Reviewing Work-Related Sexual Harassment under Philippine Law: Ambiguities, Limitations, and Improving Republic Act No. 7877

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I. INTRODUCTION

Work-related sexual harassment law in the Philippines, while already entering its 13th year since enactment, may still be considered as being in a relatively infantile stage as jurisprudence on Republic Act No. 7877 (R.A. No. 7877), or the Anti-Sexual Harassment Act of 1995,[1] remains significantly undeveloped. R.A. No. 7877, the penal statute declaring sexual harassment in the workplace unlawful, has yet to be adequately tested before the Supreme Court. Its efficacy in "uphold[ing] the dignity of workers, employees and applicants for employment" and providing redress for victims of sexual harassment and its limitations in the accomplishment of these objectives have yet to be determined.[2]

This article briefly reviews R.A. No. 7877, specifically its provisions on sexual harassment in the workplace, and examines how its language may fall short in dealing with situations that call for legal redress. Situations that may not have been contemplated during the law's inception ought to be considered in both identifying ambiguities in and limitations of the law and improving it if needed. Issues relating to workplace sexual harassment already addressed by U.S. courts, in addition to documented incidents in the domestic front, may provide guidance in evaluating and improving the law. Considering the limited jurisprudence on work-related sexual harassment, this article principally derives wisdom from U.S. jurisprudence in evaluating the present law against sexual harassment in the workplace. Existing civil service rules and regulations in the Philippines on sexual harassment are not, however, covered in this article.

II. WHAT IS SEXUAL HARASSMENT?

The definition of sexual harassment has been the "subject of intense debate since the promulgation of R.A. No. 7877."[3] The law provides that sexual harassment in a work-related or employment environment is committed:

1. by an employer, employee, manager, supervisor, agent of the employer ... or any other person who, having authority, influence or moral ascendancy over another in a work ... environment, *demands, requests or otherwise requires any sexual favor from the other*, regardless of whether the demand, request or requirement for submission is accepted by the object of said Act;[4] and
2. when:
    a. The sexual favor is made as a condition in the hiring or in the employment, re-employment or continued employment of said individual, or in granting said individual favorable compensation, terms of conditions, promotions, or privileges; or

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1. An Act Declaring Sexual Harassment Unlawful in the Employment, Education or Training Environment, and For Other Purposes [ANTI-SEXUAL HARASSMENT ACT OF 1995], Republic Act No. 7877 (1995).
2. *Id.* § 2.
3. CIVIL SERVICE COMMISSION AND THE NATIONAL COMMISSION ON THE ROLE OF FILIPINO WOMEN, FIGHTING SEXUAL HARASSMENT IN THE BUREAUCRACY: A MANUAL 38 (2002) [hereinafter CSC MANUAL].
4. ANTI-SEXUAL HARASSMENT ACT OF 1995, § 3 (emphasis supplied).

> the refusal to grant the sexual favor results in limiting, segregating or classifying the employee which in any way would discriminate, deprive or diminish employment opportunities or otherwise adversely affect said employee;
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> b. The above acts would impair the employee's rights or privileges under existing labor laws; or
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> c. The above acts would result in an intimidating, hostile, or offensive environment for the employee.[5]

The above language bears substantive similarity to title VII of the Equal Employment Opportunity Commission (EEOC) Guidelines[6] claims for sex discrimination.[7] The EEOC Guidelines provide:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the bases for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[8]

What significantly distinguishes R.A. No. 7877 from the EEOC Guidelines is the nature of acts proscribed by the law. While the EEOC Guidelines consider "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature"[9] as workplace

5. *Id.* § 3(a).

6. 42 U.S.C. §§ 2000e-2000e-17 [CIVIL RIGHTS ACT OF 1964] (1964). Title VII of the Act declares that it is "unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

7. Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986) (citing 29 C.F.R., § 1604.11 (1985)):

> in 1980 the EEOC issued Guidelines specifying that 'sexual harassment' ... is a form of sex discrimination prohibited by Title VII. As an "administrative interpretation of the Act by the enforcing agency," ... these Guidelines, "'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance ...'"

8. *Id.*

9. *Meritor*, 477 U.S. at 65 (1986) (citing 29 C.F.R. § 1604.11 (a) (1985)).

conduct that is actionable for constituting sexual harassment, R.A. No. 7877 covers a narrower list of unlawful conduct by declaring that sexual harassment may only be committed by a person who "demands, requests or otherwise requires any sexual favor," resulting to any of the conditions unfavorable to the worker or employee subjected to sexual harassment — that is, requiring such condition in employment decisions, the impairment of rights and privileges, and the creation of a hostile environment. Limiting the acts constituting sexual harassment to a demand, request, or requirement of sexual favor raises questions as to what the law covers and excludes. Proceeding from this comparative lens, does "sexual favor" (that is demanded, requested, or otherwise required) in R.A. No. 7877 contemplate or exclude "unwelcome sexual advances" or "verbal or physical conduct of a sexual nature" as articulated in the EEOC Guidelines? The interpretation of the terms "demand," "request," or "requirement" and of the broader term of "sexual favor" consequently becomes an area of serious contention.[10]

It is interesting to note that while R.A. No. 7877 uses the term "sexual favor" in describing acts of work-related sexual harassment, the law also refers to "sexual advances" when describing one form of sexual harassment committed in an education or training environment.[11] The difference in terminology used in the same law suggests the difference in meaning attributed to "sexual favor" and "sexual advances."

