

**Research Title** A Study on the Status of Sexually Discriminatory Harassment in the Workplace, and Ways to Achieve Systemic Improvement

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## The Need for Policy Efforts to Prevent Sexually Discriminatory Words and Acts That Infringe on Women's Labor Rights

### Abstract

- While the Act on the Prohibition of Harassment in the workplace was introduced, and the social awareness of this issue has been elevated, the perception, as well as the related legal and institutional regulations, are still inadequate.
- Through a survey targeting 2,000 male and female workers, it was found that 35.7% had been victims of sexually discriminatory harassment. There was a gender difference between the experiences of women and men, with 42.2% of women and 29.1% of men citing sexually discriminatory harassment.
- Victims of sexually discriminatory harassment were found to have a low organizational and work commitment related to their work life, and the sexually discriminatory harassment was also found to affect the workers' work experience, as was the case for other forms of harassment.
- This demonstrates the need to articulate the fact that sexually discriminatory harassment, which is characterized by sexually discriminatory words and acts, is an illegal act that infringes primarily upon women's labor and personal rights. Foreign legislative and judicial precedents including those of the United States, United Kingdom, and France define sexually discriminatory harassment as a form of sex discrimination. Furthermore, given that the concept of workplace harassment under the Labor Standards Act is defined as including sexually discriminatory harassment, it is necessary to add the category of "discriminatory harassment" to the workplace harassment manual of the Ministry of Employment and Labor, and also to explain that any harassment or discriminatory words and acts based on gender, race, disability, and nationality, among others, will be considered equivalent to harassment.

## Overview of the sexually discriminatory harassment policy (draft)

Short term task

Mid to long term task

### Governing Law

Application of provisions on the prohibition of harassment under the Labor Standards Act

Amendment of individual Anti-Discrimination Act such as the Equal Employment Opportunity and Work-Family Balance Assistance Act and the Age Discrimination Act

### Policy Task

- Add "discriminatory harassment" as a type of harassment to the Ministry of Employment and Labor's manual and the workplace harassment complaint handling guidelines, etc.
- Add "discriminatory harassment" as a type of harassment to the workplace harassment education and promotional materials.
- Analyze the workplace harassment reporting and counseling center's cases from a gender-sensitive perspective, and derive policy implications.

- Conduct status survey on sexually discriminatory words and acts, their impact on the working environment, and gender aspects, etc.
- Add contents related to discriminatory harassment to the education and promotional materials related to equal employment.

### Remedy for Damages

Harassment remedies available for use under the Labor Standards Act

Remedy procedures such as complaints filed with the National Human Rights Commission and the Labor Office are available for use

### Remarks

Remedial procedures under the Labor Standards Act and the Anti-Discrimination Act applied concurrently

## 1. Background and Issues

- ▶ With perceptions related to gender equality within Korean society changing rapidly since 2017, criticisms have increased at an exponential rate against practices and cultures which had not previously been recognized as discrimination and gender inequality. A new women's movement, which began as a protest against sexual violence and grew into the #MeToo movement, has further expanded to criticisms of the women degrading and misogynistic organizational culture and practices, which are called "abuse of gender differences," and is likely to grow even larger.
- ▶ It is necessary to address the sexually discriminatory organizational culture by defining and specifying that sexually discriminatory words and acts as well as sexually discriminatory harassment constitute "discrimination" in the workplace, and also by requiring employers to prevent and take measures in the event of any damages. Despite this, the laws currently in force do not provide a legal basis to regulate sexually discriminatory harassment such as sexually discriminatory words and acts. While harassment in the workplace, as regulated by the Labor Standards Act, is comprehensively specified as including sexually discriminatory harassment, sexually discriminatory harassment is not explicitly defined in the manual of the Ministry of Employment and Labor, among others. The provision of the Act on the Prevention of Discrimination Against Persons with Disabilities, Remedy Against Infringement of Their Rights, Etc., related to disability-based harassment is the sole case among the current laws and

