



**PROTECTION FROM SEXUAL HARASSMENT AT THE WORKPLACE IN THE
UNITED STATES AND WHAT EUROPEAN UNION COULD LEARN FROM IT**

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ABSTRACT

The paper analyses legal protection from sexual harassment at the workplace in the United States with the aim of identifying aspects that European Union could learn from. The two systems are assessed and compared, the weaknesses of the U.S. solution are criticised and the strengths of the European Union's Directive appreciated. The paper determines whether United States offers more efficient and broader protection from sexual harassment at the workplace than the European Union and what are the possible developments and necessary additions that European Union should consider. The discussion centres on the definition, liability and remedies for sexual harassment.

INTRODUCTION

Legal protection from sexual harassment¹ at the workplace has been discussed in the United States starting from the 1970-s. Since the landmark U.S. Supreme Court case of Meritor Savings Bank v. Vinson² hundreds of cases have been decided on state and several on federal level giving detailed interpretation of the matter. On European Union level, it was in 2002³ that sexual harassment was first addressed in a binding legal form. For a long time, Europe considered regulating sexual harassment an American export that found little support. Up to today no sexual harassment cases have found their way to the European Court of Justice⁴.

Due to the longer tradition, certain standards of legal protection from sexual harassment have emerged in the United States and the matter has been widely interpreted through case law. The definition of sexual harassment has been developed further and has reached a certain level of maturity. European Union's Equal Treatment Amendment Directive aims at harmonizing regulation of sexual harassment in Europe. However, it would be early to talk about the emergence of a European wide standard. Thus, it can be asked if Europe has something to learn from the United States.

This paper aims at analysing legal protection from sexual harassment at the workplace in the United States with the aim of identifying aspects that European Union could learn from. The main

1 This paper uses “sexual harassment” as an umbrella term to embrace the EU definition of sexual harassment as well as the two types of sexual harassment recognized in the United States, *quid pro quo* harassment and hostile working environment harassment.

2 477 U.S. 57 (1986), later also referred to as Meritor Savings Bank

3 Directive 76/207/EEC as amended by Directive 2002/73/EC, also referred to in this paper as the Directive or the Equal Treatment Amendment Directive. While Directive 76/207/EEC did not define sexual harassment, Directive 2002/73/EC included the definitions of harassment and sexual harassment. Recently a Recast Directive (2006/54/EC) came into force that aims at consolidating older equal treatment directives into one. Directive 2006/54/EC recasts and incorporates Directives 76/207/EEC, 2002/73/EC, 86/378/EEC, 75/117/EEC, 97/80/EC. As the definition and essential requirements of Directive 2002/73/EC regarding sexual harassment remain unchanged by the Recast Directive, this paper refers to Directive 2002/73/EC.

4 Later also referred to as ECJ

sources for this analysis are Title VII of the Civil Rights Act and accompanying case law in the United States and the Equal Treatment Amendment Directive in the European Union. The paper assesses and compares the two systems, while also criticising the weaknesses of the U.S. solution and appreciating the strengths of the European Union's Directive. The ultimate goal is to determine whether United States offers more efficient and broader protection from sexual harassment at the workplace than the European Union and what are the possible developments and necessary additions that European Union should consider.

The availability of literature regarding the topic of the paper varies from rather abundant literature concerning the United States, while less has been written about the European Union. Comparative studies of the two systems are limited. Available comparative literature focuses on different aspects than aimed at in this paper. United States and European Union are usually compared on the basis of policy making in the issue or the comparison remains on a general level without dealing with the particularities. Many articles discuss comparatively anti-discrimination legislation in general without special focus on sex discrimination and sexual harassment or analyse the compatibility of Member States' legislation with the European Union Directive. There is hardly any literature comparing the protection offered to sexual harassment in the United States and in Europe Union that assesses the strengths and weaknesses of both systems and determines what Europe could learn from the United States. This paper is aiming to add to that gap.

Finally, it should be mentioned that the paper is not dealing with sexual harassment in the academy and does not particularly address the special issues of homosexual sexual harassment. Race as an additional factor in addition to sex is not covered by this paper and neither is the conflict between protection from harassment and freedom of speech.

The paper is divided into three main chapters: Definition of Sexual Harassment, Aspects of Liability and Remedies Available in Sexual Harassment Cases.

The first chapter, Definition of Sexual Harassment discusses the development of the definitions in the United States and in European Union as well as gives a comparison of the two. While the first sub-chapter looks in more detail into the two types of sexual harassment accepted in the United States, *quid pro quo* and hostile working environment harassment, the second sub-chapter analyses the difference between the definitions of sexual harassment and harassment adopted by the European Union Directive. Finally, the last sub-chapter discusses what is the underlying value behind protection from sexual harassment in the United States and European Union. This is a question about what is actually being protected under the definitions of sexual harassment, equality or dignity? The consequences of choosing one or the other value are analysed.

In the second chapter, Aspects of Liability, the issue of who is liable for sexual harassment at the workplace is discussed. One of the questions addressed is whether it should be the employer that is liable or rather the individual harasser as well as what are the considerations behind the two options. The first sub-chapter analyses the model for holding employers liable in the United States and addresses its weaknesses. The issue of affirmative defence is given detailed attention as well as alternatives to the currently applied affirmative defence are offered. The second sub-chapter analyses how the question of liability is addressed by the European Union Directive and criticises the lack of attention given to this issue. Based on the lessons learnt from the U.S. system, a model of employer's liability that could be adopted by national legislations is finally suggested.

The last chapter, Remedies Available in Sexual Harassment Cases compares remedies available in a successful sexual harassment case in the United States and under the European Union Directive. The first two sub-chapters discuss remedies that existed in the United States before and after the entry into force of the 1991 amendment to the Civil Rights Act. The third sub-chapter addresses remedies available under the European Union Directive and compares their extent to those available in the United States. Finally, the last sub-chapter addresses the issue of criminal sanctions in remedying sexual harassment. The positive consequences of criminalizing sexual

harassment are weighted against the possible drawbacks that this solution would entail.

It is a commonly accepted fact that sexual harassment at the workplace is a widespread phenomenon both in the United States and European Union. Due to the longer tradition, certain standards for legal protection from sexual harassment have emerged in the United States and the matter has been widely interpreted through case law. Though Europe has shown some reluctance in legally addressing the issue, the Equal Treatment Amendment Directive aims at harmonizing protection from sexual harassment in European Union Member States. However, no European level case law has yet emerged. This paper asks whether the United States has an efficient model for protecting against sexual harassment at the workplace and whether Europe could learn from this practice.

CHAPTER I – DEFINITION OF SEXUAL HARASSMENT

Protection against sexual harassment is regulated on the European Union level by Directive 2002/73/EC⁵ and in the United States under Title VII of the Civil Rights Act of 1964⁶. While concrete regulation concerning sexual harassment was introduced by the European Union much later than in the United States, the original version of the Civil Rights Act of 1964 was not meant to protect against sexual harassment. The main purpose of the Act was to deal with the problems of racial segregation and discrimination based on race. What is more, the original grounds on which discrimination was prohibited by the Civil Rights Act did not include sex. Sex as a prohibited ground of discrimination was added at the last minute in the House of Representatives.⁷ Protection against sexual harassment in the United States, thus, developed rather through case law than on the basis of the Civil Rights Act.

In the European Union the intent was expressed by the legislators through the 2002 Equal Treatment Amendment Directive that requires all Member States to adopt or amend legislation concerning sexual harassment that meets the minimum standards set by the Directive. As a sharp contrast to the United States, there is still no case law on the European Union level. The lack of case law could partly be justified by the fact that the Directive's deadline for introducing legislation in Member States was 05 October 2005. However, more than 3 years have passed since that, a long enough period for some case law to emerge. Thus, the lack of case law on the European level reflects the reluctance, still prevailing in Europe,

5 Directive 2002/73/EC amends Directive 76/207/EEC which introduced the principle of equal treatment of men and women in employment but did not particularly address the issue of sexual harassment. This paper refers to Directive 2002/73/EC also as “the Directive” or “the Equal Treatment Amendment Directive”.

6 42 U.S.C. § 2000 e-2 et seq. Several aspects of Title VII of the Civil Rights Act of 1964 were amended by the Civil Rights Act of 1991. Any reference, unless otherwise specified, refers to the amended version.

7 110 Cong.Rec. 2577-2584 (1964), referred to in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)

to resolve occasions of sexual harassment through legal channels. Though Europe has long accepted the fact that sexual harassment at work is a widespread phenomenon⁸, it is not yet comfortable with taking such matters to court.

Protection against sexual harassment in the United States was built on an already existing strong tradition of individual rights. Racial discrimination had been acknowledged as a vice since the civil rights movement and as such, provided a beneficial basis for addressing sexual harassment as an issue of discrimination. Legal aspects of sex discrimination in employment had been dealt with by the feminists already since *Muller v. Oregon*⁹ and the Equal Pay Act was introduced in 1963, before the Civil Rights Act of 1964 came into force.¹⁰ As a result, it can be claimed that sex discrimination was a familiar issue to the public and the courts and building on the concept of civil rights made it easier to accept protection against sexual harassment as an issue of prohibition of discrimination.

Protection against sexual harassment in Europe lacked the background of a strong tradition of civil rights. In the 1990-s European Union introduced soft law measures to combat sexual harassment but these measures were not binding on the Member States. The soft law measures include the Council of Ministers resolution concerning the dignity of women and men at work¹¹ from 1990, the Commission Recommendation, and the corresponding Code of Practice¹² from 1991. Their main aim was to call upon Member States

8 Already the 1998 European Commission report on “Sexual Harassment in the Workplace in the European Union” admitted the fact that sexual harassment in the workplace is a widespread phenomenon in the European Union Member States. The report is available at <http://www.un.org/womenwatch/osagi/pdf/shworkpl.pdf>, accessed on Nov. 09, 2008

9 208 U.S. 412 (1908)

10 Kathrin S. Zippel “The Politics of Sexual Harassment. A Comparative Study of the United States, the European Union, and Germany”, Cambridge 2006

11 Council Resolution of 29 May 1990 on the Protection of the Dignity of Women and Men at Work, Official Journal C 157, 27/06/1990 P. 0003-0004

12 Commission Recommendation of 27 November 1991 on the Protection of the Dignity of Women and Men at Work, 92/131/EEC

to adopt legislation regulating sexual harassment.

Even though they were not binding, the soft law measures played an important role in the development of protection against sexual harassment in the Member States. EU measures helped to legitimize the idea that protection against sexual harassment has to be addressed in the European countries. The issue was not any more only an American exaggeration that doesn't correspond to the European culture.¹³ However, the soft law measures were criticized for not being binding on the Member States. This was finally resolved with the coming into force of Directive 2002/73/EC.

1.1 DEVELOPMENT OF THE DEFINITION OF SEXUAL HARASSMENT IN THE UNITED STATES

Sexual harassment in the United States is regulated under Title VII of the Civil Rights Act that prohibits discrimination in employment based on five grounds: race, colour, religion, sex and national origin.¹⁴ However, Title VII was not drafted with the intent to provide protection against sexual harassment. Such protection got its current form through court decisions that interpreted Title VII of the Civil Rights Act in such an extended manner as to cover sexual harassment. As a result, the actual definition of sexual harassment in the U.S. law cannot be found in the text of Title VII but in case law.

The first proposal for a definition of sexual harassment as a form of sex discrimination

13 Kathrin S. Zippel "The Politics of Sexual Harassment. A Comparative Study of the United States, the European Union, and Germany", Cambridge 2006, p. 100

14 42 U.S.C. Sec. 2000e-2: (a) It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, colour, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, colour, religion, sex, or national origin.

was made by the feminist author Catharine MacKinnon who in her 1979 book “Sexual Harassment of Working Women” defined sexual harassment as “the unwanted imposition of sexual requirements in the context of a relationship of unequal power.”¹⁵ The proposal to define sexual harassment as sex discrimination was followed by the response on behalf of the Equal Employment Opportunity Commission¹⁶, an agency created by the Civil Rights Act to enforce and implement the Act¹⁷. In 1980, the EEOC issued Guidelines that confirmed the idea expressed by MacKinnon that sexual harassment should be interpreted as a violation of Title VII. According to the Guidelines, sexual harassment was defined as “unwelcome sexual advances, requests for sexual favours, and other verbal or physical conduct of a sexual nature [...]when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.”¹⁸

Finally, in 1986, after six years of various lower court decisions¹⁹ with different interpretations, the definition of sexual harassment was confirmed in the Supreme Court case *Meritor Savings Bank v. Vinson*.²⁰ The case involved a female employee, Ms Vinson, of the Meritor Savings Bank who was discharged for overusing sick leave. After being fired Vinson

15 Catharine MacKinnon “Sexual Harassment of Working Women: A Case of Sex Discrimination”, New Haven: Yale University Press, 1979

16 Later also referred to as EEOC

17 42 U.S.C. Sec. 2000e-4

18 Guidelines on Discrimination Because of Sex, 29 C.F.R Part 1604.11(a), later also referred to as EEOC Guidelines, available at http://www.access.gpo.gov/nara/cfr/waisidx_07/29cfr1604_07.html, accessed on Nov. 17, 2008

19 The first lower court decision to recognize *quid pro quo* harassment (though not calling it so), was *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977), the first decision to use the term was *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982)

20 477 U.S. 57 (1986)

took the bank and her supervisor to the court claiming that she had been subjected to sexual harassment during the time of her employment. Vinson testified that soon after being employed by the bank, her supervisor, Taylor, took her out for dinner and suggested having sexual relations with him. Vinson refused in the beginning but eventually, agreed due to fear of losing her job. She claimed of having been in a sexual relationship with her supervisor due to the demands from Taylor and that the latter fondled her in front of other colleagues and in several occasions forcibly raped her. Taylor and the bank denied the charges and respectively claimed not having sexual relations with the plaintiff and not being aware of any such relations. The bank also argued that “in prohibiting discrimination with respect to “compensation, terms, conditions, or privileges” of employment, Congress was concerned with what [the bank] describes as “tangible loss” of “an economic character,” not “purely psychological aspects of the workplace environment”²¹.

The Supreme Court, affirming the Court of Appeals' decision, built upon the EEOC Guidelines and held that “the language of Title VII is not limited to “economic” or “tangible” discrimination”²². The court found that the “phrase “terms, conditions, or privileges of employment” evinces a congressional intent “to strike at the entire spectrum of disparate treatment of men and women” in employment.”²³ Thus, the Supreme Court accepted EEOC Guidelines' concept of not limiting sexual harassment plainly to such actions which result in employment decisions affecting the victim economically, but ruled that also hostile working environment constitutes sex discrimination prohibited under Title VII of the Civil Rights Act.

