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## ARTICLES

### **Working on Dignity: EC Initiatives on Sexual Harassment in the Workplace**

*Victoria A. Carter\**

An English factory worker suffered for two years while a colleague exposed himself to her, strategically placed pornography in her workspace, and pressed himself against her, simulating sex. She strapped a tape recorder to her bra to collect evidence of the harassment before lodging a formal complaint. Fortunately for the victim, United Kingdom law prohibits sexual harassment. A labor tribunal awarded the victim monetary compensation, recommended that her employer transfer the harasser to another location, and urged the employer to implement a company policy explicitly prohibiting sexual harassment.

This victim is only one of the millions of women who endure sexual harassment in European Community (EC or Community) workplaces.<sup>1</sup> But the remedies available to her are not available to most other women in the Community. Few EC Member States prohibit sexual harassment

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<sup>1</sup> Of the estimated 53 million working women in the European Community, studies show that 25-84% have experienced at least one incident of sexual harassment. COMMISSION OF THE EUROPEAN COMMUNITIES, 30 WOMEN OF EUROPE 36 (1989).

by law.<sup>2</sup> Moreover, the laws that do exist rarely offer victims of sexual harassment adequate legal redress. Labor union and employer policies also do little to prevent sexual harassment or compensate its victims. This situation persists despite an EC-commissioned expert report that calls sexual harassment "one of the most offensive and demeaning experiences an employee can suffer."<sup>3</sup> The report found Member State laws wholly inadequate to provide victims of sexual harassment effective legal remedies.<sup>4</sup>

Notwithstanding this assault on the status quo, the EC Commission (Commission) has done little to improve the situation.<sup>5</sup> It has neither proposed nor adopted legislation prohibiting sexual harassment. It has adopted only a recommendation<sup>6</sup> that urges measures to prevent sexual harassment in employment, but places no obligation whatsoever on Member States to implement corresponding national measures. Moreover, the Commission has not addressed the possibility of prohibiting sexual harassment through existing, legally binding Community legislation on the equal treatment of men and women in the workplace.<sup>7</sup>

This article argues that the Commission should propose legally binding legislation to guarantee all workers, both women and men, protection against sexual harassment in Community workplaces. Section I describes the nature of sexual harassment, the problems it poses in the EC, and the effects of sexual harassment on people and businesses. Section II reviews existing Member State legislation and labor union policies and identifies the inadequacy of these measures to protect EC workers from sexual harassment. Section III describes existing EC legislation on sexual harassment and the equal treatment of women and men in the workplace and identifies the limitations of these measures in prohibiting sexual harassment. The article concludes by proposing the adoption of

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<sup>2</sup> The EC Member States are Belgium, Denmark, Germany, Greece, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom.

<sup>3</sup> M. RUBINSTEIN, *THE DIGNITY OF WOMEN AT WORK: A REPORT ON THE PROBLEM OF SEXUAL HARASSMENT IN THE MEMBER STATES OF THE EUROPEAN COMMUNITIES* 19 (1988).

<sup>4</sup> *Id.* at 36-40.

<sup>5</sup> The Commission is the executive branch of the EC. It formulates policy and proposes legislation to achieve a common market among the Member States. The Council is the main decision-making body of the EC. The Commission may propose legislation in several forms including directives, regulations, decisions, and recommendations. Only directives and regulations are legally binding on the Member States.

<sup>6</sup> Commission Recommendation of November 27, 1991 on the Protection of the Dignity of Women and Men at Work (not yet published) [hereinafter Commission Recommendation].

<sup>7</sup> *Council Directive of 9 February 1976 on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions*, 19 O.J. EUR. COMM. (No. L 39) 40 (1976) [hereinafter Equal Treatment Directive] (Council Directive 76/207/EEC).

legally binding Community legislation to prohibit sexual harassment in the workplace.

## I. SEXUAL HARASSMENT IN THE EC

Between thirteen and forty-five million women in the EC endure sexual harassment at work.<sup>8</sup> Although both men and women experience sexual harassment, it is well documented that women are overwhelmingly most often its victims.<sup>9</sup> Sexual harassment has been called "one of the most pervasive and accepted forms of oppression of women."<sup>10</sup> To create effective legislation protecting women from sexual harassment, it is important to understand its nature and consequences.

### A. What Constitutes Sexual Harassment

Sexual harassment is unwanted behavior of a sexual nature. Social interaction that is sexual by nature between men and women at work does not normally constitute sexual harassment. Behavior becomes actionable when it is unwanted by the recipient.

Sexual harassment may include: (1) physical conduct such as touching, patting, or brushing up against someone; (2) verbal conduct such as offensive comments, lewd remarks, or sexual propositions; and (3) non-verbal conduct such as pornographic displays, sexual gestures, or leers and stares. In the workplace, two forms of sexual harassment are commonly found: "*quid pro quo*" harassment and hostile environment harassment.<sup>11</sup>

*Quid pro quo* harassment, or "sexual blackmail," occurs when an employee's acceptance or rejection of unwanted sexual behavior affects

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<sup>8</sup> Studies in Member States found the following rates of sexual harassment of working women: Wallonia, Belgium (75%); Flanders, Belgium (41%) (*Commission du travail des femmes*); Germany (25%) (*Public Services and Transport Union*); Netherlands (58%) (*University of Gronigen*); Portugal (37%) (*Committee for Equality for Women at Work*); Spain (84%) (*General Workers Union*); United Kingdom (61%) (*Alfred Marks Bureau*). Varying rates of sexual harassment among research findings do not necessarily indicate that sexual harassment is more common in one Member State than another. No EC-wide comparative studies exist, nor apparently has any researcher examined the prevalence of sexual harassment in each Member State based on similar research methods. See M. RUBINSTEIN, *supra* note 3, at 107-164.

<sup>9</sup> *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991). Thus, this article primarily addresses women's experiences of sexual harassment.

<sup>10</sup> Fechner, *Toward an Expanded Conception of Law Reform: Sexual Harassment Law and the Reconstruction of Facts*, 23 U. MICH. J.L. REF. 475, 484 (1990).

<sup>11</sup> These two forms of sexual harassment were first distinguished by Catherine MacKinnon in *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979); see also Fechner, *supra* note 10, at 488.

his or her employment.<sup>12</sup> This decision may affect a person's access to employment, continued employment, or conditions of employment such as promotion or salary. One incident of such sexual blackmail is sufficient to constitute sexual harassment.

Hostile environment harassment occurs when unwanted behavior of a sexual nature creates an intimidating, hostile, or humiliating work atmosphere. For example, displays of pornography; frequent glares, stares, and leers; lewd comments; sexual advances; and unwanted physical contact may over time constitute hostile environment harassment. Although a single act is sufficient to constitute hostile environment harassment, it is generally the result of cumulative behavior.<sup>13</sup> There is no clear line separating harassing and non-harassing behavior; the factual context determines when inappropriate behavior may be viewed as sexual harassment.

