

**IMPLEMENTING THE E.U.'S NEW SEXUAL
HARASSMENT DIRECTIVE: ARE EMPLOYERS
ENTITLED TO A DEFENSE?**

JAMES M. OWENS

JAMES F. MORGAN

GLENN M. GOMES

California State University, Chico

ABSTRACT

Recent amendments to the Equal Treatment Directive prohibit sexual harassment as an illegal form of discrimination throughout the European Union. In implementing the directive by the October 2005 deadline, policymakers in each member state are to seek an equitable balance between the rights and duties of both employers and employees. Toward that end, member states need to: 1) determine the appropriate standard of employer liability for sexual harassment, and 2) decide what, if any, defenses are available to employers. This article discusses these developments and potential employer defenses.

Sexual harassment in the workplace did not receive serious attention from E.U. policymakers until the mid-1980s, when Rubenstein published the results of a study made on behalf of the European Commission [1]. After determining that sexual harassment in the E.U. was widespread, the commission undertook a number of initiatives in the early 1990s to remedy the problem (with uneven results). A more recent study confirmed the pervasiveness of the problem [2]. Not surprisingly, the decade of the 1990s saw increased recognition of workplace sexual harassment as an international phenomenon [3].

Upon enacting amendments to the 1976 Equal Treatment Directive, the European Parliament and the council took the initiative in prohibiting sexual harassment throughout European Union workplaces [4]. Directive 2002/73/EC (hereafter, “the directive”) seeks to harmonize the member states’ laws regarding the equal treatment of men and women. When implementing the directive, member states must recognize sexual harassment as an illegal form of gender-based discrimination.

The directive became effective on October 5, 2002, the day of its publication in the *Official Journal of the European Communities*. By October 2005, member states must enact the mandated legislation, regulations, administrative provisions, and bureaucratic infrastructure. We anticipate that the public policy debate within each member state will be affected differently according to the degree to which antiharassment legislation and court edicts already exist in that nation. In member states where antiharassment legislation has evolved in ways consistent with the directive (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, the public policy debate may be more spirited and extended [5].

Prominent among the public policy issues likely to arise is the question of whether employers are entitled to protection from liability or reduced damages when instances of sexual harassment have occurred. After briefly highlighting the principal components of the directive, we focus our attention on issues of liability: 1) what is the appropriate standard of liability that strikes an equitable balance between the rights and duties of employers and employees, and 2) should employers be entitled to a defense that allows them to minimize or avert damages. Where appropriate, we draw upon corollaries and parallels in U.S. law that could provide insight and guidance to policy makers on these issues. We conclude by offering practical suggestions for employers who would like to initiate *now* workplace reforms that might prove useful in establishing defenses against liability or damages.

THE PRINCIPAL COMPONENTS OF THE DIRECTIVE

The directive contains a number of components, including definitions of workplace harassment; reference to preventative measures on sexual harassment; the establishment of judicial and/or administrative procedures for enforcement purposes; compensation for victims of discrimination and harassment; and the establishment of national agencies charged with promoting equal employment opportunities [4]. Of particular importance for our discussion of liability and defenses are issues regarding the nature of workplace harassment, preventative measures, and the directive’s provisions for compensation.

Defining Workplace Harassment

Article 2(2) of the directive recognizes “harassment” and “sexual harassment” as forms of discrimination on the grounds of sex and thus contrary to the principle of equal treatment between men and women [4]. “Harassment” occurs “where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating, or offensive environment.” In contrast, “sexual harassment” is defined to be “where any form of unwanted verbal, non-verbal, or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating, or offensive environment.” A person’s rejection of, or submission to, harassment or sexual harassment may not be used as a basis for an employment decision affecting that person [4, Article 2(3)].

Preventative Measures

Article 2(5) specifies: “Member States shall encourage, in accordance with national law, collective agreements or practice, employers and those responsible for access to vocational training to take measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment at the workplace” [4]. Interestingly, the directive does not legally require individual employers to take preventative actions; it merely “encourages” such activities on the part of employers. While the directive offers no specifics regarding the nature of effective prevention programs, guidelines already exist. Commission Recommendation 92/131/EEC on the protection of the dignity of women and men at work contains an appendix providing a “Code of Practice” on measures to combat sexual harassment [6]. The Code of Practice, though legally nonbinding, does encourage the use of clearly communicated policies, effective enforcement procedures, and training for all employees.

