

The Transplantation and Development of U.S. Sexual Harassment in the Workplace Framework in Taiwan

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I. Introduction

The definition of sexual harassment has been a subject of much debate. When defining sexual harassment, many countries around the world refer to its origin—the United States—as a basis for discussion. Sexual harassment claims in the United States are grounded in Title VII of the US Civil Rights Act. Although it was primarily focused on the discrimination issue, the Equal Employment Opportunity Commission (EEOC) issued guidelines declaring sexual harassment a violation of Section 703 of Title VII in 1980. Subsequently, *Meritor Sav. Bank, FSB v. Vinson*², the landmark case, affirmed the basic premises of the EEOC’s Guidelines as well as the Commission’s definition. The distinguished scholar Catharine A. MacKinnon, in her book *Sexual Harassment of Working Women* (1979), also argued that sexual harassment constitutes a form of sex discrimination, and she further categorized sexual harassment into two types: “quid pro quo” and “hostile work environment” sexual harassment. U.S. courts broadly adopted this classification, which became the dominant legal doctrine defining sexual harassment under U.S. law, influencing other regions such as Europe. It also has a profound impact on Taiwanese law.

In the late 1900s, in the wake of the gender equality trend and the Women’s Rights movement in Taiwan, the legislation of the Act of Gender Equality in Employment³ was enacted in 2002. During the legislative process, lawmakers drew on the experience of U.S. law, transplanting the framework and regulations related to sexual harassment from U.S. law into Taiwanese law. After more than twenty years of development, the Taiwanese Sexual Harassment framework has shown several differences from the U.S. system, such as the legal essence of sexual harassment, employer liability, etc. Therefore, examining the differences between the two systems would be worthwhile to give both new inspiration to better deal with Sexual Harassment Issues.

This article is broken into three parts, first, it examines the transplantation of US sexual harassment law in Taiwan; second, it explores the differences in the

² 477 U.S. 57 (1986).

³ The Act made a profound impact on gender equality in the equal pay, equal employment, discrimination, and harassment issues in the workplace. In 2024, the law was amended and renamed the Act of Gender Equality in Employment (兩性工作平等法) to the Gender Equality in Employment Act (性別平等工作法).

definition and standard of sexual harassment in the US and Taiwan; finally, it examine the differences in employers' obligation to take remedial action in the US and Taiwan.

Although there are plenty of issues worth discussing in the sexual harassment field, this article focuses on two primary issues in the comparison of sexual harassment Law: “the definition and standard of determination of sexual harassment” and “the obligation to take prompt, effective remedial action by the employer.” I aim to introduce the different outcomes developed under the same legal framework and, through comparative analysis, offer new perspectives and recommendations for addressing workplace sexual harassment in the U.S..

II. The Transplantation and Development in Taiwan

Taiwan's legislation on sexual harassment was primarily developed regarding the evolution of U.S. law.⁴ After operating within Taiwan for two decades, this legal framework has been shaped through its application in Taiwan, forming a comprehensive prevention system, which not only has a substantial body of case law been accumulated, but it was also explicitly codified in the 2024 amendment to facilitate clearer application in practice. Therefore, analyzing the comparison between the legal systems of the U.S. and Taiwan and using this analysis to review the current U.S. regulations holds significant value. However, given the broad scope of issues involved in sexual harassment prevention, this section focuses specifically on the definition and determination of sexual harassment, as well as the scope of an employer's obligations in preventing sexual harassment.

A. The Definition and Standard of Determination of Sexual Harassment

This section will first outline the framework of U.S. law regarding the definition and determination of sexual harassment, which will explore its concept from a historical perspective and also the jurisdiction review, followed by a comparison with the definitions and framework under Taiwanese law. Since the difficulty of

⁴ 鄭津津，性別工作平等法施行 20 周年之變革及挑戰，台灣勞工季刊，第 71 期，頁 4，2022 年 9 月。

determining sexual harassment is mainly about hostile environment harassment, this section will only focus on the determination of this category.

