

SEXUAL HARASSMENT AND THE AMENDED CODE OF GOOD PRACTICE ON THE HANDLING OF SEXUAL HARASSMENT IN SOUTH AFRICA

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WOMEN'S LEGAL CENTRE



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GLOSSARY OF TERMS AND ABBREVIATIONS

CCMA	Commission for Conciliation, Mediation and Arbitration
EEA	Employment Equity Act, Act 58 of 1998
LRA	Labour Relations Act, Act 66 of 1995
NEDLAC	National Economic Development and Labour Council

WOMEN'S LEGAL CENTRE

Background

The Women's Legal Centre Trust ("WLC") was formed in 1998 for the purpose of establishing a women's legal centre where legal assistance would be given in cases which involve public interest or constitutional litigation to advance the rights of women. The central aim of the WLC is to advance the struggle for equality for women, particularly black women who suffer socio-economic disadvantage. In order to fulfill this aim, the Centre litigates cases which advance women's rights and are in the public interest. The key activities of the WLC are

litigation and advocacy for law reform but the Centre employs a variety of strategies depending on the nature of the particular issue. Other Centre activities include extensive networking both locally and internationally, conducting seminars, workshops and training, and developing materials. The WLC has identified a number of broad priority areas in which it litigates cases and conducts law reform such as violence against women, customary and religious laws and women's access to resources.

About the author

The author, Nikki Naylor, was employed as a attorney at the WLC from 2002 to 2005. She was involved in the landmark *Ntasbo v Real Security CC* Labour Court case involving employer liability for sexual harassment and was also a member of the NEDLAC Drafting Team responsible for drafting the Amended Code of Good Practice on the Handling of Sexual Harassment. She has presented numerous conference papers on sexual harassment both within South Africa and abroad. This

Manual draws on the work of the Sexual Harassment Working Group established by the Centre to come up with proposals for amending the Code of Good Practice. It also draws on Nikki Naylor's previous published and unpublished work on sexual harassment together with the resources available within the WLC and the contributions of erstwhile and current attorneys at the WLC, such as Michelle O'Sullivan, Coriaan de Villiers, Deborah Quenet and Hayley Galgut.

EXECUTIVE SUMMARY

Opposing all forms of discrimination and sexual harassment at work has become an integral part of the South African workplace. There has also been an acknowledgment that we need to start looking at how we can comprehensively handle the social and legal issues related to sexual harassment in the workplace. In particular, the focus has shifted to mechanisms aimed to assist and support those who seek to challenge sexual harassment. NEDLAC's recent Amended Code of Good Practice on Sexual Harassment, which came into effect in 2005, evidences this. This Manual has been written to deal with the recent amendments and case law developments in relation to sexual harassment since 1994 in South Africa. Primarily the manual aims to be accessible to as many people, organisations and government departments as possible. Furthermore, the manual aims to assist CCMA commissioners, trade unions, employees, employers and legal practitioners who are faced with claims of sexual harassment and who

need to deal with the issue within a legal framework.

Sexual harassment is addressed in this manual in terms of employment and women's employment status. This is not to assume that work is the only place where women are sexually harassed or that only women are sexually harassed. However, since at present the overwhelming majority of sexually harassed persons in South Africa tend to be women with the perpetrators male we have chosen to use examples reflecting this gender "bias." The Manual looks at the issue of defining what amounts to and what does not amount to sexual harassment in employment and the test to be applied in assessing whether certain conduct amounts to sexual harassment. The broader constitutional context of sexual harassment as a form of discrimination and what this means is also dealt with.

The Manual adopts a question / answer format which will illustrate the working of the provisions of the Amended Code of Good Practice.

A The historical context of sexual harassment

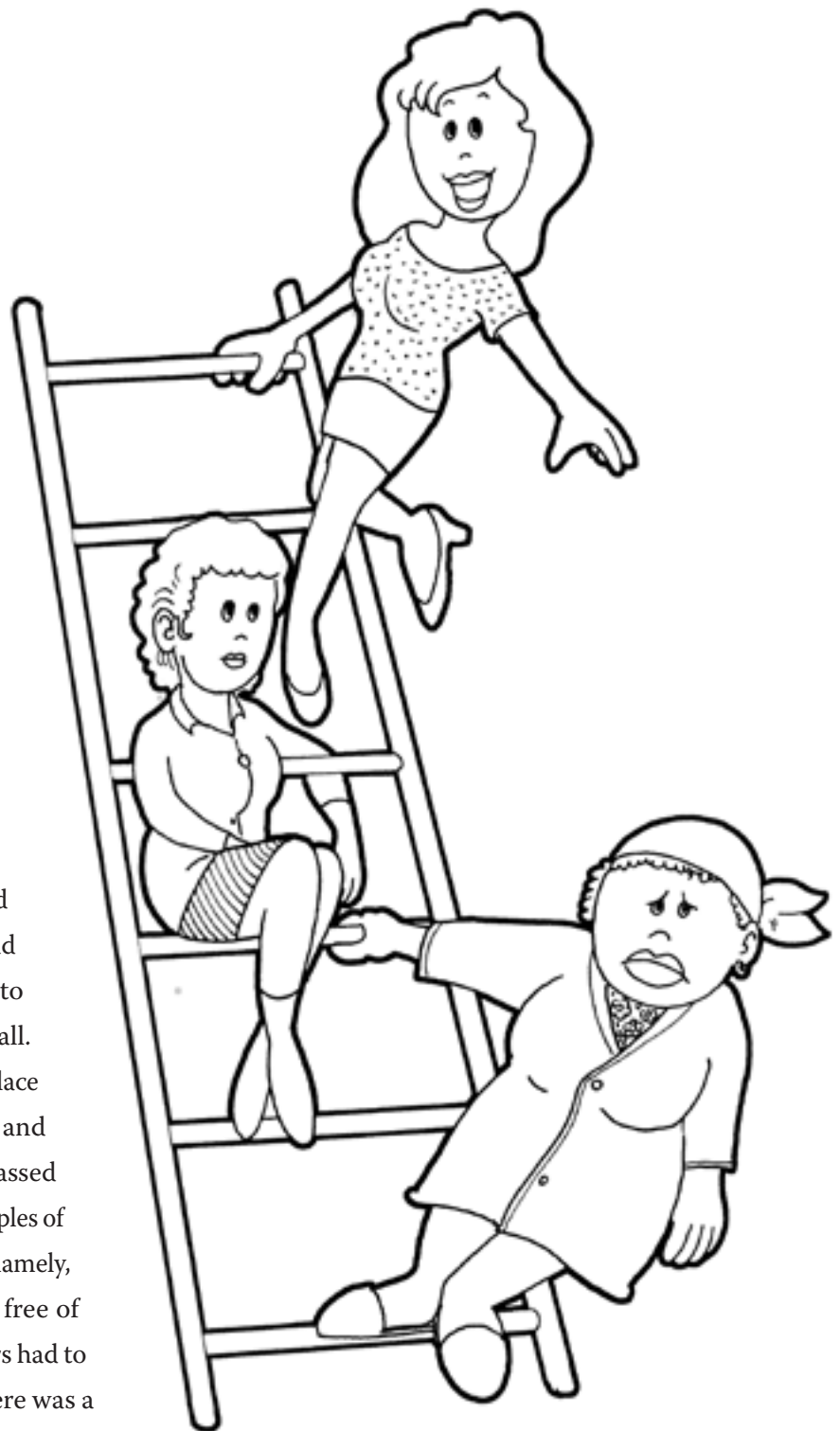
Sexual harassment is not simply abusive, humiliating, oppressive and exploitative but also a form of discrimination in employment, to be treated with the same disdain as other forms of discrimination, such as racism.

In 1979 Catherine MacKinnon a prominent professor of law and feminist legal theorist in the United States published the seminal work "*Sexual harassment of working women*,"¹ a book which has since informed and laid foundations for the development of sexual harassment laws and policies in many countries. MacKinnon started to unpack the notion of sexual harassment as a form of discrimination and also grappled with the notion of what does and does not constitute sexual harassment. At that time she defined sexual harassment broadly as "*the unwanted imposition of sexual requirements in the context of a relationship of unequal power*."² Central to her concept of sexual harassment was the use of power.

More than 25 years later in South Africa, as in the United States, there have been a number of legal developments, which have aimed to address sexual harassment in the workplace. In South Africa we also need to acknowledge the context of racial discrimination, apartheid and unemployment and its impact on early developments in the law of discrimination. Work and employment within the context of poverty and apartheid in South Africa has been critical to women and men's survival and independence. Apartheid exemplified and promoted employment practices that disadvantaged black people in South Africa. By the same token sexual harassment exemplifies and promotes employment practices which disadvantage women at work and intimately degrade

and objectify women. Sexual harassment undercuts women's potential for social equality in the same manner apartheid policies undercut the potential for social equality for black women and men in South Africa. Sexual harassment does not therefore apply or affect all women equally. Research indicates that South African women are divided by race, class, culture, urban and rural situation, education and language with black women being the most likely victims of sexual harassment since historically they have occupied the lowest rung of the working ladder and have experienced subordination as black women and as members of an exploited working class.³

For a long time, particularly in the period prior to 1994, working women in all sectors had to grapple with the social and legal failure to recognise sexual harassment as an abuse at all. Under common law all employees in the workplace were afforded the right to privacy, dignity and equal treatment. Before any legislation was passed employers therefore had to act in terms of principles of common law. Employers had two obligations, namely, employers had to develop a safe workplace, free of hostility and conducive to work and employers had to show respect to employees. Accordingly, there was a general duty on employers to actively take steps to create a safe workplace. But what did this mean in practice? In the 1970's and 1980's this "safety" was construed as physical safety of employees and failed to take into account the notion of sexual harassment and sexual violation taking place within the workplace. Ordinarily a person who was violated, humiliated or treated abusively would have a claim in delict to sue for damages in terms of physical integrity, dignity and good name.



Until the case of *J v M*⁴ in 1989, which was the first case brought before our Industrial Court (as it then was) on the issue of sexual harassment, our Courts had not dealt with the issue. In this case a male employee had fondled one of the complainants' buttocks and breasts and had

caressed and slapped the buttocks of another woman without their consent. The complainants lodged grievances resulting in the dismissal of the harasser. Even though this case was brought by the perpetrator who challenged his dismissal, it was an important decision as the Court pronounced on the notion of sexual harassment and found that sexual harassment violated the right to integrity of body and personality where *“victims of harassment find it embarrassing and humiliating and creates an intimidating, hostile, and offensive work environment.”*⁵

Nine years later on 4 May 1998 NEDLAC published a Code of Good Practice on the Handling of Sexual Harassment Cases in terms of section 203 of the Labour Relations Act, Act 66 of 1995 (“LRA”). Prior to this date employers had no clear guidelines on how to handle sexual harassment cases. The Code endeavoured to eliminate sexual harassment in the workplace by providing procedures that would enable employers to deal with occurrences of sexual harassment and to implement preventative measures. Employers were also encouraged to develop and implement policies on sexual harassment that would serve as a guideline for the conduct of all employees. The Code provided the most detailed guidelines insofar as the handling of sexual harassment was concerned. It provided that sexual harassment was *“unwanted conduct of a sexual nature with the unwanted nature of sexual harassment distinguishing it from behaviour that is welcome and mutual”*. However, it should be borne in mind that the Code was not drafted with the overall purpose of the Constitution or the Employment Equity Act, Act 58 of 1998 (“EEA”) in mind, instead it was published in terms of Section 203 of the “LRA”. Furthermore, the status of the Code is that of a **mere guide and is not binding law**. In addition, in applying principles of the Code the difficulties around “wanted” and “unwanted” conduct remained a problem together with the appropriate test to be used when assessing whether or not sexual harassment had occurred. Most significantly, sexual harassment was not seen within

a constitutional framework or recognized as a form of discrimination in the original Code.

