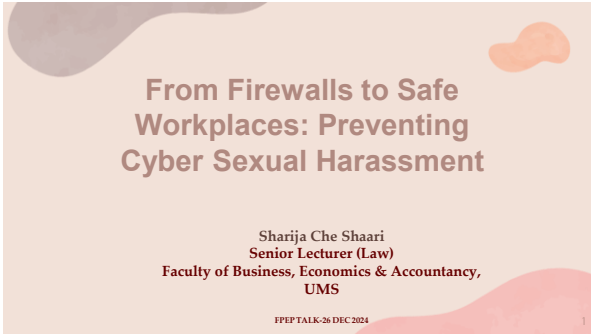



From Firewalls to Safe Workplaces: Preventing Cyber Sexual Harassment

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FPEP TALK-26 DEC 2024



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"Sexual harassment is a very serious misconduct and in whatever form it takes, cannot be tolerated by anyone. In whatever form it comes, it lowers the dignity and respect of the person who is harassed, let alone affecting his or her mental and emotional well-being. Perpetrators who go unpunished, will continue intimidating, humiliating and traumatising the victims thus resulting, at least, in an unhealthy working environment".

Tan Sri Suriyadi Halim Omar, Federal Court Judge in Mohd Ridzwan Abdul Razak v Asmah Mohd Nor (2016) 6 CLJ 346

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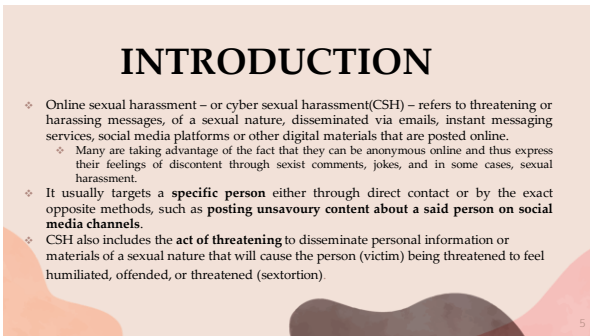
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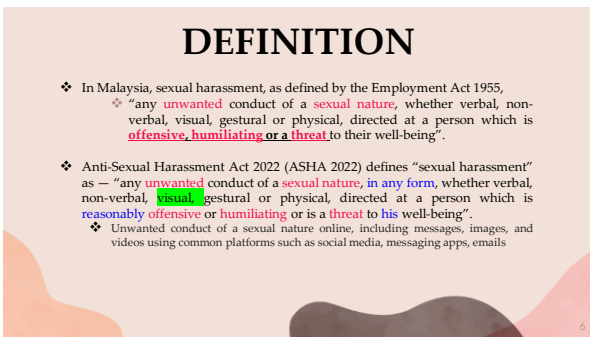
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IMPORTANCE OF HAVING AWARENESS TO SEXUAL HARASSMENT (incl CSH)

- Compliance with the Law
- Protecting Employees' Rights
- Preventing Workplace Misconduct
- Ensuring Fair Processes
- Reducing Liability for Employers
- Promoting Employee Well-Being
- Adapting to Evolving Standards

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WHAT AMOUNTS TO SEXUAL HARASSMENT?

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SEXUAL HARASSMENT AT WORKPLACE
 Any sexual conduct – verbal, non-verbal, visual, psychological or physical that causes a person to be **OFFENDED, HUMILIATED OR THREATENED**.
 Can happen to men, women or between the same gender.

TYPES OF SEXUAL HARASSMENT

- 1. Unwanted sexual advances
- 2. Excessive flirting
- 3. Staring or leering
- 4. Displaying or using any item with sexual content
- 5. Unwelcome sexual touching
- 6. Sexual assault
- 7. Sexual harassment by email or text
- 8. Sexual harassment by social media
- 9. Sexual harassment by phone
- 10. Sexual harassment by physical contact
- 11. Making sexual remarks about appearance
- 12. Unwanted gifts, food or personal items


93% of employees who have experienced sexual harassment in the workplace have not reported it.

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WHO ARE NORMALLY THE POTENTIAL HARASSER AND VICTIMS?

