

Employment Discrimination against Women with Special Reference to Sexual Harassment

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I. Prelude:

The concern of social justice was the main object of the world so that people would be equally and fairly treated in all spheres of life, irrespective of their race, birth, status or nationality. Any deviation from the path of justice is likely to lead to many other evils which surely demolish the whole system.² Sexual harassment remains as one of the most prevalent and disturbing problems for women not only in the developing country but also in some developed countries to some extent. For many years, women have recounted their experiences sexually harassing behavior as part of their daily lives. Man and woman are looked upon as equal, and any action trying to change the balance in status with the differences in sex as a tool, is sexual harassment.³ Sexual harassment is a very serious problem in employment sector. Each and every organization should have policy to deal with and held a zero tolerance to investigate report and punish.

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² Muhammad Afzalur Rahman, *Encyclopedia of Seerah*, vol 3 (London: Seerah Foundation London, 1984), p.75.

³ This comment focuses on the sexual harassment of working women by men. However, men also have alleged sexual harassment and discrimination on the basis of sex in the workplace. See, e.g., *Huebschen v. Department of Health and Social Services*, 716 F.2d 1167 (7th Cir. 1983) (male plaintiff could not bring a § 1983 claim against his female supervisor based on Title VII since she was not an employer); *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537 (M.D. Ala. 1983), *aff'd*, 749 F.2d 732 (11th Cir. 1984) (male employee established *prima facie* case of discrimination on the basis of sex and sexual harassment based on unwelcome homosexual advances by manager); *Wright v. Methodist Youth Servs.*, 511 F. Supp. 307 (N.D. Ill. 1981) (discharge of a male employee for refusing to accept sexual advances of homosexual supervisor is a violation of Title VII). It can be said that in the two cases above involving unwelcome homosexual advances, the employees were protected because they were male, not because they were either heterosexual or homosexual. Thus, when a male supervisor approaches only male employees, there is a violation of Title VII on the basis of sex, just as there would be if a male supervisor approached only female employees. An interesting dilemma might arise in the case of a "bisexual supervisor who demands sexual favors from members of both sexes." C. Sullivan, M. Zimmer, & R. Richards, *Federal Statutory Law of Employment Discrimination*, S 8.7.1, 360 n.2 (1988).

Sexual harassment could be unwanted conduct of a sexual nature, in which a reasonable person would have predicted that the person harassed would be offended, humiliated, insulted or intimidated. In the workplace, jokes, remarks, etc., are deemed discriminatory if the employer has stated it in their written policy. Sexual harassment can be any verbal, non-verbal or physical action. This is used to change a victim's status against the will of the victim. Its result is in the victim feeling inferior or hurting the victim's dignity. Prevailing of sexual harassment in the workplace and its acceptance in legal framework, the working women fail to report harassing behavior and it causes detrimental psychological health and harmful in their career advancement.⁴

II. Employment Discrimination:

In a democratic state neither the Constitution nor the Government is supreme. It is the people who are supreme, and they have the right to change the Constitution to some extent or completely.⁵ In this sense social justice is more concerned with satisfying the needs rather than the wants of the society.⁶ It itemizes the enforceable fundamental rights of all citizens, including the rights to equality before the law, the protection of the law and the prohibition of discrimination based on religion, race, caste, sex, or place of birth. In 'Convention to Eliminate all Forms of Discrimination Against Women' (CEDAW), Discrimination against Women is defined as,

Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms

⁴ Ignoring the sexual harassment may cause the woman to feel depression, anger, alienation, anxiety, or other psychological traumas leading to emotional breakdown. Physical effects often include headaches, nausea, loss of appetite, and fatigue. See Krista J. Schoenheider, "A Theory of Tort Liability for Sexual Harassment in the Workplace" in *University of Pennsylvania Law Review* at 1464-66 (1986).

⁵ A.K.M. Shamsul Huda, *The Constitution of Bangladesh*, Vol 1, 2nd Edition (Chattagong: Published by Istiaq Hasan, 1997), p.959.