Since the enactment of both the Constitution and the EEA it has been recognized that there is a need to bring sexual harassment and the Code of Good Practice within the realm of discrimination law. Proposals to amend the Code of Good Practice were tabled before NEDLAC based on a draft of the Women’s Legal Centre Legal Working Group. In September 2005, an amended version of the Code of Good Practice on the Handling of Sexual Harassment was enacted. The Amended Code has brought the scope of sexual harassment clearly within the confines of the Constitution and the discrimination framework of the EEA.

Chapter II of the EEA deals with the formal eradication of all forms of unfair discrimination and applies to all employees irrespective of size or turnover. Section 5 places a positive duty on an employer to ensure that the workplace is free from unfair discrimination. Section 6 of the Act prohibits unfair discrimination along similar lines as in the Constitution on one or more grounds including race, gender, sex and sexual orientation. Sexual harassment is specifically defined as a form of discrimination on one or more of the above grounds and is now expressly forbidden in terms of section 6(3) of the Act.

It is hoped that as a result of recent amendments more women will report cases of sexual harassment and that the systemic silence enforced upon women will be broken. This has been facilitated by the fact that sexual harassment has now found its way into our legal terminology, our courts and our legislation. But what do we mean when we speak of sexual harassment?

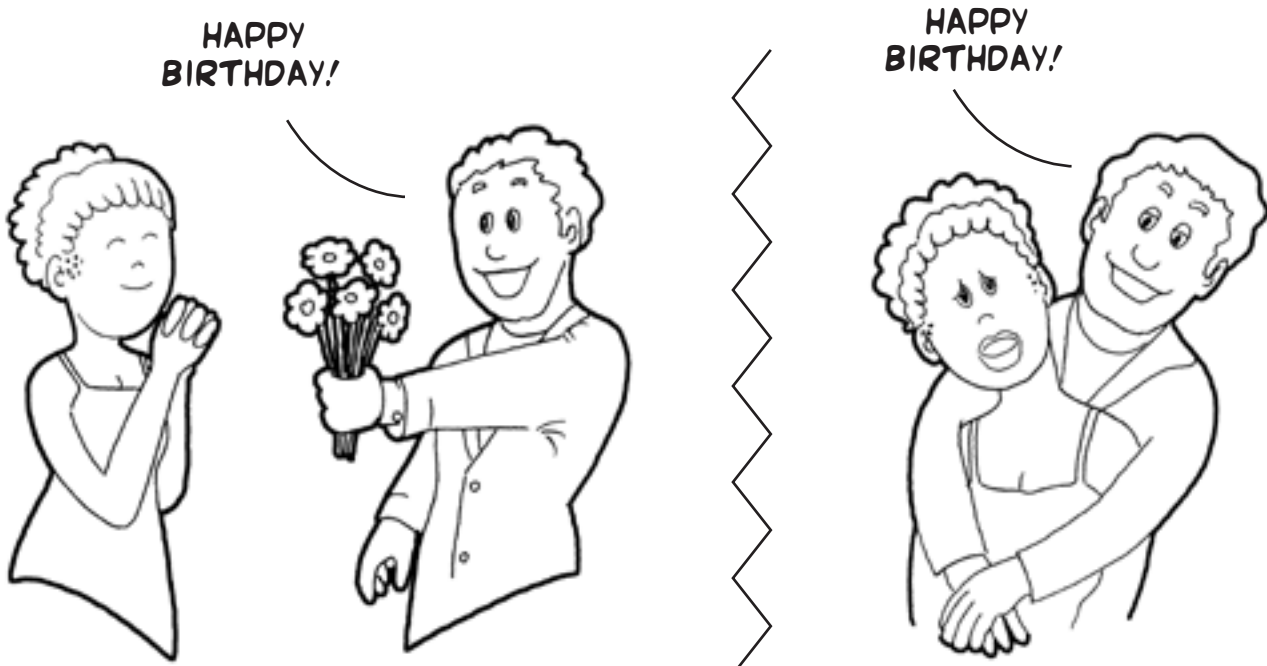
B Difficulties in establishing what constitutes sexual harassment

Since attraction of men to women and women to men is a natural sex phenomenon it may well be that this attraction plays at least a subtle role in work-related and human resource issues when employing personnel. Furthermore, it would be naïve to assume that love affairs do not occur within the employment context. But then when does an invitation for dinner become an invitation to a lawsuit? When does a drunken supervisor's flirtatious dancing at the year-end function amount to the basis for a discrimination claim?

Women have the right to choose whether, when, where and with whom to have sexual relationships. This is an important part of exercising control over one's autonomy. Sexual harassment denies this choice in conjunction with having an adverse impact on work conditions. Women who face the scourge of sexual harassment at work are thus resisting not only unwanted sexual attention but also economically enforced exploitation.⁶ But how do we know when conduct amounts to sexual harassment?

Confusion about the meaning of sexual harassment continues to plunge us into a passionate debate about what is - and what is not - sexual harassment. The illusive ever-shifting line between acceptable and unacceptable behaviour remains a difficult one to draw definitively. Is any manifestation of sexuality in the workplace whether in the form of romantic pursuit or flirting or joking unacceptable? Is it acceptable to go drinking with a co-worker? Is it acceptable to fall in love with a co-

worker? How acceptable is hugging in the workplace? The common response to all of the foregoing would be: is the behaviour unwelcome or consensual? However, how does one assess the "welcomeness" of the act? Does one consider the subjective feelings of the complainant or the reasonable woman in the office? What about the situation where all the women in the office consider the fact that their male boss pinches their behinds as acceptable and funny whilst one woman does not? What of the scenario where the perpetrator insists that the touching was not meant to be sexual and has been misinterpreted but the woman maintains that the touching made her feel uncomfortable and was perceived by her in a sexual way? Where does one draw the line in the seemingly confusing workplace environment where people do fall in love and consensual relationships do develop? Flowing from this one needs to consider what defences (if any) are open to the harasser. What role does consent play? What role does intention play? What



standard of reasonableness becomes applicable in these different scenarios? All of these questions need to be explored within the context of the legal definition of sexual harassment bearing in mind the lived experiences and social realities of women who are sexually harassed. Essentially, in cases of sexual harassment one needs to consider three stages of the harassment: the act itself, the response and the employment consequence.

Sexual harassment claims are often perceived or labelled as an agenda for women seeking revenge and blackmail. Often the media label the woman who has been sexually harassed as someone “out to get” her employer. In addition, she is referred to as a “tease” or someone

who cannot cope with office politics or a bad sport who stifles the office environment by not being able to take “a joke.” In the light of the foregoing it becomes important to contextualise the sexually harassed woman in terms of power dynamics, financial dependency and job security. In this regard the plight of the financially exploited farm worker or domestic worker illustrates the importance of issues such as class, race and status in a sexual harassment claim. The Manual will now explore how the Amended Code tries to solve these difficult questions.

C The definition of sexual harassment in the Amended Code

The Amended Code of Good Practice on the Handling of Sexual Harassment has attempted to deal with these issues and defines sexual harassment as:

“Sexual harassment in the working environment is a form of unfair discrimination and is prohibited on the grounds of sex and/or gender and/or sexual orientation.

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

- (1) whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;**
- (2) whether the sexual conduct was unwelcome;**
- (3) the nature and extent of the sexual conduct;**
and
- (4) the impact of the sexual conduct on the employee.”**

The first paragraph of the definition merely reaffirms what is contained in the EEA and the equality clause in the Constitution. It asserts that sexual harassment is a form of unfair discrimination on the grounds of sex and/or gender and/or sexual orientation. This is important since previously one needed to prove that sexual harassment was a form of discrimination and that it was unfair discrimination.

The definition goes on to set out that sexual harassment is unwanted conduct of a sexual nature and has importantly added that it also amounts to a violation of the rights of an employee yet again bringing the notion of sexual harassment within the realm of discrimination and the right to be free from sexual violence and discrimination within South Africa.

In listing the factors to consider one can see that the social context and power dynamics within which sexual harassment takes place is considered. In assessing whether or not conduct amounts to sexual harassment, requires a consideration not only of the welcomeness of the conduct and the nature and extent of the conduct but also the impact on the employee concerned. All factors must be considered.

But how does one assess these factors in a real life situation occurring within the workplace? The issue of how an individual employer or employee interprets each factor creates the potential for inconsistent interpretation and application of the Code. Therefore, the drafters of the Amended Code decided that each factor listed needed to be elaborated upon within the Code itself

rather than be left to be developed by the Courts and the CCMA. As a result Section 5 in the Amended Code expands on the above factors and specifically deals with how one should go about establishing whether sexual harassment has occurred. This is considered in more detail hereunder.

D Welcome versus unwelcome: The fine line to be drawn

“Since women seem to go along with sexual harassment the assumption is that they must like it, and it is not really harassment at all. This constitutes little more than a simplistic denial of all we know about the ways in which socialization and economic dependence foster submissiveness and override free choice...Those women who are able to speak out about sexual harassment use terms such as humiliating, intimidating, frightening, financially damaging, embarrassing, nerve-wrecking, awful, and frustrating to describe it. These words hardly describe a situation someone ‘likes.’”

Section 5 of the Amended Code deals with the issue of whether or not conduct is welcome. It provides that:

- (a) **There are different ways in which an employee may indicate that sexual conduct is unwelcome, including non-verbal conduct such as walking away or not responding to the perpetrator.**
- (b) **Previous consensual participation in sexual conduct does not necessarily mean that the conduct continues to be welcome.**
- (c) **Where a complainant has difficulty indicating to the perpetrator that the conduct is unwelcome, such complainant may seek the assistance and intervention of another person such as a co-worker, superior, counsellor, human resource official, family member or friend.**

This section is important since determining the “unwelcomeness” of conduct may pose difficulties. It should, for example, be borne in mind that it may be difficult for a complainant to indicate that the conduct

is unwelcome because of the respective power dynamics in the workplace, the awkwardness of the entire situation and the fear of consequences. However, not all women will be fearful or intimidated and whilst some women will choose to walk away, others may be very comfortable expressing their disapproval. In assessing responses, the Amended Code therefore requires one to take a contextual approach, which bears in mind the power dynamics between victim and perpetrator; the nature of the workplace and the impact on the complainant’s dignity.



Generally, it must therefore be recognised that the signals of unwelcome conduct vary from individual to individual and may vary in strength depending on the incident, the comment or behavior. A sexual advance may incite a strong refusal and outrage or may be met by stony silence and evasion. Both responses are however evidence of unwelcome behaviour.

Furthermore, the Code provides that a single incident of unwelcome sexual conduct may constitute sexual harassment and this means that the harassment does not need occur repeatedly as is often thought to be the case.