(a) Overview of U.S. Legal Framework

Under U.S. law, sexual harassment is divided into two categories: quid pro quo and hostile environment, the former refers to sexual advances or requests for sexual favors, expressed or implied, made in exchange for labor benefits, which create a hostile environment and are unwelcome; the latter refers to unwelcome conduct based on sex.⁵ After analyzing examples of the U.S. court decisions, it is found that although it is not easy to judge sexual harassment, if we disregard the different and unimportant characteristics of various types of facts, the two most central characteristics are that “the behavior is related to sex(including gender)” and “the behavior is unwelcome”.

Sexual Harassment in the U.S. is regarded as a category of sex discrimination by the majority, and several theories try to explain the reason for interpreting sexual harassment as a form of discrimination.⁶ The purpose of such an interpretation is to ensure the application of the provisions under Title VII of the Civil Rights Act. However, there were scholars who argued that sexual harassment should be regarded as harassment, an independent category from discrimination, not only focusing on females, especially it is hard for some case to prove that the harassment is “because of sex.”⁷ In April 2024, the EEOC released its new “Enforcement Guidance on Harassment in the Workplace,”⁸ explicitly categorizing “harassment” as an independent issue. This move appears to align with the global trend, that toward equality-focused legislation, such as comprehensive equality acts.

Through the examination from the practical observations of US jurisdiction,

⁵ Achampong Francis, Employer Liability for Hostile Environment Sexual Harassment Based on a Single Occurrence, 12 Hofstra Labor and Employment Law Journal 187, 189 (1995).

⁶ Rosa Ehrenreich, *Dignity and Discrimination: Toward A Pluralistic Understanding of Workplace Harassment*, 88 Geo. L.J. 1, 6-10 (1999).

⁷ See Rosa Ehrenreich, *Dignity and Discrimination: Toward A Pluralistic Understanding of Workplace Harassment*, 88 Geo. L.J. 1(1999).

⁸ Title VII, ADEA, ADA, GINA, 29 CFR Part 1601, 29 CFR Part 1604, 29 CFR Part 1605, 29 CFR Part 1606, 29 CFR Part 1625, 29 CFR Part 1626, 29 CFR Part 1630, 29 CFR Part 1635. <https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace>, last visited, Jan15 2025.

the first seminal case concerning harassment under Title VII was *Meritor Savings Bank v. Vinson*.⁹ It held that harassment is constituted by the “severity” and “pervasiveness” of the harassment, which in turn changes the employment conditions of the plaintiff and creates a hostile work environment. Subsequently, in *Harris v. Forklift Systems, Inc.*¹⁰, the court further expanded and clarified the basis for determining sexual harassment pointing out that the behavior must be severe or pervasive to be sufficient to create an objectively hostile or abusive work environment. Furthermore, to establish a claim, the plaintiff must subjectively perceive the environment as abusive (Objective hostility), and this feeling should be the same as that of an average reasonable person (Subjective hostility), which is assessed under the reasonable person standard. Due to the lack of a clear standard for judging the existence of hostility, the court pointed out that the background of the incident is extremely important. The court stated that the relevant facts are “the frequency and severity of the behavior, whether it is physical harm; whether it is threatening or merely offensive; and whether it unreasonably interferes with the employee's work performance, all of which should be taken into account when assessing whether harassment exists¹¹.”

As mentioned above, the core elements of sexual harassment under U.S. law are that the conduct is unwelcome and that it is sexual or gender-related (sexual conduct). As to the unwelcomeness, the focus will pin at severity and pervasiveness, however, it leads to an important question that from whose perspective the “severe or pervasive” nature of the above-mentioned conduct should be examined, which is the discussion of the reasonable person standard.¹²

In the past, scholars have advocated that the reasonable woman standard should be used to explore the issue and have pointed out that the reasonable person standard is inadequate to solve the problem of sexual harassment for two reasons: First, this standard does not take into account situations that women generally find offensive, while men do not, making it impossible to determine what constitutes “unwelcome conduct correctly”; second, a reasonable person cannot

⁹ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, (1986).

¹⁰ *Harri v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

¹¹ Griffin Toronjo Pivateau, Alexis Nicole Smith, Prospects and Pitfalls: Confronting Sexual Harassment in the Legal Cannabis Industry, 29 Am. U. J. Gender Soc. Pol'y & L. 1, 8-9(2020).

