

I Know a Jerk When I See One—Moving Toward the European Dignity Standard in U.S. Sexual Harassment Law

*Donna Steslow**, *Nancy Lasher***, and *Daniel Syed****

Abstract

In an effort to prevent discrimination in the workplace based on gender, many US companies have adopted employee anti-fraternization policies in an attempt to avoid instances of and liability for sexual harassment under Title VII of the Civil Rights Act of 1964 (42 USC § 2000e-2(a)). European Union nations have taken an anti-mobbing (anti-bullying) approach to workplace sexual harassment, defining sexual harassment as an unacceptable affront to human dignity. US anti-fraternization policies are flawed in that they fail to root out secretive liaisons between workers who are either involved in extra-marital affairs or who are violating the policy and don't want to get caught and these policies serve to unnecessarily restrict employee conduct and associations both in and out of the workplace. Given the large number of hours many Americans work, this restriction on employee social behavior takes away from worker satisfaction. Additionally, stringent employee fraternization policies leave human resource professionals chasing harmless conduct. The authors advocate for a more European approach to dealing with workplace fraternization and sexual harassment policies.

INTRODUCTION

In an effort to prevent discrimination in the workplace based on gender, many US companies have adopted employee anti-fraternization policies in an attempt to avoid instances of and liability for sexual harassment under Title VII of the Civil Rights Act of 1964¹. European Union nations have taken an anti-“mobbing” (anti-bullying) approach to workplace sexual harassment, defining sexual harassment as an unacceptable affront to human dignity. We advocate for a more European approach to dealing with workplace fraternization and sexual harassment policies. As anti-sexual harassment law currently stands under Title VII, employers are left fearing that employee trysts that occur outside of work will spill over into the workplace and lead to liability for the employer under Title VII. This concern leads employers to write employee non-fraternization policies that extend to activities after the workday ends and that take place outside of the office. US anti-fraternization policies are flawed in that they fail to root out secretive liaisons between workers who are either involved in extra-marital affairs or who are violating the policy and don't want to get caught and these policies serve to unnecessarily restrict employee conduct and associations both in and out of the workplace. Given the large number of

* Associate Professor, Kutztown University, Department of Business Administration, 232 deFrancesco, PO Box 730, Kutztown University, Kutztown, PA 19530, 610-683-4587, steslow@kutztown.edu.

** Assistant Professor, The College of New Jersey, School of Business, PO Box 7718, Ewing, NJ 08628-0718, 609-771-2175, lasher@tcnj.edu.

*** The College of New Jersey, Class of 2012.

¹ 42 U.S.C. § 2000e-2(a) (2010) (Hereafter referred to as “Title VII.”).

hours many Americans work,² this restriction on employee social behavior takes away from worker satisfaction. Additionally, stringent employee fraternization policies leave human resource professionals chasing harmless conduct.

The original focus of sexual harassment protection in the United States was women; although courts have since decided cases in which men were the harassment victims, the *Meritor v. Vinson*³ case in 1986 and the Clarence Thomas judicial confirmation hearings in 1991 catapulted sexual harassment onto center stage as a women's issue⁴. The EU approach appears gender⁵ neutral in that workplace sexual harassment is but one type of harassment considered destructive and therefore unacceptable in the workplace environment. While in the US, courts have had to acknowledge separate causes of action for sexual harassment, racial harassment, and disability harassment among others, the EU sweeps most harassment under this one anti-mobbing umbrella.

At least one U.S. commentator finds the European approach troubling because she fears that subsuming sexual harassment under the broad category of anti-bullying statutes means that the law will no longer serve to root out workplace sexual harassment and gender inequality.⁶ Instead, by removing the feminist underpinnings from anti-sexual harassment policies by making sexual harassment look like other forms of harassment, Clarke believes that women will lose vital workplace protections. To the extent that the EU's approach is starting to become more "Americanized" by recognizing workplace sexual harassment as a problem that requires legal treatment distinct from other forms of workplace harassment that would be a plus under this analysis. In Clarke's view, to the extent that some US state legislators are proposing so-called "Healthy Workplace Acts" to outlaw generally workplace bullying, abuse, and harassment⁷ this shift toward EU law would be a minus because of her concern that women's issues will be subsumed and forgotten under the more general anti-bullying protections.

Justice Scalia, in his majority opinion in *Oncale v. Sundowner Offshore Services, Inc.*, a case which held that same gender sexual harassment can violate Title VII, argued that Title VII is not "a general civility code for the American workplace"⁸ and went on to say that, "The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the

² According to Stephanie Coontz, Opinion, *Why Gender Equality Stalled*, N.Y. TIMES, FEB. 17, 2013, at SR1, almost forty percent of men in professional jobs and twenty-five percent of men in so-called middle income positions work fifty or more hours per week. American Time Use Survey, B.L.S. (2010), <http://data.bls.gov/cgi-bin/print.pl/tus/charts/home.htm>.

³ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64-65 (1986).

⁴ The EEOC Guidelines define sexual harassment as "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. §1604.11(a) (1999).

⁵ Although Title VII uses the term "sex" as one of the protected categories for outlawing workplace discrimination, this paper reflects a more modern approach and uses "gender" interchangeably with "sex".

