SEXUAL HARASSMENT

IN THE

WORKPLACE

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1. INTRODUCTION

The twentieth century has brought substantial changes in the legal and socioeconomic status of women. Women have entered the labour market in substantial numbers, hoping for recognition as persons in their own right, based on their individual capabilities and achievements in their chosen realms of endeavour.[1]

As more and more women find it necessary or choose to work for a living, the workplace has become the primary location for male-female interaction and in some instances even sexual attraction. But most women wish to choose whether, when, where and with whom to have sexual relationships.[2] However, the surreptitious squeeze on the factory floor, the clandestine kiss in the copyroom, the lewd remark and the obscene suggestion deny female employees this choice. In addition to being a personal violation, sexual demands in the workplace threaten a female employee's economic livelihood and creates an atmosphere that is scarcely work-oriented. Sexual harassment might therefore rightly be regarded as the assertion and abuse of power and dominance by men that disempower women and denies them recognition for their individual capabilities and achievement in the working environment.

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1 C.L. Cerutti 'Differing Standards of Employer Liability for Sexual Harassment of Working Women'(1985) 27 *Arizona Law Review* 155 at 155

2 C.A. MacKinnon *Sexual Harassment of Working Women: A Case of Sex Discrimination* (New Haven: Yale University Press, 1979) at 25

The ensuing discussion will explore the legal recourse available to victims of sexual harassment in South Africa. Reference will also be made to the legal recourse available in the United States of America since the contours of a legal understanding of the problem of sexual harassment of working women have much more clearly emerged in American jurisprudence.

To cultivate a fuller understanding of the problem of sexual harassment the discussion presented here will not, however, be confined to a strict legal analysis. Conduct that may constitute sexual harassment, explanatory models for the occurrence of sexual harassment and the effect of sexual harassment on the victims thereof will be investigated. It is submitted that this approach would be more instructive than a strict legal analysis of the problem of sexual harassment to explain why sexual harassment should be a legitimate workplace concern.

Although it is accepted that sexual harassment could be directed at either sex, this discussion will focus on the sexual harassment of females by males. The analysis presented here would, however, apply equally to harassment of males by females.

2. DEFINING SEXUAL HARASSMENT

Sexual harassment is a complex issue involving men and women, their perceptions and behaviour, and the social norms of the society.[3] In light of the divergent perceptions of men and women about proper standards of behaviour in the workplace and the wide variety of behaviour that may constitute sexual harassment, the formulation of a clear and all encompassing definition is particularly difficult.

However, definitions of sexual harassment are important since they serve to educate employers and employees in the workplace and promote discussion and conscientious evaluation of these experiences. It is also crucial to the process of helping those who have been harassed because most individuals do not identify what has happened to them as sexual harassment.[4]

Although sexual harassment encompasses a broad range of conduct, it usually falls into one of two general categories, which are really the opposite sides of a continuum.[5]

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[3] A.P. Aggarwal *Sexual Harassment in the Workplace* (Toronto: Butterworths, 1992 2nd ed.) at 1

[4] M.A. Paludi and R.B. Barickman *Academic and Workplace Sexual Harassment: A Resource Manual* (State University of New York Press, 1991) at 2

[5] J. Campanella 'Sexual harassment' (1992) vol 9 no 1 *Employment Law* 8 at 8; A. Conte *Sexual Harassment in the Workplace: Law and Practice* (New York: John Wiley & Sons, 1990) 15

At the one end there is 'quid pro quo' harassment, which forces an employee to choose between acceding to sexual demands or forfeiting job benefits, continued employment, or promotion.[6] This type of harassment results in some direct consequence to the worker's employment status or some gain or loss of tangible job benefits.[7]

Quid pro quo sexual harassment typically involves an attempt by an employer or supervisor, with power over salary, promotions and employment, to coerce a subordinate to grant sexual favours. If the worker accedes to the employer or supervisor's request, tangible job benefits follow; if the worker refuses, job benefits are denied.[8] The adverse job-related consequences that may follow upon refusal to accede to a supervisor's sexual demands may vary in form and degree of severity from employee to employee in different circumstances. They may range from assignment change, to reduction in hours, transfer, demotion, denial of promotion, or withholding confirmation from probationary status and finally to dismissal or threat of dismissal.[9]

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6 Note 'Sexual Harassment Claims of Abusive Work Environment Under Title VII' (1984) 97 *Harvard Law Review* 1449 at 1454

7 A.P. Aggarwal, *supra* note 3, at 10

8 *Ibid.*

9 A.P. Aggarwal *Sexual Harassment: A Guide for Understanding and Prevention* (Toronto: Butterworths, 1993) at 41

The other end of the spectrum is termed 'hostile environment' harassment and exists when sexual conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile or offensive working environment which negatively affects a victim's psychological health.[10]

This type of sexual harassment has no direct link to any tangible job benefit or harm. Rather, this conduct creates a bothersome work environment and effectively makes the worker's willingness to endure that environment a term or condition of employment.[11]

Quid pro quo sexual harassment and hostile environment sexual harassment are often intertwined. Failure to accede to sexual demands my give rise to a hostile environment as well as quid pro quo harassment claim, and a hostile environment may affect an employee's job status if she is dismissed for complaining or if it causes her constructive dismissal.[12]

Sexual harassment has broadly been defined as 'unwanted sexual attention in the employment environment'[13], 'any unwanted pressure involving one's

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[10] M. Vinciguerra 'The Aftermath of Meritor: A Search For Standards in the Law of Sexual Harassment' (1989) 98 *The Yale Law Journal* 1717 at 1718

[11] A.P. Aggarwal, *supra* note 3, at 10

[12] A. Conte, *supra* note 5, at 15

[13] J.G. Mowatt 'Sexual Harassment - New Remedy for an Old Wrong' (1986) 7 *ILJ* 637 at 637; M. Rubenstein 'The Law of Sexual Harassment at Work' (1983) *ILJ (UK)* 1 at 1; *J v M* (1989) 10 *ILJ* 755 (IC) at 757E

sexuality'[14], and 'unwanted, unsolicited and unreciprocated conduct of a sexual nature which is primarily, though not exclusively, directed against women;... and which has detrimental effects on the terms and conditions of her employment...'[15].

Other more zealous partisans inject male abuse of power into the very definition of sexual harassment[16]. Catharine A. MacKinnon is perhaps the best known proponent of this view by defining sexual harassment as '...the unwanted imposition of sexual requirements in the context of a relationship of *unequal power*.'[17] (emphasis added.)

Although this definition accurately mirrors what transpires in the classic *quid pro quo* situation, it reflects only uneasily hostile environment sexual harassment.[18] This definition fails to take cognisance of the fact that sexual harassment in the workplace is perpetrated not only by supervisors, but also by co-workers and subordinates. By definition sexual harassment by co-workers and subordinates does not involve the abuse of power delegated by the employer and would therefore amount to hostile environment harassment. However, the lack of formal

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[14] J.C. Renick 'Sexual Harassment at Work: Why It Happens, What to Do about It' (1980) 59 *Personnel Journal* 658 at 658

[15] J. Minson *Questions of Conduct: Sexual Harassment, Citizenship, Government* (London: The Macmillan Press, 1993) at 47

[16] E. F. Paul 'Sexual Harassment as Sex Discrimination: A Defective Paradigm' (1990) 8 *Yale Law & Policy Review* 333 at 334

[17] C.A. MacKinnon, *supra* note 2, at 1

[18] E.F. Paul, *supra* note 16, at 335

authority does not mean that the co-worker or subordinate lacks the power to harm the victim and to inject fear and anxiety into the workplace.[19] In these instances sexual harassment is used as a weapon to undermine the authority of a female colleague and to isolate and degrade that person as a worker.[20]

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[19] B. Lindemann and D.D. Kadue *Sexual Harassment in Employment Law* (Washington: BNA Books, 1992) 233

[20] T. Pattinson *Sexual harassment: The Hidden Facts* (London: Futura Publications, 1991) at 15

3. TYPES OF BEHAVIOUR THAT MAY CONSTITUTE SEXUAL HARASSMENT

Considering the type of behaviour which could be said to constitute sexual harassment, De Kock in *J v M*[21] said the following:

> 'Conduct which can constitute sexual harassment ranges from innuendo, inappropriate gestures, suggestions or hints of fondling without consent or by force to its worst form, namely, rape.'[22]

Aggarwal[23] offers a much more comprehensive exposition of the types of behaviour that may constitute sexual harassment. It is submitted that this exposition is well worth repeating in light of the differing perceptions between men and women, and women amongst themselves, of which behaviour constitutes sexual harassment.

3.1 VERBAL BEHAVIOUR

- continuous idle chatter of a sexual nature and graphic sexual descriptions;
- offensive and persistent risqué jokes or jesting and kidding about sex or

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[21] (1989) 10 *ILJ* 755 (IC)

[22] *Ibid.* at 757F

[23] *Supra* note 3 at 11 - 13

gender-specific traits;

- suggestive or insulting sounds such as whistling, wolf-calls, or kissing sounds;
- comments of a sexual nature about weight, body shape, size, or figure;
- pseudo-medical advice such as 'You might be feeling bad because you didn't get enough' or 'A little tender loving care will cure your ailments';
- staged whispers or mimicking of a sexual nature about the way a person walks, talks, sits, etc;
- derogatory or patronizing name calling;
- innuendoes or taunting;
- unwelcome remarks;
- rough and vulgar humour or language;
- jokes that causes awkwardness or embarrassment;
- gender-based insults or sexist remarks;
- comments about [a] person's looks, dress, appearance or sexual habits;
- inquiries or comments about an individual's sex life and/or relationship with sex partner;
- remarks about a woman's breasts, buttocks, vagina, and her overall figure;
- speculations about a woman's virginity, her choice of sexual partner or practices;
- verbal threat or abuse;
- telephone calls with sexual overtones.

3.2 GESTURES AND OTHER NON-VERBAL BEHAVIOUR

- sexual looks such as leering and ogling with suggestive overtones;
- licking lips or teeth;
- holding or eating food provocatively;
- lewd gestures, such as hand or sign language to denote sexual activity;
- persistent and unwelcome flirting.

3.3 VISUAL SEXUAL HARASSMENT

- display of pornographic or other offensive, derogatory and/or sexually explicit pictures, photographs, cartoons, drawings, symbols and other material;
- display of girlie magazines;
- showing of pornographic or sexually explicit movies or slides;
- sexual exposure, such as dropping down pants in view of female employees.

3.4 PHYSICAL BEHAVIOUR

- touching that is inappropriate in the workplace such as patting, pinching, stroking or brushing up against the body;
- hugging;

- cornering or mauling;
- invading another's 'personal space';
- attempted or actual kissing or fondling;
- physical assaults;
- coerced sexual intercourse;
- attempted rape or rape.

3.5 PSYCHOLOGICAL SEXUAL HARASSMENT

- repeated unwanted social invitations, for dinner, drinks, or movies;
- relentless proposal of physical intimacy beginning with subtle hints which may lead to overt requests for dates and/or sexual intercourse;
- sexual favours;
- propositioning;
- requiring to wear 'sexist and revealing' or suggestive uniforms, material or buttons.