One of the few decisions of the Philippine Supreme Court on R.A. No. 7877, *Aquino v. Acosta*,[12] lends limited guidance to this question of ambiguity. In this case, plaintiff Aquino charged respondent Acosta with sexual harassment under R.A. No. 7877 on the basis of six different incidents, from December 2000 to February 2001. Acosta allegedly "pulled her towards him and kissed her on the cheek," "embraced her and kissed her," "tried to kiss her," "placed his arms around her shoulders and kissed her," and "tried to 'grab' her."[13] In this case, the Supreme Court seems to suggest a synonymous treatment of "sexual favors" and "sexual advances" (or, at least, implies that "sexual advances" are contemplated by the terms "sexual favor" under the work-related sexual harassment provisions of R.A.

10. CSC MANUAL, *supra* note 3, at 38.

11. ANTI-SEXUAL HARASSMENT ACT OF 1995, § 3 (b) (4) provides: "In an education or training environment, sexual harassment is committed ... [w]hen the sexual advances result in an intimidating, hostile or offensive environment for the student, trainee or apprentice."

12. Aquino v. Acosta, 380 SCRA 1 (2002).

13. *Id.* Acosta was also charged for violating the Canons of Judicial Ethics and Code of Professional Responsibility.

No. 7877), when it alternately referred to both in its decision. The Supreme Court also displayed an inclination to liberally construe the meaning of sexual harassment by suggesting that any "physical conduct of sexual nature" (and not limited to sexual favors) falls within the definition of the proscribed act.[14]

What is evident, however, was the Supreme Court's endorsement in *Aquino* of the view that prior demand, request, or requirement is essential to make a case of sexual harassment. Ruling in favor of respondent Acosta, the Supreme Court noted that:

> ...complainant did not even allege that Judge Acosta *demanded, requested or required* her to give him a buss on the cheek which, she resented. ...
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> ...
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> Indeed, from the records on hand, there is no showing that respondent judge *demanded, requested or required any sexual favor* from complainant in exchange for 'favorable compensation, terms, conditions, promotion or privileges' specified under Section 3 of R.A. No. 7877.[15]

The above portion of the ruling seems to further suggest that the demand, request, or requirement must be verbal or explicit to consider the conduct in question as sexual harassment. A demand, request, or requirement is commonly interpreted as verbal, that is, "words must be uttered, and uttered *before* the commission of the act being complained of."[16] Lawyers in civil service investigations on sexual harassment have argued that "without making a prior verbal statement 'demanding, requesting or requiring' the other person to participate in, accept, or give in to the conduct, the element of 'demand, request or requirement' is absent."[17] Nevertheless, a demand or request for, or requiring a sexual favor may not always be expressed explicitly, or worse, the harasser may proceed with a sexual advance without making a prior demand or request. As aptly put in the case of *Burns v. McGregor*,[18] "[s]exual harassment can take place *in many different ways*. A female worker need not be propositioned, touched offensively, or harassed by sexual innuendo .... Intimidation and hostility toward women because they are women can obviously result from conduct *other than explicit sexual advances*."

14. *Id.* at 7 ("Atty. Aquino failed to state categorically in her affidavit-complaint that respondent demanded *sexual advances or favors* from her, or that the former had *committed physical conduct of sexual nature against her*." (emphasis supplied)).

15. *Id.* at 11 (emphasis supplied).

16. CSC MANUAL, *supra* note 3, at 38-39.

17. Evalyn G. Ursua, *Sexual Harassment in Philippine Law: Issues and Problems, in* CIVIL SERVICE COMMISSION, SEXUAL HARASSMENT CASES: A COMPILATION 102 (2002).

18. Burns v. McGregor, 989 F.2d 959 (1993) (citing Hall v. Gus Construction Co., 842 F.2d 1010, 1014 (8th Cir. 1988)).

In *Faragher v. City of Boca Raton*,[19] plaintiff Faragher claimed, among others, that one of the supervisors "repeatedly touched the bodies of female employees without invitation, would put his arm around [them], with his hand on [their] buttocks, and once made contact with another female lifeguard in a motion of sexual simulation."[20] These acts of "uninvited and offensive touching," not preceded or accompanied by any demand, request, or requirement may not qualify as among the acts proscribed by section 3 of R.A. No. 7877. Hypothetically, however, if Faragher's supervisor makes a prior demand that he be allowed to touch the employee's body or make contact with her in a motion of sexual simulation, even without doing the sexual conduct, his acts may then fall within the purview of R.A. No. 7877. Comparing the two scenarios, an anomalous situation is created where one who has merely received a demand to submit to a form of sexual conduct may file a claim based on R.A. No. 7877, but, if the law is strictly interpreted, one who has already been subjected to an unwelcome sexual advance, albeit without any verbal or explicit demand, request, or requirement of sexual favor being made, is left without legal remedy. It may therefore be more in keeping with the law's purpose to interpret the proscribed "sexual favor" to include sexual advances as well as other conduct sexual in nature that may not be preceded by a demand, request or requirement.