⁶ Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L. J. 1219 (2011).

⁷ See, e.g., New Jersey's Healthy Workplace Act, Assemb., No. 1551, (N.J. 2008).

⁸ *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998).

workplace; it forbids only behavior so objectively offensive as to alter the “conditions” of the victim’s employment.”⁹ The current state of sexual harassment law, however, leaves employers little choice but to have anti-fraternization policies that do amount to asexual work codes, and ineffective ones at that. Although US law does not recognize a right to privacy in the workplace, asking workers to refrain from or to report workplace romances clearly feels like an infringement on privacy, drives workplace relationships “underground,” and leads to employers banning “a broad range of relatively harmless sexual conduct, even where that conduct does not threaten gender equality on the job.”¹⁰

Some commentators have noted that the US attitude about the possibility of sexual liaisons among co-workers reflects the “moralistic, puritanical approach” to sexuality that runs throughout US culture.¹¹ Furthermore, “Prohibiting sexual conduct at work falls neatly within the neo-Taylorist project of advancing efficiency within the workplace by excluding irrational and emotional behavior.”¹² Given our global economy today, no one would dispute the importance of understanding the laws of other nations; especially since US companies may have subsidiaries and employees in other countries. When it comes to sexual harassment law, perhaps the US should consider borrowing from the EU.

SEXUAL HARASSMENT AND THE EU

Even though the EU has been slower to legislate policies and laws than the US,¹³ there has been significant progress by the EU over the last two decades to combat the issue of sexual harassment in the workplace. Since 1992 there have been many initiatives to address the problem including the European Parliament Resolution, the medium-term action program, EU “soft law” (non-binding) measures¹⁴ and the 1996 consultations of management and labor on the prevention of sexual harassment at work.¹⁵ Our focus will be on two of the more significant steps taken to reduce the occurrence of the problem: the comprehensive 1998 European Commission report on sexual harassment in the workplace in the EU and the 2002 EU Equal Treatment Directive.

The 1998 report is a summary and analysis of all major research done in the field in EU member states between 1987 and 1997. The 1998 report is significant because it compiled and

⁹ *Id.* at 81.

¹⁰ Linda Clarke, *Sexual Harassment Law in the United States, the United Kingdom, and the European Union: Discriminatory Wrongs and Workplace Harms*, 36 COMMON L. WORLD REV. 86 (2007) discussing V. Schultz, ‘Reconceptualizing Sexual Harassment Law’ 107 YALE L.J. 1683 (1998); V. Schultz, ‘The Sanitized Workplace’ 112 YALE L.J. 2001 (2003).

¹¹ L. Clarke, *Id.* at 88. See also C. Boyd, *The Debate Over the Prohibition of Romance in the Workplace*, 97 J. BUS. ETHICS, 326 (2010), and KATHRIN S. ZIPPEL, *THE POLITICS OF SEXUAL HARASSMENT* ix (2006), and Matthew Hutson, *Still Puritan After All These Years*, N.Y. TIMES, August 5, 2012, at SR4.

¹² *Id.*

¹³ Zippel, *supra* note 11, at 18.

¹⁴ Soft law measures are not mandatory and there are no sanctions if EU countries do not act on them. See Zippel, *supra* note 11, at 96.

¹⁵ *Sexual Harassment in the Workplace in the European Union*, European Commission (1998), available at <http://www.un.org/womenwatch/osagi/pdf/shworkpl.pdf>.

analyzed a decade of research in addition to addressing potential roadblocks in the movement toward a workplace with minimal sexual harassment. The 2002 Directive is a law handed down from the EU to member states.

A. Summary of the 1998 EU Report:

The 1998 report divides its findings into two categories: the Dutch studies of northern EU countries including Austria, Belgium, Denmark, Finland, Germany, Ireland, Norway, Sweden and the UK; and the Spanish studies of five southern EU countries including Spain, France, Greece, Italy and Portugal. The Dutch and Spanish studies both produced a number of noteworthy findings, such as a lack of a universal definition of harassment.¹⁶ Even though in 1991 the EU Commission defined sexual harassment, the 1991 EU Commission definition clearly had not been set as a foundation for research, policy and law. This can be seen by the 1992 updated definitions of harassment set by Belgium and Austria,¹⁷ as well as France's conclusion that the EU definition is inadequate in that under the definition harassment occurs only when the intent is sex.¹⁸

Through analysis of jobs such as retail and healthcare, data from the 1998 report indicate that somewhere between 40% and 50% of female employees had suffered some form of sexual harassment.¹⁹ The lowest reports of harassment came from gender diverse workplaces, whereas the highest reports of harassment stemmed from more homogenous firms.²⁰ Many of the countries also reported whether the harasser was a colleague or supervisor. This question resulted in a wide variety of responses.

