

## **SEXUAL HARRASSMENT: DEALING WITH THE PESTS**

**Johannesburg**

26 June 2015

Article by Terrance M. Booyesen and reviewed by Bruno Bruniquel (Bruniquel & Associates: Chairman)

As sad as it may be, the incidents of a particular colleague walking past your table and greeting you, or even asking about your weekend activities may not be as 'innocent' as you may first have thought. And each time you 'bumped' into each other at the coffee station, this too may not have been a 'coincidence' at all. These occurrences may all be part of an elaborate plan -- designed by the initiator -- who has their own objective to forge a closer relationship with you, and ordinary business matters was certainly not on their mind. Needless to say, the organisation had very different intentions of providing employment to this person, and in the ordinary course of business, each employee is expected to behave in a befitting manner and such that the interests of the organisation are being met. That being said, trouble sets in for the employer when an individual selfishly uses the workplace to serve their own objectives, more specifically when they use the workplace as a 'hunting arena' to satisfy their private needs and which encroaches another colleague's personal space with sexual overtures.

This is where the term 'sex pests' finds its roots, and if the organisation does not have meaningful mechanisms in place to protect its employees against the perpetrators of sexual harassment, then the organisation may fully expect the victims of this unwanted attention to hold their employers vicariously liable. A sex pest is widely understood to be a person that imposes themselves -- in one way or another -- upon another person, and where the imposition has some attached sexual form or element to it, which is not welcomed by the receiving party.

As more of these sexual harassment cases come to light, in order for organisations to mitigate their risks against an employee attempting to claim vicarious liability against their employer, organisations will need to show that their working environment is free from sexual harassment by other employees. Moreover, it is imperative that management fully understand what the common law and labour law expects of the employer's legal duty to protect its employees. This includes knowing how to deal with any allegations of sexual harassment levelled against the alleged perpetrators, even if the victim decides not to pursue the matter.

Organisations who are not able to show their reasonable steps which they have taken to protect their employees against sexual predators, may well find the Courts ruling in the favour of its employees who have suffered harm. Besides the perpetrators also being brought to book, the negligence on the part of the organisation by not establishing the correct policies and procedures to protect employees against sexual harassment, invariably brings a lot of public attention which could lead to even greater reputational damages.

Sexual harassment in the workplace is a widespread problem occurring in many organisations worldwide, and it may manifest itself in various forms, including physical, verbal and non-verbal conduct. Notwithstanding popular belief, sexual harassment does not only affect women. Statistics reveal that both men and women experience sexual harassment in the workplace, with women generally experiencing it more often than their male counterparts. According to the International Labour Office, which is the permanent secretariat of the International Labour Organisation (ILO), it reported that nearly twenty five percent of workers interviewed in Hong Kong in February 2007 suffered sexual harassment with one-third of them being men. In this report, among male workers, only 6.6 percent reported their grievance (compared to twenty percent of women) because they felt too embarrassed to face "ridicule". In another report issued in Italy in 2004, 55.4% of women in the 14 to 59 age group reported having been a victim of sexual harassment. One out of three female workers were subjected to sexual intimidations for career advancement with sixty five percent blackmailed weekly by the same harasser, which was usually a co-worker or their supervisor. Alarming, the report showed that 55.6% of women were subjected to sexual intimidation and had resigned from their jobs. In staying consistent with these findings, in 2008, the Australian Human Rights Commission conducted a survey

*"If an employer fails to address a sexual harassment complaint, the consequences may be serious. In Grobler v Naspers Bpk en n' ander [2004] All SA 160 (CC), a manager was found guilty of sexually harassing an employee."*

*The court found the employer to be vicariously liable for the conduct of the manager because it had failed to take appropriate action to prevent the harassment.*

*The employer was liable for the resultant damages of just short of R1 million."*

**Source: Bruniquel & Associates**

to investigate the nature and extent of sexual harassment in Australian workplaces. The survey found that 22% of women and 5% of men aged between 18 and 64 had experienced sexual harassment in the workplace, with 65% of the sexual harassment cases occurring in the workplace.

