



# A Comparative Analysis of Employer Liability for Sexual Harassment in the Workplace in China and the United States

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**Abstract.** The issue of sexual harassment in the workplace in China is increasingly becoming a focus of attention. In recent years, social hot topics caused by sexual harassment have occurred frequently, and a series of related issues urgently require legal response and resolution. Among them, the responsibility that the company should bear is a crucial issue. At present, China has formed a diverse and integrated protection system for workplace sexual harassment, including criminal law, administrative law, civil law, and labor law. However, there are still shortcomings in the recognition, assumption, and accountability of unit responsibilities in workplace sexual harassment. This article compares and analyzes the practices and differentiated performances of China and the United States in this field, in order to provide feasible experience and reform plans for the ways of sexual harassment in the workplace in China.

**Keywords:** workplace sexual harassment; civil law; fault liability

## 1 Introduction

The concept of sexual harassment was first put forward by Catharine MacKinnon. She published the book *Sexual Harassment of Working Women* in 1979, which divided sexual harassment in the workplace into quid pro quo and hostile work environment [1]. Quid pro quo mainly refers to that women exchange their sexual compliance for professional benefits. Hostile work environment refers to the unbearable harassment that women face in their work environment. Such work environment will not necessarily cause direct economic loss but will destroy the working conditions of the victim and interfere with the victim's normal performance of duty [2].

In recent years, social news caused by sexual harassment have taken place frequently, and a series of related problems are in urgent need of legal response and resolution. In October 2017, two reports revealed that famous Hollywood producer Harvey Weinstein had used his position to sexually harass actresses and female assistants, causing a stir in the United States. This incident has launched a new feminist movements with the slogan of MeToo [3]. Since then, several high-profile companies have been accused of

sexual harassment, paying large sums of money to victims, and the directors and executives of such companies have been forced to resign and apologize [4]. This is just the tip of the iceberg. In China, in 2018, the CEO of JD.COM, Liu Qiangdong, was suspected of sexual assault. In 2021, the “Alibaba Female Employee Was Assaulted” became a hot topic on the Internet. On August 7, 2021, an Alibaba certified employee said anonymously that she was forced by a male leader to go on business.

The sexual harassment in the workplace is pervasive around the world. Therefore, it is worth discussing what kind of liability the company should take in the case of sexual harassment in the workplace [5]. Especially for China, an emerging country in the prevention and control of workplace sexual harassment, the further refinement of corporate responsibility is particularly necessary, which also provides more feasible guidance for judicial practice. Therefore, this paper takes the employer liability for sexual harassment in the workplace as the object of study, compares and analyzes the differences between China and U.S. in this field, and uses the feasible experience for reference.

## **2 Employer Liability for Sexual Harassment in the Workplace between China and the United States**

### **2.1 Employer Liability for Workplace Sexual Harassment in China**

#### **Criminal Law.**

Article 237 of the Criminal Law of the People's Republic of China provides that “Whoever, by violence, coercion or other means, forces, molests, or humiliates a woman is to be sentenced to not more than five years of fixed-term imprisonment or criminal detention. Whoever assembles a crowd to commit the crimes described in the preceding paragraph, or commits such crimes in the public is to be sentenced to not less than five years of fixed-term imprisonment.” This is a kind of punishment for some serious acts of sexual harassment, such as forcing others to watch pornographic videos, taking off their clothes, touching their intimate sexual parts, hugging and kissing others, etc., and the offender should be held criminally liable. Therefore, the criminal law in China does not stipulate that units bear criminal liability for sexual harassment.

#### **Administrative Law.**

Article 42, paragraph 5 and Article 44 of Law of the PRC on Administration and Penalties of Public Security stipulate measures for two kinds of sexual harassment: “repeatedly sending obscene messages to disturb the normal life of others” and “indecently assaulting others”. Paragraph 5 of Article 42 requires the occurrence of the act many times and interference with the normal life of others. The degree of “indecenty” in Article 44 is also higher than that of general sexual harassment. It can be seen that the “Law on Administrative Penalties for Public Security” is mainly aimed at some relatively serious acts of sexual harassment, pursuing the offender's administrative liability.

#### **Labor Law.**

Although the Labor Law and the Labor Contract Law in China do not explicitly stipulate sexual harassment in the workplace, Article 54 of the Labor Law requires the employer to provide employees with "occupational safety and hygiene conditions which comply with national regulations". According to this article, the employer is obligated to ensure the "safe" and "hygienic" working conditions of the employees.

### **Civil Law.**

The Civil Code of the PRC promulgated in 2020 responded to the hot topic of sexual harassment, and for the first time listed sexual harassment as a violation of personal rights. Article 1010 of Part Personality Rights of Civil Code provides that "Where a person sexually harasses another person by verbal, written, pictorial, physical, or other means against the person's will, the victim has the right to request the perpetrator to bear the civil liability. The Draft defines sexual harassment by listing several specific forms of sexual harassment, and stipulates that the employers shall fulfill the corresponding prevention and treatment obligations, including "taking reasonable measures of prevention, acceptance of complaints, investigation and disposal, to prevent and stop sexual harassment by taking advantage of authority, subordinate relationship, etc." In the event of violation of such provisions, the employers shall bear the civil liability for infringement of personality rights.