### B. The Prevalence of Sexual Harassment

Surveys conducted throughout the EC substantiate what government agencies, academics, and women's organizations have contended for years: sexual harassment is a widespread and serious problem. It exists in every Member State, in virtually every workplace, public or private.

The most frequent victim is female, young, single or divorced, and just entering the workforce. Up to ninety percent of Spanish women in this group report incidents of sexual harassment.<sup>14</sup> A U.K. survey reported that ninety-six percent of women in "non-traditional" occupations (*i.e.* occupations usually held by men) suffer from sexual harassment.<sup>15</sup> Dutch researchers found that fifty-eight percent of women surveyed from all occupations experienced sexual harassment; over half of the respondents reported more than one incident.<sup>16</sup> Finally, eighty-eight percent of clients of a U.K. employment agency<sup>17</sup> said that they had "observed" sexual harassment at work.

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<sup>12</sup> King v. Board of Regents of University of Wisconsin System, 898 F.2d 533, 539 (7th Cir. 1990).

<sup>13</sup> *Id.* at 537.

<sup>14</sup> SPANISH GENERAL UNION OF WORKERS, INVESTIGACION SOBRE DISCRIMINACION Y ACOSO SEXUAL FEMENINO EN EL PUESTO DE TRABAJO (1987).

<sup>15</sup> U.K. EQUAL OPPORTUNITIES COMMISSION, SEXUAL HARASSMENT OF WOMEN AT WORK: A STUDY FROM WEST YORKSHIRE (1983).

<sup>16</sup> PROJECT GROUP OF WOMEN'S LABOUR OF THE UNIVERSITY OF GRONIGEN, ONGEWENSTE INTIMITEITEN OP HET WERK 3 (1986).

<sup>17</sup> ALFRED MARKS BUREAU, SEXUAL HARASSMENT IN THE OFFICE: A QUANTITATIVE REPORT ON CLIENT ATTITUDES AND EXPERIENCES ii (April 1991).

### C. The Effects of Sexual Harassment

Sexual harassment harms both the individuals who are harassed and the businesses that employ them. It also prevents women from integrating into the workforce. Persons subjected to sexual harassment often suffer psychological and physical consequences.<sup>18</sup> Sexual harassment may cause the victim severe stress, leading to depression, insomnia, headaches, and other stress-related health problems.<sup>19</sup> Victims of sexual harassment are absent from work more often than their counterparts and many eventually leave their place of employment.<sup>20</sup> Indeed, a recent U.K. survey found that half of all persons sexually harassed left their jobs because of the harassment.<sup>21</sup>

The effects of sexual harassment disadvantage the harassed employee because absenteeism and low productivity give employers cause to dismiss or hold back the affected employee. Women are fired, forced out of jobs, and are reluctant to enter some fields of employment due to sexual harassment. Women in non-traditional occupations experience more sexual harassment than women in jobs traditionally held by women.<sup>22</sup> These women may feel "forced out" of careers due to discriminatory treatment from male supervisors and co-workers.<sup>23</sup> In fact, they are more than twice as likely to quit a job because of sexual harassment than women in traditionally "female" occupations.<sup>24</sup> Moreover, expectations of sexual harassment in non-traditional occupations discourage many women from seeking jobs traditionally held by men.<sup>25</sup> The price to break through the gender barrier may be too high for many women. Thus, the effects of sexual harassment keep women from becoming integrated into the EC workforce.<sup>26</sup>

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<sup>18</sup> Crull, *Stress Effects of Sexual Harassment on the Job: Implications for Counseling*, 52 AM. J. ORTHOPSYCHIATRY, cited in Fechner, *supra* note 10, at 475, n.3; see also T. JACOB, LE HARCÈLEMENT SEXUEL SUR LES LIEUX DE TRAVAIL EN FRANCE (1991).

<sup>19</sup> 37 EQUAL OPPORTUNITIES REV. 28 (1991); see also Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 51 n.54 (1990).

<sup>20</sup> Pollack, *supra* note 19, at 51 n.54; see also T. JACOB, *supra* note 18, at 5.

<sup>21</sup> Thomson, *Sexual Harassment 'Costs Millions'*, The Times (London), May 9, 1991.

<sup>22</sup> Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1834 (1990).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at n.328.

<sup>25</sup> *Id.* at 1834 ("Women in female jobs understand that they will be likely to experience harassment if they attempt to cross the gender divide").

<sup>26</sup> Beneytout, Cromer, Jacob & Louis, *Le Harcèlement sexuel au travail*, 557 SEMAINE SOCIALE LAMY 3 (1991).

The cost to EC businesses is substantial.<sup>27</sup> The above-mentioned mental and physical effects of sexual harassment, as well as its labor market impacts, increase turnover thereby increasing recruiting and training costs.<sup>28</sup> Sexual harassment can also undermine training efforts because, by definition,<sup>29</sup> it interferes with an employee's ability to do his or her job.<sup>30</sup> Indeed, there is evidence that sexually harassed women in trade occupations have lower productivity and more accidents than their counterparts.<sup>31</sup>

Forcing women from the job market further disadvantages businesses by removing a large number of skilled workers from the labor pool. Employers lose valuable employees and time spent on training when women leave jobs because of sexual harassment. Therefore, it is in the interest of all Community businesses that the EC adopt legislation prohibiting sexual harassment in the workplace.

## II. NATIONAL MEASURES AGAINST SEXUAL HARASSMENT

### A. Member State Legislation

Member State efforts to prevent or prohibit sexual harassment through legislation hardly reflect the gravity of the problem. Only Spain and France have legislation that specifically prohibits sexual harassment. In the United Kingdom and Ireland, the courts have interpreted sexual harassment as illegal sex discrimination. In other Member States, there is little or no legal protection against sexual harassment.

#### 1. *Direct Legislation Against Sexual Harassment*

Spain and France have legislation that expressly prohibits sexual harassment at work. The scope of these laws, however, is limited in two ways. First, the legislation covers only supervisor-subordinate harass-

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<sup>27</sup> Galen, Schiller, Hamilton, & Hammonds, *Ending Sexual Harassment: Business is Getting the Message*, BUS. WK., Mar. 18, 1991, at 98; see also Thomson, *supra* note 21.

<sup>28</sup> Sandroff, *Sexual Harassment in the Fortune 500*, WORKING WOMAN, Dec. 1988, at 69, 71 ("Sexual harassment costs a typical Fortune 500 company with 23,750 employees \$6.7 million per year in absenteeism, low productivity and employee turnover"); see also U.S. MERIT SYSTEMS PROTECTION BOARD, *SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 4* (1988), cited in Pollack, *supra* note 19, at 51 n.54 ("[F]rom May 1985 through May 1987, sexual harassment cost the [U.S.] Government an estimated \$267 million").

