INTERNATIONAL JOURNAL OF SOCIAL SCIENCES BULLETIN
ISSN: (E) 3007-1917 (P) 3007-1909
Volume 4, Issue 3, 2026

GENDER LENS AND STRUCTURAL POWER IN FOSPAH'S ADJUDICATORY PRACTICE: ISSUES AND CHALLENGES

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DOI: https://doi.org/10.5281/zenodo.22076946

Received	Accepted	Published
26 January 2026	11 March 2026	25 March 2026

ABSTRACT

This research paper critically explores the adjudicatory practice of the Federal Ombudsperson Secretariat for Protection Against Harassment (FOSPAH) and inquiry committees constituted by departments under the Protection against Harassment of Women at the Workplace Act, 2010. It examines a central question whether FOSPAH's administrative and quasi-judicial determinations apply a genuinely substantive gender lens, one that incorporates the workplace power hierarchies, trauma responses, and intersecting socio-economic vulnerabilities. It also investigates that whether adjudicatory practices continue to default to formally neutral 'reasonable person' standard that inadvertently reproduces systemic gender asymmetries. This study analyses the integration of the 'reasonable woman' doctrine into national law, by tracing it back to the restrictive literalism in Nadia Naz case to the watershed review judgement in Nadia Naz case. This paper demonstrates that formal neutrality reinforces the institutional harm, by drawing comparative insights form the landmark decision of United States Ninth Circuit in Ellison v. Braddy and the substantive equality framework of the United Nations Convention on the Elimination of All forms of Discrimination Against Women (CEDAW). In order to resolve these structural deficits, the paper outlines a substantive gender & power model designed to align FOSPAH's adjudicative practice with constitutional mandates and international obligations.

Keywords: *FOSPAH, Gender-lens, CEDAW, quasi-judicial*

Introduction

Workplace Harassment is basically an expression of social inequality, structural power and systematic domination rather than an isolated interpersonal grievance. When the Parliament of Pakistan enacted the Protection against Harassment of Women at the Workplace Act, 2010, it established an administrative legal framework grounded in constitutional guarantees. This Act was explicitly designed to give effect to the fundamental rights including inviolability of human dignity, equality before &non-discrimination on the basis of sex, and also endorses the full participation of women in national life. As an autonomous quasi-judicial body, the creation of FOSPAH provided a specialized mechanism to deliver accessible, cost-effective, and expeditious justice, bypassing the inordinate delays and gendered barriers characteristic of conventional litigation.

Despite this framework, a fundamental issue persists within the administrative adjudication:

the tension between the formal equality & substantive equality. Formal equality relies on gender neutral standards, such as the traditional 'reasonable person' test, treating all legal subjects identically regardless of their social context. Formal neutrality often aligns with perspective of dominant workplace actors, especially in workplaces marked by steep organizational hierarchies employment precarity and patriarchal social norms. The trauma responses such as delayed reporting, polite appeasement or the absence of physical resistance can be treated as evidence that conduct was welcome or that the allegations were fabricated, by the standards pf ungendered reasonable person standard.

This paper evaluates whether FOSPAH's adjudicatory practice applies a substantive gender lens that accounts for structural power imbalances, trauma dynamics, and intersecting vulnerabilities such as class and economic dependency. It examines the jurisprudential shift from literalism to explicitly recognizing gender-based hostility and endorsed the 'reasonable woman' standard.

Background: The Statutory Architecture and Jurisprudential trajectory of Harassment law in Pakistan

Statutory Foundations and Legislative intent of the Act 2010

The Civil Society coalitions and the sustained advocacy by women's rights organizations resulted in the passage of the Protection against Harassment of Women at the Workplace Act in 2010. The Act 2010 established an administrative framework that bypassed the demanding criminal standards of Section 509 the Pakistan Penal Code, 1860, placing adjudication within the civil-administrative law governed by the 'balance of probabilities' standard. This framework aimed to reduce evidentiary barriers that historically deterred victims from seeking legal redress.