The above exposition must not, however, be taken as a *numerus clausus* of the manifestations of sexual harassment. It nevertheless provides a useful frame of reference to cultivate a fuller understanding amongst employers and employees about the nature of sexual harassment and makes them aware of the fact that sexual harassment may manifest itself in both a physical and psychological form, varying from trivial to gross.

4. THE EFFECTS OF SEXUAL HARASSMENT

The consequences of sexual harassment can be devastating for a victim's physical well-being, emotional health and vocational development.

Most obvious is the immediate economic impact of sexual harassment. The general culture of acceptance of this sort of behaviour, fear of being retaliated against, or being ridiculed and not being believed has led many victims of sexual harassment to resign rather than report incidences of sexual harassment.[24] Few women can afford the consequences thereof: loss of income and seniority, loss of promotional opportunities, a disrupted work history, a blot on their employment record, diminished ambition and lowered career commitment.[25]

Less evident at first, yet more far reaching, is the emotional toll of sexual harassment. Victims of sexual harassment may experience a wide variety of reactions depending on their intellect, temperament, perceptions and cognitive appraisals of their experiences as well as the nature and severity of the sexual harassment.[26]

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[24] *Sexual harassment in the Workplace* (Johannesburg: Institute of Directors in South Africa, 1992) [Drafted and published as a joint project of The Institute of Directors in Southern Africa, The Institute of Personnel Management, UNISA Centre For Women's Studies, The Women's Bureau of South Africa and The ANC Women's League] at 8

[25] A. Conte, *supra* note 5, at 8

[26] J.C. Renick, *supra* note 14, at 660; M.A. Paludi and R.B. Barickman, *supra* note 4, at 32

In recent years, the label 'Sexual Harassment Trauma Syndrome' has been applied to the effects of harassment on the physical, emotional, interpersonal and career aspects of women's lives.[27] Sexually harassed women may feel humiliated, degraded, ashamed, embarrassed, confused, insecure, cheap, as well as angry. It is also not uncommon for such victims to experience sleeplessness, poor motivation, decreased productivity, lowered career-commitment, loss of confidence, intimidation, nervousness, hypersensitivity, depression and greatly diminished self-image.[28]

Because sexual harassment is not publicly acknowledged as a major form of abuse, women often respond to it with confusion, doubt, self-blame, and a desire to flee from the situation rather than report it.[29] These feelings women experience as a result of sexual harassment have significant social repercussions in that it disrupts women's work lives and has a pervasive impact upon their employment opportunities.

Apart from the debilitating consequences for victims, sexual harassment may also be expensive for the employing organisation. The psychological reactions that victims of sexual harassment experience can lead to outcomes that increase labour costs for employers. Job performance can suffer; absenteeism, sick leave and staff turnover may well increase with all the associated costs of lost production

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[27] M.A. Paludi & R.B. Barickman, *supra* note 4, at 27 - 30

[28] J.C. Renick, *supra* note 14, at 660

[29] M.A. Paludi & R.B. Barickman, *supra* note 4, at 34

and recruiting and training new employees.[30] One should think that this cost incentive alone would provide the necessary impetus for employers to educate their workforce about sexual harassment, formulate preventive policies, implement adequate complaints procedures and take the necessary corrective action against perpetrators of sexual harassment.

[30] A.P. Aggarwal, *supra* note 3, at 308

5. EXPLANATORY MODELS OF SEXUAL HARASSMENT

Several explanations have been set forth to account for the occurrence of sexual harassment and hence the inappropriate attention to women workers' gendered characteristics at the expense of their occupational abilities. For the purposes of this discussion the existing explanations will be classified into three general categories: natural/biological model, sociocultural model and organizational/power differential model.

5.1 NATURAL/BIOLOGICAL MODEL

The most simplistic explanation contends that sexual harassment is a consequence of natural sexual interactions between people.[31] Sexual harassment is therefore the result of biological forces or the natural physical attraction between men and women.[32] This model attributes a stronger sex drive to men than to women.

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[31] D.E. Terpstra & D.D. Baker, 'Sexual Harassment at Work: The Psychosocial Issues' in M.J. Davidson and J. Earnshaw (eds) *Vulnerable Workers: Psychosocial and Legal Issues* (Chichester: John Wiley & Sons, 1991) 179 at 181

[32] This explanation for the occurrence of sexual harassment was used to justify non intervention in the earliest sexual harassment suits brought under Title VII in the United States of America. The court in *Miller v Bank of America* 418 F. Supp. 233, 236 (N.D. Cal. 1976), *rev'd*, 600 F. 2d 211 (9th Cir. 1979) was of the opinion that:

> 'The attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions. Such being the case, it would seem wise for the Courts to refrain from delving into these matters...'

In *Corne v Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 - 164 (D. Ariz. 1975),

Since men would therefore be less able to exercise control over their sex drive, they would be more prone to exhibit conduct of a sexual nature in the workplace.[33]

Alternatively sexual harassment is viewed as part of the 'game' between sexual equals[34], regardless of their status or position in the employing organisation. Accordingly sexual advances would therefore not be unacceptable to the recipient since it is a sign of romantic attraction. If the attraction is not mutual, this model postulates that the advances would eventually subside. Sexual harassment is therefore a normal and acceptable occurrence in the workplace that is harmless and does not have any influence on the recipient's employment opportunities.

This model obviously does not take account of the extreme stress reactions suffered by its victims (and not suffered by the harassers).[35]

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vacated without opinion, 562 F.2d 55 (9th Cir. 1977) the court reasoned that to find Title VII liability in such cases, would mean

> '...a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual.'

[33] A. Theron 'Die vrou as slagoffer van seksuele teistering in die werksituasie' (1989) Vol. 20 no. 4 *Suid-Afrikaanse Tydskrif vir Sosiologie* 216 at 218

[34] M.A. Paludi & R.B. Barickman, *supra* note 4, at 61; A. Theron, *supra* note 33, at 218 - 219

[35] M.A. Paludi & R.B. Barickman, *supra* note 4, at 61

5.2 SOCIOCULTURAL MODEL

This model asserts that sexual harassment results from differences in social 'status' and social 'power' between classes of people, such as men and women.[36] Sexual harassment is viewed as only one of the manifestations of men asserting their personal power based on sex within the much larger patriarchal system in which men are the dominant group.[37] This model posits sexual harassment as a sociological phenomenon, resulting from a carryover into the workplace of gender-based roles[38] which in turn is the result of sex role stereotyping, socialization and cultural patterns of male-female interaction.[39]

The sex role stereotyping and socialization of women and their status in Western societies almost encourages the practice of sexual harassment and have contributed enormously to the lack of concern for the issue of sexual harassment.[40]

Male sex roles encourage men to be strong, aggressive, tough, dominant and

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[36] T.E. Aaron (with Judith A. Isaksen) *Sexual Harassment in the Workplace: A Guide to the Law and a Research Overview for Employers and Employees* (Jefferson, North Carolina: McFarland & Company, Inc., 1993) at 43

[37] M.A. Paludi & R.B. Barickman, *supra* note 4, at 61

[38] J. Minson, *supra* note 15, at 48

[39] T.E. Aaron, *supra* note 36, at 43

[40] According to MacKinnon, *supra* note 2, at 153 - 154, a 'sex role' is a widely held, learned, acted upon, and socially enforced definition of behaviours, attitudes, or pursuits as intrinsically more appropriate or seemly for one sex than for the other. It refers to the cultural practice of allocating social roles according to gender.

competitive. These values, which have come to be considered 'male', describe common male behaviour in many spheres, including the sexual. On the other hand, powerful social conditioning of women to passivity, gentleness, submissiveness and receptivity to male initiative, particularly in sexual contact, tends effectively to constrain women from expressing sexual aggression or even assertion.[41]

This has led a number of feminist scholars to conceptualize sexual harassment as a pattern of interpersonal behaviour that functions at the social structural level to reinforce and perpetuate the subordination of women as a class.[42]

This model postulates that sex would be a better predictor of both recipient and initiator status than would organizational position.[43] Women would therefore be the more likely victims of sexual harassment and men the more likely perpetrators.[44]

However, this model fails to account for the fact that some women sexually harass other women, some men sexually harass other men, and some women sexually harass men.[45]

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41 J.C. Renick, *supra* note 14, at 659 - 660. *Cf.* also D.E. Terpstra and D.D. Baker, *supra* note 31, at 181

42 K.M. Schilling and A. Fuehrer 'The Organizational Context of Sexual Harassment' in M.A. Paludi and R.B. Barickman, *supra* note 4, 123 at 124

43 M.A. Paludi and R.B. Barickman, *supra* note 4, at 61

44 A. Theron, *supra* note 33, at 219

45 T.E. Aaron, *supra* note 36, at 43 - 44

5.3 ORGANIZATIONAL MODEL/POWER DIFFERENTIAL PERSPECTIVE

This explanatory model relates to organizational characteristics that may contribute to the occurrence of sexual harassment. It has been suggested that the formal status, power and authority differentials between men and women in organizations, which derive from the hierarchical structure of organizations and the asymmetrical power-relations between supervisors and subordinates, may set the stage for sexual harassment. This problem is in many instances aggravated by men's numerical domination in mixed work environments.

Where a gender difference obtains in supervisor-supervisee relations, women's structurally disadvantaged place in the sexual division of labour ensures that the supervisee role is far more likely to be a woman. This vertical stratification of the workplace provides the opportunity for individuals to use the power of their position to extort sexual gratification from their subordinates. This has led one commentator to observe:

> 'Sexual harassment in the workplace stems from the imbalance of power between men and women in society, an imbalance magnified by the superimposed power relationship between employer and employee.'[46]

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[46] Note 'Sexual Harassment Claims of Abusive Work Environment under Title VII', supra note 6, at 1452

However, it must be borne in mind that the power differential does not need to be based on any supervisory responsibilities of the harasser - differences in status, responsibility, confidence and experience in a workplace can all lead to exploitative behaviour by the person in a position of strength.

While each of the above explanatory models bears some degree of validity it is submitted that the occurrence of sexual harassment can not be accounted for by any of these models in isolation. A combination of these three models would provide a more comprehensive explanatory framework within which to view sexual harassment and lead to a more informed understanding of the problem of sexual harassment.

6. THE LAW OF SEXUAL HARASSMENT IN THE UNITED STATES OF AMERICA

Sexual harassment is not a separate wrong in the United States of America, but is 'a species of the vast number of anti-discrimination in employment cases which is distinguished from the rest in that the discriminatory practices took the specific form of sexual harassment'.[47]

An action under federal legislation is brought in terms of section 703 of Title VII of the Civil Rights Act of 1964, which provides in pertinent part:

> '[Sec. 703](a) It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin;...'

From the outset reliance had to be placed on judicial exposition since Title VII does not explicitly provide for a ban on sexual harassment. This widening of the ambit

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[47] M.K. du Toit & K.J. Kemp 'Sexual Harassment in Industry' (1983) vol 2 nr 7 *IPM Manpower Journal* 10

of Title VII to include sexual harassment occurred despite the tension with the doctrinal substructure: traditional anti-discrimination paradigms may give rise to the absurdity that a bisexual who harasses both male and female employees equally would not be liable for sexual harassment since he/she would not be guilty of sex discrimination in the strict sense of the word.[48]

The relationship of sexuality to gender was the critical link in the argument that sexual harassment constituted sex discrimination, but in earlier cases the claim that sexual harassment constituted sex discrimination was ridiculed:

In *Corne v Bausch & Lomb Inc.*[49] the plaintiffs, who were two clerical workers at the respondent company, alleged that the repeated verbal and physical sexual advances, molestation and propositions by their male superior had made their jobs intolerable, forcing them to leave, while women who were sexually compliant received enhanced employment status.