E Types of sexual harassment recognised by the code

“Welcome sexual harassment is an oxymoron; if the employee demonstrates by word or deed that the ‘harassment’ is welcome..., it is not harassment.”⁸

The Amended Code recognises that unwelcome conduct includes physical, verbal or non-verbal conduct and provides examples of various types of sexual harassment. One should bear in mind that this is not a closed list of the forms of sexual harassment, as ways in which harassment may occur can take a number of forms bearing in mind the role of modern technology and internet access. Section 5.3 provides in full as follows:

5.3 Nature and extent of the conduct

The unwelcome conduct must be of a sexual nature, and includes physical, verbal or non-verbal conduct.

Physical conduct of a sexual nature includes all unwelcome physical contact, ranging from touching to sexual assault and rape, as well as strip search by or in the presence of the opposite sex.

Verbal conduct includes unwelcome innuendos, suggestions, hints, sexual advances, comments with sexual overtones, sex-related jokes or insults, graphic comments about a person’s body made in their presence or to them, inappropriate enquiries about a person’s sex life, whistling of a sexual nature and the sending by electronic means or otherwise of sexually explicit text.



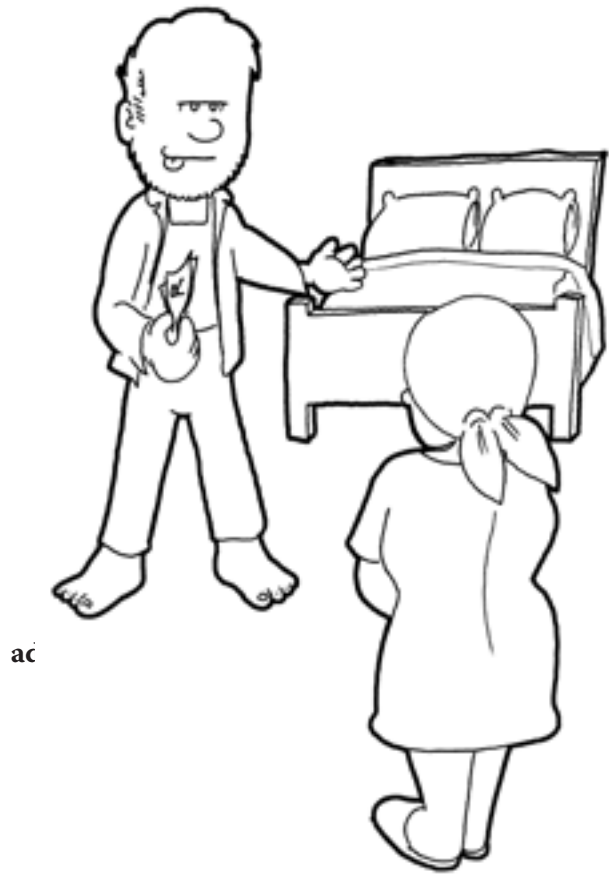
Non-verbal conduct includes unwelcome gestures, indecent exposure and the display or sending by electronic means or otherwise of sexually explicit pictures or objects.



Sexual harassment may also include, but is not limited to, victimization, quid pro quo harassment and sexual favouritism.

Victimization occurs where an employee is victimized or intimidated for failing to submit to sexual advances.

Quid pro quo harassment occurs where a person such as an owner, employer, supervisor, member of management or co-employee, influences or attempts to influence an employee's employment circumstances (for example engagement, promotion, training, discipline, dismissal, salary increments or other benefits) by coercing or attempting to coerce an employee to surrender to sexual advances. This could include sexual favouritism, which occurs where a person in authority in the workplace rewards only those who respond to his or her sexual



F Distinguishing *quid pro quo* sexual harassment from consensual sexual acts

"If I wasn't going to sleep with him, I wasn't going to get my promotion."

"I think he meant that I had a job if I 'played' along."

"Her supervisor told her that if she wanted the job she would have to be nice."

"I was fired because I wouldn't play along and let the boss pinch my behind."

In simple terms *quid pro quo* harassment occurs where a person is forced into surrendering to sexual advances against his or her will for fear of losing a job-related benefit, for example, an increase in salary or a promotion. The pattern is then as follows: a sexual advance occurs, followed by non-compliance on the part of the woman, which then results in employment retaliation. But what of the situation where the woman does comply and does not receive the promised promotion? Is employment-coerced sex an injury? Does compliance or submission amount to consent?

The fact that one is coerced into submitting to sexual

harassment should not be misconstrued as an indication of the welcomeness of the conduct. The distinction between terms such as 'unwelcome', 'voluntary', 'consenting' and 'submitting' is important in this regard. This aspect of *quid pro quo* harassment has been dealt with in the South African context most notably by the CCMA.

In the case of *Taljaard v Securicor*,⁹ the Commissioner was faced with a situation where the complainant had been interviewed by Mr. Taljaard under irregular circumstances and amorous advances made to her in exchange for being offered a position within the company. Shortly after joining the company Taljaard starting sexually harassing the

complainant and after she complained he was disciplined and dismissed. He challenged the fairness of the dismissal at the CCMA and in upholding the dismissal as fair, the Commissioner held as follows:

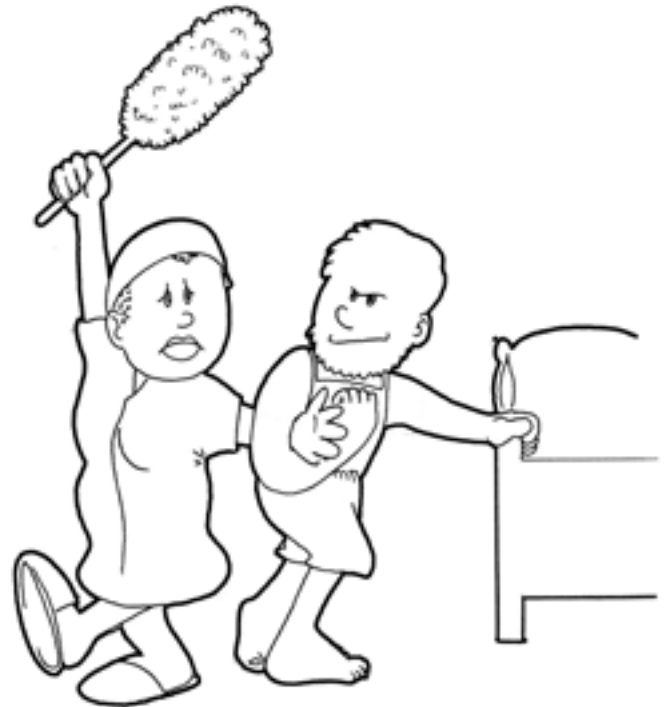
“In this case Mr. Taljaard was her benefactor, the person to whom she owed her employment. Furthermore in a fractured society such as ours, it is pertinent to note that Mr. Taljaard is a middle-aged white male, well-to-do, educated, a senior manager and seemingly powerful. Ms. Pause, on the other hand, is a young coloured woman, of limited means, low education, a menial worker on the lowest rung of the social ladder. It is difficult enough for her to deal with his advances, given this huge imbalance of power, which is amplified by socially determined discrepancies, not only around gender roles, but also classist and racial notions of superiority. When she has to do so in an atmosphere where her slightest hint of discontent may perceptibly result in her employment prospects being under threat, the position is unenviable. It is within this context that her failure to explicitly inform him that his conduct is unwanted is made all the more understandable...”¹⁰

It is also important that one is able to distinguish between ‘refusal’ cases, in which an employee refuses sexual advances and suffers job detriment and ‘submission’ cases, in which the employee submits to unwelcome advances in order to avoid a threatened job detriment. Let’s consider the following practical exercise:

PRACTICAL EXERCISE 1:

Thandi, a live-in domestic worker, claims that her boss coerces her into a violent sexual relationship by telling her that she “owes him” for all he is doing for her as her employer. Her threatens to send her back to her rural village should she not submit to his sexual advances. She also claims that her conditions of employment – including her raise, hours of work, autonomy and

flexibility vary from time to time, depending on her responsiveness to her boss. When she refuses to have sexual intercourse with him she will not be given any wages for that week or will be denied dinner. On one occasion she has been locked in her room for more than 24 hours without food due to her refusal. She believes that she will be fired, sent home or killed if she does not give in to his demands.



In this case Thandi was subjected to unwelcome sexual conduct, her reaction to that conduct was then used as the basis for decisions affecting her compensation, terms, conditions or privileges of her employment and thus this amounts to quid pro quo harassment. It is not sufficient to merely question whether the complainant submitted to advances, but instead to consider whether the employer engaged in sexually harassing conduct, in such a manner that in the mind of the complainant, submission to advances constituted a condition of employment or advancement. Within the South African context one also needs to bear in mind the dire socio-economic circumstances and social context within which vulnerable employees, such as cleaners, domestic workers and farm workers find themselves. Submission in these cases in order to retain

their employment cannot be construed as voluntary or consensual conduct when taken in context in relation to the real fear of losing their employment and their

vulnerabilities at being told that they have to submit to “the boss” who has the right to fire them and withhold their wages.

G Definition and assessment of the impact of the conduct

“Sexual harassment is not only a disregard for the law, but an unacceptable invasion of the applicant’s privacy and a violation of her constitutional rights. I can only imagine, as best I can what women must feel when their bodies are so violated by sexual attackers...”¹¹

Women’s feelings about their experiences of sexual harassment are a significant part of its social impact. Like women who are raped, sexually harassed women feel humiliated, degraded, ashamed, embarrassed and angry. Often complainants express fear that if they complain they will not be believed or that they will be blamed, considered unprofessional or a “troublemaker” or told that they are blowing the entire incident out of proportion.

Section 5.4 of the Amended Code attempts to deal with this and provides that in assessing sexual harassment, the unwanted sexual conduct should **constitute an impairment of the employee’s dignity, taking into account:**

- (a) **the circumstances of the employee; and**
- (b) **the respective positions of the employee and the perpetrator in the workplace.**

The rationale for considering the impact of the harassment on the dignity of the complainant stems from the equality cases decided under the Constitution. A two-stage enquiry is followed in order to assess whether or not there has been discrimination and whether it has been unfair discrimination. In order to assess fairness our Courts¹² consider the impact of the discrimination on the complainant whilst taking into account various factors.

Following there is a step-by-step guide illustrating how the Courts establish whether discrimination has occurred or not:

STEP 1: DOES A PROVISION DIFFERENTIATE BETWEEN PEOPLE?



IF YES,

STEP 2: IS DIFFERENTIATION ON A LISTED GROUND LIKE RACE, SEX OR GENDER?



