SEXUAL HARASSMENT IN EMPLOYMENT

By

LIEZEL RISTOW

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Supervisor: PROF JA VAN DER WALT

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Summary

Sexual harassment is a common occurrence in workplaces around the world, with South Africa as no exception. It is generally accepted that women constitute the vast majority of sexual harassment victims. Sexual harassment is therefore one of the major barriers to women’s equality as it is a significant obstacle to women’s entrance into many sectors of the labour market. The Constitution now provides that no person may unfairly discriminate against anyone on grounds of, inter alia, sex and gender. The Employment Equity Act now provides that harassment is a form of unfair discrimination. It has been said that harassment is discriminatory because it raises an arbitrary barrier to the full and equal enjoyment of a person’s rights in the workplace. Much can be learned from the law of the United States and that country’s struggle to fit harassment under its discrimination laws.

The Code of Good Practice on the Handling of Sexual Harassment Cases attempts to eliminate sexual harassment in the workplace by providing procedures that will enable employers to deal with occurrences of sexual harassment and to implement preventative measures. The Code also encourages employers to develop and implement policies on sexual harassment that will serve as a guideline for the conduct of all employees. Although the Code has been subject to some criticism, particularly regarding the test for sexual harassment, it remains a valuable guide to both employers and employees alike.

The appropriate test for sexual harassment as a form of unfair discrimination has given rise to debate. Both the subjective test and the objective test for sexual harassment present problems. Some authors recommend a compromise between these two tests in the form of the “reasonable victim” test.

The Employment Equity Act makes the employer liable for the prohibited acts of the employee in certain circumstances. The Act, however, places certain responsibilities on the employer and the employee-victim before the employer will be held liable for sexual harassment committed by an employee.

Sexual harassment committed by an employee constitutes misconduct and can be a dismissible offence. An employer may also be held to have constructively dismissed an employee, if the employer was aware of the sexual harassment and failed to control such
behaviour, and the employee is forced to resign. The test for determining the appropriateness of the sanction of dismissal for sexual harassment is whether or not the employee’s misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. However, for such a dismissal to be fair it must be both substantively fair and procedurally fair.
Chapter 1  Introduction and background

1 1  Introduction

Sexual harassment is a common occurrence in workplaces around the world. Unfortunately, South Africa is no exception. Sexual harassment is an abhorrent aspect of the modern working environment. This modern working environment evidences the fact that an ever-increasing number of women are entering and remaining in the labour market. However, one of the major barriers to women’s equality is sexual harassment, as sexual harassment is a significant obstacle to women’s entrance into many sectors of the labour market.\(^1\) Although the exact extent of sexual harassment in South Africa is relatively unknown, both the state and employers are increasingly recognising that it is a serious form of misconduct which constitutes a violation of the dignity of the complainant and may warrant dismissal.

Section 6(3) of the Employment Equity Act 55 of 1998 (hereafter “the EEA”) provides that harassment is a form of unfair discrimination. Cooper notes that harassment is discriminatory because it raises an arbitrary barrier to the full and equal enjoyment of a person’s rights in the workplace.\(^2\) She states further that it also constitutes a violation of the dignity of an individual which can never be deemed acceptable to the individual.\(^3\) In order to understand the implications of this section, it is necessary to consider the nature of harassment and the struggle in other countries to fit harassment under their discrimination laws. With the law of the United States as a brief comparative backdrop, this treatise examines the provisions on harassment on the basis of sex or gender in the EEA, and makes various suggestions on how the provisions could be interpreted. The treatise also examines the Code of Good Practice on the Handling of Sexual Harassment Cases and its contribution to the law relating to sexual harassment. Finally, the aspect of sexual harassment as a form of misconduct in the workplace is examined.

\(^1\) As will be seen below, it is not only women that are the victims of sexual harassment, but it is generally accepted that they constitute the vast majority of sexual harassment victims.

\(^2\) Cooper “Harassment on the Basis of Sex and Gender: A Form of Unfair Discrimination” 2002 ILJ 1 1.

\(^3\) Ibid.
12 Where did the concept of sexual harassment come from?

Although sexual exploitation of working women has existed for centuries, sexual harassment was first identified as a legal wrong under American anti-discrimination law. Halfkenny briefly discusses Mackinnon’s pioneering legal work in this area in the early 1970s in the United States. He quotes Mackinnon’s definition of sexual harassment as “the unwanted imposition of sexual requirements in the context of a relationship of unequal power”. Halfkenny points out that the American law of sexual harassment was the response of the legal system to the changing social reality that more women were entering formal employment; that strong women’s movements were developing out of the civil rights movements of the 1950s and 1960s; and that the broad anti-discrimination legislation of 1964 created the opportunity for change.

Other countries soon followed suit in passing laws prohibiting workplace sexual harassment. Halfkenny summarises the conclusions drawn from a comprehensive analysis of sexual harassment in 23 industrialised countries undertaken by Husbands and published in 1992. He states that the passing of laws prohibiting sexual harassment grew out of three factors: firstly, the increasing number of women in the workplace not only in jobs that were traditionally considered women’s jobs, but also in blue-collar skilled and higher paid jobs traditionally reserved for men; secondly, United States court decisions which held sexual harassment to be legally prohibited conduct and which prompted other countries to do the same; and thirdly, the political advancement of the women’s movement which placed increased attention on sexual harassment issues.

13 The extent, nature and effects of sexual harassment

If the prevalence of sexual harassment is to be measured from the case law alone, one would imagine that it is a relatively infrequent occurrence in the South African workplace. To date, the problem has not given rise to extensive litigation. However, it has been argued that

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5 Ibid.
6 Halfkenny 1995 ILJ 3.
7 Ibid.
simply because few cases concerning sexual harassment have resulted in litigation, this is no reflection of its incidence in practice.\(^8\) It has been further argued that, like rape, there are many factors that discourage victims from coming forward and particularly in the workplace where working relationships are hierarchical and it is difficult to tell a superior that his (or her) attentions are unwelcome.\(^9\) It has also been noted that harassment can, as the growing body of literature on the subject evidences, take insidious forms that are not easily proven, or it may take more obvious forms that are embarrassing to the victim.\(^10\)

Halfkenny notes that in almost every country where a study has been undertaken, sexual harassment has been found to be more pervasive than had been acknowledged.\(^11\) The number of sexual harassment complaints filed annually with the Equal Employment Opportunity Commission (hereafter “the EEOC”) in the United States more than doubled in the six years up to 1998. It increased from 75 complaints in 1980 to 7 495 in 1991. Even though this figure has increased by 112% each year since 1989, researchers estimate that 80 to 90% of sexual harassment cases go unreported. It is further estimated that at any given time at least 15% of working women have been harassed during the year and that 40 to 60% of all working women in the United States of America suffer harassment at some point in their careers. This becomes even more alarming due to the fact that only 21% of women feel that justice is done in harassment cases. Also, it is estimated that 30% of the female workforce in the European Union has been harassed.\(^12\)

The picture in South Africa is just as frightening. Snyman-Van Deventer and De Bruin report that 76% of all women are exposed to sexual harassment at some time during their working lives.\(^13\) Although sexual harassment seems to occur frequently in the workplace, few incidents are actually reported. Finnemore and Van Rensburg mention a survey carried out in 1995 and 1996 by the Financial Mail, which confirms that 76% of career women in South Africa had been harassed in some or other form in the workplace.\(^14\) Despite these high figures, few South African court cases deal with sexual harassment. There is also not much

\(^9\) Ibid.
\(^10\) Ibid.
\(^11\) Halfkenny 1995 *ILJ* 3.
\(^13\) Snyman-Van Deventer & De Bruin *Acta Academica Supplement* 197.
legal literature on this subject. It seems therefore that many, if not most women are afraid to report harassment and would rather resign than have to go through an uncomfortable process to deal with the matter.\textsuperscript{15}

It must be noted that what may be considered acceptable behaviour in a normal social environment may not necessarily be considered normal in the employment environment. Mowatt states that sexual harassment occurs when a women’s sex role overshadows her work role in the eyes of a male, whether it be a supervisor, co-worker, client or customer.\textsuperscript{16} The traditional view is that men are usually the harassers and women are the victims. However the reality is that there has been a move away from the traditional work situation in which men are the breadwinners and women the homemakers.\textsuperscript{17} Today, many women hold the same positions as men and a woman can therefore also be the harasser. It is now therefore accepted and understood that males may also be the victims of sexual harassment, yet sexual harassment is still generally directed against women.\textsuperscript{18}

Mowatt states that sexual harassment may take the form of innuendo, inappropriate gestures or physical touching; or a person may be expected to engage in sexual activity in order to obtain or keep employment or to obtain promotion or other favourable working conditions. The court in \textit{J v M Ltd}\textsuperscript{19} relied on the definition of Mowatt, who defines sexual harassment as follows:

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"[I]n its narrowest form sexual harassment occurs when a woman (or man) is expected to engage in sexual activity in order to obtain or keep employment, or obtain promotion or other favourable working conditions. In its wider view … it is any unwanted sexual behaviour or comment which has a negative effect on the recipient."
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Finnemore and Van Rensburg note how the American Psychological Association divides sexual harassment into five different types. Firstly, gender harassment, which includes generalised statements that are insulting and degrading about females, such as insulting remarks or obscene jokes. Secondly, seductive behaviour, which comprises any sexual

\textsuperscript{15} See Halfkenny 1995 \textit{ILJ} 6-14 for a full discussion of studies undertaken around the world.
\textsuperscript{16} Mowatt “Sexual Harassment – New Remedy for an Old Wrong” 1986 \textit{ILJ} 637 638.
\textsuperscript{17} Snyman-Van Deventer & De Bruin \textit{Acta Academica Supplement} 197.
\textsuperscript{18} \textit{Ibid.}
\textsuperscript{19} 1989 10 \textit{ILJ} 755 (IC) 757.
\textsuperscript{20} Mowatt 1986 \textit{ILJ} 638.
advances that are unwanted, inappropriate or offensive, such as repeated unwanted sexual invitations, insistent requests for dinner or drinks and persistent letters or telephone calls. Thirdly, sexual bribery, which is overt or subtle solicitation of sexual activity by promise of reward. Fourthly, sexual coercion, which comprises coercion of sexual activity by threat of punishment, such as withholding of promotions or threat of dismissal. Fifthly, sexual imposition, which is gross sexual imposition, such as forceful touching, grabbing or sexual assault.\(^{21}\)

Dupper and Garbers propose that sexual harassment can be described from three perspectives.\(^{22}\) Firstly, that one can identify the types of conduct that may constitute harassment. They describe the forms of harassment as mentioned in item four of the Code of Good Practice on the Handling of Sexual Harassment Cases namely: physical conduct; verbal conduct; and non-verbal conduct.\(^{23}\) Secondly, that sexual harassment can be defined by looking at the effect of harassment. In this regard, they identify three types of harassment namely: quid pro quo harassment; hostile environment harassment; and sexual favouritism. Dupper and Garbers argue that describing sexual harassment in these ways tells us much about harassment but says little about when the conduct is serious enough to constitute harassment.\(^{24}\) They argue further that this is closely related to the issue of the perspective from which conduct should be analysed in order to determine whether it constitutes harassment. They discuss the merits of applying a subjective test, an objective test as well as the “reasonable victim” test.\(^{25}\)

Finnemore and Van Rensburg record that the EEOC of the United States of America defines sexual harassment as:

“Unwanted sexual advances, requests for sexual favours and other verbal or physical conduct of a sexual nature when:

1. Submission to such conduct is made an implicit or explicit condition of employment;
2. Submission to or rejection of such conduct affects employment opportunities; or

\(^{21}\) Finnemore & Van Rensburg Labour Relations 429.
\(^{23}\) See paragraph 3.5 below for a detailed discussion on the Code of Good Practice on the Handling of Sexual Harassment Cases.
\(^{24}\) Dupper & Garbers “Employment Equity Act” CC1-69.
\(^{25}\) The test for sexual harassment is discussed more fully in chapter 4 below.
3. The conduct interferes with an employee’s work or creates an intimidating, hostile, or offensive environment.”

Finnemore and Van Rensburg record that the Quebec Human Rights Commission defines sexual harassment as:

“Conduct that is manifested by comments, acts or gestures of a sexual connotation, repeated and not desired, and in its nature infringes on the dignity, physical or psychological integrity of the person or that which causes for her unfavourable work conditions or a dismissal.”

Finnemore and Van Rensburg also record the following definition of sexual harassment used by the South African Broadcasting Corporation in their company guidelines on sexual harassment:

“Any unwelcome or uninvited attention of a sexual or erotic nature (related to the working environment) that causes discomfort, humiliation, offence or distress, and/or interferes with the recipient’s job performance, irrespective of cultural differences as to what constitutes sexual harassment.”

Finnemore and Van Rensburg note that cultural diversity should be kept in mind when dealing with sexual harassment. What may be acceptable in one culture may not necessarily be accepted in another. Finnemore and Van Rensburg emphasise that employees, irrespective of their culture, should be informed what the acceptable norm is in terms of conduct towards other employees in the workplace. Regarding the cultural diversity in South Africa, it would perhaps be better to err on the side of being over-cautious than risk subjecting someone to conduct that he or she might find offensive or unwelcome.