Dismissing the claim, Judge Frey held that sexual advances are not sex discrimination but 'personal' and that the behaviour was not 'based on sex' because the sexes of the participants could have been reversed. The alleged sexual advances of the superior was described as 'nothing more than a personal proclivity, peculiarity or mannerism' the exercise of which amounted to 'satisfying

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[48] C.A. MacKinnon 'Reflections on Sex Equality Under Law' (1991) 100 *The Yale Law Journal* 1281 at 1295; D.L. Rhode *Justice and Gender: Sex Discrimination and the Law* (London, 1989) at 236

[49] District Court Arizona, 10 FEP Cases 29 (1975)

a personal urge'.

In *Miller v Bank of America*[50], the plaintiff alleged that her supervisor promised her a better job if she would be sexually 'cooperative' and caused her dismissal when she refused. The court was of the view that 'attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions' and dismissed the claim. The court's reluctance to widen the ambit of Title VII to include unwanted sexual attention was expressed in the following terms:

> 'An invitation to dinner could become an invitation to a federal lawsuit, if some harmonious relationship turned sour at a later time. And if an inebriated approach by a supervisor to a subordinate at the office Christmas party could be the basis of a federal lawsuit for discrimination if a promotion or a raise is later denied to the subordinate, we would need 4000 federal trial judges instead of some 400.'

Nevertheless, the turning point occurred in 1976 when, in *Williams v Saxbe*[51], it was held that the retaliatory actions of a male supervisor, taken because a female employee declined his sexual advances, was sufficient to state a claim of sex discrimination under Title VII.

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50 District Court California 13 FEP Cases 439 (1976)

51 District Court for the District of Columbia 12 FEP Cases 1093 (1976)

Soon thereafter, the Court of Appeals for the District of Columbia held in *Barnes v Costle*[52] that the plaintiff had been discriminated against on the basis of her sex when she lost her job after having refused to go to bed with her supervisor. The Court pointed out that the plaintiff's job security was conditioned upon submission to sexual relations - 'an exaction which the supervisor would not have sought from any male.'[53] The judgement is noteworthy for the manner in which it links sexuality to gender so as to render sexual harassment a form of sex based discrimination:

> 'But for her womanhood, her participation in sexual activity would never have been solicited. To say, then, that she was victimised in her employment simply because she declined the invitation is to ignore the asserted fact that she was invited only because she was a woman subordinate to the inviter in the hierarchy of agency personnel. Put another way, she became the target of her superior's sexual desires because she was a woman, and was asked to bow to his demands as the price for holding her job.'

Barnes v Costle[54] became authority for another principle: there had to be an 'employment nexus' between the harassment and the disadvantage suffered - only where it could be established, on the evidence, that there was employment

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[52] C.A. D.C. 15 FEP Cases 345 (1977)

[53] M. Rubenstein, *supra* note 8, at 4

[54] *Supra* note 21

retaliation against the woman following her rejection of a sexual advance, would sexual harassment be unlawful. Where this could not be established, Title VII was of no avail.

The Court enunciated this principle in *Heelan v Johns-Manville Corp.*[55] as follows:

> 'Under the facts of this case, the frequent sexual advances by a supervisor do not form the basis of the Title VII violation that we find to exist. Significantly, termination of the plaintiff's employment when the advances were rejected is what makes the conduct legally objectionable.'

Heelan and subsequent cases[56] were characterized by the fact that it was not the harassment per se that was unlawful; only the retaliation after the advance has been rejected (such as dismissal, lost promotion, etc.) was regarded as actionable.[57] The woman against whom no retaliation has been taken was therefore left with no recourse against the harassment.

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55 D.C. Col. 20 FEP Cases 251 (1978)

56 *Smith v Rust Engineering* C.C. Ala. 20 FEP Cases 1172 (1978); *Fisher v Flynn* C.A. 19 FEP Cases 1979 (1979)

57 M. Rubenstein, *supra* note 8, at 5; J.G. Mowatt, *supra* note 8, at 640

The Equal Employment Opportunity Commission (EEOC)[58] fully appreciated this *lacuna* in sexual harassment jurisprudence when it issued guidelines on sexual harassment on 10 November 1980.[59]

These guidelines provide in pertinent part:

> 'Unwelcome sexual advances, requests for sexual favours and other verbal or physical conduct of a sexual nature constitute sexual harassment when -
>
> (1) submission to such conduct is made either explicitly or implicitly a term or condition of employment;
>
> (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
>
> (3) such conduct has the purpose or effect of unreasonably interfering with an

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[58] The EEOC is an administrative agency charged with the interpretation and administration of Title VII. Although it is not an adjudicative agency in its own right, it has the authority to investigate complaints and make findings on whether unlawful discrimination has occurred and, if so, to seek a remedy in court. Exhaustion of an administrative process in which the EEOC investigates charges of discrimination and attempts conciliation is a prerequisite to suit. Although the guidelines issued by the EEOC are of persuasive value in statutory construction, they do not have the force of law.

[59] *E.E.O.C. Guidelines on Sexual Harassment*, 29 C.F.R., s. 1604.11 (f)

> individual's work performance or creating an intimidating, hostile or offensive working environment.'

The two types of sexual harassment provided for in these guidelines, are commonly referred to as 'quid pro quo' harassment and 'hostile environment' harassment.[60]

It is important to distinguish between the two types of harassment provided for in the guidelines, since the nature of the remedies available differ: only quid pro quo violations carry back pay awards. Plaintiffs proving hostile environment harassment are confined to injunctive relief and reinstatement because the hostile environment claim specifically seeks to redress non-economic injuries.[61]

The next landmark in the development of sexual harassment law in America came in January 1981 (notably after the issuance of the EEOC guidelines) with the decision of the District of Columbia Court of Appeals in the case of *Bundy v Jackson.*[62] The plaintiff's claim arose out of a promotion denial which was preceded by verbal sexual advances, but not threats of economic retaliation. Non-economic hostility, such as supervisors inquiring about Bundy's 'sexual proclivities', also occurred.

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[60] See *infra* para. 2 for an exposition of the nature of these two types of harassment.

[61] M. Vinciguerra, *supra* note 10, at 1723

[62] 24 FEP Cases 1155 (1981)

Endorsing the guidelines of the EEOC, the court ruled that sexual harassment, in and of itself, is a violation of the law[63] and does not require further proof that the employee was penalised or lost tangible job benefits as a result.

The court, however, treated Bundy's claim as a hostile environment violation, without ruling upon the quid pro quo claim dismissed at trial in the district court. The court obfuscated the original sexual harassment question presented - whether Bundy's supervisors committed quid pro quo harassment - and instead found that a hostile environment claim was her sole cause of action for sexual harassment. The court's choice of the hostile environment claim to the exclusion of quid pro quo allegations, set a precedent which future courts followed.[64]

In its first decision on the point, the Supreme Court in *Meritor Savings Bank, FSB v Vinson*[65] accepted that sexual harassment constituted actionable sex-based discrimination under Title VII. Its treatment of the claim[66], however, exemplified

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[63] In the words of the learned Judge:

> 'How then can sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an individual's privacy, not be illegal?'

[64] M. Vinciguerra, *supra* note 10, at 1726

[65] 477 U.S. 57, 91 L.Ed.2d 49

[66] Mechelle Vinson alleged that she was required by the bank manager, Taylor, to perform sexual acts, including intercourse, in the bank vault and other rooms in the bank in order to maintain her employment. She also alleged that Taylor raped her, fondled her breasts and buttocks on the job, sometimes in the presence of co-workers. Apart from suffering persistent non-economic harm, she also lost her job after four years. Since the Supreme Court only addressed the hostile environment claim, Vinson's allegations of coerced sex and fondling as acts of sexual harassment served merely as evidence of pervasive hostility rather than as the unwelcome advance component of quid pro quo harassment.

the trend of courts to ignore quid pro quo harassment (where supervisors' threats and subsequent adverse employment decisions are not temporally linked) when facts giving rise to a hostile environment claim concurrently exist.

Dancaster sums up neatly the criticism against the misapplication by the courts of the two causes of action and the over-extension of the hostile environment claim:

> 'Misuse of the hostile environment claim as a catch-all for sexual harassment complaints involving economic detriment limits quid pro quo analysis to "clear cut" cases, in which a supervisor verbally demands sexual submission, a woman refuses and the supervisor immediately fires or demotes the recalcitrant victim. By relying upon the hostile environment framework to the exclusion of the quid pro quo cause of action in cases involving less clear-cut economic detriment, courts narrowly circumscribe the class of plaintiffs and types of behaviour covered by quid pro quo harassment. This practice reduces the availability of pecuniary relief since only quid pro quo and not hostile environment violations carry back pay awards.'

7. SEXUAL HARASSMENT CLAIMS IN THE SOUTH AFRICAN LEGAL SYSTEM

There is currently no separate remedy for sexual harassment in South Africa. Since the right to integrity of the body and personality of a person is protected in our legal system both criminally and civilly, victims of sexual harassment may seek redress in terms of the criminal law or by way of a civil action, depending on the facts of each case and the nature of the relief sought.

7.1 CRIMINAL LAW

Depending on the circumstances, sexual harassment can constitute a variety of crimes under criminal law in South Africa[67], for example assault[68], indecent assault[69], rape[70], extortion[71] or *crimen injuria*[72].

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[67] J.G. Mowatt, *supra* note 13 at 645; A. Rademan 'The Emerging Law of Sexual Harassment' (1990) 31 *Codicillus* 16 at 21; L. Dancaster 'Sexual Harassment in the Work-place: Should South Africa Adopt the American Approach?' (1991) 12 *ILJ* 449 at 463. A discussion of these crimes in the context of sexual harassment is, however, beyond the scope of this discussion. See in general C.R. Snyman *Criminal Law* (1989)

[68] Assault consists in unlawfully and intentionally (a) applying force, directly or indirectly, to the person of another, or (b) threatening another with immediate personal violence in circumstances which lead the threatened person to believe that the other intends and has the power to carry out the threat

[69] Indecent assault consists in unlawfully and intentionally assaulting another with the object of committing an indecency.

[70] Rape consists in a male having unlawful and intentional intercourse with a female without her consent

Although the offender will be punished if convicted, this avenue of redress will not compensate the victim of sexual harassment for the harm she may have suffered. Apart from the psychological torment the victim may have been subjected to, she may have lost promotion opportunities or even her employment.[73]

Another problem facing the victim of sexual harassment is proving the unlawfulness of the perpetrator's conduct since consent might be raised as a defense. Sexual harassment places a victim in a very difficult position. Refusal to accede to the perpetrator's advances might lead to adverse employment related decisions being taken against the victim. Fear of retaliation and economic dependency may therefore cause a victim to accede to such unwelcome demands. This may signify implied consent and may negate the unlawfulness of the harasser's conduct. The onus lies on the prosecution to negate consent as defence and this may be extremely difficult since normally the prosecution has to rely on the evidence of the victim.[74]

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[71] Extortion is committed when a person unlawfully and intentionally obtains some advantage which is not due to him from another by subjecting the latter to pressure which induces him to hand over the advantage. In *S v Mollendorff* (1987) 1 SA 35 (T) it was held that 'advantage' must be narrowly interpreted to include only a patrimonial benefit.

