

AMID WORKING FROM HOME, WORKPLACE SEXUAL HARASSMENT ALSO GOES VIRTUAL

Raghav Agrawal*

Abstract

Covid-19 pandemic has forced offices around the globe to move their functioning to employee's homes. With the new culture of 'Work from Home' comes work harassment in virtual forms. There have been various reports of complaints of female colleagues being harassed in virtual meetings, over the phone, and through other virtual mediums. Factors like fear for job security in one of the highest rates of unemployment in the past couple of decades further aggravates the situation and calls for attention to this new menace. With the harassment going into virtual and cyber forms it raises some vital questions. Can these acts be punished under the existing system for prevention of sexual harassment at work? Can the definition of 'workplace' be expanded to include 'work from home' in it? With everything going virtual, how can an aggrieved woman file a complaint? The definitions of 'sexual harassment' and 'workplace' have been given such language that they can be interpreted liberally. Judicial pronouncements on the same though less, but still have reiterated legislature's intent and tried to extend the purview to all forms of harassment. Preliminary analysis shows that courts have not been hesitant in applying these provisions liberally and would probably interpret any new forms of virtual harassment in the same way. Women can through the procedure established in the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 appropriately complain and seek relief. However, after the study there feels a strong need for the employers and government to bring a change in their policies for these specific forms of harassment and conduct awareness camps and workshops as per their duties under the law.

Keywords: Sexual Harassment , Sexual Harassment At Workplace , The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act , Virtual Harassment , Cyber Bullying , Women's Rights , Covid-19 Pandemic

* Student, Amity Law School, Noida.

Introduction

With the pandemic came a national level lockdown where all offices of every organization had to shift their work to virtual spaces in the form of 'Work from Home'. Working from home virtually has become the new normal but the move brings certain problems along with it. There have been incidents reported of virtual sexual harassment of employees in this new mode of working. Various national newspapers have written reports and articles on this newmenace¹. The complaints are not limited to India as the whole world has stopped and in various countries, people have reported such complaints². The complaints range from non-work

¹Kamini Mathai, Work From Home Brings Virtual Sexual Harassment Home Too , TOI , Jun 24, 2020, <https://timesofindia.indiatimes.com/india/work-from-home-brings-virtual-sexual-harassment-home-too/articleshow/76543669.cms> ; PTI, COVID-19 lockdown: Working women complain of 'online' sexual harassment, The New Indian Express, June 01, 2020, <https://www.newindianexpress.com/nation/2020/jun/01/covid-19-lockdown-working-women-complain-of-online-sexual-harassment-say-experts-2150824.html> ; Anjali Varma, Dealing with sexual harassment in the virtual workplace, The Hindu Business Line, April 22, 2020, <https://www.thehindubusinessline.com/opinion/dealing-with-sexual-harassment-in-the-virtual-workplace/article31403719.ece>

² Phillips & Associates, Amid Coronavirus Quarantines, Workplace Sexual Harassment In New York Goes Virtual, New York Employment Attorney-Blog, APRIL 29, 2020, <https://www.newyorkemploymentattorney-blog.com/amid-coronavirus-quarantines-workplace-sexual-harassment-in-new-york-goes-virtual/> ; Ivany Atina Arbi, Virtual harassment rampant during work-from-home, survey finds, The Jakarta Post, June 13, 2020, <https://www.thejakartapost.com/news/2020/06/13/virtual-harassment-rampant-during-work-from-home-survey-finds.html>

related phone calls at unprecedented times of the night, requests to turn on the camera during video conferencing to inappropriate dress codes, and unprofessional behavior at virtual meetings.

The question arises; can these violations be categorized under the existing structure of complaints against sexual harassment at workplace? Can the definition of workplace be applied to the work from home? What can women do to file a complaint in these times?

In this article, I shall attempt to answer the same.

