

THE LIABILITY OF EMPLOYERS FOR THE HARASSMENT OF EMPLOYEES BY NON-EMPLOYEES

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1 Introduction

In *Piliso v Old Mutual Life Assurance Co*¹ (“*Piliso*”) the South African Labour Court ordered an employer to pay damages to an employee who had been sexually harassed by an unknown person. The victim found crude notes on a photograph of herself affixed to her workstation on two consecutive days. She notified the employer only after the second occasion. The employer did not take action and as a result the employee suffered psychological harm. She claimed damages from the employer, but could not prove that the harasser was a co-employee (since non-employees also had access to the workplace). The Labour Court thus found that she could rely neither on common law vicarious liability, nor on section 60 of the Employment Equity Act 55 of 1998 (“the EEA”), which under certain circumstances holds the employer liable for the acts of its employees. The court did not contemplate the possibility that the employer could be held directly liable for discrimination in terms of section 6(1) of the EEA. The Labour Court held that in the absence of common law and statutory remedies, it was justified in awarding damages to the employee based on the violation of the employee’s constitutional right to fair labour practices.² The court found that the legal convictions of the community required the employer to do the following after an employee had been traumatized in this way:

- start a process of investigation to find the perpetrator;
- provide the employee with support in the form of counselling to minimize the psychological trauma and communicate regularly with the employee on her needs; and
- take all reasonable steps to eliminate or reduce the possibility of the incident recurring.³

¹ (2007) 28 ILJ 897 (LC)

² The court relied on Conradie JA’s statements in *Jayiya v MEC for Welfare, Eastern Cape* 2004 2 SA 617 (SCA) 618A:

“Constitutional damages ... might be awarded as appropriate relief where no statutory remedies have been given or no common law remedies exist. Where the lawgiver has legislated statutory mechanisms for securing constitutional rights, and provided of course that they are constitutionally unobjectionable, they must be used.”

³ *Piliso v Old Mutual Life Assurance Co* (2007) 28 ILJ 897 (LC) paras 78-80

The court found that the employer had failed to meet these requirements and as a result the employee's right to fair labour practices had been violated. The court accordingly granted constitutional damages.

In contrast to the above decision, the High Court, Supreme Court of Appeal and the Constitutional Court have recently held in a number of decisions that litigants may not rely directly on a constitutional right where that right is embodied in other legislation.⁴ According to the Constitutional Court, where such legislation does not provide a remedy the correct procedure would be to challenge the legislation as falling short of the constitutional standard.⁵ A litigant may thus only bypass enabling legislation if the litigant simultaneously demonstrates that the applicable legislation is unconstitutional or inadequate. The reason for this requirement is that, in the absence of a constitutional challenge to the provisions of enabling legislation, the result would be the creation of two parallel systems of law.⁶

The decision in *Piliso* and the criticism against the basis for the decision raise the question whether there were any other remedies available to Ms Piliso. The Labour Court did state in this case that an employer has a common law duty to provide a safe working place and that the employer could be held liable if the employer's negligence in failing to prevent sexual harassment caused psychological harm.⁷ However, the court did not investigate these grounds any further. Although it certainly is possible that an employee in the circumstances of Ms Piliso could have relied on a common law remedy based on contract or delict, the focus in this article will be on investigating the possibility of holding the employer liable for discrimination in terms of section 6 of the EEA.⁸

Another possibility (not mentioned by the court) is that Ms Piliso could have relied on the Compensation for Injuries and Diseases Act 130 of 1993 ("COIDA"). However, in *Ntsabo v Real Security CC*⁹ the Labour Court regarded a claim based on COIDA as inappropriate in the circumstances of sexual harassment because, in the court's opinion, this type of behaviour fell outside the course and scope of employment.¹⁰ It is also doubtful

⁴ *Minister of Health v New Clicks SA (Pty) Ltd (Treatment Action Campaign & another as amici curiae)* 2006 8 BCLR 872 (CC) para 97; *NAPTOSA v Minister of Education, Western Cape* 2001 2 SA 112 (C) 123; *SANDU v Minister of Defence* 2007 8 BCLR 863(CC) para 51

⁵ *SANDU v Minister of Defence* 2007 8 BCLR 863(CC) para 51

⁶ Ngcukaitobi "Direct Allocation of the Constitution in the Labour Court: A Note on *Piliso v Old Mutual* (2007) 28 *ILJ* 897 (LC)" 2007 (28) *ILJ* 2178 2179

⁷ The court referred to *Media 24 Ltd v Grobler* 2005 6 SA 328 (SCA) in which the employer was held directly liable in terms of the common law for failure to act on a complaint of sexual harassment

⁸ Ms Piliso could possibly also have relied on the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("PEPUDA"), which provides that neither the state nor any person may discriminate against any person (s 6) and that no person may subject any person to harassment (s 14). S 5(3) of PEPUDA provides that it is not applicable to any person to whom and to the extent to which the EEA applies. Should the argument be that the EEA is not applicable due to the fact that it could not be proved that the harasser is an employee, PEPUDA could be applicable. However, this course of action is not more advantageous than instituting proceedings in terms of s 6 of the EEA against Ms Piliso's employer for directly discriminating against her, as she would also have to prove under PEPUDA that the employer unfairly discriminated against her or that the employer subjected her to sexual harassment by not attending to her complaint

⁹ (2003) 24 *ILJ* 2341 (LC)

¹⁰ 2380

whether sexual harassment could be regarded as an “accident” as defined in COIDA.¹¹

There is no South African precedent for a remedy based on discrimination by the employer in the particular circumstances (harassment by a non-employee), but in light of the development of employer liability for discrimination in other jurisdictions, this possibility warrants further investigation. A South African case of racial harassment in which the employer was held to have discriminated against the employee for failing to act against the culprit employee¹² further adds to the possibility of direct employer liability for discrimination in *Piliso* and similar cases.

