Duties and Civil Liability of Employer in Workplace Sexual Harassment

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Abstract: Workplace sexual harassment, usually defined as a phenomenon relevant to gender distinction and workplace power imbalance, is a serious problem all the time. Many countries notice that employer is a special party in the workplace sexual harassment and impose duties on employer to prevent and prohibit this situation. This paper aims to demonstrate the foundation of the duties of employer to prevent and prohibit workplace sexual harassment and examine what measures employer can take. With the aim of effective consequence, it is essential to refine specific and executable duties on employer according to different period of workplace sexual harassment.

Keywords: **Workplace Sexual Harassment; Duties of Employer; Employer' Liability**

1. Introduction

In 2021, a female employee of Alibaba suffered sexual harassment, which had caught great attention on sexual harassment in the workplace. Report of Law and Judicial Trial of Sexual Harassment Prevention (2019-2021) also shows that workplace sexual harassment case reached 62.27% among all the sexual harassment cases since 2019 to 2021 in China. It can be clearly seen that workplace sexual harassment is a serious problem to be addressed. Every time when workplace sexual harassment happens, we may more likely concern about what liability the harasser should bear. Usually, harasser will bear Criminal or Administrative responsibility, which not only ignores compensation for the victims, but also ignores what an important role of employer can play in the prevention and restriction in workplace sexual harassment.

There is no doubt that employer can make a big difference in the anti-sexual harassment in the workplace. "Any development that leads to corporate directors and officers to devote more attention to sexual misconduct at their firms should be welcomed." [1]. However, some views question and doubt the rationality of the implement duties to employer. They insist that sexual harasser is independent and separate from employer and the imposition duties raise the cost of enterprise. This paper aims to demonstrates the evidence of the duties of employer and examine what measures employer can take in the workplace sexual harassment.

2. Definition of Workplace Sexual Harassment

Sexual harassment is a conflict and controversial concept, no reference to workplace sexual harassment. The feminist author and activist Lin Farley defines sexual harassment as "repeated and unwanted sexual comments, looks, suggestions, or physical contact that you find objectionable or offensive and causes you discomfort on your job" [1]. Mohamed Alli Chicktay holds the view that within the workplace, harassment includes two forms: "perpetrator requires sexual favor for work benefits such as jobs, promotion" and "salaries and unwanted behavior with sexual connotations attached to it" [2]. Sexual harassment in the workplace is usually defined by the term of workplace, work time and other factors related to work.

In China, workplace sexual harassment can be defined from its law system. The promulgation of Civil Code of China (we will use "Civil Code" in the following parts) marked that China has made great progress in sexual harassment regulation, which has settled down the definition of sexual harassment in China. According to Civil Code, sexual harassment is in the forms of verbal remarks, written language, images physical behaviors or otherwise about sex against the will of another person; and workplace sexual harassment makes use of official powers and affiliation and so on.

It can be clearly seen that the definition of workplace sexual harassment consists of the definition of sexual harassment and some factors related to work. Those factors related to work may be described differently, such as work time, workplace, official power, and affiliation and so on. No matters what the factor related to work are, it is those factors that determine employer to play a special role in the workplace sexual harassment.

3. Theory and Legal foundation of Duties of Employer in Workplace Sexual Harassment

The law aspect and theories term can demonstrate the legitimacy and rationality of anti-sexual harassment duties in the workplace of employer, which can respond to some doubts about the duties about anti-sexual harassment in the workplace of employer.

3.1 Theory Foundation

There are many theories supporting employer to be responsible for taking measures to prevent and stop workplace harassment, such as labor dignity, safe workplace condition [3] and danger control [4] and so on.

The anti-sexism theory was born in the second wave feminist movement in the United States, and sexual harassment was constructed as a strategy discourse supported by sexism theory. Historically, due to gender inequality leading to discrimination and prejudice, women often suffer from unequal treatment, and the victims of workplace sexual harassment are often women at first. With the concept of equality between men and women gradually recognized, the United States, Canada, England and other countries have carried out anti-gender discrimination legislation, to a large extent, to protect women's rights and interests. The issue of anti-sexual harassment in the workplace was initially led by the United States. The Civil Rights Act of 1964 regulated sexual harassment in the workplace by prohibiting gender discrimination [5]. Employers bear joint responsibility for sexual harassment at least. Initial judicial decision judge also based on gender equality.

