Prohibiting sexual harassment in the European Union
An unfinished public policy agenda

Glenn M. Gomes, James M. Owens and James F. Morgan
Department of Management, College of Business, California State University, Chico, California, USA

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Abstract European Union policymakers have taken a courageous step toward outlawing sexual harassment as a form of gender-based discrimination throughout the EU with the recent passage of the amended equal treatment directive. While the edict seeks to harmonize member states’ laws regarding the equal participation of men and women in the labor market, a number of public policy issues will arise as individual member states formally implement the directive. This article begins by identifying the principal components of the directive. It then focuses on two likely areas of intense public policy debate: operationalizing the definition of “sexual harassment,” and protecting employers from liability under certain circumstances. Where appropriate, the article draws upon corollaries and parallels in US law that may provide guidance to policy makers on these issues. The article concludes by offering practical suggestions for employers who would like to take the initiative in creating workplace reforms consistent with the principles underlying the directive.

Introduction


While the equal participation of men and women in the labor market is a fundamental principle underlying the EU, sexual harassment in the workplace did not receive serious attention by EU policymakers until the mid-1980s, when Rubenstein (1987) published the results of a study made on behalf of the European Commission. After determining that sexual harassment was widespread throughout the EU, the commission undertook a number of initiatives in the early 1990s to remedy the problem (with uneven results). A more recent study found evidence that perhaps as many as 40 to 50 percent of women, and 10 percent of men, have experienced sexual harassment at some point in their working lives (European Commission, 1998). Not surprisingly, the decade of the 1990s saw increased recognition of workplace sexual harassment as an international phenomenon inviting comparative analysis (e.g. Bernstein, 1994; Earle and Madek, 1993; EIRR, 1997; Gee and Norton, 1999; Kubal, 1999).

Prior to the directive, some member states took the initiative to develop strong public policy responses to workplace sexual harassment (e.g. the UK, Ireland, France, The Netherlands, Belgium, and Germany), while other member states were not as
aggressive in adopting anti-harassment legislation (e.g. Italy, Luxembourg, Portugal, and Greece) (EIRR, 1998a, b). While the directive seeks to harmonize member states’ laws regarding the equal participation of men and women in the labor market, a number of public policy issues will arise as individual member states formally implement the directive (e.g. Tsekos, 2003). This article begins by identifying the principal components of the directive. We then focus on two likely areas of intense public policy debate:

1. Operationalizing the definition of “sexual harassment” so as to eliminate, as much as possible, the ambiguities inherent in determining the boundaries between acceptable and prohibited behavior.

2. Protecting employers from liability by providing them with a defense against claims of sexual harassment under certain circumstances.

Because sexual harassment law in the US has evolved unevenly over two decades, member states may avoid many of the difficulties experienced, there by confronting these public policy issues at the outset of the implementation process. Where appropriate, then, we will draw upon corollaries and parallels in US law that may provide insight and guidance to EU policy makers. Given the public policy uncertainties surrounding the process by which each member state ultimately will implement the directive, the article concludes by offering practical suggestions for employers who would like to initiate now workplace reforms consistent with the principles of the directive.

The principal components of the directive
The directive contains a number of principal components, including:

- definitions of workplace harassment;
- reference to preventative measures on sexual harassment;
- the establishment of judicial and/or administrative procedures for enforcement purposes;
- compensation for victims of discrimination and harassment; and
- the establishment of national agencies charged with promoting equal employment opportunities.

The nature of workplace harassment
Article 2(2) of the directive recognizes “harassment” and “sexual harassment” as forms of discrimination on the grounds of sex and thus contrary to the principle of equal treatment between men and women. “Harassment” occurs “where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.” In contrast, “sexual harassment” is defined to be “where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.” A person’s rejection of, or submission to, harassment or sexual harassment may not be used as a basis for an employment decision affecting that person (Article 2(3)).
Preventative measures

Article 2(5) specifies:

Member states shall encourage, in accordance with national law, collective agreements or practice, employers and those responsible for access to vocational training to take measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment at the workplace.

