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Sexual Harassment at Workplace – A Paradox of Power

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ABSTRACT

Power is the central element of Sexual harassment. It is exercising authority over the subordinate than about sex. The abuse of power is the key to understand why sexual harassment occurs. Sexual harassment at workplace involves use of authority by the person in power over the person who is subordinate to him or her. Through the use of this power the superior satisfies his or her sexual desires. The concept of 'abuse of power' is not new in the Patriarchal Indian society. Patriarchy is a socially constructed system where males have primary power. Patriarchy reinforced violence against women. Women were confined in stereotypical gender roles that placed limitation on how far they can go. Excluding women from collective resources paved way for male domination which meant a level of power superiority against women. The impact of patriarchy on men is astounding. Not only women are affected by patriarchy but men too are impacted negatively by the same. The misuse of power can have both men and women as victims. Sexual harassment means any unwelcome sexual advances or behavior that creates an uncomfortable hostile working environment. The parties involved are one who has the power to abuse and the other who is the victim of the same. Any conduct of sexual nature that makes an employee uncomfortable can come under the ambit of Sexual Harassment at workplace

I. INTRODUCTION

Equal treatment at workplace is covered under the ambit of the Fundamental Rights³ and the Directive Principles of State Policy⁴ guaranteed under the Constitution of India. Sexual Harassment is a type of sex discrimination which involves unwelcome sexual advances or behavior in the workplace. No one should have to face such a hostile environment at workplace which affects their efficiency and no one has a right to sexually bully another person at work. However, sexual harassment is overwhelmingly a kind of discrimination that is done against the women by their male employers but though cases where men are the victims are less in

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³ Article 14, Article 19 and Article 21 of the Constitution of India.

⁴ Article 39, Article 41, Article 42 and Article 43 of the Directive Principles of State Policy in the Constitution of India.

number and mostly goes unreported, the laws in place should treat both men and women equally as they both can be harassers or harassed.

Sexual harassment is a pressing problem in the workplace. India is a developing country and the growth of the country requires the contribution of the all its citizen equally. But with workplaces being stress places we will never be able to achieve our utmost goals. Even recently there are several cases reported for Sexual Harassment at workplace where number of women has come forward to report their experiences⁵. The actual cost of Sexual harassment is very difficult to estimate as it is difficult to measure up the cost of lost career opportunities due the stressful hostile environment.

The concept of Sexual harassment was conceptualized for the first time in the 1970's by Lin Farley in one of her most famous works 'Sexual Shakedown'⁶. Farley spoke to quite a few working women and found that many of them were already facing a kind a sex discrimination which was later known as Sexual harassment. The credit of coning the term 'Sexual Harassment' goes to Catharine Alice Mackinnon. Yale University Press published Mackinnon's book 'Sexual Harassment of Working Women: A Case of Sex Discrimination' in 1979. The book created a legal claim that Sexual harassment is a form of Sex Discrimination and would fall under the ambit of Tittle VII of the Civil Rights Act of 1964. In her book Mackinnon differentiated between two types of Sexual harassment 'Quid pro quo' which meant sexual favor in exchange of a job opportunity and the second type that arises when there is a persistent condition of work. In 1980, the Equal Employment Opportunity Commission followed the same framework for drafting the guidelines prohibiting both Quid pro quo and Hostile Environment Sexual harassment.

Until the mid-seventies 'Sexual harassment at workplace' was not particularly recognized by Law in the United States of America. It was only in 1980 that Equal Employment Opportunity Commission provided for guidelines for prohibition of Sexual harassment at workplace as it comes under the ambit of sex discrimination prohibited under Title VII of the Civil Rights Act of 1964.

According to the United States Equal Employment Opportunity Commission (EEOC) Harassment can include "sexual harassment" or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature. Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a

⁵ "Sexual Harassment Cases", last updated on JAN 31, 2021, 08:15 AM IST, Available at <https://timesofindia.indiatimes.com/topic/sexual-harassment-cases>, Last visited on 2nd Feb 2021

⁶ FARLEY, L. *Sexual shakedown: the sexual harassment of women on the job*. New York, McGraw-Hill, 1978.

person's sex. For example, it is illegal to harass a woman by making offensive comments about women in general.⁷

Both victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex. The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.⁸

The first ever case reported for sexual harassment in United States was of *Barnes v. Train*⁹ in 1974. Paulette Barnes filed this case after losing her job for refusing sexual advances of a male supervisor. Thought the case was initially dismissed but Barnes won in appeal¹⁰.

In 1986 in the case of *Meritor Savings Bank v. Vinson*¹¹ the US Supreme Court recognized for the first time 'sexual harassment' as a violation of Title VII Civil Rights Act of 1964.