⁶ David Mcquoid-mason and Lloyd Lotz, "Street Law to Teach Social Justice to Law Students in South Africa" in *Human Rights and Non-state Actors*, Edited By Dr. Mizanur Rahman (Dhaka: LECOP, 2005), p.46.

in the political, economic, social, cultural, civil or any other field.⁷

CEDAW provides a broad definition of discrimination against women as "any distinction, exclusion or restriction made on the basis of sex." It requires that women receive equality in the civil, political, economic, social, and cultural spheres. This includes full access to health, physical and mental services, information, education and economic development including access to non-traditional jobs, access to credit, the right to work; and the obligation to counter stereotypical views of gender. Article 11 of the Convention⁸ deals with employment and its various sub Articles are more or less covered by the Government policies and labor laws. The labor laws have specific provisions relating to employment of women in commercial and industrial establishments, shops, tea-gardens and factories. Specific work-hours with rest hours, maternity leave etc. are expressly detailed in the relevant labor laws but unfortunately due to lack of sincerity on the part of the authority to enforce the laws, violations take place especially in the garments, electronic sectors and in the tea-garden. Women do not necessarily experience the same employment opportunities and equal remuneration, including benefits and the decent health and safety conditions, when compared to their male counterparts. At present in Bangladesh, a large number of female workers are working in the informal sector of the garments industry without having the right to organize into trade unions. Women workers do not have a proper

⁷ The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) Article 1

⁸ States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to work as an inalienable right of all human beings;
- (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
- (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
- (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
- (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

working environment. They often face violence and insecurity in their working places. Working mothers do not have facilities for their children, being deprived of day care centers facilities at their work places. Women face different kinds of harassment in their work places. There are often no separate toilets or proper water supplies for the majority of working women in their work places which promotes a disinclination to use the services provided, often resulting in different urinary tract infections and other health hazards. Many women workers work without formal appointment letters. The existing dormitory and center facilities for working women are very insufficient to meet the need. Inadequate transport, security, dormitory and hostel facilities for working women create great hazards in their lives and leave them vulnerable with their male counterparts.⁹ In order to prevent discrimination against women on the grounds of marriage or maternity states must prohibit dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status. States have to ensure women's effective right to work introducing maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances. States must take appropriate measures to provide special protection to women during pregnancy in types of work proved to be harmful to them.

III. Explanation of Sexual Harassment:

Sexual harassment is a serious problem for working women both in developing and developed country. It is not just the victimized employees who experience the devastating emotional injuries of sexual harassment for a long time, nor is it just the harasser who feels for years to come the sting of laws that prohibit sexual harassment. In a society with attention focused on eliminating sexual harassment, how do we learn to draw the line between acceptable behavior and unlawful harassment? There is no special provision in the employment law that provides for moral or sexual harassment; however it is commonly accepted by the jurisprudence, that sexual harassment occurs when the employee is subjected to acts of another person in order to obtain favors of a sexual nature. In India, *Vishaka Vs. State of Rajasthan*¹⁰ has been recognized with establishing sexual harassment as illegal.¹¹ Bangladesh prohibits sexual harassment, established milestone

⁹ Hameeda Hossain, Roushan Jahan, and Salma Sobhan, *No Better Option* (Dhaka: University Press limited,1990), p.105-111.

¹⁰ AIR 1997 S C 3011.

¹¹ In April 2013, India enacted its own law on sexual harassment in the workplace - The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. Almost 16 years after the Supreme Court's landmark

decision issued in 2009 by the High Court.¹² A public interest litigation case, brought by the Bangladesh National Women's Lawyers Association, challenged the High Court to step in and take action as there was no national law against sexual harassment. In 2002, the European Union Council and Parliament amended on the equal treatment of men and women in employment to prohibit sexual harassment in the workplace. They called it a form of sex discrimination and violation of dignity. The European Commission of the EU defines sexual harassment as:

[U]nwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work. This includes unwelcome physical, verbal or nonverbal conduct.