The theory of workers' rights protection originated from the European labor movement. Driven by the labor movement, sexual harassment got rid of the discussion of gender discrimination, instead of being discussed in the theme topic of “equal treatment of workers” and “protection of labor rights”, and the key of regulation about sexual harassment turned to protection of workers' dignity and human rights [6]. Workers are often in a weak position among the labor relations, where their rights and interests are infringed easily. Sexual harassment in the workplace infringes on the personality interests and work interests of workers. In order to protect the rights and interests of workers, employer in a stronger position has the obligation to bear certain responsibilities for anti-sexual harassment in the workplace.

The rights to work environment theory came into our eyes at the end of the 20th century, and was stipulated in ILO Convention No. 161 [7]. The rights to work environment theory is not only the safety of the workplace, but also the protection of workers’ physical and mental health in the workplace, respect to workers’ personal dignity and making workers " work decently ". Sexual harassment in the workplace will make workers be afraid the working environment and damage the personality interests of workers, which obviously violates the spirit of this theory. Therefore, employer has duty to protect employees’ dignity and provide a safety workplace condition.

Danger control theory is the spirit of the legal principle of Security Obligation, which means that those who are suitable to control danger should be responsible to eliminate danger. In other words, as a governor, employer has advantage in preventing, controlling even stopping the danger occurring in the workplace, so employer is responsible to address workplace sexual misconduct. What’s more, employer usually is accessible to evidence and proof which can prove the workplace sexual misconduct. So, in an event of workplace sexual harassment, employer need to help the victim employee to accuse of harasser.

Therefore, duties about anti-sexual harassment in the workplace of employer are reasonable due to these theoretical demonstrations.

3.2 Legitimacy Foundation

Within the temporary framework of regulation system of China, duties of employer to prevent and refrain workplace sexual harassment can be found in those area, such as protection of personality rights, labor protection of female employees and protection of rights and

interests of women and so on. Civil Code makes it lawful for enterprises to take some measures to prevent and refrain sexual harassment. It is the first time to implement anti-sexual harassment duties to employer from the aspect of private law. Article 25 of Law of China on the Protection of Rights and Interests of Women (Revised in 2022) requires employer take measures to prevent and stop sexual harassment of women. Article 11 of Special Rules on the Labor Protection of Female Employees requires employer prevent and prohibit the sexual harassment of female employees in workplace. What's more, districted province and cities in China also formulate local regulations and rules about workplace sexual harassment, such as Jiangsu, Shandong, Hebei, Guangdong and so on.

4. General duties of Employer in Workplace Sexual Harassment

According to the Civil Code, enterprises are required to take reasonable measures to prevent and curb sexual harassment, such as prevention, acceptance and handling of complaints, investigation, and disposal etc. However, those regulations seem not specific enough to be carried out and remains to be perfected. According to law and study at present, the following measures can be taken to make duties of employers in workplace sexual harassment.

4.1 Create the Atmosphere and Institution to Prevent Workplace Sexual Harassment

"Prevention is the best tool for the elimination of sexual harassment" [8]. Nowadays, an increasing number of employers has realized that it is important to formulate the prevention institution of anti-sexual harassment in the workplace.

First, it is necessary to create equal and respectful workplace culture and atmosphere. On the one hand, encourage employer to equip the office with monitor and security, which not only can prevent sexual harassment but also can provide proof of workplace sexual harassment. On the other hand, inspire employer to engage in publicity activities and preventative education about workplace sexual harassment and the rights of employees. Second, the more effective solution is to build system of inner institutions, documents, and rules about anti-sexual harassment in the workplace. In detail, employer should list the situations of workplace sexual harassment, provide accessible approaches for victim employees to accuse and seek help when suffering workplace sexual harassment, clarifies the principles and methods of the investigation and settlement of workplace sexual harassment and set appropriate punishment rules etc. The establishment of such prevention institution is necessary and effective but difficult for employer to some extent. The government, Women's Federation or the third expert parties can give help to employer by making some guidelines or standards.