Let us further analyze some of the individual countries' results from the 1998 report in order to better understand how EU law has affected workplace harassment in different areas. Of the northern EU countries, the German national study reported the highest percentage of women that had personally experienced sexually harassing behavior in the workplace (72%).²¹ This inordinately high percentage of women reporting being harassed can probably be attributed to the fact that nearly a third of women considered staring, whistling, jokes, and accidental body brushes all to be forms of sexual harassment. Germany was able to collect a representative sample by polling women from ten separate industrial sectors, with major differences arising between occupations. For example, women in working-class jobs faced physical touching including pinching and touching of body parts, while women in white-collar jobs faced more jokes of a sexual nature.²² This statistic is consistent with the general trend that the more

¹⁶ *Id.* at iii.

¹⁷ Zippel, *supra* note 11, at 83 (2006).

¹⁸ European Commission, *supra* note 15, at iii, Zippel, *supra* note 11, at 114.

¹⁹ European Commission, *supra* note 15, at iii.

²⁰ In her seminal article on the elimination of sexuality in the American workplace, Vicki Schultz also concludes that better male-female integration of the workplace would lead to fewer claims of sexual harassment even in workplace environments where employee dating relationships are permitted. Schultz advocates for differing standards of proof in sexual harassment cases related to the level of separation by gender of the employer's workforce with a lower standard of proof required for a highly gender separated workforce and a higher standard of proof required for a mixed workforce. See Vicki Schultz, *The Sanitized Workplace*, 112 YALE L. J. 2061 (2003).

²¹ European Commission, *supra* note 15, at 78.

²² *Id.* at 79.

education and training women received, the less likely they were to be harassed. There was also a discrepancy between public and private sector employees, with the private sector women reporting that they faced much less harassment than the public sector women.²³ This could potentially be because public sector employees felt more secure in their jobs and thus freer to report that they had been harassed. In both the public and private sector unionized employees were surveyed.²⁴ In Europe unions are supposed to play a role in resolving workplace issues.²⁵ In the United States, unions had such an extensive history of discriminating against anyone who was not a white male that unions were included under the proscriptions against discrimination contained in Title VII of the Civil Rights Act of 1964.²⁶ Given this history, there is clearly a significant difference between the anticipated role of unions in the EU and the United States, specifically on the issue of protecting employees against certain workplace harms.

The Denmark national survey produced quite different results than Germany, with only 11% of females reporting they faced sexual harassment in the workplace.²⁷ One thousand, one hundred and seventy of the 1300 women reported some form of physical touching and two-thirds of all women were harassed by a superior. However, this huge discrepancy between Germany and Denmark can most likely be explained through the smaller scale studies done in Denmark. Larsen's research shows that most respondents to the study did not expect to be asked about the topic, and more importantly were quite unsure what kinds of behavior are regarded as sexual harassment.²⁸ Women and men alike seemed to trivialize the problem and believe that both genders were responsible for sexual harassment to an extent. This could potentially explain the wide margin of reported harassment between Denmark and Germany; Germany's women clearly have a broader mental definition for sexual harassment.

While many countries have conducted nation wide surveys, no EU nation has conducted more research on sexual harassment in the workplace than the United Kingdom. In addition to its nation-wide study, the UK has also concentrated on particular branches of the workforce including health care workers, police, retail, and office workers.²⁹ The UK also specifically polled lesbians and gay men on the topic of workplace harassment. This is significant because it gives insight into how different work environments lead to varying scales of harassment. The nation-wide study reached out to manufacturing, financial services, food services, and government and pharmaceutical jobs. The results from this study have 54% of women and 9% of men reporting sexual harassment in the workplace, with 20% having experienced unwanted physical contact. Clearly the UK does not see sexual harassment as a strictly feminine issue, as the national study also polled men at work. The UK also provided information on employers' policies, with 40% of firms having sexual harassment policies. Employers reported providing quick and extensive investigations of complaints and outlets for harassment victims such as

²³ *Id.* at 81, 82.

²⁴ *Id.* at 204.

²⁵ Anita Bernstein, *Law, Culture and Harassment*, 142 U. PA. L. REV. 1227, 1286 (1994).

²⁶ 42 U.S.C. § 2000e-2c (2010).

²⁷ European Commission, *supra* note 15, at 63.

²⁸ *Id.* at 64. Larsen's study is under the smaller scale non-national study associated with Denmark.

²⁹ *Id.* at 133.

counseling services, and 15% of employers required awareness training for higher-level employees.³⁰

B. History of the 2002 EU Directive:

The path to the 2002 EU Directive was met with much resistance throughout the years. In fact, just four years prior the majority of member states opposed a measure because of individual country differences. The efforts to combat sexual harassment in the workplace began with the 1976 Directive on equal treatment and continued with the soft law measures of the 1990s. Up until the soft law measures, the EU brushed off sexual harassment for a number of reasons. The 1991 US Senate hearings on Anita Hill and Clarence Thomas seemed to delegitimize the issue and paint sexual harassment as a strictly American problem, with Americans being too cautious about sexual expression.³¹ The soft law measures encouraged member states to form laws against sexual harassment to give victims a legal outlet, and to have state agencies ensure these policies are followed. The soft law measures were good in theory, however were not binding for member states.