The European Commission also distinguishes three types of harassment: physical, verbal, and nonverbal sexual harassment and states that there is a range of unacceptable behavior:

Conduct is considered sexual harassment if it is (1) unwanted, improper or offensive; (2) if the victim's refusal or acceptance of the behavior influences decisions concerning her employment or (3) the conduct creates an intimidating, hostile or humiliating working environment for the recipient.

The United Nations defines sexual harassment of women as

[S]uch unwelcome sexually determined behavior as physical contact and advances, sexually colored remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem: it is discriminatory when the woman has reasonable ground to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.¹³

In the US federal context, sexual harassment is considered to be a form of sex discrimination under Title VII of the Civil Rights Act of 1964.¹⁴ A

guidelines on prevention of sexual harassment in the workplace is known as the *Vishaka Guidelines*.

¹² In the Supreme Court of Bangladesh, High Court Division (Special Original Jurisdiction), Writ Petition No. 5916 of 2008. In the matter of an application under Article 102(2) (a) (ii) of the Constitution of the People's Republic of Bangladesh. *Bangladesh National Women Lawyers Association (BNWLA) Vs. Government of Bangladesh and Others.*

¹³ The United Nations General Recommendation 19 to the Convention on the Elimination of all Forms of Discrimination Against Women

¹⁴ Title VII of the Civil Rights Act of 1964 Is to enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the

workplace harassment complainant must file with the Equal Employment Opportunity Commission (EEOC) and receive a "right to sue" clearance, before they can file a lawsuit against a company in federal court. The EEOC defines sexual harassment as:

1. Unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature when:
2. Submission to such conduct was made either explicitly or implicitly a term or condition of an individual's employment.
3. Submission to or refusal of such conduct by an individual was used as the basis for employment decisions disturbing such individual, or such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. The 1st and 2nd are called "quid pro quo" (Latin for "this for that" or "something for something"). They are essentially "sexual bribery", or promising of benefits, and "sexual coercion". Type 3rd known as "hostile work environment," is by extreme the most common form. This form is less clear cut and is more subjective. Sex discrimination can take two forms, either 1) Quid Pro Quo Harassment or 2) Hostile Work Environment Harassment.

IV. Quid Pro Quo:

There are two different types of sexual harassment claims one is tangible and another is intangible. Sexual harassment occurs when a supervisor or one in an authority position requests sex, or a sexual relationship, in exchange for not firing or otherwise punishing the employee. It may occur in exchange for favors, such as promotions or raises. In a quid pro quo situation, an employer proposes to exchange an economic benefit for sexual compliance by an employee.¹⁵ This may be such as, "If you won't sleep with me, you won't get your promotion". This also is something less explicit, "If you want the job, you have to do something 'nice' for me."¹⁶ In *Bell v. Crackin Good Bakers Inc.*¹⁷ the plaintiff claimed that her supervisor constantly harassed her with insults such as calling her the "pimp for the office", and talking

attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as the "Civil Rights Act of 1964".

¹⁵ Lin Farley, *Sexual Shakedown: The Sexual Harassment of Women on the Job* (New York: McGraw-Hill , 1978), p.98.

¹⁶ Barbara Zalucki, *Discrimination Law - Defining the Hostile Work Environment Claim of Sexual Harassment under Title VII*, 11 W. New Eng. L. Rev. 143 (1989).

¹⁷ 777 F.2d 1497 (11th Cir. 1985).

to her "like (she) was about two years old and two inches high."¹⁸ The plaintiff was again harassed by her supervisor who suggested that "he would have no women in the plant at all because men were better able to perform all of the functions required in its operation."¹⁹ The trial court granted defendant's motion for summary judgment for it "considered the case as if the petitioner had been seeking relief from sexual harassment." Another example, during a business lunch at which an office worker and her employer are discussing the employee's future promotion, the employer suddenly makes sexual advances. When the employee rejects her employer's propositions, he attempts to physically restrain her from leaving the table. Soon afterward, the office worker is threatened with physical harm, demoted, and eventually fired.²⁰

V. Hostile Work Environment:

A hostile work environment claim can arise from conduct of a sexual nature based on sex or based on gender.²¹ Sexual harassment may occur through the presence of shameful or sexual photographs, jokes or threats. The inappropriate behavior or conduct must be pervasive as the name implies, create a threatening and offensive work environment. The actionable claim of sexual harassment, a hostile work environment, is more subtle and need not be characterized by the loss of an economic benefit.²² A claim based on sex involves conduct of a sexual nature, such as unwelcome touch, leering, innuendoes, rough jokes, or the display of explicit pictures. Unwelcome touch may include, but is not limited to, pinching, deliberate fondling, or brushing against another's body. On the other hand, a claim based on gender involves conduct that is non-sexual, and detrimental to a woman as a member of a protected class.