Interestingly, the directive does not legally require individual employers to take preventative actions; it merely “encourages” such activities on the part of employers. While the directive offers no specifics regarding the nature of effective prevention programs, guidelines already exist. Commission recommendation 92/131/EEC on the protection of the dignity of women and men at work (1992) contains an annex providing a “code of practice” on measures to combat sexual harassment. The code of practice, though legally non-binding, does encourage the use of clearly communicated policies, effective enforcement procedures, and training for all employees.

Judicial and administrative enforcement procedures

When implementing the directive, member states must ensure that judicial and/or administrative procedures (including, if appropriate, conciliation procedures) are available to all persons who consider themselves wronged or victimized by harassment in the workplace, even after the employment relationship has ended. The directive does not address directly, however, the proper burden of proof in these actions. Nevertheless, council directive 97/80/EC on the burden of proof in cases of discrimination based on sex does apply to council directive 76/207/EEC and, by inference, to the directive under consideration here. Article 4 of directive 97/80/EC states that, once the employee establishes facts that support the presumption that harassment has occurred, “it shall be for the respondent [employer] to prove that there has been no breach of the principle of equal treatment,” and member states may adopt rules of evidence that are more favorable to the plaintiff (i.e. the employee).

Compensation and reparations

The directive prohibits limits on the compensation payable to the victim when unlawful harassment has been established. Reflecting past rulings by the European Court of Justice (e.g. Draehmpaehl, 1997; Marshall, 1993), Article 6(2) requires member states to introduce measures “to ensure real and effective compensation or reparation … for the loss and damage sustained by a person injured as a result of discrimination.” Moreover, the compensation should be “dissuasive and proportionate” to the injury suffered. There can be no fixed prior upper limit to the compensation, except in one instance: when the employer can prove that the only damage suffered by a job applicant was the refusal to take the job application into consideration, and there is no other actual financial loss. The desire to avoid unlimited economic loss may provide strong incentives for employers to institute procedures for eliminating workplace behavior that would expose them to such liability.

National “equal treatment” agencies

Article 8 of the directive requires that “member states shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the grounds of sex.”
Whether created anew, or whether they are a part of existing agencies, this administrative structure has the potential for serving as a key enforcement mechanism, especially if it also promulgates regulations for preventing harassment. For member states that have national agencies already charged with defending human rights generally, or safeguarding individual rights, these “equal treatment” bodies may form part of the existing agencies. Examples for such an administrative agency already exist. In the UK, these functions are the province of the Equal Opportunity Commission (EOC), a quasi-nongovernmental agency established under the sex discrimination act in 1975 that deals exclusively with sex discrimination issues.

These bureaucratic entities are required to be competent at providing independent assistance to victims of discrimination in pursuing their discrimination complaints; conducting independent surveys related to discrimination; and publishing independent reports and making recommendations on discrimination issues. In accordance with national traditions and practice, article 8 also requests member states take measures to promote a dialogue between “social partners” that fosters the principle of equal treatment. The outcome of such a dialogue might include, for example, collective agreements, the monitoring of workplace practices, the establishment of codes of conduct, and the research or exchange of experiences and good practices. Employers are encouraged (but not mandated) to disseminate to employees and/or their representatives “appropriate information on equal treatment.” Member states are directed to encourage dialogue with non-governmental organizations that have a legitimate interest in fighting workplace discrimination based on gender. Finally, member states are allowed to introduce and adopt provisions that “are more favourable to the protection of the principle of equal treatment” than established by the directive itself.

