

5-1-2004

The Development of Moral Harassment (or Mobbing) Law in Sweden and France as a Step Towards EU Legislation

Maria Isabel S. Guerrero

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/iclr>

 Part of the [Civil Rights and Discrimination Commons](#), and the [Labor and Employment Law Commons](#)

Recommended Citation

Maria Isabel S. Guerrero, *The Development of Moral Harassment (or Mobbing) Law in Sweden and France as a Step Towards EU Legislation*, 27 B.C. Int'l & Comp. L. Rev. 477 (2004), <http://lawdigitalcommons.bc.edu/iclr/vol27/iss2/10>

THE DEVELOPMENT OF MORAL HARASSMENT (OR MOBBING) LAW IN SWEDEN AND FRANCE AS A STEP TOWARDS EU LEGISLATION

MARIA ISABEL S. GUERRERO*

Abstract: Moral harassment (or mobbing) is one of the most rapidly emerging workplace violence complaints, affecting around twelve million workers in the EU annually. In 1993, Sweden was the first EU country to enact legislation against moral harassment with its Ordinance on Victimization at Work. Through the Social Modernization Law in 2002, France added both civil and criminal provisions condemning moral harassment. This Note explores the Swedish and French laws and the psychological theories by Heinz Leymann and Marie-France Hirigoyen, respectively, that preceded them. Since existing EU legislation is inadequate in covering moral harassment, a new directive should be adopted. This new directive could be modeled off of several exemplary existing directives and should consider various provisions of the Swedish and French laws, as well as the analyses of Leymann and Hirigoyen.

INTRODUCTION

Moral harassment—translated from the French *harcèlement moral* and also known as *mobbing* (in Sweden, Germany, Italy, and elsewhere), *victimization* (in Sweden), *workplace bullying* (in the United States and the United Kingdom), and *psychological terror or harassment*—is a non-status based form of workplace harassment recognized by the laws of several European Union (EU) countries and one of the most rapidly emerging workplace violence complaints.¹ Although

* María Isabel S. Guerrero is the Editor in Chief of the *International & Comparative Law Review*.

¹ Working Paper, *Bullying at Work*, EUR. PARL. DOC. (SOCI 108) 6 (2001), http://www.europarl.eu.int/workingpapers/soci/pdf/108_en.pdf [hereinafter *Bullying at Work*]; LAURENT VOGEL, *PSYCHOLOGICAL HARASSMENT AT WORK AND THE LAW WANTED: AN INTEGRATED WHOLE-WORKFORCE APPROACH IN WORKPLACE HEALTH POLICY 22* (Trade Union Technical Bureau, Newsletter No. 19–20, 2000), <http://www.etuc.org/tutb/uk/pdf/2002-19p20-25.pdf>; Press Release, International Labor Organization, *Violence on the Job—A Global Problem: Taxi Drivers, Healthcare Workers, Teachers Among Those at Highest Risk* (July 20, 1998), at <http://www.ilo.org/public/english/bureau/inf/pr/1998/30.htm>. For

there is no internationally accepted definition of moral harassment, it may be understood generally as repeated, non-physical acts of harassment at the workplace, occurring over a significant time period, that have a humiliating effect on the victim.²

In December 2000, the European Foundation for the Improvement of Living and Working Conditions reported that around eight percent of EU workers, or twelve million people, had been victimized by moral harassment during a twelve-month period.³ However, this figure is considered to be underreported, and moral harassment may be even more widespread throughout the EU.⁴ The European Parliament has called for the European Commission to present a plan for EU-wide measures against moral harassment, but no such plan has been presented thus far.⁵ Nevertheless, the European Agency for Safety and Health at Work held a conference in October 2002—European Week 2002: Preventing Psychological Risks at Work—to discuss the broader problem of work-related stress.⁶ Although the current European Commission position is that moral harassment is covered under the 1989 Safety and Health Framework Directive (89/391/EEC), current discussion about moral harassment suggests that further EU legislation, likely in the form of a new directive or an amendment to the Safety and Health Framework Directive, may be impending.⁷

In considering what actions the EU may take, it is instructive to examine the development of moral harassment laws in Member States.⁸ Sweden was the first EU country to enact legislation against moral har-

consistency, the term “moral harassment” will be used throughout this Note, except in specific contexts where legal or psychological materials use one of the other terms for moral harassment. For a proposal to codify moral harassment in the United States as a status-blind “intentional infliction of a hostile work environment,” see David C. Yamada, *The Phenomenon of “Workplace Bullying” and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 524, 529 (2000).

² Bullying at Work, *supra* note 1, at 5, 7.

³ European Parliament Resolution on Harassment at the Workplace, 2001/2339(INI), at 9, (July 16, 2001), <http://indigo.ie/~odonnllb/cabullying/305695EN.doc> [hereinafter Harassment at the Workplace].

⁴ *Id.* at 5.

⁵ See generally *id.* at 18.

⁶ European Agency for Safety and Health at Work, European Week 2002: Preventing Psychological Risks at Work, at <http://osha.eu.int/ew2002/> (last modified May 24, 2002).

⁷ Council Directive 89/391, 1989 O.J. (L 183) [hereinafter Safety & Health Framework Directive]; European Commission, Anti-Discrimination, Fundamental Social Rights, and Civil Society, Frequently Asked Questions, at http://europa.eu.int/comm/employment_social/fundamental_rights/faq/faq7_en.htm (last visited May 2, 2004) [hereinafter EU Mobbing FAQs]; see Bullying at Work, *supra* note 1, at 27–28.

⁸ See VOGEL, *supra* note 1, at 20, 22–23.

assment with the Ordinance on Victimization at Work in 1993.⁹ More recently, France added provisions covering moral harassment to its Labor and Penal Codes, which came into effect with the Social Modernization Law of January 17, 2002.¹⁰ Movements against moral harassment in Sweden and France have been particularly strong because of the publication of important studies by Swedish psychologist Heinz Leymann, beginning in 1984, and French psychologist Marie-France Hirigoyen, beginning in 1998.¹¹

Publications by Leymann and Hirigoyen have generated increased public awareness about moral harassment not only in Sweden and France but throughout the EU.¹² For example, Luxembourg signed its first collective agreement on moral harassment in 2001, a Spanish court held in 2001 that workers were entitled to receive compensation for an "industrial accident" caused by moral harassment, and Belgium enacted legislation against moral harassment in 2002.¹³ Other countries such as the United Kingdom have proposed legislation that has not yet

⁹ *Id.* at 22.

¹⁰ *Id.* (referred to in this source as the Modernization of Employment Act).

¹¹ See generally MARIE-FRANCE HIRIGOYEN, *STALKING THE SOUL: EMOTIONAL ABUSE AND THE EROSION OF IDENTITY* (Helen Marx trans., Helen Marx Books 2000) (1998) [hereinafter *STALKING THE SOUL*]. The English translation of Hirigoyen's book refers to moral harassment as "emotional abuse"; however, "moral harassment" is a more accurate translation of the French "harcèlement moral," which is used in the title of the original work: MARIE-FRANCE HIRIGOYEN, *LE HARCÈLEMENT MORAL, LA VIOLENCE PERVERSE AU QUOTIDIEN* (1998). See also generally Heinz Leymann, *The Content and Development of Mobbing at Work*, 5 EUR. J. WORK & ORGANIZATIONAL PSYCHOL. 165, 165, 183 (1996) (citing Leymann's first study co-authored with B. Gustavsson and published by the Swedish National Board of Occupational Safety and Health in 1984, *Psykiskt våld i arbetslivet. Två explorativa undersökningar*, translated in this source as *Psychological Violence at Work Places. Two Explorative Studies*). Note that much of the information in Leymann's article is available at <http://www.leymann.se/> (last visited May 2, 2004). For a counterpart to these psychological studies that has been published in the United States, with a foreword by Heinz Leymann, see NOA DAVENPORT ET AL., *MOBBING: EMOTIONAL ABUSE IN THE AMERICAN WORKPLACE* (1999).