Based on the EEOC Guidelines, the Court of Appeals and the Supreme Court

21 Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986)

22 Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986)

23 Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986)

judgements in the case of *Meritor Savings Bank v. Vinson*, sexual harassment in the United States can thus be defined as:

Quid pro quo harassment – harassment that makes granting sexual favours a condition for receiving employment benefits;

Hostile working environment – harassment that does not have an influence on economic benefits but nevertheless creates a hostile or offensive working environment.

The distinction between *quid pro quo* and hostile working environment harassment was later shifted to a distinction between harassment that results in tangible employment action and such that does not. After the Supreme Court's decisions in *Burlington Industries, Inc. v. Ellerth*²⁴ and *Faragher v. City of Boca Raton*²⁵ established affirmative defence for harassment that does not result in tangible employment action and strict liability for harassment that does, the distinction between *quid pro quo* and hostile working environment lost its practical meaning in deciding about employer's liability.

In a sexual harassment case where the existence of harassment has been determined, the most important question that remains, is whether the employer is made liable and thus the plaintiff can collect damages. Since *Ellerth* and *Faragher*, the employer is strictly liable only in cases where tangible employment action follows. Thus, all other situations are subject to the affirmative defence. As a result, the distinction between hostile working environment and *quid pro quo* harassment has practical relevance only “when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII”²⁶. The EEOC adopted a

24 524 U.S. 742 (1998), later also referred to as *Ellerth*

25 524 U.S. 775 (1998), later also referred to as *Faragher*

26 *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998)

similar approach in its guidelines on employer's liability²⁷.

Even though the distinction between *quid pro quo* and hostile working environment sexual harassment lost its meaning in deciding about the availability of compensation in successful cases, it still plays a role in differentiating between the two types of harassment according to their severity. The fact that strict liability is applied only in case a tangible employment action is taken, does not alter the fact that *quid pro quo* is a more severe form of harassment than hostile working environment harassment. Thus, this paper follows by discussing the distinction between the two.

1.1.1. *Quid Pro Quo Harassment*

Quid pro quo harassment cases involve a situation where a demand for sexual favours is made a condition for job benefits. This form of harassment can be divided into two possible situations. The first one involves an occasion when an employee submits to sexual demands and thus is rewarded with job benefits, while in the second case, the employee rejects sexual demands and thus suffers from retaliation. In case the employee submits to sexual demands which are not followed by an adverse employment action, no *quid pro quo* harassment is present.

Quid pro quo sexual harassment can be perpetrated only by supervisors and not by co-workers. Co-workers, theoretically, are not able to condition submission to sexual demands upon job benefits as they do not possess the authority to provide or deny such benefits. However, it must be noted that in some cases employees can possess informal power at workplace that does not derive from hierarchy but from other factors, such as superiority or

27 EEOC "Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors" 1999, available at: <http://www.eeoc.gov/policy/docs/harassment.html>, accessed on Nov. 17, 2008

belonging to a trade union.²⁸ Thus, co-workers, in theory, can also possess power to influence job benefits and perpetrate *quid pro quo* harassment. This, however, was not considered by the Supreme Court decisions and thus, harassment is defined as *quid pro quo* only if executed by supervisors.

Quid pro quo harassment requires a showing by the plaintiff of a direct connection between the job benefit or loss and the acceptance or refusal to comply with sexual advances. No proof that the harassment is pervasive and objectively intolerable is required but the plaintiff has to establish that an actual threat existed and that it was the reaction to the threat that resulted in the job loss. In other words, the nexus between the harassment and the employment action has to be proved by the employee. Thus, the burden of proof is placed on the plaintiff and not the employer.²⁹ This makes *quid pro quo* cases rather difficult to prove as the employer has the option of claiming that dismissal did not depend on rejecting sexual advances but on the shortcomings in the work or qualifications of the employee.

1.1.2. Hostile Working Environment Harassment

Hostile working environment, the form of sexual harassment that was recognized by the Supreme Court in the case of Meritor Savings Bank v. Vinson, involves situations where submission to sexual demands is not made a condition for employment benefits but a hostile and intimidating working environment is created that often results in the voluntary resignation of the victim. Such harassment can be perpetrated by all employees and thus is not limited to the actions of the supervisors.

However, as the Supreme Court held in Meritor Savings Bank, “for [hostile working

28 This is further discussed in Chapter II, under the subtitle Potential Model for Employer's Liability for EU Member States

29 Susan Estrich “Sex at Work”, 43 Stan. L. Rev. 813, 1999 p. 834 - 840

environment] to be actionable, it must be sufficiently severe or pervasive “to alter the conditions of [the victim's] employment and create an abusive working environment”³⁰. The sufficiently severe or pervasive requirement aims at avoiding situations where the “mere utterance of an ... epithet which engenders offensive feelings”³¹ would result in a sexual harassment lawsuit. However, the requirement has often been unduly used as a basis for denying a hostile working environment cause.

In deciding whether sexual harassment is sufficiently severe or pervasive, the courts have to take into account the “totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred”³². Frequency of the discriminatory conduct, severity, physical threat and humiliation are some of the factors that can be considered. Proving psychological harm or actual injury is not required but the conduct must be considered both objectively and subjectively hostile or abusive to show that it actually altered the conditions of employment.³³

The sufficiently pervasive or severe requirement distinguishes hostile working environment harassment clearly from *quid pro quo* harassment. While *quid pro quo* harassment is sufficiently severe by nature and thus one single occurrence is considered enough to make a claim, hostile working environment harassment has to occur repeatedly or its severity has to be proved.

Some of the problems that have emerged in proving hostile working environment

30 Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), quoting Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982)

31 Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), quoting Rogers v. EEOC, 454 F.2d 234 (1971)

32 Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), reinforced in Harris v. Forklift Systems, 510 U.S. 17 (1993)

33 Harris v. Forklift Systems, 510 U.S. 17 (1993)

harassment include the fact that court decisions that followed *Harris v. Forklift Systems*³⁴ have wrongfully merged the tests for the subjective and objective standards and have used the examples brought in *Harris* to illustrate what could be considered under the totality of circumstances as determining factors. The courts have inquired whether harassment meets the frequency, severity, physically threatening and humiliating and unreasonable interference with job performance conditions that only served as examples in *Harris*. What is more, instead of asking whether the conduct was subjectively considered hostile or abusive by the victim and objectively by a reasonable person, the courts only inquire whether a reasonable person would find the conduct hostile.³⁵ Thus, how the victim perceived the situation, is left outside the consideration. It is questionable how a reasonable person's perception alone, of such a personal matter, can be sufficient to determine whether the harassment creates a hostile working environment or not.

Another issue that has received little attention though it deserves discussion, is the fact that in order to be able to make out a hostile working environment case, courts, in most cases, require the presence of sexual acts. In *Oncale v. Sundowner Offshore Services, Inc.*³⁶ the Supreme Court found that hostile working environment includes all forms of discriminatory behaviour that is taken “because of [the] sex” of a person and that “harassing conduct need not be motivated by sexual desire to support an interference of discrimination on the basis of sex”³⁷. Nevertheless, lower courts have been willing to find hostile working environment only in cases where explicit sexual conduct exists.³⁸ This leaves such employees without a remedy

34 510 U.S. 17 (1993), also referred to as *Harris*

35 Elisabeth A. Keller and Judith B. Tracy “Hidden in Plain Sight: Achieving More Just Results in Hostile Work Environment Sexual Harassment Cases by Re-Examining Supreme Court Precedent”, 15 *Duke J. Gender L. & Pol'y* 247, 2008, p. 257 and see also *Mitchell v. Pope*, 189 F. App'x 911 (11th Cir. 2006)

36 523 U.S. 75 (1998)

37 *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998)

38 Jennifer D. Growe “Reform the EEOC Guidelines: Protect Employees from Gender Discrimination as

who suffer from harassing behaviour because of their sex that does not find expression in sexual conduct. Thus, an employee who experiences hostile working environment due to hostility because of sex finds it very hard to prove a hostile working environment case unless sexually explicit conduct occurred. As a result, there is an area of discrimination based on sex that is basically left without a remedy.

1.1.3. Conceptual Elements that Apply Equally to Quid Pro Quo and Hostile Working Environment Harassment

Besides the elements of *quid pro quo* and hostile working environment harassment that have been discussed above, there are two requirements that a plaintiff has to prove in both types of sexual harassment claims. First, anyone alleging sex discrimination under Title VII must show that they were discriminated “because of sex”. The other common requirement includes the showing that the harassing behaviour was “unwelcome”.

While in *quid pro quo* cases the fact that discrimination occurs “because of sex” is usually presumed, it is somewhat harder to prove in hostile working environment cases. The question concerns a determination about whether a representative of one sex was subjected to disadvantageous terms and conditions to which members of the other sex were not.³⁹ The requirement causes difficulties in cases where both men and women are subjected to the same harassing behaviour. If, for example, sexually explicit photos are used to decorate the office or sexual language is used, it can be claimed that both men and women were subject to such behaviour, and thus, no discrimination “because of sex” occurred.

However, courts have recently adopted a different attitude to the “because of sex”

Mandated by Title VII”, 24 Wash. U. J.L. & Pol’y 275, 2007, also see cases such as *Peterson v. Scott County*, 406 F.3d 515 (8th Cir. 2005) and *Alagna v. Smithville R-II*, 324 F.3d 975 (8th Cir. 2003)

39 *Harris v. Forklift Systems*, 510 U.S. 17 (1993), Justice Ginsburg’s concurrence

requirement. In *EEOC v. National Education Association, Alaska*⁴⁰, it was found that the underlying question is whether “behaviour affected women more adversely than it affected men”⁴¹. Thus, the 9th Circuit Court concluded that “unbalanced distribution of men and women in relevant employment positions, and the fact that some men were also harassed, does not automatically defeat a showing of differential treatment”⁴². A similar decision was reached in *Petrosino v. Bell Atlantic*⁴³ where the court found that “common exposure of male and female workers to sexually offensive material does not necessarily preclude a woman from relying on such evidence to establish a hostile working environment based on sex”^{44, 45}. As a result, situations where both men and women are harassed, are more often classified as discrimination “because of sex” and thus also as hostile working environment harassment. To decide otherwise would obviously be in conflict with the purpose of Title VII.

The other requirement that has to be met by plaintiffs of both *quid pro quo* and hostile working environment sexual harassment is the so-called “unwelcomeness” condition. Already in *Meritor Savings Bank* the Supreme Court determined that a plaintiff has to show that the conduct complained of was unwelcome. The Supreme Court contended with the Court of Appeals' voluntariness requirement and concluded that the “correct inquiry is whether respondent, by her conduct, indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary”⁴⁶. “Unwelcomeness” has turned out to be rather difficult to prove as most sexual harassment occurs in private without any witnesses.

40 442 F.3d 840 (9th Cir. 2005)

41 *EEOC v. National Education Association, Alaska*, 442 F.3d 840 (9th Cir. 2005)

42 *EEOC v. National Education Association, Alaska*, 442 F.3d 840 (9th Cir. 2005)

43 385 F. 3d 210 (2nd Cir. 2004)

44 *Petrosino v. Bell Atlantic*, 385 F. 3d 210 (2nd Cir. 2004)

45 See Kymberly K. Evanson “Employment Law Chapter: Title VII of the Civil Rights Act 1964”, 7 Geo. J. Gender & L. 981, p. 992-994

46 *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)

One of the main drawbacks that accompanied the “unwelcomeness” requirement is the fact that evidence about the victim's lifestyle, previous behaviour, dress and sexual history is considered as relevant. This puts victim's of sexual harassment into a situation where such private matters as past sexual conduct can be used against them in deciding about a situation that might have no connection to the person's previous life. The attention is thus shifted from the perpetrator to the victim who has to prove such a vague and intangible factor as unwelcomeness. It is also unclear how sexually provocative dress would be defined in case the victim of harassment is not female but male.

EEOC's Policy Guidance⁴⁷ proposes that the victim's failure to complain about harassment could be part of the evidence for finding that the action was welcome. This suggestion is questionable as not reporting sexual harassment incidents can be the result of many other factors such as fear of retaliation or embarrassment as well as hope that the harassment will cease, and does not necessarily refer to the fact that the behaviour was welcomed.

Finally, it has not been specified by the courts what would a victim of sexual harassment need to do to express unwelcomeness. Thus, the showing of unwelcomeness is a vague and difficult to prove requirement that can turn out to be an obstacle in making out a sexual harassment case.

In conclusion, it can be said, that the definition and elements of sexual harassment in the United States have changed and been specified through case law over the years since the Meritor Savings Bank case. Though several problematic issues can be identified as discussed above, the definitions of *quid pro quo* and hostile working environment harassment in the

⁴⁷ Policy Guidance On Current Issues of Sexual Harassment, EEOC Notice No. 915-050 (1990), available at <http://www.eeoc.gov/policy/docs/currentissues.html>, accessed on Nov. 08, 2008

United States have been elaborated on and have thus reached some stability as opposed to the rather immature definitions of the European Union that have yet not found expression or discussion in European level case law.

1.2. HOW HARASSMENT IS DEFINED IN THE EUROPEAN UNION

The binding definition of sexual harassment on the European Union level was introduced with the entry into force of Directive 2002/73/EC that set the minimum standards for Member States concerning protection to be granted against sexual harassment. The Directive required Member States to draft or revise existing legislation so as to meet the standard set by it latest by October 2005.

The Directive recognizes two forms of harassment and defines them in the following way:

“Harassment: 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,

Sexual harassment: 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.”⁴⁸

Article 2.3 adds that “harassment and sexual harassment within the meaning of [the] Directive shall be deemed to be discrimination on the grounds of sex and therefore

48 Directive 2002/73/EC Article 2.2

prohibited”⁴⁹, thus adopting the U.S. attitude of qualifying sexual harassment as an issue of discrimination. The same Article specifies that “a person's rejection of, or submission to, [harassment or sexual harassment] may not be used as a basis for a decision affecting that person.”⁵⁰ Thus, adverse employment action is prohibited in case of both types of harassment.

Thus, the Directive makes a difference between “harassment related to sex” and “sexual harassment”. The first includes situations where a person is being harassed because of his or her sex without the act itself being of a sexual nature, while the second refers to unwanted sexual conduct or in the words of the Directive, “conduct of a sexual nature”.

Besides defining workplace harassment, the Directive requires Member States to create national bodies to promote equal opportunities of men and women, to establish procedures of enforcement, gives guidelines in connection to compensation and reparations in case of violations and stipulates that member states should encourage employers to take preventive measures against sexual harassment⁵¹.

