



Workplace and Sexual Harassment: Time to Take a Second Look at the Law?

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Abstract. With the recent allegations regarding Harvey Weinstein and other famous figures in the entertainment industry taking over the news in recent months, there has been a renewed focus on sexual harassment (SH) worldwide. This paper takes a legal look at SH particularly in Ghana. In its submission, this paper discusses the controversies surrounding the meaning of SH and offers arguments characterizing it as an abuse of power at the workplace. The 21st Century dynamics of the menace are also examined and its prevalence presented in a global context. In conclusion, this paper offers relevant insights for improving Ghana's laws on SH.

Keywords: Sexual harassment · Workplace · Law · Ghana

1 Introduction

The 1992 constitution of Ghana even though with articles that speak to discrimination has no explicit mention of issues of sexual harassment. Article 12(2) of the 1992 constitution of Ghana reads “*Every person in Ghana, whatever his race, place of origin, political opinion, colour, religion, creed or gender shall be entitled to the fundamental human rights and freedoms of the individual contained in this Chapter but subject to respect for the rights and freedoms of others and for the public interest.*”¹ Before the inception of the Labour Act 2003, Act 651, Article 12(2) of the 1992 constitution were the only sections that a person could rely on in circumstances where he or she had experience any act of a sexual nature at work. The Criminal Code also has no provision on indecent assault such as sexual bodily contact with another person

¹ 1992 Constitution of Ghana, Chapter 5, Article 12(2).

without the consent of the other person or sexual violation of the body of that person in any manner not amounting to carnal knowledge or unnatural carnal knowledge.²

The Labour Act 2003, Act 651 provides a fairly strong definition of sexual harassment which reads “*any unwelcome, offensive or importunate sexual advances or request made by an employer or superior officer or a co-worker, whether the worker is a man or woman.*”³ The prohibition is wide reaching, with ‘unwanted conduct’ broadly defined to include acts, requests, spoken words or gestures, and other forms of unwelcome conduct. It did not only end there with the definition but also classified a dismissal based on the sexual harassment as unlawful dismissal which comes with a remedy.⁴ The common law principle of vicarious liability has been placed on a statutory footing under the Labour Act 2003, Act 651 such that sexual harassment claims can be brought not only against the alleged harasser but also the harasser’s organization. However, this development has still not resulted in persons affected by this menace reporting their predicaments.

2 Sexual Harassment

2.1 Meaning and Controversies

Sexual harassment in the words of Robbins and Judge [1] is defined as “any unwanted activity of a sexual nature that affects an individual’s employment and creates a hostile work environment” (p. 493). Though there remains some universal confusions with respect to what constitutes sexual harassment, great inspiration is drawn from the “litmus” test offered by the U. S. Supreme Court which ascertains whether some comments or behaviours at work will qualify to be reasonably perceived as abusive and hostile [2]. Generally, sexual harassment includes overt actions, like unwanted physical touching and coercive threats for sex to be exchanged for job offers and opportunities at work. These forms of harassment are relatively easy to spot and thus have over the years received commendable attention from organizations. However, there are other subtle actions, like unwanted comments and looks, sexual artifacts, some indelicate jokes or acts that can cross over the line of friendship into harassment [1]. These forms of sexual harassment seem to remain prevalent in today’s work environment due to their covert and indirect nature but are all considered harmful once they are abusive or create hostility at work.

A controversial aspect of this menace is its residual nature in the harassed. In other words, the sole determiner of sexual harassment is the harassed. This leads to likely confusion of acts intended as friendly such as hugs to be, in some cases, regarded as harassment. Robbins and Judge [1] explain that women are more likely to regard certain acts and behaviours as harassment as compared to men. This is because men are in most cultures and traditionally considered as those who reserve the right to approach women for legitimate amorous relationships. This often results in women confusing

² Criminal Code 1960, Act 29, Section 103.

³ Labour Act 2003, Act 651, Section 175.