The issue of sexual harassment in the workplace is a very delicate one as many consensual relationships do develop at the workplace. A problem may also arise if the relationship begins as consensual but then becomes a harassing situation. It is not suggested that

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26 Finnemore & Van Rensburg Labour Relations 428 quoting the University of California San Francisco Policy on Sexual Harassment.
28 Finnemore & Van Rensburg Labour Relations 429 quoting from the Guidelines on Dealing with Sexual Harassment at the SABC.
29 Finnemore & Van Rensburg Labour Relations 429.
30 Ibid.
employers should discourage or prohibit office romances, but rather that employees should know that it is an area that should be approached with caution. Finnemore and Van Rensburg argue that the employer should include a consensual relationship clause in its sexual harassment policy to avoid the situation of unfounded complaints being made at the end of a relationship.

Sexual harassment has serious consequences for those who are harassed as well as for the organisation in which it takes place. Mowatt notes that it is generally agreed that the effect of sexual harassment in the short term is to make the victim feel embarrassed, disillusioned, humiliated and, in some instances work performance may suffer. Finnemore and Van Rensburg state that women who are sexually harassed often also feel degraded, ashamed, cheap and angry. They also note that recently, the term “sexual harassment trauma syndrome” has been used to describe the effects of sexual harassment on the physical, emotional, interpersonal and career aspects of employees’ lives. Mowatt states that the longer term effects are that career commitment may be lowered and many feel forced to resign or request a transfer.

The effects of sexual harassment on the organisation are potentially far reaching. When an employee does not perform to his or her full potential as a result of harassment, productivity is impacted. Productivity suffers because of time lost to the actual incident or harassing, worrying about the harassment and the avoiding of recurring incidents. Absenteeism increases with the associated use of sick leave. Staff turnover is often high in workplaces with a high incidence of sexual harassment, resulting in increasing costs to the company and low morale among workers. Finnemore and Van Rensburg point out that the publicity associated with a sexual harassment court case would tarnish a company’s image with its employees and its current and prospective clients.

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33 The wording of such a clause could read as follows: “It is recorded that, whilst the Employer recognises the fact that romantic relationships between Employees do occur, Employees should approach such relationships with caution. It is specifically recorded that any unfounded allegations of harassment made by the parties at the end of such a relationship will be dealt with in a serious light.”
34 Mowatt 1986 *ILJ* 638.
35 Finnemore & Van Rensburg *Labour Relations* 430.
36 See Finnemore & Van Rensburg *Labour Relations* 431 for a detailed table of effects.
37 Mowatt 1986 *ILJ* 638.
38 Finnemore & Van Rensburg *Labour Relations* 432.
Chapter 2 United States of America

Legal remedies for sexual harassment within the workplace include equal opportunity legislation, labour laws, law of delict and criminal law. Halfkenny undertook a study of sexual harassment and surveyed 27 countries. He found that in some countries sexual harassment is specifically prohibited; in others, courts have interpreted equal opportunity or labour legislation to prohibit sexual harassment; in other countries, sexual harassment has been found by implication to be an activity which violates a statute relating to criminal behaviour, delictual misconduct or unfair dismissal.\(^{40}\)

The United States leads the field in terms of the law relating to sexual harassment. The stage of legal development in the United States and the cases of sexual harassment, as well as the large amount of literature available, serves as a guideline and comparative system for South African law.\(^{41}\) It is therefore useful to give a brief exposition of the approach taken by the United States before turning to the South African law on sexual harassment.

2.1 Defining sexual harassment

As mentioned above, the United States was the first country to acknowledge sexual harassment as a legal wrong and influenced the way in which many countries subsequently addressed sexual harassment within an equal opportunities framework. Sexual harassment is not a separate wrong in the United States, but is recognised as a form of discrimination based on sex under Title VII of the Civil Rights Act of 1964. Title VII prohibits discrimination on the basis of sex by employers in their employment practices.

At first, the courts were reluctant to view sexual harassment as a form of discrimination under Title VII and tended to dismiss such claims on the basis that sexual activity was personal and private in nature; that the employer could not be held liable for the personal actions of its employees as these were not within the scope of employment; and that to allow such claims under Title VII would open the floodgates.\(^{42}\)

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\(^{40}\) Halfkenny 1995 *ILJ* 5.

\(^{41}\) Snyman-Van Deventer & De Bruin *Acta Academica Supplement* 198.

\(^{42}\) Cooper 2002 *ILJ* 3.
The turning point occurred in 1976 when, in Williams v Saxbe, the court held that if the behaviour in question was “an artificial barrier to employment that was placed before any one gender and not the other, even though both genders were similarly situated”, it amounted to sex discrimination and therefore violated Title VII.\(^{43}\) This approach was endorsed in Barnes v Castle where the court found that an employee had become the target of her supervisor’s sexual desires because she was a woman and that no male employee would have been susceptible to the approach.\(^{44}\) Mowatt points out that these cases held that the harassment \textit{per se} was not unlawful, but rather the employment-related consequences which flowed from it in the event of non-compliance such as dismissal, lost promotion, no pay increase and the like.\(^{45}\) This narrow interpretation of harassment was termed \textit{quid pro quo} harassment.\(^{46}\) If the complainant could not establish an “employment nexus” between the harassment and the disadvantage suffered, Title VII was of no avail.\(^{47}\)

Snyman-Van Deventer and De Bruin point out that it does not matter in the case of \textit{quid pro quo} harassment whether the person threatening the employee acted on the threat or not.\(^{48}\) \textit{Quid pro quo} is a unique form of gender discrimination resulting in tangible job detriment.\(^{49}\) By definition, the supervisor uses his or her power over the employee to demand a sexual favour. In other words, \textit{quid pro quo} harassment occurs when an employer or supervisor threatens to inflict a work-related disadvantage, such as failure to hire, demotion, termination, unfavourable transfer or a decrease in responsibilities, on an employee if such employee fails to respond positively to sexual advances.\(^{50}\) However, the threat must be more serious than a mere inconvenience if it is to be actionable. Such threats are known as tangible job detriments.\(^{51}\)

In 1980, the EEOC issued guidelines interpreting sexual harassment to be discrimination on the basis of sex and thus a violation of Title VII. Finnemore and Van Rensburg record that the EEOC defined sexual harassment as:

\(^{43}\) 413 F Supp 654 DDC (1976) 658.
\(^{44}\) 561 F 2d 983 (1977) 989-990.
\(^{45}\) Mowatt 1986 \textit{ILJ} 640.
\(^{46}\) Cooper 2002 \textit{ILJ} 3.
\(^{47}\) Mowatt 1986 \textit{ILJ} 640.
\(^{48}\) Snyman-Van Deventer & De Bruin \textit{Acta Academica Supplement} 199.
\(^{49}\) Ibid.
\(^{50}\) Ibid.
\(^{51}\) Ibid.
“Unwelcome sexual advances, requests for sexual favours and other verbal or physical conduct of a sexual nature when: firstly, submission to such conduct is made an implicit or explicit condition of employment; secondly, submission to or rejection of such conduct affects employment opportunities; or thirdly, when the conduct interferes with an employee’s work or creates an intimidating, hostile or offensive environment”.\(^{52}\)

The guidelines therefore broadened the kinds of treatment which could be considered sexual harassment to conduct which had the effect of unreasonably interfering with a person’s work performance or creating a working environment which was intimidating, hostile or offensive.\(^{53}\) This extended interpretation of harassment was termed hostile environment harassment.\(^{54}\)

Thereafter, the courts interpreted sexual harassment in accordance with these guidelines. In the case of \textit{Henson v City of Dundee} the court held that hostile environment harassment could amount to discrimination and a violation of Title VII as follows:

“Sexual harassment which creates a hostile or offensive working environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality … A pattern of sexual harassment inflicted upon an employee because of her sex is a pattern of behaviour that inflicts disparate treatment upon a member of one sex with respect to terms, conditions or privileges of employment. There is no requirement that an employee subjected to such disparate treatment prove in addition that she has suffered a tangible job detriment.”\(^{55}\)

A hostile work environment does not involve a tangible job detriment. In this type of harassment, the employee is badgered with unwanted attention from a co-worker or supervisor in such a way that it significantly interferes with his or her work.\(^{56}\)

Cooper observes that the Supreme Court in \textit{Meritor Savings Bank FSB v Vinson}\(^{57}\) definitively decided that sexual harassment amounted to sex discrimination and that hostile environment sexual harassment was a form of sexual discrimination actionable under Title VII, but that the

\(^{52}\) Finnemore & Van Rensburg \textit{Labour Relations} 428.
\(^{53}\) Cooper 2002 \textit{ILJ} 4.
\(^{54}\) \textit{Ibid}.
\(^{55}\) 682 F 2d 897 (1982) 902.
\(^{56}\) Snyman-Van Deventer & De Bruin \textit{Acta Academica Supplement} 199.
\(^{57}\) 477 US 57, 64, 91 L Ed 2d 49, 106 S Ct 2399 (1986).
conduct had to be sufficiently severe to alter the conditions of the complainant’s employment and create an abusive working environment.  

Snyman-Van Deventer and De Bruin point out that it is no defence to an allegation of sexual harassment that a person of the opposite gender would have been treated in the same way.  

The United States Supreme Court has stressed that it is irrelevant whether the parties concerned are heterosexual or homosexual as same-sex harassment falls within the ambit of discrimination based on sex. The Supreme Court in *Oncale v Sundowner Offshore Services Inc* held that there was nothing in the statutory language or precedents to exclude same-sex harassment from the ambit of Title VII.  

The court’s reasoning was that the perpetrator would not have directed the conduct towards a member of the opposite sex, and therefore the conduct amounted to discrimination against the person of the perpetrator’s sex.  

**2.2 Determining the occurrence of sexual harassment**

Snyman-Van Deventer and De Bruin note that the EEOC makes provision for most sexual harassment cases to be resolved by examining all the facts in context:

“In determining whether alleged conduct constitutes sexual harassment, the [EEOC] will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case-by-case basis.”  

They further record that most governmental investigating agencies or courts consider four factors when determining whether sexual harassment has occurred. Firstly, was the behaviour sexual in nature?  

Secondly, was the behaviour reasonable?  

Thirdly, was the behaviour severe or pervasive in the workplace?  

Fourthly, was the behaviour unwelcome?  

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58 Cooper 2002 *ILJ* 5.  
59 Snyman-Van Deventer & De Bruin *Acta Academica Supplement* 199.  
60 *Oncale v Sundowner Offshore Services Inc* 118 S Ct 201 (1998) 207.  
61 Cooper 2002 *ILJ* 6.  
63 *Ibid.* The authors record that behaviour of a sexual nature includes sexual advances, propositions, or attempts to obtain sexual favours from an employee, and hostility towards female employees or a particular female employee, ranging from pranks, threats, and intimidation to highly dangerous physical attacks; sexual or
Cooper states that the courts in the United States have required both a subjective and an objective test in determining the existence of sexual harassment. The subjective test requires that the conduct be unwelcome to the complainant and the test is whether the complainant has indicated that the conduct is unwelcome. The objective test is whether the conduct is sufficiently pervasive or severe to alter the conditions of the complainant’s employment and create an abusive working environment. Cooper notes that the setting of an objective standard in relation to the pervasiveness and severity of the conduct does not address the question of whose perspective should prevail: that of the reasonable victim (usually a woman), reasonable respondent (usually a man), or the reasonable person. Since most victims of sexual harassment are women, women are generally more concerned about sexual behaviour in the workplace. Men may see sexual conduct in a vacuum, not recognising the social setting or the threat of violence which a woman may perceive in the same situation. Cooper does however point out that the United States Court of Appeal in *Ellison v Bradley* adopted the standard of the reasonable victim, holding that if it only applied the reasonable person test, it would run the risk of reinforcing the prevailing level of discrimination as a sex blind reasonable person’s standard tends to be male-biased.

### 2.3 Liability of the employer

The question of when and if an employer should be held liable for the torts of its employees has been described as one of the most debated and difficult legal questions in sexual harassment cases because the victim is rarely harassed by the employer because the employer is usually a juristic person. The perpetrator is usually a co-worker or a supervisor, but the victim often wishes to sue the employer, either to compel the employer to take responsibility for the situation and the work environment or because the employer has the financial or other

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64 Snyman-Van Deventer & De Bruin *Acta Academica Supplement* 200.
65 Cooper 2002 *ILJ* 11.
66 Ibid.
67 Ibid.
68 Cooper 2002 *ILJ* 12.
70 Cooper 2002 *ILJ* 12.
71 *Katz v Dole* 709 F 2d 251 (4th Cir 1983).
means to remedy the problem.\textsuperscript{72} Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 prohibits the employer from:

“discrimina[ting] against any individual with respect to … terms, conditions or privileges of employment because of some individual’s sex.”

However, Snyman-Van Deventer and De Bruin point out that the Act does not expressly ban sexual harassment or define a standard of employer liability.\textsuperscript{73} One therefore needs to turn to case law in this regard. The question of the employer’s vicarious liability in sexual harassment cases was exhaustively examined in the Supreme Court decisions of \textit{Faraghar v City of Boca Raton}\textsuperscript{74} and \textit{Burlington Industries Inc v Ellerth}.\textsuperscript{75} The court found that even if discrimination in the workplace has been proved, it could not automatically make a finding of vicarious liability. The Supreme Court in 1998 changed the landscape of sexual harassment law by introducing a burden-shifting scheme and by promulgating a unique affirmative defence for employers seeking to avoid liability.\textsuperscript{76} In the \textit{Ellerth}\textsuperscript{77} case, the Supreme Court held that the complainant must be given an opportunity to state a hostile work environment claim. The burden would then shift to the employer who must then prove that it had exercised reasonable care in preventing and correcting harassment and that the complainant unreasonably failed to take advantage of the anti-harassment policies. The employer was thus afforded a defence against liability. In the \textit{Faraghar}\textsuperscript{78} case, the court held the city, as employer, vicariously liable for the harassment of a female employee by her supervising male colleagues because it had unreasonably failed to promulgate a policy on the prevention of sexual harassment.