The 2002 EU Equal Treatment Directive addresses many of the issues brought up in the 1998 report. The Directive created a uniform instrument that tackles workplace sexual harassment for all member states by instituting new minimum standards for gender equality legislation.³² These standards had to be met by 2005 and member states were also required to have separate bodies to implement and supervise EU gender equality law.³³ The Directive states a binding definition of sexual harassment for all EU states. “Harassment” is defined as taking place “where an unwanted conduct relating to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.” “Sexual harassment” is defined to exist “where any form of unwanted verbal or nonverbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.”³⁴

The definition combined the US model of specific gendered discrimination and the European concept of harassment as a violation of dignity. According to the European Parliament and EU Commission a violation of dignity constitutes a breach of the principle of equal treatment between men and women at work.³⁵ The Directive also shifted the burden of proof in sexual harassment cases from the employee to the employer, an important reversal of previous policy. The 2002 Directive eliminated a ceiling limit of compensation in discrimination cases, another important step in combatting harassment.³⁶

³⁰ *Id.* at 134.

³¹ Zippel, *supra* note 11, at 100.

³² *Id.* at 116.

³³ *Id.*

³⁴ See James M. Owens, et al., *Sexual Harassment in the European Union: The Dawning of a New Era*, S.A.M. ADVANCED MGT. J. 4-11, (Winter 2004). (citing European Parliament and European Council, Directive Amending Council Directive 76/207/EEC. (2002)).

³⁵ European Commission, *supra* note 15, at iii.

³⁶ Zippel, *supra* note 11, at 108.

Shifting the burden of proof to the employer should address one issue EU women have faced: a greater risk of return libel suits.³⁷ For example, the French Penal code serves as an exemplary model for other EU members. However, once an accused man has been acquitted, French law permits him to file a defamation lawsuit in return. Return suits have even resulted in fines and potential jail time for sexual harassment *victims*.³⁸ These return libel suits happen quite frequently, and while judges are sometimes lenient and sympathetic in the name of justice, this is not always the case.³⁹ It should also lessen incentive for litigation, which has been shown to inhibit female hires.⁴⁰ Essentially, in certain instances the litigation-heavy mentality can potentially deter an employer from hiring females out of fear of future harassment lawsuits. However, making the law binding, shifting the burden of proof and focusing on a violation of dignity standard should lessen the frequency of sexual harassment claims. This is likely because the new standards should change both employers and potential harassers' mindsets about harassment as well as return libel suits. Unlike the United States, in the UK and many other nations, the winner in a lawsuit pays the loser's attorney fees. This also discourages people from filing spurious claims.

SEXUAL HARASSMENT LAW IN THE UNITED KINGDOM

Legal scholars often look to English law when seeking comparisons or guidance on the path that United States' law should take. This is because of the shared history between the two nations as well as the recognition that the United States' common law legal system is descended from the English system. However, in the over two hundred years since the United States won independence the legal systems have certainly diverged. Not only has time caused this divergence; the United Kingdom's membership in the European Union with its commitment to following EU laws and Directives has led to differences between the two nations' laws as well.

One area in which these differences can be seen is the area of sexual harassment law. While U.S law defines two types of sexual harassment (quid pro quo and hostile environment), UK law follows the harm to one's dignity approach espoused by the EU. The UK has followed the EU "2002 Equal Treatment Directive, [which] required the twenty-five member states to revise or adopt sexual harassment laws by October 2005."⁴¹ The UK outlaws harassment on grounds of sex as well as sexual harassment. The latter prohibits conduct that is sexual in nature and has the effect of harassing the victim.⁴² The former is problematic given the history of and development of sexual harassment law in the UK.

Even before the Equal Treatment Directive, the UK did outlaw unequal treatment based on gender in the workplace; however, plaintiffs frequently lost their cases because tribunals made determinations based on a mythical "comparator" standard under which the tribunal would

³⁷ *Id.* at 109.

³⁸ *Id.* at 109.

³⁹ *Id.* at 109. In a November 2004 case, not only was the judge unsympathetic, he imposed an 11,500 Euro fine to the victim in a return libel suit.

⁴⁰ *Id.* at 108.

⁴¹ Zippel, *supra* note 11, at 83.

⁴² L. Clarke, *supra* note 10, at 352.

ask whether a male in the same position might have been subject to the same treatment. If the tribunal answered “yes,” no gender-based harassment would be found to have occurred. For example, if a company has a policy that someone who dresses inappropriately will be dismissed for violating the dress code and a female employee comes to work in jeans and is fired, there would be no discrimination as long as the tribunal hearing the case believes that the employer would have dismissed a mythical male employee (the “comparator”) who came to work in jeans.

