Sexual harassment at work

Protection without protection

South Africa has a number of good laws that protect women against sexual harassment in the workplace. **Jennifer Williams** records some cases that have been heard in recent years, but notes with alarm how few sexual harassment cases see the light of day.

Nthabiseng is a 35-year-old domestic worker. She supports her children and grandchildren on an income of less than R1 000 a month. She travels to work everyday by public transport and loves the children at the house where she works. One day her employer touches her breasts without her consent. She pulls away and he then rapes her. She is afraid it will happen again, but she cannot afford to lose her job. She continues working and tries to avoid him.

Such cases are unfortunately not unusual. The Women's Legal Centre is approached by domestic and farm workers, women in the defence force, police, and professional women complaining of sexual harassment and all reluctant to report it. Some fear losing their jobs, others fear victimisation and all are reluctant to face the accompanying stigmatisation.

South African law is at the forefront of the international human rights law project. In terms of the Constitution, read with the Employment Equity Act 1998 (EEA), sexual harassment is a form of unfair discrimination.

However, these formal protections are frequently undercut by the realities of working life for many women. Significant successful sexual harassment cases have been run in recent years, but these cases are only a fraction of the sexual harassment endured by South African women.

As with many violations of bodily integrity, those most likely to experience sexual harassment are poorly educated African women, most often performing unskilled work in rural areas.

Human Rights Watch has published reports detailing sexual violence and harassment experienced by women, and also by girls attending rural schools. The situation is made worse by the nature of their employment, which is often tied to their residency at their place of work, particularly farm and domestic workers.

The barriers to reporting sexual harassment are often insurmountable. Many of these women have little formal education and do not have the knowledge of, or access to, services to assist them to enforce their rights. But most pressing is the knowledge that once they report harassment, they either remain in residence with the perpetrator, or leave and risk homelessness and unemployment.

A continuum of sexual violence and intimidation in South Africa threatens the safety and livelihoods of all women and undermines the constitutional promise of equality.

CODE OF GOOD PRACTICE

Unequal power relationships are at the centre of sexual harassment in the workplace. The position of women previously classified as black under apartheid is still loaded with historic and institutional disadvantages.

However, in recognition of these disadvantages, there have been a number of legislative and judicial attempts to better protect women from sexual harassment in the last ten years.

The first sexual harassment case to come before the Industrial Court was *J v M* in 1989. Prior to this decision, the rights of employees at work had only extended to physical safety and freedom from hostility.

The first Code of Good Practice on the Handling of Sexual Harassment Cases (the Code) under Section 203 of the Labour Relations Act attempted to eliminate sexual harassment in the workplace by providing procedures to assist employers in dealing with sexual

harassment complaints (see page 20). The Code defined sexual harassment as "unwanted conduct of a sexual nature with the unwanted nature of sexual harassment distinguishing it from behaviour that is welcome and mutual."

Since the enactment of the Constitution and the EEA, the Code has been revised to bring it into line with these legal provisions. Chapter II of the EEA deals with all forms of unfair discrimination and applies to all companies and employees. Sexual harassment is defined as a form of discrimination and is now expressly forbidden under section 6(3) of the EEA, which prohibits harassment under any of the grounds listed in section 6(1) which include gender and sex.

SIGNIFICANT CASES

The two leading cases, *Ntsabo v Real Security* (2003) and *Grobler v Naspers* (2004) subsequent to the enactment of the EEA, established that employers can be held responsible for an employee's misconduct where the employer fails to act after being notified of a sexual harassment claim against another employee.

In order to succeed against an employer, the complainant must show that sexual harassment had occurred and that the employer was immediately notified but failed to prevent future misconduct. A broad interpretation is given to "immediately" in these cases and in the Code.

The development of the law to recognise a positive duty on employers to create a working environment that is free from all forms of discrimination was a welcome step towards eliminating sexual harassment in the workplace.

However, the obligation was limited. In *Mokoena v Garden Art Ltd* (2008), two employees filed a claim against their employer for failing to take steps to prevent future sexual harassment. Their claim relied on section 60 of the Employment Equity Act 55.

The Labour Court found that an employer is only liable under section 60 if subsequent sexual harassment had occurred because the employer had failed to take action after it had been notified of the harassment. Therefore, an employer is not liable under section 60 for one act of sexual harassment that is brought to its attention. The Court found that the employer was not liable because he had reacted to the employee's complaint by issuing a warning against the offender and no future incidents of harassment had occurred.

Perhaps this judgement can be questioned on whether the employer did not have an obligation to take reasonable steps to prevent the incident occurring in the first place, and an argument could be developed in this way.

There are also other legal routes available where an employee is unable to prove the harassment under the EEA or under the common law for damages. An employee could seek constitutional damages as an alternative claim.

In *Piliso v Old Mutual Life Assurance Co* (2007), the complainant found pictures of herself with suggestive writing at her workstation and subsequently filed a claim against her employer for failure to investigate. The complainant did not succeed in her sexual harassment claim because, although she was harassed, the Labour Court found that the complainant was unable to prove that the conduct was committed by a fellow employee.

