

**DRAWING THE LINE BETWEEN PERMISSIBLE AND IMPERMISSIBLE
BEHAVIOUR IN SEXUAL HARASSMENT CASES**

by

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Annexure G

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SUMMARY

Sections 9, 10 and 23 of the Constitution protects the right to equality, human dignity and fair labour practices. As a result of these constitutional rights, the Employment Equity Act 55 of 1998 (EEA) was birthed in order to promote equality and to eliminate all forms of unfair discrimination in the workplace. Further, the EEA states that the harassment of an employee is a form of unfair discrimination.

A topic that has become ever so prevalent in today's society is that of sexual harassment. With the "#MeToo" movement that is currently circulating social media, it is crucial that employers are able to properly cater for victim's grievances and complaints.

Unfortunately, there is no sound definition for sexual harassment in our legislation and often the line between permissible and impermissible behaviour in the workplace is very difficult to draw. Employers are only left with the 1998 and 2005 Codes of Good Practice on the Handling of Sexual Harassment Cases, of which Codes appear to be rather confusing when read together. It will be argued that a lack of a proper definition on sexual harassment will have a negative impact on the management of sexual harassment cases in the workplace. This will in turn place employers at risk of being liable for sexual harassment in terms of the EEA.

In this dissertation, I will explore the pitfalls with our current law governing sexual harassment and will propose a solution going forward on how to tackle this heinous plague in the workplace.

CHAPTER 1: INTRODUCTION

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"Do you need a lover tonight?"¹

1.1 Introduction

The line between sexual attention and sexual harassment is often difficult to draw, with the result of sexual harassment becoming a contemporary and controversial topic. Sexual harassment can take the place of many forms such as victimisation, *quid pro quo* harassment, sexual favouritism and a hostile work environment harassment.²

Sexual harassment is defined as unwelcome conduct of a sexual nature that violates the rights of an employee³ and constitutes a barrier to equity in the workplace.⁴ Although sexual harassment is not defined in the Employment Equity Act⁵ (EEA), the EEA regards harassment as a form of unfair discrimination and prohibits it on any one

¹ *Campbell Scientific Africa (Pty) Ltd v Simmers* 2016 ILJ 116 (LAC) para 7. These words were of particular relevance in this matter which dealt with sexual harassment.

² Botes *TSAR* (2017) 36 -37.

³ Although an employee has the Constitutional rights to equality, dignity and fair labour practices (ss 9, 10 and 23 of the Constitution, Act 108 of 1996 respectively), the employer also has a common law duty to provide safe working conditions. See Van Niekerk *et al* (2017) 97.

⁴ Item 4 of the Code of Good Practice on the Handling of Sexual Harassment Cases issued in terms of G.N. 1357 of 2005 published in Government Gazette No 27865 of 4 August 2005 (2005 Code).

⁵ No. 55 of 1998.

of the listed grounds.⁶ The Promotion of Equality and Prevention of Unfair Discrimination Act⁷ (PEPUDA) however defines sexual harassment as follows:

Unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to (a) sex, gender or sexual orientation; or (b) a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group.

Currently our courts are tasked with deciding on when perceived sexual harassment amounts to actual sexual harassment.⁸

The 2005 Code requires a consideration of the circumstances against the background of all the factors when evaluating a case of sexual harassment.⁹ This entails that not only one single factor can justify the fact that sexual harassment occurred as opposed to the 1998 Code.¹⁰ The 2005 Code did not replace or supersede the 1998 Code, which to date has not been withdrawn. The effect of this is that both Codes are still relevant to guide commissioners in the interpretation and application of the labour legislation.¹¹

The issue with having two different Codes being read together is that it creates confusion in the mind of the interpreter as both Codes are awkwardly formulated.¹² A

⁶ S 6(1) of the EEA states that "no person may unfairly discriminate, either directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or any arbitrary ground."

⁷ Promotion of Equality and Prevention of Unfair Discrimination Act No.4 of 2000.

⁸ Botes *TSAR* (2017) 761.

⁹ Item 4 of the 2005 Code states that all these factors must be taken into account when testing for sexual harassment: 4.1 whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation; 4.2 whether the sexual conduct was unwelcome; 4.3 the nature and extent of the sexual conduct; 4.4 and the impact of the sexual conduct of the employee.

¹⁰ Item 3 of the Code of Good Practice on the Handling of Sexual Harassment Cases (issued in terms of G.N 1367 of 1998 published in Government Gazette No. 19049 of 17 July 1998) (the 1998 Code) defines sexual harassment as: "(1) unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual; (2) Sexual attention becomes sexual harassment if: (a) The behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or (b) The recipient has made it clear that the behaviour is considered offensive; and/or (c) The perpetrator should have known that the behaviour is regarded as unacceptable."

¹¹ Labour Relations Act No. 6 of 2014 (LRA).

¹² Cooper *ILJ* (2002) 27.

part of this dissertation will unpack the definition of sexual harassment and will recommend an appropriate test that should be applied when dealing with sexual harassment in the workplace. Further, an investigation will be conducted into the courts' interpretation of the definition of sexual harassment by looking at various case law, for example, the case of *Simmers v Campbell Scientific Africa*.¹³ What makes this case significant is whether the statement "do you need a lover tonight" crosses the line from being an inappropriate comment to that of sexual harassment.

It will be argued that although both 1998 and 2005 Codes make provision for a subjective (as perceived by the victim) and an objective (the reasonable person test),¹⁴ the courts today are placing much reliance on a subjective test. The Labour Appeal Court¹⁵ in *Simmers* did not consider all the factors as outlined in the applicable Codes, and instead opted to place much weight on one factor, that being that the victim took offence to Simmer's conduct and that her dignity was infringed as result.¹⁶

In searching for answers for the most appropriate test, a visit to the United States of America (USA) as well as England are deemed appropriate. The USA has applied a test which involves a combination of both subjective and objective factors requiring that the perpetrator's conduct should be "unwelcome" to the victim as well as objectively unreasonable.¹⁷ England on the other hand, tends to lean more towards a subjective standard.¹⁸

As it stands, the definition of sexual harassment that is offered in both the 1998 and 2005 Codes does not provide much assistance. This *lacuna* has also created a

¹³ 2014 *ILJ* 2866 (LC) at para 31 where the Labour Court found that a single incident of unwelcome sexual conduct will only constitute sexual harassment if the conduct amounts to serious conduct.

¹⁴ In *Gaga v Anglo Platinum Ltd* 2012 3 BLLR 285 (LAC) at para 42 the Appeal Court set aside an arbitration award in that the commissioner followed a too narrow approach by wrongly construing the victims uncertainty about "how to deal with the situation" as she indicated that she was not offended, while disregarding the inappropriateness of the senior manager's conduct who had harassed her.

¹⁵ 2016 *ILJ* 116 (LAC).

¹⁶ Botes *TSAR* (2017) 787. The Appeal Court in *Simmers* found that the conduct constituted sexual harassment.

¹⁷ Cooper (2002) 13.

¹⁸ *Reed v Stedman* 1999 EAT/443/97.

confusion for the courts in applying the appropriate test as seen in the conflicting judgments of both *Simmers* (LC) and *Simmers* (LAC).

The absence of a proper definition and test for sexual harassment means that the Codes are open for interpretation by both employers and courts. The result of not having proper guidance from legislation can result in employers not adequately dealing with complaints of sexual harassment, as it is extremely difficult to draw the line between permissible and impermissible behaviour in the workplace. If sexual harassment is proven, it may have serious implications for employers extending beyond bad publicity, to the possibility of financial liability for the conduct of its employees as a result of their failure to provide safe working conditions.

1.2 Research Questions

This study will be dealt with in two parts. Firstly, it will investigate what type of test should be considered when dealing with sexual harassment in the workplace. Secondly, it will examine employers' liability in sexual harassment cases and their associated risk due to a lack of a unified Code on the appropriate test for sexual harassment. Thirdly, this study will further evaluate the precedence of the Labour Relations Act (LRA),¹⁹ the 1998 and 2005 Codes, as well as South African case law, with a comparative analysis to the USA and England. The following questions will be answered:

- What should be the appropriate test when dealing with cases of sexual harassment?
- How does the applicable test for sexual harassment in South Africa compare to the tests used in USA and England?
- Why is there a need to reform the current Codes on sexual harassment?

¹⁹ Act 66 of 1995 (LRA).

- What risk will employers be faced with (in so far as their common law duty of protection is concerned) should they fail to apply the appropriate test for sexual harassment?

1.3 The Importance of Study

The issue of sexual harassment is now being more recently exposed than ever. In the USA, celebrities that have been associated with this form of gender discrimination have made headlines for example, Angelina Jolie, Ashley Judd and Gwyneth Paltrow.²⁰ As a result of this, the “#MeToo”²¹ movement went viral across the globe with South Africans retweeting the hashtag symbol (#) followed by the word “MeToo” on various social media platforms.²² This has created a pattern of awareness in the workplace and beyond, placing an obligation on employers to tighten up their policies and procedures governing this form of unfair labour practice.

In South Africa, sexual harassment has become a controversial topic in the workplace as there are many different views as to what constitutes sexual harassment.²³ Should employers not be well equipped and trained to deal with the test for sexual harassment, it could increase their liability for these type of claims owing to the deeming provision that was created in terms of section 60(3) of the EEA.²⁴

²⁰ The Gaurdian 2018.

<https://www.theguardian.com/film/2018/may/01/ashley-judd-suesharveyweinstein-for-sexual-harassment>.

²¹ Jordaan and Masweneng 2017.

<https://www.timeslive.co.za/news/south-africa/2017-10-19-metoo-campaign-sparks-calls-for-new-ways-to-tackle-woman-abuse>.

²² *Pietersen* (LC) at para 3 the court’s view is that “In the face and growth of global movements such as ‘#Metoo’, ‘The Silence Breakers’, ‘#NotInMyName’, and ‘#BalanceTonPorc’ or ‘out your pig’, there is an even greater need for more sensitisation to the scourge of sexual harassment in the workplace.”

²³ Mukheibir and Ristow *Obiter* (2006) 245 -246.

²⁴ S 60 of the EEA creates a form of vicarious liability of employers for the discriminatory acts of its employees. In terms of s 60(1), if it is alleged that an employee, while at work, discriminates against a co-employee, the alleged conduct must immediately be brought to the attention of the employer, who in turn must take all necessary steps to eliminate the alleged conduct as highlighted in s 60(2). S 60(3) states that if the employer fails to take the necessary steps and it is proved that the employee has discriminated against a co-employee, the employer will be held equally liable for the discrimination.

A suggestion will be made that the two current Codes be withdrawn and a new Code of Good Practice on the Handling Sexual of Sexual Harassment cases be drafted which clearly defines the appropriate test for sexual harassment.

1.4 Research Methodology

This study follows an investigation and comparative approach on the test for sexual harassment as well as the liability of employers. This study takes the form of a literature review. The information presented was collected from various literature sources including journal articles, textbook material, legislation and case law in South Africa, USA and England. A specific reference method is used. A full citation is given to the first footnote when citing legislation, international instruments and case law, thereafter it is cited as per abbreviations as per the bibliography. The complete reference to each book, journal article, legislation instrument, case law, internet source and international instrument can be found in the bibliography at the end of this dissertation.

1.5 Overview of chapters

In Chapter 1 provides a general introduction. The research questions are specified and problems on this topic are dealt with and explained. The importance of this study is identified and the research methodology and referencing method is explained.

Chapter 2 explores the common law, with specific emphasis on an employer's duty to establish safe working conditions. This chapter will investigate as to when an employer may be held liable should he fail to establish safe working conditions. Various textbooks, case law and journal articles are referred to.