In this article, the liability of employers for third party (or non-employee) discrimination against its employees in the United States, the United Kingdom and Australia will be investigated. First, the development of harassment as a form of discrimination in each of the mentioned jurisdictions will be discussed briefly. The focus will then shift to the development of employer liability for the harassment of an employee by a co-employee and finally, the development of the liability of employers for the harassment of their employees by third persons will be discussed.

2 The United States

2.1 Harassment as a form of discrimination

Section 703 of Title VII of the Civil Rights Act 1964 prohibits an employer from discriminating “against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual’s race, color, religion, sex or national origin.” Guidelines of the Equal Employment Opportunities Commission (EEOC)¹³ specify that sexual harassment is a form of discrimination based on sex and thus prohibited in terms of Title VII. According to these guidelines:

“Unwelcome sexual advances, requests for sexual favours, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment.”¹⁴

The United States’ courts have followed these guidelines and interpreted the prohibition in Title VII to include harassment¹⁵ (since harassment can alter the terms and conditions of employment) which is based on one of the prohibited grounds.

¹¹ “Accident” is defined in s 1 of COIDA as “an accident arising out of and in the course of the employee’s employment and resulting in a personal injury” See *Grobler v Naspers* (2004) 25 *ILJ* 439 (C) 514A

¹² *SATAWU for and on behalf of Finca v Old Mutual Life Insurance Company (SA) Limited and Burger* [2006] 8 *BLLR* 737 (LC)

¹³ *Guidelines on Discrimination because of Sex* (2005) 29 CFR Ch XIV §1640 11

¹⁴ §1640 11(a)

¹⁵ *Meritor Savings Bank, FSB v Vinson* 477 U S 57 (1986)

At first only *quid pro quo* sexual harassment (referred to as “tangible employment action” after the *Ellerth*¹⁶ and *Farragher* judgements¹⁷) was recognized by the courts as discrimination.¹⁸ Tangible employment action is action that results in “a significant change in employment status.”¹⁹ Sexual harassment which creates a hostile work environment was only subsequently recognized as discrimination in cases such as *Henson v City of Dundee*.²⁰ In *Meritor Savings Bank FSB v Vinson*²¹ the United States Supreme Court confirmed that acts creating a hostile working environment will be regarded as discrimination if the harassment is so pervasive that it alters conditions of employment and creates an abusive working environment.²²

2.2 Employer liability for harassment of an employee by a co-employee

In circumstances of sexual harassment by a supervisor where tangible employment action was taken, the courts will hold the employer vicariously liable without recourse to an affirmative defence; thus the employer will be strictly liable.²³ Where the supervisor did not take tangible employment action, but merely created a hostile environment, the employer may be exonerated if he can prove that he exercised reasonable care to prevent or promptly correct any sexually harassing behaviour and that the employee unreasonably failed to take advantage of the preventative or corrective opportunities provided by the employer.²⁴

In terms of the EEOC guidelines, an employer would be liable for harassment of an employee by a co-employee who is not a supervisor if the employer knew or should have known of the harassment and failed to take prompt and effective remedial action.²⁵

While the employer’s liability for harassment of his employee by a supervisor is seen as a type of vicarious liability,²⁶ liability for harassment of

¹⁶ *Burlington Industries, Inc. v Ellerth* 118 S Ct 2257 (1998)

¹⁷ *Farragher v City of Boca Raton* 118 S Ct 2275 (1998)

¹⁸ *Williams v Saxbe* 413 F Supp 654 (1976)

¹⁹ *Burlington Industries, Inc. v Ellerth* 118 S Ct 2257 (1998) 2268

²⁰ 682 F 2d 897 29 EPD (11th Cir 1982) The court stated that a hostile work environment is

“every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of epithets” (902)

In *Harris v Forklift Systems Inc* 510 U S 17 (1993) 370-371, the court eased the burden of proof on the harassed employee by stating that “so long as the environment would reasonably be perceived, and is perceived as hostile or abusive, there is no need for it also to be psychologically injurious”

²¹ 477 U S 57 (1986)

²² 67

²³ *Burlington Industries, Inc. v Ellerth* 118 S Ct 2257 (1998) para 4; *Farragher v City of Boca Raton* 118 S Ct 2275 (1998) para 9

²⁴ Fujiwara & Brown “Cause of Action for Post-Ellerth/Farragher Title VII Employment Sexual Harassment Claims” 2005 27 COA 2d 1

²⁵ *Guidelines on Discrimination because of Sex* §1640 11

²⁶ In *Kohler v Inter-Tel Technologies* 244 F 3d 1167 (9th Circuit 2001) the court explained that the US Supreme Court referred to this kind of liability as vicarious liability and that the Californian courts refer to it as strict liability The affirmative defence formulated by the Supreme Court in *Burlington Industries v Ellerth* 118 S Ct 2257 (1998) would be applicable to Californian cases despite the difference in terminology

his employee by a co-employee is regarded as liability based on the negligent failure to act in circumstances in which the employee was harassed.²⁷

Actions of the employer such as suspending the harasser after learning about the harassment, changing work schedules and transferring the victim after she requested a transfer have been regarded by the courts as prompt remedial action and as constituting effective defences against liability.²⁸ In a case in which the harassed person could not identify her harassers, the court held that the employer could have distributed an anti-harassment policy among its employees to ensure that this type of conduct did not occur again. The employer was held liable on the basis that it failed to take this step.²⁹ If the employee does not report the incident and there is no reason why the employer should have known of the harassment, the employer cannot be held liable.³⁰ From this it is clear that an employer in the United States cannot be held liable for a first incident of sexual harassment by a co-employee in circumstances where there were no warning signs that such an action could take place.³¹

In *Lowry v Powerscreen*³² the facts were very similar to those in *Piliso* in that graffiti was directed at an employee by an unknown person. However, in contrast to *Piliso*, the employer in *Lowry* promptly distributed the firm's existing sexual harassment policy and interviewed shift workers to try and establish who was responsible for the graffiti. These actions were regarded by the court as prompt and remedial corrective action and the employer escaped liability.³³

