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Sexual harassment law in employment: An international perspective

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Introduction

This article [1] describes and compares the law applicable to sexual harassment at work in 23 industrialized countries.[2] It shows how different legal approaches have been adopted to combat sexual harassment in the countries surveyed, and how this diversity reflects differences both of legal traditions in general, and of attitudes to the legal classification of sexual harassment. Some governments have adopted special laws to combat sexual harassment, while others have preferred to rely on more general laws.

Sexual harassment law in its modern sense first made its appearance in the United States in the second half of the 1970s. According to one commentator, the term "sexual harassment" was not even used in the public media until 1975.[3] Laws prohibiting sexual harassment were subsequently adopted in a number of other industrialized countries in the 1980s and 1990s. At least three factors contributed to the growth of interest in the question.

The first factor was the advance of the women's movement politically in industrialized countries. The adoption of equal opportunity laws, and greater

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[1] The material for this article is drawn primarily, but not exclusively, from the author's comparative analysis of sexual harassment law in 23 industrialized countries which appeared in *Conditions of Work Digest: Combating sexual harassment at work* (Geneva, ILO), Vol. 11, 1/1992. The *Digest* was prepared under the ILO's interdepartmental project on equality for women in employment. Citations of laws or court cases not appearing in the text of the present article can be found in this more comprehensive publication with the exception of labour laws on sexual harassment which were adopted in Belgium and France subsequent to the *Digest*'s preparation. See Royal Order organizing the protection of workers against sexual harassment in the workplace, 18 September 1992 (*Moniteur Belge*, No. 197, 7 Oct. 1992, pp. 21505-21506); Law No. 92-1179 of 2 November 1992 relative to the abuse of authority in sexual matters in labour relations and modifying the Labour Code and the Code of Penal Procedure (*Journal Officiel de la République française*, No. 257, 4 Nov. 1992, pp. 15255-15256).

[2] The countries included in the survey are Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, United States.

[3] C. MacKinnon: *Sexual harassment of working women. A case of sex discrimination* (New Haven, Yale University Press, 1979), p. 250, n. 13.

attention by employers to women's issues generally, encouraged women to speak out against sexual harassment more forcefully than before. The increased awareness of the problem can also be traced to the commissioning of a large number of studies of its extent and seriousness; to activities by trade unions and women's groups which served to publicize the nature of the phenomenon and its consequences; and to a work environment which made complaints by individual victims of sexual harassment more acceptable.

The second factor was the entry of more women into the workplace. Their greater participation in the labour force led to more reported incidents of harassment and increased demands for relief.[4] The harassment took two principal forms. The first involved the demand that sexual favours be granted as a condition of being hired, of keeping a job, or of being promoted or transferred. The second involved subjecting women to either verbal or physical abuse of a sexual nature, with the intent to embarrass or humiliate them. This type of harassment was particularly prevalent in what had previously been male-dominated occupations and it was calculated to discourage women from entering or remaining in them: [5] it was directed, for example, against women entering skilled blue-collar jobs, which had been bastions of male employment and typically better paid than traditional women's work. Such treatment conveyed two messages. First, women were valued in the workplace primarily for their physical attractiveness and femininity, while their value as productive workers was secondary. The other message was that women should not try to compete with men, particularly in the more highly paid, traditional male preserves, but should confine themselves to lower-paid, conventional women's work.

The third factor was the initial judicial decisions by American federal courts in the latter part of the 1970s which recognized sexual harassment as a specific type of conduct prohibited by the law.[6] These decisions introduced the notion that relationships in the workplace which have a sexual characteristic could place on the employer certain duties and obligations. Sexual harassment was no longer simply a personal problem between the individuals concerned.

It should be remarked that sexual harassment presents novel questions for employment law. It is a common occurrence for the factory or office to be a social meeting place and for romances to result from such encounters.

[4] See M. Vhay: "The harms of asking: Towards a comprehensive treatment of sexual harassment", in *University of Chicago Law Review*, Vol. 55, 1988, p. 331.

[5] For an account of how sexual harassment has been used to discourage women from working in male-dominated workplaces, see V. Schultz: "Telling stories about women and work: Judicial interpretations of sex segregation in the workplace in Title VII cases raising the lack of interest argument", in *Harvard Law Review* (Cambridge, Massachusetts), Vol. 103, 1990, pp. 1749 and 1832-1839.

[6] As will be seen below, the American federal courts after considerable hesitation found that sexual harassment was a violation of the Title VII of the Civil Rights Act of 1964, which forbids sex discrimination in employment. See 42 United States Code, section 2000e et seq. This equal opportunity statute, however, makes no reference to sexual harassment.

However, where to draw the line between acceptable flirting and unwelcome, offensive conduct is not always obvious. The conduct itself may not be inherently offensive for many types of social interaction. Indeed, in certain circumstances social invitations or flattering comments may even be desired by one person from another in a workplace setting. Therefore, the real question is not whether the conduct is offensive, but whether it is welcome from a given individual. This is in contrast to other types of harassment based on racial, ethnic or religious characteristics where there is usually little difficulty in determining whether conduct constitutes harassment because the conduct by its very nature is offensive. As one judge noted in a sexual harassment case, "We are not here concerned with racial epithets ... which serve no one's interest, but with social patterns that are to some extent normal and expectable. It is the abuse of the practice, rather than the practice itself, that arouses alarm." [7]

1. Studies indicating the extent and consequences of sexual harassment

Numerous studies have been conducted to examine the extent of sexual harassment at work.[8] They have typically found that sexual harassment takes place on a larger scale than is generally acknowledged, and that the consequences to the victims can be quite dramatic and severe, in terms of both psychological stress and loss of tangible job benefits.

Research findings can, it is true, differ wildly. For example, in a study conducted by *Redbook* magazine in the United States, 88 per cent of 9,000 women respondents indicated that they had experienced sexual harassment,[9] whereas in a French study the corresponding figure was only 10 per cent. Moreover, in the same French study, 48 per cent of the women thought that if a woman seeking a promotion was asked by her supervisor to go away with him for the weekend, this should not be considered sexual harassment. Perhaps more striking, if a female job candidate was asked by the employer whether she would be ready to undress before him, 20 per cent of the women indicated that this also would not be sexual harassment.[10]

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[7] Barnes *v.* Costle, 561 F.2d 983, 15 FEP Cases 345 (D.C. Cir. 1977).

[8] Details of these studies are given in *Conditions of Work Digest*, op. cit., pp. 67-173 (under "General") and pp. 286-289.

[9] This study is cited in B. Lindemann and D. Kadue: *Sexual harassment in employment law* (Washington, DC, Bureau of National Affairs, 1992), p. 4, n. 12. Variations can be considerable even within the same country. Another comprehensive study by the United States Merit Systems Protection Board of 23,000 federal employees found that 42 per cent of women had experienced sexual harassment as defined by the surveyors (ibid., p. 4, n. 14).

[10] The survey was conducted by Ipsos-*Le Point*, using a sample of 1,000 men and women aged 15 or over, and was reported in the French weekly magazine *Le Point* (Paris), No. 1010, 25 Jan. 1992, pp. 63-69.

