What is the Role of the Law in Combating Sexual Harassment in the Workplace? — Lessons for China’s Evolving Anti-Sexual Harassment Legislation

Dong Yifu: Experience from many countries shows that the law is only the necessary first step in combating sexual harassment. Only by changing the environment can the chronic challenge of sexual harassment be solved.

Recently, a prominent figure in Chengdu’s social work circle, Liu Meng, lost in China’s first civil case filed under a new cause of action for sexual harassment suits, just added in December 2018. The court demanded that Liu apologize to the plaintiff, but rejected the plaintiff’s request for compensation for mental distress and her demand to hold the employer liable. China’s first anti-sexual harassment legal clause appeared in the amendment of the Law on the Protection of Women’s Rights and Interests in 2005. However, nearly 14 years later, even if victims of sexual harassment in the workplace in China prevail in court as the plaintiff did in the case above, they still cannot expect to receive reasonable compensation, let alone hold employers accountable.

In fact, the State Council’s 2012 Special Provisions on Labor Protection for Female Workers already set forth employer responsibility to prevent and stop sexual harassment of female workers. However, this series of anti-sexual harassment clauses neither include definitions or standards for determining sexual harassment, nor have they set up prevention, investigation, compensation, and other related mechanisms for handling workplace sexual harassment. As a result, even if China’s employers do nothing to prevent sexual harassment, they will hardly face any consequences.

Experience in many countries shows that employer responsibility is an effective way to deal with sexual harassment in the workplace. At first glance, sexual harassment occurs between individuals, and sexual harassment itself is by no means part of any job. Therefore, it is unfair to let employers take any responsibility at all. This narrow understanding is precisely the judge’s thinking on employer responsibility in the aforementioned case, and it also reflects many people’s misunderstanding of the nature of sexual harassment.

As Professor Vicki Schultz of Yale Law School points out in a recent paper, unchecked, subjective authority is one of the main culprits of sexual harassment scandals in the US film
and tech industries. The root cause of sexual harassment is not sexual desire, but the power relationship between people. In China, survey statistics show that nearly half of the employees in workplaces are victims of sexual harassment, while in the database containing tens of millions of Chinese court trial documents, only a few dozen cases on sexual harassment can be found between 2010 and the end of 2017. What makes most victims of sexual harassment choose silence is not the lust of the harassers but rather their high-power status. If subordinates dare to sexually harass their superiors, it is very easy for the superiors to deal with such behaviors. In reality, sexual harassment in the workplace cannot be effectively dealt with because in most cases it occurs when superiors harass subordinates and the empowered harass the vulnerable. Employers are responsible for making frequent contact between employees possible and for establishing power relationships through job arrangements.

Generally speaking, an employer responsibility system mandates that employers formulate anti-sexual harassment policies, train employees, and establish complaint handling procedures. Under certain circumstances, they also bear legal responsibility for employees’ sexual harassment. However, facing the hard and fast rules under the employer responsibility system, most employers only aim to avoid legal responsibility. Take the United States, the birthplace of the MeToo movement, for example. One of the criteria that constitutes hostile workplace sexual harassment at the federal level is the “severe or pervasive” nature of the act. However, in the eyes of some U.S. federal court judges, the “severe or pervasive” standard is a high bar. For example, in Brooks v. City of San Mateo, decided by the U.S. Ninth Circuit Court of Appeals in 2000, the harasser touched the plaintiff’s stomach while she was working, made a sexual comment to her, and then forced his hand under the plaintiff’s sweater and bra to touch her bare breast. Even so, a majority of the male judges failed to determine the actions as serious and refused to rule against the employer. In addition, as long as the employer can prove that it has established an anti-sexual harassment system and the victim failed to utilize it, a successful affirmative defense is often possible. Therefore, in order to avoid fines and lawsuits, most employers have set up anti-sexual harassment mechanisms, but these measures are often mere formality. Internal investigation mechanisms often fail to act as a check on the harassers, and many victims know all too well that it is futile to kick start the internal procedures and that filing a complaint can even incur retaliation.

On the surface, the nature of the prohibitions against sexual harassment is the same as those against lying or stealing. It is a negative obligation for individuals. However, framing sexual harassment as an individual’s negative obligation has proved ineffective in practice. The reason is that the cause of sexual harassment is the power relationship between people. The essence of the employer’s responsibility system is to transform the individual’s negative obligation into an employer’s positive obligation by transferring part of the legal
responsibility to the employer, which is responsible for the power relationship. The positive obligation requires employers to actively prevent sexual harassment. However, this kind of positive obligation for employers does not result in effective prevention and handling mechanisms. Therefore, some local governments in the United States, such as California, New York State and New York City, have passed new laws in an attempt to make the employer responsibility system more substantive.