[72] *Crimen injuria* consists in the unlawful and intentional violation of the dignity or privacy of another, in circumstances where such violation is not of a trifling nature

[73] A. Rademan, *supra* note 67, at 21

[74] *Ibid.*

7.2 DELICTUAL REMEDIES

Another avenue available to the victim of sexual harassment in South Africa would be to recover damages by way of an action in delict.

The foundation-stones of delictual liability in South African law, are the Aquilian action and the *actio iniuriarum*. The former provides a general remedy for wrongs to interests of substance, the latter a general remedy for wrongs to interests of personality.[75]

In the Aquilian action patrimonial loss must be proved and the plaintiff is compensated for that loss only.[76] It is not necessary for the plaintiff to prove intention (dolus); proof of negligence (culpa) is sufficient to found liability.

Damage suffered by the plaintiff does not mean injury to the plaintiff's person; it means 'the *damnum*, that is the loss suffered by the plaintiff by reason of the negligent act'.[77] Damage in this sense is not limited to actual losses or expenses incurred, but also includes the deprivation of a financial benefit that would otherwise have acrued, such as loss of earnings.[78]

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[75] P.Q.R. Boberg *The Law of Delict* (Cape Town: Juta & Company Ltd, 1989) at 18

[76] *Ibid.*

[77] *Oslo Land Co Ltd v Union Government* 1938 AD 584 at 590 as quoted by P.Q.R. Boberg, *supra* note 75, at 476

[78] P.Q.R. Boberg, *supra* note 75, at 476

The victim of quid pro quo sexual harassment who has been dismissed on account of her refusal to accede to an employer or supervisor's sexual demands may therefore be compensated for the patrimonial loss suffered as a result of her dismissal, which would of course include loss of future earnings. Theoretically an employee who has been refused promotion on account of her refusal to accede to an employer or supervisor's sexual demands will also have this right of recourse. This would of course only be the case if the aggrieved employee is able to prove that she would have been promoted had she not refused to accede to the sexual demands of her employer or supervisor. Discharging this onus would most likely prove to be an unsurmountable obstacle.

Instances of hostile environment sexual harassment inflict no proprietary loss on the victims thereof, but nevertheless operate to the detriment of the victims' dignity and character. In these instances sentimental damages may be claimable under the *actio iniuriarum* to assuage the victim's injured feelings. In the *actio iniuriarum* patrimonial loss need not be proved; loss is assumed once it is established that *contumelia* (impairment of dignity) has been suffered.[79] The plaintiff will, however, have to prove intent on the part of the perpetrator. This may leave room for the argument that the harasser may only have made a playful jest without any intention to cause mental anguish, humiliation or degradation for the victim.

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[79] A. van Niekerk 'Remedies in Unfair Labour Practice Proceedings, including Developments Concerning Awards of Compensation (1993) *Current Labour Law* 34 at 39

7.3 LIABILITY OF THE EMPLOYER TO THE VICTIM

The perpetrator of sexual harassment is very often a supervisor or a co-worker, and not the employer. As the supervisory employee or the co-worker may not be able to respond in damages, a victory in court could be hollow unless the plaintiff can succeed in establishing liability on the part of the employer.

At common law, an employer may be liable for injuries sustained by an employee as a result of the wrongful act of a fellow employee. The employer's liability here may be vicarious or personal.

The employer will be personally liable if he knows that the act was being committed and was negligent in taking or failing to take action to prevent it. This would be the case if an employer fails to investigate a complaint of sexual harassment or fails to take the adequate disciplinary steps against the harasser. The liability in this instance is based on the breach of the employer's duty to provide reasonable care.[80]

In terms of the principles of vicarious liability[81], an employer is made liable for the wrongs (delicts) committed by his employees in the course and scope of the

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[80] B. Jordaan in A. Rycroft & B. Jordaan *A Guide to South African Labour Law* (Juta, 1990) at 68; L. Dancaster, *supra* note 67 at 464

[81] For a brief reference to the origin of this rule in our law, see Booysen J in *Hirsch Appliance Special v Shield Security Natal (Pty) Ltd* 1992 (3) SA 643 (D) at 647 - 648

employee's employment. The employer need not be personally at fault in any way[82] but the wrong of the employee (for which the employee remains personally liable) is imputed or transferred to the employer who often has the 'deeper pocket' or 'broader financial shoulders' to compensate the person injured by the employee's wrong.[83]

An employer will only be liable for the delict of an employee whose acts occur within the course and scope of employment.[84] In this regard the following test was enunciated by the Appellate Division per Van Heerden JA in *Minister of Police v Rabie*[85]:

> 'It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention... The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be

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82 Since no fault on the part of the employer need be found, vicarious liability is, in a sense, a form of strict liability. However, the servant must have committed a delict before the principle of vicarious liability can operate.

83 J. Burchell *Principles of Delict* (Juta, 1993) at 215

84 J. Neethling, J.M. Potgieter & P.J. Visser *Deliktereg* (2 ed: Butterworths, 1992) at 367 - 368

85 1986 (1) SA 117 (A)

liable. This is an objective test. And it may be useful to add that "... a master ...is liable even for acts which he has not authorized provided that they are so connected with acts which he has authorized that they may rightly be regarded as modes - although improper modes - of doing them..." '[86]

According to this test[87], an employer will be vicariously liable for the sexual harassment of an employee by a co-employee or supervisor only if there is a sufficiently close link between the perpetrator's acts for his own interests and purposes and the business of the employer. By sexually harassing someone in the working environment, the harasser undoubtedly acts in his own interest with the purpose of sexual gratification. The problem, however, would be to prove that there was a sufficiently close link between the said acts and the business of the employer. It is submitted that acts of sexual harassment should be regarded as improper modes of performing acts which had been authorized by the employer.

Finally, an employer may also be liable for sexual harassment of employees by supervisors according to the principles of agency. Where the power delegated to the supervisor includes the right to hire or fire, or generally to judge the employee's performance, the supervisory employee may abuse the power in order to obtain

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[86] At 134C - E

[87] This test was approved of in *Dithipe v Ikageng Town Council* 1992 (4) SA 749 (T); *Macala v Maokeng Town Council* 1993 (1) SA 434 (A); *Romansrivier Koöp. Wynkelder v Chemserve Manufacturing* 1993 (2) SA 358 (C); for a critiscism of the test, see *Minister of Law and Order v Ngobo* 1992 (4) SA 822 (A) at 830C - 832B. This criticism does not, however, have any bearing on the proposed application of the test in sexual harassment claims.

sexual favours from subordinate employees. Notwithstanding the supervisor's breach of contract in such cases, the employer would be liable to the harassed employee on the principles of agency.[88]

7.4 INSUFFICIENCY OF A DELICTUAL APPROACH TO SEXUAL HARASSMENT

It is evident from the above that a delictual approach to the problem of sexual harassment is inadequate to address and remedy the problem and compensate the victims thereof.

The first obstacle the victim is faced with is that of proving the unlawfulness of the perpetrator's conduct in view of the fact that consent might be raised as a defense. Many women are too intimidated to complain about incidences of sexual harassment and would rather try to ignore and tolerate it for fear of retaliation and for reasons of economic dependency. This might be construed as implied consent and negate the unlawfulness of the perpetrator's actions. This approach fails to take cognisance of the precarious position of the victim: only rejection will prove that the sexual advances are unwanted and unwelcome, but rejection is also likely to call forth retaliation, thus forcing the victim to bring intensified injury upon herself in order to demonstrate that she is injured at all. 'Skilled' harassers who construct their actions with enough coerciveness, subtlety, suddenness, or one-

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[88] L. Dancaster, *supra* note 67, at 465

sidedness, might also be able to negate the effectiveness of the victim's refusal.[89]

Another problem facing the victim of sexual harassment is that of proving intent on the part of the perpetrator for purposes of the *actio iniuriarum*. The perpetrator might argue that he never intended to cause mental anguish for the victim, but merely acted in jest.

But at a more fundamental level, the delictual approach is conceptually inadequate to address the problem of sexual harassment adequately. In terms of the delictual approach, the essential purpose is to compensate individuals one at a time for mischief which befalls them as a consequence of the wrongful actions of other individuals.[90] The delictual approach considers individual and compensable something which is fundamentally a social problem. Compensating individuals one at a time has no real potential of changing societal attitudes and shaping social interaction so that this kind of injury would not recur. This is not to say that sexual harassment is not both wrong and a personal injury, but it would be more accurate to say that it is a social wrong and a social injury that occurs on a personal level.[91]

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[89] C.A. MacKinnnon, *supra* note 2, at 46

[90] C.A. MacKinnon, *supra* note 2, at 172

[91] C.A. MacKinnon, *supra* note 2, at 173

In a delictual perspective, sexual harassment could be seen as an injury to an individual person's sexual integrity, with damages extending to the job. Alternatively sexual harassment could be viewed as an injury to an individual interest in employment, with damages extending to the emotional harm attendant to the sexual invasion as well as to the loss of employment. This poses the question of whether sexual harassment is essentially an injury to the person, with pendent damages to the job, or whether it is essentially an injury to the job, with damages extending to the person.[92] Fact is, it is both and in this regard the delictual approach ignores the nexus between women's sexuality and women's employment and fails to view injuries to women's sexuality within the context of women's social circumstances as a whole.

The delictual approach furthermore fails to take cognisance of the fact that sexual harassment is an abuse of power which injures a discrete and identifiable group by subjecting its victims to demeaning treatment and relegating them to inferior status in the workplace.[93] Catharine MacKinnon sums up the critiscism against a delictual approach to sexual harassment neatly:

> 'The ...suggestion that sexual harassment be treated as a tort - a private harm - applies, unstated, the view that the interest to be protected is not so much an interest of women as a sex in

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[92] C.A. MacKinnon, *supra* note 2, at 171

[93] Note 'Sexual Harassment Claims of Abusive Work Environment under Title VII', *supra* note 6, at 1463

employment opportunities as it is a personal interest. Torts best redress injuries to one's person, here to individual sexuality as an aspect of the self, rather than to public and shared social existence, here sex in employment. The tort remedy attempts to monetize physical and psychic damage to the person, sometimes including punitive damages representing outrage, rather than to formulate redress in terms of hiring, seniority, or promotion... . To the extent that tort theory fails to capture the broadly social sexuality/employment nexus that comprises the injury of sexual harassment, by treating the incidents as if they are outrages particular to an individual woman rather than integral to her social status as a woman worker, the personal approach on the legal level fails to analyze the relevant dimensions of the problem.'[94]

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[94] C.A. MacKinnon, *supra* note 2, at 88

7.5 THE LABOUR RELATIONS ACT, NO. 28 OF 1956

7.5.1 The unfair labour practice concept

Damages that could be recovered in delict in the abovementioned ways, may not be adequate to put an end to the harassment or to fully compensate the victim of sexual harassment. Another possible avenue of redress would be to use the unfair labour practice jurisdiction of the industrial court in terms of the Labour Relations Act.[95] Indeed, the unfair labour practice definition[96] is ideally suited to this purpose as it focuses on the adverse effect of the conduct both on the employee concerned and on the employment relationship.[97]

Of particular significance in the context of sexual harassment is subparagraphs (a)(i) and (a)(iv) of the definition.

