



ILERA AFRICA

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Secondary sexual harassment and the employer's liability in the workplace

**Maralize Conradie &
Laetitia Fourie
University of the Free State, ZA**

Introduction:



- “Sexual harassment has no place in the South African working environment...[people] go to work to sell their skills and labour and to practise their professions to earn an income[,] not for the sexual pleasure of their employers or other employees...”. *Solidarity obo B v SA Police Service* (2022) 43 ILJ 2869 (LC)
- International organisations and movements:
 - UN / ILO / WHO / AU / “Me Too” / #EndRapeCulture
- More than 20% experience. Only 50% reports.
- COVID-19 & 4thIR

Prohibition against unfair discrimination:

- Right to equality.
- Instruments prohibiting unfair discrimination:
 - ILO (Discrimination Convention & Violence & Harassment Convention)
 - UN (Universal Declaration of Human Rights)
 - AU (African Charter on Human and People's Rights)
 - SA (*Constitution* / Code of Good Practice: Prevention and Elimination of Harassment in the Workplace / *PEPUDA* / *EEA*)
- Context of equality
 - Substantive equality
- Prohibition
 - Scope
 - Discrimination
 - Unfairness

Sexual harassment (as a form of unfair discrimination):



- Employees: entitled to working environment free of harassment.
- SH not addressed in UN Declaration or AU Charter.
- First international instruments: Niamey Guidelines & ILO Violence and Harassment Convention.
- Why important to eliminate SH in workplace? Several reasons.
- SA: Constitution, EEA & SAHC regards SH form of UD – specifically prohibited on grounds of sex, gender, sexual orientation or arbitrary ground.
- Niamey guidelines regards secondary SH as form of UD – imposes duty on member states
- Defining SH
 - What is harassment in the workplace?
 - What is SH in the workplace?
 - What is the test for SH
- Duties upon the employer?
 - Policies, information & education, confidentiality, additional sick leave, removal from workplace, steps to be taken when incident reported (reporting, advice & counselling, consultation & investigation, informal & formal procedures, sanctions.

Secondary harassment:



- Not explicitly mentioned in SAHC (but certain actions identified relate thereto)
- What is secondary harassment?
 - What is second-hand harassment?
 - What is second-order harassment?
- Why is secondary harassment a serious issue?
- How does secondary harassment feature in the context of SH?
 - WHO and other instruments zero tolerance for any form of sexual misconduct.
 - Within the SAHC:
 - Item 4.4.5: focus of inquiry when determining if conduct is harassment, on impact of the conduct (position of victim or bystander should be focus)
 - Item 4.6.4: indirect harassment where not directed to complainant undermines dignity (may include second-order)
 - Specific forms of harassment (spreading rumours maliciously & pressuring employee to resign)
 - Definition of sexual harassment: unwanted conduct of a sexual nature.
 - LRA & PDA?
 - Impact on employer's liability?

Employer's liability:

- Different forms of liability:
 - Sec. 60
 - ❖ Immediately. Consult & eliminate. Deemed. All that was reasonably practicable.
 - ❖ *A K v Right to Care NPC.*
 - ❖ E/e OR e/r.
 - ❖ Steps – Items 9 & 10.
 - ❖ Sec 60(3) & 60(4) interplay.
 - ❖ Remedies (ILO & *Niamey Guidelines*).
 - ❖ Direct liability.
 - Vicarious / Delictual / Contractual / Constitutional / Enterprise / Safety and health
- E/r's liability i.t.o. sec. 60
 - Necessary steps (Policy; Investigation / Consult / Advise on procedures / Procedure / Sanction)
 - Protection of the e/e
 - ❖ *A K v Right to Care NPC (Liberty Group Ltd v M):*
 - ✓ E/r's responsibility. SH?

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- ✓ Information and education.
- ✓ Do not dismiss complaints.
- ✓ Investigate complaints.
- ✓ True effort to consult.
- ✓ Confidentiality.
- ✓ Primary harassment does not continue.
- ✓ Additional support.
- ✓ Sanction.

Conclusion:



- Time has arrived to effectively decode and regulate the consequences of SH.
- Formulating & understanding secondary harassment is significant in ensuring policies are enforced and also central factors in eliminating future occurrences of SH.
- Should legislation and enforceable guidelines cover secondary harassment, it will contribute to a SH-free working environments.
- Increased awareness and knowledge = vital in changing perceptions and attitudes that condone harassment.
- Active support by those aware of potential harassment, amongst the most efficient measures to overcome violence = protection for bystanders vital!
- SAHC should be amended to cater for secondary harassment – to be aligned with international guidelines.
- Victimisation does not cater for bystander or the primary victim being victimised for disclosing harassment – should be addressed.
- Policies in place should be supported with education and training on the topic of secondary sexual harassment.
- CCMA, BC, Labour Court specialised training.
- What a beautiful time to finally listen to primary and secondary sexual harassment victims.