴¹³ Huen,⁴¹⁴ provides that the EEOL serves as a guide to employers when dealing with sexual harassment.

⁴⁰⁶ Hayashi 1995 *St. John's Law Review* 48.

⁴⁰⁷ Hayashi 1995 *St. John's Law Review* 48.

⁴⁰⁸ Hayashi 1995 *St. John's Law Review* 48.

⁴⁰⁹ Marikkar *Kanagawa University International Management Review* 125.

⁴¹⁰ Huen 2007 "Workplace Sexual Harassment in Japan: A Review of Combating Matters Taken" 812.

⁴¹¹ Huen 2007 "Workplace Sexual Harassment in Japan: A Review of Combating Matters Taken" 812.

⁴¹² Huen 2007 "Workplace Sexual Harassment in Japan: A Review of Combating Matters Taken" 812.

⁴¹³ Huen 2007 "Workplace Sexual Harassment in Japan: A Review of Combating Measures Taken" 812.

⁴¹⁴ Huen 2007 "Workplace Sexual Harassment in Japan: A Review of Combating Matters Taken" 812.

Huen⁴¹⁵ provides that, in Japan, the term “sexual harassment” only received legal definition in late 1992. Before then, sexual harassment was not forbidden by Japanese law. As highlighted by Marikkar,⁴¹⁶ in Japan, the EEOL came into effect on the 1st of April 1986. By the year 1993; there was still no law prohibiting sexual harassment.⁴¹⁷ As a result, one-way sexual harassment cases were settled in court was through demanding compensation for damages under general tort law.⁴¹⁸ The action would be based on the provisions of Article 709 of the Civil Code 89 of 1896.⁴¹⁹ According to article 709 of the Civil Code of 1896;

a person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequences⁴²⁰

Marikkar provides that it was in 1997 that the revised EEOL started being operational for the purpose of making employers responsible for the creation of an environment that is not sexual. According to Assmann,⁴²¹ amongst a number of its guidelines, the EEOL of 1997 prohibits the discrimination of women with respect to hiring, recruitment, promotion, and assignment. As Shimada and Naito indicate,⁴²² the EEOL of 1997 also permits the preferential treatment of women as an exception in cases where such treatment is adopted to eliminate sex discrimination. The authors also provide that the EEOL of 1997 requires that employers give consideration in personnel management to the prevention of sexual harassment in the workplace.⁴²³

Huen,⁴²⁴ also indicates that in the interest of defining the scope of sexual harassment the Ministry of Labour provided a collection of guidelines. This action by the Ministry of Labour has as its objective to enable companies to enact procedures to follow in remedying sexual harassment. These guidelines are important because when the

⁴¹⁵ Huen 2007 “Workplace Sexual Harassment in Japan: A Review of Combating Matters Taken” 812.

⁴¹⁶ Marikkar *Kanagawa University International Management Review* 124.

⁴¹⁷ Yukiko and Mariko 1993 *U.S.-Japan Women's Journal. English Supplements* 58.

⁴¹⁸ Yukiko and Mariko 1993 *U.S.-Japan Women's Journal. English Supplements* 58.

⁴¹⁹ Yukiko and Mariko 1993 *U.S.-Japan Women's Journal. English Supplements* 58.

⁴²⁰ Article 709 of the Civil Code 89 of 1896.

⁴²¹ Assmann 2014 *Asia-Pacific Journal* 6.

⁴²² Shimada and Naito 2016 *Waseda Bulletin of Comparative Law* 60

⁴²³ Shimada and Naito 2016 *Waseda Bulletin of Comparative Law* 60.

⁴²⁴ Huen 2007 “Workplace Sexual Harassment in Japan: A Review of Combating Matters Taken” 812.