Whether section 3 of R.A. No. 7877 may be liberally construed to contemplate unwelcome sexual advances and other forms of conduct that are sexual in nature, even without an explicit prior or accompanying demand, request, or requirement, for now, depends on judicial generosity. The literal reading of R.A. No. 7877 does not seem to permit such liberal construction and existing jurisprudence hardly gives support to such interpretation. Meanwhile, the ambiguity in the nature of the prohibited acts persists and, consequently, presents a fertile opportunity for contentious litigation. Suffice it to say, the present language of the law fails to capture the realities of sexual

19. Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

20. *Id.* at 782.

harassment.[21] Hence, a legislative clarification of the definition of sexual harassment under R.A. No. 7877 is in order.

III. DIFFERING POINTS OF VIEW

In the same *Aquino* case, the Supreme Court did not sustain the complaint of sexual harassment by finding that the acts of respondent Acosta are "casual gestures of friendship and camaraderie, nothing more, nothing less."[22] The Court held:

> [i]n sum, no sexual harassment had indeed transpired on those six occasions. Judge Acosta's acts of bussing Atty. Aquino on her cheek were merely forms of greetings, casual and customary in nature. No evidence of intent to sexually harass complainant was apparent, only that the innocent acts of 'beso-beso' [kissing] *were given malicious connotations by the complainant.* Undeniably, there is no manifest sexual undertone in all those incidents.
>
> ...
>
> We have reviewed carefully the records of this case and found no convincing evidence to sustain complainant's charges. What we perceive to have been committed by respondent judge are casual gestures of friendship and camaraderie, nothing more, nothing less. In kissing complainant, we find no indication that respondent was motivated by malice or lewd design. Evidently, *she misunderstood his actuation and construed them as work-related sexual harassment* under R.A. No. 7877.[23]

The above decision brings forward the issue of subjectivity. From whose viewpoint should a demand, request, or requirement of a sexual favor[24] or a hostile, offensive or intimidating environment[25] be interpreted as being present? Are there standards by which a "sexual favor" or a "hostile, offensive or intimidating environment" can be measured? When is an act a demand, request, or requirement of sexual favor under the purview of the

21. It has been contended that the absence of a definition of sexual harassment results in an incomplete reflection of the realities of the issue. *See,* Sentro ng Alternatibong Lingap Panlegal (SALIGAN), *Sexual Harassment,* PANTAS: OFFICIAL PUBLICATION OF SALIGAN WOMEN'S UNIT, Issue No. 1 (Special ed. 2000), *available at* http://www.salidumay.org/discussions/articles/sexual-harassment.doc (last accessed Feb. 14, 2004) [hereinafter SALIGAN].

22. Aquino v. Acosta, 380 SCRA 1, 9 (2002).

23. *Id.* (emphasis supplied).

24. ANTI-SEXUAL HARASSMENT ACT OF 1995, §§ 3 & 3 (a) (1).

25. *Id.* § 3 (a) (3).

law and when is it a mere casual gesture? *Meritor Savings Bank v. Vinson,*[26] emphasizes that "the trier of fact must determine the existence of sexual harassment in light of the record as a whole and the *totality of circumstances,* such as the *nature of the sexual advances* and the *context in which the alleged incidents occurred.*"[27] *Harris v. Forklift Systems, Inc.*[28] expounds on the circumstances to be examined:

> [t]hese may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.[29]

Nevertheless, relying on a totality of circumstances standard as well as on a liberal construction of the demand, request, or requirement of sexual favor in determining a violation of the law may not provide a comforting refuge for sexual harassment victims. The "totality of circumstances" standard and the use of "context" to determine commission of sexual harassment under U.S. law may not be sufficient as R.A. No. 7877 is a penal statute and, as such, the courts must strictly interpret it in favor of the accused.[30] Courts, at least when it determines penal liability under R.A. No. 7877, must not extend or enlarge the law by implication, intendment, analogy, or equitable consideration.[31] Also, the quantum of evidence required in R.A. No. 7877,

26. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). This is a landmark decision of the U.S. Supreme Court for its recognition of certain forms of sexual harassment as a violation of the Civil Rights Act and its establishment of standards in analyzing when certain conduct violates the law and when an employer shall be held liable.

27. *Id.* at 69.

28. Harris v. Forklift Systems, Inc., 510 U.S. 114 (1993).

29. *Id.* at 22-23.