The focus of the U.S. and EU definitions of sexual harassment is not the same. The U.S. makes a difference between sexual harassment that results in unfavourable employment decisions and for that reason can be perpetrated only by supervisors, and harassment that creates a hostile working environment while not having any direct impact on job benefits, thus putting the emphasis on the result. The EU definition, on the other hand, focuses on the nature of the conduct itself, whether it is a non-sexual conduct related to sex or a sexual conduct, and forbids employment related decisions in both cases.

Thus, the second form of harassment (“sexual harassment”) in the meaning of the EU

49 Directive 2002/73/EC Article 2.3

50 Directive 2002/73/EC Article 2.3

51 Directive 2002/73/EC Articles 8a, 6.1, 6.2 and 8b3 respectively

Directive does not require the conduct to be related to the sex of the person. This means that men and women need not be treated differently to establish sexual harassment and neither is a showing of a connection between the conduct and the sex of the victim necessary.⁵² Thus, the second type of sexual harassment under the EU Directive does not require the showing that harassment occurred “because of [the] sex” of a person. At the same time, the Directive deems both types of harassment discrimination based on sex, thus creating some confusion.

Not requiring conduct to be related to the sex of a person to qualify as sexual harassment solves the problems of “equal opportunity harasser” (where both male and female employees are harassed by the same person) and harassment that is considered intimidating by both male and female employees (such as the display of pornography or use of sexual language), the problems that U.S. courts have had hard time struggling with.⁵³ The only weakness of the EU definition in this aspect is the confusion created by the fact that both types of harassment are defined as discrimination based on sex. If conduct need not be related to the sex of a person, it is unclear, how it could be defined discrimination based on sex. Regardless the confusion, this aspect of the EU definition is a new development as compared to the U.S.

At the same time, the EU definition enables to have a case for harassment also in situations when no sexual conduct occurred but the person was nevertheless harassed “because of [the] sex”. As discussed above, this type of discrimination based on sex has not

52 Linda Clarke “Harassment, Sexual Harassment, and the Employment Equality (Sex Discrimination) Regulations 2005”, 35 *Indus. L. J.* 2006 (161), p. 169-170

53 For a long time court cases in the United States found that if both sexes are harassed by the same person, a defence to Title VII claim is established as the conduct does not meet the “because of sex” requirement. This attitude was changed in the 1998 Supreme Court case *Oncale v. Sundowner Offshore Services, Inc.*, though it was not clearly declared that harassment need not be “because of sex”. Recently courts have started to reject the “equal opportunity harasser” defence and recognize that harassing conduct that is directed against both sexes can amount to sexual harassment. For a detailed discussion of the issue see Deborah Zalesne “Lessons From Equal Opportunity Harasser Doctrine: Challenging Sex-Specific Appearance and Dress Code”, 14 *Duke J. Gender L. & Pol'y* 535, Spring 2007, available at: <http://www.law.duke.edu/shell/cite.pl?14+Duke+J.+Gender+L.+&+Pol%27y+535>, accessed on Nov. 09, 2008

been properly addressed in the United States. In EU, however, non-sexual conduct that violates the dignity of a person, and creates an intimidating, hostile, degrading, humiliating or offensive environment, qualifies as the first type of harassment.

Thus, the definitions of sexual harassment and harassment in the EU Directive, in theory offer wider protection than the U.S. definitions of *quid pro quo* and hostile working environment harassment. The fact that the Directive deems both types of harassment discrimination based on sex, causes some confusion as sexual harassment does not require a showing that the conduct occurred because of sex as in the United States. Whether the EU definitions will be interpreted to give broader protection than the U.S. definitions also in practice, will be left for the courts to decide. At this point, however, no case law exists on the European Union level.

Another question that is left open by the Directive's definitions of harassment concerns the standard that will be used to assess the conduct of the harasser. As discussed above, U.S. courts have determined that a combination of both the objective and subjective standard have to be utilized. The EU definitions of both types of harassment refer to the violation of a person's dignity. Dignity being an undefinable and such a personal concept, it could be claimed that only the subjective standard, and not the reasonable person, should be taken as a yardstick. Also in this aspect, the EU definition of harassment could offer broader protection than is the practice in the U.S.

Similarly to the U.S. definition, the EU Directive talks about “unwanted conduct” in relation to both types of harassment. This is close to the “unwelcomeness” requirement that the U.S. Supreme Court determined governs in deciding whether harassment occurred or not. As referred to earlier, in the United States, the “unwelcomeness” requirement has been used

to allow evidence about the dress and past sexual behaviour of the plaintiff to be presented. Whether “unwanted conduct” is identical to “unwelcome” behaviour, will once again be left for the courts to decide. However, there is room for a more restrictive interpretation.

“Unwanted” as opposed to “unwelcome”, it could be argued, sets a more clear message as to what is expected from the victim. It seems to refer to the fact that a “No” would be enough to express that the behaviour is not wanted. In the United States behaviour of the harasser has been interpreted welcome also in cases where the victim in the beginning rejected the invitation for sexual favours but later submitted to them. Thus, one way of interpreting “unwanted conduct” would be to say that as long as the victim expressed a lack of desire to submit to sexual invitations at any one point, the requirement has been met. This interpretation would make it easier for victims to prove sexual harassment cases in the EU than in the United States.

There are still other aspects of the definition of harassment and sexual harassment in the EU Directive that are not reflected in the text and that will be left for the European Court of Justice to interpret and further elaborate on. These include the inquiry whether conduct that is defined as harassment needs to reach a certain level of severity or pervasiveness to be actionable, whether social context has a role to play in determining the existence of harassment and what exactly is understood under the violation of dignity or as conduct of a “sexual nature”. These aspects will need to be specified by the case law and thus are left unclear until such case law appears.

1.3. EQUALITY AND/OR DIGNITY?

The fundamental difference between the attitude to sexual harassment in the United States as compared to the European Union, is the concept of what is the value that is being protected. Is it equality or dignity that is being violated when sexual harassment occurs? Or is it both?

In the United States, the issue of sexual harassment was formulated from the beginning as discrimination based on sex. Since Catharine MacKinnon published her ground-breaking book “Sexual Harassment of Working Women”⁵⁴ in 1979, feminists in the United States advocated for recognition of sexual harassment as a form of sex discrimination. This approach was a logical one due to the strong tradition of individual rights in the United States and the already existing Civil Rights Act that prohibited discrimination on the grounds of sex and thus provided an existing framework for dealing with the issue. Once the EEOC Guidelines adopted and the Supreme Court affirmed the approach developed by MacKinnon, there has been little debate in the United States over what is the value behind sexual harassment. What is more, for second wave-feminists it was important to emphasize that harassment related to sex is something that does not affect equally men and women but is one of the many forms of subjugation of women by men.

In the European Union, on the other hand, a different attitude was taken. The soft law measures of the 1990-s define sexual harassment through the violation of dignity rather than as a form of sex discrimination. While the Council Resolution makes no mention of discrimination at all, the Commission Recommendation, issued a year later, refers to sexual

⁵⁴ Catharine MacKinnon “Sexual Harassment of Working Women: A Case of Sex Discrimination”, New Haven: Yale University Press, 1979

harassment as a “problem of sex discrimination”⁵⁵ but defines it nevertheless as “unwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work”⁵⁶. The concept of dignity is rather vague and it has not been specified whether discrimination in itself constitutes a violation of dignity. In case dignity is a wider concept, equal respect of dignity could include equal treatment in all aspects, including prohibition of discrimination based on sex.

Also at the EU level, feminists advocated for sexual harassment to be specifically defined as sex discrimination to emphasize it as a gender-specific concept but EU Member States found it easier to accept that by prohibiting sexual harassment they were protecting the dignity of their citizens. This can be explained by the strong tradition of workers rights and the familiar discourse of human rights.⁵⁷

Since the coming into force of the 2002 Equal Treatment Amendment Directive, the European Union adopts the U.S. concept. However, dignity has not disappeared from the text of the Directive. In fact, the definitions of harassment and sexual harassment both refer to conduct that has “the purpose or effect of violating the dignity of a person”⁵⁸. It is only in the third sub-point of Article 2 that discrimination is mentioned. Thus, the Directive's definition of sexual harassment incorporates the U.S. notion of discrimination based on sex while keeping the European concept of violation of dignity.

Substantial arguments can be brought to defend both approaches. Feminists underscore

55 Commission Recommendation of 27 November 1991 on the Protection of the Dignity of Women and Men at Work, 92/131/EEC, subtitle 3

56 Commission Recommendation of 27 November 1991 on the Protection of the Dignity of Women and Men at Work, 92/131/EEC, subtitle 2

57 Kathrin S. Zippel “The Politics of Sexual Harassment. A Comparative Study of the United States, the European Union, and Germany”, Cambridge 2006, p. 114

58 Directive 2002/73/EC Article 2.2

the importance of qualifying sexual harassment as sex discrimination to emphasize the gender specificity of the issue and to avoid individualizing a wrong that is suffered by women mainly because of the fact of being women. Shifting the focus to dignity would imply that sexual harassment affects equally all workers and ignore the statistics that proves that it is overwhelmingly women that are affected.⁵⁹ While it is important to emphasize that sexual harassment affects women because of their sex, it also has to be taken into consideration that defining harassment as discrimination requires the showing of differential treatment based on sex. This, however, has limited the chance of women in the United States to make out a case of sexual harassment.

It is further argued that by not connecting dignity with equality, a threat of perpetuating stereotypical attitudes towards women and sexuality might appear.⁶⁰ “The belief that sexual expression is demeaning to women invites legal protection for the wrong reasons. It positions women as a sexually pure and vulnerable victim class whose virtue or special sensibilities require protection from men, positioned as natural sexual predators.”⁶¹ However, the tradition of gender equality and the attention given to it by the European Union decrease the probability of these threats. While it remains important to state that sexual harassment concerns mainly women, it is unrealistic that defining harassment as a violation of dignity would perpetuate stereotypes about women's sexuality. Violation of dignity has a broader meaning in Europe than humiliation or disgrace. Dignity is rather derived from the tradition of personality rights and refers to physical as well as psychological integrity.

59 Kathrin S. Zippel “The Politics of Sexual Harassment. A Comparative Study of the United States, the European Union, and Germany”, Cambridge 2006, p. 114-115

60 Linda Clarke “Harassment, Sexual Harassment, and the Employment Equality (Sex Discrimination) Regulations 2005”, 35 *Indus. L. J.* 2006 (161), p. 175

61 Jean L. Cohen “Regulating Intimacy: A New Legal Paradigm”, Princeton 2002, p. 136, cited in Linda Clarke “Harassment, Sexual Harassment, and the Employment Equality (Sex Discrimination) Regulations 2005”, 35 *Indus. L. J.* 2006 (161), p. 174

The supporters of a gender-neutral definition of sexual harassment seem to disregard the feminist concerns and focus on the practical problems that have emerged due to qualifying sexual harassment as a form of discrimination. One of the first problems that has also been faced by U.S. courts, is the issue of an “equal opportunity harasser”. As briefly referred to above, “equal opportunity harasser” was recognized as a defence in Title VII sexual harassment cases. The logical argument goes that if both male and female employees are being harassed by the same person, there can be no issue of sex discrimination and as a result, no sexual harassment. Shifting the focus to violation of dignity instead of discrimination, would pose no problem in convicting an “equal opportunity harasser”.

Another shortcoming of the gender-specific definition surfaces in the U.S. hostile working environment cases that require that the treatment in question would be “based on sex” or “because of sex” for it to qualify as sexual harassment. This requirement becomes relevant in cases where pornographic images are displayed at workplace or sexual language is used. In such cases, the treatment is neutral, both men and women are exposed to such images or language. It is difficult and indeed, has not been accepted by the courts that a claim of sex discrimination could be meted out in such cases. As a result, women who do experience disadvantages and whose dignity is being violated are left without redress.⁶² Once again, if the focus were on violation of dignity and not on discrimination, such situations would not escape liability and the emphasis would shift from the motives of the harasser to the effect harassment has on the victim.

Thus, the solution adopted by the Equal Treatment Amendment Directive of making a

⁶² For a similar view, see Linda Clarke “Harassment, Sexual Harassment, and the Employment Equality (Sex Discrimination) Regulations 2005”, 35 Indus. L. J. 2006 (161), p. 165. The author gives examples of such U.K. cases as *Stewart v. Cleveland Guest (Engineering) Ltd*, [1996] ICR 535 and *Brumfitt v. Ministry of Defence* [2005] IRLR 4

reference to sexual harassment as a form of sex discrimination while at the same time defining it as a violation of dignity might serve as a better solution than the one adopted in the United States. The Directive makes it clear that sexual harassment is a form of subjugation of women and is experienced mainly by women by declaring it discrimination based on sex and thus addressing the concerns expressed mainly by U.S. feminists. At the same time, the Directive does not require a showing of differential treatment based on sex to make out a sexual harassment case. The weakness of the EU approach, on the other hand, is the confusion it creates in not requiring differential treatment based on sex to make out a case of sexual harassment that is defined as sex discrimination. It will be left for the European Court of Justice to clarify this matter.

CHAPTER II – ASPECTS OF LIABILITY

The issue of employer's liability for sexual harassment was brought to the centre of attention of legal theorists and courts in the United States after the judgements delivered in two U.S. Supreme Court cases, *Burlington Industries, Inc. v. Ellerth*⁶³ and *Faragher v. City of Boca Raton*⁶⁴. These judgements, both delivered in 1998, established the vicarious liability standard in hostile working environment cases while maintaining the strict liability in case of *quid pro quo* harassment. Lower courts had imposed liability on the employer for the harassment caused by its employees but there was confusion and discrepancy in whether the employer is vicariously liable in both *quid pro quo* and hostile working environment cases⁶⁵.

The reason for holding the employer liable for sexual harassment follows the logic of agency. The employer delegates power to a supervising employee to act in its name and thus the acts of a supervisor can be attributed to the employer. This principle was reinforced by the U.S. Supreme Court in the *Ellerth* and *Faragher* cases when deciding to apply strict liability to *quid pro quo* harassment cases.

The European Union Directives have not set a common standard in the matter. None of the Equality Directives⁶⁶ are formulated in a manner that would specify what the standard is that European Union Member States should achieve in relation to liability. Though it is in the nature of the directives not to dictate the means, directives, nevertheless require achieving a common result⁶⁷. Regarding liability, no common result, however, is specified.