<sup>29</sup> Equal Employment Opportunity Commission, *Guidelines on Discrimination Because of Sex*, 29 C.F.R. § 1604.11 (1988) [hereinafter EEOC Guidelines](Revised as of July 1, 1991); see also Schultz, *supra* note 22, at 1835.

<sup>30</sup> This is especially true in blue-collar occupations where an employee's ability to work depends upon learning skills from others. See Schultz, *supra* note 22, at 1835.

<sup>31</sup> *Id.*

ment, not co-worker harassment.<sup>32</sup> Second, while the laws provide for fines and/or imprisonment, they provide no compensation for victims.

The Italian Parliament is currently drafting a bill that would expressly prohibit sexual harassment at work. If adopted, sexual harassment would be punishable by up to one year in prison and a fine up to three million lira (approximately \$2,400).<sup>33</sup> Similar to the Spanish and French legislation, the bill proposes no compensation for victims. The Belgian Ministry of Employment and Work proposed amendments to national laws expressly prohibiting sexual harassment at work. Legislators and employers' unions, however, rejected the proposal outright.<sup>34</sup>

## 2. Indirect Legislation Against Sexual Harassment

Victims of sexual harassment may find means of legal redress through Member State legislation that indirectly prohibits sexual harassment; for example, under sex discrimination and unfair dismissal laws, worker health and safety rules, and employment contract and civil code provisions.<sup>35</sup> Only in extreme sexual harassment cases amounting to sexual assault can victims bring criminal cases. The above options offer only limited applications to a majority of sexual harassment cases.

### a. Sex Discrimination Laws

Courts in the United Kingdom and Ireland interpret sexual harassment as sex discrimination prohibited by law. Since 1986, persons in the United Kingdom alleging sexual harassment have been able to seek legal redress under the Sex Discrimination Act of 1975 (Act).<sup>36</sup> United Kingdom courts interpret sexual harassment broadly to include physical and verbal behavior, and *quid pro quo* as well as hostile environment harassment. The Act establishes strict employer liability for sexual harassment committed by its employees.<sup>37</sup> Victims of sexual harassment may seek damages for personal injury under the Act.

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<sup>32</sup> According to the European Association on Violence Against Women at Work, the French Government may soon amend the law to include co-worker harassment.

<sup>33</sup> COMMISSION OF THE EUROPEAN COMMUNITIES, 68 WOMEN OF EUROPE 25 (1991).

<sup>34</sup> Ministère de l'Emploi et du Travail, Commission du Travail des Femmes, Avis no. 49 du 16 janvier 1989 de la commission du travail des femmes, relatif harcèlement sexuel sur les lieux de travail. A counsellor at the Secretariat of the Committee of Women at Work said that legislators worried that too many women may file groundless claims based on such a law, and employers feared additional liabilities.

<sup>35</sup> M. RUBINSTEIN, *supra* note 3, at 28-32.

<sup>36</sup> Sex Discrimination Act of 1975 at §§ 1(1), 6(2)(b). The first sexual harassment case under the Act to reach the appellate court was *Strathclyde Regional Council v. Porcelli* [1986] I.C.R. 564.

<sup>37</sup> Sex Discrimination Act of 1975 at § 41(1). See *McPhee v. Smith Anderson & Co. Ltd.*, Case No. S/2260/89.



Similar legislation in Ireland prohibits sexual harassment as unlawful sex discrimination. In 1985, a labor court ruled that all employees are entitled to a work environment free from sexual harassment under the Employment Equality Act of 1977.<sup>38</sup> However, this legislation does not establish employer liability for sexual harassment in the workplace or compensation for victims of sexual harassment.

In theory, sex discrimination laws cover sexual harassment.<sup>39</sup> Few cases, however, have been brought to test this theory in Member States other than the United Kingdom and Ireland.<sup>40</sup> Most Member State sex discrimination laws generally provide legal remedies that are inappropriate for cases of sexual harassment. For example, a finding of discrimination most often renders the discriminatory act null and void. While this may have the effect of reversing an adverse employment decision, it does not compensate the victim.

#### b. Unfair Dismissal Laws

Unfair dismissal laws provide victims of sexual harassment effective means of redress in some Member States, but their application is limited to victims who leave their jobs. This means of compensating sexual harassment victims thus exacerbates the problem of women being forced from the labor market. It is possible, for example in Belgium, to quit one's job voluntarily due to sexual harassment, then claim compensation under unfair dismissal laws.<sup>41</sup> Such laws create incentives that work against the long term interests of businesses and employees.

#### c. Health and Safety Laws

The scope of health and safety legislation limits their application to cases of sexual harassment. Most Member States require employers to provide a workplace free of health and safety risks. While sexual harassment poses a serious threat to the mental and physical health of victims,<sup>42</sup> it has not been traditionally recognized as a health and safety issue.

#### d. Contract Laws

Some Member State labor contract laws require employers to re-

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<sup>38</sup> M. RUBINSTEIN, *supra* note 3, at 133-4.

<sup>39</sup> See *infra* notes 60-62 and accompanying text.

<sup>40</sup> M. RUBINSTEIN, *supra* note 3, at 107-164.

<sup>41</sup> See JACQMAIN, HARCÈLEMENT SEXUEL SUR LES LIEUX DE TRAVAIL: LES MOYENS D'ACTION JURIDIQUES (DROIT DU TRAVAIL) 17 (1988).

<sup>42</sup> See *supra* notes 18-21 and accompanying text.

spect the dignity of its employees. Victims of sexual harassment may claim a breach of this contractual obligation when employers neglect their responsibility. However, complainants may have difficulties proving that sexual harassment represents a breach of the employment contract.<sup>43</sup>

## B. Labor Union Policies

EC labor unions can play a key role in reducing incidents of sexual harassment in the workplace. They can educate members about sexual harassment, provide counselling and advice for harassed members, secure collective bargaining agreements that condemn sexual harassment and establish grievance and disciplinary procedures, and represent alleged victims and harassers during investigations of sexual harassment. For the most part, however, labor unions fail to realize their potential for combatting sexual harassment in the workplace.