30. Centeno v. Villalon-Pornillos, 236 SCRA 197, 205 (1994).

31. *Id.* at 205. The Second Division of the Philippine Supreme Court reiterates the rule on strict construction of penal laws by stating:

> it is a well-entrenched rule that penal laws are to be construed strictly against the State and liberally in favor of the accused. They are not to be extended or enlarged by implications, intendments, analogies or equitable considerations. They are not to be strained by construction to spell out a new offense, enlarge the field of crime or multiply felonies. Hence, in the interpretation of a penal statute, the tendency is

being a penal law, is more difficult to obtain, as the complainant will have to provide beyond reasonable doubt all elements of the crime. The absence of detailed guidelines to supplement a totality of circumstances standard and the lack of clarity to understand and interpret the elements of the offense of sexual harassment highlight the necessity to improve the anti-sexual harassment law through amendatory legislation. A more comprehensive definition of sexual harassment or a more extensive listing of objectionable acts may help address the problems caused by ambiguity and subjectivity. As the Sentro ng Alternatibong Lingap Panlegal (SALIGAN) Women's Unit once proposed, the crime of sexual harassment "must be defined [and] the elements to identify the crime must be clear. Otherwise, it may remain a legally vague concept subject to misinterpretation."[32]

IV. "UNWELCOMENESS" AND "VOLUNTARINESS"

The issue of acceptance of or voluntary participation to the sexual conduct arose in *Meritor*,[33] where the petitioner, employer Meritor Savings Bank argued that the respondent, plaintiff Vinson, voluntarily submitted to the complained acts of sexual harassment. Consistent with the tenor of R.A. No. 7877, the U.S. Supreme Court ruled in *Meritor*, the "fact that sex-related conduct was 'voluntary,' in the sense that the complainant is not forced to participate against her will, is not a defense to a sexual harassment suit."[34] This ruling in *Meritor* is in accord with the last part of section 3 of R.A. No. 7877, which provides that the demand, request, or requirement of a sexual favor is considered an act of sexual harassment "regardless of whether the demand, request or requirement for submission is accepted by the object of said Act."[35] The *Meritor* Court, however, drew a distinction between "unwelcomeness" and "voluntariness" by clarifying that the "correct inquiry

> to subject it to careful scrutiny and to construe it with such strictness as to safeguard the rights of the accused. If the statute is ambiguous and admits of two reasonable but contradictory constructions, that which operates in favor of a party accused under its provisions is to be preferred. The principle is that acts in and of themselves innocent and lawful cannot be held to be criminal unless there is a clear and unequivocal expression of the legislative intent to make them such. Whatever is not plainly within the provisions of a penal statute should be regarded as without its intendment.

32. SALIGAN, *supra* note 21.
33. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).
34. *Id.* at 68.
35. ANTI-SEXUAL HARASSMENT ACT OF 1995, § 3.

is whether respondent by her conduct indicated that the alleged sexual advances *were unwelcome, not whether her actual participation in sexual intercourse was voluntary.*"[36] Realizing this distinction, must a plaintiff alleging sexual harassment still prove "unwelcomeness" when suing under R.A. No. 7877? Is it an element of the offense? Or is the fact of "welcomeness" a mere defense to negate liability? These questions come to fore upon consideration of the ruling in *Meritor*, citing the EEOC Guidelines, that the "gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"[37]

In contrast to the EEOC Guidelines, which consider sexual harassment to constitute "*unwelcome* sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature,"[38] R.A. No. 7877 does not specify "unwelcomeness" as an element of the offense. Interestingly, what R.A. No. 7877 states is that a complaint of sexual harassment may prosper "regardless of whether the demand, request or requirement for submission *is accepted* by the object of said Act."[39] Did the inclusion of this clause mean that a plaintiff in a sexual harassment case need not show "unwelcomeness"? The language of the Supreme Court in *Dawa v. De Asa*,[40] which relies on the *Meritor* decision as its authority, suggests but does not explicitly require the necessity of factoring "unwelcomeness" in determining criminal liability under R.A. No. 7877:

> [i]n the present case, we find totally unacceptable the temerity of the respondent judge in subjecting herein complainants, his subordinates all, to *his unwelcome sexual advances* ... His severely abusive and outrageous acts, which are an affront to women, *unmistakably constitute sexual harassment* because they necessarily '. . . result in an intimidating, hostile, or offensive environment for the employee[s].'[41]

In any case, while common sense dictates that acts of sexual harassment are necessarily unwelcome, clarity in the law, especially a penal statute, must be achieved. Such clarity is essential to properly guide prosecutors in evaluating complaints of sexual harassment submitted to them, and judges in

36. *Meritor*, 477 U.S. at 68 (emphasis supplied).
37. *Id.* (citing 29 C.F.R. § 1604.11 (a) (1985)).
38. CIVIL RIGHTS ACT OF 1964, §§ 2000e-2000e-17 (emphasis supplied).
39. ANTI-SEXUAL HARASSMENT ACT OF 1995, § 3 (emphasis supplied).
40. Dawa v. De Asa, 292 SCRA 703 (1998).
41. *Id.* at 726 (citing ANTI-SEXUAL HARASSMENT ACT OF 1995, § 3 (a) (3); Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986)) (emphasis supplied).

deciding cases and to ensure litigants can adequately prepare their cases during both the preliminary investigation stage and the trial proper.[42]

As the Supreme Court has yet to confront an issue involving the voluntary submission by a harassed employee to the act of sexual harassment, the question of "unwelcomeness," however, shall inevitably surface. When that occasion arises, courts as well as litigants ought to proceed with caution by taking into account the distinction enunciated in *Meritor*. While the acts indicating "voluntariness" do not prevent a sexual harassment suit from prospering, as clearly stated in R.A. No. 7877, these acts may nonetheless be used by defendants in a sexual harassment case and be admitted into evidence to prove the "welcomeness" of the alleged sexual conduct. As ruled in *Meritor*,

> [w]hile voluntariness in the sense of consent is not a defense to a sexual harassment claim, it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant.[43]

The concepts of voluntary participation in, submission to, and "welcomeness" of the sexual conduct have to be carefully clarified or distinguished as such is necessary to better understand when acts alleged as sexual harassment must result in criminal liability. In the event R.A. No. 7877 is considered for amendment, a provision governing admissibility and evidentiary weight which would reflect this distinction (should legislators deem it necessary to make the same distinction as *Meritor*) ought to provide better legal guidance.