Compensation and Reparations

There are no limits on the compensation payable to the victim of unlawful harassment in the directive. Reflecting past rulings by the European Court of Justice [7], Article 6(2) require member states to introduce measures “to ensure real and effective compensation or reparation . . . for the loss and damage sustained by a person injured as a result of discrimination.” Moreover, the compensation should be “dissuasive and proportionate” to the injury suffered. There can be no fixed prior upper limit to the compensation, except in one instance: when the employer can prove that the only damage suffered by a job applicant was the refusal to take the job application into consideration, and there is no other actual financial loss. The desire to avoid unlimited economic loss provides

strong incentives for employers to institute procedures for eliminating workplace behavior that would expose them to such liability.

As member states implement the directive, each will need to address the following issues: 1) the nature of employer liability for sexual harassment, particularly in light of the social and cultural differences existing in workplaces within and among member states; and 2) whether employers who undertake measures to prevent or remedy workplace harassment should be entitled to defenses that either eliminate liability or alleviate damages. It is to these major public policy issues that we now turn.

ESTABLISHING LIABILITY FOR SEXUAL HARASSMENT

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

Elements of a *Prima Facie* Case

Article 2(2) of the directive specifies the formal, legal definition of “sexual harassment.” In our opinion, there are three critical components of a *prima facie* case: 1) the word “unwanted”; 2) the concept of dignity (“the purpose or effect of violating the dignity of a person”); and 3) the notion of an abusive work environment (“creating an intimidating, hostile, degrading, humiliating, or offensive environment”). Interesting parallels can be drawn between the language of the directive and definitions used in the United States. For example, Title VII of the 1964 Civil Rights Act prohibits employer discrimination “against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex . . .” [8]. The Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing the provisions of Title VII, states that sexual harassment involves “unwelcome sexual advances, requests for sexual favors, and other verbal or physical contact of a sexual nature constitute sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual’s employment, unreasonably interferes with an individual’s work performance or creates an intimidating, hostile or offensive work environment” [9].

The concept of “unwanted” is a key element of the directive’s definition of sexual harassment, and this closely mirrors U.S. sexual harassment law. In the landmark 1986 decision of *Meritor Savings Bank v. Vinson* (“*Meritor*”), the U.S. Supreme Court ruled unanimously that the employee’s consent to sexual liaisons was not germane to the question of whether sexual harassment existed; rather, the proper inquiry is whether the behavior is “unwelcome” [10, at 68]. By employing the word “unwanted,” the directive appears congruent with U.S. law, and we assert that the crux of the determination is whether the employee had a *meaningful choice* when being exposed to objectionable behavior.

When compared to the law of sexual harassment in the United States, the directive’s use of the word “dignity” represents a uniquely European contribution to conceptualizing workplace behavior. According to Friedman and Whitman, for example, “to continental Europeans, it seems unproblematically obvious that . . . dignity is something that the law can and should protect” [11, p. 264]. Simply stated, dignity is nothing more than routinely treating a person with respect. As Ehrenreich pointed out, because individuals are unique and autonomous, “actions that would humiliate, torment, threaten, intimidate, pressure, demean, frighten, outrage, or injure a reasonable person are actions that can be said to injure an individual’s dignitary interests” [12, p. 22]. But when, *exactly*, is a person’s dignity violated? Each member state will have to address this question as a matter of public policy.

The directive relies on the key phrase “intimidating, hostile, degrading, humiliating, or offensive environment” to establish the existence of prohibited conduct. While the directive does not provide guidance on precisely what constitutes such an environment, parallels can again be drawn by reference to United States law. The *Meritor* decision established the concept of a hostile working environment, and that hostility could be shown when a behavior has the characteristics of being sufficiently severe or pervasive to alter the conditions of employment. Following that decision, the Supreme Court in *Harris v. Forklift Systems, Inc.* ruled that a victim need not claim psychological damage, but the working environment must take on characteristics of hostility [13].

