The New EU Directive Prohibiting Sexual Harassment in the Workplace:

Reflections From Across the Pond

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INTRODUCTION


The Directive is a natural outcome of a series of policy initiatives over the last few decades aimed at realizing a fundamental principle underlying the European Union—the equal participation of men and women in the labor market. Sexual harassment in the workplace did not receive serious attention by EU policymakers until the mid-1980s, when Rubenstein (1987) published the results of his study made on behalf of the European Commission. Finding that sexual harassment was a widespread problem, the Commission undertook a number of initiatives in the early 1990s to correct the problem, but progress was painfully slow and results minimal. In a more recent manuscript prepared by the European Commission (1998), evidence suggests that between 40 and 50 per cent of women, and 10 per cent of men, have experienced sexual harassment at some point in their working lives.

Five important tasks are accomplished by the Directive: (1) sexual harassment is defined as a form of sex discrimination; (2) Member States are required to erect national bodies for the enforcement of equal opportunities; (3) excluding women from certain jobs on the basis of their gender requires justification; (4) certain special protections are to be afforded women during and after pregnancy; and (5) it implements Article 141, paragraph 4, of the Treaty of Amsterdam.
calling on Member States to adopt measures promoting equality of men and women, and to report on the positive actions taken to implement this principle.

The European Union’s most recent efforts to eliminate sexual harassment in the workplace closely parallels earlier, similar developments in the United States. From the perspective of interested observers from across the pond, this paper first examines what the authors believe to be the major components of the Directive. Next, it provides reflective commentary on significant similarities with U.S. law. Third, we will offer informed speculation about how employers may wish to influence unresolved issues on the public policy agenda. The paper concludes with practical suggestions for employers who will inevitably implement each nation’s public policy mandates consistent with the Directive.

THE PRINCIPAL ELEMENTS OF THE DIRECTIVE

The Directive contains a number of key elements, including: (1) the nature of workplace harassment; (2) reference to preventative measures on sexual harassment; (3) the establishment of judicial and/or administrative procedures for enforcement purposes; (4) compensation for victims of discrimination and harassment; and (5) the establishment of national agencies charged with promoting equal employment opportunities.

The Nature of Workplace Harassment

The Directive adds to Article 2(2) definitions of “harassment” and “sexual harassment.” Harassment and sexual harassment are recognized as a form of discrimination on the grounds of sex and thus are contrary to the principle of equal treatment between men and women.

“Harassment” is defined to be “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.” The
Directive also establishes that 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)). Moreover, instructions to discriminate against persons on the basis of gender constitute
discrimination (Article 2(4)).

Preventative Measures

Article 2(5) now 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.” It is interesting that the Directive merely
“encourages” such activities on the part of employers—it does not legally require individual
employers to take preventative actions.

The Directive is not entirely silent on how harassment and sexual harassment might be
prevented. For example, the Directive calls for the abolition of any law, regulation, or
administrative provision that would allow (or perhaps even encourage) harassment to exist. It
also allows provisions in existing contracts or collective bargaining agreements that are contrary
to the principle of equal treatment to be amended, or declared null and void. The elimination of
laws, regulations, policies, or provisions that could be viewed as “harassment-facilitating” is
itself an important preventative measure.

Judicial and Administrative Enforcement Procedures
The Directive obliges Member States to ensure that judicial and/or administrative procedures (including, if appropriate, conciliation procedures) are available to all persons who consider themselves wronged or victimized by discrimination in the workplace, even after the employment relationship has ended. Additionally, certain assurances are provided to associations, organizations, or other legal entities having legitimate interests in ensuring equal treatment compliance. With the prior approval of the complainants, these entities may engage, either on behalf or in support of the complainant, in any judicial and/or administrative procedure provided by the Member States for the enforcement of the obligations under the Directive. The Directive does not address directly the question of the burden of proof in these judicial and administrative procedures. Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, however, applies to Council Directive 76/207/EEC and, by inference, to the Directive under consideration here. Article 4 of Directive 97/80/EC states that “it shall be for the respondent 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.

