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PREVENTION OF RETALIATORY ACTIONS AGAINST COMPLAINANTS OR WITNESSES POST- REPORTING OF SEXUAL HARASSMENT COMPLAINTS AT WORKPLACE.

AUTHORED BY - ANUSHA C KOTI

Introduction

India is exponentially advancing towards developmental goals. The presence of women can be seen in every sector of the work force and about 39 million women are working in India¹. But, in this patriarchal society where the ideology of male superiority is strong, emphasizing dominance, physical strength, and male honor, sexual violence in any form becomes an opted mode of suppressing women (Vandana 230). One such form of suppression is sexual harassment at the workplace which is extensively addressed in many academic papers and books. However, the suppression of victims post-reporting by retaliatory actions such as demotion, isolation from company activities, illegal transfers, etc., which are not in sexual nature is not delved deeply into as an existing problem that is harming the safety in the workplace and making women suffer silently. This aspect of the victimization of women post-reporting shall be covered extensively in my paper.

Linda Wirth states, “*Sexual harassment is not a sexual lust, but it is a form of oppression, victimization, and intimidation based on the relationship of power and authority*” (140). The Victims of Sexual harassment face harmful effects, due to the power dynamics existing in the hands of the perpetrator. The accused acts beyond harassing a woman, making her feel vulnerable and believe that her job is extremely difficult, further making her hesitant to report the matters to the authorities. The victimization strikes at the economic self-sufficiency of women, disrupting their earning capacity which negatively impacts other working women by forcing them to think twice before they report the sexual harassment complaint. For every woman who raises an outcry, there are a hundred others who suffer Sexual Harassment at the workplace in silence without reporting due to the fear of retaliation. The paper shall focus on those ‘silent’ women from various sectors within India who face retaliatory actions post-reporting and suggest measures to be undertaken to

protect the complainants or witnesses from being victimized or treated unfairly because *'Unnamed should not be mistaken for the non-existence and this silence speaks of pain and degradation' and not of absence*(Mackinnon 353)ⁱⁱ

The paper is designed to address the loophole in the Prevention of Sexual Harassment at Workplace Act, 2013 for protecting the complainants or witnesses post-reporting which is resulting in underreporting of Sexual Harassment complaints. Towards analyzing the necessity of protecting victims, the paper shall first, establish the existence of retaliatory actions against complainants or witnesses post-reporting and the need for social and organizational support for victims, relying on the survey reports and documented instances taken from already established empirical studies. Secondly, analyse the judicial pronouncements dealing with retaliatory actions against complainants and drawbacks in the existing legal framework. Thirdly, conclude by suggesting measures to be undertaken by the organization to protect the complainants or witnesses from being victimized, which shall encourage women to report sexual harassment complaints and increase the number of women in the workforce by providing a safe working environment.

Analyzing the existence of victimization

There is neither any sector nor any class of working women left untouched by the evil of Sexual Harassment in the workplace. The fear of reporting sexual harassment is more in women occupying lower jobs is a myth. The women holding high-profile jobs though having multiple equal opportunities do not complain about it due to fear of the consequences to be faced by her from the authority. According to the Report Garimaⁱⁱⁱ, 68.9% of the women did not complain to the internal complaints committee or management due to the fear of retaliation, and subsequent repercussions. Fifty percent of the women quit their job post-inquiry, due to the victimization faced by them (16). Therefore, the fear of retaliatory actions is one of the reasons for underreporting of sexual harassment in the workplace.

Instances explaining the existence of retaliatory actions against the complainant

The moment a victim of sexual harassment attempts to 'public' her 'private' anguish, she is labeled as a bad woman and becomes an easy target of harassers, and is subjected to humiliation publicly (Gupta 9). Studying the employer's response to the reported