According to subpara (a)(i) of the definition, any act or omission which may unfairly affect an employee or which may prejudice or jeopardize an employee's 'employment opportunities or work security'[98] is an unfair labour practice. It is

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[95] It is beyond the scope of this essay to explore fully the merits and demerits of available relief. Due to the limited nature of the discussion, only a brief overview will be given of remedies provided for in the Labour Relations Act.

[96] See Appendix A for the definition of an unfair labour practice

[97] J. Campanella, *supra* note 5, at 10

[98] The pre-1988 definition included a reference to any act or omission which unfairly affected, prejudiced or jeopardized the employee's 'physical, economic, moral or social welfare', which would of course have facilitated proof of quid pro quo harassment. The 1988 definition of an unfair labour practice made specific reference to the 'unfair discrimination

(continued...)

submitted that quid pro quo sexual harassment could surely be brought within the ambit of this provision. If an employee's promotion or salary increase is made conditional upon acceding to her employer or supervisor's sexual demands, it would undoubtedly prejudice or jeopardize her employment opportunities. Similarly, if an employee is threatened with dismissal or if she is in fact dismissed for refusing to accede to such sexual demands, the said acts will prejudice or jeopardize the employee's work security. The plaintiff will, however, have to prove a causal link between the alleged harassment and the economic retaliation.

It might also be argued that hostile environment sexual harassment could be covered by the term 'unfairly affect' contained in subpara. (a)(i). However, subpara (a)(iv) seems to be the more likely provision to afford victims of hostile environment harassment a ground for action. According to this subparagraph, any act or omission which has or may have the effect of detrimentally affecting the 'labour relationship between the employer and employee' is an unfair labour practice. In *United African Motor & Allied Workers Union v Fodens*[99] it was held that the use of derogatory language where the employee addressed experienced 'humiliation, degradation and hurt' constituted an unfair labour practice. Victims of sexual harassment experience exactly these feelings and should therefore, by way of analogy, be able to persuade a court that hostile environment sexual harassment constitutes an unfair labour practice. The employer does after all have

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[98](...continued)
by any employer against any employee solely on the grounds of ... sex ...'. Under that dispensation the courts would probably have taken cognisance of the fact that sexual harassment is recognized as sex discrimination in America.

[99] (1983) 4 *ILJ* 212 (IC)

a common law duty to take reasonable care for the safety of its employees, which includes their psychological health. Failure to provide these safe working conditions will undoubtedly have a negative impact on the 'labour relationship' between the employer and the employee and therefore constitute an unfair labour practice.

Another problem facing the victim of sexual harassment is that it might become so intolerable that the victim rather chooses to resign than to endure it any longer. In these instances, the unfair labour practice jurisdiction of the industrial court would also afford a right of recourse to the victim. The following observations about constructive dismissal per Bulbulia in *Ndebele v Foot Warehouse (Pty) Ltd t/a Shoe Warehouse*[100] are particularly apposite in this regard:

> 'Constructive dismissal arises when the employee terminates the employment contract in circumstances such that he is entitled to terminate it without notice, by reason of the *employer's intolerable or unreasonable conduct*. It may also arise in a situation where an employee resigns and the resignation cannot be said to be voluntary in the real sense, as it was prompted by the employer's unlawful or improper conduct, for example assault, sexual harassment or unsubstantiated allegations of theft or dishonesty.' (emphasis in the original.)

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[100] (1992) 1 *LCD* 225 (IC) at 226

Another significant aspect of the definition of an unfair labour practice is the reference to 'an act or *omission*', since the failure of an employer to investigate a complaint of sexual harassment and take appropriate action will also be actionable by the victim.

Also significant in the unfair labour practice jurisprudence, is the following dictum enunciated in *Marievale Consolidated Mines Ltd v The President of the Industrial Court & Others*[101]:

> 'In my opinion the reference to "labour practice" in the definition of "unfair labour practice" relates to a customary or recognized device, scheme or action adopted in the labour field. My purpose is solely to indicate that *it does not in any way relate to habitual or repetitious conduct*. ...Such an interpretation of the phrase does not appear to be a natural one and is certainly not necessary having regard to the words and their context. It would lead to the unhappy if not absurd result that any employer can be a "bad boy" once and may be twice but not thrice! That cannot have been the intention of the legislature.'[102] (emphasis added)

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[101] (1986) 7 *ILJ* 152 (T)

[102] *Id.* at 165C - E

This is an important principle in view of the following statement by De Kock in *J v M Ltd*[103]:

> 'It is in my opinion also not necessary that the conduct must be repeated. A single act can constitute sexual harassment.'[104]

A claim for sexual harassment will therefore lie after only one such incident eliminating the need for the victim to subject herself to harassment over a long period of time in order to prove a pattern of such behaviour on the part of the perpetrator.

Despite the fact that the unfair labour practice concept seems broad enough to cover sexual harassment claims, only two industrial court cases have, to date, dealt with the issue of sexual harassment. In both instances, the applicant was an 'aggrieved' harasser who alleged that he had been unfairly dismissed.

J v M Ltd[105] was the first South African case involving sexual harassment. J, a senior executive employee of the respondent company, was dismissed after having been found guilty of sexual harassment at a disciplinary inquiry. The industrial court upheld the respondent's decision to dismiss the applicant as fair and accordingly refused J's sec.43 application for reinstatement.

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[103] *Supra* note 13

[104] *Id.* at 757F - G

[105] (1989) 10 *ILJ* 755. The case involved a sec. 43 application for reinstatement.

The industrial court, per De Kock, took a broad view of what may amount to sexual harassment:

> '...in its narrowest form sexual harassment occurs when a woman (or a man) is expected to engage in sexual activity in order to obtain or keep employment or obtain promotion or other favourable working conditions. In its wider view it is, however, any unwanted sexual behaviour or comment which has a negative effect on the recipient. Conduct which can constitute sexual harassment ranges from innuendo, inappropriate gestures, suggestions or hints or fondling without consent or by force to its worst form, namely, rape.'[106]

The phrase 'any unwanted sexual behaviour or comment which has a negative effect on the recipient' seems to suggest that the court adopted a subjective approach. The references to the victim's embarrassment and humiliation[107] and the psychological effect on sensitive and immature employees[108] also seem to indicate the adoption of a subjective approach.[109]

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[106] At 757E-G

[107] At 758A

[108] At 758B

[109] L. Dancaster, *supra* note 67, at 462 is, however, of the opinion that statements concerning the employer's right to decide on 'acceptable' behaviour and the phrase 'sexual harassment is unacceptable at any level in Western society' indicates an objective approach.

It is submitted that a subjective approach focusing on the feelings and perceptions of the victim of sexual harassment is to be preferred. Due to the differing perceptions amongst men and women, and women amongst themselves, of what constitutes acceptable conduct in the workplace a subjective approach would ensure that individual employees determine what is acceptable to them. The danger of an objective approach to sexual harassment is that the employer and employee might hold different views of what is an acceptable standard of conduct in the workplace. An aggrieved employee may therefore not find relief by complaining to an employer who holds different views on 'acceptability Concern for the dignity of women would require the application of a subjective test, with due regard to the perception of the victim. If this seems harsh to the harasser, so be it. The employer always has a discretion to decide on an appropriate sanction - if the sexual harassment was slight or trivial a warning might suffice.[110]

In *Jerry Mampuru v PUTCO*[111] the industrial court once again had the opportunity of considering the question of sexual harassment. Jerry Mampuru, who was employed by the respondent as a store manager, was dismissed for making suggestions of a sexual nature and touching and pulling three female employees of the respondent company.

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[110] J. Campanella, *supra* note 5, at 9

[111] 24 September 1989 (case number NH 11/2/2136)

The court again appeared to have applied a subjective test by considering the effect of the harassment on the recipients. The court was of the opinion that:

> '...sexual harassment may take various forms. It may be verbal and trivial, it may be verbal but gross, or it may be physical, again varying from trivial to gross. It may be a single act or the act may be repeated. The actions as such disclose a total disregard for the feelings and the integrity of the recipient.'[112]

One of the most significant aspects of the above two cases is that it would appear that the industrial court does not require a sexually harassed employee to suffer any economic detriment at the hands of her employer regarding remuneration, promotion, training, continued employment or any other tangible benefit. An offensive work environment, resulting from sexual harassment, appears to satisfy the requirement of unfairness.[113]

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[112] At pp.18 - 19 of the unreported judgement.

[113] C. Louw 'Sex Discrimination and the Labour Relations Act' (1990) 2 *South African Mercantile Law Journal* 164 at 185

7.5.2 Relief available to the victim of sexual harassment

According to sec. 46(9)(c) the industrial court has the power to 'determine the dispute on such terms as it may deem reasonable, including but not limited to the ordering of reinstatement or compensation'.

Reinstatement will sometimes be inappropriate since the victim of the sexual harassment might prefer not to face her harasser again, especially not in the working environment.

With regard to compensation, sec. 46 provides no guidance as to the determination of compensation or criteria for the assessment of compensatory awards, other than that the award should be reasonable.[114] Most recently an approach has emerged whereby the court regards the appropriate measure of compensation in unfair labour practice disputes as the amount necessary to compensate the employee for patrimonial loss suffered as a result of an unfair labour practice. According to this approach, the assessment of compensation in terms of sec. 46(9) is considered analogous to an award of damages in a delictual claim.

In *Alert Employment Personnel (Pty) Ltd v Leech*[115] the Labour Appeal Court, per McCall J, said the following in this regard:

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[114] A. van Niekerk, *supra* note 79, at 35

[115] (1993) 14 *ILJ* 655 (LAC)

'...a claim for compensation for an unfair labour practice is more akin to a delictual claim than to a claim based on breach of contract. ....The Labour Relations Act makes unfair conduct, as distinct from unlawful conduct, wrongful and authorizes the payment of compensation for it. In my opinion the appropriate measure of compensation for the respondent in this case would be the amount necessary to compensate her for her patrimonial loss...'[116] [117]

According to Van Niekerk[118] the guidelines suggested by Combrinck J in *Ferodo (Pty) Ltd v N. de Ruiter*[119] seem likely to be influential in future in the assessment of compensation. Those relevant for a sexual harassment claim, are:

(a) There must be evidence before the Court of actual financial loss suffered by the person claiming compensation;

(b) there must be proof that the loss was caused by the unfair labour practice;

(c) the loss must be foreseeable (i.e. not too remote or speculative);

(d) the award must endeavour to place the applicant in monetary terms

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[116] At 661D-F

[117] This approach has been followed in a number of recent decisions: *Foodpiper CC t/a Kentucky Fried Chicken v Shezi* (1993) 2 *LCD* 32 (LAC); *Jonker v ABI* (1993) 14 *ILJ* 219 (IC); *Ferodo (Pty) Ltd v N de Ruiter* (1993) 14 *ILJ* [Part 3] (LAC)

[118] *Supra* note 79, at 37

[119] *Supra* note 117

in the position which [s]he would have been had the unfair labour practice not been committed;

(e) in making the award the Court must be guided by what is reasonable in the circumstances. It should not be calculated to punish the party.