In our opinion, if the E.U. adopts a definition of hostility similar to that used in the United States, the concepts of “intimidating,” “degrading,” and “humiliating” may be used to establish the degree of severity or pervasiveness of the hostility whereby the conditions of employment are altered. Moreover, in *Oncale v. Sundowner Offshore Services*, the Supreme Court stated that the presence of a hostile environment should be determined by considering the workplace’s social or cultural context [14]. For example, “a professional football player’s working environment is not severely or pervasively abusive . . . if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach’s secretary (male or female) back at the office” [14, at 81-82]. In other words, “in judging the severity of the conduct, attention to the cultural context in which the purported harassment

occurs will guard against imposing liability on behavior that—although offensive to Miss Manners—does not offend Title VII” [15, p. 450].

Within the European Union, the social or cultural context cannot be ignored when arriving at a determination of a hostile environment, especially when wide-ranging sociopolitical and cultural differences exist among the populations of the member states [16]. Moreover, as Gee and Norton persuasively argued, “cultural relativism” exerts considerable influence over definitions, tolerance levels, and legislative solutions to workplace harassment [17]. These cultural differences are not limited to national norms, however, but can also be detected within different work environments in a single country. For example, Wright drew the distinction between blue-collar and white-collar cultures and workplaces, and noted that different work environments are qualitatively different with respect to prevailing attitudes toward women and behaviors deemed “acceptable” [18]. Massaro cautioned that “conduct should not automatically be legitimized merely because it is an accepted part of a particular workplace or industry” [19, p. 365]. It would be perverse indeed if employers could avoid liability by simply making gender-biased conduct an acceptable workplace practice. In implementing the directive, member states should provide employers, employees, courts, and others with guidance on precisely what workplace conduct is unacceptable with this reality of the social and cultural context in mind.

From Whose Perspective?

While the definition of “sexual harassment” requires that the alleged illegal behavior involve unwanted conduct which is both violative of human dignity, and which creates an intimidating, hostile, degrading, humiliating, or offensive environment, there remains considerable ambiguity as to the proper perspective to be taken when establishing the existence of such behavior. At least two major competing legal standards have emerged in the United States—both based on the concept of “reasonableness”—to determine the presence of sexual harassment: 1) the “reasonable person” standard, and 2) the “reasonable victim” (typically, although not exclusively, known as the “reasonable woman”) standard. The academic and legal debate over which standard is most appropriate has been vigorous [20]. The determination by member states of which standard to adopt in legal proceedings to establish the existence (or absence) of sexual harassment will be of considerable interest to alleged victims and employers of alleged harassers.

To determine whether a particular behavior rises to the level of harassment creating a hostile work environment, the objective perspective of a “reasonable person” can be applied. In the case of *Rabidue v. Osceola Refining Co.*, for example, the court’s majority stated that “to accord appropriate protection to both plaintiffs and defendants in a hostile and/or abusive work environment sexual harassment case, the trier of fact must adopt *the perspective of a reasonable*

person's reaction to a similar environment under essentially like or similar circumstances" [21, at 620; emphasis added]. Based on the centuries-old concept of a generic reasonable human being (the "reasonable man"), and originally conceived as a gender-neutral standard, the reasonable person standard was adopted with the anticipation that the legal system would be spared an avalanche of complaints lodged by hypersensitive employees.

Although the "reasonable person" standard is still used in many U.S. jurisdictions, it could be argued that women and men evaluate incidents of sociosexual behavior differently. Moreover, it could be argued further that a gender-neutral, sex-blind reasonable person standard may tend not to be understanding of, or empathetic with, the experiences of women (who historically have been disproportionately victimized by workplace harassment). As a result, beginning with the case of *Ellison v. Brady*, a "reasonable woman" standard for assessing alleged incidents of harassment has been adopted in some jurisdictions [22]. Based on the presumption that important gender-based differences in perception do exist, and that judges and juries may not be able to fully appreciate the viewpoint of women, the *Ellison* court found that "a complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women" [22, at 878]. Consequently, juries should be instructed to consider the facts from the following gender-sensitive standpoint: Would a reasonable woman consider the alleged conduct sufficiently severe or pervasive to alter the conditions of employment, thus creating an abusive environment? (In actuality, the perspective to be used is that of a "reasonable victim," but because most victims historically have been women, the "reasonable woman" has become nearly synonymous with a "reasonable victim"; in those rare cases involving a male plaintiff, the proper gender-sensitive standard would then be that of a "reasonable man.")