Compensation and Reparations

When unlawful discrimination has been proven, the Directive prohibits limits on the compensation payable to the victim. Article 6(2) now 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.

**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.” 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. These bureaucratic entities are required to be competent at (1) providing independent assistance to victims of discrimination in pursuing their discrimination complaints; (2) conducting independent surveys related to discrimination; and (3) publishing independent reports and making recommendations on discrimination issues.

In accordance with national traditions and practice, Article 8 also requires Member States to 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, they 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.
REFLECTING ON THE EU DIRECTIVE: AN AMERICAN PERSPECTIVE

The Directive invites comparisons with developments across the pond. In this section, we present an overview of sexual harassment law in the United States. Next, we explore the contrasting definitions of sexual harassment, including how the existence of sexual harassment can be established. We conclude by discussing several additional issues raised by important provisions of the Directive.

Sexual Harassment Law in the United States

Sexual harassment law in the United States is primarily the creation of the courts through their interpretation of Title VII of the 1964 Civil Rights Act, which prohibits employer discrimination “against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s...sex....” (42 U.S.C. §2000e-2(a)(1)(1994)). Title VII initially applied only to those situations where an employer was denying (i.e., discriminating against) an applicant or employee a term or condition of employment. Following the publication of MacKinnon’s (1979) treatise, the Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing the provisions of Title VII, suggested expanding the concept of discrimination to include sexual harassment in guidelines to employers published in 1980. Lower level courts then began to recognize sexual harassment as a legitimate ground for discrimination by acknowledging two types of harassment: *quid pro quo* (where an employer attempts to trade favorable treatment for sexual favors), and hostile environment (where a hostile work situation is created for workers because of sexual conduct) (Evans, 1999).

The United States Supreme Court first embraced the sexual harassment theory in the landmark 1986 decision of *Meritor Savings Bank v. Vinson* (hereafter “*Meritor*”) which clarified
the elements an aggrieved plaintiff must show in order to recover money damages from an employer. The Court further refined the Meritor standard on two occasions, first in Harris v. Forklift Systems, Inc. (1993), and again in Oncale v. Sundowner Offshore Services (1998). While these three cases form the basic structure for sexual harassment law in the United States today, two additional pronouncements from the nation’s highest court are also relevant.

In the summer of 1998, the Supreme Court handed down decisions in two cases that described more precisely the exact conditions under which an employer would be liable for sexual harassment conducted by a supervisor. Read together, Burlington Industries, Inc. v. Ellerth (1998) and Faragher v. City of Boca Raton (1998) adopted the legal theory that employers are vicariously liable for sexual harassment committed by a supervisor. But this determination does not end the analysis. The court stated that an employer might assert an affirmative defense forestalling the imposition of liability if the employer has “exercised reasonable care to prevent and correct promptly any sexually harassing behavior” (Faragher: 807). This defense, however, is available only if the supervisor’s action does not culminate in a tangible employment action (e.g., discharge, demotion).

With more than twenty years of case law serving to mold the conceptual structure of sexual harassment law, employers and employees in the United States are better able to gauge what behaviors will violate federal law and what actions will create a defense for the employer. The extant situation in the United States is in marked contrast to the challenges facing European Union members as they embark on crafting responsive legislation and, later, as member courts and the European Court of Justice attempts to interpret legislative intent in light of the guidance provided by language in the Directive. Given the degree that many critical dimensions of sexual harassment law have been honed in the United States during the past two decades, the
membership of legislative, executive, and judicial entities in all Member States and within the European Union’s hierarchy should consider approaches currently adopted “across the pond.” The remaining sections are intended to assist policymakers in this critical endeavor.

**Establishing Sexual Harassment: Contrasting Definitions**

The essence of the European Union’s depiction of sexual harassment is found in Article 2(2) of the Directive, which declares that sexual harassment exists “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.” In somewhat different language, the United States EEOC 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). Three areas of comparison are particularly insightful.