2 3 Employer liability for harassment of an employee by a non-employee

The EEOC issued the following guidelines on harassment of employees by non-employees:

"An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action."³⁴

Although the same standard is applicable in the case of harassment by co-employees, the guidelines of the EEOC provide that it will take the extent of the employer's control over non-employees and any other legal responsibility of the employer into consideration in deciding on the liability of the employer.³⁵

²⁷ *Fred Meyer, Inc. v Bureau of Labor and Industries* 152 Or App 302, 954 P 2d 804 (1998)

²⁸ *Kent v Henderson* 77 F Supp 2d 628, 81 Fair Empl Prac Cas (BNA) 1373 (E D Pa 1999)

²⁹ *Continental Can Co., Inc. v State* 297 NW 2d 241, 22 Fair Empl Prac Cas (BNA) 1808, 23 Empl Prac Dec (CCH) par 30997 312 (Minn 1980), (94 ALR 5th)

³⁰ *Schemensky v California Pizza Kitchen, Inc.* 122 F Supp 2d 7651 (E D Mich 2000)

³¹ *Johns v Harborage I, Ltd* 585 NW 2D 853, 78 Fair Empl Prac Cas (BNA) 770, 76 Empl Prac Dec (CCH) 46145 (Minn Ct App 1998) If the employer had knowledge that a male worker previously harassed female co-employees, it may be argued that the employer should have anticipated that other employees could be harassed and thus "should have known" of the conduct

³² 72 F Supp 2d 1061, 81 Fair Empl Prac Cas (BNA) 579 (E D Mo 1999)
1072-1073

³³ *Guidelines on Discrimination because of Sex* §1640 11(e)

³⁵ *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (1999) <http://www.eeoc.gov/policy/docs/harassment.html> (accessed 31-01-2009)

In *Folkerson v Circus Circus Enterprises Inc.*³⁶ an employer successfully defended a claim of harassment of his employee by a non-employee on the basis that he took prompt and remedial corrective action once he learnt of the harassment. The employee, a performer in a circus, was touched on the shoulder by a member of the audience. The employer promptly removed the employee from the show after having learnt of the incident.

The employer in *Lockard v Pizza Hut*³⁷ was held liable for not responding after a waitress complained of being sexually harassed by male customers. The manager denied her request to assign the table to another waitress. The court stated that

“[a]n employer who condones or tolerates the creation of such an environment should be held liable regardless of whether the environment was created by a co-employee or a non-employee, since the employer ultimately controls the conditions of the work environment”³⁸

In *Windermere v Little*³⁹ an employee was raped by a client whose account was regarded as very important to the employer. The rape took place outside the work premises just after a business meeting with the harasser. When the employee reported the rape to a senior person at work, she was informed that reporting the rape would probably result in an adverse employment action (because of the importance of the client) and was told to go for therapy. She eventually reported the incident to the president of the company, but he responded that he did not want to hear about the incident and referred her to the company’s lawyers. Shortly after reporting the incident she was demoted.

The court held that the conduct (the rape) was sufficiently severe to make a reasonable woman feel that her work environment had been altered, even though it was only a single incident. Although she had no further contact with the rapist, “Windermere’s subsequent actions reinforced rather than remediated the harassment”⁴⁰ and “Windermere’s failure to take immediate and effective corrective action allowed the effects of the rape to permeate Little’s work environment and alter it irrevocably”⁴¹. Although the employer had no control over the harasser, the employer could have ensured that the victim had no further duties in regard to this client.

The position in the United States is thus that an employer will be held liable for third party or non-employee harassment on the basis of negligence if the employer knew or should have known that harassment took place and did not take prompt and remedial action. Even in the case of only one incident over which the employer did not have control (initially) and there was no warning that it would take place, the employer would be liable if he remained passive after the incident. The basis for liability is that by its inaction the employer reinforced the hostile work environment.

³⁶ 107 F 3d 754 (9th Cir 1997)

³⁷ 162 F 3d 1062 (10th Cir 1998)

³⁸ 1073

³⁹ No 99-35668 (9th Cir January 23, 2002)

⁴⁰ 1035

⁴¹ 1036

2 4 Assumption of risk

In 1993, several waitresses who worked at the Hooters restaurant chain sued their employers for sexual harassment by customers. Their argument was that the sexually provocative uniforms that they were required to wear and the atmosphere deliberately created at the restaurants were conducive to sexual harassment. However, it has been argued that assumption of risk should be a defence available to the employer in these circumstances. The reasonable expectations of employees contracting to work at such establishments should, according to this argument, be used as a yardstick to determine whether harassing conduct is sufficiently serious to “cross the threshold into actionable sexual harassment.”⁴² The Hooters cases were settled out of court and therefore do not shed light on the limits of employer liability when it comes to the conduct of customers in the workplace.⁴³

An employer who required a receptionist to wear a provocative red, white and blue bicentennial costume was held liable when she was harassed by clients and the employer insisted that she should keep wearing the costume.⁴⁴ In this instance there was no question of assumption of risk (in contrast to the Hooters cases), as the nature of the job of receptionist did not imply that sexually provocative clothing would be required.