EC labor unions are divided in their attitudes toward and effectiveness in reducing sexual harassment. In 1991, the British Trade Union Congress issued detailed guidelines on sexual harassment for unions and employers.<sup>44</sup> These guidelines define sexual harassment, identify its effects on workers and employers, and recommend actions in the event sexual harassment occurs. In contrast, the French labor unions show "ambivalence" toward the problem.<sup>45</sup> Trade unions in Greece, Italy, Luxembourg, and Portugal have taken few steps to prevent sexual harassment in the workplace.<sup>46</sup>

Even in the United Kingdom and Ireland, where trade unions denounce sexual harassment and actively promote prevention programs, female members are dissatisfied with their unions' treatment of the problem. A 1991 survey showed that one-third of sexually harassed female trade union members did not report the incident(s) to their representatives.<sup>47</sup> Of these, thirty-five percent did not expect to receive help, forty-eight percent did not want to report to a male representative, and seventeen percent expected the union to protect the harasser. Almost

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<sup>43</sup> JACQMAIN, *supra* note 41, at 19.

<sup>44</sup> BRITISH TRADE UNION CONGRESS, *SEXUAL HARASSMENT AT WORK: TUC GUIDELINES* (1991).

<sup>45</sup> M. RUBINSTEIN, *supra* note 3, at 129 (quoting representative of a major French trade union confederation who characterized sexual harassment as a "relatively marginal" problem caused by men who are 'ill' and 'unbalanced'").

<sup>46</sup> *Id.* at 132, 140, 141, 149. The author, commissioned by the EC to conduct a study on sexual harassment, was "unaware" of any trade union initiatives or collective agreement provisions relating to sexual harassment in these countries.

<sup>47</sup> 37 EQUAL OPPORTUNITIES REV. 24, 25 (1991).

half of those members that reported sexual harassment said that their union showed little understanding of the problem.

### III. EC LEGISLATION ON SEXUAL HARASSMENT

#### A. Legislative Framework

##### 1. *Treaty of Rome*

Under the 1957 Treaty of Rome, the EC has the authority to adopt five types of legislative measures: regulations, directives, decisions, recommendations, and opinions.<sup>48</sup> These legal acts can be distinguished from one another in a number of respects, including their binding nature.

*Regulations* are immediately binding on all Member States. They require no subsequent action by Member States to become effective.

A *directive* requires Member States to which it is addressed to adopt national legislation to effectuate specific objectives. Member States may choose the method adopted to conform with the objectives of a directive. The EC generally uses directives to adopt provisions relating to the single market program or to harmonize Member State legislation in an area of importance to the Community.

*Decisions* are legally binding on its addressees, which may include specific Member States, institutions, or private parties. The Commission or Council often apply decisions to specific cases whereas regulations and directives apply more broadly to general areas of legislation.

*Recommendations* and *opinions* have no binding force. Recommendations set forth, for example, the Commission's or Council's desired course of action in a particular area. Opinions generally express Commission or Council viewpoints on a given topic.

##### 2. *The Equal Treatment Directive*

The 1976 Council Directive on the Equal Treatment of Men and Women in the Workplace (Equal Treatment Directive) prohibits discrimination in the workplace on the basis of sex.<sup>49</sup> It requires equal treatment for men and women with respect to access to employment,

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<sup>48</sup> Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]. Six founding members originally signed the EEC Treaty to form a single economic space within which goods, services, people and capital would move freely. The 1987 Single European Act amended the EEC Treaty to increase the pace at which the 12 current Member States would remove internal barriers to trade. One of the key provisions of the Act was to authorize legislation by the vote of a "qualified majority" of the Member States (*i.e.*, voting weighted according to the size of each country's population).

<sup>49</sup> Equal Treatment Directive, *supra* note 7, at art. 2(1).

vocational training and working conditions.<sup>50</sup> It does not expressly include sexual harassment as a form of sex discrimination. As such, it is not sufficiently specific to require Member State implementing legislation to prohibit sexual harassment or compensate its victims.

### 3. *Legislation Leading to the 1991 Commission Recommendation on Sexual Harassment*

The 1984 Council Recommendation on the Promotion of Positive Action for Women set forth the Community's will to further eliminate inequalities in the workplace among men and women.<sup>51</sup> In 1990, the Council adopted a Resolution on the Protection of the Dignity of Women and Men at Work (Resolution), which cites sexual harassment as one cause of inequality in the workplace.<sup>52</sup> The Resolution states that "unwanted conduct of a sexual nature . . . is unacceptable" and creates an "obstacle to the proper integration of women into the labour market."<sup>53</sup> The Resolution defines sexual harassment as unacceptable if:

- (a) such conduct is unwanted, unreasonable and offensive to the recipient;
- (b) a person's rejection of, or submission to, such conduct on the part of employers or workers (including superiors or colleagues) is used explicitly or implicitly as a basis for a decision which affects that person's access to vocational training, access to employment, continued employment, promotion, salary or any other employment decisions; and/or
- (c) such conduct creates an intimidating, hostile or humiliating work environment for the recipient.<sup>54</sup>

The Resolution concludes by requesting that the Commission develop, in consultation with Member States, national equal opportunities authorities, employer and employee unions, and a code of conduct to prevent sexual harassment in EC workplaces.

In May 1991, the Commission adopted a legislative program on equal opportunities for men and women.<sup>55</sup> It hails the integration of women into the workforce as "an essential part of the strategy for Europe's

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<sup>50</sup> *Id.* at art. 1.

<sup>51</sup> *Council Recommendation of 13 December 1984 on the Promotion of Positive Action for Women*, 33 O.J. EUR. COMM. (No. L 331) 34 (1984) (Council Directive 84/635/EEC).

<sup>52</sup> *Council Resolution of 29 May 1990 on the Protection of the Dignity of Women and Men at Work*, 33 O.J. EUR. COMM. (No. C 157) 3 (1990)[hereinafter Council Resolution] (Council Resolution 90/C 157/02).

<sup>53</sup> *Id.* at preamble.

<sup>54</sup> *Id.* at para. 1. This definition was subsequently adopted by the Commission in its recommendation on sexual harassment.

<sup>55</sup> COMMISSION OF THE EUROPEAN COMMUNITIES, EQUAL OPPORTUNITIES FOR WOMEN AND MEN: THE THIRD MEDIUM-TERM COMMUNITY ACTION PROGRAMME 1991-1995 (May 23, 1991).

economic and social cohesion” and reiterates the Council request for a code of good conduct.<sup>56</sup>

### B. The Commission Recommendation on Sexual Harassment

In November 1991, the Commission adopted the Recommendation on the Protection of the Dignity of Women and Men at Work (Recommendation).<sup>57</sup> It defines “unacceptable behavior” as set out in the 1990 Council Resolution and recommends that Member States take measures to prevent sexual harassment in employment. However, as a recommendation, it places no legal obligation on Member States to adopt national measures in accordance with its provisions.

The Code of Practice on the Combatting of Sexual Harassment and the Protection of the Dignity of Women and Men at Work (Code of Practice or Code) requested by the Council accompanies the Recommendation. It sets forth specific actions to reduce incidents of sexual harassment at work. The Code of Practice identifies the responsibility of every employer to take measures to prevent sexual harassment.