In other cases, however, there has been a certain consistency in research findings from different countries. The variation in results is no doubt influenced by the conditions under which the data have been gathered, including the way in which questions are phrased, the range of possible answers, the characteristics of those surveyed, and differences in cultural attitudes with respect to what constitutes sexual harassment.

These studies have been undertaken by governments, university researchers, magazines and women's groups. Their sample size has ranged from several thousands to 100 persons or less. In some studies women exclusively were surveyed, while others included men. A few focused on women who had already been victims of sexual harassment in order to identify the typical perpetrators of the harassment and what types of consequences were experienced, while other studies have used a broader sample to determine, inter alia, how frequently sexual harassment occurs.

With the foregoing qualifications, the results of some of these studies are summarized below. Those considered relate only to the sexual harassment of women, although studies in some countries (e.g. Belgium) have found that men too can experience sexual harassment, but in numbers which are less important statistically.

The extent of sexual harassment

In a number of studies sexual harassment was found to have caused between 6 and 8 per cent of the working women surveyed to change their jobs, a significant number of whom were dismissed. These women left their jobs or were dismissed for objecting to or refusing to submit to sexual harassment, which frequently involved requests for sexual favours to keep their jobs or to obtain tangible job benefits (Denmark, Germany, Switzerland).

Sexual harassment involving unwanted touching, pinching, offensive sexual comments and unwelcome requests for sexual intercourse is reported in studies from several countries to have been experienced by between 15 and 40 per cent of women questioned, with psychological stress, anxiety and physical problems frequently reported as the consequences of such harassment (Austria, Denmark, Norway, Spain, United Kingdom, United States).[11] There is evidence that a great deal of sexual harassment goes unreported. According to one study, 60 per cent of those who experience sexual harassment ignore it, believing that complaining will not resolve the problem but instead will cause further economic and psychological harm (United States).[12]

[11] In the United States one court opinion noted that "stress as a result of sexual harassment is recognized as a specific, diagnosable problem by the American Psychiatric Association". Robinson *v.* Jacksonville Shipyards, 760 F.Supp. 1486 (M.D.Fla. 1991).

[12] W. Pollack: "Sexual harassment vs. legal definitions", in *Harvard Women's Law Journal* (Cambridge, Massachusetts), Vol. 13, 1990, p. 35.

Persons who most commonly engage in sexual harassment

Nearly a quarter (23.5 per cent) of the women respondents in a Japanese survey indicated that they had been sexually harassed by their boss; 14 per cent by someone else in a position of authority; 18.5 per cent by someone with longer experience in the job area; 15.8 per cent by a colleague; 4.4 per cent by a customer; and 4.2 per cent by a business client. Some reported harassment by more than one of these categories, while others had not been harassed at all.

A more even spread of offenders was found in a French research project. Women who had been harassed on one or more occasions identified the harasser as being the employer himself (29 per cent); a supervisor (26 per cent); a colleague (22 per cent); or a client (27 per cent).

Groups particularly affected by sexual harassment

A Spanish study found that women workers between 26 and 30 years old were more likely to be sexually harassed than other age groups because they combine two important factors: youth and perceived sexual experience. Women who were separated, divorced or widowed were not only more likely to be subjected to sexual harassment, they also suffered the stronger forms of harassment. This study also indicated that the women surveyed were generally ill-informed of their legal rights with respect to sexual harassment. A similar finding was reached in a Belgian study which concluded that single women, divorced or separated women, and women under 30 were the groups most frequently subject to sexual harassment.

In Australia the federal Human Rights and Equal Opportunities Commission found that most sexual harassment claims are from young women employed in small businesses with fewer than 100 employees. In this case, however, 75 per cent of the complaints which proceeded to a public hearing involved women under 20. Over half had difficulties in finding employment prior to their harassment experience, and in most cases it was their first job. Other research indicated that younger women are particularly vulnerable to sexual harassment because of their inexperience and limited knowledge of their rights and remedies. The complainants held mainly clerical and retail jobs.

A French study found that the sectors reporting the highest rates of sexual harassment were commerce and handicrafts (18 per cent of all females employed), industry (17 per cent), the medical and hospital sector (14 per cent) and the bar, restaurant and hotel industry (10 per cent). Women in service occupations were found to be particularly exposed to sexual harassment in an Austrian survey. A research project in the United States found that the women who had the greatest chance of being harassed were single or divorced, had a non-traditional job, or worked in a predominantly male environment or for a male supervisor.

Financial consequences of sexual harassment for employers

It is difficult to quantify how much sexual harassment costs employers. It should be noted, however, that there are three types of cost. The first is that related to consequential absenteeism, low productivity and employee turnover. One study carried out in 1988 of 160 major companies in the United States found that sexual harassment had cost these corporate employers an average of $6.7 million per year in such expenses.

The second type of cost is the award of damages to victims of sexual harassment. In the United States damages of $100,000 or more for a sexual harassment case are not unusual, although smaller amounts are common as well. Most awards in other countries have been for relatively small sums, usually less than $10,000 (Australia, Denmark, Japan, Sweden, Switzerland, United Kingdom), although theoretically the amounts could be larger, particularly under unfair dismissal claims which typically provide for payment of indemnities of six months of salary, and in some countries even more. In the United Kingdom claims of sexual harassment have resulted in higher average monetary damages than other types of sex discrimination complaints, suggesting that, while the actual damages payable are not exorbitant, companies still have an incentive to take such complaints seriously.

The third type of cost to enterprises is the loss of management time devoted to the investigation and defence of claims of sexual harassment, as well as the legal fees associated with such cases. Lost management time and legal expenses can be a substantial burden on employers.

To some extent, all these costs to enterprises are avoidable if a company has an explicit policy against sexual harassment, and takes measures to ensure compliance.

2. Legal approaches to sexual harassment

Legal definitions of sexual harassment

Of the 23 industrialized countries surveyed, only nine have statutes which specifically define or mention the term sexual harassment – Australia (federal level and most states), Belgium, Canada (federal level and a number of provinces), France, Germany (Berlin), New Zealand, Spain, Sweden and the United States (several states). In some countries the term has been recognized and defined by judicial decision – Australia (one state), Canada (federal level and some provinces), Ireland, Switzerland, the United Kingdom and the United States (federal level and some states). In most other countries sexual harassment has been defined by implication as an activity which is in violation of a statute covering a subject other than sexual harassment, such as unfair dismissal, tortious misconduct or criminal behaviour.

The narrow and traditional definition of sexual harassment at work is a demand by a supervisor, usually but not always a man, directed to a subordinate, usually but not always a woman, that the subordinate grant the supervisor sexual favours in order to obtain or keep certain job benefits, be it a wage increase, a promotion, a transfer, or the job itself. This has been termed "quid pro quo" sexual harassment; it involves an abuse of authority by a supervisor or the employer.

The broader definition of sexual harassment is that of unwelcome sexual advances, requests for sexual favours or other verbal, non-verbal or physical conduct of a sexual nature which has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, abusive or offensive working environment. This has been broadly termed "hostile environment" sexual harassment; it can be distinguished from quid pro quo harassment in that the complainant does not have to show a tangible economic loss through being dismissed or forfeiting a promotion or a wage increase.

A limited number of countries have either by statute or court decision endorsed both the quid pro quo theory and the hostile environment theory (Australia, Canada, New Zealand, Switzerland, United Kingdom, United States), while France has adopted only the traditional quid pro quo definition embracing the abuse of authority concept.