The Act 2010 laid down a dual-track enforcement system. Under Section 3, all organizations including public, private, and autonomous were legally mandated to constitute a standing three-member Inquiry committee, comprising at least one female member, to hear and investigate internal workplace complaints. Concurrently, section 7 created the Federal Ombudsperson Secretariat (FOSPAH). Under Section 8, FOSPAH was granted quasi-judicial powers to hear direct complaints, decide appeals from departmental decisions, summon witnesses, compel document production, and impose statutory minor or major penalties.

Legislative Expansion of 2022 (Act V of 2022)

Recognizing statutory gaps that excluded informal workers and narrow definitions of misconduct, the amendment was passed by the Majlis-e-Shoora, which expanded the protective ambit of the legal framework;

- The amendment broadened the definition of Employee beyond the regular staff to explicitly cover the contractual, gig, piece-rate, temporary, part-time, freelance, and daily wage employees alongside interns, trainees, students, performers, artists, artists, sports persons, and domestic workers.
- It also expanded the definition of workplace which was broadened beyond the formal offices to encompass the highways, educational institutions, digital & online platforms, and any venue visited by an employee during or arising out of employment.
- The amendment 2022 also bifurcated the actionable conduct under definition of Harassment into two actionable categories: Section 2(h)(i): unwelcome sexual advances, requests for sexual favors, stalking, cyber-stalking or physical conduct of sexual nature. Section 2(h)(ii): Discrimination on the basis of sex/gender, which may not explicitly in nature, but embodies a discriminatory or pre-judicial mindset resulting in an intimidating, hostile, or offensive work environment.

The Judicial Watershed: From Literal Formalism to Purposive Interpretation

The operational course of FOSPAH has been heavily shaped by the interpretations of the Superior courts. In Nadia Naz case, the three-member bench of the Supreme court of Pakistan adopted a literal and restrictive interpretation of Section 2(h). The court held that actionable harassment under the Act was strictly limited to

the conduct of sexual nature, requiring the complainant to establish that the perpetrator acted with direct sexual intention or overture with his act, demeanor, behavior, and/or conduct. The sexualized gender hostility, systematic marginalization, and gender-based bullying were excluded by this interpretation from FOSPAH's statutory jurisdiction.

This restrictive interpretation was overturned in the review judgement of Nadia Naz case. Authoring the majority opinion Justice Ayesha A. Malik held that 2021 judgement contained an error of law. The SC determined that the term *'harassment'* in section 2(h) encapsulates sex-based and gender-based discrimination. The court affirmed that the workplace harassment is rooted in gendered power dynamics designed to humiliate, demean, and exclude individuals based on their gender. The Supreme Court held that standard of a ***reasonable woman*** should be considered to determine whether there was harassment, which rendered the workplace hostile and all relevant factors should be viewed objectively and subjectively.

A Comparative Legal Framework: Substantive Equality and Intersectional Framework

The Myth of Formal Neutrality and the Reasonable Women's Standard

The 'reasonable person' Standard is often presented in administrative and common law system as an objective gender-neutral benchmark. However, feminist theorists played a critical role in developing the Developing the concept of workplace harassment and also demonstrated that this standard frequently masks male normative assumptions. Because men and women occupy different social physical & structural position within patriarchal societies and women's sensibilities about what constitutes a corrosive work environment may differ from men.

The US 9th Circuit Court of appeals addressed this dynamic in the landmark case *Ellison vs. Brady*, The Ellison court rejected the gender-neutral *"reasonable person"* standard and concluded instead that the presence of a hostile environment should be judged from the perspective of the victim. The court determined that a reasonable person" standard was erroneous because it does not permit analysis of differing perspectives of men & women. The court recognized that the conduct a man might consider an objectionable can reasonably be perceived by a woman as intimidating or hostile this is because women are disproportionately targets of sexualized violence and harassment. Resultantly, the court settled that whether the conduct is sufficiently pervasive or severe to create an abusive work environment must be analyzed from the perspective of a ***'reasonable woman'***.