EEOL was enacted, it was undertaken for the purpose of addressing sexual discrimination in the workplace.⁴²⁵ However, this law had no provision on matters pertaining to sexual harassment.⁴²⁶

According to Huen,⁴²⁷ female employees who had been sexually harassed were forced to rely on dispute resolution for their claim. In spite of that, in terms of the EEOL, they could not engage in mediation without first obtaining the employer's consent.⁴²⁸ According to Marikkar,⁴²⁹ "sexual harassment is the largest discrimination case reported to the Equal Employment Offices (EEO) among employed women in Japan." The author provides that:

"these numbers do not only represent difficult employment conditions workers face, but also provides evidence of growing legal consciousness among working women in response to broader legal and social change."⁴³⁰

In the year 2019, there was finally an enactment of a law called the Comprehensive Labour Policy Promotion Act 24 of 2019 (hereafter known as CLPPA). The Act aims to eliminate sexual harassment, harassment against women as well as bullying in the workplace.⁴³¹ It also requires companies to put in place a policy preventing harassment within the workplace environment.⁴³² Furthermore, failure to comply with the CLPPA may result in the disclosure of the names of the companies which could lead to reputational risks.⁴³³

⁴²⁵ Huen 2007 "Workplace Sexual Harassment in Japan: A Review of Combating Matters Taken" 812.

⁴²⁶ Huen 2007 "Workplace Sexual Harassment in Japan: A Review of Combating Measures Taken" 815.

⁴²⁷ Huen 2007 "Workplace Sexual Harassment in Japan: A Review of Combating Measures Taken" 812.

⁴²⁸ Huen 2007 "Workplace Sexual Harassment in Japan: A Review of Combating Matters Taken" 812.

⁴²⁹ Marikkar *Kanagawa University International Management Review* 125.

⁴³⁰ Marikkar *Kanagawa University International Management Review* 125.

⁴³¹ Industrial Relations and Labour Law 2021 <https://ioewec.newsletter.ioe-emp.org/industrial-relations-and-labour-law-march-2021/news/article/japan-new-law-to-deal-with-harassment-and-abuse-of-power-at-work>.

⁴³² Industrial Relations and Labour Law 2021 <https://ioewec.newsletter.ioe-emp.org/industrial-relations-and-labour-law-march-2021/news/article/japan-new-law-to-deal-with-harassment-and-abuse-of-power-at-work>.

⁴³³ Industrial Relations and Labour Law 2021 <https://ioewec.newsletter.ioe-emp.org/industrial-relations-and-labour-law-march-2021/news/article/japan-new-law-to-deal-with-harassment-and-abuse-of-power-at-work>.

Marikkar provides that there exists a high number of public court cases around prominent political figures in relation to the issue of sexual harassment, and this has led to more of the media's attention in recent years.⁴³⁴

4.4 Nigeria

According to section 34(1)(a) of the Constitution of the Federal of Nigeria, 1999, "every individual is entitled to respect for the dignity of his person, and accordingly no person shall be subject to torture or to inhuman or degrading treatment...". Furthermore, section 42(1) of Constitution of the Federal of Nigeria, 1996 provides that:

A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:-

- (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions are not made subject...⁴³⁵

According to Aina-Pelemo *et al*⁴³⁶, sexual harassment is a challenging subject in Nigeria due to a lack of clear-cut legislation that explicitly provides a definition of what constitutes "sexual harassment" as well as provisions that allow perpetrators to be held accountable for sexual harassment. The authors provide that most Nigerian organisations view sexual harassment in the workplace as a personal problem between an employer and employee that can only be resolved by the two parties.⁴³⁷

According to Aina-Pelemo *et al*:

the impact of culture on sexual harassment in Nigeria in Nigerian organisation evaluated, showed that 8 out of 10 interviewees in their study reported their harassers, but no serious action was taken against them by the relevant authority at work, while some laughed it off, and chastised the victim for arousing the sexual drive of the harasser.⁴³⁸

⁴³⁴ Marikkar *Kanagawa University International Management Review* 124.

⁴³⁵ Section 42(1)(a) of the Constitution of the Federal of Nigeria, 1999.