Chapter 3 deals with sexual harassment as a form of unfair discrimination with a specific focus on the appropriate test for sexual harassment. This chapter will examine the definition of sexual harassment by relying on both 1998 and 2005 Codes, the LRA,

the Constitution²⁵, EEA and various case law. This chapter will also recommend which test should be applied when dealing with claims for sexual harassment.

Chapter 4 deals with employers' liability in cases of sexual harassment. The Constitution, LRA, EEA, case law, journal articles as well as various textbook materials are referred to.

Chapter 5 is a comparative analysis. This chapter compares the test for sexual harassment in South Africa compared to the test used in USA and England. This chapter will also compare the liability of employers in South Africa to that of USA and England. Specific reference is made to legislative instruments and court opinions through case law.

Chapter 6, the conclusion, contains concluding remarks on each chapter. The research questions will be answered, and recommendations will be provided on where the line should be drawn between permissible and impermissible behaviour by recommending the appropriate test for sexual harassment. It will further suggest the importance of training sexual harassment specialists in the workplace in order to mitigate the risks associated with these types of cases.

²⁵ Act 108 of 1996 (the Constitution).

CHAPTER 2: COMMON LAW RIGHTS AND DUTIES

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2.1 Introduction

The rights and duties arising from the employer-employee relationship have a variety of sources. Although legislation is the most important source of labour law, common law still offers an alternative source for aggrieved employees.²⁶

Although employees may rely on the recourse that the common law provides for disputes concerning contracts of employment, some of the shortfalls with the common law is that it ignores the enduring nature of the employment relationship in that it gives employees no legal rights to demand better working conditions. Also, there can be no legally binding relationship between the parties unless they have entered into a valid contract of employment.²⁷

At common law, there is a duty on employers to establish safe working conditions for their employees. This duty could have its origin in either the law of contract, or law of delict. Thus, an employer may be held liable in terms of common-law delict both directly and vicariously.²⁸ In order to succeed with a claim for sexual harassment in

²⁶ Van Niekerk *et al* (2017) 89. It is not uncommon for employees to bypass the CCMA and head directly to High Court and Labour Court to entertain disputes concerning contracts of employment.

²⁷ Grogan *Workplace Law* (2017) 2 – 3.

²⁸ Du Toit *et al* (2015) 714.

the work place, the victim will need to prove the elements of delict²⁹ in order to be successful.³⁰ Once the elements of delict have been proven, then a victim of sexual harassment may be entitled to common-law remedies as prescribed by legislation in the form of compensation or damages.³¹

Although the employment relationship can be regulated by common law,³² it is necessary to explore whether the common law is an adequate source when dealing with cases of sexual harassment in the workplace. The purpose of this chapter will therefore investigate to what extent the common law recognises and prescribes the phenomenon of sexual harassment, and further will investigate to what extent employers may be held liable for failure to provide employees with safe working conditions.

2.2 Common law rights and duties

The South African law of employment was initially based on common law contractual principles.³³ Although labour legislation has been implemented in order to regulate the rights and duties in any employment relationship, the common law still remains of relevance today. An aggrieved employee may rely on common law rights³⁴ to bypass the jurisdiction of the CCMA³⁵ and proceed straight to the High Court and Labour Court to entertain disputes concerning contracts of employment.³⁶

The South African common law contract of employment originated from *locatio conductio operarum* (contract of letting and hiring of personal services in return for remuneration) of Roman law.³⁷ One of the legal consequences that flow from this

²⁹ See Van Niekerk *et al* (2017) 91 where it is confirmed that at common law, a delictual claim can be instituted against a perpetrator only in respect of his or her wilful or negligent wrongful act or omission which must be causally linked to the damage or personal injury caused.

³⁰ Mukheiber and Ristow *Obiter* (2006) 247.

³¹ Du Toit *et al* (2015) 719.

³² This is only the case wherein legislation is inapplicable. See Grogan (2015) *Workplace Law 2*.

³³ *Colonial Mutual Life Assurance v MacDonald* 1931 AD 412.

³⁴ In other words the rights of the employee are the obligations of the employer.

³⁵ The Commission for Conciliation, Mediation and Arbitration (CCMA).

³⁶ Van Niekerk *et al* (2017) 85.

³⁷ Grogan (2017) *Workplace Law 2*.

contract is that employees could render their employers vicariously liable for unlawful acts committed in the course and within the scope of their employment.³⁸

Moreover, there is a duty³⁹ on employers to establish safe working conditions for their employees.⁴⁰ Should the employer's negligent conduct lead to injury of the employee, the employee may have a delictual claim.⁴¹ If the employer is in breach of a contractual obligation, then the employee/s may have a claim in terms of contract.⁴²

The duty imposed on the employer to offer safe working conditions to their employees has been codified to a certain extent. Compensation for Occupational Injuries and Diseases Act (COIDA)⁴³ now steps into the shoes of the employer against certain delictual claims by offering compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment.⁴⁴

Although COIDA can offer some assistance to aggrieved employees in cases of sexual harassment, this has not always been the case in terms of the common law.⁴⁵

³⁸ Grogan (2017) *Workplace Law* 13.

³⁹ See Van Niekerk *et al* (2017) 96 -99 for a detailed discussion on the obligations of the employer. For purposes of this dissertation, the focus will be on an employer's duty to provide safe working conditions.

⁴⁰ *Van Heerden v SA Pulp & Paper Industries Ltd* 1946 (AD) 385 at para 385.

⁴¹ A victim may claim patrimonial and non-patrimonial damages. Patrimonial damages will be the amount that your patrimonial estate has been diminished as a result of the wrongdoer's conduct (see *Trotman v Edwick* 1951 1 All SA 443 (A) at 449B-C). Non-patrimonial damages pose more of a difficulty to prove. These damages are usually a result of an injury to one's personality such as good name, reputation, feelings and liberty and because there is no financial value attached to your feelings for example, it is difficult to quantify these damages financially.

⁴² Van Niekerk *et al* (2017) 97. See *Primat Construction v Nelson Mandela Bay Metropolitan Municipality* (1075/2016) 2017 (ZASCA) 73 where a party to an agreement breaches its obligations by repudiating its obligations, the innocent party has an election to either reject the repudiation and enforce the performance thereof or accept the repudiation and cancel the agreement.

⁴³ S 35(1) of the Compensation for Injuries and Diseases Act, No 61 of 1997 (COIDA).

⁴⁴ In *Mankayi v Anglogold Ashanti Ltd* 2011 6 BLLR 527 (CC), the Constitutional Court held that s 35(1) of COIDA has a twofold purpose: "Firstly, it removes the common law claims of employees against the employer and, secondly, it limits an employer's liability to pay compensation save for under COIDA."

⁴⁵ See *Media24 v Grobler* 2005 6 SA 328 (SCA) at para 33 where the court held that post-traumatic stress syndrome is not a disease listed in Schedule 3, but, by virtue of the provisions of s 65(1) (b) of COIDA, if the respondent (aggrieved employee) contracted it in circumstances arising "out of or in the course of her employment", she would be entitled to compensation under the Act and would not be able to institute a civil action against the employer.

Until the case of, *J v M*⁴⁶ which was the first case brought before the former Industrial Court on the issue of sexual harassment, our courts had not really dealt with this issue. In this matter, a male employee had fondled one of the complainants' buttocks and breasts and had caressed and slapped the buttocks of another woman without their consent. The complainants lodged grievances resulting in the dismissal of the perpetrator.⁴⁷ This decision is of importance as the court finally pronounced on the concept of sexual harassment. The court found that:

Sexual harassment, depending on the form it takes, violates that right to integrity of the body and personality which belongs to every person and which is protected in our legal system both criminally and civilly.⁴⁸

Therefore, in light of the fact that an employer has a common law duty to protect its employees, it can face liability for delictual claims committed by employees during the course of their employment. This type of liability stems from the common law doctrine of vicarious liability which is discussed below.⁴⁹

2.3 Vicarious liability

During the course of the seventeenth and eighteenth centuries, the maxim *qui facit per alium facit per se* (he who acts through another acts himself) was recognised with its origins in English law. This common law maxim supports the view that the wrongful or delictual acts of one person acting at the pleasure of another, could be attributed to that other, as the latter gave the former power to act within the scope of their agreement.⁵⁰

The legal principles underlying vicarious responsibility have been well established. An employer will be vicariously liable for the delict of the employee if the delict is committed by the employee in the course of his or her employment.⁵¹ Three

⁴⁶ 1989 19 ILJ755 (IC).

⁴⁷ *J v M* (IC) at 757-758.

⁴⁸ *J v M Ltd* (IC) at 755H.

⁴⁹ Van Niekerk *et al* (2017) 91.

⁵⁰ Loots *Stell L R/Rev* (2008) 145.

⁵¹ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) at para 9.

requirements therefore need to be satisfied. Firstly, there must be an employer-employee relationship at the time the delict is committed. It is rather unfortunate that the employer cannot be vicariously liable for the delictual acts of an independent contractor in terms of common law.⁵² Secondly, the employee must have committed the delict and have satisfied all the requirements of a delict. Therefore, there must be an act or omission on the part of the employee, which was wrongful, which caused the damage or personal injury to the third person, and which was committed intentionally or negligently. Thirdly, the employee must have acted within the scope of his or her employment wherein the employee's actions fell within the execution or performance of his or her duties in terms of the contract of service.⁵³ The employer and its employee will therefore become jointly and severally liable for the employee's delictual act.⁵⁴

The issue of vicarious liability was dealt with in the case of *K v Minister of Safety and Security*.⁵⁵ In this matter, three policemen committed acts of rape during their employ. The court had to decide whether the Minister of Safety and Security was vicariously liable for rapes committed upon Ms K as the policemen exploited their employment situation for their own benefit.⁵⁶

The Constitutional Court overturned the Supreme Court of Appeals decision⁵⁷ and held the state vicariously liable for the raping of the applicant by three on-duty policemen. The court relied on the Bill of Rights⁵⁸ to develop the "course and scope of employment

⁵² *Stein v Rising Tide Productions* CC 2002 (5) SA 199 (C) at 204–5.

⁵³ *Minister of Safety & Security v Jordaan t/a Adre Jordaan Transport* 2000 (4) SA 21 (SCA) at 24H-25E.

⁵⁴ Manamela *SA Merc LJ* (2004) 126.

⁵⁵ 2005 (6) SA 419 (CC) (*K*).

⁵⁶ See also *Booyesen v Minister of Safety and Security* CCT25/17 2018 (ZACC) (*Booyesen*) at para 117 where the court held that "unlike before, when the test in deviation cases was whether the employee acted within the course and scope of employment, the focus is now on whether the connection between the conduct of the policemen and their employment was sufficiently close to render the respondent liable. The establishment of this connection must be assessed by the explicit recognition of the normative factors that point to vicarious liability including the constitutional mandate of the State, to establish a credible and efficient police service on which the public ought to be able to rely for protection and the prevention of crime. That should be a police service worthy of the trust of the public and one to which vulnerable members of the public ought to turn readily for protection in times of need."

⁵⁷ *K v Minister of Safety and Security* 2005 3 SA 179 (SCA).