IF YES,

STEP 3: THE COURT WILL THEN ASSESS WHETHER THE DISCRIMINATION IS UNFAIR



STEP 4: FACTORS COURT WILL CONSIDER IN ASSESSMENT OF FAIRNESS:

- *PRIMARY FOCUS WILL BE THE IMPACT OF THE DISCRIMINATION ON THE COMPLAINANT;**
- *WHAT IS THE POSITION OF THE COMPLAINANT IN SOCIETY? (IS THE COMPLAINANT A MEMBER OF A HISTORICALLY DISADVANTAGED GROUP – WOMAN, BLACK PERSON OR A GAY OR LESBIAN PERSON?);**
- *HAS THE COMPLAINANT OR THE GROUP TO WHICH THE COMPLAINANT BELONGS SUFFERED PAST DISADVANTAGE?;**
- *IS THE PURPOSE DIRECTED AT IMPAIRING DIGNITY OR IS IT AIMED AT ACHIEVING AN IMPORTANT SOCIETAL GOAL, SUCH AS AFFIRMATIVE ACTION (WHICH WOULD BE AN EXAMPLE OF AN IMPORTANT SOCIETAL GOAL)?**
- *ANY OTHER RELEVANT FACTOR WHICH IMPAIRS THE DIGNITY OF THE COMPLAINANT.**

The test applied by our Constitutional Court is re-enforced in the EEA and Amended Code in terms of the focus on the impact on the complainant. In a discrimination enquiry it is also significant that the issue of intention becomes irrelevant. The primary aim of the EEA and the Constitution is to eradicate discrimination and not to punish wrongdoers in terms of a criminal standard of proof where intention becomes important.

Therefore, just as one cannot argue that a racist comment was not intended to be racist, the same applies to sexual harassment. Whether or not the perpetrator intended to violate the dignity of the complainant is irrelevant, the impact that the perpetrator's conduct has had on the complainant will be decisive. This also deals with the difficulty where all the women in the office find the behaviour complained of "harmless" or "flirtatious" and only one woman finds the conduct offensive or unwanted. It is not necessary to demonstrate that all women in the work environment find the behaviour offensive or were subjected to sexual harassment. Before sexual harassment was treated as a form of unfair discrimination there were ongoing debates around whether a subjective or objective test should be applied in assessing whether harassment had occurred. Did a reasonable woman standard apply or a reasonable person standard apply?

Today we are guided by the discrimination query and the impact that the act has on the complainant as illustrated by the following exercise.

PRACTICAL EXERCISE 2:

Ms X claims that she has been sexually harassed by Mr. Y her boss who continuously asks her on dates, sends her graphic pornographic emails and rubs up against her when passing in the corridor. She demands action by the company after her efforts to ignore the advances have not helped. Mr. Y claims that he was only joking, she has misunderstood his advances and that he never intended to sexually harass Ms X. In this case how does one establish whether or not this is sexual harassment? What is the test to establish sexual harassment?

In considering the above exercise it is useful to start with the notion that sexual harassment is unwelcome conduct of a sexual nature that detrimentally affects the work environment and attacks the dignity and self-respect of the victim both as an employee and as a human being. In assessing whether or not sexual harassment has occurred, one needs to ask whether the conduct was unwelcome, what the nature and extent of the sexual conduct is and the impact on the complainant. Applying this test it is clear that the acts described amount to verbal, non-verbal and physical sexual harassment as per the definition. In assessing whether Ms. X indicated that the conduct was unwelcome the fact that she has ignored his advances and not explicitly stated "no" does not mean that she fails on this leg. The power dynamic between herself and her boss would mean that it would be difficult for her to assertively confront him and her "non-response" can never be construed as consensual. The fact that he has not intended to sexually harass her is not relevant in terms of the test for discrimination and the focus would be on the impact that the conduct has had on Ms. X rather than on Mr. Y's motive / intention.



H Steps to be taken when someone has been sexually harassed: Guiding principles

“A waitress was serving a customer when he reached up her skirt. When she complained to management and asked for future protection against such incidents, she was harassed by her boss who then put her on probation as if she was the guilty one. Things went from bad to worse, she got less tables, bad hours and was eventually asked to leave.”¹³

The importance of management responding and acting appropriately in cases of sexual harassment and discrimination cannot be over-emphasised. Not only does it foster good working relations but it also evidences a commitment from management to take the complaints of the workforce seriously. However, often small businesses or management are unaware of the steps that need to be taken and the procedures that need to be followed when dealing with complaints of sexual harassment. The Amended Code is useful in this regard in that it sets out guiding principles for employers in Section 6, which reads as follows:

“Employers should create and maintain a working environment in which the dignity of employees is respected. A climate in the workplace should also be created and maintained in which complainants of sexual harassment will not feel that their grievances are ignored or trivialized, or fear reprisals.”

Section 6 is also significant in that it not only prohibits all acts of sexual harassment by management and employers but goes further to provide that all employers, management and employees have a role to play in creating and maintaining an environment in which sexual harassment is unacceptable.¹⁴ This means that every member of staff and management needs to actively ensure that no sexual harassment occurs within the workplace. It is not sufficient to be aware of sexual harassment occurring but not doing anything about it or turning a blind eye until such time as court action looms.

The Amended Code, like the previous Code, recommends that employers should adopt a sexual harassment

policy. However, the Amended Code adds that such policy should take cognisance of and be guided by the provisions of the Code.¹⁵ A further addition in the Amended Code gives effect to the judgment of *Ntsabo v Real Security CC* (2003) 24 ILJ 2341 (LC) where Pillay AJ held that failure to implement a policy and plan to deal with sexual harassment “does not provide a veil behind which an employer can hide to avoid possible liability.”¹⁶ The Amended Code provides that the adoption of a policy and its communication to all staff should be considered as one of the factors when weighing up whether an employer has complied with its obligations under the EEA. Therefore, a negative inference may be drawn where an employer does not have a policy in place.

By the same token the Amended Code requires not only the adoption of a policy but also its effective communication to all employees to avoid the situation whereby a perpetrator advises that he had no idea that there was a policy which prevented him from committing the act with which he is charged. Section 7 of the Amended Code also specifies that policies should incorporate the definition of sexual harassment as contained in the Amended Code. By so doing it is hoped that consistency in policies of employers will be fostered. All policies should henceforth recognise that sexual harassment is a form of discrimination.

In terms of protecting complainants, Section 7.4.4 provides that it will be a disciplinary offence to retaliate against an employee who in good faith lodges a grievance of sexual harassment. This is to prevent the situation as highlighted above in terms of the plight of the waitress who complained and then faced victimization rather than protection from management. All complaints need to be treated in a sensitive, efficient and effective way. To this

end the Amended Code recognises that a complainant may require advice and assistance including counselling and recommends that an employer should designate a person outside of line management whom complainants may approach for advice and/or counselling.¹⁷

PRACTICAL EXERCISE 3:

Sally works as a secretary at a large corporate firm. She works in a pool of secretaries with five other women. Sally has been sexually harassed by her supervisor, Mr. Brink in that he brushes up against her when he walks past her and often pinches her behind or slaps her on her behind when she goes into his office. Mr. Brink behaves in a similar fashion toward all the other women in the pool of secretaries. During one incident Mr. Brink tries to kiss Sally in his office behind closed doors. She is distraught. Sally confides in the human resources official but is uncertain about whether to take action against Mr. Brink since the other people working in her team all think Mr. Brink is a wonderful boss. She would also prefer to not undergo any disciplinary process. Does she have a choice? What are her choices? Advise her as if you are the human resource official of the company bearing in mind the company has a sexual harassment policy that is identical to the Amended Code of Good Practice.

In terms of the Amended Code of Good Practice, like the earlier Code, a complainant like Sally has a choice in terms of whether to follow a formal or informal procedure. The only time that the complainant may not have a choice is where the employer feels that there may be a significant risk of sexual harassment to other employees. In such a case the employer needs to take action irrespective of the wishes of the complainant. The factors to be taken into account in terms of Section 8.7.2 of the Amended Code would be the severity of the sexual harassment and whether the perpetrator has a history of sexual harassment.

As human resource official one would need to also re-assure Sally that she will not face job loss or any

negative consequences from the company or from Mr. Brink irrespective of her choice to follow a formal or informal process. Sally, should also be reassured that the matter will be dealt with confidentially and not be discussed with the women in the pool. This is in accordance with Section 8.5.1. of the Amended Code.

The **informal procedure** should be explained to Sally. In terms of the informal procedure Sally or at her request another appropriate person (such as the human resource official) explains to Mr. Brink that the conduct in question is not welcome, that it offends Sally, makes her uncomfortable and that it interferes with her work. Mr. Brink should then be asked to stop the behaviour. Another option in terms of the Amended Code would be for Mr. Brink to be approached without revealing the identity of Sally where he is then told that certain forms of conduct such as touching, slapping and pinching the buttocks of women in the office constitutes sexual harassment and makes employees feel uncomfortable. This would assist in that Mr. Brink would not know who the complainant has been. Sally could also recommend any other informal process which she thinks would assist. In terms of the informal process, there would be no need for a disciplinary hearing and Sally would not need to face Mr. Brink.

Sally has a choice in terms of whether she wants to first exhaust the informal process before proceeding to formal steps or she may proceed directly with a request for a formal process. In terms of the **formal procedure** Sally would lodge a grievance against Mr. Brink following the internal grievance procedures of the company. All sexual harassment policies should make allowance for a formal grievance to be lodged in terms of which the complainant is allowed to state what her desired outcome would be in terms of the grievance process. The grievance should be dealt with as speedily as possible maintaining confidentiality at all times. During the grievance process both parties will present their cases and evidence and an impartial, independent chairperson will make a recommendation to the company. Section 8.8 of the Amended Code sets out the disciplinary sanctions to be applied and provides that the

sanction imposed must be proportionate to the seriousness of the sexual harassment in question. Warnings may be provided for minor instances, dismissal is appropriate in cases of continued minor instances or where warnings have not been adhered to. In appropriate circumstances, a perpetrator may be transferred to another position in the workplace.

Should Sally or Mr. Brink be unsatisfied with the outcome either one of them may appeal in terms of the company appeal procedure and thereafter they may directly approach the CCMA. Sally could also pursue a criminal action and/or may elect to bring a civil action for damages instead of claiming under the EEA.

Employer liability: What obligations have been placed on employers?

“The spirit of the EEA imposes a duty on all employers to protect its employees against offensive conduct. The failure to do so is a disregard for the law... it [is] not only a disregard for the law, but an unacceptable invasion of the applicant’s privacy and a violation of her constitutional rights.”¹⁸

In terms of Schedule 7(2)(1)(a) of the LRA, no provision was made for an employer to be held liable for acts committed by an employee as against a fellow employee. However, the failure to take appropriate action could lead to a claim of constructive dismissal where the person harassed elected to resign as a result of the intolerable situation. The employer would then be held responsible on the basis of constructive dismissal. In terms of the LRA the fact that an employer had no policy in place would not be actionable in itself. Any action was therefore limited and only available where an employee elected to resign as a result of the employer’s failure to take action. The onus would then be on that employee to show that she was “forced” to resign due to the intolerable circumstances within which she found herself. The mere fact that the employer had failed to discipline the harasser and the fact that the employer had no policy in place would be insufficient, she would have to link this to the “intolerable” circumstances of her employment and show that she had attempted to exhaust her internal remedies prior to resigning. The claim for constructive dismissal would also be one that would be automatically unfair in terms of the LRA, due to the fact that the resignation would be as a result of discrimination on the basis of sex and/or gender.

In terms of the EEA it is not enough for an employer to simply take steps to eliminate unfair discrimination in the workplace. There is a further duty and obligation on an employer to investigate complaints and allegations of unfair discrimination (for example an allegation of sexual harassment would HAVE to be investigated). The duty of employers is further elaborated on in Section 60 of the EEA. In terms of section 60(1):

“If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in conduct that, if engaged in by that employee’s employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.”

