

# Towards a Better Workplace for Women: Curbing the Menace of Sexual Harassment in Nigeria

<sup>1</sup> Wesley Newcomb Hohfeld's 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16; Wesley N. Hohfeld 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 *Yale Law Journal* 710; Arthur L. Corbin 'Rights and Duties' (1924) 1(1) *Yale Law Journal* 501-527; David Lyons *Noûs* 'The Correlativity of Rights and Duties' (1970) 4(1) *Wiley* 45-55; Jack Donnelly 'How are rights and duties correlative?' (1982) 16(4) *The Journal of Value Inquiry* 287-294.

## Proem

From the [#MeToo](#) [#Hertoo](#) and [#Time'sUp](#) online campaigns as well as allegations of [#sexual harassment](#) against perceived industry leaders or supposedly industry 'role models,' to the not so recent allegation of sexual harassment against a Professor in a Nigerian University, there seems to be some sort of unspoken consensus that the days of sexual harassment are numbered, and new times are now here with us. New times, indeed, are here with us as such untellable acts and morally despicable conducts (of sexual harassment and workplace sexual assaults) are no longer to be condoned, tenable or swept swiftly and easily under the 'corporate or professional sham carpet,' in a bid to cover up for the irresponsibility, unprofessionalism and lack of self-control of the perpetrator(s) of such workplace menaces.

Truly, there is no telling the fact sexual harassment and workplace assault can adversely affect women as well as even take its unpleasant toll on women's lives to unimaginable levels. As a matter of fact, one will be attempting to say the obvious to assert that sexual harassment and workplace assault have serious implications for not only women but also their employers. For one, it is incontrovertible that women are mostly targets of sexual harassment and workplace assault; for it is women, more often than their male counterparts, that get to experience the negative consequences of such bastardly acts, including but not limited to physical and mental health problems, career interruptions, lower earnings, workplace intimidation, toxic work environment, amongst others.

It is against the above background that this publication seeks to lend its voice to the call for the increased protection of women's rights under Nigerian law and more importantly, to further add to existing literature on workplace sexual harassment in Nigeria.

Starting with what sexual harassment entails, this publication proceeds to demystify what sexual harassment is; examine how workplace sexual harassment and assault affect women's economic advancement and security; the costs and/or harms sexual harassment or assault against women in the workplace can bring to employers; the position of the law in Nigeria and possible remedies; while ending with recommendations for preventing sexual harassment and reducing the negative effects of sexual harassment for individuals and workplaces. It should be noted that the discussion in this publication is by no means exhaustive.

## What about Women's Rights and Sexual Harassments or assaults in Workplace?

A discussion of this nature on the issue of sexual harassment and workplace sexual assault without a correlative discussion of women's rights will be incomplete. While there is no-one-size-fits-all-definition of women's rights and given how difficult it is to define any concept in law, we are minded to assert that the concept of women's rights is better described than explained, having in mind the existence of a right in law often implies a correlative (corresponding) duty or obligation towards the holder of such right.<sup>1</sup>

The foregoing being the case, we are minded to opine that Women's rights in the workplace include: ensuring that women are not exposed to a very toxic environment where they are not truly seen for their competencies and expertise; not encroaching on the right of women to work when pregnant or even exclude women from workplace due to pregnancy, for as long as they can reasonably perform on the job; not refusing to hire a woman due to her marital status or gender;



as well as making necessary adjustments to ensure that women have the best possible and most enabling environment to work in accordance with international best practices.

Riding the waves of the above, it could be further submitted that women's rights in the workplace will include not being sexually harassed or assaulted in any way whatsoever, including being protected from a rather hostile work environment where the woman is made a subject of unwelcomed sexual comments, uninvited touching of body or possessions, as well as unwanted sexual advances that put her in fear of losing her job if she does not comply.

Having briefly examined the concepts of women's rights and sexual harassment, we shall now proceed to examine the legal position on workplace sexual harassment in Nigeria and more importantly, the liability for workplace sexual harassments in Nigeria.

