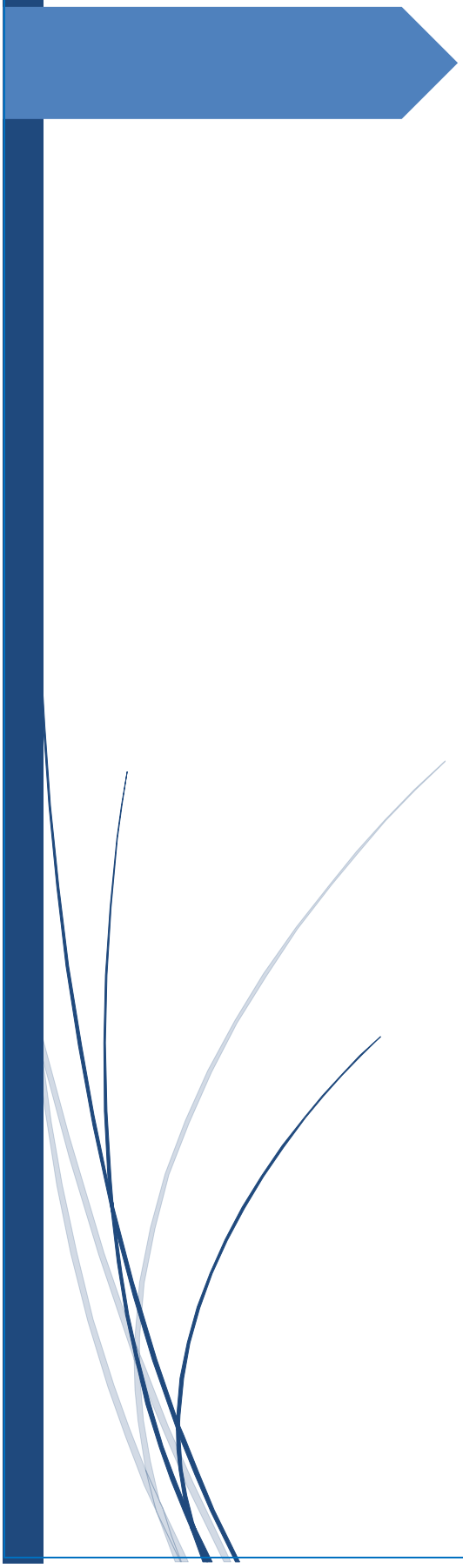

Bornito Nhlebeya

A critical analysis of sexual harassment in the workplace

by

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ABSTRACT

The dissertation seeks to scrutinise the definition of sexual harassment in the workplace. It seeks to analyse the legislation and the 1998 Code of Good Practice on the Handling of Sexual Harassment Cases read together with the 2005 Code, in order to establish whether the definition of sexual harassment and its application in the workplace is clear and concise.

The dissertation seeks to answer some important questions:

Has the definition not been stretched too far in a way that leads to challenges in its application?

Have the tribunals and courts decided on what is sexual harassment in the workplace, with certainty?

Have the courts over the years interpreted the definition in such that employees and employers understand exactly what sexual harassment is?

This is important because, out of a definition an act is defined, employees charged, found guilty and dismissed on sexual harassment charges. The tribunals and courts also, rely on the same definition to determine disputes. Court decisions set precedents and cements the law. Certainty is key in any society as it enables members to self-monitor their behaviour.

The paper also investigates the USA and Canada jurisdictions for comparison. What can we learn from these jurisdictions, when coming to handling of sexual harassment cases, or is the South African position better?

CHAPTER 1

INTRODUCTION

1.1 BACKGROUND

The issue of sexual harassment has been around ever since women joined the labour force in the nineteenth century.[1] Initially it was regarded by many men and women as part of the contract of employment. This has led to many women even today, not to complain or report it, some for fear of retaliation while others for fear of social stigma. Dodier puts it this way "until recently, harassment victims did not legally challenge workplace sexual harassment."[2] The author argues that some of the reasons are:

> "sexual harassment's traditional social acceptability: sex role socialization that gives men the 'prerogative of sexual initiative' and 'leaves women open to sexual coercion'; and some women's failure to recognize that such behaviour amounts to illegal sexual harassment".[3]

The failure to recognise that such behaviour amounts to sexual harassment can to a certain extent be attributed to lack of education of employees in this regard. For how many employers, employers' organisations and trade unions have taken the initiative to educate employees on sexual harassment as suggested by both codes?[4] Apart from

[1] Dodier "Meritor Savings Bank v Vinson: Sexual Harassment at Work" (1987) 10 Harv Women's L.J. 208 fn 4.
[2] *Ibid*, 208.
[3] *Ibid*.
[4] The Notice of Code of Good Practice on the Handling of Sexual Harassment Cases 1367 of 1998 issued in terms of S. 203 (1) of the Labour Relations Act 66 of 1995, item 10. The Amended Code of Good Practice on Handling

physical sexual harassment, how many employees are aware that any unwelcome verbal, non-verbal sexual conduct and *quid pro quo* harassment are sexual harassment and need to be reported so that it can be stopped. In a patriarchal society like South Africa, it is understandable but unacceptable that men can get away with "murder" under the lame excuse that they are just being men. Interestingly, men would take more offence when a loved one experiences sexual harassment. Dodier argues that "sexual harassment victims, like rape victims, often feel humiliated, guilty and responsible for the harassment even though they did not encourage it."[5] I agree with his sentiments which I regard to be disquieting.

Tahmindjis argues that "sexual harassment is not simply misdirected sexual desire; it is the exploitation of a relationship of unequal power".[6] It is not caused by the "sex role socialization that gives men the prerogative of sexual initiate [that] leaves women open to sexual coercion" as argued by Dodier above. Tahmindjis notes that "sexual harassment is more often than not ignored by both government and trade unions."[7]

This has been a social ill which women and women organisations around the world have been fighting since the eighties. In Canada, it was in 1980 when the first recorded case of sexual harassment was decided.[8] Similarly, in the United States of America (USA) the first sexual harassment case was decided in 1986,[9] whereas in South Africa, it was in 1989.[10]

The Industrial Court in this South African case of *J v M*[11] defined sexual harassment as "unwanted sexual behaviour or comment which has a negative effect on the recipient".[12] Du Toit *et al*[13] criticises the case for not being clear about "whether the

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of Sexual Harassment Cases in the Workplace 1357 of 2005 issued in terms of S. 54(1)(b) of the Employment Equity Act 55 of 2005, item 11. Hereinafter referred to as 1998 Code and 2005 Code.

[5] *Ibid.*

[6] Tahmindjis "From Disclosure to Disgrace: Lessons from a Comparative Approach to Sexual Harassment Law" (2005) 7 Int'l J. Discrimination & L., 337.

[7] *Ibid*, 346.

[8] *Bell and Korczak v Ladas & The Flaming Steer Steak House Tavern* (1980), 1 C.H.R.R. D/155, para. 1383-1442. See Backhouse "Bell v The Flaming Steer Steak House Tarven: Canada's First Sexual Harassment Decision", 19 U.W. Ontario L. Rev. 141 (1981) fn 3.

[9] *Meritor Savings Bank v Vinson* 477 U.S. 57 (1986).

[10] *J v M* (1989) 10 *ILJ* 755 (IC).

[11] *Ibid*.

[12] Du Toit *et al*, Labour Relations Law: A Comprehensive Guide (2015), 701.

[13] *Ibid*.

court was applying a 'subjective test or a combination of both'".[14] The authors argue that the cases of *Gregory*[15] and *Gerber*[16] decided at a later stage were clear on the use of the objective test. The authors give credit to the 1998 Code for creating clarity around the definition of sexual harassment in the workplace. They argue that "the test for sexual harassment laid down by the Code involves a combination of subjective and objective factors."[17]

Regardless of praises showered by Du Toit *et al* and Van Niekerk *et al*[18] to the 1998 and 2005 Codes, and despite the protections introduced by the Employment Equity Act (EEA),[19] incidents of sexual harassment appear to continue unabated.[20]

In February 2019 Pule Mabe a member of the National Executive Committee (NEC) of the African National Congress (ANC) which is the ruling party was cleared of sexual harassment charges by the ANC grievance panel. According to News24,[21] Pule Mabe was accused by his former personal assistant (a 26-year-old woman) of sexual harassment on three occasions, one of which was when Mr Mabe entered her room joining her in bed and putting his leg on top of hers. The woman had written a 14-page grievance to the party's deputy secretary-general Jessie Duarte seeking intervention as her salary got cut due to her not reciprocating Mr Mabe's sexual advances.[22] The panel recommended that the ruling party should adopt a sexual harassment policy as it did not have one. The ANC being the ruling party played a major role in the promulgation of the 1998 and 2005 Codes through parliament. For the party not to have adopted a sexual harassment policy thus far, sheds light on why sexual harassment continues unabated.

[14] *Ibid*.
[15] *Gregory v Russels* (1999) 20 *ILJ* 2145 (CCMA).
[16] *Gerber v Algorax* [2000] 1 BALR 41 (CCMA).
[17] *Supra*, fn 12.
[18] Van Niekerk *et al*, Law@work (2018), 127.
[19] Employment Equity Act 55 of 1998.
[20] *Supra*, fn 18.
[21] https//m.news24.com/SouthAfrica/News/pule-mabe-cleared-of-sexual-harassment-charges-by-anc-panel-report-2019021 (accessed 01 March 2019).
[22] https://ewn.co.za/2018/12/11/hawks-circle-anc-spokesperson-pule-mabe-over-harassment-claims (accessed 01 March 2019).

Du Toit *et al* points out that "sexual harassment is the most widespread form of harassment and has been the subject of extensive analysis and legislative response".[23] In my view, although sexual harassment has been extensively analysed, it has not been much a subject of legislative response until December 2018.[24] The legislature only touched on this subject twice. Once in 1998 and once in 2005 through the introduction of Codes of Good Practice.

1.2 **PROBLEM STATEMENT**

The courts have continued to decide cases in a manner that raised the question whether the Codes gave a firm and precise definition of sexual harassment. The 2005 Code is titled 'amended' which immediately gives the impression that the 1998 Code has been repealed as Du Toit *et al* opines. However, in *Rustenburg Platinum Mines*[25] it was held that both Codes must be considered in the determination of sexual harassment in the workplace.

There has been inconsistency in decisions reached pertaining to sexual harassment. The inconsistency lingers upon how sexual harassment is defined. This determines the existence of sexual harassment and the sanction deemed fit. Over the years, the lack of certainty in the definition of sexual harassment has led to cases going back and forth through the courts. In 2010, the Labour Appeal Court (LAC) in *Motsamai*[26] held that the labour court (LC) was correct in reviewing and setting aside the award handed down by the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA found the perpetrator guilty of sexual harassment but found the dismissal to be unfair and ordered his re-employment. The LAC however, confirmed that the LC was

[23] *Supra*, fn 12, 700.
[24] On the 19 December 2018 the Minister of Labour in an attempt to bring some certainty in dealing with sexual harassment in the workplace officially repealed the 1998 Code which is a move welcome by many. See https://www.golegal.co.za/handling-sexual-harassment-code/ (accessed 01 March 2019).
[25] *Rustenburg Platinum Mines Ltd v UASA obo Pietersen & Others*(2018) 39 *ILJ* 1330, 1337 para 25 (LC) (27 February 2018). See also *Campbell Scientific Africa(Pty) Ltd v Simmers & Others* (2016) 37 *ILJ* 116 (LAC) (23 October 2015).
[26] *Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC) (04 June 2010).

correct in reaching the decision that the dismissal of the applicant was both procedurally and substantively fair and that dismissal was an appropriate sanction.

In 2011 the LAC in *Gaga*[27] found that the LC did not err in its conclusion that the commissioner's decision was unreasonable. It held that the substitution of the award with a decision that the dismissal was substantively fair, was just.

In 2014 the court in *SA Metal Group*[28] investigated the definition of sexual harassment in detail and the CCMA award was set aside due to the failure of the commissioner to apply the test for sexual harassment in accordance with the 2005 Code. In 2018 the LC in *Rustenburg Platinum Mines*[29] held that in determining sexual harassment cases in the workplace, the starting point according to section 203 (3) of the Labour Relations Act (LRA)[30] is the 1998 Code read together with the 2005 Code.