“**Sexual.**” Under United States law, there was some degree of confusion for years as to whether conduct by an alleged harasser qualified as “sexual harassment” if the statements or actions were gender-based but lacked a specific sexual connotation. The United States Supreme Court clarified this issue in *Oncale* by noting, “harassing conduct need not be motivated by sexual desire” and that illegal harassment can occur, for example, where “the harasser is motivated by general hostility to the presence of women in the workplace” (*Oncale*: 80). Therefore, in the United States no distinction is made today between gender-based and the more individually-oriented, amorous type of sexual harassment.
Interestingly, the Directive continues to separate the two concepts. Article 2(2) is amended to define “harassment”, in part, as “unwanted conduct related to the sex of a person.” This would fall within the old classification of “gender-based” sexual harassment in the United States. A companion paragraph defines “sexual harassment,” in part, as “conduct of a sexual nature.” What remains unclear, however, is the degree of significance that should be attached to the Directive defining “harassment” to include only “unwanted conduct” while the provision relating to “sexual harassment” covers “unwanted verbal, non-verbal, or physical conduct.” Also, employing the term “harassment” without an adjective may lead to misconceptions about the breadth of behaviors prohibited. Member States may wish to clarify these definitions.

“Unwanted.” In the first United States Supreme Court decision to address sexual harassment in the workplace, the court in *Meritor* declared that a claim for harassment is actionable even where the employee “voluntarily” agreed to a supervisor’s demands because the proper inquiry is whether the behavior is unwelcomed. In *Meritor*, a supervisor allegedly asked an employee under his control to accompany him to a motel forty to fifty times for sexual favors. The Supreme Court ruled unanimously that the employee’s consent to such liaisons was not germane. Rather, the relevant inquiry was whether the victim welcomed the sexual conduct.

Article 2(2) of the Directive appears congruent with U.S. law by employing the word “unwanted.” Whether “unwelcomed” or “unwanted,” the crux of the determination is if the employee had a meaningful choice in being exposed to objectionable behavior. The employee’s desire not to be treated in a particular manner is communicated effectively by both words. The similarity of words employed, however, does not end the inquiry. For example, are manifestations of “unwelcomeness” always necessary? Federal courts have determined that where the supervisor is accused of the harassment, the aggrieved employee may not have to
affirmatively express that particular conduct is unwelcome because of the power differential existing between the two. Silence by the employee may be an indication that the conduct is welcome, but it might just as easily be evidence of unwelcomeness. Or, should an employee’s provocative dress or participation in sexual behavior be used as an indicator of whether attention from a supervisor is welcome? Some courts in the United States have ruled that such evidence might be relevant, but not all agree. As Member States respond to the Directive, these are among the many issues relating to the term “unwanted” that will surface.

“Hostile environment.” U.S. courts adopt a common-sense approach to determining when activities in the workplace constitute actionable harassment. While a victim of sexual harassment need not claim psychological damage to prove a claim, the court in *Harris* ruled that the working environment must take on characteristics of hostility. Moreover, whether a behavior is sufficiently severe or pervasive to alter the conditions of employment requires an examination of the “totality of the circumstances.” The later decision in *Oncale* stated that the presence of sexual harassment could only be determined by considering the workplace’s social or cultural context. For example, “a professional [American] 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*: 81-82). Accordingly, the Supreme Court believes “that 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: 450).

In implementing the Directive, Member States should provide employers, employees, courts, and others with guidance on precisely what workplace conduct is unacceptable. Using the
“totality of the circumstances” test would allow for a dose of reality to be incorporated into the legal system and prevent sexual harassment law from turning into a type of civility code. Unfortunately, phrases such as “totality of the circumstances” and “social context” lend themselves to ambiguous interpretations. For example, does the fact that conduct took place in a private or public setting matter? What about social sensibilities relating to one’s race, sex, or religion? Finally, does the social relationship between the individual claiming harassment and the alleged harasser—perhaps involving a past intimacy—have relevance?