Although the debate over which standard—the reasonable person or the reasonable woman—is most appropriate has been vigorous, in recent years both empirical and theoretical research has begun to question the utility of the distinction. For example, in a comprehensive meta-analysis, Rotundo et al. found that, while gender differences in perception do exist to some degree in certain situations, the magnitude of the differences does not provide strong empirical support for the use of a reasonable-woman standard in preference to a reasonable-person standard [23]. Similarly, Gutek et al. found that the reasonable-woman standard had little practical effect on the assessment of hostile work environment sexual harassment [24]. Shoenfelt et al. came to the conclusion that the argument over standards was moot [25]. While Abrams supported the reasonable person standard, she would modify the term "reasonable" to be understood as characterizing a person "with a solid base of political knowledge regarding sexual harassment" [26, p. 1224]. In critiquing the entire "reasonableness" debate, and in arguing that sexual harassment is most properly viewed as primarily a harm associated with the violation

of an individual's dignity (and less an issue of discrimination), Bernstein endorsed the adoption of a "respectful person" standard [12], a perspective that would be supported by Friedman and Whitman [11].

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

Who Bears the Burden of Proof?

Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex [27] does apply to Council Directive 76/207/EEC and, by inference, to 2002/73/EC, the directive under consideration here. Article 4(1) of Directive 97/80/EC mandates that persons who consider themselves wronged first must establish before a court or other competent authority facts from which it may be presumed that there has been discrimination. Moreover, once the plaintiff establishes this presumption, the burden of proof shifts to the respondent [employer] "to prove that there has been no breach of the principle of equal treatment" [27, p. 6]. In proceedings where the court undertakes the investigation of the facts of the case, however, Article 4(3) allows member states to waive this shifting burden-of-proof standard. Article 4(2) allows member states to adopt rules of evidence that are more favorable to the plaintiff (i.e., the employee). But because Directive 97/80/EC establishes only minimum standards and allows member states to adopt rules more favorable to the plaintiff, it arguably opens up the possibility of creating an uneven playing field for the plaintiff-employee and the defendant-employer. Whether shifting the burden of proof will deliver its intended effects of promoting equal treatment by making it easier to bring discrimination claims remains open to question [28].

ARE EMPLOYERS ENTITLED TO A DEFENSE?

The directive contains two overriding public policy objectives: 1) to eliminate sexual harassment from the European Union workplace, and 2) to provide a means for compensating victims of workplace harassment. There is probably widespread agreement that it is preferable to prevent sexual harassment from occurring rather than simply compensating victims after harassment has occurred. Toward this end, member states could encourage employers to enact policies and procedures consistent with the directive if such actions would enable

employers to defend themselves against liability for damages arising from harassment claims. 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.” Nevertheless, once sexual harassment has occurred, the issue of employer liability—and the amount of damages that flow from that liability—necessarily must be addressed.

Historically, two quite different standards have been used to impose liability upon employers for the acts of their employees. One standard, “negligence,” is based on the notion of “fault,” whereby the employer is liable for failing to meet society’s expectations of civil behavior. The other standard, “absolute liability,” imposes liability on the employer without regard to fault. It can be argued that, in attempting to establish an equitable workplace that fairly balances the rights and duties of employers and employees, each standard has advantages under certain conditions.

An alternative approach (and, in our mind, the desirable alternative) is to examine employer liability and the issue of damages from the standard of strict liability whereby, while fault is not at issue, employers may be allowed certain defenses in an effort to minimize or avoid damages. Ultimately what is desired is an administratively practical and economically efficient resolution to workplace harassment that also strikes an appropriate balance between preventing sexual harassment and compensating harassment victims. We now turn to a discussion of these standards of liability.

Negligence

Negligence is a “knowledge and action” theory that establishes a minimum standard for employer liability. As applied in U.S. law, an employer is liable for damages resulting from sexual harassment under this standard if the employer knew (or should have known) about the discriminatory conduct *and* subsequently failed to promptly and effectively intervene to stop the offending behavior. It is the plaintiff’s burden to prove that the employer was at fault for the damages arising from the sexual harassment. If the aggrieved employee cannot prove that the employer breached a duty of care owed to the employee, no damages can be recovered. In effect, the negligence standard provides a substantial “safe harbor” for employers as long as they either had no prior knowledge of the harassing behavior or, if they did have (or should have had) knowledge, they acted reasonably to prevent future harm. In U.S. law, this knowledge-and-action approach is used in instances where a hostile work environment is alleged to have been created by co-workers, clients, customers, or other third parties exclusive of supervisors.