⁵⁸ Chapter 2 of the Constitution.

test” and found that the state is vicariously liable for the acts committed by the policemen.⁵⁹

It can be said that in order for vicarious liability to exist, there must be a close connection between the delictual conduct of the employee and his/her employment.⁶⁰

The judgement of K directly concerns a question that has often served before the courts when determining whether an employer may be held vicariously liable for the intentional wrongdoing of its employee i.e. sexual harassment.⁶¹

2.4 Liability of the employer in the context of sexual harassment

An employer can avoid liability for sexual harassment cases if it implements proper procedures in the workplace that identifies and eliminates harassment.⁶² Wrongfulness for an omission will only result if the employer had a legal duty to act positively to prevent the harm.⁶³ Thus the court in *Piliso v Old Mutual Life Assurance Co (SA) Ltd & others*⁶⁴ provides employers with assistance when faced with claims of sexual harassment. In this matter Ms Piliso, found a note written in Afrikaans on a photograph of herself. The photograph was affixed to her workstation in the department. The words written on the photograph were extremely crude and offensive. The next day she found a similar second note on a photograph of hers, this time in English. Ms Piliso felt unsafe and insulted as a result of these two incidents. After receipt of the second note, she immediately called management. The manager promised to submit documents to the first respondent's top management and to convene a meeting with employees under his supervision in which he failed to do. She contended that the company's liability arose in terms of the statutory law.⁶⁵ In the alternative, she based

⁵⁹ K (CC) at para 58.

⁶⁰ Refer also to *Booyesen* (CC) (fn 56) where the doctrine of vicarious liability was developed.

⁶¹ It was already established in this chapter that the employer has a common law duty to create safe working conditions for its employees.

⁶² Smit and du Plessis *PER / PELJ* (2011) 6.

⁶³ Mukheiber and Ristow *Obiter* (2006) 249.

⁶⁴ (2007) 28 *ILJ* 897 (LC).

⁶⁵ See s 60 of the EEA.

her claim on delict on the basis of the company's failure in its duty to ensure its workplace was safe.⁶⁶

The court had to determine whether the respondent was vicariously liable in terms of the prescripts of the EEA.⁶⁷

To attract vicarious liability at common law, the plaintiff must prove that the perpetrator of the sexual harassment was an employee of the employer. The applicant would further have had to prove that the perpetrator committed the delict against her whilst acting within the course and scope of the perpetrator's employment.⁶⁸

Unfortunately, the applicant had failed to prove that the perpetrator of the sexual harassment was an employee of the first respondent. Therefore, the applicant's delictual claim in terms of the common law could not stand.⁶⁹

The applicant however claimed constitutional damages in the alternative.⁷⁰ When dealing with this claim, the court turned to the legal convictions of the community.⁷¹ The legal convictions of the community require the employer to do the following after an employee had been traumatised and suffered psychological harm as a result of sexual harassment:

- 1) Start a process of investigation to find the perpetrator;
- 2) Provide the employee with support in the form of counselling to minimise the psychological trauma and communicate regularly with the employee on her needs; and

⁶⁶ *Piliso* (LC) at paras 1-3.

⁶⁷ *Piliso* (LC) at para 11.

⁶⁸ *Piliso* (LC) at para 28.

⁶⁹ *Piliso* (LC) at para 29.

⁷⁰ *Piliso* (LC) at para 30.

⁷¹ *Piliso* (LC) at para 78 the court stated that "I do not for a moment hesitate to conclude that, in the event of an employee having been traumatised in the workplace that, even if the employer, or the employee for that matter, is unable to identify the perpetrator, the legal convictions of the community will reasonably require and expect of an employer that, by way of example, in the first instance, there will be prompt reaction by the employer to commence a process of investigation which will leave no reasonable stone unturned to try and find the perpetrator."

- 3) Take all reasonable steps to eliminate or reduce the possibility of the incident recurring.⁷²

The employer's duty to protect its employees from sexual harassment was also dealt with in the *Media 24 Ltd & another v Grobler*⁷³ decision. Here the court had to ascertain whether the employer has a legal duty to protect an employee from being sexually harassed where the victim and the perpetrator were employed by different employers in the same work place. Further, the victim claimed that, as a result of the alleged sexual harassment, she suffered severe psychological trauma which manifested into post-traumatic stress syndrome.⁷⁴

Grobler alleged that over a period of approximately six months during 1999 she was sexually harassed on various occasions by Samuels, a fellow employee. The last and most traumatic of these incidents (the 'flat incident') occurred away from work while Grobler was showing her flat to Samuels.⁷⁵

The employer denied that, in sexually harassing the respondent as alleged, the perpetrator had been acting in the course and scope of his employment.⁷⁶

The court held that apart from protecting employees from physical harm, the duty of protection extends to protect employees from psychological harm caused by sexual harassment.⁷⁷ Further, sexual harassment will violate the right to an employee's integrity of body and personality which belongs to every person and is protected in our legal system both criminally and civilly. An employer undoubtedly has a duty to ensure that its employees are not subjected to this form of violation in the workplace.⁷⁸

⁷² *Piliso* at paras 78 – 80. The court accordingly granted constitutional damages in favour of the employee and held that the employer had failed to meet these requirements. See also s 23(1) of the Constitution which guarantees the right to fair labour practices.

⁷³ (2005) 7 BLLR 649 (SCA).

⁷⁴ *Grobler* (SCA) at para 7.

⁷⁵ *Grobler* (SCA) at para 77.

⁷⁶ *Grobler* (SCA) at para 8.

⁷⁷ *Grobler* (SCA) at para 65. By coming to this conclusion, the court relied on the case of *Van Deventer v Workmen's Compensation Commissioner* 1962 4 SA 28 (T) at 31B-C where the court held that an employer owes a common law duty to its employees to take reasonable care for their safety.

⁷⁸ *J v M Ltd* (IC) at 757I.

The court further held that the company should have realised the victim's unwillingness to pursue the matter had nothing to do with the credibility of her claims and that preventative steps were required.⁷⁹

The employer argued that the employee had no claim against the employer other than in terms of COIDA.⁸⁰ The court held, and rightly so, that but for the flat incident, the employee would not have sustained post-traumatic stress disorder or any other psychiatric injury qualifying for legal redress. The court went on further to state that it may be that the flat incident constituted the "last straw" that broke the camel's back but what ultimately caused the employee's injury was the sexual harassment that took place in the flat incident.⁸¹ The incident thus did not arise out of or in the course of the employee's employment but in her own private activity.⁸² Had the incident of the flat taken place during the course and scope of her employment, she may very well have been able to claim in terms of COIDA.⁸³

The court was trying to emphasise is that in order for a victim to recover damages for emotional shock, it will need to be proven that the sexual harassment amounted to something traumatic (like the "flat incident") or amounted to a recognised psychiatric injury.⁸⁴

⁷⁹ *Grobler (SCA)* at para 71. See further Le Roux *Law, Democracy and Development* (2006) 62 where it is established that the duty to protect is not reactive but proactive, and a workplace policy must be implemented in terms of the 2005 Code of Good Practice on Sexual Harassment cases. However, even when the employer has not implemented such Code, then it may still be liable in terms of common law.

⁸⁰ S 35(1) states that no action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.

⁸¹ *Grobler (SCA)* at paras 21-22.

⁸² *Grobler (SCA)* at para 77.

⁸³ See s 65. (1) which states the following: "Subject to the provisions of this chapter, an employee shall be entitled to the compensation provided for and prescribed in this Act if it is proved to the satisfaction of the Director-General- (a) that the employee has contracted a disease mentioned in the first column of Schedule 3 and that such disease has arisen out of and in the course of his or her employment; or (b) that the employee has contracted a disease other than a disease contemplated in paragraph (a) and that such disease has arisen out of and in the course of his or her employment."

⁸⁴ Le Roux *Law Democracy and Development* (2006) 57.

The court thus held the employer liable on the basis of an extended interpretation of the common law doctrine of vicarious liability for its failure to comply with its contractual duty to provide a safe working environment.⁸⁵ Conversely, the court came to a different conclusion in the *Piliso* matter, and held that the doctrine of vicarious liability could not be applied where the identity of the perpetrator was unknown and it could not be established whether he was an employee of the employer.⁸⁶

2.5 Conclusion

It is trite law that an employer has a common law duty to take reasonable care for the safety of its employees and to provide its employees with a safe working environment.

Despite legislation intervention, the common law remains relevant and is now being developed in line with the Constitution. The Constitution⁸⁷ stipulates that when a court embarks upon a course of developing the common law, it is obliged to promote the spirit, purport and objects of the Bills of Rights. This ensures that the common law will evolve within the framework of the Constitution, consistent with the basic norms of the legal order that it establishes.⁸⁸ Should an employer not discharge its common law duty of protection successfully, the court may order the employer to pay both compensation (non-patrimonial) and damages (patrimonial) to the aggrieved victim.⁸⁹

Sadly, the common law has not been sufficiently developed to pronounce on the extent of an employer's liability for sexual harassment cases. Further, there is uncertainty as to what extent an employer can be found liable in terms of the doctrine of vicarious liability. As seen in the *Grobler* and *Piliso* decisions, the courts have failed to provide

⁸⁵ Du Toit *et al* (2015) 714.

⁸⁶ Du Toit *et al* (2015) 714.

⁸⁷ S 39 (2).

⁸⁸ *City of Cape Town v South African National Roads Authority Ltd* 2015 3 SA 386 (SCA) at para 29.

⁸⁹ The court considered the distinction between an award for compensation and an award for damages with reference to the case of the *SA Airways (Pty) Ltd v Jansen van Vuuren and Another* 2014 35 ILJ 2774 (LAC), in which it was stated that "damages" refers to an actual or potential monetary loss (i.e. patrimonial loss), while "compensation" refers to the award of an amount in *solatium* (i.e. non-patrimonial loss).

clear and consistent guidance on the doctrine of vicarious liability's extension to non-employees. One is uncertain as to whether a victim of sexual harassment may have a valid claim in terms of the common law if he or she is exposed to sexual harassment by an independent contractor or a client of an employer.

It is on this basis that the development of the common law is welcomed in order to provide guidance on the extent of the employer's duty to provide a safe working environment, as well as clarity on the limitations of vicarious liability in sexual harassment cases.

CHAPTER 3: SEXUAL HARASSMENT AS A FORM OF UNFAIR DISCRIMINATION

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3.1 Introduction

Sexual harassment is a contemporary topic that has become ever so prevalent in today's society. With the "#MeToo" movement⁹⁰ that is currently circulating social media, it is crucial that employers are in a position to properly cater for victim's grievances and complaints.

Although it is vital that proper policies are implemented and circulated within the workplace, such policies should not be used to entertain burdensome inquiries and investigations that do not meet the requirements and the true definition of sexual harassment.

Although sexual harassment is relevant in today's society, it is crucial that employers are up to speed in its developments by studying applicable case law.⁹¹ This chapter will therefore investigate whether the current test for sexual harassment is sufficient,

⁹⁰ Jordaan and Masweneng (2017) <https://www.timeslive.co.za/news/south-africa/2017-10-19-metoo-campaign-sparks-calls-for-new-ways-to-tackle-woman-abuse/>.

⁹¹ *Simmers v Campbell Scientific Africa (Pty) Ltd* 2014 35 ILJ 2866 (LC) and *Campbell Scientific Africa (Pty) Ltd v Simmers* 2016 37 ILJ 116 (LAC) where the definition of sexual harassment was analysed. See also the discussion that follows.

and will further investigate whether this type of misconduct does actually amount to unfair discrimination in the workplace.

3.2 Is sexual harassment a form of unfair discrimination?

The ILO⁹² was recognised as a point of departure in defining the term discrimination. In *SACWU & Others v Sentrachel Ltd*⁹³ the Industrial Court, had to determine whether wage discrimination occurred based on race and thus relied on the Convention⁹⁴ for purposes of defining discrimination:

Discrimination is defined as including any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.⁹⁵

The Constitution of South Africa gives way to an equality clause.⁹⁶ This clause must be read in conjunction with section 10 of the Constitution, which states that everyone has the inherent right to dignity and the right to have their dignity respected and protected.⁹⁷ Subsequently the EEA was implemented in order to address discrimination within the employment arena by giving application to the constitutional right to equality,⁹⁸ dignity and unfair labour practices.⁹⁹ The EEA states that harassment of an employee is a form of unfair discrimination¹⁰⁰ prohibited on any one

⁹² *Convention 111 on Discrimination in Employment and Occupation* (1958).