Implementation timeline and the anticipated public policy debate

The directive became effective on 5 October 2002, the day of its publication in the Official Journal of the European Communities. Member states have until October 2005 to enact the mandated legislation, regulations, administrative provisions, and bureaucratic infrastructure. We anticipate that the public policy debate within each member state will be affected differently according to the degree to which anti-harassment legislation and court edicts already exist. In member states where anti-harassment legislation has evolved in ways consistent with the directive and where the regulatory bureaucracy is already established (e.g. the UK), the public policy debate over legislative mechanisms for implementing the directive will likely be unprotracted and more-or-less routine. Conversely, in member states with a relatively undeveloped legislative code in this area, or where the bureaucratic infrastructure responsible for promulgating and enforcing regulations may be nascent or immature (e.g. Portugal), the public policy debate may be more spirited and extended. In either case, however, it should be the role of the employer, as a vital social partner in the implementation process, to contribute meaningfully and assertively to whatever public policy debate ensues.

In our opinion, at least two important public policy issues will certainly arise as member states work to implement the directive:
The desirability of clarifying the *prima facie* elements of harassment and sexual harassment, particularly in light of the social and cultural differences existing in workplaces within and among member states.

The possible benefits of creating protection from liability for employers who undertake measures to prevent or remedy workplace harassment.

It is to these major public policy issues that we now turn.

Clarifying the *prima facie* elements of sexual harassment

Perhaps it is in the nature of “harassment” or “sexual harassment” that any definitions of these terms would contain broad, generic words and phrases that invite their own interpretive challenges. We anticipate that employers in each of the member states will want both a clarification of the meaning of these words and phrases either in the implementing statutes or in the regulations promulgated by the equal treatment agencies, as well as guidance on how such definitional elements will be used in proving a *prima facie* case. When establishing (or refuting) the existence of workplace sexual harassment, a clear understanding of the meaning of the words becomes essential for all parties involved.

What constitutes sexual harassment?

Article 2(2) of the directive specifies the formal, legal definition of “sexual harassment.” In our opinion, there are three critical components of the definition:

1. The word “unwanted”.
2. The concept of dignity (“the purpose or effect of violating the dignity of a person”).
3. The notion of an abusive work environment (“creating an intimidating, hostile, degrading, humiliating or offensive environment”).

Interesting parallels can be drawn between the language of the directive and definitions used in the USA. For example, Title VII of the 1964 civil rights act prohibits employer discrimination “against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex . . .” (42 USC §2000e-2(a)(1)(1994)). The Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing the provisions of title VII, states that sexual harassment involves “unwelcome sexual advances, requests for sexual favors, and other verbal or physical contact of a sexual nature constitute sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual’s employment, unreasonably interferes with an individual’s work performance or creates an intimidating, hostile or offensive work environment” (EEOC, 2002).

The concept of “unwanted” is a key element of the directive’s definition of sexual harassment, and this closely mirrors US sexual harassment law. In the landmark 1986 decision of *Meritor Savings Bank v. Vinson* (1986) (hereafter “*Meritor*”), the US supreme court ruled unanimously that the employee’s consent to sexual liaisons was not germane to the question of whether sexual harassment existed; rather, the proper inquiry is whether the behavior is “unwelcomed.” By employing the word “unwanted,” the directive appears congruent with US law, and we would assert that the crux of the
determination is whether the employee had a meaningful choice in being exposed to objectionable behavior.

When compared to the law of sexual harassment in the US, the directive’s use of the word “dignity” represents a uniquely European contribution to conceptualizing workplace behavior. According to Friedman and Whitman (2003, p. 264), for example, “to continental Europeans, it seems unproblematically obvious that ... dignity is something that the law can and should protect”. Dignity is simply an individual routinely being treated with respect. As Ehrenreich (1999, p. 22) points out, because individuals are unique and autonomous, “actions that would humiliate, torment, threaten, intimidate, pressure, demean, frighten, outrage, or injure a reasonable person are actions that can be said to injure an individual’s dignity interests” (e.g. Bernstein, 1997; Carter, 1992). But when, exactly, is a person’s dignity violated? Each member state will have to resolve this question as a matter of public policy.