Bundy v. Jackson,²³ is the first case to recognize a claim of a sexually hostile work environment. It hold opposing views from previous sexual harassment cases in that the employee did not allege a loss of a tangible job benefit. As a

¹⁸ 777 F.2d 1499 (11th Cir. 1985).

¹⁹ *Id.* at 1501.

²⁰ Krista J. Schoenheider, "A Theory of Tort Liability for Sexual Harassment in the Workplace" in *University of Pennsylvania Law Review* at 1464-66 (1986).

²¹ "Sex" is reserved for anatomical identity, based on genitalia and physical secondary sex characteristics. The term "gender" is used to indicate aspects of identity or behavior related to both perceptions of self and social roles. See M. Richmond- Abbott, *Masculine and Feminine: Sex Roles over the Life Cycle*, 41-53 (1983).

²² Abolishing the Quid Pro Quo and Work Environment Distinctions in Sexual Harassment Cases under the Civil Rights Act of 1964: Vinson I. Taylor, 60 ST. JOHN'S L. REv. 177 (1985).

²³ 641 F.2d 934 (D.C. Cir. 1981).

substitute, she alleged that sexually stereotyped insults, such as “telling her that ‘any man in his right mind would want to rape you,’” and degrading propositions to “spend the workday afternoon with him at his apartment,” affected her work environment and were thus prohibited by law. The court in *Bundy*, following the guide of Judge Goldberg’s opinion in *Rogers*, extended the principles of Title VII to include a protection of an individual’s psychological well-being from sexually harassing conduct as a condition of employment.²⁴

It described “terms, conditions, or privileges of employment is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. ... One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.”²⁵ In *Henson v. City of Dundee*,²⁶ the Court of Appeals for the Eleventh Circuit delineated the necessary elements of a hostile work environment claim against an employer under Title VII. These elements include the following: (1) the employee belongs to a protected group, i.e., a simple condition that the employee is a man or a woman; (2) the employee is subject to unwelcome sexual harassment; (3) the harassment complain is based upon sex, i.e., but for the fact of petitioner’s sex, she would not have been the object of harassment; (4) the harassment complained of affects a “term, condition, or privilege” of employment; and (5) liability is determined under the doctrine of respondent superior.²⁷

VI. Sexual Harassment Myths:

One of the basic rights women have is not to be discriminated against in the workforce and in the workplace. This right is enshrined in international law, such as United Nations Conventions, International Labor Organization (ILO)

²⁴ *Bundy*, 641 F.2d at 944-45.

²⁵ *Id.* at 944 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)).

²⁶ 682 F.2d 897 (11th Cir. 1982). In *Henson*, the plaintiff was a police dispatcher who alleged that her supervisor continually propositioned her and that she had been subjected to a hostile work environment created by daily use of vulgar language. *Id.* at 899. While the court correctly decided that this is an element that needs to be stipulated, it is highly probable that such a determination would require neither excessive time nor substantive examination.

²⁷ *Id.* at 903-05. One commentator has suggested a revision of the *Henson* test, which “align[s] all actions involving harassment,” and “removes the unnecessary showing of unwelcomeness.” Michael D. Vhay, “The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment” in *The University of Chicago Law Review*, 55 U. CHI. L. REV. 328, 355-56 (1988).