The US Supreme Court gave a landmark judgment in 1998 in *Oncale v. Sundowner Offshore Services*¹². The suit was filed for sex discrimination by a male oil-rig worker, who claimed that he was sexually harassed by his male co-workers. The court held that protection against sex discrimination under Title VII of the Civil Rights Act of 1964 also applies to anyone regardless of the gender of either the victim, or the harasser.

In 2020 US Supreme Court gave another leading judgment in *Bostock v. Clayton County*¹³ reestablishing the fact that Title VII of the Civil Rights Act of 1964 protects employees against any discrimination because of their sexual orientation or gender identity.

The Indian society on the other hand was not only aware of the concept like 'Sexual Harassment at Workplace' until 1992. In 1992, a dalit woman Bhanwari Devi who was a social worker was gang raped while she was employed for Rural Development Programme of the Rajasthan Government. This incidence shook the nation and highlighted that the concept of Sexual Harassment at workplace can be a major menace. The Supreme Court of India then framed guidelines and issued directions for the prohibition of Sexual harassment at workplace.¹⁴ These guidelines were to be followed until a proper law is enacted on the same. Thus it was only in 1997 that Indian Judiciary defined and interpreted the concept of Sexual harassment at Workplace.

⁷ According to U.S Equal Employment Opportunity Commission; available on http://www.eeoc.gov/laws/types/sexual_harassment.cfm, Last visited on 5th Feb 2021

⁸ Ibid

⁹ *Barnes v. Train*, 13 Fair Empl. Prac. Cas. 123 (D.D.C. 1974)

¹⁰ *Barnes v. Costle*, 561 F.2d 983(D.C. Cir. 1977)

¹¹ *Meritor Savings Bank, FSB v. Mechelle Vinson, et al.* 477 U.S. 57 (1986) 106 S. Ct. 2399; 91 L. Ed. 2d 49

¹² *Joseph Oncale v. Sundowner Offshore Services, Inc.* 523 U.S. 75 (1998) 118 S. Ct. 998; 140 L. Ed. 2d 201

¹³ *Gerald Lynn Bostock v. Clayton County, Georgia* 590 U.S. 140 S. Ct. 1731; 2020 WL

¹⁴ *Vishaka Vs. State of Rajasthan* (1997) 6 SCC 241

The guidelines framed in *Vishaka v. State of Rajasthan*¹⁵ took reference from International Conventions to which India is a signatory party. India is a party to Convention on Elimination of all forms of Discrimination against Women (CEDAW) and Discrimination (Employment and Occupation) Convention which makes it obligatory for India to any form of gender based discrimination in the workplace.

Prior to the *Vishaka's guidelines* in 1997 there was no remedy for addressing workplace sexual harassment. There were only some sections of the Indian Penal code¹⁶ which could come to the rescue of the victim they were Sec 294¹⁷, Sec 354¹⁸ and Sec 509¹⁹.

In the case of *Rupan deol Bajaj v. K. P. S Gill*²⁰, an IAS officer was sexually harassed by a superior officer in a dinner party. Due to the lack of any particular legislation on sexual harassment at workplace the victim had to resort to the limited provisions of the Indian Penal Code.²¹

In December 2012, an un-fateful event²² shook the nervous of our country and all the citizens were on the roads to make the laws even more stringent for women protection. Due the demanding situation the laws were amended and the Criminal laws (Amendment) Act 2013 was enacted. In an attempt to serve justice the Government of India constituted a three-member judicial committee headed by the former Chief Justice of India, Justice J.S. Verma, to submit a report on legal reforms required to tackle violence against women. The key objective of the Commission was to review for possible amendments to the criminal law and suggest measures for faster trials and harsher penalties for vicious offences against women.

The Commission submitted its recommendations by identifying 'lack of good governance' as

¹⁵ Ibid

¹⁶ Indian Penal Code, 1860

¹⁷ Whoever, to the annoyance of others—

(a) does any obscene act in any public place, or

(b) sings, recites or utters any obscene song, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.]

¹⁸ Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

¹⁹ Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

²⁰ 1995 SCC (6) 194

²¹ Supra note 15

²² On the dark night of 16 Dec 2012 a 23 year old paramedic student along with her male friend boarded a private chartered bus to reach their home. Six men travelling in the bus, who were drunk, began molesting her. The male friend was knocked down when he opposed the molesting. The drunken men gang raped the girl, when she tried to oppose, one of the attackers inserted an iron rod in her private parts, pulling and ripping her intestines apart. The medical reports later revealed that she had septic injuries on her abdomen and her genital organs also. The attackers then threw the half-naked blood soaked bodies the two on the road and ran away.

the central cause of offences against women. The report criticised the government, the abysmal and old-fashioned police system alongside public apathy in tackling offences against women, and thereby, recommended an ardent need for amendments in legislations. The recommendations were based on more than 70,000 suggestions received from stakeholders, social activists and public comprising of eminent jurists, legal professionals, NGOs, women's groups and civil society through varied methods: emails, posts and fax. Based on some of the recommendations of the Commission report, an anti-rape ordinance was drafted. The Criminal Law (Amendment) Bill, 2013, passed by the Parliament of India received the assent from the President and was enacted as the Criminal Law (Amendment) Act in April 2013.

