

# SEXUAL HARASSMENT

AT THE WORKPLACE



INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA



## SEXUAL HARASSMENT AT THE WORKPLACE IN MALAYSIA

Ashgar Ali Ali Mohamed Muzaffar Syah Mallow Farheen Baig Sardar Baig



Perpustakaan Negara Malaysia

Cataloguing-In-Publication Data

Ashgar Ali Ali Mohamed

Sexual harassment at the workplace in Malaysia/ Ashgar Ali Ali Mohamed, Muzaffar Syah Mallow and Farheen Baig Sardar Baig.

ISBN 978-983-9680-97-3

1. Sexual harassment--Law and legislation--Malaysia. 2. Sex role in the work environment--Malaysia. I. Musaffar Syah Mellow. II. Baig, Farheen Baig Sardar.

III. Title 345.5950253

Copy no: 1122 611 0 Initial: NAEA

Date: 5/8/ Location: MAIN/PJ /ISTAC /NILAI /K /K2 /IIBF

Published by

#### The Malaysian Current Law Journal Sdn Bhd

E1-2, Jalan Selaman 1/2, Dataran Palma, 68000 Ampang, Selangor Darul Ehsan, Malaysia [Co No 51143 M]

Tel: 603-42705400 Fax: 603-42705401

#### 2011 © The Malaysian Current Law Journal Sdn Bhd ('MCLJ').

All rights reserved. No part of this publication may be reproduced or transmitted in any material form or by any means, including photocopying and recording, or storing in any medium by electronic means and whether or not transiently or incidentally to some other use of this publication, without the written permission of the copyright holder, application for which should be addressed to the publisher. Such written permission must also be obtained before any part of this publication is stored in a retrieval system of any nature.

> Tables by Impression One Index by Dr Anandan Krishnan

Although every effort has been made to ensure accuracy of this publication, The Malaysian Current Law Journal accepts no responsibility for errors or omissions, if any.

ISBN 978-983-9680-97-3

Dolphin Press Sdn Bhd (610809-W) No. 98, Jalan PBS 14/4, Taman Bukit Serdang, 43300 Seri Kembangan, Selangor Darul Ehsan.

fp d65 kpG 4200 48255 2011 Printed by

W/8/11 Fmy 10/8/11 rose

### Contents

Foreword i
Preface iii
Abbreviations vii
Table of Cases xv
Table of Legislation and Statutes xlvii
Table of Foreign Legislation lvii
Table of Conventions and
Treaties lxv

#### CHAPTER 1

SEXUAL HARASSMENT: AN OVERVIEW 1 (This chapter is contributed by Ashgar Ali Ali Mohamed)

- I.I Sexual harassment: A violation of individual rights 8
- 1.2 ILO Convention Concerning Discrimination in Respect of Employment and Occupation (Convention No. 111) 11
- 1.3 Sexual harassment: The Law in Malaysia 12
- 1.4 Sexual harassment: The Islamic approach 14
- 1.5 Scope of the Book 16

#### **CH**APTER 2

SEXUAL OFFENCES: THE CRIMINAL LAW AND PROCEDURE 19 (This chapter is contributed by Ashgar Ali Ali Mohamed)

- 2.1 Introduction 21
- 2.2 Sexual offences: The Penal Code 23

- 2.2.1 (i) Section 292 23
- 2.2.2 (ii) Section 294 25
- 2.2.3 (iii) Section 354 27
- 2.2.4 (iv) Section 355 30
- 2.2.5 (v) Section 375 30
- 2.2.6 (v) Section 376A 39
- 2.2.7 (v) Intercourse against the order of nature 42
- 2.2.9 (vi) Section 509 49
- 2.2.10 (vi) Section 511 50
- 2.3 Aspects of criminal procedure 51
- 2.3.1 (i) Lodging a police report 51
- 2.3.2 (ii) Police to conduct an investigation 52
- 2.3.3 (iii) Investigation report submitted to Attorney General's chambers 54
- 2.3.4 (iv) Criminal jurisdiction of the civil courts 56
  - 2.3.4.1 (i) High Court 56
  - 2.3.4.2 (ii) Sessions Court 57
  - 2.3.4.3 (iii) Magistrates Courts 58
- 2.4 Local limits of jurisdiction 59
- 2.5 Framing of charge 60
- 2.6 Criminal trial 61
- 2.7 Prima facie case 62
- 2.8 Appropriate sentence 63
- 2.9 Conclusion 66