These guidelines will of course only be relevant in quid pro quo harassment claims where the plaintiff proves some quantifiable proprietary loss.[120]

Hostile environment harassment, however, offers the classic example of an unfair labour practice whereby the victim suffers no proprietary loss. Although the victim's dignity and character is detrimentally affected, there is no basis for compensation since the industrial court has no jurisdiction to award damages. This has to date been the preserve of the civil courts. Punitive damages, known more correctly to our civil law as moral and sentimental damages, may be awarded as a *solatium* where no pecuniary loss is proved to compensate a person for the indignity suffered by the wrongful act of another.[121] It is not necessary to prove damage - loss is assumed once it is established that *contumelia* (impairment of dignity) has been suffered.[122]

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[120] This will clearly be the case if an employee is dismissed following a rejection of a sexual demand.

[121] L. Gcabashe 'Sexual Harassment in the Workplace' (Paper delivered at the 5th Annual Labour Law Conference 1992: Labour Law, Corporate Law and the Constitution') at 6

[122] A. van Niekerk, *supra* note 79, at 39

In *Prinsloo v Harmony Furnishers (Pty) Ltd*[123] the industrial court awarded sentimental damages as a solatium for the indignity, wounded feelings and mental pain and suffering of the applicant as result of the improper and intimidating manner in which respondent searched applicant's home and motor vehicle and interrogated him. Victims of sexual harassment experience exactly these feelings and should therefore, by way of analogy, also be afforded this form of redress. This award for non-patrimonial loss has, however, been severely criticized[124] and only time will tell whether the industrial court will continue with this approach.

It is submitted that the remedies available under the Labour Relations Act are relatively ineffective to compensate the victims of sexual harassment. This is as a result of the fact that the harm caused by sexual harassment differs qualitatively from the more easily recognizable forms of unfair labour practice which the provisions of the Act were designed to meet.[125] The problem is further compounded by the uncertainty regarding the assessment of compensation. It is submitted that the Act should be amended to make provision for some form of compensating damages for victims of sexual harassment who do not suffer any patrimonial loss.

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[123] (1993) 2 *LCD* 82 (IC)

[124] Cf. *Ferodo (Pty) Ltd v N. de Ruiter, supra* note 117; A. Landman 'Compensatory Orders in the Industrial Court *Labour Law Briefs* vol 4 no 2 (15 September 1990) 9; D. Segrott 'Reinstatement and Compensation: Remedies in Unfair Labour Practice Proceedings' (Unpublished paper) at 20 - 24

[125] J.G. Mowatt, *supra* note 13, at 652

7.5.3 Scope of application

It must be borne in mind that the Labour Relations Act has a fairly limited scope of application: officers of Parliament, public sector employees, domestic servants, chief administrative officers of local authorities, persons who work in charitable institutions without receiving remuneration and persons who teach, educate or train other persons at any university, technikon, college, school or other educational institution are excluded from the provisions of the Labour Relations Act.[126]

The passing of the Education Labour Relations Act[127] and the Public Service Labour Relations Act[128] has effected a significant change in this regard and merits further scrutiny.

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[126] *Cf.* sec. 2 of the Labour Relations Act, No. 28 of 1956

[127] Act No. 146 of 1993. The Act was promulgated on 20 October 1993.

[128] Act No. 102 of 1993

7.6 THE EDUCATION LABOUR RELATIONS ACT, NO. 146 OF 1993

In terms of the definition of an 'employee' contained in the Education Labour Relations Act, persons who teach, educate or train other persons at any school, technical college or teachers' training college as well as persons who assist in rendering professional services or educational auxiliary services provided by or in a Department of Education are now also afforded access to the unfair labour practice jurisdiction of the industrial court.

The definition of an 'unfair labour practice' contained in the said act[129] is very similar to that contained in the Labour Relations Act and the above discussion in this regard is thus equally applicable in respect of the Education Labour Relations Act. There are, however, two important additions: not only does the definition include acts or omissions which has or may have the effect of prejudicing or jeopardizing an employee's employment opportunities or work security; it also includes acts or omissions which have or may have the said effect on an employee's *employment* or *terms and conditions of employment*. Instances of hostile environment sexual harassment which result in an offensive and intimidating work environment will undoubtedly prejudice the victim's terms and conditions of employment. Similarly, where an employee's employment is made conditional upon her compliance with her employer or supervisor's sexual demands it will undoubtedly jeopardize her employment and constitute a prejudice to her terms and conditions of employment.

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[129] See Appendix B

7.7 THE PUBLIC SERVICE LABOUR RELATIONS ACT, NO. 102 OF 1993

The definition of an 'unfair labour practice' contained in this act[130] is similar to the definition supplied by the Labour Relations Act. There is, however, one very important addition: victimization or unfair discrimination against an employee on grounds of the employee's sex or on any arbitrary grounds will also constitute an unfair labour practice.[131]

This definition of an unfair labour practice offers public sector employees a very wide ambit within which to formulate a claim of sexual harassment. It is very likely that the industrial court will in this regard take cognisance of the fact that sexual harassment is recognised as sex discrimination in the United States of America and follow suit.[132] The fact that the 'discrimination' must be 'unfair' should not be cause for too much concern in sexual harassment cases[133]: there is no conceivable way in which an employer should be able to justify acts of sexual harassment as being fair.

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[130] See Appendix C

[131] Sec. 4(7). See Appendix C

[132] Sexual harassment is also recognised as sex discrimination in Great Britain under the Sex Discrimination Act of 1975.

[133] This qualification of the word 'discrimination', is, however, cause for great concern in the other cases of discrimination on grounds of an employee's race, colour, sex, religion, political opinion, membership or non-membership of an employee organization or participation in the activities of such an organization, or any arbitrary grounds. The fact that discrimination on the said grounds must be unfair, leaves sufficient room for an employer to justify his discrimination. It is, however, beyond the scope of this discussion to traverse the merits and demerits of this legislative approach to promoting equality in employment.

The inclusion of the concept of 'victimization on grounds of an employee's sex' would also facilitate stating a claim of sexual harassment: it would place less emphasis on comparing the treatment of the victim with the way in which other employees are being treated, as is the case when one has to determine whether an employee has been discriminated against.

It is evident from the above that the definition of an 'unfair labour practice' contained in the Public Service Labour Relations Act is wider than that contained in either the Labour Relations Act or the Education Labour Relations Act. Public sector employees are thus in a much more favourable position than any other employees in formulating a claim of sexual harassment.

7.8 THE ELECTORAL ACT, NO. 202 OF 1993

Section 55(1) of the Electoral Act, 1993 is the first, and to date the only, legislative attempt in South Africa to address the problem of sexual harassment expressly.[134] In terms of the said section, any person who, directly or indirectly, uses or threatens to use sexual harassment for certain circumscribed purposes, will be guilty of an offence. The application of sec.55 is, however, problematic for the following reasons:

i.) According to sec.55(1)(a) proof of *intent* on the part of the perpetrator to compel, induce or influence any other person to do or refrain from doing certain circumscribed acts through the use or threat of sexual harassment is required. This may leave room for the argument that the harasser's actions was meant only as a playful jest, or that the sexual harassment was perpetrated with some other intention than attaining the circumscribed goals.

ii.) The circumscribed goals which the perpetrator of the sexual harassment must have intended to attain only refers to political activities such as participating in and attending any political meeting, march, demonstration or other event of a political nature, voting and lending support to a registered political party or refraining from any or all such acts. Sexual harassment intended for any other purpose would not be actionable under the Electoral Act. The application of

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[134] See Appendix D

the Act as a means of addressing the problem of sexual harassment in general is thus very limited as the Act was essentially designed to ensure that political activity and the electoral process is conducted without any undue influence.

iii.) According to sec.55(b) any person who sexually harasses any other person *on account of* that person performing or refraining from performing certain circumscribed acts shall be guilty of an offence. These circumscribed acts once again refer only to political activities such as participating in and attending any political meeting, march, demonstration or other event of a political nature, voting and lending support to a registered political party or refraining from any or all such acts. The victim of sexual harassment will thus have to prove that there was a causal connection between her performance of or abstinence from the said political activities and the sexual harassment. This may leave room for the argument that the perpetrator harassed the victim on account of some other reason, wholly unrelated to her political activities or abstinence therefrom.

iv.) Although the offender will be punished if convicted, this avenue of redress will not compensate the victim of sexual harassment for the harm she may have suffered as a result of the sexual harassment.[135]

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[135] Any person convicted of a contravention of the provisions of sec.55(1) shall in terms of sec.65(a) be liable to a fine not exceeding R100 000 or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment.

Although such legislative attempts to address sexual harassment is to be welcomed, the scope of application of sec. 55(1) is extremely limited and has very limited potential to address the problem of sexual harassment adequately.

7.9 DRAFT BILL ON THE PROMOTION OF EQUAL OPPORTUNITIES 1993[136]

The inclusion of a clause dealing with sexual harassment in the Draft Bill on the Promotion of Equal Opportunities[137] is to be welcomed. If the Bill is passed by parliament, the courts, in dealing with sexual harassment claims, will not be faced with the problem of trying to accommodate such claims within the broad anti-discrimination provision contained in the Bill.

Sexual harassment is defined in clause 14(4) as:

> '...any conduct where a person makes an unwelcome sexual suggestion to another person, or makes an unwelcome request for a sexual favour to another person, or engages in any other unwelcome conduct of a sexual nature in relation to another person, in circumstances where such other person has reasonable grounds to believe that the rejection of such conduct may prejudice him or her -

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[136] The discussion presented in 7.9 is based on S. Christie *et al.* 'Submissions on the Promotion of Equal Opportunities Draft Bill' (1993) *Current Labour Law*

[137] See Appendix D for the wording of clause 14

(a) in any application for employment or a position with an employer or for admission to an educational institution; or

(b) in the continuation or the circumstances of his or her employment with an employer or of his or her studies at an educational institution.'

The reference to 'any conduct of a sexual nature' is wide enough to address not only the most overt forms of sexual harassment, but also subtler manifestations thereof, such as comments with a sexual innuendo. The fact that clause 14 focuses on the 'unwelcome' nature of the behaviour is also to be welcomed: it acknowledges the fact that women have a right to choose whether and with whom to engage in conduct of a sexual nature. Another advantage of clause 14 is that it has a fairly wide scope of application. Not only does it cover sexual harassment by employer to employee and by one employee to another employee of the same employer; sexual harassment by an employer to an applicant for employment and by an employee to an applicant for employment by the same employer is also prohibited.

The requirement that the victim of sexual harassment must have *reasonable grounds* to believe that rejection of the conduct may prejudice him or her is problematic. The reasonableness of the claimant's fear will most probably be evaluated according to male norms of how women should perceive and react to conduct of a sexual nature. It is submitted that the focus of the enquiry should rather be whether the conduct in question did in fact have a negative impact on the

claimant.