An evaluation of the Criminal Laws (Amendment) Draft 2013, the Criminal Laws (Amendment) Ordinance 2013 and the final Criminal Laws (Amendment) Act 2013 clarified that at its inception the Justice Verma Committee formulated a Gender Neutral draft in many aspects such as it contained Gender Neutral Rape Laws and Gender Neutral Sexual Harassment at Workplace Laws. However when the final Act came, its Gender Neutrality was ignored as unimportant and didn't become the part of the final Act.

Until recently the Indian laws having been treating sexual harassment at workplace as a personal problem of the victims. However sexual harassment is a very serious form of employment discrimination which can be suffered both by men and women. The need of the hour is an adoption of a zero tolerance policy against sexual harassment at workplace.

II. SEXUAL HARASSMENT & POWER

Power is the central element of Sexual harassment. It is exercising authority over the subordinate than about sex. The abuse of power is the key to understand why sexual harassment occurs. Sexual harassment at workplace involves use of authority by the person in power over the person who is subordinate to him or her. Through the use of this power the superior satisfies his or her sexual desires.

The concept of 'abuse of power' is not new in the Patriarchal Indian society. Patriarchy is a socially constructed system where males have primary power. Patriarchy reinforced violence against women. Women were confined in stereotypical gender roles that placed limitation on how far they can go. Excluding women from collective resources paved way for male domination which meant a level of power superiority against women. The impact of patriarchy on men is astounding. Not only women are affected by patriarchy but men too are impacted negatively by the same. The misuse of power can have both men and women as victims.

Thus, sexual harassment means any unwelcome sexual advances or behavior that creates an

uncomfortable hostile working environment. It negatively affects the employee's work performance and also undermines his or her sense of personal dignity. The parties involved are one who has the power to abuse and the other who is the victim of the same. Any conduct of sexual nature that makes an employee uncomfortable can come under the ambit of Sexual Harassment at workplace.

Sexual Harassment can be evidently both physical and psychological. The milder form of sexual behavior can include inappropriate sexual gestures however it can escalate to extreme behaviors amounting to sexual assault or rape.

III. DEFINITION OF SEXUAL HARASSMENT

The International Labor Organization defines sexual harassment as a "sex-based behavior that is unwelcome and offensive to its recipient. For sexual harassment to exist these two conditions must be present. Sexual harassment may take two forms: 1) *Quid Pro Quo*, when a job benefit - such as a pay rise, a promotion, or even continued employment - is made conditional on the victim acceding to demands to engage in some form of sexual behaviour; or; 2) hostile working environment in which the conduct creates conditions that are intimidating or humiliating for the victim. Behavior that qualifies as sexual harassment: **PHYSICAL**- Physical violence, touching, unnecessary close proximity. **VERBAL**- Comments and questions about appearance, life-style, sexual orientation, offensive phone calls. **NON –VERBAL**- Whistling, sexually-suggestive gestures, display of sexual materials."²³

According to the Equal Employment Opportunity Commission "It is unlawful to harass a person (an applicant or employee) because of that person's sex. Harassment can include "sexual harassment" or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature. Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's sex. For example, it is illegal to harass a woman by making offensive comments about women in general. Both victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex. Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted). The harasser can be the victim's supervisor, a supervisor in

²³ 'Sexual Harassment at Workplace', available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_fs_96_en.pdf, last visited on 15th Feb 2021

another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.”²⁴

In 1997 the term ‘Sexual Harassment’ was defined in a landmark judgment of *Vishaka v. State of Rajasthan*²⁵ by the Supreme Court of India. India is a signatory party to the International Convention on Elimination of all forms of Discrimination against Women hence the Supreme Court of India relied on the Article 11²⁶ of the same for formulating the definition of Sexual Harassment. The Supreme Court defined Sexual Harassment as:-

“Sexual Harassment includes such unwelcome sexually determined behavior, whether directly or by implication, as under:

- a. Physical contact and advances.
- b. A demand or request of sexual favors.
- c. Showing pornography.
- d. Sexually colored remarks.
- e. Any other unwelcome physical, verbal or non-verbal conduct of sexual nature.”²⁷

If any of the above mentioned acts are committed in circumstances under which the victim of

²⁴ ‘Sexual Harassment’, available at <https://www.eeoc.gov/sexual-harassment>, last visited on 15th Feb 2021

²⁵ Supra note 13

²⁶ 1.States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to work as an inalienable right of all human beings;
- (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
- (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
- (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
- (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

- (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
- (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
- (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
- (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

²⁷ Supra note 26 at 3016

such conduct has a reasonable apprehension that her retaliation to the same could cost her job, such a conduct would come under the ambit of the definition of sexual harassment. It is a serious form of sex discrimination which the victim has to face at the workplace from where they earn their livelihood and have minimum scope of retaliation because of the fear of losing their job.