In 2015 the LAC in *Campbell Scientific Africa*[31] found that the CCMA commissioner committed no reviewable irregularity in confirming that the dismissal of the applicant for sexual harassment and unprofessional conduct was substantively fair. The LC on review had found that the conduct was inappropriate, but it did not constitute sexual harassment. The LAC disagreed with the LC and found that the commissioner was right in arriving at the decision that the perpetrator's conduct of asking the victim whether she would like a lover for tonight did constitute sexual harassment as defined in both Codes. Savage AJA in *Campbell Scientific Africa*[32] confirmed that the 2005 Code did not repeal and replace the 1998 Code.

In *Rustenburg Platinum Mines* the court held that the commissioner had failed to consider both Codes, as too much reliance was placed on the 1998 Code.[33]

One of the aspects that arises is whether the 2005 Code supersedes the 1998 Code, or whether the two Codes should be read together. Furthermore, the decision of the

[27] *Gaga and Anglo Platinum Ltd* (2012) 33 *ILJ* 329 (LAC) (20 October 2011).
[28] *SA Metal Group (Pty) Ltd and CCMA* (2014) 35 *ILJ* 2848 (LC) (15 April 2014).
[29] *Rustenburg Platinum Mines Ltd v UASA obo Pietersen & Others* (2018) *ILJ* 1330, 1337 para 25 (LC) (27 February 2018).
[30] The Labour Relations Act 66 of 1995.
[31] *Campbell Scientific Africa(Pty) Ltd v Simmers & Others* (2016) 37 *ILJ* 116 (LAC) (23 October 2015).
[32] *Ibid*.
[33] *Supra*, fn 29, para 33.

LAC in *Campbell Scientific Africa* raises the question whether the definition of sexual harassment in the workplace has not been stretched too far?

Out of a definition an act is defined, employees charged, found guilty and dismissed on sexual harassment charges. The CCMA and courts rely upon the very same definition to resolve disputes. Court decisions set precedents, however, as demonstrated above,[34] there seems to be no certainty. Certainty is key in any society as it enables members to self-monitor their behaviour.

This dissertation will therefore look deep into the definition's strength and weaknesses and trends of the courts, with the purpose to suggest a more certain and objective definition. Having the 1998 Code repealed[35] is a step in the right direction but is it enough? The dissertation will also look at the correlation of the definition to the sanction.

1.3 **RESEARCH QUESTIONS**

Based on the problem statement above, this dissertation seeks to answer the following questions:

1. Does South African legislation provide a clear and concise definition of sexual harassment in the workplace?
2. How should sexual harassment in the workplace be defined?

It is therefore the intention of this research paper to look at the definition and application of sexual harassment in the South African workplace. Sexual harassment as correctly stated by Tahmindjis is "unacceptable and should be regulated, preferably through law [as] it is the law which helps us to articulate what sexual harassment in fact is."[36]

[34] See paragraph 1.2 Problem Statement, above.
[35] *Supra*, fn 24.
[36] *Supra*, fn 6, 359.

1.4 **RESEARCH METHODOLOGY**

The method used was a desktop method which entailed extensive reading and analysis. Despite the change of events,[37] it was still necessary to investigate the 1998 Code before analysing the 2005 Code and its success and short comings. The research also investigated key court decisions and how the courts arrived at these decisions overbearing the definition/s in mind. A comparative analysis has been done between South Africa, Canada and the USA.

1.5 **PROPOSED STRUCTURE**

Chapter 1 introduced the nature of the study, laying the background of the research, stating the research questions, highlighting the significance of the study, setting out the research methodology and the proposed structure.

Chapter 2 gives the historical background of sexual harassment in the workplace and the law governing it. The chapter covers sexual harassment as per the Constitution of South Africa,[38] the LRA 66 of 1995, the 1998 Code, case law before and after the 1998 Code, as well as international instruments.[39]

Chapter 3 discusses the 2005 Code and case law on sexual harassment in the workplace after the 2005 Code. It also looks at sanctions suggested where it has been found that sexual harassment exists. This illustrates that without a proper definition, the ability of decision makers to impose appropriate sanctions on perpetrators is hampered. Lastly, it evaluates the parallel recourse of the 1998 and 2005 Codes highlighting the importance of incorporating the 1998 Code into the 2005.

Chapter 4 gives a comparative analysis of the definition and application of sexual harassment in the USA and Canada. The focus is on assessing what South Africa can learn and adopt from these jurisdictions. The USA is chosen as a comparator because

[37] *Supra*, fn 24.
[38] The Constitution of South Africa 108 of 1996.
[39] The Declaration on the Elimination of Violence against Women 48/104; The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) adopted in 1979 by the UN General Assembly; The Discrimination (Employment and Occupation) No. 111 of 1958.

firstly, the courts have dealt with a fair amount of sexual harassment cases and secondly, because when the USA sneezes, the world catches the flu. Canada on the other hand is chosen as a comparator as it is a good jurisdiction to compare with on many legal fields, including the subject at hand.

Chapter 5 concludes on the findings of the research as whole. It provides answers to the research questions and makes recommendations on the definition and handling of sexual harassment in the workplace.

CHAPTER 2

HISTORICAL BACKGROUND OF SEXUAL HARASSMENT IN THE WORKPLACE AND THE LAW GOVERNING IT

2.1 **INTRODUCTION**

This chapter seeks to trace the social ill known as sexual harassment in the workplace. It covers the history of sexual harassment and the South African law governing sexual harassment prior the 1998 era. It then touches upon the provisions of the Constitution[40] which covers sexual harassment, although not explicitly. The Constitution of 1996 is purposely discussed before the Labour Relations Act (LRA) of 1995[41] for two reasons. Firstly, the Constitution is the supreme law of the land and any law inconsistent with it is to that extent, invalid.[42] Secondly, the Constitution started as an interim Constitution of 1993 which maintained most of its content in the final, 1996 Constitution. For example, labour relations rights were found in section 27 of the interim Constitution and have been carried forward in section 23 of the 1996 Constitution.

This chapter also touches on the LRA, from which the 1998 Code on sexual harassment originated.[43] The 1998 Code did not only provide a definition of sexual harassment, but also, forms of sexual harassment, procedures to handle sexual harassment, as well as sanctions.

The cases cited hereafter demonstrate how the Commission for Conciliation, Mediation and Arbitration (CCMA) and courts adjudicated unfair dismissal cases that arose from allegations of sexual harassment. These cases give practical examples of how the

[40] The Constitution of South Africa 108 of 1996.
[41] The Labour Relations Act 66 of 1995.
[42] *Supra*, fn 40, S. 2.
[43] The Notice of Code of Good Practice on the Handling of Sexual Harassment Cases 1367 of 1998 issued in terms of S. 203 (1) of the Labour Relations Act 66 of 1995 (hereinafter the 1998 Code).

courts defined sexual harassment, how it was handled and when it was regarded fair to dismiss an employee on such allegations. Botes points out that:

> "One first has to be aware of exactly which conduct would constitute sexual harassment before the existence thereof can be truly established. Only then will one be able to ascertain whether the circumstances justify disciplinary action and which sanction would be appropriate in light of the facts at hand."[44]

In terms of the Employment Equity Act (EEA)[45] sexual harassment can be classified as unfair discrimination based on sex, gender or an arbitrary ground.[46] The Act also established a positive role on the employer to eliminate discrimination, as there are consequences for the employer if it fails to act against perpetrators.[47] This Act is also responsible for the promulgation of the 2005 Code.[48] The discussion of the 2005 Code and the cases decided thereafter is reserved for the next chapter.

Lastly, this chapter covers the international legal instruments dealing with discrimination, by extension, sexual harassment.

2.2 **HISTORY OF SEXUAL HARASSMENT**

Sexual harassment is acknowledged by Halfkenny[49] as having been in existence for centuries, long before Catherine Mackinnon's work on sexual harassment emerged in the early 1970's in the USA. Mackinnon defines sexual harassment as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power."[50] Halfkenny refers to sexual harassment as "sexual exploitation of working women."[51] Halfkenny further explains that "sexual exploitation was the everyday experience of women by men who held power over their economic survival."[52] The studies conducted

[44] Botes "Sexual Harassment as a Ground for Dismissal: A Critical evaluation of the labour and labour appeal courts' decisions in Simmers v Campbell Scientific Africa" 2017 TSAR 761, 763-764.
[45] The Employment Equity Act 55 of 1998.
[46] *Ibid*, S. 6 (1) and (3).
[47] *Supra*, fn 45, S. 60.
[48] The Amended Code of Good Practice on Handling of Sexual Harassment Cases in the Workplace 1357 of 2005 issued in terms of S. 54 (1) (b) of the Employment Equity Act 55 of 1998.
[49] Halfkenny "Legal and Workplace Solutions to Sexual Harassment in South Africa (part 1): Lessons from other Countries, (1995) 16 *ILJ* 1.
[50] Mackinnon, Sexual Harassment of working Women: A Case for Sex Discrimination (1979), 1.
[51] *Supra*, fn 49, 2.
[52] *Ibid*.

on the extent of this social ill revealed that sexual harassment is more prevalent than was originally thought.[53]

2.3 **THE SOUTH AFRICAN LAW GOVERNING SEXUAL HARASSMENT**

2.3.1 Introduction

In South Africa, it was not until after the 1998 Code[54] that employers were encouraged to formulate sexual harassment policies.[55] This does not mean that up until then, there was no redress of sexual harassment. According to Dancaster, "the 1988 amendments to the Labour Relations Act [28 of 1956] expressly included sex discrimination as an unfair labour practice."[56] This was repealed by the Labour Relations Amendment Act 9 of 1991 which according to Dancaster[57] re-introduced a broad definition of the unfair labour practice. Prior to the 1998 Code, sexual harassment was therefore, a subject of discussion by both authors and courts.

In 1986 Mowatt[58] defined sexual harassment to refer "very broadly, to unwanted sexual attention in the employment environment."[59] It was referred to as an act that occurs "when a woman's sex role overshadows her work role in the eyes of the male, whether it be a supervisor, co-worker, client or customer; in other words, her gender receives more attention than her work."[60] Innuendos, inappropriate gestures or physical touch are but some of the examples cited by Mowatt within the context of sexual harassment.[61] The author further states that "sexual harassment occurs when a woman is expected to engage in sexual activity in order to obtain or keep her employment, or obtain a promotion or other favourable working conditions."[62] It is

[53] *Supra*, fn 49, 3- 4.
[54] *Supra*, fn 43.
[55] *Supra*, fn 43, Item 6.
[56] Dancaster "Sexual Harassment in the Work-Place: Should South Africa Adopt the American Approach?" (1991) 12 *ILJ* 449, 450.
[57] *Ibid*.
[58] Mowatt "Sexual Harassment – New Remedy for an Old Wrong (1986) 7 *ILJ* 637.
[59] *Ibid*.
[60] *Ibid*.
[61] *Ibid*. See also *J v M* (1989) 10 *ILJ* 755, 757 where De Kock opined that the conduct must not necessarily be repeated. A single act can constitute sexual harassment. This principle was later incorporated in the 1998 Code.
[62] *Supra*, fn 58. See also *Meritor Savings Bank v Vinson* (1986) 477 U.S. 57.

when "any unwanted sexual behaviour or comment which has a negative effect on the recipient constitutes sexual harassment."[63] This definition was adopted by the first South African recorded court case of sexual harassment.[64]

2.3.2 Case Law Prior 1998 Code

The following cases demonstrate how the courts dealt with sexual harassment prior to the 1998 Code and how these cases influenced the 1998 Code.

In March 1989, the Industrial Court dealt with the first ever reported sexual harassment case in the workplace in *J v M*.[65] In *casu*, the applicant who was a senior executive was dismissed for sexual harassment. The applicant had touched, fondled breasts, caressed and/or slapped buttocks of two complainants without their consent. The court found that the applicant had on several occasions sexually harassed staff. He had been warned several times and was thus fully aware that such behaviour was unacceptable. This behaviour was extended to other women, as admitted by him during the disciplinary hearing. His conduct caused great displeasure amongst staff which led to resignations. The court was satisfied that the perpetrator had been guilty of sexual harassment.