#### Examining the Legal Framework for Workplace Sexual Harassment in Nigeria

A good starting point for a discussion on the legal framework for workplace sexual harassment in Nigeria is to succinctly examine the existing legal protection for women, if any, provided in the Constitution of the Federal Republic of Nigeria 1999 (as amended) (the 'Nigerian Constitution'), relevant conventions or treaties domesticated pursuant to Section 12 of the Nigerian Constitution, local legislation, regulations or rules made pursuant to such legislation as well as case law on workplace sexual harassment.

It may not be out of place for one to assert that Nigerian laws on workplace sexual harassment seem to be inadequate. It could also be argued that there are few provisions in Nigerian law that deal squarely with sexual harassment. It is, however, not in doubt that for sexual harassment to be effectively curbed in Nigeria, adequate protections must be contained in our laws. Rather strangely, there is no explicit provision in the Nigerian Labour Act 2004 that prohibits sexual harassment or any other kind of harassment during employment. The closest one finds is a provision in the Employees Compensation Act 2010 which provides for compensation in the event of mental stress is caused to a worker as a result of a sudden and unexpected traumatic event arising out of or in the course of the employee's employment.<sup>2</sup>

While it could be arguably said that the Nigerian Labour Act is silent on the issue of workplace sexual harassment and that this has left many victims of workplace sexual harassment in doubt as to what legal options are available to them, it will be quite incorrect to assert that no protection, whatsoever, is afforded women under Nigerian law. This is because the Nigerian Constitution contains provision relating to workplace sexual harassment by entrenching the dignity of the human person under Section 34 of the Nigerian Constitution and effectively ensure that the dignity of women in workplace is always protected. In the event of a breach of this constitutional right, an aggrieved woman can seek remedy in a court of competent jurisdiction. An example of how an aggrieved woman, whose employment was wrongfully terminated but alleged that the termination stemmed from rebuffed sexual advances and harassment in workplace will be discussed later in this publication.

Flowing from the foregoing, it suffices, therefore, to say that a (wo)man's right to protection from sexual harassment and the right to work with dignity are also universally recognised human rights by international conventions and instrument some of which have been domesticated in Nigeria.

Consequently, it follows that every (wo)man has the right to practice any profession or to carry on any lawful occupation, trade or business which includes a right to a safe environment free from sexual harassment.

With a view to filling the void in the labour statutes in respect of workplace sexual harassment in Nigeria, the National Industrial Court (NIC) included in its Civil Procedure Rules 2017, four categories of acts that constitutes workplace sexual harassment within the Nigerian labour milieu. Specifically, the four categories of act that may constitute workplace sexual harassment under Order 14 Rule 1 (a), (b), (c) and (d) of the NIC Civil Procedure Rules 2017 include the following:

- 1 Physical conduct of a sexual nature: such as unwanted physical contact, ranging from touching to sexual assault and rape, strip search by or in the presence of the opposite sex, gesture that constitutes the alleged sexual harassment; and/or
- 2 A verbal form of sexual harassment: such as unwelcome innuendoes, suggestions and hints, sexual advances, comments with sexual overtones, sex related jokes or insults, or unwelcome graphic comments about a person's body, unwelcome and inappropriate enquiries about a person's sex life and unwelcome whistling at a person or group of persons, any document, material or exhibit in further support of the claim ; and/or
- 3 A non-verbal form of sexual harassment which includes unwelcome gestures, indecent exposures, and unwelcome display of sexually explicit pictures and objects; and/or
- 4 Quid pro quo harassment where an owner, employer, supervisor, member of management or co-employee undertakes or attempts to influence or influences the process of employment, promotion, training, discipline, dismissal, salary increments or other benefits of an employee or job applicant in exchange for sexual favours.