The directive relies on the key phrase “intimidating, hostile, degrading, humiliating, or offensive environment” to establish the existence of prohibited conduct. While the directive does not provide guidance on precisely what constitutes such an environment, parallels can again be drawn by reference to US law. The Meritor decision established the concept of a hostile working environment, and that hostility could be shown when a behavior has the characteristics of being sufficiently severe or pervasive to alter the conditions of employment. Following that decision, the supreme court in *Harris v. Forklift Systems, Inc.* (1993) ruled that a victim need not claim psychological damage, but the working environment must take on characteristics of hostility.

In our opinion, if the EU adopts a definition of hostility similar to that used in the USA, the concepts of “intimidating,” “degrading,” and “humiliating” may be used to establish the degree of severity or pervasiveness of the hostility. Moreover, in *Oncale v. Sundowner Offshore Services* (1998), the supreme court stated that the presence of sexual harassment should be determined by considering the workplace’s social or cultural context. For example, “a professional football player’s working environment is not severely or pervasively abusive ... if the coach smacks him on the buttocks as he heads onto the field – even if the same behavior would reasonable by experienced as abusive by the coach’s secretary (male or female) back at the office” (*Oncale v. Sundowner Offshore Services*, 1998, pp. 81-2). In other words, “in judging the severity of the conduct, attention to the cultural context in which the purported harassment occurs will guard against imposing liability on behavior that, although offensive to Miss Manners, does not offend title VII” (Frank, 2002, p. 450).

Within the European Union, the reality of a social or cultural context cannot be ignored when arriving at a determination of a hostile environment, especially when wide ranging sociopolitical and cultural differences exist among the population of the member states (e.g. Timmerman and Bajema, 1999). Undoubtedly, as Gee and Norton (1999) persuasively argue, “cultural relativism” exerts considerable influence over definitions, tolerance levels, and legislative solutions to workplace harassment (see Sigal and Jacobsen, 1999). These cultural differences are not limited to national norms, however, but can also be detected within different work environments in a single country. For example, Wright (2001) draws the distinction between blue-collar and white-collar cultures and workplaces, and notes that different work environments are qualitatively different with respect to prevailing attitudes toward women and
behaviors deemed “acceptable.” Massaro (2002/2003, p. 365) cautions that “conduct should not automatically be legitimized merely because it is an accepted part of a particular workplace or industry”. It would be perverse, indeed, if by making gender-biased conduct an acceptable workplace practice, employers could avoid liability for creating and tacitly approving such an environment. In implementing the directive, member states should provide employers, employees, courts, and others with guidance on precisely what workplace conduct is unacceptable with this reality of the social and cultural context in mind.

From whose perspective?
While the definition of “sexual harassment” requires that the alleged illegal behavior involve unwanted conduct which is both violative of human dignity, and which creates an intimidating, hostile, degrading, humiliating or offensive environment, there remains considerable ambiguity as to the proper perspective to be taken when establishing the existence of such behavior. At least two major competing legal standards have emerged in the USA, both based on the concept of “reasonableness”, to inform decisions about the presence of sexual harassment:

1. the “reasonable person” standard; and
2. the “reasonable victim” (typically, although not exclusively, known as the “reasonable woman”) standard.

The academic and legal debate over which standard is most appropriate has been vigorous (for an interesting introductory “dialogue,” see e.g. Paetzold and Shaw, 1994). The determination by member states of which standard to adopt in legal proceedings to establish the existence (or absence) of sexual harassment will be of considerable interest to alleged victims and employers of alleged harassers.

In order to determine whether a particular behavior rises to the level of harassment creating a hostile work environment, the objective perspective of a “reasonable person” can be applied. In the case of Rabidue v. Osceola Refining Co. (1986, p. 620, emphasis added), for example, the court’s majority stated that “to accord appropriate protection to both plaintiffs and defendants in a hostile and/or abusive work environment sexual harassment case, the trier of fact must adopt the perspective of a reasonable person’s reaction to a similar environment under essentially like or similar circumstances”. Based on the centuries-old concept of a generic reasonable human being (the “reasonable man”), and originally conceived as a gender-neutral standard, the reasonable person standard was adopted with the anticipation that the legal system would be spared an avalanche of complaints lodged by hypersensitive employees.