complaints, Anagha Sarpotdar found two major things, firstly, complaining to the employer was women's last choice and was resorted to when their workplace environment was becoming intimidating and secondly, retaliation from the employer after complaining, in the form of termination, demotion, etc., was common in all the responses received during the study (27). In a study about nurses and nursing students Meena Ganapathy, found women do nothing and pretend as if they have not witnessed, felt, or experienced the situation because many times victims are in regular contact with perpetrators and they fear consequences faced post-reporting (140). According to the study conducted by Anuj Thomas, about eighty percent of the participants' key reason for sexual harassment incidents at institutions was the result of lack of courage, fear of disgrace, and social isolation faced by them after complaining against the abuser. In an academic community, when a woman is harassed, there can be a concern to come forward and lodge a complaint, due to the fear of reputation, fear of retaliation, or any repercussions on one's career (320). Further, the woman on probation will find it more difficult to report the complaint (Kapur 28). This is because a woman who is new to the workforce might be worried about being perceived negatively or face biases if reported. According to the study conducted by Paramita Chaudhuri despite the grievance mechanism in place, there exists the power dynamics against the women if she makes the formal report (99). Chaudhuri also in a separate study about experiences of sexual harassment of women health workers in four hospitals of Kolkata, found that 50 out of 77 women recognized fear of dismissal, loss of income, blocking of promotion, and victimization in work assignments such as inconvenient duty hours, as the factors underlying for non-action against the perpetrator (222). Whenever women report sexual harassment, it causes a division in the workplace where they will be isolated, and bullied and the rumour of such harassment will just escalate the situation and harm the working conditions of the victim. Many of the victims tend to leave the job as it becomes difficult to work in a hostile environment. The effects of sexual harassment will follow her to the next job because it will affect her work record and references (Bolland 48). The victims go through problems, irrespective of whether they respond actively or passively, because, if the victim complains, the perpetrator can become antagonistic or the victim may obtain a lower performance rating; and if they do not complain, they must go through the emotional and mental trauma (Salin, et al. 2). Therefore, these instances show that the fear of consequences such as demotion, low ratings, isolation from company activities, sudden transfers, increase in the working hours, salary reduction or termination of employment, with lack of social and organizational support, is discouraging women to take a step towards

reporting the sexual harassment and this has a bad impact on other women who are subjected to sexual harassment and may be ready to report. The bitter experience pre- and post-reporting harms their mental health and lowers confidence and victims tend to think all men are rude and vulgar (Bularzik 124).

Do Women Get the Social Support They Need from Their Peers?

The above instances prove that women are hesitant to report due to the fear of consequences, but when a woman picks up the courage to report the harassment, support, and help at the workplace are crucial. Social support acts as a catalyst to encourage the tormented woman to report sexual harassment against the perpetrator (Shagal and Dang 54). Support acts as a strength to the victim, which helps her to report the case rather than fighting alone. But such support is not always forthcoming. Some of the women interviewed in the survey for Saheli Report^{iv} said that, when the victim revealed about the sexual harassment she was not supported to report, but rather was isolated and asked to remain silent about such matters. Punam Shagal and Aastha Dang, have a similar finding for social support, that is female colleagues advised the victims not to bring their experiences to authority. Their concern for “*nothing will come out of complaining*” contrasted with the support received from male colleagues (52). Further, 57.8%^v of the victims who reported sexual harassment underwent abuse, and bullying by their colleagues. On the other hand, the Saheli report, also revealed that some of the victims received support from their colleagues in the workplace which helped them to successfully persuade the case of harassment done by their superiors. To quote a few, in a government hospital a nurse was supported by her colleagues to report against the superior doctor who harassed her in the ICU, the peers in an international-based bank fully supported the complaint of sexual harassment made by employees against the management.

One of the reasons behind not supporting the victim of sexual harassment is the fear of severe consequences from the authorities such as a threat to jobs, demotion, transfers, and jeopardizing their relationship with other peers, etc., Therefore, the victimization is extended to those who support victims and retaliatory actions are not only limited to the victims post-reporting but are also extended to the witnesses and woman colleagues who support her. This creates a situation where all women in the workplace are being placed in a vulnerable position, even if the women are willing to help the victims the fear of retaliatory actions will make them remain silent.

The previous paragraphs portray that sexual harassment in the workplace is not merely a physical attraction but is more about the misuse of authority (Agrawat and Haridas 271). Women apart from becoming independent and fighting against the male-dominated work place to establish their status must also put their dignity and respect at stake, which is considered a negative consequence of women entering the workforce, (Bhaya 1253). Respect for women is one of the non-negotiable demands of human dignity. Sexual harassment at the workplace is not only questioning their dignity but also violating their fundamental and human rights because it violates the principle of equal treatment for men and women at work (Bhasin 70). Also, the tussle between the woman's dignity and her being the breadwinner of the family makes the situation even worse (Choudary and Kaithwas). Usually, working women with the poor financial conditions struggle more between the psychological pressure on one hand and economic independence on the other. Even after facing all such traumatic acts, if the victim wants to continue the job, victimization will create a hostile environment which makes her constructively discharged from the job (Bolland 49). Due to this, working woman lose their self-confidence, are not sure about their work, and do not feel safe at their workplace, which further affects the basic motive of seeking employment and becoming independent. Therefore, even if complaining about sexual harassment will uphold their self-respect, many a time due to fear of consequences, victims think complaining is more injurious than remaining silent (Mackinnon, *Directions* 235)^{vi}.