4.2 Build Procedure of "Acceptance of Complaint" and "Conduction of Investigation"

First, employer shall clarify the subjects and ways of "acceptance of complain". Usually the law department, human source department or labor union of employer is a suitable role of accepting complain about workplace sexual harassment. Small company without these department can appoint manager or executive director as the subject of "acceptance of complaint". Besides, provide a lot of approaches for victim employee to accuse, such as telephone, e-mail, mailbox and so on. At the same time, in order to encourage victim employee or someone known the fact to stand out, it is wise for employer to allow those complainants choose real name or anonymity when they accuse of the workplace sexual harassment. Then, after accepting the complaint, employer should launch an investigation immediately and objectively. By means of obtaining evidence and talking with victim employee, workplace sexual harassment behavior and those knowing fact, make the whole thing clear. Under the agreement of interviewee, employer can keep the talking in audio or video recording. Besides, it is very necessary to protect the privacy of victim in case of second injury.

4.3 Take Disposal Measures

When the investigation finished and the workplace sexual harassment proven, employer need to help the victim employee and punish the harasser according to the institution. In detail, employer can compensate for the victim within its scope of liability,

adjust the position of harasser or victim [9] to avoid or reduce the contact between them and strengthen the psychological counseling of the victim employee and so on. As for the workplace sexual harasser, employ has the right to give demotion, warning even dismission according to normal procedure. If the victim employee decides to turn to the police or court for help, employer should spare no effort to help. As a party that usually is accessible to evidence, employer should provide those proof and evidence.

If necessary and possible, set out an independent department to command and conduct those contents about anti-sexual harassment in the enterprise [10]. What' s more, provide punishment regulation for employer so as to ensure it make every effort to make those duties into reality. And the government or other authority parties like Women's Federation can make a review on employer to monitor the execution of those duties.

5. Should Employer Bear Liability for Nonfeasance of Anti-workplace sexual Harassment?

Strict duties on employer are rejected by many people because it will increase the cost of enterprise heavily and may be injustice, so the employer has the motivation not to fulfill its duties. Legislation makes employer be obligated to take measures to prevent or stop workplace sexual harassment. However, it is doubt whether employer bear civil liability when failing to take those measures in the law. For this problem, some holds the view the employer need not bear liability, some insist that the employer bears joint and several liability, some think the employer's liability is vicarious liability, others consider it should undertake supplementary liability.

This paper holds the view that employer should be liable for fail to perform tis anti-workplace sexual harassment duties. First, anti-workplace sexual harassment duties in Article 1010 of the Civil Code are different from the security obligation in the scope of protection, but it has the characteristics of security obligation. If the employer fails to fulfill the obligation of anti-workplace sexual harassment, it shall bear the responsibility for the fault. Second, if employer fails to assume the obligation to prevent, stop, investigate, and dispose of sexual harassment, there is no doubt that employer' nonfeasance causes the loss of the employee's personality interests to some extent. Therefore, the employer should bear the relevant civil liability for failing to fulfill the obligation of workplace sexual harassment.

5.1 Identification of Responsibility

5.1.1 Nonfeasance behavior

The employer's obligation to combat workplace sexual harassment is a statutory active obligation, so the nonfeasance behavior is the base of the employer to bear civil liability. The employer' nonfeasance is different in different period. In the pre-prevention stage, the employer's nonfeasance is reflected in the failure to establish relevant rules and regulations against sexual harassment. When the workplace sexual harassment happening, the employer's nonfeasance is not accepting the victim's complaint, or accepting the victim's complaint but ignoring it. After the workplace sexual harassment happened, the employer' nonfeasance is the failure to protect the privacy of the victim, respond to the victim's demands, and assist the victim in safeguarding their rights. Different acts of nonfeasance lead to different degrees of loss. Therefore, liability of employers for violating the obligation of anti-workplace sexual harassment should be analyzed in specific case.

5.1.2 Principle of liability

There are three opinions about the principle of employer's liability, including no-fault principle, fault principle and different liability principle according to different types of workplace sexual harassment. Some scholars believe that the employer' liability in workplace sexual harassment can be based on the employer's liability under Article 1191 of the Civil Code by explaining "performing work tasks" flexibly, so it should applying the principle of no-fault liability [11]. Judging from most opinions, if employer fail to fulfill the obligation of anti-workplace sexual harassment, it should bear general tort liability, which should be based on employer's fault. And the key point to judge employer' fault is to see whether the employer has taken measures to prevent or stop workplace sexual harassment [12]. At the same time, numerous scholars hold the view that if employer does not fulfill the anti-workplace, it shall bear civil liability based on no fault principle in

workplace sexual harassment in exchange for benefits, while bear civil liability based on the fault principle in hostile environment workplace sexual harassment [9,13,14]. Some scholars argue that if a third party commits sexual harassment to an employee engaged in employment activities, the employer shall bear the tort liability based on fault [15].