This section is important since it casts the net of vicarious liability widely in that it does not confine the test to whether or not the actions occurred in the course and scope of employment but rather looks at whether an alleged act occurred “**whilst at work.**” Previously and under the common law of vicarious liability an employer could escape liability if the employer could show that the employee concerned had been on a “frolic of his own” and not acting in the course and

scope of his employment. Naturally, no employer authorises employees to be racist or to harass or assault each other. This means that in sexual harassment cases an employer would almost always be able to argue that the act occurred outside the course and scope of employment. This position was substantially altered by the enactment of Section 60(1) of the EEA with its very specific wording that the act need only have occurred **“whilst at work.”**

Furthermore, the word **“immediately”** need not be construed restrictively and needs to be interpreted in a contextual manner. The Labour Court in the case of *Ntsabo v Real Security CC*, found in this regard that immediately should be interpreted to mean: **“as soon as is reasonably possible bearing in mind the context of sexual harassment”** and does not necessarily mean within minutes of the alleged incident.¹⁹ This has been reinforced by an addition in the Amended Code where section 8.1.2 now provides as follows:

“In instances of sexual harassment, the word “immediately” shall mean as soon as is reasonably possible in the circumstances and without undue delay, taking into account the nature of sexual harassment, including that it is a sensitive issue, that the complainant may fear reprisals and the relative positions of the complainant and the alleged perpetrator in the workplace.”

As highlighted above, the Amended Code also provides that the incident of sexual harassment need not be reported by the complainant herself and may be brought to the attention of the employer by any person aware of the sexual harassment such as a friend, colleague, or human resources official acting on the request of the complainant. But what happens where the complainant does not wish to take action or report the matter to the employer? In this regard the Amended Code provides in Section 8.1.3 that where a third party reports the harassment to the employer it should be at the request of the complainant where the complainant has indicated that she / he wishes the employer to be made aware

of the conduct. It must be borne in mind that often a complainant will not wish to take the matter further and lodge a formal or informal complaint and her right to privacy and respect should be acknowledged in such a case. However, in view of the broader duty imposed on the employer by Section 60 the Amended Code also specifies that **where the sexual harassment is of a particularly serious nature, the complainant should be encouraged to inform the employer.**

Section 60(2) provides that when an employee is subjected to sexual harassment and where such conduct is brought to the attention of an employer, the employer **“must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct.”** This compels the employer to take steps to remedy the situation. It is only in the event that an employer fails to take any steps or fails to take reasonable steps that liability will arise. The implication is that an employer can be held liable for instances where he/she fails to take steps to prevent discrimination or fails to investigate allegations of discrimination.

The question remaining relates to what steps need to be taken by an employer and what will be regarded as “sufficient” steps? Would a meeting between all parties constitute a consultation and would that be sufficient even if the matter were not resolved after that meeting? The Act is silent in this regard, save to state that “necessary steps” needs to be taken by the employer. The Amended Code elaborates on this aspect in Section 8.3 by stating that:

“The steps to be taken by the employer on receipt of a complaint by a complainant, should include but not be limited to the following:

- 1. Advising the complainant of the informal and formal procedures available to deal with the sexual harassment...**
- 2. Where reasonably practicable, offering the complainant advice, assistance and counselling, including during any disciplinary enquiry that may be instituted...”**

“PLEASE, TELL ME EVERYTHING THAT HAPPENED.”



“... YES... TELL ME... YAWN...”



Section 60(4) provides further that an employer may escape liability if it can show that it has done all that was “reasonably practicable” in the circumstances. It seems therefore that the Courts would have to determine what “necessary steps” should have been taken and that this will be a factual determination, varying from scenario to scenario. It may also be dependant on whether or not a policy exists at the workplace and how the employer has implemented it. Where no policy exists it may be necessary to scrutinise the employer’s conduct more carefully, in terms of the manner in which the complaint is dealt with and the action taken. A further enquiry flows from the foregoing: what if the employer takes action and the employee is aggrieved by the manner in which the employer deals with the situation or the result of the action? For example, what happens where a disciplinary enquiry is convened and the harasser is found “not guilty.” It appears that the EEA does not envisage this situation. All the EEA requires is that steps be taken. Guidance would then have to be sought from the Amended Code of Good Practice and the grievance procedures contained therein. Furthermore, it should be borne in mind at all times that the necessary steps to be taken must be taken with a view to eliminating and eradicating sexual harassment in the workplace and not simply to appease the complainant or to superficially comply with

grievance and disciplinary policies. Not every employer will automatically be held liable. Sometimes the most progressive employer may still employ a sexual harasser and notwithstanding steps to prevent harassment from taking place incidents may occur.

In conclusion, it appears that the EEA will only hold an employer vicariously liable for acts of harassment by employees where:

- An employment relationship exists;
- An act of sexual harassment as defined has occurred;
- The sexual harassment is brought to the attention of the employer;
- Immediately (to be construed in context);
- The employer fails to consult all parties; and
- Fails to take the necessary steps and act in a reasonable fashion.

SOUTH AFRICAN CASE STUDY 1 ON EMPLOYER LIABILITY: NTSABO v REAL SECURITY CC (2003) 24 ILJ 2341 (LC)

The facts

Bongiwe Ntsabo is a young South African woman who grew up in Khayelitsha. In 1993, Bongiwe completed standard nine and the year thereafter she fell pregnant and dropped out of school. So began her search for

employment, which took her six years. She relied on her mother and particularly her brother who was running a taxi business for financial support in this period. She completed security guard training and then obtained a position as a security guard at Real Security on 4 June 1999. Her time at Real Security was predominantly spent at Khayelitsha Day Hospital where she worked a 12-hour shift. She was an unarmed security guard and was responsible for searching women who entered the hospital.

The sexual harassment

From the beginning of October 1999 Mr. Dlomo her supervisor started sexually harassing her. The sexual harassment started with him asking her out on dates then progressed to him touching her breasts, thighs, buttocks and genitals. She became more and more uncomfortable, she told him that she was uneasy and not interested in him but the harassment continued. Dlomo would ask her to engage in a relationship and when she refused he would threaten her with a “poor work performance” report. This went on until December 1999. On 15 December 1999, Bongiwe was in the guardroom having her lunch when Dlomo came in and closed the door. Dlomo then placed the firearm he carried on the table and threatened to shoot Bongiwe if she screamed. He then proceeded to indecently assault her by attempting to rape her by simulating a sexual act and ejaculating on her skirt .

The complaint to management

Prior to the indecent assault Bongiwe reported the sexual harassment incidents to Mrs. Fisher (Mr. and Mrs. Fisher are the owners of Real Security). Mrs. Fisher said that she would investigate the matter. Nothing happened. Mr. Themba Ntsabo – Bongiwe’s brother took charge and also reported the matter to management. Nothing was done, instead management called Bongiwe in and advised that Dlomo had complained about her poor work performance. Bongiwe responded that she had already reported to the company that Dlomo had been sexually harassing her. After the indecent assault and attempted rape Bongiwe reported the incident to

her mother and her brother. Her brother telephoned the office of Real Security and again complained.

On 24 December 1999 Dlomo told Bongiwe that she was being transferred to another site. In January 2000 she was moved to another Hospital and is told she will have to work night shift. After Bongiwe advised Mrs. Fisher that she is unable to work night shift and again raised the issue of the sexual harassment and whether Dlomo will be disciplined, Mrs. Fisher told Bongiwe if she can’t work the night shift then she should resign. Bongiwe wrote a letter of resignation and left her employment. In June 2000 Bongiwe launched an action in the Labour Court suing Real Security (not Dlomo) for damages under the EEA for failing to take steps to protect her. She was successful in her claim and the Court for the first time unpacked the meaning of Section 60 of the EEA and the notion of employer liability.

“I FIND THE EMPLOYER LIABLE!”



The judgment

Acting Judge Pillay accepted that on a balance of probabilities the sexual harassment had occurred and had been reported to the Company who did nothing to alleviate or deal with the situation. Having accepted the version of Bongiwe and her witnesses the Court then had to deal with the liability of the employer for the acts of the harasser. The Court accepted that Section 60 of the EEA creates a form of vicarious liability for employers where an employee sexually harasses a co-employee at work. The Court held that since Real Security had been notified

of the sexual harassment and took no steps to protect Ms. Ntsabo the company would be liable for her damages.

In terms of the dismissal of Bongiwe the Judge held that she was constructively dismissed and that she is entitled to the maximum compensation in terms of Section 186(1)(e). He held that the fact that the employer failed to address Bongiwe's concerns made her life intolerable and thus it was primarily a constructive dismissal claim and did not fall within the confines of Section 186(1)(f) namely an automatically unfair dismissal. He found that the resignation was not as a result of the discrimination. It is submitted that the Judge erred in this regard by trying to restrictively draw a line between the acts of sexual harassment and the inaction of the Company. These should have been viewed cumulatively.

The learned judge did however correctly contextualise the EEA and its purpose. He states:

“The spirit of the EEA imposes a duty on all employers to protect its employees against offensive conduct. The failure to do so is a disregard for the law. In this case it was not only a disregard for the law, but an unacceptable invasion of the applicant's privacy and a violation of her constitutional rights. I can only imagine, as best I can what women must feel when their bodies are so violated by sexual attackers. I do not limit this only to sexual attackers but I think an attack motivated by sexual lust is worse. Society has clearly rejected this type of behavior and the law makers have recommended, through the EEA, measures to be adopted in educating everyone involved in employment to rid ourselves of this scourge.”

In the case of Ntsabo the Company elected to align itself firmly with Dlomo and did not distance itself from Dlomo's version, Dlomo was in fact the Company's main witness. This is not a case where the Company took reasonable steps to investigate and convene an enquiry or took any steps to protect Bongiwe. As a result, the Company

was ordered to pay patrimonial and non-patrimonial damages to Bongiwe for her future medical expenses (psychological therapy), her pain and suffering and for the impairment of her dignity. This claim was over and above the claim for unfair dismissal under the LRA.

CASE STUDY 2 ON EMPLOYER LIABILITY: MEDIA 24 & ANOTHER v SONJA GROBLER²⁰

The facts

In this case Sonja Grobler was sexually harassed by Gasant Samuels, a trainee manager at the Managing Director of Naspers' office. Samuels displayed a pattern of sexually harassing women like Sonja and others in her position. Women recognising his position and authority in the Company chose to reject him and move on rather than take action. The Company (unlike Real Security) had a Sexual Harassment Policy in place. In the case of Sonja Grobler Mr. Samuels harassed her culminating in a threatening incident involving a fire-arm.

The complaint

Sonja complained to at least two managers. She became progressively more depressed, suicidal and was diagnosed with post-traumatic stress disorder. Experts advised that the lack of support from management exacerbated her condition, as was the case with Bongiwe. Samuels alleged a consensual sexual relationship between them. Unlike the Ntsabo case, in this case the Company took disciplinary action resulting in Samuels dismissal.

Sonja Grobler sued the Company and the perpetrator and argued that her employer was under a legal duty to create and maintain a working environment in which the dignity of employees would be respected and that the Company had failed to do so. The case was thus about a breach of a legal duty and based on the negligence of the Company, as opposed to the EEA. The Cape High Court found the Company and perpetrator jointly and severally liable. The Court found that Naspers was vicariously liable for the acts of sexual harassment. The matter then went on appeal to the Supreme Court of Appeal.