Rise In Cases Of Virtual Harassment

According to a survey conducted³, it was observed that the incidents of sexual harassment *-accentuated during off sites, office parties, and field trips* or the so-called *—extended workplace*. This shows a pattern that perpetrators of such crimes are likely to commit harassment outside the traditional workplaces. Though no research has been done for reports of harassment in *-Work from Home* but it would be prudent to assume given the increasing number of incidents being reported and such similar patterns of harassment outside traditional office spaces in the past that such incidents are on the rise and should not be dealt trivially. The survey also shows another facet of such incidents that usually women tend to report

³Punam Sahgal & Aastha Dang, Sexual Harassment at Workplace - Experiences of Women Managers and Organisations , Economic & Political Weekly , VOL LII NO 22

harassment more when it is physical and direct rather than when it may be implicit and through a virtual medium. A pattern can be observed that when such indirect inappropriate behavior is not reported then it often leads to much more direct and physical forms of harassment.

The under-reporting of the incidences also is expected to rise given the increasing unemployment rates and laying off employees by many companies in this pandemic. Uncertainty regarding job security also leads to more incidences and their under-reporting due to fear of losing jobs.

This makes it a need that women are made aware of their rights, organizations are held accountable to address these issues and governments be expected to bring out specific guidelines for these unprecedented times.

What Laws For Sexual Harassment Exist Now?

Laws regarding sexual harassment are covered under the IPC⁴ but the provisions are for general sexual harassment. Sexual harassment at work can be much subtle and has other factors which make it desirable for it to have a specific law. This was to an extent felt by the court in the

landmark judgment of Vishakha V State of Rajasthan⁵. In this historic judgment, the Hon'ble Supreme Court went on to lay down the guidelines for defining, preventing and punishing sexual harassment at workplace using its power under Article 32 of the Constitution and further held that these guidelines to be held as law as per Article 141⁶ of the Constitution. The guidelines laid down in the judgment went on to act as provisions for the laws for almost 16 years till finally The Sexual Harassment Of Women At Workplace (Prevention, Prohibition And Redressal) Act, 2013 or more commonly- known as Prevention of Sexual Harassment Act (Hereinafter POSH Act)⁷ was passed based on the same guidelines and the CEDAW convention⁸.

For now, the POSH Act passed in 2013 acts as a complete guide for these disputes. The purpose of the act is stated as _to provide protection against sexual harassment of women at work- place and for the prevention and redressal of complaints of sexual harassment'. The statement and purpose of the act reflect how these provisions are essential to protect the basic fundamental rights of the women and how it is

Intended to Outrage Modesty of women.

⁴ The Indian Penal Code, 1860 ,No. 45, Acts of Parliament, 1860

•Sections 209, 292 and 294 which deal with Obscenity

•Section 354 deal with Criminal Force or Assault Intended to Outrage Modesty

•Section 375 deals with the offence of Rape

•Section 509 deals with Word, Gesture or Act

⁵ Vishakha V State of Rajasthan, (1997) 6 SCC 241

⁶ Article 141: The law declared by the Supreme Court shall be binding on all courts within the territory of India.

⁷ The Sexual Harassment Of Women At Workplace (Prevention, Prohibition And Redressal) Act, 2013, No 14 , Acts of Parliament, 2013

⁸ Convention on the Elimination of All Forms of Discrimination Against Women, United Nations, Treaty Series, vol. 1249, p. 13

pertinent to implement these after the ratification of CEDAW convention by India.

The act first facilitates the composition of two committees – Internal Complaints Committee (Hereinafter ICC) at every organization having more than 10 employees, presided by a senior woman in charge and a Local Committee (Hereinafter LC) whose chairperson to be nominated from amongst the eminent women in the field of social work.

ICC is to be formed in every organization having more than 10 employees with strict compliance as to formation and working.

In case of a violation, a woman can file a complaint as per Section 9 of the Act to the ICC or if not formed to the Local committee within 3 months from the last incident. Upon receiving the complaint, the committee might try to reconcile the parties to an amicable solution if possible otherwise launch an inquiry into the matter by a team and if a prima facie case appears, forward the complaint to police.

Women then have right during the inquiry period to request leave or transfer or any other possible interim resolution.

