



Research of Corporate Liability for Sexual Harassment in the Workplace

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Abstract. *Numerous* cases of sexual harassment in the workplace have occurred frequently in recent years. While companies' active prevention of it isn't merely a fulfillment for its obligation to the compliance that against sexual harassment, but also an effective mean of defending its reputation. However, there is still a blank space in the attribution and compliance of corporate liability for such situations. Therefore, this article basically focuses on newly revised "Company Law", combining "Civil Code" and other regulations, to explore the liability that companies should take in the relevant issue. This paper is divided into five parts. In the first part, the author introduces the purpose and significance of the study. In the second part, the author argues the legitimacy of companies' relevant responsibility from three standards as followed. Firstly, in the traditional field of civil law, especially in the field of personality right rules, companies has to bear legal liability. Moreover, in the perspective of corporate compliance, the emergence of sexual harassment in the workplace is a manifestation of non-compliance in companies' internal control. Thus, the company should be held liable. Last, in the perspective of company law, workplace sexual harassment is regarded as a behavior from company executives that violates the duty of loyalty. As a result, the company needs to take certain responsibility for it. In the third part, according to current legislation, the author proposes some recommendations for improving the compliance system against sexual harassment in the workplace, including: enhancing companies' internal policy, establishing the company's relief system, and clarifying relevant penalties. In the fourth part, a conclusion is summarized.

Keywords: sexual harassment in the workplace; corporate responsibility; corporate Compliance.

1 Introduction

In August 2021, keywords such as "workplace sexual harassment" and "drinking table culture" caused a social storm. From the incident of Ali's female employees being sexually assaulted in a drunken stupor, to the case of Chongqing's female teacher being sexually harassed by the headmaster, apparently sexual harassment in the workplace once again triggered extensive social concern. Among them, companies'

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I. A. Khan et al. (eds.), *Proceedings of the 2024 3rd International Conference on Humanities, Wisdom Education and Service Management (HWESM 2024)*, Advances in Social Science, Education and Humanities Research 849, https://doi.org/10.2991/978-2-38476-253-8_19

legal liability related to sexual harassment in workplace has gained attention. As a result, companies are given more legal responsibilities in preventing such issues.

In 2012, Article 11 of China's Special Provisions on Labor Protection for Female Workers and Employees made a clarification for the first time that companies should meet the obligation to prevent and cure sexual harassment in the workplace. In 2020, Article 1010 (2) of Civil Code specifically establishes that government agencies, enterprises, schools and other units have obligation to take precautions against sexual harassment. Furthermore, these units should adopt proper measures such as prevention, receipt of complaints, investigation, disposal and so on to prevent sexual harassment caused by taking advantages of one's authority or affiliation in workplace. Although in legislative level, the necessity for companies to bear civil liability in workplace sexual harassment has been reinforced, there are still some unsolved problems. For instance, there's a lack of effective definition on whether companies should hold legally liable for compliance as a result of the companies' negligence in fulfilling its obligation to prevent sexual harassment and how the principle of attribution of liability should be established [1].

Currently, Chinese scholars have made several achievements in the study of corporate responsibility in workplace sexual harassment. First, from the view of the legitimacy of corporate responsibility in workplace sexual harassment, some scholars point out four dimensions: compensation theory, danger control, labor contract and social responsibility [2]. Others believe that based on the labor relationship, staffs' behavior in the workplace can be regarded as an extension of the companies' behavior, so companies should be responsible[3]. Secondly, from the perspective of delving inside the responsibility of companies in workplace sexual harassment, some scholars started their study from the basic connotation of sexual harassment[4]. Others analyze the deficiencies in the regulation of companies' responsibility through existing law provisions and judicial practice, and put forward several targeted suggestions on the specific content of companies' responsibility and the relevant compensation system [5]. Thirdly, from the types of corporate liability, some scholars propose two types of workplace sexual harassment. In the case of exchanging benefits, companies should bear vicarious responsibility based on the principle of no-fault. In the case of hostile environment, companies should bear direct or joint and several responsibilities based on the principle of fault responsibility [2]. However, other scholars think that in the aspect of establishing employers' liability, it should be clear that the employers' liability is of its own nature [6].

Anyway, it is not enough for companies to be aware of their management responsibility for preventing and controlling sexual harassment in the workplace, but only by establishing a compliance system and put it into practice can they deal with such problems calmly. Against this background, this article explores the issue of corporate legal liability for sexual harassment in the workplace in China from the perspective of the "Company Law" and other multifaceted perspectives, providing recommendations for the establishment and implementation of a corresponding compliance system.

2 Why do companies need to take responsibility for workplace sexual harassment?

Existing Chinese laws and regulations specify that companies should bear a certain amount of legal responsibility for sexual harassment in the workplace, but there is still controversy over it. In this regard, the author discusses the issue from three perspectives: "China's Civil Code", the newly revised "Company Law", and the construction of corporate compliance systems.