Cooper explains that vicarious liability was determined by agency rules and the court found that sexual harassment fell outside the employee’s scope of employment.\textsuperscript{79} However, she explains that an employer would still be vicariously liable for acts of supervisory personnel outside the scope of employment, when the employment relationship aids the supervisor in the misconduct and a tangible outcome results. Where there is no tangible outcome (such as

\begin{thebibliography}{99}
\item Snyman-Van Deventer & De Bruin \textit{Acta Academica Supplement} 201.
\item \textit{Ibid.}
\item 118 S Ct 2275 (1998).
\item 118 S Ct 2257 (1998).
\item Snyman-Van Deventer & De Bruin \textit{Acta Academica Supplement} 202.
\item 2270-2271.
\item 2279.
\item Cooper 2002 \textit{ILJ} 18.
\end{thebibliography}
in hostile environment harassment) the employer would be vicariously liable unless it could be shown that the employer had exercised reasonable care to prevent and correct swiftly any sexually harassing conduct, and further that the complainant unreasonably failed to take advantage of any such preventive or corrective measures provided by the employer.\textsuperscript{80} Cooper notes that this finding applies only when the perpetrator is a supervisor and not a co-worker as Title VII applies only to employers.\textsuperscript{81} However, the EEOC guidelines impose strict liability on employers for sexual harassment by a co-worker provided the employer knew or should have known of the conduct, unless the employer took immediate corrective action.

2.4 Remedies available to harassed persons

Although the majority of sexual harassment cases are brought under Title VII, Halfkenny notes that tort and criminal law may be used to address aspects of sexual harassment.\textsuperscript{82} He also adds that in addition to these remedies, unions have negotiated collective bargaining agreements that prohibit discrimination including sexual harassment or that require employers to provide a safe and healthy working environment for employees.

The remedies available to a complainant in the United States include compensatory damages for emotional harm (pain and suffering) and punitive damages for intentional discrimination.\textsuperscript{83} Punitive damages may be available even if the employer did not intend a particular practice to adversely impact upon a protected group, but the requirement was not a legitimate occupational qualification or business practice.\textsuperscript{84}

\textsuperscript{80} Ibid.
\textsuperscript{81} Ibid.
\textsuperscript{82} Halfkenny 1995 ILJ 7.
\textsuperscript{83} Cooper 2002 ILJ 20.
\textsuperscript{84} Ibid.
Chapter 3  The legal position in South Africa

The laws relating to sexual harassment in South Africa can be gleaned from the common law, the Constitution of the Republic of South Africa\(^85\) (hereafter “the Constitution”), the EEA, the Code of Good Practice on the Handling of Sexual Harassment Cases\(^86\) and, possibly in the future, to a certain extent the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (hereafter “COIDA”) and the Occupational Health and Safety Act 85 of 1993 (hereafter “the OHSA”).

3.1  Common law

Before any legislation was promulgated dealing with sexual harassment, employers only had to act according to the principles of common law. Common law imposed two obligations upon employers: firstly, employers had to develop a safe work environment which is free of hostility and conducive to work; and secondly, employers had to show respect to employees.\(^87\) Unquestionably, sexual harassment creates a hostile, unsafe and unproductive working environment and violates the dignity of the individuals affected by it. It can be argued that, in terms of the common law, employers should do more than simply create a safe workplace, and should actively take steps to eliminate sexual harassment and bring disciplinary proceedings against those charged with harassment.\(^88\) An employer who neglects this duty should be held vicariously liable.

An employer may be held vicariously liable for sexual harassment committed by an employee if the employer knew that an employee was harassing another and neglected to take steps, or the harassment was committed by an employee in the performance of his or her duties and the employer knew or should have known this.\(^89\) In South Africa, a person accused of sexual harassment can be held delictually and contractually liable or can be

\(^{85}\) Act 108 of 1996.
\(^{88}\) Ibid.
\(^{89}\) Dancaster “Sexual Harassment in the Workplace: Should South Africa Adopt the American Approach?” 1991 *ILJ* 449 464.
charged with assault, indecent assault, attempted rape or rape. Of course, the common law also has its crime and delict of *crimen injuria.*

### 3.2 The Constitution

Employees are protected not only by the labour legislation, but also by the Constitution. Section 9(1) states that everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(4) states that no person may unfairly discriminate against anyone on grounds of, *inter alia,* gender and sex. Section 10 states that everyone has inherent dignity and the right to have his or her dignity respected and protected. Section 14 affords everyone the right to privacy. Section 23 also affords everyone the right to fair labour practices. Since sexual harassment is undoubtedly a form of unfair labour practice, the constitutional provision confirms that it is the employer’s duty to ensure that sexual harassment does not occur in the workplace. In terms of the Constitution, sexual harassment can arguably be viewed as an infringement of all these fundamental rights.

### 3.3 COIDA

In August 1997 the Sexual Harassment Education Project (hereafter “SHEP”) made submissions to the Portfolio Committee on Labour in Parliament that COIDA be amended so as to recognise sexual harassment in the workplace as an occupational injury warranting compensation. The basis for this submission was the fact that both the International Labour Organisation (hereafter “the ILO”) and the World Health Organisation recognise sexual harassment as a health and safety concern. SHEP therefore also recommended that the OHSA should similarly treat sexual harassment as a health and safety issue. As a result, a task team under the guidance of the Department of Labour was appointed to investigate the matter. Finnomore and Van Rensburg report that little progress has been made to date.

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92 Snyman-Van Deventer & De Bruin *Acta Academica Supplement* 212.
93 Finnomore & Van Rensburg *Labour Relations* 428.
94 Ibid.
3.4 The EEA

3.4.1 Prohibition of discrimination

Harassment in the workplace, including sexual harassment, is regulated by the EEA. Section 6(1) of the EEA provides that no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice on one or more grounds in section 6(1). This list of grounds, which is not exhaustive, includes 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. It is interesting to note that the EEA cites three more grounds than the Constitution, that is, political opinion, family responsibility and HIV status. Section 6(3) provides that 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).

In order to understand the notion of harassment as a form of unfair discrimination within the South African context, one must consider the aims and objectives of the EEA and the context in which it operates.\(^{95}\) The context of the EEA can be gleaned from the preamble. This context is that, as a result of apartheid and other discriminatory laws and practices, there are disparities in employment and that these disparities create such pronounced disadvantages for certain categories of people that they cannot be addressed simply by repealing the discriminatory laws. The focus of the preamble is both retrospective and prospective.\(^{96}\) It is retrospective in that it aims to redress the disadvantages of the past by eliminating discrimination and its effects. It is prospective in that it aims to promote equality and the exercise of democracy, economic development and efficiency in the workforce, as well as to achieve a diverse workforce.\(^{97}\) The emphasis in the preamble is therefore primarily on rectifying disadvantage in the workplace and promoting equity in the future.

Despite the radical inroads the EEA makes on the freedom of employers to run their businesses as they deem fit, the EEA itself tells us very little about discrimination as a legal phenomenon. For example, the EEA declares harassment to be discrimination, but does not

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\(^{95}\) Cooper 2002 *ILJ* 21.

\(^{96}\) *Ibid.*

\(^{97}\) *Ibid.*
tell us what harassment means. The EEA contains only the basic structure of a prohibition on unfair discrimination. It is left to the courts to give content to and develop the law relating to discrimination. As a result, the context within which the EEA operates is very important as the courts grapple with some very difficult issues raised under the banner of discrimination.99

3.4.2 The right to equality

Cooper argues that when interpreting the EEA, particular attention must be paid to the constitutional right to equality as this is specifically mentioned in the preamble. Other constitutional rights are also important when interpreting unfair discrimination under the EEA, such as the right to fair labour practices and the right to dignity. However, Cooper argues that the specific mention of the right to equality indicates that this should be the primary reference point for the interpretation of the EEA’s provisions.

In cases of alleged equality violations, a distinctive approach has been developed by the Constitutional Court. This approach comprises a two-stage enquiry into whether there is unfair discrimination and was established in Harken v Lane NO. During the first stage, in order to determine whether section 9(1) has been violated, the following should be considered: Firstly, does the law, policy or practice differentiate between people or between categories of people? Secondly, if the answer to this is yes, is there a rational connection between the differentiation and a legitimate government purpose? Thirdly, if there is no such rational connection, section 9(1) has been violated.

During the second stage of the enquiry, in spite of the existence of a rational connection, discrimination may still be present in terms of section 9(3) or 9(4) after considering the following: Firstly, does the differentiation amount to discrimination? Secondly, if the

98 Dupper & Garbers “Employment Equity Act” CC 1-1.
99 Ibid.
100 Cooper 2002 ILJ 21.
101 S 23(1).
102 S 10.
103 Cooper 2002 ILJ 21.
104 The following discussion of the two-stage enquiry is adapted from Olivier, Smit & Kalula Social Security: A Legal Analysis (2003) 95-98.
105 1998 1 SA 300 (CC) 325.
answer to this is yes, does it constitute unfair discrimination? In this regard, discrimination on the specified grounds is presumed to be unfair, and if the ground alleged is not listed, the complainant must prove unfairness. Olivier et al argue that unfairness is determined by the impact of the discrimination on a person or persons in similar situations.\textsuperscript{106} They state that there are two important elements in the establishment of unfairness: the “listed grounds” and the establishment of “impact”.\textsuperscript{107} Under the “listed or unlisted grounds”, it should be determined whether the complainant belongs to a disadvantaged group; whether the differentiation can lead or has led to patterns of harm or disadvantage; whether it is owing to that person’s (or group’s) attributes; and whether it impairs the person’s dignity or has a comparably serious effect. Under the test for “impact” the following would play a role: the person’s position in society; the nature of the discriminating provision or power; the purpose for which the provision or power is used; the extent to which it affects the person’s rights; and the question as to whether it violates the person’s dignity or has a comparably serious impact. Thirdly, the final aspect of the second stage of the enquiry provides that, if the discrimination is then indeed established to be unfair, the law or conduct in question will be unconstitutional only if it cannot be justified under section 36 of the Constitution. In terms of section 36, if the limitation is in terms of a law of general application and is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, then such limitation will not be unconstitutional.\textsuperscript{108}

There is a strong link between human dignity and equality. Olivier et al note that much is evident from the equality jurisprudence of the Constitutional Court, where the impairment or violation of a person’s dignity has been elevated to a decisive criterion, in cases where the unfairness of discrimination has to be proved.\textsuperscript{109} According to several Constitutional Court judgments, unfairness is determined by the impact of the discrimination on a person or person’s in similar situations.\textsuperscript{110} Cooper confirms that the centrality of the notion of human dignity to the concepts of fairness and equality has been emphasised repeatedly by the

\textsuperscript{106} Olivier et al Social Security 96.
\textsuperscript{107} Ibid.
\textsuperscript{108} S 36(1) lists these factors as including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve this purpose.
\textsuperscript{109} Olivier et al Social Security 61.
\textsuperscript{110} Harksen v Lane NO 1998 1 SA 300 (CC); Prinsloo v Van der Linde 1997 3 SA 1012 (CC); Brink v Kitschoff NO 1996 6 BCLR 752 (CC) and Jooste v Score Supermarket Trading (Pty) Ltd 1999 2 BCLR 139 (CC).
Constitutional Court.  In this regard, the Constitutional Court in *President of the Republic of South Africa v Hugo* stated as follows:

“At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply engrained past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.”

**3 4 3 Purpose of the EEA**

The prohibition of harassment as a form of unfair discrimination must also be interpreted to give effect to the purpose of the EEA. Section 2 of the EEA states that its purpose is to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and implementing affirmative action measures to redress disadvantages to ensure equitable representation in the workforce. Section 3 of the EEA also requires that it be interpreted in compliance with the Constitution, and with the international law obligations of the Republic, in particular those contained in the ILO Convention 111 of 1960 concerning Discrimination in Respect of Employment and Occupation. Ratifying member states undertake to eliminate discrimination which includes any distinction, exclusion or preference made on the basis of a number of grounds, including sex, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. Section 3 of the EEA also states that it must be interpreted taking into account any relevant code of good practice issued in terms of the EEA or any other employment law.

Labour law has long been concerned with the notion of fairness through unfair labour practices. Under the previous pre-constitutional Labour Relations Act 28 of 1956 fairness was generally interpreted to mean a scrupulous evenhandedness in dealing with the rights and

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111 Cooper 2002 *ILJ* 23.
112 1997 1 SACR 567 (CC) 568.
113 Cooper 2002 *ILJ* 23.
114 Article 1.
115 Cooper 2002 *ILJ* 24.
obligations of both employees and employers. For example, the Appellate Division (as it then was) in National Union of Metalworkers of South Africa v Vetsak Co-operative Ltd held that fairness under the unfair labour practice was fairness towards both employer and employee. This enquiry, unlike the procedure in constitutional jurisprudence, involves the contemporaneous weighing up of the invasion of the complainant’s rights and interests by the impugned conduct as against the objective justification for the conduct by the employer. The unfair discrimination provision has now, however, been shifted to the EEA in an amended form and has been released from the ambit of the unfair labour practice. One can therefore argue for an interpretation of unfairness which is unequivocally located within the Constitutional Court’s equality jurisprudence with its focus on the impact of discrimination on the complainant and the violation of dignity.