⁹³ (1988) 9 ILJ 410 (IC).

⁹⁴ S 3(d) requires that the EEA be interpreted in compliance with South Africa's international law obligations, particularly the obligations under the ILO Convention No.111 on Discrimination in Employment and Occupation (1958). The Convention prohibits all discrimination against employees.

⁹⁵ *Sentrachel Ltd* at 429E-H.

⁹⁶ S 9 of the Constitution states that everyone is equal before the law and has the right to equal protection and benefit of the law. S 9(2) states: "Equality includes the full and equal enjoyment of all rights and freedoms.

⁹⁷ See *President of the RSA & Another v Hugo* 1997 4 SA 1 (CC) at 586 where the court held that "at the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which human beings will be accorded equal dignity and respect regardless of their membership to particular groups."

⁹⁸ Preamble of EEA.

⁹⁹ S 23(1) of the Constitution.

¹⁰⁰ One could argue whether it was necessary for the EEA to include the word "unfair" as it creates an impression that the onus can be shifted to the perpetrator to prove that the harassment was fair (as a defence). Workplaces are required to adopt a zero-tolerance approach as harassment should never

of the unlisted grounds of unfair discrimination listed in subsection(1).¹⁰¹ In interpreting the right to equality in the Constitution, the Constitutional Court has followed a two-stage enquiry into whether there was unfair discrimination on a prohibited ground and then, whether the discrimination was unfair.¹⁰²

Therefore by stipulating that harassment is unfair discrimination as mentioned in section 6(3) of the EEA, the legislator relieved the burden of victims in harassment cases to prove, first, that the harassment was discriminatory, and secondly, that it amounted to unfair discrimination.¹⁰³ This is in keeping with ILO Convention 111 as the Convention prohibits all discrimination against employees ultimately making the second leg of the two-stage enquiry (fairness) redundant.¹⁰⁴

Before assessing the elements which could form the basis of a claim for sexual harassment, an investigation into the test for sexual harassment must first be dealt with.

3.3 The definition of sexual harassment

The LRA¹⁰⁵ empowers NEDLAC¹⁰⁶ to prepare and issue Codes of Good Practice. Two Codes that were issued that are of relevance to this topic are the 1998 Code of Good Practice on the Handling of Sexual Harassment Cases in the workplace¹⁰⁷ (the "1998

been seen to be justified. However, one is still uncertain as to whether the overall burden of proof rests with the complainant or with the employer (my emphasis).

¹⁰¹ S 6 (3) of the EEA stipulates the grounds for unfair discrimination in that no person may unfairly discriminate directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, (and) birth or on any other arbitrary ground.

¹⁰² *Harksen v Lane NO & Others* 1998 1 SA 300 (CC) at 323. The notion of fairness fulfils an important function in an assessment of whether the impugned conduct stands as a barrier to the achievement of equity in the workplace.

¹⁰³ Calitz *Stell Law Review* (2009) 421.

¹⁰⁴ Van Niekerk *et al* (2017) 125.

¹⁰⁵ S 203(1) (a) of the LRA.

¹⁰⁶ National Economic Development and Labour Council (South Africa).

¹⁰⁷ G.N 1367 of 1998 published in Government Gazette No 19049 of 17 July 1998.

Code”), and the 2005 Code of Good Practice on the Handling of Sexual Harassment Cases in the workplace¹⁰⁸ (the “2005 Code”).

In essence, the Codes provide guidelines on defining sexual harassment, the various forms such harassment may take, the proposed test for sexual harassment and workplace policies and procedures to deal effectively with such.¹⁰⁹

The 1998 Code provides the following definition for sexual harassment:

Sexual harassment is unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual. Sexual attention becomes sexual harassment if:

- The behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or
- The recipient has made it clear that the behaviour is considered offensive; and/or
- The perpetrator should have known that the behaviour is regarded as unacceptable.¹¹⁰

The 2005 Code defines sexual harassment as follows:

Sexual Harassment is unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier of equity in the workplace, taking into account all of the following factors:

- Whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
- Whether the sexual conduct was unwelcome;
- The nature and extent of sexual conduct; and
- The impact of the sexual conduct on the employee.¹¹¹

The 1998 Code is still in force and has not been formally withdrawn, which means that the 2005 Code did not replace the 1998 Code.¹¹² The result of such is that both Codes will need to need to be read and interpreted together. This creates confusion in the

¹⁰⁸ G.N. 1357 of 2005 published in Government Gazette No 27865 of 4 August 2005.

¹⁰⁹ Van Niekerk *et al* (2017) 127 – 128.

¹¹⁰ Item 3 of the 1998 Code.

¹¹¹ Item 4 of the 2005 Code.

¹¹² *Simmers* (LAC) para 24.

mind of the interpreter especially when unpacking the definition of sexual harassment as highlighted in both Codes.

The 1998 Code is awkwardly written and presents the interpreter with a number of issues. One being with the terminology "and/or". One is uncertain as to whether the elements should be read disjunctively or conjunctively.¹¹³

The 2005 Code on the other hand, takes all the factors into account before a determination on sexual harassment can be made. It also appears to be more lenient towards victims by relying on a more subjective test,¹¹⁴ whereas the 1998 Code states that the perpetrator should have known that the behaviour is regarded as unacceptable (objective test).¹¹⁵ In other words, does sexual harassment only occur once the victim has made that determination based on his or her feelings, alternatively does it only occur if it can be determined that the perpetrator knew or ought to have reasonably known that the conduct constituted sexual harassment?¹¹⁶

To balance the dangers of an entirely subjective test with those of an entirely objective test, Le Roux, Rycroft and Orleyn suggest a "reasonable victim test," which allows the subjective feelings experienced by a victim to be assessed against an objective standard. They reject the reasonable person test as complex and question "whether the same reactions can be expected of a woman in a rural setting as one in an urban setting?"¹¹⁷

For example, in the United States of America, a "reasonable woman standard" is applied in the lower courts in determining if indeed an incident could legally be classified as sexual harassment. The "reasonable woman standard" considers the

¹¹³ Cooper *ILJ* (2002) 27.

¹¹⁴ See requirements listed in the 2005 Code where reliance is placed on the unwelcome conduct and impact it had on the employee. In *Reddy v University of Natal* 1998 1 BLLR 29 (LAC) at 31 where the court applied a subjective test when it defined sexual harassment as "any unwanted sexual behaviour or comment, which has a negative effect on the recipient."

¹¹⁵ *Gerber v Algorax (Pty) Ltd* 2000 1 BALR 41 (CCMA) opted for an objective test in order to make a determination on whether sexual harassment occurred.

¹¹⁶ Le Roux, Rycroft and Orleyn (2010) 23.

¹¹⁷ Le Roux, Rycroft and Orleyn (2010) 24.

gender of the victim because research has established the existence of large gender differences in perceptions of hostile environment sexual harassment situations. Therefore, studies of perception of sexual harassment may serve to further establish reasonable woman standards. For example, women are more likely than men to consider sexual teasing, jokes, looks and gestures, as well as remarks from co-workers, to be sexual harassment.¹¹⁸

Although the “reasonable woman test” has its advantages because it incorporates the experiences of the woman as the typical victim, one problem with this test is that it exposes employers to claims from super sensitive employees. It may also result in holding a man responsible for his conduct, which from his view, he did not realise that such conduct was offensive.¹¹⁹

3.3.1 Case law leaning towards a subjective approach

In *Campbell Scientific Africa (Pty) Ltd v Simmers*¹²⁰ the court had to deal with the definition of sexual harassment as well as the applicable test.

A senior male employee, Simmers, and an external female consultant were on a business trip to Botswana to survey a site in order to install some equipment for the Botswana Power Corporation.¹²¹ While staying overnight at a lodge, Simmers said to the female consultant, “Do you want a lover tonight?” She made it clear that she did not and that she had a boyfriend. He responded, “If you change your mind during the night, you are welcome to come to my room”. The female consultant said that she felt threatened and that Simmers advances were not welcome at all. Simmers disputed this version by saying that he only asked her once and half-jokingly “Do you want a

¹¹⁸ Ekore *Gender & Behaviour* (2012) 4360.

¹¹⁹ Basson *Stell Law Review* (2007) 434.

¹²⁰ *Simmers* (LAC).

¹²¹ It must be emphasised that Simmers and the complainant were not employed by the same employer. They further did not work in the same workplace and had no continuous workplace relationship beyond this project.

lover tonight?" Mr Simmers was then subsequently dismissed for sexual harassment following a disciplinary hearing.¹²²

Although the comment was not made during working hours, the commissioner at the CCMA found the conduct to constitute sexual harassment in the form of unwanted sexual advances. He also agreed with the sanction of dismissal to be both procedurally and substantively fair.¹²³

The Labour Court¹²⁴ found that it is common cause that Simmers did not persist in his proposals once the female consultant told him that it was unwelcome.¹²⁵ The court further went on to say that the words were certainly inappropriate and did not cross the line from a single incident of an unreciprocated sexual advance to sexual harassment. Further, the incident should constitute an impairment of the victim's dignity which involves an infringement of bodily integrity such as touching, groping or some other form of sexual assault or quid pro harassment.¹²⁶ The Labour Court ruled that the dismissal of Simmers was unfair.

The Labour Appeal Court erred to the EEA¹²⁷ which treats harassment as a form of unfair discrimination, and that such conduct poses a barrier to the achievement of substantive equality in the workplace, of which is echoed in both the 1998 and 2005 Codes.¹²⁸

The court ruled that although Simmers' conduct amounted to one incident¹²⁹ and said incident was not physical and was not persisted with thereafter, it did not

¹²² *Simmers* (LAC) paras 1 – 7.

¹²³ *Simmers* (LAC) para 10.

¹²⁴ *Simmers* (LC).

¹²⁵ See *Rustenburg Platinum Mines v United Association of SA on behalf of Pietersen & Others* 2018 39 ILJ 133 (LC) (*Pietersen*) at para 45 where the court found that there are different ways in which a complainant may indicate that sexual conduct is unwelcome, including non-verbal conduct such as walking away or not responding to the perpetrator. The commissioner failed to appreciate that in the seven years that the sexual advances had persisted, not once had the complainant reciprocated Pietersen's advances.

¹²⁶ *Simmers* (LC) paras 28 – 29.

¹²⁷ S 6(3) of the EEA.

¹²⁸ *Simmers* (LAC) para 19.

¹²⁹ Item 3 of the 1998 Code states that a single incident may amount to sexual harassment, without

negate the fact that it constituted sexual harassment. Simmers violated the victim's right to enjoy substantive equality in the workplace.

Realistically speaking, not all unwelcome sexual attention of a single instance paid to another should be deemed as sexual harassment. The conduct usually only becomes harassment if it persists. However, if a single incident were to justify a particular act to be classified as sexual harassment, it will then have to be a serious transgression of an oppressive nature. It would be unthinkable that a single occurrence of winking at a colleague could justify a formal sanction.¹³⁰ Thus, by only relying on the hurt feelings of the victim,¹³¹ could potentially open the floodgates of litigation for employers as the test makes provision for overly sensitive victims.¹³²

Objectively, it can be argued that Simmers did not threaten the complainant or give her reason to believe that he would force himself on her. It thus follows that the reasonable person would not have felt threatened after a single invitation was extended to him or her and thus the complainant's reaction should not tip the scale of seriousness.¹³³

The Labour Appeal Court further failed to consider all three factors as outlined in the definition of sexual harassment in the 1998 Code. That being it said, it only relied and placed much emphasis on one factor; that being that the victim considered the conduct to be offensive. The Labour Appeal Court did not look at all the factors as a whole in item 3 of the 1998 Code. The fact that the conduct was not serious, and an absence of a future working relationship should have also been taken account in order to be fair to both the complainant and Simmers.¹³⁴

clarifying as to when this will be the case.