The potential doers and victims are normally:

- superiors against subordinates;
- amongst colleagues;
- subordinates against superiors;
- employer (boss) against employee;
- clients against employee vice versa
- UMS context:
 - staff against student
 - between students



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EFFECT OF SEXUAL HARASSMENT

- ❖ Upon the victim:
 - ❖ less motivated, fear, mental health
 - ❖ *Mohd Ridzwan Abdul Razak v Asmah Hj Mohd Nor* [2016] 4 MLJ 282, Asmah was examined four times by a psychiatrist and was diagnosed with major depression caused by the harassment, and she also bore physical symptoms of migraine and pains in her leg.
 - ❖ Even though she was transferred to a different unit and was no longer working under the perpetrator, she could no longer bear the emotional stress to the point where she had to leave the organisation and move to another state.
- ❖ Upon the harasser
- ❖ Upon the secondary victim
- ❖ Upon the organisational & society

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Type of Harassment	Examples of Undesirable Behaviour
Verbal	Offensive or suggestive remarks, comments, jokes, kidding, sounds, questioning
Non-Verbal/Gestures	Leering, ogling, suggestive overtones, licking lips, holding or eating food provocatively, hand signal, sign language denoting sexual activities, persistent flirting
Visual	Showing pornographic materials, drawing sex-based sketches, writing sex-based letters, sexual exposure
Psychological	Repeated unwanted social invitations, relentless proposals for dates or physical intimacy
Physical	Any form of unwanted touching, patting, pinching, rubbing, hugging or kissing etc

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EXAMPLES OF CSH

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IS SEXTING ILLEGAL?

- ❖ What is sexting?
 - ❖ Sexting is the act of sending provocative or sexual photos, such as nudes, or sending erotic messages or videos through social media.
 - ❖ It may be done willingly, or it may be forced by a partner or peers.
 - ❖ While there is no doubt that the mutual flirting or intimate gesture can help improve relationships between couples, it may lead to some serious social and legal repercussions such as cyber bullying, harassment, blackmailing, or even defamation.
- ❖ **Is taking a nude photo of myself illegal?**
 - ❖ According to Article 10 of the Federal Constitution of Malaysia, Malaysians are entitled to the freedom of expression. Thus, taking nude photo of oneself is not illegal per se since one has the ultimate freedom to do so.
 - ❖ However, it is illegal if one is found keeping nudes of oneself in his/her own possession as provided under Malaysian laws
- ❖ **Is asking for nude photos illegal?**
 - ❖ Yes, it is illegal to deliberately solicit nude photos. However, according to the wording of Section 233 of the CMA 1998, it is only illegal if the act of asking for nudes annoys, abuses, threatens or harass(es) the victim.

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WHETHER SEXUAL JOKE AMOUNT TO SEXUAL HARASSMENT?

- Whether a comment amounts to sexual harassment depends on the perspective of the intended victim and its perpetrator.
- In *R. Jesudaa Raghavan v St. Microelectronics Sdn Bhd* [2013] 1 MELRU 11, the Courts have laid down several factors to consider on in determining whether a comment can be deemed as sexual harassment:
 - Whether the recipient gave a negative reaction to the comment or action;
 - The working environment where it was conveyed;
 - Whether the act or comment is seen to have any sexual connotation or different meaning (double entendre);
 - The relationship between the recipient and the perpetrator.
- *Yahya Mat Wazir v Petrolim Nasional Berhad* [2015] 2 MELR 614.
 - Claimant was held to have committed sexual harassment by text messages and making inappropriate statements to colleagues such as "I don't plan to marry another one but you can never know ... nafsu lelaki satu, nafsu perempuan banyak [...] you know la nafsu lelaki itu apa?".

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CSH involving minors

- Social media platforms are used as an introductory medium prior to committing sexual offences or the medium is used directly to commit the offence of disseminating child sexual abuse materials or sextortion offences
- Last year, police recorded a total of 1,464 cases of online sexual harassment cases involving minors compared to 1,272 cases in 2021, the daily reported, citing data from Bukit Aman.
- And in the last five years, there have been a total of 5,727 cases of sexual harassment cases involving children through social media.



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Children using the internet are exposed to virtual sexual threats

By ROSLINDA HASHIM Follow
02 Oct 2023 06:18pm

Based on the 2021 United Nations Children's Fund (Unicef) Malaysia report, at least four per cent of children aged 12 to 17 who used the internet faced threats of online exploitation and sexual abuse.

Source:
<https://www.thestar.com.my/news/nation/2022/09/29/100000-children-in-msia-face-online-sexual-exploitation-and-abuse-says-unicef-report>

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CHALLENGES AND GAPS

- ❖ **Enforcement Issues**
 - ❖ Low number of cases investigated and prosecuted
 - ❖ The Malaysian Communications and Multimedia Commission (MCMC) received a total of 15,238 online harassment complaints since 2016. Of these, the MCMC investigated only 963 cases up to 30 September 2021.
 - ❖ The 963, or 6%, of the total cases investigated by MCMC were related to online abuse via social media and investigated under Section 233 of the Communications and Multimedia Act 1998.
- only 60 of these 963 cases were brought to court
- These 60 cases resulted in 241 charges against the perpetrators.