3 4 4 Harassment as a form of unfair discrimination

Harassment is expressly forbidden in terms of Chapter II of the EEA. Section 6(3) explicitly states that harassment is viewed as a form of unfair discrimination and is prohibited on the grounds of unfair discrimination listed in section 6(1). Although harassment can be based on any one of the listed grounds, the most prevalent types of harassment encountered in the workplace are sexual harassment, racial harassment, sexual orientation harassment and religious harassment. Of these, sexual harassment, generally by men on women, is the most prevalent and forms the focus of this treatise. The discrimination arises when a person is treated in a different and unequal way in that he or she is subjected to offensive conduct, on the prohibited grounds of sex or gender. Therefore the sex or gender must be the cause of the discrimination. The discrimination or unequal treatment must arise because the victim of the unwanted sexual conduct is being treated less favourably than persons of the opposite sex or gender.

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116 Ibid.
117 1996 4 SA 577 (A) 593G-H.
118 Cooper 2002 ILJ 24.
119 Cooper 2002 ILJ 25.
120 Dupper & Garbers “Employment Equity Act” CC 1 -67.
121 Cooper 2002 ILJ 25.
122 See chapter 4 below for a discussion on the differences between sex and gender.
123 Cooper 2002 ILJ 25.
It is interesting to note that section 6(3) does not state that harassment is discrimination but rather that it is a form of unfair discrimination. Cooper argues that this wording suggests that the constitutional jurisprudence on unfair discrimination cannot be rigidly applied. She reasons that, to establish the existence of unfair discrimination, constitutional jurisprudence tells us that one must first ascertain whether there was discrimination, and then, if so, one must determine whether the discrimination was fair or unfair, followed by a separate enquiry into the justification for the conduct. However, applying this test to harassment, it is clear that such is the nature of the conduct that it can never be fair or justified. Cooper does concede, however, that the constitutional test for unfair discrimination does have a role to play as “the notion of fairness fulfills an important function in an assessment of whether the impugned conduct stands as a barrier to the achievement of equity in the workplace” by focusing on the impact of the conduct on the complainant in the overall assessment of whether the conduct amounts to a violation of the person’s rights and interests and an infringement of dignity. Once the existence of harassment has been established and shown to be on the ground of sex or gender, it will then constitute unfair discrimination.

345 Persons regulated by the EEA

The EEA aims to regulate the relationship between employers and employees on matters relating to discrimination and affirmative action measures. One needs to understand which perpetrators of harassment it seeks to regulate. Section 6(3) of the EEA prohibits harassment of an employee as a form of unfair discrimination. The section does not, however, specifically mention which perpetrators it seeks to regulate. Section 6(1) does, however, state that “no person” may unfairly discriminate against an employee. Prima facie, it appears then that the EEA covers harassment in the workplace even where the perpetrator is not the employer. However, a closer examination of this provision together with the rest of the EEA reveals this to be incorrect and that the section only regulates discriminatory acts of employers, including where an employer is held to be liable for the harassing conduct of an employee.

124 Ibid.
125 Cooper 2002 ILJ 26.
126 Ibid.
127 Cooper 2002 ILJ 36.
Section 10 of the EEA provides the procedure for the resolution of disputes arising out of this Act. As discussed in paragraph 3 4 6 below, disputes concerning unfair discrimination and harassment are referred to the Commission for Conciliation, Mediation and Arbitration (hereafter “the CCMA”) established in terms of the Labour Relations Act 66 of 1995 (hereafter “the LRA”). Section 134 of the LRA provides that the CCMA may only hear disputes where the parties are, on the one side, one or more trade unions, employees or trade unions and employees, and on the other hand, one or more employers’ organisations, employers or employers’ organisations and employers. Cooper argues that it would be anomalous for the LRA to provide for a dispute resolution procedure that excludes potential parties, which would be the case if the words “no person” were to be read as including persons other than employers.128

There are also other sections in the EEA which indicate that it seeks only to regulate instances of harassment between employers and employees.129 Section 4 provides that the EEA applies to all employers and employees; section 5 enjoins employers to take steps to promote equal opportunity in the workplace; section 6 prohibits unfair discrimination against an employee concerning “any employment policy or practice” thereby limiting this to employers; section 11 provides that an allegation of unfair discrimination can only be made against an employer; and section 50 confines the orders which the Labour Court may make to orders against the employer. Therefore, notwithstanding the wording “no person” in section 6(1) of the EEA, it is clear that the EEA seeks to regulate harassment in the workplace only where the employer is a party to the harassment.

Section 9 of the EEA provides that, for the purposes of inter alia section 6, an employee includes an applicant for employment. Therefore the EEA would protect such an applicant from harassment by the employer or an employee.130 As in the LRA and the Basic Conditions of Employment Act 75 of 1997, the definition of employee under the EEA excludes independent contractors.131 Section 4 of the EEA also excludes from its application members of the South African Defence Force, the National Intelligence Service and the South

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128 Cooper 2002 ILJ 37.
129 See Cooper 2002 ILJ 37 for a discussion of these sections.
130 See chapter 5 below on employer’s liability.
131 S 1 of the EEA defines an employee as “any person other than an independent contractor who-
   (a) works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
   (b) in any manner assists in carrying on or conducting the business of an employer”.
African Secret Service. These persons would have to seek a remedy in the equality courts or civil courts.

3.4.6 Disputes concerning the EEA

Disputes concerning Chapter II of the EEA may be referred to the CCMA for conciliation. If the dispute remains unresolved, any party can refer it to the Labour Court for adjudication or the parties may consent to arbitration. If the Labour Court finds that an employee has been unfairly discriminated against, it may make any appropriate order that is just and equitable in the circumstances including payment of compensation or damages by the employer to the aggrieved employee and/or an order that the employer take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees.

3.5 Code of Good Practice on the Handling of Sexual Harassment Cases

In the second half of 1998, the National Economic and Labour Council (hereafter “NEDLAC”) published a Code of Good Practice on the Handling of Sexual Harassment Cases (hereafter “the Code”). Previously, employers had no clear guidelines on how to deal with sexual harassment cases. The Code attempts to eliminate sexual harassment in the workplace by providing procedures that will enable employers to deal with occurrences of sexual harassment and to implement preventative measures. The Code also encourages employers to develop and implement policies on sexual harassment that will serve as a guideline for the conduct of all employees.

It has been argued that the Code’s objective is grand and possibly over ambitious. The objective is to eliminate sexual harassment in the workplace. Item 3(1) defines sexual harassment as “unwanted conduct of a sexual nature”. It states that it is the unwanted nature of sexual harassment that distinguishes it from behaviour that is welcome and mutual.

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133 Finnemore & Van Rensburg Labour Relations 459.
134 Finnemore & Van Rensburg Labour Relations 428.
136 Item 1(1).
3(2) provides that sexual attention becomes sexual harassment if (a) it is persisted in, (b) the recipient has clearly indicated it is offensive and which (c) the perpetrator should have known is unacceptable.\textsuperscript{137} Item 4 of the Code describes various forms of sexual harassment which covers a wide range of actions, from the obvious, physical contact, through verbal forms which include innuendoes, suggestions and hints, comments with sexual overtones, sex-related jokes or unwelcome graphic comments about a person’s body made in their presence or directed towards them and inappropriate enquiries about a person’s sex life, to non-verbal forms of sexual harassment such as unwelcome gestures, indecent exposure and the unwelcome display of sexually explicit pictures and objects.\textsuperscript{138}

Finnemore and Van Rensburg argue that, under verbal forms of sexual harassment, the example of terms of endearment can also be added.\textsuperscript{139} They state that terms such as “sweetheart”, “darling” and “dear” should be avoided and that politically correct language such as “Ms” or the person’s first name should rather be used. They also note that some authors use a further category, namely visual forms of sexual harassment, such as posters, cartoons, magazine centerfolds and photographs.\textsuperscript{140} They note an instance in the United States where a woman lodged a sexual harassment complaint against a male colleague who had a photograph of his wife dressed in a bikini on his desk. The man was ordered to remove the photograph.\textsuperscript{141} In today’s modern age, the frequent use of electronic mail and the Internet also provides easy access to pornographic material that can potentially be abused in the office environment.\textsuperscript{142} Employers are increasingly becoming aware of this risk and are taking proactive steps to prevent the possibility of this happening by, for example, blocking Internet sites which have a sexually explicit nature. Many companies have also installed a monitoring system which automatically blocks electronic mails that contain words of a sexually explicit nature.

The Code also recognises some forms of harassment peculiar to the workplace, such as \textit{quid pro quo} harassment.\textsuperscript{143} \textit{Quid pro quo} harassment occurs when the victim is forced to

\textsuperscript{138} \textit{Ibid}.
\textsuperscript{139} Finnemore & Van Rensburg \textit{Labour Relations} 430.
\textsuperscript{140} \textit{Ibid}. It is submitted, however, that this would simply fall under the category of “hostile environment harassment”.
\textsuperscript{141} \textit{Ibid}.
\textsuperscript{142} \textit{Ibid}.
\textsuperscript{143} Grogan \textit{Workplace Law} 165.
surrender to sexual advances against his or her will for fear of losing a tangible job-related benefit. This type of harassment typically occurs in a relationship of actual power in the workplace and is perpetrated by a person in a position to affect job-related benefits.\textsuperscript{144} Item 4(1)(d) describes \textit{quid pro quo} harassment as where an owner, employer, supervisor, member of management or co-employee, undertakes or attempts to influence the process of employment, promotion, training, discipline, dismissal, salary increment or other benefit of an employee or job applicant, in exchange for sexual favours. Grogan argues that the prohibition of sexual harassment is therefore aimed not only at employers, but extends to all persons over whom they have control.\textsuperscript{145} Item 2(1) states that, although the Code is intended to guide employers and employees, the perpetrators and victims of sexual harassment may include owners, employers, managers, supervisors, employees, job applicants, clients, suppliers, contractors and others having dealings with the business. However, item 2(2) specifically states that it does not confer authority on employers to take disciplinary action in respect of non-employees. Grogan concludes that the Code requires employers not only to refrain from such conduct themselves, but also to ensure that they do not permit, condone or encourage sexual harassment in the workplace by anyone else.\textsuperscript{146} Item 4(2) states that sexual favouritism exists where people in authority reward only those who respond to their sexual advances with promotions or increases, while ignoring those who do not submit to sexual advances.

Although not specifically mentioned in the Code, sexual harassment can also take the form of hostile environment harassment, which occurs where an abusive working environment is created which makes it extremely difficult for the employee to work.\textsuperscript{147} A hostile working environment could, for example, be created by jokes, sexual propositions or other sexual innuendoes which are offensive to an employee but are not necessarily aimed directly at her person. A hostile environment does not involve the loss of a tangible job-related benefit as the harassment in itself amounts to an alteration to working conditions.\textsuperscript{148} This type of harassment does not depend on a relationship of actual power in the workplace, but often takes place between employees at the same level in an organisation.\textsuperscript{149}

\textsuperscript{144} Dupper & Garbers “Employment Equity Act” CC 1-69.\textsuperscript{145} Grogan \textit{Workplace Law} 165.\textsuperscript{146} \textit{Ibid}.\textsuperscript{147} Dupper & Garbers “Employment Equity Act” CC 1-69.\textsuperscript{148} \textit{Ibid}.\textsuperscript{149} \textit{Ibid}.
Item 5, which deals with guiding principles, provides that employers should create and maintain a working environment in which the dignity of employees is respected. It provides further that a climate in the workplace should be created and maintained in which victims of sexual harassment will not feel that their grievances are ignored or trivialised, or fear reprisals. Item 5(2) provides that the Code recognises the primacy of collective agreements regulating the handling of sexual harassment cases, but that collective agreements and policy statements should be guided by the provisions of the Code.

Item 6 of the Code requires all employers to adopt policies on sexual harassment. A clear, well-formulated policy is an indication to all employees that the management of the company is concerned about sexual harassment and is committed to deal with any occurrence swiftly and justly. Also, the purpose of a policy should not only be to avoid legal liability, but also to restore human dignity in the workplace. The objective of these policies should be to encourage employers and employees not only to refrain from sexual harassment, but also to discourage such conduct by others including customers, job applicants and suppliers. To achieve this end, item 6(1) requires that employers issue a policy statement which states that: all employees, job applicants and other persons who have dealings with the business have the right to be treated with dignity; sexual harassment in the workplace will not be permitted or condoned; and that persons have a right to raise a grievance with the assurance that appropriate action will be taken. The policy should also provide an explanation of the procedure to be followed by employees who are victims and affirm a positive duty that management will take disciplinary steps against employees who do not comply with this policy. The Code also requires that policies on sexual harassment should be communicated effectively to all employees and should state that allegations of sexual harassment will be taken seriously and will be dealt with sensitively, expeditiously and confidentially, and that employees will be protected against victimisation and false accusations.