In *Nadia Naz*, the SC integrated this doctrine into national jurisprudence. The court observed that when evaluating the workplace hostility judges must evaluate how a reasonable woman positioned in the complainant's circumstances would perceive the conduct. This standard requires that tribunals must evaluate subjective harm alongside the objective context, shifting the inquiry away from the perpetrator intent and towards victim impact.

The Substantive Equality Framework under CEDAW

Formal equality mandates the identical treatment regardless of social context (treating unequals equally). In contrast, Substantive equality, which is entrenched in Article 11 & 13 of CEDAW and later on elaborated in General Recommendations No. 19 (Violence against Women) and 35 (General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19), requires state organs to achieve equality in outcome. Accordingly, legal institutions must account for historical disadvantage, structural power imbalances, and persistent social barriers.

The basic framework of CEDAW establishes that gender-based discrimination is a form of harassment that impairs equal access to employment. The imposition of equal burdens of proof, without accounting for structural inequality violates substantive equality. In the context of FOSPAH, applying a substantive gender lens requires assessing how power asymmetries impair a complainant's ability to gather direct documentary or eye-witness evidence.

Substantive Gender Lens and Formal Neutrality in FOSPAH Practice

An analysis of recent orders of FOSPAH demonstrates a progressive operationalization of the Nadia Naz (2023) review mandate. FOSPAH's jurisprudence has increasingly adopted a broader gender-based discrimination, extending beyond coital or explicitly sexual motives to recognizing non-sexual physical aggression, administrative victimization, and hostile work environment as actionable GBD.

The approach of substantive gender lens is illustrated in *Muqaddas Fatima* case. The complainant, who was supervising a women's hockey match as an official, alleged that a male official used derogatory language, aggressively snatched and tore up an official match sheet and pushed her. The accused took the plea for defended his actions on routine administrative grounds, asserting that he was following superior instructions regarding team walkovers and that his action lacked sexual intent.

FOSPAH relied on *Nadia Naaz* case and *Ellison vs Brady* case, in holding that physical aggression and public verbal abuse constitute gender-based harassment rooted in dominance dynamics designed to undermine a female official's authority. FOSPAH concluded that the accused acted aggressively because he considered himself to be superior to a female officer and felt entitled to humiliate & demean her by pushing her and denying her authority. The honorable Ombudsperson further emphasized that concentering the victim's perspective noting that behavior men dismiss as minor heated exchanges often constitutes serious harassment to women.

Similarly, in *Ayesha Kulsoom* case, FOSPAH addressed structural administrative hostility. The complainant alleged that senior management retaliated by subjecting her to frequent transfers, issuing imprecise seniority lists, denying her promotions, and posing continuous professional isolation.

FOSPAH held that harassment encapsulates both sexual and gender-based discrimination, ruling that prolonged administrative instability imposed on a female officer constitutes an actionable hostile work environment. FOSPAH recognized that the context of harassment is inherently subjective, heavily influenced by the power dynamics, societal norms and individual experiences.

However, formal neutrality persists in jurisdictional maintainability decisions. In *Rubina Nasir* case, an employee challenged her compulsory retirement and transfer from Islamabad to Lahore as psychological harassment. FOSPAH postpartum dismissed the complaint as non-maintainable reasoning that routine service transfers and disciplinary proceedings lacking explicit gender bias or sexual misconduct fall exclusively within the jurisdiction of service tribunals. The decision highlights a continuing adjudicatory boundary; although FOSPAH addresses administrative victimization linked to gender bias, employers frequently attempt to reframe retaliatory conduct as ordinary exercises of managerial discretion.

FOSPAH's developing jurisprudence reflects a growing engagement with institutional power dynamics, especially where senior officials use managerial authority to retaliate against sub-ordinates. Despite these developments, class and economic precarity remain significant challenges. Although the 2022 Amendments expanded legal protections to domestic workers, gig-workers and daily wage laborers, contested FOSPAH orders continue to disproportionately concern formal sector, professionals; including doctors, bank managers, radio producers and etc.