regulations in force. The bill for the legislation of the Equality Act proposed by the National Human Rights Commission of Korea merely contains provisions related to the basis for regulating sexually discriminatory harassment, and given this legislative gap, it may be difficult to search for decisions or precedents which primarily deal with sexually discriminatory harassment. Among the cases of sexual harassment complaints filed by the National Human Rights Commission of Korea, cases corresponding to sexually discriminatory harassment were found, which demonstrated the tendency for the act of issue to become the primary issue disputed as to whether it was “sexual words and acts.” It is not always easy to recognize sexual harassment when it appears in the form of a demand to pour drinks at a corporate dinner, or a criticism of a worker’s appearance based on femininity-related standards. But words that degrade a specific gender and remarks about appearance can be interpreted as “sexual words and acts” with a focus on sexuality. In relation to this, interpretive or legislative measures are needed, such as i) interpreting the concept of sexual harassment by expanding sexual words and acts, or ii) determining it as discrimination by including it as a type of sexually discriminatory harassment.

## 2. Results of Status Survey on Sexually Discriminatory Harassment in the Workplace

### A Samples and survey method

- ▶ We utilized the results of the survey on the status of the labor force of businesses (2018), which was conducted targeting 2,000 male and female workers, and subdivided based on the type and size of the businesses.

### B Sexual words and acts and their effects

#### ● Experience of victimization by sexually discriminatory words and acts by type

- ▶ 26.1% of the respondents claimed that in their workplace they had experienced generalization and stigma regarding gender-specific work skills, 32.6% claimed that they had experienced gender role stereotypes, 23.6% had experienced degrading or hate speech based on gender, 32.2% had been called or referred to by an inappropriate name or term, 22.1% had been asked to act with cuteness or kindness, and 28.3% had been subject to criticisms or evaluations of their appearance. In addition, 24.4% of respondents had been excluded from key work based on their gender, 35.3% had experienced demands for trivial work or odd jobs, 36.3% had experienced interference with their privacy, and 28.3% had experienced criticisms or pressures related to the use of childcare, childbirth, work, and life balance system.
- ▶ The percentage of those who experienced interference with privacy, demand for trivial work and odd jobs, gender role stereotypes, and inappropriate names or references was found to be the largest, which

confirmed that these are the types of sexually discriminatory words and acts which the workers have generally experienced.

- ▶ In most of the types, women were found to have a higher rate of experience of sexually discriminatory words and acts than men, with the largest difference being in stereotypes about work skills based on gender or exclusion from certain types of work. By age group, the rate of this experience was found to be high across all types in the group aged 20 to less than 35, which confirmed that there is a large difference in terms of the experiences of damage by gender and age.

### ● Sexually discriminatory words and acts and the feeling of discomfort and insult

- ▶ It is evident that even if the rate of experience of sexually discriminatory words and acts is similar regardless of the worker's gender, the rate of feeling of discomfort and insult as a result is higher among women. Even in the cases where men had a higher rate of experience or in which there were only subtle differences, such as gender role stereotype related remarks or gender degrading, hate speech, women had 10%p higher rate of feeling discomfort and insult. In the case of criticisms related to the use of cuteness and kindness, interference with privacy, childcare and childbirth, and the work and life balance system, the gender gap for the rate of the feeling of discomfort and insult were found to be close to 20%. This demonstrates that even the same type of sexually discriminatory words and acts may have different impacts depending on the gender.

### ● Status and measures for workers who experience victimization due to sexually discriminatory words and acts in the workplace

- ▶ When workers were asked about their most unpleasant and shocking experiences of gender-based discrimination in the workplace, the most common responses were found to be demands to perform trivial work and odd jobs, followed by interference with privacy and the use of inappropriate names or references.
- ▶ When asked about the source of the harassment in these cases, the majority reported it was their boss at 54.8%, while harassment from colleagues and senior management (business owner, CEO, etc.) seemed to occur at a similar level, at 23.5% and 23.3%, respectively.
- ▶ After these experiences that they classified as most unpleasant and shocking, 66.5% of the respondents did nothing at all, 15.0% of them consulted with their colleagues, 12.4% raised the issues directly with the party responsible, 7.8% complained to their boss, 2.9% requested a consultation or reported to the internal grievance center, 0.9% consulted a private counseling center outside the company, and 0.4% reported / appealed / filed lawsuits with a public institution outside of the company.
- ▶ The percentage of non-permanent workers who did not take any measures at all was found to be much higher than that of the permanent workers, and the rate of non-permanent workers who raised the issue directly with the party responsible or complained to their boss at work was found to be even lower.
- ▶ When asked the reasons why they did not take any measures, 48.5% of the respondents claimed that it was not a matter that was sufficiently adequate to raise an issue, 47.1% thought no improvement would result, 29.2% thought that they would be perceived as sensitive or placed at a disadvantage, 9.4% thought that

