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TEMPLARS ThoughtLab

Employers Responsibility for Dealing with Sexual Harassment in the Workplace

Introduction

Sex in the workplace is a private affair between two consenting adult staff and in many parts of the world employers do not see the need to interfere or talk about it. However, the recent Me-Too Movement¹ raised public awareness to the inconvenient truth that there is a prevalence of non-consensual sex, sexual abuse and sexual harassment in the workplace which has rendered the workplace a hostile and unsafe environment.

A recent survey of 996 women showed that 38% experienced sexual harassment in the workplace. 72% of victims were harassed by a superior or a figure of authority, 37% of sexually harassed women say that the incident negatively affected their performance at work and career advancement. 7 in 10 victims do not think their company take sexual harassment seriously.² A BBC survey³ of 2,000 employees showed that most victims of sexual harassment (63% women and 79% men) did not report the violation for fear of retaliation or concerns that the issue will not be addressed, and the culprits will go unpunished.

Understanding Sexual Harassment

Sexual harassment is a broad concept ranging from the obvious cases to the not so obvious and nuanced cases. The International Labor Organization (ILO) defines sexual harassment as a sex-based behavior that is unwelcome and offensive to its recipient. It is defined as any behavior of a sexual nature that affects the dignity of women and men, which is considered as unwanted, unacceptable, inappropriate and offensive to the recipient, and that creates an intimidating, hostile, unstable or offensive work environment.

¹ <https://www.britannica.com/topic/Me-Too-movement>

² A 2018 survey by Stop Street Harassment. <https://inspiredelearning.com/blog/sexual-harassment-in-the-workplace-statistics/>

³ <https://inspiredelearning.com/blog/sexual-harassment-in-the-workplace-statistics/>

In line with recent trends and growing public awareness, the government at the Federal and State levels have attempted to legislate on sexual harassment.⁴ The Lagos State Law appears to be the most comprehensive statutory definition of sexual harassment. The Law defines Sexual Harassment as unwelcome sexual advances, request for sexual favors, and other visual, verbal or physical conduct of a sexual nature which when submitted to or rejected (a) implicitly or explicitly affects a person's employment or educational opportunity or unreasonably interferes with the person's work or educational performance (b) implicitly or explicitly suggests that submission to or rejection of the conduct will be a factor in academic or employment decision or (c) creates an intimidating, hostile or offensive learning or working environment.

So, let's look at some of the actions and subtle conducts that may constitute sexual harassment at work that you may not have thought about:

- Quid pro quo i.e. the exchange of sexual favour for work related favour
- asking a colleague to hug you against her/his wish
- brushing up against or groping a colleague "accidentally" or "deliberately"
- paying excessive attention and staring at a colleague's body
- making comments about a colleague's sexual orientation
- telling lewd jokes or sharing unsolicited stories about your sexual experiences
- sharing or displaying unwanted, suggestive, or lewd emails, letters, posters, or images of a sexual nature or displaying screensavers of a sexual nature
- inappropriate and suggestive touching, kissing, rubbing, or caressing of a colleague.
- repeatedly asking for dates or sexual favours despite being rebuffed
- making sexually offensive gestures, remarks, or facial expressions.

The challenge of proving sexual harassment

Proving sexual harassment is a herculean task. This is mainly because a lot of the sexual harassment incidents occur in private and under circumstances that do not afford the victim the opportunity to gather material evidence. As a result, several times cases of sexual harassment suffer serious set backs on account of lack of evidence.

To ameliorate this problem, the International Labor Organization (ILO) Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)⁵ has laid down a "reasonableness grounds test"⁶ which the National Industrial Court of Nigeria applied in ***Ejike Maduka vs. Microsoft***⁷ to determine whether a female employee is or has suffered sexual harassment.

Applying this Test, a female employee is deemed to have suffered sexual harassment when she has reasonable grounds to believe she's being subjected to unwelcome sexually determined behavior, such as physical contact and advances, sexually colored remarks, showing pornography and sexual demands, whether by words or actions and she has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or it creates a hostile working environment.

Statutory Protection Against Sexual Harassment

Sexual harassment constitutes discrimination on grounds of sex, inhuman and degrading treatment and a lack of respect for the dignity of the employee under Sections 34⁸ and 42 of the Constitution of the Federal Republic of Nigeria (CFN) as amended. A female employee who perceives that she has suffered sexual harassment

can initiate a civil action to protect her constitutional right. The National Industrial Court of Nigeria (NIC) has affirmed this position in the case of **Ejike Maduka vs. Microsoft** that sexual harassment in the workplace could be gender-based discrimination and an abuse of right to dignity of human person.

Sexual harassment is also a criminal offence under various laws of the government at the Federal and State levels. The Lagos Law provides that any person who sexually harasses another commits a felony and is liable on conviction to imprisonment for three (3) years.⁹

The Employer's Duty of Care & Potential Liability

Sexual harassment in the workplace by its nature can only be committed by an employee against another employee. The various laws made by the government at the Federal and State levels focus on the employee who is the harasser and do not attach any liability on the employer.