THE DEFINITION, CATEGORIES AND FORMS OF SEXUAL HARASSMENT IN THE WORKPLACE 67 (This chapter is contributed by Muzaffar Syah Mallow)

- 3.1 An overview over the nature and definition of sexual harassment in the workplace worldwide 69
  - 3.1.1 Sexual harassment in the workplace must occur at the work site or in a work-related environment 71
  - 3.1.2 Sexual harassment in the workplace is conduct based on sex or of a sexual nature 73
  - 3.1.3 Sexual harassment in the workplace is a conduct that is unwelcome or unwanted by the recipient 75
  - 3.2 The issue surrounding sexual harassment and consensual or romantic relationships in the workplace 81
- 3.3 The conduct in question should be perceived and experienced by the recipient rather than the intention behind it 83
- 3.4 The application of objective test in order to determine whether or not the behaviour was offensive, humiliating or intimidating 83

- 3.5 The application of subjective test to determine whether or not the behaviour is unwelcome 87
- 3.6 Categories of sexual harassment in the workplace 89
  - 3.6.1 Quid Pro Quo Sexual Harassment 89
  - 3.6.2 Hostile Working Environment Sexual Harassment 91
- 3.7 Forms of sexual harassment in the workplace 94
  - 3.7.1 Verbal harassment 95
  - 3.7.2 Non-verbal (Gestures) harassment 95
  - 3.7.3 Written harassment 96
  - 3.7.4 Visual (Environmental) harassment 99
  - 3.7.5 Physical conduct of sexual in nature 100
  - 3.7.6 Psychological harassment 101
  - 3.7.7 Sex-based conduct 102
  - 3.7.8 Sex discrimination 102
  - 3.7.9 Sexual orientation (Homophobic) harassment 104
  - 3.7.10 Transgender harassment 105
  - 3.7.11 Same sex harassment 106
  - 3.7.12 Treatment which is nongender in specific 107
- 3.8 Conclusion 109

THE GOVERNING LAW AND PRACTICE ON THE SEXUAL HARASSMENT AT THE WORKPLACE IN MALAYSIA III (This chapter is contributed by Muzaffar Syah Mallow)

- 4.1 Introduction 113
- 4.2 Historical trace on the law and practice relating to the issue of sexual harassment in Malaysia 115
- 4.3 An overview over the current governing law and practice on the issue of sexual harassment in the workplace in Malaysia 118
  - 4.3.1 Federal Constitution 120
  - 4.3.2 Penal Code 122
  - 4.3.3 Employment Act, 1955 125
  - 4.3.4 Industrial Relations Act, 1967
  - 4.3.5 Occupational Safety and Health Act, 1994 139
- 4.4 Conclusion 145

#### CHAPTER 5

WORLDWIDE APPROACH TOWARDS THE ISSUE OF SEXUAL HARASSMENT IN THE WORKPLACE 149 (This chapter is contributed by Muzaffar Syah Mallow)

- 5.1 The issue of sexual harassment in the workplace from the international, regional and national perspectives 151
- 5.2 International level 152
  - 5.2.1 United Nations (UN) 153
  - 5.2.2 International Labour Organization (ILO) 156
- 5.3 Regional level 160
  - 5.3.1 European Union (EU): The 1991 Code of Practice and the 2002 European Parliament and Council Directive 160
  - 5.3.2 The Caribbean community (CARICOM): The Model Legislation on Sexual Harassment 1991–161
  - 5.3.3 The Organization of American States (OAS): The Inter- American Convention on Violence against Women (the Convention of Belem do Para) 1995–163
- 5.4 National level 165
  - 5.4.1 United Kingdom: The Sex
    Discrimination Act, 1975 and
    the Employment Equality
    (Sex Discrimination)
    Regulations, 2005–168

- 5.4.2 United States of America: Title VII of the Civil Rights Act of 1964 172
- 5.4.3 Australia: The Sex Discrimination Act, 1984 175
- 5.4.4 New Zealand: The
  Employment Relations
  Act, 2000 and Human
  Rights Act, 1993 176
- 5.4.5 Canada: Canada Labor Code, 1985 177
- 5.4.6 India: Part III on the Fundamental Rights of the Indian Constitution and case law 178
- 5.5 Conclusion 181