Based on the existing employer responsibility system, these latest local legislations impose detailed minimum requirements on employers’ anti-sexual harassment obligations, standardizing the form and content of anti-sexual harassment policies and anti-sexual harassment training. These laws stipulate that an employer’s anti-sexual harassment policy should at least include a legal definition of sexual harassment, examples of sexual harassment behavior, complaint forms and procedures for internal handling mechanisms, legal remedies and procedures applicable to sexual harassment, statements prohibiting retaliation against employees who complain or cooperate in the investigation of sexual harassment, and links to online anti-sexual harassment training. In addition, these latest laws also require employers to provide regular anti-sexual harassment training for employees. These trainings must include all the contents of the sexual harassment policy in detail and be interactive.

In order to reduce the burden on employers, these local government websites have anti-sexual harassment policies and training samples, which are available in various languages. As long as employers download and print the anti-sexual harassment policy samples and distribute them to employees, as well as offer anti-sexual harassment training for employees according to the training samples, they can meet all the statutory minimum requirements except for the interactivity requirement for the training.

The interactivity requirement in anti-sexual harassment training is important yet difficult to meet. Some studies have shown that if employees only passively receive anti-sexual harassment information, anti-sexual harassment training can only achieve the effect of raising awareness and will not have a fundamental impact on employees’ daily behavior. Interactivity can be realized through question and answer as well as discussion, which will encourage employees to think for themselves and enable a deep understanding of the challenge of sexual harassment in the workplace.

In addition to these local legislations with minimum requirements, the US Equal Employment Opportunity Commission and some large enterprises are exploring more advanced anti-sexual harassment policies and training methods, changing employers’ goal from evading legal responsibilities to building a respectful working environment. Building a respectful working environment is more effective in preventing sexual harassment in the
workplace, but it also costs more. Before the MeToo movement, few companies were willing to pay the cost to prevent sexual harassment. As MeToo led to a society-wide reckoning, more and more companies realized that investments for a respectful working environment are both necessary and worthwhile, for they are preferable to the potential negative impact of sexual harassment on staff morale and corporate reputation.

At present, one of the most advanced anti-sexual harassment training methods is the bystander intervention approach. The essence of bystander intervention is to transform prevention of sexual harassment into an individual’s positive obligation. Traditional anti-sexual harassment training emphasizes what one should not do, while bystander intervention training uses theories and practices from psychology and emphasizes what bystanders — a role which everyone plays in everyday life — can do. Noninteractive, traditional training might leave people with a misunderstanding that sexual harassment is only a matter between the harasser and the victim, while bystander intervention tells everyone that there are things they can do to resolve high-risk situations and do so by avoiding direct confrontations with harassers and providing support for victims.

Coupled with the goal of building a friendly working environment, bystander intervention is likely to be effective. For example, in a healthy working environment, enterprises should encourage employees to hold regular in-depth discussions on how to respect each other and how to deal with misconduct. When sexual harassment is about to occur or has already occurred, employees as bystanders have the right to intervene and question the harasser for the reason of maintaining a friendly working environment: “We have talked about mutual respect. Is your behavior respectful?” In this way, sexual harassment not only involves the harasser and the victim but also concerns the whole working environment and every employee. Although the application of bystander intervention in dealing with sexual harassment in the workplace is not yet mature, studies have shown that bystander intervention has a significant effect on preventing sexual harassment in the army and in schools. Therefore, if paired with a reasonable training mechanism, bystander intervention will be very useful in dealing with sexual harassment in the workplace.

In comparison, China's anti-sexual harassment legislation is still in its infancy. At present, in the draft of the Civil Code, there have been provisions that initially define sexual harassment and refer to the responsibilities of employers. In the next revised edition of the Law on the Protection of Women’s Rights and Interests, it is even expected that there will be specific requirements for the establishment of an anti-sexual harassment mechanism for employers.

In fact, from the experience of many countries, the law is only the necessary first step in the face of sexual harassment. After all, sexual harassment is a product of the environment. Only by fundamentally promoting trust and respect among people and by increasing the number
of people committed to improving the working, learning and living environment can the challenge of sexual harassment be solved. The ultimate goal of the anti-sexual harassment law, after all, is to reduce violations of rights in various degrees and forms among people by improving the environment in which they live.

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