The Supreme Court of Appeal found that what Sonja Grobler experienced over a period of six months amounted to sexual harassment on the part of Samuels and objectively could not be construed as being consensual. As far as the duty of the Company to take steps was concerned the Court held that it was not necessary to consider the issue of vicarious liability and disposed of the matter on the basis that:

“The legal convictions of the community require an employer to take reasonable steps to prevent sexual harassment of its employees in the workplace and to be obliged to compensate the victim for harm caused thereby should it negligently fail to do so.”²¹

The Court went further and held that this common law remedy applied irrespective of the statutory remedy in the EEA. Importantly, the Court held that the reluctance of Grobler to lay a charge or even make use of the grievance procedure initially had not precluded the Company from preventing the sexual harassment. This is a similar requirement to the provisions of the EEA requiring actions to be taken where serious harm may result. The failure of management to deal with her complaints immediately made management culpable in the view of the Court.²²

J SOME FURTHER PRACTICAL EXAMPLES

EXAMPLE 1:

Mr. Abrahams is a chief buyer in a large supermarket chain store. Ms. Johnstone is the outside supplier who came to the store on business on a particular morning. Both parties knew each other. When Ms. Johnstone entered the sales representative's office she was approached by Mr. Abrahams who tried to physically embrace her, touch her breast and kiss her cheek all whilst she resisted him with her clipboard and protested. After a few minutes he stopped and left the office. He was charged with bringing the company name into disrepute and sexual harassment. Mr. Abrahams' defence was that the acts were justified in light of the provocative manner in which Ms. Johnstone dressed, her unorthodox behaviour and her friendliness. He claimed that he had thought that his actions were “welcome” in view of her flirtatious behaviour and a previous comment and invite for him to “feel her sexy pants.” Advise the company as to whether they can take action against Mr. Abrahams? Would the position be different if Ms. Johnstone was employed at the store as opposed to being an outside supplier or if she were an applicant for employment?

The facts here are similar to the case of *Pick & Pay Stores Ltd v Another*²³ where the dismissed perpetrator challenged the fairness of his dismissal on the part of the Company. The Arbitrator held that the conduct was of a sexual nature, was physical, affected the complainant's dignity and had an element of coercion or abuse of power. On the issue of the unwanted nature of the conduct the arbitrator held as follows:

“...[T]here can be no doubt that the complainant found the conduct unwelcome: indeed, shocking and humiliating. The factors mentioned by the grievant as creating a climate in which he assumed his embrace would be welcome are flimsy indications in the extreme... I find therefore that the conduct was unwanted in an objective sense. From the complainant's subjective sense it was clearly unwanted...”²⁴

On the issue of Ms. Johnstone's dress and flirtatious manner the arbitrator held as follows:

“While such factors may play some part in exceptional cases when it comes to assessing the sanction to be

imposed on a guilty perpetrator in cases of sexual misconduct they can never, in my view, without more be deemed to constitute the type of incitement which was clearly hinted at in the evidence. The complainant put it trenchantly in her evidence: 'Am I allowed to be condemned for what I wear?'"²⁵

Furthermore, in terms of the Amended Code the intention of Abrahams is irrelevant.

The fact that there may not be a strict employer / employee relationship between the parties is no longer of significance. The Amended Code of Sexual Harassment provides that the Code, like the EEA, applies to owners, employers, managers, supervisors, employees, job applicants, clients, suppliers, contractors and even others who have dealings with the business. This has expanded the scope of application beyond simply employer and employee relationships.

EXAMPLE 2:

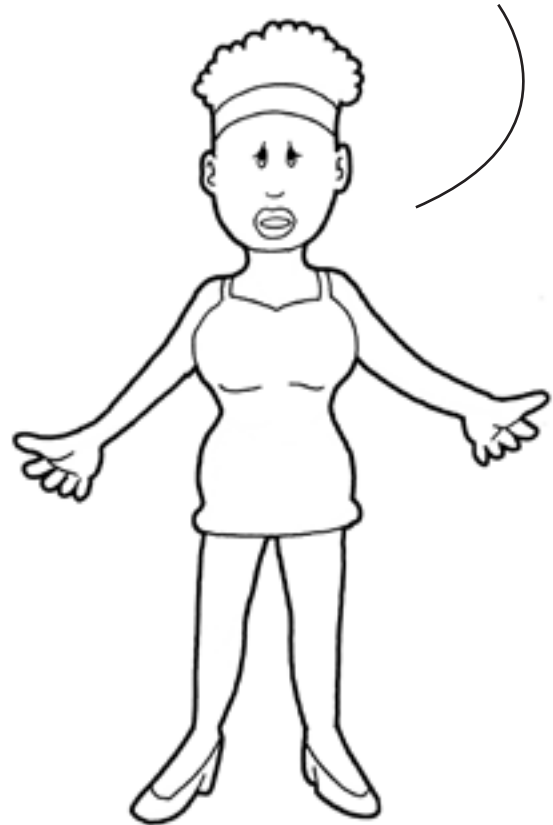
Ms. Mbeki approaches you, as her trade union representative, in relation to the fact she has been sexually harassed resulting in severe post-traumatic stress disorder necessitating her being off work and exhausting her sick leave. The disciplinary enquiry has exacerbated her condition and having to testify and be cross-examined has again required her to undergo intensive therapy. What advice will you give her in terms of the company obligations under the Amended Code of Good Practice, assuming the company adopts the same provisions in its own sexual harassment policy?

The Amended Code of Good Practice has been amended in terms of Section 10 and now provides as follows so as to cater for situations such as Ms. Mbeki's.

“Additional sick leave

1. Where an employee's existing sick leave entitlement has been exhausted, the employer should give due

AM I ALLOWED TO BE CONDEMNED FOR WHAT I WEAR?



consideration to the granting of additional paid sick leave in cases of serious sexual harassment, where the employee, on medical advice, requires trauma counselling.

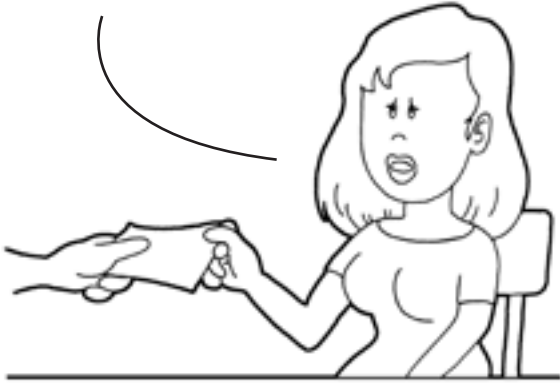
2. In appropriate circumstances, employers may give consideration to assisting with the cost of the medical advice and trauma counselling, where such amounts are not covered by any applicable medical aid scheme.”

Ms. Mbeki would therefore be entitled to make representations to the Company on this basis in order to assist with her future medical requirements.

EXAMPLE 3:

The EEA allows a sexually harassed employee to claim damages for both patrimonial and non-patrimonial loss in terms of Section 50. What does this mean and how does one go about calculating what damages should be awarded to a sexually harassed employee in terms of pain and suffering and impairment of dignity?

**“THANK YOU DOCTOR,
FOR THE SICK LEAVE”**



Section 50(2) sets out wide-ranging relief, which provide that the Court may grant:

- “(a) payment of compensation by the employer to that employee;
- (b) payment of damages by the employer to that employee;
- (c) an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees;
- (d) an order directing an employer, other than a designated employer, to comply with Chapter III as if it were a designated employer;
- (e) ...; or
- (f) the publication of the Court’s order.”

The Court has the power to order damages it deems “just and equitable” in terms of Section 50(2) of the EEA. This power is aimed at compensating a victimised employee for the breach of the right not to be unfairly discriminated against, as well as damages for any patrimonial loss flowing from such breach (for example, the cost of psychotherapy necessary to treat post-traumatic stress disorder caused by the discrimination) and non-patrimonial loss (for example, pain and suffering and the invasion of the privacy, dignity and equality rights under the Constitution).

The Labour Court has emphasised the special nature and purpose of the EEA, and the remedies created by Section 50(2) in cases involving discrimination. In the case of *Ntsabo*, Pillay AJ considered what would be “just and

equitable” in terms of Section 50(2) in a sexual harassment case and allowed claims for general and special damages for future medical expenses and for pain and suffering for impairment of Ntsabo’s dignity. On the basis of these decisions it is clear that the same principles and approach will be adopted in assessing damages for psychological harm as is done in an ordinary action for personal injuries. Accordingly, it is competent to award medical costs and counselling costs as part of damages in cases of sexual harassment. Guidance should be obtained, in this regard, from the evidence of the applicant as supported by expert evidence, which can corroborate and complement the applicant’s evidence. Where as a result of the sexual harassment a person is precluded from earning income then she is entitled to damages representing the amount she would have earned but for the accident / injury.

Save for the *Ntsabo* decision referred to above, there is little guidance in relation to how the Labour Court assesses awarding general damages for pain and suffering and impairment of dignity in sexual harassment cases under the EEA, as human rights legislation. In a recent unreported judgment by Oosthuizen AJ in the Labour Court it was held that in cases of sexual harassment the determination of appropriate relief in terms of Section 50 of the EEA requires that the Court:

“duly consider various interests, including the need to redress the wrong caused by the infringement, the deterrence of future violations, the dispensation of justice which is fair to all those who might be affected and the necessity of ensuring that the order can be complied with...It would be unwise to attempt an exhaustive list of factors to be taken into account. These would include the duration, extent and frequency of the harassment, the extent to which the acts of harassment are blatant and intrusive, the arrogance and maliciousness attributable to the harassing party, and the consequences to the victim, but these are by no means the only factors which could play a role.”²⁶

K Concluding remarks

In South Africa the demand for racial equality and the abolition of Apartheid came about at an enormous cost and has caused and continues to cause social upheaval and conflict. Notwithstanding the progressive Constitution and the eradication of discriminatory laws, further measures have been taken in order to remedy the injustices of the past, most notably the enactment of equality legislation such as the EEA and the Promotion of Equality and Prevention of Unfair Discrimination Act and the setting up of a Truth and Reconciliation Commission.

Sex and gender discrimination finds itself at a similar crossroad now. Change is inevitable but takes time, the journey is often hazardous and treacherous. However, this should not deter us as the time has clearly come to deal with and break the silence that surrounds unspeakable issues such as sexual harassment and violence against women. Just as rape is seen as a form of violence, as

opposed to a crime of sex, sexual harassment can now be properly contextualised as an abuse of hierarchical economic or institutional power as opposed to being an issue of boundaries relating to flirtation and sexuality. To a large extent the promulgation of the EEA and the Amendment to the Code of Good Practice recognising sexual harassment as a form of unfair discrimination has paved the way for South Africans to deal with the scourge of violence against women within the employment sphere.