Since 1997 when the term sexual harassment was defined for the first time in *Vishaka v. State of Rajasthan*²⁸ until 2013 when the Sexual Harassment at Workplace Act²⁹ came into force many Indian Courts adopted the same guidelines which was held in Vishaka's case³⁰. The fact that did not come under consideration even at that time and at present is the need of a Gender Neutral approach for the concept like sexual harassment at workplace where victims can be both men and women.

The term Sexual Harassment is defined under Section 2(n) of the Act of 2013³¹ as:-

“Sexual harassment” includes any one or more of the following unwelcome acts or behavior (Whether directly or by implication) namely:—

- (i) Physical contact and advances; or
- (ii) A demand or request for sexual favours; or
- (iii) Making sexually coloured remarks; or
- (iv) Showing pornography; or
- (v) Any other unwelcome physical, verbal or non-verbal conduct of sexual nature;”³²

Further Section 3 states Prevention of Sexual Harassment as:-

“The following circumstances, among other circumstances, if it occurs, or is present in relation to or connected with any act or behavior of sexual harassment may amount to sexual harassment:—

- (i) Implied or explicit promise of preferential treatment in her employment; or
- (ii) Implied or explicit threat of detrimental treatment in her employment ; or
- (iii) Implied or explicit threat about her present or future employment status; or

²⁸ Supra note 26

²⁹ The Sexual Harassment Of Women At Workplace (Prevention, Prohibition And Redressal) Act, 2013

³⁰ Supra note 29

³¹ Supra note 30

³² Sec 2(n) of the Sexual Harassment Of Women At Workplace (Prevention, Prohibition And Redressal) Act, 2013

- (iv) Interference with her work or creating an intimidating or offensive or hostile work environment for her; or
- (v) Humiliating treatment likely to affect her health or safety.”³³

IV. ELEMENTS OF SEXUAL HARASSMENT

It is common for people to associate with others who are like themselves it is called the ‘*just like me syndrome*’ or ‘*similar to me bias*’.³⁴ Work relationships and friendships are often formed with people who look like us or act like us or have the same mental wavelength. But when this impacts the ability to hire someone or give promotion to someone it would come under the ambit of unreasonable discrimination. Managers may make decisions on the prejudice that favors workers like them or of the same sex or of the opposite sex; this would amount to sex discrimination at workplace. Employees who does not come under ‘*like me*’ bracket and are considered ‘*different*’ may get tougher appraisals.

When employment is conditioned over submission to sexual advances or when the conduct of the supervisor is so intimidating that a reasonable employee would find it to be inappropriate and offensive then it would amount to sexual harassment. Courts interpretation the Sexual Harassment at Workplace Act 2013³⁵ have carved out different standards of the conduct which constitutes sexual harassment depending upon factors ranging from who is doing the harassing, who is the victim, how it impacted the victim, how sever the conduct was etc. It may differ from case to case depending upon the facts and circumstances of each and every case.

Therefore the behaviors that amount to sexual harassment involves a range of conducts ranging from minor offensive words or acts to major sexual assault. But there is no minimum standard or level of sexual harassment under the law; the only general rule that is followed is that more sever the conduct the fewer number of times it has to occur. For example, a single event of sexual advance may be enough to amount to sexual harassment if it is connected to granting or denying promotion. However if the conduct is not very serious then a single incident of offensive sexual conduct would not amount to sexual harassment. In such a case it is important to show a pattern of offensive sexual conduct. But in case of sever offensive sexual conduct; a single incident would suffice to amount sexual harassment at workplace. For example, touching

³³ Sec 3(2) of the Sexual Harassment Of Women At Workplace (Prevention, Prohibition And Redressal) Act, 2013

³⁴ Georgina Grant, “Similar-To-Me Bias: How Gender Affects Workplace Recognition”, 7th Aug 2018, available at <https://www.forbes.com/sites/georginagrants/2018/08/07/similar-to-me-bias-how-gender-affects-workplace-recognition/?sh=7b875d48540a>, last visited on 17th Feb 2021

³⁵ Supra note 32

of intimate body areas.