3 The United Kingdom

3 1 Harassment as a form of discrimination

Sexual and racial harassment claims in the United Kingdom may be brought in terms of the Sex Discrimination Act 1975 (“the SDA”) or the Race Relations Act 1976 (“the RRA”).⁴⁵

In section 1(1)(a) of both the SDA and the RRA, discrimination is defined as “less favourable treatment” on the grounds of sex or race. To bring a successful claim based on sexual harassment, the claimant must prove that the employer discriminated against her,⁴⁶ in other words that she was treated less favourably and that she suffered a detriment as a result. In *British Telecommunications PLC v Williams*⁴⁷ the Employment Appeals Tribunal (EAT) defined sexual harassment as “unwanted conduct of a sexual nature or other conduct based on sex affecting the dignity of women and men at work.”⁴⁸

In *Porcelli v Strathclyde Regional Council*⁴⁹ the court held that if conduct is gender-specific, for example a man would not be vulnerable to the conduct or verbal abuse, the requirement of section 1 of the SDA in regard to less

⁴² Cahill “Hooters: Should there be an Assumption of Risk Defence to Hostile Work Environment Sexual Harassment Claims?” 1995 (48) *Vanderbilt Law Review* 1107 1151

⁴³ Kelly & Watt “Damages in Sex Harassment Cases: A Comparative Study of American, Canadian and British Law” 1996 (16) *NYLSJICL* 79

⁴⁴ *EEOC v Sage Realty Corp* 507 F Supp 599 607 (S N D Y 1981)

⁴⁵ Harassment was only expressly prohibited by the RRA in 2003. Before the amendments, employees harassed on the basis of race could only bring a claim based on direct discrimination

⁴⁶ S 1 read with s 6 of the SDA

⁴⁷ [1997] IRLR 668 (EAT)

⁴⁸ Para 8

⁴⁹ 1986 ICR 564

favourable treatment has been met and no further proof of such treatment is required. In *British Telecommunications PLC v Williams*,⁵⁰ the EAT accepted this interpretation and stated as follows:

“Because the conduct which constitutes sexual harassment is itself gender-specific, there is no necessity to look for a male comparator. Indeed, it would be no defence to a complaint of sexual harassment that a person of the other sex would have been similarly so treated.”⁵¹

Unfortunately, this interpretation was later overruled by the House of Lords,⁵² as will be discussed below.

3 2 Employer liability for harassment of an employee by a co-employee

Section 32 of the RRA and section 41 of the SDA impose a type of vicarious liability on the employer for “[a]nything done by a person in the course of his employment ... whether or not it was done with the employer’s knowledge or approval”. The employer may be exonerated if he proves that he “took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description”.⁵³ In *Canniffe v East Riding of Yorkshire*⁵⁴ the EAT stated that the following questions should be asked in determining whether “reasonably practicable” steps have been taken:

- (i) did the respondent take any steps to prevent the employee from doing the act or acts complained of in the course of his employment; and
- (ii) were there any steps which could reasonably have been taken which the respondent did not take?⁵⁵

According to the EAT, the answer to the second question must be in the negative for an effective defence in the case where there was knowledge of the possibility of sexual harassment. Where there was no such suspicion or possibility, a sexual harassment policy would be adequate and there would be no need to proceed to the second question.⁵⁶

⁵⁰ [1997] IRLR 668 (EAT)

⁵¹ Para 8 See Garbers “Sexual Harassment as Sex Discrimination: Different Approaches, Persistent Problems” 2002 SA *Merc LJ* 371 386-390 for a discussion of the difficulties experienced by British tribunals due to a preoccupation with harassment as discrimination and the concomitant need for a comparator

⁵² In *Pearce v Governing Body of Mayfield School* [2003] UKHL 34

⁵³ Initially the phrase “in the course of his employment” was interpreted in line with the common law requirements for vicarious liability. Thus, in *Irving v The Post Office* [1987] IRLR 289, the Court of Appeal held that the Post Office was not liable for racist remarks written on a letter by a Post Office employee, as such remarks were regarded as outside the sphere of his employment. However, in *Jones v Tower Boot* [1997] 2 All ER 406 the Court of Appeal rejected this interpretation of the RRA and adopted a purposive approach. This debate is now laid to rest with the decision of the House of Lords in *Lister v Hesley Hall Ltd* [2002] 1 AC 215, where the “close connection” test based on policy considerations was applied, in terms of which intentional wrongdoing was no longer seen as conduct that could never fall within the meaning of “in the course of employment”

⁵⁴ [2000] IRLR 555

⁵⁵ Para 14

⁵⁶ Para 14

3.3 Employer liability for harassment of an employee by a non-employee

In 1997 the EAT held an employer liable for race discrimination where his employees were harassed by non-employees. In *Burton and Rhule v De Vere Hotels*⁵⁷ (“*Burton*”), two black waitresses were subjected to racial and sexual harassment by Bernard Manning, a famous “blue” comedian, and an all-male audience. The employment tribunal in this case held that the employer was not liable on the discrimination charge because, although the complainants suffered a detriment, it was not the employer who subjected them to the detriment. The EAT overruled the decision of the tribunal and stated that

“[a]n employer subjects an employee to the detriment of racial harassment if he causes or permits the racial harassment to occur in circumstances in which he can control whether it happens or not”,⁵⁸

and

“where the treatment to which the employer had permitted the employees to be subject was race specific, there was no need for the claimants to prove that the employers treated them less favourably than they did or would treat employees of a different racial group”.⁵⁹

For this second part of the judgment, the EAT relied on the *dictum* in *Porcelli v Strathclyde*⁶⁰ discussed above

The EAT held that it was not necessary to establish any foresight on the side of the employer and held that it was undesirable to import concepts of negligence into the statutory torts of racial and sexual discrimination.⁶¹ The EAT gave the following guidance to employment tribunals:

“The tribunal should ask themselves whether the event in question was something which was sufficiently under the control of the employer so that he could, by the application of good employment practice, have prevented the harassment or reduced the extent of it. If such is their finding, then the employer has subjected the employee to the harassment.”⁶²

Thus, instead of focusing on the negligence of the employer in order to establish liability as in the United States,⁶³ the court in the *Burton* decision (and courts that have followed this decision) focused on the measure of control that the employer had over the work environment.⁶⁴ Measures to control the

⁵⁷ [1997] ICR 1

⁵⁸ 10

⁵⁹ 10

⁶⁰ 1986 ICR 564

⁶¹ *Burton and Rhule v De Vere Hotels* [1997] ICR 1 10

⁶² 10

⁶³ As explained above, in the USA the measure of control that an employer is able to exercise will be a factor in determining whether the employer was negligent or not