EMPLOYER'S IMPLIED
OBLIGATION TO
MAINTAIN A
WORKPLACE FREE OF
SEXUAL HARASSMENT 183
(This chapter is contributed by
Ashgar Ali Ali Mohamed)

- 6.1 Introduction 185
- 6.2 Contract of employment 186
- 6.3 Express terms 186
- 6.4 Implied terms 188
  - 6.4.1 Implied duty of mutual trust and confidence 101
  - 6.4.2 Employer's duty of care for the health and safety of employee 199
- 6.5 Conclusion 202

#### CHAPTER 7

SEXUAL HARASSMENT:
ALLEGING
CONSTRUCTIVE
DISMISSAL 203
(This chapter is contributed by
Ashgar Ali Ali Mohamed)

- 7.1 Introduction 206
- 7.2 Constructive dismissal: Definition 207
  - 7.2.1 The employer breached the essential term of the contract 212
  - 7.2.2 Significant breach going to the root of the contract 214
  - 7.2.3 Employee leaves immediately by reason of the breach 218
  - 7.2.4 Employee had not terminated the contract before the employer's breach 221
- 7.3 Illustration from decided cases 223
- 7.4 Burden of proof in constructive dismissal 225
- 7.5 Procedure to bring a claim for constructive dismissal 227
  - 7.5.1 Compensation in lieu of reinstatement 229
  - 7.5.2 Back wages 230
- 7.6 Conclusion 231

PROVING SEXUAL
HARASSMENT IN THE
WORKPLACE: WITH
REFERENCE TO THE
EVIDENCE ACT, 1950 233
(This chapter is contributed by
Muzaffar Syah Mallow)

- 8.1 Introduction 235
- 8.2 Applicability of the Evidence Act, 1950 236
- 8.3 Definition of evidence 239
- 8.4 Proving sexual harassment in the workplace 241
  - 8.4.1 Oral testimony of a witness 242
  - 8.4.2 Submission of documentary or written evidence 246
  - 8.4.3 Tendering physical or real evidence 249
  - 8.4.4 The gathering of circumstantial or indirect evidence 251
  - 8.4.5 Analysing character evidence 258
- 8.5 The requirement of corroboration evidence in the sexual harassment in the workplace case 262
- 8.6 The concept of burden of proof and the issue of sexual harassment in the workplace 268
- 8.7 Conclusion 271

#### **CHAPTER 9**

SEXUAL HARRASSMENT: DOMESTIC INQUIRY 273 (This chapter is contributed by Ashgar Ali Ali Mohamed)

- 9.1 Introduction 275
- 9.2 The Procedure 276
  - 9.2.1 Complaints 276
  - 9.2.2 Notice to Show Cause 279
  - 9.2.3 Suspension pending investigation 282
- 9.3 Period of suspension 289
- 9.4 Suspension with or without salary 289
- 9.5 Investigation 293
- 9.6 The Procedure of Domestic Inquiry 297
  - 9.6.1 Notice of hearing 302
  - 9.6.2 Charge 303
  - 9.6.3 Hearing 308
  - 9.6.4 Decision of the Inquiry
    Panel 310
  - 9.6.5 Notes of proceedings 319
  - 9.6.6 Appeal 321
- 9.7 A Review of Siti Sarinah bt Sibun v. Azizah bt Kamaruddin and Anor 321
  - 9.7.1 Show Cause issued according to in-house procedure 322
  - 9.7.2 Plaintiff suspended pending investigation 323

- 9.7.3 Discovery of mysterious authorisation form and benefit of doubt given 323
- 9.7.4 Victimisation not established 324
- 9.7.5 Mala fide or negligence on part of the defendants 324

9.8 Conclusion 325

#### **CHAPTER 10**

CASES OF SEXUAL HARASSMENT: A REVIEW 327 (This chapter is contributed by Farheen baig Sardar Baig)