¹² Steve n H. Winterbauer, Sexual Harassment - The Reasonable Woman Standard, 7 Lab. Law. 811, 812(1991).

accurately determine when unwelcome conduct can achieve a “severe or pervasive” level and constitute sexual harassment. Therefore, the standard does not consider men and women and does not provide a level playing field in economic or professional competition.¹³ Despite this scholarly debate, sociological research has found that the judgment of sexual harassment does not differ whether it is determined by the standard of a reasonable person or a reasonable woman.¹⁴ Therefore, scholars point out that the determination of sexual harassment should focus on whether offensive words or conduct occurred, which can end the debate over whether the reasonable man or woman standard to use.¹⁵

To conclude, to establish a *prima facie* hostile work environment claim, an employee must show (1) the employee was subjected to conduct based on a legally protected characteristic, (2) the conduct was either so severe or frequent (it does not have to be both) that a reasonable person in the employee’s position would conclude that the working conditions were abusive(Objective hostility); (3) the employee found the conduct to be hostile (i.e., the employee did not welcome the conduct)(Subjective hostility); and (4) the employer can be held liable for the harassment.¹⁶

(b) Taiwanese Law Framework

The sexual harassment framework in Taiwan is constructed by three sexual harassment laws. Aiming to address sexual harassment in different areas of society, Taiwanese law divides it into three domains: the workforce, educational settings, and general public spaces. To tackle these issues, three separate laws have been enacted: the Gender Equality in Employment Act, the Sexual Harassment Prevention Act, and the Gender Equality Education Act. The enactment of these three laws was influenced by American law, and therefore, the types of sexual harassment regulated therein are also like those in American law,

¹³ Leslie M. Kerns, A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance, 10 Colum. J. Gender & L. 195, 215(2001).

¹⁴ Elizabeth L. Shoenfelt, Allison E. Maue & JoAnn Nelson, Reasonable Person versus Reasonable Woman: Does It Matter, 10 Am. U. J. Gender Soc. Pol’y & L. 633, 669 (2002).

¹⁵ Beve Beverly H. Earle & Gerald A. Madek, An International Perspective on Sexual Harassment Law, 12 Law & Ineq. 43, 89-91 (1993).

¹⁶ EEOC, Summary of Key Provisions: EEOC Enforcement Guidance on Harassment in the Workplace, <http://eeoc.gov/summary-key-provisions-eeoc-enforcement-guidance-harassment-workplace#:~:text=Some%20factors%20that%20may%20be,and%20any%20power%20disparity%20between.>

which in principle distinguishing between sexual harassment for the purpose of exchange of benefits (*Quid pro quo*) and in a hostile environment. However, the concept and definition of sexual harassment are independent of the discrimination, even though there were several arguments when these laws were implemented, based on the statute structure and the implementation of Taiwanese jurisdiction, Sexual harassment remains a concept distinct from discrimination.

Regarding the basis for determining sexual harassment, given its highly subjective nature and the difficulty of determine whether the sexual harassment exit, there is a lack of specific standards for determination. In the discussions on related issues by scholars, there is a consensus on how to incorporate an objective judgment factor, which is the “reasonable person standard” from American law that was introduced by scholar¹⁷. Unlike American law, while applying the reasonable person standard, the court doesn’t concern whether the claimed conduct is severe or pervasive, rather, the court applies this provision to determine whether the claimed conduct is related to sex.

However, to determine sexual harassment, there are different opinions on the connotation. In earlier discussions, like the debate in American law, scholars argued whether the connotation of this so-called reasonable person standard should be judged from the perspective of the victim, a third party, or a reasonable person. Moreover, what the gender of the reasonable person that should be was also a dispute. Among these, some scholars pointed out that when the victim is male, it is appropriate to judge from the perspective of a “reasonable male,” and when the victim is female, it is appropriate to judge from the perspective of a “reasonable female.” In other words, it is argued that there should be judgments based on the gender of the victim.¹⁸

Recent scholarly discussions have focused on evaluating situations based on the objective feelings of an average, reasonable third party, rather than on the victim's standards.¹⁹ If only assessing from the victim's perspective, particularly