63 *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998)

64 *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)

65 See discussion in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998)

66 Directive 76/207/EEC, Directive 2000/78/EC, Directive 2000/43/EC, Directive 2002/73/EC, Directive 2006/54/EC

67 Treaty Establishing the European Community (TEC), Article 249

What is more, the Equality Directives do not specify whether both natural and legal persons can be made liable for acts that could be defined as discriminatory under the Directives. Thus, it is not clear if a law of a Member State that establishes only personal liability for harassment breaches Directive 2002/73/EC. Disparities already exist between Member States' legislations. Some countries apply only personal liability⁶⁸ while others impose various degrees of liability on the employer^{69, 70}.

The requirement of imposing some form of liability on the employer does not automatically follow from the fact that Directive 2002/73/EC regulates discrimination in employment. Until case law specifies this issue, the Directive can be read to require Member States to ensure the existence of “judicial and/or administrative procedures”⁷¹ for the enforcement of obligations under the Directive, the possibility to receive “compensation or reparation”⁷² and the establishment of “rules on sanctions”⁷³ for the infringement of national provisions. Nothing refers to the obligation of holding employers liable for harassment as long as liability is imposed on someone.

However, it is of utmost importance to impose some form of liability on the employer in sexual harassment cases. The following sub-chapters will discuss to more detail the U.S. approach to employer's liability and analyse the need of introducing a homogeneous standard throughout EU Member States as well as give a suggestion to possible solutions that national legislations could adopt.

68 Lithuanian legislation, for example, accepts only personal liability, thus the employers cannot be made liable

69 Portugal, UK, Sweden, the Netherlands and Ireland hold the employer liable while Ireland's and UK's legislations introduce something that could be compared to the affirmative defence option in the United States. Austrian legislation provides for both, individual liability of the harasser as well as liability of the employer.

70 Janet Cormack, Mark Bell “Developing Anti-Discrimination Law in Europe. The 25 EU Member States Compared”, European Network of Independent Experts in the Non-Discrimination Field 2005, p. 30-38

71 Directive 2002/73/EC Article 2.1

72 Directive 2002/73/EC Article 2.2

73 Directive 2002/73/EC Article 8d

2.1. STRICT AND VICARIOUS LIABILITY IN THE UNITED STATES

While the first remarkable U.S. Supreme Court decision in the matter of sexual harassment, *Meritor Savings Bank v. Vinson* established strict liability in case of *quid pro quo* harassment, the Court declined to declare that in hostile working environment cases the employer would automatically be held responsible for harassment caused by supervisors. The Court found that, “While such common-law [agency] principles may not be transferable in all their particulars to Title VII, Congress' decision to define “employer” to include any “agent” of an employer surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible”⁷⁴.

Thus, the Supreme Court majority denied the existence of strict liability in hostile working environment cases without specifying the exact standard that would apply. It is interesting to note that the concurrence of Justice Marshall supported by three other judges suggested the establishment of strict liability for both hostile working environment and *quid pro quo* harassment cases.⁷⁵ Thus, the Court, in fact, was very close to establishing strict liability for all sexual harassment cases.

The confusion about liability was finally resolved more than ten years later, by Supreme Court decisions in the cases of *Ellerth* and *Faragher* that established vicarious employer's liability for harassment by supervisors with an affirmative defence option when no tangible employment action is taken. Employer's liability in cases of harassment by co-workers has to meet the negligence standard, thus making it actionable only when the employer knew or should have known about it and failed to react.⁷⁶

⁷⁴ *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)

⁷⁵ *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (Marshall, J., concurring)

⁷⁶ Susan D. Carle has drawn attention to the irony that due to the misinterpretation and misapplication of the affirmative defence in cases of supervisor harassment, co-worker harassment sometimes has to meet a higher

Attention should be drawn to the fact that in other Title VII discrimination cases, those that are not classified as harassment but as other forms of discrimination based on the prohibited grounds, employer is held liable for any actions of its employees that violate the statute.⁷⁷ If one is put into a discriminatory position as compared to other employees in relation to salary or working conditions, the employer is liable without possessing any form of affirmative defence.⁷⁸ Thus, the Supreme Court in *Ellerth and Faragher*, without specifying why this form of discrimination would differ to such an extent from other types, nevertheless established a different standard of liability for harassment.

The concept was enforced by the EEOC Guidelines issued a year later that broaden the scope of affirmative defence to all forms of harassment claiming that “[...] the Commission has always taken the position that the same basic standards apply to all types of prohibited harassment.”⁷⁹ The Guidelines continue by declaring that this exception (as compared to other forms of discrimination) “must be construed narrowly”⁸⁰ but do not go as far as to adopt a much more well-founded approach that would demand the higher standard of liability to be applied to all forms of discrimination.

What is more, employer's liability for any form of discrimination could be called vicarious liability. As long as individuals cannot be personally sued for discrimination, the company is always responsible for something that someone else has done under their

standard. This is due to the more detailed scrutiny that is afforded to employer's response to co-worker harassment. See Susan D. Carle “Acknowledging Informal Power Dynamics in the Workplace: A Proposal for Further Development of the Vicarious Liability Doctrine in Hostile Working Environment Sexual Harassment Cases”, 13 *Duke J. of Gender L. & Pol'y* 85, 2005, footnote 128

77 EEOC “Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors” 1999, available at: <http://www.eeoc.gov/policy/docs/harassment.html>, accessed on Nov. 17, 2008

78 Susan Estrich “Sex at Work”, 43 *Stan. L. Rev.* 813, 1999, p. 853

79 EEOC “Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors” 1999, available at: <http://www.eeoc.gov/policy/docs/harassment.html>, accessed on Nov. 17, 2008

80 EEOC “Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors” 1999, available at: <http://www.eeoc.gov/policy/docs/harassment.html>, accessed on Nov. 17, 2008

authority. However, it was with sexual harassment that this liability was added the adjective “vicarious” and as such, used as a pretext for establishing a different standard of liability for sexual, and later also for other forms of harassment.⁸¹ Whether reasonable or not, the vicarious liability standard as established by the Ellerth and Faragher cases, is now applied to all Title VII harassment cases.

2.1.1. Vicarious Liability and Affirmative Defence in Ellerth and Faragher

The two cases decided on the same day by the U.S. Supreme Court in 1998, *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton* established the rule of vicarious liability in case of sexual harassment by supervisors. To qualify as supervisor, the harasser must be “authorized to undertake tangible employment decisions affecting the employee”⁸². The same decisions created an affirmative defence option for employers for harassment by supervisors that does not result in “tangible employment action”⁸³ while excluding any such possibility for harassment that does.

According to the EEOC Guidelines, this solution is based on two principles: first, employer's responsibility for the acts of supervisors and secondly, the objective to encourage the employer to prevent harassment on the one hand and to encourage the employee to avoid the harm from harassment on the other hand.⁸⁴ Whether the affirmative defence option developed by the Ellerth and Faragher judgements actually reaches the objective to encourage both employers and employees can be questioned and will be discussed later in this chapter.

81 Catharine MacKinnon “Leo C. Goodwin Symposium: Tilting the Scales: The Changing Roles of Women in the Law and Legal Practice: Directions in Sexual Harassment Law”, 31 *Nova L. Rev.* 225, 2007, p. 232

82 EEOC “Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors” 1999, available at: <http://www.eeoc.gov/policy/docs/harassment.html>, accessed on Nov. 17, 2008

83 *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)

84 EEOC “Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors” 1999, available at: <http://www.eeoc.gov/policy/docs/harassment.html>, accessed on Nov. 17, 2008

The affirmative defence established by the Ellerth and Faragher decisions consists of two elements: first, the employer has to have “exercised reasonable care to prevent and correct promptly any sexually harassing behaviour”⁸⁵ and secondly, the employee has to have “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise”⁸⁶. The two judgements continue by specifying:

While proof that an employer had promulgated an anti-harassment policy with a complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defence. And while proof that an employee failed to fulfil the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer’s burden under the second element of the defence.⁸⁷

Two implications can be derived from these quotes by the Court that should have become instructive for deciding about employer's liability in harassment cases. First, the Court makes it obvious that in order to satisfy the affirmative defence, both aspects of the defence have to be proved by the employer. It should not be enough for the employer to show that it satisfied its responsibility to exercise reasonable care without proving at the same time that the employee failed to meet his/her side of the responsibility. What is more, from the reading of the text, it is apparent that in the latter case it has to be shown that the failure by the employee to respond to harassment, was unreasonable.

The second implication includes two aspects in itself. First, the Court declares that the existence and distribution of an anti-harassment policy by the employer is not always decisive but nevertheless has an influence on the decision. And secondly, that the showing that the employee unreasonably failed to make use of a complaint procedure is usually

85 Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775 (1998)

86 Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775 (1998)

87 Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775 (1998)

enough to satisfy the affirmative defence but not the only way to prove the unreasonableness.

This interpretation has been reinforced by the EEOC Guidelines that explain the requirement that the employer prove both elements of the affirmative defence with the Supreme Court's assertion that the vicarious liability created in *Ellerth* aims at invoking a “more stringent standard” than the “minimum standard” of negligence.⁸⁸

However, the second implication referred to above (i.e. existence and distribution of an anti-harassment policy by the employer can influence the decision and the showing that the employee unreasonably failed to make use of a complaint procedure is usually enough to satisfy the affirmative defence), widens the opportunities of the employer to prove both elements of the affirmative defence and thus renders this “more stringent standard” into something much weaker than the standard of employer's liability for other forms of discrimination.

2.1.2. Problems with Affirmative Defence

2.1.2.1. Burden of Persuasion

The *Ellerth* and *Faragher* cases established vicarious liability of employers for all harassment committed by supervisors. This can be considered an important result for the cause of victims of sexual harassment. However, the Supreme Court decisions also established the affirmative defence option while not specifying enough what exactly amounts to an affirmative defence.

A number of lower courts have accepted that the burden of persuasion of the two-prong

⁸⁸ EEOC “Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors” 1999, available at: <http://www.eeoc.gov/policy/docs/harassment.html>, accessed on Nov. 17, 2008 and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998)

affirmative defence should be entirely on the employer⁸⁹ but some courts are still requiring the victim of the harassment to establish that his/her actions were reasonable⁹⁰. Other courts use the adequacy of the reasons provided by the employee for the failure to use the complaint procedure to decide if the employer has met the burden of persuasion⁹¹. Some lower courts that follow the two-prong test reduce the second element of the defence by eliminating the requirement to show the unreasonableness of the employee's failure to make use of the corrective or preventive opportunities and consider the second element to be met if the employer establishes that the employee simply failed to do it^{92,93}. Thus, the requirement set by the Supreme Court in *Ellerth and Faragher* to put the burden of persuasion for affirmative defence entirely on the employer, has found different reflection in later cases. Many of the lower courts' interpretations are not favourable to the victims of harassment.

2.1.2.2. Failure and Delay in Reporting

In addition to the incorrect distribution of the burden of persuasion between the employer and the employee, the courts have interpreted such aspects as the failure to report a harassment or the delay in reporting in favour of the employer. The *Ellerth and Faragher* judgements themselves opened the avenue for such interpretations by declaring “while proof that an employee failed to fulfil the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the

89 See *Hardy v. University of Ill. at Chicago*, 328 F.3d 361 (7th Cir. 2003) and *Watts v. Kroger Co.*, 170 F.3d 505 (5th Cir. 1999)

90 See *Leopold v. Baccarat, Inc.*, 239 F.3d 243 (2nd Cir. 2001)

91 See *Leopold v. Baccarat, Inc.*, 239 F.3d 243 (2nd Cir. 2001)

92 *Watkins v. Professional Security Bureau*, 98-2555 (4th Cir. 1999)

93 The above examples of cases decided by lower courts are given in L. Camille Hebert “Why Don't “Reasonable Women” Complain About Sexual Harassment”, 82 Ind. L.J. 711, 2007, p. 715-720

employer's burden under the second element of the defence".⁹⁴ As a result many courts automatically find the failure to formally report harassment to the employer unreasonable without considering other factors such as fear of retaliation or embarrassment and discomfort.⁹⁵

What is more, the delay in officially reporting to the employer an occasion or sequence of harassment is often used by the courts as a proof of the unreasonableness of the employee. Delays as short as 7 days from the first occasion of harassment have been found unreasonable.⁹⁶ This is in apparent contradiction with the EEOC's Guidelines that emphasise that "an employee should not necessarily be expected to complain to management immediately after the first or second incident of relatively minor harassment"⁹⁷.

Another mistake in the logic of demanding employees to report harassment immediately is exposed when analysing the pervasiveness and severity requirements to make out a hostile working environment case. If a harassed employee reports a single occasion of harassment or a sequence prematurely, he/she might face the problem of reporting action that is not severe or pervasive enough to constitute harassment.⁹⁸ Thus, the employees are left with a choice between reporting too early and not having a case and reporting too late and not

94 *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)

95 L. Camille Hebert "Why Don't 'Reasonable Women' Complain About Sexual Harassment", 82 Ind. L.J. 711, 2007, p. 721 and David Sherwyn, Michael Heise and Zev J. Eigen "Don't Train Your Employees and Cancel Your '1-800' Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges", 69 *Fordham L. Rev.* 1265, 2001, p. 1266

96 Joanna Grossman "What Should Happen When Sexual Harassment Victim's Don't File Prompt Complaints? A Court Weighs in", 2003, available at: <http://writ.news.findlaw.com/grossman/20030408.html>, accessed on Nov. 17, 2008

97 EEOC "Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors" 1999, available at: <http://www.eeoc.gov/policy/docs/harassment.html>, accessed on Nov. 17, 2008

98 For similar views see e.g. Susan D. Carle "Acknowledging Informal Power Dynamics in the Workplace: A Proposal for Further Development of the Vicarious Liability Doctrine in Hostile Working Environment Sexual Harassment Cases", 13 *Duke J. of Gender L. & Pol'y* 85, 2005, at footnote 119 and L. Camille Hebert "Why Don't 'Reasonable Women' Complain About Sexual Harassment", 82 Ind. L.J. 711, 2007, at footnote 54 and Theresa M. Beiner "The Misuse of Summary Judgement in Hostile Environment Cases", 34 *Wake Forest L. Rev.* 71, 1999 p. 100

being afforded damages due to the affirmative defence option provided for the employer. This can obviously not serve the aim of preventing violations, the purpose of anti-discrimination statutes according to EEOC⁹⁹.

2.1.2.3. *Constructive Discharge*

Since the Supreme Court's decision in *Pennsylvania State Police v. Suders*¹⁰⁰ the affirmative defence option has also been applied in case of constructive discharge. A victim of hostile working environment who leaves the job on his/her own initiative, can sue for constructive discharge. Being forced to leave the job without being officially fired should logically amount to tangible employment action and thus no affirmative defence should be available for the employer. In *Suders*, however, the Court made a distinction between constructive discharge preceded by the supervisor's "employer-sanctioned adverse action officially changing [the] employment status or situation"¹⁰¹ and such that occurs without any official act by the supervisor. In the latter case, the affirmative defence is available for the employer.