The Code encourages each employer to: (1) issue a policy statement that makes clear what is considered unacceptable behavior and train managers and supervisors to properly explain and apply the policy; (2) designate and train personnel to counsel sexually harassed employees; (3) develop procedures to investigate sexual harassment complaints; and (4) develop disciplinary rules stating the penalties to be imposed on sexual harassers.

The Code also recommends that labor unions increase awareness of sexual harassment among their members. Unions are encouraged to represent alleged victims and harassers during investigations and to address the effects of sexual harassment on their members, especially women.

### C. Limits of the Recommendation

The Recommendation and Code of Practice are influential but not legally binding measures. The European Court of Justice has held, in the context of social policy, that national courts should consider Commission recommendations when adjudicating complaints.<sup>58</sup> In the few Member States that offer victims of sexual harassment legal redress, the Recom-

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<sup>56</sup> *Id.* at 17.

<sup>57</sup> Commission Recommendation, *supra* note 6.

<sup>58</sup> *Grimaldi v. Fonds des Maladies Professionnelles*, Case 322/88, 2 COMM. MKT. L.R. 265 (1989) (“[N]ational courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them . . .”).

mentation may influence judicial interpretations of law. What are needed, however, are national laws prohibiting sexual harassment under which victims can seek legal redress. A Commission recommendation cannot provide this.

#### IV. ADOPTING COMMUNITY-WIDE PROTECTION AGAINST SEXUAL HARASSMENT

##### A. Community Competence to Legislate Sexual Harassment

The Single European Act of 1987 added Article 118A to the EEC Treaty. Article 118A grants the Council authority to adopt, by qualified majority, directives to improve the working environment, especially with regard to worker health and safety. The EC therefore has the authority to adopt binding legislation on sexual harassment in employment under Article 118A.<sup>59</sup>

##### B. Form of EC Legislation

Under the authority of Article 118A, the EC could adopt either (1) an amendment to the 1976 Equal Treatment Directive, expanding its scope to explicitly cover sexual harassment as a form of sex discrimination; or (2) adopt a new directive on sexual harassment.

Sexual harassment should be prohibited as a form of sex discrimination falling within the scope of the Equal Treatment Directive. Sexual harassment is sex discrimination because gender determines who is harassed.<sup>60</sup> As such, both women and men experience sex discrimination when sexually harassed. Discrimination results because conditions of employment are applied unequally to an employee based on his or her gender.

Moreover, sexual harassment is contrary to the purpose of the Equal Treatment Directive and should therefore come within its scope. The Equal Treatment Directive aims to integrate women into the workforce by eliminating unequal treatment. As previously noted, the effects of sexual harassment interfere with this objective.

EC Council and Commission documents suggest support for this interpretation of the Equal Treatment Directive. The 1990 Council Resolution on the Protection of the Dignity of Women and Men at Work

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<sup>59</sup> Following a Commission proposal, the Council may adopt directives under Article 118A by a qualified majority in cooperation with the European Parliament, and following consultation with the Economic and Social Committee.

<sup>60</sup> See MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L. J. 1281, 1301 (1991) ("Women are sexually assaulted because they are women; not individually or at random, but on the basis of sex, because of their membership in a group defined by gender").

states that sexual harassment "may, in certain circumstances, be contrary to the principle of equal treatment."<sup>61</sup> Similarly, the Explanatory Memorandum accompanying the 1991 Commission recommendation on sexual harassment states, "in principle, existing national legislation on equal treatment in the Member States may be interpreted as outlawing certain instances of sexual harassment in the workplace."<sup>62</sup>

Not all Member States, however, perceive sexual harassment as sex discrimination. Such political considerations may dissuade the Commission from proposing amendments to the Equal Treatment Directive that would include sexual harassment within its scope. In this case, the EC should adopt a new Council directive on sexual harassment based upon the current Commission Recommendation. The Code of Practice on sexual harassment, appended to the Recommendation, should represent suggested measures to be taken by employers to prevent sexual harassment.

### C. Elements of Effective Legislation

To be effective, legally binding legislation would require Member States to include certain provisions in their implementing legislation. As detailed below, these laws should make clear the employer's responsibility to take measures to prevent sexual harassment; identify competent authorities where sexual harassment claims may be brought; take account of the special nature of adjudicating sexual harassment claims; and ensure adequate compensation for victims of sexual harassment.

#### 1. *Employer Liability*

Employers have a responsibility to provide a safe and healthy workplace. Thus, the first element of effective legislation that prohibits sexual harassment is an explicit statement of this responsibility.

Employers should take measures to prevent sexual harassment before it occurs. They should educate employees about what constitutes sexual harassment under national implementing measures and adopt a company policy prohibiting such behavior. If an employee reports an incident of sexual harassment, the employer should conduct an internal investigation and take measures to prevent further harassment, including possible punitive measures against the harasser. If employers ignore this responsibility, victims should have legal redress.

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<sup>61</sup> Council Resolution, *supra* note 52, at preamble. Commission officials define "in certain circumstances" to mean that sexual harassment has been addressed "in some Member States." Conversation with Commission officials in the Equal Opportunities Division of Directorate-General V (Social and Industrial Relations), August 16, 1991.

<sup>62</sup> Commission Recommendation *supra* note 6, at 5.

Member State laws on employer responsibility should provide that employers are: (1) responsible for providing a workplace free from harassment and discrimination based on sex; (2) strictly liable for acts of sexual harassment committed by the employer or its supervisory employees (company policies prohibiting sexual harassment do not release employers from this liability);<sup>63</sup> (3) liable for co-worker harassment where the employer or supervisory employees knew or should have known about the harassment (unless it can be shown that the employer took immediate and appropriate action to correct the situation); and (4) responsible for the actions of non-employees where (a) the employer has a degree of control over the non-employee, (b) knew or should have known about the harassing behavior, and (c) fails to take corrective action.<sup>64</sup> For example, the employer should be liable if it takes no action when a female receptionist reports that a deliveryman harasses her each time he makes a delivery.

## 2. *Competent Authorities*

Authorities competent to adjudicate sexual harassment complaints may include courts, equal opportunity commissions, agencies for women's affairs, or labor unions and works councils. Such authorities already exist in most Member States.

Ideally, alleged victims of sexual harassment should report the harasser to their employer or labor union representatives. Surveys indicate that in approximately ninety percent of cases, informal avenues of reconciliation will suffice to end the harassment.<sup>65</sup> If such practical measures do not work, or if employers neglect their responsibility to reconcile such matters, complainants should be able to approach other authorities for action.