Protection against quid pro quo sexual harassment, without the term being explicitly defined as such, exists in a number of countries, principally in continental Europe, which have reprimanded an abuse of authority by supervisors who have made unwelcome demands for sexual favours from subordinates. These cases have been brought principally in the context of unfair dismissal cases where the complainant successfully argued that refusal of unwanted sexual advances by a supervisor is not a valid reason for dismissal (Austria, Denmark, Germany, Greece, Netherlands, Norway, Sweden).

A successful court case in Japan was based on the hostile environment theory, when a quid pro quo issue was not present. Since this has been the only reported sexual harassment case in Japan, there is no assurance that a court would endorse the quid pro quo theory if it was presented in another case. However, it could be inferred that since hostile environment harassment has been forbidden by court decision, and this is the broader type of harassment, quid pro quo harassment would be similarly unlawful.

In virtually all countries which have defined sexual harassment by statute or court decision, the essential element of a complaint of sexual harassment is that the conduct was unwelcome. The question that follows is how to determine if certain sexually oriented conduct is unwelcome.

The formulation typically given by statute or court decision (e.g. in the Canadian provinces of Manitoba, Newfoundland and Ontario) is that sexual harassment refers to actions that an individual knows or ought reasonably to know are unwelcome.

It is clear that some forms of conduct are unwelcome by their nature, e.g. sexist epithets, physical violence or touching of intimate parts of the body. The welcomeness of other conduct, such as a social invitation, is less obvious because the conduct is not inherently offensive and because the reaction can be ambiguous. Therefore anything less than a clear rejection of sexual advances or a clear objection to offensive sexual behaviour will create problems for a potential complainant. Ambiguous conduct, particularly concerning someone with whom the complainant has had a prior relationship, may make a complaint of sexual harassment difficult, if not impossible, to prove because of a lack of persuasive evidence on the issue of unwelcomeness.

Only in Sweden has the question been posed differently. The Swedish statute states that a worker shall not be harassed because he or she has refused sexual advances. Under such a formulation, welcomeness is disposed of as an issue. The complainant must have clearly refused a sexual advance before a claim of harassment can be made.

Another key issue is from whose point of view should the question of welcomeness be viewed: the reasonable man or the reasonable woman? Most courts which have addressed this issue (e.g. Canada, Switzerland, United Kingdom, United States) have favoured the reasonable woman (as opposed to the totally subjective standard of the individual complainant), on the ground that men and women often perceive and appreciate sexual conduct very differently and that the reasonable woman's perception should be used since it is women who suffer principally from sexual harassment.

One issue relevant to the question of definition is whether objectionable conduct must be repeated to be properly regarded as sexual harassment, or whether a single serious act is sufficient. The issue merits some attention because, as noted in French parliamentary debates on the issue and in a court case in the United Kingdom, the term "harassment" in its dictionary sense means repeated action. Because the French legislators wanted even a single serious act to be covered by the penal statute, it was decided that in the French law the words "sexual harassment" should not appear in the text of the statute, but only in the title. Similarly, in a British court case, the judicial opinion noted that although the word "harassment" does mean repeated action in its dictionary sense, the term "sexual harassment" could be interpreted to cover a single incident of a serious nature.[13]

Can rape and violent sexual assault be fairly categorized as sexual harassment? Although there is some disagreement on this issue, the more generally accepted view is that they constitute qualitatively different types of offence, far more dramatic in terms of the violence or threat of violence associated with the act, and also in terms of the consequences to the victim.

[13] Bracebridge Engineering Ltd. *v.* Darby [1990], IRLR 3.

In the French parliamentary debate on the penal law covering sexual harassment, legislators were careful not to use the term "constraint" in the text of the law because this word was used in the French rape law. The legislators did not want sexual harassment to be interpreted by courts as a form of rape, but as a different type of sexual offence.

A number of organizations, including the United Nations and some women's groups,[14] have addressed the issue of sexual harassment as part of an overall effort to combat violence against women.[15] While this does not mean that rape and violent assault come within the formal definition of sexual harassment in its legal sense, it does show that a number of groups see the struggle against sexual harassment as part of a larger movement to prevent all forms of aggression against women. From this viewpoint, sexual harassment could be regarded – as in the French conception – as a lesser form of sexual aggression, and therefore still qualitatively different from rape.

Legal protection

Sexual harassment law is relatively recent. As a legal concept the term had little meaningful application prior to the first sexual harassment cases decided under the American federal sex discrimination law in the second half of the 1970s.[16] The concept seems to have been subsequently adopted by other industrialized countries, including Australia, Canada, Japan, New Zealand and parts of western Europe. In many of these countries the words "sexual harassment" only appeared in a formal legal sense in the 1980s or even at the beginning of the 1990s: however, the concept has undergone

[14] For example, in Denmark the Joan-Sostrene (Joan Sisters) is devoted to combating violence against women, such as rape and incest, as well as sexual harassment in employment. In France the Association européenne contre les violences faites aux femmes au travail (AVFT) seeks to eradicate sexual harassment at work as part of its broader mission against all forms of violence against women. With respect to the United Nations, in 1989 the Committee on the Elimination of All Forms of Discrimination against Women, which monitors the implementation of the United Nations Convention on the Elimination of All Forms of Discrimination against Women, expressed concern that violence against women may hamper progress towards the elimination of discrimination, and sexual harassment was discussed in the context of violence against women.

[15] The word "violence" is sometimes used by commentators in a broader sense than simple physical violence. For example, it has been defined by one expert to include language (or more specifically "symbolic" language) that is used to enforce or impose a power relationship. See A. Garcia: *Sexual violence against women: Contribution to a strategy for countering the various forms of such violence in the Council of Europe States* (Strasbourg, European Committee for Equality between Men and Women, 1991), pp. 4-6.

[16] Although sexual harassment was not recognized as a form of sex discrimination by an American federal appeals court until 1977, prior to this time a measure of protection existed at the state level where courts had used common law tort theories to protect women from extreme cases of sexual harassment involving unwelcome physical conduct. Verbal sexual harassment, however, was largely excluded from protection by the state courts since judges were reluctant to intervene in what was considered to be a personal matter between litigants. See Vhay, op. cit., p. 328.

modification, for example as regards the rules of liability and persons potentially liable. It is also sometimes used in a different statutory context from that found in the United States, for example by the adoption of labour or criminal laws explicitly prohibiting sexual harassment rather than through the application of equal opportunity law.

In a number of industrialized countries the term "sexual harassment" still has no precise legal meaning, and behaviour which is assimilated to sexual harassment is prohibited under a variety of equal opportunity, labour, tort and criminal laws which do not specifically address sexual harassment.

In the United States the legal right to protection against harassment was recognized only after a great deal of hesitation. Five of the first seven cases that considered the question found that the sex discrimination statute, which had been adopted in 1964, did not cover sexual harassment.[17] The initial cases concluded that sexual harassment by a male supervisor of a female subordinate was not a form of sex discrimination and reasoned that the conduct complained of reflected a "personal proclivity, peculiarity or mannerism of the supervisor" rather than discrimination based on sex; [18] was based on physical attractiveness, and not on the complainant's sex; [19] and that sexual advances were not employment-related and that the law was not designed to "hold an employer liable for what is essentially the isolated and unauthorized sex misconduct of one employee to another".[20] In denying relief in one case,[21] the court concluded that "this is a controversy underpinned by the subtleties of an inharmonious relationship".