This distinction would be justifiable in case affirmative defence would also not apply to actual threats to change the employment status or situation. It is more than realistic that such threats would force an employee to leave the job on his/her own initiative before the threats are actually executed. As in proving *quid pro quo*, the burden of showing that the actual threat existed, could be imposed on the employee. Denying the affirmative defence option to employers in such cases would create a more level playing field.

99 See EEOC "Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors" 1999, available at: <http://www.eeoc.gov/policy/docs/harassment.html>, accessed on Nov. 17, 2008 and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)

100 542 U.S. 129 (2004)

101 *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004)

2.1.3. *Alternatives to Affirmative Defence*

It is apparent from the analysis provided above that courts do not want to find liable employers that in their opinion have exercised reasonable care. They find difficulty in punishing an employer that has done everything that is in its power to prevent and correct harassment. Thus, the courts in such cases have just ignored or misinterpreted the second element of the affirmative defence in favour of the reasonable and responsible employer. For this reason, Sherwyn, Heise and Eigen propose a new test for affirmative defence that would contain only the first prong of the current test.¹⁰²

According to these authors the current solution discourages employers from creating more advanced preventive and corrective measures as they could nevertheless be found liable while an employer with weak measures could escape liability as employees would be less encouraged to report harassment cases and failure to report is automatically considered by the courts as unreasonable. Their solution to avoiding such anomalies is simply to deprive the two-prong test from its second element.

How the proposed solution would help employees that have suffered from harassment and have failed to report due to fear of retaliation or embarrassment and discomfort, is unclear. What Sherwyn, Heise and Eigen suggest would make it even easier for employers to escape liability. Thus, an employee that manages to prove that he/she suffered from sexual harassment would be left without any compensation merely due to the fact that an employer has an anti-harassment policy and complaint procedure in place. As there is no requirement to prove that the complaint procedure is efficient and that previously harassing behaviour was

¹⁰² The proposal for a new affirmative defence test is discussed in David Sherwyn, Michael Heise and Zev J. Eigen “Don't Train Your Employees and Cancel Your “1-800” Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges”, 69 Fordham L. Rev. 1265, 2001

condemned, employers would escape liability without putting much efforts in providing a harassment-free working environment.

A more substantiated critique of the affirmative defence solution draws attention to the problem that the Supreme Court has shifted the emphasis in defining the issue of sexual harassment away from the employer.¹⁰³ Starting in *Meritor Savings Bank* and continuing in the same line in *Ellerth and Faragher*, the Supreme Court has shifted the attention away from the employer to the harasser and the victim. Thus, the Court has defined sexual harassment rather as an interpersonal dispute between the harasser and the victim while marginalizing the role of the employer in creating and fostering a hostile working environment.¹⁰⁴

According to this logic, the employer is obliged to rectify (through circulating policy against sexual harassment and providing for a complaint procedure) a situation that in reality does not derive from the shortcomings of the company and its culture but the wrong committed by an individual harassing employee. In reality, however, the general culture of the company plays an important role in encouraging or discouraging harassment regardless whether a policy and complaint procedure exist or not.

The employer, according to Lawton, is punished for hiring an employee that commits harassment or in other words for “individual bad actors working for an otherwise “innocent” organizational employer”¹⁰⁵ and not for fostering an organizational culture where harassment is tolerated. Thus, organizational causes for harassment, such as a workplace that is segregated by sex, the job's gender context or the history of discrimination and harassment at

103 This critique has been developed by Anne Lawton in “The Bad Apple Theory in Sexual Harassment Law”, *Geo. Mason L. Rev.* Vol. 13:4, 817, 2005

104 Anne Lawton in “The Bad Apple Theory in Sexual Harassment Law”, *Geo. Mason L. Rev.* Vol. 13:4, 817, 2005, p. 836

105 Anne Lawton in “The Bad Apple Theory in Sexual Harassment Law”, *Geo. Mason L. Rev.* Vol. 13:4, 817, 2005, p. 836

the workplace, are not considered by the courts.

This makes the victim of harassment, and not the employer, responsible for eliminating workplace harassment as employer's liability derives from lack of response to harassment and not from its part in creating and fostering a hostile working environment in the first place. Furthermore, this presumes that employer is not aware of the occurrence of harassment at the workplace unless it is given notice by the victim.¹⁰⁶ The emphasis is on the employer's reaction to harassment and not in its role in fostering a culture that encourages harassment. Supreme Court is thus not following what it declared in *Meritor Savings Bank* - that sexual harassment is a form of sex discrimination and not a personal dispute.

To avoid this misstep, Anne Lawton proposes to apply direct liability for employers who create and foster hostile working environment. Thus, the individual model would be replaced in situations where the employer is responsible for creating a workplace that is segregated by sex, where the employee performs a job that is usually done by the opposite sex and where there is a history of harassment and discrimination at the workplace. Such a model, arguably, would motivate employers to create a workplace free of sexual harassment and constantly monitor it for possible violations.¹⁰⁷

The attractiveness of Lawton's theory lies in the fact that employers would be made responsible for creating and promoting a working environment where there is more gender equality, a balance of sexes and where harassment would be condemned to such an extent that alone the idea of harassment would be impossible. Taking into account that courts have found it sufficient for an employer to simply circulate an anti-harassment policy and establish a

106 Anne Lawton in "The Bad Apple Theory in Sexual Harassment Law", *Geo. Mason L. Rev.* Vol. 13:4, 817, 2005

107 Anne Lawton in "The Bad Apple Theory in Sexual Harassment Law", *Geo. Mason L. Rev.* Vol. 13:4, 817, 2005, p. 867

complaint procedure to meet the first requirement of affirmative defence without imposing on the employer an obligation to conduct trainings, to have punished harassers in the past or to take any other preventive measures, Lawton's concern to put more responsibility on the employer, is understandable.

On the other hand, Lawton would impose direct liability on employers that create a workplace that is segregated by sex, where the employee performs a job that is usually done by the opposite sex and where there is a history of harassment and discrimination at the workplace. While segregating the workplace by sex is somewhat under the control of the employer, it is unclear how the employer could have influence on whether a job is usually done by a member of the opposite sex. Such conceptions are created by the society and putting the burden of changing them on the employer, would clearly be out of balance.

As for the history of harassment and discrimination at the workplace, it is true that courts are not taking it into account in deciding a particular case. Thus, the suggestion to apply direct liability in such cases is once again attractive. In consequence, a revised version of Lawton's solution would be to deny affirmative defence in case a) tangible employment action was taken and/or b) the company has a history of sex discrimination and/or harassment. Including the existence of sex segregation at the company among factors that would deny affirmative defence, is more questionable as it is not entirely under the control of the employer.

Thus, though Anne Lawton's proposition is attractive, it must be kept in mind that one of the aims of affirmative defence is to encourage employers to foster a harassment-free workplace by rewarding such initiatives with a possibility to escape liability. Putting excessive responsibility on the employer, can well work against this goal.

2.2. EMPLOYER'S LIABILITY IN EUROPEAN UNION DIRECTIVES

As mentioned above, European Union Equality Directives have left the issue of liability for harassment entirely in the discretion of the Member States. Even though a directive cannot prescribe the concrete means for regulation, it should nevertheless set a goal for Member States that would result in harmonised standards. The lack of instruction from the Equal Treatment Amendment Directive has resulted in different standards throughout Europe ranging from no employer's liability, a model that gives preference to personal liability, to such that is similar to the vicarious liability developed in the United States¹⁰⁸.

Taking into consideration the aim of all EU Directives to harmonise legal regulations within Member States, thus creating a standard that would be applied in all EU countries, it is hard to find a justification for not setting a common goal in this aspect of equality law and leaving it to the complete discretion of each Member State. Though directives set requirements to Member States as to the result and not the methods or forms of achieving them, not even mentioning such an important aspect as liability, cannot possibly result in the aim of creating a harmonised system.

The analysis above of employer's liability in the United States exposed how leaving the regulation of liability issues to courts can change the whole essence of equality law. Not regulating at least to some extent the aspect of liability in European Equality Directives, denigrates the Directives' purpose of achieving homogeneous equality laws throughout European Union. Thus, it can be claimed that EU Equality Directives should set basic requirements for liability issues in equality law.

Moreover, if we look at the Commission's Recommendation from 1991 on the

¹⁰⁸ See above footnotes 68 and 69

Protection of the Dignity of Women and Men at work¹⁰⁹, we can see that EU, at least in theory, has adopted the approach of the U.S. in imposing liability for harassment on the employer. Subtitle 3 of the Recommendation's Code of Practice on Measures to Combat Sexual Harassment provides:

Since sexual harassment is a form of employee misconduct, employers have a responsibility to deal with it as they do with any other form of employee misconduct as well as to refrain from harassing employees themselves. Since sexual harassment is a risk to health and safety, employers have a responsibility to take steps to minimize the risk as they do with other hazards. Since sexual harassment often entails an abuse of power, employers may have a responsibility for the misuse of the authority they delegate.¹¹⁰

Though the language of the Recommendation is unquestionably not imperative, it nevertheless suggests employer's liability for harassment. It would only be logical if EU Equality Directives set the minimum requirements as for the common result for Member States regarding such liability. The following sub-chapter discusses a potential model that EU Member States could apply in regulating employer's liability. Too detailed to be included in a directive, it rather aims at suggesting a model for national legislations.

2.2.1. Potential Model for Employer's Liability for EU Member States

What follows is not intended to provide a complete and perfect solution for a liability model to be realised by EU Member States. Rather, some aspects that should be taken into account in developing a solution for EU will be discussed. The lessons learnt from the U.S. experience are taken as a starting point.

In theory, the U.S. model of employer's liability, as it was formulated in the Ellerth and

109 Commission Recommendation of 27 November 1991 on the Protection of the Dignity of Women and Men at Work, 92/131/EEC

110 Commission Recommendation of 27 November 1991 on the Protection of the Dignity of Women and Men at Work, 92/131/EEC, subtitle 3

Faragher decisions could serve as a basis for an EU model. Article 8b(3) of the Directive requires Member States to “encourage employers to promote equal treatment for men and women in the workplace in a planned and systematic way”¹¹¹. After all, the aim of creating an affirmative defence option for compliant employers was to provide them with some incentive to put efforts into guaranteeing a harassment-free working environment.¹¹² Nevertheless, certain aspects of the vicarious liability and affirmative defence should be modified.

To begin with, the difference drawn between supervisors and co-workers in deciding about employer's liability should be abolished. Employers should be held more strictly liable in all cases that an employee, whether supervisor or not, abuses his/her power. Susan D. Carle gives an excellent account of why exempting employers from a more stringent liability in co-worker harassment cases serves as an irrational solution.¹¹³ According to Carle, informal power dynamics at most employers make it possible for co-workers to abuse their power that is derived from seniority, membership in labour union, favourable relationship with decision-makers and other similar factors. Thus, it is not only the supervisors that wield power over employees in a workplace laden with informal power dynamics. Consequently, distinguishing between supervisors and co-workers in deciding about employer's liability is not substantiated.

Secondly, the affirmative defence in the form it was developed by Ellerth and Faragher decisions could also be applied in Europe. However, a more stringent examination of the two prongs would be necessary. As for the first prong of the affirmative defence test, the existence of an anti-harassment policy and a complaint procedure as such should not be enough to meet

¹¹¹ Directive 2002/73/EC, Article 8b(3)

¹¹² Faragher v. City of Boca Raton, 524 U.S. 775 (1998)

¹¹³ Susan D. Carle “Acknowledging Informal Power Dynamics in the Workplace: A Proposal for Further Development of the Vicarious Liability Doctrine in Hostile Working Environment Sexual Harassment Cases”, 13 Duke J. of Gender L. & Pol'y 85, 2005, p. 101-113

the requirement. The employer should be obliged to prove that these avenues for complaint are also implemented effectively. Such a requirement in principle exists in the United States as the EEOC Guidelines stipulate that the policy needs to be distributed as well as trainings organized¹¹⁴. However, as discussed above, these requirements are not followed in reality by the courts and a simple showing of the existence of a complaint procedure is often considered sufficient to satisfy the first prong.

As for the second prong of the employer's defence, the unreasonableness of the failure to report harassment should be assessed in more detail compared to the practice in the United States. Considerations about fear of worsening working conditions, humiliation and falling into disfavour among colleagues should be taken into account. Furthermore, as Susan D. Carle points out, the victim of harassment should be invited to present evidence regarding culture at the workplace, efficiency and results of previous harassment complaints submitted by employees and examples of informal power dynamics at work¹¹⁵.

Finally, delays in reporting harassment should not be interpreted to disadvantage the employee. As the analysis in the preceding subsections revealed, early reporting in the United States might result in a finding that no harassment has yet occurred, while late reporting is interpreted as unreasonable behaviour, thus satisfying the second prong of the affirmative defence. Such anomaly can be avoided by not requiring prompt reporting and by taking into account the particularities of a sequence of harassment.

While the solution provided above might go into too much detail to be regulated by a

114 EEOC "Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors" 1999, available at: <http://www.eeoc.gov/policy/docs/harassment.html>, accessed on Nov. 17, 2008

115 Susan D. Carle "Acknowledging Informal Power Dynamics in the Workplace: A Proposal for Further Development of the Vicarious Liability Doctrine in Hostile Working Environment Sexual Harassment Cases", 13 Duke J. of Gender L. & Pol'y 85, 2005, p. 103

directive, a more general, though more radical alternative would be to require the existence of employer's liability and allow employers the possibility to escape punitive damages. According to this version, employers would always be liable for compensatory damages, while escaping punitive damages would be made contingent on meeting conditions similar to the U.S. affirmative defence. This alternative is put forward by Theresa M. Beiner and though drafted with the U.S. model in mind, it could easily be applied in Europe.¹¹⁶

Beiner finds that if an employer is exercising due care and has disseminated an anti-harassment policy as well as trained its employees, it should only be liable for compensatory damages. However, in case it has not exercised its obligation to prevent harassment, the victim should receive punitive damages. Thus, the employer could escape only punitive damages by meeting the two-prong affirmative defence test.¹¹⁷

The proposal is attractive as it gives a solution that would serve the aim of providing an incentive for employers to prevent harassment. At the same time, it would also be fair from the victim's point of view as compensatory damages would always be rewarded. Thus, the employer would be liable for compensatory damages regardless its anti-harassment policy and complaint procedure like in case of work-related health accidents while punitive damages would be made conditional on the lack of initiative by the employer to prevent harassment.