“Social context” might well be relevant in determining the existence of a hostile work environment as a court assesses the coarseness of language and degree of juvenile behavior present generally in the workplace. In the United States, lower courts have found that foul language, sexual banter, and the like are common in certain “blue-collar” work environments. But it must be remembered that a judgment call is inherent in the sexual harassment debate: drivers of social policy will determine the boundaries of acceptable and unacceptable behavior in the workplace. The “blue-collar” versus “white-collar” distinction might resonate well with government and business leaders concerned about practical, realistic aspects of harassment law. But beyond this economic distinction in the workplace exists the sociopolitical and cultural differences among the population of the Member States (see, e.g., Timmerman and Bajema, 1999). Thus, in defining “hostile environment,” cultural differences viewed through the “social context” lens could also influence European Court of Justice decisions.

**Prevention, Retaliation, Liability for Damages, and Administrative Procedures**

A number of other comparisons can be made between U.S. sexual harassment law and the provisions of the Directive, particularly in the areas of prevention, retaliation, liability for damages, and administrative procedures.
Prevention. As mentioned earlier, the Directive does not legally require individual employers to take preventative actions, but merely encourages such actions. Unfortunately, it does not provide specific advice to Member States on just how such encouragement should manifest itself. The European Parliament and the Council seem content to let individual Member States develop their own forms of implementing legislation or regulations with respect to preventing harassment and sexual harassment in the workplace, and this position appears consistent with the overall purpose of the Directive itself.

Looking across the pond at how the United States has addressed prevention of sexual harassment, as early as 1980 the EEOC issued guidelines encouraging employers to thwart sexual harassment by adopting effective preventive programs. Following the *Burlington Industries* and *Faragher* decisions, the EEOC issued guidance on the minimum contents of an effective prevention program (EEOC, 1998). According to the revised guidelines, employers should have an explicit written policy against sexual harassment that is clearly and regularly communicated to employees. Simply having a policy against sex harassment, however, is not considered an effective prevention program; the employer must actually implement the policy. Adopted procedures for resolving complaints should be designed to encourage victims of harassment to come forward. If the employee’s supervisor is the alleged harasser, the employee should be allowed to bypass the supervisor in complaining about the behavior. In all cases, confidentiality should be protected to the extent possible, and effective sanctions and remedies, including protection of victims and witnesses against retaliation, must be provided. The EEOC suggests that employers educate both supervisory and non-supervisory employees on the adopted policy against sexual harassment, on the procedures for resolving complaints, and on the sanctions for violating the policy.
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. This Code of Practice and the EEOC guidelines both suggest employers adopt similar actions. Each encourages the use of clearly communicated policies, effective enforcement procedures, and training for all employees. What is uncertain, however, is whether compliance with the Code of Practice in the European Union, or with the EEOC guidelines in the United States, will offer any tangible benefits to the employer.

**Retaliation.** Article 7 of the Directive requires Member States to adopt measures to prevent “dismissal or other adverse treatment by the employer as a reaction to a complaint . . . aimed at enforcing compliance with the principle of equal treatment.” Without some type of protection, employees might be reluctant to come forward with their complaints about sexually harassing behavior.

In the United States, retaliation is also seen as a potential problem. The EEOC’s *Compliance Manual* (1998) suggests that there are three elements to a retaliation claim. A person must show that he or she had opposed an unlawful activity under Title VII, that he or she suffered an adverse employment action, and that this adverse employment action was suffered as a result of his or her opposition to the discriminatory behavior. Upon proving these three elements, a person might be entitled to appropriate remedies, which could include temporary or preliminary relief in addition to compensatory and punitive damages.

**Liability for Damages.** To what extent are employers liable for workplace sexual harassment? And, does it matter whether a supervisor or a co-worker committed the sexually harassing behavior? Is the employer to be strictly liable for all workplace sexual harassment,
or should provisions allow employers to limit their liability? These questions need to be addressed by Member States.

The Directive does not require Member States to make employers strictly liable for sexual harassment in the employer’s workplace, nor does it prohibit Member States from imposing such liability. By not limiting employers to liability for only the behavior of supervisors, it appears that the Directive makes employers liable for the conduct of both supervisors and co-workers. One possible indication of the Directive’s intent might be the requirement that the compensation or reparation provided to a victim of sexual harassment is to be both dissuasive and proportionate to the damages suffered.