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150 Finnemore & Van Rensburg Labour Relations 432.
151 Ibid.
152 Grogan Workplace Law 165.
153 Finnemore & Van Rensburg Labour Relations 472.
154 Item 6(3).
Employers and management are expressly required to take appropriate action when cases of sexual harassment come to their attention.\textsuperscript{155} Item 7 provides that employers should develop clear procedures to deal with sexual harassment in a sensitive, efficient and effective way. The Code provides that employers should designate a person outside of line management whom victims may approach for confidential advice.\textsuperscript{156} Such a person could include a shop steward or co-employee, or if there is no suitably qualified person on the staff, an outside professional. Item 7(1)(b) provides that such a person should have the appropriate skills and experience or be properly trained and given adequate resources. Grogan therefore suggests that trade unions be encouraged to include the issue of sexual harassment in their education and training programmes for shop stewards.\textsuperscript{157}

Item 7(2) provides that employees should be given the choice to resolve a sexual harassment problem in an informal way or to embark on a formal procedure. The informal procedure entails the complainant being afforded the opportunity of explaining to the perpetrator that the behaviour in question is unwelcome and offensive, makes the complainant uncomfortable and that it interferes with his or her work. It is important to have an informal complaints procedure as some victims do not want to punish the harasser, but simply want the harassment to stop.\textsuperscript{158} Many victims feel embarrassed by the harassment and prefer not to take a formal route. Finnemore and Van Rensburg mention the advantages of an informal procedure: it is immediate; it encourages victims to report harassment because it follows a quicker route; and it shares responsibility for action with the complainant.\textsuperscript{159} They also mention that the disadvantages are that no message is conveyed to the rest of the staff that sexual harassment is being tackled and that it leaves the complainant open to victimisation.\textsuperscript{160} If the informal procedure does not provide a satisfactory outcome or if the sexual harassment is serious, formal action should be taken.

The formal procedure entails an investigation and disciplinary action if necessary. Finnemore and Van Rensburg mention some advantages to the formal procedure: it publicises the employer’s commitment to fighting sexual harassment; it obliges managers to take their

\textsuperscript{155} Grogan \textit{Workplace Law} 165.  
\textsuperscript{156} Item 7(1).  
\textsuperscript{157} Grogan \textit{Workplace Law} 165.  
\textsuperscript{158} Collier \textit{Combating Sexual Harassment in the Workplace} (1995) 87 as quoted in Finnemore & Van Rensburg \textit{Labour Relations} 433.  
\textsuperscript{159} Finnemore & Van Rensburg \textit{Labour Relations} 433.  
\textsuperscript{160} Ibid.
responsibilities seriously; it provides better protection to the complainant against victimisation; and it allows the employer to take action against the perpetrator. They also mention the disadvantages: it is more stressful for all concerned; it is sometimes difficult to maintain confidentiality; there can be hostility from other employees; and it can be difficult to collect evidence. Grogan points out that the only difference between disciplinary proceedings for sexual harassment and those relating to other offences are that special steps must be taken to ensure confidentiality. Item 8 reinforces this and provides that only appropriate members of management, the complainant, his or her representative, the alleged perpetrator, witnesses and an interpreter may be present at the hearing. Regarding appropriate disciplinary action, item 7 refers to the Code of Good Practice: Dismissal, which provides that an employee may be dismissed for serious misconduct or repeated offences. Such a dismissal, however, must still be both procedurally and substantively fair.

Item 7(7) provides that if a complaint of alleged sexual harassment is not satisfactorily resolved by the internal procedures, either party may refer the matter to the CCMA for conciliation in terms of section 135 of the LRA, and then, in the event of settlement not being reached, to the Labour Court which, in terms of the EEA, will have the power to order the employer to compensate the aggrieved employee and to take steps to ensure that the situation is rectified. If the complainant is still not satisfied, he or she can resign and claim to have been constructively dismissed.

### 3.5.1 Persons covered by the Code

Item 2(1) of the Code provides that perpetrators and victims of sexual harassment may include owners, employers, managers, supervisors, employees, job applicants, clients, suppliers, contractors and others having dealings with a business. The effect of this item is to give the impression that the ambit of the Code is wider than the employer-employee relationship. However, item 2(2) immediately dispels this impression by providing that

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161 Ibid.
162 Ibid.
163 Grogan Workplace Law 166.
164 Schedule 8 of the LRA.
165 Ibid.
166 Cooper 2002 ILJ 37.
nothing in item 2(1) confers authority on employers to take disciplinary action against non-
employees. When a non-employee harasses an employee the victim would have to institute
action through the equality courts\textsuperscript{168} or the civil courts.\textsuperscript{169} Item 2(3) provides that 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. Again, it is argued that such non-employee would not be able to
pursue action in the Labour Court, as the court would not have jurisdiction to hear such a
matter. Such non-employee would have to pursue a claim in the equality courts or civil
courts.

\textbf{3.5.2 Comments on the Code}

Cooper criticises the test for sexual harassment proffered in the Code.\textsuperscript{170} She points out that
her study of comparative law\textsuperscript{171} shows that in other jurisdictions sexual harassment forms
part of discrimination law and that the EEOC in the United States fashioned a specific test for
sexual harassment within this broad framework. She comments that the EEA, in line with the
US Civil Rights Act, does not provide a specific definition of sexual harassment. She then
compares the guidelines on sexual harassment drawn up by the EEOC and the Code. She
concludes that, unlike the guidelines drafted by the EEOC which were drafted to give effect
to the provision on discrimination in the Civil Rights Act, the Code was not drafted with the
overall purpose of the EEA and the specific provisions of section 6 in mind.\textsuperscript{172} The effect of
this is a test which does not adequately reflect the approach in the EEA that sexual
harassment is a form of unfair discrimination.\textsuperscript{173} It is submitted that the Code, while
undoubtedly of practical relevance to employers and employees alike, should have been
drafted in such a way as to give content to the EEA’s provisions dealing with harassment. It
will be interesting to observe how the Labour Court will interpret and apply the Code to
sexual harassment cases in the future.

Item 3 of the Code defines sexual harassment as the following:

\begin{itemize}
  \item \textsuperscript{168} See paragraph 3.6 below.
  \item \textsuperscript{169} Cooper 2002 \textit{ILJ} 37.
  \item \textsuperscript{170} Cooper 2002 \textit{ILJ} 26.
  \item \textsuperscript{171} Including American law as set out above.
  \item \textsuperscript{172} Cooper 2002 \textit{ILJ} 26.
  \item \textsuperscript{173} Cooper 2002 \textit{ILJ} 27.
\end{itemize}
Sexual harassment is unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour which is welcome and mutual.

Sexual attention becomes sexual harassment if:

a. The behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or

b. The recipient has made it clear that the behaviour is considered offensive; and/or

c. The perpetrator should have known that the behaviour is regarded as unacceptable.

Cooper maintains that the Code is awkwardly written and presents a number of problems. The first problem she identifies concerns the “and/or” terminology which links each subsection. She believes that it would be less confusing if the drafters had indicated precisely which elements should be read conjunctively and which disjunctively. She then provides a few examples of possible confusion which could result. If (a) were to be read alone, a single incident of a sexual nature could give rise to a finding of sexual harassment regardless of whether the recipient had indicated the conduct to be unwelcome and without applying a reasonableness test. If (b) were to be read alone, a finding of sexual harassment may result if the recipient clearly indicated that the conduct is unwelcome, even though it has been shown that it is not always possible for the recipient to indicate that he or she considers the conduct to be unwelcome. Both (b) and (c), if read alone, do not require the conduct to meet a certain standard. She submits that the provision should require that (a) be read conjunctively either with (b) or (c).

Dupper and Garbers comment that, in reality, item 3(2)(a) and (b) are merely variations of item 3(2)(c). They argue that the Code adopts a mixture of a subjective victim-based test (unwelcome in the mind of the victim) and an objective perpetrator-based test (unacceptable in the mind of the reasonable person in the position of the perpetrator). They conclude that the test then introduces fault into the definition of sexual harassment. They do concede,
however, that the presence of fault is required where employers want to discipline employees for sexual harassment, but they argue that fault is not required to establish discrimination. They argue that the test is useful for purposes of determining unfair dismissal cases, but not for establishing whether harassment is serious enough to constitute discrimination.

Cooper takes this argument further and states that subparagraph (c) introduces a test which applies a delictual standard of negligence.\(^{180}\) It requires that the perpetrator should have known that the behaviour is regarded as unacceptable, in other words that the perpetrator should have constructive knowledge. This introduces a form of liability which is foreign to discrimination law. Unfair discrimination focuses on the effect of the perpetrator’s conduct on the complainant as part of a group and not on the moral blameworthiness of the perpetrator, which is found in the concept of fault in criminal law and delict.\(^{181}\) Since harassment is a form of unfair discrimination, it is submitted that the test for harassment should reflect the constitutional test for unfair discrimination. Therefore, harassment should amount to conduct which has the effect of infringing the recipient’s dignity, taking into account the context, the position of the complainant and of the perpetrator in the workplace and the complainant’s subjective experience.\(^{182}\) It must be remembered, however, that the Code is not binding law. Section 3 of the EEA merely provides that it must be taken into account when interpreting the EEA, it need not therefore be followed. It is therefore submitted that such an approach is permissible.

The Labour Court in *Louw v Golden Arrow Bus Services (Pty) Ltd*\(^{183}\) confirmed that the delictual notions of fault are inappropriate to the determination of unfair discrimination as part of the unfair labour practice regime.\(^{184}\) The Court pointed out that the definition of the unfair labour practice was an effect-based one and creates a form of strict liability.

Grogan states that although the objectives of the Code are commendable, it raises the possibility of some interesting and complex disputes. He states that the first would be the difficulty of establishing the point at which conduct that may be regarded as “normal” becomes harassment. The second would be to ensure that the prohibition against harassment

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\(^{180}\) Cooper 2002 *ILJ* 27.

\(^{181}\) Ibid.


\(^{183}\) 2000 21 *ILJ* 188 (LC) 194-195.

\(^{184}\) Cooper 2002 *ILJ* 28.
does not turn into a witch-hunt enabling people to harass others with claims of harassment. The third would be to decide what to do when management imposes what is considered by the victim to be an inadequate penalty for a particular instance of harassment. He asks the question whether the Labour Court will be empowered to decide that dismissal is the appropriate penalty and compel the employer to dismiss the perpetrator? These are questions that will need to be addressed by the courts in future.

As mentioned above, the Code is not binding law. Section 3 of the EEA merely provides that it must be taken into account when interpreting the EEA, it need not, therefore, be followed.

3.6 Promotion of Equality and Prevention of Unfair Discrimination Act

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (hereafter “PEPUDA”) also regulates harassment. Section 5(3) does, however, provide that the Act does not apply to any person to whom and to the extent to which the EEA applies. Section 2 of PEPUDA sets out the objects of the Act, which are the following:

(a) to enact legislation required by section 9 of the Constitution;

(b) to give effect to the letter and spirit of the Constitution, in particular-

(i) the equal enjoyment of all rights and freedoms by every person;

(ii) the promotion of equality;

(iii) the values of non-racialism and non-sexism contained in section 1 of the Constitution;

(iv) the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution;

(v) the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16(2)(c) of the Constitution and section 12 of this Act;

Grogan 1998 EL 11.
(c) to provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability;

(d) to provide for procedures for the determination of circumstances under which discrimination is unfair;

(e) to provide for measures to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment;

(f) to provide remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed;

(g) to set out measures to advance persons disadvantaged by unfair discrimination;

(h) to facilitate further compliance with international law obligations including treaty obligations in terms of, amongst others, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.

Section 11 of PEPUDA provides that no person may subject any person to harassment. PEPUDA differs from the EEA in that it provides a comprehensive definition of harassment which is defined as “unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to (a) sex, gender or sexual orientation; or (b) a person’s membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such a group”. Sexual harassment is therefore conduct of a sexual nature based on the prohibited grounds of gender or sex. The recipient will have to indicate to the perpetrator that the conduct is unwanted. The definition further requires that the conduct be persistent or serious. Cooper argues that this is an objective test and the standard should be that of the

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186 “Prohibited grounds” are defined in s 1 as:

(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or

(b) any other ground where discrimination based on that other ground-

(i) causes or perpetuates systematic disadvantage;

(ii) undermines human dignity; or

(iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).

187 S 1.
reasonable person in the circumstances. The definition also focuses on the impact of the conduct on the recipient by requiring that the conduct demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences. Cooper also argues that this sets a standard which the conduct must meet in order to constitute sexual harassment. PEPUDA is also unique in that it does not locate harassment within the ambit of unfair discrimination. Section 15 specifically states that harassment is not subject to a determination of fairness.

It can be argued that this test is clear and logical and can be reconciled with the requirements of the EEA because it also focuses on the impact of the conduct on the recipient. However, it must again be emphasised that PEPUDA will only apply in the workplace where the EEA does not apply. Therefore, when concerned with sexual harassment in the workplace, the central piece of legislation will be the EEA as the EEA sets out to regulate the employment relationship between employers and employees in relation to discrimination and affirmative action measures.

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188 Cooper 2002 ILJ 36.
189 Ibid.
190 Cooper 2002 ILJ 35.
Chapter 4  Test for sexual harassment as a form of unfair discrimination

The test for sexual harassment as offered by the Code has been subject to some criticism. Item 4 (dealing with the forms of sexual harassment) reveals much about what harassment is, but says little about when conduct is serious enough to constitute harassment. This is closely related to the issue concerning the perspective from which conduct should be analysed in order to determine whether it constitutes sexual harassment. In cases of quid pro quo harassment, it is clear that the harassment will always be severe enough to constitute discrimination as by definition, there is always a tangible loss or threat of loss of some job-related benefit. In cases of hostile environment harassment, however, it may be difficult to determine whether a specific workplace is indeed hostile and whether the conduct in question constitutes discrimination as individuals perceive their working environments differently. For example, a sensitive employee may perceive a picture against an office wall as offensive while another employee may not. Also, men and women’s perceptions about what constitutes a hostile working environment differ. The question is what test to apply in determining whether a hostile working environment exists.