¹⁷ 鄭津津，敵意環境性騷擾的認定，月旦法學教室，第 54 期，2007 年 4 月，頁 31。

¹⁸ 邱琦，工作場所性騷擾民事責任之研究，臺大法學論叢，第 34 卷 2 期，2005 年 3 月，頁 193。

¹⁹ 高鳳仙，性侵害及性騷擾之理論與實務，頁 18-22，增訂 2 版，五南出版，2019 年；邱琦，同註 8，頁 191；傅柏翔，職場性騷擾，收錄於性別工作平等法精選判決評釋，頁 144-145，元照出版，2018 年 7 月。

with an extremely sensitive individual, words or actions that are typically acceptable may be perceived as hostile sexual harassment. Hence, scholars argue that the reasonable person standard is inadequate. Another scholar argued that there is justification for determining whether the alleged words are hostile, coercive, and offensive according to the victim's perception, but it takes a risk if the victim were oversensitive.²⁰ Therefore, for factual determinations and to prevent varying interpretations from the recipient of the words or behavior—which could result in differing conclusions—the assessment of the facts must rely on the perspective of a reasonable person to maintain objectivity.

From the development of Taiwanese jurisdiction's practical insights recently, in determining sexual harassment, there is a growing trend to accept and use the "reasonable person" as the basis for judgment. However, there are differences in the way it is applied. In other words, the core elements of sexual harassment are "unwelcome conduct" and the fact that such unwelcome conduct is "related to sex or gender," thereby creating a hostile or offensive environment, as mentioned above. When applying the "reasonable person" standard, courts generally use a broad approach, such as: "considering whether an ordinary person in the same background, relationship, and environment would normally feel sexually harassed by the words or actions of the perpetrator".²¹ Some courts use it as a basis for determining whether a behavior is subjectively "unwelcome," and the other used to evaluate whether the behavior is objectively "related to sex or gender." As it seems no clear logical pattern, scholar has pointed out that if others can evaluate whether a particular behavior is unwelcome, to examine subjective feeling, it seems that the court can decide whether the victim should feel unwelcome based on the facts of the case, which is inappropriate.²² Letting others decide whether one's subjective feeling of a conduct is undoubtedly a fallacy to condemn the victim and reverse the cause and effect by having a third party "inform" the victim from his or her experience that the victimized experience should not be

²⁰ 鄭津津，敵意環境性騷擾的認定，月旦法學教室，第 54 期，頁 31，2007 年 4 月。

²¹ 臺北高等行政法院 110 年度訴字第 375 號判決、臺北高等行政法院 107 年訴字第 1486 號判決、臺北高等行政法院 104 年訴字第 747 號判決、臺灣高雄地方法院 107 年簡上字第 81 號民事判決、臺中高等行政法院 106 年訴字第 183 號判決、高雄高等行政法院 108 年訴字第 68 號判決。

²² 李政霖，性騷擾行為之認定—最高行政法院 105 年判字第 192 號行政判決判決評析，全國律師，2022 年 12 月，頁 80。

unwelcome or does not exist.²³

More recently, some courts have begun to further amend the operation of the reasonable person standard. Trials concerning sexual harassment into two stages: the first stage is to use the reasonable person standard to examine whether the alleged behavior is objectively related to sex or gender and whether the behavior is appropriate. If it is determined that it is inappropriate, then the second stage will be entered, and the subjective response of the complainant will be used as the standard for determination. If the complainant subjectively feels hostility, coercion, or offense, and the result infringes or interferes with the complainant's personal dignity, personal freedom, or affects his or her work performance, then hostile environment sexual harassment is established.²⁴

Accordingly, in Taiwan, sexual harassment cases first determine whether the complainant subjectively feels unwelcome is based on the complainant's feelings. Then, applying the reasonable person standard to evaluate whether the alleged objective behavior is related to sex and gender, which, if the court finds such, then it uses the same standard to assess whether the behavior is hostile or offensive.

(c) Comparison

The development of sexual harassment judgments in Taiwan initially followed a similar trajectory to that of U.S. law. Both have experienced debates over the perspective from which the issue should be approached and have moved away from gender-specific perspectives to determine whether the alleged behavior is related to sex from the perspective of a reasonable person, thereby creating an environment that is hostile and offensive. However, there are slightly different after twenty years of enforcement.