The concept of the comparator becomes more complicated where relationships are involved, however. For example, if a lower level female employee were fired from her job because of rumors that she was having an affair with a supervisory level employee, in violation of company policy, a tribunal hearing a claim of sex discrimination brought by the terminated female would ask whether the employer would have fired a hypothetical lower level male employee rumored to be having a homosexual affair with this supervisor. If the conclusion the tribunal arrives at is “yes” then the tribunal will not find sex discrimination since the tribunal is convinced that there would not be an unequal treatment of men and women in this workplace.⁴³ It can be argued that recasting the situation in this way does not really answer the question of whether the female employee was treated differently based on her gender. There is concern that the comparator concept will carry over to the “on grounds of sex” type of harassment.⁴⁴ If tribunals continue to invent comparators that don’t truly reflect the situations presented, then it becomes less likely that a woman’s dignity would be viewed as being assaulted. There seems to be no allowance in the comparator standard for the differences in perception of men and women, or, as it is known in the US, the “reasonable victim” standard.⁴⁵

FRANCE AND OTHER EU NATIONS:

While it is difficult to generalize sexual harassment law and all of its variations within the rest of the European Union, there are some common themes which can be gleaned from the research. As stated above, the Equal Treatment Directive of the EU European Parliament and Council imposed requirements on its member states regarding equal treatment.⁴⁶ The EU became more proactive in 2002 when it amended the Directive to define “harassment” and “sexual harassment,” to establish judicial and enforcement procedures relating to harassment claims as well as requiring compensation for victims of discrimination and harassment.⁴⁷

The definitions of harassment and sexual harassment contained in the 2002 Directive reveal both similarities and differences compared to U.S. Title VII interpretations. As previously stated, the 2002 Directive defines “harassment” as taking place “where an unwanted conduct relating to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.” “Sexual harassment” is defined to exist “where any form of unwanted verbal or nonverbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating

⁴³ *Id.* at 362.

⁴⁴ *Id.* at 367.

⁴⁵ *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).

⁴⁶ *Owens et al.*, *supra*, note 34, at 4.

⁴⁷ *Id.*

the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.”⁴⁸

One word is prevalent in the EU definitions : “dignity.” Much of the sexual harassment law in the EU is seen as an affront to the dignity of the person. This focus on human dignity creates a difference between European and U.S. sexual harassment law, which has a narrower focus on harassment based on sex, a protected trait under Title VII. For example, while France specifically prohibited quid pro quo sexual harassment in its Penal Code,⁴⁹ the French Labor Code prohibits “moral harassment,” defined as conduct “liable to harm his rights and his dignity.”⁵⁰

The crime of sexual harassment under Article 222-33 of the French Penal Code was ruled unconstitutionally vague on May 4, 2012 by France’s Constitutional Council.⁵¹ Legislators were forced to repeal the law, but on July 12, 2012, the French Senate passed a new version of the law, which contains three levels of prohibited acts.⁵² The previous French prohibition against criminal quid pro quo sexual harassment was categorized as a type of sexual violence under the Penal Code and referred to the “abuse of authority” in coercing someone to grant sexual favors.⁵³ Interestingly, the European Association Against Violence Towards Women at Work reported during arguments before the Constitutional Council that the old criminal statute had resulted in only 54 convictions since its initial passage in 1992.⁵⁴

The new sexual harassment law is more specific and attempts to address previous criticisms by feminists.⁵⁵ The first tier of prohibited conduct is “repeatedly imposing yourself on a person through degrading or humiliating speech or physical motions, and being detrimental *towards their dignity* (emphasis added) and creating an environment they find intimidating, hostile or offensive.” Offenders face one year in prison and a 15,000 Euro fine.⁵⁶ The second level of prohibited conduct is “ordering or threatening a person in order to obtain acts of a sexual nature for yourself or another person.” Violators of this level face two years in prison and a

⁴⁸ *Id.* at 4-5, (citing European Parliament and European Council, Directive Amending Council Directive 76/207/EEC. (2002)).

⁴⁹ See Tom Tudor, *Global Issues of Sexual Harassment in the Workplace*, FRANKLIN BUS. & L. J. 51 (Issue 4 2010).

⁵⁰ See L. Clarke, *supra* note 10, at 79, 91 (2007).

⁵¹ Rebecca DiLeonardo, *France repeals sexual harassment law*, JURIST, May 6, 2012, available at: <http://jurist.org/paperchase/2012/05/france-repeals-sexual-harrassment-law.php>.

⁵² Heather McCrobie, *How France’s Sexual Harassment Law Took a Five-Week Hiatus*, <http://www.newstatesman.com/blogs/politics/2012/07/how-frances-sexual-harassment-law-took-five-week-hiatus> (Last visited February 20, 2013).

⁵³ See Abigail C. Saguy, *Sexual Harassment in France and the United States: Activists and Public Figures Defend Their Definitions*, RETHINKING COMPARATIVE CULTURAL SOCIOLOGY: POLITICS AND REPERTOIRES OF EVALUATION IN FRANCE AND THE U.S., 56-93, Michèle Lamont and Laurent Thévenot, Ed. (Cambridge University Press and Presses de la Maison des Sciences de l’Homme 2000).

⁵⁴ *France Drops Sex Harassment Law, Angers Feminists*, <http://ca.reuters.com/article/topNews/idCABRE84317V20120504?sp=true> (last visited February 20, 2013).

⁵⁵ McCrobie, *supra* note 52.

⁵⁶ Elsa Carpenter, *Sexual Harassment Finally Makes it Back into French Law*, THE RIVIERA TIMES, June 26, 2012, available at <http://www.rivieratimes.com/index.php/provence-cote-dazur-article/items/sexual-harassment-finally-makes-it-back-into-french-law.html>.

