Inspira- Journal of Modern Management & Entrepreneurship (JMME)
ISSN : 2231–167X, General Impact Factor : 2.5442, Volume 08, No. 02, April, 2018, pp. 367-373

EMPLOYER'S REPRISAL AND THE SEXUAL HARASSMENT AT WORKPLACE

Dr. Ashok Nimesh*

ABSTRACT

Sexual harassment has remained a critical problem of the workplace. It not only affects the work performance of an organization but also undermines its repute. This is not to deny the fact that sexual harassment does not occurs, rather it is prevalent in almost every organization. Usually unreported by victims, the employers' responses to such practices further restrict employees to bring it into account. Employers tangled with various situations though intense in harassment, they hardly chose to redress. It is argued of all the situations encountered, no two are identical with the other. But the pattern of behaviour as to employers remains uniform. Employers usually act in reprisal to the reported cases of sexual harassment. This is not to defy the contrary and less prevalent behaviour of employers acting judiciously to redress grievances of employee in the cases of sexual harassment.

KEYWORDS: *Sexual Harassment, Workplace, Employers Liability, Bystanders.*

Introduction

Sexual harassment though a universal problem associated to the workplace has recently been established an offence. Previously, it was ignored as a personal problem of the employees. And the disputes arose in-between employees were either handled under tort law or the service law. When countries started acknowledging the gravity of offence there evolved an entire discourse on sexual harassment law. Many countries have endured it in their service law with suitable modifications and amendments. So, the law on sexual harassment is deemed new in the legal jurisprudence. This newness of law makes it more prone to the critical questions which remain unresolved. Moreover, the present discourse on the sexual harassment law is a result of Court interventions. Case law as it is appropriately called has contributed the largest of its discipline. Multifaceted approach to the discourse has resulted in evolving a holistic picture of the law. Various countries have adopted laws in accordance to their political and administrative setups. United States for an example has covered the offences of sexual harassment at workplace under Title VII of Civil Rights Act 1964, but remarkable development took place aftermath of the Guidelines issued by Equal Opportunity Commission (EEOC) in the year 1988.Many other countries both completely or in-partial have followed those footprints and assimilated them in theory and principle for establishing sexual harassment law. United Kingdom is one of such example which has replicated the United States model in establishing its own law on sexual harassment. But when it comes to India,it was apparently the lack of vision in establishing law on sexual harassment at workplace.

The menace of sexual harassment was covered under Section 354 and 509 of Indian Penal Code (IPC) that deals with outraging the modesty of women or intending to do so. Though both the sections claim to cover matters related to sexual harassment against women, any specific mention of the same is absent. Particularly, it is silent over addressing the situations at workplace. In the legal history of India, recognition to sexual harassment at workplace started with the course of judicial interventions. The Supreme Court of India while upholding the verdict of High Court of Rajasthan in *Vishakha vs. State of Rajasthan(1997)*has provided a comprehensive definition as to what constitutes sexual harassment at workplace. The Court has

* Assistant Professor, Centre for Human Rights & Conflict Management, School of Humanities & Social Sciences, Central University of Jharkhand, Ranchi, Jharkhand, India.

also issued guidelines to be followed by the employers at workplaces to address issues of sexual harassment. With a lukewarm support of organizations throughout the country *Vishakha Guidelines* as they were called received a minuscule success. Of the various reasons responsible, the crucial one was absence of employers-will required for implementation of Vishakha Guidelines. Moreover, there left many grey areas in court directives which were preconditions for execution of Vishakha Guidelines. It was not until the enactment of Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 that institutions were mandated to abide by the comprehensive directions on sexual harassment. Before that, all efforts for enforcement of guidelines went into vain. But the real challenge emanated aftermath of evolution of the law. In a short span of time, the judiciary in India has witness numerable cases covering dynamics of sexual harassment in various possible ways. As argued that no two cases were identical in themselves, the uniformity of employers' reprisal remained constant all through the jurisprudence on sexual harassment. This incites the necessity for an inquiry to understand factors responsible for uniformity in pattern of behaviour found in attitudes of employers.