Analyzing the judicial pronouncements dealing with retaliatory actions against complainants.

In the case of *Utkal Machinery Ltd. Vs. Patnaik*^{vii}, the respondent entered services with the appellants and was terminated from the job during the probation period. The respondent alleged that her termination was mala fide, illegal, and an act of victimization for complaining about the sexual harassment against the manager. The contention made by the appellate was that the termination was due to the unsatisfactory discharge of work by the respondent. However, the management failed to produce evidence for the unsatisfactory work of the respondent. Therefore, the Hon'ble Supreme Court upholding the award of the Industrial Tribunal (Orissa), set aside the order of discharge of respondent during the probation period and held such order to be punitive.

In the case of *M/S. Saudi Arabian Airlines vs Mrs. Shehnaz Mudbhatkal & Another*^{viii}, the petitioner is a foreign Airline company incorporated under the laws of Saudi Arabia and

has offices at various places all over the world including Mumbai. The respondent joined the service of the petitioner as Secretary to the Station Manager. She was later promoted to 'Customer Service Agent' for carrying out her job with the utmost satisfaction. Further, Abdul Allah Bahrani took charge as Station Manager and a series of unfortunate events started to commence in the work-life of respondent. Bahrani made repeated demands asking the respondent to come out with him for lunch and dinner, which she politely refused. Then he started making indecent and objectionable personal remarks, asking her to give the detailed method of family planning, or talking purely personal matters which had no connection with the work. The respondent politely asked Bahrani, that she had no interest in having any personal relationship with him. This provoked Bahrani and he started harassing the respondent. Further, the respondent was due for promotion to the post of "Lead Customer Services Agent," but the same was denied and given to her junior. The improper requests by Bahrani and unwelcome sexual advances continued during the day-to-day work. The continued harassment made the respondent complain to the supervisor, seeking his intervention in the matter. When the supervisor sought clarification from Bahrani, the respondent was immediately sent on leave. Later, when the respondent attempted to resume work, she was not allowed, nor was allowed to perform any of her duties despite going to the office every day. The respondent was also threatened that she and her husband employed in Saudi Arabia would be dismissed from work. When the respondent attempted to take the matter to a higher authority, she was given a letter of termination, which stated that she was guilty of wilful insubordination and acts of negligence committed during her work for which there was no explanation. The matter was heard before the First Labour Court in Mumbai, the court held the termination as an act of victimization and directed reinstatement of the respondent with full back wages and continuity of service with all attendant benefits. Aggrieved by the decision of the Labour Court, the petitioner approached the Bombay High Court, which further upheld the decision of the labour court.

In the case of *Rina Mukerjee vs, The State of West Bengal*^{ix}, victim Rina lost her job within six months of her joining The Statesman newspaper. While the company alleged that her work was "tardy" and "lacking in quality," it suppressed the fact that right before her termination within her first month of work, Rina complained to the managing director about the sexual harassment she faced from the news coordinator Ishan Joshi. When the organization failed to inquire into the matter, Rina filed a complaint to the West Bengal

Women's Commission with the firm belief that her termination was the result of the sexual harassment complaint. Hearing the matter, the Industrial Tribunal (West Bengal) held that such termination was not bona fide and was a colourable exercise of power. The employer not being able to produce any evidence to show that the performance of the employee was unsatisfactory raises doubt about the bona fide discharge and makes one think that she was victimized. The High Court of Calcutta upheld the award asking the organization to reinstate Rina for the remaining period of probation along with the compensation of Rs. 1,00,000/- (One lac) to be paid by the Statesman Ltd., within three weeks from the date of order to the employee.