However, the Court found that the employer had violated the complainant's right to fair labour practices under section 23(1) of the Constitution because the employer failed to properly investigate and provide adequate support to the complainant after a sexual harassment incident had been reported. Since the employer had infringed on the complainant's constitutional right to fair labour practices, the Court ordered it to pay her R45 000 in constitutional damages.

The law can come to the assistance of women that have the resources and the courage to report the harassment, but these are exceptional cases.

CONCLUSION

When we view the high levels of violence against women and the huge levels of poverty they suffer, the cases of sexual harassment that remain unreported are a cause for alarm.

In order to create equality in the workplace, an environment that is conducive to reporting sexual harassment without repercussions is essential. A first step is to make the guidelines in the Code compulsory and penalise employers that do not comply.

Also legislation and jurisprudence must be developed for particularly vulnerable sectors such as domestic and farm workers and the obligations of employers in small businesses. As with the enforcement of many constitutional rights, access to justice is crucial. Most importantly, we need to work to change the mindset of people around equality between men and women in society. LB

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Clauses from 'Code of Good Practice on the Handling of Sexual Harassment Cases' in Labour Relations Act

The object of this Code is to eliminate sexual harassment in the workplace.

PROCEDURES

Employers should develop clear procedures to deal with sexual harassment. These procedures should ensure the resolution of problems in a sensitive, efficient and effective way.

1. Advice and assistance

Sexual harassment is a sensitive issue and a victim may feel unable to approach the perpetrator, lodge a formal grievance or turn to colleagues for support… employers should designate a person outside of line management who victims may approach for confidential advice. Such a person –

(a) could be employed by the company to perform that function among other things, a trade union representative or co-employee or an outside professional;
(b) should have the appropriate skills and experience or be properly trained and given adequate resources;
c) could be required to have counselling and relevant labour relations skills and be able to provide support and advice on a confidential basis.

2. Options in resolving a problem

(a) Employees should be advised that there are two options in solving a problem relating to sexual harassment… an informal way or a formal procedure can be embarked upon.
(b) The employee should be under no duress to accept one or other option.

3. Informal procedure

(a) It may be sufficient for the employee to have an opportunity to explain to the person engaging in the unwanted conduct that the behaviour in question is not welcome…
(b) If the informal approach does not resolve the matter, if the case is severe or if the conduct continues, it may be appropriate to embark upon a formal procedure. Severe cases may include: sexual assault, rape, a strip search and quid pro quo harassment.

4. Formal procedure

… a formal procedure… should

(a) specify with whom the employee should lodge the grievances;
(b) make reference to timeframes which allow the grievance to be dealt with expeditiously;
(c) provide that if the case is not resolved, the matter can be dealt with in terms of the dispute procedures on this code.

5. Investigation and disciplinary action

(a) Care should be taken during any investigation of a sexual harassment grievance that the aggrieved person is not disadvantaged, and that the position of other parties is not prejudiced if the grievance is found to be groundless.
(b) The Code of Good Practice regulating Dismissal contained in Schedule 8 to the Labour Relations Act, reinforces the provisions of Chapter VIII of the Act and provides that an employee may be dismissed for serious misconduct or repeated offences. Serious incidents of sexual harassment or continued harassment after warning are dismissable offences.
(c) In cases of persistent harassment or single incidents of serious misconduct, employers ought to follow the procedures set out in the Code of Good Practice.
(d) The range of disciplinary sanctions to which employees will be liable should be clearly stated, and it should also be made clear that it will be a disciplinary offence to victimise or retaliate against an employee who in good faith lodged a grievance of sexual harassment.

6. Criminal and civil charges

A victim of sexual assault has the right to press separate criminal and/or civil charges against an alleged perpetrator…

7. Dispute resolution

Should a complaint of sexual harassment not be resolved by internal procedures, either party may within 30 days of the dispute having arisen, refer the matter to the CCMA for conciliation… Should the dispute remain unresolved, either party may refer the dispute to the Labour Court within 30 days of receipt of the certificate issued by the commissioner…

CONFIDENTIALITY

(1) Employers and employees must ensure that grievances about sexual harassment are investigated and handled in a manner that ensures that the identity of the person is kept confidential.
(2) ... management, employees and the parties concerned must ensure confidentiality at the disciplinary inquiry. Only appropriate members of management, and the aggrieved person, his or her representative, the alleged perpetrator, witnesses and an interpreter, if required, should be present at the disciplinary inquiry.
(3) Employers are required to disclose to either party or to their representatives such information as may reasonably be necessary to enable the parties to prepare for any proceedings.

ADDITIONAL SICK LEAVE

Where an employee's sick leave entitlement has been exhausted, the employer should give consideration to the granting of additional sick leave in cases of serious sexual harassment where the employee, on medical advice, required trauma counselling.

INFORMATION AND EDUCATION

(1) The Department of Labour should ensure that copies of this Code are accessible and available.
(2) Employers and employer organisations should include the issue of sexual harassment in their orientation, education and training programmes for employees.
(3) Trade unions should include the issue of sexual harassment in their education and training programmes for shop stewards and employees.
(4) CCMA commissioners should receive specialised training to deal with sexual harassment cases.