¹² See generally *Bullying at Work*, *supra* note 1, at 6–7 (a European Parliament document citing and quoting Leymann and Hirigoyen). Indeed, there is awareness about moral harassment even in countries without any specific legislation. See Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination Versus Dignity*, 9 COLUM. J. EUR. L. 241, 248 & n.25, 254–59 (2003) (noting that, although German law does not specifically define moral harassment, German legal scholars have included it under laws protecting the "right of personality," German attorneys have begun to advise clients on moral harassment matters, and there is much discussion about moral harassment in the German media).

¹³ VOGEL, *supra* note 1, at 23; Pep Espluga, *Court Rulings Recognise Bullying as "Occupational Risk"*, EIRONLINE, July 23, 2002, at <http://www.eiro.eurofound.ie/2002/07/Feature/ES0207202F.html>; Marc Feyereisen, *First Collective Agreement Signed on Moral/Psychological Harassment*, EIRONLINE, May 28, 2001, at <http://www.eiro.eurofound.ie/2001/05/InBrief/LU0105166N.html>.

been adopted.¹⁴ Therefore, in accordance with the EU's practice of harmonizing its laws by adopting EU-wide directives, EU legislation addressing moral harassment may be forthcoming.¹⁵

Section I of this Note explores the development of moral harassment law in Sweden and France by outlining the psychological theories of Leymann and Hirigoyen that introduced the concept in each country, respectively. Section II then discusses early case law and awareness concerning moral harassment in Sweden and France, outlines the legislation against moral harassment adopted in these countries, and presents the current EU position regarding moral harassment legislation. Finally, in analyzing the legislation against moral harassment in Sweden and France and the options for enacting EU legislation, this Note proposes in Section III that, rather than relying on existing legislation, the EU should adopt a new directive to cover moral harassment. In doing so, the EU should take into consideration the psychological theories of Leymann and Hirigoyen, existing legislation in Sweden and France, and other directives that may serve as a model for effective moral harassment legislation. Accordingly, the new directive should define moral harassment in terms of the pervasiveness rather than the severity of harassing behaviors and address the following in its provisions: (1) employer guidelines, (2) a similar employer and employee burden of proof, (3) sanctions, (4) the dissemination of information, and (5) dialogues with unions and other interested organizations.

I. BACKGROUND: WHAT IS MOBBING/MORAL HARASSMENT?

A. "Mobbing" Definition Proposed by Swedish Psychologist Heinz Leymann

In 1984, Swedish psychologist Dr. Heinz Leymann was the first to use the English term "mobbing" to describe hostile behavior by employees in the workplace, a term used in the early 1970s by a Swedish physician to describe hostile behavior observed among schoolchildren.¹⁶ Leymann defines mobbing as "hostile and unethical communication, which is directed in a systematic way by one or a few indi-

¹⁴ VOGEL, *supra* note 1, at 25 (discussing the United Kingdom's draft legislation, the Dignity at Work Bill, which would advise employers to establish policies against moral harassment in consultation with union and safety representatives). The Dignity at Work Bill was introduced in the House of Lords on December 1, 2001. United Kingdom Parliament, Dignity at Work Bill [HL], at <http://www.parliament.the-stationery-office.co.uk/pa/ld200102/ldbills/031/2002031.htm> (Dec. 4, 2001).

¹⁵ See Bullying at Work, *supra* note 1, at 28.

¹⁶ DAVENPORT ET AL., *supra* note 11, at 21; Leymann, *supra* note 11, at 165, 167.

viduals mainly towards one individual who, due to mobbing, is pushed into a helpless and defenceless position, being held there by means of continuing mobbing activities.”¹⁷ This definition of mobbing

excludes temporary conflicts and focuses on the breaking point where the psychosocial situation begins to result in psychiatrically or psychosomatically pathological conditions [T]he distinction between “conflict” and “mobbing” . . . does not focus on *what* is done or *how* it is done, but rather on the *frequency* and *duration* of *whatever* is done.¹⁸

Leymann’s definition emphasizes the *pervasiveness* rather than the *severity* of mobbing behaviors, and he points out that it focuses more on the psychological strain on the individual than on the actions that constitute mobbing.¹⁹

Nevertheless, Leymann has identified forty-five behaviors representative of mobbing, divided into the following five categories according to the effect on the victim: (1) effects on the victim’s communication abilities (e.g., caused when the employee receives constant criticisms about work or private life, oral or written threats, or restrictions on communication); (2) effects on the victim’s social relations (e.g., caused when the employee is isolated by others or ignored); (3) effects on the victim’s reputation (e.g., caused when the employee is ridiculed, demeaned, or the subject of gossip); (4) effects on the victim’s professional life (e.g., caused when the employee is given meaningless work assignments, no work assignments at all, or unreasonably difficult assignments designed to discredit the employee); and (5) effects on the victim’s physical health (e.g., caused when the employee is physically threatened, attacked, or receives dangerous work assignments).²⁰ Considered in conjunction with Leymann’s definition of mobbing, which emphasizes the *pervasiveness* of incidents affecting the employee, it is important to note that mobbing only occurs when individual conflicts—by themselves *not* indicative of mobbing—escalate into conflicts on a daily basis for a long period of time.²¹ Indeed, Ley-

¹⁷ Leymann, *supra* note 11, at 168.

¹⁸ The Mobbing Encyclopedia (Homepage of Dr. Heinz Leymann), The Definition of Mobbing at Workplaces, at <http://www.leymann.se/English/12100E.HTM> (last visited May 2, 2004) (emphasis in original) [hereinafter Leymann, Mobbing Definition].

¹⁹ See *id.*

²⁰ DAVENPORT ET AL., *supra* note 11, at 34–37; Leymann, *supra* note 11, at 170.

²¹ Leymann, *supra* note 11, at 168, 171.

mann states that mobbing only occurs when the employee is subjected to mobbing actions at least once per week, for at least six months.²²

Leymann reports that mobbing has affected around 3.5% of the Swedish workforce (for an average of about fifteen months per individual) and that mobbing will victimize one in four individuals for at least six months during their working careers.²³ Mobbing has serious consequences, as an estimated ten to twenty percent of individuals subjected to mobbing will develop post-traumatic stress disorder (PTSD) symptoms.²⁴ Furthermore, mobbing causes about ten to twenty percent of the suicides reported in Sweden per year.²⁵ Society must also pay for the consequences of mobbing in the form of increased insurance and health care costs.²⁶

To counteract mobbing in the workforce, Leymann suggests that appropriate measures should be in place for each particular stage of mobbing.²⁷ In the prevention stage, employers should establish a company policy against mobbing and educate management in how to handle conflicts.²⁸ Managers should also be prepared to intervene in early stages of conflict and “appoint one or more individuals in the organization to whom employees in danger can turn to for advice.”²⁹ If conflicts develop into mobbing situations, Leymann advises that managers should protect the victim by preventing stigmatization of the employee and providing vocational rehabilitation to those who may have to take sick leave.³⁰ Proper organization in the workforce should therefore not result in victims of mobbing having to leave the company.³¹

²² *Id.* at 168.