Conventions and the revised European Social Charter, as well as in the national law of all Council of Europe member states and in European Community Law.²⁸ Unfortunately, reality does not always comply with the law and women continue to be discriminated against in various ways, both in the workforce and in the workplace. Only women can be harassed. This is not true. A woman can't harass another woman and a man can't harass another man. This is not true. A man can be harassed by a woman, although such a situation is slightly rarer than a male harassing a woman. The U.S. Supreme Court has recognized that illegal sexual harassment can occur between people of the same sex. Sexual harassment can only occur in a workplace. This is also not true. The U.S. Supreme Court has ruled that teachers, professors, and other individuals with authority in school systems (including universities and colleges) can sexually harass students in violation of the law. A teacher can sexually harass a student either male or female. Only supervisors or those in authority positions can be a harasser. This is not true. A harasser can be a coworker and, in some cases, a third party such as an agent or client of the employer. The key is whether the employer knew or should have known of the harassing behavior and failed to take action.

VII. Gender Discrimination and Retaliation:

Gender discrimination is a subset of sex discrimination. It is often non-sexual but is nonetheless directed at a person because of that person's sex. Examples of discriminatory comments include employers:

- Asking whether an employment candidate is married or plans on having children;
- Claiming that a woman should be more feminine and wear makeup;
- Claiming that a person isn't fulfilling certain gender role;
- Calling an womanish male a "fairy," or "prissy" or stating that he should act more like a man;
- Refusing to hire a woman in a "man's job" and vice versa;

Retaliation has happened when an employee experiences a negative action after he or she has made a report or file sexual harassment complaint. Retaliation is illegal even if the original charge of sexual harassment was not proven. Negative actions may include being fired, downgrading, suspension, denial of promotion, poor evaluation. Any adverse employment decision or

²⁸ Sandra S. Tangri, Martha R. Burt, Leonor B. Johnson, "Sexual Harassment at Work: Three Explanatory Models" in *Journal of Social Issues*, Volume 38, Issue 4, p. 33-54, 1982.

treatment would be likely to discourage a reasonable worker from making or supporting a charge of discrimination.²⁹ Retaliation is as illegal as the sexual harassment itself, though also as difficult to prove.

VIII. Sexual Harassment Cases in Workplace:

The women have been a very much neglected and exploited segment from a long time. There is a direct link between a country's attitude toward women and its social and economic progress. The status of women is central to the health of a society. If one part suffers, so does the whole. From the 1970's, several US courts began to expand this definition of unlawful discrimination to include other behavior in a claim of discrimination on the basis of sex. The United States District Court of Columbia in *Williams v. Saxbe*³⁰ considered whether unwelcome sexual behavior such as sexual advances by a male supervisor constituted unlawful discrimination. Similarly, in *Barnes v. Costle*,³¹ the Court of Appeals for the District of Columbia Circuit acknowledged that when a female employee refuses to submit to the sexual advances of her male supervisor and, as a result, loses an economic benefit; her employer is guilty of an illegal employment practice. In *Munford v. James T. Barnes & CO.*,³² the court concluded that sexual harassment was a form of discrimination on the basis of sex and that it was a type of activity prohibited by law. However, until 1986 the United States Supreme Court recognized the hostile work environment claim as a form of sexual harassment actionable under Title VII. In *Meritor Savings Bank v. Vinson*,³³ a supervisor touched female employees in public and repeatedly asked one employee to have sexual relations with him. Vinson alleged that during her four years of employment, she was harassed constantly by her supervisor and that such conduct affected her work environment to the point where she frequently became ill and was discharged for too much sick leave.³⁴ In considering Vinson's claim, the Supreme Court acknowledged the existence of a hostile work environment claim of sexual harassment. Although it failed to create a detailed framework for identifying a hostile work environment,³⁵ the Court observed that "sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the victim's]

²⁹ *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006).

³⁰ 413 F. Supp. 654 (D.D.C. 1976).

³¹ 561 F.2d 983 (D.C. Cir. 1977).

³² 441 F. Supp. 459 (E.D. Mich. 1977) (employee who refused sexual advances from her supervisor subsequently was subjected to repeated sexual innuendoes).

³³ 477 U.S. 57 (1986).

³⁴ *Ibid*, 60.