⁴ Labour Act 2003, Act 651, Section 63.

acts and expressions of men that demonstrate genuine love and care. What is even more worrying is the reservation of the judgement as to what constitute sexual harassment to mainly the harassed. This subjects advancements made in the conceptualization of sexual harassment to even greater debates in respect of whose perspective (the harassed or the harasser) should be taken in such cases [3].

2.2 Abuse of Power

Regardless of the controversies that surround what could be considered as sexual harassment, the factors underlying the act and its effect on the work environment basically translates it into an abuse of organizational power and formal authority [4]. Power is when an individual, A, influences another B in such a way that B does what A wants [5]. Power exists when there is a dependency relationship between two parties. This dependency is when an individual A possesses something that another individual B requires [6]. In this case, A will have power of B. The extent of dependency determines the extent of power an individual will possess. That is, the greater the dependency of an individual on another, the higher the power the latter will have on the former. The resources that an individual must possess to create dependency on himself or herself must be important, scarce and non-substitutable [7]. Importance means that the resource must be valuable and useful. Scarcity means that the resource must not be common and non-substitutability means that it must be difficult to replace the resource.

Sexual harassment basically falls into the power construct due to the abusive relationships among supervisors, co-workers and subordinates that come along with harassments. The formal power that supervisors often wield gives them coercive and reward powers [1]. The desire of employees for promotion, retention, increase in salary and favourable performance reviews thus create a dependency relationship characterized by unequal power in the supervisor – subordinate dyad [1]. This scenario often leads to situations where subordinates who are sexually harassed by their supervisors may have the challenge of either not voicing such acts out or even not knowing whom to report to due to fear of reprisal from the superior who has control over the same resources that the subordinate desires. Though rare, co-workers and even subordinates who have power over relevant information at the workplace, in some situations, could also abuse such powers by demanding for sexual favours.

No matter the perpetrator and the form in which it takes, sexual harassment typifies an abuse of power at the workplace and its consequences do not promote organizational success and high performance. Willnesa et al. [8] as cited in [1] summarily describe sexual harassment as “significantly and substantively associated with a host of harms” (p. 494).

Previous studies have shown that the occurrence of sexual harassment results in the harassed often engaging in negative work attitudes such as lower commitment, poor satisfaction and higher turnover intentions [1, 8, 9]. Sexual harassment also reduces group cohesion and productivity at the workplace. Norman et al. [10] also found that victims of sexual harassment suffered from physical injury, fear of the general public, psychological trauma and irritability at everyone, loss of trust for colleagues, disturbing

memories, recurrent nightmares and emotional breakdown. Besides, women have been reported to suffer more in reported instances of sexual harassment due to the limited social power and vulnerable status [11]. These point to the fact that regardless of the factor that drives harassment at the workplace, it is an abuse to human dignity and defeats the creation of a healthy working climate and thus must not be tolerated under any circumstance.

2.3 A 21st Century Perspective

Sexual harassment in the 21st Century appears to have assumed some dynamics different from its traditional perspective of a male – female or a superior – subordinate “unwanted” relationship at work. More recently, the phenomenon has extended to hostile relationships between people of the same sex at work and involves people at all levels of the organization whether as a subordinate or supervisor.

Despite the legalization and public recognition of same sex marriages in several countries around the world, the phenomenon of sexual harassment is yet to receive adequate attention in law in most countries. This does not however dispute the fact that there are reported instances of same-sex sexual harassment on the rise in many countries [12]. But evidence in the United States seek to provide some legal suggestions for “evidentiary routes” for proving a same-sex sexual harassment violation.

In 1998, the case of same-sex sexual harassment was held by the United States Supreme Court as actionable under Title VII in the case of *Oncale v. Sundowner Offshore Services, Inc.*⁵. In the said case, the Supreme Court Judges unanimously agreed that same sex harassment violated Title VII of the Federal Civil Rights Act of 1964. Ever since, there has been several cases of sexual harassment between people of the same sexes held in courts in the United States and other parts of the world (see^{6,7,8}). A study by Dubois, Knapp, Faley and Kustis [13] involving respondents comprising males and females found that male targets of same-gender sexual harassment experienced consequences that were more pervasive and severe than those experienced by male targets of sexual harassments involving opposite genders. Again, Fineran [14] describes same-sex sexual harassment as sexual violence that has considerable mental health implications for both males and females.

