The Yankee Woman In King Arthur’s Court—What The United States and The United Kingdom Can Learn From Each Other About Sexual Harassment Law†

Toni P. Lester*

INTRODUCTION

Sexual harassment is an on-the-job hazard faced by working women everywhere.1 One study of approximately 8,500 American federal government workers showed that almost one-half of the women respondents reported having been subjected to sexual harassment.2 The problem is not limited to women in the U.S. labor market. A recent report published by the International Labor Organization disclosed that a significant number of women in other western countries also have experienced some form of workplace sexual harassment.3

† Copyright © 1994 Toni P. Lester.

* Asst. Prof. of Law, Johnson Term Chairholder and former Dill International Research Fellow (Babson College); (Georgetown University); Juris Doctor (Georgetown University Law Center). The author wishes to thank Alice Leonard, Deputy General Counsel for the U.K. Equal Opportunities Commission, and Tess Gill, barrister and member of the European Economic Community’s Equal Opportunity Unit, for their advice on U.K. and EEC law. An earlier version of the EC law section of this article was presented at the Critical Legal Studies Conference held at New College in Oxford in 1993. A portion of that version, entitled, The European Economic Community’s Code of Conduct On Sexual Harassment—Will It Help Or Hurt Harassment Victims? was published in London by the NEW LAW JOURNAL in October, 1993.

1 Although both men and women can be harassed sexually, women appear to be harassed more often than men. See U.S. Merit Systems Protection Board, Sexual Harassment in the Federal Government: An Update 2 (1988) [hereinafter 1988 Merit Report]. Forty-two percent of the women and 14% of the male respondents reported being subjected to some kind of sexual harassment. These results were virtually the same as the results of an earlier study conducted by the same agency. See U.S. Merit Systems Protection Board, Sexual Harassment in the Federal Workplace, Is it a Problem?—A Report of the U.S. Merit Systems Protection Board 2-3 (1981) [hereinafter 1981 Merit Report] (Out of 23,000 federal government workers surveyed, 42% of the women and 15% of the male respondents reported being sexually harassed). This Article, therefore, will focus on the sexual harassment of women.

2 1988 Merit Report, supra note 1, at 3.

Sexual harassment particularly is pervasive in the United Kingdom, one of the European Community's (EC) most important member nations. One study indicated that 73 percent of the 46,000 women who worked for private and public sector U.K. organizations reported having been sexually harassed.4 Other U.K. studies have reported equally disturbing results.5

When women are sexually harassed, they often become depressed, take sick leave, and fail to be productive at work.6 Some remain silent because they fear that their complaints will not be taken seriously, or that they will be reprimanded.7 Others do complain about the problem and ultimately may sue their employers for failing to protect them from the harassment. Courts today can award substantial compensatory and punitive money damages to women who win harassment lawsuits.8

Despite the psychological harm experienced by harassment victims and the monetary costs to companies who fail to prevent it, many businesses still lack sufficient policies to ensure that harassment does not occur. This leaves employers vulnerable to lawsuits and loss of public goodwill. Furthermore, qualified women become wary of working for such employers.

Sexual harassment also is viewed as a major international human rights problem. Laws prohibiting it have been in existence in the United States since the 1970s, and major international organizations like the EC also have condemned it. Although compared to the

---

5 See Preliminary Report by NAS/UWT (1987) cited in Michael Rubenstein, DIGNITY OF WOMEN AT WORK: A REPORT ON THE PROBLEM OF SEXUAL HARASSMENT IN THE MEMBER STATES OF THE EUROPEAN COMMUNITIES 157 (1987) [hereinafter DIGNITY OF WOMEN] (72% of the female secondary school teachers questioned in one survey, and 96% of the women holding non-traditional women’s jobs in another survey reported having been sexually harassed); see also Stewart Tendler, Police Chiefs Start Drive To Wipe Out Sex Harassment, THE TIMES, Jan. 22, 1993, at 5 (harassment ranging from physical abuse to bad language and sexual innuendo was endured by many female officers); see generally Working Conditions—Sexual Harassment, Labour Research, Sept. 1983.
6 1988 Merit Report, supra note 1, at 39–42; see Commission Recommendation of 27 Nov. 1991 On The Protection of the Dignity of Women and Men at Work, 1992 O.J. (L. 49) 3 [hereinafter EEC Recommendation]. “It has a direct impact on the profitability of the enterprise where . . . employees’ productivity is reduced by having to work in a climate in which an individual’s integrity is not respected.” Id.
8 This is especially true in the United States, where the Civil Rights Act Amendments of 1991 enable harassment victims to win up to $300,000 in compensatory and punitive damages. 42 U.S.C. §§ 1981(a)–(b) (1993).
United States, European harassment law is still in its infancy, important developments already have begun to take place in countries like the United Kingdom. As such, the United Kingdom promises to play a major role in the development of European harassment law.