³⁵ *Ibid*, 66.

employment and create an abusive working environment.”³⁶ The harassment in this case was pervasive enough to contribute a basis for stating a claim for hostile work environment sexual harassment. It would consider facts alleging sexual harassment on a case by case basis; it may be at the record as a whole and at the totality of the circumstances, needed paying particular attention to the context and nature of the harassment. The remainder of the guidelines focuses on the issues of employer liability for sexually harassed employees and prevention of sexual harassment in the workplace. The guideline point out that an employer is responsible for sexually harassing acts and with regards of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained.³⁷ This comment will not address the issue of employer liability.³⁸

IX. Pervasive and Offensive Behavior:

In *Phillips v. Smalley Maintenance Services Inc.*³⁹ an employer touched the plaintiff without her consent. Again, he hit her bottom with the back of his hand. In addition to physical contact, the employer repeatedly harassed Phillips by asking “how often [she] and her husband had sex and ‘what positions’ they used” and by telling her that she had to “engage in oral sex with [her employer] at least three times a week.”⁴⁰ In *Phillips*, the court accepted with little debate the claim that the employee was subject to

³⁶ For a more extensive discussion of Vinson and the repercussions of that decision, see Note, *Meritor Savings Bank v. Vinson: What Makes a Work Environment “Hostile”?*, 40 ARK. L. REV. 857 (1987); Note, Between the Boss and a Hard Place: A Consideration Of Meritor Savings Bank FSB v. Vinson and the Law Of Sexual Harassment, 67 B.U.L. REV. 445 (1987); Note, *Meritor Savings Bank v. Vinson: Sexual Harassment at Work*, 10 HARV. WOMEN’S L.J. 203 (1987); Note, *Meritor Savings Bank v. Vinson: Finally a Supreme Court Ruling on Sexual Harassment in the Workplace: For What It’s Worth*, 38 MERCER L. REV. 733 (1987).

³⁷ 29 C.F.R. § 1604.11(c) (1988).

³⁸ For a further discussion of employer liability in sexual harassment cases, see Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563 (1988); Smith, *When Should an Employer Be Held Liable For the Sexual Harassment by a Supervisor Who Creates a Hostile Work Environment? A Proposed Theory of Liability*, 19 ARIZ. ST. L.J. 285 (1987); Note, *Employer Liability for Sexual Harassment: Inconsistency Under Title VII*, 37 CATH. U.L. REV. 245 (1987); Note, *Employer Liability Under Title VII for Sexual Harassment After Meritor Savings Bank v. Vinson*, 87 COLUM. L. REV. 1258 (1987); Note, *Employment Discrimination Defining an Employer’s Liability Under Title VII for On-the-Job Sexual Harassment: The Adoption of a Bifurcated Standard*, 62 N.C.L. REV. 795 (1984).

³⁹ 711 F.2d 1524 (11th Cir. 1983).

⁴⁰ *Id.*

unwelcome sexual harassment.⁴¹ In *Robson v. Eva's Super Market, Inc.*,⁴² an employer touched the plaintiff on her buttocks and felt the back of her top, without her permission, to see if she was wearing a bra.⁴³ The court held that this conduct, in addition to verbal harassment in the form of frequent vulgarity directed towards her, and an offer of one hundred dollars to "go to bed" with him, constituted sexual harassment.⁴⁴ In *Priest v. Rotary*,⁴⁵ an employer engaged in many sexually harassing physical acts, such as placing his arms around an employee's waist, grabbing areas of her body, rubbing his body against her body, and unzipping her uniform. The court held that such behavior, along with comments to another employee about her breasts, and other offensive remarks made about her to patrons, constituted sexual harassment. Other cases point out that pushing a stray tag into a woman's blouse could be as sexually harassing as peering over a bathroom stall when a woman is there, when attended by other factors such as a pattern of offensive verbal harassment or other forms of physical sexual conduct.⁴⁶ After determining whether the conduct itself is offensive, courts then question whether the plaintiff invited the conduct by her own behavior. In *Sand v. Johnson Co.*,⁴⁷ the court considered behavior such as giving modest gifts, an attempted kiss, and a comment about a woman's bosom as teasing behavior rather than sexual harassment. The employer followed a relationship with Sand by giving gifts which she accepted; the court concluded that these events indicated more of a "romantic ambience." In summary, if the sexually harassing conduct is both verbal and physical and represents an offensive pattern of unwelcome behavior, courts agree that the plaintiff has asserted a valid claim of sexual harassment.