In *casu*, the court considered the dictionary meaning of the word and said, "sexual harassment would mean to trouble another sexually in the sexual sphere",[66] and "unwanted sexual attention in the employment environment".[67] In deciding the case, the court applied a subjective test, that is, it looked at the effect of the perpetrator's behaviour on the recipients.[68] The recipients had found the perpetrator's behaviour offensive and humiliating. Importantly, the case affirmed that a single act can constitute sexual harassment. This principle has now been enshrined in the 1998 Code.[69] The importance of this judgement cannot be over-emphasised as it laid down

[63] *Supra* fn 58, 638.
[64] *J v M* (1989) 10 *ILJ* 755 (IC), 757.
[65] *Ibid*, where it is reported that "neither the parties nor the court has been able to find any previous decision by this court in which the court has dealt with sexual harassment."
[66] *Supra*, fn 64.
[67] *Ibid*.
[68] Govender "Sexual Harassment: The South African Perspective (2005) 7 Int'l J. Discrimination & L. 229, 234.
[69] Item 3(2)(a).

the foundation of deciding sexual harassment cases. These principles were followed in subsequent cases decided by the Industrial Court.[70]

In 1997, in *Sadulla*,[71] a cautionary rule of the law of evidence was applied to determine the existence of sexual harassment. This rule was used to distinguish "between a real victim and the pretended or ridiculously hypersensitive victim."[72] This case shows the importance of a recipient to not only object to sexual advances, but to demonstrate such objection by making it loud and clear that they are unwelcome.[73] The recipient should not take an active role in the conversation or entertain the aggressor and his questions. It was held that one would not expect a victim to initiate new trends in the conversation, especially ones about her sexual life or private body parts, because the victim under normal circumstances should be discouraging and protesting the behaviour. As such, in *casu* it was held that the complainant had tolerated the alleged sexual harassment without objecting or raising an alarm immediately. For these reasons, no sexual harassment was found to have been committed. This case demonstrates that an important factor in identifying the existence of sexual harassment is "unwelcome conduct".[74] Walking away and not responding to the perpetrator are ways an employee can indicate that the sexual conduct is unwelcome.[75]

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[70] *Jerry Mampuru v Putco* Case No. 11/2/2136 (1989) where the perpetrator who was a store manager, had allegedly made suggestions of a sexual nature to three female employees. He had further invited them, individually to accompany him to casino hotels, touched and pulled them in a way described as terrifying, humiliating and unwanted by the recipients. The court followed the subjective test used in *J v M*, that is, the nature of the sexual harassment as well as the effects it has on the recipients and other females who feared same abuse. With these factors taken into consideration, the court upheld the dismissal. The importance of this judgement is that it demonstrates the factors that warrants dismissal as a sanction in a sexual harassment case. See also *Pick & Pay Stores Ltd and An Individual* (1994) 3 (1) ARB, where the commissioner found that the conduct met the requirements of a single act sexual harassment. In *casu*, a chief buyer of Pick & Pay sexually harassed an agent of a manufacturer that did business with Pick & Pay. The perpetrator had embraced the recipient, kissed and touched her intimately for about two minutes despite her objections. The principle enshrined in this case was that a single act can constitute sexual harassment. This is a landmark case when coming to sexual harassment between an employee and a non-employee which was later incorporated in the 1998 and 2005 Codes in item 2(3) and item 2.2, respectively.

[71] *Sadulla v Jules Katz and Co Ltd* (1997) 18 *ILJ* 1482 (CCMA).

[72] *Ibid*, 1486B-C.

[73] This was later incorporated in item 5.2.1 of the 2005 Code.

[74] See *Intertech Systems (Pty) Ltd v Sowter* 1997 (4) 18 *ILJ* 689 (LAC), where sexual harassment was said to include unwanted telephone calls, unwelcome home visits, unwelcome declaration of affection, being followed to her car, physical intrusion of her person, possessive conduct, intimidation, threats on her life, *etcetera*.

[75] Item 5.2.1 of the 2005 Code.

2.3.3 The Constitution of South Africa 1996

The Constitution[76] in section 1 states that South Africa is founded on "human dignity, the achievement of equality and the advancement of human rights and freedoms"[77] and "non-racialism and non-sexism".[78] Sexual harassment in its different forms, be it a hostile environment, *quid pro quo,* or sexual favouritism does violate these constitutional rights. The Constitution being the supreme law of the land states that any law or conduct inconsistent with it is to that extent invalid.[79] The equality clause[80] forbids discrimination on many grounds including gender and sex and further encourages the enactment of law preventing and prohibiting unfair discrimination.[81] Sexual harassment is discrimination based on sex.[82] The Constitution therefore, does deal with sexual harassment. This view was confirmed in *Reddy v Natal University*.[83] In addition to the Constitution's prohibition of sexual harassment in its unfair discrimination provisions, there are other provisions in the Constitution that outlaw sexual harassment. These are section 10, the right to dignity,[84] section 12(2)(b), the right to bodily and psychological integrity,[85] as well as section 14, the right to privacy.[86]

The views of Halfkenny[87] that the right to privacy and the right to respect protection of a person's dignity is a guarantee of the right to be free from sexual harassment is

[76] *Supra*, fn 40.
[77] *Supra*, fn 40, S. 1(a).
[78] *Supra*, fn 40, S. 1(b).
[79] *Supra*, fn 40, S. 2.
[80] *Supra*, fn 40, S. 9.
[81] *Supra*, fn 40, S. 9 (4). The EEA was enacted for this purpose.
[82] Dodier "Meritor Savings Bank v Vinson: Sexual Harassment at Work", (1964) 203-204. See also *supra*, fn 58. S. 6(3) of the EEA which is a creation of S. 9(4) of the Constitution states that harassment of an employee based on sex, gender or an arbitrary ground is unfair discrimination. See also item 3 of the 2005 Code.
[83] *Reddy v Natal University* 1998 (1) 19 *ILJ* 49 (LAC), where the Industrial Court decided on a sexual harassment case with constitutional law imperatives. The court had found that sexual harassment had taken place considering the university's policy on sexual harassment as well as the law as developed by the courts. The court also found that the right to human dignity as well as the right to privacy as protected by the constitution were infringed by the act of sexual harassment. The LAC confirmed the court *a quo* decision. The importance of this decision is two-fold. Firstly, it considered the policy of the employer on sexual harassment, the law as developed by the courts and the South African Constitution. Secondly, the protection of employees was thereby broadened to areas not directly dealt with by the LRA and EEA.
[84] *Supra*, fn 40, S. 10.
[85] *Supra*, fn 40, S. 12 (2) (b).
[86] *Supra*, fn 40, S. 14.
[87] *Supra*, fn 49, 2.

supported. De Kock points out that the right to integrity of body and personality belongs to everyone and is protected in our legal system.[88]

2.3.4 The Labour Relations Act 1995

2.3.4.1 *Introduction*

An unfair labour practice is defined by the LRA as unfair conduct perpetrated by the employer to the employee relating to promotion, demotion, probation, training, the provision of benefits, unfair suspension or any other disciplinary action short of dismissal.[89] Although the LRA in its current form does not deal with sexual harassment as an unfair labour practice, the LRA[90] however, empowered the National Economic Development and Labour Council (NEDLAC) to prepare and issue the 1998 Code.

2.3.4.2 *The Code of Good Practice on the Handling of Sexual Harassment Cases (1998)*

The Code was created to eliminate sexual harassment in the workplace. This was done by providing appropriate procedures to encourage the development and implementation of policies to deal with the problem, as well as prevent its recurrence in the workplace.[91] This objective was for workplaces to be free of sexual harassment such that the integrity, dignity, privacy and the right to equality of an employee is respected by all.[92]

For the first time in our legislation, sexual harassment was given a definition. The Code defined sexual harassment as "unwanted conduct of a sexual nature."[93] In order for sexual attention or sexual act to become sexual harassment the following criteria applied:

a) the behaviour must have been persistent; and/or

[88] *J v M* (1989) 10 *ILJ* 755 (IC).
[89] *Supra*, fn 41, S. 186 (2) (a) and (b).
[90] *Supra*, fn 41, S. 203 (1).
[91] *Supra*, fn 43, item 1.
[92] *Supra*, fn 43.
[93] Supra, fn 43, Item 3 (1).

b) the recipient must have made it known to the perpetrator that such behaviour was considered offensive; and/or

c) the behaviour must have been gross in a way that the perpetrator should have known that it was unwelcome and unacceptable. For example, indecent assault, sexual assault or rape.[94]

The term 'and/or' in item 3 of the Code has raised a problem in answering the question of, when does sexual attention become sexual harassment. Le Roux *et al*[95] argued that according to item 3, the following three interpretations are possible. Firstly, the behaviour must have been persisted on, although a single incident of harassment could constitute sexual harassment even in the absence of the recipient's objection. Secondly, the conduct can be sexual harassment on the basis that the recipient has objected to the conduct even if such conduct was trivial. Lastly, in the presence or absence of the two requirements above, the perpetrator should have known that the conduct will be unwelcome.

Le Roux *et al* refers to this last interpretation as a "constructive knowledge test"[96] "which focuses not on the effect of the conduct, but the moral blameworthiness of the perpetrator."[97] Regardless of the 'and/or' phraseology of item 3, a reasonable interpretation would be one of two. Where behaviour is trivial such as asking a recipient out on a date, and the perpetrator has no reason to believe that it is unwelcome the recipient must object if such behaviour persists for it to be regarded as sexual harassment. She must make it clear that, it is considered offensive and therefore unwelcome. However, if the conduct is gross in nature, it becomes harassment as the perpetrator should reasonably have known that it will be considered offensive and unwelcome without the recipient having to object. For example, touching of buttocks, private parts, asking for sexual favours, rape, *etcetera*. Although South Africa is a multi-cultural society, this should not affect the outcome of the constructive knowledge test of "ought to have known". This is because the workplace

[94] *Supra*, fn 43, item 3 (2). See also item 4 (1) (a).
[95] Le Roux *et al*, Sexual Harassment in the Workplace (2010), 32.
[96] *Ibid*.
[97] *Ibid*.

culture which has its own norms and values is the one to be used to measure the knowledge of the perpetrator.[98]

Upon interpretation and application of the sexual harassment definition, why then do adjudicators arrive at different conclusions in terms of definition and/or sanction, especially if the objective of the Code "is to eliminate sexual harassment in the workplace?"[99]

2.3.5 Case Law after the 1998 Code

In some cases where sexual harassment was established, dismissal was found to be too harsh a sentence. In other cases, however, dismissal was found to be a just sentence.

In *Gregory*,[100] the CCMA held that insistently inviting women to view an adult magazine is sexual harassment. However, it does not call for dismissal as a sanction. This case is acknowledged to have used the objective test.[101]

In *Sebatana*,[102] the commissioner agreed that unwanted kissing, grabbing, requests for telephone numbers, invitations to go out for coffee was sexual harassment. The commissioner felt however, that the sanction of dismissal was too harsh and substituted it with a final written warning. The rational was that, dismissal as per the 1998 Code[103] should be reserved for cases of serious misconduct or continued sexual harassment after warnings. It is not clear why the commissioner was not guided by the case of *Pick & Pay Stores*,[104] where an unwanted kiss was found to be serious enough to warrant dismissal. What then made the commissioner to regard consistent physical contact in the form of grabbing and kissing, as not serious?

[98] Le Roux *et al*, Sexual Harassment in the Workplace (2010), 30. See also *Gerber v Algorax (Pty) Ltd* [2000] 1 BALR 41 (CCMA).
[99] *Supra*, fn 43, item 1.
[100] *Gregory v Russels (Pty) Ltd* (1999) 20 *ILJ* 2145 (CCMA).
[101] Du Toit *et al*, Labour Relations Law: A Comprehensive Guide (2015), 701.
[102] *SACCAWU obo Willie Sebatana and Dions and Ngantwini and Daimler Chrysler* CCMA case No. FS4517 (20 August 1999).
[103] *Supra*, fn 43, item 7 (5) (b).
[104] Pick & Pay Stores and An Individual (1994) 3 (1) ARB.

In *Sookunan*,[105] the harassment was categorised as *quid pro quo.* The commissioner found the dismissal to be fair. It was found that the perpetrator had knowledge of sexual harassment. His position of authority on the recipients, his abuse of power to discourage one of the recipients from reporting him, as well as the repetitive behaviour on more than one recipient were taken into consideration. What was also considered was the physical nature of the act and his interference with the complainants after charges were laid against him. The commissioner highlighted that although hostile environment harassment and *quid pro quo* harassment are equally important, the latter is to be viewed in a more serious light.[106]

In *Maepe*,[107] a senior commissioner was dismissed for sexual harassment against a CCMA receptionist. The CCMA substituted the sanction of dismissal with a twelve-month final written warning because the perpetrator was never told nor thought such acts were unwelcome. This case supports *Sadulla*,[108] in that an employee needs to indicate verbally or non-verbally that the sexual conduct is unwelcome.