For the purpose of securing the principles of workplace fairness envisioned by the European Union, the theory of negligence may not have the desired prophylactic effect, nor will it be consistent with the intent of the Burden of Proof Directive 97/80/EC. If one of the primary objectives of E.U. public policy is to prevent harassment from occurring, the negligence standard arguably does not provide employers with the necessary incentive to establish preventative measures because they can avoid liability simply by responding adequately once they know that harassment occurs. If the negligence standard appears too permissive from a public policy perspective, member states could adopt a far more stringent standard that imposes liability regardless of fault.

Absolute Liability for Damages without a Defense

Using an absolute liability standard, under which the employer's knowledge about the harassing activity is irrelevant, liability is absolute. The employer is responsible for the resulting damages, and there are no defenses. Under common law principles, this rigid standard is typically reserved for ultrahazardous activities so inherently dangerous that liability cannot be avoided under any circumstances. Proponents of such a standard in the sexual harassment context argue that absolute liability provides the strongest incentive for employers to take all reasonable steps to ensure that they have done their utmost to prevent and eliminate workplace harassment. Moreover, such a standard rewards employers only if their actions—recruiting, hiring, training, promoting, and dismissing—are effective. Arguably, such an approach will provide employers with an incentive to earnestly undertake both preventative and corrective measures, and to do so in the spirit of continuous improvement. Finally, it has been asserted that an absolute liability standard properly places the burden on those entities—employers—who can best absorb, or insure against, damages occurring from sexual harassment [29].

Absolute liability, however, has substantial drawbacks that may lead to unintended consequences. First, contrary to the assumption noted above, holding employers absolutely liable may actually discourage them from instituting preventative measures. If employers are to be found absolutely liable and defenseless, some might question the wisdom of spending scarce resources to devise and implement processes for eliminating sexual harassment. If employers who make a concerted effort to create a harassment-free environment are treated exactly the same as employers who have not made such efforts, a cost-benefit analysis may convince them that it is cheaper to litigate the underlying claim of sexual harassment than to prevent workplace discrimination. Similarly, other employers may question the wisdom of investigating allegations of sexual harassment promptly because such activity, if it leads to corrective actions, may be perceived as having the effect of making an admission of liability for wrongdoing. Absolute liability may encourage employees *not* to report instances of sexual harassment

in the hopes of reaping larger, future financial rewards through the accumulation of incidents of inappropriate behavior that can later be presented in court. Finally, in contemplating significant financial rewards from bringing fraudulent claims, unethical employees may fabricate or stage bogus instances of sexual harassment knowing that, without an available defense, the employer will be held absolutely liable.

While we are not in favor of using the absolute liability standard in most instances of sexual harassment, we recognize that there are certain circumstances that are so onerous, so disrespectful of the dignity of the employee, that it is not merely useful but essential to invoke the standard. For example, conditioning future employment on submission to demands for sexual favors is so egregious as to offend all reasonable people. More generally, if sexual harassment results in other tangible job actions (e.g., demotion, failure to promote, dismissal), there can be no defense for employers, a principle firmly adopted by the U.S. Supreme Court.

Strict Liability: The Preferred Standard

From a social welfare perspective concerned with economic efficiency, and from a managerial perspective concerned with administrative practicality, the preferred standard for balancing the prevention of sexual harassment with the compensation of harassment victims should be one of strict liability—liability is incurred by the employer on the first harassing act of its employee. Finding employers strictly liable for the actions of their employees, without determining whether the employer was at fault, does not preclude the provision of defenses against damages. In contrast to absolute liability, a strict liability approach encourages employers to adopt effective preventative and corrective measures while simultaneously encouraging employees to act reasonably in utilizing these employer-created procedural mechanisms. Two general approaches currently in use in the United States, one based on agency principles involving “vicarious liability,” and one based on the common law doctrine of “avoidable consequences,” attempt to partition equitably the responsibility for damages resulting from sexual harassment in the workplace. An evaluation of the former approach will lead, in our opinion, to a preference for the latter.