In the case of *X and ors vs Akademi and ors*^x, the aggrieved woman is from the northeastern states and was appointed to the post of editor on probation for two years. The aggrieved woman started to face several sexual harassments from the secretary, which included sexual advances, unwelcome physical and sexual contact, and sexually coloured remarks. He also regularly made racist comments about women hailing from the North-east. When aggrieved woman confronted him and told him that she would complain to a higher authority, he tried to hold her hand, saying that she should have understood his 'hints' and she should provide him 'bodily satisfaction' if she did not want her probation period to be extended. After she reported the matter, the Internal Complaints Committee stated that it did not have the jurisdiction to inquire about the matter, and the Local Committee had the jurisdiction, which clearly shows the impartiality of the Internal Committee. The local Complaint Committee inquired about the matter and granted her interim relief and she requested the Internal Complaints Committee to discontinue the proceedings. But the Internal Complaints Committee while submitting the report to the respondent stated that the aggrieved woman had withdrawn the complaint. When aggrieved woman started protesting for the same, she was terminated from the job. Challenging the termination order she approached Delhi High Court. And court ordered for reinstatement of the woman as a probationer in terms of her appointment letter with continuity of her services, till the conclusion of the inquiry by the Local committee.

In the case of *Ms. X vs Registrar General, High Court of Madhya Pradesh and Anr*^{xi}, the petitioner was working as an Additional District and Sessions Judge with good grades in her Annual Confidential Record (ACRs). Thereafter, the petitioner complained that she was sexually harassed by Justice A. Due to the said sexual harassment complaint, the then

District and Sessions Judge addressed a complaint against the petitioner to the Registrar General of M.P. High Court. Further, the Transfer committee of the M.P High Court, with two judges approved the mid-term transfer of the petitioner from Gwalior to Sidhi (424 km away), without going through the annexures of the Transfer policy. The petitioner requested an extension of 8 months in Gwalior so that her daughter studying in 12th grade complete her academic session, the same was rejected. She further requested to seek an alternative post to any of the four cities nearby so that her daughter could complete her education, which was also rejected. Out of frustration, the petitioner applied for resignation, which was accepted by the government of Madhya Pradesh. The petitioner thereafter filed a writ petition before the Hon'ble Supreme Court, stating that she was coerced and exerted duress until the only option she had was to resign. The Supreme Court declared circumstances of the case show that the petitioner's resignation could not be considered voluntary, but was forced and left with no other alternative. The respondents were directed to reinstate the petitioner and she would be entitled to continuity in service with all consequential benefits.

Although the termination order of Patnaik was set aside; Shehnaz Mudbhatkal, Rina, and Ms. X were all reinstated to their earlier position, and the District & Sessions judge was given back her post, these cases are effectively capturing the essence of the retaliatory actions faced by the complainants of sexual harassment. The cases also capture that, the trend of the retaliatory actions against the complainant existed even before the Vishaka guidelines and continues till today in various forms. The organization in all the above cases neglected to take cognizance of the complaint through the mechanisms prescribed by the law, which had a negative impact on other women workers, the safety of the workplace environment, and the company's reputation.

Recently, the Hon'ble Supreme Court in the case of, *Sunita Thawani Vs Union of India and Another*^{xii}, dismissed the Public Interest Litigation filed to protect the complainant, witnesses, or other persons in cases of sexual harassment from victimization or retaliatory actions faced in the hands of the accused person or the concerned organization. The reasoning for the same was, that the petitioner was required to show some instances of harm arising out of such victimization. In February 2020, the Delhi High Court dismissed the case relating to the offense of victimization and retaliation, stating “*Retaliation, or victimization, is only the provocation for an act of assault. If an act of assault amounts*

to sexual harassment, it would anyway be punishable under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. If it does not, it cannot be punishable under the said Act, as the Act deals with only offenses of a sexual nature, and an offense which does not lead to sexual harassment can find no place therein.” But the truth is, it is difficult to provide substantial proof of damage or harm caused to victims because retaliatory actions after reporting the sexual harassment are often non-sexual which can cause significant emotional distress and career setbacks for victims. This fear of non-sexual retaliation is one of the factors discouraging victims from reporting sexual harassment. Therefore, my argument is that, to encourage the reporting and combat sexual harassment effectively, undertaking measures to address all forms of retaliation even if it is non-sexual nature is necessary and this would create a safer environment for victims and other working women to come forward and seek the redressal.

Does The Law Protect Against Victimization?