As the business community becomes more globalized, the need to address the problem of sexual harassment is even more critical. There are over 2,000 U.S.-based multinational companies operating in the United Kingdom, and approximately 1,200 U.K. parent companies with manufacturing operations in the United States. Managers in these companies need to develop sexual harassment policies that reflect the laws of both countries. Their employees also need to know what rights and responsibilities they have concerning sexual harassment. Furthermore, other multinational companies that have operations in the United States and the United Kingdom, also can benefit from learning about U.S. and U.K. sexual harassment law. Employees of these multinational corporations certainly will benefit as well.

These two countries can make their own laws more effective by examining their counterparts overseas. Part I of this Article discusses U.S. and U.K. statutory and case law definitions of sexual harassment, the different remedies that are available to sexual harassment victims, and how employer liability issues are addressed in each country. Where appropriate, aspects of EC law that effect U.K. sexual harassment law is examined.

Part II suggests how the laws can be changed to combat sexual harassment in each country more effectively. Part II also proposes a plan of action for companies wishing to eliminate sexual harassment. This Article concludes that at the very minimum, multinational companies should adopt harassment policies that synthesize the highest common principles inherent in the legal and ethical systems of all the countries in which they operate. Policies that fail to accomplish this objective ultimately do a disservice to both employers and employees alike.

---

9 Interview with S. Mukherjee, Membership Department of the American Chamber of Commerce, in the United Kingdom (May 21, 1993) (there are 460 U.S. members of the U.K. Chamber of Commerce and 2,070 non-member U.S. companies operating in the United Kingdom).

I. COMPARING U.S. AND U.K. SEXUAL HARASSMENT LAW

A. U.S. Statutory and Administrative Agency Definitions of Sexual Harassment

U.S. statutory law does not prohibit sexual harassment in employment specifically. Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits discrimination in employment on the basis of race, religion, national origin, and sex, however, has been interpreted as a prohibition on workplace sexual harassment. The Equal Employment Opportunities Commission (USEEOC), the federal agency charged with enforcing Title VII, first acknowledged that sexual harassment was illegal under Title VII in 1980. At that time, the USEEOC issued guidelines (U.S. Guidelines) that defined sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." Furthermore, conduct has to have (1) been made a term or condition of employment or (2) had the purpose or effect of creating a hostile, intimidating, or offensive work environment. Although the U.S. Guidelines do not carry the force of law, the courts generally have relied upon them to adjudicate harassment claims.

B. U.S. Case Law Definition of Sexual Harassment

1. Quid Pro Quo Harassment vs. Hostile Environment

Harassment that has been made a term or condition of employment, commonly called "quid pro quo" harassment, occurs when a supervisor expressly demands that an employee have sex with him either (1) in exchange for a job benefit (i.e., being hired or getting promoted) or (2) to prevent a job detriment (i.e., being fired). U.S. courts recognize that the sexual blackmail inherent in supervisor quid pro quo harassment should be condemned.

13 Id.
15 Downs v. FAA, 755 F.2d 288, 290–91 (Fed. Cir. 1985); Henson v. Dundee, 682 F.2d 897, 908 (11th Cir. 1982).
16 For an example of one of the earliest cases to take this view, see Barnes v. Costle, 561 F.2d
In the United States, it generally is believed that quid pro quo harassment cannot be perpetrated by co-workers because co-workers have no direct authority to make decisions that positively or negatively effect the job status of other employees. Co-worker harassment is instead characterized as a form of “hostile environment” harassment.

Hostile environment harassment can occur when a woman is subjected to sexually-charged remarks, obscene gestures, or unwanted touching on the part of a co-worker. Some courts have found that pornographic displays in the workplace can be a form of hostile environment harassment. In addition to co-worker harassment, any type of supervisor harassment that does not involve quid pro quo harassment is considered a form of hostile environment harassment. Initially, many courts did not find hostile environment harassment actionable under Title VII. The typical assumption was that hostile environment harassment was not as serious as quid pro quo harassment because it could not cause the type of tangible job losses that were associated with quid pro quo harassment. Michael Rubenstein, noted expert on U.K. and EC sexual harassment law, stated that the inherent flaw in this point of view is that it leaves “the woman against whom no retaliation has been taken with no recourse against the harassment.... It would permit a woman to be sexually harassed with impunity.”