Going through these cases, Botes comments rings true that:

> "One first has to be aware of exactly which conduct would constitute sexual harassment before the existence thereof can be truly established. Only then will one be able to ascertain whether the circumstances justify disciplinary action and which sanction would be appropriate in light of the facts at hand."[109]

This is further supported by item 7(5) of the 1998 Code which states that in imposing a sanction for sexual harassment reliance should be placed on schedule 8 of the LRA.

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[105] *Sookunan v SA Post Office* (2000) 21 *ILJ* 1923 (CCMA). Here, there was unwelcome touching and declaration of love to two women. The commissioner found that the conduct of the supervisor who was also acting postmaster was *quid pro quo* sexual harassment due to the evidence of one of the recipients that the perpetrator had told her that he is the final authority, so she has no one to report him to.

[106] *Ibid*, 1935.

[107] *Maepe v CCMA* (2002) 23 *ILJ* 568 (CCMA). Here, the perpetrator had made two phone calls after 17h00 and 18h00 from his extension to recipient cell phone number where he declared his love, urge to kiss and wash her back in a bath. Few days after the second phone call, the perpetrator approached recipient at her work desk where he declared his love for her, as well as his intention to walk around the desk to hug and kiss her. He also made kissing gestures with his mouth towards her one morning. Further, on request she had given the perpetrator her pictures. These pictures he failed to return and indicated intention to put them on his chest when he goes to sleep.

[108] *Supra*, fn 71.

[109] *Supra*, fn 44.

Item 3 of Schedule 8 states that, employees should be dismissed for either serious acts of misconduct or repeated offences where progressive discipline has taken place. What therefore are serious acts of sexual harassment and according to whose view is the element of seriousness weighed?

The problem with the 1998 code is classifying sexual attention into three possible categories instead of two, as discussed above. Such qualification clouds the definition and creates a position that gives too much discretion to adjudicators which in return creates uncertainty.

2.3.6 The Employment Equity Act 1998 (EEA)

2.3.6.1 *Introduction*

In 1998, the EEA[110] came into effect. It brought about the prohibition of unfair discrimination based on sex, gender, arbitrary grounds, among others.[111] Section 6(3) prohibits harassment based on one or more grounds, including gender and sex. This therefore directly covers sexual harassment. The EEA also establishes a positive role on employers to combat such discrimination with an intention to extinguish it in the workplace.[112] If an employer fails to act on a contravention of any provision of the EEA, it will be deemed to have also breached the relevant provision of the Act.[113]

In the year 2005, in terms of section 54 (1) (b) of the EEA, an Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the workplace was published. This Code will be discussed in the next chapter.

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[110] *Supra*, fn 45.
[111] *Supra*, fn 45, S. 5 states that "Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice." S. 6 states 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, birth or any other arbitrary ground."
[112] *Supra*, fn 45, S. 60 (2).
[113] *Supra*, fn 45, S. 60 (3).

2.4 **INTERNATIONAL LEGAL INSTRUMENTS**

2.4.1 Introduction

There are several international legal instruments dealing with discrimination. Notwithstanding the fact that none of these deal with sexual harassment directly, they are still relevant to the handling of sexual harassment in South Africa.

2.4.2 The Discrimination (Employment and Occupation) Convention 111 of 1958[114]

In this Convention, discrimination is defined as "any distinction, exclusion or preference made on the basis of race, colour, *sex* [my emphasis], religion which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation."[115] South Africa as a member state has since enacted the EEA which seeks to eliminate discrimination in the workplace.[116]

2.4.3 The Convention on Elimination of All Forms of Discrimination Against Women 1979[117]

The Declaration forbids any kind of discrimination and particularly mentions discrimination based on sex. It acknowledges the extensive existence of discrimination against women, which "violates the principles of equality of rights and respect for human dignity."[118]

Discrimination against women is defined as "any distinction, exclusion or restriction made on the basis of *sex* [my emphasis] which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women."[119]

This definition is like that found under the Discrimination Convention 111 of 1958 above. The Convention further encourages member states to condemn discrimination

[114] Ratified by South Africa on 05 March 1997. See https://www.ilo.org (accessed 6 April 2019).
[115] The Discrimination (Employment and Occupation) Convention 111of 1958, Article 1.
[116] EEA, Ss. 2 (a) and 3.
[117] Ratified by South Africa on the 15th December 1995. See www.dirco.gov.za/foreign/multilateral/inter/treaties/discrim.htm (accessed 6 April 2019).
[118] Preamble.
[119] Article 1.

against women in all forms, agree to pursue by all appropriate means and without delay, a policy of eliminating discrimination against women and to this end undertake:

> "To embody the principle of equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of the principle."[120]

It is my submission that the Constitution and the EEA gives effect to this.

2.4.4 The Declaration on the Elimination of Violence against Women 48/104

General Assembly, United Nations 1993

The Declaration encourages the implementation of the Convention on the elimination of all forms of discrimination against women. This would be a major factor in the elimination of violence against women. Violence against women is defined as "physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, *sexual harassment and intimidation at work* [my emphasis]."[121]

2.4.5 The relevance of International Instruments

The international legal instruments are relevant because the constitution states that "when interpreting the Bill of Rights, a court, tribunal or forum must consider international law",[122] and "may consider foreign law."[123]

Considering the contents of the international instruments that pertain to sexual harassment, it is apparent that South Africa is not only compliant with international law but surpasses these international instruments when coming to defining and handling of sexual harassment in the workplace. The main principle enshrined in international law is that, any discrimination based on sex is forbidden. South Africa ascribes to this principle considering the provisions of the Constitution and the EEA. While international instruments prohibit sexual harassment, they do not provide details

[120] Article 2 (a).
[121] Article 2(b).
[122] *Supra*, fn 40, S. 39 (1) (b).
[123] *Supra*, fn 40, S. 39 (1) (c).

on how sexual harassment cases should be dealt with by member states. It is evident from South African legislation that we ascribe to the principles of international law. We go further to provide processes and procedures. However, notwithstanding our compliance with international law, there are practical difficulties in our domestic law in dealing with sexual harassment. Some of these problems have been highlighted regarding the 1998 Code.

2.5 **CONCLUSION**

This chapter has traced the history and development of sexual harassment recourse in the workplace. Throughout its development in South Africa, sexual harassment has been defined in many ways. The common description being unwanted/unwelcome sexual conduct. Sexual harassment often goes with the manipulation of one's position of power be it socially, politically but more relevantly, economically.

The first South African reported case on sexual harassment is *J v M* in 1989. This shows that sexual harassment was being dealt with long before 1998, when the Code on handling sexual harassment cases in the workplace was passed.

Authors like Mowatt influenced the courts when coming to the definition of sexual harassment. The principles evolved through the cases such as *J v M*, *Putco*, *Pick & Pay Stores*, *Sadulla*, *Intertech Systems*, *Reddy*, *etcetera.* Such principles were later enshrined in the LRA, EEA and the Constitution.

The LRA and the EEA gave us the 1998 and 2005 Codes which became sources of first reference in handling sexual harassment cases in the workplace. See cases such as *Gregory*, *Sebatana*, *Sookunan*, *Maepe*, among others which were decided after the 1998 Code but before the 2005 Code.

The period from 1989 to 2004 did not only develop sexual harassment law, but also made SA compliant with international law.

It is therefore safe to conclude that, the South African law on handling of sexual harassment does give a definition of sexual harassment and forms of sexual

harassment. This South African position although not necessarily clear and concise, is better than that of the international legal instruments. This is because, it explicitly deals with the definition and sanctioning of sexual harassment. The 1998 code defines it as an unwanted conduct of a sexual nature. It then goes on to qualify sexual attention into three possible categories. The latter is one of the shortcomings of the 1998 Code as this cloud the definition of sexual harassment by splitting the categories into three and further using the words and/or. Such creates a position that enables adjudicators to have much discretion which leads to uncertainty.

The Code created a link between the nature of sexual harassment and the sanction. Item 7(5) states that reliance should be placed on Schedule 8 of the LRA. Schedule 8 states that employees should be dismissed for either serious acts of misconduct or repeated offences where there has been progressive discipline. Looking at the 1998 Code together with schedule 8 of the LRA, it means that progressive discipline would be just for the trivial, persistent but non-physical forms of sexual harassment. Dismissal as a sanction would then be just on all physical as well as *quid pro quo*[124] forms of sexual harassment. However, this is not the case as adjudicators continue to give contradicting decisions where it is found that sexual harassment exists in the form of unwanted kissing and grabbing.[125]

The problem emanates from how sexual harassment is defined and how it is classified. This then has a bearing on the sanction deemed fit.

[124] *Gaga v Anglo Platinum Ltd* (2012) 33 *ILJ* 329 (LAC) 331 paras G; *University of Venda v M & Others* (2017) 38 *ILJ* 1376 (LC).
[125] *Supra*, fn 102. Whereas in *Pick & Pay Stores Ltd and An Individual* (1994) 3 (1) ARB, unwanted kissing was sanctioned with dismissal.

CHAPTER 3

SEXUAL HARASSMENT IN THE WORKPLACE, YEAR 2005 AND BEYOND

3.1 **INTRODUCTION**

This chapter seeks to demonstrate through case law how the application and interpretation of the 2005 Code has influenced the courts and tribunals in deciding on sexual harassment cases in the workplace. It will answer the following questions:

1) How does the definition of sexual harassment in the Code affect the outcome of these cases?

2) Are we closer to knowing with certainty what constitutes sexual harassment in the workplace or is it as Le Roux sees it, the more we find out the less we know?[126]

The definition of sexual harassment as established in the 1998 Code, has led to inconsistent results as discussed in the previous chapter.[127]

[126] Le Roux, "Sexual Harassment in the Workplace: A Matter of More Questions than Answers or Do We Simply Know less the more We Find Out" (2006) 10 Law Democracy and Dev. 49.
[127] See *Gregory v Russels (Pty) Ltd* (1999) 20 *ILJ* 2145 (CCMA); *SACCAWU obo Willie Sebatana and Dions and Ngantwini and Daimler Chrysler* CCMA case No. FS4517 (20 August 1999); *Pick & Pay Stores Ltd and An Individual* (1994) 3 (1) ARB.

Until December 2018, there was confusion regarding the 1998 and 2005 Codes. One school of thought argued that the 1998 Code has been substituted by the 2005 Code[128] considering the wording 'amended' in its title. The other school of thought argued that both Codes ran concurrently.[129] The latter school of thought was the one adopted by the courts.[130] However, on the 19th December 2018, the 1998 Code was repealed, leaving only the 2005 Code for consideration in the handling of sexual harassment cases.

3.2 THE AMENDED CODE OF GOOD PRACTICE ON THE HANDLING OF SEXUAL HARASSMENT CASES (2005)

Prior to December 2018, the 2005 Code was to be read together with the 1998 Code for one to reach the correct decision in a sexual harassment case.[131]

The 2005 Code shares similarities with the 1998 Code. For one, is the intention or purpose of its creation. The 2005 Code however defines sexual harassment as a form of unfair discrimination on the ground of sex and/or gender and/or sexual orientation.[132] It continues in its definition and says that "sexual harassment is unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to [equality] in the workplace."[133] For sexual harassment to exist according to the 2005 Code, the following elements are all to be taken into account. That is, harassment must be on a prohibited ground of sex, gender and/or sexual orientation; the sexual conduct must be unwelcome; the nature, extent as well as the impact of the sexual conduct on the employee must be considered.[134] As pointed out

[128] Du Toit *et al*, Labour Relations Law: A Comprehensive Guide (2015), 700-702. Le Roux *et al*, Harassment in the Workplace: Law, Policies and Processes (2010), 21.
[129] *Rustenburg Platinum Mines Ltd v UASA obo Pietersen & Others* (2018) *ILJ* 1330, 1337 para 25 (LC) (27 February 2018). See also *Campbell Scientific Africa(Pty) Ltd v Simmers & Others* (2016) 37 *ILJ* 116 (LAC) (23 October 2015).
[130] *Ibid*.
[131] *Ibid*. It should be noted that the 1998 Code was repealed on 19 December 2018 leaving the 2005 Code as The Code. See https://www.golegal.co.za/handling-sexual-harassment-code/ (accessed 01 March 2019).
[132] The Amended Code of Good Practice on Handling of Sexual Harassment Cases in the Workplace 1357 of 2005 (2005 Code), item 3.
[133] *Ibid*, item 4. This will mean *quid pro quo* sexual harassment.
[134] *Supra*, fn 132, item 4.

by Le Roux *et al*,[135] these elements must be considered separately, when determining the existence of sexual harassment.