However, we need to acknowledge that law reform is not always in and of itself the answer to social injustice. In engaging the law, we need to do so for purposes beyond mere law reform and also consider the modes of social regulation which are deeply antithetical to women's needs and concerns and then come up with non-legal and legal strategies avoiding the temptation of seeing the law as the promise of a solution.²⁷



LONG WINDING ROAD FOR WOMEN

AMENDED CODE OF GOOD PRACTICE ON THE HANDLING OF SEXUAL HARASSMENT CASES IN THE WORKPLACE

28 SEPTEMBER 2004

1. Introduction

- 1.1 The objective of this code is to eliminate sexual harassment in the workplace.
- 1.2 This code provides appropriate procedures to deal with sexual harassment and prevent its recurrence.
- 1.3 This code encourages and promotes the development and implementation of policies and procedures that will lead to the creation of workplaces that are free of sexual harassment, where employers and employees respect one another's integrity and dignity, their privacy, and their right to equity in the workplace.

2. Application of the Code

- 2.1 Although this code applies to the working environment (1) as a guide to employers, employees and applicants for employment, the perpetrators and victims of sexual harassment may include:
 - 2.1.1 owners
 - 2.1.2 employers
 - 2.1.3 managers
 - 2.1.4 supervisors
 - 2.1.5 employees
 - 2.1.6 job applicants
 - 2.1.7 clients
 - 2.1.8 suppliers
 - 2.1.9 contractors
 - 2.1.10 others having dealings with a business.
- 2.2 Nothing in 2.1 above confers the authority **or obligation** on employers to take disciplinary action in respect of non-employees.
- 2.3 A non-employee who is a victim of sexual harassment may lodge a grievance with the employer of the harasser, where the harassment has taken place in the workplace or in the course of the harasser's employment. (2)
- 2.4 Where the term "employee" is used in this code, it will be deemed to include applicants for employment.

3. Sexual Harassment as a form of unfair discrimination

Sexual harassment in the working environment is a form of unfair discrimination and is prohibited on the grounds of sex and/or gender and/or sexual orientation. (3)

4. Test for Sexual Harassment

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

- 4.1 whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
- 4.2 whether the sexual conduct was unwelcome;
- 4.3 the nature and extent of the sexual conduct; and
- 4.4 the impact of the sexual conduct on the employee.

5. Factors to establish sexual harassment

5.1 Harassment on a prohibited ground

- 5.1.1 The grounds of discrimination to establish sexual harassment are sex, gender and sexual orientation;
- 5.1.2 Same-sex harassment can amount to discrimination on the basis of sex, gender and sexual orientation.

5.2 Unwelcome conduct

- 5.2.1 There are different ways in which an employee may indicate that sexual conduct is unwelcome, including non-verbal conduct such as walking away or not responding to the perpetrator.

- 5.2.2 Previous consensual participation in sexual conduct does not necessarily mean that the conduct continues to be welcome.
- 5.2.3 Where a complainant has difficulty indicating to the perpetrator that the conduct is unwelcome, such complainant may seek the assistance and intervention of another person such as a co-worker, superior, counsellor, human resource official, family member or friend.
- 5.3 Nature and extent of the conduct
 - 5.3.1 The unwelcome conduct must be of a sexual nature, and includes physical, verbal or non-verbal conduct.
 - 5.3.1.1 Physical conduct of a sexual nature includes all unwelcome physical contact, ranging from touching to sexual assault and rape, as well as strip search by or in the presence of the opposite sex.
 - 5.2.3.2 Verbal conduct includes unwelcome innuendos, suggestions, hints, sexual advances, comments with sexual overtones, sex-related jokes or insults, graphic comments about a person's body made in their presence or to them, inappropriate enquiries about a person's sex life, whistling of a sexual nature and the sending by electronic means or otherwise of sexually explicit text.
 - 5.3.1.3 Non-verbal conduct includes unwelcome gestures, indecent exposure and the display or sending by electronic means or otherwise of sexually explicit pictures or objects.
 - 5.3.2 Sexual harassment may include, but is not limited to, victimization, *quid pro quo* harassment and sexual favouritism.
 - 5.2.3.1 Victimization occurs where an employee is victimized or intimidated for failing to submit to sexual advances.
 - 5.2.3.2 *Quid pro quo* harassment occurs where a person such as an owner, employer, supervisor, member of management or co-employee, influences or attempts to influence an employee's employment circumstances (for example engagement, promotion, training, discipline, dismissal, salary increments or other benefits) by coercing or attempting to coerce an employee to surrender to sexual advances. This could include sexual favouritism, which occurs where a person in authority in the workplace rewards only those who respond to his or her sexual advances.
 - 5.3.3 A single incident of unwelcome sexual conduct may constitute sexual harassment.
- 5.4 Impact of the conduct

The conduct should constitute an impairment of the employee's dignity, taking into account:

 - 5.4.1 the circumstances of the employee; and
 - 5.4.2 the respective positions of the employee and the perpetrator in the workplace.

6. Guiding principles

Employers should create and maintain a working environment in which the dignity of employees is respected. A climate in the workplace should also be created and maintained in which complainants of sexual harassment will not feel that their grievances are ignored or trivialized, or fear reprisals. Implementing the following guidelines can assist in achieving these ends:

- 6.1 Employers/management and employees are required to refrain from committing acts of sexual harassment.
- 6.2 All the employers/management and employees have a role to play in contributing towards creating and maintaining a working environment in which sexual harassment is unacceptable. They should ensure that their standards of conduct do not cause offence and they should discourage unacceptable behaviour on the part of others.
- 6.3 Employers/management should attempt to ensure that persons such as customers, suppliers, job applicants and others who have dealings with the business are not subjected to sexual harassment by the employer or its employees.
- 6.4 Employers/management should take appropriate action in accordance with this code where instances of sexual harassment occur in the working environment.

7. Sexual Harassment Policies

- 7.1 Employers should, subject to any existing collective agreements and applicable statutory provisions in respect of sexual harassment, adopt a sexual harassment policy which should take cognisance of and be guided by the provisions of this code.

- 7.2 The contents of sexual harassment policies should be communicated effectively to all employees.
- 7.3 The adoption of a sexual harassment policy and the communication of the contents of the policy to employees, should, amongst other factors, be taken into consideration in determining whether the employer has discharged its obligations in accordance with the provisions of section 60(2) of the Employment Equity Act (EEA).
- 7.4 Sexual harassment policies should substantially comply with the provisions of this code and include at least the following statements:
 - 7.4.1 Sexual harassment is a form of unfair discrimination on the basis of sex and/or gender and/or sexual orientation which infringes the rights of the complainant and constitutes a barrier to equity in the workplace.
 - 7.4.2 Sexual harassment in the workplace will not be permitted or condoned.
 - 7.4.3 Complainants in sexual harassment matters have the right to follow the procedures in the policy and appropriate action must be taken by the employer.
 - 7.4.4 It will be a disciplinary offence to victimize or retaliate against an employee who in good faith lodges a grievance of sexual harassment.
- 7.5 The procedures to be followed by a complainant of sexual harassment and by an employer when sexual harassment has occurred, should be outlined in the policy.

8 Procedures

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

- 8.1 Reporting sexual harassment
 - 8.1.1 Section 60 Section 60(1) of the EEA provides that conduct in contravention of the EEA must ***immediately*** be brought to the attention of the employer.
 - 8.1.2 In instances of sexual harassment, the word “***immediately***” shall mean as soon as is reasonably possible in the circumstances and without undue delay, taking into account the nature of sexual harassment, including that it is a sensitive issue, that the complainant may fear reprisals and the relative positions of the complainant and the alleged perpetrator in the workplace.
 - 8.1.3 Sexual harassment may be brought to the attention of the employer by the complainant or any other person aware of the sexual harassment, for example a friend, colleague or human resources official acting on the request of the complainant, where the complainant has indicated that she/he wishes the employer to be made aware of the conduct. However, where the sexual harassment is of a particularly serious nature, the complainant should be encouraged to inform the employer.
- 8.2 Obligations of the employer

When sexual harassment has been brought to the attention of the employer, the employer should:

 - 8.2.1 consult all relevant parties;
 - 8.2.2 take the necessary steps to address the complaint in accordance with this code and the employer’s policy; and
 - 8.2.3 take the necessary steps to eliminate the sexual harassment.
- 8.3 The steps to be taken by the employer on receipt of a complaint by a complainant, should include but not be limited to the following:
 - 8.3.1 advising the complainant of the informal and formal procedures available to deal with the sexual harassment, as set out in items 8.5, 8.6 and 8.7 of this code;
 - 8.3.2 where reasonably practicable, offering the complainant advice, assistance and counselling as set out in item 8.4 of this code, including during any disciplinary enquiry that may be instituted; and
 - 8.3.3 following the procedures required by items 8.5, 8.6 and 8.7 of this code, in a manner that is procedurally and substantively fair.
- 8.4 Advice and assistance
 - 8.4.1 A complainant of sexual harassment may require advice and assistance, including counselling.
 - 8.4.2 As far as is practicable, employers should designate a person outside of line management who complainants may approach for confidential advice and/or counselling. Such person:
 - 8.4.2.1 could be a person employed by the employer to perform such a function, a trade union representative, a co-employee or a professional engaged to perform such activity;

- 8.4.2.2 should have the appropriate skills and experience, including counselling and labour relations skills; and
- 8.4.2.3 should be properly trained and given adequate resources.
- 8.5 Advising the complainant of workplace procedures to deal with sexual harassment
 - 8.5.1 When an incident of sexual harassment is brought to the attention of an employer, such employer should:
 - 8.5.1.1 advise the complainant that there are formal and informal procedures which could be followed to deal with the problem;
 - 8.5.1.2 explain the formal and informal procedures to the complainant;
 - 8.5.1.3 advise the complainant that she/he may choose which procedure should be followed by the employer, except that in certain limited circumstances, as set out in clause 8.7.2, the employer may choose to follow a formal procedure even if the complainant does not wish to do so;
 - 8.5.1.4 re-assure the complainant that she/he will not face job loss or any adverse consequences if she/he chooses to follow either the formal or informal procedure;
 - 8.5.1.5 advise the complainant that the matter will be dealt with confidentially if the complainant so chooses.
- 8.6 Informal procedures
 - 8.6.1 A complainant of sexual harassment may choose to follow either of the following informal procedures:
 - 8.6.1.1 the complainant or another appropriate person explains to the perpetrator that the conduct in question is not welcome, that it offends the complainant, makes him or her feel uncomfortable and that it interferes with his or her work; or
 - 8.6.1.2 an appropriate person approaches the perpetrator, without revealing the identity of the complainant, and explains to the perpetrator that certain forms of conduct constitute sexual harassment, are offensive and unwelcome, make employees feel uncomfortable, and interfere with their work.
 - 8.6.2 An employer should consider any further steps which can be taken to assist in dealing with the complaint.
- 8.7 Formal procedure
 - 8.7.1 A complainant may choose to follow a formal procedure, either with or without first following an informal procedure.
 - 8.7.2 In the event that a complainant chooses not to follow a formal procedure, the employer should still assess the risk to other persons in the workplace where formal steps have not been taken against the perpetrator. In assessing such risk the employer must take into account all relevant factors, including the severity of the sexual harassment and whether the perpetrator has a history of sexual harassment. If it appears to the employer after a proper investigation that there is a significant risk of harm to other persons in the workplace, the employer may follow a formal procedure, irrespective of the wishes of the complainant, and advise the complainant accordingly.
 - 8.7.3 The employer's sexual harassment policy and/or collective agreement should outline the following in respect of a formal procedure:
 - 8.7.3.1 with whom the employee should lodge a grievance;
 - 8.7.3.2 the internal grievance procedures to be followed, including provision for the complainant's desired outcome of the procedures;
 - 8.7.3.3 time frames which will allow the grievance to be dealt with expeditiously;
 - 8.7.3.4 that should the matter not be satisfactorily resolved by the internal procedures outlined above, a complainant of sexual harassment may refer the dispute to the Commission for Conciliation Mediation and Arbitration (CCMA). Similarly an alleged perpetrator of sexual harassment may refer a dispute arising from disciplinary action taken by the employer to the CCMA; and
 - 8.7.3.5 that it will be a disciplinary offence to victimize or retaliate against a complainant who in good faith lodges a grievance of sexual harassment.