Although the “reasonable person” standard is still used in many US jurisdictions, it could be argued that women and men evaluate incidents of socio-sexual behavior differently. Moreover, it could be argued further that a gender-neutral, sex-blind reasonable person standard may tend not to be understanding of or empathetic with the experiences of women (who historically have been disproportionately victimized by workplace harassment). As a result, beginning with the case of Ellison v. Brady (1991), a “reasonable woman” standard for assessing alleged incidents of harassment has been adopted in some jurisdictions. Based on the presumption that important gender-based differences in perception do exist, and that judges and juries may not be able to fully appreciate the viewpoint of women, the Ellison court found that “a complete
understanding of the victim’s view requires, among other things, an analysis of the different perspectives of men and women. Conduct that many men consider objectionable may offend many women” (Ellison v. Brady, 1991, p. 878). Consequently, juries should be instructed to consider the facts from the following gender-sensitive standpoint: would a reasonable woman consider the alleged conduct sufficiently severe or pervasive to alter the conditions of employment, thus creating an abusive environment? (In actuality, the perspective to be used is that of a “reasonable victim”, but because most victims historically have been women, the “reasonable woman” has become nearly synonymous with a “reasonable victim”; in those rare cases involving a male plaintiff, the proper gender-sensitive standard would then be that of a “reasonable man”).

Although the debate over which standard – the reasonable person or the reasonable woman – is most appropriate has been vigorous, in recent years both empirical and theoretical research has begun to question the utility of the distinction. For example, in a comprehensive meta-analysis, Rotundo et al. (2001) found that, while gender differences in perception do exist to some degree in certain situations, the magnitude of the differences does not provide strong empirical support for the use of a reasonable woman standard in preference to a reasonable person standard. Similarly, Gutek et al. (1999) found that the reasonable woman standard had little practical effect on the assessment of hostile work environment sexual harassment (see Wiener and Hurt, 1997; Wiener et al., 1997). Shoenfelt et al. (2002) came to the conclusion that the argument over standards was moot. While Abrams (1998, p. 1224) supports the reasonable person standard, she would modify the term “reasonable” to be understood as characterizing a person “with a solid base of political knowledge regarding sexual harassment”. In critiquing the entire “reasonableness” debate, and in arguing that sexual harassment is most properly viewed as primarily a harm associated with the violation of an individual’s dignity (and less an issue of discrimination), Bernstein (1997) endorses the adoption of a “respectful person” standard, a perspective that would be supported by Friedman and Whitman (2003).

Each member state will need to address – legislatively, administratively, or via judicial decisions – the question of which perspective should be adopted when assessing the validity of a claim of sexual harassment. If member states wish to adopt a standard currently in use in the USA, they could choose between the gender-neutral perspective incorporating the “reasonable person”, or the gender-sensitive perspective incorporating the “reasonable victim” (and typically the reasonable woman). However, member states may wish to adopt a more uniquely European perspective based on the concepts of dignity and respect rather than a gender-based paradigm.

Creating an “affirmative defense” for employers
The directive contains two overriding public policy objectives:

(1) To eliminate sexual harassment from the European Union workplace.
(2) To provide a means for compensating victims of workplace harassment.

While member states are not required by the directive to include employer defenses within their national implementing legislation, an excellent method of encouraging employers to enact policies and procedures prohibiting sexual harassment would be to
create for employers an “affirmative defense” against liability for damages arising from claims of sexual harassment under certain circumstances.