Upon the end of the enquiry, a report is submitted by the authority, where if, found guilty steps can be taken as per the service rules or if none, as per the discretion of the committee.

Can the definition of “workplace” be applied to the work from home?

Before the POSH Act, there was no particular definition of –workplace in context of harassment. Delhi High Court even before the act in its decision of Saurabh Kumar Mallick vs. (CAG) Comptroller and Auditor General of India and Ors⁹ interpreted the scope of workplace in a wide sense. They went on to take examples of video conferencing and such other instances where the harassment might take place outside the purview of a traditional workplace.

The definition of ‘workplace’ as given under the POSH Act¹⁰ is wide enough to include Work

⁹ Saurabh Kumar Mallick vs. The Comptroller and Auditor General of India and Ors, 151 (2008) DLT 261.

¹⁰ Section 2 (o) - –workplace includes—

- (i) any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly by the appropriate Government or the local authority or a Government company or a corporation or a co-operative society;
- (ii) any private sector organisation or a private venture, undertaking, enterprise, institution, establishment, society, trust, non-governmental organisation, unit or service provider carrying on commercial, professional, vocational, educational, entertainment, industrial, health services or financial activities including production, supply, sale, distribution or service;
- (iii) hospitals or nursing homes;
- (iv) any sports institute, stadium, sports complex or competition or games venue, whether residential or not used for training, sports or other activities relating thereto;
- (v) any place visited by the employee arising out of or during the course of employment including transportation by the employer for undertaking such journey;
- (vi) a dwelling place or a house;

from Home'. The definition includes all departments, organizations, etc. fully or partially funded by the Government and includes any private sector organization even when having less than 10 employees (unorganized sector). The definition includes all areas where a person might go in the course of employment and exclusively in Section 2 (o)(4) includes *a dwelling place or a house*.

Bare interpretation of the sections leaves no uncertainty that the legislature clearly intended —workplace¹¹ to include all places in the course of employment including Working from Home.

The courts have also over judgments interpreted the definition of —workplace¹¹ with a wide scope where all areas for the purpose or in course of employment have been included¹¹.

From the aforesaid definition, it is clear that the place visited by the employee arising out of or during the course of his or her employment falls within the ambit of the term —workplace¹¹ and since workplace has been shifted to —home¹¹, it should be included in the same.

What Acts Do Constitute As “Sexual Harassment”?

There have been numerous attempts by the legislature on national and international scale to interpret the term. A dilemma is faced that if the definition is too wide then there are instances where colleagues have avoided interaction with

¹¹ Biplab Kumar Das vs. IDBI Bank Ltd. and Ors. , 2017 LLR 1148

their female counterparts altogether creating barriers in the work environment. There also have been cases of misuse of such wide definition with malafide intent. However, assessing the various reports and surveys the major concern is under-reporting not misuse. Hence the interpretation of the term shall be widened enough to bring into its preview all acts which make a woman uncomfortable in her work environment. The POSH Act has a provision for misuse or for malafide complaints which helps to counter false complaints¹².

The act lays down this definition which has been applied by courts keeping a broad sense in view.

“Sexual harassment” includes any one or more of the following unwelcome acts or behavior

(whether directly or by implication) namely:—

(i) physical contact and advances; or

(ii) a demand or request for sexual favours; or

(iii) making sexually coloured remarks; or

(iv) showing pornography; or

(v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature;

What Acts Can Be Construed As Virtual Harassment?

Virtual harassment can be any unwanted digital interaction including and not limited to any

¹² Section 14 of the Prevention of Sexual Harassment Act , 2013 - Punishment for false or malicious complaint and false evidence.

inappropriate/ unprofessional behavior through means of computers, internet, or telephonically.

It may also include but limited to:

- Indirect calls for favor of sexual nature
- Inappropriate calls during odd times.
- Inappropriate dress code at video calls.
- Inappropriate messages, jokes, on messaging platforms
- Virtual stalking extending to sexual remarks and comments on personal social media handles

Can Instances Of Virtual Harassment Be Covered Under The POSH Act?