From a reading of the foregoing, it could be rightly asserted that an action arising from a claim by a working woman who alleges sexual harassment at the workplace is likely to succeed where any of the following can be established: (a) Physical conduct of a sexual nature; (b) A verbal form of sexual harassment; (c) A non-verbal form of sexual harassment; and (d) Where the owner, employer, supervisor, member of management or co-employee undertakes or attempts to influence or influences the process of employment, promotion, training, discipline, dismissal, salary increments or other benefits of an employee or job applicant in exchange for sexual favour).

Additionally, our review of Order 14 of the new NIC Rules reveals that any of the following situation would qualify as workplace sexual harassment: asking for sex in exchange for a benefit or a favour; repeatedly asking for dates, and not taking "no" for an answer; strip search by or in the presence of the opposite sex; making unnecessary physical contact, including unwanted touching; using rude or insulting language or making comments towards women; calling women sex-specific derogatory names; making sex-related comments about a person's physical characteristics or actions; posting or sharing pornography, sexual pictures or cartoons, sexually, explicit graffiti, or other sexual images (including online); making sexual jokes, amongst others. Any worker who suffers from any of the above can institute an action at the NIC seeking, inter alia, reliefs, which include monetary compensation, damages and injunction.



3 See Section 8 of the Sexual Harassment Act

4 Unreported Suit Number NICN/LA/492/2012 where Judgement was delivered on 19 December 2013.

The creativity of the NIC in making the aforementioned provisions of [Order 14 of the National Industrial Court of Nigeria \(Civil Procedure\) Rules, 2017](#) on workplace sexual harassment in its Rules can be better appreciated when understood in the context of NIC innovative efforts to ensure that Nigerian labour law accords with existing international labour best practices as well as ratified international conventions, particularly, as it relates to workplace sexual harassment.

The foregoing notwithstanding, we are aware the argument can be made in some quarters that [Order 14 of the NIC Rules](#) is not necessarily a codification of the law on workplace sexual harassment, as this workplace vice has always been actionable before the courts. We are of the considered view, however, that the new provision of the [NIC Civil Procedure Rules 2017](#) is helpful in the following three major ways: First, it defines what amounts to workplace sexual harassment; second, it makes sexual harassment an actionable claim; and third, it provides a guide on how to prove sexual harassment before a court of competent jurisdiction.

We are not unaware of the contributions of the Lagos State to the advancement of the jurisprudence on workplace sexual harassment in Nigeria by enacting the Criminal Law of Lagos State. For instance, [the Criminal Law of Lagos State prohibits harassment that implicitly or explicitly affects a person's employment or educational opportunity or unreasonably interferes with the person's work or educational performance or creates an intimidating, hostile or offensive learning or working environment. In addition, any person who sexually harasses another in Lagos State is guilty of a crime and is liable to imprisonment for three years.](#)

Another interesting legislation which protects women against sexual harassment is the [Sexual Harassment in Tertiary Educational Institutions Prohibition Act 2016 \("Sexual Harassment Act" or "SHA"\)](#). While Section 3 of the Sexual Harassment Act recognizes the existence of a relationship of authority, dependency and trust between an educator and a student in an institution, breach of which is unlawful, an educator who commits an offence of sexual harassment (extensively defined in Section 4 of the Act to include having or demanding sexual intercourse from a student as a condition to the giving of a passing grade, grabbing, hugging, pinching or stroking any body part of a student, whistling or winking at a student or making sexually complimentary or uncomplimentary remarks about a student's physique), is liable on conviction, to be sentenced to imprisonment of up to 5 years but not less than 2 years.<sup>3</sup>

While we note the enactment of the Sexual Harassment Act as a welcome development and great victory for the war against sexual harassment in Nigeria, we struggle to understand why the Sexual Harassment Act was limited to only tertiary educational establishments and not extended to include harassment in not only educational institutions but also workplaces in Nigeria. Going forward, we recommend an amendment of the Sexual Harassment Act to include all educational institutions and workplaces in Nigeria. Having examined the legal framework for sexual harassment in Nigeria, we shall now proceed to examine the liability for workplace sexual harassment in Nigeria.