Information Gaps

One of the prominent reasons for employers having a negative attitude towards complainant is due to the gaps in information available to employers. Employers, as it is argued, at times are usually unaware of the laws in-effect. Particularly, the judicial interventions evolving case laws are not accessible to the employers. This questioned the governmental agencies endowed with the task for enforcing laws. There exists the problem of execution for dissemination of information. Though government does notify through official gazette, its global outreach remain doubtable. Multiple reasons are responsible for this limitation. First and the foremost is that the employers in the country like India are less educated to uneducated. This disability debars them to have knowledge of prevalent laws and regulations in-effect by the government and allied agencies. Second, is the silence of labour laws in the arena of sexual harassment at workplace. It may be argued that the conservative outlook of labour and trade unions to an extent has not given rooms for evolution of gender sensitive policies within the workplaces. The labour movement has neither expressed nor has seriously taken cognizance of gravity of the problem. This resulted in failure of socialization at lower levels and from there to the higher ones where it is entirely absent. Any enactment of such law addressing sexual form of harassment is unthinkable for the employers. Third and the conventional argument is lack of monitoring agency for surveillance over implementation of the law. Though the law mandates institutions or organizations to constitute agencies under the name of Internal Complain Committee (ICC) or with whatever names their enactments solely depends on the employers. Employers due to lack of monitoring agency, casually took the issue and refrained constituting ICC. They are less informed about the mandatorily condition with regard to ICC. Fourth and the last is that private and corporate sectors are having issues in information gaps. This occurs due to separate sets of laws and numerable overlapping regulations which come every day and night. These institutions are having complex sets of rules and regulations which usually deal with the nature of their commercial workings. Whatever not related to their avenue is alien and doubted in its integrity. They hardly consider gender sensitive issues, till recently, when huge influx of information has compelled them for the same. And, even today, they hardly bother to accept sexual harassment as a critical area of their workplace and so the need for implementation of law. Hence, there remain halfhearted efforts to deal with the issue. Laws related to gender and welfare is usually treated alien and left as an instrument for implementation in the governmental bodies only. Information is one of the prominent and establish element of power and development. Any compromise in that will definitely result in unlikely outcomes. Employers' reprisals are primarily the result of such shortfalls of information gaps both in accessibility of the laws and their implementation further. It is unknowing of the important that led employers to act in-negative.

Organizational Performance and Repute

Employers' liability is multifaceted today. Out of many, they are required to have sufficed the institutional and organizational goals achieved with suitable directions and requirements attached. In pursuance of the same, employers primary concern rests on productivity of the organizational setup. This in longer run tends to build an attitude of negligence towards the human resource. It is the dire need of work performance measured in terms of productivity that makes other things secondary. This is an absolute illusion. Attributes of work performance do include humane working conditions. And this includes gender sensitive environment, respect for women and intolerance towards any form of harassment including the sexual ones.

But, the organizations are institutionalized in such a manner that they hardly have had any rooms for addressing those issues. Not only the small set-ups but giant governmental and corporate organizations which do have separate department of human resource are insensitive to the same. It is male dominant workforce having patriarchal mindsets socialized in gender stereotypes what makes them unthinkable of the critical issues of sexual harassment. This tendency in-long run resulted in crafting a myth among its own employees that these issues are of less concern and botheration. So, the attribute of work performance does create false norms of work ethics. Under the same, employees were inculcated to refrain discussing such issues even in their private space. Work ethics, as an umbrella term provide ample of space where employers enforce submission over its employees. Submission could range from a number of attitudes and behaviors categorized under the rubric of working norms. The working norms evolved for work ethics creates a fanciful environment that drift employees from serious issues like the one of sexual harassment to an another world where everything is pretended to be perfect, if output is good. So, the issues of sexual harassment were of least concern as a result of false emphasis on work performance. Work performance cannot be alienated from the issue of gender sensitivity and harassment. It is part and parcel of the same. Organizations which are sensitive to gender and intolerant to harassment have a friendly work environment built with trust and mutuality. This result in unprecedented growth and success rates of the organizations compare to its contraries. But employers fail to understand the same.

The negative attitudes of employers' towards these issues are also the result of false apprehensions over repute of the organizations. Employers when come across the issues of sexual harassment, act in reprisal, against the complainant, to prevent any harm to repute of the organizations. The issues of sexual harassment spread very fast, if taken by the media coverage. Public outreach due to accessibility of information through media triggers discussion among various sections of the society. Since, media sensationalize the same, negative image of organizations carved fast in mindsets of people rather than a neutral outlook altogether. It also goes to the established patriarchal norms, insensitive public outlook toward gender issues and stereo-typical mindset of people that they perceive and develop negative outlook over and above the positive ones. Hence, the apprehensions were there at employers' mindsets which propel them to act negatively in haste to protect false repute of the organizations.