One must either apply a subjective test or an objective test for sexual harassment as a form of unfair discrimination. Using a subjective test, one simply considers the perceptions of the victim. If the victim experienced conduct as unwelcome and offensive, then it is hostile. The sanction or remedy would then reflect whether any perceptions on the part of the victim were overly sensitive or whether the victim in some way contributed to the incident through speech or conduct. There has been some criticism against this test as it could lead to liability of a harasser without fault, a concept foreign to our law. However, Dupper and Garbers caution against evaluating this criticism:

“The criticism of liability without fault holds true where an employer seeks to discipline an employee for harassment – an employee cannot be guilty of misconduct if no fault is involved. A subjective approach that eliminates the relevance of intent or negligence on the

191 Dupper & Garbers “Employment Equity Act” CC1-69.
192 Ibid.
193 Ibid.
194 Dupper & Garbers “Employment Equity Act” CC1-70.
195 Ibid.
196 See the remarks of Campanella “Sexual Harassment as Misconduct – Is There Strict Liability for Harassers?” 1994 ILJ 491.
part of the perpetrator, has to be rejected as a test for harassment in matters of discipline, including disputes about unfair dismissal, where the harasser was dismissed for harassment. However, as far as discrimination law is concerned (where the victim of harassment institutes proceedings against the harasser or the employer based on discrimination) the requirement of fault can fall by the wayside.\(^{197}\)

However, Dupper and Garbers do concede that although the subjective approach is in line with the broad approach to discrimination where fault only plays a role in determining the appropriate remedy, the fundamental problem remains that it still casts the net too wide.\(^{198}\) It is generally accepted that much of what goes on at work between the sexes is not necessarily harassment.

The second option is to adopt an objective test. Using this test, the usual “reasonable man” test in the position of the victim is used to determine whether hostile environment harassment has taken place. One looks at all the circumstances of the case and at the *mores* of society to determine whether the perpetrator foresaw, or should reasonably have foreseen, that his or her conduct constituted harassment.\(^{199}\) In the context of sexual harassment, the main criticism of this test is the use of the “reasonable man” test. It can be argued that the foundations of this test are found in a society traditionally dominated by heterosexual males and that the norms and values underlying the concept reflect male-dominated values.\(^{200}\) This means that this test might cast the net too narrowly in that it is not sensitive to the differing perceptions between the sexes.

A compromise between these two tests is the so-called “reasonable victim” test. The starting points of this test are the sex, perceptions and experiences of the victim, which are evaluated, but which do not discount the surrounding circumstances.\(^{201}\) Regardless of the test to be used, what often happens in practice is that the victim of sexual harassment is herself put on trial in an attempt to exonerate the employer. The defence often leads evidence on the victim’s speech, dress or sexual history to try and show that the sexual conduct complained of was welcome and not offensive. As a general rule, evidence of this nature is irrelevant to the question of whether the harassment complained of took place. This evidence may, however,

\(^{197}\) Dupper & Garbers “Employment Equity Act” CC1-70.

\(^{198}\) Dupper & Garbers “Employment Equity Act” CC1-71.

\(^{199}\) *Ibid.*

\(^{200}\) *Ibid.*

\(^{201}\) *Ibid.*
be relevant in the case of hostile environment cases. For example, if a woman complains of crude, sexual banter within a workplace, evidence of her initiation and participation in such behaviour may be relevant.\textsuperscript{202} However, this does not mean that she has to endure physical harassment. Dupper and Garbers conclude that it is a question of relevance and degree. The prior conduct, speech and dress of the victim must not only be relevant (there should be a similarity between the prior conduct and the nature of the harassment) but the degree of the harassment should also relate to the prior conduct, speech or dress.\textsuperscript{203}

Cooper argues that a more appropriate test would be one which recognises the EEA’s provision that harassment is a form of unfair discrimination and is located within the constitutional equality jurisprudence where the focus is on the effect of the conduct on the individual.\textsuperscript{204} She argues that the behaviour in question should amount to conduct which violates the dignity of the complainant and constitutes a barrier to equality in the workplace.\textsuperscript{205} She states that “[s]tandards of reasonableness, where required, should not be based on delictual notions of negligence, but on an objective weighing up of all relevant factors for a finding of whether the harassing conduct amounts to a violation of the dignity of the person and therefore constitutes a form of unfair discrimination”.\textsuperscript{206} On the basis of these criticisms, Cooper suggests that an alternative test for sexual harassment should address the following elements: whether the harassment is on a prohibited ground or grounds; whether the recipient has indicated that the conduct is unwelcome; the nature and extent of the conduct; and the impact of the conduct on the individual and whether it amounts to an invasion of the complainant’s rights and interests and a violation of dignity.\textsuperscript{207}

Regarding the first element, the EEA lists a number of grounds of unfair discrimination in section 6(1). The grounds that would be relevant to show sexual harassment would be the grounds of sex and gender, as conduct of a sexual nature is aimed at a person because of that person’s sex and gender. Sex, in discrimination law, means the physical or biological characteristics that distinguish male from female.\textsuperscript{208} An example of discrimination based on sex is when a woman is refused a job because of her reproductive role. Gender, however,
refers to the cultural and attitudinal aspects of sex, incorporating the concepts of masculinity and femininity.\textsuperscript{209} It promotes the traditional roles assigned by society to men and women: that women are the homemakers and caregivers and that men are the breadwinners. An example of discrimination based on gender is when a woman is overlooked for promotion because the company feels that men generally make better managers. Cooper argues that both the grounds of sex and gender are integral to the determination of sexual harassment and that it is unnecessary to distinguish between the two.\textsuperscript{210} She argues that sexual harassment is “discrimination on the basis of sex in that a person’s biological sex may determine his/her selection as the target of harassment; it is also discrimination on the basis of gender in that socially construed perceptions of the roles of the respective sexes can form a basis for the discriminatory conduct”.\textsuperscript{211} However, in many cases it would be difficult to identify whether the sexual conduct amounts to discrimination on the grounds of one’s sex or gender, therefore a rigid distinction should not always be drawn between the two. Although sexual harassment can be aimed at men or women and can take place between persons of the same sex, most targets of sexual harassment are women, not only because of their sex, but also because of their traditionally inferior position in society and in the workplace as a result of gender stereotyping.\textsuperscript{212}

The second element advanced by Cooper is whether the recipient has indicated that the conduct is unwelcome. Sexual harassment clearly differs from other forms of harassment in that sexual conduct in the workplace can be mutual and welcome. Only conduct that is unwelcome and offensive to the recipient can amount to unequal treatment and therefore be discriminatory in nature. Therefore, for the conduct to amount to sexual harassment, it can be argued that the recipient must have indicated that the behaviour in question was unwelcome.\textsuperscript{213} Cooper requires more than simply the subjective notion that the conduct was unwelcome as it would be difficult to ascertain what a person subjectively considers to be offensive. She argues that the test requires that the recipient objectively indicated by his or her behaviour that the conduct was unwelcome.\textsuperscript{214} Such behaviour might be express indications of a verbal nature, or non-verbal conduct such as walking away. The courts should, however, take the respective positions of the parties into account. For example, a

\textsuperscript{209} Ibid.
\textsuperscript{210} Cooper 2002 \textit{ILJ} 31.
\textsuperscript{211} Ibid.
\textsuperscript{212} Cooper 2002 \textit{ILJ} 32.
\textsuperscript{213} Ibid.
\textsuperscript{214} Ibid.
junior employee may struggle to indicate to her superior that his conduct is unwelcome as she fears losing her job. Cooper concludes that where the victim did not clearly signal that the conduct was unwelcome, the court will be required to make a credibility finding.\(^\text{215}\)

The third element requires an analysis of the nature and extent of the conduct. It is not simply any conduct which would be discriminatory in nature. Clearly, to constitute sexual harassment the conduct has to be sexual in nature and the conduct has to amount to harassment. Cooper states that the question is what standard should the conduct reach in order to amount to harassment, and therefore discrimination.\(^\text{216}\) Regarding the extent of the sexual conduct, our courts have held that harassment may be repetitive or an isolated incident.\(^\text{217}\) There is no consensus on what the standard of the single incident should be. Cooper recommends that a single objective standard be set, which all potentially harassing conduct would have to meet.\(^\text{218}\) She argues that the standard should be in line with the notion of unfair discrimination and be whether the conduct has the potential to cause prejudice which would amount to an infringement of the rights and interests of the person and an impairment of his or her dignity.

The final element of the test for sexual harassment as proposed by Cooper is an analysis of the impact of the conduct on the recipient and whether the conduct amounts to an infringement of dignity. In this regard, it is clear that conduct which may be harmful to one person, may not necessarily be harmful to another person. One has to look at the personality of the recipient, his or her position in the workplace or society and the position in the workplace of the wrongdoer.\(^\text{219}\)

Cooper concludes that, taking all these elements into account, the court must be satisfied that the conduct amounts to a form of unfair discrimination and that the test is whether “the conduct violates the dignity of the individual, in line with the foregrounding of dignity as

\(^{215}\) Ibid.
\(^{216}\) Cooper 2002 ILJ 33.
\(^{217}\) The Industrial Court in \textit{J v M supra} 757 stated that “[i]n the employment relationship the word[s] [sexual harassment] has a slightly different connotation and is very broadly unwanted sexual attention in the employment environment … a single act can constitute sexual harassment”.
\(^{218}\) Cooper 2002 ILJ 34.
\(^{219}\) Cooper 2002 ILJ 35.
fundamental to the achievement of equality in constitutional jurisprudence, and constitutes a barrier to equality in the workplace”. 220

It is submitted that a more appropriate test for sexual harassment would be one which incorporates the elements as set out above. Since sexual harassment forms part of discrimination law, a specific test for sexual harassment should be fashioned within this broad framework. The Code seems to have been drafted in isolation and not with the overall purpose of the EEA and the specific provisions of section 6 in mind. Notwithstanding the criticisms of the test for sexual harassment as contained in the Code, the EEA clearly requires that it must be taken into account when interpreting the EEA. Also, because the EEA situates harassment within discrimination law and because the EEA has not provided for a definition of sexual harassment, the drafters of the EEA have left the way open for the courts to determine the test for sexual harassment.

220 Ibid.
Chapter 5  The employer’s liability

One of the most important issues in sexual harassment cases is the question of liability. In many cases the employee who has been harassed will want to take action against his or her employer, as this will more likely be the most fruitful legal route to follow. It has been shown above that the EEA only regulates the relationship between employers and employees. This creates the impression that if an employee has been harassed by a fellow employee, and not by the employer, the employee would not be afforded protection by the EEA but would have to seek a remedy in the equality courts or civil courts. Section 60 of the EEA specifically deals with this issue by making the employer liable for the prohibited acts of the employee in certain circumstances. Before any employer will be held liable for the acts of all employees, one needs to look at the responsibilities placed on the employer and the employee-victim of harassment by section 60. Cooper notes that the “notion underlying the provisions that makes liability dependent on employers’ introduction of preventative or ameliorative measures is reflective of the approaches in other jurisdictions and is consonant with the remedial and educative goals of discrimination law to achieve a discrimination free environment”. However, she praises the fact that liability is specifically dealt with in the EEA as opposed to other jurisdictions and that “this has the advantage of clarity and certainty, especially in relation to the question of the applicability of common law notions of vicarious liability to sexual harassment jurisprudence”.

Section 60(1) provides:

“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.”

The victim need not be the one to report the alleged harassment to the employer. This means that if the victim is too afraid or embarrassed to report the harassment, a co-employee, trade union official or even a friend or family member may bring the alleged conduct to the attention of the employer.

221 Cooper 2002 ILJ 39.
222 Ibid.
223 Ibid.
Another interesting point concerning this section is the meaning of the word “immediately”. Cooper points out that there are probably two reasons for the use of this term: firstly, to place employers in a position to take swift action to resolve the matter; and secondly, that the employer should be informed expeditiously of conduct for which he or she may be held liable. The courts have interpreted the word “immediately” according to its literal meaning of “without delay” as well as to mean “as soon as is reasonably possible”, depending on the context. Cooper believes that the more flexible standard of “as soon as is reasonably possible” should be applied. It is submitted that this is the correct interpretation taking into account the sensitive nature of sexual harassment, especially if the complainant is a junior employee or the wrongdoer is the complainant’s supervisor. Such complainants might be afraid to report the alleged conduct without delay. However, the complainant must still act as soon as is reasonably possible in the circumstances. Cooper concludes this point by saying that “the need for swift action and justice to the employer who might be deemed liable must be weighed up against the sensitivities of the employee in the particular case”.

In the first judgment dealing with sexual harassment as a form of unfair discrimination in terms of the EEA, *Ntsabo v Real Security CC*, Pillay AJ found that the requirement that the allegations be reported immediately cannot be construed to mean within minutes of the incident complained of. He provides that the requirement will have been met if done within a reasonable time in the circumstances. Also, what is a “reasonable time” will differ from case to case and will be determined by the prevailing circumstances. In this case the victim did not report the harassment to her employer immediately, but first went home and reported the matter to her family in order to obtain advice from the elders and the males in the family, as was custom in her extended family. The judge accepted that the victim’s failure to report the problems directly and immediately to her employer would not negatively affect her evidence.