American federal judges were also initially reluctant to apply the sex discrimination law to what was considered a personal problem between employees because they feared that it would lead to a flood of legal actions. As one court opinion put it, "If the plaintiff's view were to prevail, no supervisor could, prudently, attempt to open a social dialogue with any

[17] Note, "Sexual harassment and Title VII: The foundation for the elimination of sexual cooperation as an employment condition", in *Michigan Law Review* (Ann Arbor), Vol. 76, 1978, p. 1007.

[18] Corne *v.* Bausch & Lomb, 390 F.Supp. 161, 10 FEP Cases 289 (D.Ariz. 1975), *vacated on procedural grounds*, 562 F.2d 55, 15 FEP Cases 1370 (9th Cir. 1977). The judge in the district court also objected to interpreting the equal opportunity law to apply to sexual harassment of a woman employee because "to do so would mean that if the conduct complained of was directed equally to males, there would be no possibility of a suit". 390 F.Supp. 163, 10 FEP Cases 291. The "bisexual harasser" defence raised in the Corne case has never been decided in a case involving quid pro quo harassment, but it has been asserted with some success in hostile environment cases. See for example Sheehan *v.* Purolator, Inc., 839 F.2d 99, 49 FEP Cases 1000 (2nd Cir. 1988) (supervisor who directed his temper to male and female employees alike did not commit sexual harassment), *cert. denied*, 488 U.S. 891 (1988).

[19] Barnes *v.* Train, 13 FEP Cases 123 (D.D.C. 1974), *rev'd sub nom.* Barnes *v.* Costle, 561 F.2d 983, 15 FEP Cases 345 (D.C. Cir. 1977).

[20] Miller *v.* Bank of America, 418 F.Supp. 233, 13 FEP Cases 439 (N.D. Cal. 1976), *rev'd*, 600 F.2d 1211, 20 FEP Cases 462 (9th Cir. 1979).

[21] See note 19.

subordinate of either sex. An invitation to dinner could become an invitation to a federal lawsuit." [22]

In 1977 the conflict in the American district federal courts was settled when a federal court of appeals determined that quid pro quo sexual harassment did indeed constitute sex discrimination, reasoning that "but for her womanhood [the complainant's] participation in sexual activity would never have been solicited. . . . She became the target of her superior's sexual desires because she was a woman, and was asked to bow to his demands as the price for holding her job." [23]

In 1981, in another decision by a federal court of appeals, hostile environment sexual harassment was also recognized as a form of sex discrimination. The court asked, "How . . . can sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an individual's innermost privacy, not be illegal?" Unless such hostile environment harassment is found to be unlawful, "an employer could sexually harass a female employee with impunity by carefully stopping short of firing the employee or taking any other tangible actions against her in response to her resistance". In such a case, the court went on to say, the employer could "implicitly and effectively make the employee's endurance of sexual intimidation a 'condition' of employment".[24]

These two decisions by American federal courts of appeals have strongly influenced the parameters of sexual harassment law today, not only in the United States but also in other countries. Although these decisions were based on the federal equal opportunity statute, other countries have effectively adopted the quid pro quo and hostile environment approaches, in part or in whole, but adapted them to fit within the confines of other laws not necessarily relating to sex discrimination.

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[22] Tomkins *v.* Public Service Electric & Gas Co., 422 F.Supp. 553, 13 FEP Cases 1574 (D.N.J. 1976), *rev'd*, 568 F.2d 1044, 16 FEP Cases 22 (3d Cir. 1977). Even recently, however, it has been advanced that sexual harassment is not sex discrimination. See E. F. Paul: "Sexual harassment as sex discrimination: A defective paradigm", in *Yale Law & Policy Review* (New Haven, Connecticut), Vol. 8, No. 2, 1990, pp. 333-365. Reasons include the absence of group-based prejudice in quid pro quo cases and some hostile environment cases; the conceptual problem of the bisexual supervisor; the inherently unauthorized nature of sexual harassment; and the difficulty in distinguishing between welcome and unwelcome sexual advances. Paul argues that sexual harassment should be dealt with under tort law, believing that this approach has the following advantages: (1) it is theoretically consistent; (2) it recognizes that harassment is essentially a personal matter between the individuals concerned; (3) it provides more compelling incentives to employers to discourage such conduct and discipline harassers; (4) it places fault where it should lie – with the harasser – and not with the employer; (5) it discourages frivolous suits and compensates victims of outrageous behaviour more completely; (6) it indicates that harassment victims, usually women, should take more responsibility in bringing complaints to the attention of their employers; (7) it names the offence as sexual harassment rather than sex discrimination; and (8) it treats the offence uniformly regardless of its social setting. Ibid., pp. 364-365.

[23] Barnes *v.* Costle, 561 F.2d 983, 15 FEP Cases 345 (D.C. Cir. 1977).

[24] Bundy *v.* Jackson, 641 F.2d 934, 24 FEP Cases 1155 (D.C. Cir. 1981).

Modern sexual harassment law in the 23 countries surveyed can be classified according to whether protection is accorded under equal opportunity law, labour law, tort law or criminal law. A number of countries have overlapping coverage, with protection afforded by two or more different categories of laws.

Equal opportunity laws, which forbid sex discrimination in employment and in some cases explicitly mention sexual harassment, provide the most substantive source of protection in a number of countries – Australia, Canada, Denmark, Germany (Berlin), Ireland, New Zealand, Sweden, the United Kingdom and the United States. Equal opportunity laws prohibiting discrimination in employment on the basis of sex exist in most other countries surveyed, but no court cases have been brought under these statutes with regard to sexual harassment. Indeed, where the words sexual harassment do not appear in the text of the statute, it is not certain whether courts in these countries would necessarily interpret the antidiscrimination statutes as being applicable to such harassment. However, in countries where the question has not been resolved, it is more likely than not that courts would interpret sexual harassment as a form of sex discrimination given the affirmative decisions reached by courts elsewhere.

In the European Community, for example, sexual harassment has been addressed principally in terms of equal opportunity. The Council of Ministers endorsed a Recommendation in December 1991 concerning sexual harassment which addresses the issue as one of protecting the dignity of women and men at work.[25] The Recommendation calls on Member States to promote awareness that sexual harassment is unacceptable and may contravene the 1976 Council Directive on implementing the principle of equal treatment for men and women. The Recommendation also provides for a review mechanism and requires Member States to submit implementation reports within three years.[26]

Equal opportunity laws are normally applicable to both men and women, although in some cases their role in promoting the equality of women is highlighted. Hence, both women and men are protected from sexual harassment if an antidiscrimination law has been construed to cover sexual harassment. But what would be the situation in the case of

[25] Council Declaration of 19 December 1991 on the implementation of the Commission Recommendation on the protection of the dignity of women and men at work (*Official Journal of the European Communities* (Luxembourg), Vol. 35, No. C.27, 4 Feb. 1992, p. 1).

