

LEGAL PROVISION FOR PROTECTION AGAINST SEXUAL HARASSMENT AT WORKPLACE : A COMPARISON

Juhary Ali, Ng Lee Peng & Ida Rosnita Ismail
School of Management, Universiti Utara Malaysia

Sexual harassment is also referred as sexual blackmail (in France), unwanted intimacy (in Holland) and sexual molestation (in Italy). Recent report indicated that sexual harassment has been the most serious problem for working women in Europe. Sexual harassment takes many forms ranging from a mere verbal insult to a physical advance that is unwelcome and sexually in nature. It can also be a stalking or a bullying tactic. In Malaysia, although there is no sexual law exists, a person who has been sexually harassed could seek legal remedies under Malaysian criminal law. Section 354 and Section 509 of the Penal Code regarding sexual harassment provide some forms of remedy for the victims. The launching of Malaysian Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace was launched on August 17, 1999. The main objective of the Code is to increase awareness among all levels of workers on sexual harassment so that they would not involve in such an offence. However such Code -a mere guidelines to both employers and employees- creates no legal obligation for those who choose not to implement and it has no binding effect.

The problems on sexual harassment, although relatively new in Malaysia, existed prior to 1960s during which neither a term to describe nor legal remedy to address. The issues on sexual harassment was alarming within 40 years and according to ILO in 1992, 23 countries revealed that sexual harassment was a major problem in workplace known to women.. It has been reported that thirty six countries have enacted specific legislation on sexual harassment in order to handle and prevent this contagious problem from spreading into the society. Against these background, this paper reveals selected sexual harassment cases and highlights the legal provision against sexual harassment at workplace among nine Asian countries.

INTRODUCTION

Sexual harassment is any unwelcome sexual advances, requests for sexual favors, sexual favoritism, verbal insult and /or physical conduct of a sexual nature. It can also be a stalking or a bullying tactics (Allen 1996;Yeates, 2000). The Equal Employment Opportunity Commission (USA, 1964) distinguishes two types of sexual harassment: quid pro quo harassment (sometimes called sexual blackmail) and hostile environment sexual harassment. This sexual harassment case can occur vertically (between supervisor and subordinate) or horizontally (between employee and colleague, among employers and between a client and a employee).

Sexual harassment mostly happens between gender, i.e. done by men toward women. It has indicated that most often the harasser is man who has more authority and supervising capacity than woman. Power differentials are most apparent when a harasser is the supervisor and the victim is the subordinate. This power approach frames sexual harassment as a mechanism for maintaining the economic and political superiority of men over women. The case of men being sexually harassed are not denied and even at an increasing rate.

Sexual harassment presents economic, social and competitive issues for any company. A successful company requires the existence of good relations among its employees and the people with whom the company does business. Sexual harassment may create poor relationships that can harm the company. The companies that have a high incidence of sexual harassment often have additional problems such as high rate of racial harassment, discrimination and other forms of unfair treatment. More subtle and troubling costs of sexual harassment include the psychological and physiological harm to victims and their coworkers. Victims often experience depression, career-damaged, frustration, nervousness and decreased self-esteem and low self-confidence, headaches, appetite disturbances as well as fatigue and hypertension. Often the victims were fired or forced to leave their jobs, These symptoms often lead to decrease in productivity, increased absenteeism and worker resentment.

SEXUAL HARASSMENT: A COMPARISON

It has been reported that 95% of sexual harassment cases claimed to be in the hostile environmen (Anon,2000m). The International Labour Organization (ILO, 1992) discovered that 23 countries faced major problem on sexual harassment at workplace. It was reported that thirty six countries have enacted specific legislations on sexual harassment (Maidment, 1999; M. Sauffee Ab. Muain 2000) Recent report indicated that sexual harassment has been the most serious problem for working women in Europe. The most common victims are women of age between 18-24 years old. For the year 2000 statistic, the reports showed that the category of women that have high exposure of sexual harassment are divorced women, young ladies who just enter into labour force, immigrants and those women who ever being employed for a long time. Table 1 indicates sexual harassment faced by working women in both the private and public sector in European Union (EU).

Table 1

**Percentage of Women Faced with Sexual Harassment
in European Union (EU), year 2000**

Country	Percentage of Women Subjected to Sexual Harassment
Spain	84%
Greece	60%
Holland	58%
England	51%
Germany	50%

Sexual harassment relates to the violation of individual's right to have a safe working environment (Jefferson 1997) Thus the organization and the harasser are liable for any legal action taken against them, which usually incur large cost. Beside the particular organization also experiences image deterioration.

The lawsuits resulting from unlawful cause severe monetary penalties to be imposed on the companies. According to UK Advisory Conciliation and Arbitration Service, legal actions against British employers on sexual harassment cases has increased about one third or 164,525 for the year ending March 2000. The UK Engineering Employers Federation reported that employee claims against member companies has increased from 2137 in 1998 to 2770 in 1999. Between the period January 1 1996 to October 1, 2000, there were a total of 4638 bullying cases reported in the UK and 5 percent or 232 cases involved sexual discrimination. Table 2 shows the penalties paid by several examples of companies as the results of sexual harassment lawsuits.