In order to limit these unwanted sexual workplace advances, it makes no sense for the victims not to report sexual harassment to the necessary workplace authorities. In a telephone poll conducted in 2008 by Louis Harris and Associates on 782 United States workers, it found that as many as 62% of the victims of sexual harassment took no action against their perpetrators. The poll found that the majority of perpetrators were either their supervisor (43%) or more senior persons (27%) than themselves. Considering the fact that the perpetrators are most often at more senior levels, and noting the high prevalence rates of sexual harassment in the workplace, organisations must protect their employees who have become victims of sexual harassment in order to avoid the immense damage its causes to both the victim and the organisation.

According to data compiled by Equal Rights Advocates (a women's law centre in the United States), victims of sexual harassment lose \$4.4m in wages and 973,000 hours in unpaid leave each year in the United States. The data revealed between 90% - 95% of sexually harassed women suffer from some debilitating stress reaction, including weight loss (or gain), lowered self-esteem, anxiety, depression and sleep disorders. Whilst statistics on monetary benefits accruing to claimants of sexual harassment in South Africa are not readily available, statistics in America reveal that \$35m accrued to victims of sexual harassment (excluding those obtained by way of litigation) in 2014 alone. Besides the fact that the victims may suffer from various disorders which most often impacts their productivity, the more worrying outcome is when the victim feels so helpless that they forego their career opportunities, or leave their employment or even commit suicide.

In South Africa, sexual harassment in the workplace is prohibited and an employee who commits sexual harassment may be dismissed. The victim is completely within their rights to lodge civil and / or criminal claims against the perpetrator, as well as their employer. According to the Employment Equity Act 55 of 1998, employers are obliged to take steps to prevent sexual harassment in the workplace, failing which, employers could be held liable for the acts of any of their employees who engage workplace sexual harassment. The Code of Good Practice on Sexual Harassment -- which is a regulation under the Labour Relations Act 66 of 1995 -- contains guidelines on how to deal with sexual harassment in the workplace, including offering principles and procedures to be used when dealing with sexual harassment.

And whilst there are many genuine cases of sexual harassment in the workplace, one should also not forget the potential scorn of a person who may have been 'jilted' by the other person who did not welcome their sexual advances. There could be instances where a 'victim' of sexual harassment makes a false accusation against the 'perpetrator' and this could have serious consequences for the accuser. Whilst the accused is completely innocent of the charges, most people (especially wives and husbands) will think *'there is no smoke without fire'* and therefore a cloud of suspicion is likely to hang over the accused, regardless of whether or not they are innocent.

Making false accusations of sexual harassment is a major transgression and it certainly warrants a mandatory disciplinary enquiry by the employer. If the accuser is found guilty of falsely accusing another person in the workplace of sexual harassment, they could in all probability be dismissed from the organisation. The perpetrator in sexual harassment cases, invariably waits until the victim is alone so that there are no witnesses to prove or disprove the allegations made by the 'victim'. Therefore offering both the 'victim' and the 'perpetrator' the opportunity to undergo a polygraph examination will at the very least, provide the investigator some indication regarding the veracity of the allegation, even if the parties refuse to take the test. A 'victim' who is lying is unlikely to agree to a polygraph and if the 'perpetrator' is innocent, they will jump at the chance to prove their innocence.

Indeed, it is important that management are adequately equipped and know how to deal with sexual harassment in the workplace in a timely manner, as well as how to avoid the common mistakes. Some of the most common mistakes in investigating complaints of sexual harassment typically occur when organisations lack proper policies and procedure to protect their employees in this regard, or when an investigator who is not qualified and/ or who lacks experience is chosen to lead the investigation. But when the organisation does not have a proper strategy and investigation plan, including preliminary time lines for interviewing witnesses, or gathering documents and completing the necessary reports, it simply spells disaster for the victim and the organisation. **ENDS**

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