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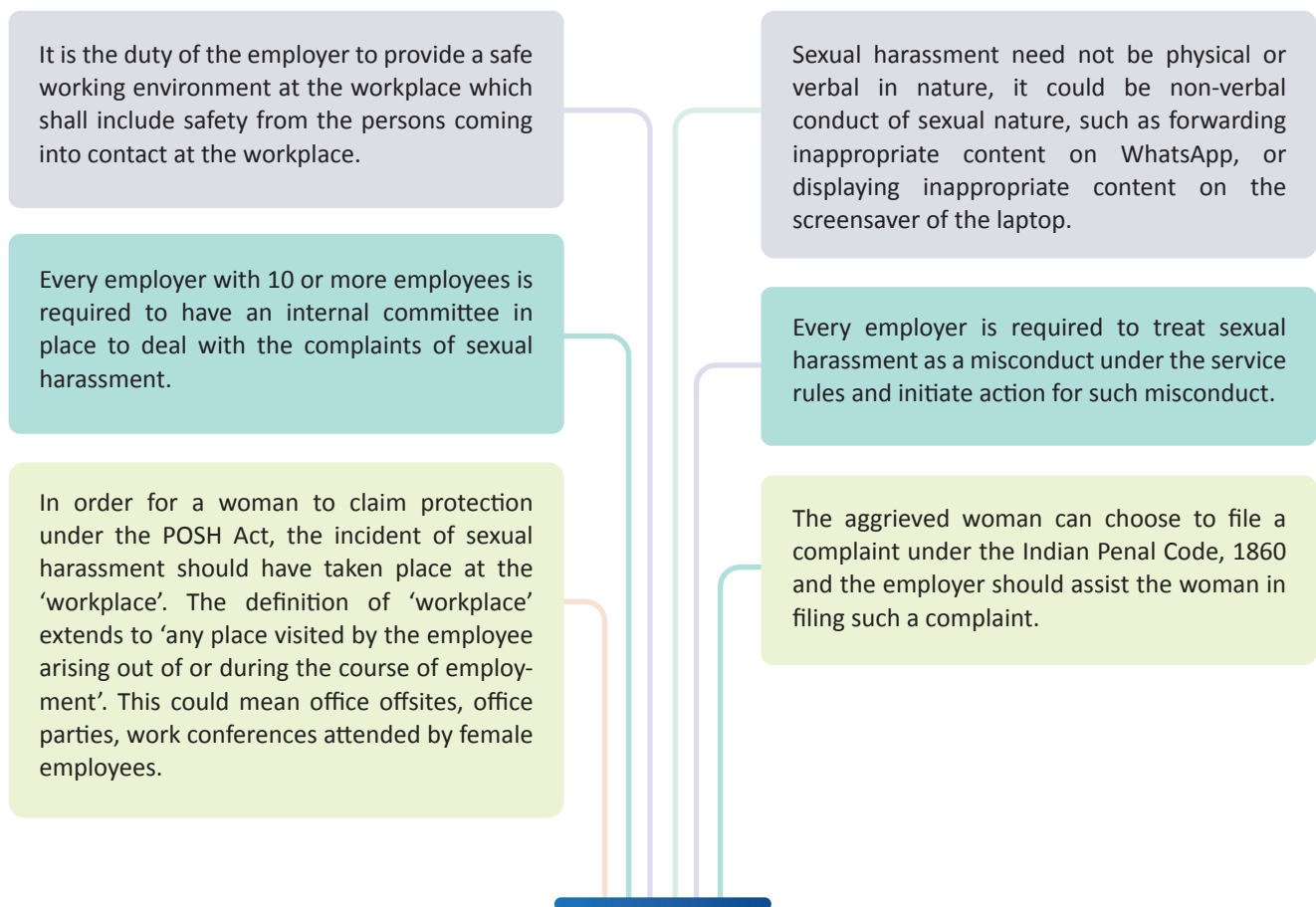
PREVENTION OF SEXUAL HARASSMENT AT THE WORKPLACE

Case Studies from an India perspective

Organizations today are increasingly striving to achieve gender diversity and cultural inclusiveness. There is an equal focus on creating safer work environments for all genders. However, the stark reality of sexual harassment faced by women at the workplace for generations cannot be denied. The silver lining though is that incidents of sexual harassment are increasingly getting reported, both globally as well as in India. Last year, the #metoo movement brought forward many such cases. Be it allegations against Google of payment of a total of USD 135 million to 2 employees after they were accused of sexual harassment at the company or a number of accusations brought against Harvey Weinstein. Nearer home, Indian companies reported more cases of sexual harassment in FY 2019 compared to a year earlier. Data from BSE 100 companies showed a 14% increase in reports of sexual harassment complaints in FY 2019¹.