Once sexual harassment is found to exist, the Code suggests a list of three sanctions.[136] Firstly, the Code suggests warning for minor instances of sexual harassment. However, it does not give examples of what constitute minor instances. It has been argued in the preceding chapter that the minor instances must be those non-physical types of sexual harassment. Secondly, the Code suggests dismissal for continued minor instances of sexual harassment where there has been progressive discipline, as well as for single serious instances of sexual harassment. There is no indication in the Code of what would constitute a serious instance of sexual harassment. It has been suggested in the preceding chapter that serious instances of sexual harassment must be the physical as well as the *quid pro quo*[137] types of sexual harassment. Thirdly, where appropriate a perpetrator maybe transferred to another position. Looking at the essence of the Code and the EEA, that is, to eliminate sexual harassment and discrimination in the workplace, the only reasonable interpretation would be, if this sanction is used in conjunction to the first one. This can be done in order to alleviate the impact of sexual harassment on the victim.

3.3 **CASE LAW AFTER THE 2005 CODE**

The courts and tribunals have continued to decide cases in a manner that raises the question of whether the 2005 Code gives a precise definition and guideline of what and how to handle sexual harassment. There is lack of certainty as demonstrated by the following cases.

In 2010, the LAC in *Motsamai*,[138] held that the LC was correct in reviewing and setting aside the arbitration award. It held that the commissioner erred in ordering re-employment after having found that the perpetrator was guilty of sexual harassment.

[135] Le Roux *et al*, Harassment in the Workplace: Law, Policies and Processes (2010), 32.
[136] *Supra*, fn 132, item 8.8.
[137] *Gaga v Anglo Platinum Ltd* (2012) 33 *ILJ* 329 (LAC) 331 paras G; *University of Venda v M & Others* (2017) 38 *ILJ* 1376 (LC).
[138] *Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC) (04 June 2010).

In *casu*, the perpetrator had sexually harassed two women by asking one woman her panty size. The perpetrator had asked the other woman whether she knew he could undress her with his eyes, displaying pornographic material on his computer, commenting about a colleague's penis, commenting about a female colleague's panty size and estimating it to be the same size as that of the woman in the pornographic material, touching her private parts while hugging, amongst other acts. This was then a new precedent overriding *Gregory*[139]and *Sebatana.*[140]It supported *Pick & Pay Stores.*[141]

In 2011, the LAC in *Gaga*,[142] found that the LC did not err in its conclusion that the commissioner's decision was unreasonable. At the CCMA, the perpetrator had successfully argued that his conduct was removed from the sphere of sexual harassment because the recipient's behaviour signified that she did not regard his advances as offensive or unwelcome. She had only complained about this conduct in an exit interview despite it occurring over a period of two years. The LAC held that "the fact that the subordinate may present as ambivalent, or even momentarily be flattered by the attention, is no excuse; particularly where at some stage in an ongoing situation she signals her discomfort."[143] Another important principle from this case is that senior managers who are found guilty of sexual harassment should face the harshest sentence and when this happen, they will have nobody but themselves to blame.[144]

In 2014, the LC in *SA Metal Group*,[145] held that the commissioner had failed to consider the 2005 Code when defining sexual harassment. The commissioner had found that there was no explicit sexual connotation in the communication exchanged between the perpetrator and the victim. The court however held that the commissioner had

[139] *Gregory v Russels (Pty) Ltd* (1999) 20 *ILJ* 2145 (CCMA).
[140] *SACCAWU obo Willie Sebatana and Dions and Ngantwini and Daimler Chrysler* CCMA case No. FS4517 (20 August 1999).
[141] *Pick & Pay Stores and An Individual* (1994) 3 (1) ARB.
[142] *Gaga v Anglo Platinum Ltd* (2012) 33 *ILJ* 329 (LAC).
[143] *Ibid*, 343 (LAC), para E.
[144] See also *J v M* (1989) 10 *ILJ* 755, 758 (IC) where De Kock stated that it is difficult enough for a young girl to deal with advances from a man who is old enough to be her father. That sexual harassment of an employee in an inferior position is despicable is only fully realized when one has to comfort a young girl crying her heart out in a quiet corner. See also *SA Broadcasting Services v Grogan* (2006) 27 *ILJ* 1519, 1532 para A.
[145] *SA Metal Group (Pty) Ltd v CCMA and Others* (2014) 35 *ILJ* 2848 (LC) (15 April 2014).

failed to refer adequately to the relevant portions of the 2005 Code. This was because for the purpose of the definition of verbal sexual harassment, unwelcome innuendo, suggestions and hints are enough to establish the existence of sexual harassment. The court held further that the Code does not require such communication to be explicit sexual connotation. It is on this aspect that one respectfully disagrees with the court as the Code states that the conduct complained about should be sexual in nature and must be unwelcome.[146] In *casu* however, in all five instances, where the perpetrator complimented the victim on her shoes, invited her for lunch, invited her to come to his house with him after eating lunch, to come eat roti and curry, and to come play monopoly, the victim did not make the perpetrator aware that this banter was unwelcome.[147] Her responses in fact indicated that she was comfortable with it. She also participated willingly in the communication including initiating hugging as a form of greeting which then became a norm. Under these circumstances, it is submitted that the cautionary rule as demonstrated in *Sadulla,*[148] is to be used in such cases in order to distinguish "between a real victim and the pretended or ridiculously hypersensitive victim."[149]

It is submitted that regardless of the power dynamics, it is important for the recipient to object and demonstrate such objections by making it loud and clear that the advances are considered sexual and are unwelcome. This is more relevant where the perpetrator could not have known that such advances are not welcome. Considering the 2005 Code, the acts of the perpetrator in *SA Metal Group* do not amount to sexual harassment. These acts were welcome, and they were not gross in a way that the perpetrator should have known that they will be unwelcome.[150] The victim therefore, had an obligation to communicate in no uncertain terms either verbally or by walking away and not participating in the conversation.[151] It is submitted based on the above

[146] The Notice of Code of Good Practice on the Handling of Sexual Harassment Cases 1367 of 1998, item 3(1); *Supra*, fn 132, item 5.3.1.
[147] See also *Maepe v CCMA* (2002) 23 *ILJ* 568 (CCMA).
[148] *Sadulla v Jules Katz & Co Ltd* (1997) 18 *ILJ* 1482, 1486 paras B-C (CCMA).
[149] *Ibid*.
[150] *Supra*, fn 146, Item 3 (2) (c).
[151] *Supra*, fn 132, item 5.2.1. However, this is in respect of verbally objecting, walking away or not participating in the conversation.

argument that the stance of the Labour Court was therefore incorrect. In *Christian*,[152] a 23-year-old matriculant secretary who was three days in the job was able to voice out her displeasure towards her older manager. Even when her job was on the line, she stood firm and never succumbed to sexual pressure.[153]

Another controversial case is that of *Campbell Scientific Africa*.[154] In 2015 the LAC found that the CCMA was correct in finding that the dismissal was substantively fair since sexual harassment was present. The court found that the perpetrator's conduct constituted sexual harassment as defined in both Codes. The LC had however found the conduct to be inappropriate but held that it did not amount to sexual harassment. The facts of the case are as follows: the perpetrator, a 48-year-old manager of the appellant company had gone to Botswana for business together with his colleague, Mr Le Roux and the complainant, a 23-year-old who was working for another company in a joint venture project.[155] On their last night at the lodge, the three had dinner together. While Mr Le Roux settled the bill, the perpetrator and complainant walked to the parking area to wait for him. It was during this time when the perpetrator told the complainant that he felt lonely, made advances towards her and asked her to come to his room. Her evidence was that he had reiterated this invitation several times, to the point that she felt quite uncomfortable. He also inquired whether she had a boyfriend which the complainant answered in the affirmative and added that they were in contact and it was a serious relationship. The perpetrator then invited her to phone him in the middle of night if she changed her mind.[156]

Steenkamp J, in the LC considered the issue for determination to be, whether the words "do you want a lover tonight" and "come to my room if you change your mind", which the perpetrator had admitted saying, constituted sexual harassment or "mere sexual attention"?[157] It was also considered whether dismissal was a just sanction.

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[152] *Christian v Colliers Properties* (2005) 26 *ILJ* 234 (LC) (25 February 2005).
[153] It is however noted according to *Rustenburg Platinum Mines v UASA obo Pietersen & Others* (2018) 39 ILJ 1330, 1344 para 49 (LC) (27 February 2018) that "the so-called 'victims' of sexual harassment react to their own ordeals and circumstances differently."
[154] *Campbell Scientific Africa (Pty) Ltd v Simmers & Others* (2016) 37 *ILJ* 116 (LAC) (23 October 2015).
[155] *Ibid*, para 2.
[156] *Supra*, fn 154, para 3.
[157] *Supra*, fn 154, para 11.

The LC found it relevant that the two were not co-employees, that they would probably never work together again since the victim had gone to Australia and that there was no disparity of power between them. In addition, the conduct was "once-off", found to have occurred outside the workplace and outside working hours.[158] Furthermore, once the victim made it clear to the perpetrator that it was not welcome, such was never repeated, in other words he backed off.

The LC found that although the perpetrator's comment was crude, inappropriate and amounted to sexual attention, it was a once off and not a serious incident that could qualify as sexual harassment. It is submitted that the reasoning of the LC is one that is sound as it is supported by the Codes. The LC found that even if the perpetrator's conduct was found to be sexual harassment, it could not justify dismissal.[159]

The LAC had however, found that there was sexual harassment when considering both Codes. It found that there was a power differential that favoured the perpetrator due to both his age and gender.

It is acknowledged that sexual harassment is "the most heinous misconduct that plagues a workplace,"[160] and that sexual harassment by older men in positions of power has become a scourge in the workplace.[161] It is also acknowledged that sexual harassment targets amongst other things, reprehensible expressions of misplaced authority by superiors towards their subordinates.[162] However, it is important that the existence of sexual harassment must first be established. It is therefore submitted that the conduct of the perpetrator was not sexual harassment because it was verbal and not a demand for sex. The perpetrator could not have known that such would be unwelcome and when he came to know, he desisted.

It is argued that the reasoning of the LAC is one based on gender and age difference and not on the Codes interpretation. The reasoning of the court also capitalised on "the impact of the sexual conduct on the employee".[163] It is opined that the conduct

[158] *Supra*, fn 154, para 12.
[159] *Supra*, fn 154, para 16.
[160] *Supra*, fn 138, para 20.
[161] *SA Broadcasting Corporation v Grogan* (2006) 27 *ILJ* 1519 (LC) 1532 A.
[162] *Supra*, fn 142, 343 para 41.
[163] *Supra*, fn 132, item 4.4.

in question does not tick off item 4.2 of the 2005 Code, that is, "whether the sexual conduct was welcome" because it is not sexual conduct. The conduct in question also does not tick off item 4.3 of the Code, that is, "the nature and extent of the sexual conduct". Without the presence of sexual conduct, the impact thereof is immaterial.

It is further submitted, that much reliance was put on the emotional response of the victim in that, she was incredibly nervous, felt insulted and had put Mr Le Roux's (a colleague) cell phone number into her cell phone in case the perpetrator approached her during the night. None of these were communicated or demonstrated to the perpetrator. In as much as the victim has a right to protect herself including putting Mr Le Roux's cell phone number into her phone, there were no signs that the perpetrator was persistent in his endeavours in that he might have approached the victim in the middle of the night and forced his way into her room. The emotional response at the proceedings might have been as a result of a well-prepared witness in order to deliver maximum impact at the CCMA. The LAC should have applied the cautionary rule.

It is submitted that categorising verbal conduct such as asking a woman out on a date as sexual harassment is prohibiting romance or courtship in the workplace. This will be an infringement on individuals' rights to make decisions and choices of who to love. For how many relationships that started in the workplace turned permanent by escalating to marriages? Le Roux *et al*[164] states that "there are many instances of successful "office romances" which result in permanent partnerships that are greeted with joy and congratulations."[165] In *Rustenburg Platinum Mines*[166]Judge Tlhotlhalemaje concurred with the commissioner's observations that:

> "there is nothing wrong with employees being attracted to each other at the workplace. After-all, we are all part of Homo Sapiens with feelings and emotions, and it is possible for the office affair to turn into a "happily thereafter union."[167]

[164] *Supra*, fn, 135.
[165] *Supra*, fn 135, 23.
[166] *Supra*, fn 129.
[167] *Rustenburg Platinum Mines Limited v UASA obo Pietersen* (2018) 39 *ILJ* 1330, 1342, para 40 (LC) (27 February 2018). See also para 41 where the judge pointed out that what is wrong and frowned upon is the kind of persistency in one showing love and affection to an extent that it crosses the line between innocent attraction and sexual harassment. *Supra*, fn 154.