The two basic elements of sexual harassment are:-

1. The offensive conduct should be of sexual nature
2. The conduct should be unwelcome.

The less physical threatening forms of sexual harassment are the most experienced by the victims of Sexual Harassment at Workplace. They include various forms of harassment which are as follows:-

Sexual Words-

Sometimes Sexual Harassment might take form of words which are particularly directed towards women or men in specific or towards a person having a different gender identity. They include:-

- ◆ Calling a women 'doll', 'babe', 'honey' or 'sweety'
- ◆ Asking male employees to 'think above their belt'
- ◆ Using phrases for people of different gender identities
- ◆ Stating that 'some jobs are women's work'
- ◆ Saying that 'women can't manage the work' or that 'men can't work under a female boss'

Sexual Joking

Sexual Joking is something that often happens between close friends but it when happens at workplace some people might feel offensive about it. As sexual harassment is unwelcome offensive sexual behavior hence sexual joking in office intimidating someone will amount to sexual harassment. Most employees think that if they join in the joking it would lessen the impact of harassment, but in fact it worsens the case. As it provides evidence that they did not find it objectionable or offensive and may result in determination that they were not victims to hostile working environment. Both male and female can be victims of this form of harassment. In case of Men of the concept of stereotypical masculinity paramount's the impact of harassment on them.

Sexist conduct or behavior

An employer's physical conduct can also amount to offensive unwelcome sexual conduct contributing to a hostile working environment. Such a conduct is without words and it may

include:-

- ◆ looking up and down a person's body
- ◆ staring at one's chest
- ◆ staring at one's ass
- ◆ staring at someone
- ◆ intentionally standing too close to a person
- ◆ brushing against a person
- ◆ looking up a skirt or down a blouse
- ◆ pulling a person onto one's lap
- ◆ massaging or touching a person's clothing, hair or body
- ◆ hugging, kissing, patting
- ◆ making sexual gestures with hands or body movements

Sexual Advances

Some sexual harassment may include physical or verbal sexual advances by the employer. Such as:

- ◆ telling sexually explicit stories
- ◆ asking about sexual fantasies
- ◆ turning discussions to sexual topics
- ◆ making sexual comments
- ◆ making sexual comments about person's clothing, anatomy, or looks
- ◆ making harassing phone calls or emails
- ◆ spreading rumors about person's sex life
- ◆ spreading rumors about person's sexual orientation

Showing Pornography

Showing of pornographic material when unwelcome can be very offensive and uncomfortable. Display of pornography on the wall or the desk can be a way of expression of sexual desire of the employer. Such a sexual stratification can be targeted against a woman or man or person with specific sexual orientation.

The more physical threatening forms of sexual harassment would include the following forms of harassment:

Sexual Intimidation

This type of coercion occurs when there is a threat that if the employee does not adhere to the sexual terms of the employer the employee would lose his or her job. Such sexual intimidation may include request to have an affair or request to have sex or to engage in sexual conduct. For example, calling an employee to a hotel to negotiate his or her appraisal in the salary.

Sexual Criminal Conduct

Sometimes sexual harassment might become more violent where if the employee does not submit himself or herself to the sexual demands of the employer then he or she would have to face threats of harm, forced sexual touching, attempted or complete sexual assault, or even rape.

Under the Indian Law, although the concept of 'reasonableness' with to sexual harassment at workplace is yet to be adjudicated upon but the 'unwelcomeness' of the conduct is a definite part of the definition of sexual harassment. The *Vishaka v. State of Rajasthan*³⁶ as well as the Sexual Harassment at Workplace Act 2013³⁷ both define sexual harassment as 'unwelcome sexually determined behaviour'. A victim of the sexual harassment may verbally express to the harasser that the conduct is unwelcome or it may be implied from victim's behavior.

V. KINDS OF SEXUAL HARASSMENT

Sexual harassment at workplace can be classified into two categories namely:-

1. *Quid pro quo*
2. *Hostile environment*

Quid pro quo

Quid pro quo sexual harassment usually happens when a supervisor who has the power to make decisions about the employee based on the whether he or she submits to the sexual demands.

The two main elements of *quid pro quo* are-

1. The employee is subject to unwelcome sexual advances and,

³⁶ Supra note 29

³⁷ Supra note 36

2. Submission to the sexual advances is a condition for the job benefit and refusal would result in a detriment.

Power plays an important role in this type of sexual harassment. The harasser is in a position of authority over the victim for example the employer can make sleeping with him or her as a condition for a promotion. Sometimes the victim is in such domination by the authority of the supervisor that he or she has to submit to the unwelcome sexual conduct as a condition to the continuation of the job. *Quid pro quo* may also exist where there are colleagues for example where work evaluation takes into account comments from co-workers or when a co-worker makes sexual demands as a condition for cooperating in the team project. The adverse work consequences in all cases may be tangible such as firing, not hiring, failing to promote, demotion, material loss of benefits, diminished material responsibilities etc.