²³ The Mobbing Encyclopedia (Homepage of Dr. Heinz Leymann), Frequently Asked Questions, at <http://www.leymann.se/English/00005E.HTM> (last visited May 2, 2004) [hereinafter Leymann, FAQs].

²⁴ *Id.*

²⁵ The Mobbing Encyclopedia (Homepage of Dr. Heinz Leymann), Mobbing—Its Course Over Time, at <http://www.leymann.se/English/12220E.HTM> (last visited May 2, 2004).

²⁶ Leymann, FAQs, *supra* note 23.

²⁷ Leymann, *supra* note 11, at 179–80.

²⁸ *Id.* at 180.

²⁹ *Id.*

³⁰ *Id.*

³¹ *See id.*

B. “Moral Harassment” Definition Proposed by French Psychologist Marie-France Hirigoyen

French psychologist Marie-France Hirigoyen, whose 1998 book about moral harassment, *Le harcèlement moral, la violence perverse au quotidien*, introduced the concept in France,³² proposes the following definition for *harcèlement moral*, or moral harassment: “any abusive conduct—whether by words, looks, gestures, or in writing—that [through repetition or systematization]³³ infringes upon the personality, the dignity, or the physical or psychical integrity of a person; also, behavior that endangers the employment of said person or degrades the climate of the workplace.”³⁴ Hirigoyen notes that the victim may be subjected to moral harassment by colleagues, superiors, and even subordinates, for example, when a recently promoted employee faces hostility and resentment from former co-workers.³⁵ Moral harassment does not include external aggressions (for example, perpetuated by clients), physical violence, or sexual harassment (which, although it may be sometimes linked to moral harassment, is generally covered by other laws).³⁶

Moral harassment, Hirigoyen emphasizes, is more than mere stress at work.³⁷ If an individual feels stressed at work, for example from being overworked, excess or burdensome assignments may be either a feature of the job or part of a campaign against the individual.³⁸ The latter case constitutes moral harassment, while the former does not, since psychological consequences are more severe when an individual is the target of an intentional harm.³⁹ As Hirigoyen explains, stress is only destructive in excess, while moral harassment is destructive by its very nature.⁴⁰ Stress, unlike moral harassment, does not involve any malicious intent against the individual.⁴¹ The word “moral” in “moral harassment” underlines the fact that this type of

³² *Le harcèlement moral, Interview de Marie-France Hirigoyen, psychiatre, psychanalyste, ALTERNATIVE SANTÉ—L'IMPATIENT*, Oct. 1999, <http://www.medecines-douces.com/impatient/260oct99/interv.htm>.

³³ These terms were added to Hirigoyen's definition in a more recent work. MARIE-FRANCE HIRIGOYEN, *MALAISE DANS LE TRAVAIL: HARCÈLEMENT MORAL, DÉMÊLER LE VRAI DU FAUX* 13 (2001) [hereinafter *DISCOMFORT AT WORK*].

³⁴ *STALKING THE SOUL*, *supra* note 11, at 52.

³⁵ *Id.* at 56–61.

³⁶ *DISCOMFORT AT WORK*, *supra* note 33, at 26–27.

³⁷ *Id.* at 15.

³⁸ *Id.* at 15–17.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *DISCOMFORT AT WORK*, *supra* note 33, at 18.

conduct exposes the employee to humiliation and a lack of respect, which differs from what one might term "professional harassment."⁴²

Hirigoyen also notes that moral harassment differs from conflicts at work: while conflicts involve a symmetrical relationship (where each worker has an equal position in the conflict), moral harassment involves an asymmetrical relationship (where one worker exerts dominance over another worker).⁴³ This dominance does not refer to workplace hierarchy, but to psychological dominance—the harasser asserts psychological dominance over the victim, who is forced into submission and into losing his or her identity.⁴⁴

Moral harassment must also be distinguished from managerial abuse, which Hirigoyen refers to as the tyrannical behavior of managers, who pressure all of their subordinates, sometimes violently, with insults or a lack of respect.⁴⁵ Although such conduct is reprehensible, it only constitutes moral harassment if the manager harasses an employee individually (rather than coming across as a generally unpleasant manager to all employees), for example, by targeting an employee's personal life or weaknesses with injurious words and actions.⁴⁶ It is also sometimes difficult to separate moral harassment from bad working conditions: if the employee must work with low lighting in a cramped office, this would only constitute moral harassment if the employee was intentionally targeted with these conditions.⁴⁷ Finally, moral harassment must not be confused with legitimate employer practices such as constructive criticisms or justifiable changes in the employee's duties.⁴⁸

While Leymann emphasizes the pervasive character of mobbing, Hirigoyen broadens her definition of moral harassment by recognizing that severity may also play a role in determining which behaviors constitute moral harassment.⁴⁹ Hirigoyen agrees with Leymann that moral harassment is characterized by repetition above all else but adds that some aggressions could have a severe psychological effect on the victim in much less than Leymann's suggested six months.⁵⁰ According to Hirigoyen, a single act of aggression could constitute moral harassment

⁴² *Id.* at 17.

⁴³ *Id.* at 19–22.

⁴⁴ *Id.* at 22.

⁴⁵ *Id.*

⁴⁶ DISCOMFORT AT WORK, *supra* note 33, at 23–24.

⁴⁷ *Id.* at 27.

⁴⁸ *Id.* at 28.

⁴⁹ See *id.* at 24; Leymann, Mobbing Definition, *supra* note 18.

⁵⁰ DISCOMFORT AT WORK, *supra* note 33, at 24.

if it is intentionally humiliating.⁵¹ For example, a brutally humiliating termination, where the employer locks the employee out of his or her office, throwing the employee's personal belongings into a box, could be considered as moral harassment in that it would be a deliberate campaign to eliminate and humiliate the employee.⁵² In contrast, single verbal acts, which are often spontaneous rather than premeditated, usually do not constitute moral harassment.⁵³

According to a survey conducted by the marketing research company Ipsos, thirty percent of French workers report that they have suffered moral harassment at work, and thirty-seven percent of French workers have observed a colleague being subjected to moral harassment.⁵⁴ Workers over age thirty-five are more often victims of moral harassment than younger workers, and workers with lower wages are more likely to be victims than workers with higher wages.⁵⁵ Twenty-two percent of French workers report being "systematically and repeatedly assigned to the most unpleasant or the less interesting tasks," and seventeen percent of French workers surveyed admit having been "systematically refused any . . . [raise or systematically given] . . . less importance than . . . colleagues on the same hierarchical level when this was not merited."⁵⁶ Moreover, twelve percent of French workers surveyed have "suffered repeated bullying from their hierarchical superior with the goal to make them resign without any allowance or to make them change over to another department."⁵⁷

To effectively counteract moral harassment, Hirigoyen advises the employer to appoint internal consultants, such as medical personnel or union representatives, who could work towards prevention on a daily basis.⁵⁸ Furthermore, Hirigoyen suggests that employees from several levels within the company should be chosen to provide support to victims of moral harassment and should do so in confidentiality, since victims are often confused, embarrassed, and nervous about seeking help.⁵⁹ Educat-

⁵¹ *Id.* at 25.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Cabinet Ravisy-Yakovlev & Associés, Three Wage Earners Out of Ten Are Victims of Psychological Harassment at Work, at <http://perso.club-internet.fr/lextel/anglais/harmor/IPSOS.html> (last visited May 2, 2004). The official survey results are available at <http://www.ipsos.fr/>.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ DISCOMFORT AT WORK, *supra* note 33, at 265–66.