30,000 Euro fine.⁵⁷ The final tier adds a new level of protection against sexual harassment and prohibits “abuse of authority and power” by employers. This level can be imposed in addition to the first two prohibitions and offenders may be fined up to 45,000 Euros.⁵⁸

In both France (on the civil side) and Germany, the dignity framework in workplace harassment is the primary focus.⁵⁹ Other countries⁶⁰ which specifically have anti-bullying regulations are Austria, Belgium, Denmark, Finland, the Netherlands, Sweden, and the U.K. (discussed above).⁶¹ Another way to characterize the concept of “dignity” in European harassment law is the term “anti-mobbing” (bullying).⁶² “Mobbing” is a term first used in industrial psychology literature based upon observations of the behavior of a herd of animals uniting against a newcomer and attacking it.⁶³ This concept broadens the impact of harassment to include behaviors which are not based on a sexual motive, or sex being a protected trait. For example, the Swedish regulations on anti-mobbing refer to the terms “insults”, “gross lack of respect,” “degradation,” and “respect for people’s right to personal integrity.”⁶⁴

While there are similarities between US and EU sexual harassment law, it is evident that the European approach continues to hold on to the non-sexual concept of dignity. Would it be beneficial for the US to consider implementation of the “affront to dignity” model? Perhaps in some types of US sexual harassment cases, adoption of an anti-bullying, dignity based standard should be considered.

WORKPLACE ROMANCE AND SEXUAL HARASSMENT LAW

Compared with the EU, the United States has developed an area of hostile work environment sexual harassment law based on workplace relationships. One cause of action resulting from consensual relationships may occur after the relationship ends and one party continues to pursue the other. Or, one of the parties, particularly a subordinate in a relationship with a superior, may claim the relationship was not consensual or welcome.⁶⁵ Another recognized claim is that of so-called “bystander hostile work environment,” when a co-worker witnesses the harassment, or the remnants of a consensual relationship “gone bad.”⁶⁶ Because workplace relationships may subject employers to liability for even initially consensual romantic contact, many human resources professionals are trained to identify and monitor them. As a

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ L. Clarke, *supra* note 10, at 80.

⁶⁰ For a comprehensive review and analysis of the development of Continental Europe’s harassment law, see Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law, Discrimination versus Dignity*, 9 COLUMBIA J. EUR. L. 241, 253 (2003).

⁶¹ J. Clarke, *supra* note 6, at 1219, 1231 (2011).

⁶² L. Clarke, *supra* note 10, at 80.

⁶³ See Friedman & Whitman, *supra* note 60, at 253.

⁶⁴ *Id.* at 262.

⁶⁵ *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

⁶⁶ See Christopher M. O’Connor, *Stop Harassing or We’ll Both Sue: Bystander Injury for Sexual Harassment*, 50 CASE W. RES. 501 (1999).

result, most of the literature on workplace romances is from the United States.⁶⁷ Practitioner articles suggest human resources professionals approach the dating issue head-on, meeting with the employees, and having them sign “dating contracts” or “cupid contracts” indicating the relationship is consensual and that the parties understand the company’s sexual harassment policy.⁶⁸

Even high-level executives are subject to having their relationships scrutinized and are at risk for losing their jobs. A recent example of this is former Chief Executive of Stryker Corp. Stephen MacMillan, who resigned amidst a relationship with a former Stryker employee. While his divorce was pending, Stryker went to the Board Chairman and the Board Governance and Nominating Committee head seeking permission to date a company flight attendant. He was granted permission to date her as long as the flight attendant left the company’s employ. Stryker’s girlfriend did in fact quit but the Board subsequently received a complaint about the woman’s treatment in this matter and the Board launched an investigation about whether the relationship began before MacMillan reported it. Ultimately MacMillan offered his resignation even though he was cleared of wrongdoing.⁶⁹

Boyd proposes several reasons why monitoring of workplace romance appears to be “US-centric”: the tendency to remove intimacy and emotion from the workplace; the history of the United States, specifically the influence of Puritanism; radical feminism and their influence in creating sexual harassment law; the move towards political correctness and the “litigious” nature of the US with regard to sexual harassment.⁷⁰ The aforementioned issue of American prudishness, particularly in the workplace is not new; in fact it has been around since the early 1900’s as a part of the bureaucratization process in an effort to establish that sex has no business in the workplace.⁷¹ According to the Bureau of National Affairs, “The workplace is not designed to accommodate people falling in love. Love is an irrational emotion; the workplace is built on a foundation of rationality.”⁷² This attitude along with fear of litigation has led employers to institute sexual harassment policies that allow management to regulate and police workplace conduct and sexual behavior that may not be illegal or damaging to gender equality. This prudishness has come to the point that employers have begun to ban any intimate relationships in the workplace, sometimes resulting in zero tolerance policies.⁷³ Furthermore, employees have been punished or even fired irrespective of whether the actions were linked to sex discrimination of any kind.⁷⁴ The problem associated with completely devaluing workplace intimacy is that it

⁶⁷ “...[O]ut of total of some 400 articles on the topic there is just one article from outside the US for every 10 articles originating from the United States.” C. Boyd, *supra* note 11, at 326.