In a case of *quid pro quo* sexual harassment if the plaintiff is able to establish the above mentioned elements, the burden of proof shifts to the employer. The remedies for the victim may include recovery of compensatory damages such as medical expenses, future economic loss, loss of job opportunities etc. This type of sexual harassment was first recognized in the Vishaka's guidelines³⁸ and now it finds a place in the Sexual Harassment at Workplace Act 2013.³⁹

Hostile environment

The second type of sexual harassment is Hostile Environment. It was first recognized in 1980 with the adoption of the Equal Employment Opportunity Commission's guidelines on sexual harassment.⁴⁰ In India the phrase 'hostile environment' is found in the Vishaka's guidelines⁴¹. In *Apparel Export Promotion Council v. A.K Chopra*⁴² the Supreme Court of India relied on the Vishaka's guidelines⁴³ to determine whether the perpetrator's conduct had created an intimidating hostile working environment. The court relied on the guidelines with respect to hostile working environment for reversing the Delhi High Court's judgment that there was no sexual harassment. The phrase 'Hostile Environment' now finds its statutory reflection under the Sec 2(n) read with Sec 3(2) of the Sexual Harassment at Workplace Act 2013.⁴⁴

The 'unwelcome sexually determined behavior' also covers under its ambit acts or words that

³⁸ Supra note 37

³⁹ Supra note 38

⁴⁰ 'Policy Guidance on Current Issues of Sexual Harassment', <https://www.eeoc.gov/laws/guidance/policy-guidance-current-issues-sexual-harassment>, last visited on 22nd Feb 2021

⁴¹ Supra note 39

⁴² *Apparel Export Promotion Council v. A.K. Chopra* (1999) 1 SCC 759

⁴³ Supra note 42

⁴⁴ Supra note 40

may have sexual overtones. For example commenting about fairness or other physical features of a woman, questioning about what she sexually desires in a man etc. According to the Vishaka guidelines⁴⁵ and the Sexual Harassment Act of 2013⁴⁶, for any conduct to amount for sexual harassment 'actual physical contact' is not necessary. In *Apparel Export Promotion Council v. A.K Chopra*⁴⁷ the Supreme Court while reversing the decision of the Delhi High Court held that in a case of sexual harassment for the offending action to be outrageous, actual assault or touch by the offender is not essential. Unwelcome objectionable overtures with sexual overtones are enough.

A hostile work environment case is established when the environment becomes so intimidating or offensive that it changes the conditions of the Job. Unlike the usual quid pro quo case, a hostile environment can be caused by the sexual harassment of co-workers, third parties and supervisors.

Hostile environment cases are not that easy to identify as quid pro quo cases, because there is no exact formula that determines what constitutes a hostile environment. The victim may not be able to show a job loss or pay cut, but instead must show that the work environment is so hostile that it affects his or her working conditions. The elements of a hostile environment are:-

- ◆ An employee was subject to unwelcome sexual harassment and
- ◆ The harassment unreasonably interfered with the employee's work performance, or
- ◆ The harassment created an intimidating, hostile offensive environment.

Whether an environment is hostile is determined by examining how many times the conduct occurred, the severity of the conduct, and the effect it had on the victim. All of the circumstances of the environment are examined, including:-

- ◆ The conduct itself (nature, type, how often, for how long and where the conduct occurred)
- ◆ The person involved (age and sex of the parties and number of accused)
- ◆ Whether an accused harasser was in a position of power
- ◆ Whether the conduct negatively affected the work environment
- ◆ Whether any other incidents of sexual harassment occurred in the workplace.

⁴⁵ Supra note 44

⁴⁶ Supra note 45

⁴⁷ Supra note 43

VI. IMPACT OF SEXUAL HARASSMENT

Sexual harassment can cause serious harm to its victims, their families, and other coworkers. It also has a destructive effect on the entire workplace. The victim's workplace performance declines as the stress of sexual harassment distract them from work. Coworker friends also become less productive as they spend time strategizing ways to solve the problem. Employers are impacted too because they loss financially due to disrupted productivity.

Job opportunities, financial gain and potential for promotion are things that workers seek from employment. However sexual harassment at workplace makes the achievability of all these things difficult.

*“Sexual harassment is a personal attack on women's minds and bodies, instilling fear and violating a women's right to bodily integrity, education, and freedom of movement. It is utilized as a powerful mechanism of control and intimidation, through which women's subordinate social status is maintained. Sexual harassment frequently occurs on the street, in the workplace, in educational institutions and on public transportation. The more pernicious form, however, is sexual harassment in the workplace or in the educational institutions. Sexual harassment strikes at the heart of the victim's economic self-sufficiency, disrupting their earning capacity by forcing them out of the workplace or school. Women here are nine times more likely than men to become victims of sexual harassment.”*⁴⁸

Sexual harassment causes harm to its victims that goes far beyond the workplace. Victims suffer physical, mental, emotional and financial losses that can all be very devastating. Most victims experience stress related conditions that can be traumatic. Majority of sexual harassment victims experience emotional stress, performance stress and physical stress problems. In fact, sexual harassment causes so many damaging physical, mental, and emotional effects on its victims that the American Psychiatric Association has recognized that it is a severe stressor that can contribute to 'Posttraumatic Stress Disorder'.⁴⁹ Sexual harassment also affects the victim's relationships with their families, as well as friendships both inside and out of the workplace.