The “Agency/Vicarious Liability” Approach

When the alleged harasser holds a supervisory position within the firm, the employer can be considered vicariously liable for the supervisor’s conduct under the agency principle of *respondeat superior* as applied in U.S. law. When compared to the negligence principle, vicarious liability holds employers to a higher standard of conduct under the assumption that the employer grants supervisors substantial authority compared to nonsupervisory personnel. In other words, supervisors are empowered to direct the activities of disempowered

subordinates, thus establishing a power imbalance. This form of liability falls somewhere between the standard of negligence and the standard of absolute liability in that it does not require a finding of fault but does allow a defense for the employer for limiting or avoiding damages. As a result, in theory it avoids the potential shortcomings of both the negligence and absolute liability standards of liability. As currently utilized in U.S. law, this standard based on agency law is not applicable in situations involving harassment by co-workers or third parties, and employers are also precluded from using it in instances of harassment involving tangible job actions.

Under this approach, when implementing the directive, member states could fashion statutes creating an “affirmative defense” to vicarious liability following the examples created by the U.S. Supreme Court in *Burlington Industries, Inc. v. Ellerth* (“*Ellerth*”) [30] and *Faragher v. City of Boca Raton* (“*Faragher*”) [31]. These cases created an affirmative defense for employers based on a novel two-pronged test. As the Court wrote,

a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise [30, at 765; 31, at 807].

This defense is allowable *only* when no tangible job action is taken against the harassed employee (which probably constitutes the majority of incidents of sexual harassment). To assert the defense successfully, the employer must show that the employee acted unreasonably either by failing to report promptly to the employer instances of sexual harassment, or by failing to utilize employer-provided internal grievance procedures.

It can be argued that this defense may not go far enough, either for employers or employees. For example, empirical evidence supports the proposition that employers who do establish appropriate and meaningful workplace justice procedures should be afforded protection even when a harassed employee does, in fact, use them—as was intended by the employer’s policies and procedures [32]. Others, however, assert that this defense fails to protect the harassed employee fully by rewarding procedural compliance at the expense of effective prevention. In other words, employers might give less attention to preventing harassment if their liability can be limited by merely following procedures after harassment has occurred [29]. Moreover, this defense may not adequately take into account the pressures a harassed employee experiences in deciding if, or when, to utilize the employer’s procedural mechanisms. An open question remains: Does an affirmative defense apply only when an employee unreasonably fails to take advantage of employer-created preventive or corrective procedures, or should it

be extended to include instances when employees do, in fact, avail themselves of the procedural mechanisms provided by the employer? In any case, the affirmative defense based on agency principles and vicarious liability is at least a first step toward properly allocating responsibility between the employer and the employee for the prevention and remediation of workplace harassment.

Unfortunately, in the years since the *Ellerth* and *Faragher* decisions, an examination of lower courts' interpretations and applications of the affirmative defense has led one observer to claim that these courts have "emasculated" the U.S. Supreme Court's ruling by adopting a pro-employer bias to the detriment of the civil rights of harassment victims. This bias takes the form of treating each prong of the affirmative defense as a sufficient condition for avoiding vicarious liability, rather than requiring each of them to be necessary conditions. Equally troubling, however, is that these lower courts tend to ignore the "harm-avoidance analysis" required by the second prong of the defense [33].

What is often insufficiently appreciated is that the *Ellerth* and *Faragher* decisions hold that merely establishing the two-pronged defense does not automatically absolve the employer from liability for damages. Once the defense is established, the common law principle of "avoidable consequences" must be invoked, to wit: the employer avoids all liability if, and only if, reasonable care by the harassed employee would have avoided all harm; and, if reasonable care by the employee would have avoided only some harm, the employer *remains liable but is not required to pay* for those damages that reasonably could have been avoided. Thus, assuming that it is extremely unlikely that an employee will be able to avoid all harm from the harassing behavior initiated by others, the essence of the affirmative defense under the agency/vicarious liability approach is less about avoiding liability than it is about the apportionment of damages. In other words, the critical question should be: For which unavoidable damages must the employer pay, and for which avoidable damages is the employee not entitled to receive compensation?