The current silence of EU Equal Treatment Amendment Directive regarding employer's liability in sexual harassment cases does not serve the aim of creating a common standard

116 See Theresa M. Beiner "Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment", 7 Wm. & Mary J. of Women & L. 273, 2001, p. 331 and "Gender, Myths v. Working Realities: Using Social Science to Reformulate Sexual Harassment Law", NYU Press, 2005, p. 173-174

117 Theresa M. Beiner "Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment", 7 Wm. & Mary J. of Women & L. 273, 2001, p. 331 and "Gender, Myths v. Working Realities: Using Social Science to Reformulate Sexual Harassment Law", NYU Press, 2005, p. 173-174

throughout Member States. The Directive should prescribe a requirement that employers be held liable in addition or instead of personal liability. In this sub-chapter possible alternatives for national legislations, derived from the U.S experience, have been discussed. Certainly other solutions could be feasible. However, the present situation where Member States regulations range from no employer's liability at all to strict liability, cannot be acceptable.

CHAPTER III – REMEDIES AVAILABLE IN SEXUAL HARASSMENT CASES

In the landmark case of *Meritor Savings Bank v. Vinson*, besides declaring sexual harassment a prohibited discrimination under the Civil Rights Act, the U.S. Supreme Court gave an interpretation to the extent of discrimination that Title VII is applicable for. More specifically, the Court held that “Title VII is not limited to “economic” or “tangible” discrimination”¹¹⁸. Thus, it was found that economic harm was not necessary to create a violation of Title VII. This interpretation leads to the conclusion that Title VII should provide compensatory and punitive damages besides simple equitable relief including reinstatement and injunction. However, until the Civil Rights Act was amended in 1991, very limited damages were available to plaintiffs in sexual harassment cases.

Until the Civil Rights Act of 1991¹¹⁹ courts construed Title VII's relief provisions narrowly allowing no compensatory and punitive damages, except for back pay, lost benefits, attorney's fees and certain litigation costs that were perceived as equitable remedies¹²⁰. Intangible injuries, such as psychological harm were not compensated for, though the existence of such harm was considered enough to create a Title VII violation. This led to lower court decisions¹²¹ that refused to hold the employer liable for hostile working environment harassment even though the claim had been proved, as there was simply no award that the plaintiff could recover.¹²² Thus, hostile working environment harassment that

118 *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)

119 As passed: Pub. L. No. 102-166, 105 Stat. 1071 (1991), codified in: 42 U.S.C.

120 42 U.S.C. § 2000e-5

121 See e.g. *Swanson v. Elmhurst Chrysler Plymouth, Inc.*, 882 F.2d 1235 (7th Cir. 1989)

122 Sharon T. Bradford “Relief for Hostile Work Environment Discrimination: Restoring Title VII's Remedial Powers”, 99 Yale L.J. 1611, 1990, p. 1612

did not result in tangible employment action became an empty concept that courts could declare to constitute discrimination on the ground of sex but could not offer remedies for.

Such inequitable situations where victims were found to have a right that was violated but left without relief or with attorney's fees and small nominal damages only, occurred in case of hostile working environment sexual harassment. As *quid pro quo* harassment involves tangible employment decisions, victims of this form of harassment were ironically better off as far as rewarding damages are to be considered. In case of sexual harassment, this situation lasted for approximately 10 years as the cause of action for hostile working environment sexual harassment was first recognized in 1981¹²³ and reinforced by the Supreme Court in 1986¹²⁴. In case of racial harassment, however, the hostile working environment theory was recognized already in the 1970-s¹²⁵, thus leaving a gap of 20 years before victims could claim damages for the violation of their legally recognized right under Title VII.

One of the aspects that could explain why courts interpreted Title VII relief provisions narrowly could be the fact that the need for compensatory and punitive damages appeared after the courts had already construed their interpretation of Title VII's relief provisions. As mentioned above, awarding compensatory and punitive damages became indispensable once the courts recognized hostile working environment harassment that requires no tangible loss. However, courts had declared Title VII not to provide for such damages before the latter and thus adhered to that approach. This would also explain why this situation was tolerated for a longer period in relation to racial harassment as section 1981 of the Civil Rights Act of 1866 provided an alternative source of compensatory and punitive damages for such harassment by

123 *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981)

124 *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)

125 *Rogers v. EEOC*, 454, F.2d 234 (5th Cir. 1971)

prohibiting racial discrimination that violates the right “to make and enforce contracts”^{126, 127}.

Compensatory and punitive damages for harassment were finally allowed with the coming into force of the Civil Rights Act of 1991. The 1991 Act provides for compensatory damages for intentional discrimination and for punitive damages for discriminatory conduct with malice or with reckless indifference.¹²⁸ Compensatory damages include those for emotional pain, future pecuniary losses, suffering, inconvenience, mental anguish and loss of enjoyment of life.¹²⁹ However, the amount of the compensatory and punitive damages was capped according to the size of the company. The maximums range from \$50,000 for employers with less than 101 employees to \$300,000 for employers with more than 500 employees.¹³⁰ The need for a cap on damages was explained by the purpose of “deter[ring] frivolous lawsuits and protect[ing] employers from financial ruin as a result of unusually large awards”¹³¹.

As usually the case with compensatory and punitive damages, the right for a jury trial had to be provided for since such damages are considered legal remedies that under the Seventh Amendment demand for jury trial.¹³² Existence of jury trial is beneficiary for plaintiffs in sexual harassment lawsuits (who in most cases are women) as the judiciary is usually comprised of primarily male judges while the jury includes both men and women. Presence of women when deciding issues related to women's experience, is essential in reaching a just judgement.

126 As passed: 14 Stat. 27 (1866), codified in: 42 U.S.C. 21

127 Sharon T. Bradford “Relief for Hostile Work Environment Discrimination: Restoring Title VII's Remedial Powers”, 99 Yale L.J. 1611, 1990, p. 1617-1618 and 1626

128 42 U.S.C. § 1981a

129 42 U.S.C. § 1981a

130 42 U.S.C. § 1981a (b)

131 *Luciano v. Olsten Corp.*, 110 F.3d 210 (2nd Cir. 1997), quoting 137 Cong. Rec. S15472 (1991) (statement of Sen. Dole); 137 Cong.Rec. S15478-79 (1991) (statement of Sen. Bumpers)

132 42 U.S.C. § 1981a (c)

In the European Union, Directive 2002/73/EC requires Member States to introduce “such measures as are necessary to ensure real and effective compensation or reparation [...] for the loss and damage sustained by a person injured”¹³³ due to discriminatory conduct. In addition, the Directive provides that the compensation has to be provided “in a way which is dissuasive and proportionate to the damage suffered”¹³⁴. In a sharp contrast to the U.S., the Directive prohibits the establishment of upper limits to compensation or reparation, the only exception being “in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination [...] is the refusal to take his/her job application into consideration”¹³⁵. These provisions of the Directive codify past European Court of Justice rulings, such as *Draehmpaehl*¹³⁶ and *Marshall II*¹³⁷ that were decided long before the Directive came into force.

Thus, it could be claimed that European employers found guilty of sexual harassment, are liable for bigger damages than their counterparts in the United States. Opinions on whether refusing to apply caps on damages are good or bad, range from criticising the enormous extent to which employers can be made liable¹³⁸ to claims that a threat of high economic penalties can serve as an effective deterrent against sexual harassment¹³⁹. Taking into consideration the fact that deterrence is considered one of the objectives of awarding

133 Directive 2002/73/EC Article 6(2)

134 Directive 2002/73/EC Article 6(2)

135 Directive 2002/73/EC Article 6(2)

136 *Draehmpaehl [Nils] v Urania Immobilienservice OHG*, Case C-180/95, 1997 E.C.R. I-02195

137 *Marshall v. Southampton-South West Hampshire Area Health Authority*, Case 271/91, 1993 E.C.R. I-4367

138 See Jamie Myers “New Equal Treatment Directive Spurs Rise of Sex-Discrimination Suits in Europe: How Employment Regulatory Schemes Affect U.S. and European Markets”, 14 *Currents Int'l Trade L.J.* 82, 2005, p. 86-87

139 See James M. Owens, Glenn M. Gomes, James F. Morgan “The New EU Directive Prohibiting Sexual Harassment in the Workplace: Reflections From Across the Pond”, Full Proceedings of the 7th Conference on International Human Resource Management, University of Limerick, Ireland 2003, p. 16, available at <http://www.csuchico.edu/mgmt/gomes/ihrm.pdf>, accessed on Oct. 12, 2008

damages, higher costs of for employers can only be considered a positive result. Financial burden can encourage employers to take steps that go beyond the minimum requirement of circulating anti-harassment policies and establishing a complaint procedure. The result is beneficial to both, the employer and employee as preventive measures diminish the amount of occasions of sexual harassment at work and part of the problem can be solved before it actually emerges.

3.1. REMEDIES AVAILABLE UNDER TITLE VII BEFORE THE CIVIL RIGHTS ACT OF 1991

Until the Civil Rights Act of 1991 came into force, sexual harassment victims were not afforded compensatory and punitive damages under Title VII. Title VII remedies emphasized equitable relief and thus courts focused on making victims of discrimination “whole” and deterring employers from engaging in any such practices as the main goals for providing relief.¹⁴⁰

The first of these goals was considered to be achieved by eliminating the unlawful practice and by restoring the plaintiff to the position that he/she had been in before discrimination occurred. For the second aim to be achieved, assurance needed to be provided to other employees that protection against such violations of Title VII exists.¹⁴¹ It was not considered necessary to punish the employer by applying punitive damages to achieve the aim of deterrence. Thus, the main remedies afforded to plaintiffs that managed to prevail were declaratory and injunctive relief, reinstatement, front and back pay and attorney's fees.¹⁴²

¹⁴⁰ Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)

¹⁴¹ Elizabeth Papacek “Sexual Harassment and the Struggle for Equal Treatment under Title VII: Front Pay as an Appropriate Remedy”, 24 Wm. Mitchell L. Rev. 743, 1998, p. 764-766

¹⁴² 42 U.S.C. § 2000e-5(g)(1), except for front pay that is not explicitly mentioned in the Civil Rights Act but was accepted as a suitable remedy by case law. See e.g. Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976)

It is now clear that these remedies were not sufficient to remedy and to deter further occasions of sexual harassment. However, these were the only rewards for successful plaintiffs in sexual harassment cases during the 10 years between *Bundy v. Jackson*¹⁴³ and the 1991 amendment to the Civil Rights Act and still remain to be rewarded besides the more extensive damages under the amendment. Thus, below is a brief discussion of the extent and conditions for rewarding them.

3.1.1. Reinstatement and Front Pay

Reinstatement is applied by courts in situations where the victim has lost the job or promotion opportunity due to harassment. Reinstatement is often given preference to by the courts and might at first glance appear to be a promising remedy. In reality, however, courts can refuse to order reinstatement in exceptional circumstances. Such special situations that have to be proven by the employer, include among others the impossibility of a productive working relationship due to the hostility between the employer and the victim¹⁴⁴, the need for a displacement of an innocent employee¹⁴⁵ and the fact that the victim is no longer qualified for the position initially hired for^{146, 147}.

The exceptions call for questioning especially in instances of sexual harassment where ruination of the relationship between the employer and the employee is almost unavoidable and where victim's work performance often deteriorates due to the harassing practice. *Quid pro quo* harassment can only be committed by direct supervisors. Hence, if the harasser is not removed from its position, hostility between the employer and the victim occurs in every

143 641 F.2d 934 (D.C. Cir. 1981)

144 See e.g. *Green v. Administrators of the Tulane Education Fund*, 284 F.3d 642 (5th Cir. 2002)

145 See e.g. *Baker v. John Morrell & Co.*, 263 F. Supp. 2D 1161 (N.D. Iowa 2003)

146 See e.g. *Kamberos v. GTE Automatic Electric, Inc.*, 603 F.2d 598 (7th Cir. 1979)

147 These cases were given as examples in A. Mackenzie Smith and Cassandre Charles "Employment Law Chapter: Title VII of the Civil Rights Act of 1964", 5 Geo.J.Gender & L.421, 2004, p. 441-444

single case of *quid pro quo* harassment. At the same time, reinstatement to a harassing working environment is also not attractive from the victim's point of view. Thus, it cannot possibly advance the objective of Title VII most effectively.

The weakness of reinstatement can partly be compensated for by awarding the victim of harassment front pay. Front pay is a form of relief that is used in lieu of reinstatement when the latter is made impossible due to the deteriorated working relationship between the employee and the employer. Such relief can be awarded for a reasonable future period with the aim of compensating for future loss of wages until the plaintiff manages to re-establish his/her competitiveness on the job market. Unlike in case of back pay, no limit is set for the maximum duration of such compensation.¹⁴⁸ While not fixing a minimum and maximum range on the duration of front pay can offer more extensive compensation to the victim, it can also work against the plaintiff by judgements that provide front pay for an unreasonably short time. The weakness of this form of compensation lies in its dependence on the discretion of the court.

In deciding whether front pay is a suitable form of relief, courts take into consideration such factors as intimidation, threats and the effect of the harassment on the employee's psychological well-being.¹⁴⁹ However, inevitable bad feelings that are a result of a discrimination case are not sufficient for the court to decide to award front pay instead of reinstatement. In fact, courts view requests for front pay with rather a critical eye.¹⁵⁰ As mentioned above, front pay is rendered a weak remedy due to the discretion afforded to the

148 Anne N. Walker "Sexual Harassment: What's Your Liability?", 1993, available at <http://www.phcbl.com/publications/pubsdetail.asp?offset=-1&PubID=288> accessed on Oct. 04, 2008

149 A. Mackenzie Smith and Cassandre Charles "Employment Law Chapter: Title VII of the Civil Rights Act of 1964, 5 Geo.J.Gender & L.421, 2004, p. 447

150 Elizabeth Papacek "Sexual Harassment and the Struggle for Equal Treatment under Title VII: Front Pay as an Appropriate Remedy", 24 Wm. Mitchell L. Rev. 743, 1998, p. 776

court in deciding whether to afford it or not. As a result, in theory, front pay might serve as a suitable replacement for reinstatement but in reality, reinstatement still remains the main compensation to be afforded.