Firstly, it is the harasser not employer commit workplace sexual harassment, the employer bear civil liability only when it fails to fulfill the obligation of anti-workplace sexual harassment. Thus, applying the principle of no-fault liability blindly may violate the principle of self-responsibility and fairness. Secondly, it is unsuitable to decide the principle of employer's liability according to different types of workplace sexual harassment. The "work connection" contained in workplace sexual harassment in exchange for benefits seems more obvious than hostile environment workplace sexual harassment. It seems unfair for employers to determines its liability principle based on the type of workplace sexual harassment, because it cannot interfere and decide what type of workplace sexual harassment will be committed by the perpetrator. In fact, no matter what type of workplace sexual harassment will happen, there not only has no difference in employer's prevention and control obligations, but also its nonfeasance. Different application of liability principles based on different type of workplace sexual harassment, will weaken the certainty of law. At the same time, it is difficult to distinguish what is workplace sexual harassment in exchange for benefits and hostile environment workplace sexual harassment. In addition, the fault principle is flexible enough to be applied in the sexual harassment committed by not only employee but also the third party. Therefore, it is reasonable to determine employer' liability for its nonfeasance based on the fault principle of liability.

5.1.3 Damage results and causality

In terms of damaging results, workplace sexual harassment may lead to mental damage and loss of work interests. Spiritual damage means that right to decide to have sex or not and personal dignity of victim employee are violated. Loss of work interests mainly includes tangible loss of work and intangible hostile environment. Tangible loss of work is mainly the disbenefit of working conditions, such as dismissal, demotion and salary reduction suffered by the victim for resisting workplace sexual harassment. Intangible hostile environment refers to the unbearable working environment. As for causal relationship, there is no certain relationship between the nonfeasance of the employer to fulfill the duties of anti-workplace sexual harassment and the damage result of the victim. If the fulfilling anti-workplace sexual harassment obligation cannot avoid the damaging consequences happening, it can prevent the establishment of a causal relationship between the employer's nonfeasance and damaging consequences [12]. In addition, some loss of victim employee could not result from employer's nonfeasance. For example, the victim automatically quit because of intolerableness of the workplace sexual harassment, resulting in a long-term failure to find a new job. The victim employee's work loss during this period cannot be attributed to the employer's failure to fulfill the obligation to combat workplace sexual harassment. In practice, we should accurately assess the causal relationship between the employer's nonfeasance and the victim's loss, and reasonably determine the scope of responsibility of employer.

5.2 Form of Responsibility

5.2.1 Not joint liability

Whether the employer bears joint and several liability with the workplace sexual harasser, there are three views: agreement, objection, or compromise. Those who agree with joint liability think that employer is at fault for not fulfilling the obligation of anti-sexual harassment in the workplace, and the fault of the employer is combined with the intention of the harasser, so the employer and the perpetrator should bear joint and several liability. Joint and several liability is beneficial to victim employee. Therefore, it is necessary take joint liability of employer for nonfeasance of anti-workplace sexual harassment into legislation. For example, Yang Lixin and Zhang Guohong believe that joint and several liability is reasonable, so legislation should respond it [16]. Zheng Yongkuan also considers that it is difficult to apply joint and several liability from interpretation of law, but it can be solved at the level of legislation [17].

The opponent holds the view that the joint liability is based on legislation or contract, but the workplace sexual harassment lack of this foundation. On the one hand, employer do not have the same intention or fault with workplace sexual harasser; on the other hand, the employer does not abet or help the harasser employee. Besides, the liability of the employer for failing to fulfill the obligation of anti-workplace sexual harassment is independent. For these reasons mentioned above, the employer should not bear joint and several liability with the workplace sexual harasser. For example, Zhang Xinbao argues that the employer should not bear joint liability with the perpetrator [12], Lin Weiyu believes that joint liability has no basis for liability [18], and Wang Yichun believes that joint liability has no room for application [19].Based on the current legal framework, it is not realistic to stipulate that the employer and the perpetrator bear joint liability through legislation.