Another case for concern is *University of Venda*.[168] In 2017, the LC found that there was sexual harassment perpetrated against three students by their lecturer. The CCMA commissioner had erred in finding that sexual advances by the lecturer to a student in return for marks was not sexual harassment. As discussed thus far, this is a classic example of *quid pro quo* harassment which turned into hostile environment harassment as the students were failed by the lecturer because they did not submit to his sexual advances.[169] The commissioner held that kissing and grabbing one of the students without her consent was not sexual harassment, because after the lecturer was pushed away by the student as a sign of it being unwelcome, he never repeated it. Even though this case happened outside the workplace, it is relevant as it demonstrates the lack of training of the commissioners, which leads to inconsistent and absurd decisions.

3.4 **EVALUATING THE PARALLEL RECOURSE OF THE TWO CODES**

A better definition of sexual harassment in the workplace would be the one found in the 1998 Code as modified in chapter 2 paragraph 2.5 of this dissertation. Repealing the 1998 Code without incorporating the definition into the 2005 Code has its own risks. The 2005 Code concentrates on unfair discrimination. Under this Code, sexual harassment must not only violate the rights of the employee, but also, must constitute a barrier to equality in the workplace. This will cover *quid pro quo* and victimisation harassment leaving out hostile environment sexual harassment. This begs the question therefore; would it still be considered sexual harassment if sexual harassment is committed on all groups indiscriminately or where it does not constitute a barrier to equality?

[168] *University of Venda v M & Others* (2017) 38 *ILJ* 1376 (LC).
[169] *Ibid*.

3.5 **CONCLUSION**

Post 2005 Code, it seems that the more we find out, the less we know as averred by Le Roux.[170] The first challenge was having the Amended Code of Good Practice[171] that did not explicitly repeal and replace the 1998 Code. This then gave us two schools of thoughts. One that said it was repealed and replaced,[172] while the other said both Codes must be applied.[173] The latter was what the courts went for. In *SA Metal Group*,[174] the court reviewed and set aside a CCMA award as the commissioner had failed to consider the definition of sexual harassment as per the 2005 Code.

It has been demonstrated above however, that the 2005 Code cannot be used in isolation of the 1998 Code as they are complementary. The 1998 Code is geared towards misconduct in general hence it is found in the LRA, whereas the 2005 Code is geared towards unfair discrimination and equality hence it is found in the EEA. Therefore, repealing the 1998 Code without incorporating it in the 2005 Code will prove disastrous as the benefits of the 1998 Code regarding definition and handling of sexual harassment will be lost.

The era post 2005 demonstrates a trend in adjudicators failing to make appropriate decisions, as guided by the Codes and case law. This can be attributed to insufficient or lack of training in sexual harassment matters.[175] It can also be attributed to the definition of sexual harassment in the workplace. In the 1998 Code the definition needs some work, while in the 2005 Code, it will need some serious work. There is no doubt that the application or interpretation of the definition has a bearing on the sanction to be meted out. This is because there are minor and serious cases of sexual harassment where dismissal is not always the appropriate sanction.

[170] *Supra*, fn 126.
[171] *Supra*, fn 132, item 3.
[172] Du Toit *et al*, Labour Relations Law: A Comprehensive Guide (2015), 700-702.; Le Roux *et al*, Harassment in the Workplace: Law, Policies and Processes (2010), 21.
[173] *Supra*, fn 145; *Supra*, fn 129.
[174] *Supra*, fn 145.
[175] *Supra*, fn 138; *Supra*, fn 142; *Supra*, fn 145; *Supra*, fn 168 where commissioners were found to have erred.

CHAPTER 4

A COMPARATIVE ANALYSIS OF THE DEFINITION AND APPLICATION OF SEXUAL HARASSMENT WITH THE USA AND CANADA

4.1 **INTRODUCTION**

This chapter seeks to investigate the jurisprudence of the United States of America (USA) and Canada on the definition and application of sexual harassment in the workplace. The chapter will achieve this by looking into relevant cases considered by these jurisdictions, the elements needed to establish the existence of sexual harassment, as well as the test used by the courts and tribunals in deciding on the existence of sexual harassment in the workplace.

4.2 **THE USA**

4.2.1 Introduction

The USA is an important comparator as it was the first country to acknowledge sexual harassment as a legal wrong.[176] The USA also influenced Canada.[177] Backhouse,[178] a renowned Canadian speaker and author points out that although she cannot remember the exact day when the phrase "sexual harassment" was adopted, she does remember that it was coined in April 1975 in Ithaca, New York when a group of 275 women gathered to protest against sexual harassment.

4.2.2 The Law Governing Sexual Harassment in the USA

This section will look at the type of sexual harassment that can be dealt with under Title VII. Title VII is found under the Civil Rights Act of 1964 which is a piece of legislation that outlawed segregation in businesses such as restaurants, hotels and theatres;[179] banned discriminatory practices in employment; ended segregation in public places;[180] established a Commission on Equal Employment Opportunity;[181] and

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[176] Dancaster "Sexual Harassment in the Work-Place: Should South Africa Adopt the American Approach?" (1991) 12 *ILJ* 449.

[177] *Dupuis v British Columbia* 20 C.H.R.R. D/87 (B.C. H.R. Council 1993) cited *Meritor Savings Bank v Vinson* 477 U.S. 57 (1986) to decide whether voluntary sexual intercourse eroded the existence of the unwelcomeness requirement. It held that voluntary conduct by the complainant is not determinative on the issue of unwelcomeness.

[178] Backhouse "Sexual Harassment: A Feminist Phrase that Transformed the Workplace" (2012) 24 Can. J. Women and L. 275, 278.

[179] The Civil Rights Act of 1964, Title II.

[180] *Ibid*, Title III.

[181] *Supra*, fn 179, Title VII.

banned discrimination on the basis of race, colour, religion, national origin or sex,[182] among others. Although Title VII does not refer specifically to sexual harassment, cases of sexual harassment in the USA are dealt with under Title VII. The handling of sexual harassment under Title VII is like that of the 2005 Code which is a product of the South African Employment Equity Act (EEA).[183] Such similarities are evident in the below cases. Secondly, this section is going to look at what constitutes unwelcome conduct as demonstrated by the cases.

4.2.2.1 *Title VII*

Under Title VII and through the cases,[184] sexual harassment was equated to sex discrimination. Title VII states that it shall be unlawful to discriminate against any individual with respect to employment privileges, compensation, terms of conditions, *etcetera*, because of the individual's race, colour, religion, national origin and sex.[185] Such protection is extended to both employees and prospective employees.[186]

This section is like section 6 of the South African EEA[187] which prohibits discrimination based on sex ,amongst other grounds.

In order to bring a claim under Title VII, a plaintiff needs to prove five elements to establish the existence of sexual harassment. She will need to prove that she belongs to a protected group;[188] that she was subjected to unwelcome harassment; that this harassment was based on sex; that the harassment affected a term, condition or

[182] *Ibid*.
[183] EEA 55 of 1998.
[184] *Williams v Saxbe*, 413 F. Supp. 654 (D.D.C. 1976); *Barnes v Costle*, 561 F. 2d 983 (D.C. Cir. 1977); *Bundy v Jackson*, 641 F. 2d 934 (D.C. Cir. 1981).
[185] The Civil Rights Act of 1964, Title VII 2000e-2 (a) (1988).
[186] *Ibid*.
[187] *Supra*, fn 183.
[188] In *Barnes v Costle*, 561 F. 2d 983 (D.C. Cir. 1977), 990 the appellate court held that a Title VII claim could be based on the sexual harassment allegations as employee had been a target of supervisor's sexual advances because she was a woman.

privilege of employment;[189] and that her employer is liable. This is evident from cases such as *Williams*,[190] *Garber*[191] and *Tompkins*.[192]

Earle and Madek[193] pose the question, "what constitutes sex discrimination?"[194] The authors further acknowledge that there is a struggle to find a satisfactory definition of sexual harassment as well as to decide whether it is a form of sex discrimination.[195] In the early cases,[196] the courts found that sexual-oriented conduct was discrimination based on the individual sexually attractiveness, or her refusal to engage in sexual relations with the perpetrator. The courts found that it was not discrimination based on gender. Sexual harassment could therefore not be found because the element that the victim belongs to a protected group, was missing.

For example, in *Barnes*,[197] the district court failed to find a Title VII claim because in the opinion of the trial court, the victim "was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor". In *casu*, the victim claimed that her position was made redundant after refusing a male supervisor's sexual proposal.

The *Barnes* case is inconsistent with Title VII and the below cases where sexual harassment was found to exist.

In *Williams*,[198] the court held that the retaliatory actions taken by the supervisor as a result of the refusal of sexual advances were actionable under Title VII because the conduct created an artificial barrier to employment which was placed before one gender and not the other.[199] In *casu*, the victim alleged that a previously good

[189] In *Bundy v Jackson* 641 F. 2d 934 (D.C. Cir. 1981) 943-944, the appellate court held that Title VII sexual discrimination may occur where an employer created or condoned a substantially discriminatory work environment regardless of whether the complaining employees lost any tangible job benefits.
[190] *Williams v Saxbe*, 413 F. Supp. 654 (D.D.C. 1976).
[191] *Garber v Saxen Business Products, Inc* 552 F. 2d 1032 (4th Cir. 1977).
[192] *Tompkins v Public Ser. Elec. & Gas Co*., 422 F. Supp. 553 (D.C.N.J 1976).
[193] Earle and Madek "An International Perspective on Sexual Harassment Law, 12 Law & Ineq. 43 (1993).
[194] *Ibid*, 48.
[195] *Ibid*.
[196] *Supra*, fn 192; *Muller v Bank of America*, 418 F. Supp. 233 (N.D. Cal. 1976); *Supra*, fn 190; *Supra*, fn 188; *Supra*, fn 191.
[197] *Supra*, fn 188. See also *Muller v Bank of America*, 418 F. Supp. 233 (N.D. Cal. 1976) and *Barnes v Train*, 13 Fair Empl. Prac. Cas. (BNA) 123 (D.D.C. 1974).
[198] *Supra*, fn 190.
[199] See in comparison item 4 of the 2005 Code.

employment relationship had turned sour after she had rejected her supervisor's sexual advances.[200]

Similarly, in *Garber*,[201] the court found that Title VII was violated as a result of the victim being dismissed after refusing her male supervisor's sexual advances. The court held that the silence and non-action by the employer made it look like it was the employer's policy to make female employees submit to the sexual advances of their male supervisors.[202]

In *Tomkins,*[203] the court held that Title VII was violated by the supervisor on account of his sexual advances, as the victims continued employment was only secure if she submitted to these advances.[204] The court held that:

> "Title VII is violated when a supervisor, with the actual or constructive knowledge of the employer, makes sexual advances or demands toward a subordinate employee and conditions that employee's job status-evaluation, continued employment, promotion, or other aspects of career development on a favourable response to those advances or demands and the employer does not take prompt and appropriate remedial action after acquiring such knowledge."[205]

4.2.2.2 *What Constitutes an Unwelcome Conduct?*

On the element of unwelcome, the supreme court in *Meritor Savings Bank*,[206] held that voluntariness "in the sense that the complainant was not forced to participate against her will,"[207] is not a defence to the Title VII sexual harassment claim. The correct inquiry according to the court "is whether [the victim] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."[208]

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[200] *Supra*, fn 190, 655.
[201] *Supra*, fn 191.
[202] *Ibid*.
[203] *Tomkins v Public Serv. Elec. & Gas Co*. 568 F. 2d 1044 (3rd Cir. 1977). See also *Muller v Bank of America*, 600 F. 2d 211 (9th Cir. 1979; *Corne v Bausch & Lomb Inc*., 562 F. 2d 55 (8th Cir. 1977).
[204] *Tomkins v Public Serv. Elec. & Gas Co*. 568 F. 2d 1044, 1045 (3rd Cir. 1977).
[205] *Ibid*, 1048-1049. In *Meritor Savings Bank v Vinson* 477 U.S. 57 (1986) the court rejected the strict liability standard and said that an employer will only be liable if it was aware of the wrongful conduct.
[206] *Meritor Savings Bank v Vinson* 477 U.S. 57 (1986).
[207] *Ibid*, 68.
[208] *Ibid*.