The distinction between quid pro quo harassment and hostile environment harassment thus is not simply a rhetorical one. Using an approach that is somewhat analogous to how antitrust violations are evaluated in the United States, courts tend to treat quid pro quo harassment as if it were per se illegal under Title VII. Hostile environment harassment is treated as if it were subject to a more burdensome rule of reason evaluative standard. Thus, if a plaintiff is able to show that she was the subject of unwelcome sexual blackmail

---

983, 990 (D.C. Cir. 1977) where an employee's job was abolished after she rejected her supervisor's suggestion that she might receive a job benefit if she would submit to his sexual advances. See also Downs, 775 F.2d at 290; Meritor, 477 U.S. at 67-68.

17 See Dignity of Women, supra note 5, at 51; see also Catherine A. MacKinnon, Sexual Harassment of Working Women 32-47 (1979).


19 See Waltman, 875 F.2d at 472, 476; Jacksonville Shipyards, 760 F. Supp. at 1495.

20 Michael Rubenstein, Industrial Relations Service, Preventing and Remediing Sexual Harassment At Work 11 (1989) [hereinafter Preventing Sexual Harassment].
on the part of her supervisor, she might be able to sustain a claim for quid pro harassment without having to submit additional evidence. If the same plaintiff merely is subjected to unwanted demands for sex from a co-worker, however, proof of the co-worker’s conduct is not conclusive to sustain a hostile environment claim against her employer.

Even if the plaintiff in the latter case could show that she decided to leave her job in order to avoid being harassed by her co-worker, this still would not convince most courts that she suffered a significant job detriment to characterize the co-worker’s behavior as quid pro quo harassment. She instead would have to prove that the co-worker’s behavior was sufficiently unreasonable and offensive. These concepts, in turn, are subject to a great deal of subjective interpretation.

Some legal commentators argue that courts tend to apply sexist preconceptions about male-female behavior to define what constitutes offensive or unreasonable conduct. They maintain that much of what would be considered unreasonable and offensive to most women traditionally has been dismissed as trivial by a predominantly male judiciary. In the 1986 case, *Meritor Savings Bank v. Vinson*, the U.S. Supreme Court concluded that Title VII prohibited hostile environment harassment. Because the Court defined hostile environment harassment in an open-ended manner, however, some lower courts continued to trivialize hostile environment harassment claims.

2. *Meritor Saving Bank v. Vinson*

In *Meritor*, a bank teller named Michele Vinson, claimed that she was coerced into having a sexual relationship with her supervisor. Vinson stated that she engaged in the relationship because she was afraid that she would lose her job if she did not comply with her supervisor’s demands. The supervisor apparently never expressly threatened to fire Vinson, as a result, the Court characterized his conduct as hostile environment harassment.

---

22 *Id.*
24 *Id.* at 70.
25 *Id.*
26 *Id.* at 59-60.
Strongly condemning the harassment that Vinson experienced, the Supreme Court found that Vinson’s allegations, “which includ[ed] not only pervasive harassment but also criminal conduct of the most serious nature— [were] plainly sufficient to state a claim for ‘hostile environment’ sexual harassment.”27 The Court further stated that hostile environment harassment occurs when the harassment is “sufficiently severe or pervasive . . . to ‘create an abusive working environment.’”28 Because the Supreme Court did not limit its definition to supervisor hostile environment harassment, lower courts have applied the definition to co-worker harassment claims.

The U.S. Guidelines definition of hostile environment harassment clearly influenced the Supreme Court’s decision in Meritor. Critics of the decision, however, believe that by using the words “severe” and “abusive” to expand the USEEOC definition of harassment, the Court implicitly endorsed an undue focus on the effects of the harassment on the victim. The Court instead could have focused on the impropriety of the harasser’s conduct.29

For instance, in Rabidue v. Osceola Refining Company,30 the court of appeals relied on Meritor to conclude that the plaintiff had not been able to prove that the co-worker’s conduct sufficiently interfered with the work performance of a “reasonable person under like circumstances.”31 The court also characterized company displays of pornography and a co-worker’s repeated vulgarities as “annoying . . . [but] not so startling as to have affected seriously the psyches of the plaintiff or other female employees.”32

This quote implies that judicial relief only should be granted when harassment has caused a victim to have a nervous breakdown or to seek long-term psychological care. Some courts, like the Ninth Cir-