The insensitive attitude of employers is also, in effect, an attempt to prevent the triggering of further complains in the organizations. On a genuine complaint addressed, if an employer chooses to redress the same, there remain chances that other will also seek redressal of their complaints, if any. To prevent this 'domino effect' of one redressal giving rise to another is seen troublesome by employers, which is not the reality. The employers fail to understand that, more they become sensitive to issues of gender the more it will become transparent, accountable and developed with no blind spots either. But employers fail to choose the right path and got swayed with the established conservative societal norms of gender insensitivity on false repute.

Legal Costs and Expenditure

Almost all employers presume that the organization under their control does not have any incidences of sexual harassment. This non-existence of any incidence is result of a pre-occupied notion of an ideal organization which hardly exists. This is to argue that almost every organization does have the issues of sexual harassment, provided that employees somehow come in contact to other in various venues and ways. Certain degree of harassment does happen in workplaces every here and then.

There are employers who choose to act in reprisal due to heavy costs involved in legal processes and litigations. If employees get hostile at workplace and decide for legal remedies, the organization encounters numerable troubles on monetary fronts. First, the organization has to pursue its defense in the court. Professional legal practitioners charge hefty fees which will be burdensome on the monetary budget of an organization. Since, sexual harassment has recently been established as a punishable offence, its will be hard to find suitable lawyer and expert for the defense. This might result in long procedures ranging from months to years. Again it will be monetary trouble for the organization. Second, if the employee got redress through the court, there remains the chances that compensation might be awarded. The compensation costs definitely invite monetary losses to the organization. And, if compensation were high enough for the organization specially, in Corporates, their whole financial backbone might come under trouble. Third, the organizations will be required to pay huge salaries to employees who due to harassment or legal procedure went on leaves or off the duty. They have to pay the salaries to employee without any contribution whatsoever. These will again a trouble to monetary budget of an organization.

Avoidance to the legal whirlpool, employers employs nitty-gritty politics of subjugation and control to either pacify the victim or to compel the accused for settled confessions. There are cases of true conciliations also. But the problem arises when those critical cases of serious offences were settled in suppression under the name of conciliation. Hence, there remained a constant tension to employers at both the ends. On the one side if cases were arbitrarily suppressed, fear remains there of anytime outburst of the same and on the other side, if case went to court employers have to suffer huge monetary losses. In both the cases, leadership of employers will fall into question. Employers' reprisal is motivated with an objective to sustain no monetary loss to an organization due to the cases of sexual harassment. They reprise in negative ways to have control over the employees. But the control itself is an offence of suppressing the complaints of sexual harassment.

Discharge of Duties and Responsibilities

After enactment of the law on sexual harassment in 2013, every employer was bound to have furnished certain duties and responsibilities to prevent, prohibit and redress the issues of sexual harassment at the workplaces. Prior to that, employers were ethically bound to have furnished such duties. But the sheer ignorance and patriarchal attitude has restricted them to do that. Even aftermath of Visakha Guidelines, employers have not taken due cognizance to implement the same. Astound with this reckless attitude, Supreme Court in *Medha Kotewal Lele vs. Union of India* has issued strict guidelines as to be followed by the employers in the organizations. The verdict has supplemented Vishakha verdict in line and spirit. The employers were not abiding Visakha Guidelines in myriad ways. First, there were numerable instances where even on mandatory requirement as to constitute ICC, they have not constituted one. A number of instances were recorded in legal verdicts where it is found that there were employers even with a positive mindset failed to constitute ICC in their organizations. Pathetic are the majority ones who are having negative outlook and even on legal directions fail to mandate one. Second, the employers even if constituted an ICC within their organization, fail to adhere it in-accordance to the law. Like, the Act of 2013 mandates an ICC to be headed by an female member of the organization is not considered and many of them has constituted ICC with a male employee as a head. Similarly, other provisions like half of its members to be women and one NGO representative are taken casually and ignored while constituting ICCs. Third, is that the duties and powers entrusted on ICCs were not facilitated by organizations. Employers use to either sideline the decisions of the committee or at instances use to overrule their verdicts. Employers hardly facilitate smooth functioning of the ICCs and implementation of their verdicts thereto.