First, the essential legal concept of sexual harassment is different between the two systems. Under U.S. law, sexual harassment has been seen as a form of discrimination for a long time, but scholars point out, such attempts to shoehorn all forms of sexual harassment into Title VII have failed to diminish noticeably the public confusion about sexual harassment and have led to a distorted definition

²³ 傅柏翔，性騷擾與性別騷擾之理論與實務，2021年臺北大學飛鳶學術研討會，2021年10月。

²⁴ 臺北高等行政法院109年度訴字第1103號判決；臺中高等行政法院111年度訴字第89號判決；高雄高等行政法院110年度訴字第344號判決；高雄高等行政法院110年度訴字第240號判決。

of sex discrimination.²⁵ Specifically, discrimination is typically determined based on a comparison to establish differential treatment. However, harassment does not necessarily involve such a comparison, making it more challenging for the complainant to prove that the harassment they experienced was because of their sex or gender. The interpretation that workplace harassment is a form of discrimination seems to have no stable ground as it used to be. In contrast, Taiwanese law has no burden like U.S. law, which interpret sexual harassment a form of sex discrimination to fit in the Title VII, since the statute itself directly stipulates sexual harassment as an independent workplace misconduct, and it makes Taiwanese law more flexible to deal with the new development of gender identification. Furthermore, recent trends in workplace discrimination law have shifted towards a greater emphasis on equality law, that not only splits the discrimination and harassment concept but also integrate different protected characters together. As previously mentioned, the EEOC's announcement of new guidance focusing on workplace harassment as an independent action raises the question of whether this marks the beginning of a shift in U.S. law, warranting close attention in the future.

Second, in the determination of sexual harassment claims, U.S. law applies a reasonable person standard to determine whether the conduct is objective hostility, which means whether the conduct is “severe or frequent (either of them is enough)”. Although Taiwanese trial’s application of this standard doesn’t make it clear whether they use the “reasonable person standard” to examine for, the subjective or objective feeling, the essence of the application is similar.

B. The Obligation to Take Prompt, Effective Remedial Action by the Employer

Regarding an employer's obligation to prevent sexual harassment, this section will first examine how U.S. law positions this duty as an affirmative defense, and outline the preventive measures recognized as effective by court rulings. In contrast, Taiwanese law goes a step further, establishing administrative penalties

²⁵ Rosa Ehrenreich, *Dignity and Discrimination: Toward A Pluralistic Understanding of Workplace Harassment*, 88 Geo. L.J. 1, 6-10 (1999).

as a consequence for failure to meet this obligation, in addition to using remedial action as an affirmative defense. This approach imposes a stronger legal requirement on employers to fulfill their duty of care and protection for employees, which ensures they are safeguarded from the risks of sexual harassment.

(a) Overview of the U.S. Framework

In the US, employer liability for sexual harassment is governed by Title VII of Civil Right Act, Section 703,²⁶ and the EEOC later formulated guidelines for harassment. With the operation and development of practice and doctrine, the framework of employer liability under US law has been jointly shaped. First, the obligation of employers is not an order by law, it is only a defense for employer to avoid the liability at trial. Moreover, claims can only be brought against employers with more than 15 employees.

The United States practice in determining whether an employer is liable can be examined by several aspects, for instance, the category of the harassment²⁷ and the identification of the harasser. As mentioned above, sexual harassment is categorized into quid pro quo and hostile work environment harassment. The former is relatively uncontroversial, and case law holds that employers should bear vicarious liability for quid pro quo harassment. In hostile environment cases the scenario became more complicated, according to EEOC 2024 Guidance, one or more standards of liability will apply. Which standards apply to any given situation depends on the relationship of the harasser to the employer and the nature of the hostile work environment, which generally categorized the cases by the harassers into employers' agency, supervisor, coworkers, and the third parties .²⁸ However, because of the liability of employers if harassers were employers' agency, it will simply held the employer to bear vicarious liability without any affirmative defense, this part will narrow the discussion to the employer's prompt, effective remedial action defense, which is mainly discussed

²⁶ It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

²⁷ If the harassment is quid pro quo, the employer is liable and there is no defense. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 760-62 (1998).