nobody would be supportive of them, 9.0% said that they did not know how to handle it, and 2.9% said that there was no venue for grievance counseling and reporting within the company.

- ▶ Among men who had experienced victimization, the most common response was that it was not a significant enough issue to take any measures, while among women, those aged 20 to 34, and small businesses with less than 30 employees the most common response was that they took no measures because they expected no improvement to result.

### ● Experience of victimization through sexually discriminatory words and acts (at a previous workplace) and its impact on changing jobs

- ▶ The experience of sexually discriminatory words and acts at a previous workplace was found to be higher among women than among men. Furthermore, each specific type of sexually discriminatory words and acts was much more commonly experienced by women than by men.
- ▶ As a result of asking the respondents whether the experience of sexually discriminatory words and acts at the previous workplace has had an impact on their decision to find a new job, 53.1% of them responded positively. While 42.9% of men said that it had an impact on their decision to find a new job, 59.9% of women said that the sexually discriminatory words and acts had a major impact on their decision to change jobs. The highest influence was found in the 20 to 35 age group, and among workers for businesses with 100 to less than 300 employees, and among non-permanent workers turned out to have a higher rate of response than the permanent workers.

## ㉔ Experience and impact of sexually discriminatory harassment

### ● Status of sexually discriminatory harassment

- ▶ By examining the definition of sexually discriminatory harassment in previous studies in South Korea, international researches, the FGI results and among others, we have defined sexually discriminatory harassment as follows: “Workers who have experienced any of the ten types of sexually discriminatory words and acts over the past year, and for which the experience caused a feeling of discomfort or insult that made the worker ‘want to get out or have difficulty enduring the workplace.’” Unlike previous surveys in South Korea, this study is differentiated by the fact that it has added the negative impact on the working environment to the experience of sexually discriminatory words and acts.
- ▶ As a result of the analysis conducted in line with this definition, the percentage of workers who had been victims was found to be 35.7%, and there was a gender difference between women and men, with 42.2% of women and 29.1% of men experiencing sexually discriminatory harassment.

### ● Impact of the sexually discriminatory harassment

- ▶ Through measuring the work life in terms of organizational commitment and work commitment, the results all signify that the victims experienced low levels of organizational commitment and work commitment.