⁴³⁶ Aina-Pelemo *et al* 2019 *Journal of Law, Policy and Globalization* 122.

⁴³⁷ Aina-Pelemo *et al* 2019 *Journal of Law, Policy and Globalization* 122.

⁴³⁸ Aina-Pelemo *et al* 2019 *Journal of Law, Policy and Globalization* 123.

Haruna *et al*⁴³⁹ asserts that although sexual harassment is not provided for in any organisational guidelines as an offence, the broad range of laws aimed at the protection of women as well as Acts against sexual violence serve a form of guiding tool. According to the authors⁴⁴⁰, it is due to the moral and ethical values of the society of Nigeria that sexual harassment is then seen as an offence. Aina-Pelemo *et al*⁴⁴¹ credit the structure of the Nigerian society that is heavily patriarchal in nature and regards men as important and women as commodity for the lack of action where women in sexual harassment cases are concerned.

Nigerian culture, according to the authors,⁴⁴² frowns upon open discussions of sexual dialogues; as a result, the victims elect to adopt a culture of silence instead. Where the factors that contribute to the existence of sexual harassment in Nigerian culture are concerned, Haruna *et al*⁴⁴³ credits poverty as one of the contributory factors as most victims desire financial or material favours from their superiors without the intention of being harassed, however, their superiors take advantage of them by requiring sexual favours in return.

Aina-Pelemo *et al*⁴⁴⁴ acknowledge that although there is ample research on sexual harassment within various fields of work such as banking, medical, and educational sectors, there is little research within a large number of sectors such as entertainment, telecommunication, legal etc. Additionally, the authors indicate that there is no policy that is effective enough to sanction the employers or employees of sexual harassment in the workplace or court.⁴⁴⁵

In the year 2003 Ladebo⁴⁴⁶ conducted a study at three tertiary institutions located in Ogun State in the south-west part of Nigeria with the subjects of the study being both male and female students and faculty staff. One of the objectives of the study was to

⁴³⁹ Haruna *et al* 2016 *International Journal of Democratic and Development Studies* 32.

⁴⁴⁰ Haruna *et al* 2016 *International Journal of Democratic and Development Studies* 32.

⁴⁴¹ Aina-Pelemo *et al* 2019 *Journal of Law, Policy and Globalization* 123.

⁴⁴² Aina-Pelemo *et al* 2019 *Journal of Law, Policy and Globalization* 123.

⁴⁴³ Haruna *et al* 2016 *International Journal of Democratic and Development Studies* 34.

⁴⁴⁴ Aina-Pelemo *et al* 2019 *Journal of Law, Policy and Globalization* 123.

⁴⁴⁵ Aina-Pelemo *et al* 2019 *Journal of Law, Policy and Globalization* 125-131.

⁴⁴⁶ Ladebo 2003 *African Sociological Review* 117.

examine the legal situation regarding sexual harassment within the Nigerian workplace or academe specifically.⁴⁴⁷ One of the questions addressed by the study was whether there existed any legislation on sexual harassment in Nigeria, as well as whether universities possess explicit or formal regulations where sexual harassment is concerned.⁴⁴⁸

According to Ladebo, at the time the study was conducted, there had not been even a single case of sexual harassment to come before a Nigerian court.⁴⁴⁹ The author further quoted the following answer given by a female judicial member when interviewed:

I am not aware of any case of sexual harassment in our records. Since there is no law on it, it becomes pretty difficult for anybody to allege harassment. What we have are assaults and rape, that is all. Certainly, there is sexual harassment here and there; but the nature of our society ...is male dominated and nobody will pay attention to you when you come up with such allegation. Besides, no woman wants to lose her job... jobs are hard to come by, and so, many women have to put up with it as much as possible. It is like rape; nobody wants to be associated with it because of the stigma.⁴⁵⁰