Such authorities can act as an initial "screen" to avoid unnecessary litigation of sexual harassment claims. Revenge or disappointment in an office romance gone sour may motivate an employee to file unsubstantiated claims of sexual harassment. Employees unjustly accused of committing sexual harassment and employers unjustly found liable for incidents of sexual harassment should also have the ability to seek legal redress from such authorities. For example, an employee demoted or otherwise disciplined following an internal investigation of a sexual har-

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<sup>63</sup> See *McPhee v. Smith Anderson & Co., Ltd.*, *supra* note 37; *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979).

<sup>64</sup> U.S. Equal Employment Opportunity Commission Compliance Manual, §§ 615.3 (d) & (e) (1981).

<sup>65</sup> 37 EQUAL OPPORTUNITIES REV. 24 (1991).



assment complaint should be able to seek reinstatement or compensation from legal authorities.

### 3. *Special Considerations in Adjudicating Complaints*

Sexual harassment claims traditionally involve special considerations that national legislation must address. Member States should modify the procedural and legal requirements necessary to make a sexual harassment claim, including the legal standard used to substantiate harassment claims, rules of evidence, and the burden of proof.

#### a. Legal Standard

Harassment is substantiated if it seriously affects the psychological well-being of a reasonable victim.<sup>66</sup> This standard, first adopted by U.S. courts, is appropriate for the EC as well.

Anti-discrimination laws, including laws that prohibit sexual harassment, aim to prevent the dominance of one societal group whose power may be used to disadvantage the members of another group. These laws aim to further egalitarian objectives for the benefit of society as a whole. To resolve conflicts between a dominant group and an individual, courts have used a reasonableness standard based on "societal consensus" to substantiate discrimination.<sup>67</sup> The consensus of society's views, however, necessarily reflects discriminatory characteristics of the status quo.<sup>68</sup> Therefore, equating reasonableness with societal consensus maintains discrimination.<sup>69</sup> The reasonableness standard should therefore be based

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<sup>66</sup> See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986) (harassment is substantiated if it is "sufficiently severe or pervasive 'to alter the conditions of the [victim's] employment and create an abusive working environment' " (citation omitted)); see also *Ellison v. Brady*, *supra* note 9, at 879 (a victim substantiates a claim of sexual harassment when "she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment").

Ehrenreich warns against adopting the "reasonable response" standard with respect to an alleged victim's reaction to sexual harassment. She asserts that "reasonableness" is tied to an objective notion that the law can resolve legal conflicts without considering the personal perspective of the parties involved. Applying the same, objective standard to all individuals harms everyone but the dominant faction of society. She suggests expansive thinking to eradicate discriminatory interpretations of law by considering the broader social context underlying each conflict. The social context may include the "group identification" of each individual involved (*i.e.* male, female, ethnic background, religion, etc.), and the distribution of power in society (*i.e.* male dominance over women). Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 *YALE L.J.* 1177, 1232-33 (1990).

<sup>67</sup> Ehrenreich, *supra* note 66, at 1190-1191.

<sup>68</sup> *Id.* at 1204 (Societal consensus "marginaliz[es] those who do not espouse the viewpoint that has been defined as the societal norm").

<sup>69</sup> *Ellison v. Brady*, *supra* note 9, at 878 ("If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing

on the perspective of the oppressed group or victim.

The victim's perspective in a sexual harassment case is most often the female perspective because women represent an overwhelming majority of its victims.<sup>70</sup> To apply the "reasonable victim" standard, one must therefore apply the "reasonable woman" standard.<sup>71</sup>

Women and men generally hold differing views on sexual harassment.<sup>72</sup> Since women are most frequently the victims of sexual assault and sexual harassment, they have a strong incentive to take harassing behavior very seriously.<sup>73</sup> Women exposed to sexual harassment may fear that such behavior will escalate into sexual assault.<sup>74</sup> Many men, however, "tend to view 'milder' forms of harassment . . . as harmless social interactions to which only overly-sensitive women would object."<sup>75</sup> Therefore, women and men embrace different standards of what constitutes sexual harassment. It follows that unless one views sexual harassment from the woman's perspective, society runs the risk of sustaining discriminatory notions of what constitutes harassing behavior.<sup>76</sup>

#### b. Rules of Evidence

Certain rules of evidence can deter women from filing sexual harassment claims. Many victims never bring complaints because they fear humiliation, retaliation, or, worse, that no action will be taken.<sup>77</sup> For example, references to the victim's sexual habits or attitudes hold the

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level of discrimination"); see also *King v. Board of Regents*, *supra* note 12, at 537 ("[We] should consider the victim's perspective and not stereotyped notions of acceptable behavior," (citation omitted)).

<sup>70</sup> *Ellison v. Brady*, *supra* note 9, at 878; *King v. Board of Regents*, *supra* note 12, at 537.

<sup>71</sup> In sexual harassment cases involving a male witness, the "reasonable man" standard should apply.

<sup>72</sup> *Ellison v. Brady*, *supra* note 9, at 878; *Rabidue v. Osceola Refining Company*, 805 F.2d 611, 625 (6th Cir. 1985).

<sup>73</sup> Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1205 (1989) ("[W]omen[s] greater physical and social vulnerability to sexual coercion can make [them] wary of sexual encounters . . . . Because of the inequality and coercion with which [sex] is so frequently associated in the minds of women, the appearance of sexuality in an unexpected context or a setting of ostensible equality can be an anguishing experience").

<sup>74</sup> *Ellison v. Brady*, *supra* note 9, at 879 ("Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault").

<sup>75</sup> Ehrenreich, *supra* note 66, at 1207.

<sup>76</sup> See *Rabidue v. Osceola Refining Co.*, *supra* note 72, at 626 (Keith, J., dissenting) ("[U]nless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men"), *cert. denied*, 481 U.S. 1041 (1987).

<sup>77</sup> A recent poll in Germany found that only 6% of sexual harassment victims reported the incident(s), although 52% said sexual harassment should be reported. German Public Services and Transport Union (OETV), Pro Familia, and Center for Men's Studies, Frankfurt, Germany (1990).

victim's values up for judgment rather than the behavior of the alleged harasser. Such evidence only serves to humiliate and further harass the complainant.<sup>78</sup> As with rape cases, the attitudes of the victim are not on trial in a sexual harassment case. Probing victims to disclose their sexual behavior insinuates that the victims welcomed harassment. Courts and tribunals should therefore suppress evidence relating to the sexual attitudes and behavior of alleged victims outside the scope of the work relationship.<sup>79</sup>

### c. Burden of Proof

The burden of proof also can deter women from filing formal charges against sexual harassers. Women fear that authorities will not believe their accusations, claiming that the victim "provoked" the harasser.<sup>80</sup> For example, a judge in a Spanish harassment case found that an office manager fondled a sixteen-year-old clerk because he had an "uncontrollable" reaction to her miniskirt.<sup>81</sup> Such sexist attitudes in the judiciary maintain sex discrimination in society.<sup>82</sup> Under these conditions, one can understand why so few women report sexual harassment.