[26] Appended to the Recommendation is a Code of Practice which suggests measures to be taken by employers, trade unions and employees themselves to prevent sexual harassment and how to deal with its occurrence (ibid., Vol. 35, No. L.49, 24 Feb. 1992, pp. 1-2 (Recommendation), pp. 3-8 (Code of Practice)). The Recommendation and Code of Practice were endorsed by the Council after the Commission published a report on sexual harassment in the Member States. The report found that sexual harassment was a serious problem, and that existing legal remedies were inadequate. See M. Rubenstein: *The dignity of women at work: A report on the problem of sexual harassment in the Member States of the European Communities* (Luxembourg, 1988).

unwelcome sexual advances by one homosexual to another? In the United Kingdom, and in the United States at the federal level, the courts have held that if a person is singled out because of his or her sex for unwelcome sexual advances, sex discrimination has occurred notwithstanding that the alleged harasser is of the same sex as the victim. The victim was chosen on account of his or her sex, and someone of the other sex would not have been chosen for such sexual advances.

Another issue is whether sexual harassment laws apply to harassment of homosexuals because of their sexual orientation. In the United States this question has been raised several times under the federal equal opportunity law and the federal courts have uniformly concluded that this does not constitute sex discrimination, reasoning that the victims are singled out for harassment on the basis of their homosexuality, i.e. their sexual orientation, and not on the basis of their sex.[27]

Labour law, broadly defined, also provides significant protection against sexual harassment, but in practice its impact is often confined to quid pro quo cases. Unfair dismissal legislation has been or could be used to protect against dismissal or constructive dismissal based on objection, or refusal to submit, to sexual harassment in most of the countries surveyed (Austria, Belgium, Czechoslovakia, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom).

Frequently, the specific legal provisions applicable to contracts of employment are framed in terms of the duties and obligations that an employer owes a worker, and in some cases the corresponding duties and obligations that a worker owes the employer. For example, in various countries employers are to show respect for "propriety and decency" during the employment relationship (Belgium); or are responsible for an employee's physical and moral integrity (Italy); or have to ensure good working conditions, "both physically and morally" (Portugal); or shall "protect and respect the worker's person and individuality" with due regard to the protection of the worker's "health and observance of morals" (Switzerland).

In five countries (Belgium, Canada, France, New Zealand, Spain) labour law explicitly prohibits sexual harassment. In Belgium the law directs the employer to protect workers against sexual harassment at work, including any actions of a verbal, non-verbal or physical nature which one knows or ought to know would offend the dignity of men and women employees. Canada's federal Labour Code states that all employees are "entitled to employment free of sexual harassment". In France the law

[27] DeSantis *v.* Pacific Telephone & Telegraph Co., 608 F.2d 327, 19 FEP Cases 1493 (9th Cir. 1979). Some American states such as Hawaii, Massachusetts and Wisconsin have laws which explicitly prohibit employment discrimination on the basis of sexual orientation. See Lindemann and Kadue, op. cit., p. 190, n. 148.

prohibits an abuse of authority in sexual matters, and makes illegal the harassing or threatening of a subordinate with the aim of obtaining sexual favours for the benefit of the harasser or a third party. In Spain all workers are to enjoy the right to protection against any verbal or physical offence of a sexual nature.

New Zealand's labour law describes sexual harassment as a personal grievance that can be taken up with the employer. This sexual harassment statute is among the most extensive of all the legislation reviewed, and addresses, inter alia, the following issues: definition, legal protection afforded, employer liability, remedies, and personal grievance procedures. Many of the ideas incorporated into the law are similar to those which are contained in equal opportunity statutes of other countries, or which have been developed by judicial interpretation of these statutes (Australia, Canada, United Kingdom, United States). However, there is a fundamental difference in the case of New Zealand in that these concepts are stated in the framework of the law relating to employment contracts rather than in antidiscrimination legislation.

In Switzerland a special protective law for working women has been found applicable to the sexual harassment of women, although the words "sexual harassment" do not appear in the text.

Tort law has also been found to provide a measure of protection to victims of sexual harassment. A tort is a legal wrong, other than a breach of contract, for which a court can grant a remedy, most commonly in the form of damages and interest. In a number of English-speaking countries, tort law is a matter of common or judge-made law, while in most other countries it is defined in the Civil Code as the general responsibility to exercise due care towards others, and the obligation to pay for damages caused by injury which results from a failure to exercise due care. Tort law encompasses both negligent acts resulting from carelessness or inattention, and intentional acts that cause harm. Sexual harassment is by its nature an intentional act and would qualify as an intentional tort under most circumstances. Tort law has been found to prohibit sexual harassment in a number of countries (Japan, Switzerland, United Kingdom, United States), and at least theoretically could be applicable in virtually all countries, except where a statutory scheme is the exclusive remedy (Canada).

The United States has a particularly diverse group of torts which are applicable to sexual harassment. These torts include intentional infliction of emotional distress, assault and battery, false imprisonment, invasion of privacy, defamation, and negligence in supervising or retaining an alleged harasser in his or her functions. Some contract-related tort claims can also be applicable, such as claims for wrongful discharge as a tortious breach of public policy, and tortious interference with contract. American courts have demonstrated imagination in using these theories, holding for example that the tort of false imprisonment was applicable when a restaurant owner picked up a cocktail waitress and trapped her between his legs while he

fondled her.[28] In another case the court found the tort of invasion of privacy applicable where a colleague placed a high-pressure air hose between the complainant's legs.[29]

Criminal law is another category of law potentially applicable to sexual harassment. France is the only country surveyed which has adopted a specific penal law concerning sexual harassment. The French law, however, was not designed to be limited to an abuse of authority in the employment context. It was also intended that the law have general application to any abuse of authority involving requests for sexual favours, and hence could be applied to a teacher-student or landlord-tenant relationship as well.

In contrast to the situation in France, the criminal laws of other countries potentially applicable to sexual harassment at work are aimed at a more general type of conduct. Nevertheless, some criminal provisions may be particularly applicable to sexual harassment such as laws which make it a crime to take advantage of someone in a situation of economic dependency; sexual assault and battery statutes which cover, respectively, the situations of putting someone in apprehension of unwanted bodily contact and actual touching of intimate parts of the body; and indecent assault, indecent behaviour and immoral conduct laws. More general criminal laws, such as general assault and battery laws not expressly related to aggressions of a sexual nature, may also be applicable where specific sexual aggression criminal laws do not exist.

Legal prohibition versus an affirmative duty to act

Not all laws applicable to sexual harassment are framed exclusively in terms of a legal prohibition. In Sweden the equal opportunity law requires an affirmative action plan to be submitted annually by employers with more than ten employees; the plan should indicate, inter alia, what positive steps are to be taken to prevent sexual harassment in the workplace. Similarly in the Canadian federal Labour Code, employers are required, after consulting with the workers or their representatives, to issue a policy statement concerning sexual harassment. The new Belgian law also requires employers to adopt a policy against sexual harassment, and to institute certain procedures (discussed below) for receiving and processing complaints. The French labour law has a provision that allows the works Safety, Health and Working Conditions Committee to propose measures to prevent sexual harassment to management.

[28] Priest *v.* Rotary, 634 F.Supp. 571, 40 FEP Cases 208 (N.D. Cal. 1986).

[29] Waltman *v.* International Paper Co., 47 FEP Cases 671 (W.D. La. 1988), *rev'd on other grounds*, 875 F.2d 468, 50 FEP Cases 179 (5th Cir. 1989).