In *Burns*,[209] the court held that the test for determining that the conduct was unwelcome is "that the employee did not solicit or incite it, and the employee regarded the conduct as undesirable or offensive."[210]

Earle and Madek summarise the importance of the unwelcome element as "the gravamen of any sexual harassment claim."[211] In the South African context, this element of unwelcome is demonstrated by the case of *Sadulla*,[212] and is to be used in cases to distinguish "between a real victim and the pretended or ridiculously hypersensitive victim."[213]

4.2.2.3 *The Equal Employment Opportunity Commission (EEOC) Guidelines*

Section 706(b) of the Civil Rights Act of 1964 empowers the EEOC to investigate employers whom it has reason to believe are in violation of the Act.

Section 1604.11[214] states that "harassment on the basis of sex is a violation of section 703 of title VII." It defines sexual harassment as unwelcome sexual advances which may include requests for sexual favours, verbal or physical conduct of a sexual nature. To constitute sexual harassment, the submission to such conduct must be made a term or condition of employment either explicitly or implicitly. The EEOC guidelines states that "the commission must look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual harassment and the context in which the alleged incident occurred."[215]

The drawback of the EEOC guidelines lies in the name itself. They are guidelines and not regulations having the force of the law.[216] Furthermore, the condition that the sexual conduct must be explicitly or impliedly made a condition of employment removes other sexual acts from the sexual harassment category.

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[209] *Burns v McGregor Electronic Industries, Inc*., 955 F. 2d 559 (8th Cir. 1992).
[210] *Ibid*, 565.
[211] *Supra*, fn 193, 52.
[212] *Sadulla v Jules Katz & Co Ltd* 1997 (18) *ILJ* 1482, 1486 paras B-C (CCMA).
[213] *Ibid*.
[214] Code of Federal Regulations, Part 1604 Guidelines on discrimination because of sex.
[215] *Ibid*, S. 1604.11 (3) (b).
[216] *Chrysler Corp v Brown*, 441 U.S. 211, 301-308 (1979) (EEOC guidelines are entitled to great deference); *General Elec. Co. v Gilbert*, 429 U.S. 124, 142-143 (1976) (Supreme court rejected EEOC guidelines for reasons that they were ill-reasoned and inconsistent with the position the EEOC had taken earlier).

The arguments advanced by Earle and Madek that "the parameters of what constitutes actionable sexual harassment still need definition in the United States"[217] and that there is still a "struggle to find a satisfactory definition for sexual harassment,"[218] is convincing.

4.2.2.4 *The Test Used by the Courts*

The EEOC recommends evaluating the circumstances of each claim from the viewpoint of a reasonable person in order to create an objective standard as to when interference is unreasonable.[219] The question therefore arises as to who is a reasonable person, the victim or the perpetrator? According to the EEOC guidelines a reasonable person is the reasonable victim.[220] It cites that a reasonable person would not be seriously offended by "invitations to join a group of employees who regularly socialized at dinner after work."[221] The guidelines continue to state that "sexual flirtation or innuendo, even vulgar language that is trivial or merely annoying, would probably not establish a hostile environment."[222]

In *Rabidue*,[223] the court wrongly applied the reasonable person test. It focused on the victim's personality more than it did on the perpetrator's offensive behaviour. It then decided that the perpetrator's use of the words such as "whores, cunt, pussy and tits were merely annoying but not startling to affect the psyches of the plaintiff or other female employees seriously."[224]

This test has shortcomings. It perpetuates the debate whether the test to be applied is one of reasonable person or a reasonable woman. Secondly, as demonstrated in

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[217] *Supra*, fn 193, 46.
[218] *Supra*, fn 193, 48.
[219] EEOC: Policy Guidance on Sexual Harassment, 8 Fair Empl. Prac. Man. (BNA) 405: 6681, 6689 (1990), hereinafter Policy Guidance.
[220] *Ibid*. See also Judge Keith dissent judgment in *Rabidue v Osceola Refining Co*. 805 F. 2d 611 (6th Cir. 1986) where a reasonable woman was advocated over a reasonable person which influenced several courts in *Andrews v City of Philadelphia* 895 F. 2d 1469 at 1482 (3rd Cir. 1990); *Ellison v Brady* 924 F. 2d 872, 878-881 (9th Cir. 1991).
[221] *Ibid*.
[222] *Ibid*. *Supra*, fn 212, where a cautionary rule was used to distinguish between a real victim and the pretended or ridiculously hypersensitive victim.
[223] *Rabidue v Osceola Refining Co*. 805 F. 2d 611 (6th Cir. 1986).
[224] *Ibid*, 622.

Rabidue, it shifts the focus to the victim and away from the perpetrator whose conduct should be under scrutiny.

4.2.3 Evaluation of USA Protection

The handling of sexual harassment under Title VII as well as equating sexual harassment to sex discrimination has its challenges. A sexual conduct is immediately removed from the sexual harassment category should the perpetrator direct his conduct to both men and women. This is because, he will now be treating both equally without discrimination, even though he is sexually harassing them. Secondly, the requirement that the sexual conduct must be explicitly or impliedly be made a condition of employment also removes a sexual conduct from the sexual harassment category. This language of Title VII can already be seen in the 2005 Code. The 1998 Code read together with the 2005 Code gives a stronger position in defining and handling sexual harassment. Unlike Title VII, these Codes are explicit on sexual harassment. South Africa can however benefit immensely if an EEOC like body can be created. This body like in the USA will have the power to investigate sexual harassment cases. It will function like the human rights commission.

4.3 **CANADA**

4.3.1 Introduction

There are three aspects that will be looked at in this section. The first one is whether sexual harassment is discrimination based on sex. The second aspect is the definition of sexual harassment in the Canadian jurisdiction. The last aspect is the test used by the courts to determine the existence of sexual harassment.

4.3.2 The Law Governing Sexual Harassment in Canada

Canada's approach to sexual harassment in the workplace is one that is based on human rights.[225] The Canadian Human Rights Act[226] states that it is a discriminatory act to "refuse to employ or continue to employ any individual or in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination."[227]

The Canadian Labour Code (CLC)[228] provides that employees are entitled "to employment free of sexual harassment"[229]. Like the 1998 and 2005 Codes,[230] the CLC provides that employers should make "every reasonable effort to ensure that no employee is subjected to sexual harassment."[231] The CLC further directs that the employer must issue a sexual harassment policy.[232]

Like the USA, Canada has equated sexual harassment to sex discrimination. Pellicciotti[233] equates the development of sexual harassment law in Canada to that of the USA in that "the same central issue, that is, whether acts of sexual harassment in the workplace amounted to sex discrimination prohibited by a jurisdiction's human rights law."[234]

In *Bell,*[235] the central issue was whether sexual harassment was a form of prohibited sexual discrimination. Shime the adjudicator defined sexual harassment as:

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[225] The Canadian Human Rights Act (CHRA) R.S.C., Ch H6 (1985), amended by R.S.C. Ch 31 (1985, 1st Supp.), R.S.C. Ch 32 (1985, 2nd Supp.) prohibits workplace discrimination of any kind including sexual harassment. See also Pellicciotti "Workplace Sexual Harassment Law in Canada and the United States: A Comparative Study of the Doctrinal Development concerning the Nature of Actionable Sexual Harassment, 8 Pace Inte' L. Rev. 339, 346-347 (1996).
[226] The Canadian Human Rights Act (CHRA) R.S.C., Ch H6 (1985), amended by R.S.C. Ch 31 (1985, 1st Supp.), R.S.C. Ch 32 (1985), 2nd Supp.).
[227] *Ibid*, S. 7. See in comparison S.6 of the South African EEA.
[228] The Canadian Labour Code R.S.C., Ch 9 (1985).
[229] *Ibid*, S. 17.
[230] Item 5 of 1998 Code, and item 6 of the 2005 Code.
[231] *Supra*, fn 228.
[232] *Ibid*. See in comparison item 6 of 1998 Code, and item 7 of the 2005 Code which mandates employers in the South African jurisdiction to adopt sexual harassment policy.
[233] Pelliciotti "Workplace Sexual Harassment Law in Canada and the United States: A Comparative Study of the Doctrinal Development concerning the Nature of Actionable Sexual Harassment, 8 Pace Inte' L. Rev. 339, 355 (1996).
[234] *Ibid*.
[235] *Bell v Ladas, RC Bell and Korczak*, 27 L.A.C 2d 227, 1 C.H. R.R. D/155 (Ont. Bd. of Inq. 1980).

> "the forms of prohibited conduct that, in my view, are discriminatory run the gamut from overt gender based activity, such as coerced intercourse to unsolicited physical contact to persistent propositions to more subtle conduct such as gender based insults and taunting, which may reasonably be perceived to create a negative psychological and emotional work environment."[236]

In *casu*, the victim's case was dismissed as she was unable to satisfy the burden of proof. The adjudicator found that the victim's testimony was unreliable and as a result she failed to prove the existence of sexual harassment. The tribunal however, found that sexual harassment was a form of prohibited sex discrimination.

Coutroubis,[237] was the first case to find the employer liable for prohibited sex discrimination due to sexual harassment in the workplace.[238] The principle as expounded by *Bell*, that sexual harassment is prohibited sex discrimination was then accepted and followed by other tribunals.[239]

The *Janzen*[240] case was also instrumental in defining sexual harassment. It defined sexual harassment as "the concept of using a position of power to import sexual requirements into the workplace thereby negatively altering the working conditions of employees who are forced to contend with sexual demands."[241] It is an "unwelcome conduct of sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment."[242]

The *Janzen* case points out that there is no longer a need to classify sexual harassment as *quid pro quo* or hostile work environment. What is important is that sexual harassment is unwelcome sexual conduct which "has invaded the workplace, irrespective of whether the consequences of the harassment included a denial of concrete employment rewards for refusing to participate in sexual activity."[243] More

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[236] *Ibid*, D/156.
[237] *Coutroubis v Sklavos Printing* 2 C.H.R.R. D457 (Ont. Bd. of Inq. 1981).
[238] *Supra*, fn 233, 356.
[239] *Kotyk v Canadian Employment and Immigration Comm'n*., 4 C.H.R.R. D1416 (Can. H. R. Comm'n 1983); *Phillips v Hermiz*, 5 C.H.R.R. D/2450 (Sask. H. R. Comm'n 1984); *Deisting v Dollar Pizza Ltd*., 3 C.H.R.R. D/898 (Alta. H. R. Comm'n 1982); *Hughes v Dollar Snack Bar*, 3 C.H.R.R. D/1014 (Ont. Bd. of Inq. 1981).
[240] *Janzen v Platy Enterprises Ltd* 59 D.L.R. 4th 352, 10 C.H.R.R. D/6205 (Can. 1989).
[241] *Ibid*, D/6225.
[242] *Supra*, fn 240, D/6227. *Supra*, fn 233, 386.
[243] *Supra*, fn 240.

importantly, the court concluded that an exhaustive definition of sexual harassment was impossible.

The court elaborates as follows:

> "When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being."[244]

In *Bouvier*,[245] sexual harassment is defined as consisting of

> "unwelcome behaviour of a sexual nature which is an affront to the personal dignity of another person. It may be blatant or subtle, and may take many forms, but the evidentiary burden on the victim is only that of establishing that the conduct complained of was (1) of a sexual nature, (2) unwanted and (3) humiliating."[246]

Janzen's definition concentrates on a situation where the aggressor is in a position of power in order to import sexual requirements in the workplace. *Janzen's* definition is like Bouvier's in so far that sexual harassment injures personal dignity of the victim. It differs however in that Bouvier's definition does not advocate that the perpetrator should necessarily be in a position of power. All that is required is that there should be conduct of sexual nature, which is unwanted and humiliating. This approach will thus include sexual harassment amongst colleagues.

Sexual harassment in Canada, as is the case in our jurisdiction[247] encompasses inappropriate comments.[248] Sexual harassment in Canada is discrimination based on sex. Although definitions vary, the common thread is that, it is an unwelcome sexual conduct.