⁶⁸ See Susan Adams, *How to Have a Successful Office Romance*, <http://www.forbes.com/sites/susanadams/2011/08/31/how-to-have-a-successful-office-romance/> (last visited February 20, 2013).

⁶⁹ Joann S. Lublin and Christopher Weaver, *CEO Sought Nod for Romance*, WALL ST. J., MAY 23, 2012, at A1.

⁷⁰ Boyd, *supra* note 11, at 326.

⁷¹ Schultz, *supra* note 20 at 2072.

⁷² *Id.* at 2063.

⁷³ *Id.* at 2065.

⁷⁴ *Id.*

can also prevent healthy and normal friendships from occurring simply out of fear of harassment claims in a tense work environment.

The workplace is a fertile ground for meeting marriage partners. Boyd cites a 2003 American Management Association survey that indicated “that 44% of workplace romances led to marriage, while another 23% led to a long-term relationship.”⁷⁵ In supporting workplace romances, Boyd also relies on a 2009 piece by Pierce and Agunis when he states that “there are 10 million new workplace romances a year in the US compared to an average of 14,200 sexual harassment claims per year, an incidence of one harassment case per 704 romances.”⁷⁶ Thus, in the US workplace, avoidance of anything sexual that might interfere with workplace efficiency outweighs building what might very well be a happier and more productive workplace environment. Of course “happy” is not the way traditional organization experts described the American work environment. The emphasis has been and remains one of productivity, and anything that can possibly make the workplace less productive is a threat.

There is perhaps an additional factor affecting the regulation of workplace romance: the legal framework, both statutory (such as Title VII) and our court system in the United States permit lawsuits and redress for sexual harassment. As summarized above, the EU has evolved in a different manner, and while it is difficult to make generalizations across the countries in the EU, certain marked differences exist between the United States and the European Union. While it appears that many aspects of sexual harassment law in Europe (particularly in Great Britain) are moving towards the U.S. model, within the specific area of workplace relationships we propose that the United States become more “European” in approach and enforcement. We make this proposal for several reasons: 1) healthy consensual relationships in the workplace do not pose as much of a potential for employer liability; 2) employers expend unnecessary resources monitoring these relationships when those resources could be better utilized in more egregious cases; 3) as employees spend more time at the workplace, it becomes a common place to form relationships⁷⁷; and 4) the European model of anti-bullying would protect employees in the event negative consequences occur in a consensual romantic relationship.

There is opposition to assimilation of sexual harassment into the “universal turn”⁷⁸ of the dignity-based, anti-bullying framework. Feminist legal and political scholars contend that universalizing workplace protections under the anti-bullying movement waters down discrimination based on gender and makes it “no worse than a personality conflict.”⁷⁹ While there must be caution when proceeding with wholesale changes to sexual harassment law in the United States,⁸⁰ it is perhaps appropriate to at least consider that females have made strides in the workplace, that sexual harassment law applies to males as much as females, and that it is difficult in some situations to pinpoint or disentangle the sexual nature of a workplace conflict from plain harassment.

⁷⁵ Boyd, *supra* note 11, at 333.

⁷⁶ *Id.* at 332-333.

⁷⁷ *Id.*; See also <http://www.mamashealth.com/dating/coworker/marriage.asp> (last visited April 20, 2012).

⁷⁸ This term was coined by Jessica A. Clark: “These proposals are part of a larger trend—which I refer to as the ‘universal turn’—of expanding civil rights protections beyond rules that prohibit discrimination to rules of universal applicability.” J. Clark, *supra* note 6, at 1221.

⁷⁹ *Id.* at 1219-20.

⁸⁰ *Id.* at 1287.

Choosing between the anti-bullying model and the sexual harassment US model does not necessarily have to be a choice between one or the other. “In effect, there are now two paradigms for harassment law in the western world: an American anti-discrimination paradigm and a Continental dignity paradigm. In principle these two paradigms should not be mutually exclusive: It ought to be possible both to condemn discrimination and to further individual dignity”.⁸¹ There are types of hostile work environment cases which may not fit neatly into the anti-bullying model. For example, cases of “paramour favoritism,” in which a supervisor grants preferential treatment to a subordinate as a result of a consensual relationship, has been recognized as a possible hostile work environment situation by the EEOC.⁸² Specifically, if the granting of preferential treatment in return for sexual favors is widespread in a workplace, both male and female colleagues who do not welcome this conduct can establish a hostile work environment in violation of Title VII regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed the sexual favors. Although most courts addressing whether this type of favoritism is actionable under Title VII have rejected the EEOC arguments, at least one court has found that so-called paramour favoritism is a type of hostile work environment sexual harassment.⁸³

Since bullying and sexual harassment are not identical, we advocate a balanced, rational approach to workplace relationships and sexual harassment monitoring. This approach does not necessarily require legislation, although adoption of an anti-bullying statute would facilitate implementation. Human resources managers can act as the front lines for implementation with or without legislation. Many employer policies already contain workplace civility codes, as well as sexual harassment guidelines. Employees are trained as to what is appropriate conduct. Perhaps consensual relationships, particularly those not in a superior-subordinate position, should not be interfered with by the employer. (Due to the potential for claims of paramour favoritism and the negative impact that this could have on employee morale, superior-subordinate relationships may call for closer monitoring.) If there is a break-up and some negative behaviors by one or both of the parties involved, it should be viewed as a violation of workplace civility or general harassment. Normal disciplinary procedures can be implemented.