10.1 Introduction 329

10.2 Review of sexual harassment cases 331

Sitt Tatt Berhad v. Flora Gnanapragasam 331

Mohd Nasir Deraman v. Sistem Televisyen Malaysia Berhad (TV3) 337

Abdul Majid Mohamed v. Du Security Services Sdn Bhd 339

Mohamad Shahrul Azman Bin Ishah v. Malaysia Airlines Systems Berhad 342

Varitronix (M) Sdn Bhd v. R Thandavanaiher P Raman 344

Berjaya Redang Beach Resort Sdn Bhd v. R Samikannoo Rajoo 348

Fuchs Petrolube (Malaysia) Sdn Bhd v. Chan Puck Lin 351 Jennico Associates Sdn Bhd v. Lilian Therera De Costa And Anor 354

Shangri-La Hotel v. Leow Yoke Sim 357

Melewar Corporation Bhd v. Abu Osman 360

Edwin Michael Jalleh v. Freescale Semiconductor Malaysia Sdn Bhd 362

Khoo Ee Peng v. Galaxy Automation Sdn Bhd 364

Malaysia Airline System Berhad v. Wan Sa'adi Wan Mustafa 368

Mohd Razmi A Rahman v. Tahan Insurance Malayasia Berhad 372

Haidar Ali Kader Mydin v. Xtra Supercenter Sdn Bhd 375

Copthorne Orchid Sdn Bhd v. Lim Phaik Gim & 3 Ors 378

Sunway Lagoon Club Bhd v. Md Noh Mat Tahir 381

Colgate-Palmolive (M) Sdn Bhd v. Yap Shyan Meng 390

Sistem Televisyen Malaysia Bhd v. Baharum Abu Baher 396

Jaman Saidin v. Hotel Istana 400

Celcom (M) Bhd v. Afandi Mohamed Mukry 404

Hong Leong Bank Berhad v. Adrian Joseph D'cruz 407

Transnasional Express Sdn Bhd v. Mohd Rosedi Hassan 409

- Yasmin Norhazleena Bahari Md Noor v. Institut Kefahaman Islam Malaysia 414
- 10.3 Vicarious Liability in sexual harassment cases 422
- 10.4 Sexual Relations with an employee outside the workplace 432
- 10.5 Sexual harassment cases summary 436

SEXUAL HARASSMENT AT THE WORK PLACE: THE ISLAMIC APPROACH 441 (This chapter is contributed by Farheen Baig Sardar Baig)

- 11.1 Introduction 443
- 11.2 Honour and dignity in Islam 445
- 11.3 Are women allowed to work in Islam? 449
- II.4 Women who have worked from among the family and companions of Prophet Muhammad (SAW) 453
- 11.5 Sexual harassment: The protection in the Qur'an and Sunnah 459
  - 11.5.1 Lowering of the gaze 459
  - 11.5.2 Decent dressing 461
  - 11.5.3 Proximity between opposite sexes to be avoided 468

- 11.5.4 Prohibition of shameful (deeds) 471
- II.6 Guarding chastity: Preserves one's honour and dignity 473
- 11.7 Sexual Harrasment: The law in Saudi Arabia 480
- 11.8 Conclusion 482

#### CHAPTER 12

SEXUAL HARASSMENT COMPLAINTS: GUIDELINES FOR THE PARTIES 485 (This chapter is contributed by Ashgar Ali Ali Mohamed)

- 12.1 Introduction 487
- 12.2 Dealing with sexual harassment: The employee's guideline 487
  - 12.2.1 Objecting to sexual misconduct 488
  - 12.2.2 Document the incidences 488
  - 12.2.3 Report incident of sexual harassment 489
  - 12.2.4 Adduce convincing evidence 490
  - 12.2.5 Formal complaint 494
  - 12.2.6 Employer to keep identity of complainant confidential 495
- 12.3 Dealing with sexual harassment: The employer's guideline 495
  - 12.3.1 Formal complaint of sexual harassment 496
  - 12.3.2 To verify the complaint 496

		1	1 • .
12.3.3	Investigate t	he comb	laint 407

- 12.3.4 Notice to show cause 498
- 12.3.5 Domestic hearing 498
- 12.3.6 Sanction 499
- 12.4 Sexual Harassment Policy 500
  - 12.4.1 Sexual Harassment policy template 500
- 12.5 Conclusion 506

Bibliography 507

Appendix 523

Index 559