⁶⁴ In certain circumstances it may be foreseeable that an employee will be harassed by third persons, but the employer will not have control over the situation (the example of bus drivers who may be harassed by passengers was cited by the court in *Burton* as an example) and will not be liable if harassment takes place. The judgment in *Burton* was followed in *Go Kidz Go Ltd. v Bourdouane* EAT case 110/95 (Sept 10, 1996). In this case the employee worked for an employer who organised birthday parties for children. The employee was harassed by the father of one of the children attending a party. After complaining to her manager, she was encouraged to return to the party room, where the harassment then continued. The tribunal held that although the first incident of harassment was unexpected, the employer could have sent someone else to the party after the employee complained. As the employer had control over the situation, he was held liable for subjecting the employee to sexual harassment. The employer was thus not liable for the first act of harassment, but for the subsequent acts, as he knew about it and had control over the situation, but nevertheless omitted to prevent further acts of harassment. The liability incurred by the employer in these circumstances is direct liability.

environment may include barring a customer from the premises or removing the harassed employee from the location.⁶⁵ Control by the employer is the key element. By controlling the situation or by removing the employee or the customer, the employer will have an effective defence.

The House of Lords overruled the *Burton* judgment in *Pearce v Governing Body of Mayfield School*⁶⁶ (“*Pearce*”). According to the House of Lords, discrimination by the comedian and the guests in *Burton* could not be regarded as discrimination by the employer in circumstances where the employer merely failed to protect the waitresses against the discriminatory conduct. Lord Nicholls held that the employer would only be liable for discrimination if he had treated white waitresses differently to black waitresses in the same circumstances. In other words, to be successful the harassed employees would be required to prove that the employer did not take any measures to protect them against the discrimination by the comedian and the audience because they were black. This burden of proof creates an almost insurmountable barrier to complainants.

In *Pearce* the House of Lords held that there was no discrimination by an employer who failed to protect a teacher who was harassed by pupils on the basis of her sexual orientation. The court’s reason for the decision was that it was likely that a male homosexual would have been similarly treated by the employer. The comparator test required by the court has the effect that an employer cannot be found guilty in terms of anti-discrimination legislation if the employer fails to protect the employee against discrimination and there is no proof that he would have protected someone of a different sex or race. This legalistic interpretation of the SDA made it extremely difficult for employees to proceed against their employers in the case of harassment by non-employees.

Since the decision in *Pearce*, the liability of employers for the harassment of their employees by third parties has been addressed in *Equal Opportunities Commission v Secretary of State for Trade and Industry*.⁶⁷ In this case the Equal Opportunities Commission (EOC) argued that the Employment Equality (Sex Discrimination) Regulations (2005) which were formulated to implement the European Equal Treatment Amendment Directive⁶⁸ in the United Kingdom, did not contain the protection provided for in the Directive.

At issue before the court was the 2005 amendment of section 4A(1)(a) of the SDA. The section as amended provided as follows:

- “For the purposes of this Act, a person subjects a woman to harassment if–
- (a) on the ground of her sex, he engages in unwanted conduct that has the purpose or effect-
 - (i) of violating her dignity, or
 - (ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her
 - (b) he engages in any form of unwanted, verbal, non-verbal or physical conduct of a sexual nature that has the purpose or effect-

⁶⁵ *Go Kidz Go Ltd. v Bourdouane* EAT case 110/95 (Sept 10, 1996)

⁶⁶ [2003] UKHL 34

⁶⁷ [2007] EWHC 483 (Admin), [2007] IRLR 327

⁶⁸ 2002/73/EC

- (i) of violating her dignity, or
- (ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her.”

The phrase “on the ground of her sex” was regarded by the High Court as requiring a causal link between the sex of the person who is harassed and the conduct of the person liable for the harassment.⁶⁹ The Directive does not require such a causal link and merely provides that the conduct must be related to the sex of the victim. It was pointed out by the EOC that causation is still relevant in regard to direct discrimination, but not in regard to harassment provisions, which should only require an association with the sex of a person.

It was argued by the EOC that the implication of the 2005 amendments was that, in terms of section 4A(1)(a), an employer could not be held liable for a failure to address the harassment of an employee by a third person such as a customer or supplier, except if the employee proves that such an omission by an employer was because of her sex. This would leave employees who were harassed by non-employees in the same (undesirable) position as the victim in *Pearce*.⁷⁰ The High Court agreed with the EOC that the 2005 amendments did not afford sufficient protection and that they should be amended to implement the protection as envisaged by the Directive.⁷¹

The Sex Discrimination Act 1975 (Amendment) Regulations 2008 amended section 4A of the SDA. The result is that the employer can now be held liable if a third party subjects his employee to harassment in the course of the employee’s employment. The SDA provides that the employer must take steps that are reasonably practicable to prevent third party harassment. The employer must have had knowledge of at least two occasions of harassment by a third party (not necessarily the same third party) and will only be liable for the third occasion of harassment if he knew about the first two occasions.

Employers will not be liable for failing to take action if they did not know about the harassment, for single incidents of harassment by non-employees and for conduct that is beyond the employer’s control.⁷² However, employers in especially the hospitality sector will now have to make it clear to customers and clients that the harassment of employees is unacceptable.⁷³

The waitresses in *Burton* under the circumstances in that case could now, after the amendments, only have claimed from their employer if they had been harassed on two other occasions before the Manning incident. Victims of sexual harassment by non-employees now have more protection than in the era after the *Pearce* decision, but less protection than afforded by the decision in *Burton*.

⁶⁹ *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] EWHC 483 (Admin) para 63

⁷⁰ Walker “Is Bernard Manning Back in Fashion” 2007 (80) *Empl LB* 3

⁷¹ *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] EWHC 483 (Admin)

⁷² Government Equalities Office factsheet referred to in Nicolle “Hands Off!” 2008 *NLJ* 725

⁷³ 725

4 Australia

4.1 Harassment as a form of discrimination

Similar to the position in the United Kingdom, different Acts regulate discrimination on different prohibited grounds in Australia. The Sex Discrimination Act 1984 ("the SDA 1984") and Race Discrimination Act 1975 ("the RDA") regulate discrimination on these prohibited grounds.