Courts have not deterred to take into ambit, acts of defamation and violations of dignity if they have taken place through a virtual medium. Sharing of an audio clip of telephone conversation to many people on social media to demean the respect and dignity and sexist comments have been taken into account by courts under the ambit of the POSH act¹³.

They have re-iterated the fact that to constitute sexual harassment it is not required that the delinquent is to touch the body of the victim lady or to molest her in any other manner. *An unusual conduct or behaviour to a woman employee at workplace which is not generally expected and from which an inference may be*

¹³ Ravindra Vitthal Parmar vs. Union of India and Ors. , MANU CA 0295 2016

drawn that the behaviour was because of the fact that the victim was a woman amounts to "sexual harassment" in workplace¹⁴. The definition given in Vishaka's Case has been construed as an inclusive definition that can be expanded to include other types of harassment if they fail to fall between the 5 categories so set. The court left the interpretation open enough so that each case can be judged subjectively. The court set out an extensive definition, enabling the scope to go wide.

For example unnecessary telephone calls of longer duration have also been taken up as parts of sexual harassment of work and as *clear case of sexual harassment* by the judges¹⁵.

Courts have also accepted –*Verbal and written harassment through jokes, racist, sexist or sectarian remarks, homophobic comments, comments about a person's disability, offensive language, gossip and slander, sectarian songs, mobile telephone ring tones, threats, letters, e-mails* as part of harassment at work¹⁶.

After Vishaka's case the Disciplinary Authority of CRPF¹⁷ issued the standing order which defined the sexual harassment expressly including

¹⁴ Pankaj Kumar vs. Union of India and Ors. , 2017 LabIC 1091

¹⁵ Sarita Das vs. Union of India , 2014 (3) GLD 697 (Gau)

¹⁶ L. Nagaraju vs. Syndicate Bank and Ors. , 2014 (7) SLR 125

¹⁷ Disciplinary Authority of CRPF, Standing order No. 4 ,2004 ,16.08.2004

...(ix) Unwelcome sexual overtone in any manner such as over telephone (obnoxious telephone calls) and the like....

which have been quoted in the courts.

These leave it to no doubt that the incidences which are being reported of cyber and virtual harassment like through telephones, video calls and virtual meetings would as per the legislature's definitions and the interpretations of the courts thereafter would definitely be included in definition of sexual harassment and hence be punishable under the act.

In Case A Person Has Suffered – What Steps Can They Take?

In case of any such commission of such offence, it is important that these are reported and the accused are convicted through proper channels. This helps to create a safe work environment for all and prevents such actions from being committed in the future. The following steps can be taken by the aggrieved woman.

1. Inform - Clearly indicate to the person that their actions have made you uncomfortable. If possible make this communication in a recorded form. (Letter, e-mail, etc.)
2. Report - Since now we have to file the complaint electronically; try to file the complaint to the internal committee by email. This helps create an electronic record as to when the complaint was lodged and if any appropriate action was taken in the

mentioned time. If you are unable to file the complaint through email try to contact the employer and have him transfer the complaint. If no means left, it is recommended to record the call before filing the complaint telephonically. Do inform the person that the call is being recorded as it creates more credibility in this evidence.

An aggrieved woman can file a written complaint to ICC/LC three months from the date of the incident and in case of series of such incidents within three months from the last such incident. Delay in filing of such complaint can be condoned by the committee if sufficient reasons are provided. As per Rule 6 of The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013, in case of physical or mental incapability of the aggrieved woman, her legal heirs or such other person as described in may make a complaint.

3. Know your rights and employer's duties - The employer has a duty under the code to assist filing a complaint under the IPC¹⁸ or initiate such an action if the complainant desires so. Under section 26 the employer can be punished for not complying with his duties, so be assertive in enforcing your rights.
4. Action during the pendency of inquiry – As per section 12 of the Act, the aggrieved

¹⁸ The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860

woman can make a written request to ICC/LC and they may recommend the employer to transfer the woman to another workplace or grant leave of 3 months or other relief if appropriate. Employer has to comply with these recommendations and send a report on compliance to such committee.