Considering the rise of this form of sexual harassment in the 21st Century, there is the need for sufficient legislative provision about same-sex marriage; a necessity that is apparently missing in Ghana’s laws. The Supreme Court of the United States however provide some “evidentiary routes” that could be used to prove a sexual harassment violations. First, the offer that the harasser is a homosexual and thus primarily motivated by sexual desire. Second, a victim needs to be harassed in such sex-specific and derogatory terms by someone who has the same gender as to make it clear that the harasser is motivated by general hostility to the presence of someone of the same gender in the

⁵ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998).

⁶ *Rosas v. Balter Sales Co.*

⁷ *EEOC v. Michael Cetta Inc. d/b/a Sparks Steak House.*

⁸ *EEOC v. Pitre, Inc.*

workplace. Finally, the Supreme Court provides that there is a direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. These provisions offer significant basis for addressing issues of same-sexual harassment, a phenomenon that is trending in the 21st Century.

Also, reports of sexual harassment in the 21st Century has witnessed the unspoken issues of supervisors being harassed sexually by their subordinates. These acts are less rampant between female supervisors and male subordinates but are not impossible. In the case of the cigarette manufacturer, Philip Morris, female supervisors were subjected to series of sexual abuses by their male subordinates [1]. In such cases, the women are devalued through gender stereotypes that produce negative energy among the female supervisors. In some cases, male supervisors are also sexually harassed by their female subordinates but such cases are quite controversial since men are often considered as relatively highly oriented towards sex than women.

These trends of sexual harassment offer new challenges to legal provisions like that existing in Ghana which are yet to factor in the recent dynamics of sexual harassment. Nevertheless, it must be emphasized that the phenomenon of sexual harassment is not only peculiar to the Ghanaian context but has a very wide reaching impact across the globe.

3 Sexual Harassment: A Global Menace

Sexual harassment could be described as a global menace due to its pervasiveness across countries and various economic sectors. A joint Reuters/Ipsos global poll of 12,000 workers in 24 countries revealed a damaging report of the menace of sexual harassment. The report revealed that 26% of workers in India, 18% of workers in China, 16% of workers in Saudi Arabia, 13% of workers in Mexico and 10% of workers in South Africa were most likely to report having experienced one form or the other of sexual harassment. The report revealed also 9% of workers reported sexual harassment in Italy and a total of 8% reported same in Brazil, Russia, South Korea and the United States of America. In Europe, 5% of workers in Poland, Germany and Belgium reported sexual harassment with 6% reporting it in Spain. 4% of workers reported sexual harassment in Britain and in Australia while 6% also reported same in Spain, Canada, Japan and Argentina. Also, 7% of workers reported sexual harassment in Hungary. Summarily, the report found that one out of 10 workers globally reported having experienced sexual harassment at work.

The joint Reuter/Ipsos survey also revealed that workers who were aged below 35 years were most likely to report experiencing sexual harassment at their workplace. This gives an indication of the persistence of the problem of sexual harassment and no proper end of sight of the menace especially when early career workers and organizational entrants are those most vulnerable to the spate of sexual harassment.

A critical examination at the trend reveals not only the pervasiveness of the menace, but also a subtle relationship between sexual harassment and the development level of the country. Reports on sexual harassment in developing countries such as India and

Saudi Arabia as compared to developed economies such as Britain and Germany reveal that the less developed a country is, the more likely there are going to be reports of sexual harassment. Developing countries are characterized as sovereign states with a less developed industrial base and a low Human Development Index [15]. The development of the industrial base involves the enactment of legislations that promote a safe and healthy working environment. This provides some background to the fact that workers in developing or less developed countries are more likely to report sexual harassment. This however does not exempt the developed countries from incidence of sexual harassment. A recent survey by the BBC Radio 5 live of British adults showed that about half of British women and about a fifth of men have been sexually harassed at their work or school⁹.