### 3. Overseas Cases

- ▶ In France, discriminatory harassment is regulated by both the Labor Code and the Anti-Discrimination Act. Since the employer's obligation to establish a preventive plan is based on the provisions of the Labor Code related to harassment prevention, and since the Labor Supervisor is entitled to investigate violations of the provisions of the Labor Code, he/she may exercise the right to investigate and report on discriminatory harassment, which is a type of harassment. The Rights Protection Officers, who are remedies under the Anti-Discrimination Act, are also entitled to intervene for the discriminatory harassment. A Rights Protection Officer can be considered as having stronger authority than the National Human Rights Commission of Korea given the fact that it is a constitutional institution and has the authority to issue orders of performance. As such, France has the strength to select and apply remedies to cases of discriminatory harassment under both the Labor Code and the Anti-Discrimination Act. Furthermore, another comparison may be made with the United States and the United Kingdom, in that the obligation to establish a preventive plan for the prevention of harassment is specified and required in advance.
- ▶ The United Kingdom has no separate law prohibiting harassment in the workplace, and only discriminatory harassment is prohibited by the Equality Act, and damages are specified. The Equality Act of the United Kingdom is meaningful in that it applies not only to the workers whose employment is recognized, but also to the providers of labor. Another advantage of the remedy procedures is that the Employment Tribunal may issue remedial orders which are binding and compulsory.
- ▶ Looking at the United States, the most prominent advantage is the existence of the EEOC (Equal Employment Opportunity Commission), which has expertise related to employment discrimination, sexual harassment, and discriminatory harassment, along with the investigative authority. Each year, thousands of complaints related to discriminatory harassment are filed on the background of the EEOC's capabilities, and cases of discriminatory harassment filed with the EEOC are consistently resolved via mediation. In the United States, discriminatory harassment is classified as a type of employment discrimination, beginning with cases of racially discriminatory harassment, and based on such interpretation, sexual harassment and sexually discriminatory harassment are also recognized as discrimination.
- ▶ In all 3 of these countries, in addition to civil compensation in the discriminatory harassment related lawsuits, the Employment Tribunal, Rights Protection Officer, and the courts, among others, may issue various remedial orders to stop harassment and prevent its recurrence. The Korean courts may only issue orders for compensation related to sexual harassment and discrimination, while the Human Rights Commission may issue various remedial orders, yet there is a limitation in that they are not binding or compulsory. Considering the fact that discriminatory harassment is not an individual's unusual and deviant behavior, as there are sexually discriminatory workplace policies and practices, among others, which make such words and acts possible, it is necessary to form the legal basis for various remedial orders to prevent their recurrence.

<Table 1> Comparison of France, UK, and the US

Classification	France	United Kingdom	United States
Whether the Anti-Harassment Act is applied under the labor law	Possible	No basis under the Labor Code	At the federal level, only discriminatory harassment is prohibited
Human attributes	Race, gender, family circumstances, pregnancy, appearance, and disability, etc.	Race, age, disability, change of gender, religion or belief, gender, and sexual orientation	Gender, race, color of skin, country of origin, disability, age, genetic information, and pregnancy
Subject to protection	Limited to workers	Providers of labor and workers are included as well	Limited to workers
Intent to inflict harm	Not required		
Recurrence	Not essentially required		
Burden of proof	Shifted to the employer		Burden of proof is relaxed
External remedy procedures	Remedy procedures of a discrimination correction specialized organization, and civil litigation		
Order for remedy	In addition to civil compensation, orders may be issued to stop harassment and prevent its recurrence		
Adverse measure	Provisions of prohibition exist		
Prevention obligation	Obligation to devise a preventive plan exists	Indirect induction via the principle of the employer's responsibility, and guidelines on corrective action against discrimination	

Source: self-prepared

## 4. Policy Recommendations



### Legal and institutional regulation of sexually discriminatory harassment

- ▶ The fact that foreign legislative and precedents such as those of the United States, United Kingdom, and France specify sexually discriminatory harassment as a type of sex discrimination also implies what Korea's Anti-Discrimination Act has omitted. In addition, the fact that sexually discriminatory harassment whose sexual attributes are weak occurs more frequently highlights the need for a policy response. Due to this omission in the current law in force, it ought to be clarified that not only are sexual words and acts illegal in the workplace, but also that acts of degrading, insulting, and ignoring women are a form of illegal sexual discrimination.
- ▶ Further to sexually discriminatory harassment, there is a need to consider regulating discriminatory harassment based on race, age, and nationality, among other aspects. Just as foreign women and women with disabilities there are various attributes overlapping within women, discriminatory harassment needs

to be defined separately from sexual harassment in order to manage the issue of sexually discriminatory words and acts women experience due to factors other than gender.