Section 5(1) of the SDA 1984 states that someone discriminates against a person on account of the aggrieved person's sex if the discriminator treats the aggrieved person less favourably than the discriminator treats or would treat a person of the opposite sex in circumstances that are the same or are not materially different. This is similar to the formulation of race discrimination in the RDA.

Sexual harassment is recognized by the Australian courts as discrimination based on sex. In *Aldridge v Booth*⁷⁴ it was held that

"when a woman is subjected to sexual harassment ... she is subjected to that conduct because she is a woman, and a male employee would not be so harassed: the discrimination is on the basis of sex. The woman employee would not have been subjected to the advance, request or conduct but for the fact that she was a woman."⁷⁵

The court concluded that the discrimination (in the form of sexual harassment) is on the basis of the sex of the victim. This judgment thus eases the burden of a victim in a sexual harassment case in that the victim does not have to prove that she was treated less favourably than someone of the opposite sex. There is thus no need for a comparator in Australian sexual harassment law.

4.2 Employer liability for harassment of an employee by a co-employee

In terms of section 106(2) of the SDA 1984 the employer may be held liable for the discriminatory acts of his employee. However, the section further provides that the employer can avoid liability if he proves that he took all reasonable steps to prevent the employee or agent from performing discriminatory acts. This is similar to the formulation in the SDA of the United Kingdom, which requires the employer to take measures that are "reasonably practicable" to prevent discrimination. Although the SDA 1984 itself does not require this explicitly, the Australian Human Rights and Equal Employment Opportunities Commission (HREOC) requires the employer to have a sexual harassment policy in order to establish that he took all reasonable measures to prevent the employee from engaging in sexual harassment.

⁷⁴ (1988) 80 ALR 1

⁷⁵ 16-17

Paragraph 4.1 of the Code of Practice issued by the HREOC⁷⁶ provides that each employer, regardless of size, must take the following measures to avoid liability for sexual harassment:

- (i) The employer must take steps to prevent sexual harassment from occurring. An employer should have a sexual harassment policy, implement it as fully as possible and monitor its effectiveness; and
- (ii) if sexual harassment does occur, the employer must take appropriate remedial action in order to remedy sexual harassment and an employer should have appropriate procedures for dealing with complaints once they are made.

Thus, while the SDA 1984 only requires measures to prevent sexual harassment, the Code requires remedial action as well. In line with the guidelines of the HREOC, the courts have held that the defence that “reasonable steps” have been taken will usually require proof of an effective harassment policy.⁷⁷ Lack of knowledge that the harassment took place will not constitute a defence if the employer has not implemented a sexual harassment policy. This point is illustrated in *Boil v Ishan Ozden*⁷⁸ where the employer was not in the country when the harassment took place and there was no indication that harassment could take place. The employer was nevertheless held liable for the harassment because he had not implemented a sexual harassment policy.

The expectations that employees may have regarding their workplace were summarized in *Horne v Press Clough Joint Venture*.⁷⁹ In this case two women worked as cleaners in a male-dominated workplace. They were continuously subjected to pornographic material over a prolonged period. The employer did not respond to their complaints. The tribunal stated as follows:

“It is now well-established that one of the conditions of employment is quiet enjoyment of it. That concept includes not only freedom from physical intrusion or from being harassed, physically molested or approached in an unwelcome manner, but extends to not having work in an unsought sexually permeated environment”.⁸⁰

4.3 Employer liability for harassment of its employee by a non-employee

Section 105 of the SDA 1984 prohibits unlawful sexual discrimination, but does not make provision for liability of the employer for the sexual harassment of employees by non-employees. However, as the courts have accepted that sexual harassment is a form of unlawful sexual discrimination, an employer can be regarded as an accessory to sexual harassment in terms of section 105.⁸¹ Liability of an employer in terms of section 105 differs

⁷⁶ *Sexual Harassment in the Workplace: A Code of Practice for Employers* (2004) http://www.hreoc.gov.au/sex_discrimination/workplace/code_practice/SH_codeofpractice.pdf (accessed 31-01-2009)

⁷⁷ *Dippert v Luxford* (1996) EOC 92-828 79, 114

⁷⁸ (1986) EOC 92-165

⁷⁹ (1994) EOC 92-556

⁸⁰ 77, 175

⁸¹ Australian Human Rights Commission *Effectively Preventing and Responding to Sexual Harassment: A Code of Practice for Employers* (2008)

from vicarious liability regulated by section 106 of the SDA. For liability in terms of section 105 there is no need for a legal tie between the employer and the harasser.⁸² The failure of an employer to protect an employee if the employer was aware or should have been aware that sexual harassment was taking place, could lead to the employer being personally liable.⁸³ In *Elliot v Nanda & the Commonwealth*⁸⁴ the court found an employment agency liable in terms of section 105 of the SDA for “permitting” acts of sexual harassment. The agency placed the complainant as a receptionist with a doctor, while the agency was aware of complaints concerning sexual harassment made by other receptionists who had previously worked for the same doctor. The court stated that if a person knowingly places a victim in a position where “there is a real and something more than a remote possibility that the conduct will occur”, this will be regarded as permitting the conduct in terms of section 105.⁸⁵ In *Smith v Sandalwood Motel*⁸⁶ (“*Sandalwood Motel*”) a motel owner employed two singers to perform at his motel. The motel’s patrons sexually harassed the singers, but the employer did nothing to address this conduct. The tribunal found that the conduct of the employer amounted to less favourable treatment. The mere omission by the employer to act was held to constitute discrimination on the ground of sex. The employer was held liable on the basis of direct discrimination.

This reasoning is similar to that of the court in the *Burton* case in the United Kingdom. However, in terms of the 2008 amendments to the SDA in the United Kingdom, the harassed employees in *Burton* and employees in the United Kingdom in general who are in a similar position to the singers in the *Sandalwood Motel* case would have no claim. Employees in the United States would, on the other hand, have a claim as the employer knew about the harassment and failed to take prompt and effective remedial action as discussed above.