¹³⁰ Botes *TSAR* (2017) 767.

¹³¹ See *Simmers* (LAC) para 27 where the court relied on the victim's version that "she was insulted and felt "incredibly nervous" given the proximity of the sleeping arrangements."

¹³² See *Grogan Dismissal* (2017) at 301, where the author argues that an employee guilty of sexual harassment should not be allowed to benefit from the fact that his victim may have "overreacted" to the misconduct. To an extent, the harasser must "take his victim has he find him or her."

¹³³ Botes *TSAR* (2017) 783.

¹³⁴ Botes *TSAR* (2017) 788.

The recent case of *Rustenburg Platinum Mines v United Association of SA on behalf of Pietersen & Others*¹³⁵ also applauded the use of a subjective test. In this case, the court also had to determine the line between innocent attraction and sexual harassment. The perpetrator had made sexual advances towards the victim; however it was the perpetrator's version that the victim's "docile" conduct encouraged him to do so, and as such it did not amount to unwanted sexual harassment.¹³⁶

The court found that the commissioner erred in placing specific emphasis on whether the perpetrator must have been aware or should have reasonably been aware that his conduct was unwanted by and deemed offensive to the complainant. The Labour Court held the absence of one factor does not mean that sexual harassment did or did not occur (as highlighted in the 2005 Code). It further held that commissioners are obliged to consider the impact of the sexual conduct of the employee.¹³⁷

3.3.2 Case law leaning towards an objective approach

In the case of *Gerber and Algorax (Pty) Ltd*, the CCMA had to also determine the applicable test for sexual harassment. The applicant, a senior employee, was dismissed after several female employees had complained that he had subjected them to unwanted attention of a sexual nature, including physical touching and suggestive comments.¹³⁸

In determining the appropriate test, the CCMA recognised that what may be acceptable in a normal social setting need not necessarily be regarded as normal in the workplace. Conduct that can be defined as sexual harassment affects victims in different ways. However, the test for whether conduct amounted to sexual harassment is objective and is aimed at establishing whether the conduct

¹³⁵ 2018 39 ILJ 133 (LC) (*Pietersen*).

¹³⁶ *Pietersen* (LC) at para 1.

¹³⁷ *Pietersen* (LC) at para 41.

¹³⁸ *Gerber* (CCMA) 41.

complained of unreasonably interfered with the complainant's work performance. Applying this test, the applicant's conduct unquestionably amounted to sexual harassment.¹³⁹

The danger with adopting a purely objective test or "reasonable person" test is that it embodies society's values which, to a large extent, remain male-dominated. Women's perceptions regarding sexual harassment will not necessarily be considered in assessing the conduct in question.¹⁴⁰

The preferred test applicable in my view, is the "reasonable victim" test. This test considers the feelings of the victim as well as the surrounding circumstances by looking at, *inter alia*, the infringement of the victim's dignity as well as the objective severity of the harassment. This was confirmed in the *Taljaard v Securicor*¹⁴¹ matter where Jamodien C supported this approach by emphasising that the test is not whether the perpetrator believed his behaviour was welcome, but that the victim found his behaviour to be unwelcome¹⁴² (the subjective test), and whether a reasonable person in his position would find it so (the objective test).¹⁴³

3.4 Conclusion

It was ascertained that sexual harassment constitutes unfair discrimination based on the grounds of sex and/or gender. Unfortunately, legislation is silent on whether a crude comment, inappropriate joke or a sexual advance can proceed to form the basis of a sexual harassment claim.

¹³⁹ *Gerber* (CCMA) 51.

¹⁴⁰ Basson *Stell Law Review* (2007) 433.

¹⁴¹ 2003 *ILJ* 1167 (CCMA).

¹⁴² In *Maepe V CCMA* 2008 8 *BLLR* 723 (LAC) para 26 the Labour Appeal Court had to determine whether the conduct of the alleged harasser constituted sexual harassment. He made sexual advances to the victim which he should never have made. However, said advances did not amount to sexual harassment as the victim did not object to it and further encouraged the alleged harasser's behaviour until the issue of her performance appraisal rose.

¹⁴³ *Taljaard* 1174A-B.

It is therefore up to the courts to determine the test for sexual harassment. Although there is case law that dates all the way back to 2000 (*Gerber*), determining the test for sexual harassment appears to still be an ongoing exercise (as seen in the recent *Simmers* and *Pietersen* cases).

NEDLAC has published two Codes in an attempt to provide guidance to both employers as well as the courts when determining the issue of sexual harassment in the workplace. It is my view that these Codes are confusing and fail to provide clarity on the exact test for sexual harassment. One can assume that an objective and subjective test should be applied in order to achieve the constitutional right to fair labour practices, however it appears that the courts are striving towards a zero-tolerance approach when dealing with cases of sexual harassment (as seen in *Simmers* and *Pietersen*).

There appears to be, now more than ever, a desperate need for NEDLAC to revisit both 1998 and 2005 Codes. I therefore recommend that a new single, uniform Code be drafted on the handling of Sexual Harassment Cases in the Workplace. This Code should clearly state the appropriate test (subjective, objective or both) to avoid any confusion. Further, sexual harassment poses to be a difficult and highly specialised area of our law. I also suggest that sexual harassment specialists be appointed in the workplace in order to deal with a victim's grievance fairly and efficiently from the onset, which will in turn affect employee productivity within an organisation.

CHAPTER 4: LIABILITY OF EMPLOYERS

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4.1 Introduction

The Constitution enforces the protection of the right to equality and the right to human dignity. Considering South Africa's history and the previous laws of apartheid, legislation was implemented in an attempt to address the imbalances of the past.¹⁴⁴

Although legislation has been enacted post-apartheid, there are still cases of unequal treatment between persons, specifically between employees in the workplace.¹⁴⁵

As stated in Chapter 2 of this dissertation, employers are expected to create a working environment free from all forms of discrimination. This stems from the common law duty of protection.

Should employers not adhere to this duty of protection, they may attract liability in terms of the EEA, the Constitution as well as the LRA.

¹⁴⁴ See EEA and PEPUDA.

¹⁴⁵ South African Human Rights Commission, 8 March 2016; 25 April 2016.

https://www.sahrc.org.za/home/21/files/SAHRC%20%20Unfair%20Discrimination%20in%20the%20Workplace%20Report%20_%20September%202017.pdf.

This chapter will deal with the liability of the employer in sexual harassment cases. It will further propose a solution to minimise the cases of sexual harassment in the workplace.

4.2 Employers liability in sexual harassment cases

The 2005 Code emphasises the need for employers and managers to play a leading role in creating and maintaining a working environment free from sexual harassment.¹⁴⁶ This duty of protection also extends to customers, suppliers and other people who have business dealing with the employer.¹⁴⁷

Item 7.1 of the 2005 Code places a further duty on the employer to adopt a sexual harassment policy. The policy should also contain a statement that sexual harassment constitutes a form of unfair discrimination on the basis of sex, gender or sexual orientation and that it constitutes a barrier to equity.

Item 7.2 of the 2005 Code requires that the policy must be communicated effectively to all employees. A well-structured policy accompanied by an initial orientation and education session will also assist employers in avoiding liability in terms of section 60 of the EEA.

Section 60 of the EEA deals with the liability of employers, if it is alleged that an employee, while at work, contravened the provisions of the EEA of which was brought immediately to the attention of the employer.¹⁴⁸ If the employer fails to take necessary steps by ensuring that all relevant parties are consulted, and further that all the necessary steps were taken to eliminate the alleged unfair discriminatory conduct, then the employer will be held liable for said conduct if proven.¹⁴⁹ However, the

¹⁴⁶ See item 6.2 of the 2005 Code.

¹⁴⁷ Item 6.1 – 6.4 of the 2005 Code.

¹⁴⁸ S 60(1) of the EEA.

¹⁴⁹ S 60(3) of the EEA. This confirms the doctrine of vicarious liability as discussed in Chapter 2 of this dissertation.

employer may raise a defence that it did all that was reasonably practical to ensure that the employee would not act in contravention of the EEA.¹⁵⁰

One of the “reasonably practical ways” in which an employee can educate and stimulate change is through a policy which is given specific status. A policy can be made through an employment contract, just as normally done with the Disciplinary Code. Where an employer fails to follow the process as stated in its sexual harassment and Disciplinary Code, the employer runs the risk of a claim based on common law breach of contract.¹⁵¹

The downfall of both 1998 and 2005 Codes is that it does not offer guidance in respect of the type of disciplinary action that can be taken against an employee should he be guilty of sexual harassment. This *lacuna* in the Codes imposes a further risk on employers when dealing with the sanctioning part of a guilty verdict. We can further see how both the Labour Court and Labour Appeal Court in *Simmers* struggled with making a determination on the appropriate sanction for an employee found guilty of sexual harassment.¹⁵²

4.2.1 *Potgieter v National Commissioner of the SAPS*¹⁵³

The applicant was employed at a police station. She was sexually harassed by a fellow employee of the SAPS who was disciplined and fined R600, half of which was suspended. The applicant approached the Labour Court for relief in terms of the EEA. She claimed that she had been unfairly discriminated against and/or victimised by the SAPS and claimed compensation and damages.

¹⁵⁰ S 60(4) of the EEA.

¹⁵¹ Le Roux, Rycroft and Orleyn (2010) 95.

¹⁵² If sexual harassment is not dealt with properly and fairly in a workplace, it could also have a negative impact on the rights of the perpetrator. The employer may be faced with an unfair labour practice claim in terms of s 186(2) of the LRA, wherein an inappropriate sanction e.g. a final written warning was issued to the perpetrator as a result of an alleged sexual harassment complaint. The law of evidence will need to be thoroughly applied, coupled with an extensive investigation involving all relevant parties.

¹⁵³ 2009 30 *ILJ* 1322 (LC).

In order to determine the liability of SAPS in terms of s 60 of the EEA, the court had to determine whether or not the harassment had been reported to the SAPS, and whether the SAPS had consulted with all relevant parties and taken the necessary steps to eliminate the conduct by the perpetrator and to comply with the provisions of the EEA.¹⁵⁴

The victim's concerns were that SAPS had delayed in addressing her complaint of sexual harassment, that the employer failed to follow its own disciplinary procedures, that the sentence imposed on the perpetrator was too lenient, and that the perpetrator was not removed from the premises.

The court held that failure to dismiss the perpetrator does not assist the victim, since her rights should not depend on whether the perpetrator is dismissed. Even if the employer dismissed the perpetrator, but delayed unreasonably in proceeding with the disciplinary enquiry, or failed to suspend the perpetrator where the nature of the alleged sexual harassment clearly necessitated suspension,¹⁵⁵ the eventual dismissal of the employee may not necessarily assist the employer. However, dismissing an employee as part of an appropriate and timeous employer response to a report in terms of section 60(1) of the EEA, should count in the employer's favour. Furthermore, the court was convinced that the SAPS did not unreasonably delay the victim's sexual harassment complaint.¹⁵⁶

¹⁵⁴ *Potgieter* (LC) at paras 5 and 6.

¹⁵⁵ *Potgieter* (LC) at para 53 the court held that "it may well have been prudent for Mafodi (the perpetrator) to have been suspended or removed from the workplace and transferred to another workplace, however there is no general rule that suspension or removal from the workplace is automatic in every sexual harassment complaint. In my view, the nature and extent of the sexual harassment may indicate whether suspension or removal from the workplace of the perpetrator was a necessary step which the employer ought to have taken. The other incidents were on the version of the applicant never reported to the employer and therefore the respondent cannot be faulted for not taking appropriate steps to deal with the complaints."

¹⁵⁶ *Potgieter* (LC) at para 50.