The special case of indirect discrimination based on consensual sexual favouritism

In the United States the equal opportunity law has been interpreted to prevent indirect sexual harassment in a situation where a female complainant was not herself sexually harassed, but was denied an opportunity to be considered on the merits of her work because her male supervisors granted promotions and salary increases to numerous other female employees because of their voluntary participation in sexual activities. The court found that the complainant was subjected to implicit quid pro quo sexual harassment and to a hostile work environment.[30]

The situation is less clear when the practice of sexual favouritism is not widespread but isolated. This would be the case, for example, if a male supervisor had a consensual relationship with a female subordinate but did not solicit sexual favours or otherwise harass other women employees. If the female subordinate having a special relationship with her supervisor receives certain preferences in promotion or financial treatment in relation to other employees, the American Equal Employment Opportunities Commission (EEOC) has taken the position that this does not constitute indirect discrimination against those who are not favoured. Most court decisions, but not all, which have considered this situation have reached a similar result, reasoning that, like nepotism, the law does not prohibit isolated instances of preferential treatment based on a consensual sexual relationship.[31]

Liability

The question of liability for sexual harassment is a complicated one, particularly if the matter is not clearly spelled out by statute. It also depends on the type of law that is being used to prohibit sexual harassment, i.e. whether an equal opportunity law, a labour law, a tort law or a criminal law. In many of the 23 countries surveyed there have been no or very few sexual harassment lawsuits that focused on the issue of liability. In the absence of a statute or court decisions on this question, it is not always clear whether the employer alone, the harasser alone, or both could be held liable.

The question is important for two reasons. First, if employer liability can be established, the complainant will have a better chance of recovering monetary damages. Employers are often more financially solvent than the

[30] Broderick *v.* Ruder, 685 F.Supp. 1269, 46 FEP Cases 1272 (D.D.C. 1988).

[31] See EEOC Policy Guidance on Sexual Favoritism, 8 *Fair Employment Practices Manual* (Washington, DC, Bureau of National Affairs), 405:6817-6821, 12 Jan. 1990 ("Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships. An isolated instance of favoritism toward a 'paramour' (or a spouse, or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders"). For a detailed summary and analysis of American court decisions addressing this subject, see Lindemann and Kadue, op. cit., pp. 205-209.

employees who actually commit sexual harassment. Second, the complainant may be interested in suing the actual harasser. This may be for a variety of reasons, but most probably to win a moral victory over the harasser, and possibly to have a second alternative for financial compensation. Depending on what type of sexual harassment is involved, the employer may be able to escape liability for the offence, and the complainant's only chance for financial recovery would be against the actual harasser. Suing the alleged harasser and holding that person financially responsible, wholly or partially, for the monetary damages, may also be more effective in discouraging the individual from engaging in sexual harassment in the future than if the employer only is required to pay damages.

Where a sexual harassment claim is based on a violation of **equal opportunity laws** forbidding sex discrimination, a distinction for liability purposes can be drawn between whether the legislation prohibits sex discrimination "by an employer" (United States – federal level), or "by any person" (Canada – federal level). In the first case only the employer can be found liable; in the second the provision "by any person" could be interpreted to include the actual harasser. In the latter case, in addition to the potential liability of the alleged harasser, the employer could also possibly be held liable under the doctrine of vicarious responsibility, which imposes liability on an employer for the actions of his or her employees under defined circumstances.

Liability of an employer can depend on whether the sexual harassment was committed by supervisors, by colleagues or by non-employees. It can also depend on whether the alleged harasser is accused of quid pro quo or hostile environment harassment. In the handful of countries which have addressed the issue in detail (Australia, Canada, New Zealand, United Kingdom, United States) the employer is ordinarily automatically liable for quid pro quo harassment by supervisors. The justification for automatic liability is that, because a supervisor exercises authority delegated by the employer to make decisions affecting an employee's job situation in a tangible way, the supervisor's actions are justifiably imputed automatically to the employer.

In the case of hostile environment sexual harassment by supervisors, automatic employer liability does not always apply in the countries which have considered the matter. In the United States, for example, the employer is normally liable for hostile environment harassment by a supervisor when the employer knew or should have known of the harassment, and failed to prevent it or take prompt and appropriate corrective action.

There is some disagreement on this question, however, with some authorities taking the position that the employer should also be automatically liable in hostile environment cases under the same doctrine that the supervisor is invested with the authority of the employer. Even though a tangible economic benefit is not involved in this kind of harassment, the power of a supervisor to create a sexually intimidating and

abusive work environment is far greater than that of colleagues or non-employees because of the authority of the employer vested in the supervisor. In New Zealand, for example, the employer is automatically responsible by statute for both quid pro quo and hostile environment sexual harassment by supervisors.[32]

Liability for sexual harassment by colleagues and non-employees, such as clients and customers, which by definition is hostile environment harassment because of the lack of power to grant or withhold tangible job benefits, is not imposed automatically on the employer. But normally the employer can be held vicariously liable for sexual harassment by colleagues and, in some instances, non-employees if the employer knew or should have known of the harassment, and failed to prevent it or take prompt and appropriate corrective action. This is the case, for example, in Australia, Canada, New Zealand (under employment contracts law) the United Kingdom and the United States.

As regards liability for actions by non-employees, in some countries equal opportunity law (e.g. United States) or employment contracts law (e.g. New Zealand) provides protection against sexual harassment by clients and customers, although in most countries surveyed the question has not been addressed. Cases involving non-employees usually centre on dress requirements stipulated by employers which obligate female employees to wear sexually revealing outfits in situations that are likely to invite unwelcome sexual propositions and comments from clients, customers or even the general public.

With respect to **labour law**, legal provisions applicable to contracts of employment (including those which deal with unfair dismissal), special protective laws for women and general labour codes are all drafted in terms of the responsibility of the employer, and the employer's liability in the event of non-compliance. Hence there is no statutory basis for direct liability of colleagues or non-employees. However, the employer may be liable indirectly, depending on the provisions of the law in question, if a complainant brings a case of sexual harassment by a colleague or a non-employee to the attention of the employer who then takes no corrective action.

With respect to **tort law**, all persons are individually responsible for their tortious actions in all the legal systems reviewed. The question that is difficult to answer, however, is whether an employer can also be held vicariously liable for tortious acts committed by his or her employees. Normally, an employer is responsible for acts of an employee committed within the scope of his or her employment, but under special circumstances may also be held vicariously liable for acts outside the scope of employment when it would be fair and just to do so.

[32] The statutory basis for automatic liability for hostile environment claims is the employment contracts law, although it should be recalled that New Zealand's equal opportunity statute also provides protection against sexual harassment.

Sexual harassment does not easily fit such an analysis, because it is an intentional tort, i.e. an intentional action which results in harm to another, and intentional torts are not easily found as being within the scope of the employment relationship, unless there are special circumstances that would make it fair to hold the employer responsible. Moreover, the nature of the act suggests that the harasser is acting in his or her own personal interests and not those of the employer. Notwithstanding these conceptual obstacles, it is interesting to note that there is significant judicial authority for holding an employer vicariously liable for the tortious sexual harassing acts of an employee, e.g. in Japan, Switzerland and the United States (at state level).