5. Take recordings – Throughout the process try to record as much evidence as possible. This could be in the form of recording of meetings where harassment happens there to recording phone calls and conferences. Complaining through means like letters and e-mails also keeps a record of when the complaint has been filed. Record the time, date, and place of the meeting, and who was there. If you're comfortable doing so, ask any witnesses to write down what they heard or saw.
6. Seek Help – If you can afford, try seeking legal help. The employer is also duty-bound to help you throughout the process. There are various organizations and legal aid groups formed exclusively to help with these kinds of harassment.

In case you or somebody you know who can't take action on their own, there exist certain helplines and organizations which specifically tackle these disputes and also provide free legal aid. (**Error! Reference source not found.**)

What Changes Need To Be Done?

A paradigm shift can be observed throughout the world in work culture by bringing it home through virtual means and bringing new forms of work harassment along with it. It becomes necessary that all organizations bring a change in their policies to tackle this.

Changes By Workplaces

From preliminary searches almost all corporations have provisions for sexual harassment in the form of company policies, by-laws, regulation, etc. but none have specific for work from home. General sexual harassment policy of such workplaces can be easily expanded to working from home however a more focused method would be required to prevent these in the first place. Given these policy changes are introduced annually, it shall be expected from at least major MNCs to include specific guidelines of appropriate behavior during e-meetings and for work boundaries.

Awareness probably is the most powerful tool to prevent sexual harassment at the workplace. It works both ways. In many incidents, the perpetrator is not aware that even acts that may seem trivial to them are unprofessional and may have a deep profound effect on the professional lives of others. Awareness through workshops about what constitutes as harassment and in this particular case what may be virtual harassment and the penal consequences of such acts would

help prevent such instances from happening in the first place. Secondly, awareness needs to be made to the women about their rights, complaint procedure, and familiarization with the internal complaint committee, etc.

Workshops need to be conducted on appropriate dress codes on e-meetings. Guidelines shall be set for contacting after work hours. Regular workshops should be conducted on messaging and appropriate work language.

Conducting such workshops is a legal duty for the employer under the code¹⁹. Employees can demand for these to be conducted.

Organizations shall make reporting harassment safe and easy. They ideally should offer multiple reporting avenues, such as a dedicated phone number, email address, and webform.

Since ‘workplace’ has been shifted, the employer should try and enforce all these measures as it is the legal duty of the employer to provide a safe working environment at the workplace²⁰

Changes by Government

The government can organize camps and awareness programs to increase the awareness about the provisions of this Act to employers and employees²¹. The government can under the Act make rules for such organization of

workshops for awareness²², etc., as given in Section 19(c).

Changes by Employees

Employees can make the biggest difference as their actions have immediate consequences. Every employee shall strive to make the workplace a comfortable environment for all employees. They can create informal support groups, make every person in the organization aware of their rights, support any aggrieved colleague, and hold the employer to its duties under this Act.

Conclusion

With the newfound work settings and the advent of technology into this space, we see ‘blurring of personal and professional, formal and informal lines’. Sexual harassment need not be direct, it can be subtle and unintended too if that makes a woman uncomfortable. It has transformed with what was thought as a traditional form of it to cyber harassment. Lockdown has just aggravated the problem as most businesses are forced to work remotely.

The provisions of the POSH Act are sufficient to deal with such cases and the courts have not hesitated to apply the same. The definitions under the Act are wide enough to encompass such forms of harassment and duties exist in the Act for the government and employers to apply necessary changes in these unprecedented times.

¹⁹ Section 19(c), *supra* note 7

²⁰ Section 19(a), *supra* note 7

²¹ Section 24, *supra* note 7

²² Section 29 (2) (1), *supra* note 7

What is required is for people to be aware of their rights and of the penal provisions for acts which they may feel like are harmless. We need sensitization, where employers are reminded of their legal duties which they need to abide by. We need empathy from people to help those who might not know about their rights and may due to some constraints refrain from complaining. To conclude we need to be conscious and try to make the environment everyone works in to be congenial so that everybody can develop and contribute reassured of their dignity.