According to Ladebo, it is believed that sexual harassment has penetrated all parts of Nigerian life which includes the benches.⁴⁵¹ In concluding the interview, the female judicial member who was being interviewed asked who then will judge the cases when perpetrators of sexual harassment form part of the bench itself.⁴⁵² Ladebo reported findings on the study conducted at the 3 institutions indicating that the first tertiary institution did not have a code of conduct governing sexual harassment matters.⁴⁵³ The second institution on the other hand did have a code of conduct aimed at safeguarding matters pertaining to sexual harassment, however, the code of conduct failed to provide the definition of sexual harassment.⁴⁵⁴ With the third tertiary institution

⁴⁴⁷ Ladebo 2003 *African Sociological Review* 117.

⁴⁴⁸ Ladebo 2003 *African Sociological Review* 118,

⁴⁴⁹ Ladebo 2003 *African Sociological Review* 121.

⁴⁵⁰ Ladebo 2003 *African Sociological Review* 121.

⁴⁵¹ Ladebo 2003 *African Sociological Review* 121.

⁴⁵² Ladebo 2003 *African Sociological Review* 121.

⁴⁵³ Ladebo 2003 *African Sociological Review* 122.

⁴⁵⁴ Ladebo 2003 *African Sociological Review* 123-126.

there was no policy in existence to govern staff behaviour and safeguard against sexual harassment.⁴⁵⁵

The case of *Ejjeke Maduka v Microsoft Nigeria Limited and 2 Ors*, NICN/492/2012; came about in year 2012 demonstrating the stride the Nigerian judiciary had made. In this case the applicant was an employee of the first respondent.⁴⁵⁶ She provided that since the Country Manager occupied the position of being Country Manager he has consistently sexually harassed her through tickling her as well as other female staff members on the waist. According to the applicant, she fought against the Country Manager's acts of sexual harassment by repeatedly warning him to stop physically handling as well as fondling her and other female staff members to which the Country Manager responded by disregarding her protests.⁴⁵⁷

The applicant reported the sexual harassment to one of her bosses and the Human Resources Manager who both failed to act in response to her reports as they had a mutual relationship with the country manager and were already aware of the acts of the Country Manager⁴⁵⁸. Due to the harassment creating an intolerable working environment she informed her husband who then confronted the Country Manager, this led to the respondent facing intimidation.⁴⁵⁹ The internal policy aimed at protecting employees against sexual harassment was not being helpful either.⁴⁶⁰ According to the applicant, after standing her ground to her bosses and refusing to give into sexual harassment she was later informed that her employment had been terminated with immediate effect. Following that, a letter of release agreement was forcefully given to her for her to sign.⁴⁶¹

When she refused to sign the letter of release agreement she was threatened with a dismissal and given a typed note that had the effect of ensuring that she would not be

⁴⁵⁵ Ladebo 2003 *African Sociological Review* 126.

⁴⁵⁶ *Ejjeke Maduka v Microsoft Nigeria Limited and 2 Ors* p4.

⁴⁵⁷ *Ejjeke Maduka v Microsoft Nigeria Limited and 2 Ors* p4-5.

⁴⁵⁸ *Ejjeke Maduka v Microsoft Nigeria Limited and 2 Ors* p5.

⁴⁵⁹ *Ejjeke Maduka v Microsoft Nigeria Limited and 2 Ors* p5.

⁴⁶⁰ *Ejjeke Maduka v Microsoft Nigeria Limited and 2 Ors* p5.