### **Protection of women's rights.**

The revised Law on the Protection of Women's Rights and Interests specifies employers' duties of preventing and stopping sexual harassment, and stipulates that enterprises shall formulate relevant rules and regulations on anti-sexual harassment. According to the Law on Protection of Women's Rights and Interests, the employer mainly assumes administrative liabilities.

## **2.2 Employer Liability for Workplace Sexual Harassment in the US.**

The United States mainly adopts the workplace protection model of sexual harassment regulation, and sexual harassment is regarded as a kind of sex discrimination. Title VII of the Civil Rights Act of 1964 prohibits "sex discrimination," which regulates sexual harassment under the model of anti-sex discrimination law. According to the concept proposed by Professor Catharine MacKinnon, there are two types of workplace sexual harassment, quid pro quo and hostile work environment. Victims of both types of sexual harassment can bring a sex discrimination suit under the anti-discrimination provisions of Title VII of the Civil Rights Act of 1964.

The Equal Employment Opportunity Commission (EEOC) has issued the Policy Guidance on Sexual Harassment, which helps people to have a more concrete understanding of the concept of sexual harassment in the workplace. In the long-term judicial practice, the United States has gradually established a set of standards to distinguish three different types of employers' liability for sexual harassment in the workplace.

First, strict vicarious liability. If the sexual harassment has a real impact on the victim's working conditions, the employer should bear strict vicarious liability regardless

of the fault or preventive measures. This is because sexual harassment of subordinates by employees with managerial functions is often committed by taking advantage of their advantageous position, and it is due to the power vested in them by the employer that they can have a tangible impact on the working conditions of the victim [6].

Second, there is presumption of vicarious liability. Where an employee who engages in sexual harassment has a managerial function, the employer is presumed to be vicariously liable even if the harassment does not have a tangible impact on the victim's working conditions. However, the employer may be excused from liability by showing that it has taken reasonable preventive and corrective measures and that the victim did not make reasonable use of these measures [7].

Third, negligence liability. If the employee who engages in sexual harassment does not have a management function and is an ordinary employee or a third party, the employer is usually not liable. Unless the employer knew or should have known of the harassment and failed to take timely and appropriate corrective measures, the employer is liable for negligence for sexual harassment.

Besides, the cost to employers of sexual harassment in the U.S. is high. In 2011 alone, more than 11,000 sexual harassment claims were filed with the Equal Employment Opportunity Commission, costing employers more than \$50 million in damages. Notably, this figure does not include additional funds won by the accuser in the lawsuit, nor does it include legal fees, the cost of internal investigations, or lost productivity [8].

The U.S. law also establishes restrictions on the conduct of perpetrators of sexual harassment and provides the victim with various remedies in the form of litigation expenses, which can provide the victim with complete remedy [9].

### **3 Elaboration and Perfection of Employer Liability for Workplace Sexual Harassment in China**

#### **3.1 Determination of Liability**

Although the problem of sexual harassment has a long history, the current law on sexual harassment in China does not clearly stipulate the employer responsibility, so it is not very practical to require the employer to take the responsibility. In this case, many enterprises evade the responsibility of preventing sexual harassment, and the victims cannot get comprehensive relief. Classification of sexual harassment is an important step to identify the responsibility. Distinguishing different types of workplace sexual harassment is conducive to the follow-up discussion on what kind of responsibility the employer should take. Workplace is in a special power system, there is a relationship between management and management between superiors and subordinates. In the regulation of sexual harassment in China, we can learn from the classification of sexual harassment in the U.S., and divide sexual harassment in the workplace into quid pro quo and hostile work environment. Distinguishing the two types of sexual harassment, on the one hand, can make a more clear division of the various forms of workplace sexual harassment, so that the court can have a strong initial determination of sexual harassment, and lay a good foundation for the further detailed undertaking of liability.

On the other hand, in order to balance the contradiction between the employer's liability and the victim's relief, the victim side has added an object to request compensation, for the employer, the bearing of liability will be different according to the type, the classification of sexual harassment can also better balance the contradiction between the victim's relief and the employer's liability.

### 3.2 Weight of Evidence

To solve the problem of "the difficulty of adducing evidence" in sexual harassment cases, China may learn from the advanced practice of the United States, relieve the aggrieved party on the basis of the principle of "who asserts, who bears the burden of proof" and on the probative force and standard of proof of evidence. As for the standard of proof, multiple pieces of indirect evidence may be connected to form chains of indirect evidence, thus the standard of proof is appropriately lower than the general standard of high probability, so that the employees who have been subjected to sexual harassment can make a large number of proofs of the violation, such as the testimony of other colleagues, the diary of the aggrieved employee, and the suspicious activity tracks and shifts of attitude of the party concerned under office monitoring. Evidence provided by victims, such as recordings, videos, chat records and letters of apology to offenders, directly proving the existence of sexual harassment have higher probative force. Accordingly, defendants need to deny the existence of sexual harassment by proving their behaviors conformed to the existing code or practice. For example, a supervisor did not individually invite a subordinate to a date outside of working time or only use the company's WeChat account to contact colleagues.