⁵⁹ *Id.*

ing all employees about moral harassment is also important; this could include holding a company-wide conference advising employees of their rights and available remedies, posting a list of employee rights relating to moral harassment, and providing informational brochures.⁶⁰ Where internal procedures are insufficient for the moral harassment victim, Hirigoyen advocates mediation as a first step, which avoids the further psychological strains, frustrations, and costs of litigation.⁶¹

II. THE DEVELOPMENT OF MOBBING/MORAL HARASSMENT LAW IN SWEDEN, FRANCE, AND ON AN EU-WIDE LEVEL

A. *The Development of Mobbing Law in Sweden*

1. The Ordinance on Victimization at Work

Sweden was the first EU country to enact legislation against moral harassment.⁶² The Ordinance on Victimization at Work (AFS 1993:17), consisting of six short sections, defines victimization (*kränkande särbehandling*) as “recurrent reprehensible or distinctly negative actions which are directed against individual employees in an offensive manner and can result in those employees being placed outside the workplace community.”⁶³ The Ordinance requires the employer to prevent victimization “as far as possible” and to “make clear that victimization cannot be accepted.”⁶⁴ Furthermore, the employer must have a system in place for detecting and correcting “unsatisfactory working conditions, problems of work organization or deficiencies of co-operation,” which could lead to victimization.⁶⁵ The employer must take “counter-measures” upon detecting signs of victimization, including conducting a “special investigation . . . to ascertain whether the causes of shortcomings of co-operation are to be found in the way in which work is organized.”⁶⁶ Finally, the employer must have procedures for helping or supporting employees who are subjected to victimization.⁶⁷

⁶⁰ *Id.* at 266.

⁶¹ *Id.* at 272–74.

⁶² VOGEL, *supra* note 1, at 22.

⁶³ Ordinance of the Swedish National Board of Occupational Safety and Health Containing Provisions on Measures Against Victimization at Work, Ordinance AFS 1993:17, § 1 (adopted Sept. 21, 1993, entered into force Mar. 31, 1994), <http://www.av.se/english/legislation/afs/eng9317.pdf> [hereinafter Ordinance on Victimization at Work].

⁶⁴ *Id.* §§ 2–3.

⁶⁵ *Id.* § 4.

⁶⁶ *Id.* § 5.

⁶⁷ *Id.* § 6.

The Swedish National Board of Occupational Safety and Health provides “General Recommendations” for implementing the Ordinance, which identify “[u]nsolved, persistent organizational problems” as a main cause of victimization.⁶⁸ Instead of pointing to the acts of individual persons, the Recommendations stress that unsatisfactory working conditions underlie victimization.⁶⁹ In effect, organizational problems at the workplace result in a “scapegoat mentality,” where individual employees are targeted because of the problems of the group.⁷⁰ The Recommendations identify the following consequences of victimization: (1) negative effects on individual employees (e.g., irritability, indifference, high stress levels, physical illness, substance abuse, psychological reactions, and thoughts of suicide or violence), and (2) negative effects on the entire workforce (e.g., reduced efficiency and productivity, erosion of workplace rules, criticism of the employer, increased friction, increased sickness absenteeism, high personnel turnover, magnification of minor problems, and a continuing search for new scapegoats).⁷¹

2. The Impact of Swedish Legislation

The Ordinance on Victimization at Work does not provide any specific remedy for mobbing victims.⁷² Therefore, it may not be surprising that few mobbing cases appear before the Swedish courts, and it is unclear whether anyone in Sweden has ever been condemned for mobbing under this law.⁷³ Nevertheless, the Ordinance on Victimization at Work is important in that it recognizes concerns about mobbing in the workplace and encourages discussion about mobbing.⁷⁴ The Swedish National Board of Occupational Safety and Health promotes such discussion by distributing instructive materials—including videos, transparencies, manuals, and books—which at least 300 companies in Sweden have used.⁷⁵

As a result of awareness about moral harassment, employers in Sweden in both the private and public spheres have recognized mob-

⁶⁸ General Recommendations of the Swedish National Board of Occupational Safety and Health on the Implementation of the Provisions on Measures Against Victimization at Work, in Ordinance on Victimization at Work, *supra* note 63, at 5.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 6–7.

⁷² See generally Ordinance on Victimization at Work, *supra* note 63.

⁷³ See Olivier Truc, *La Suède, pionnier européen*, LIBÉRATION, Sept. 13, 1999, <http://www.liberation.com/travail/thema/spec990913/art7.html>.

⁷⁴ *Id.*

⁷⁵ Leymann, *supra* note 11, at 179.

bing in their policies and guidelines.⁷⁶ For example, the public institution Uppsala University states on its website that it “does not tolerate victimization at work.”⁷⁷ It provides a section entitled “An action programme against victimization at work,” which includes a definition of victimization, references to regulations in force, examples of victimization at work, an outline of department head responsibilities and preventive measures, and contact information and advice for those who have been victimized.⁷⁸ In the private sector, Indiska Magasinet, a Swedish company with forty-nine stores selling Indian-inspired clothing and home furnishings, provides in its Codes of Conduct that “[n]o harsh or inhuman treatment is allowed. . . . sexual or other harassment and verbal abuse or other forms of intimidation shall be prohibited.”⁷⁹

B. *The Development of Moral Harassment Law in France*

1. Early Case Law Mentioning the Concept of Moral Harassment and Foreshadowing Current Laws

In France, it is interesting to note that the courts recognized moral harassment, though not by name, long before legislation was implemented, thereby providing the backdrop for strong legislation.⁸⁰ As early as 1960, the French Supreme Court (*Cour de Cassation*)⁸¹ affirmed a judgment of damages awarded against IBM France, where an employee was terminated after her responsibilities were reduced without cause.⁸² In 1973, the French Supreme Court found in favor of a manager whose employer took his secretary and telephone away and

⁷⁶ See Indiska Magasinet's Codes of Conduct, <http://www.somo.nl/monitoring/reports/indiska-coc.htm> (last visited May 2, 2004) [hereinafter Indiska Codes of Conduct]; Uppsala Universitet, An Action Programme Against Victimization at Work, at <http://www.arbmilj.uadm.uu.se/victimization.html> (last modified July 1, 2002) [hereinafter Uppsala Action Programme].

⁷⁷ Uppsala Action Programme, *supra* note 76.

⁷⁸ *Id.*

⁷⁹ Indiska Codes of Conduct, *supra* note 76; Indiska Website, at <http://www.indiska.com/eng/> (last visited May 2, 2004).

⁸⁰ See Cabinet Ravisy-Yakovlev & Associés, Quelques décisions de jurisprudence pouvant être utilisées dans les affaires de harcèlement, at <http://perso.club-internet.fr/lextel/jurisprudence/jurisprudence.html> (last visited May 2, 2004).

⁸¹ The French Supreme Court is divided into chambers (formerly called “sections”), and it is the Labor Chamber (or Section) that hears cases such as those cited. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 259 (Columbia Law Review Ass'n et al. eds., 17th ed. 2000).