#### **Examining the Liability for Workplace Sexual Harassments in Nigeria: Lessons from the Microsoft Case**

We note that the [National Industrial Court of Nigeria \(NIC\)](#) had the opportunity to greatly enrich our labour law jurisprudence, particularly, as it relates to workplace sexual harassment in the 2013 case of [Ejike Maduka V Microsoft & Ors](#)<sup>4</sup> (hereinafter referred to as "[Microsoft's case](#)").

In Microsoft's case, the NIC gave a judgement which ushered in a new regime of labour law in Nigeria as it relates to workplace sexual harassment. This is because [the NIC not only held the workplace sexual harasser liable but also held the employer vicariously liable for acts of sexual harassment perpetrated against its employee](#). No doubt, [Microsoft's case](#) has great implication for our jurisprudence and more importantly, for liability of both employee and employer for acts of sexual harassment perpetrated by an employee in workplace. We have taken the liberty to produce some brief facts in Microsoft's case below.

#### **The facts of the Microsoft's case are quite straightforward.**

The Applicant, Mrs. Ejike Maduka was until the termination of her employment, the Enterprise Marketing Manager of the Microsoft Nigeria Limited - the 1st Respondent. Microsoft Nigeria Ltd, the Nigerian subsidiary of Microsoft Corporation, was the 2nd Respondent in the [Microsoft's case](#). The Applicant's grievance against the Respondents was that the termination of her employment was traceable to her refusal to succumb to sexual advances from her immediate boss, a certain Mr. Onyeje, the 3rd Respondent, who was the Country Manager and Chief Executive Officer of Microsoft Nigeria Ltd. Consequently, the Applicant instituted the action under the Fundamental Human Right Enforcement Procedure Rules, praying the NIC to declare that the termination of her employment for her refusal to succumb to the sexual advances of Mr Onyeje constituted a flagrant infringement on her right to dignity of person and freedom from discrimination as guaranteed by sections 34 and 42 of the Constitution of Federal Republic of Nigeria, 1999 (as amended) and sections 15 and 19 of the African Charter on Human and Peoples Right (Ratification and Enforcement) Act. In its reply, the Respondent (Microsoft Corporation) prayed the Court to strike its name out of the matter, canvassing the arguments that it is a separate and distinct legal entity from its Nigerian subsidiary, and that it did not directly instruct the termination of the employment of the Applicant. The arguments of the Respondent notwithstanding, [the NIC relied on the principle of agency of a principal employer and the subsidiary employer to hold that there was a co-employer status between the 1st and 2nd Respondents as well as further held the 2nd Respondent answerable for the claims of the Applicant.](#)

Flowing from the foregoing, the NIC found that the allegations that the 3rd Respondent consistently tickled and touched Mrs. Maduka and some other female workers in the office against their will and despite their protests, was proved by the evidence tabled before it. The NIC further declared that the sexual harassment of the Applicant was an infringement on her fundamental right to dignity of human person and freedom from discrimination. Quite notably, the NIC held the 1st and 2nd Respondents liable in damages for not taking utmost care to ensure that the Claimant's fundamental right to freedom from discrimination and degrading treatment in the workplace. Further to the foregoing, the NIC proceeded to award [N13,225,000.00 \(Thirteen Million, Two Hundred and Twenty-Five Thousand Naira\)](#) against the Respondents severally.

Having examined the landmark decision of the NIC in Microsoft's case, we shall now proceed to examine some pertinent issues triggered by the Microsoft's case for women rights and workplace sexual harassment in Nigeria.

#### **Microsoft's Case and Matters Arising on Workplace Sexual Harassment**

[Microsoft's case](#) brings to the fore an issue in an area of labour law bereft of Nigerian legislation or case law at the date of the Court's judgement in 2013





5 (NAAPE) & Ors. [2014] 42 NLLR (Pt. 133) 664 NIC.

