

VICARIOUS LIABILITY AND SEXUAL HARASSMENT IN THE WORKPLACE: AN EMPLOYER'S NIGHTMARE.

Abstract

Harassment equates to discrimination¹ and is sexual harassment in the workplace not only prohibited by means of legislation² and a Code of Good Practice in South Africa³ but is it still seen as a pervasive problem.⁴ Although this complex phenomenon has been the subject of thorough investigation the past few years, little or no emphasis had been placed on the financial implications suffered by employers due to the sexual harassment of their employees and the possibility of paying out financial claims to the victims of sexual harassment based upon the doctrine of vicarious liability or the effect of section 60 of the Employment Equity Act.⁵

It is no longer sufficient to understand the invisible, inaudible and institutionalised phenomenon⁶ of sexual harassment in the workplace and to put into place policies and procedures to combat this peril, but do employers need to take cognisance of the vast amounts of monies paid out to victims especially in the United States of America⁷ where 11,717 recipients received \$48, 4 in 2010 as payment for their successful claims of sexual harassment committed in their working environments.⁸ South African employers also face dire consequences where sexual harassment was committed in a working environment and turned a blind eye to the problem or dealt with it insufficiently.⁹

¹ R Le Roux *et al* Harassment in the Workplace: law, policies and processes lexis Nexis: 3

² The Constitution of South Africa Act 108/1996:sec. 9

³ Code Of Good Practice on the Handling of Sexual Harassment Cases 2005

⁴ SHEP on www.genderlinks.org.za accessed on 2011/11/23

⁵ Act 55/1998

⁶ R Le Roux *et al* Harassment in the Workplace: law, policies and processes lexis Nexis: ix

⁷ EEOC on www.eeoc

⁸ <http://eeoc.gov/eeoc/statistics/enforcement/sexual-harassment.cfm> accessed on 2100/11/23

⁹ Grobler v Naspers (2004) 25 ILJ 439 (C) 439.

This article endeavours to explore the South African and American positions, on a comparative basis, relating to the interaction between vicarious liability and sexual harassment in the workplace. The focus of this article will not be on the phenomenon itself, but will this article emphasize the potential liabilities of employers and indicate the risks attached to the prevalence of sexual harassment in the workplace. Employers in South Africa are financially exposed due to the possibility of claims against them from employees, especially in the absence of specific legislation prohibiting retaliation against employees complaining about being victims in cases of sexual harassment – employers in America are specifically prohibited from dismissing or retaliating against the victims of sexual harassment and is it worded as such in Title VII of the Civil Rights Act.¹⁰ In America in March 2011, the US District Court for the Western District of Tennessee awarded three women victims \$1.5 million due to the employer having ignored their pleas of being sexually harassed and the subsequent retaliation by the employer. This means to stress the serious risk that employers are exposed to where sexual harassment is not optimally managed in the workplace.

A *lacuna* exists in the Code of Good Practise on the Handling of Sexual Harassment cases in South Africa, the legislator's practical guidelines for employers on how to deal with sexual harassment in the workplace, on top of the legal prohibitions of the Employment Equity Act¹¹ and the working of the Constitution¹² in that it does not provide guidance on how to handle cases of sexual harassment by third parties in the workplace, which could easily have been bridged through reference to the American perspective.

Employers in South Africa need to take cognisance of the business risks pertaining to sexual harassment in their businesses and especially the financial risks attached to the unsuccessful managing of harassment in their businesses based upon both the

¹⁰ The Civil Rights Act/1964

¹¹ Act 55/1998.

¹² The Constitution of South Africa/1996

common law doctrine of vicarious liability and a statutory remedy supplied by the Employment Equity Act¹³ upon the meeting of certain pre- requirements.

¹³ Act 55/1998.