

Sexual harassment and vicarious liability of the employer



An employer has a duty to provide a workplace safe from any unfair discrimination; therefore, companies will not be absolved from their responsibilities in respect of sexual harassment in the workplace.

Employers can be held liable for the actions of their employees should they fail to take reasonable steps to eliminate sexual harassment. The Code of Good Practice for the Prevention and Elimination of Harassment in the workplace defines Sexual harassment as the unwanted conduct of a sexual nature which makes a person feel offended, humiliated or intimidated.

Sexual harassment is regarded as a form of discrimination which is prohibited in terms of the Employment Equity Act (EEA) 55 of 1998.

The purpose of this blog is to remind employers of their duty to investigate sexual harassment and to provide training to all employees on workplace policies to ensure that they follow processes to identify and eliminate sexual harassment and any other form of unfair discrimination in the workplace. For ease of reference, we included relevant caselaw scenarios.

Vicarious liability of employers

Section 60 of the EEA holds employers liable for the actions of their employees should an employee contravene any provision of the EEA (which includes sexual harassment) while performing their duties, unless the employer can prove that it had taken the required steps to prevent or eliminate the undesired act.

In the case of ***Public Servants Association of South Africa obo AG v Department of Agriculture, Land Reform and Rural Development [2021] 1 BALR 76 (CCMA)***, an employee who was exposed to an obscene act of sexual harassment during working hours lodged a grievance in accordance with the company policy.

The employer chose not to act on the grievance and had to reckon with the consequences thereof as it was proven that there had been a **contravention of the EEA**; that the employer **failed to consult all relevant parties**; and that it had **failed to take steps to eliminate the conduct** complained of. It was held that the employer failed to act in accordance with its duty as per section 60 of the EEA and it was ordered to pay the employee ten months' compensation. The employer was also ordered to take proactive steps to prevent the recurrence of such conduct in its workplace.

In the case of ***National Union of Metalworkers of South Africa and another v Passenger Rail Agency of South Africa (2022) 31 LC 1.13.3***, however, the court looked at section 60 of the EEA and stated that the onus rests on the employee to prove that the employer was liable and that in order for the employer to be deemed liable under section 60, the employee must prove that–

- there had been a contravention of the EEA in the workplace;
- the alleged conduct was reported immediately; and
- the employer had failed to take the necessary steps to eliminate the alleged conduct.

To escape liability, the employer must prove that it had taken all the required steps to protect the employee.

It was common cause that there had been a contravention of the EEA (sexual harassment) in the workplace; however, the employee waited two years to lodge the grievance, which deprived PRASA of the chance to comply with its statutory obligations. Discussions with or confiding in fellow employees did not constitute reporting, as all grievances must be reported in accordance with the adopted policy of PRASA, which was available to all employees. According to the policy, PRASA was required to investigate the claim, which the employee objected to on flimsy grounds and further also declined to cooperate with external investigators.

The court held that in adopting a sexual harassment policy, the employer had taken all the necessary steps to prevent a breach of the EEA, and that the employer had been prevented from complying with its obligation in terms of section 60, given that the employee did not report the sexual harassment to the employer in line with the procedure set out in the policy. Therefore, the employer was not held liable for the actions of its employees in terms of section 60 of the EEA.

In conclusion

Employers can be held vicariously liable for the wrongs of their delinquent employees, except if they can prove that they had taken the required steps to prevent contravention of the EEA. Efforts by employers to protect employees will be viewed favourably by a court when assessing liability; therefore, it is of utmost importance for employers to ensure that they have a proper sexual harassment policy that is in line with the Code of Good Practice for the Prevention and Elimination of Harassment in the workplace.

Employers should take complaints of sexual harassment seriously and ensure that all their employees receive proper training on what constitutes sexual harassment and how to identify and report sexual harassment in the workplace. A reporting structure must be made available to all employees.

SERR Synergy assists businesses by putting preventative steps in place to ensure that they are not held liable for the actions of their employees in terms of section 60 of the EEA. We can simplify the drafting of sexual harassment policies and subsequently assist employers with regard to sexual harassment grievances and hearings to limit the risks for our clients.

About the author: Angelique van der Sandt joined *SERR Synergy* in March 2017. She is a Senior Labour legal advisor at our Cape Town branch. She is an admitted attorney of the High Court of South Africa and completed her Bachelor of Arts (BA) in Law and subsequent Bachelor of Laws (LLB) degrees, Law School and post-graduate Certificate in Advanced Labour Law at the University of Pretoria.

Reference list of sources consulted

- Item 5 of Code of Good Practice on the Prevention and Elimination of Harassment in the workplace GG46056:1890 of 2022.
- Section 60 of *Employment Equity Act (EEA) 555 of 1998 as amended*
- *Public Servants Association of South Africa obo AG / Department of Agriculture, Land reform and Rural Development* [2021] 1 BALR 76 (CCMA)
- *National Union of Metalworkers of South Africa and another v Passenger Rail Agency of South Africa* (2022) 31 LC 1.13.3

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