In the case of *Janzen and Govereau Vs. Platy Enterprise Ltd.* (Supreme Court of Canada), Dainna Janzen made a complaint to the Human Rights Commission of Manitoba against Platy Enterprise Ltd, its owner's agents and servants, Pharos Restaurant. During her period of employment at the restaurant, she was constantly sexually harassed by Tommy, the cook. On many occasions Tommy grabbed her legs and touched her knee, bum and crotch area. When she resisted his sexual advances, he told her to shut up or he would fire her. He began to scream at her in front of staff and criticize her

⁴¹ *Id.* at 1529.

⁴² 538 F. Supp. 857 (N.D. Ohio 1982).

⁴³ *Id.* at 859.

⁴⁴ *Id.* at 859, 864.

⁴⁵ 634 F.Supp. 571 (N.D. Cal. 1986).

⁴⁶ 634 F. Supp. 571 (N.D. Cal. 1986).

⁴⁷ 33 Fair Empl. Prac. Cas. (BNA) 716 (E.D. Mich. 1982).

work. Five days later, Tracy Govereau made a complaint of a similar nature against same parties alleging sexual harassment by "Tommy, the cook". The case went up to the Supreme Court of Canada. Chief Justice Dickson who delivered the judgment of the Court held that sexual harassment in the workplace might broadly be defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment. When sexual harassment occurred in the workplace, it was an abuse of both economic and sexual power. By requiring an employee to compete with unwelcome sexual actions or clear sexual demands, sexual harassment in the workplace attacked the dignity and self-respect of the victim both as an employee and as a human being. Mr. Alok Bhasin referred to a definition of sexual harassment which was mentioned in the decision in the Canadian case of *Canadian Pacific Ltd. and B.M.W.E. (Parker)* as below:

While physical touching and the making of sexual demands may be the crudest form of sexual harassment, giving rise to the earliest complaints and court or tribunal decisions, experience has shown that the concept of sexual harassment can be much broader. Innuendo by words or gestures, unwelcome staring, sexually-abusive jokes or other language, the unwelcome displaying of pornography and the writing of graffiti on workplace walls which singles out or demeans individual employees are all now generally recognised as forms of sexual harassment, even though they may not involve an abuse of power or the making of sexual demands by the member of one sex upon a member of the other sex.⁴⁸

In the case of *Vishaka v State of Rajasthan*⁴⁹ a group of women's NGOs brought a petition to the Supreme Court of India. It was relating gang rape about a social worker. The perpetrator was her own colleagues in a village in Rajasthan, and the malfunction of local officials to investigate. However, the problem was there were no laws in India that proscribed sexual harassment in the workplace. Legal question is whether the State actually had responsibility to protect women from sexual harassment. The Constitution prohibited discrimination on the basis of sex, and guaranteed just and

⁴⁸ The quotation was extracted by Malone, J. in *David Dotchin v. Saskatchewan (Worker's Compensation Board), Queen's Bench, Judicial Centre of Regina, Canada, 2002 SKQB 279.*

⁴⁹ *Vishaka and Others v State of Rajasthan*, AIR 1997 SC 3011.

humanitarian conditions of work, but it didn't refer clearly to sexual harassment. Then, Supreme court said sexual harassment includes determined behavior as: a) physical contact and advances; b) a demand or request for sexual favors; c) sexually coloured remarks; d) showing pornography; e) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.⁵⁰ In the landmark judgment, the Supreme Court of India in the case of *Vishaka* was formulated guidelines to protect women at their workplaces by defining sexual harassment and prescribed procedures for redress. The concluding portion of the judgment runs as follows:

Accordingly, we direct that the above guidelines and norms would be strictly observed in all work places for the preservation and enforcement of the right to gender equality of the working women. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field. These Writ Petitions are disposed of, accordingly.⁵¹