⁸² Cabinet Ravisy-Yakovlev & Associés, Décisions les plus anciennes, at <http://perso.club-internet.fr/lextel/jurisprudence/ancien.html> (last visited May 2, 2004).

demoted him to sweeping a warehouse floor in order to force his resignation.⁸³ These cases foreshadowed Hirigoyen's definition of moral harassment as occurring when the employee is the target of an intentional harm and Leymann's identification of moral harassment behaviors that affect the victim's professional life.⁸⁴

Following the publication of Hirigoyen's book in 1998, French courts began to mention moral or psychological harassment in their opinions.⁸⁵ On February 15, 1999, the Court of Appeals of Pau (*Cour d'appel de Pau*) reversed the lower court's 1998 decision that "psychological harassment" (*harcèlement psychologique*) justified a hairdresser's breach of employment contract.⁸⁶ In this case, the hairdresser took seven months of sick leave for depression caused by her employer's constant criticisms, including comments in front of clients.⁸⁷ The Court of Appeals held that the employer's criticisms, although causing tension in the workplace, did not rise to a level of "psychological harassment" that would have rendered the continuation of contractual relations impossible.⁸⁸

Later, in 1999, the Labor Court of Paris (*Conseil de Prud'hommes de Paris*) awarded 100,000 French francs to a hotel employee whose supervisor constantly criticized and humiliated her in front of clients and colleagues, changed her working hours incessantly, and forced her to work with English and computers despite a lack of training in these skills.⁸⁹ Here, the court held that the employee, whose depression forced her to take sick leave for two years, had established a causal link between her illness and the "moral harassment" (*harcèlement moral*) she endured.⁹⁰ This decision is compatible with Hirigoyen's definition of moral harassment as involving humiliation and Leymann's classification of behaviors affecting the victim's reputation and professional life.⁹¹

In 2000, the Social Security Court of Vosges (*Tribunal des affaires de sécurité sociale des Vosges*) broadened the applicability of moral har-

⁸³ *Id.*

⁸⁴ See DAVENPORT ET AL., *supra* note 11, at 37; DISCOMFORT AT WORK, *supra* note 33, at 15-17; Leymann, *supra* note 11, at 170.

⁸⁵ See, e.g., CA Pau, ch. soc., Feb. 15, 1999, <http://perso.club-internet.fr/lextel/jurisprudence/girardappel.html> [hereinafter CA Pau]; Conseil de Prud'hommes Paris, Dec. 15, 1999, <http://perso.club-internet.fr/lextel/jurisprudence/Billaux.html> [hereinafter CP Paris].

⁸⁶ CA Pau, *supra* note 85.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ CP Paris, *supra* note 85.

⁹⁰ *Id.*

⁹¹ DAVENPORT ET AL., *supra* note 11, at 36-37; DISCOMFORT AT WORK, *supra* note 33, at 17; Leymann, *supra* note 11, at 170.

assment claims when it recognized that an accident caused by moral harassment would qualify as a “work accident” (*accident du travail*) for the purposes of collecting benefits from the regional health insurance agency (*Caisse primaire d’assurance maladie* or *C.P.A.M.*).⁹² In this case, a cleaning woman under psychological pressure from her supervisor was rendered paraplegic after jumping from the third story of her employer’s building.⁹³ The court held that the employee’s attempted suicide satisfied the Social Security Code’s definition of a “work accident” as occurring because of or during work (*survenu par le fait ou à l’occasion du travail*).⁹⁴

The introduction of moral harassment laws in France was further precipitated by the use of existing provisions in the Penal Code to punish moral harassment behavior.⁹⁵ In 2001, the Regional Court of La Roche sur Yon (*Tribunal de grande instance de La Roche sur Yon*) applied Article 225–14 of the Penal Code—providing that anyone who abuses a position of dependency to submit another to working conditions that are incompatible with human dignity may be punished by two years imprisonment and a fine of 500,000 French francs—against the owner of a confectionary company.⁹⁶ Although not specifically mentioning moral harassment, the court outlined the owner’s many actions that humiliated his employees: in his workshop he did not permit employees to raise their heads, talk, or smile; he gave out warnings and even fired employees for talking; and at one point, he took away the employees’ chairs and would no longer allow them to sit down while working.⁹⁷

2. Activism Against Moral Harassment

In addition to increasing awareness about moral harassment in the courts, Hirigoyen’s book encouraged activism against moral harassment.⁹⁸ In March 2000, seventy percent of employees at the out-

⁹² See Trib. aff. séc. soc. Vosges, Feb. 28, 2000, <http://perso.club-internet.fr/lextel/jurisprudence/rousseau/premier.html>.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See generally T.G.I. La Roche sur Yon, Feb. 26, 2001, <http://perso.club-internet.fr/lextel/jurisprudence/bonnet.html>.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See, e.g., Dépêche AFP, Grève à la CCI Vendée: le directeur accusé de “harcèlement moral” (Apr. 3, 2000), at <http://www.hmstop.com/Articles/Article19.htm> [hereinafter CCI Strike]; Dépêche AFP, Harcèlement moral: la grève se poursuit dans une entreprise de luminaires (Mar. 17, 2000), at <http://www.hmstop.com/Articles/Article18.htm> [hereinafter Eclatec Strike].

door lighting company Eclatec went on strike to demand the departure of the president of the board of directors (*président du directoire*), whom they accused of moral harassment.⁹⁹ A few weeks later, around fifty employees at the Chamber of Commerce and Industry of Vendée (*Chambre de commerce et d'industrie de Vendée*) protested in the streets and went on strike, alleging that their General Manager (*directeur général*) had subjected them to moral harassment, humiliation, and attacks on their dignity.¹⁰⁰

3. The Social Modernization Law and Provisions Added to the French Labor Code and Penal Code

Both the recognition of moral harassment by the French courts and widespread awareness about moral harassment among the French public called for particularly strong legislative action.¹⁰¹ On January 17, 2002, France's Social Modernization Law (*loi de modernisation sociale*) accomplished this task with the introduction of Articles L. 122–49 through L. 122–54 to the Labor Code and Article 222–33–2 to the Penal Code.¹⁰² The French Labor Code now provides that no employee shall suffer repeated acts of moral harassment, which have the purpose or effect of causing a deterioration in working conditions by impairing the employee's rights and dignity, affecting the employee's physical or mental health, or compromising the employee's professional future.¹⁰³ Pursuant to the French Penal Code—which contains a nearly identical definition of moral harassment as found in the Labor Code—moral harassment is punishable by one year in prison and 15,000 Euros, while the penalty in the Labor Code is one year in prison and/or 3750 Euros.¹⁰⁴ The Labor Code further provides that

⁹⁹ Eclatec Strike, *supra* note 98.

¹⁰⁰ CCI Strike, *supra* note 98.

¹⁰¹ See, e.g., Trib. aff. séc. soc. Vosges, *supra* note 92; Eclatec Strike, *supra* note 98.

¹⁰² Institut National de Recherche et de Sécurité, Dossier, Loi de modernisation sociale, at <http://www.inrs.fr/> (last updated Jan. 29, 2002).

¹⁰³ CODE DU TRAVAIL [C. TRAV.] art. L. 122–49 (Fr.), <http://www.legifrance.gouv.fr> (last visited May 2, 2004) (“*Aucun salarié ne doit subir les agissements répétés de harcèlement moral qui ont pour objet ou pour effet une dégradation des conditions de travail susceptible de porter atteinte à ses droits et à sa dignité, d'altérer sa santé physique ou mentale ou de compromettre son avenir professionnel.*”).