Arguably, article 8b(3) provides a basis for employer defenses when it directs member states to “encourage employers to promote equal treatment for men and women in the workplace in a planned and systematic way.” Once sexual harassment has occurred, the extent of employer liability, and the amount of damages that flow from that liability, necessarily must be addressed. Ultimately what is desired is an administratively practical and economically efficient resolution to workplace harassment that balances the rights and duties of employers and employees, and that strikes an appropriate balance between preventing sexual harassment and compensating harassment victims.

Member states could fashion statutes creating an affirmative defense by following the examples created by the US supreme court in *Burlington Industries, Inc. v. Ellerth* (1998) and *Faragher v. City of Boca Raton* (1998). These cases created an affirmative defense for employers if they exercised “reasonable care” in preventing sexual harassment and, where sexual harassment is alleged to have occurred, they promptly corrected the harassment. Moreover, according to these decisions, an employee alleging sexual harassment must have unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer. It could be argued, however, that this defense may not go far enough, and that employers who do establish appropriate and meaningful workplace justice procedures should be afforded protection even when a harassed employee does, in fact, takes advantage of them, as was intended by the policy (e.g. Hogler et al., 2002).

Whether an affirmative defense applies only when an employee unreasonably fails to take advantage of employer-created justice procedures, or if it is extended to include instances when employees do, in fact, avail themselves of the opportunities provided, an affirmative defense begins to correctly allocate responsibility for preventing and correcting harassment to both the employer and the employee (for an entirely contrary view, see Grossman (2003), arguing that an affirmative defense rewards compliance at the expense of success). An affirmative defense of the type discussed here also is wholly consistent with recommendation 92/131/EEC on the protection of the dignity of women and men at work, whereby the annexed code of practice acknowledges “employees’ responsibilities” in preventing and discouraging sexual harassment. Without such a defense, employers would be held absolutely liable for workplace sexual harassment.

**Workplace initiatives for employers**
The most important and direct guarantor of the principle of equal treatment between men and women in the workplace will be employers. As individual member states debate how best to implement the mandates contained within the directive, as they wrestle with how to operationalize key definitional elements, and as they consider whether to extend certain protections to employers who demonstrate that they have embraced the principles embodied in the directive, employers cannot afford to stand idly by waiting for the public policy debates to conclude. In this section we offer employers – who we anticipate will be working closely with their social partners – some practical suggestions for both preventing sexual harassment and undertaking
remedial measures once sexual harassment is alleged to have occurred. These suggestions represent “best practices” that would be appropriate in any case.

Preventative measures
Employers need look no farther than the commission recommendation 92/131/EEC on the protection of the dignity of women and men at work, particularly its suggested code of practice, when anticipating what measures they will be encouraged to take toward eliminating sexual harassment in the workplace. While the directive makes no mention of this recommendation, in our opinion it is an essential companion document to the directive. The code of practice, though legally non-binding on member states, offers sound advice consistent with current human resource management “best practices.” It recognizes that the prevention of workplace harassment rests on a number of critical employer actions, including developing and effectively communicating unequivocal policy statements, and assigning responsibility at each organizational level while providing training programs for all employees.

The development and dissemination of a policy statement unequivocally stating that harassing behavior will not be permitted or condoned by the employer at any time or in any fashion is the most profound and effective measure for preventing sexual harassment. Policy statements should include definitions of harassment and sexual harassment, examples of inappropriate behavior, and an inventory of rights and duties for managers, supervisors, and employees alike, as well as the procedures employees should follow in order to lodge a complaint or seek assistance with the process. Moreover, employees must be assured in the policy that the employer will take complaints seriously, and that the employer will address the complaints in a timely and (to the extent possible) confidential manner. Employees filing a complaint must be protected from retaliation. The range of sanctions and disciplinary measures should effectively deter offending behavior and be clearly specified in the policy. Such a policy could be integral to establishing an affirmative defense for employers (should the implementing legislation adopted by each member state include such provisions).