This confirms the prevalence of sexual harassment across boundaries. Nonetheless, what remains is the protection and promotion of the rights of workers through the law. Though the Ghanaian law has made some progress recognizing sexual harassment as a violation of the right of workers, several loopholes still remain and this study identifies these problems and offers suggestions for legal reforms.

4 Problems with the Current Ghanaian Law

The current state of the law has fallen short in defining what will constitute work space. There are no clear indications given either by precedents or by statute which in this case is the Labour Act, 2003, Act 651. For example, in the Employment Equality Act 1998-2005, the prohibition covers sexual harassment not just at work, but also on training courses, work trips, and other work-related activities including social events. Employers can be held liable for sexual harassment perpetrated by employees and non-employees (clients, customers and other business contacts) where the employer has some control over the perpetrator. It appears provisions in the Ghanaian law are loose in this regard and need provisions to cater for it.¹⁰

Furthermore, there seem not to be a strong relationship between the Labour Commission and various employers with respect to drafting policies that could be adhered to by all which is drafted with the input of various stakeholders. For example Ireland has a code prepared by the Equality Authority with the approval of the Minister for Justice and Equality and after consultation with various labour unions and other relevant organisations representing equality interests which aims at giving practical guidance to employers, employers' organisations, trade unions and employees on what is meant by sexual harassment and harassment in the workplace, how it may be prevented and what steps to take if it does occur to ensure that adequate procedures are readily available to deal with the problem and to prevent its recurrence.¹¹ It is imperative to add that, the

⁹ The ComRes Poll for BBC Radio 5 live involved over 2,000 respondents. The survey was necessitated after sexual assault claims were levelled against Harvey Weinstein leading to several other sexual harassment stories.

¹⁰ The Employment Equality Act 1998-2005.

¹¹ S.I. No. 208/2012 - Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012.

provisions of this code are admissible in evidence and if relevant may be taken into account in any criminal or other proceedings before a court and under Part VII of the Employment Equality Act (see Footnote 10), and also in proceedings before the Labour Court, the Labour Relations Commission, the Employment Appeals Tribunal, the Equality Tribunal and a rights commissioner. I believe having such a document will not only put employers or employees on their toes but will also provide the courage for victims to report such acts.

Finally, though Ghana's laws seem to make direct reference to the gender of the harasser – a legal provision that is emphatic and indicative of Ghana's position with respect to the same-sex sexual harassment – the law seems to have left out an important aspect of an upward direction of sexual harassment. In other words, the law ignores subordinates harassing superiors. With a specific statement of the harasser being an employer, superior officer or a co-worker, the law presumptively dismisses the likelihood of low level workers harassing their supervisors. Drawing from the Philip Morris case stated earlier in this study, there seems to be a lot of relevant legislative lessons for Ghana. Ghana is a highly masculine culture where the roles of women and men are divided among them based on gender. Men in masculine cultures are regarded as those who should be assertive and natural leaders while women are considered as soft, calm, considerate and caring [16]. Women in cultures like Ghana are thus least considered as intrinsically having the macho traits that is required of leaders. Hence, the Philip Morris kind of sexual harassment where women are sexually abused through their devaluation as being helpless is more likely to occur in the Ghanaian workplace. It is thus for important for the Ghanaian law, particularly the Labour Act, Act, 2003, Act 651 to summarily spell out all the directions from which workers could experience sexual harassment. In other words, the law should be extensive to include all kinds of harassers at the workplace regardless of their position.

5 Conclusion

There are adverse costs arising from sexual harassment and harassment for employers. It has a direct impact on the profitability of the enterprise where staff take sick leave or resign their posts because of sexual harassment or harassment. It can also have an impact on the economic efficiency of the enterprise where employees' efficiency is reduced by having to work in a climate in which the individual's honour is not respected. There is therefore the need to take a critical look at the state of the current law and amend it to meet up with the exigencies surrounding the phenomenon.

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