In the above case the learned Solicitor General for the Union of India helped the Court in formulation of the guidelines. The Commission circulated the Code of Conduct for workplaces widely amongst all the Central Ministries and Government Departments. The Commission also circulated it to all State Commissioners for women, NGOs and apex bodies of the Corporate Sector and to the Media. While analyzing the definition of sexual harassment in the case of *Vishaka*, the Supreme Court of India in the case of *Apparel Export Promotion Council v A.K. Chopra*⁵², has held that

Sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones, whether directly or by implication, particularly when submission to or rejection of such a conduct by the female employee was capable of being used for effecting the employment of the female employee and unreasonably interfering with her work performance and had the effect of

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Apparel Export Promotion Council Vs. A.K. Chopra, AIR 1999 SC 625.*

creating an intimidating or hostile working environment for her.⁵³

X. Conclusion and Suggestion:

All of the above discussion the society feels “Gender Equal Society”. It is a society in which men and women enjoy equal opportunities to participate as equal partners in all the activities of all fields, to share responsibilities and to enjoy equal political, social, economic and cultural rights. “Violation of equal rights on men and women” or “discrimination” is active or passive action, which signifies underestimation, dislike, contempt and restriction of rights or privileges on the grounds of sex. “Sexual harassment” is an offensive behaviour of sexual nature that includes words or actions against a person at work, business or other dependence relations. Regarding work the employer shall:

- a) Apply equal recruitment criteria;
- b) Ensure equal work conditions, equal opportunities and improve the qualifications for equal earnings;
- c) Apply equal evaluation criteria of work quality;
- d) Apply equal salary for an equal value work;
- e) Take measures against sexual harassment at work;
- f) Take measures to prohibit the persecution towards the employee who has submitted a discrimination claim to employee;
- g) Provide work for in every position or vacancy without gender differences at all levels of professional hierarchy.

The employer actions are considered as discriminatory if on the grounds of gender:

- a) The employer uses different standards related to working hours and/or salary on equal value work towards employers;
- b) The employer establishes differing work conditions for his employees;
- c) The employer undertakes disciplinary measures towards the employee; changes work conditions, transfer him or her to another work, or terminate terms of agreement;
- d) The employer punishes the employee due to an appeal on the above mentioned grounds.

Discriminatory announcements should not be allowed;

⁵³ Ibid.

- a) A study or job announcement constitutes discrimination if it contains gender-specific priority criteria.
- b) It is forbidden to ask for information on civil status, private or family life in the job announcements.
- c) Producers of advertisements shall ensure that their advertisement message does not conflict with the natural gender equality, does not imply any discriminatory statement on both sexes, and does not portray any woman or man in an offensive manner.

However, neither State nor the courts adequately defined what sexual harassment is. The EEOC attempted to define sexual harassment broadly and to define the hostile work environment as consisting of "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" which interferes with an individual's work performance. The guidelines clearly referred to harassment based on sex in the biological sense. A variety of distinctions were then developed in case law to define behavior as sexual harassment. Harassment could take many forms: physical, verbal, or symbolic. Courts considered the frequency of the conduct and the offensiveness of the behavior in order to find a sexually harassing condition of employment. Courts also focused on the behavior between the harasser and the victim to determine if the conduct was unwelcome in the sense that the employee did not solicit the undesirable conduct. These distinctions were then evaluated within a pervasive standard of harshness and persistence. If the court is confronted with a case of harassment that exhibits no behavior directed at a woman in a sexual sense, but behavior directed at her because of her gender. The existing EEOC definition on sexual harassment should be modified to include not only sexual conduct, but also gender-based behavior. In effect, courts have been dealing with gender harassment since the first case involving a claim of a hostile work environment. Many instances of sexual harassment are instances of gender harassment. When a co-worker selects and displays a calendar with pictures of nude women, he is making a symbolic statement that could be actionable as sexual harassment as well as gender harassment. Likewise, sexual harassment toward a woman can obviously result from conduct other than explicit behavior, if it interferes with her work performance and broadest possible terms to define harassment.