If policy statements are to effectively deter sexual harassment in the workplace, their provisions must be clearly communicated to all employees at every level of the firm’s hierarchy. The policy should be published, copies should be provided to each employee, and managers and supervisors should reinforce periodically the employer’s commitment to a harassment-free workplace by holding meetings with employees to review the policy’s essential provisions. These actions will convey a responsive and supportive attitude that will earn the employee’s faith and trust. If employees perceive management’s commitment to be honest, sincere, and resolute, there should be a decreased probability that harassment will occur, and possibly a significant reduction in the number of sexual harassment claims filed.

Employees have the duty of complying with the policy and its provisions, and employers have the duty to provide adequate training. Training sessions should familiarize or reacquaint each employee with their respective rights and responsibilities under the policy, and should provide a form of continuing education on conditions that contribute to a harassment-free working environment. This training should be undertaken at the time of hiring and throughout an employee’s tenure and specialized training should be provided to those employees assigned an official role in administering the policy’s complaint procedures. Managers and supervisors are
responsible for implementing the policy, for taking actions to encourage compliance, and for ensuring that a system of workplace justice is established. On-going training for managers and supervisors, is an essential element in the employer’s arsenal of preventative measures.

Remedial measures

Preventing sexual harassment from occurring in the first place should be a high priority for employers. If the promulgation and dissemination of a policy statement, combined with an on-going training program for all employees, fails to accomplish this objective, employers must have in place processes for addressing incidents of harassment once they have occurred (or have been alleged to have occurred). Workplace justice systems and procedural mechanisms for remedying sexual harassment are as important as policy statements for employers seeking to provide equal treatment for employees consistent with the letter and spirit of the directive.

Commission recommendation 92/131/EEC provides sound advice and direction for employers seeking to establish a system of remedial measures to address claims and instances of sexual harassment. These justice-based procedural mechanisms would include several important facets of remediation:

- an informal inquiry and complaint process;
- a formal complaint process;
- the availability of advice and assistance for employees;
- an investigatory process; and
- a system of disciplinary sanctions.

Informal inquiries and complaints. Most employees probably prefer to resolve problems arising from instances of workplace sexual harassment in an informal way, usually victims of sexual harassment would be content simply to have the offending behavior cease. Employers could design systems and procedures to encourage employees to resolve instances (or allegations) of sexual harassment informally among themselves through open communication and honest dialogue. Sometimes it may be necessary only for an offended employee to communicate clearly to the offending employee the nature of the unwelcomed behavior, the fact that it makes the offended employee uncomfortable, and/or that such behavior interferes with the offended employee’s ability to perform workplace duties. Where a policy statement exists and has been communicated to employees who have also been part of an on-going training program, this informal resolution process undertaken by the employees themselves is often enough to stop the harassing behavior. For those instances where the offended employee finds it embarrassing or otherwise difficult to raise the issue directly with the offending employee, the employer should designate a counselor, employee assistance officer, or an employee liaison who would provide the offended employee with confidential advice and who, when requested to do so by the employee, would intervene informally on the employee’s behalf. If such informal methods are ineffective, the employee should have the ability to pursue a remedy by means of a formal complaint procedure.

Formal complaint procedures. When informal methods are inappropriate or ineffective, or when such informal overtures have been refused by the offending
employee, the offended employee must be able to seek redress and remedy through a
formal complaint process created and scrupulously administered by the employer. The
employer must designate the person (or persons) with whom an offended employee
may report an instance of harassment or file a complaint. Alternatives should be
available in case the normal formal procedure is inappropriate (for example, when the
person designated to initially receive formal complaints is also the person alleged to be
the harasser). To ensure that all employees are aware of the formal complaint
procedure – including the identity of persons designated to receive formal complaints,
documentation required to establish a formal complaint, and appropriate time lines – it
should be included as an integral part of the employer’s sexual harassment policy.
Indeed, the existence of an effective complaint process reduces the likelihood that a
harassment victim will quit the employment relationship or, worse, seek legal remedies
(Hogler et al., 2002).