### 3.3 Burden of Proof

Most sexual harassment incidents do not have witnesses, only two people are involved, the harasser and the victim. Therefore, it is difficult to judge who is right and who is wrong based on the statements of the two opposing parties in court [10]. In almost every existing sexual harassment case in China, after the party has finally overcome the problem of cause of action, the first difficulty is the problem of adducing evidence. In a case of sexual harassment, it should be the plaintiff, i.e. the person claiming that sexual harassment exists, who should provide prima facie evidence to support the claim. However, the plaintiff only needs to provide prima facie evidence, the state of prima facie evidence is sufficient for the court to presume that sexual harassment exists. Otherwise, the plaintiff needs to bear the negative consequences caused by losing the lawsuit. Then the case enters the counterevidence stage, i.e., the employer needs to prove that it had taken reasonable and effective preventive measures before the act took place and organized the employee to study such measures; and after the act took place, the employer had also taken prompt measures. The two are not parallel, i.e., the employer may be exempted from liability only by providing evidence of either one of the two. During the process of adducing evidence, the employer only bears the burden to furnish evidence while the onus of persuasion rests on the victim. American experience shows that stubbornly dismissing claims on the ground of lack of evidence and neglecting protection

for victims of sexual harassment is contrary to what China's current law is seeking for. Earlier introduction of unit's burden of proof is conducive to resolving the problem of difficulty in adducing evidence by parties in sexual harassment cases.

### **3.4 Type of Employer Liability**

#### **No Fault Liability.**

When the exchange sexual harassment occurs in the workplace, the employer should bear the no-fault liability. The main reason is that in the exchange sexual harassment, the main body of sexual harassment is mainly the supervision and management personnel in the enterprise, who hold certain power, have certain personnel decision-making rights or have certain influence on the position promotion. This includes directors, supervisors, and senior managers and so on. Because of the power suppression and benefit exchange, the victims often dare not to refuse the manager's sexual harassment behavior, lest they will be adversely affected in work, such as being demoted, reducing salary, and reducing benefits and so on. In this kind of sexual harassment, most victims choose to claim their rights after leaving the company, when it has been some time since the incident occurred, which puts the victims in a disadvantageous position in terms of evidence. No matter being directors, senior managers or supervisors, the management personnel of such companies certainly keep some information of evidence in the company, and it is very difficult for the victims as subordinates to obtain such evidence. In order to balance the unbalanced status between the two, the law needs to establish a no-fault liability for the employer. This kind of no-fault liability and the punitive damages in contrast to it will greatly mobilize the victims' enthusiasm for safeguarding rights. For profit-seeking enterprises, the increase of the cost of violation of regulations is quite fatal. This sensitivity also determines the necessity of the existence of punitive damages. In exchange sexual harassment, requiring the unit to assume no-fault liability will purify the whole workplace environment of the society.

#### **Presumption of Fault Liability.**

But when hostile work environment occurs, no amount of cost can absolutely prevent the existence of the harassment. The sources of sexual harassment in hostile environment are various, which may come from colleagues, customers or managers, so we can't require the company to bear no-fault liability directly, because the company has no control over some of the sources. In this case, we should reduce the cost of violating the regulations correspondingly, and give the company some exemptions to embody the flexibility of the law. Under such circumstance, the employer's performance of the obligations of prevention and remedy is an important judgment standard. In terms of hostile work environment, sexual harassment may not be avoided completely; however, the employer should take preventive measures in advance to reduce the occurrence of such harassment. As long as the employer can prove that it has fulfilled the relevant obligations and that it is not at fault, the employer will be exempted from liability under hostile work environment of sexual harassment.

## 4 Conclusions

From the Law on the Protection of Women's Rights and Interests in 2005 to the Article 1010 of the Civil Code in 2020, China has made great progress in the legal regulation of workplace sexual harassment. However, there are still legislative inadequacies and judicial confusion in China. The legal regulation of sexual harassment in the workplace in the United States is relatively perfect, and the judicial practice also has advanced experience, which is worthy of reference for China. This paper contrasts the different regulations of the unit's liability for sexual harassment in the workplace between China and the U.S., and puts forward some possible suggestions to improve the relevant laws in China. First of all, in the aspect of liability determination, we should take a clearer way to classify sexual harassment, and divide it into two types, quid pro quo and hostile work environment. Secondly, in the issue of proof, the law should be appropriately inclined to the victim. Thirdly, in the aspect of burden of proof, when the person who alleges the existence of sexual harassment provides prima facie evidence, the employer should bear the burden of proving that reasonable and effective preventive measures have been taken before the act, and the employer has also taken prompt measures after the act. Finally, in terms of the types of responsibility of the unit, according to different types of sexual harassment, the responsibility of the unit to put forward different requirements. When quid pro quo occurs, the unit is required to assume the no-fault responsibility. When hostile work environment occurs, the unit is required to assume the responsibility of the presumption of fault.

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