4.2.2 *Mokoena & another v Garden Art (Pty) Ltd & another*¹⁵⁷

The applicant employees contended that they had been sexually harassed by their supervisors. They allege that the employer failed to take proper steps to prevent, eliminate or prohibit sexism and genderism in the workplace. The employer argued that when the complaints of sexual harassment were brought to its attention, it had investigated same and found that there was no evidence of sexual harassment.¹⁵⁸

The court therefore had to consider what conduct constituted sexual harassment and further, whether the employer was successful in escaping liability in terms of section 60 of the EEA.

After applying the 1998 Code, the court found that the first applicant failed to discharge the onus that she was sexually harassed.¹⁵⁹ The court however found that the second applicant had proven on a balance of probabilities that sexual harassment took place relating to one incident.¹⁶⁰ The perpetrator was found guilty of an invasion of privacy, and the employer took steps to remedy the situation by issuing the perpetrator with a warning.¹⁶¹

The court thus found that the employer cannot be criticised for not taking the necessary steps to eliminate the alleged conduct.¹⁶²

¹⁵⁷ 2008 29 ILJ 1196 (LC).

¹⁵⁸ *Mokoena* (LC) at paras 1 – 3.

¹⁵⁹ *Mokoena* (LC) at para 52.

¹⁶⁰ *Mokoena* (LC) at para 56.

¹⁶¹ *Mokoena* (LC) at para 59.

¹⁶² *Mokoena* (LC) 60. Read with para 37 the court held that "although Grove admitted that the first respondent could have dealt with the grievance proceedings in a different way, the first respondent consulted all relevant parties and took the following steps to eliminate the alleged conduct as is required by the EEA - the first respondent issued the second respondent with a written warning (despite being in doubt); and posted a notice on the walls of the premises specifically prohibiting males from entering the change room of females and vice versa. Although the applicants were disappointed with the outcome of the proceedings followed, they failed to file a further grievance and/or lodge an appeal to express their dissatisfaction. There is no evidence before this court to suggest that the steps taken by the first respondent (albeit not in accordance with the guidelines provided by the Code of Good Practice on the Handling Sexual Harassment Cases) were inadequate to protect complainants from the sexual harassment complained of."

What is clear from the above case law, is that perfection is not expected from employers when responding to a claim for sexual harassment. Instead, what is expected is a reasonable and honest effort to deal with the matter, considering the size of the employer's business, as well as the victims delay or failure to convey information that is important to the employer.¹⁶³

4.2.3 The Labour Relations Act

Section 187(1) (f) of the LRA provides that if the reason for a dismissal is the employer's direct or indirect unfair discrimination on the basis of "any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility", such dismissal will constitute an automatically unfair dismissal. In the case of other unfair dismissals, the maximum compensation that may be awarded to an employee who has been unfairly dismissed is twelve months' salary.¹⁶⁴ In the case of an automatically unfair dismissal, the maximum awardable compensation is twenty-four months' salary.¹⁶⁵

Another example of where an employer may be found liable in terms of the LRA for sexual harassment claims is constructive dismissal. A constructive dismissal occurs where the employer by its acts or omissions, renders a continuation of employment by the employee intolerable.¹⁶⁶ The maximum compensation that can be awarded to an employee who has been constructively dismissed is twelve months' salary.¹⁶⁷ Implied in every contract of employment is a duty of mutual trust and confidence.

Failure by an employer to implement policies and procedures in order to eliminate sexual harassment in the workplace, may be construed as a material breach of the

¹⁶³ Le Roux, Rycroft and Orleyn (2010) 136.

¹⁶⁴ S 194(1) of LRA.

¹⁶⁵ S 194(3) of LRA.

¹⁶⁶ S 186(1) (e) of the LRA.

¹⁶⁷ S 194 of the LRA.

implied term of mutual trust and confidence, thus rendering the employee's performance in terms of the contract intolerable.¹⁶⁸

In the case of *Ntsabo v Real Security CC*,¹⁶⁹ the court was tasked with dealing whether the employee was constructively dismissed. The victim resigned after being harassed by her supervisor. The employer consistently ignored the situation, despite being made aware of the incidents of sexual harassment. The Labour Court found that the employer's lack of inaction in dealing with the victim's complaints, rendered it intolerable to continue working at the employer. The court found that she was constructively dismissed.¹⁷⁰

The court awarded the maximum allowable compensation for unfair dismissal.¹⁷¹ The employer's same inaction resulted in a further two awards of compensation. It was ordered to pay a further amount of R20 000 in terms of the EEA for future medical costs for psychiatric treatment, and an amount of R50 000 for general damages including *contumelia*.¹⁷² In addition, the employer was ordered to pay the costs of the application. Its liability for future medical costs and general damages was based on the statutory vicarious liability of the employer for the conduct of its employees created by section 60 of the EEA.¹⁷³

4.3 Conclusion

An employer must ensure that sexual harassment incidents are dealt with expeditiously and efficiently. Once an incident has been reported, and employer is obliged to consult with all the relevant parties, to take the necessary steps in terms of the 2005 Code

¹⁶⁸ Vettori *SAMLJ*(2007) 158.

¹⁶⁹ 2004 1 *BLLR* 58 (LC).

¹⁷⁰ *Ntsabo* (2004) 93.

¹⁷¹ Twelve months salary (R12 000) in terms of s 194(1) of the LRA.

¹⁷² Injury or insult to one's self-esteem. S 50(1) (d) and (e) of the EEA provides that the Labour Court may make any appropriate order, including awarding compensation and damages "in circumstances contemplated in this Act." S 50(2) of the EEA further provides that if the Labour Court finds that an employee has been unfairly discriminated against, it may make "any order that is just and equitable in the circumstances, including – (a) payment of compensation by the employer to the employee; (b) payment of damages by the employer to the employee."

¹⁷³ *Ntsabo* (2004) 97-98.

and employer policy, and further to take all the necessary steps to eliminate sexual harassment.¹⁷⁴

Such steps would include advice on the available procedures, which can include advice, counselling and assistance in concluding a disciplinary hearing.¹⁷⁵ The employer must ensure that these matters are dealt with urgently, with sensitivity and in a fair manner as employees who lodge grievances sometimes fear victimisation, especially when the grievance involves a superior or line manager. Employers are thus under an obligation to protect employees who have lodged a grievance.¹⁷⁶

As seen in the case of *Simmers*, there is a fine line between impermissible and permissible behaviour in sexual harassment cases. Employers should therefore be well equipped with tools when handling complaints of harassment in the workplace in order to determine whether sexual harassment has indeed taken place, and further, if same has occurred, a determination must be made on appropriate punishment to match the transgression. The various types of offences and levels of transgressions must be detailed in sexual harassment policies. It is on this basis that Government revisits both 1998 and 2005 Codes for purposes of redrafting a clearer and single Code establishing the correct test for sexual harassment. Proper guidance on how to establish that sexual harassment has taken place will assist employers in rebutting liability in terms of section 60(3) of the EEA (deeming provision).

¹⁷⁴ Item 8.2 of the 2005 Code.

¹⁷⁵ Item 8.3 of the 2005 Code.

¹⁷⁶ Le Roux, Rycroft and Orleyn (2010) 99. This duty of protection stems from the common law as already discussed in Chapter 2 of this dissertation.

CHAPTER 5: THE POSITION OF SEXUAL HARASSMENT AND DISCRIMINATION IN THE UNITED STATES OF AMERICA AND ENGLAND

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5.1 Introduction

The Constitution of the Republic of South Africa¹⁷⁷ recognises international and foreign law as a foundation of democracy. The labour standards generated by a number of international organisations, in particular the International Labour Organization (ILO) constitutes an important source of customary international law.¹⁷⁸ The ILO's Governing body has identified eight conventions that is considered fundamental.¹⁷⁹ The most applicable fundamental convention for purposes of this chapter is Convention No. 111.

¹⁷⁷ S 39 of the Constitution.

¹⁷⁸ Van Niekerk *et al* (2017) 23.

¹⁷⁹ These conventions are: 1) Freedom of Association and the Right to Organise Convention, 1948 (No.87); 2) Right to Organise and Collective Bargaining Convention, 1949 (No.98); 3) Forced Labour Convention, 1930 (No.29); Abolition of Forced Labour Convention, 1957 (No.105); Minimum Age Convention, 1973 (No.138); Worst Forms of Child Labour Convention, 1999 (No.184); Equal Remuneration Convention, 1951 (No.100); and Discrimination (Employment and Occupation) Convention, 1958 (No.111).

As already determined in Chapter 3 of this paper, sexual harassment is a form of unfair discrimination.¹⁸⁰ Convention No. 111 prohibits discrimination on any of the listed grounds.¹⁸¹ It will also be established that both the 1998 and 2005 Codes are unclear as to what test (subjective, objective or both) should be adopted when defining sexual harassment. It was argued that there is a need to determine the appropriate test within the workplace as same could have a negative impact on employers and could increase their liability for sexual harassment in the workplace.

This chapter will therefore compare South Africa's test for sexual harassment to the test applied in the United States of America and England. This chapter will also briefly discuss sexual harassment as a form of discrimination and the liability of employers in both jurisdictions.

5.2 Sexual Harassment in the United States of America¹⁸²

5.2.1 Sexual harassment as a form of discrimination

Sexual harassment in American law is defined as any unwelcome sexual conduct that creates an intimidating, hostile or offensive work environment.¹⁸³ It is

¹⁸⁰ See Dine and Watt *58 Mod. L. Rev.* 343 (1995) at 349 where the authors of the article disagree with the concept that sexual harassment is a form of discrimination. Where a discrimination claim is made, there must be some real connection between the gender of the victim and the action of the perpetrator. In other words, there must be some form of disparate treatment in order to succeed with a claim for discrimination. Some offensive behaviour based on sexuality of the victim may not be actionable (where the harasser makes no distinction between the sexes in his offensive conduct).

¹⁸¹ See A 1 of Convention No. 111:

"1. For the purpose of this Convention the term discrimination includes--

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies."

¹⁸² Although the USA has not ratified Convention No. 111, the Constitution requires South Africa to consider International and Foreign Law when interpreting the Bill of Rights (see Chapter 2 of the Constitution, more specifically s 9 (right to equality)).

¹⁸³ Kaplowitz and Harris *The Brief* (1997) 32.

suggested that when defining sexual harassment, especially in codes of conduct or other guidelines, three basic principles pertain. All guidelines must:

- acknowledge that sexual harassment is gender discrimination and not isolated misconduct;
- include as sexual harassment all actions ranging from subtle innuendo to assault;
- recognise that sexual harassment may involve sexual advances by a person in a position of authority.¹⁸⁴

Sexual harassment is therefore a form of sex discrimination that violates Title VII of the Civil Rights Act (CRA).¹⁸⁵ Workplace harassment under Title VII of the CRA generally requires the presence of a hostile working environment where discriminatory intimidation must be sufficiently severe or pervasive enough to change the victim's conditions of employment and create an abusive work environment.¹⁸⁶ Through the hostile work environment theory, harassment law has been applied to suppress or attempt to suppress a whole variety of expressive activity.¹⁸⁷

The Equal Employment Opportunity Commission (EEOC) is further responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, colour, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information.¹⁸⁸ Unwelcome sexual advances, requests for sexual favours, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.¹⁸⁹

¹⁸⁴ *CFR Sexual Harassment* (2009).

¹⁸⁵ S 703 Civil Rights Act (1964).

¹⁸⁶ *Harris v Forklift Systems, Inc*, 510 US 17 (1993).

¹⁸⁷ Mallery and Rachal *The Labor Lawyer* (1997) 475.

¹⁸⁸ U.S. Equal Employment Opportunity Commission, date unknown.
<https://www.eeoc.gov/eeoc/>.