Advice and assistance. The success of both informal and formal procedures for
resolving sexual harassment complaints is dependent upon the availability of a person
within the organization charged with the responsibility for dispensing advice and
providing assistance to aggrieved employees. Recommendation 92/131/EEC
anticipates that this person will likely come from within the personnel or equal
opportunities department. Alternatively, the designated counselor may be a member of
a recognized support group or a member of the employee’s trade union. Whoever is
charged with this important responsibility must be intimately familiar with the
organization’s policies and complaint procedures and should receive formal training in
conflict resolution. Appropriate resources should be budgeted for this position, and the
person must be protected from retaliation for counseling or assisting anyone seeking
advice or filing a complaint.

Investigations. Undoubtedly, the key to successfully resolving formal complaints of
sexual harassment is the investigation process. The decision to investigate claims of
harassment, and to do so reasonably, can no longer be viewed as simply a matter of
managerial discretion. These investigations can be done in-house or can be outsourced
to qualified professionals (see, e.g. Morgan et al., 2001). Failing to investigate
competently, however, may very well be regarded as strong evidence that the employer
approves, albeit implicitly, of the harassment, in direct contravention of the directive.

Effective investigations must be impartial, thorough, and prompt. For the
investigator to make determinations regarding the credibility of the parties and
witnesses, the investigator must maintain unquestioned impartiality. Thorough
investigations involve interviewing all relevant parties (i.e. the complainant, the
alleged harasser, and relevant witnesses). The focus of the inquiry relates exclusively
to the question of whether the alleged harasser engaged in prohibited behavior, and
investigators must distinguish statements of fact from mere conjecture. The duration
of the inquiry should be as short as possible, reasonable investigations normally can be
completed within a few days to a couple of weeks.

Discipline. The firm’s policy prohibiting sexual harassment and protecting the
dignity of employees at work should first clearly identify behavior that is
unacceptable, and then specify the range of sanctions that will be imposed on
employees engaging in such unacceptable behavior. The policy should prohibit
retaliation against, and victimization of, persons bringing complaints of sexual
harassment (or persons advising or otherwise assisting complainants). If a complaint is
valid, management must take whatever action is appropriate to ensure that the offending behavior ceases. When an allegation is found to be unsubstantiated, however, it may be prudent for management to reassign or transfer one of the parties to the complaint in the interests of reestablishing workplace harmony, especially if either party expresses a desire for such a transfer.

Conclusion

By adopting directive 2002/73/EC, the European Union has taken a major step toward harmonizing public policy aimed at reducing sexual harassment in the workplace. We have argued that, as member states pass implementing national legislation, they will likely confront at least two major issues that are vitally important to both employers and employees:

1. The need to more clearly operationalize the definition of “sexual harassment” so as to eliminate, as much as possible, the ambiguities inherent in determining the boundaries between acceptable and prohibited behavior.

2. The desirability of protecting employers from liability by providing them with a defense against claims of sexual harassment under certain circumstances.

The evolution of sexual harassment law in the USA is characterized by incremental, sometimes contradictory, and occasionally contentious resolutions to definitional issues, as well as by continuing debate over the extent to which employers should be allowed a defense against liability for damages. While we make reference to approaches taken in the USA for resolving these dilemmas, we do not necessarily advocate that individual member states imitate US law. On the contrary, individual member states will find it desirable to chart their own legislative path given existing social and cultural differences within the European Union. What we do advocate, however, is that each member state give considerable attention to the benefits – for employers and employees alike – of more clearly defining the boundaries between acceptable and unacceptable workplace behavior. We also encourage member states to give serious consideration to providing employers with an economically efficient incentive – an affirmative defense – for embracing the principles of workplace equality embodied in the directive. As member states undertake initiatives leading to an harassment-free environment, we look forward to observing how they will implement the recently amended equal treatment directive.

References


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Further reading