2.1 Requirements for attribution in the traditional civil sphere

From a traditional civil law perspective, companies are legally liable for their own negative handling of sexual harassment in the workplace. When sexual harassment occurs between members of companies, the individual who commits the act of sexual harassment is legally liable to the victim. But if the company fails to take measures such as prevention, complaint acceptance, investigation and disposal, it should bear tort liability. However, the company's tort liability is independent of tortfeasors' liability. Thus, it doesn't have a joint, several, or supplementary relationship with tortfeasors' liability for infringement. And its legal basis is still the general liability for fault as stipulated in article 1065, paragraph 1, of China's Civil Code.

2.2 Implementation of the duty of diligence and fidelity in the field of corporate law

From the perspective of the new "Company Law", a director's duty of loyalty is "the duty to take measures to avoid conflicts between its interests as well as the companies', and not to make use of its position to gain undue advantage". When the director or senior managers uses its authority to commit sexual harassment in the workplace, it is seen as one of the circumstances of using authority to gain undue benefits. Since sexual harassment will bring damage to companies' reputation, this kind of behavior will put both directors and the company's interests in an antagonistic level. In addition, if relevant organizations are passive in dealing with such incidents, they won't escape the legal risks as well. Therefore, the prevention of workplace sexual harassment is not only the implementation of the directors, supervisors, and senior executive's duty of loyalty, but also the diligence obligation of the company as a manager.

2.3 The need for the company's compliance governance

The establishment of a compliance system is conducive to the protection of legitimate rights for employees. For workers, sexual harassment in the workplace not only violates their personal dignity, personal safety, labor rights and dignity, but may also cause a serious blow to their career. Based on the labor relationship between companies and workers, companies should sort out the basic values of respect for workers and create an excellent corporate culture. Meanwhile, companies should provide em-

ployees with a safe and harmonious working environment and prevent sexual harassment by establishing an anti-sexual harassment compliance system. At the same time, the establishment of a sexual harassment compliance system will help a lot to avoid risks and protect companies' good reputation. In recent years, workplaces have gradually become more and more prone to sexual harassment, with high concern from society about the way that companies handled and outcome of such incidents. Once the company lacks proper treatment, it is likely to have a negative impact on working environment, corporate reputation and credibility. In practice, proceedings such as accepting complaints, investigating, verifying, and processing method require a rigorous and fair process within privacy protection. Only by establishing a set of regulations and completing anti-sexual harassment system can a company deal with such situations properly, which is conducive to maintain the company's credibility and image. Therefore, it is imperative for the company to promote the development of anti-sexual harassment compliance actively. From the perspective of compliance competition in China, preventing sexual harassment in workplace is an inevitable choice for sustainable development. The relevant policy requires the company to strengthen compliance management on the basis of "Building Risk Management" throughout the process and life cycle, proposing the establishment of a "Big Compliance Management Mechanism" and improving the compliance management system as one of the company's 6 major control systems. As one of the contents of safeguarding individual personality rights and interests in the construction of national rule of law, the law management of sexual harassment in the workplace carries high expectation of the public, so anti-sexual harassment affairs should be included in the scope of corporate legal compliance.

3 Suggestions for Improving Corporate Responsibility in Workplace Sexual Harassment in China

After clearing that companies need to bear legal and social responsibilities in sexual harassment in the workplace, how to build a complete compliance system has become another major problem. In this regard, the author provides several suggestions.

3.1 Strengthening Internal Company Policies on Sexual Harassment in the Workplace

Strengthening the company's internal policy on sexual harassment in the workplace is important. The following two parts should be grasped. On one hand, the company's internal rules should involve a special module [7]. And the module should contain three elements as followed: (1) Clearly definite sexual harassment isn't a non-exhaustive list of specific types of behavior. (2) Clearly state that employees are obliged to comply with the policy and they have the right to report such behavior. (3) Specify internal complaint reporting channels [8]. On the other hand, the company should provide training on sexual harassment. Hereto of this, other countries already have mature laws that requires companies to provide such training to cultivate em-

ployees' awareness. Additionally, some countries and regions even have laws that make such training an obligation of companies. For example, according to the laws of New York and California, companies are obliged to provide relevant training to employees to prevent sexual harassment in the workplace. Although China has not yet established laws that make sexual harassment training a mandatory obligation for companies, owing to the highly social concern, it is likely that responsibility of companies in this regard will be enhanced in the future in the aspect of legislation, law enforcement, and regulatory. Hereto, companies could establish a complete sexual harassment prevention mechanism in accordance with the existing legislation and policies in their localities. Furthermore, template documents mentioned above or the training document templates of domestic and overseas companies that have already established mature compliance mechanisms may set good examples and provide much help, too. The mechanisms should introduce employees to companies' existing internal complaint and reporting mechanisms and external legal channels for defending their rights with the local competent authorities or judicial organs. Companies should make all employees aware of the regulations through various and sustained advocacy, education as well as training such as on-site presentations, teleconferences, electronic messaging, public announcements in the OA system, postings on bulletin boards and so forth [9]. For new employees, individual training sessions are needed. Besides, companies should provide irregular training sessions for employees to strengthen awareness of the prohibition of sexual harassment, and to improve employees' personal cultivation and consciousness of the rule of law. As a consequence, a healthy and favorable atmosphere in the workplace will be created.