The requirement that there should be a *rejection of the conduct* which may *prejudice the claimant* has the effect of focusing clause 14 on quid pro quo harassment. No explicit provision is made for instances of hostile environment sexual harassment where the victim is not typically threatened with any tangible loss. This is regrettable in view of the fact that the industrial court appears not to require a sexually harassed employee to suffer any detriment at the hands of her employer regarding remuneration, promotion, training, continued employment or any other tangible benefit. In *J v M*[138] an offensive work environment, resulting from sexual harassment, appeared to satisfy the requirement of unfairness.[139] It may be argued that the word 'circumstances' in clause 14(4)(b) is intended to refer to instances of hostile environment harassment but, if so, it does not do so with sufficient clarity.

Clause 14 regrettably contains no guidelines as to the liability of an employer to an employee for acts of sexual harassment perpetrated by himself or one of his employees.

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[138] *Supra*, note 13

[139] C. Louw, *supra* note 113, at 185

7.10 THE OPINION OF THE SUPREME COURT ON SEXUAL HARASSMENT

The Supreme Court of South Africa has recently had the opportunity of voicing its opinion on sexual harassment in *Plessey Tellumat SA Limited v G. Berger, South Press Services (Pty) Ltd & Nasionale Media Ltd*[140]. The applicant had obtained a temporary interdict restraining the respondents from publishing an article in South, the essential contents of which concerned acts of sexual harassment perpetrated by one Trevor Baynham, an employee of the applicant company.

On the return date of the rule *nisi* the Supreme Court made some very interesting remarks about sexual harassment.

After defining sexual harassment as 'the unwanted imposition of sexual requirements in the context of a relationship of unequal power'[141], Conradie J went on to state that:

> 'One of the essential elements of the offence is therefore that the harasser should be in a position of authority over the victim. He or she should be able to grant or withhold advantages depending upon the success of his or her advances. This element is, of course, of cardinal importance. A supervisor who cannot influence the employee's job prospects is a molester not a harasser. ...[T]he mere

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[140] Cape of Good Hope Provincial Division (Case number 7361/1993; 17 December 1993)

[141] At p14 of the unreported judgement

presence of a known offender cannot give rise to a fear of sexual harassment unless the offender is in a position of authority over the victim. *Prima facie* therefore what the female employees are said to fear cannot be sexual harassment unless one of their supervisors is the culprit.'[142]

It is respectfully submitted that Conradie J's exposition displays a lack of understanding of the nature of sexual harassment. It is logically untenable to state that sexual harassment is only capable of being performed by persons who are in a position of authority over the victim and are accordingly able to grant or withhold advantages depending upon the success of his or her advances. By these premises a supervisor who repeatedly propositions a subordinate may be guilty of sexual harassment, but a co-worker who does exactly the same will not be. Focusing on the status of the perpetrator in the organisational hierarchy rather than on the nature of the behaviour of the perpetrator in order to determine how the conduct is to be labelled is logically untenable. It is furthermore irreconcilable with the basic principles of South African criminal law and the law of delict to focus on the perpetrator's status and organisational power rather than on the nature of the conduct in question. It is submitted that the status of the perpetrator in the organisational hierarchy is only relevant for the purpose of distinguishing between quid pro quo and hostile environment sexual harassment and has no relevance in determining whether the behaviour in question amounts to sexual harassment.

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[142] At pp. 14 - 15 of the unreported judgement

8. DEALING WITH SEXUAL HARASSMENT

The high costs of sexual harassment in personal, psychological and financial terms underline the need for all organisations to develop and implement effective policies to deal with sexual harassment.[143] Although the industrial court has not yet considered in any detail the employer's responsibility to prevent sexual harassment in the workplace, the following *dictum* from *J v M*[144] is encouraging:

> 'An employer undoubtedly has a duty to ensure that its employees are not subjected to this form of violation [i.e. sexual harassment] within the workplace.'

The development of a sexual harassment policy and the implementation of responsive and accessible grievance procedures for dealing with complaints quickly and sensitively may go a long way towards minimizing the incidence and impact of sexual harassment.

The policy should contain a strong and unequivocal statement of the employer's commitment to maintain a work environment that is free from sexual harassment. It should be made clear that offending and objectionable conduct will not be tolerated and that the employer will act vigorously against any incident of sexual

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[143] Ann Margerson 'Sexual harassment - an issue for lawyers' (1992) 66 *Law Institute Journal* 501 at 502

[144] *Supra* note 13

harassment. The policy statement must also unequivocally state that sexual harassment will be regarded as a disciplinary offence and specify the disciplinary measures that might be taken against perpetrators.

The term 'sexual harassment' should be defined as comprehensively as possible in the policy statement in order to give employees a clearer idea of the types of behaviour that may constitute sexual harassment and to eliminate any ambiguity. The definition should, however, leave room for a broader interpretation to cover unpredictable human behaviour.[145]

Minimising the risk of sexual harassment may also be greatly aided by providing managers, supervisors and employees at all levels with appropriate training. Although a definition of sexual harassment may sufficiently impress upon employees what behaviour can constitute sexual harassment, that knowledge must be accompanied by a sensitivity as to how others might perceive the behaviour in question. This is an important aspect of an effective policy since sexual harassment depends less on the intention of the perpetrator than on the response of the recipient.

The policy statement should furthermore explain the redress mechanism available to victims of sexual harassment. It should set out clearly the complaint and investigation procedures to be followed. To maximize effectiveness, the procedure should designate an independent party other than the victim's supervisor to whom

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[145] A.P. Aggarwal, *supra* note 3, at 323

complaints may be addressed. This will encourage victims of supervisory harassment to use the grievance procedure.[146] Ideally, the person designated to receive the complaints should be of the victim's own gender. An employer should therefore appoint both male and female liaisons to attend to complaints, so that the victim will have a choice.

The complaints procedure should encourage employees to come forward with allegations of sexual harassment by providing a guarantee that all complaints will be treated confidentially and that no retaliatory action will be taken against an employee as a result of lodging a complaint of sexual harassment.

Ideally a company's system for handling complaints should be designed to provide choice for the complainants, so that different people may find an option for stopping harassment that is appropriate for them.

Often a formal complaint procedure is preferred for harassment that is considered egregious, and informal complaint resolution is preferred for more subtle, ambiguous or idiosyncratic harassment. Choice of option is, however, affected by many factors, such as the complainant's need for privacy and control over the complaint, the complainant's preferred style of complaint resolution, and the kind of evidence that exists in substantiation of the allegation of sexual

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[146] Notes 'Sexual Harassment in the Workplace: Employer Liability for a Sexually Hostile Environment' (1988) 66 *Washington University Law Quarterly* 91 at 108 - 109

harassment.[147]

A direct and informal approach, such as writing a letter to the harasser or confronting the harasser personally, might prove to be effective for people who just want the harassment to stop, without wanting to pursue a fact-finding process or seeking sanctions. This option might be useful in cases of verbal harassment or where offensive images and posters are displayed in the workplace. The advantages of this approach are manifold: it may give the complainant the most control over how the complaint is handled, it may produce better and quicker results than intervention by a third party, it gives the complainant a chance to ask directly for what he or she wants, it provides the harasser with an opportunity to learn how his or her behaviour is affecting others and an opportunity to change the offensive behaviour voluntarily.[148] This approach may also be particularly helpful if the offensive behaviour might be seen by a third party to be ambiguous, or if there might be a question as to whether the sexual attentions in question were welcome.[149]

Complaints of sexual harassment may also be resolved informally through the use of mediation. Although this entails third party intervention, mediation allows the complainant some control of the process by which the grievance is resolved and enables him or her to participate actively in the resolution of the complaint. The

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[147] *Dealing with Harassment at MIT* (Cambridge: Massachusetts Institute of Technology, 1993) at 21 - 22

[148] *Ibid.*

[149] *Ibid.*

presence and activity of a mediator can empower a grievant by making her feel safe to speak to the harasser without the fear of intimidation.

If an informal approach does not put an end to the sexual harassment, or in more severe and persistent cases of sexual harassment, a complainant might prefer to make use of the formal complaints procedure. Lodging a formal complaint may, however, be intimidating to the complainant - these procedures take time and involve considerable embarrassment and stress for those who have been harassed. It is therefore of cardinal importance that all complaints of sexual harassment should be investigated quickly, effectively and as confidentially as possible.

Finally, although a written policy statement and the implementation of a grievance procedure is an essential first step, it is not sufficient to ensure that the organization's policy to combat sexual harassment is effective. Only by educating all employees as to their rights and responsibilities and by devoting sufficient time and resources to establish rules and procedures and monitoring their effectiveness will it be made clear that the problem of sexual harassment is taken seriously by the employer.[150] The consequences of not doing anything to deal with sexual harassment can far outweigh the time and effort required to formulate and implement a sexual harassment policy along the lines suggested above.

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[150] Michael Rubenstein *Preventing and Remedying Sexual Harassment at Work: A Resource Manual* (London: Eclipse Publications, 1989)

9. CONCLUSION

Concern for the dignity of women requires that sexual harassment be regarded and treated as a legitimate workplace concern.

Sexual harassment has very little to do with genuine sexual attraction: it is an assertion of male power that undermines the autonomy and personhood of female workers and displays a total disregard for their feelings, dignity and integrity. Sexual harassment in the employment context is always coercive because it is unwanted and unsolicited and threatens the victim's job satisfaction, performance, productivity and security. Its impact upon women's economic status and job opportunities, and upon their mental health and sense of self-worth is devastating.

In view of the nature of the interests and injuries involved and its manifold ramifications, sexual harassment is a troubling, difficult and mystifying problem to address and remedy. The above overview of the legal recourse available to the victims of sexual harassment simply underscores this fact: legal remedies are either conceptually inadequate to deal with the unique nature of sexual harassment claims, or do not compensate the victims thereof adequately. Furthermore, legal remedies only serve to address the problem of sexual harassment after its occurrence; it therefore has a very limited deterrent effect with no real potential to shape societal attitudes and behaviour.

In order to eradicate the occurrence of sexual harassment in the workplace a pro-active approach is called for to create greater public awareness of the incidence and impact of sexual harassment. This should be done by addressing the root of the problem and not just the consequences thereof after it has occurred. In this regard it is submitted that legislation should be adopted which places greater regulatory responsibility on employers by requiring them to formulate and implement codes of conduct along the lines suggested above. Educating employees, informing them of their rights and responsibilities and sensitizing them about the issue of sexual harassment will undoubtedly make a valuable contribution to the shaping of societal attitudes and the erradication of sexual harassment from the workplace.

APPENDIX A

LABOUR RELATIONS ACT, NO. 28 OF 1956

'Unfair labour practice' means any act or omission, other than a strike or lock-out, which has or may have the effect that -

(i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardized thereby;

(ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;

(iii) labour unrest is or may be created or promoted thereby;

(iv) the labour relationship between employer and employee is or may be detrimentally affected thereby.