With respect to **criminal law**, it is normally the harasser alone who could be held liable for criminal conduct constituting sexual harassment. The employer could not be held vicariously liable.

Remedies and sanctions

Broadly speaking there are two types of remedies and two types of sanctions for sexual harassment.

The first and most common type of **remedy** is money damages. Monetary relief can be given for actual pecuniary harm suffered, such as lost income from being dismissed or from failure to get a promotion. It can also be awarded for immaterial damages, which are also known in various legal systems as moral damages or compensatory damages. Immaterial damages serve to compensate a complainant for injury to feelings, mental anguish and humiliation caused as a result of sexual harassment. The ability to recover immaterial damages is important because otherwise victims of hostile environment harassment would have no financial recovery, given that no tangible pecuniary job benefit is affected.

The second type of remedy is an order of a court that an employer or a harasser cease the activity which led to the complaint, or affirmatively do certain acts which will repair the damage caused, or some combination of the two. In some countries the principal remedy for a violation of an equal opportunity statute is for the discriminatory employment practice to be declared null and void (e.g. Italy, Netherlands). Such a remedy has little useful significance in the context of a complaint of sexual harassment because it may not concretely repair the damage caused to the complainant or otherwise remedy the situation satisfactorily.

The most common **sanction** is for the harasser to be disciplined by the employer. The range of options can include a reprimand, a transfer, a demotion, a temporary suspension of service or actual dismissal. This authority is inherent in the power of the employer, and in the public service of many countries it is articulated at length in the applicable civil servants' regulations. While the employer's right to dismiss the harasser has been upheld by the courts in many countries, it is frequently limited by the principle of proportionality of the sanction to the seriousness of the offence.

In some countries (e.g. Greece, Italy, Netherlands) dismissal as a disciplinary measure is considered extreme, and the law requires the employer to ensure that the sanction of dismissal is proportionate to the offence committed and to weigh whether less dramatic disciplinary alternatives are available. Hence, it is unlikely that the sanction of dismissal would be imposed for minor cases of sexual harassment.

The other type of sanction is criminal penalties – fines or prison terms or both. In the limited number of cases where criminal penalties have been applied in cases involving sexual harassment, it has been far more common for fines to be imposed than prison sentences.

Procedures and institutional authorities

Procedures applicable to complaints of sexual harassment, and sex discrimination more broadly, are most often found in **equal opportunity statutes**. Some of these have created a special equal opportunity commission, human rights commission, board, ombudsman or commissioner with authority to receive and investigate claims of sexual harassment (Australia, Canada, Finland, Netherlands, Norway, Sweden, United States). The procedures for processing a complaint can vary considerably, although there tend to be some common features.

The procedures followed at the federal level in Australia are generally illustrative. When proceeding under the federal antidiscrimination law, the complainant, or a trade union on behalf of the complainant, makes a written complaint which describes the circumstances giving rise to the problem. The Sex Discrimination Commissioner makes an investigation and, if the complaint has merit, attempts to resolve the matter by conciliation. If conciliation fails, the Commissioner refers the matter to the Human Rights and Equal Opportunity Commission.

The latter Commission conducts a public hearing and has the power to summon persons other than the complainant and the respondent to appear and give evidence, and also to compel the production of relevant documentation. The hearing is not bound by the strict rules of evidence of the Australian court system. The Commission can request that monetary damages be paid, or that the respondent undertake actions to remedy the situation. However, if the respondent does not agree, the Commission must seek enforcement in a federal court. The federal court will review the case to ensure that sexual harassment has been committed before ordering enforcement of the Commission's declarations.

In most other countries which have a specially designated office or equal opportunity agency the procedure similarly involves the filing of a written complaint with such office or agency. This complaint is followed by an investigation. In some instances a complainant can be assigned an investigator of the same sex if the facts of the case would be embarrassing or sensitive for a complainant to discuss with someone of the opposite sex. The

investigating authority seeks to determine whether the complaint alleges an actionable case of sexual harassment. The investigator also focuses on whether the conduct was unwelcome, and the related question of the exact nature of the complainant's relationship with the alleged harasser. If the investigator finds that the complaint has merit, usually there will be an effort to conciliate a settlement between the parties. However, if these efforts fail, in a number of countries the institutional body can bring an enforcement action, or refer the complainant to another institutional entity for enforcement action, or make submissions on behalf of the complainant before the competent judicial authority (Australia, Canada, Finland, Ireland, New Zealand, Norway, Sweden, United States).

In some cases the institutional entity which has primary responsibility for equal opportunity or human rights laws adjudicates the complaint in an administrative hearing (e.g. Australia, Canada, Finland, New Zealand, Norway, Sweden, United States (California)), while in others the complaint is brought directly in the competent labour court or ordinary court and the institutional entity can make submissions on behalf of, or otherwise represent, the complainant (e.g. Ireland, United States (federal level)).

The procedures for handling claims of sexual harassment under the **labour laws** of the 23 countries surveyed are similar to those involved in resolving other labour disputes, with some exceptions.

The most notable exception is New Zealand, which has special procedures defined under its employment contracts law for proceeding with such claims as a personal grievance against an employer. Under the New Zealand law, the employee makes a complaint to the employer concerning sexual harassment. The employer must inquire promptly and fully into the facts surrounding the complaint, and must take all practical steps to remedy the situation if it appears that the complaint is justified. If the sexual harassment recurs or if the employer takes no action to stop the undesired activity, the employee is deemed to have a personal grievance.

If it is inappropriate for the employee to try to resolve the personal grievance directly, the employee can appoint an agent such as a trade union or a bargaining agent. If the grievance is not resolved after the employer has been contacted, the employee or his or her agent prepares a written statement of complaint stating the type of grievance alleged, how it occurred, and the relief sought. If the grievance is not then resolved, the employee or his or her agent can refer the issue to the Employment Tribunal for mediation or adjudication.

Belgium also has special procedures applicable to sexual harassment. They notably require the employer to designate an individual or a department to which complaints of sexual harassment can be directed, and which can treat such complaints confidentially. Moreover, the concerned individual or department is responsible for giving complainants support and assistance as needed in dealing with situations of sexual harassment. The

Belgian law requires enterprises to adopt specific procedures for processing complaints and for taking disciplinary measures relating to sexual harassment.

The procedures for bringing sexual harassment claims under **tort law** are the same as for all tort claims, which, like other civil complaints, are processed in the ordinary courts.

In **criminal cases** it is ordinarily in the discretion of the state prosecutor whether or not to bring a criminal proceeding against an alleged sexual harasser. Hence, with the exception of the United Kingdom where private criminal prosecutions are still allowed, a complainant will have to convince the state prosecutor that the situation merits bringing a criminal action against the alleged harasser.

Evidentiary questions particular to complaints of sexual harassment

A complainant may encounter a number of practical obstacles in litigating a sexual harassment case. In pursuing any type of civil case in the countries surveyed, the burden of proof falls on the complainant alleging the harassment. In English-speaking countries this burden of proof is often termed preponderance of the evidence (United States), or balance of the probabilities (Australia, United Kingdom), while in many civil law countries the Civil Code imposes a simple obligation on the complainant to prove the matters asserted in the complaint, which has been interpreted to mean that the judge must be firmly convinced of the proposition asserted by the complainant. In either case this may be difficult to prove in a sexual harassment case. Most propositions for tangible job benefits in exchange for sexual favours are not made with witnesses present, so it may often be the complainant's word against the alleged harasser's.