There is a sequence of changes that occurs in the victims of sexual harassment. Because sexual harassment is often based on a series of incidents, the victim may initially have thought that

⁴⁸ Comment of Radhika Coomarasawmy, United Nations Special Rapporteur on Violence Against Women (1994-2003) as reported in 1997 Report on the Special Rapporteur on Violence Against Women, UN Commission on Human Rights.

⁴⁹ Avina & O'Donohue, "Sexual Harassment and PTSD: Is Sexual Harassment Diagnosable Trauma?", J Trauma Stress 15, Page 69-75 (2002), available at <https://doi.org/10.1023/A:1014387429057>, last visited on 2nd March 2021

each incident was an isolated event and that the harassment would stop after each time. When it does not, the victim commonly feels confused or blames herself or himself for not recognizing what was happening earlier. Next comes the anxiety as the victim realizes that the harassment is continuing and wonders when it will stop. Anxiety impairs concentration, and their work responsibilities may suffer. The victim feels that they are singled out, scrutinized and targeted unfairly, yet feels trapped by the situation. They may avoid the workplace by taking leaves to get away from the situation. Finally, the victim becomes angry. It is in the anger stage that most victims think about filing charges. The Indian law on sexual harassment⁵⁰ may still provide some remedy to the female victims but as there is no law acknowledging that fact that though low in number but there can be male victims of sexual harassment at workplace, the male victims are left to suffer in silence.

Emotional Effects

Emotional trauma can be as disabling to a person as a visible physical wound. Sexual harassment is humiliating and degrading, and can cause the victim to suffer a loss of self-confidence and esteem. Even less severe harassment, if repeated, can have a serious stressful effect on workers. The workplace in such a case becomes a place to dread and work productivity suffers.

The emotional effect of sexual harassment also takes a toll on the desire to work at all. The victim's self-confidence is affected. He or she may feel incompetent and question their desire to work in that field. Emotionally, victims feel embarrassed and ashamed at being targeted for abuse. Victims may feel that they do not know how to stop it or when it will end. Some may try to control by changing their mannerisms or dressing, thinking that they, in some way are causing the harassment.

At times, victims of sexual harassment feel tremendous anger over their situation. As the effects of sexual harassment are compounded over time, victims may have difficulty concentrating and feel helpless, isolated, and vulnerable. Ultimately, they may become depressed, have anxiety attacks, or even have a nervous breakdown.

Physical Effects

The victim may not realize it, but emotional distress can and often does have a direct effect on other bodily functions. Sleeplessness may lead to fatigue, which may contribute to aches pains, or increased susceptibility to illness. Physically, the symptoms of stress can often be seen in

⁵⁰ Supra note 47

people. Their stomach may be upset and they may begin vomiting or stop eating, causing weight loss. Or may seek comfort in food and gain considerable weight. Victims may also experience heart palpitation or high blood pressure. Due to all the stress that they are facing they might attempt substance abuse or alcohol to numb the stress of the workplace.

Economic Effects

Sexual Harassment may have severe economic effects on a victim. They may be denied training opportunities, a promotion, or a raise. In retaliation for complaining, the women may be reassigned to a difficult position or transferred away from her family and support.

Even if the worker attempts to stay on the job, sexual harassment that is severe enough to change the conditions of the work environment may make it effectively impossible to stay on the job. In effect, the victim may be '*constructively discharged*', causing even more trauma and havoc.⁵¹

Impact on the Employer

It is a recognized fact that it is the responsibility of the employer to not to permit a working environment which allows sexual harassment. Good employers know that it is the long term benefit of the organization to make sure that all its employees are treated with dignity. If any of the employees is a victim of sexual harassment at workplace their productivity is affected adversely and the employer has to bear the cost of this low productivity. The employer not only has to bear the cost of damages that can be ordered to be paid to the victim but it will also adversely affect the goodwill of the employer. Cost of recruiting and training new people may also emerge as an additional cost, especially where the employer has failed to undertake any effective action.

Employers have a duty to protect their employees from *quid pro quo* or *hostile work environment* sexual harassment coming from supervisors, coworkers, and even outside personnel, such as contractors or customers. When they fail, they can be held responsible for sexual harassment. An employer may be held liable for sexual harassment committed by managers, supervisors, coworkers and third parties, but there must be proof that the employer knew or should reasonably have known of the harassment, and failed to take steps to correct it.