V. WHAT ABOUT EMPLOYER'S LIABILITY?

In the United States, the determination of the degree of employer's liability for workplace sexual harassment depends on whether tangible employment action — for example, disadvantageous work reassignment, demotion, termination — was taken against the plaintiff. In *Burlington Industries, Inc. v.*

42. *See,* 2000 REVISED RULES OF CRIMINAL PROCEDURE, rule 110. Under the Revised Rules of Criminal Procedure, rule 110 on Prosecution of Offenses provides that a complaint for a criminal offense must first be filed with an investigating officer (*e.g.* provincial or city prosecutor) who shall conduct a preliminary investigation to determine if there is sufficient ground to engender a well-founded belief that a crime is committed and an information should be formally filed in court. *See also,* 2000 REVISED RULES OF CRIMINAL PROCEDURE, rule 112.

43. Meritor Savings Bank v. Vinson, 477 U.S. 57, 69 (1986).

Ellerth[44] and *Faragher v. City of Boca Raton,*[45] the U.S. Supreme Court ruled, with substantive similarity, that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense."[46]

The standard giving rise to the civil liability of the employer in R.A. No. 7877, unlike the above enunciated rule in *Faragher* and *Burlington*, does not distinguish if tangible employment action against the employee resulted from the act of sexual harassment. Instead, the employer, regardless of the employment condition resulting from the sexual harassment, "shall be solidarily liable for damages arising from the acts of sexual harassment committed in the employment" provided that (1) the employer "is informed of such acts by the offended party" and (2) "no immediate action is taken" by the employer.[47]

A. Should "Ignorance" be Bliss?

A cursory reading of section 5, which provides that an employer shall be solidarily liable if it "is informed" of the acts of sexual harassment "by the offended party," dictates that a plaintiff must show that he/she positively informed the employer of the alleged acts of sexual harassment. Such interpretation of this requirement differs from what is acknowledged under U.S. jurisprudence that the "absence of notice to an employer does not necessarily insulate that employer from liability."[48] Does R.A. No. 7877 require actual, verbal notification? Or is proof of actual (or constructive) knowledge sufficient? Who should the employee inform? What if the purported harasser is the employer or the agent of the employer? To date,

44. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).

45. Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

46. *Burlington*, 524 U.S. at 765; *Id.* at 807. The affirmative defense "comprises two elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.".

47. ANTI-SEXUAL HARASSMENT ACT OF 1995, § 5 provides: "The employer or head of office ... shall be solidarily liable for damages arising from the acts of sexual harassment committed in the employment ... environment if the employer or head of office ... is informed of such acts by the offended party and no immediate action is taken."

48. Meritor Savings Bank v. Vinson, 477 U.S. 57, 72 (1986).

the Philippine Supreme Court has had no occasion to rule on any of these issues relating to employer's liability under R.A. No. 7877. Nevertheless, these academic questions become real upon recollection of the factual circumstances in the *Meritor* and *Burlington* cases. In *Meritor*, plaintiff Vinson claimed she never reported the harassment committed by Taylor, vice president of petitioner Meritor, to any of his supervisors and never attempted to use the bank's complaint procedure "because she was afraid of Taylor."[49] Similarly in *Burlington*, plaintiff did not inform anyone in authority about Slowik's (the alleged harasser) conduct despite knowing Burlington, plaintiff's employer, had a policy against sexual harassment. Plaintiff even chose not to inform her immediate supervisor (not Slowik) because "'it would be his duty as [her] supervisor to report any incidents of sexual harassment'" and based on the management structure of the employer, her immediate supervisor answered to Slowik.[50] In both cases, employees subjected to harassment are confronted with genuine obstacles in actually informing their employers.

Some cases reported on the domestic front further highlights the problematic nature of the section 5 informing-the-employer requirement. In a report of the Trade Union Congress of the Philippines, women workers of a Japanese importer/exporter and manufacturer complain that male security guards inspect the color and brand of their underwear and that they are frisked when entering and leaving company premises.[51] The Center for Women Resources also recounts experiences of workers in a major shopping chain in the Philippines who were asked to pull up their skirts to reveal their underwear to supervisors who suspected the workers had slipped merchandise beneath their clothes.[52] In these cases, informing the employer may be deemed superfluous as the supposed acts of sexual harassment were apparently executed pursuant to official company policy. It may also be argued that the harassers were agents of the employer and their acts may already be imputed to the latter making notice unnecessary. At the very least, since these reported acts were imposed on a widespread and repeated basis ("severe and pervasive") and even known publicly, the requirement for the offended party to inform the employer may not anymore be needed.