¹⁰⁴ *Id.* art. L. 152–1–1; CODE PÉNAL [C. PÉN.] art. 222–33–2 (Fr.), <http://www.legifrance.gouv.fr> (last visited May 2, 2004). In the criminal context, it must be noted that, in Article 121–3, the Criminal Code requires intent for all crimes. M. Graser et al., *Legislative Recognition in France of Psychological Harassment at Work*, 22 MED. & L. 239, 242–43 (2003). Graser et al. also point out the inconsistency between penalties provided under the Labor and Penal Codes. *Id.* at 274.

an employee shall not be sanctioned, terminated, or discriminated against (directly or indirectly)—for example, with regard to pay, training, promotion, or contract renewal—for having endured or refused to endure moral harassment.¹⁰⁵ Indeed, a termination of contract resulting from such circumstances is invalid pursuant to Article L. 122–49.¹⁰⁶ The Labor Code also authorizes the employer to take disciplinary sanctions against employees who commit acts of moral harassment and permits the victim of moral harassment to request a mediation procedure in order to stop the harassment.¹⁰⁷ Furthermore, the head of the company (*chef d'entreprise*) has the responsibility of taking all necessary actions to prevent moral harassment in the workplace.¹⁰⁸

The Labor Code also provides instruction as to the burden of proof applicable to moral harassment litigation.¹⁰⁹ First, the employee must *establish* the elements of moral harassment.¹¹⁰ In response, the employer must prove objectively that the conduct reported by the employee does not constitute moral harassment.¹¹¹ While the employer and employee have similar burdens of proof, the judge makes the ultimate decision as to whether the employee has been the victim of moral harassment.¹¹²

4. Case Law Following the Introduction of Moral Harassment Laws

The first criminal moral harassment case following the 2002 Social Modernization Law involved a former manager of Canal Numedia, subsidiary of the French television station Canal Plus (belonging to the Vivendi group).¹¹³ The employee alleged that the president of the

¹⁰⁵ C. TRAV. art. L. 122–49.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* arts. L. 122–50, L. 122–54. For a brief description of the mediation procedure provided by Article L. 122–54 of the Labor Code, see Graser et al., *supra* note 104, at 245–46.

¹⁰⁸ C. TRAV. art. L. 122–51.

¹⁰⁹ *Id.* art. L. 122–52.

¹¹⁰ *Id.* Interestingly, the burden on the employee presented here was recently modified in January 2003; while the original version provided that the employee only had to *present* the elements of moral harassment, this phrase in Article 122–52 was modified from “present” to “establish,” in order to more evenly distribute the burden of proof between the employer and employee. EmploiCenter, Les députés modèrent le “harcèlement moral,” at <http://emploi.journaldunet.com/php/publication/publication.php?i=1314> (Dec. 9, 2002).

¹¹¹ C. TRAV. art. L. 122–52.

¹¹² *Id.*

¹¹³ EmploiCenter, Harcèlement moral chez CanalNumedia: relaxe de l’ancien PDG, at <http://emploi.journaldunet.com/magazine/1290/> (Oct. 28, 2002) [hereinafter Canal Numedia]; Le Web de l’Humanité, Le harcèlement moral au tribunal, at <http://www.>

company (*président-directeur général*) had subjected her to repeated vexation and pressure, which caused her to become depressed and leave the company.¹¹⁴ However, the Criminal Court of Paris (*Tribunal correctionnel de Paris*) found that the alleged harassment suffered by the employee—including having to move her office away from her colleagues and to the ground floor of the building where she was exposed to passersby, and not being invited to meetings where the project for which she was responsible was discussed—was not directed personally at her.¹¹⁵ The Criminal Court emphasized the language in the Labor Code that the harassment must have the purpose or effect of harming the employee, infringing upon the employee's rights or dignity, altering the employee's physical health or morale, or compromising the employee's professional future.¹¹⁶ Surprisingly, after much case law in favor of the employee, this first decision by the Criminal Court has limited the scope of France's moral harassment laws.¹¹⁷

C. *The Status of Moral Harassment Law on an EU-Wide Level*

Article 31 of the Charter of Fundamental Rights of the European Union provides the source for Community-wide action against moral harassment, stating that “[e]very worker has the right to working conditions which respect his or her health, safety and dignity.”¹¹⁸ The current position of the European Commission is that moral harassment is covered under Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work (the Safety and Health Framework Directive).¹¹⁹ This directive states that “[t]he employer shall have a duty to ensure the safety and health of workers in every aspect related to the work.”¹²⁰ Despite this general statement that would seem to include moral harassment, this directive more specifically addresses occupa-

humanite.presse.fr/journal/2002-07-16/2002-07-16-37215 (July 16, 2002) [hereinafter Moral Harassment at Trial].

¹¹⁴ Canal Numedia, *supra* note 113; Moral Harassment at Trial, *supra* note 113.

¹¹⁵ Canal Numedia, *supra* note 113; Moral Harassment at Trial, *supra* note 113.

¹¹⁶ Canal Numedia, *supra* note 113; Moral Harassment at Trial, *supra* note 113.

¹¹⁷ Canal Numedia, *supra* note 113; Moral Harassment at Trial, *supra* note 113.

¹¹⁸ Charter of Fundamental Rights of the European Union, art. 31, 2000 O.J. (C 364), http://www.europarl.eu.int/charter/pdf/text_en.pdf; Adapting to Change in Work and Society: A New Community Strategy on Health and Safety at Work 2002–2006: Communication from the Commission, COM(2002)118 final at 4–5, http://europe.osha.eu.int/systems/strategies/future/com2002_en.pdf.

¹¹⁹ Safety & Health Framework Directive, *supra* note 7; EU Mobbing FAQs, *supra* note 7.

¹²⁰ Safety & Health Framework Directive, *supra* note 7, art. 5.

tional risks and accidents, the elimination of risk and accident factors, giving appropriate instructions and training to workers, replacing dangerous equipment, first-aid and evacuation procedures in the event of serious and imminent danger, and other similar physical safety and health concerns.¹²¹ Indeed, the fact that the European Council adopted the Safety and Health Framework Directive in 1989, well before public awareness about moral harassment and before the adoption of any legislation, supports the position that this directive covers physical rather than psychological safety and health.¹²² Therefore, the European Parliament recommends that the Commission either clarify or extend the scope of the Safety and Health Framework Directive or draft a new directive to cover moral harassment.¹²³

III. ANALYSIS: THE FUTURE OF EU LEGISLATION AGAINST MORAL HARASSMENT

A. *The Inadequacy of Current EU Legislation in Addressing Moral Harassment*

In order to most effectively combat moral harassment, the EU should adopt a new directive.¹²⁴ The Safety and Health Framework Directive, in addition to focusing on physical rather than psychological risks, contains some provisions that are incompatible with including moral harassment concerns under "safety and health."¹²⁵ For example, Article 6 of this directive requires the employer, "when he entrusts tasks to a worker, [to] take into consideration the worker's capabilities as regards health and safety."¹²⁶ If moral harassment concerns are covered under "health and safety," this provision seems to suggest that the employer should consider the employee's capacity for psychological breakdown when assigning tasks.¹²⁷ Yet, such considerations might result in unnecessary discrimination before problems in the workforce arise, for example, if a manager were to use a psychological assessment to exclude an employee from a particular work assignment if conflicts

¹²¹ *Id.* arts. 1, 5–6, 8–9, 12.