Complainants often cannot prove an employer's knowledge of harassment, or that the alleged harasser knew his actions were unwanted. An EC-sponsored report describes the difficult nature of proving sex discrimination:

Discrimination is often an action or activity which is suspected rather than established and notoriously difficult to prove. The information on which claims can be based is almost always exclusively in the employer's hands and applicants are frequently left only with circumstantial evidence which in the ordinary course of legal proceedings will not suffice to discharge the burden of proof.<sup>83</sup>

One approach to the difficulty of proof is to apply the burden of proof in three stages: first, the complainant must establish a *prima facie* case of sexual harassment;<sup>84</sup> second, the burden of proof shifts to the

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<sup>78</sup> Mitchell v. Hutchings, 116 F.R.D. 481 (1987).

<sup>79</sup> *Id.* at 484. ("[E]vidence of sexual conduct which is remote in time or place to [complainant's] working environment is irrelevant" to determine if sexual harassment occurred).

<sup>80</sup> This may legitimately raise questions of what constitutes an alleged harasser's "reasonable response" to the complainant's behavior. In a hostile environment sexual harassment case, determining to what extent the alleged harassment was "unwanted" may rely on such issues.

<sup>81</sup> Riding, *Women to the Fore!*, N. Y. Times, May 30, 1989, at 4, col. 3.

<sup>82</sup> MacKinnon, *supra* note 60.

<sup>83</sup> F. VON PRONDZYNSKI, NETWORK OF EXPERTS ON THE IMPLEMENTATION OF THE EQUALITY DIRECTIVES (1987).

<sup>84</sup> The Commission proposed that a complainant establishes a "presumption of discrimination" when "a fact or a series of facts . . . would, if not rebutted, amount to . . . discrimination." *Proposal for a Council Directive on the Burden of Proof in the Area of Equal Pay and Equal Treatment for*

employer to show the possibility of a non-discriminatory basis for its actions; third, if the employer raises doubt as to whether discrimination occurred, the burden of proof shifts back to the complainant. The Commission proposed a directive on the reversal of the burden of proof in the area of equal treatment incorporating precisely this procedure, which the Council has yet to adopt.<sup>85</sup>

In sexual harassment cases, employers would bear the burden of proof when a complainant establishes a *prima facie* case of harassment. If the complainant alleges *quid pro quo* harassment, the employer must show that it based its employment decision allegedly affected by the complainant's "acceptance of, or rejection of harassing behavior" on non-discriminatory factors. For example, a female employee establishes a *prima facie* case of sexual harassment by stating a series of facts leading to her dismissal, that, if true, would constitute sexual harassment. The employer must then state reasons for her dismissal unrelated to the alleged sexual harassment or argue that the harassment never occurred. If the employer satisfies this condition, the burden of proof shifts back to the complainant to show that sexual harassment occurred beyond a preponderance of the evidence.

If a complainant establishes a *prima facie* case of hostile environment harassment, the employer may show, for example, that it enforced a policy to promote a workplace free from sexual harassment. The complainant must then show that the employer knew of the alleged harassment but did nothing to stop it.

#### 4. Compensation

Compensation for victims is appropriate because sexual harassment is a form of personal injury. Many victims are denied promotional opportunities, take additional sick days, and resign their positions due to sexual harassment.<sup>86</sup>

Courts in the United Kingdom compensate victims for lost earnings and physical and mental distress. Requiring negligent employers to pay substantial compensation may effectively deter future harassment.<sup>87</sup> In a recent U.K. harassment case, the court awarded the victim £15,000 (approximately \$25,000).<sup>88</sup> An Equal Opportunities Commission officer

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*Women and Men*, 31 O.J. EUR. COMM. (No. C 176) art. 3(2), at 6 (1988) (Commission Proposal 88/c 176/09).

<sup>85</sup> *Id.*

<sup>86</sup> See *supra* notes 22-31 and accompanying text.

<sup>87</sup> Jones, *Sexually Harassed Worker Gets £15,000*, Press Association Newsfile, Jan. 16, 1991.

<sup>88</sup> *Id.*

stated that the amount of the award reflects the serious nature of sexual harassment and may encourage employers to adopt preventative policies.

By contrast, a French law prohibiting sexual harassment fines harassers up to FF100,000 (approximately \$17,000), but does not expressly allow for victim compensation. This law misplaces liability for sexual harassment and misallocates funds.

As argued above, employers have a responsibility to take measures to prevent sexual harassment in the workplace. This responsibility does not relieve individuals of their moral obligation to respect fellow employees. However, without employer liability for sexual harassment, employers may not take proactive measures to prevent harassment. Compensatory damages give employers incentives to adopt company policies against sexual harassment and encourage behavioral change in the workplace. By contrast, individual fines tend to reduce sexual harassment to a question of the appropriateness of an individual's behavior rather than the perpetuation of a hostile environment or social attitudes tolerant of discrimination. Furthermore, any monetary awards should go to the victim of sexual harassment to compensate for personal injury, not to the state.

#### D. Role of EC Legislation to Prevent Sexual Harassment

Offensive and harmful behavior of a sexual nature will not disappear from Community workplaces simply because the EC adopts legislation prohibiting sexual harassment at work. EC legislation, however, can play a powerful role in eradicating sexual harassment from the lives of many workers.

First, binding Community legislation would raise the minimum level of legal protection against sexual harassment throughout the Community. Making sexual harassment illegal would for the first time allow harassed workers to seek legal redress in most Member States.

Legally prohibiting sexual harassment also furthers the Community's goal toward equal treatment of women and men in the workplace. Since a woman's reaction to sexual harassment may affect her employment, the conditions under which women and men work are unequal.<sup>89</sup> Fewer incidents of sexual harassment will provide a more equitable workplace environment.

Second, Community legislation would increase the market place awareness of the consequences of sexual harassment. Labor union and workplace policies would have to address sexual harassment as a result of

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<sup>89</sup> See generally MacKinnon, *supra* note 60.

legislation, thereby increasing awareness among business leaders, employers and employees. Publicity generated by such legislation may also generally inform the public of the nature of sexual harassment. It is important that women be able to identify and reject sexual harassment.<sup>90</sup> The frequency and severity of sexual harassment may decrease if more women in the workforce reject harassing behavior.<sup>91</sup>

Third, Community legislation would inform employees of their right to work in an environment free from sexual harassment. In a recent survey, thirty percent of respondents agreed with the statement: "Complaining about sexual harassment does no good: employers take little or no notice."<sup>92</sup> Community legislation that establishes the employer's responsibility to provide a workplace free from sexual harassment would allow harassed employees to seek legal redress against employers that ignore sexual harassment claims.