49. *Id.* at 57, 61.

50. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 748-49 (1998).

51. *Gender discrimination*, BUSINESSWORLD ONLINE, http://www.bworld.com.ph/weekender/focus/ focus2.html (last accessed Mar. 19, 2004) [hereinafter *Gender discrimination*].

52. Gerald G. Lacuerta, *Sales ladies asked to show legs at work, study reveals*, PHIL. DAILY INQUIRER, Dec. 10, 2001, http://archive.inq7.net/archive/2001-p/met/2001/dec/10/met_3-1-p.htm (last accessed Mar. 4, 2004) [hereinafter Lacuerta].

Should employees in these cases, if they file complaints of sexual harassment, still "inform" the employer of the objectionable acts, assuming they fall within the purview of R.A. No. 7877, when the same acts are rendered pursuant to the employer's policy? Should not knowledge, even without formal notification, be presumed in this case? Furthermore, considering that employees are often faced with fear of loss of employment[53] and are consequently afraid to formally notify the employer, can the actual knowledge (acts pursuant to company policy) or constructive notice (assuming the application of agency rules) be concluded in these cases for the purpose of giving rise to employer liability under section 5 of R.A. No. 7877?

In *Meritor,* petitioner employer argues in the same tune as R.A. No. 7877, that is, plaintiff's failure "to use the established grievance procedure, or to otherwise put it on notice of the alleged misconduct, insulates petitioner from liability."[54] The U.S. Supreme Court disagreed with this contention, and instead ruled, with the concurrence of EEOC as *amicus curiae*, that agency principles should provide guidance in assessing employer liability.[55] The rule suggested in *Meritor* bears significance in the event Philippine courts are called to interpret the "informing-the-employer" requirement under section 5. As quoted in *Meritor*:

> ... [i]f the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge of the sexually hostile environment. In all other cases, the employer will be liable *if it has actual knowledge of the harassment* or if, considering all the facts of the case, *the victim in question had no reasonably available avenue for making his or her complaint known to appropriate management officials.*[56]

Nevertheless, relying on the courts' liberality to adhere to a standard consistent with *Meritor* does not allay uncertainties on the law's ability to make employers responsible in preventing all forms of sexual harassment in the workplace. Positive action from Congress to amend the law and to qualify the "informing-the-employer" requirement, to contemplate actual or constructive notification, may be more appropriate to provide an unmistakable cause of action for future victims of harassment.

53. *Gender discrimination*, *supra* note 51.

54. Meritor Savings Bank v. Vinson, 477 U.S. 57, 70 (1986).

55. *Id.* at 72.

56. *Id.* at 71 (citing the Brief for United States and EEOC as *Amici Curiae* 26) (emphasis supplied).

Furthermore, requiring actual notification by the offended party may not be a prudent prerequisite, considering the constraints faced by an employee subjected to harassment. Difficulties like those faced by Ellerth and Vinson or by the workers of the major shopping chain and of the Japanese exporter are further aggravated by the fear of retaliation and limited employment alternatives facing sexual harassment victims. As acknowledged by the Supreme Court in *Philippine Aeolus Automotive United Corporation v. National Labor Relations Commission,* where the employee did not report the sexual harassment for four years:[57]

> few persons are privileged indeed to transfer from one employer to another. The dearth of quality employment has become a daily 'monster' roaming the streets that one may not be expected to give up one's employment easily but to hang on to it, so to speak, by all tolerable means. Perhaps, to private respondent's [the plaintiff's] mind, for as long as she could outwit her employer's ploys she would continue on her job and consider them as mere occupational hazards. This uneasiness in her place of work thrived in an atmosphere of tolerance for four (4) years, and one could only imagine the prevailing anxiety and resentment, if not bitterness, that beset her all that time.[58]

Hence, it may be worthy to rethink section 5 and to amend it from the requirement that the "employer is informed by the offended party" to a provision making the employer liable if it has knowledge, whether actual or constructive, of the harassment or if the victim plaintiff has no reasonable avenue to make her complaint known to the management. When contemplating amendments to section 5 of R.A. No. 7877, the pertinent ruling of the U.S. Supreme Court in *Burlington* is instructive: "[a]n employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it."[59]

B. What If Action Taken is Immediate but Not Effective?

Section 5 also states that an employer can be held liable only if it did not take immediate action after it is informed of the acts of sexual harassment.[60] The

57. Philippine Aeolus Automotive United Corporation v. National Labor Relations Commission, 331 SCRA 237 (2000). In this case, the plaintiff, a company nurse, who filed a case for illegal dismissal, was subjected to sexual harassment by the company president. The Supreme Court did not make any positive finding of the commission of sexual harassment since the suit did not arise from a complaint pursuant to R.A. No. 7877.

58. *Id.* at 249.

59. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 759 (1998).