²⁸ EEOC, Enforcement Guidance on Harassment in the Workplace, IV. Liability A, 2024.

in the situation that the harasser is “Supervisor” and “Non-Supervisory Employees, Coworkers, and Non-Employees” cases. The liability to employers will vary depending on factors such as whether the employers have treated the employee unfavorably about work, the nature of the sexual harassment, and the identity of the perpetrator. If the employers wish to defend against employer liability, it may raise the defense that they have fulfilled their duty of prevention to establish the defense. Moreover, under the EEOC’s guidelines, only employers with fifteen or more employees are subject to the requirements, unless superseded by state law.

In addition to the guidelines issued by the EEOC, courts at all levels have consistently emphasized that employers must proactively develop and enforce sexual harassment prevention measures to effectively prevent such incidents from occurring,²⁹ if they wanted to establish an affirmative defense. Based on observations of case law and the EEOC’s guidelines, the specific requirements for an employer’s obligation, which is that immediate and effective corrective actions include issuing a clear statement and procedures prohibiting sexual harassment, as well as ensuring that these procedures are effectively implemented and accessible in practice.³⁰ On this basis, employers’ established procedures are considered ineffective if the employer or its management discourages the use of the grievance procedure in any way or tries to suppress complaints of sexual harassment in the workplace. In this case, the employer fails to meet the affirmative defense.³¹ Furthermore, the employer should conduct an effective and confidential investigation and handling after the incident. Therefore, the court believes that the employer has fulfilled its obligations if it conducts an effective investigation immediately after the incident.³²

In addition, even if an employee files a complaint after leaving the company, the employer is still obligated to conduct an effective investigation. If the employer refuses to investigate on the grounds that the complaint was filed too late, the court is likely to hold the employer accountable.³³ In addition, effective remedies during or immediately after the investigation, may include transferring the victim

²⁹ 焦興鎧，美國法院對工作場所性騷擾判決之發展趨勢－兼論對我國相關制度之啟示，臺大法學論叢，28卷3期，1999年4月，頁40-42。

³⁰ *Robinson v Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (MD Fla 1991).

³¹ *Smith v. First Union National Bank*, 202 F.3d 234, 245 (4th Cir. 2000).

³² *Sapp v. City of Warner Robins*, 655 F. Supp. 1043, 1049-1050 (M.D. Ga. 1987).

³³ *Stewart v. Cartessa Corp.*, 771 F. Supp. 876 (S.D. Ohio 1990); *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004).

or the perpetrator to another workplace, in order to immediately stop the continued occurrence of sexual harassment.³⁴

This situation can be seen in the case of *Moore v. Sam's Club*.³⁵ In this case, when the plaintiff complained about sexual harassment, the employer immediately investigated and suspended the accused (in this case, the perpetrator was a supervisor) from work until the investigation was confirmed.³⁶ The perpetrator was transferred to another workplace so that he would no longer be in the sight of the complainant.³⁷ In response, the court readily recognized the employer's handling procedures as an effective remedial measure. Relevant judgments also highlight the importance of promptly completing the investigation process. In cases where the investigation was concluded within 24 hours and the perpetrator was reassigned during this period, employers have successfully demonstrated that they fulfilled their obligation to take immediate and effective corrective measures.³⁸ In this regard, effective handling not only separates the perpetrator from the victim but also requires a certain disposition after the investigation.

In summary, U.S. practice generally recognizes that an employer may fulfill the obligation to take immediate and effective corrective remedial measures by: (1) producing a written document of the complaining policy with definition of the clause and procedure; (2) providing an effective resolution procedure; (3) guiding employees in filing complaints; (4) demonstrating the employer's determination to effectively address sexual harassment; and (5) informing employees of the consequences of engaging in sexual harassment.

(b) Taiwanese Law Framework

The Gender Equality in Employment Act regulates employers' obligations in terms of prevention and handling sexual harassment, which are the employers'

³⁴ *Long v. First Family Fin. Servs., Inc.*, 677 F. Supp. 1226, 1233 (S.D. Ga. 1987); Hope A. Comisky, *Prompt and Effective Remedial Action - What Must an Employer Do to Avoid Liability for Hostile Work Environmental Sexual Harassment*, 8 LAB. LAW. 181, 192-193 (1992).