Sometimes the *hostile work environment* is so abusive that the employee resigns due to the harassment. A constructive discharge is, in effect, a firing, because the *hostile work*

⁵¹ Hanley, Christy M., "A Constructive Compromise: Using the Quid Pro Quo and Hostile Work Environment Classifications to Adjudicate Constructive Discharge Sexual Harassment Cases Comments and Casenotes", University of Cincinnati Law Review, Vol. 73, 2004-2005, Page 259-291

environment has forced the worker to resign. The question in these cases is ‘*did the working condition become so intolerable that a reasonable person in the victim’s position would have felt compelled to resign?*’ If so, the employee has been constructively discharged. In the United States of America an employer will be liable if the employee is constructively discharged, unless the employer had a sexual harassment policy, effective procedures existed to address sexual harassment, and the employee failed to make a complaint⁵².

A policy on preventing sexual harassment at work will not cost money. Preventing sexual harassment will save more money than the cost of permitting sexual harassment to continue. The policy would not represent an unnecessary burden upon employers. Sensible employers already recognize that it is not good management to permit a working environment which allows sexual harassment. The policy would not represent an intrusion of the law into the private behavior of employees. The distinction between relationships mutually entered into and the imposition of unwelcome and offensive conduct, once understood, is easily recognized. The policy on sexual harassment would not conflict with equal treatment legislation. Sexual harassment at work is an obstacle which must be removed if the aspiration of equal treatment for men and women is to be realized.⁵³

VII. NON-REPORTING OF CASES

In the Indian society being a victim of any type of sexual assault is a Taboo. It is thought to be a mistake of the victim rather than of the crime doer. It is mainly because of this reason that the victims of sexual assault prefer to suffer in silence rather than reporting it. In the case of Sexual Harassment at Workplace victims often prefer to remain under the blanket not only because of the social stigma but also because the repercussion of reporting to the authorities might cost their job.

In our society women have been conditioned in a way to believe that such small incidents are part and parcel of their life and that they should not make a fuss out of it. So even when the small incident turns into a major crime her conditioning tells her to forget about it and move on. On other hand, normally we believe that only women bottle up and suffer in silence and we forget about the other half of the society. The situation of Men in our society is even worse as they have been suffocating under the concept of so called ‘Toxic Masculinity’ since ages. The society doesn’t want to accept the fact that Men too can be victims of Sexual Assault especially Sexual Harassment at Workplace. We believe that a man should be “Man enough” to handle a

⁵² Pennsylvania State Police v. Suders, 542 U.S. 129 (2004)

⁵³ Tanya Martinez Shively, “Sexual Harassment in the European Union”, Louisiana Law Review, Vol. 55/Number 6, July 1995

sexual situation in his life whether at work or otherwise. Hence both counter parts of our society prefer to suffer in silence due to their respective conditioning.

Although with the advancement of time the world altogether is trying to out of the shell. The movements like #ME TOO⁵⁴ and #TIMES UP⁵⁵ are helping many to open up against sexual violence. Though these movements initially wanted to highlighted cases of sexual violence against women, but it created a platform which brought to the forefront the sexual violence against not only women but also other genders as victims. Since 2017 these movements have become a sensation on social media where in all victims irrespective of their race, class, color, religion, gender identity is coming forward against sexual harassment.

Some of the factors that are the reason behind the silence of the victims of sexual harassment at workplace are:

- i. Fear of Stigma
- ii. Fear of Reprisal
- iii. Social and family pressure
- iv. Rumors about one's love life or sexual life
- v. Rumors about one's sexual preferences or sexual orientation
- vi. No stringent punishment to the offender
- vii. Lack of adequate legal support system

VIII. CONCLUSION

The contribution of all the citizens of a country is of vital importance for the development of the country. Sexual Harassment at Workplace is a speed breaker in this process. It is an occupational hazard that working people have to face. Mostly women are found to be victims of sexual harassment at workplace but though less in number Men too can be victims of the same. Therefore, there is an urgent need to develop a gender-neutral approach on Sexual Harassment at Workplace. Sexual harassment at workplace is a grave offence that violates the basic Human Right of a person. A Gender-Neutral Legal Mechanism can be a savior and can prove to be an effective weapon for bringing about socio-economic justice in our society.

⁵⁴ The #ME TOO movement was founded to help the survivors of sexual violence, particularly the women of color from low wealth communities. Their aim is to reframe and expand the global conversation around sexual violence and to hold accountable the perpetrators.

⁵⁵ The #TIMES UP movement insisted upon a world where everyone is safe and respected at work. It aims to create a society free from gender based discrimination in the workplace and beyond. Every person across race, ethnicity, religion, sexuality, gender identity and income level should be safe on their jobs and should have equal opportunity for economic success and security.

Sexual harassment at workplace is a kind of employment discrimination that is faced by all the countries. Legal Mechanism alone cannot curb this evil. The need is of a change in the social attitude. For achieving gender neutrality there should be a sense of mutual respect between men and women workers. Sexual harassment at workplace violates one's Right to life and Liberty that includes under its ambit Right to Human Dignity. So it is the duty of the nation to provide to all its citizens irrespective of their Gender, a working environment free of sexual harassment.