Though, the law has provided for penalties on non-perusal of its direction but there still lacks some sound mechanism for implementation of the same. Employers while addressing the issues of sexual harassment connotes their being subject matter of personal dispute among the employees and nothing to do with the official matters. Employers use to create fanciful dichotomy of private versus official colour to the matters of sexual harassment. Though the matters of sexual harassment are very much integral to the official workplace and ethics they are brought to dispute and later terminated on the grounds of jurisdiction. There are two arguments for that. One is that the employers unknowingly did not understand the nature of sexual harassment complaints and presume that they have no rooms in official matters. They are perceived as alien to workplaces and treated as a private dispute among two or more parties involved. This was the trend for decades since recently when it has been agreed and accepted as a problem integral to workplaces. And the other is that employers did not want to expand the jurisdiction of workplace to include sexual harassment as a problematic area of concern. It is obviously the lack of employers understanding that sexual harassment is taken in a negative sense. It has to be accepted as a part and parcel of grey area where constant efforts are required to keep the check so that work environment does not get negatively affected.

While escaping their duties, employers have hardly accepted sexual harassment an area of serious concern and so they have hardly incorporated penalties for the offence in their service books. Organizations either have not included sexual harassment as a form of offence or if included, they are equally diluted. Moreover, there are minor to negligible penalties provided in those service books. Absence of the same, employees left scot free of no fear and hence probabilities of harassment occurring frequently leaving vulnerable at risk and workplace sexually charged. Without discharge of duties by the employers it cannot be possible to have implemented the policies handling issues of sexual harassment.

The 'Complex' of Hostile Work Environment

Women encounter harassment at workplace in a particular environment with certain elements. Though the list is infinite but the impact they had is defined. It can be identified when and in what

conditions a women subjected to harassment. Of the two typologies, the quid pro quo and hostile work environment, the first lies in interpersonal relationship between people and the second locates to work conditions. For hostile work environment as it is called so,its difficult to delineate it with certain fixed pre-conditions. Women might encounter harassment through innumerable actions both intentional or not.This very nature of problem facilitates employers to exploit the benefit of doubt and to act indifferent to sexual harassment complaints.

Employers acting contrarily to complainant in cases of hostile work environment turn blind eye and use to keep silent. This is due to the inherent vagueness of defining a workplace sexually charged and hence the occurrence of sexual harassment. Moreover, the problem get further complicated when identification is not defined. This means that the person responsible for sexually charging the workplace is not clear. The problem got tangled among employee, employer or the third person not associated to the organization but had access of it. Reasonable doubts goes to everyone who has the access to workplace. This creates a condition of confusion for employers in cases when they aspire to resolve the one. Contrarily, there are cases when employers themselves complicate the situation as they themselves are the culprits. So, employers justify their inaction in sexual harassment complaints.

Except few critical conditions, when identification is blurred, in most of the situation the victim through on-going harassment easily identify the person responsible for harassment. In those cases also, employers rescue not to initiate any action against the culprit. Here the reason lies in the solidarity of an employer to his employees. The nexus of friendship defined under the parameters of patriarchal norms, the male brotherhood. Interestingly here to remind that, in India only heterosexual harassment at workplace is an offence under the Act of 2013 and not the homosexuals and others.

Employers Liability is a legal discourse that falls primarily under the law of Torts. When an employee with whatever name, commits an act, for which legal penalties through judicial interventions are there, the responsibility is sorted out. Means the person responsible for commission of those acts are sorted out as there remains probability of other person involvement in various ways. Similarly, in sexual harassment cases there are probabilities that employees charged of an offence are functioning either under the direction of employer or with his consent. Moreover, if there remains no connection in between employee and employer, even in those cases, the responsibility of employers is fixed. Since, he is in charge of the workplace, he should be held responsible for any act of harassment. This is due to his being employer indifferent to the employees. The responsibility to maintain a harassment free work environment rests to him. It is the employer who must be held for any unlike occurrence of incident at workplace including the sexual harassment. In this way, the employer's liability is attached in the cases of sexual harassment. In the discourse of sexual harassment vis-à-vis employer's liability, the onus is fixed primarily to one of its typologies, the hostile work environment. Since, quid pro quo occurs secretly in between harasser and victim, having information of the same to employers is less feasible. Even then there remain arguments for fixing employers liability in quid pro quo cases too. But for hostile work conditions there are hardly any contestations. Employers' liability is fixed in almost all cases of hostile work environment sexual harassment. Employers' are held for whatever happens at the workplaces. It is the apprehensions of 'employer's liability' in legal redressal system at courts, as and when dragged by the victims of sexual harassment that employers refrain from addressing the complaints. This is what motivates them to reprise at times to suppress the complainant from becoming hostile.