Many organizations were found to have no sexual harassment policy. If there are any sexual harassment cases, the police usually handle such case. Among the problems faced by the police in sexual harassment case is the difficulty in determining the criminal intent in such cases and the long delay in reporting such cases. In Malaysia, 188 cases of sexual harassment were reported between 1997 and 1999. Of this number, 110 cases were received by the Ministry of Human Resource 72 cases by All Women's Action Society, and 6 cases by Malaysian Employers Federation (MEF). Fifty cases have been resolved. There was only one case that actually brought before the Industrial Court, Jenico Associates Sdn. Bhd v Lilian (1997) . In this case, Ms. Lilian dismissal and forced to resign from the company due to sexual harassment was held to be unlawful and constituted an offence. (McCarthy 2000; Sabitha 2000).

Historically, women in Malaysia are not protected against sexual harassment. In fact there is no any legal protection against sexual harassment at workplace. In Malaysia, no sexual laws exists but there is a Penal Code regarding sexual harassment. A person who has been sexually harassed could seek legal remedies under Malaysian Criminal law. Even though there is no specific provision that spells out sexual harassment, Section 354 and Section 509 of the Penal Code provide some form of legal remedies for the victims.

Table 2
Lawsuits and Penalties paid by the Firms

Firms	Penalties/ Consequences
Mitsubishi	Paid USD34 million to settle a sexual harassment case brought by EEOC on behalf of more than 300 female employees. Among the complaints; being groped, gestured to; urge to reveal their sexual preferences and exposed to sexually explicit pictures.
Ford Motor	Paid penalty up to USD187,023 as a result of sexual harassment claims.
AT & T	Awarded USD 2 million a result of sexual harassment charged by its ex-personnel manager in Los Angeles.
Fortune 500	Loses USD6.7 million a year because of harassment, not counting law suit costs. Much of this cost is associated with decreased in work effectiveness, increased stress or/and related health problem, increase in absenteeism and turnover.

In Malaysia, the awareness and concern of sexual harassment is becoming to take place. This led to the launching of Malaysian Code of Practice on the Prevention and Eradication of Sexual Harassment on August 17, 1999. The Code comprises of almost any aspect that concern sexual harassment: purpose, definition, mechanisms to combat sexual harassment policy prohibiting sexual harassment, complaints/grievance procedures, protective and remedial measures for the victims, promotional and educational programs and the involvement and commitment of the trade unions. It has been suggested that the Industrial Relations Acts 1967 should be amended to curb sexual harassment.

During its launching, 12 pioneered companies have actually implemented the Code: Motorola (M) Sdn. Bhd; Harris Advance Technology (M) Sdn. Bhd.; Kumpulan Perubatan Johor Sdn. Bhd.; Equatorial Hotel, Bangi; Casio (M) Sdn. Bhd. Tamura Electronics (M) Sdn. Bhd. Samsung Electronics Group Sdn. Bhd.; Sapura Holding Sdn. Bhd.; Hilton Kuala Lumpur; Shangri La (Malaysia); Telekom Malaysia Berhad.; Tenaga Nasional Malaysia Bhd. It has been reported by the Ministry of Human resources, Malaysia (2000) that as at March 10, 2000, 50 firms are already adopting code on sexual harassment (Albela 2000), the majority of which are factories consisting of large numbers of female workers. Another 49 companies implemented the Code by Mid 2000. This represents 2.75 percent of 3,600 company representatives who have attended the sexual harassment awareness seminars since March 1999.

The survey on legal provision for protection against sexual harassment at workplace in Malaysia, and in 8 selected countries provide a useful comparative analysis. These selected countries are . Nepal, South Korea, Sri Lanka , Thailand, Hong Kong, Indonesia, India and Japan. The survey indicates that Malaysia is the one country that has no legal protection against sexual harassment at workplace. The majority of the countries have some sections or clauses of other labour laws that specify about sexual harassment at workplace. None of the countries, except Indonesia consider sexual harassment faced while traveling to and from the workplace. Except Nepal and Hong Kong, the sexual harassment is not considered a criminal offence in other remaining countries. The punishment or penalties to the offenders of the sexual harassment laws differ from country to country.

DISCUSSION AND CONCLUSION

It is found that there are not many sexual harassment cases have been reported in Malaysia. Many cases were solved personally. The reasons could be due to:

1. the difficulty of the victim to establish the case because the incidence usually occur in the private place rather than in open office space . The victim feel helplessness since evidence is required by the court.
2. the complainant must show that she or he is subject to some forms detriments;: physical assault or words (unwelcome propositions and suggestion that have been done repeatedly) (Peyton 1997).
3. sexual element is present in the exhibited (liberated) behaviour (Malone, 1993)
4. the complainant must show that the matter complained actually happen (Malone 1993).