In a word, reasons object to joint liability are as follow: first, it is hard to say employer has common intention or fault with the workplace sexual harasser. Second, the relevance between employer's nonfeasance to fulfill the obligation of anti-workplace sexual harassment and the sexual harassment committed by the perpetrator is weak. Third, it is difficult to identify the causal relationship between the employer's nonfeasance for failing to fulfill anti-workplace sexual duties and victim's damage. There is no doubt that in workplace sexual harassment, nonfeasance of the employer cannot cause damage alone. Applying the path of joint and several liability damages the principle of fairness and improperly increases the liability of employers.

5.2.2 Not vicarious liability

Some countries such as South Africa and Australia have ruled that employer is vicariously liable for the sexual misconduct of his employee. Vicarious liability of employer is controversial for three main reasons: first, it is employee not employer that commits sexual harassment, so if employer is vicariously liable for the sexual misconduct of his employee, it will violate the principle that a person full capacity for civil conduct should be responsible for his behaviors by himself. Second, to what extent the sexual misconduct of his employee could be related to conduct work assignment which usually is one of the conditions of vicarious liability of employer. Third, it doubts whether vicarious liability of employer could be applied to the situation still belonging to workplace sexual harassment where harasser such as customer of the employer who is not employee of employer.

China has similar legislations about vicarious liability of employer in tort law in article 1191 of the Civil Code. It remains to be seen whether vicarious liability of employer can be used in workplace sexual harassment. But it seems that vicarious liability of employer merely has little possibility to be applied in workplace sexual harassment. First, according to article 1010, victim has the right to request the harasser to bear civil liability, which has provided accessible compensation for victim. And one of the functions of vicarious liability of employer is to prevent conductor could not afford the damages, but the amount of compensation is usually so small that harasser could afford. Second, making use of official powers and affiliation has obvious distinction from conducting work assignment. As referred above, making use of official powers and affiliation is difficult to be proved as conducting work assignment which is one of the conditions of vicarious liability of employer according to Chinese law. Therefore, it is not appropriate for employer to be vicariously liable for the sexual misconduct of his employee.

5.2.3 Application of supplementary liability

Although the employer does not fulfill the obligation of anti-workplace sexual harassment, it will not establish the tort liability of violating the interests of personality rights alone, but its nonfeasance has a certain causal relationship with the occurrence and expansion of sexual harassment damage, so supplementary liability should be applied. Some scholar thinks that the liability from the employer's nonfeasance of anti-workplace sexual harassment is independent from the tort liability of the sexual harasser, so there is no joint liability, vicarious liability and supplementary liability between them [12]. However, the supplementary liability is not as applicable as the joint and several liability, and not as unfair as the vicarious liability which excessively increases the liability of the employer. It better balances the relationship between the right remedy of victim employee

and the fair distribution of liability between harasser and employer, which is applicable and operable. The second paragraph of Article 1198 of the Civil Code stipulates the supplementary liability of the security guarantee obligor, and the security guarantee person who fails to fulfill the security guarantee obligation shall bear the tort liability of the third party and enjoy the right of recourse to the infringer. Because the employer's obligation to anti-workplace sexual harassment has some characteristics of the security obligation, so it can adopt the "reference applicable" law application path. The employer who fails to fulfill the obligation of anti-workplace sexual harassment shall bear the supplementary responsibility, and the employer remains the rights to recover the harasser.

6. Conclusion

In conclusion, employer can take a lot of effective measures to prevent and resist workplace sexual harassment. Imposing duties to employer about prevention and prohibition of workplace sexual harassment is lawful and rational. With the aim of shifting employer from bystander to active role in the prohibition of workplace sexual harassment, it is necessary to make it clear that what measures employer should do in different period of workplace sexual harassment. To some extent, this paper discovers the blank of Article 1010 Civil Code, pointing out that employer should bear civil liability for its nonfeasance of anti-workplace sexual harassment. But it is not appropriate for employer to be jointly or vicariously liable for the sexual misconduct of his employee, employer should bear supplementary liability instead. However, it is undeniable that the prominent problem in the practice is the labor dispute related to workplace sexual harassment. Therefore, it may be better to discuss about employer' s duties and liability in workplace sexual harassment from the aspect of both Civil Law and Labor Law.

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