60. ANTI-SEXUAL HARASSMENT ACT OF 1995, § 5.

nature of "immediate action" that may insulate the employer from liability is undetermined. In the United States, "an employer is responsible for acts of sexual harassment in the workplace where the employer knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."[61] By simply comparing this rule enunciated in *Intlekofer v. Turnage*[62] with R.A. No. 7877, it may be said that the Philippine statute gives the employer a relatively manageable burden (that is, "immediate action") to escape liability. Immediacy only refers to promptness and not the efficacy of the action taken by the employer. To only expect that the employer's action be immediate without requiring that it be appropriate and corrective runs counter to the mandated duty of the employer "to prevent or deter the commission of acts of sexual harassment."[63] The necessity of requiring not only immediate but also appropriate corrective action from the employer is punctuated by the ruling in *Intlekofer.*

61. Intlekofer v. Turnage, 973 F.2d 773, 778 (9th Cir. 1992) (citing 29 C.F.R. § 1604.11 (d) (1985)) (emphasis supplied). It must be noted that this rule found in the EEOC Guidelines applies to "conduct between fellow employees" when "an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." For sexual harassment committed by a supervisor with immediate or successively higher authority over an employee, the employer is subject to vicarious liability.

    When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

    See, Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); *See also,* Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).

62. *Intlekofer,* 973 F.2d at 778.

63. ANTI-SEXUAL HARASSMENT ACT OF 1995, § 4 provides:

    > SECTION 4. Duty of the Employer or Head of Office in a Work-related, Education or Training Environment. - It shall be the duty of the employer or the head of the work-related, educational or training environment or institution, to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment.

> [w]e interpret the phrase "appropriate corrective action" to require some form, however mild, of disciplinary measures. Action is "corrective" only if it contributes to the elimination of the problem at hand. Because disciplinary measures are more likely to decrease the likelihood of repeated harassment than a mere request to stop the behavior, disciplinary measures are "corrective" within the meaning of the regulation.[64]

For the action of the employer to be effective, it must be "reasonably calculated to end the harassment."[65] Without any controlling jurisprudence to date on what constitutes immediate action, Philippine courts may possibly construe the same to contemplate "appropriate corrective action," consistent with the long-adopted policy to resolve doubts in interpretation of statutes, contracts, and agreements in favor of labor.[66] That possibility, however, can only be left to speculation. Meanwhile, employers enjoy the leeway given by the law to present a convenient defense to avoid being held liable to victims of sexual harassment.

C. Imputing Negligence and Even Criminal Liability

R.A. No. 7877 declares it the "duty" of the employer or the head of the work-related environment or institution "to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment."[67] To this end, all employers are directed by the law to promulgate "appropriate rules and regulations" against sexual harassment that shall include guidelines on proper decorum in the workplace and prescribe a procedure for the investigation of sexual harassment cases and corresponding administrative sanctions. Employers are likewise directed to create a committee on decorum and investigation for hearing complaints of sexual harassment within their particular offices and factories.[68] Unfortunately, R.A. No. 7877

64. *Intlekofer*, 973 F.2d at 778.

65. Ellison v. Brady, 924 F.2d 872, 881 (9th Cir. 1991) (citing Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983)).

66. Pioneer Texturizing Corp. v. National Labor Relations Commission, 280 SCRA 806, 826 (1997).

67. ANTI-SEXUAL HARASSMENT ACT OF 1995, § 4, ¶ 1.

68. *Id.* § 4 (a) provides that the employer or head of office shall

> [p]romulgate appropriate rules and regulations in consultation with and jointly approved by the employees ..., through their duly designated representatives, prescribing the procedure for the investigation of sexual harassment cases and the administrative sanctions therefor ... The said rules and regulations ... shall include, among others, guidelines on proper decorum in the workplace ....

does not provide any penalty for failure to comply with their positive duties. It is only in section 5, as earlier discussed, where employer's liability is clearly referred to in the text of the law. It may be contended, however, that solidary liability under section 5 is not the exclusive basis for a cause of action against an employer. R.A. No. 7877, when read together with the Civil Code,[69] may still possibly hold an employer liable for damages if it fails to adopt the appropriate policies, rules and regulations mandated by the law. Article 2176 of the Civil Code provides, "[w]hoever by act or omission causes damage to another, there being fault or negligence, is obliged to pay for the damage done."[70] It can certainly be argued that a failure to formulate anti-sexual harassment policies and procedures required by law amounts to fault or negligence that permitted the commission of acts of sexual harassment in the workplace.

The last paragraph of section 3, defining the crime of sexual harassment may be another source of potential liability of employers. This part of section 3 states, "[a]ny person who *directs or induces* another to commit any act of sexual harassment as herein defined, or *who cooperates in the commission thereof* by another without which it would not have been committed, shall also be held liable under this Act."[71] It may be contended that the employer maintaining a policy sanctioning acts amounting to demands, requests, or requirements of sexual favors, as in the cases of the women workers of the Japanese exporter[72] and the salesladies of the shopping chain,[73] effectively "directs or induces" the commission of sexual harassment. Also, if an employer fails or refuses to formulate anti-sexual harassment policies and procedures pursuant to section 4 of R.A. No. 7877, or if it has knowledge of acts of sexual harassment and fails to take appropriate action to prevent them, this employer may be deemed to have cooperated in the commission of sexual harassment. Hence, criminal liability may possibly be imputed to said employer.