The "Avoidable Consequences" Approach

The first prong of this defense places a duty on employers to establish reasonable policies and procedures to prevent and correct promptly any sexually harassing behavior. The ultimate success in fulfilling this duty will be gauged by the employer's ability to prevent sexual harassment; in other words, prevention is the only result that renders an employer free from liability. While the full eradication of sexual harassment from the workplace is a noble goal worth pursuing, it is unrealistic to assume that it will be achieved completely. Because perfection likely cannot be achieved, employers will never fully escape liability. We propose, therefore, that employers should be held strictly liable for any and every instance of workplace sexual harassment, but the amount of damages for which the employer is responsible must be dictated solely by a harm-avoidance

analysis under the avoidable consequences doctrine in cases not involving tangible job action. Put simply: while the employer remains strictly liable for workplace sexual harassment, the harassed employee should not be allowed to recover damages that the employee could have reasonably avoided.

A clear and persuasive application of the avoidable consequences principle to workplace sexual harassment is illustrated in *State Department of Health Services v. Superior Court (McGinnis)*, decided by the Supreme Court of California in November, 2003 [34]. Focusing exclusively on sexual harassment by supervisors, the California high court ruled that an employer is strictly liable for all acts of sexual harassment by a supervisor and, under the avoidable-consequences doctrine, “a plaintiff’s recoverable damages do not include those damages that the plaintiff could have avoided with reasonable effort and without undue risk, expense, or humiliation” [34, at 1034]. In other words, “even under a strict liability standard, a plaintiff’s own conduct may limit the amount of damages recoverable or bar recovery entirely” [34, at 1042]. The employer bears the burden of proving all elements of a defense based on avoidable consequences.

The avoidable-consequences defense fashioned by the California Supreme Court requires three prongs: 1) the employer must show that it took reasonable steps to prevent and correct workplace sexual harassment, 2) the employee must unreasonably fail to use the preventive and corrective measures provided by the employer, and 3) it must be shown that a reasonable use of the employer’s procedures would have prevented at least some of the harm that the employee suffered. Thus conceived, a defense based on avoidable consequences encourages preventive action by both the employer and the employee while entitling the harassed employee to compensation only for those damages that neither the employer nor the employee could have avoided through reasonable care. If the employer using this defense can establish that, had the employee taken reasonable steps to utilize the employer’s complaint procedures, and that such efforts would have caused the harassment to cease, the employer would remain liable for any damages suffered by the employee prior to the time the harassment would have ceased, but would avoid liability for any damages the employee suffered thereafter. In layman’s terms, the employee would not be entitled to recover damages caused by “self-inflicted wounds.”

To the extent that this defense acknowledges a duty on the part of both the employer *and* the employee to take reasonable steps to prevent workplace harassment, it is wholly consistent with Recommendation 92/131/EEC on the protection of the dignity of women and men at work, whereby the annexed Code of Practice acknowledges “employees’ responsibilities” in preventing and discouraging sexual harassment. We see no good reason to apply the avoidable-consequences doctrine to only those cases involving harassment by supervisors—it is sufficiently robust to be applied to all cases of workplace harassment without regard to the status of the harasser [35]. By acknowledging that liability for damages can and should be apportioned between employer and

employee based on the reasonableness of their actions, both parties in the employment relationship are given a powerful incentive to work diligently to prevent workplace harassment.

THE FOUNDATIONS OF AN EMPLOYER DEFENSE

A defense for employers based on the avoidable-consequences doctrine neither demands nor expects that victimized employees will immediately utilize employer-provided grievance procedures. For example, the aggrieved employee might delay in the belief that reporting harassing behavior will lead to reprisals because the employee appropriately feels humiliated, embarrassed, or ashamed. Even worse, the employer may lack adequate published harassment policies and enforcement procedures or, if such policies and procedures exist, may not have adequately communicated them to the employee. Under these conditions, the employer becomes more vulnerable to liability for damages.

The most important and direct guarantor of the principle of equal treatment between men and women in the workplace will be employers. To decrease their vulnerability, employers should be prepared to demonstrate that they have prohibited retaliation for reporting instances of harassment, that they will reasonably protect employee confidentiality, and that they are determined to enforce anti-harassment policies consistently. The employer must be prepared to show that it has in fact adopted appropriate antiharassment policies *and* has effectively communicated essential information to all employees. The defense based on avoidable consequences necessarily depends on the ability of employers to show that they have effectively encouraged employees to utilize established procedures and that the employer actively addresses all complaints. Of course, the determination of when a harassed employee suffered compensable damages must be a matter for the trier of fact to resolve. Similarly, the employee's reluctance to formally come forward because s/he prefers to try to resolve the complaint informally in a nonconfrontational manner (to avoid embarrassment, for example) is a factual issue to be resolved by carefully considering the particular workplace environment in which the harassment allegedly occurred.