- ▶ If discriminatory harassment were separately defined, as in the National Human Rights Commission of Korea's proposed Equality Act, it would be possible to regulate an even wider scope of sexually discriminatory words and acts while more broadly interpreting “sexual words and acts” in cases of sexual harassment. The concept of sexual harassment may be further expanded to include the use of sexual terms and other related behaviors, such as cases in which demands are made to pour drinks or the use of profanity including terms for genitals, while words and actions with weak sexual attributes may be separately regulated as sexually discriminatory harassment.
- ▶ The practical benefits of separately defining sexually discriminatory harassment are as follows.
  - Sexually discriminatory words and acts which are not covered by the provisions related to harassment in the workplace or sexual harassment can be included.
  - The effectiveness of the remedies for damages may be enhanced in that the remedies for gender discrimination and advantages in terms of litigation procedures such as shifting the burden of proof may be enjoyed.
  - If the sexually discriminatory harassment were defined under each individual Anti-Discrimination Act, it may be reflected in the companies' in-house guidelines such as employment rules to prevent employment discrimination and sexual harassment, as well as in the contents of the prevention education related materials.
- ▶ In the mid-to-long term, it is necessary to add studies and case studies to establish the standards for determining as to whether sexually discriminatory words and acts are equivalent to discriminatory harassment. In order to avoid being construed as a mere “mistake committed in expressing intimacy” or “innocent words and acts in line with practices and customs,” more surveys and studies on the impact of sexually discriminatory words and acts on a workers' life in their workplace are required. Furthermore, follow-up studies ought to focus on the criteria for the determination of hostile and threatening work environments among foreign cases and precedents.

## Need for approach via the soft law method

- ▶ Since sexually discriminatory harassment is a topic which has not been discussed for long in Korean society, leaving a legislative vacuum, a careful and flexible approach is needed in forming new norms for the workplace. A reference in this respect may be the recent amendment of the Labor Standards Act related to workplace harassment. It is meaningful as a phased approach to induce voluntary improvement by companies via a soft law method. Thus, a proposal is made to amend the law specifying the prohibition of discriminatory harassment under the Equal Employment Opportunity and Work-Family Balance Assistance Act and the Equality Act, while the legal sanctions will be limited to addressing those actions with adverse impacts on victims, and these can be reinforced in a phased manner.



## Short-term task: application of the harassment related provisions under the Labor Standards Act

- ▶ The concept of harassment in the workplace in Article 76-2 of the Labor Standards Act is defined to include sexually discriminatory harassment. If gender were interpreted as a hierarchy, it would be possible to satisfy the requirement of “superiority of status or relationship.” Thus, as part of a strategy to prevent sexually discriminatory harassment in the workplace and improve perceptions in this area, it is necessary to review the application of the harassment related provisions under the Labor Standards Act as a short-term task.
- ▶ As evident in the case of France, sexually discriminatory harassment may be regulated both as (general) harassment in the workplace-related provisions of the Labor Code and under the provisions of the Anti-Discrimination Act related to the prohibition of harassment. It is necessary to add the category of “discriminatory harassment” to the workplace harassment manual (2019) of the Ministry of Employment and Labor, and also to explain that harassment or discriminatory words and acts based on gender, race, disability, and nationality, among others, are also harassment.

<Table 2> Overview of the sexually discriminatory harassment policy (draft)

Classification	Governing Law	Policy Task	Remedy for Damages	Remarks
Short term task	Application of provisions on the prohibition of harassment under the Labor Standards Act	<ul style="list-style-type: none"> <li>• Add "discriminatory harassment" as a type of harassment to the Ministry of Employment and Labor's manual and the workplace harassment complaint handling guidelines, etc.</li> <li>• Add "discriminatory harassment" as a type of harassment to the workplace harassment education and promotional materials.</li> <li>• Analyze the workplace harassment reporting and counseling center's cases from a gender-sensitive perspective, and derive policy implications.</li> </ul>	Harassment remedies available for use under the Labor Standards Act	
Mid to long term task	Amendment of individual Anti-Discrimination Act such as the Equal Employment Opportunity and Work-Family Balance Assistance Act and the Age Discrimination Act	<ul style="list-style-type: none"> <li>• Conduct status survey on sexually discriminatory words and acts, their impact on the working environment, and gender aspects, etc.</li> <li>• Add contents related to discriminatory harassment to the education and promotional materials related to equal employment.</li> </ul>	Remedy procedures such as complaints filed with the National Human Rights Commission and the Labor Office are available for use	Remedial procedures under the Labor Standards Act and the Anti-Discrimination Act applied concurrently

Source: self-prepared

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Responsible Organizations: Labor Standards Policy Department of the Ministry of Employment and Labor; Sexual Discrimination Correction Team, National Human Rights Commission of Korea