5 South Africa

5 1 Harassment as a form of discrimination

Section 6(1) of the EEA provides that

“No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex ...”

Unlike the United Kingdom and Australia, there are no separate Acts in South Africa which regulate discrimination on different prohibited grounds.

Section 6(3) of the EEA provides that harassment of an employee is a form of unfair discrimination and is prohibited on any one or a combination of grounds of unfair discrimination listed in subsection (1).

⁸² Para 5 2

⁸³ Para 5 2

⁸⁴ (2001) 111 FCR 240

⁸⁵ 293

⁸⁶ (1994) EOC 92-577

By stating that harassment is unfair discrimination, the legislator eased the burden of victims in harassment cases to prove, first, that the harassment was discriminatory and secondly, that the harassment amounted to unfair discrimination. There is thus no need to prove less favourable treatment or to make use of a comparator.

The amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace⁸⁷ (“the Code of Good Practice”) states that harassment is unwelcome conduct of a sexual nature that violates the rights of an employee.⁸⁸

5 2 Employer liability for harassment of an employee by a co-employee

5 2 1 Liability in terms of section 60 of the EEA

Section 60 of the EEA is often seen as creating a kind of vicarious liability in terms of which the employer can be held liable for discrimination against his employee by a co-employee. However, Le Roux and others rightly argue that the section in fact creates direct liability for the employer if he fails to take certain steps.⁸⁹ An employer will not be liable in terms of section 60 in the following circumstances:

- if it did not know about the harassment;⁹⁰
- if the harassment was brought to its attention and it had consulted the relevant parties and took steps to eliminate the conduct; or
- if it did all that was reasonably practicable to prevent the discriminatory conduct.

Section 60 has been criticized⁹¹ for being phrased in such a way that the employer will have a double defence against harassment claims, that is, the employer can either consult and take steps to eliminate the conduct after the event, or it can rely on its sexual harassment policy to prevent the conduct as a defence. The effect of this is that the employer has an effective defence even when it has done nothing more than have a sexual harassment policy in place.

5 2 2 Liability in terms of section 6(1) of the EEA

There is no precedent in South African law of an employer being held directly liable for the harassment of its employee by a non-employee. However, a South African employer has been held directly liable for the discrimination

⁸⁷ GN 1357 in GG 27865 of 2005-08-04

⁸⁸ Para 4

⁸⁹ Le Roux, Orleyn & Rycroft *Sexual Harassment in the Workplace: Law, Policies and Processes* (2005) 94

⁹⁰ This in contrast to the position in Australia, where an employer who did not know about the harassment will only have a defence if he had a sexual harassment policy in place. See *Boil v Ishan Ozden* (1986) EOC 92-165

⁹¹ See Le Roux “Section 60 of the Employment Equity Act 1998: Will a Comparative Approach Shake This Joker Out of the Pack?” 2006 *Obiter* 411

against its employee by a co-employee. In *SATAWU for and on behalf of Finca v Old Mutual Life Insurance Company (SA) Limited and Burger*⁹² (“*Finca*”) the employer was held directly liable for a racist remark made by one of its employees to the supervisor with regard to another employee.

The Labour Court held that Old Mutual was liable for the delay in taking action against the person who made the remark and that the employer thereby failed to protect the victim. The court held that this amounted to direct discrimination in terms of section 6(1) of the EEA.⁹³ The usual test for discrimination, namely establishing whether the conduct amounted to differentiation on a prohibited ground, was not applied. The court simply accepted that in delaying to take appropriate measures after the racist remark had been made about an employee by a co-employee, Old Mutual itself discriminated against the employee. Old Mutual was not held liable on the basis of statutory “vicarious liability” in terms of section 60 (it is not entirely clear why), but was held directly liable in terms of section 6. In terms of this decision, mere inaction of the employer to act on a complaint about discriminatory conduct thus amounted to discrimination by the employer itself.

Although the racist remark itself cannot be seen as an “employment policy or practice” in terms of section 6(1) of the EEA, Old Mutual’s failure to act can be seen as indicative of a policy or practice. It was for this conduct that Old Mutual was held directly liable.

5 3 Employer liability for harassment of an employee by a non-employee

Neither the EEA nor the Code of Good Practice addresses the liability of an employer for the harassment of its employee by a non-employee.⁹⁴ The question is whether the principle of direct liability of the employer for discrimination against his employee by co-employees established in *Finca* could be extended to liability for discrimination by non-employees. The court in *Finca* held the employer liable for not having protected the employee against racism in the workplace. In principle, there is no reason why an employer cannot be held liable if an employee is discriminated against (harassed) by a non-employee and the employer does not protect the harassed employee. Based on the decision in *Finca*, this failure to protect could possibly lead to a finding of direct discrimination.

Support for holding an employer liable for discrimination in the case of harassment of its employee by a non-employee is also to be found in the three jurisdictions discussed above.

⁹² [2006] 8 BLLR 737 (LC)

⁹³ Para 45

⁹⁴ The Code of Good Practice provides in para 2.1 that “although this code applies to the working environment as a guide to employers, employees and applicants for employment, the perpetrators and victims of sexual harassment may include: ... clients, suppliers, contractors and others having dealings with a business” No further provision addresses the harassment of employees by third persons and the Code is clearly meant to deal with harassment by the employer or co-employees

In the United States, the liability of the employer for discriminatory conduct by non-employee parties is based on negligence. If the employer knew or should have known of the harassment and did not take prompt and corrective remedial action to protect the employee, the employer will be liable on the ground of direct discrimination.

In the United Kingdom, the liability of the employer depends on whether the employer took reasonably practicable steps to protect the employee. However, the employee must have known of the harassment and the conduct must be beyond his control. Furthermore the employer will only be liable for the third incident. The victim-employee in *Piliso* would have found no relief in this legal system.