Nevertheless, there are instances where negative attitude of employers is due to compulsions of workplace. There are organizations like the one of marketing where policies either directly or in subtle way result to sexual harassment of women at workplaces. They are insensitive to gender issues and pursue policies that somehow are derogatory to women and their honour. Revealing dress code in restaurants, cafeterias and discotheque are few examples where women are vulnerable to harassment. The policies of organization compel them to such practices where they are susceptible to harassment. Here employers are having compulsion of organizational policies which they cannot escape off. And organizations pursue such policies as a result of competition and consumer market. So, indirectly responsibility goes to the employer for taking caution in such practices and even if there are compulsions, then security of employees must be ensured of any unfortunate occurrence of harassment. Overwhelming responsibilities are not diligently handled and employers through their reckless attitude undermine safety and security of its employee at the workplace. Hostile work environment is a complex matrix of incidences hard to decipher at times and subtle involvement of employers in the acts of harassment has defied the meaning of erecting a law specific for harassment issues at workplace.

Societal Norms and Sexual Stereotyping

As per the theory of Sexual Role Spillover, women are considered as a sexual being specifically restricted to domestic household arena. The primary role of women is defined in-relation to her sexuality. And men while working at offices perceive women in the same role. They expect women to adhere to the roles associated with sexuality. The sexual projection of women from home to society is further carried to workplace in the mindsets of men. This is sexual role spillover. Women while working in the capacities of an employee act as a neutral being, contributing to an organization. This is not tolerated to the men. The basic reason behind this reluctance, in accepting her as an employee rather than a sexual being, lies in the conservative patriarchal societal norms where they are socialized in. So, the women who do not adhere to sexuality even at the workplace are subjected to harassment.

Established societal norms have provided space for harassers to victimize women in the name of common sets of behaviour. These are carried to the workplaces. Dictums like 'men will be men' shields numerable instances of harassment addressed to women in the name of established norms of male behaviour in society. They are further carried to the workplaces of which male employee take leverage for their obnoxious behaviour. These societal norms are premised on sexual stereotypes, the indiscriminate behaviour established under various institutions of society through history and tradition. Being a part of the society, employers too are socialized under these stereotypical norms. Hence, they usually fail to understand the gravity of problem to act casually in ignorance. Employers do not understand the act of commission as an offence. This is due to lack of their sensitivity. This means that socialization in sexual stereotypical society leads to insensitivity towards gender issues. In sexual stereotypes, women are subordinated to men initially through sarcasm and satires which in due course of time establish as traditional societal norms. Patriarchal male dominated society sanctions those norms which easily assimilate in the mindsets of people and reflected in their actions and behaviour. Though verbal abuse is sufficient to create a hostile work environment, employees tend to seeks physical sexual favours too. Either by force or persuasion extortion of sexual favours at workplace leads to hostile work environment sexual harassment. Here the element of intention or un-intention of employees in course of their actions is immaterial.

Societal norms reinforced through sexual stereotypes leads to hostile work environment sexual harassment. Employers fail to consider certain behaviour as offending against the dignity of women and even if they take cognizance, it seems difficult to have taken action as various institutions won't accept them as offending. For this reasons, employers use to counter and suppress complaints of sexual harassment, due to hostile work environment. It is not to deny the fact that employers also use to discipline women at workplace through actions and policies that in one way or the other culminates into sexual harassment. Discipline either through dress- codes or through actions, women are required to behave in a patterned manner governed through societal norms. Employers swayed by sexual stereotypes are colour-blind to the offences which are harassing to women but routine norms of behaviour for men at workplace. This results in inaction to reprisal of employers while handling complaints of sexual harassment.