However, following the introduction into our labour jurisprudence of concepts like unfair labour practice, international best practices in labour, international labour standards under the Third Alteration of the 1999 Constitution employers now owe a duty of care to their employees to keep the workplace safe and free of sexual predators. Under the new labour jurisprudence sexual harassment is regarded as part of the universe of unfair treatments which employees are exposed to at the workplace and which, if not properly addressed, could potentially give rise to a claim of unfair employment/labour practices¹⁰ against the employer. Unfair employment/labour practices simply put, are practices in the workplace that do not conform with best local and international labour practices.¹¹

Recently, the National Industrial Court of Nigeria (NICN) held a multinational corporation and its Nigerian subsidiary vicariously liable for not taking any administrative action to thoroughly investigate the allegations of sexual harassment made against the country manager. In that case, the court held that by "*the inaction and silence of the [corporations], they both tolerated and ratified the [country manager's] conduct which is against their policy of prohibition and nontolerance of sexual harassment, gender discrimination and retaliatory action.*". The NICN declared further that "*they are both in breach of their duty of care and protection to the applicant and are vicariously*

⁴ The Violence Against Person Prohibition Act, 2015 (VAPP Act) in Section 46 states that sexual harassment means "unwanted conduct of a sexual nature or other conduct based on sex or gender which is persistent, serious and demeaning, humiliates or creates a hostile or intimidating environment and this may include physical, verbal or non-verbal conduct." See similar provision in Section 63 of the Ekiti State Gender – Based Violence (Prohibition) Law 2019.

⁵ ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Convention on the Elimination of All Forms of Discrimination against Women, 1979; African Charter on Human and Peoples' Rights, 1981

⁶ CEDAW General Recommendation Number 19 of 1992 defines "sexual harassment" to include: "*such unwelcome sexually determined behavior as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment.*"
7 19 December 2013, Case No. NICN/LA/492/2012

⁸ Section 34 of the Constitution provides that every individual is entitled to respect for the dignity of his person; no person shall be subject to torture or inhuman or degrading treatment.

⁹ Section 264 (1) of the Criminal Law of Lagos State, 2011. See similar provision in Section 262 (1) Kaduna State Penal Code Law 2017

¹⁰ The concept of unfair labour practice is not expressly provided for in Nigerian Labour Laws. However, the concept has gained recognition through the National Industrial Court of Nigeria pursuant to Section 254C of the 1999 Constitution of the Federal Republic of Nigeria (as amended by the Third Alteration Act, 2010), Section 7 (6) of the National Industrial Court Act, 2006 as well as the Rules of the Court which enjoins the Court to adopt and enforce international best practices and labour conventions in determining labour disputes.

¹¹ Mix & Blake V. NUFBTE (2004) 1 NLLR (Pt. 2) 247

liable for the acts of sexual harassment carried out by the [country manager] within the apparent scope of authority they entrusted to him.”¹²

A contrasting outcome was reached in another case¹³ where the employer set up a panel to investigate the allegation of sexual harassment made by the employee against her manager¹⁴ and the panel's report and findings was that the allegations of harassment, victimization and intimidation were unsubstantiated.

Considering the foregoing, it is now legally imperative not only for employers to talk about sexual harassment but also owes the employee the duty to take steps to regulate it.

Addressing sexual harassment in the workplace

As part of the responsibility to handle sexual harassment, employers should have well defined sexual harassment policy with effective and accessible complaint procedures for employees. The formal procedure should include the following:

- i. provision of a safe, confidential and easily assessable avenue for making complaints, e.g. whistleblower hotline or email, speak out link on the company's intranet or portal.
- ii. complaints are investigated by an internal or independent external investigator within a reasonable timeframe.
- iii. the investigation is handled in a manner that ensures the identities of the persons involved and all records relating to the complaint are kept confidential.
- iv. provisional working arrangements are made, if necessary, to protect the victim from any retaliatory action, victimization, or harm pending the investigation.
- v. the alleged harasser is afforded fair hearing throughout the investigation process.
- vi. a written report documenting the investigation process, evidence, findings and recommended outcome(s) is submitted to employer.
- vii. if allegation is proven, the employer decides on appropriate disciplinary action against the alleged harasser and remedial measures for the victim.
- viii. if the allegation is not proven, the employer should ensure that the complainant is not sanctioned, or victimized.
- ix. the employer should organize regular training or sensitization of the entire workforce to ensure that everyone understands why such conduct is unwarranted and why the company has zero tolerance for such behavior.

¹² *Ejike Maduka v Microsoft & Ors.*, unreported Suit Number NICN/LA/492/2012, Judgement delivered on December 19, 2013.

¹³ *Eniye Ogbebor v. LM Ericsson Nigeria Ltd* (unreported) judgment of the National Industrial Court in Suit No. NICN/LA/454/2016, delivered on 27th April 2020.

¹⁴ Ms. Eniye Ogbebor lodged a formal complaint against Mr. Mahomed Essof, her manager, whom she complained subjected her to “very adverse and unpleasant working relations” and had been “retaliatory and hostile towards her” which she felt was triggered by her unwillingness to accept the offer of relocation and employment to South Africa on the terms and conditions proposed by the Company. In a subsequent action against the employer, the issue was whether the various conducts of the employee's manager after she rejected the offer to move to South Africa does not amount to victimization at her workplace. The court resolved the issue against the employee and dismissed the action. See *Eniye Ogbebor v. LM Ericsson Nigeria Ltd* (unreported) judgment of the National Industrial Court in Suit No. NICN/LA/454/2016, delivered on 27th April 2020.

Conclusion

The prevalence of unreported non-consensual sex, sexual abuse and sexual harassment in the workplace has rendered the workplace a hostile and unsafe environment. Many companies do not have policies and procedures to deal with this scourge and those that have policies and procedures do not walk the talk by adequately investigating allegations of sexual harassment and bringing the culprits to book. Against the backdrop, companies need reappraise their policies and procedures not only to appropriately and effectively respond to allegations of sexual harassment, but also to mete out penalties that will deter inappropriate behavior in their workplaces.