

© BEYOND/CORBIS



LIABILITY FACTOR

In countries like the UK and US, companies are required to actively create a work culture in which sexual harassment becomes unthinkable

UK employers can be held vicariously liable for sexual harassment under The Equality Act, 2010. "Only if a UK employer can show it took 'all reasonable steps' to prevent harassment in the workplace by its employees, can it avoid liability. But an important point is that the employer can only rely on this defence by showing that it took such steps before the actual harassment took place. So taking a pro-active approach to prevent harassment occurring is very important," says Robin Jeffcott, UK-based partner and co-chair, labour and employment practice at global law firm Reed Smith.

This framework also applies in the US — employers can be held vicariously liable for allowing sexual harassment to create a hostile work environment. "A hostile work environment is established where the employee is subject to unwelcome harassment based on her sex, the harassment is sufficiently severe or pervasive, a reasonable person un-

© BETTMANN/CORBIS



EARLY CRUSADE: Anita Hill became the face of a landmark case in 1991. She alleged that US Supreme Court nominee Clarence Thomas had earlier made sexual statements to her as her supervisor

der similar circumstances would find the conduct offensive, and where the employer knew or should have known of the harassment and failed to take prompt, effective action to stop the harassment. If the harassment is committed by a supervisor, the employer will be deemed vicariously liable. If, however, the harassing conduct is committed by a co-worker, the employee must show that the employer was aware of the conduct.

"Where the employer's liability is based on harassment alone without any tangible employment action taken against the employee, the employer can defend itself by proving that it exercised reasonable care to prevent harassment and correct such behaviour but that the employee failed to take advantage of the employer's corrective measures," explains Sara Begley, US based partner and co-chair, labour and employment practice at global law firm Reed Smith.

Reed Smith partners explain that employers can more readily avoid liability and provide their employees with a harassment free working environment by taking various steps: implementing and updating comprehensive anti-harassment policies, holding mandatory training regarding these policies and the implications of breaching them. Above all they need to take robust disciplinary action where the policy is breached to show that it is being enforced. ■

THE CUBICLE CODE

The Lok Sabha recently passed the sexual harassment Bill safeguarding women at the workplace. But the Bill has one glaring loophole — it spares employer organizations from any monetary compensation liability for employee's misbehaviour

LUBNA KABLY
TIMES INSIGHT GROUP

According to the National Crimes Record Bureau, 8,570 cases of sexual harassment were reported last year. Not all of these dealt with sexual harassment at the workplace — they could also include incidents like eve teasing on the roads. But with up to 5.5 million educated women joining the workforce every year it can be assumed that cases of sexual harassment at work would run into thousands.

In this context, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal Bill 2012) recently passed by the Lok Sabha, comes as a welcome piece of legislation though it is several decades behind legislative developments in Western nations. The Bill is yet to be passed by the Rajya Sabha and given Presidential assent, which means that it may be 2013 by the time it is finalised.

The law recognises that sexual harassment at work can take varied forms ranging from physical advances and demands for sexual favours to offensive remarks, display of pornographic material and other kinds of unwelcome physical, verbal and non-verbal conduct.

In 1997, the Supreme Court of India recognised the problem and while delivering its judgement in the landmark Vishaka's case, laid down guidelines that employer organisations have to follow. Employers were required to: prohibit sexual harassment and include such prohibition in the employees' rules of conduct; set up a complaint committee with majority of women members and headed preferably by a woman which would investigate all complaints of sexual harassment; and initiate disciplinary proceedings and possible criminal action against any offenders.

"These guidelines while mandatory were an interim measure, till a suitable

legislation containing specific details was enacted. Most developed countries have a formal law to deal with sexual harassment at the workplace," says Vikram Shroff, head, employment and labour laws, Nishith Desai Associates, international legal counsellors.

Sexual harassment at work can be a prickly issue for women to deal with publicly. "In the initial stages, it can even be so subtle that it leaves the woman employee wondering whether she is over-reacting. The fear of being ridiculed, the need for job security or even the lack of awareness of their rights, all result in many cases going unreported," explains a social worker.

Compared to many other nations, women in the UK and US are less hesitant to seek justice. According to the statistics issued by UK's Employment Tribunal Service, the number of sex discrimination cases during 2011-12 stood at 10,800. The US Equal Employment Opportunity Commission recorded 11,364 cases of sexual harassment charges filed during 2011.

The Bill that is awaiting passage in Rajya Sabha is not entirely flawless. For instance, it provides that action can be taken against a woman who has made a false or malicious complaint. As a saving grace, the Bill adds that a mere inability to substantiate a complaint or provide adequate proof 'need not' attract such action.