The Supreme Court of India laid down the guidelines for prevention of sexual harassment at workplace in the case of *Vishaka & Ors. V/S State of Rajasthan*² in the year 1997. Encompassing those principles, 6 years ago, the Government promulgated Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (the POSH Act) and the rules thereunder. POSH Act seeks to prevent and protect women from sexual harassment at workplace.

The key principles emerging from the POSH Act include:



However, in India, the POSH Act is wide in its application and open for interpretation. Sometimes, POSH Act is even considered biased in favor of women. However, the POSH Act provides enough safeguards to ensure that the internal committee follows the principles of natural justice and if a malicious complaint is made or false evidence is produced by the complainant, an appropriate action is taken against such complainant including by way of a written apology, warning, reprimand or censure, withholding of promotion, withholding of pay rise or increments, terminating the services, counselling or community service etc.

ELP is regularly approached by a number of domestic as well as multinational organizations to advise them on complaints of sexual harassment. To put the current issues arising under the POSH Act in India, we have analyzed two recent cases in India.

¹ <https://economictimes.indiatimes.com/news/company/corporate-trends/india-inc-reports-14-rise-in-sexual-harassment-complaints-in-fy19/articleshow/71288712.cms?from=mdr>

² AIR 1997 SC 3011



Case Study 1

Facts: A young woman was allegedly sexually harassed by an employee of an establishment which the young woman often visited. There were a number of witnesses to the incident, however, the victim was not willing to come forward and file a complaint of harassment with the employer. The victim was afraid of retaliation from the accused. The question raised before us was whether in absence of a complaint filed by the victim, can an action be taken by the employer against the accused?

Legal Position: As per the POSH Act, a complaint of sexual harassment can be filed by:

- A woman who alleges to have been subjected to any act of sexual harassment
- In case of an aggrieved woman's physical incapacity, a complaint can be filed by:
 - a. Her relative or friend or co-worker
 - b. An officer of National Commission for Women or State's Women Commission
 - c. Any person who has knowledge of the incident with her written consent
- In case of an aggrieved woman's mental incapacity, a complaint can be filed by:
 - a. Her relative, friend or special educator
 - b. A qualified psychiatrist or psychologist
 - c. A guardian or authority under whose care she is receiving treatment
- If the aggrieved woman is unable to file a complaint for any other reason, any person with knowledge of the incident, can file a complaint on her behalf with her written consent.

There is nothing in the POSH Act which permits the employer to take suo moto action against the accused unless a written complain of sexual harassment has been received from the aggrieved woman or in her incapacity, any other person specified above. The POSH Act makes the wishes of the victim paramount, and if she so desires that the particular incident of harassment should not be prosecuted, her wishes are to be respected by the employer.

However, under the POSH Act, it is mandatory for the employer to treat sexual harassment as 'misconduct' under the services rules, therefore, the matter can be investigated as per the due process laid down in the service rules without a written complaint from the victim and post investigation, due action can be taken by the employer.



Case Study 2

Facts: A female employee accused her reporting manager of sexual harassment at the workplace and filed a written complaint with the internal committee. The internal committee suspended the accused, pending investigation. The accused filed a complaint with the employer alleging that it was illegal on part of the internal committee to suspend the accused.

Legal Position: During the pendency of the inquiry, on a written request by the aggrieved woman, the internal committee can recommend the following to the employer:

- Transfer the aggrieved woman or the respondent to any other workplace or
- Grant leave to the aggrieved woman upto a period of 3 months in addition to leave she would otherwise be entitled to or
- Restrain the respondent from reporting on work performance of the aggrieved woman or writing her confidential report or assign the same to another office or
- Restrain the respondent from supervising any academic activity of the aggrieved woman (in the case of an educational institute)

There is nothing under POSH Act or rules framed thereunder which permits the internal committee to suspend an accused while the investigation is underway. If the aggrieved woman so requests, it is the aggrieved woman who can be granted additional leave upto 3 months and not the accused. If the accused is in a position to tamper evidence or intimidate witnesses, the accused can be transferred to a different location or measures can be taken by the employer so that the investigation process is not hindered. However, it is important that the internal committee acts well within its powers granted under statute and does not overstep. In case of doubt Internal Committee should consult legal experts to avoid taking steps which fall foul of the POSH Act or the rules framed thereunder.

These are only two examples of many other complex issues which may arise while dealing with cases of sexual harassment, e.g. what action needs to be taken if the sexual harassment takes place in the elevator of the office building, how should the internal committee view a case of sexual harassment if the aggrieved woman and the accused were previously involved in a romantic relationship etc.

Given the above context, it is important to understand what employers and legal advisors need to be mindful of in India, when dealing with such cases.





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