Absence of Bystanders

The complaints of sexual harassment are redressed primarily through two mechanisms. First, is the process of conciliation, initiated as a usual course of action by the employers to settle cases of harassment of minor intensity. And second, is the penalties imposed after completion of due process of inquiry. The penalties for sexual harassment were imposed only when efforts of conciliation got exhausted. In both mechanisms the important factor that plays a crucial role is by Bystanders.

Bystanders are witnesses of incidences in legal recourse of justice. They are the major links to address a problem and for drawing conclusions. In cases of sexual harassment bystanders are important for depiction of real time incidences. But they fail to play the role as expected. First, reason of their failure is fear of retaliation by employers, if the complaint results in tangible loss to organization or its important human resource in form of employees. Second, is the fear of retaliation by co-employees who might target or boycott witnesses at the workplace due to his actions. Third, is the fear of hostilities that will develop with either the party in harassment if the complaint got lingered for undue delay or concluded in penalties. Fourth, is the fear of losing reputation during the course of inquiry either departmental or legal. No one wants to undertake his reputation at stake for the cost of justice delivered to others. This parochial mindset is ubiquitous in conservative people of countries like India. Fifth and the final, is

avoidance of mental tension and stress that one has to face in such complex cases of inquiry. These factor singular or in-multiple ways discourage bystanders from playing proactive roles.

Absence of bystanders is a serious loss to recourse of inquiries and in certain cases do led to miscarriage of justice. In many incidences employers out-rightly deny to admit the complaints due to lack of bystanders. And in others, it happens that the case got dismissed or fails to prove itself due to absence of bystanders. Worst are those inquires where bystanders furnish contrary information against the victim to support the employer and his associates. These types of bystanders vary from voluntary ones to the one who functions under the pressure of higher authorities. For whatever may be the reasons, they end in supporting the cause for injustice to the victim of sexual harassment. Employers do have another category of bystanders who are bogus. Means they are framed by employers for producing fake witnesses. They add to the class of witnesses who are employed to overrule genuine complaints. Over viewing all, majority of them are found to have functioned form neutral to negative ways while witnessing the complaints of sexual harassment. This is the underlining factor for employers having whimsical attitude while handling complaints of sexual harassment. Dominant position by the virtue of hierarchy in an organization facilitates them further.

Conclusion

In the cases of sexual harassment at workplace, victims hardly dare to complaint against the harasser. This is not due to their lower position or job profile in the organization. Women working even in higher positions feel reluctant to report the incidences of harassments. It has no relation to power or position, as the women holding both power and position are subjected to harassment by the ones who does not. It is the reluctance for which they don't dare to complain. Though legal remedies are there but hardly brought into the action. Of the various reasons responsible for infusing hesitation among the victims, employers' reprisal stands the crucial one. Endowed with the task of handling complaints of sexual harassment, employers at workplace choose to act in contrary to the mandate. They use to employ numerable instruments to suppress the complainants and terminate their grievance without suitable redressal. Of various tactics employed by the employers there establishes a uniform pattern of action in it. The uniformity of employers reprisal to the complaints of sexual harassment at workplace. The uniformity is hardly diluted even after the enactment of law on sexual harassment. Judicial interventions were less respected while employers continued acting whimsical against the complainants.

This uniformity if continued for longer period will result in critical outcomes. The persistent reprisal of employees by the employers will spoil the workplaces. They will become the chambers of gendered discrimination. Subjection of women to harassment will lower their participation which will result in single sex workplaces of men. Ultimately, it will lessen in productivity and outcome will be negligible. In conclusion, the uniformity if continued will spoil the institution of workplaces the edifice of all developments and progress. The uniformity must be tangled to result in positive approach in handling issue of sexual harassment at workplace.

References

- Apparel Export Promotion Council vs. A.K. Chopra AIR 1999 SC 625
- Gutek, Barbara A. and Aaron Groff Cohen (1987), Sex Ratios, Sex Role Spillover, and Sex at Work: A comparison of men's and women's experiences, Human Relations, Vol. 40, No. 2, pp. 97-115.
- Medha Kotwal Lele & Others vs. Union of India & Others AIR 2013 SCC 297
- Seema Lepcha vs. State of Sikkim & Others AIR 2013 SCC 641

♦❐♦