Preventative Measures

As individual member states debate how to implement the mandates contained in the directive, employers cannot afford to stand idly by waiting for the public policy debates to conclude. Here are some practical suggestions for both preventing sexual harassment and for undertaking remedial measures. These suggestions constitute the foundations of a defense that employers can use to minimize damages arising from workplace harassment.

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

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

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

Employees have the duty to comply with the policy and its provisions, and employers have the duty to provide adequate training. Training sessions should familiarize or reacquaint employees with their respective rights and responsibilities under the policy, and should provide a form of continuing education

on conditions that contribute to a harassment-free working environment. This training should be undertaken at the time of hiring and throughout an employee's tenure, and specialized training should be provided to those employees assigned an official role in administering the policy's complaint procedures. Managers and supervisors are responsible for implementing the policy, for taking actions to encourage compliance, and for ensuring that a system of workplace justice is established. Ongoing training for managers and supervisors is an essential element in the employer's arsenal of preventative measures.

Remedial Measures

Employers must also have in place processes for addressing incidents of harassment once they have occurred (or are alleged to have occurred). Workplace justice systems and procedural mechanisms for remedying sexual harassment are as important as policy statements for employers seeking to provide equal treatment for employees consistent with the letter and spirit of the directive.

Commission Recommendation 92/131/EEC provides sound advice and direction for employers seeking to establish a system of remedial measures to address claims and instances of sexual harassment. These justice-based procedural mechanisms should 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 sexual harassment in an informal way. Sometimes it may be necessary only for an offended employee to communicate clearly the nature of the unwelcomed behavior to the offending employee, 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. Toward this end, employers could design systems and procedures to encourage employees to resolve instances (or allegations) of sexual harassment informally among themselves through open communication and honest dialogue. 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 the harasser has refused such informal overtures, the harassed employee must be able to seek redress and remedy through a formal complaint process created and scrupulously administered by the employer. 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 timelines—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 [32].

Advice and Assistance

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

Investigations

The decision to investigate claims of harassment impartially, thoroughly, and promptly—and to do so reasonably—can no longer be viewed as simply a matter of managerial discretion. The focus of the inquiry relates exclusively to the question of whether the alleged harasser engaged in prohibited behavior, and investigators must distinguish statements of fact from mere conjecture. These investigations can be done in-house or can be outsourced to qualified professionals [36]. Failing to investigate competently, however, may very well be regarded as strong evidence that the employer approves, albeit implicitly, of the harassment, in direct contravention of the directive.

Discipline

The firm’s policy prohibiting sexual harassment and protecting the dignity of employees at work should first clearly identify behavior that is unacceptable, and then specify the range of sanctions that will be imposed on employees engaging in such unacceptable behavior. The policy should prohibit retaliation against, and victimization of, persons bringing complaints of sexual harassment (or persons advising or otherwise assisting complainants). If a complaint is valid, management must take whatever action is appropriate to ensure that the offending behavior

ceases. When an allegation is found to be unsubstantiated, however, it may be prudent for management to reassign or transfer one of the parties to the complaint in the interests of reestablishing workplace harmony, especially if either party expresses a desire for such a transfer.

CONCLUSION

With the adoption of the directive, the European Union has taken a major step toward harmonizing public policy aimed at reducing sexual harassment in the workplace. If it seems as though U.S. law is a confusing and sometimes contradictory amalgam of principles and standards, the cause of this confusion can be traced directly to the failure of the U.S. Congress to define precisely the nature of sexual harassment, and its failure to adequately address issues of employer liability. As member states pass implementing national legislation, they can avoid the confusion experienced in the United States by: 1) operationalizing the definition of "sexual harassment" so as to eliminate, as much as possible, the ambiguities inherent in determining the boundaries between acceptable and prohibited behavior; and 2) adopting a standard of strict liability accompanied by an employer defense for damages based on the doctrine of avoidable consequences. In our opinion, member states need not make distinctions based on the status of the accused harasser, and strict liability with an avoidable consequences defense can be made applicable to all forms of sexual harassment.

ENDNOTES

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Direct reprint requests to:

Professor G. Gomes
Department of Management
California State University, Chico
Chico, CA 95929-0031
e-mail: ggomes@csuchico.edu