Lower-income informal workers face substantial structural barriers to accessing FOSPAH, including limited legal literacy, fear of immediate dismissal, lack of digital documentation, and acute economic dependency. Even when informal workers are able to access the forum, formal evidentiary requirements may further disadvantage those without written contracts, CDR or comparable documentary evidence.

Trauma Responses, Evidentiary Standards, And Credibility Assessment

Assessing witness credibility, trauma responses, and digital evidence constitutes a central component of FOSPAH's adjudicatory function. Formalist approaches to legal adjudication often

regard delayed reporting, the absence of verbal protest, or continued professional interaction with the respondent as factors that undermine the complainant's credibility. In Contrast, a trauma-informed substantive gender lens recognizes that harassment may produce responses like shock, confusion, fear and stigma with victims sometimes relying on polite neutrality, appeasement to protect their employment.

The evidentiary jurisprudence of FOSPAH has massively adapted itself to the structural realities. In *Naheed Saghir case*, FOSPAH settled that in workplace harassment proceedings, where direct evidence is scarce, the sole credible testimony of complainant may suffice for conviction for conviction.

Recommendations

To overcome the limitations of essentialist 'Reasonable Person' framework into a fully operational substantive gender-and -power approach adjudicatory model, the broader legal system and FOSPAH should adopt the following structural reforms:

FOSPAH must issue codified procedural regulations instructing Internal/Departmental Inquiry Committees and adjudicators on trauma-informed assessment of the evidence. The non-linear reporting, delayed filing, strategic polite communication with harasser must be recognized as trauma responses and rational job preservation strategies. Adjudicatory practice should expressly bar adverse credibility inferences based solely on these factors.

Adjudicatory orders should, as a matter of institutional practice, incorporate an "Institutional Power Matrix" analysis.

This framework should assess:

- The administrative rank and supervisory relationship between the parties.
- The nature of the complaints' employment and level of job security, including whether they are permanently employed, engaged on a daily-wage basis, gig-based or contractual.
- The extent to which the victim/complainant depends on the job for basic livelihood and survival.
- The combined effects of socio-economic status, marital status, and geographic isolation.

FOSPAH should establish protocols to prevent the complainants from administrative retaliation during pendency of proceedings. Upon admission of a *prima facie* complaint, FOSPAH should be empowered to stay any pending transfers, performance evaluations or disciplinary action against the complainant. In addition, the accused should be barred from exercising the direct administrative or supervisory authority vis-à-vis the complainant until final determination is made.

In order to extend the protections of the Amendment Act 2022 to the domestic, gig, and informal workers, FOSPAH should establish dedicated legal aid cells. The situations in which the formal employment contracts or evidence through the modern devices are not available, FOSPAH should exercise its summary investigative powers under Section 8 of the Act to gather evidence directly through field visits, oral testimony, and witness statements. This approach would promote the substantive rather than the formal evidentiary barriers and ensure that lower-income complainants are not denied access to justice because of the nature of their employment.

Conclusion

Over the last five years, FOSPAH's adjudicatory practice reflects a notable shift from formalistic neutrality towards a more contextual and victim-centered approach to workplace harassment. This transformation has been reinforced by the expanded statutory framework introduced through the 2022 Amendment Act and the Supreme Court's landmark review judgement in *Nadia Naz* case. In interpreting harassment through narrow and formalistic understanding to the lens of the victim-centered *'reasonable woman'* standard informed by the Ellison v. Brady, FOSPAH has broadened its focus beyond isolated accts of misconduct to encompass hostile-work, gender-discrimination, and administrative retaliation.

However, adopting a 'reasonable woman' standard is an intermediate step towards achieving the substantive gender-equality. FOSPAH should move beyond essentialist assumptions about

gender and toward a comprehensive framework attentive to structural power, in order to fulfill its constitutional and international obligations under CEDAW. FOSPAH can strengthen its legal process to deliver substantive justice across all sectors of society by systematically accounting for class-based precarity, economic-dependency, administrative authority, and the effects of trauma.

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