Finally, the combined results of Community legislation prohibiting sexual harassment may encourage legal and social change toward equality of the sexes. Greater public awareness of sexual harassment may change society's views thereby affecting legal decision making and, in turn, reinforcing social change.<sup>93</sup> In Spain, for example, women's groups recognized loopholes in the penal code that allowed judicial rulings to discriminate against women. When the groups protested against the courts in the streets and newspapers, the Spanish Government quickly acted to strengthen equal treatment legislation.<sup>94</sup>

In the United States, where courts have held since 1976 that sexual harassment constitutes unlawful sex discrimination,<sup>95</sup> attitudes toward sexual harassment have indeed changed. In 1980, the Equal Employment Opportunity Commission (EEOC) issued its guidelines on sexual harassment to assist employers in conforming to sex discrimination laws.<sup>96</sup> More than 38,000 cases have been filed under the EEOC Guide-

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<sup>90</sup> Delaney, *A First in Spain: Study on How Women Fare*, N. Y. Times, Aug. 16, 1987, at 13, col. 1.

<sup>91</sup> Kay & Brodsky, *Protecting Women from Sexual Harassment in the Workplace* (Book Review), 58 TEX. L. REV. 671, 693 (1980), cited in Fechner, *supra* note 10, at 486 n.41.

<sup>92</sup> ALFRED MARKS BUREAU, *supra* note 17, at 25.

<sup>93</sup> Fechner, *supra* note 10, at 476-78 ("Consciousness raising creates a social climate for rethinking doctrine in which legal decision makers begin to construe facts differently. Reformulated doctrine reinforces social change and provokes more widespread consciousness raising"). Fechner uses the feminist movement's reform of sexual harassment law to show how the reconstruction of factual descriptions can lead to changes in the law.

<sup>94</sup> Delaney, *supra* note 90.

<sup>95</sup> *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), *rev'd in part on other grounds, vacated in part, sub nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978).

<sup>96</sup> EEOC Guidelines, *supra* note 29.

lines prompting U.S. businesses to identify sexual harassment as a significant problem in the workplace.<sup>97</sup> Among Fortune 500 companies, sixty-six percent adopted company policies on sexual harassment as a result of the EEOC Guidelines.<sup>98</sup>

In 1981, sixty-three percent of corporate executives in the United States believed that the amount of sexual harassment at work is greatly exaggerated. In 1989, sixty-four percent of corporate executives agreed that most sexual harassment complaints are valid.<sup>99</sup> An ex-director of the EEOC called this transformation in corporate attitudes toward sexual harassment "one of the great lessons in how education can have an effect on an offensive practice."<sup>100</sup> The EC Code of Practice on sexual harassment may have similar success in the Community if it is supported by binding legislation.

### E. Support for Binding Legislation

EC institutions and experts in the field of sexual harassment support binding legislation to prohibit sexual harassment. The Parliament of the European Communities (Parliament) recently called for a Council directive to make binding the action program under which the Commission proposed its recommendation on sexual harassment.<sup>101</sup> A July 1991 resolution states that the Parliament "deplores" the Commission action program because it lacks "a binding procedure for its implementation by either the Community institutions or the Member States."<sup>102</sup> This resolution follows several reports by the Parliament's Committee on Women's Rights urging the Council to adopt a directive on sexual harassment.<sup>103</sup>

Similarly, a Commission expert report on sexual harassment in the Community calls for a Council directive to effectively protect EC work-

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<sup>97</sup> Sandroff, *supra* note 28, at 69.

<sup>98</sup> *Id.* at 70.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 73. *But see* comparison of U.S. Merit Systems Protection Board studies of 1980 and 1987 which reveal the percentage of women subjected to sexual harassment remained the same over the period. U.S. MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM? (1981); U.S. MERIT SYSTEMS PROTECTION BOARD, *supra* note 28, at 4.

<sup>101</sup> European Parliament Resolution on the Third Medium-Term Community Action Programme on Equal Opportunities for Women and Men, Minutes of Proceedings of the Sitting of the Parliament, July 12, 1991.

<sup>102</sup> *Id.* at 5.

<sup>103</sup> *See* PARL. EUR. DOC. (SEC No. 0167) 10 (7 juin 1991)(stating that the Commission action program is simply a declaration of intentions, which describe future actions to be taken by the Commission without making binding commitments); *see also* 1990 EUR. PARL. DOC. (COM No. 0358) 8 (Dec. 6, 1990).

ers from its consequences.<sup>104</sup> The report concludes that existing Member State laws inadequately address sexual harassment, thus requiring legislation at the Community level. Women's organizations in the Community also support binding legislation to prevent sexual harassment. For example, the European Association Against Violence Towards Women at Work and the U.K. Women Against Sexual Harassment actively petition Member States to adopt effective measures against sexual harassment. Such organizations work with labor unions to raise awareness of the problems posed by sexual harassment in the workplace.<sup>105</sup>

Prior to the 1980s, Member State and labor union policies were inadequate to ensure equal pay for equal work and equal social security benefits for men and women. However, Community legislation obliged Member States to adopt equal opportunity laws covering these areas.<sup>106</sup> As a result, all Member States adopted sufficient legal standards to achieve necessary social change.<sup>107</sup> EC legislation should also oblige Member States to adopt national measures to protect all workers from sexual harassment.

## V. CONCLUSION

Widespread sexual harassment oppresses women, stripping them of their dignity at work. As a result, women are forced from the labor force and businesses lose millions in related costs. Current EC Member State legislation and labor union policies inadequately protect workers from sexual harassment. Existing EC legislation also fails to protect Community workers and businesses from the damaging effects of sexual harassment. Therefore, the EC should adopt legislation that obliges Member States to prohibit sexual harassment under national laws. Such legislation would give victims of sexual harassment the ability to seek legal redress, inform workers of their right to work in an environment free of sexual harassment, and move the Community closer toward equality for women and men in the workplace.

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<sup>104</sup> M. RUBINSTEIN, *supra* note 3, at 1.

<sup>105</sup> See T. JACOB, *supra* note 18.

<sup>106</sup> Council Directive of 10 February 1975 on the Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women, 18 O.J. EUR. COMM. (No. L 45) 19 (1975)(Council Directive 75/117/EEC); Council Directive of 19 December 1978 on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security, 22 O.J. EUR. COMM. (No. L 6) 24 (1979)(Council Directive 79/7/EEC); Council Directive of 24 July 1986 on the Implementation of the Principle of Equal Treatment for Men and Women in Occupational Social Security Schemes, 29 O.J. EUR. COMM. (No. L 225) 40 (1986)(Council Directive 86/378/EEC).

<sup>107</sup> M. VERWILGHEN, EQUALITY IN LAW BETWEEN MEN AND WOMEN IN THE EUROPEAN COMMUNITY 7 (1987).