It must be conceded that the approach outlined above could produce some negative consequences, such as increased litigation against employers as a result of relationships which have ended badly. However, we believe employees who are the subject of harassment (sexual and otherwise) and employers who carefully monitor all types of bullying would be protected as well, if not more, under our suggested approach.

Interestingly, in a recent study conducted by Workplace Options and Public Policy Polling, 71% of “Millennials” aged 18-29 view office relationships as positive, and 84% of them would engage in a romantic relationship with a co-worker.⁸⁴ The numbers supporting office

⁸¹ Friedman & Whitman, *supra* note 60, at 246.

⁸² See Policy Guidance on Employer Liability under Title VII for Sexual Favoritism, EEOC Notice No. 915-048 (Jan. 12, 1990) available at <http://www.eeoc.gov/policy/docs/sexualfavor.html> .

⁸³ See *Miller v. Department of Corrections*, 115 P 3d 77 (Cal. 2005). For an in-depth analysis of the Miller case and the EEOC guidelines on paramour favoritism, see Cheryl L. Howard, *Romeo and Juliets, a Modern Workplace Tragedy*, 9 U. PA. J. LAB. & EMP. L. 805 (2007).

⁸⁴ *Millennials More Likely to be Smitten with Superiors, Co-Workers* <http://www.workplaceoptions.com/news/press-releases/press->

romance were lower for older workers.⁸⁵ This study indicates that perhaps HR policies need to evolve away from relationship prohibition towards training and counsel of employees as to appropriate conduct and treatment of harassment as a result of relationships under the anti-bullying model.

This conclusion is further supported in a study by organizational behaviorists.⁸⁶ After presenting several different workplace romance scenarios, it was concluded that despite the legal standards, investigators of sexual harassment may condone the behaviors based upon their own ethics. "...[E]mployers, employees, and courts should be aware that sexually harassing behavior stemming from a dissolved workplace romance may be condoned by investigators who have prevailing ethics schemas that inhibit them from perceiving features of the social-sexual conduct as unethical."⁸⁷ This supports our call for implementation of a more general harassment prohibition in that the morals of the sexual aspects of the relationship may be neutralized in the minds of the investigators. Thus, discipline may be meted out in a more impartial manner.

Some may worry that adopting an anti-bullying or dignity based approach may open the floodgate for litigation. We believe that this is simply untrue for several reasons. First of all, the system in place for proving hostile environment sexual harassment is based on a "reasonable victim" standard. In fact, tort litigation in the United States is based on a "reasonableness" standard and there is no reason why the reasonableness standard should not be extended to evaluating dignity claims. Secondly, while Title VII does allow successful plaintiffs (other than the US government) to recover reasonable attorney's fees,⁸⁸ the United States Supreme Court has held that "a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."⁸⁹ The threat of being assessed defendant's attorney's fees should discourage plaintiffs from filing meritless claims. Finally, a person who is insensitive enough (or a big enough "jerk") to harass someone sexually stands a high probability of being insensitive enough to harass someone based on race or nationality. Why have different causes of action for what really is unacceptable workplace behavior that does interfere with the productive working environment for employees. In the U.S. workplace, with its emphasis on efficiency and productivity, it makes sense to recognize that workplace bullying, or violating someone's dignity, is disruptive and stopping this behavior should not depend on whether it fits into a very particular category of legal cause of action.

CONCLUSION

release.asp?id=41EF97FCB0FF4EBF81C1&title=%20Millennials%20Face%20Uphill%20Battle%20to%20Wow%20Co-Workers%20with%20Work%20Ethic (last visited February 20, 2013).

⁸⁵ *Id.*

⁸⁶ Charles A. Pierce & Herman Aguinis, *Legal Standards, Ethical Standards, and Responses to Socio-Sexual Conduct at Work*, 26 J. ORG. BEH. 727 (2005).

⁸⁷ *Id.* at 731.

⁸⁸ 42 U.S.C. § 2000e-5(k) (2010).

⁸⁹ *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 421 (1978).

In the case of *Grutter v. Bollinger*,⁹⁰ Justice O'Connor, writing for the majority in finding that using race as part of admissions criteria for law school admission was constitutionally acceptable, suggested "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today".⁹¹ Perhaps this statement is analogous to the use of gender in regulating and litigating workplace harassment. Based on the commentary, the time is likely not appropriate to move to a pure anti-bullying model in the U.S. Sexual-based harassment appears to be too ingrained in our legal framework. This does not mean, however that the law governing harassment in the workplace should not evolve. Perhaps the regulation of workplace relationships is an appropriate place to reexamine our focus, and consideration of the European anti-bullying model provides a suggested course.

⁹⁰ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁹¹ *Id.* at 342.