⁴⁶¹ *Ejjeke Maduka v Microsoft Nigeria Limited and 2 Ors* p5.

entitled to the gratuitous two months' salary if she failed to sign the release letter.⁴⁶² Despite all her efforts, the respondent's employment was later terminated.⁴⁶³

In coming to its decision, the Court relied on sections 34 and 42 of the Constitution of the Federal of Nigeria, 1996 and Articles 2, 5, 14, 15 and 19 of the African Charter on Human and People's Rights.⁴⁶⁴ According to the Court, the sexual harassment by the Country Manager and the termination of her employment by her superiors was a violation of her Fundamental Rights to Human Dignity and Freedom from Discrimination⁴⁶⁵ The Court instructed each respondent (the applicant's superiors), to pay the applicant the sum of N13,225,000.00 as general damages for violating the applicant's rights as guaranteed by Sections 34 and 42 of the Constitution of the Federal Republic of Nigeria, 1999.⁴⁶⁶ Furthermore, the Court instructed the first and second respondent to immediately implement a sexual harassment policy that would assist in preventing the recurrence of sexual harassment and hostile working environment.⁴⁶⁷

As Ladebo provides, the absence of legislation giving recognition to sexual harassment is a major contributory factor to the continued perpetration of sexual harassment in Nigeria.⁴⁶⁸

4.5 Lessons for South Africa

Each one of the above discussed countries have addressed the issue of sexual harassment in different ways and with different levels of urgency as well as different outcomes. As such, there are a number of lessons South Africa (S.A), can learn from each one of them. The first lesson S.A can learn from both the United States of

⁴⁶² *Ejike Maduka v Microsoft Nigeria Limited and 2 Ors* p5.

⁴⁶³ *Ejike Maduka v Microsoft Nigeria Limited and 2 Ors* p6.

⁴⁶⁴ *Ejike Maduka v Microsoft Nigeria Limited and 2 Ors* p31.

⁴⁶⁵ *Ejike Maduka v Microsoft Nigeria Limited and 2 Ors* p31.

⁴⁶⁶ *Ejike Maduka v Microsoft Nigeria Limited and 2 Ors* p31-32.

⁴⁶⁷ *Ejike Maduka v Microsoft Nigeria Limited and 2 Ors* p32.

⁴⁶⁸ Ladebo 2003 *African Sociological Review* 128.

America and Japan is the concept of vicarious liability. From the above discussions, it is indicative that both these countries strongly apply the principle of vicarious liability.

South African laws aimed at curbing sexual harassment need to be stricter on employers and apply more pressure for them to provide a work environment that is free of sexual harassment. Failing which, they should be held accountable. The second lesson that can be learned is more discussion based around the issue of sexual harassment in the workplace. For instance, as highlighted above, the USA came up with movements such as the #MeToo movement which aided in providing a safe space for victims of sexual harassment to step forth with their accountants and tell their stories.

Coverage that leads to discussions can also be achieved through on-going cases in order to expose cases in order to expose the extent of sexual harassment in the workplace as it is the approach in Japan.⁴⁶⁹ Thirdly, from cases such as Nigerian case of *Ejieke Maduka v Microsoft Nigeria Limited and 2 Ors*, South Africa could ensure that strict action is taken against individuals who subject employees to sexual harassment, whether it is superiors or fellow employees. This sends a message that sexual harassment will not under any circumstances be tolerated.

Additionally, just as in the Nigerian case of *Ejieke Maduka v Microsoft Nigeria Limited and 2 Ors*, South African should make sure that victims who come forward with accounts of their ordeals are not chastised. Finally, ample research needs to be conducted on the different professional sectors respectively, to determine which ones are more susceptible to sexual harassment and develop ways to approach each one.

4.6 Conclusion

There have been different levels of urgency that have been afforded to sexual harassment issues in the workplace by different countries. In well-developed countries such as the USA, there is vast legislation created to address sexual harassment in the

⁴⁶⁹ Marikkar Kanagawa University International Management Review 124.

workplace. However, as demonstrated in the discussion above, in Japan, the formulation of these laws has been delayed for years due to a number of reasons such as cultural beliefs, norms and practices. This is also the case in developing countries such as Nigeria where the discussion of any subject that features a sexual aspect is frowned upon.