The threat of economic penalties for engaging in harassment can be an effective deterrent against such discriminatory behavior. Reflecting past rulings by the European Court of Justice, Article 6 of the Directive requires Member States to introduce into their national legal systems measures to ensure real and effective compensation or reparation for losses sustained as a result of discrimination. It further implements past European Court of Justice rulings (e.g., Draehmpaehl, 1997; Marshall, 1993) by restricting the use of any upper limits on discrimination damage awards except where the damages are suffered as a result of the employer not taking into consideration an applicant’s job application. The desire to avoid economic loss may provide incentives for employers to institute procedures for eliminating workplace behavior that would expose employers to such loss.

In the United States, Title VII provides that victims of sexual harassment be made whole. Title VII was amended in 1991 to permit compensatory damages (pain and suffering), and where the discrimination was intentional, punitive damages. Congress placed limits on the compensatory damages depending on the size of the employer. The upper limit is $300,000 for
employers with more than 500 employees. While these limits apply to Title VII, they do not apply to claims brought under the civil rights statutes of individual states, and awards there can run into the millions of dollars.

**Administrative Agencies.** Article 8 of the Directive requires that Member States create the bureaucratic infrastructure necessary for promoting, analyzing, monitoring, and supporting the equal treatment of all persons. 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. Examples for such an administrative agency already exist elsewhere. In the United Kingdom, 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. In the United States, these functions are undertaken by the EEOC.

**REFLECTIONS ON SHAPING THE 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 legislation, regulations, and administrative provisions and infrastructure that will allow each Member State to comply with the Directive. This presents both opportunities and challenges for employers who must eventually implement the equal treatment principle. Employers will first have the opportunity to influence public policy by engaging in the inevitable debate that will ensue within each Member State over the nature of the national legislation implementing the Directive. The challenges will arise after such national legislation is passed.
We anticipate that the public policy debate within each Member State will be affected differently according to the degree to which antidiscrimination legislation already exists. In Member States where antidiscrimination legislation has evolved in ways consistent with the Directive and where the regulatory bureaucracy is already established (e.g., the United Kingdom), 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.

Possible Public Policy Initiatives

While there may be general consensus among the various social partners and other interested stakeholders regarding the overall objective of eliminating discrimination in the workplace, considerable room for political debate and compromise may exist over how each Member State can most effectively and efficiently achieve the desired social outcomes. Employers will want to be heard on at least four important public policy areas: (1) the clarification of the *prima facie* elements of harassment and sexual harassment, including more specific definitions of such terms and phrases as “unwanted,” “violating the dignity,” and “intimidating, hostile, degrading, humiliating or offensive;” (2) the creation of an affirmative defense for employers; (3) the establishment of an official arbitration process for discrimination claims; and (4) the delineation of the powers, duties, and responsibilities of the “equal treatment” agencies mandated by the Directive.
Clarification of the elements of harassment and 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. Two phrases are common to the definitions of harassment and sexual harassment found in the Directive: (1) “the purpose or effect of violating the dignity of a person,” and (2) “creating an intimidating, hostile, degrading, humiliating or offensive environment.” We anticipate that employers will want clarification of these words and phrases either in the implementing statutes or in the regulations promulgated by the equal treatment agencies. For example, when is a person’s dignity violated? Is such a determination based on a “reasonable person” standard, whereby an alleged harasser should have known, as a reasonable person, that the alleged harassing behavior would have the effect of violating the dignity of another person? Or is such a determination based on a “reasonable victim” standard, whereby any person receiving the alleged harassing behavior could reasonably be assumed to have suffered a violation of one’s dignity (cf., e.g., Kubal, 1999)? Similarly, what constitutes an intimidating, hostile, degrading, humiliating, or offensive environment? How are these words to be defined, and what standards are to be applied in defining them? Definitions of these terms are critical for establishing a *prima facie* case of harassment and sexual harassment, and for defending against claims of discrimination.