³⁵ *Moore v. Sam's Club*, 55 F.Supp.2d 177 (S.D.N.Y. 1999).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Kotcher v. Rosa and Sullivan Appliance*, 957 F.2d 59, (2nd Cir. 1992).

duties. First, in terms of the prevention of sexual harassment, Article thirteen, Paragraph one of the Gender Equality in Employment Act stipulates that employers shall take appropriate measures to prevent sexual harassment and shall proceed under the following provisions, and there is no limitation of how many employee that employer has.

In terms of handling sexual harassment, these obligations are not only a defense for employers, but administrative penalties also apply if employers fail to deal with workplace sexual harassment. The obligation of employer has been developed varies from past practice in practice in the past. Taiwan's supreme court has interpreted this obligation as: "employers must treat sexual harassment in the workplace with caution, take the initiative to care, activate the established handling mechanism, and take appropriate measures to resolve the situation, to prevent the victim from being in a hostile, coercive, or offensive work environment for a long time." In addition, the employer shall actively intervene to investigate the circumstances of the incident. Relevant mechanisms must be established proactively before an incident occurs, and appropriate procedures should be implemented to investigate effectively after an incident takes place.³⁹

Under the implementation of the case law, three specific actions and one guiding principle have been established: (1) Take immediate and effective action to initiate an investigation and response mechanism, employing a prudent approach to ascertain the facts and understand the circumstances.; (2) Promptly stop the continuation of sexual harassment⁴⁰, implement reasonable remedial measures, improve the work environment, and establish standard operating procedures to prevent victims from facing retaliation or remaining in a workplace where they are at risk of harassment⁴¹; (3) Upon confirming the nature of the harassment, administer appropriate disciplinary action or corrective measures against the perpetrator⁴². Moreover, the most important principle in handling sexual harassment cases is to protect the privacy of both parties during the

³⁹ 最高行政法院 98 年度裁字第 2802 號裁定、高雄高等行政法院 103 年簡上字第 60 號判決、臺北高等行政法院 99 年簡字第 590 號判決、臺北地方法院 103 年度簡字第 247 號判決、南投地方法院 102 年簡字第 3 號判決、屏東地方法院 101 年簡字第 8 號判決。

⁴⁰ 臺北高等行政法院 94 年度簡字第 64 號判決；侯岳宏，雇主對職場性騷擾之行政責任—臺中高等行政法院判決 104 年度簡上字第 16 號判決評釋，臺北大學法學論叢，第 110 期，2019 年 6 月，頁 247。

⁴¹ 桃園地方法院 108 年度簡字第 9 號判決。

⁴² 臺北高等行政法院 109 年度訴字第 512 號判決。

investigation, which underscores the duty of confidentiality. A sexual harassment complaint is a double-edged sword, as both the complainant and the accused have significant rights and interests at stake, requiring careful attention throughout the process.

The Sexual Harassment Act, which was enacted in 2023 and implemented on March 8, 2024, will soon embody the immediate and effective corrective measures, and further regulate different immediate and effective corrective measures depending on whether the employer becomes aware of the sexual harassment due to the complaint. In the event that the employer “becomes aware of” sexual harassment through a complaint, the new Act stipulates that the employer shall “Take measures to prevent the recurrence of harassment against the complainant”; “Provide or refer the complainant to counseling, medical or psychological counseling, social welfare resources, and other necessary services”; “Investigate the sexual harassment incident”; “Administer appropriate disciplinary action or disposition”.⁴³ In the case of sexual harassment that the employer “becomes aware of a sexual harassment incident not resulting from the circumstances[of the complaint],” the Act stipulates that the employer shall “Clarify the relevant facts as necessary”; “Assist the victim in filing a complaint according to their wishes”; “Make reasonable adjustments to work content or the workplace”; and “Provide or refer the victim, as desired, to counseling, medical or psychological counseling, social welfare resources, and other necessary services.”⁴⁴

Accordingly, although the new law further distinguishes between the employer's obligations depending on whether the employer learned of the complaint or not, in terms of the substantive content of prevention, it may be regarded as a codification of the content of sexual harassment into writing. However, in terms of practical application, the norms of the two are still uncertain legal concepts and await future development of doctrine and practice to be concretized for ease of application.