"This provision could have a dampening effect. The provisions should be further strengthened — for instance, the onus of proof could be on the alleged offender who wants to prove his innocence or there could be certain scenarios in which it shall be presumed that the complaint is genuine. The alleged offender should also have the opportunity to rebut. Also perhaps it would have been better for another act, such as the Indian Penal Code, to deal with a malicious complaint, instead of making it part and parcel of the proposed anti-sexual harassment Act," says senior advocate Anand Grover.

In most other countries, such as the UK or US, the employer organisation can be, under certain circumstances, held vicariously liable for sexual harassment by an employee. Suits filed can even be upwards of a million dollars. However, India Inc does not have to bear any such liability.

Let us take the scenario of sexual harassment in a large company (local complaint committees are to be set up at each location having ten or more workers). Once a complaint is made to this complaint committee, after due inquiry the committee has to give its recommendations to the company for taking action. Action taken would be based on the employment rules (which could include dismissal) and it can also include granting monetary compensation by the offender to the aggrieved woman employee.

The monetary compensation is derived based on several factors, such as mental trauma caused, medical expenses incurred (including for psychiatric treatment), and the income and financial status of the offender — based on which the compensation can either be a lump-sum or payable in instalments.

At best, the company can deduct the monetary compensation from the salary of the offender; if this is not possible because the offender is absent or has been dismissed, the complaint committee can merely direct the offender to pay or send the matter to the district officer who has the power to attach and sell the offender's property. This makes the whole procedure very time consuming.

There is a further catch. "Under The Payment of Wages Act, 1936 (POWA), a list of authorised deductions from wages is provided. In addition the total amount of deduction that an employer can make is restricted to 50 per cent of the wages paid in any wage period. POWA provisions will need to be amended or waived to allow the employer to deduct the compensation payable to the harassment victim," explains Shroff.

"There are even limits prescribed when it comes to attachment of property. Thus the law should provide that the company can also make a deduction out of the final settlement which includes retirement benefits payable to the offender," suggests Grover.

Some terms in the Bill are loosely defined. UK's Equality Act, 2010, is clear that the sexual harassment act must be viewed from the perspective of the victim. A similar view must be taken in India. Last but not the least, this Bill is not gender neutral and only covers harassment to women. ■

RIGHTING A WRONG: Mysore University researcher M Saritha who alleged sexual harassment by zoology professor Shivabasavaiah was proved right by a Women's complaint panel



STAYING A STEP AHEAD

Indian companies have been proactive and progressive about preventing instances of harassment at workplace

India Inc already has policies and processes — such as complaints committee — to help it comply with the apex court guidelines on sexual harassment. With a specific Act around the corner, such measures will be further strengthened.

Companies like MindTree, Marico and GMR have gone a step further and adopted gender-neutral policies. "Our policy on sexual harassment applies to men and women; to like and opposite gender relationships; to relationships between supervisors and subordinates and relationships among peers. GMR Group employees, customers, vendors, consultants, and anyone else doing business in our premises must comply with this policy," says a GMR spokesperson.

Marico's code of conduct has evolved over

time to reflect the growing awareness on various issues relating to workplace conduct; they have adopted best global corporate practices. "Periodic focus group discussions are held amongst cross sections within the organisation to understand its efficacy," states Milind Sarwate, group CFO, Marico.

Genpact says it has fair employment practices that guarantee a harassment free workplace. "Complaints on sexual harassment are investigated by internal channels and the findings put forth to a sexual harassment committee that gives its recommendations. Investigation into any concern is launched within two days of its receipt," states Deepa Kapoor, VP, Genpact.

Tulip Telecom has both formal and informal committees to address harassment is-



© IMAGES.COM/CORBIS

From self-defence workshops to focus discussion groups, leading Indian companies have evolved several strategies to deal with sexual harassment at work. They also claim to enforce zero-tolerance for misbehaviour

sues. "Further, HR representatives at various levels have been assigned for grievance handling and they help to resolve the matters at the very onset," says Ashu Malhotra, executive VP, HR, Biocon HR head Ravi Dasgupta says that his company plans to hold special training sessions to sensitise employ-

ees.

E-learning is emerging as a tool to create better awareness. "New employees, be they campus recruits or lateral hires, are made aware during orientation that there is zero-tolerance towards sexual harassment (even towards outsiders like customers and vendors). From October 1, we will also be introducing a mandatory e-learning course for all employees in India. Every employee on joining has to clear this e-learning course and the access to their systems will be restricted depending on such clearance," explains, Ravi Shankar, Chief People Office, MindTree.

Some companies prefer to think out of the box. "Women employees have also been trained in self-defence workshops to protect them against any unwanted incidents. We have also partnered with Catalyst to stay focussed on women empowerment at work," states Manish Choudhary, MD, Pitney Bowes Inc. ■

— LUBNA KABLY