Legislation providing for an affirmative defense. In the Directive, Member States are not required to include employer defenses within their national implementing legislation. It is possible to argue, however, that Article 8b(3) provides a basis for Member States to include employer defenses when it “encourage[s] employers to promote equal treatment for men and women in the workplace in a planned and systematic way.” An excellent method of encouraging
employers to enact policies and procedures prohibiting sexual harassment would be to give employers an affirmative defense.

Council Directive 97/80/EC clearly places the burden of proof on employers to prove that there has been no breach of the equal treatment principle. In essence, the employer is presumed to have violated the principle unless it can prove otherwise. To level the playing field in a way allowable under the Directive (and Directive 97/80/EC), employers should lobby for an “affirmative defense” within the national implementing legislation.

Following the scheme in *Burlington Industries* and *Faragher*, Member States could fashion statutes creating an affirmative defense if employers exercised “reasonable care” in preventing sexual harassment and, where sexual harassment is alleged to have occurred, promptly corrected the harassment. An affirmative defense of this nature would necessitate one additional element: that the employee alleging a breach of the equal treatment principle unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer. Such a requirement correctly allocates responsibility for preventing and correcting harassment to both the employer and the employee. This is consistent with Commission 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.

**Legislation establishing an official arbitration process.** If the European Union’s experience is anything like that of the United States, the prohibition of workplace sexual harassment will likely lead to a significant increase in the number of claims requiring resolution within the legal system—inevitably costly for all parties. To minimize the risks and financial costs of trial, employers may wish to lobby for the creation of a system of binding arbitration.
Whether such arbitration is allowable in employment cases under extant European Union law is debatable (see, e.g., Sternlight, 2002). In the United States, however, the Supreme Court has ruled that virtually all private employers can require applicants to accept dispute resolution via arbitration as a condition of employment (Circuit City, 2001). The arbitrator or arbitration panel is capable of enforcing all federal protections against discrimination. For the European Union, Directive 97/80/EC acknowledges the possibility that such cases might be brought “before a court or other competent authority” (emphasis added), and a system of arbitration could serve as such an authority. Similarly, Article 6 of the Directive calls for “judicial and/or administrative procedures, including . . . conciliation procedures” (emphasis added). A system of arbitration would have the effect of lessening the anticipated increased pressure on the respective national court systems, and would facilitate efforts to resolve discrimination claims (and other employment disputes) quickly and reasonably, but at a lesser cost than litigation.

Delineation of the role and powers of equal treatment agencies. The Directive mandates each Member State create a bureaucratic mechanism for advancing the equal treatment of all persons, but the duties and responsibilities are only broadly defined. As each Member State enacts harmonizing legislation implementing this part of the Directive, employers may wish to be active in lobbying for clarity regarding the precise powers of these agencies.

In summary, until passage of enabling and harmonizing legislation in each Member State, employers should take an active role in the public policy process. Moreover, they must anticipate being called upon not only to take measures to prevent harassment and sexual harassment from occurring, but also to establish procedures for taking remedial actions once harassment has occurred (or has been alleged to have occurred). It is these preventative and remedial measures to which we now turn.
REFLECTIONS ON THE RESPONSIBILITIES OF EMPLOYERS

The employer will be the European Union’s most important and direct guarantor of the principle of equal treatment between men and women in the workplace. In this section we offer employers some practical suggestions for both preventing sexual harassment and undertaking remedial measures once sexual harassment is alleged to have occurred.

Suggested Preventative Measures

In anticipating what measures employers might be encouraged to take toward eliminating sexual harassment in the workplace, 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. Curiously, the Directive makes no mention of this Recommendation. Though legally non-binding on Member States, the code of practice offers sound advice consistent with human resource management “best practices.”

The prevention of workplace harassment rests on four critical employer actions: (1) developing unequivocal policy statements; (2) communicating the policy to employees; (3) assigning responsibility at all levels within the organization; and (4) providing training programs for all employees, including managers and supervisors. In our opinion, Recommendation 92/131/EEC is an essential companion document to the Directive if employers are to be encouraged to take measures to prevent workplace harassment. Such encouragement should begin with Member States mandating that employers operationalize the code of practice within their organizations.