¹²² See generally *Bullying at Work*, *supra* note 1, at 27.

¹²³ *Harassment at the Workplace*, *supra* note 3, at 7.

¹²⁴ See *id.*

¹²⁵ See, e.g., *Safety & Health Framework Directive*, *supra* note 7, arts. 6, 13; Leymann, *Mobbing Definition*, *supra* note 18.

¹²⁶ *Safety & Health Framework Directive*, *supra* note 7, art. 6.

¹²⁷ See generally *Safety & Health Framework Directive*, *supra* note 7, art. 6; Leymann, *Mobbing Definition*, *supra* note 18.

are foreseeable.¹²⁸ Leymann stresses that moral harassment occurs only when temporary or isolated conflicts escalate into pervasive harassment.¹²⁹ Therefore, while it might be reasonable to require the employer to monitor conflicts that may progress into moral harassment, it would be unreasonable to exclude employees from certain job tasks solely on the basis of a psychological assessment.¹³⁰

Another provision that conflicts with moral harassment being covered by the Safety and Health Framework Directive is Article 13, which provides that it "shall be the responsibility of each worker to take care as far as possible of his own safety and health."¹³¹ While it may be appropriate to require employees to be careful when operating machinery, psychological harm does not result from an employee's carelessness.¹³² Indeed, Leymann's and Hirigoyen's examples and definitions of moral harassment do not refer to any responsibility on the part of employees to avoid harassment.¹³³ The European Council should thus adopt a separate directive to cover moral harassment because of these conflicting provisions.¹³⁴

B. *Suggestions for an EU Definition of Moral Harassment*

If the European Council adopts a new directive, it will probably include a definition of moral harassment.¹³⁵ One issue to confront is whether the moral harassment definition should refer only to *pervasive* acts of harassment or whether it should also include *severe*, isolated acts of harassment.¹³⁶ A useful analogy is U.S. sexual harassment case law and the hostile work environment doctrine, articulated by the Supreme Court in *Harris v. Forklift Systems*: "When the workplace is permeated

¹²⁸ See generally Safety & Health Framework Directive, *supra* note 7, art. 6; Leymann, Mobbing Definition, *supra* note 18.

¹²⁹ Leymann, Mobbing Definition, *supra* note 18.

¹³⁰ See generally Safety & Health Framework Directive, *supra* note 7, art. 6; Leymann, Mobbing Definition, *supra* note 18.

¹³¹ Safety & Health Framework Directive, *supra* note 7, art. 13; see STALKING THE SOUL, *supra* note 11, at 52; Leymann, Mobbing Definition, *supra* note 18.

¹³² See Safety & Health Framework Directive, *supra* note 7, art. 13; STALKING THE SOUL, *supra* note 11, at 52; Leymann, Mobbing Definition, *supra* note 18.

¹³³ See Safety & Health Framework Directive, *supra* note 7, art. 13; STALKING THE SOUL, *supra* note 11, at 52; Leymann, Mobbing Definition, *supra* note 18.

¹³⁴ See generally Safety & Health Framework Directive, *supra* note 7, art. 13; STALKING THE SOUL, *supra* note 11, at 52; Leymann, Mobbing Definition, *supra* note 18.

¹³⁵ See generally Council Directive 2002/73, art. 2, 2002 O.J. (L 269) (defining "harassment" and "sexual harassment").

¹³⁶ See DISCOMFORT AT WORK, *supra* note 33, at 13, 24–26; Leymann, Mobbing Definition, *supra* note 18.

with discriminatory intimidation, ridicule, and insult, that is sufficiently *severe or pervasive* to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated."¹³⁷ Sexual harassment law in the United States and moral harassment laws in Sweden and France share the aim of eliminating offensive and degrading harassment that adversely affects the victim's working environment.¹³⁸ However, while the U.S. Supreme Court has defined sexual harassment as encompassing severe *or* pervasive behaviors, Leymann's definition of mobbing only addresses *pervasiveness*.¹³⁹ Hirigoyen, on the other hand, suggests that single acts that are particularly egregious and humiliating (or *severe*) could also constitute moral harassment in some circumstances.¹⁴⁰ However, Hirigoyen still emphasizes that moral harassment is most characterized by repetition and includes the comments on severe incidents in a chapter discussing behaviors that do not constitute moral harassment.¹⁴¹ Furthermore, the French Labor Code emphasizes pervasiveness rather than severity in stating that no employee shall suffer *repeated* acts of moral harassment ("*Aucun salarié ne doit subir les agissements répétés de harcèlement moral . . .*").¹⁴² The Swedish Ordinance on Victimization at Work also emphasizes pervasiveness in defining victimization as "recurrent reprehensible or distinctly negative actions."¹⁴³ Therefore, a moral harassment definition should focus on pervasiveness rather than severity, in conformity with Leymann's definition—with which

¹³⁷ See *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993) (emphasis added; internal quotation marks and citations omitted); Yamada, *supra* note 1, at 509. For a discussion on the differences between U.S. and continental European definitions of "harassment," see Friedman & Whitman, *supra* note 12, at 243–46, 265–70 (observing that, while U.S. harassment laws, including those on sexual harassment, focus on *discrimination* or *equality*, European laws tend to focus on the notion of *dignity*). Friedman & Whitman also note that the U.S. focus on discrimination makes sense given that the United States has a system of at-will employment. *Id.* at 266–67. In European countries, where employment relationships are more long-term, broader human rights issues, and thus dignity, are very important in the workplace. *Id.* at 267. In the United States, however, where employees change jobs frequently, the emphasis is more on employees "being given a fair chance to move on [to another job] or to move up [at their current place of employment]." *Id.*

¹³⁸ See C. TRAV. art. L. 122–49; Ordinance on Victimization at Work, *supra* note 63, § 1; *Harris*, 510 U.S. at 21.

¹³⁹ *Harris*, 510 U.S. at 21; see Leymann, *Mobbing Definition*, *supra* note 18.

¹⁴⁰ DISCOMFORT AT WORK, *supra* note 33, at 24–25.

¹⁴¹ See *id.*

¹⁴² See C. TRAV. art. L. 122–49.

¹⁴³ See Ordinance on Victimization at Work, *supra* note 63, § 1.

Hirigoyen generally agrees—and the language in French and Swedish legislation.¹⁴⁴

*C. Suggested Provisions for Effective Moral Harassment Legislation:
Guidelines, Burden of Proof, Sanctions, Dissemination of
Information, and Dialogues*

Several existing directives may serve as a model for provisions that could be included in a moral harassment directive.¹⁴⁵ For example, Council Directive 89/654/EEC, concerning the minimum safety and health requirements for the workplace (the Workplace Directive) was the first directive adopted under Article 16(1) of the Safety and Health Framework Directive, which provides that the Council shall adopt individual directives concerning “work places.”¹⁴⁶ It sets forth “minimum requirements for safety and health at the workplace,” with guidelines for over twenty areas, including electrical installations, emergency doors, fire detection, ventilation, lighting, windows, doors, restrooms, sanitary equipment, first aid, and conditions for pregnant and handicapped workers.¹⁴⁷ A moral harassment directive could follow the same format by prescribing guidelines for employers as suggested by Leymann and Hirigoyen, some of which have already been recognized in a European Parliament working paper.¹⁴⁸ For example, a new directive could state that employers shall: (1) formulate a company policy against moral harassment, (2) make available brochures or other information about moral harassment, (3) designate individuals within the company whom moral harassment victims may consult for confidential advice, and (4) provide vocational rehabilitation for moral harassment victims who take sick leave.¹⁴⁹ In deciding which guideline provisions to include in a new moral harassment directive, the psychological studies of Leymann and Hirigoyen should be considered.¹⁵⁰

¹⁴⁴ See *id.*; C. TRAV. art. L. 122–49; DISCOMFORT AT WORK, *supra* note 33, at 24–25; Leymann, *Mobbing Definition*, *supra* note 18.