3.1.2. *Back Pay*

Back pay compensates the employee for the salary that could have been earned in case sexual harassment had not occurred and the employee could have continued working. The emphasis is once again on restoring the situation that existed before the unlawful action occurred and the aim is thus to make the victim “whole”. Courts are given certain discretion in deciding whether to afford back pay or any other equitable relief to the victim but denying back pay has been restricted to exceptional cases and “only the most unusual circumstances”¹⁵¹ could justify denying relief if liability is established.¹⁵²

There are two limits that have been set on rewarding back pay as an equitable remedy. According to § 2000e-5 g(1) of the Civil Rights Act, it can be paid for a maximum period of two years that are counted back from the filing of a charge with the EEOC. Thus, the Act prevents the possibility of rewarding unlimited damages in the form of back pay. Secondly, the Act imposes an obligation on the victim to exercise reasonable diligence in looking for alternate employment opportunities. Earnings that the victim received or could have received between the unlawful action and the court decision, are deducted from the back pay.¹⁵³

The obligation of the victim to look for new employment opportunities as a requirement for rewarding back pay is questionable. How is the court able to determine whether the victim

151 *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975)

152 A. Mackenzie Smith and Cassandre Charles “Employment Law Chapter: Title VII of the Civil Rights Act of 1964, 5 *Geo.J.Gender & L.*421, 2004, p. 444

153 42 U.S.C. § 2000e-5g (1)

exercised reasonable diligence and what specifically can be considered reasonable diligence? It is unclear whether the diligence requirement is met by sending work applications or a more active approach is expected. It is also questionable what exactly should be considered as alternate employment opportunities. Should the plaintiff accept only jobs that are of the same level, with the same or similar salary and conditions as the one lost due to harassment or alternate refers to any accessible job. Finally, such a requirement puts the burden on the victim instead of the employer.

Lastly, it should be mentioned that back pay is not limited to lost salaries. An award of back pay can also contain such components as compensation for overtime, bonuses and vacation pay.¹⁵⁴ Likewise, back pay cannot be replaced by front pay. These two remedies should complement each other as they compensate for harm experienced in different periods of time.¹⁵⁵

As the analysis above revealed, back pay, though more often rewarded than front pay, is still made conditional to requirements that put the burden on the plaintiff rather than the employer. The upper limit of two years can be considered reasonable taking into account that this should be a sufficiently long period for finding new employment. The requirement to seek for alternative employment opportunities as a condition for rewarding back pay is thus made unnecessary by the two years limit. It should not be applied as a condition, especially as it is unclear what it entails.

154 A. Mackenzie Smith and Cassandre Charles "Employment Law Chapter: Title VII of the Civil Rights Act of 1964, 5 Geo.J.Gender & L.421, 2004, p. 445

155 Elizabeth Papacek "Sexual Harassment and the Struggle for Equal Treatment under Title VII: Front Pay as an Appropriate Remedy", 24 Wm. Mitchell L. Rev. 743, 1998, p. 772-773

3.1.3. Attorney's Fees

Besides reinstatement, front and back pay, a plaintiff in a successful sexual harassment case may collect attorney's fees.¹⁵⁶ This is possible only if the plaintiff receives some relief on the merits and thus becomes the prevailing party.¹⁵⁷ In most civil law cases, it is the losing party that covers costs related to the lawsuit and the same principle is followed in Title VII harassment cases.

The awarded fees have to be reasonable and a three-prong test has been suggested to determine what constitutes reasonable: 1) “difference between the judgement recovered and the recovery sought”, 2) “significance of the legal issue on which the plaintiff claims to have prevailed” and 3) “the public purpose [the] litigation [...] served”¹⁵⁸.¹⁵⁹ Awarded fees are counted according to the market rate for attorneys at the particular time and place. The awards can be higher than the amount of back and front pay.¹⁶⁰

It is not clear why rewarding attorney's fees is not deemed automatic in a successful sexual harassment case like it usually is in civil law cases. This would encourage victims of sexual harassment to bring actions and thus contribute to the eradication of such discriminatory practices. It is hard to imagine that plaintiffs would be encouraged to file lawsuits if they cannot be sure that even if they prevail, they will be compensated for the expenses borne due to a lawsuit. Making reward of attorney's fees conditional even in cases

156 42 U.S.C. § 2000e-5k

157 A. Mackenzie Smith and Cassandre Charles “Employment Law Chapter: Title VII of the Civil Rights Act of 1964, 5 Geo.J.Gender & L.421, 2004, p. 448

158 Justice O'Connor's concurrence in *Farrar v. Hobby*, 506 U.S. 103 (1992)

159 A. Mackenzie Smith and Cassandre Charles “Employment Law Chapter: Title VII of the Civil Rights Act of 1964, 5 Geo.J.Gender & L.421, 2004, p. 449

160 Anne N. Walker “Sexual Harassment: What's Your Liability?”, 1993, available at <http://www.phcbl.com/publications/pubsdetail.asp?offset=-1&PubID=288> accessed on Oct. 04, 2008

where the plaintiff prevails, renders sexual harassment lawsuits the privilege of a few who can afford, also after losing their job, to take on a lawsuit.

As the above analysis reveals, remedies that were available to successful plaintiffs in sexual harassment cases before the Civil Rights Act of 1991 were neither efficient nor sufficient. Reinstatement cannot be considered a satisfactory remedy in most sexual harassment cases where the usual result is a deterioration of the relationship between the victim and the employer. Front pay is awarded rarely and is faced with scepticism from the judiciary. Furthermore, it is entirely made dependent on the discretion of the court. Back pay, though more rarely denied, sets requirements that put the burden on the victim rather than the employer. And finally, even compensation of attorney's fees is made conditional. The amendments made to the Civil Rights Act in 1991 aimed at remedying this situation.

3.2. REMEDIES AVAILABLE SINCE THE CIVIL RIGHTS ACT OF 1991

The main aim of providing for compensatory and punitive damages in the Civil Rights Act of 1991, was “to conform remedies for intentional gender, disability, and certain forms of religious discrimination to those [...] available to victims of intentional race, national origin and other forms of religious discrimination”¹⁶¹. Victims of race, national origin and some forms of religious discrimination were afforded compensatory and punitive relief already before the coming into force of the 1991 Act under 42 U.S.C. § 1981.¹⁶²

The aim of compensatory damages is to serve the goal of Title VII to make victims

161 Statement of Representative Edwards in 137 Cong. Rec. H9505, H9256 (daily ed. Nov. 7, 1991), quoted in Andrea Bough “Punitive Damages in Title VII Employment Discrimination Cases: Redefining the “Standard””, 69 UMKC L. Rev. 381, 2000, p. 384

162 Andrea Bough “Punitive Damages in Title VII Employment Discrimination Cases: Redefining the “Standard””, 69 UMKC L. Rev. 381, 2000, p. 383

whole after discrimination has inflicted injury to the plaintiff's career, physical and psychological well-being and self-respect. Punitive damages, on the other hand, aim at punishing especially egregious discrimination and deterring possible future discrimination.¹⁶³

Compensatory damages are afforded to plaintiffs of intentional sex discrimination while awarding punitive damages requires malice or reckless indifference.¹⁶⁴ The two types of relief do not serve as a prerequisite to each other.¹⁶⁵ Neither compensatory nor punitive damages can be awarded when facially neutral practices are challenged.¹⁶⁶ Thus, compensatory and punitive damages can only be claimed for direct discrimination. Harassment is always a form of direct discrimination, thus since the coming into force of the 1991 Civil Rights Act, victims of both *quid pro quo* and hostile working environment sexual harassment are entitled to compensatory and punitive damages.

Both damages are capped according to the size of the employer.¹⁶⁷ Limiting the amount of damages available under Title VII has been criticised as discriminatory because such limitations apply to discrimination based on sex, religion and disability while damages for discrimination based on race or national origin are recoverable under the Civil Rights Act of 1866, § 1981 without any such limitations.¹⁶⁸

The use of limitations on damages is not only discriminatory but does not, in general,

163 Andrea Bough "Punitive Damages in Title VII Employment Discrimination Cases: Redefining the "Standard"", 69 UMKC L. Rev. 381, 2000, p. 384, paraphrasing statement of Rep. Edwards (137 Cong. Rec. H9505, H9256 (daily ed. Nov. 7, 1991))

164 42 U.S.C. § 1981a(b)

165 A. Mackenzie Smith and Cassandre Charles "Employment Law Chapter: Title VII of the Civil Rights Act of 1964, 5 Geo.J.Gender & L.421, 2004, p. 455

166 42 U.S.C. § 1981a(a)(1)

167 42 U.S.C. § 1981a (b)(3)

168 For similar views see Judith Lichtman and Holly Fechner "Almost There", 19 Hum. Rts. Q., Summer 1992, p. 18-19; Elizabeth Papacek "Sexual Harassment and the Struggle for Equal Treatment under Title VII: Front Pay as an Appropriate Remedy", 24 Wm. Mitchell L. Rev. 743, 1998, p. 763; Andrea Bough "Punitive Damages in Title VII Employment Discrimination Cases: Redefining the "Standard"", 69 UMKC L. Rev. 381, 2000, p. 385

serve the aim of deterring violations. Employers are not motivated to prevent sexual harassment at work unless they face serious financial consequences as a result of their inactivity. What is more, as discussed in the previous chapter, in case of sexual harassment, employers can escape responsibility by using the affirmative defence. Limiting their liability even further by setting caps on compensation, renders the remedies available to victims of sexual harassment rather weak.

While the application of compensatory damages that did not usually reach the maximum amount set by the Civil Rights Act of 1991, caused little worries for courts, awarding punitive damages faced with much more controversy. This was due to the increased financial burden that the recovery of punitive damages was seen to put on the employers. Thus, lower courts were confronted with the question of which standard to apply for rewarding punitive damages in Title VII discrimination cases. Opinions ranged from deciding that standards for Title VII should be the same as for § 1981¹⁶⁹ to applying a heightened level of culpability by requiring that conduct be “extraordinarily egregious”.¹⁷⁰

The matter was finally decided by the Supreme Court in *Kolstad v. American Dental Association*¹⁷¹. While finding that a showing of “egregious misconduct” on behalf of the employer was not a requirement for awarding punitive damages, the Court nevertheless declared that the fact that the employer demonstrated a reckless indifference to a federally protected right, alone, was not enough. Thus, the court promulgated the existence of a further condition - the actions complained of had to be imputable to the employer. This in itself demanded the discriminatory conduct to be committed by a managerial agent in the scope of

¹⁶⁹ The standard for § 1981 is the showing of a reckless indifference to a federally protected right

¹⁷⁰ See cases such as *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927 (5th Cir. 1996) and *Harris v. L & L Wings, Inc.*, 132 F.3d 978 (4th Cir. 1997)

¹⁷¹ 527 U.S. 526 (1999)

employment. Furthermore, the Court found that an employer would be exempted from vicarious liability if the employment decisions of the managerial agent were “contrary to the employer's “good-faith efforts to comply with Title VII””¹⁷².

As a result, the employer can avoid punitive damages by keeping a sexual harassment policy even if it is not enforced. Circulating an anti-harassment policy and establishing a complaint procedure show the “good-faith efforts” of the employer that are disregarded by a mistaken employee. Thus, there is no need to for the employer to actually have punished past harassers to escape punitive damages.

The judgement placed limits on the vicarious liability of the employer for punitive damages for all Title VII discrimination claims. A parallel could be drawn with the affirmative defence afforded to employers in sexual harassment claims. In fact, in sexual harassment cases, the requirement that complained actions be committed by a managerial agent, in other words supervisor, is already satisfied in deciding about employer's liability. The similarity between affirmative defence in case of sexual harassment and the test for punitive damages in all other discrimination cases takes us back to the proposition voiced in the previous chapter to allow for affirmative defence only in deciding about punitive damages. There is no reason why in case of sexual harassment affirmative defence should relieve the employer entirely from liability whilst in other discrimination cases a similar test only applies to decisions about punitive damages.

Another question regarding the defence to avoid punitive damages is how compensating to the victim for the violation of a federal law can be made dependent on good-faith efforts of the employer. If a plaintiff prevails in a case because a violation of the law is

¹⁷² Kolstad v. American Dental Association, U.S. 526 (1999), quoting Tatel, J's dissent in Columbia Circuit Court's decision in the same case (139 F.3d 958)

determined, and the violation has been found to be due to the reckless indifference of the employer, why should the victim not be awarded punitive damages in cases when the employers' good faith efforts have not been sufficient to prevent harassment. The goal of punitive damages is to deter further violations or to complement compensatory damages. Thus, the underlying determination here should be whether the employer acted with malice or reckless indifference and not the existence of insufficient good-faith efforts.

The discussion above leads to the conclusion that receiving just compensation for sexual harassment is extremely complicated. Equitable relief available before the Civil Rights Act of 1991 was obviously not sufficient due to the reasons pointed out before. The introduction of amendments in the Civil Rights Act of 1991 promised a more efficient compensation for victims of sexual harassment. However, setting caps on both compensatory and punitive damages and making the awarding of the latter conditional to a test that can be compared to the affirmative defence in deciding employer's liability, limited the extent of available damages as well as the group of plaintiffs that are eligible for them.

3.3. REMEDIES UNDER EU DIRECTIVE

Article 6 of the EU Equal Treatment Amendment Directive enacts that “judicial and/or administrative procedures [...] [have to be made] available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them.”¹⁷³ Thus, the Directive requires Member States to provide in their laws an opportunity to seek for remedies through administrative or judicial process. Article 6 does not, however, prescribe specific sanctions that Member States' laws should apply in case of successful sexual harassment claims and neither does it specify the concrete forms of remedies that need to be made

¹⁷³ Directive 2002/73/EC Article 6(1)

available. It is left for the discretion of each Member State to design specific solutions.¹⁷⁴ This is due to the nature of directives which require Member States to achieve certain results but do not specify the means for doing it. However, Member States are not given complete discretion in these matters.

The Directive sets a requirement that compensation ensured by the sanctions designed according to the discretion of the Member States has to be real and effective as well as dissuasive and proportionate to the damage suffered.¹⁷⁵ These requirements were set already before Directive 2002/73/EC came into force through ECJ case law. In relation to discrimination based on sex, it was the ECJ decision in the so-called Marshall II case¹⁷⁶ that specified the standard for compensation.

Though, not in relation to sexual harassment, the ECJ declared in Marshall II that compensation for the victim of discrimination based on sex has to be “sufficiently effective to achieve the objective of the Directive”¹⁷⁷ and that financial compensation has to be “adequate, in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full”¹⁷⁸. These requirements were re-enforced and elaborated on in the Draehmpaehl case¹⁷⁹ where the court specified that the “sanction chosen by the Member States must have a real dissuasive effect on the employer”¹⁸⁰.