Despite these legal probabilities, it cannot be ascertained how courts will rule in the event employers face suits seeking damages based on R.A. No. 7877 in relation to the Civil Code or even criminal liability for employers.

69. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386 (1950).

70. *Id.* art. 2176.

71. ANTI-SEXUAL HARASSMENT ACT OF 1995, § 3 (emphasis supplied).

72. *Gender discrimination*, *supra* note 51.

73. Lacuerta, *supra* note 52.

Meanwhile, there is no legal compulsion for employers to comply[74] with the duties imposed on them by section 4 of the law absent explicit sanctions for non-compliance, and employees may consequently suffer the effects of this non-compliance.

VI. CONCLUSION

After more than a decade since the legislation of R.A. No. 7877, the law's ability to provide protection and redress for employees actually or potentially exposed to sexual harassment remains to be seen and its capacity to ably promote a workplace free of sexual harassment is put to doubt. Several cited ambiguities in the law and the scarce jurisprudence seem to fail in providing ample guidance to address uncertainties. All said, limitations of the law to effectively promote a workplace free from all forms of sexual harassment cannot be denied. In light of the identified ambiguities, the law may be regarded inadequate — except when acts complained of are blatant demands for sexual favors — in addressing many other forms of workplace sexual harassment. R.A. No. 7877 is a penal law and must always be construed strictly in favor of the accused; hence, underlined ambiguities shall most likely be interpreted in favor of perpetrators of harassment.

There are two options — to wait for a case involving more contentious issues about the law to reach the Supreme Court and anticipate how the High Court shall interpret these ambiguities, or to seek legislative amendment to clarify the law making it more responsive to the declared policy of upholding the dignity of workers.[75] Considering the relatively slow pace in the development of case law, legislative action becomes an appealing option to better guide judges and prosecutors, and, more importantly, to protect employees exposed to sexual harassment and to require employers to effectively prevent sexual harassment from happening in the workplace. In fact, it has been found, through an informal study, that more than half of the cases filed in the lower courts in Metro Manila pursuant to R.A. No. 7877 resulted in dismissal or the charging of a different offense, for instance, acts of lasciviousness. One of the reasons cited to explain this finding is the "difficulty in proving and establishing the elements of [the] crime as stated in

74. In a survey conducted in 2000 among private and public establishments in five provinces, results show that only 21% had implementing guidelines on sexual harassment. CSC MANUAL, *supra* note 3, at 19 (citing MANGGAGAWANG KABABAIHANG MITHI AY PAGLAYA (MAKALAYA), THE ANTI-SEXUAL HARASSMENT LAW IN RETROSPECT: ADVANCING OR RETARDING WOMEN'S STATUS? (2000)).

75. ANTI-SEXUAL HARASSMENT ACT OF 1995, § 2.

the law."[76] Without clarity in the law, the interpretation of basic elements is left to the discretion of investigating officers, prosecutors, lawyers and judges who may not be familiar with the complex nature of sexual harassment. The lack of clear standards in the law may perpetuate the lack of success for complaints premised on R.A. No. 7877.

As the law itself acknowledges, employers play a significant role in preventing and deterring sexual harassment in the workplace. Nevertheless, unless they are explicitly faced with more serious potential legal sanctions, the responsibility imposed upon them, at least as reflected in policy, remains a purely voluntary affair. Meanwhile, employees continue to be exposed to work environments that allow or even permit sexual harassment to flourish.

The list of ambiguities and limitations continues. It has also been proposed that the law should do away with the requirement of "moral ascendancy, influence or authority" and recognize sexual harassment among peers and co-equals in the workplace.[77] Also suggested is the treatment of the hostile environment form of sexual harassment as a separate act and not as a mere result of a *quid pro quo* form of sexual harassment.[78] This is in addition to the proposed amendment to expand the definition of sexual harassment to include situations outside the work environment such as sexual harassment committed by a doctor against a patient.[79]

Perhaps this article raises more questions than answers. Nonetheless, it is through these questions that the efficacy of the law can be better reviewed and improved. While it is interesting to anticipate where the Supreme Court shall be leading workplace sexual harassment jurisprudence in coming years, a move from Congress to lend more clarity in the law may be better appreciated to quickly achieve the goal of eliminating all forms of sexual harassment in the workplace.

76. CSC MANUAL (citing Sentro ng Alternatibong Lingap Panlegal (SALIGAN), *Sexual Harassment,* PANTAS: OFFICIAL PUBLICATION OF SALIGAN WOMEN'S UNIT, Issue No. 1 (special ed. 2000)).

77. MAKALAYA, FRIEDRICH-EBERT-STIFTUNG, & LABOR EDUCATION AND RESEARCH NETWORK, THE ANTI-SEXUAL HARASSMENT LAW IN RETROSPECT: ADVANCING OR RETARDING WOMEN'S STATUS? 85 (2000).

78. SALIGAN, *supra* note 21.

79. Meritor Savings Bank v. Vinson, 477 U.S. 57, 69 (1986).