Normally, an employer is not allowed to inquire into a complainant's sexual history or reputation. This prohibition is established, for example, in Rule 412 of the Federal Rules of Evidence in the United States, which forbids such evidence in rape cases and has been applied by analogy to sexual harassment cases.[33] Similarly, the New Zealand employment contracts law explicitly provides that a complainant's sexual experience or reputation cannot be taken into account in a personal grievance alleging sexual harassment.

However, testimony would be permitted at trial concerning a complainant's relationship with an alleged harasser to discredit the assertion that the alleged harasser's conduct was unwelcome. Hence, it would normally be admissible evidence that the complainant had an affair with the

[33] For a more detailed discussion see Lindemann and Kadue, op. cit., pp. 538-540. Before the adoption of Rule 412, evidence pointing to the promiscuity of the complainant was admissible on the ground that sexual promiscuity was probative of the willingness to submit to sexual acts.

alleged harasser,[34] or had visited the alleged harasser's home alone at night,[35] or had freely spent time with the alleged harasser in consensual non-employment settings.[36]

Workplace behaviour of a complainant with others may also be admitted into evidence on the issue of welcomeness. In one case it was held that evidence showing that the complainant had initiated sexually oriented conversations with male and female colleagues; had asked male employees about their marital and extramarital relationships; and had herself volunteered intimate details about her own premarital and marital sexual relationships could be introduced at trial to show that the conduct complained of had been prompted by the complainant's own behaviour and was therefore welcome.[37] However, evidence which is admitted that shows a complainant's use of sexually explicit language or sexual innuendo in a consensual setting with persons other than the alleged harasser does not waive the complainant's legal protection against sexual harassment, and does not indicate whether the complainant welcomed the conduct of the alleged harasser.[38]

A complainant's sexual conduct with third parties outside the workplace is typically not admitted into evidence at trial on the grounds that it is too remote in time or place to the workplace.[39] Such evidence has also been excluded as inadmissible evidence of the complainant's character.[40]

Summary and conclusions

Studies have indicated that victims of sexual harassment, who are overwhelmingly women, can suffer serious forms of stress, anxiety, fatigue and depression. Sexual harassment is particularly pernicious in that it is often directed at women who are young, who are employed for the first time, who are in a situation of economic dependency because they are single, divorced or separated, and who may not fully understand their legal rights.

The studies suggest that the phenomenon is widespread, and that it is costly not only to the victims but also to enterprises in terms of absenteeism, low productivity and employee turnover. Monetary damage awards to

[34] Bigoni *v.* Pay'N Pak Stores, 48 FEP Cases 732 (D.Or. 1988).

[35] Reichman *v.* Bureau of Affirmative Action, 536 F.Supp. 1149, 30 FEP Cases 1644 (M.D. Pa. 1982) (complainant invited alleged harasser to home-cooked dinner on several occasions).

[36] See for example Evans *v.* Mail Handlers, 32 FEP Cases 634 (D.D.C. 1983) (off-premises consensual sexual relations relevant to issue of welcomeness of advances); Laudenslager *v.* Covert, 163 Mich. App. 484, 415 N.W.2d 254, 45 FEP Cases 907 (1987), *appeal denied*, 430 Mich. 865 (1988) (off-premises consensual activities relevant to whether sexual advances were welcome).

[37] Gan *v.* Kepro Circuit Systems, 28 FEP Cases 639 (E.D. Mo. 1982).

[38] Swentek *v.* USAir, 830 F.2d 552, 44 FEP Cases 1808 (4th Cir. 1987).

[39] Mitchell *v.* Hutchings, 116 F.R.D. 481, 44 FEP Cases 615 (D.Utah 1987).

[40] Priest *v.* Rotary, 98 F.R.D. 755, 32 FEP Cases 1064 (N.D.Cal. 1983).

victims of sexual harassment, legal expenses and lost management time dealing with such cases are further serious consequences for enterprises.

Sexual harassment law is in a state of full evolution in most of the 23 countries surveyed. The different legal approaches to sexual harassment at work reflect, to a certain degree, differences in cultural attitudes and in legal systems in the countries surveyed. Four types of laws have been found to be potentially applicable to sexual harassment: equal opportunity law, labour law, tort law, and criminal law.

The use of equal opportunity law as a basis for prohibiting sexual harassment carries with it a requirement of a finding of discrimination on the basis of sex. Sexual harassment, then, is assimilated either expressly by statute or through court interpretation to a type of discriminatory employment practice.

Many countries which have adopted equal opportunity statutes have established a specialized institution that can assist a complainant who alleges sex discrimination. This assistance can include investigating whether the complaint has merit, attempting to resolve the issue informally, and in some cases bringing an enforcement action against the employer or the alleged harasser or both.

Labour laws, tort laws and criminal laws providing protection against sexual harassment generally have a much broader approach to the issue, frequently addressing the issue in terms of an unacceptable affront to the dignity and privacy of the individual. Such an approach interprets sexual harassment as an unjustified interference with a worker's right to freedom in sexual matters and as a violation of his or her intimate privacy rights.

Perhaps more important than the type of law upon which the prohibition of sexual harassment is based is the fundamental recognition of sexual harassment as a distinct legal wrong. Countries which have so recognized it, either by statute or through court interpretation, have tended to provide more effective protection to victims of sexual harassment than countries which have dealt with the issue tangentially through the application of labour statutes dealing with unfair dismissal, tort laws against assault and battery, or criminal laws directed at indecent behaviour. If adequate protection is to be provided to victims of sexual harassment at work, it is primordial that sexual harassment be recognized as a distinct wrongful act.

A comprehensive statutory scheme recognizing sexual harassment as a specific legal wrong would ideally include the following elements: an explicit definition of sexual harassment and the scope of legal protection; clear rules governing the liability of the employer and alleged harasser; clear sanctions and remedies; and applicable procedures, including special rules to ensure that a complainant's sexual reputation or history is not used as evidence in a sexual harassment case. Although such a scheme exists in New Zealand, and in a number of other countries comprehensive rules governing the above matters have been developed by case law, it is a clear weakness in some of

the legislation reviewed that the prohibition of sexual harassment is stated in a summary manner, without any further explanation or guidance.

A workplace free of sexual harassment, however, cannot be based on new or reinforced legal rights alone. Combating sexual harassment involves tackling sensitive questions associated with human relationships. It involves changing attitudes with respect to the role of women at work, and how they are treated and valued as workers. It also involves educating management and labour as to the terrible costs of sexual harassment, in terms of the personal anguish and lost job opportunities for the victims and of the financial costs and lost efficiency for enterprises.

Traditional collective bargaining agreements can no doubt contribute to this educational process by making clear that sexual harassment will not be tolerated, and by the adoption of procedures and disciplinary measures to deal with offenders. Awareness-raising programmes by governments, employers, trade unions and women's organizations should also play an important role in helping to change people's attitudes and hence their behaviour. The goal of such efforts should be to create a workplace atmosphere that discourages sexual intimidation or unwelcome sexual conduct but promotes relaxed working relations where normal, voluntary social contact is preserved.