The interesting aspect of European Court of Justice's decision in Marshall II is that the

174 Ursula R. Kubal “ U.S. Multinational Corporations Abroad: A Comparative Perspective on Sex Discrimination Law in the United States and the European Union”, 25 N.C.J. Int'l L. & Com. Reg. 207, 1999, p. 249

175 Directive 2002/73/EC Article 6(2)

176 Marshall v. Southampton-South West Hampshire Area Health Authority, Case 271/91, 1993 E.C.R. I-4367

177 Marshall v. Southampton-South West Hampshire Area Health Authority, Case 271/91, 1993 E.C.R. I-4367

178 Marshall v. Southampton-South West Hampshire Area Health Authority, Case 271/91, 1993 E.C.R. I-4367

179 Draehmpaehl [Nils] v Urania Immobilienservice OHG, Case C-180/95, 1997 E.C.R. I-02195

180 Draehmpaehl [Nils] v Urania Immobilienservice OHG, Case C-180/95, 1997 E.C.R. I-02195

Court not only dictated the form of remedy to be applied by the Member State (financial compensation together with interests) but also gave an opinion on the amount of an adequate compensation. Until that, the Court had refrained from specifying the concrete amount of damages that could be considered adequate, specifying only that the compensation needs to be effective¹⁸¹. Thus, even though the Directive does not specify the form and amount of compensation to be awarded to victims of sexual harassment, European Court of Justice can be expected to make more detailed pronouncements on that.

As already mentioned above, one of the positive features of the EU Directive 2002/73/EC is the prohibition of setting caps to the amount of compensation to be awarded. Though this does not guarantee that compensation awarded to sexual harassment victims or victims of any other form of discrimination based on sex is always adequate in reality, it does decrease the opportunity of leaving successful plaintiffs with unfairly small rewards.

The aim of compensation to serve as a deterrent to further violations can only be achieved if companies face financial damages that have a remarkable influence on their actions. Limits or caps, as applied in the United States, would strip the compensation of its deterrent influence. In this aspect, the EU Directive guarantees more extensive compensation to victims of sexual harassment than the U.S. Civil Rights Act. Whether “adequate and proportionate” compensation will actually be interpreted to be higher than the limits set in the United States, will depend on case law.

Another aspect of the EU Directive that deserves attention as compared to the original regulations in the United States, is the fact that the Directive allows for both compensatory and

181 See Von Colson and Kamann v. Land Nordrhein-Westfalen, Case 14/83, 1984, E.C.R. 01891

punitive damages. In fact, according to the language of *Von Colson and Kamann*¹⁸², *Marshall II*¹⁸³ and *Draehmpaehl*¹⁸⁴, sanctions must have a deterrent effect on the employer. This objective can only be reached by allowing for compensatory as well as punitive damages. The standard for rewarding punitive damages, however, has not been specified and is left for the Member States to determine. However, the ECJ might nevertheless find that not rewarding punitive damages in a certain case does not meet the requirement of “effective and dissuasive” remedies.

Finally, it is worth mentioning that remedies exist also in case Member States fail to adopt laws and regulations necessary to comply with the Directive. In cases such as *Commission of the European Communities v Kingdom of Belgium*¹⁸⁵ and *Commission of the European Communities v Grand Duchy of Luxembourg*¹⁸⁶, the court has ordered the respective states to pay the costs for not fulfilling their obligations under the Directive. Belgium and Luxembourg were deemed to have failed to adopt laws and regulations that would meet the requirement of the Directive to put such measures in place latest by October 2005. This measure guarantees that the Directive does not remain only on paper and is in fact transposed by the Member States.

In conclusion it can be said that in theory, the EU Directive promises broader remedies and higher compensation for victims of sexual harassment than the U.S. Civil Rights Act. This is mainly due to the prohibition of setting limitations on the amount of compensation to be awarded. Taking into account that in relation to sex discrimination, ECJ has already stipulated the form and amount of damages that can be considered “effective and dissuasive”, it can be expected to make similar pronouncements in relation to sexual harassment.

182 *Von Colson and Kamann v. Land Nordrhein-Westfalen*, Case 14/83, 1984, E.C.R. 01891

183 *Marshall v. Southampton-South West Hampshire Area Health Authority*, Case 271/91, 1993 E.C.R. I-4367

184 *Draehmpaehl [Nils] v Urania Immobilienservice OHG*, Case C-180/95, 1997 E.C.R. I-02195

185 Case C-543/07, 2008, O.J. C 37/18, 09.02.2008

186 Case C-340/07, 2008, O.J. C107/9, 26.04.2008

3.4. CRIMINAL SANCTIONS TO REMEDY SEXUAL HARASSMENT

Title VII of the Civil Rights Act in the United States provides civil remedies, including punitive damages to victims of sexual harassment while criminal remedies are not provided for. However, some states have adopted laws that include both civil and criminal sanctions¹⁸⁷, though in most cases criminal sanctions do not apply for workplace harassment. The EU Directive does not prescribe the form of sanctions that Member States have to adopt to remedy sexual harassment, thus leaving it up to the Member States whether to apply criminal sanctions in addition to civil ones or not. Similarly to the United States, some Member States have included criminal sanctions in their national laws¹⁸⁸.

Both in U.S. and among EU Member States, criminal sanctions are usually applied in case of *quid pro quo* type of sexual harassment. France could be mentioned here as an exception. The French Penal Code criminalizes also hostile working environment type of sexual harassment under “moral harassment”¹⁸⁹. In some cases the sanctions are stipulated in the equal treatment or employment law (e.g. Cyprus, Malta) while in others sexual harassment explicitly or implicitly is included as an offence in the criminal code (e.g. Texas, France, Germany).

The main arguments for seeking to criminalize sexual harassment in employment rely on the harm that sexual harassment causes not only to individual women but to women as a group. Sexual harassment subordinates women as a group and perpetuates the hierarchical

187 See e.g. Delaware (Del.Code Ann. Tit. 11 § 763, 1995) – extensively criminalizes conduct defined as sexual harassment; Texas (Texas Penal Code Ann. 39.03, 1994) – applies only to civil servants; North Carolina (N.C. Gen. Stat. 14-395.1, 1997) – applies only to property lessors

188 See e.g. Cyprus (The Equal Treatment of Men and Women in Employment and Vocational Training Law, No. 205(I) /2002) – 6 months' imprisonment and/or fine; France (Penal Code, 1994, Art. 222-33-2) – one year's imprisonment and a fine; Germany (Criminal Code, 1998, Sec. 177) – minimum 6 months' imprisonment; Malta (Employment and Industrial Relations Act, 2002, Article 66) – maximum 3 months' imprisonment or fine.

189 French Penal Code, 1994, Art. 222-33-2

relationship between the sexes. Furthermore, sexual harassment harms not only women but the whole society, including employers who are faced with lower productivity and deterioration of morale at the workplace. Thus, the argument goes, sexual harassment should be criminalized to protect women, to deter such behaviour and to avoid the extensive harm to the whole society.¹⁹⁰

One of the possible solutions for criminalizing sexual harassment relies on extending rape law to cover such behaviour in employment. MacKinnon proposes to define rape as a “practice of inequality” that occurs when an employer with power forces an employee that is vulnerable to offer sexual favours as a condition for work.¹⁹¹ She further suggests to redefine “force [to] include inequalities of power” and “consent [to be] replaced with a welcomeness standard”¹⁹² Thus, sexual harassment at work would be criminalized as a form of rape where the force is psychological instead of physical.

Qualifying *quid pro quo* sexual harassment as a form of rape, however, emphasizes the personal aspect of harassment. Rape is a crime committed by an individual, not by the employer. Thus, criminalizing sexual harassment by widening the scope of rape law would serve as a reason for not imposing liability on employers. Holding employers liable for harassment that occurs at work, however, is essential in achieving a harassment-free working environment. Thus, the negative consequences of MacKinnon's proposal might outweigh its positive aspects.

Another option is to adopt criminal laws that specifically prohibit sexual harassment. Baker proposes a model for the United States that would define *quid pro quo* sexual harassment as “sexual extortion”. According to Baker “threatening to deny or withdraw

190 For such views, see Catharine MacKinnon “Women's Lives, Men's Laws”, Cambridge 2004, p. 240-248 and Carrie N. Baker “Sexual Extortion: Criminalizing Quid Pro Quo Sexual Harassment”, 13 Law & Ineq. J. 213, 1994

191 Catharine MacKinnon “Women's Lives, Men's Laws”, Cambridge 2004, p. 243, 347

192 Catharine MacKinnon “Women's Lives, Men's Laws”, Cambridge 2004, p. 247

benefits from a victim, the harasser attempts to induce her to comply with his sexual demands”¹⁹³. In Europe a separate offence under the name of sexual harassment in the Criminal Code would probably serve as a solution. As mentioned above, some European countries have already taken this route. However, whether under rape law or as a separate offence in the Criminal Code, such solutions would emphasize harassment as a personal conflict between the victim and the perpetrator, thus, drawing attention away from the responsibility of the employer.

Several other questions arise regarding the need and appropriateness of criminalizing sexual harassment. First of all, it is unclear what necessitates such a change. If civil remedies for sexual harassment were efficient and served the goals that they are expected to fulfil, including compensating for damages and deterring future violations, there would be no need to criminalize harassing behaviour. The emphasis should rather be on ensuring the efficiency of existing regulations, instead of creating new ones with the hope that these would serve as a solution.

Secondly, criminalizing sexual harassment can discourage victims from reporting harassment. Having to witness in a criminal lawsuit regarding matters that are sensitive and quite often embarrassing for the victim, can cause victims to reconsider the benefits and disadvantages of taking the matter to court. What is more, victims' main concern is to stop the harassment and to be compensated for the damage they have suffered, while the prospect of instituting criminal prosecution against the harasser might seem too far-fetched.

As already mentioned above, criminalizing sexual harassment raises questions regarding employer's liability and the standard of proof. Employers would be vacated of

193 Carrie N. Baker “Sexual Extortion: Criminalizing Quid Pro Quo Sexual Harassment”, 13 Law & Ineq. J. 213, 1994, p. 240

liability if criminal procedures would be instituted against the harasser. This would be a step back towards individualizing sexual harassment and not considering it as an issue of workplace discrimination. As for the standard of proof, criminal offences usually require a higher standard than civil law violations. Thus, victims would find it even more difficult to prevail in a sexual harassment case.

Finally, it is worth mentioning that the general trend in the last decades has rather been decriminalization than establishing new crimes. Thus, criminalizing sexual harassment would run against these developments and would most probably find little support. As a result, though criminalizing might seem attractive at first glance, civil remedies should be preferred. Emphasis should rather be on ensuring more efficient protection through existing remedies than developing criminal sanctions that would find little support.

CONCLUSION

This paper discussed legal protection from sexual harassment in the United States, analysed its strengths and weaknesses and compared it to the regulation of sexual harassment in the European Union. Three aspects of sexual harassment regulation were discussed, the definition and its elements, liability for harassment and finally the remedies that are available for rewarding to successful plaintiffs in sexual harassment cases. The aim of the the analysis was to determine whether United States offers more efficient protection to sexual harassment than the European Union and what Europe could learn from the approach adopted in the United States.

European Union addressed sexual harassment in a binding legal form for the first time with the 2002 Equal Treatment Amendment Directive. The United States has addressed the matter starting from the 1970-s and since the ground-breaking U.S. Supreme Court case of *Meritor Savings Bank v. Vinson*, abundant case law has interpreted and developed the different aspects of sexual harassment law to a level where certain standards have emerged. Regulation of sexual harassment by the European Union has not been interpreted and developed as much as in the United States. Several aspects of the definition of sexual harassment are still unclear and would need to be better specified. What is more, there is still no European Union level case law that would give interpretation to the Directive's regulation of sexual harassment.

In defining sexual harassment, the main difference between the United States and the European Union is the focus of the definitions. The U.S. differentiates between *quid pro quo* and hostile working environment sexual harassment by putting emphasis on the result of the harassment while the European Union definitions of sexual harassment and harassment focus on the nature of the conduct. The strength of the EU definition of “sexual harassment” lies in

the fact that it does not require the showing that harassment occurred “because of [the] sex” of a person, one of the main problems faced in the United States. At the same time, the definition of “harassment” enables to have a case in situations where no sexual conduct occurs but the person was nevertheless harassed “because of [the] sex”. This type of discrimination based on sex has not been properly addressed in the United States.

Secondly, the European Union Directive states that harassment constitutes discrimination based on sex, thus emphasising the gender specificity of the issue, while at the same time defines it as a violation of dignity. This approach causes some confusion but might serve as a better solution than the one in U.S. that requires a showing of differential treatment based on sex to make out a case of sexual harassment.

However, there are many aspects of the definition of harassment and sexual harassment in the EU Directive that are not clear and have been given more attention to in the United States. These include the inquiry whether conduct that is defined as harassment needs to reach a certain level of severity or pervasiveness to be actionable, what is the standard to be used for determining if harassment occurred, what exactly is understood as a conduct of a “sexual nature” and what constitutes “unwanted conduct”.

The current silence of EU Directive regarding liability for sexual harassment does not serve the aim of creating a common standard throughout Member States. The Directive should prescribe a requirement that employers be held liable in addition or instead of personal liability. In this aspect, the U.S. model could be taken as an example. Though several problems can be identified in the U.S. approach, Member States could adopt a model that takes these weaknesses into consideration.

Thus, European Union Member States should specify that employer faces liability regardless whether liability is also imposed on the harasser. Employer's liability should not be made

dependent on whether harassment was perpetrated by a co-worker or a supervisor as power dynamics at workplace can give authority also to co-workers. While the U.S. type of affirmative defence that aims at encouraging employers to take measures to prevent harassment could also be adopted in European Union Member States, a more stringent examination of the two prongs of the test should be exercised. Both prongs of the defence should be proven by the employer and a delay in reporting should not automatically be interpreted as unreasonable behaviour by the employee.

Finally, remedies available for successful plaintiffs in sexual harassment cases under the EU Directive include both compensatory and punitive damages, thus following the approach that was taken in the United States after the 1991 amendment to the Civil Rights Act. However, the standard for rewarding punitive damages is not specified in the Directive and the European Court of Justice can be expected to make pronouncements regarding this matter.

The Directive has the potential of offering bigger damages to successful plaintiffs in sexual harassment cases than available in the United States. This is due to the fact that it prohibits the establishment of upper limits for compensation. Whether “adequate and proportionate” compensation will actually be interpreted to be higher than the limits set in the United States, will depend on case law.

Lastly, it is important to note that though imposing criminal sanctions for sexual harassment serves the aim of emphasising the seriousness of the problem, this solution entails various drawbacks. Criminalizing individualizes sexual harassment and vacates the employer from liability, thus moving attention away from the fact that sexual harassment is a form of workplace discrimination. The EU Directive, however, enables Member States to apply both civil and criminal sanctions. The situation is similar in the United States where in addition to the remedies provided for by the Civil Rights Act, some states have decided to criminalize sexual harassment.

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