¹⁴⁵ *Bullying at Work*, *supra* note 1, at 27.

¹⁴⁶ Council Directive 89/654, art. 1, 1989 O.J. (L 393) [hereinafter *Workplace Directive*]; *Safety & Health Framework Directive*, *supra* note 7, art. 16, annex; *Bullying at Work*, *supra* note 1, at 27.

¹⁴⁷ *Workplace Directive*, *supra* note 146, art. 1, annex.

¹⁴⁸ See *Bullying at Work*, *supra* note 1, at 25–26; DISCOMFORT AT WORK, *supra* note 33, at 265–68; Leymann, *supra* note 11, at 179–80.

¹⁴⁹ See *Bullying at Work*, *supra* note 1, at 25–26; DISCOMFORT AT WORK, *supra* note 33, at 265–68; Leymann, *supra* note 11, at 179–80.

¹⁵⁰ See generally DISCOMFORT AT WORK, *supra* note 33; Leymann, *supra* note 11.

As a model for remedies, enforcement, and sanctions in a new moral harassment directive, two existing directives with similar provisions could be considered: (1) Council Directive 2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Racial and Ethnic Origin Directive); and (2) Council Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation (the General Equal Treatment Directive).¹⁵¹ For example, these directives provide for a burden of proof that is favorable to the employee: “[when there are] facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.”¹⁵² However, the burden of proof for the employee is higher in the French Labor Code (Article L. 122–52), which provides that the employee must *establish* the elements of moral harassment.¹⁵³ Therefore, in adopting a new moral harassment directive, the European Council should consider that France sought more of an equilibrium in the burden of proof in January 2003 when it changed the wording in this provision from “present” to “establish.”¹⁵⁴

The Racial and Ethnic Origin and General Equal Treatment Directives, using identical language, also suggest the feasibility of sanctions:

Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.¹⁵⁵

Indeed, a main difference between the Swedish and French legislation is the availability of sanctions; while the Swedish Ordinance on Victimization at Work does not include any sanctions, the French Penal Code provides for a penalty of one year imprisonment and 15,000

¹⁵¹ See Council Directive 2000/78, arts. 9–14, 17, 2000 O.J. (L 303) [hereinafter General Equal Treatment Directive]; Council Directive 2000/43, arts. 7–12, 15, 2000 O.J. (L 180) [hereinafter Racial & Ethnic Origin Directive]; Bullying at Work, *supra* note 1, at 27.

¹⁵² General Equal Treatment Directive, *supra* note 151, art. 10; Racial & Ethnic Origin Directive, *supra* note 151, art. 8.

¹⁵³ See C. TRAV. art. L. 122–52.

¹⁵⁴ See *supra* text accompanying note 110.

¹⁵⁵ General Equal Treatment Directive, *supra* note 151, art. 17; Racial & Ethnic Origin Directive, *supra* note 151, art. 15.

Euros, and the penalty in the Labor Code is one year imprisonment and/or 3750 Euros.¹⁵⁶ Given that there have been few mobbing cases before the courts in Sweden, where sanctions are not designated, a new moral harassment directive should probably include a provision on sanctions, at least for an employer's failure to follow guidelines such as formulating a policy against moral harassment.¹⁵⁷

Another provision articulated in the General Equal Treatment Directive that may be useful for a new moral harassment directive is "Dissemination of information," which states: "Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force in this field, are brought to the attention of the persons concerned by all appropriate means, for example at the workplace, throughout their territory."¹⁵⁸ A similar provision should be adopted in a new moral harassment directive in accordance with Leymann's and Hirigoyen's analyses that informing the workforce is an effective mechanism for preventing moral harassment.¹⁵⁹

Similarly, to further encourage awareness about moral harassment in the workplace, provisions for dialogues with unions and non-governmental organizations would also be appropriate in a new moral harassment directive.¹⁶⁰ Pursuant to the General Equal Treatment Directive: "Member States shall, in accordance with their national traditions and practice, take adequate measures to promote dialogue between the social partners . . . including through the monitoring of workplace practices, collective agreements, codes of conduct and through research or exchange of experiences and good practices."¹⁶¹ This directive and the Racial and Ethnic Origin Directive also require the Member States to "encourage dialogue with appropriate non-governmental organisations which have . . . a legitimate interest in contributing" towards preventing prohibited conduct.¹⁶² Hirigoyen

¹⁵⁶ See C. PÉN. art. 222-33-2; C. TRAV. art. L. 152-1-1; Ordinance on Victimization at Work, *supra* note 63.

¹⁵⁷ See generally Ordinance on Victimization at Work, *supra* note 63; Truc, *supra* note 73.

¹⁵⁸ See General Equal Treatment Directive, *supra* note 151, art. 12; see also Racial & Ethnic Origin Directive, *supra* note 151, art. 10 (including an almost identical provision without the words "for example at the workplace").

¹⁵⁹ See DISCOMFORT AT WORK, *supra* note 33, at 266; Leymann, *supra* note 11, at 180.

¹⁶⁰ See DISCOMFORT AT WORK, *supra* note 33, at 266-67.

¹⁶¹ General Equal Treatment Directive, *supra* note 151, art. 13; see also Racial & Ethnic Origin Directive, *supra* note 151, art. 11 (including an almost identical provision).

¹⁶² General Equal Treatment Directive, *supra* note 151, art. 14; Racial & Ethnic Origin Directive, *supra* note 151, art. 12.

advises that informing and consulting union delegates and other specialists would be an effective measure against moral harassment.¹⁶³ Therefore, the European Council should consider a similar measure when drafting a new moral harassment directive.¹⁶⁴

CONCLUSION

Moral harassment, or mobbing, is a widespread problem in the EU that has affected more than twelve million workers. The psychological studies of Heinz Leymann and Marie-France Hirigoyen have generated increased public awareness about moral harassment and have encouraged Member States to adopt legislation to address these concerns. Sweden was the first country to enact legislation against mobbing in 1993 with the Ordinance on Victimization at Work. More recently, in 2002, France added moral harassment provisions to both its Labor Code and Penal Code.

The current position of the European Commission is that moral harassment is covered under the Safety and Health Framework Directive; however, this directive is inadequate because it focuses on physical rather than psychological risks. The European Council should thus draft a new directive. In conformity with Leymann's and Hirigoyen's studies and existing legislation in Sweden and France, the new directive should define moral harassment in terms of the pervasiveness rather than the severity of incidents. Furthermore, in using directives already in force—such as the Workplace Directive, the General Equal Treatment Directive, and the Racial and Ethnic Origin Directive—as models, the new moral harassment directive should address the following: (1) guidelines for employers, (2) a similar burden of proof for both the employer and employee, (3) sanctions, (4) provisions for the dissemination of information, and (5) provisions encouraging dialogue with unions and other interested non-governmental organizations.

¹⁶³ DISCOMFORT AT WORK, *supra* note 33, at 266–67.

¹⁶⁴ *See id.*