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WHAT SHOULD THE VICTIM DO WHEN ENCOUNTERING SEXUAL HARASSMENT?

Here are some steps which would be useful to seek proper redress:

- ❖ Confront the harasser firmly by stating that his/her behaviour is undesirable.
- ❖ If the harasser continues, report to the superior/ supervisor immediately.
- ❖ Record the incident in details i.e. when, who, where, how, and witnesses (if any).
- ❖ File a formal complaint in accordance with the organisation's policies and procedures.
- ❖ Document EVERYTHING!

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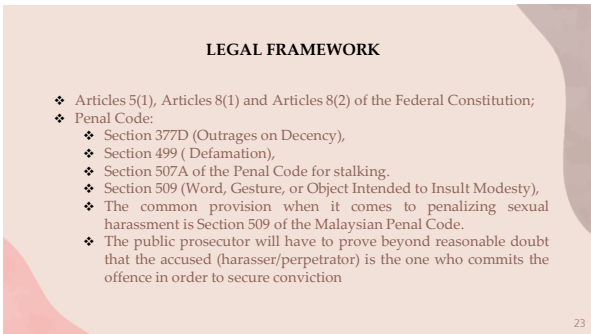
REPERCUSSION UPON THE HARASSER

- ❖ Once a complaint is filed, employer must investigate and convene a domestic inquiry (DI)
- ❖ If the employer is satisfied that sexual harassment is proven, the harasser may suffer the following disciplinary action:-
 - ❖ Be dismissed without notice;
 - ❖ Be demoted; or
 - ❖ Suffer a lesser punishment than the above as the employer deems just and fit; or
 - ❖ Be suspended without wages not exceeding a period of 2 week
- ❖ Depending on the nature of the allegations, a victim of sexual harassment may also sue the harasser in court based on law of tort

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LEGAL FRAMEWORK

- ❖ Personal Data Protection Act 2010 (PDPA)
 - ❖ offers some protection against the misuse of personal data, which can be relevant in cases of cyber sexual harassment involving the unauthorized disclosure of private information.
 - ❖ However, the PDPA's focus is primarily on commercial data processing, and its application to individual acts of harassment is limited.
- ❖ The Communications and Multimedia Act 1998 (CMA)
 - ❖ provides a broader framework for regulating online content.
 - ❖ Section 233 of the CMA prohibits the improper use of network facilities or network services, which can include the transmission of offensive or menacing content.
 - ❖ This provision has been used to prosecute cases of online harassment, including those with sexual undertones.
 - ❖ This prohibits the spread of false, pornographic, threatening and harassment content, offensive and harmful online behavior
 - ❖ However, the CMA does not explicitly define cyber sexual harassment, leading to inconsistencies in its application.

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ASHA'S 2022 SALIENT FEATURES

- ❖ ASHA 2022, amongst others,
 - ❖ the function and powers of the Ministry of Women, Family and Community Development to formulate policy and issue guidelines relating to sexual harassment;
 - ❖ to make the necessary regulations in respect of the Tribunal for Anti-Sexual Harassment (**Tribunal**).
 - ❖ Composition includes legally trained members.
 - ❖ Closed hearings; no lawyer representation unless complex legal issues arise.
 - ❖ Tribunal may order compensation up to RM 250,000.
 - ❖ Other remedies include public apologies and attendance at programs
 - ❖ employees are not prevented from filing a claim before the Tribunal even if they have already filed an internal grievance complaint with the employer, and regardless of the outcome of any internal investigation conducted by the employer.

Source: <https://www.freemalaysiatoday.com/category/nation/2022/07/20/devian-rakyat-passes-sexual-harassment-bill/>

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EMPLOYERS' OBLIGATIONS

- ❖ Develop and implement written clear policy and codes of conduct outlining the behaviour amounting to sexual harassment and the punishment.
 - ❖ It is mandatory under Employment Act 1955 for the employers to display posters on prohibition of sexual harassment in conspicuous places.
- ❖ Conducting regular training sessions on sexual harassment awareness
- ❖ Establishing a whistleblowing for employees to report complaints confidentially, without fear of reprisal.
- ❖ Promptly investigate all complaints of harassment.
- ❖ Take disciplinary action against offenders, which may include dismissal.