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[244] *Supra*, fn 240.
[245] *Bouvier v Metro Express* 17 C.H.R.R D/313 (Can. H.R. Trib. 1992).
[246] *Ibid*, D/326.
[247] Item 4(1) (b) of the 1998 Code and item 5.3.1.2 of the 2005 Code.
[248] *Shaw v Levac Supply Ltd*., 14 C.H.R.R. D/36, at D/54 (Ont. Bd. of Inq. 1990); *Supra*, fn 245.

4.3.2.1 *The Test Used by the Courts*

In a Canadian case, the test used is a subjective one, that is, the conduct complained of must be unwelcome to the complainant.[249] In *Dupuis*,[250] the tribunal cited the American case of *Meritor Savings Bank*,[251] and held that voluntary conduct by the complainant is not determinative on the issue of unwelcomeness.[252] In the *Dupuis* case, like in *Meritor Savings Bank*, the tribunal considered whether sexual harassment had occurred even though the complainant had voluntarily entered into sexual intercourse with her supervisor. The tribunal stated that the "indication of unwelcomeness may be implicit; an overt refusal may not be necessary."[253] The tribunal pointed out that body language or walking away can be enough to prove that the sexual conduct was unsolicited and unwelcome.[254]

The tribunal further made it clear that:

> "Though a protest is strong evidence, it is not a necessary element in a claim of sexual harassment. Fear of repercussions may prevent a person in a position of weakness from protesting. A victim of harassment need not confront the harasser directly so long as her conduct demonstrates explicitly or implicitly that the sexual conduct is unwelcome."[255]

In the South African jurisdiction, the case of *Gaga*,[256] summarises this position and state that "the fact that the subordinate may present as ambivalent, or even momentarily be flattered by the attention, is no excuse; particularly where at some stage in an ongoing situation she signals her discomfort."[257]

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[249] *Janzen v Platy Enterprises Ltd* 59 D.L.R. 4th 375.
[250] *Dupuis v British Columbia* 20 C.H.R.R. D/87 (B.C. H.R. Council 1993).
[251] *Supra*, fn 206.
[252] *Supra*, fn 249, D/93.
[253] *Ibid*.
[254] *Ibid*. See in comparison item 5.2.1 of the 2005 Code.
[255] *Supra*, fn 250, D/94.
[256] *Gaga v Anglo Platinum Ltd* (2012) 33 *ILJ* 329 (LAC).
[257] *Ibid*, 343 para E. See also *J v M* (1989) 10 *ILJ* 755, 758 (IC) where De Kock stated that it is difficult enough for a young girl to deal with advances from a man who is old enough to be her father. That sexual harassment of an inferior position is despicable is only fully realized when one must comfort a young girl crying her heart out in a quiet corner. See also *SA Broadcasting Services v Grogan* (2006) 27 *ILJ* 1519, 1532 para A.

In Canada, to determine the element of unwelcomeness, the trier of fact must first consider all relevant facts[258] in order to satisfy himself that for all intents and purposes, the victim's conduct did demonstrate that the perpetrator's conduct was never welcome. [259] He must further assess the evidence to support the notion that the perpetrator either knew or ought to have known that his conduct remained unwelcome. [260]

Put in another way,

> "While the perception of the alleged harasser is relevant in determining whether the conduct was unwelcome, the proper question to ask is whether a reasonable person would recognize that the conduct in those circumstances was unwelcome. What is reasonable will depend on all the circumstances, including the nature of the impugned conduct and the relationship."[261]

It is therefore safe to conclude that in Canada, sexual harassment in the workplace is not susceptible to a precise definition and questions regarding the appropriateness of workplace conduct in some cases will always remain.

4.3.3 Evaluation of Canadian Protection

Canada equates sexual harassment to sex discrimination, just like the 2005 Code does. Its CLC shares the desire both the 1998 and 2005 Codes share, that is, to eliminate sexual harassment in the workplace by advocating for the creation of policies on sexual harassment. The case of *Janzen* is crucial in that it states that there is no need to classify sexual harassment into *quid pro quo* or hostile work environment cases. What is crucial is that it is unwelcome sexual conduct irrespective of the nature of consequences. South Africa can simplify the definition of sexual harassment by doing away with classifying sexual harassment into *quid pro quo* and hostile work environment.

[258] *Supra*, fn 250, D/94.
[259] *Supra*, fn 250, D/94. This position mirrors the South African position in *Sadulla v Jules Katz & Co Ltd* 1997 (18) *ILJ* 1482 (CCMA) where it was held that the victim should not actively participate or bring in new topics in the conversation.
[260] *Supra*, fn 250, D/94. See in comparison item 3(2) (C) of the 1998 Code which states that sexual attention becomes sexual harassment when the perpetrator should have known that the behaviour is regarded as unacceptable.
[261] *Supra*, fn 250, D/95.

Canada also share with South Africa the definition of the element of unwelcomeness. A victim of sexual harassment can voluntary engage in the sexual conduct, however, it does not mean that such was welcome. What is required is that the victim must demonstrate such unwelcomeness explicitly or impliedly. The courts are considerate of victims that are vulnerable because of age, economic position, junior status at work, *etcetera*. What also is considered is the fact that the perpetrator either knew or ought to have known that his conduct will be unwelcome. All these facts are considered. The South African position is demonstrated by the cases of *Gaga*, *J v M* and *SA Broadcasting Services*. The overall sense is that when relying on the 2005 Code, South Africa is at par with Canada on defining and handling sexual harassment in the workplace.

4.4 **CONCLUSION**

Both the USA under Title VII and Canada under the Canadian Human Rights Act classify sexual harassment as discrimination based on sex. This is in comparison with item 3 of the South African 2005 Code which also classifies sexual harassment as unfair discrimination which is prohibited on the grounds of sex and/or gender. The common thread amongst these three jurisdictions, lies in the definition of sexual harassment where the common terms used to define sexual harassment are unwelcome conduct of a sexual nature.

Canada relied on the USA to determine the question of unwelcomeness where there has been voluntary sexual conduct. South Africa in *Gaga*[262] shares similar sentiments with the USA *Meritor*[263] case and Canada's *Dupuis*[264] case regarding the element of unwelcomeness. The *Gaga* case puts it clear that "the fact that the subordinate may present as ambivalent, or even momentarily be flattered by the attention, is no excuse; particularly where at some stage in an ongoing situation she signals her discomfort."[265]

[262] *Supra*, fn 256.
[263] *Supra*, fn, 206.
[264] *Supra*, fn 250, D/94.
[265] *Supra*, fn 256, 343 para E.

The commitment by the CLC on workplaces free of sexual harassment is also pledged by South Africa's 1998 and 2005 Codes. Regardless of this commitment, the social ill known as sexual harassment continues to plague workplaces.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 **INTRODUCTION**

The dissertation sought to investigate the definition of sexual harassment in the workplace. The purpose was to investigate whether the legislation in the form of the 1998 and 2005 Codes provide a clear and concise definition.

The dissertation also investigated how the courts have defined and handled sexual harassment cases. In the interpretation and application of the law, have the courts not stretched the definition of sexual harassment too far? The jurisprudence of the USA and Canada were used to gauge the South African position on both interpretation and application. Although the South African position came out on top, there is still room for improvement.

Set out below are the findings of this dissertation in respect of the two research questions posed, followed by recommendations.

5.2 DOES SOUTH AFRICAN LEGISLATION PROVIDE A CLEAR AND CONCISE DEFINITION OF SEXUAL HARASSMENT IN THE WORKPLACE?

Both the USA and Canada do not have a precise sexual harassment definition. South Africa is in a better although not perfect position. Although it is impossible to come up with an exhaustive definition of sexual harassment, [266] a proper foundation of such definition goes a long way to create certainty. The cases discussed in this dissertation indicate lack of certainty with both the definition and application of sexual harassment.

The repeal of the 1998 Code without incorporating it to the 2005 Code has weakened the South African position when coming to the definition and application of sexual harassment in the workplace. What has been noted also, is that, there is no longer a need to classify sexual harassment into *quid pro quo* or hostile work environment,[267] the legislation should cover both without classification.

To sum up, while there is a definition, it needs to be more concise.

5.3 HOW SHOULD SEXUAL HARASSMENT IN THE WORKPLACE BE DEFINED AND APPLIED?

Firstly, the 1998 Code must be incorporated into the 2005 Code to cover hostile work environment sexual harassment. While there is no longer a need to classify sexual harassment into *quid pro quo* and hostile work environment, both still need to be covered by defining sexual harassment as an unwelcome sexual conduct irrespective of the nature of consequences. The 2005 Code in its current state, does not cover hostile work environment sexual harassment. It deals with sexual harassment as sex or gender discrimination. Therefore, the repeal of the 1998 Code leaves the workplace unprotected from hostile work environment types of sexual harassment. Secondly, item 3(2)(c) of the 1998 Code states that the perpetrator should have known that his behaviour is regarded as unacceptable. This implies that the perpetrator should have

[266] *Rabidue v Osceola Refining Co*. 805 F. 2d 611, D/6226 (6th Cir. 1986).
[267] *Ibid*.

known because the recipient has made it clear before, that the behaviour is offensive.[268] This perpetuates the patriarchal culture of blaming the victim on what she said, did and was wearing. There should be less focus on the behaviour of the victim *vis-a-vis* that of the perpetrator. The wording should thus be "the perpetrator ought reasonably expectedly to have known".

The 1998 code defines sexual harassment as unwanted conduct of a sexual nature. It then goes on to qualify sexual attention into three possible categories, which then clouds the definition.

It is thus recommended that there must only be two categories, that is,

(a) The behaviour although trivial, is persistent and unwelcome, meaning the recipient has communicated or demonstrated that it is considered offensive. For example, non-physical forms of sexual harassment.
(b) The behaviour is gross, even if it is a single act as the perpetrator ought reasonably expectedly to have known that it is regarded as unacceptable. For example, physical contact forms of sexual harassment.

The code of good practice on the handling of sexual harassment cases must stipulate the minor types of sexual harassment that calls for punishment short dismissal. These are acts on first occurrence and which are non-physical. It should also state that physical cases are serious in nature and warrant a dismissal on first occurrence. This will create a zero tolerance to unwelcome physical sexual conduct which will drastically reduce sexual harassment cases.

5.4 **RECOMMENDATIONS**

Coming up with a concise definition of sexual harassment is only half the battle. The other half is on the following.

[268] The Notice of Code of Good Practice on the Handling of Sexual Harassment Cases 1367 of 1998 (1998 Code), item 3(2)(b).

The government must enforce item 5[269] and item 6,[270] that is, of employers having to develop and implement sexual harassment policies. Currently, this is not mandatory for employers, including the ruling party, the African National Congress, which has been found to be without a sexual harassment policy. Section 60 of the Employment Equity Act (EEA)[271] is an example where the employer is held liable for acts of its employees where the employer fails to take necessary steps to eliminate discrimination(sexual harassment) after it has become aware. Employers must thus be held liable for not having sexual harassment policies in place.

Education of all stake holders is also critical in the handling and combating of this scourge. The awareness trainings[272] must be done for all employees, management and staff alike, unions, commissioners, *etcetera*. This will educate the likely perpetrators and potential victims of what sexual harassment is, the consequences and how to handle it.

In order to combat sexual harassment in the workplace, remedies should be made easily available under criminal and civil law. This will act as a deterrence as the perpetrator will also be directly dealt with.

With a degree of certainty in the sexual harassment definition, education of stakeholders, enforcement from government and consistent application of the law governing sexual harassment, it is possible to eliminate sexual harassment from the workplace without infringing on the right of who to love. South Africa, therefore, must continue to be a pacesetter in the sexual harassment law especially in defining and handling sexual harassment in the workplace.

[269] 1998 Code.
[270] 2005 Code.
[271] EEA 55 of 1998.
[272] Awareness training is held as one of the most effective ways of preventing and combating sexual harassment in the workplace. See Halfkenny "Legal and Workplace Solutions to Sexual Harassment in South Africa (Part 2): The South African Experience", 17 *ILJ* 213 (1996) 231.

Acronyms

ANC: African National Congress

CCMA: Commission for Conciliation, Mediation and Arbitration

CLC: Canadian Labour Code

EEA: Employment Equity Act

EEOC: Equal Employment Opportunity Commission

LAC: Labour Appeal Court

LC: Labour Court

LRA: Labour Relations Act

NEC: National Executive Committee

NEDLAC: National Economic Development and Labour Council

USA: United States of America

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