3.2 Establishment of a Corporate Redress System for Sexual Harassment in the Workplace

In terms of complaint acceptance, companies should establish a reporting telephone number or mailbox to receive anonymous complaints. At the same time, companies should establish specialized agencies to combat sexual harassment in the workplace. Upon receiving clues of suspected sexual harassment incidents or receiving complaints and reports by employees in the company, the agency should take timely action to gain a preliminary understanding and provide psychological counselling or other assistance to the victim. Meanwhile, the privacy and confidentiality of the complainant should be maintained. In the process of understanding, it is necessary to communicate with the parties involved actively and listen to their opinions carefully in order to understand their demands. According to this process, if the suspected act of sexual harassment should be admissible, then it shall enter the investigation process.

In terms of investigation and collection of evidence, the company should refer the evidence to the specialized agency for the prevention and control of sexual harassment in the workplace to carry out the work in detail. Communication with the reporting party to gain details behind the incident and find adequate evidence (including direct, indirect and circumstantial evidence and so on) that can prove the party's statement. Then the rationality of the statement can be judged. Besides, the back-

ground of the case, the relationship between the parties involved, the environment, the words of the perpetrator, the behavior and the perception of the relative should be ascertained, too. During the investigation, the investigator shall follow the principles of avoidance, non-disclosure, confidentiality, objectivity and impartiality. Instead of allowing both parties to make full statements, the processing agency should inform them that relatives or witnesses in their favor, evidence for the necessity to carry out inspection on functions and powers, examination of the scene and so on can be put forward. Moreover, care needs to be taken to avoid repetitive questioning of the victim. Regular observation of the emotional reaction of the complainant in the aftermath of the incident is needed as well. If necessary, actual site inspections and simulations may be included, too. Sometimes, in order to clarify the veracity of the statements from bilateral sides, assistance of other authorities or the participation of relevant experts may also be required.

In terms of determining and dealing with sexual harassment in the workplace, the company should establish a procedure for such incidents and dispose offending employees in a proper manner. In cases where sexual harassment isn't justified, the process shall be terminated. On the contrary, disciplinary measures shall be taken according to the severity of the case. Measures for harassers include warning, suspension of salary, transfer from the original position, demotion, suspension, dismissal and so on.

3.3 Defining the penalties for sexual harassment in the Workplace

Companies shouldn't dismiss sexual harassment offenders as punishment, which is considered as a one-size-fits-all solution to the problems. Instead, they should divide those offenders into different disciplinary grades based on the severity of sexual harassment in the company's compliance system, with different levels of punishment. Only serious offenders should be dismissed, so as to make the rules and regulations more reasonable. Since there are strict limitations of the company's right to unilaterally terminate one's employment in terms of the labor law, the company should take a cautious attitude towards the application of such penalties. If the company dismisses a harasser on the grounds of sexual harassment in the workplace, evidence should be carefully preserved to avoid counterclaims. Evidence above includes direct ones such as statements from the victim containing WeChat chat records, emails, surveillance video, and police records. What's more, circumstantial evidence such as the collection of testimonies from bystanders, and statements from other witnesses is effective too [10]. Apart from that, companies should send a notice of termination of labor contract to the person himself, within close attention to the words, for achieving an objective statement and make sure that the words aren't radical. Especially, the termination of labor contract needs permission from the trade union if the company have such organizations. At the same time, the company is reminded to take notice of the manner and scope of service. It is not appropriate to take the notification, posting and other means of proliferation and dissemination, to avoid being caught in a dispute over the right of honor.

4 Summary

Nowadays, sexual harassment in workplace is a serious problem. While companies should take responsibilities, whether from the traditional civil field, the new Company Law regulation or compliance building. Therefore, companies should highly focus on the issue of sexual harassment in the workplace by strengthening their internal policies on sexual harassment in the workplace (including establishing special provisions against sexual harassment in company rules and training organization), establishing a reasonable redress system (including founding an organization to receive complaints, enhancing detailed investigation and evidence collection work, and providing a reasonable determination of sexual harassment) , and stipulating penalties (including the appropriate handling of cases in which sexual harassment is substantiated or not), to further improve the system of early warning and compliance in dealing with anti-sexual harassment.

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