---

27 Id. at 67.
28 477 U.S. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (1982)).
29 For a discussion of the way in which the expanded definition of hostile environment harassment has had the potential to thwart harassment victim litigants, see Toni Lester, The Reasonable Woman Test In Sexual Harassment Law, Ind. L. Rev. 227, 238–40 (1993) [hereinafter Reasonable Woman Test]; see also Pollack, supra note 21, at 62 (Meritor allowed courts to view harassment “through the eyes of the perpetrator” as opposed to the perspective of the victim).
31 Id. at 620 (emphasis added); see also Scott v. Sears Roebuck & Co., 798 F.2d 210 (7th Cir. 1986) (declaring that unwanted touching by one co-worker, personalized vulgarities from another co-worker, and sexually suggestive comments from a superior also did not constitute sexual harassment).
32 805 F.2d at 622 (emphasis added).
cuit Court of Appeals, rejected Rabidue on the grounds that it should have focused more on another issue, the impropriety of the conduct under review. After several years of debate among the lower courts, the Supreme Court addressed this issue in Harris v. Forklift Systems, Inc.

3. Harris v. Forklift Systems, Inc.

In Harris, the district court found that a company president subjected a female manager to “a continuing pattern of sex-based derogatory conduct.” In the presence of other employees, the president called the manager “a dumb ass woman” and stated that the two of them should go to a hotel to discuss her raise. Citing Rabidue, the court concluded that the president’s comments were not “so severe as to be expected to seriously affect the plaintiff’s psychological well-being.”

The Supreme Court reversed and remanded the district court’s decision. It ruled that “as long as the environment would reasonably be perceived, and is perceived, as hostile or abusive . . . , there is no need for it also to be psychologically injurious.” Justice O’Connor, writing for the majority, said that psychological harm is one factor, among many, that should be considered by the courts. Other factors include the frequency of the harassment, whether it was “physically threatening,” or a “mere offensive utterance.”

The Court’s rejection of Rabidue’s psychological harm requirement can be considered a major victory for harassment victims. The Court, however, left unanswered another equally important question, the extent to which the “reasonable woman/victim” test should replace the “reasonable person” test as an evaluative standard in harassment law. The reasonable woman/victim test first received notoriety in Ellison v. Brady, a case decided by the Ninth Circuit Court of Appeals in 1991. The test gives greater weight to the victim’s perspective in harassment cases.

33 See Ellison v. Brady, 924 F.2d 874 (9th Cir. 1991).
34 See id. at 877–78.
37 Id.
38 Id. at *17.
40 Id. at *10–11.
41 Id.
42 924 F.2d 872, 877–79 (9th Cir. 1991).
C. The Reasonable Woman Test Under U.S. Law

In *Ellison*, a female IRS agent received romantic love letters from one of her male co-workers.\(^{43}\) Although the IRS initially responded to her complaints by temporarily moving the co-worker to another job site, the IRS eventually reassigned the co-worker back to his original position.\(^{44}\) This prompted the plaintiff to sue the IRS for failing to take the appropriate steps to protect her from her co-worker.\(^{45}\)

Taking into account the general experiences of women,\(^{46}\) the court said that, "a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a *reasonable woman* would consider sufficiently severe or pervasive to alter the conditions of employment."\(^{47}\) The court also criticized *Rabidue*’s requirement that a woman’s psychological well-being be affected seriously.\(^{48}\) As the court stated, "surely, employees need not endure sexual harassment . . . to the extent that they suffer anxiety and debilitation."\(^{49}\) Using this analysis, the court reasonably concluded that the plaintiff legitimately feared her harasser and that her employer was liable for failing to protect her from working in a hostile work environment.\(^{50}\)

The *Ellison* decision received a great deal of media attention and quickly gained influence in other jurisdictions. One district court in Florida even supported its use of the test with expert testimony and the results of sociological and psychological research that showed how harassment negatively affects women.\(^{51}\) The hypothetical reasonable woman constructed by the Florida court supposedly was based on the results of objectively-based research as opposed to the biases of individual judges.\(^{52}\)

---

\(^{43}\) *Id.* at 874–75.

\(^{44}\) *Id.*

\(^{45}\) *Id.*

\(^{46}\) *Id.* at 879. The court determined that women have the propensity to be traumatized by harassment because they are vulnerable to rape and therefore fear that harassment might lead to physical assault. Thus, it reasoned, women may tend to find certain behavior more offensive than men do.

\(^{47}\) 924 F.2d at 879.

\(^{48}\) *Id.* at 877–78.

\(^{49}\) *Id.* at 878.

\(^{50}\) *Id.* at 883.

\(^{51}\) See *id.* at 879 n.10 (discussing 1989 U.S. Justice Department statistics, which showed that 75% of every 100,000 women are reported rape victims); see also *Jacksonville Shipyards*, 760 F. Supp. at 1503–04, 1506 (discussing testimony of a psychologist and a management consultant who were experts on the effects of pornography on men and women, and how women
Lawyers for the plaintiff in *Harris* asked the Supreme Court to endorse the use of the reasonable woman test. The Court, however, failed to give a definitive response to their request. The Court simply stated that “conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview.” The Court did not reject the reasonable woman test specifically, however. Consequently, lower courts still have room to maneuver with respect to its use.