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Employer's Duty

- ❖ Shell Malaysia Trading Co Sdn Bhd v. National Union of Petroleum & Chemical Industry Workers [1986] 1 ILR 677 (Award No. 134 of 1986), the Industrial Court held that:
 - ❖ It is for the management to determine whether the act of the workman constitutes misconduct and whether it merits an order of dismissal.
- ❖ As employers have an obligation to provide a working environment that is safe and conductive, sexual harassment is a misconduct that may warrant termination. An employer faced with unlawful harassment in the workplace by a third party (such as a customer or visitor)
- ❖ An employer can create a **hostile work environment by failing to take immediate corrective action in response to a coworker's or third party's sexual harassment** that the employer knew or should have known about.
- ❖ Employers should also ensure staff are trained to deal with harassment arising at work, make it clear to customers, suppliers and visitors (for example, through signage or notices) that harassment is unacceptable, and record instances of harassment and action taken

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COMPLAINT PROCEDURES

- ❖ **Internal Complaint Mechanism:**
 - ❖ Employees can report harassment to the employer or designated personnel.
- ❖ **Labour Department:**
 - ❖ Victims can lodge complaints with the Labour Department if employers fail to address the issue.
- ❖ **Industrial Court:**
 - ❖ Employees may seek redress through the Industrial Court in cases of constructive dismissal.
- ❖ **Civil Suit**
 - ❖ The employee may seek compensation through civil courts for emotional or psychological harm.
 - ❖ Civil liability (tortious liability) may be imposed upon the employers for their negligence in providing a safe workplace.

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THE CONSEQUENCES FOR EMPLOYERS WHO FAIL TO ADDRESS SEXUAL HARASSMENT

1. **Legal Liability**
 - ❖ Non-compliance with Section 81A-81G of the Employment Act can lead to fines or legal action.
 - ❖ Constructive Dismissal Claims: If an employer ignores a sexual harassment complaint, the affected employee may resign and claim constructive dismissal, arguing that the employer made their work environment intolerable.
 - ❖ Discriminatory Dismissal Claims: Employees may also allege discriminatory dismissal if they believe they were terminated due to their complaints about harassment.
2. **Regulatory Scrutiny**
 - ❖ Employers may face increased scrutiny from labour authorities if there are multiple complaints or if a pattern of neglect is established.
 - ❖ This scrutiny can lead to investigations and potential sanctions from regulatory bodies.

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THE CONSEQUENCES FOR EMPLOYERS WHO FAIL TO ADDRESS SEXUAL HARASSMENT

3. Reputational Damage

- ❖ Employers who fail to act on harassment complaints risk significant reputational harm.
- ❖ Negative publicity can arise from media coverage of incidents or legal cases, leading to loss of trust among employees, clients, and the public.
- ❖ This damage can affect recruitment efforts and overall business performance.

4. Workplace Morale and Productivity

- ❖ Ignoring sexual harassment can lead to a toxic work environment, resulting in decreased morale among employees.
- ❖ This may manifest in lower productivity, higher absenteeism, and increased turnover rates as employees seek safer workplaces.

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THE CONSEQUENCES FOR EMPLOYERS WHO FAIL TO ADDRESS SEXUAL HARASSMENT

5. Financial Consequences

- ❖ Compensation Payments: Employers can be ordered to pay compensation to victims if it is found that they failed to take appropriate action regarding harassment allegations. Compensation may cover out-of-pocket losses, including medical expenses related to the harassment.
- ❖ Insurance Premiums: Legal claims related to harassment can lead to higher liability insurance premiums for employers due to increased risk assessments by insurers.

6. Mandatory Training and Policy Implementation

- ❖ In response to failure in handling harassment claims, employers may be mandated by labor authorities to implement comprehensive training programs and establish clear policies on sexual harassment prevention and response mechanisms

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ALLEGATION OF SEXUAL HARASSMENT AT UM

- ❖ A Universiti Malaya student lodges report over sexual harassment involving associate professor accused of sexually harassing his student on June 3, 2019.
- ❖ 15 July 2020: A Universiti Malaya student lodged a police report over what she claimed was inaction by the university authorities over the alleged sexual harassment of her by an associate professor.
 - ❖ The student urged the police to investigate saying that there were no details of the internal probe conducted by the university into the incident a year ago or on the action taken
- ❖ August 27, 2020, the Attorney General Chambers of Malaysia and the Royal Malaysian Police quietly decided to close the investigation & prosecution path against a University of Malaya senior lecturer.
- ❖ The alleged misconduct against the third-year female student included physically touching her hips while asking her disturbing personal questions at his university office. The University of Malaya confirmed this senior lecturer is a repeat offender against multiple students.
- ❖ What is their rationale to avoid prosecuting this alleged sexual predator?