The Prevention of Sexual Harassment at Workplace Act, 2013 fails to provide any safeguards or protection against the retaliatory actions faced by the victims of sexual harassment post-reporting. Some of the provisions of the Act try to provide safety to the victims but are inadequate, such as Section 19 of the Act, which imposes duties on the employer to ensure the safety of the workplace. But the section falls flat to ensure the safety of the victims against the retaliatory actions.

Further, section 12 of the act provides the action to be taken during the pendency of inquiry, where on the request being made by the aggrieved women the Internal Committee or the local committee, may recommend the employer to transfer the aggrieved woman or the accused to any other workplace, or grant leave to aggrieved woman for three months. This should be considered as a step towards ensuring the safety of the victim but inversely the transfer is resulting in an act of retaliation against the victim for reporting the sexual harassment.

Therefore, the present law on Sexual Harassment of Women at the Workplace fails to recognize any protection against the victimization of complainants, witnesses, or other persons supporting the victims at the workplace. But India being a signatory, is yet to ratify the International Labour Organization’s Violence and Harassment Convention, 2019 which effectively under Article 10 targets the issue of retaliation and ensures the safeguards against retaliation, victimization, or undue consequences against complainants, witnesses, and

whistle-blowers. Thus, the incorporation of Article 10 through organizational policies can provide safety to the victims of sexual harassment, and increase the number of reporting of sexual harassment complaints.

Conclusion and Way Forward

Victims of Sexual Harassment value their safety and support in the workplace more than taking legal actions against the perpetrator because they fear facing retaliatory actions post-reporting, which most of the time make the victim powerless due to job insecurity (Lopez 6). Retaliation significantly hinders the efforts to prevent Sexual Harassment in the workplace and creates a hostile environment. To overcome the stigma attached to the reporting of Sexual Harassment at the Workplace, which is well established in the paper, there is an urgent need to undertake measures protecting the complainants or witnesses from being victimized. Safeguarding those who come forward to report is not just a legal obligation but also a moral duty of the organization.

A committed effort on the part of the organization is necessary to ensure that the purpose of the Prevention of Sexual Harassment Act 2013, is served by encouraging the reporting of sexual harassment, rather than discouraging women through the weapon of victimization. Organizations that have invested in emphasizing gender diversity and ethical practices must inculcate strong policies toward protecting the victims of Sexual Harassment in the Workplace (Bhatt). Thus, organisations while framing their policy must give a specific emphasis in the following aspects such as, zero-tolerance policy against retaliation within the sexual harassment policy which shall include a clear definitive clause describing all the acts of threats, intimidation, illegal transfer, isolation etc., as retaliatory actions; include the anti-retaliation clause written within the offer agreements between employer and employees which shall clearly state retaliation against complainants is prohibited, knowing there will be serious consequences for indulging in retaliation can make the individual less likely to do so; strengthen the reporting mechanism which shall include a confidential reporting through online reporting forms, anonymous reporting options rather than manually complaining to the superior authority which many a times go unheard (Zheng); the training and awareness programme about Sexual Harassment at Workplace should extensively cover recognising, reporting, and understanding the consequences of retaliatory actions against victim, the explicit discussion about retaliatory actions can bring it to the forefront of employee's mind about what

constitute retaliation because many might not even realize their actions constitute retaliation, further this can enhance peer support as it empowers the peers to recognize retaliation and understand its impact on the victim. These measures by prioritizing the victims make them feel safe even after reporting their experience of sexual harassment in the workplace.

The paper reflects the power dynamics and patriarchal culture exercised by the authority over the victims of sexual harassment. Further, it is worth commenting that our education system is enabling women to develop the skills and competence to be economically independent but failing to build more emphasis on gender equality and respect towards women. Thus, tackling the issue solely through organizational measures is like treating the symptoms without addressing the root cause. To create a safe environment for women, a prolonged approach is necessary, focusing on cultural shifts along with organizational reforms.

To conclude, the fact that despite policies on sexual harassment, inappropriate behaviour towards women employees continues in the form of retaliatory actions. This makes me think that laws and policies are universal but it is on the shoulders of the organization to improvise on them as per the need of their workplace. Therefore, organizations should focus on gender diversity in the workplace not only in terms of increasing the number of working women but also ensuring that all those numbers count!

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^{vi} Mackinnon Katherine, and Siegal Reva. *Directions in Sexual Harassment Law*. London Yale UP, 2004.

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^{viii} 1999 (1) BomCR 643

^{ix}2014 (4) CALLT 190 (HC)

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^{xi}(2022) 14 SCC 187

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