¹⁸⁹ U.S. Equal Employment Opportunity Commission, date unknown.
<https://www.eeoc.gov/eeoc/publications/fs-sex.cfm>.

5.2.2 Sexual harassment: A subjective or objective test through the case law

In the matter of *Harris v Forklift Systems Inc.*¹⁹⁰ the victim (Harris) sued her former employer (Forklift) on the basis that the conduct committed by Forklift's president towards her amounted to an "abusive work environment" because of her gender in terms of Title VII of the CRA. The president often insulted the victim based on her gender and made her the target of unwanted sexual innuendos.¹⁹¹

The court had to ascertain whether the conduct committed by the perpetrator amounted to that of sexual harassment. The court held that conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview.¹⁹²

When determining whether the environment is "abusive" or "hostile", the court will need to look at all the circumstances.¹⁹³ The effect of the employee's psychological wellbeing is relevant, but no single factor should be required.¹⁹⁴

The hostile work environment claim is both subjective and objective in that the victim must show that their work environment was objectively and subjectively offensive,¹⁹⁵ where a reasonable person would find hostile and abusive and one where the victim in fact did perceive it so.¹⁹⁶

¹⁹⁰ *Harris v Forklift systems Inc* 510 U.S. 17 (1993) (*Harris*).

¹⁹¹ *Harris* 17.

¹⁹² *Harris* 21.

¹⁹³ See *Harris* 23 where the court held that "these may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."

¹⁹⁴ *Harris* 23.

¹⁹⁵ *Ellis v CCA of Tennessee LLC*, 650 F.3d 640 (7th Circuit 2011) (*Ellis*).

¹⁹⁶ *Harris* 21.

5.2.3 Liability of employers in sexual harassment cases: United States of America

As seen above, it is required under the CRA to maintain a working environment free from hostility, intimidation or offensive conduct.

The United States Supreme Court in the case of *Faragher v City of Boca Raton*¹⁹⁷ set the standard for determining when an employer will be liable for harassment committed by its employees.

After resigning as a lifeguard with respondent City of Boca Raton (City), Faragher brought an action against the City and her immediate supervisors for nominal damages and other relief, alleging that the supervisors created a "sexually hostile atmosphere" at work by repeatedly subjecting Faragher and other female life guards to "uninvited and offensive touching," by making lewd remarks and by speaking of women in offensive terms, and that the conduct amounted to discrimination in the terms and conditions of her employment. This violated Title VII of CRA.¹⁹⁸

The court had to determine whether the employer (City) could be held vicariously liable¹⁹⁹ for the conduct committed by its supervisors. The court held that an employer is subject to vicarious liability to a victimised employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. The scope of supervisory employment may be treated separately because supervisors have special authority enhancing their capacity to harass and the employer can guard against their misbehaviour easily.²⁰⁰ When no tangible employment action is taken, an employer may raise an affirmative defence on the basis that the employer exercised reasonable care to prevent and correct promptly any

¹⁹⁷ *Faragher v City of Boca Raton*, 524 U.S 775 (1998) (*Faragher*).

¹⁹⁸ *Faragher* 775.

¹⁹⁹ S 219(1) *Restatement (Second) of Agency* (1958) provides that "a master is subject to liability for the torts of his servants committed while acting in the scope of their employment".

²⁰⁰ *Faragher* 776 -777.

sexual harassing behaviour, and that the victim unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer.²⁰¹

While it is clear from the above case law that an employer may escape liability in certain circumstances, it may not always be the case if the employer has not adopted a proper sexual harassment policy that has been circulated to all its employees.

From the above, it is quite clear that employers are required to implement sexual harassment policies within their organisation. The sexual harassment policy must set out a procedure for making, investigating, and effectively dealing with complaints of sexual harassment. The employer must further train designated personnel to investigate complaints, document the facts uncovered by the investigation including: statement by witnesses, and recommend appropriate action.²⁰² The Supreme Court observed that a procedure which encourages victims to come forward provides an employer with a substantially stronger defence.²⁰³

5.3 Sexual Harassment in England

5.3.1 Sexual harassment as a form of discrimination

The laws of the European Union (EU) and Britain are inextricably linked and cannot be considered in isolation.²⁰⁴ Article 1 of the Commission's Recommendation²⁰⁵ states the following:

It is recommended that the Member States take action to promote awareness that conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work, including conduct of superiors and colleagues, is unacceptable if: (a) such conduct is unwanted, unreasonable and offensive to the recipient; (b) a person's rejection of, or submission to, such conduct on the part of employers or workers (including superiors or colleagues) is used explicitly or implicitly as a basis for a decision which affects that person's access to vocational training, access to employment,

²⁰¹ *Faragher* 778.

²⁰² Achampong (1999) 163.

²⁰³ *Meritor Savings Bank, Fsb V. Vinson et al* U.S 477 (1985) at 73.

²⁰⁴ Dine and Watt *58 Mod.L.Rev.* (1995) 344.

²⁰⁵ A 1 of Recommendation 92/131/EEC.

continued employment, promotion, salary or any other employment decisions; and/or (c) such conduct creates an intimidating, hostile or humiliating work environment for the recipient; and that such conduct may, in certain circumstances, be contrary to the principle of equal treatment within the meaning of Articles 3, 4 and 5 of Directive 76/207/EEC.²⁰⁶

Sexual harassment is further defined in the recommendation²⁰⁷ as:

Sexual harassment means unwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work. This can include unwelcome physical, verbal or non-verbal conduct.

²⁰⁶ A 3 of the Directive 76/207/EEC states the following:

"1. Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.

2.To this end, Member States shall take the measures necessary to ensure that: (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;(b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended;(c) those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded shall be revised ; and that where similar provisions are included in collective agreements labour and management shall be requested to undertake the desired revision."

A 4 of the Directive 76/207/EEC states the following:

"Application of the principle of equal treatment with regard to access to all types and to all levels, of vocational guidance, vocational training, advanced vocational training and retraining, means that Member States shall take all necessary measures to ensure that: (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished; (b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended;(c) without prejudice to the freedom granted in certain Member States to certain private training establishments, vocational guidance, vocational training, advanced vocational training and retraining shall be accessible on the basis of the same criteria and at the same levels without any discrimination on grounds of sex."

A 5 of the Directive 76/207/EEC states the following:

"1. Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.

2.To this end, Member States shall take the measures necessary to ensure that: (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;(b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended; (c) those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded shall be revised ; and that where similar provisions are included in collective agreements labour and management shall be requested to undertake the desired revision."

²⁰⁷ S 2 of 92/131/EEC.

The Equal Opportunities Commission (EOC) has published guidelines for employers on sexual harassment.²⁰⁸ These guidelines were birthed from the Equality Act²⁰⁹ which was introduced to legally protect people from discrimination in the workplace and wider society.²¹⁰ The EOC defines harassment as a form of discrimination. Harassment comprises of unwanted behaviour that makes another person feel offended, humiliated or intimidated. Unwanted behaviour could include physical gestures, abuse, jokes, spoken or written words or offensive emails and expressions.²¹¹ Further, the Sex Discrimination Act (SDA) of 1975 prohibits discrimination on the grounds of sex in the fields of employment.²¹²

5.3.2 Sexual harassment: A subjective or objective test through the case law

In the matter of *Reed v Stedman*,²¹³ the applicant reported to Marketing Manager, Mr Reed. The applicant resigned on the basis that her Manager behaved in an unwelcome sexual manner towards her. He uttered the following words to the Applicant:

You're going to love me so much for my presentation so that when I finish you will be screaming out for more and you will want to rip my clothes off.

The tribunal had to consider the appropriate test in deciding whether the incidents amounted to sexual harassment. Mr Reed maintained that the incidents alleged would not, on an objective basis, be considered as harassment. A number of the comments were made to a group of employees and not to the applicant alone and that the incidents were not grossly offensive, in all the circumstances there was no course of conduct amounting to sexual discrimination.

²⁰⁸ Author and date unknown <https://www.eoc.org.uk/sex-discrimination/>.

²⁰⁹ The Equality Act of 2010 (EA).

²¹⁰ See Chapter 2: Prohibited conduct where no person may discriminate against any other on the account of their sex, gender or sexual orientation.

²¹¹ Author and date unknown, <https://www.eoc.org.uk/what-is-discrimination/>.

²¹² See Part II: Discrimination in The Employment Field.

²¹³ (1999) EAT/443/97.

The Employment Appeal Tribunal preferred to apply a subjective standard and held that it was for the individual concerned to decide what behaviour they found offensive and the fact that another person might not do so did not undermine the claim.

5.3.3 Liability of employers in sexual harassment cases: England

The Sexual Discrimination Regulations (SDR) of 2008 imposes liability on employers for failing to protect employees from third party harassment.²¹⁴

Section 4(1) of the SDA imposes vicarious liability on an employer where the acts of harassment were carried out "in the course of his or her employment".²¹⁵

Where a claimant is seeking to use section 4(1) of the SDA, the employer may have a special defence. The employer may escape liability if it can prove that he took steps as were reasonably practicable to prevent the employee from doing that act or from doing, in the course of his employment, acts of that description.²¹⁶ In determining the "reasonable practical steps", the employer must have at the very least have expressly prohibited sexual harassment in the workplace by implementing a policy on sexual harassment and providing training on its meaning and implications.²¹⁷

²¹⁴ Regulation 4 of SDR (2008) states that "(2B) For the purposes of subsection (2A), the circumstances in which an employer is to be treated as subjecting a woman to harassment shall include those where- (a) A third party subjects the woman to harassment in the course of her employment, and (b) the employer has failed to take such steps as would have been reasonably practicable to prevent the third party from doing so.

(2C) Subsection (2B) does not apply unless the employer knows that the woman has been subject to harassment in the course of her employment on at least two other occasions by a third party.

(2D) In subsections (2B) and (2C), 'third party' means a person other than - (a) the employer, or (b) a person whom the employer employs, and for the purposes of those subsections it is immaterial whether the third party is the same or a different person on each occasion."

²¹⁵ See s 41(1) of SDA: "Anything done by a person in the course of his employment shall be treated for the purposes of this Act as done by the employer as well as by him, whether or not it was done with the employer's knowledge or approval." See further the case of *Chief Constable of the Lincolnshire Police v Stubbs* (1997) EAT/1231/97 wherein an employee was distressed by personal comments of a sexual nature made at a colleague's leaving party that was not on police premises. The Employment Tribunal found that work related functions are an extension of employment and so "in the course of employment."

²¹⁶ S 4(3) of the SDA.

²¹⁷ *Jeffers v Int'l J. Discrimination & L.* 253 (2005) 269.

In the matter of *Go Kidz Go Ltd. Bourdouane*²¹⁸ the court had to ascertain whether the employer took reasonable practical steps to protect the employee from sexual harassment. The employer organised children's birthday parties and employed Ms Bourdouane to host such parties. At one party, Ms Bourdouane was subjected to sexual remarks by one of the children's parents and later deteriorated into an actual assault when the man pinched her bottom. At this stage, the employer decided to send Ms Bourdouane home. However, the next day when Ms Bourdouane insisted on reporting the incident to the police, the employer dismissed her. Ms Bourdouane claimed that she had been directly discriminated against on the grounds of her sex.

The Industrial Tribunal held that Ms Bourdouane had been directly discriminated against because the employer had failed to protect her against the harassment. She had not been dismissed due to any misconduct, but for the fact that she reported the matter to the police. The employer appealed, and Employment Appeal Tribunal found that Ms Bourdouane was indeed sexually harassed because of her sex. The employer was held liable because once it was aware of the harassment, it failed to take any steps to protect its employee. Furthermore, Ms Bourdouane's dismissal amounted to unlawful discrimination under section 6(2) (b) of the SDA.²¹⁹

Although this case sets a standard for imposing liability on an employer, it does not offer assistance in dealing with the test for discrimination.²²⁰ This is similar to the position in South Africa where sexual harassment is automatically recognised as a form of unfair discrimination (as guided by the ILO Convention No.111) without actually unpacking the test for discrimination.²²¹

²¹⁸ (1996) EAT/1110/95.