⁴³ Gender Equality in Employment Act, Article 13 Section 2, para1.

⁴⁴ Gender Equality in Employment Act, Article 13 Section 2, para2.

(c) Comparison

First, the difference between U.S. law and Taiwanese law is that EEOC limits the enforcement of its guidelines to employers whose employees are fifteen or above, and the obligation of employers under Taiwanese law has no limitation in contrast. The U.S. Senate amended the Civil Rights Act of 1964 (Title VII), and some Congressmen made statements emphasizing that no one should be excluded from the scope of anti-discrimination regulations.⁴⁵ The purpose of this law was to protect the rights of all individuals and eliminate discriminatory restrictions on employment. With such broad and established objectives, the law reflected a commitment to thoroughly reform the workplace. Excluding so many workers from the protections of Title VII simply due to potential burdens on employers would be an affront to the legislative intent.⁴⁶ Furthermore, some scholars have argued that excluding small businesses from these protections might give small businesses a 'license to discriminate.'⁴⁷ I support the argument above, as employers generally have greater power to address harassment within the workforce. As the House Committee affirmed during the passage of the Equal Employment Opportunity Act of 1972, "discrimination in employment is . . . equally invidious whether practiced by small or large employers."⁴⁸

Second, in terms of immediately effective corrective remedial measures, the substance of which is very similar to the development of specific acts in the United States. Both countries use whether the act can be immediately and effectively activated to interrupt the continued harm caused by sexual harassment and to impose the necessary punishment or disposition on the sexual harassment incident. In addition, both countries should conduct the process in secret to protect the privacy of both parties. However, U.S. law only regard the employer obligation as the affirmative defense, in contrast, Taiwanese law has further regulated the obligation as an administrative duty. I believe Taiwan's law shows a good influence on the employer focus on the sexual harassment issue in

⁴⁵ Adam W. Aston, "Fair and Full Employment": Forty Years of Unfulfilled Promises, 15 *Washington University Journal of Law and Policy* 285, 293 (2004).

⁴⁶ Anna B. Roberson, *The Migrant Farmworkers' Case for Eliminating Small-Firm Exemptions in Antidiscrimination Law*, 98 *Texas Law Review* 185, 195(2019).

⁴⁷ Richard Carlson, *The Small Firm Exemption and the Single Employer Doctrine in Employment Discrimination Law*, 80 *St. John's Law Review*, 1197, 1264(2006).

⁴⁸ H.R. REP. NO. 92-238, at 20 (1971). See also, Anna B. Roberson, *The Migrant Farmworkers' Case for Eliminating Small-Firm Exemptions in Antidiscrimination Law*, 98 *Texas Law Review* 185, 195-196(2019).

the workplace, and this framework also provides valuable insights for U.S. law in encouraging employers to take sexual harassment prevention more seriously. Moreover, the lesson that Taiwanese law can learn from U.S. law is the need to more specifically distinguish the identity of the harasser to clarify the scope of the employer's preventive and remedial obligations in such cases.

III. Conclusion

After transplanting the U.S. framework of Sexual harassment law in the workplace into Taiwan's law, it has evaluated the basic framework in its own way. However, through the comparison between the two systems, although the recognition of the sexual harassment and the outcome of employers' liability is different in two system, we can see that the essentials of both systems have developed in a similar path. Based on Taiwan's legal experience, this article recommends that U.S. law clarify the distinction between discrimination and harassment and strengthen employers' obligations by establishing them as an administrative duty. This duty should be accompanied by penalties to encourage employers to invest more effort in the prevention and handling of sexual harassment.

Above all, the new trends of sexual harassment issues might shift to gender-based harassment since the breakthrough of gender identification and other gender movements, especially after the #MeToo movement. How it will change the landscape of the current sexual harassment law, especially when it is still seen as a form of discrimination. Moreover, the employer's obligation to prevent these kinds of harassment and provide prompt and effective remedial action might be the challenge in this field in the future. Hopefully, the result and discussion in this article can shed light on the sexual harassment handling issue and continually sparks attention and new inspiration on this matter.