The most profound and effective measure for preventing sexual harassment is 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. Such a policy statement should include definitions of harassment and sexual harassment, examples of
inappropriate behavior, and a statement of rights and duties for managers, supervisors, and employees alike. Managers and supervisors should be charged with the responsibility for implementing the policy and for taking actions to ensure compliance. Employees likewise would be charged with the duty of complying with the policy and its provisions. Such a policy would be integral to establishing an affirmative defense for employers (should the implementing legislation adopted by each Member State include provisions for such an affirmative defense).

The policy adopted by the employer would inform employees of their right to report instances of sexual harassment, and it would provide and explain the procedure employees should follow in order to lodge a complaint or seek assistance with the process. Employees should be assured that the employer will take such complaints seriously and that they will address the complaints in a timely and (to the extent possible) confidential manner. The policy must also protect employees filing a complaint from retaliation. The range of sanctions and disciplinary measures to be taken against employees should effectively deter offending behavior and be clearly specified in the policy.

To increase the likelihood that policy statements will be a deterrent for sexual harassment in the workplace, the provisions of the policy must be effectively communicated to all employees at every level of the firm’s hierarchy. Copies of the policy should be given to every employee, and periodically managers and supervisors should reinforce the employer’s commitment to a harassment-free workplace by holding meetings with employees to review the policy’s essential provisions, and to 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.
On-going training—for managers, supervisors, and employees alike—is an essential element in the employer’s arsenal of preventative measures. These training sessions should provide a form of continuing education on conditions that contribute to a harassment-free working environment, and should familiarize or reacquaint each employee with their respective rights and responsibilities under the policy. Such training should be undertaken at the time of hiring and throughout an employee’s tenure. Finally, those employees assigned an official role in administering the policy’s complaint procedures should receive specialized training.

Suggested Remedial Measures

Employers will prefer to prevent sexual harassment and other forms of workplace discrimination from occurring. 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). 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.

Once again, the wheel need not be reinvented—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. The procedural mechanisms would include several important facets of remediation: (1) an informal inquiry and complaint process, (2) a formal complaint process, (3) the availability of advice and assistance for employees, (4) an investigatory process, and (5) a system of disciplinary sanctions.

Informal inquiries and complaints. Most employees probably prefer to resolve problems arising from instances of workplace discrimination in an informal way—usually victims of
discrimination, and especially victims of sexual harassment, would be content simply to have the offending behavior cease. Employers could encourage employees to resolve instances of harassment (or alleged 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 might 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, Frame and Thornton, 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 of organizations possessing such administrative units. Alternatively, the designated counselor may be a member of the employee’s trade union or a member of a women’s support group. Whomever is charged with this important responsibility must receive formal training in conflict resolution, and must be intimately familiar with the organization’s policies and complaint procedures. An appropriate level of resources must be budgeted for this position, and the person must be protected from retaliation for counseling or assisting anyone seeking advice or filing a sexual harassment complaint.

**Investigations.** Without question, 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 (see, e.g., Morgan, Gomes, and Owens, 2001). Indeed, failing to investigate competently 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 should exhibit three attributes: (1) thoroughness, (2) impartiality, and (3) promptness. Thorough investigations involve interviewing 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. Investigators must distinguish statements of fact from mere conjecture. Moreover, for the investigator to make determinations regarding the credibility of the parties and witnesses, the investigator must maintain unquestioned impartiality. The duration of the inquiry should be as short as possible, and 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 clearly (1) identify behavior that is unacceptable, and (2) specify the range of sanctions that are appropriate for employees who engage 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 harassment ceases. When an allegation is found to be unsubstantiated, 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**

With the approval of the Directive, the European Union has taken a major step toward harmonizing public policy aimed at reducing sexual harassment in the workplace. As Member States pass implementing national legislation, employers throughout Europe will enjoy new opportunities for advancing the principle of equality between men and women. In pursuing these
opportunities, however, employers inevitably will face substantial challenges to accomplishing this social objective. The likely addition of another ten Member States by 2004 simply multiplies the opportunities and challenges for employers throughout the European Union.

Selected References


Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§2000(e) et seq.