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Shamani Devi Chendra Chekheren v Shangri-la Hotels & Resorts (2017)

- ❖ the Industrial Court found that the female employee in question was proven to have, on a balance of probabilities, sexually harassed her male supervisor, and that consequently, the company was justified in dismissing the employee.
- ❖ sent messages through Facebook and SMS to her male supervisor, some of which were sexually explicit. Below are some examples of the messages that were examined by the court:
 - ❖ The employee describing how she had a dream of the company's agents having gay sex.
 - ❖ The employee stated to the supervisor that he was staring at the ass of another agent.
 - ❖ The employee saying that each time she looked in the supervisor's eyes, she cannot help but to think of sex.
 - ❖ The employee asked the supervisor whether he was having an affair with anyone
 - ❖ The employee saying to the supervisor: "U R MY UBBIE Always and Forever!!!"
- ❖ employee calling him "Ubbie" made him uncomfortable because it was unwanted attention and an unwanted nickname

source: <https://dnh.com.my/case-spotlight-sexual-harassment-by-female-employee/>

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CASES	FORMS OF CSH
Fuchs Petrolube (Malaysia) Sdn Bhd v Chan Puck Lin @ Chan Pak Nean (2003)	Psychological: Sexual harassment via phone, cards and invitations to dinner
PP v John Doe - first individual to be charged in court under Section 507A of the Penal Code for stalking . The new Section 507A was added on 29 May 2023 to the Penal Code (Act 574) to make stalking an offence, with individuals found guilty facing a maximum penalty of up to three years in prison, a fine, or both.	<ul style="list-style-type: none"> ❖ suspect began harassing the victim in 2016 by leaving comments on her blog & IG– suspect allegedly began stalking the victim in 2017 and even followed her to a fast-food restaurant and her home. ❖ the police received reports of online sexual harassment faced by the female photographer in 2018. ❖ the victim claimed to have frequently received explicit messages and videos showing the suspect engaging in inappropriate behavior.

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credit: imgflip.com

Leading case Mohd Ridzwan Abdul Razak v Asmah Mohd Nor

- Sued By Her Sexual Harasser, She Fought Back & Opened The Door For Malaysian Survivors
- Since there's no law on sexual harassment, the Federal Court introduced a new law called tort of sexual harassment into our legal and judicial system

<https://www.therakyatpost.com/living/2020/07/01/sued-by-her-sexual-harasser-she-fought-back-opened-the-door-for-malaysian-survivors/>

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Syed Naharuddin bin Syed Hashim v. Etiqa Takaful Berhad [2018] MELRU 3143 page 1

- it is commonly observed that individuals with pedophilic tendencies often employ strategies to establish emotional bonds, trust, and companionship with minors prior to engaging in more intimate interactions of a sexual nature.
- The word "sexually communicate" refers to any form of communication that pertains to sexual behavior.
- In the case of Syed Naharuddin, the company was notified through email of allegations implicating two officials as individuals who had engaged in sexual activities with underage females, specifically those under the age of 13, and therefore being classified as sexual offenders.
- The perpetrator acknowledges he engaged in sexual communication which involve their interaction with the alleged "victim" through online platforms before their in-person meeting, during which he admitted that they were 15 years old.

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CONCLUSION

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CONCLUSION

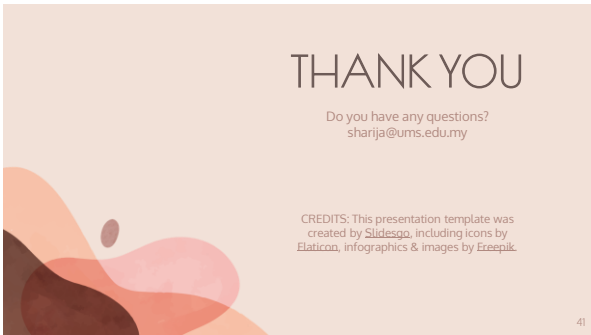
- Employees must understand the effect of SH and pay attention to its details:
 - As employers have an obligation to provide a working environment that is safe and conductive
 - Create an accessible and safe environment for reporting of such incidences in your company. This would certainly help in creating a better and safer working environment
 - Creating public awareness: Need for more education and awareness campaigns
 - Communication of the same to all employees must be clear and enforcement, consistent.
 - Otherwise, it will adversely affect all of us- productivity, brain drain, health, organisation's reputation & financial
- An ounce of salt worth a pound of cure

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