APPENDIX B

EDUCATION LABOUR RELATIONS ACT, ACT NO. 146 OF 1993

Sec. 1 (xxv) 'unfair labour practice' means any act or omission, other than a strike of lock-out, which has or may have the effect that -

(a) any employee or class of employees is or may be unfairly affected or that his or their employment, employment opportunities, terms and conditions of employment or work security is, are or may be prejudiced or jeopardized thereby;

(b) the activities of any employer or class of employers are or may be unfairly affected or disrupted thereby;

(c) labour unrest is or may be created or promoted thereby; or

(d) the labour relationship between employer and employee is or may be detrimentally affected thereby.

APPENDIX C

PUBLIC SERVICE LABOUR RELATIONS ACT, ACT NO. 102 OF 1993

Sec. 1 (xxxvii) 'unfair labour practice' means any act or omission, other than a strike or lock-out, which has or may have the effect that -

(a) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardized thereby;

(b) the activities of any employer or class of employers are or may be unfairly affected or disrupted thereby;

(c) labour unrest is or may be created or promoted thereby;

(d) the labour relationship between employer and employee is or may be detrimentally affected thereby; or

(e) the principles contemplated in section 4(1) to (15) are not adhered to.

Sec. 4(7) No employee shall be victimized or unfairly discriminated against on grounds of race, colour, sex, religion, political opinion, membership or non-membership of an employee organization or participation in the activities of such an organization, or any arbitrary grounds.

APPENDIX D

ELECTORAL ACT, ACT NO. 202 OF 1993

Sec. 55(1) Any person who, directly or indirectly, uses or procures the use of, or threatens to use or procure the use of, any force, violence or sexual harassment, or inflicts or threatens to inflict any injury, damage, loss or disadvantage to or upon any other person or property -

(a) with intent thereby to compel, induce or influence any person -

(i) to vote or refrain from voting, either at all, or for any particular registered party, or in any other manner; or

(ii) to attend or participate in, or to refrain from attending or participating in, any political meeting, march, demonstration, or other event of a political nature, or in some other manner lending support to or for any registered party or any candidate; or

(b) on account of any person having -

(i) voted, attempted to vote or having refrained from voting, either at all, or for any particular registered party, or in any other manner; or

(ii) attended or participated in, or having refrained from attending or participating in, any such political meeting, march, demonstration, or other event of a political nature, or from lending support as aforesaid,

shall be guilty of an offence.

APPENDIX E

PROMOTION OF EQUAL OPPORTUNITIES DRAFT BILL (1993)

Sexual harassment

14(1) No employer shall sexually harass an employee in his or her employment or a person who applies for employment or a position with him or her.

(2) No employee of an employer shall sexually harass another employee in the service of such an employer or a person who applies for employment or a position with such employer.

(3) No member of the staff of an educational institution shall sexually harass a pupil or student at such institution or a person who applies for admission as a pupil or student at such institution.

(4) For the purpose of this section sexual harassment means any conduct where a person makes an unwelcome sexual suggestion to another person, or makes an unwelcome request for a sexual favour to another person, or engages in any other unwelcome conduct of a sexual nature in relation to another person, in circumstances where such other person has reasonable grounds to believe that the rejection of such conduct may prejudice him or her -

(a) in any application for employment or a position with an employer or for admission to an educational institution; or

(b) in the continuation or the circumstances of his or her employment with an employer or of his or her studies at an educational institution.

Jurisdiction of Industrial Court

15. For the purpose of the Labour Relations Act, 1956 (Act No. 28 of 1956), a contravention of sections 5, 6, 7, 8, 10, 11, 12, 13 or 14 of this Act shall be deemed to be an unfair labour practice.

BIBLIOGRAPHY

A.) BOOKS

i.) Aaron, T.E. (with Judith A. Isaksen) *Sexual Harassment in the Workplace: A Guide to the Law and a Research Overview for Employers and Employees* (Jefferson, North Carolina: McFarland & Company, Inc., 1993)

ii.) Aggarwal, A.P. *Sexual Harassment in the Workplace* (Toronto: Butterworths, 1992 2nd ed.)

iii.) Aggarwal, A.P. *Sexual Harassment: A Guide for Understanding and Prevention* (Toronto: Butterworths, 1993)

iv.) Boberg, P.Q.R *The Law of Delict* (Cape Town: Juta & Company Ltd, 1989)

v.) Conte, A. *Sexual Harassment in the Workplace: Law and Practice* (New York: John Wiley & Sons, 1990)

vi.) Davidson, M.J. and Earnshaw, J. (eds) *Vulnerable Workers: Psychosocial and Legal Issues* (Chichester: John Wiley & Sons, 1991)

vii.) *Dealing with Harassment at MIT* (Cambridge: Massachusetts Institute of Technology, 1993)

viii.) Lindemann, B. and Kadue, D.D. *Sexual Harassment in Employment Law* (Washington: BNA Books, 1992)

ix.) MacKinnon, C.A. *Sexual Harassment of Working Women: A Case of Sex Discrimination* (New Haven: Yale University Press, 1979)

x.) Minson, J. *Questions of Conduct: Sexual Harassment, Citizenship, Government* (London: The Macmillan Press, 1993)

xi.) Neethling, J., Potgieter, J.M. & Visser, P.J. *Deliktereg* (2 ed: Butterworths, 1992)

xii.) Paludi, M.A. and Barickman, R.B. *Academic and Workplace Sexual Harassment: A Resource Manual* (State University of New York Press, 1991)

xiii.) Pattinson, T. *Sexual harassment: The Hidden Facts* (London: Futura Publications, 1991)

xiv.) Rhode, D.L. *Justice and Gender: Sex Discrimination and the Law* (London, 1989)

xv.) Rubenstein, M. *Preventing and Remedying Sexual Harassment at Work: A Resource Manual* (London: Eclipse Publications, 1989)

xvi.) Rycroft, A. and Jordaan, B. *A Guide to South African Labour Law* (Juta, 1990)

xvii.) *Sexual harassment in the Workplace* (Johannesburg: Institute of Directors in South Africa, 1992) [Drafted and published as a joint project of The Institute of Directors in Southern Africa, The Institute of Personnel Management, UNISA Centre For Women's Studies, The Women's Bureau of South Africa and The ANC Women's League]

xviii.) Snyman, C.R. *Criminal Law* (1989)

B. JOURNALS AND PERIODICALS

i.) Campanella, J. 'Sexual harassment' (1992) vol 9 no 1 *Employment Law* 8

ii.) Cerutti, C.L. 'Differing Standards of Employer Liability for Sexual Harassment of Working Women'(1985) 27 *Arizona Law Review* 155

iii.) Dancaster, L. 'Sexual Harassment in the Work-place: Should South Africa Adopt the American Approach?' (1991) 12 *ILJ* 449

iv.) Du Toit, M.K. & Kemp,K.J. 'Sexual Harassment in Industry' (1983) vol 2 nr 7 *IPM Manpower Journal* 10

v.) Landman, A. 'Compensatory Orders in the Industrial Court *Labour Law Briefs* vol 4 no 2 (15 September 1990) 9

vi.) MacKinnon, C.A. 'Reflections on Sex Equality Under Law' (1991) 100 *The Yale Law Journal* 1281

vii.) Margerson, A. 'Sexual harassment - an issue for lawyers' (1992) 66 *Law Institute Journal* 501

viii.) Mowatt, J.G. 'Sexual Harassment - New Remedy for an Old Wrong' (1986) 7 *ILJ* 637

ix.) Note 'Sexual Harassment Claims of Abusive Work Environment Under Title VII' (1984) 97 *Harvard Law Review* 1449

x.) Notes 'Sexual Harassment in the Workplace: Employer Liability for a Sexually Hostile Environment' (1988) 66 *Washington University Law Quarterly* 91

xi.) Paul, E. F. 'Sexual Harassment as Sex Discrimination: A Defective Paradigm' (1990) 8 *Yale Law & Policy Review* 333

xii.) Rademan, A. 'The Emerging Law of Sexual Harassment' (1990) 31 *Codicillus* 16

xiii.) Renick, J.C. 'Sexual Harassment at Work: Why It Happens, What to Do about It' (1980) 59 *Personnel Journal* 658 at 658

xiv.) Rubenstein, M. 'The Law of Sexual Harassment at Work' (1983) *ILJ (UK)* 1

xv.) Theron, A. 'Die vrou as slagoffer van seksuele teistering in die werksituasie' (1989) Vol. 20 no. 4 *Suid-Afrikaanse Tydskrif vir Sosiologie* 216

xvi.) Van Niekerk, A. 'Remedies in Unfair Labour Practice Proceedings, including Developments Concerning Awards of Compensation (1993) *Current Labour Law* 34

xvii.) Vinciguerra, M. 'The Aftermath of Meritor: A Search For Standards in the Law of Sexual Harassment' (1989) 98 *The Yale Law Journal* 1717

C.) COURT DECISIONS

i.) *Alert Employment Personnel (Pty) Ltd v Leech* (1993) 14 *ILJ* 655 (LAC)

ii.) *Dithipe v Ikageng Town Council* 1992 (4) SA 749 (T)

iii.) *Ferodo (Pty) Ltd v N de Ruiter* (1993) 14 *ILJ* [Part 3] (LAC)

iv.) *Foodpiper CC t/a Kentucky Fried Chicken v Shezi* (1993) 2 *LCD* 32 (LAC)

v.) *Hirsch Appliance Special v Shield Security Natal (Pty) Ltd* 1992 (3) SA 643 (D)

vi.) *Jerry Mampuru v PUTCO* [24 September 1989 (case number NH 11/2/2136, unreported)]

vii.) *J v M Ltd* (1989) 10 *ILJ* 755 (IC)

viii.) *Jonker v ABI* (1993) 14 *ILJ* 219 (IC)

ix.) *Macala v Maokeng Town Council* 1993 (1) SA 434 (A)

x.) *Marievale Consolidated Mines Ltd v The President of the Industrial Court & Others* (1986) 7 *ILJ* 152 (T)

xi.) *Minister of Law and Order v Ngobo* 1992 (4) SA 822 (A)

xii.) *Minister of Police v Rabie* 1986 (1) SA 117 (A)

xiii.) *Ndebele v Foot Warehouse (Pty) Ltd t/a Shoe Warehouse* (1992) 1 *LCD* 225 (IC)

xiv.) *Oslo Land Co. Ltd v Union Government* 1938 AD 584

xv.) *Plessey Tellumat SA Limited v G. Berger, South Press Services (Pty) Ltd & Nasionale Media Ltd* [Cape of Good Hope Provincial Division (Case number 7361/1993; 17 December 1993

xvi.) *Prinsloo v Harmony Furnishers (Pty) Ltd* (1993) 2 *LCD* 82 (IC)

xvii.) *Romansrivier Koöp. Wynkelder v Chemserve Manufacturing* 1993 (2) SA 358 (C)

xviii.) *S v Mollendorff* (1987) 1 SA 35 (T)

xix.) *UAMAWU v Fodens* (1983) 4 *ILJ* 212 (IC)

D.) LEGISLATION

i.) Education Labour Relations Act, Act No. 146 of 1993

ii.) Electoral Act, Act No. 202 of 1993

iii.) Labour Relations Act, Act No. 28 of 1956

iv.) Public Service Labour Relations Act, Act No. 102 of 1993