Furthermore, with countries such as Nigeria, the topic of sexual harassment has for a long time been swept under the carpet due to a strong presence of patriarchal beliefs. As such, this has created major delays in the development of any laws that aim to address sexual harassment in the workplace. However, one trend that can be picked up is the impact that social movements such as USA's #MeToo movement and Japan's high number of public court cases that involve prominent political figures has had on the attention that sexual harassment has been receiving as of late.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

Sexual harassment in the workplace has been an issue for a long time. Although it is not only limited to women, but women are also more commonly subjected to it than men. This can be credited to a number of reasons such as societal patriarchal beliefs that regard the man as a symbol of the highest authority.⁴⁷⁰ Another reason, as highlighted in the study, is the issue of power dynamics whereby men are intimidated by women in superior positions, as a result they attempt to assert dominance through sexual harassment. In order to resolve the issue of sexual harassment, laws were created. This has led to the formulation of different laws which hold perpetrators accountable, and in the instance of some countries, holding the employer vicariously liable for not providing their employees with a safe working environment.

Legislation and workplace policies have been proven to be useful tools in confronting the issue of sexual harassment in the workplace if implemented correctly. Although some countries have had a great success in the formulation of their sexual harassment laws, some are still new to the scene, while other countries have barely gotten started..

5.2 Recommendations

The fight against sexual harassment in the workplace is not a lost cause. There is ample research outlining the different causes of this issue and how it could possibly be remedied. The following are a number of recommendations on how sexual harassment in the workplace could be approached:

5.2.1 *Better implementation of workplace policies*

Workplace policies are a crucial tool for maintaining order and discipline within a workplace environment. Furthermore, they have been proven to be effective in

⁴⁷⁰ Aina-Pelemo *et al* 2019 *Journal of Law, Policy and Globalization* 123.

confronting sexual harassment matters in the workplace.⁴⁷¹ Therefore, it is imperative that they be implemented precisely in order to effectively achieve desired results. This can be done through ensuring that every individual in the workplace is made aware of the workplace policy operational in the said workplace.

5.2.2 Employee training

It is also important that employees receive sufficient training aimed at guiding them on how to interact with other employees within the workplace so as to prevent incidents of sexual harassment from materialising. This training could be done by HR personnel with the guidance of The Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace of 2005. Failure to prevent such incidents, training could further cover the subject of the steps to take in a situation where there has been an occurrence of sexual harassment in order to remedy the situation and provide some form of relief.

5.2.3 Promotion of gender equality in the workplace

To a large extent sexual harassment is perpetuated against women. Although the act of sexual harassment is not only limited to women being on the receiving end of the offence, but women also remain the most vulnerable group. This is despite there being an increase in the number of women entering the workplace environment. Evidently, gender inequality is still an issue that is rife within the workplace, as such, there is a necessity for it to be confronted and subsequently remedied so as to promote mutual respect. This can be done through creating awareness on the importance of gender equality in the workplace by use of different platforms such as workplace policies.

5.2.4 Harsher punishment for perpetrators

There is a duty on the government and employers to demonstrate zero tolerance for sexual harassment in order to maintain a balance of mutual respect between

⁴⁷¹ The Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace of 2005 provides no room for sexual harassment in that; (a) all employees, job applicants and other persons who have dealings with the business, have the right to be treated with dignity. (b) sexual harassment in the workplace will not be permitted or condoned. E.g., an employer who wants to subject an applicant to a sexual favour in exchange for securing employment would be acting against the Code or policies provided in the workplace.

employees regardless of gender. People are rarely ever deterred from committing offences where they hold the knowledge that they can get away with the offence with only minor accountability if any. For this reason, it is essential to become strict when issuing out punishment to those found guilty of committing the offence of sexual harassment.

5.2.5 Protection and support for whistle-blowers

It is important that individuals who make reports of their encounters with sexual harassment be protected and given any form of support necessary. Knowing that once they expose those who have subjected them to sexual harassment they won't be subjected to further victimisation may encourage more employees to come forward. Upon giving account of their ordeals it is imperative that the said employees further be given some form of counselling to help them deal with the psychological effects of being harassed sexually and everything else that comes with it.

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