5. a female employee who works in male-dominated area is expected to accept and not to complain of the swearing and bad language of her male colleague, unless the bad language is directed at her or intensified in an attempt to make her feel uncomfortable (Rubenstein, 1995).
6. culturally, the victim tries to avoid embarrassment to the harasser
7. the victim feels fear of losing the job. In many cases the victim usually leaves the job rather than being fired for whistle blowing.
8. the incidence must take place within an employment context. It is easier to establish the company's liability if the harasser is a company director / company's client than if the harasser is a fellow employee committing the offence entirely outside the scope of employment (Malone, 1993).
9. the case could fall under the law of negligence (Sinclair, 1998).

Sexual harassment is among the most serious of the detriments that an employee could suffer and the fact that it can amount to less favorable treatment on grounds of sex (Pitt 1994). It has been said that sexual harassment is widely spreading like infectious disease. Currently, there is a favorable trend towards sexual harassment case reporting and awareness among societies. The judicial trend throughout the world favors passing of specific legislation in dealing with sexual harassment (Maidment 1999). Nevertheless, out of 36 countries that have specific legislation, Malaysia does not yet come out with such legislation. It has been suggested that the specific legislation on sexual harassment is considered necessary in order to reduce uncertainty of judicial interpretation. As it has been illustrated in the UK, failure to have a specific legislation that deals directly with sexual harassment has created a leeway for the court to interpret Section 6(2)(b) of the Sexual Discrimination Act 1975 as to fit in the case. As such the European Commission is currently considering a proposal in a draft directive to ban sexual harassment in the work place (Burnett, 2000).

Sexual harassment in the workplace presents an ongoing and growing risk to the organization. As the awareness of employees' rights and equal employment practice increases, the organization might face with more and more legal actions filed by the employees. Thus a proactive approach is needed to curb sexual harassment in the organizations. It has been suggested that a 'zero-tolerance' to sexual harassment program, creating a "harassment-free work zone" organization and conducting sexual harassment training and awareness programs might be useful to reduce or eliminate sexual harassment. General Electric Corporation (GEC), for example, has come out with a manual on sexual harassment, listing all almost every possible behaviours and conducts that constitute sexual harassment in an attempt to combat the issue. (see Appendix 1) The spectrum of behaviour patterns ranging from visual, verbal, written, touching, power, threats and force (Carell, Elbert & Hatfield, 1995).

Another example is Deluxe company which has an anti-harassment policy. The management posted the policy in the plant in full view of all employees and they will review it several times a year in the meeting. Deluxe's policy also goes the distance and inform employees that they can report a complaint to any member of the company, including the general manager or owner.

REFERENCES

Anonymous (2000m) Your Guide to Malaysia Legal Information
<http://www.lawyerment.com.my/employment/sexharr.shtml>

Albela, G. (2000) %0 firms Adopt Code on Sexual Harassment, New Straits Times
<http://adtimes.nstp.com.my/jobstory/mar10.htm>

Allen, M.J (1996) Look Who's stalking: Seeking a Solution to a Problem of Stalking, Web Journal of Current Legal Issues, Blackstone Press Ltd
<http://www.webjcli.ncl.ac.uk/1996/issue4/allen4.html>

Burnett, A (June 2000) **InfoBASE EUROPE**

Carell, M.R., Elbert, N.F. & Hatfield, R.D. **Human Resource Management – Global Strategies for Managing A Diverse Work Force.** Prentice Hall, 5th Edition

Jefferson, M (1997) **Principles of Employment Law**, Cavandish Publishing Ltd. 3rd Edition

Yeates, N (2000) Bullying in the Workplace: a Atudy of Victimization, Federal Magazine, Spring 2000 Edition
<http://www.sufplofed.co.uk/spring%202000%20Edition.htm>.

Malone, M (1993) **Discrimination Law – A Practical Guide to Management**, Kogan Page Ltd.

Maidment, F.H. (1999) Human Resource 99/00, Annual Edition, Dushkin McGrwa-Hill

Muhamad Sauffee Ab. Muain (2000) **Sexual Harassment: E6employment Perspective.** Workshop on Sexual Harassment, Kuala Lumpur: 27 January 2000.

McCarthy, J.M. (2000) **Landmark Decision on Sexual Harassment For Malaysian Women**, New England International & Comparative Law Annual.
<http://www.nesl-edu/annual/vol3/mal.htm>

Peyton, D (1997) **Sex and Discrimination Law**, Blackstone's Employment Law Library

Pitt, G. (1994) **Cases and materials in Employment Law**, Pittman Publishing

Rubenstein, M (1995) Discrimination: A Guide to Relevant Case Law on Race and Sex Discrimination and Equal pay. **Industrial Relation Service** , 8th Edition, pp29-31

Sabitha Marican (2000) The Perception, Incidence and Management of Sexual Harassment: A Malaysian Case. **Workshop on Sexual Harassment**, Kuala Lumpur: 27 January 2000.

Sinclair, A (1998) Harassment:discrimination in Interpretion. **Web Journal of Current Legal Issues**, Blackstone Press Ltd.
<http://www.webcli.ncl.ac.uk/1998/issue1/sinclair1.htm>

Website research