²¹⁹ Jeffers 7 *Int'l J. Discrimination & L.253* (2005) 267.

²²⁰ That the victim was discriminated on the grounds of her sex and that she subject to less favourable treatment. See Jeffers 7 *Int'l J. Discrimination & L.253* (2005) 267.

²²¹ Refer to *Harsken v Lane* in Chapter 3.

5.4 Comparison and Conclusion

The Hollywood sexual harassment scandal involving film producer Harvey Weinstein, has brought about awareness across the world, with the result of the so called “#MeToo” movement being circulated across various social media platforms today.

It was determined that sexual harassment is seen as a form of discrimination across the three jurisdictions without the need of embarking on an unfairness enquiry.

Regarding the applicable test that should be applied to sexual harassment cases, the USA follows an objective and subjective standard by looking at all the circumstances and not a single factor,²²² whilst South Africa and England on the other hand, places more emphasis on the subjective standard.²²³

Sadly, the USA’s definition does not emphasise the importance of the right to dignity amongst victims, as well as not overstepping the barrier of equity in the workplace.²²⁴ South Africa goes a step further by stating that such conduct constitutes a barrier of equity in the workplace. This demonstrates the progressive nature of South African law when dealing with cases of harassment, given its history of apartheid. The irony is that the right to equality still remains as the most violated right in South Africa.²²⁵

The liability of employers in sexual harassment cases, also appears to be similar throughout the three studied jurisdictions. In South Africa, a person accused of sexual harassment can be held liable delictually and contractually. In *J v M*²²⁶ the court stated

²²² These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employees work performance.

²²³ S 4 of the 2005 Code states the following: “whether the sexual conduct was unwelcome; the nature and extent of the sexual conduct; and the impact of the sexual conduct of the employee.”

²²⁴ See Le Roux, Rycroft and Orleyn (2010) at 41 where the courts in the USA found that the correct classification was not “sex” or “gender”, but “the class of persons who refused to engage in a sexual affair with his/her supervisor” and, not being confined to one sex, was not discrimination on the basis of sex or gender. It is submitted that this type of reasoning is not possible in terms of the EEA and 2005 Code.

²²⁵ SABC, 2017 <https://www.sahrc.org.za/index.php/sahrc-media/news/item/575-equality-remains-one-of-the-most-violated-rights-in-sa-sahrc>.

²²⁶ *J v M* (IC) 757J – 758A.

that it is the employer's duty to ensure that employees are not exposed to sexual harassment. An employer who neglects this duty can be held vicariously liable.

In USA sexual harassment law, the courts have also emphasised the importance of creating and implementing sexual harassment policies. This was confirmed in the *Faragher v City of Boca Raton* case. This case also distinguishes between ordinary employees and supervisory employees, whereas in South African law, the 2005 Code emphasises the need for employers and managers to play a leading role in creating and maintaining a working environment in which sexual harassment is unacceptable.²²⁷

With regards to England and following the Council Resolution of 29 May 1990 on the protection of the dignity of women and men at work, the European Commission intended on providing guidelines for employers, trade unions and employees to prevent sexual harassment and ensure swift implementation of procedures to solve problems and prevent their repetition. The Code was introduced to all working men and women to encourage them to respect one another's human integrity.²²⁸ Further, section 4(3) of the SDA establishes a defence for employers, if it can be shown that it has implemented a sexual harassment policy and had taken additional steps to prevent and illuminate sexual harassment in the workplace.

Therefore, there is a positive duty to adopt a sexual harassment policy relating to the treatment of harassment cases and put in place continuous training on this issue. Should an employer not follow a proactive stance in combating this form of misconduct in the workplace, it may find it difficult to defend prospective claims lodged by victims of sexual harassment.²²⁹

²²⁷ See item 6.2 of the 2005 Code.

²²⁸ Author unknown 2017.

<https://eurlex.europa.eu/legalcontent/SK/ALL/?uri=LEGISSUM%3Ac10917b>.

²²⁹ See s 60 4(4) of the EEA which states that an employer may escape liability if it has shown that it has done all that it is reasonably practical to ensure that the employee would not act in contravention of the EEA.

CHAPTER 6: CONCLUSION

The Labour Appeal Court has characterised sexual harassment as “the most heinous misconduct that plagues a workplace.”²³⁰

This loaded statement alludes to the fact that it is not good enough to merely treat the symptoms of sexual harassment, but rather to deal with the root of sexual harassment before it turns into an epidemic in the workplace.

It is fascinating that the likes of Billy Cosby and Harvey Weinstein have been under the spotlight recently, however the focus should not only focus on the so called “heinous acts” committed by perpetrators, but should also emphasise the importance of the creation of appropriate platforms and channels to report sexual harassment in the workplace.

Although the #MeToo movement is responsible for sowing the seed of awareness, it should not stop there. There is a desperate need for employers, now more than ever, to implement or revisit sexual harassment policies before this “disease” turns into a workplace plague. In the recent case of *Pietersen*,²³¹ the court held that:

“There is a school of thought that holds the view that human beings can be slaves to their urges. That being so, it does not imply that employees are incapable of controlling those urges in the workplace. A workplace should be free from ‘amorous’ and testosterone filled employees looking for love and gratification at every available opportunity. There is everything wrong when employees express their affection in the workplace to each other, to the point where the conduct in question is frowned upon, as it crosses that fine line between innocent attraction and sexual harassment.”

It was explained in this dissertation that a duty rests on employers to protect their employees from harassment by other employees and by customers. This principle was also confirmed in the foreign jurisdictions that was visited. It was further shown that should an employer fail to discharge its duty of care in the workplace, this would in

²³⁰ *Motsamai v Everite Building Products (Pty) Ltd* 2011 2 BLLR (LAC).

²³¹ *Pietersen* (LC) at para 41.

turn attract liability in terms of the EEA,²³² and employers will be held vicariously liable for the acts of its employees.²³³ One of the elements that need to be present when dealing with the doctrine of vicariously liability is that the employee must have acted within the scope of his or her employment. In the case of *Simmers*, the Labour Court and CCMA failed to apply the test for off-duty misconduct for which an employee can be reprimanded. You will recall that both Simmers and the aggrieved (who was an employee of a different company), travelled to Botswana to survey and monitor a site. After completing the survey, the parties had a social dinner at a restaurant one evening before they left the country. It was during this time that Simmers engaged in the alleged sexual misconduct. Had the courts dealt properly with the principles of vicarious liability, it would have perhaps arrived at a different conclusion.

Before an employer can be found liable in failing to take reasonable steps to deal with and eliminate sexual harassment in the workplace, it must first be proven by the victim that sexual harassment has indeed taken place. Not all conduct constitutes sexual harassment, and therefore one is often faced with a difficult task in determining the fine line between permissible and impermissible behaviour.

The 1998 and 2005 Codes are both not clear on whether a subjective test or an objective test should be applied when making this determination. Unfortunately, in terms of South African law, there is no clear definition on sexual harassment either. In comparison to foreign jurisdictions, it appears that both USA and England apply different tests when determining if sexual harassment has taken place. While the USA adopts a subjective and objective standard by looking at all the circumstances, England on the other hand prefers a more subjective approach and relies on the experience of the victim to determine if the conduct was offensive. Currently, the South Africa position is by no means different as the courts are leaning towards a more subjective standard (see *Simmers* and *Pietersen*).

²³² See chapter 2 para 2.2 for a discussion on the extent of liability.

²³³ In *Media 24* (SCA), the court reached a significant finding when it extended the scope of the employer's duty to take reasonable steps to protect employees from physical harm caused by physical hazard, to include a duty to protect employees from psychological harm caused by sexual harassment.

It was recommended that both 1998 and 2005 Codes be revisited, and a new Code of Good Practice on the Handling of Sexual Harassment Cases be drafted. The new Code should set a new definition on sexual harassment incorporating the correct test that should be applied. As it stands, both Codes are very confusing as the 1998 Code makes provision for an objective test, whilst the 2005 Code leans more in favour of a subjective test.

The dangers with a purely subjective approach is that it focuses purely on the perceptions or feelings of the victim, which could lead to frivolous suits by supersensitive employees who might find any situation hostile. Secondly, the application of this test may lead to liability without fault which is not really accepted in terms of our employment law.²³⁴

Should a new Code be drafted and implemented, it will have the effect of dealing away with all types of uncertainty, thus minimising the risk for employers who have to defend claims of sexual harassment which are frivolous. It is therefore on this basis that a "reasonable victim test" is welcomed where all factors relevant to the situation are considered, including the fault on part of the perpetrator.²³⁵

It is my view that the Appeal Court's decision in *Simmers* can be critiqued in this instance. The court did not properly consider all the facts against the elements in the definition of sexual harassment as it was a single, non-aggressive/physical incident. *Simmers* also ceased with the alleged unwanted conduct when the complainant rejected the attention.²³⁶

As demonstrated, interpreting the law on sexual harassment appears to be a daunting task, it was recommended that sexual harassment specialists be trained and appointed in the workplace. This will assist employers with managing their risk of potential sexual

²³⁴ Basson *Stell Law Review* (2007) 432. See also Schedule 8 Code of Good Practice: Dismissal of the LRA states that an employee should have known or ought to have known that he/she has breached a workplace rule.

²³⁵ Basson *Stell Law Review* (2007) 444. A purely subjective test will impair on the dignity and constitutional rights of the accused (my emphasis).

²³⁶ Botes *TSAR* (2017) 781.

harassment claims. The issue of liability²³⁷ may be rebutted successfully if an employer can prove that it has:

- a) Adopted a policy on sexual harassment;
- b) Trained a sexual harassment specialist to deal effectively and efficiently with these claims;
- c) Defined sexual harassment and the appropriate test;
- d) Discussed what constitutes inappropriate conduct;²³⁸ and
- e) Outlined the consequences of sexual harassment.

Probably, the most difficult part of this checklist is “defining sexual harassment and the appropriate test.” This is where employers may completely miss the mark by introducing all sorts of definitions and tests, borrowing “help” from the 1998 and 2005 Codes. This is where I propose the intervention of NEDLAC in hope that they agree to the “reasonable victim test.”

Policies on sexual harassment is not enough to change a workplace culture where harassment is more likely to take place. Over and above this, there should be ongoing training sessions for sexual harassment specialists,²³⁹ as well as seminars and information sessions on recent articles and case law with all employees at the workplace.

Therefore, in order for employers to crack the whip on sexual harassment claims, a good starting point would be to visit the Codes²⁴⁰ in order to outline a meaningful definition on sexual harassment. Thereafter, workplace policies must be revisited, and

²³⁷ See Chapter 4 para 4.2.

²³⁸ This will eliminate any confusion between permissible and impermissible sexual conduct.

²³⁹ I recommend that sexual harassment specialists be trained specifically on how to apply the law of evidence. Although disciplinary proceedings should not be formal as envisaged in terms of the LRA, it is necessary for the complainant in sexual harassment cases to successfully discharge the burden of proof. More often than not, incidents of sexual harassment occur in places where the parties are alone, often leading to two mutually destructive versions. A sexual harassment specialist will need be trained on how to really establish if sexual harassment has taken place, especially where the alleged perpetrator completely denies that he was party to the alleged misconduct.

²⁴⁰ 1998 Code and 2005 Code.

training be provided not only to rebut employer liability, but also to assist both employers and courts to get one step closer in drawing the line between permissible and impermissible behaviour in sexual harassment cases.

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