In Australia, employers may be held directly liable for failing to protect their employees against harassment by third parties. Inaction will be seen as less favourable treatment on the ground of sex.

Piliso could be compared to the United States' case of *Windermere v Little*⁹⁵ in which the employer's passive response after harassment by a non-employee perpetuated the hostile working environment. The employer in *Windermere* was held liable after only one incident, not for the harassment as such, but for discrimination based on an omission to take corrective measures. In the United States, as in Australia, the complainant in *Piliso* would probably have been successful on a claim of direct discrimination against the employer.

The basis for employer liability in circumstances similar to those in *Piliso* is the fact that the employer's failure to address the harassment perpetuated the hostile environment created by the conduct of the harasser. It is clear from the evidence in both *Windermere* and *Piliso* that the trauma of both victim-employees was exacerbated by the employers not taking their respective complaints seriously and not taking measures to eliminate the conduct. The fact that their complaints were not addressed had a profound impact on the dignity and psychological wellbeing of the harassed employees in *Windermere* and *Piliso*. Apart from the outcome of measures taken, the very fact that the employer regards a complaint as serious and endeavours to resolve the matter will go a long way in eradicating the hostile environment created as a result of the sexual harassment by non-employees.

5 4 Requirements for effectively dealing with harassment of an employee by a non-employee

What actions of the employer could have constituted adequate protection for the victim and could thus be regarded as an effective defence by an employer in a similar position to the employer in *Piliso*? As discussed above,⁹⁶ the Labour Court held that the legal convictions of the community require an employer in the circumstances to

⁹⁵ No 99-35668 (9th Cir January 23, 2002)

⁹⁶ See 1

- start a process of investigation to find the perpetrator;⁹⁷
- provide the employee with support in the form of counselling to minimize the psychological trauma and communicate regularly with the employee on her needs; and
- take all reasonable steps to eliminate or reduce the possibility of the incident recurring.

These requirements set by the court in *Piliso* overlap to a certain extent with measures that section 60 of the EEA requires the employer to take in the case of harassment by a co-employee, which requires the employer:

- to consult with the relevant parties and to take the necessary steps to eliminate the alleged conduct;⁹⁸ or
- to do everything that was reasonably practicable to ensure that the employee would not act in contravention of the Act.⁹⁹

The above requirements could possibly be adapted and combined with the court's requirements in *Piliso* to provide a defence to an employer for direct discrimination in terms of section 6(1) for harassment of its employee by a non-employee. Preventative steps that are reasonably practicable (a sexual harassment code) may also play a role as a defence, but should not be allowed as an alternative defence to consultation and other corrective steps.¹⁰⁰ The court in *Piliso* added the requirement of counselling and keeping the employee-victim up to date with the progress of the investigation to ensure the psychological wellbeing of the employee. If these requirements are added to consultation and a code (a preventative policy), the employer will have a heavier onus than in the case of harassment by a co-employee. This may not be justified. On the other hand, these "extra" requirements could also be made applicable to harassment by co-employees in an amended Code of Good Practice on sexual harassment to ensure more effective protection of victim-employees.

In the case of harassment by non-employees, the employer will usually not have control over the non-employee, who may be a client or customer. However, the employer could make it clear that harassment of its employees is unacceptable. The Code of good practice should make provision for, and provide guidance on, how to manage harassment by third parties. In all three jurisdictions discussed above guidance is provided to employers in codes and guidelines of the relevant bodies.

6 Conclusion

In *Piliso v Old Mutual* the employer was held liable for not addressing a complaint of its employee for sexual harassment by an unknown person. The employer could not be held liable on the basis of vicarious liability, nor in

⁹⁷ The first requirement would naturally fall away if the identity of the harasser is known to the victim-employee

⁹⁸ S 60(2)

⁹⁹ S 60(4)

¹⁰⁰ Le Roux 2006 *Obiter* 428

terms of section 60 of the EEA, as the complainant could not prove that the harasser was an employee. However, the Labour Court held the employer liable for infringing the employee-victim's constitutional right to fair labour practices. South African courts have warned against a direct reliance on a constitutional right where legislation has been enacted to protect the relevant constitutional right. In the light of this critique, the possibility of holding the employer directly liable on section 6 of the EEA was investigated.

Legal comparison with foreign jurisdictions, namely the United States, the United Kingdom and Australia, indicated that employers who did not take the required measures after a complaint of sexual harassment by a non-employee would be held directly liable for discrimination against the victim-employee.

There is no precedent in South African law for holding an employer directly liable for discrimination against its employee on the ground of a failure to address harassment by a non-employee. However, in the *Finca* case, the court held the employer liable in terms of section 6(1) of the EEA for discrimination against its employee where the employer failed to adequately address racial harassment of the employee by a co-employee.

In the light of the decision in *Finca* and the position in the United States, United Kingdom and Australia, it is submitted that an employer who does not take adequate steps to investigate a complaint of sexual harassment of its employee by a non-employee could be held directly liable for discrimination against its employee in terms of section 6(1) of the EEA.

SUMMARY

Employees who suffer work-related harassment by non-employees in circumstances in which the employer does not protect them can neither institute action against their employer on the basis of vicarious liability, nor in terms of section 60 of the Employment Equity Act (EEA). Section 60 of the EEA renders the employer liable for certain acts of his employees. In *Piliso v Old Mutual Life Assurance Co* (2007) 28 *ILJ* 897 (LC) the Labour Court held such a (passive) employer liable on the basis of the infringement of the employee-victim's constitutional right to fair labour practices. In the light of criticism against direct reliance on constitutional rights where the right is embodied in other legislation, a more appropriate approach would be to hold the employer directly liable for discriminating against an employee in an employment practice in terms of section 6(1) of the EEA. An examination of foreign jurisdictions (the United States, the United Kingdom and Australia), reveals that employers who do not take action to protect victim-employees against work-related harassment by non-employees, are held directly liable in terms of anti-discrimination legislation. This article proposes that the same approach be adopted in the South African context.