It is also necessary to consider the meaning of the words “while at work”. Section 60 introduced a no-fault statutory liability which is appropriate to discrimination law and takes the place of the common law vicarious liability of the employer. Therefore it would not be

224 Ibid.
225 See Cooper 2002 ILJ 39 for a discussion of cases on this point.
226 Cooper 2002 ILJ 40.
228 In *Ntsabo v Real Security CC supra* the court stated that where the employer allows and condones, either directly or by inaction, conduct which is or leads to a violation of the EEA, then the employer is vicariously liable for any damages flowing from such conduct. It is submitted, however, that the EEA does not envisage the
open for the employer to argue that sexual harassment is a personal and private activity falling outside the scope of the employment relationship. Also, section 6 of the EEA specifically makes the employer responsible for ensuring a harassment free workplace. Therefore, the term “while at work” should not be interpreted by applying the test for vicarious liability of employers, namely that the conduct should take place “during the course and scope of employment”. Cooper interprets “while at work” to mean at the workplace or while the employed parties were engaged in activities relating or connected to work. It will certainly not always be easy to determine whether the conduct took place at work, especially where the employee parties are involved in work activities outside the normal business premises or outside office hours, such as conferences or work social functions. It is submitted that it will be a question of fact in each case as to whether the harassing conduct occurred “while at work”.

Subsections (2) and (3) make it clear that the employer will be liable for the contraventions of the Act’s provisions by an employee unless the employer fulfills certain obligations. Subsections (2) and (3) provide as follows:

“(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.”

Subsection (2) affords the employer an opportunity to address the problem thereby escaping liability. It is submitted that the employer should consult not only the direct parties involved (the alleged perpetrator and the victim), but also the trade union representative of the direct parties should they be members of the union and should they request such representation, or a co-employee of the direct parties should they require assistance from a fellow employee. To determine the “necessary steps” to be taken by the employer to eliminate the conduct and comply with the provisions of the EEA, one must first determine whether the employer has a sexual harassment policy in place. The employer should then follow the steps outlined in an

employer’s liability to be in the form of common law vicarious liability due to the wording of the section as discussed below. Perhaps simply a new form of vicarious liability is created.

Cooper 2002 ILJ 40.

Cooper 2002 ILJ 41.
existing policy. As seen above, the Code of Good Practice on the Handling of Sexual Harassment Cases suggests that procedures could be informal or formal. Informal procedures could involve counselling the perpetrator. Where this informal procedure does not provide a satisfactory outcome, or where the alleged harassment is severe or persistent, the employer would be required to institute formal proceedings. Such formal proceedings would generally involve a disciplinary hearing. If the perpetrator is dismissed for misconduct after such a hearing, the employer must ensure that the dismissal was substantively and procedurally fair in order to avoid an action for unfair dismissal. Where there is no policy in place, the employer will have to be proactive in dealing with the matter by ensuring that barriers to inequality are removed as required by the EEA. It is recommended that each employer draw up such a policy as this can be seen to be a step taken by the employer in complying with the EEA.

If the employer does not take the necessary steps referred to in subsection (2) and it is proved that the employee has contravened the relevant provision, subsection (3) provides that the employer must be deemed also to have contravened the provision.

Subsection (4) states as follows:

“(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 practicable to ensure that the employee would not act in contravention of this Act.”

The effect of subsection (4) is that employers should not be held liable when they have taken action to ensure that harassing conduct does not take place. This section seems to refer to action taken by the employer prior to the harassment incident.²³¹ According to Cooper, the “reasonably practicable” standard appears extensively in labour law, especially in relation to health and safety at work where it requires “the balancing of the severity of the hazard or risk, the state of knowledge, the availability and suitability of means to remove the risk and the cost of doing so”.²³² There are indeed certain similarities between health and safety issues and sexual harassment. Sexual harassment can also cause harm to the victim and can create a hostile, stressful and unproductive work environment. There are, however, substantial differences between the two with regard to the state of knowledge, the availability and

²³¹ Cooper 2002 ILJ 42.
²³² Ibid.
suitability of means to remove the risk and the cost of measures to maintain a risk free
environment. Cooper points out that the costs associated with implementing health and
safety measures are far greater than those of introducing a sexual harassment policy, which is
one of the main requirements in relation to sexual harassment. The Code gives extensive
guidelines to employers as to what the policy should include and how it should be
implemented. The costs of formulating and implementing a sexual harassment policy,
which is the minimum requirement for meeting the reasonably practicable standard, are far
less than measures required in the health and safety legislation due to the technical nature of
such measures.

The burden of proof in matters of sexual harassment is dealt with slightly differently than in
the constitutional jurisprudence. In constitutional jurisprudence, the onus to establish the
existence of discrimination is on the complainant. Section 9(5) of the Constitution
provides that where the discrimination is on a listed ground, it is unfair unless the respondent
establishes it to be fair. Where the discrimination is not on a listed ground, therefore, the
complainant will have to establish unfairness. The EEA adopts a similar approach although
the reversal of the onus occurs differently. The EEA places the burden on the respondent to
prove that the conduct was not unfair when dealing with both the listed and unlisted grounds
of discrimination. Section 11 of the EEA provides that wherever unfair discrimination is
alleged, the employer against whom the allegation is made must establish that it is fair. The
enquiry, however, must be into unfair discrimination as a whole as sexual harassment can
never be fair. The question arises as to who would then bear the overall burden of proof.
Cooper suggests that since the labour courts have not followed the constitutional paradigm as
far as the question of onus is concerned, it could be that they might require the complainant to
discharge the burden.

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 payment of compensation by the employer to that employee, payment of damages
by the employer to that employee, an order directing the employer to take steps to prevent the

233 Cooper 2002 ILJ 43.
234 See paragraph 35 above on what the policy should include and the steps to be taken by the employer to
implement the policy.
235 Cooper 2002 ILJ 43.
236 Cooper 2002 ILJ 44.
same unfair discrimination or a similar practice occurring in the future in respect of other employees.\textsuperscript{237}

In \textit{Ntsabo v Real Security CC},\textsuperscript{238} a female security guard instituted action against her employer for failing to act when she complained about sexual harassment committed by her supervisor and for unfair dismissal in the form of constructive dismissal. She alleged that the two-week period of harassment culminated in an incident on 15 December 1999 when the perpetrator walked into the guard room at the Khayelitsha Day Hospital where they were both stationed. He then locked the door, went to the toilet, came out, stood behind her, simulated a sexual act and ejaculated on her skirt. The victim went home and reported the matter to her family and her brother was notified in accordance with what seems to be their family practice. The brother complained to the employer on two occasions and each time a representative of the employer promised that action would be taken. However no steps were taken to investigate the complaints and the employer later denied that the victim or her brother had even complained at all.

This case highlights the serious effects that sexual harassment can have on female employees. The victim in this case suffered severe depression, had recurring nightmares, she withdrew socially and became extremely fearful and angry. The victim felt that she had no choice but to resign from her employment due to the fact that the employer did not make any attempt to assist her. The court noted that constructive dismissal does not necessarily refer exclusively to proactive conduct by the employer, but that an omission to deal with an intolerable situation would also constitute constructive dismissal. The court found that the inaction of the employer was unfair and led to a situation that became an intolerable environment for the victim to continue employment.

The court found that the actions of the perpetrator constituted a contravention of the provisions of the EEA. It also found that these actions were brought to the attention of the employer who did not attend to the issue as envisaged in section 60(2) for at least five to six weeks after being so informed and indeed turned a blind eye to the complaint. The court therefore found that the employer contravened the same provisions as envisaged in section 60(3). The court found that this was not only a disregard for the law, but an unacceptable

\textsuperscript{237} S 50(2) of the EEA.
\textsuperscript{238} \textit{Supra}. 
invasion of the victim’s privacy and a violation of her constitutional rights. The court awarded her an amount of R12 000,00 as compensation in respect of unfair dismissal (she was earning R1 000,00 per month at the time of her dismissal), an amount of R20 000,00 for future medical costs and a sum of R50 000,00 in respect of general damages.
Chapter 6  Sexual harassment as a form of misconduct

6.1  Introduction

It has been established that employers have a duty to protect their employees from harassment by other employees and by others who have dealings with the business. Sexual harassment committed by an employee constitutes misconduct and can be a dismissible offence. The Industrial Court in *J v M Ltd*\(^{239}\) upheld the dismissal of a senior executive for conduct of a sexual nature towards a female employee. This case began to define the legal parameters of the wrong of sexual harassment. Recognising that sexual harassment could occur between members of the opposite or the same sex, the court defined sexual harassment as:

“unwanted sexual attention … [which] in its narrowest form … occurs when a woman (or man) is expected to engage in sexual activity in order to obtain or keep employment or obtain promotion or other favourable working conditions. In its wider view … it is any unwanted sexual behaviour or comment which has a negative affect on the recipient. Conduct which can constitute sexual harassment ranges from innuendo, inappropriate gestures, suggestions or hints or fondling without consent or by force”\(^{240}\).

The applicant was a senior executive in a large company and had approximately 350 employees reporting to him. A complaint was lodged against the applicant that he had sexually molested and harassed a female employee against her will. The employer dismissed the applicant without conducting a formal disciplinary hearing and the applicant claimed that his dismissal was procedurally unfair. The court held that sexual harassment within the workplace is a serious matter and demands attention from employers. It said that, depending on its form, sexual harassment violates the right to integrity of body and personality which belongs to every person and is protected in our legal system both criminally and civilly. The court pointed out that this is aggravated in the employment context because many victims are afraid to lay a complaint against the wrongdoer because they are afraid of the consequences.\(^{241}\) There was a dispute of fact as to whether the applicant had been previously warned about his amorous behaviour at the workplace. The applicant denied that he had

\(^{239}\) *Supra*.

\(^{240}\) 757D-G.

\(^{241}\) 7571-758D.
received any warnings about sexual harassment. The court did however accept that there was
evidence of previous incidences of sexual harassment committed by the applicant and that the
general manager had previously discussed this behaviour with the applicant. Regarding the
applicant’s contention of procedural unfairness, the court held that he had been given a
reasonable opportunity to state his case and the court was satisfied that a hearing or enquiry
would not have resulted in a different effect. The court held that sexual harassment was
unacceptable at any level and that no warning or counselling was required, especially not at
senior managerial level. The court also expressed the view that it should be careful not to
substitute its own assessment for that of the employer, especially with regard to the standard
of conduct required by employers from employees.

6.2 Test for sexual harassment as a form of misconduct

South African cases have shown an inconsistent approach as to which test for sexual
harassment should be adopted. In J v M Ltd, the court described sexual harassment as “any
unwanted sexual behaviour or comment which has a negative effect on the recipient”. Campanella points out that an IMSSA arbitration award, Pick ‘n Pay Stores Ltd v Individual, provided that an employee would be guilty of sexual harassment if the victim of harassment claims that she (or he) found the harasser’s conduct offensive or unwanted. He further points out that the award indicated that it did not matter if the harasser said that he (or she) did not mean to give offence or that he genuinely but mistakenly misread the signals and thought that his actions would be welcome. This case therefore suggested a subjective test from the victim’s perspective.

In Pretorius v Britz, the commissioner accepted the definition found in the EEOC
guidelines in the United States. An essential factor in identifying sexual harassment is
whether the sexual attention was unwanted. Employees who claim to have been harassed

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242 760E.
243 761I.
244 761F-762D.
245 Supra 757F.
246 1994 3 1 ARB 8.25.136.
247 Campanella 1994 ILJ 491.
248 Ibid.
249 1997 5 BLLR 649 (CCMA) 652H-653B.
must subjectively have felt that the conduct in question was offensive. Grogan points out, however, that these subjective feelings must be assessed against an objective standard.\textsuperscript{250} The commissioner in \textit{Gregory v Russells (Pty) Ltd}\textsuperscript{251} referred to the debate between the respective proponents of a subjective as opposed to an objective test in determining the existence of sexual harassment. He states that the subjective test requires that the conduct be unwanted in the eyes of the victim of harassment and that the objective test requires at least that the harasser ought reasonably to have known that the conduct was unwelcome. He states that the objective standard seems to be the preferable approach as it is more consistent with standards elsewhere which do not ascribe liability without fault. The commissioner points out that in South Africa’s multicultural society, it is to be expected that the objective test’s “ought reasonably to have known” requirement is going to be the deciding factor in a number of workplace altercations and that it will be up to the courts to decide on a factual basis, case by case, which forms of action constitute harassment.