It is worth noting that the Labour Act and other extant labour laws in Nigeria do not make specific provisions for workplace sexual harassment. However, the Constitution of the Federal Republic of Nigeria 1999 (as amended) confers on the NIC jurisdiction on matters connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified relating to labour, employment, workplace and industrial relations matters. It is worth mentioning that the NIC had in the celebrated case of *Aero Contractors Co. of Nigeria Limited v. National Association of Aircrafts Pilots and Engineers*,<sup>5</sup> endorsed the use of labour-related international conventions duly domesticated and ratified by Nigeria pursuant to Section 12 of the Nigerian Constitution and applied as is the case in *Microsoft's case*.

It is pursuant to the powers conferred on the NIC that the NIC applied the United Nations Convention on The Elimination of All Forms of Discrimination against Women (CEDAW) and International Labour Organization's Discrimination (Employment and Occupation) Convention 1958 No 111 to determine provide remedies for the wrongs done to the Applicant in *Microsoft's case*. It is also useful to note that the NIC specially relied on the Recommendation Number 19 of the CEDAW which stipulates that "it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment." The NIC also relied on a Canadian case where the Canadian Court held that sexual harassment is a form of sexual discrimination banned by the human rights statutes in all jurisdictions in Canada,<sup>3</sup> and a Supreme Court of India's judgement where it was held that a right against gender discrimination is a universally recognized basic human right.<sup>4</sup> It was against the foregoing background that the Presiding Judge of the NIC came to conclusion that the termination of the Applicant's employment for her refusal to succumb to the sexual advances and overtures of the 3rd Respondent was a discrimination against the Applicant on the basis of her gender, and a rape on her right to dignity of her human person.

### Concluding Remarks

It would appear paradoxical that an employer who may not directly partake in an act of workplace sexual harassment may be called upon to bear the liability for the act within its employ. The Microsoft's case, surely and undoubtedly, has laid the foundation of the law that in certain circumstances, the employer may be vicariously liable for workplace sexual harassment.

It was the argument of the 1st and 2nd Defendant in the case under review that it has a policy, (Anti –Harassment & Anti- Discrimination Policy and Complaint Procedure) to address workplace sexual harassment. It was also brought to the attention of the Court that when Microsoft Corporation became aware of the allegations of sexual harassment in its Nigerian company, it launched an investigation on the report in the United States of America. However, there was no evidence put before the Court that the Applicant was invited or interviewed in respect of her allegations when the investigation commenced, neither was there any evidence of the outcome of the investigation commended to the Court. It therefore became apparent that the refusal of Microsoft Corporation to conclude investigations of the alleged case of sexual harassment in its Nigerian subsidiary company made the 1st and 2nd Respondents liable for the acts of the Nigerian CEO. The Court particularly held that by "the inaction and silence of the 1st and 2nd Respondent, they both tolerated and ratified the 3rd respondent's conduct which is against their policy of prohibition and non-tolerance of sexual harassment, gender discrimination and retaliatory action. I hold that they are both in breach of their duty of care and protection to the applicant and are vicariously liable for the acts of sexual harassment carried out by the 3rd respondent within the apparent scope of authority they entrusted to him."<sup>5</sup>

Riding on the back of the attitude of the NIC in Microsoft's case, we are minded to opine that where an employer becomes aware of a workplace sexual harassment incidence and takes no administrative decision to investigate and address it, such employer may be liable for breaching its duty of care owed to the employee to protect the employee's fundamental rights. No doubt, Microsoft's case has established the liability of employers and employees alike, for cases of workplace sexual harassment in Nigeria. We submit that the Microsoft's case is a watershed development for women's workplace rights under Nigerian law as well as a call on all employers in Nigeria to speedily create policies and put in place, mechanisms that will effectively and robustly address cases of sexual harassment in their workplace, with a view to being caught in the web of liability brought about by their refusal to act on sexual harassment cases against their employees, upon becoming aware of such. It is time employers understood that they owe a duty to their employees to provide a toxic-free workplace for employees and this duty specifically includes a workplace free from all sorts of sexual harassment.

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