8.8 Disciplinary sanctions

The employer's sexual harassment policy should specify the range of disciplinary sanctions that may be imposed on a perpetrator. The sanctions must be proportionate to the seriousness of the sexual harassment in question, and should provide that:

- 8.8.1 warnings may be issued for minor instances of sexual harassment;
- 8.8.2 dismissal may ensue for continued minor instances of sexual harassment after warnings, as well as for serious instances of sexual harassment;
- 8.8.3 in appropriate circumstances upon being found guilty of sexual harassment, a perpetrator may be transferred to another position in the workplace.

9. Confidentiality

- 9.1 Employers and employees must ensure that grievances about sexual harassment are investigated and handled in a manner that ensures that the identities of the persons involved are kept confidential.
- 9.2 In cases of sexual harassment, management, employees and the parties concerned must endeavour to ensure confidentiality in the disciplinary inquiry. Only appropriate members of management as well as the aggrieved person, representatives, alleged perpetrator, witnesses and interpreter if required should be present in the disciplinary inquiry.
- 9.3 Employers are required to disclose to the complainant, the perpetrator and/or their representatives, such information as may be reasonably necessary to enable the parties to prepare for any proceedings in terms of this code.

10 Additional sick leave

- 10.1 Where an employee's existing sick leave entitlement has been exhausted, the employer should give due consideration to the granting of additional paid sick leave in cases of serious sexual harassment, where the employee, on medical advice, requires trauma counselling.
- 10.2 In appropriate circumstances, employers may give consideration to assisting with the cost of the medical advice and trauma counselling, where such amounts are not covered by any applicable medical aid scheme.

11 Information and education

- 11.1 Where feasible, the Department of Labour should endeavour to ensure that copies of this code are accessible and available in the official languages.
- 11.2 Employers and, where applicable, employer organizations should include the issue of sexual harassment in their orientation, education and training programs.
- 11.3 Trade unions should include the issue of sexual harassment in their education and training programs for shop stewards and employees.
- 11.4 CCMA commissioners should receive specialized training to deal with sexual harassment cases.

FOOTNOTES ON ANNEXURE A

(1) & (2) Where sexual harassment occurs outside of the working environment, regard should be had to the Promotion of Equality and Prevention of Unfair Discrimination Act. 4 of 2000.

(3) Section 6 of the Employment Equity Act 55 of 1998 provides that no person may unfairly discriminate, directly or indirectly against an employee in any employment policy or practice, on one or more grounds, including race, gender.

sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, ACT 108 OF 1996

[ASSENTED TO 16 DECEMBER 1996]

[DATE OF COMMENCEMENT: 4 FEBRUARY 1997]

(Unless otherwise indicated - see also s. 243 (5))

(English text signed by the President)

as amended by

Constitution of the Republic of South Africa, Act 108 of 1996
Constitution of the Republic of South Africa Amendment Act 35 of 1997
Constitution of the Republic of South Africa Amendment Act 65 of 1998
Constitution of the Republic of South Africa Second Amendment Act 87 of 1998
Constitution of the Republic of South Africa Second Amendment Act 2 of 1999
Constitution of the Republic of South Africa Amendment Act 3 of 1999
Constitution of the Republic of South Africa Amendment Act 34 of 2001
Constitution of the Republic of South Africa Second Amendment Act 61 of 2001
Constitution of the Republic of South Africa Amendment Act 18 of 2002
Constitution of the Republic of South Africa Second Amendment Act 21 of 2002
Constitution of the Republic of South Africa Amendment Act 2 of 2003
Constitution of the Republic of South Africa Second Amendment Act 3 of 2003

Regulations under this Act

REGULATIONS GOVERNING 'THE ORDER FOR MERITORIOUS SERVICE - DIE ORDE VIR VOORTREFLIKE DIENS'

RULES OF THE CONSTITUTIONAL COURT

ACT

To introduce a new Constitution for the Republic of South Africa and to provide for matters incidental thereto.

Preamble

*We, the people of South Africa,
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our diversity.
We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to-
Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
Improve the quality of life of all citizens and free the potential of each person; and
Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.
May God protect our people.
Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.
God seën Suid-Afrika. God bless South Africa.
Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.*

CHAPTER 1

FOUNDING PROVISIONS (ss 1-6)

1 Republic of South Africa

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

2 Supremacy of Constitution

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

3 Citizenship

- (1) There is a common South African citizenship.
- (2) All citizens are-
 - (a) equally entitled to the rights, privileges and benefits of citizenship; and
 - (b) equally subject to the duties and responsibilities of citizenship.
- (3) National legislation must provide for the acquisition, loss and restoration of citizenship.

4 National anthem

The national anthem of the Republic is determined by the President by proclamation.

5 National flag

The national flag of the Republic is black, gold, green, white, red and blue, as described and sketched in Schedule 1.

6 Languages

- (1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.
- (2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.
- (3) (a) The national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages.
(b) Municipalities must take into account the language usage and preferences of their residents.
- (4) The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.
- (5) A Pan South African Language Board established by national legislation must-
 - (a) promote, and create conditions for, the development and use of-
 - (i) all official languages;
 - (ii) the Khoi, Nama and San languages; and
 - (iii) sign language; and
 - (b) promote and ensure respect for-
 - (i) all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu; and
 - (ii) Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.

CHAPTER 2

BILL OF RIGHTS (ss 9-12, 36)

9 Equality

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

10 Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

11 Life

Everyone has the right to life.

12 Freedom and security of the person.

- (1) Everyone has the right to freedom and security of the person, which includes the right-
 - (a) not to be deprived of freedom arbitrarily or without just cause;
 - (b) not to be detained without trial;
 - (c) to be free from all forms of violence from either public or private sources;
 - (d) not to be tortured in any way; and
 - (e) not to be treated or punished in a cruel, inhuman or degrading way.
- (2) Everyone has the right to bodily and psychological integrity, which includes the right-
 - (a) to make decisions concerning reproduction;
 - (b) to security in and control over their body; and
 - (c) not to be subjected to medical or scientific experiments without their informed consent.

36 Limitation of rights

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

EMPLOYMENT EQUITY ACT 55 OF 1998

CHAPTER II – PROHIBITION OF UNFAIR DISCRIMINATION

- (1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.
- (2) It is not unfair discrimination to -
 - (a) take affirmative action measures consistent with the purpose of this Act; or
 - (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.
- (3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).

SECTION 50 – POWERS OF LABOUR COURT

- (1) Except where this Act provides otherwise, the Labour Court may make any appropriate order including:
 - (a) on application by the Director-General in terms of Section 37(6) or 39(6) making a compliance order an order of the Labour Court;
 - (b) subject to the provisions of this Act, condoning the late filing of any document with, or the late referral of any dispute to, the Labour Court;
 - (c) directing the CCMA to conduct an investigation to assist the Court and to submit a report to the Court;
 - (d) awarding compensation in any circumstances contemplated in this Act;
 - (e) awarding damages in any circumstances contemplated in this Act;
 - (f) ordering compliance with any provision of this Act, including a request made by the Director-General in terms of Section 43(2) or a recommendation made by the Director-General in terms of Section 44(b);
 - (g) imposing a fine in accordance with Schedule 1 for a contravention of certain provisions of this Act;
 - (h) reviewing the performance or purported performance of any function provided for in this Act or any act or omission of any person or body in terms of this Act on any grounds that are permissible in law;
 - (i) in an appeal under Section 40, confirming, varying or setting aside all or part of an order made by the Director-General in terms of Section 39; and
 - (j) dealing with any matter necessary or incidental to performing its functions in terms of this Act.
- (2) If the Labour Court decides that an employee has been unfairly discriminated against, the Court may make any appropriate order that is just and equitable in the circumstances, including:
 - (a) payment of compensation by the employer to that employee;
 - (b) payment of damages by the employer to that employee;
 - (c) an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees;
 - (d) an order directing an employer, other than a designated employer, to comply with Chapter III as if it were a designated employer;
 - (e) an order directing the removal of the employer's name from the register referred to in Section 41; and
 - (f) the publication of the Court's order.
- (3) The Labour Court, in making any order, may take into account any delay on the part of the party who seeks relief in processing a dispute in terms of this Act.

(4) If the Labour Court declares that the medical testing of an employee as contemplated in Section 7 is justifiable, the Court may make any order that it considers appropriate in the circumstances, including imposing conditions relating to:

- (a) the provision of counseling;
- (b) the maintenance of confidentiality;
- (c) the period during which authorization for any testing applies; and
- (d) the category or categories of jobs or employees in respect of which the authorization for testing applies.

SECTION 60 – LIABILITY OF EMPLOYERS:

- (1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.
- (2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.
- (3) If the employer fails to take the necessary steps referred to in subsection 2, and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.
- (4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably necessary to ensure that the employee would not act in contravention of this Act.

NOTES

ENDNOTES

- 1 MacKinnon C, *Sexual Harassment of Working Women* (1979) Yale University Press.
- 2 Ibid at 1
- 3 Zalesne D, *The effectiveness of the Employment Equity Act and the Code of Good Practice in reducing sexual harassment*. (2001) 17 SAJHR 503 at 507-508.
- 4 J v M 1989 19 ILJ 755 (IC)
- 5 Ibid at 757-758
- 6 MacKinnon at 25
- 7 MacKinnon at 48
- 8 Carr v Allison Gas Turbine Div. 32 F.3d 1007, 1009 (7th Cir. 1994)
- 9 Taljaard v Securicor (2003) 24 ILJ 1167
- 10 Ibid at 1177; 1179 F-I
- 11 Ntsabo v Real Security (2003) 24 ILJ 2341 (LC) at 2384G-H
- 12 Harksen v Lane NO & Others 1998 (1) SA 300 (CC)
- 13 Mackinnon at 34
- 14 Amended Code of Good Practice section 6.2.
- 15 Amended Code of Good Practice section 7.1.
- 16 Ntsabo at 2382E-G
- 17 Amended Code of Good Practice Section 8.4.2
- 18 Ntsabo at 2384G-I
- 19 Ntsabo at 2374D-E and 2375B
- 20 Media 24 Ltd & Another v Sonja Grobler Supreme Court of Appeal Case No. 301/04, dated 9 May 2005
- 21 Ibid at para 68
- 22 Ibid at para 71
- 23 IMSSA Arbitration Digest Vol 3 Aug-Nov 1993 at 136
- 24 Ibid at 141
- 25 Ibid at 142
- 26 Amarall Christian v Colliers Properties, Unreported Case No. C323/2004 at pages 7, 11
- 27 Smart C, *Feminism and the Power of the Law* (London: Routledge, 1989) at 164