Brand C in \textit{Gerber v Algorax (Pty) Ltd}\textsuperscript{252} supports the view that the test to be applied to determine whether the conduct constitutes sexual harassment should be an objective one. He records that the test is whether the advances were welcome or whether the accused reasonably believed them to be so. Grogan points out that the Labour Appeal Court also took this view in \textit{Reddy v University of Natal}.\textsuperscript{253}

Against this background, item 3 of the Code attempts to provide a suitable definition of sexual harassment. This definition has received much criticism.\textsuperscript{254} Dupper and Garbers refer to the Code as “muddled” as it adopts a mixture of a subjective victim-based test (unwelcome in the mind of the victim) and an objective perpetrator-based test (unacceptable in the mind of the reasonable person in the position of the perpetrator).\textsuperscript{255} This test introduces fault into the definition. As mentioned above, the existence of fault is necessary where employers wish to discipline their employees for sexual harassment. The leading case of \textit{J v M Ltd}\textsuperscript{256} must be read as requiring fault when dealing with sexual harassment as a form of misconduct. Here, the court found that the harasser knew that his behaviour was unacceptable and that it was not

\textsuperscript{250} Grogan \textit{Workplace Law} 164.
\textsuperscript{251} 1999 20 ILJ 2145 (CCMA) 2168B.
\textsuperscript{252} 1999 20 ILJ 2994 (CCMA) 3005F.
\textsuperscript{253} 1998 19 ILJ 49 (LAC).
\textsuperscript{254} See paragraph 3 5 2 for a discussion of such criticism.
\textsuperscript{255} Dupper & Garbers “Employment Equity Act” CC1-72.
\textsuperscript{256} \textit{Supra}. 
right for him to do what he was doing. Therefore, for the purposes of determining cases relating to unfair dismissal, the test will be instructive. However, in order to determine sexual harassment as a form of unfair discrimination, fault is not required. Dupper and Garbers submit that the “reasonable victim” test as discussed above is more appropriate in cases where it has to be established whether harassment is serious enough to constitute discrimination.\textsuperscript{257}

6.3 When does misconduct amount to sexual harassment?

When dealing with sexual harassment as a disciplinary offence, the employer must prove that the conduct amounted to sexual harassment and should hold a proper disciplinary inquiry. If it is established that the parties had merely engaged in idle sex talk and the employer cannot determine who had started the conversation, this does not amount to misconduct. In \textit{Sadulla v Jules Katz & Co Ltd}\textsuperscript{258} an employee was dismissed due to idle sex talk between two willing and consenting adults. The court found the dismissal to be procedurally and substantively unfair as this did not constitute misconduct.

To determine whether the employee’s alleged conduct constitutes sexual harassment, regard may be had to the Code of Good Practice on the Handling of Sexual Harassment Cases promulgated in terms of the LRA.\textsuperscript{259} The CCMA in \textit{Gerber v Algorax (Pty) Ltd}\textsuperscript{260} found that although this code does not seek to define sexual harassment for the purpose of discipline \textit{per se}, the definitions contained therein are instructive. The CCMA noted that it ranges from the obvious physical contact, through verbal forms such as innuendoes, suggestions and hints, comments with sexual overtones, sex-related jokes or unwelcome graphic comments made about a person’s body made in their presence or directed at them, inappropriate enquiries about a person’s sex life, unwelcome gestures, indecent exposure and the unwelcome display of sexually explicit pictures and objects.\textsuperscript{261}

\textsuperscript{257} Dupper & Garbers “Employment Equity Act” CC1-73.
\textsuperscript{258} 1997 18 ILJ 1482 (CCMA).
\textsuperscript{259} See paragraph 3 5 above for a full discussion on the provisions of this code.
\textsuperscript{260} Supra 3004A-C.
\textsuperscript{261} See below for a discussion on the legal nature and status of a code of good practice.
In *Consolidated Wire Industries Limited v MWU*\(^{262}\) the grievant was a credit control manager who was dismissed for repeated incidents of sexual harassment. The arbitrator found that he had created a hostile working environment, persisted in unwelcome sexual advances and innuendoes, used abusive, derogatory and offensive language towards female employees, indecently exposed himself to female employees and physically touched and groped the private parts of a female employee.\(^{263}\)

According to Grogan, a single assault will not necessarily amount to sexual harassment, even if it is sexually motivated.\(^{264}\) Such conduct will not be condoned, however, as it amounts to assault. In *Ngantwini v Daimler Chrysler*\(^{265}\) the applicant was dismissed for grasping a female colleague’s breast and forcing himself against her for sexual gratification. The applicant denied this and claimed that he had patted her on the shoulder to console her after an argument. The commissioner found that the complainant’s evidence was more probable than that of the applicant. He found that, on the facts, the applicant was guilty of assault, and not of sexual harassment. He held that simply because the assault was sexually motivated, did not alter the fact that it was assault. He reasoned that it was not a true example of sexual harassment since, in its ordinary usage, that term implies conduct of a continuing nature. He held that it was not a case of sexual harassment but rather a case of a man who, apparently overcome by an irresistible urge, grabbed a woman, who was a stranger, for purposes of sexual gratification in a public place in the hope that she would not take exception. The dismissal was upheld as assault is clearly a dismissible offence. It is respectfully submitted that the commissioner’s reasoning is flawed. The commissioner accepted the victim’s version that the applicant had grasped her breast and forced himself on her for sexual gratification. If such conduct does not constitute sexual harassment, then what does? It is conceded that conduct may simultaneously amount to sexual harassment as well as an assault, but to maintain that such conduct did not amount to sexual harassment is clearly wrong. Also, it is settled law that sexual harassment need not necessarily imply conduct of a continuing nature.\(^{266}\) Therefore, the commissioner’s reasoning that sexual harassment implies conduct of a continuing nature is also not correct.

\(^{262}\) 1995 4 ARB 8.25.1.
\(^{263}\) Finnemore & Van Rensburg *Labour Relations* 435.
\(^{264}\) Grogan *Workplace Law* 164.
\(^{265}\) 2000 9 BALR 1161 (CCMA).
\(^{266}\) *J v M Ltd* supra 757F-G.
The sexual conduct does not have to be directed at a fellow employee in order to constitute a dismissible offence. In *Pick 'n Pay Stores Limited v Individual* the complainant was not a company employee, but worked for a supplier company. A manager that she regularly conducted business with sexually harassed her and the manager was subsequently dismissed. However in this case, although sexually harassing someone from a supplier company may warrant dismissal, the arbitrator found mitigating factors in favour of the manager in that he had worked for the company for 15 years with a clean disciplinary record and that he immediately desisted from his conduct once he realised it was unwelcome. Also, the company had no policy on sexual harassment. The commissioner ordered reinstatement, but the company had to issue an internal memorandum outlining the facts of the case and emphasising that the reinstatement in no way condones his misconduct.

The CCMA has also held that, for sexual harassment to constitute a dismissible offence, the offensive conduct need not have taken place at the workplace. In *NEHAWU obo Barnes and Department of Foreign Affairs* the applicant was a diplomat in the service of the Department of Foreign Affairs. He sexually harassed cabin attendants on an international flight to London. He was charged with misconduct and was dismissed after a disciplinary hearing. He referred the matter to the CCMA and challenged the validity of his dismissal on the grounds that the misconduct was committed outside the workplace. The commissioner dismissed the application and found that the applicant’s actions would certainly have repercussions for the workplace.

### 6.4 Constructive dismissal

An employer may also be held to have constructively dismissed an employee, if the employer was aware of the sexual harassment and failed to control such behaviour, and the employee is forced to resign. In *Pretorius v Britz* the employee was employed as the personal secretary of Britz. She resigned after having been subjected to constant sexual harassment from Britz. She claimed constructive dismissal. She succeeded and was awarded an amount

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267 Supra.
268 2001 10 CCMA 8.25.1.
269 Grogan *Workplace Law* 164.
270 Supra.
equal to nine months’ salary. Also, in the case of *Intertech Systems (Pty) Ltd v Sowter* the employee resigned following severe sexual harassment by a fellow employee. The court found that the employer’s conduct towards the employee was reprehensible and insupportable. The court held that the employee had to be compensated for the egregious invasion of her employment security and her dignity which the company perpetrated. The company was ordered to pay an amount equivalent to 12 months’ salary.

### 6.5 Appropriateness of sanction of dismissal

The test for determining the appropriateness of the sanction of dismissal for sexual harassment is whether or not the employee’s misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. The relationship of trust between the parties lies at the heart of the employment relationship and the destruction of that relationship renders continuation of the employment contract intolerable. The court in *Reddy v University of Natal* stated the following: “It is obviously not every act of sexual harassment which will lead to dismissal. Dismissal was, nevertheless, the appropriate remedy in this case, where the harassment was of an aggravated kind”. In this case the appellant was employed by the respondent as a security guard. He was charged with sexual harassment of a colleague and other offences and was found guilty and dismissed. The court upheld the dismissal of the appellant. The court held that not all acts of sexual harassment would lead to dismissal, but that it was the appropriate remedy in this case. The harassment took place over a period of four hours and the appellant showed no remorse. He even fabricated a story that the complainant had consented to his behaviour.

It is clear from Reddy’s case that sexual harassment, like other forms of misconduct, renders employees liable to disciplinary action, and that the appropriate sanction in a case of sexual harassment will depend, as in other cases of misconduct, on the severity of the conduct in

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271 1997 18 ILJ 689 (LAC).
272 705H.
274 See *Central News Agency v CCAWUSA* 1991 12 ILJ 340 (LAC) and *Anglo American Farms supra*.
275 Supra.
276 52H.
question. For example, to dismiss an employee for displaying a calendar depicting women in bathing costumes in his office would probably be excessive. Although the display of such a calendar might well constitute hostile environment harassment, the appropriate form of action could perhaps be to request the employee to remove the calendar and issue an apology to any persons that may have been offended. If such employee refused to remove the calendar, then further action could be considered.

The principles of progressive or corrective discipline are well-established in our case law, and these principles have been reinforced by the provisions of schedule 8 to the LRA, namely the Code of Good Practice: Dismissal. The code applies to all cases of discipline and dismissal, therefore would include sexual harassment as a form of misconduct. The commissioner in *Maepe and Commission for Conciliation, Mediation and Arbitration* set out the relevant portions of this code:

- Informal advice and correction is the best and most effective way for an employer to deal with minor violations of work discipline.

- Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable.

- Repeated misconduct will warrant warnings, which themselves may be graded according to degrees of severity. More serious infringements or repeated misconduct may call for a final warning, or other action short of dismissal. Dismissal should be reserved for cases of serious misconduct or repeated offences.

- Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or willful damage to the property of the employer, willful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer, and gross insubordination.

Aside from schedule 8, we have seen that the Code of Good Practice on the Handling of Sexual Harassment Cases is also applicable, which envisages both informal and formal procedures for addressing sexual harassment and which attempts to define sexual harassment. The Code provides *inter alia* that serious incidents of sexual harassment or

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277 2002 23 ILJ 568 (CCMA) 578B-E.
278 See paragraph 3 5 above for a detailed discussion of the provisions of this code.
continued harassment after warnings are dismissible offences, and as examples of such serious incidents, it refers to sexual assault, rape, a strip-search and *quid pro quo* harassment.

6.6 Procedural fairness

For a dismissal to be fair it must be both substantively fair and procedurally fair. When considering whether the employer acted procedurally fairly, the CCMA or the courts are enjoined to have regard to the Code of Good Practice: Dismissal which serves as a guide to both employers and the CCMA. Item 4(1) reads as follows:

“Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.”

Regarding the legal nature and status of this code, the Labour Court has held that a code is not a law in itself, and that a contravention of one of its provisions by someone does not render that person directly liable to any form of proceedings. Further, compliance with a code on matters of discipline and dismissal will be material to an employer’s claim that he or she acted reasonably and fairly although, as the code does not have the force of law, failure to comply with it, will not make the action in question automatically unfair, for there may be good reasons for not complying on the facts of a particular case.279

Also, in *Motsenyane v Rockface Promotion*280 the CCMA stated that the code relating to dismissal serves only to guide both employer and the CCMA and stated the following:

“I do not believe that the code of good practice was intended to promote that kind of formalism in the application by an employer of the applicable rules and standards. On the
contrary, I believe that the intention in the code was to get away from the formalistic approach for which the Industrial Court was at times criticised in requiring a too literal compliance with an employer’s rules and procedures.”

Therefore, although the code serves as a valuable guide, the CCMA should be more concerned with substance rather than formality when deciding whether there was compliance with the code. The test for procedural fairness can be gleaned from the Labour Appeal Court decision of *Anglo American Farms t/a Boschendal Restaurant v Komjwayo:*[^281]

“… At disciplinary proceedings presided over by laymen, it cannot be expected that all the finer niceties which a formal court of law would adopt would always be observed… Nor is an employee’s right to a fair hearing an inflexible package, whose rules are to be applied mechanically to every situation. A certain amount of flexibility must be allowed. The test is whether the hearings were fair when the proceedings are judged in their broad perspective.”

[^281]: Supra 587D-E
Chapter 7 Conclusion

Sexual harassment in the workplace is a serious problem and a significant obstacle to access to many sectors of the labour market. Despite the high figures of sexual harassment, few South African court cases and little of the legal literature deals with this subject. Few victims of harassment actually report such harassment for fear of losing their jobs or being ridiculed. The Constitution determines that no one shall be discriminated against and this provision includes a person’s right to work without harassment or discrimination. It is therefore imperative that employers provide all employees a safe environment without discrimination. Employers are required to adopt a policy on sexual harassment, to communicate it to all employees and to ensure that the policy is followed. If harassment nevertheless takes place, the procedure and disciplinary process prescribed in the policy must be followed.

The Code of Good Practice on the Handling of Sexual Harassment Cases is a valuable guide to both employees and employers alike. Although the Code has limited application with regard to the appropriate test for sexual harassment, its merit lies in its detailed description of the forms of conduct constituting sexual harassment and in its guidelines for the implementation of a policy on sexual harassment in the workplace. It also provides a useful procedure for parties to follow in the event of allegations of sexual harassment.

Although the EEA provides that harassment is a form of unfair discrimination, it does not provide any further insight into the subject of sexual harassment. It will therefore be left to the courts to interpret and develop the law relating to sexual harassment as a form of unfair discrimination. The landmark ruling of Ntsabo v Real Security CC\(^{282}\) should send out a warning to employers to take proactive steps to eliminate and investigate sexual harassment allegations or otherwise face substantial claims for compensation.

\(^{282}\) Supra.
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