Therefore, the courts in the United States will probably continue to be divided when it comes to determining whether hostile work harassment should be evaluated from the perspective of the reasonable woman or the reasonable person. Absent the Supreme Court or the U.S. Congress specifically mandating that the courts use one test exclusively, the method of analysis used in harassment cases probably will depend on the particular circuit in which a case is heard, and the philosophical leanings of the individual judges who reside in those circuits. It is possible, however, that as the more liberal Clinton administration continues to appoint new judges, like Ruth Bader Ginsburg, over the next three years, U.S. courts will start to lean more uniformly towards adopting a standard that gives the victim’s perspective greater weight in harassment cases.

**D. The Probative Value of a Victim’s Mode of Speech or Dress Under U.S. Law**

Under the U.S. Guidelines, a plaintiff also must show that she did not welcome the alleged harassment. In *Meritor*, the Supreme Court stated that the victim’s sexually provocative speech or manner of dress could be used to make this determination. It is interesting to note that the plaintiff in *Meritor* had sexually-charged conversa-

---

53 Harris, 1993 U.S. LEXIS 7155, at *19.
54 Id. at *16-18.
55 Id. at *7.
56 Id. at *16-18.
57 Meritor, 477 U.S. at 72.
58 Id. at 73.
tions with her co-workers, but not with her supervisor-harasser. Some writers argue that, absent Vinson's having had such conversations directly with her supervisor, the relevancy of her conversations with others never should have been assumed by the Court. Criticizing the presence of similar assumptions held by courts in the United Kingdom, Michael Rubenstein remarked that, "as in her life outside work, a woman at work should have a right to differentiate between the treatment she will accept from one man and another. That a woman will accept, or even welcome, a particular male colleague putting his arm around her does not grant a license to every man in the organization to [do so]."

Some courts also rely on the Supreme Court's pronouncements about "welcomeness" to determine whether or not a plaintiff is justified in claiming that she found the conduct in question to be offensive. For example, in Burns v. McGregor Electronics Industries, the plaintiff's harasser knew that she posed nude once in a magazine. The court concluded that evidence about the plaintiff's nude appearance in the magazine might be relevant to determine whether or not she truly was offended by her harasser's lewd gestures and personalized sexual comments.

The danger in allowing this type of evidence is that it perpetuates the age-old bias that the most chaste of women are entitled to be protected from rape, and by analogy, sexual harassment. Such an approach undermines the ability of women to be treated as equals in the workplace. The rules of evidence, more appropriately, should mandate that this type of evidence be shielded from review in the same manner that state rape shield laws block the review of similar types of evidence about rape victims. The state of California already has enacted such a rule into law.

60 Id. ("Contemporaneous statements that sexual advances are welcome or unwelcome are obviously more objective expressions than are accounts of dreams or idle discussions about sex.")
61 PREVENTING SEXUAL HARASSMENT, supra note 20, at 12.
62 955 F.2d 559, 561 (8th Cir. 1992).
63 Id.
64 Id. at 565.
65 See NANCY L. ABELL & BARBARA BERISH BROWN, NATIONAL EMPLOYMENT LAW INSTITUTE, 1993 EMPLOYMENT DISCRIMINATION LAW UPDATE MANUAL, SEXUAL HARASSMENT: INVESTIGATION, SUMMARY JUDGMENT AND DISCOVERY OF PRIOR SEXUAL HISTORY 25-26 (1993) [hereinafter LAW UPDATE MANUAL] (quoting California Civil Code § 2017(d), which limits the
E. Remedies Under U.S. Law

Traditionally, victims of sex discrimination were entitled only to "make-whole" relief under Title VII. The statute originally allowed courts to order companies to hire or reinstate successful harassment complainants, to award them back pay, or to grant them any other "appropriate" equitable relief. Most courts interpreted Title VII's remedial provisions conservatively, and only were willing to offer victims injunctive relief, job reinstatement, front pay, back pay, or attorneys' fees. Traditional tort-like compensatory damages for pain and suffering, consequential damages for loss of future earnings, and punitive damages were not awarded to plaintiffs. If a victim of sex discrimination wishes to recover for psychological injuries or punitive damages, she must sue her employer for such torts as intentional infliction of emotional distress or constructive discharge. Both of these torts, however, are and were subject to a much more burdensome evaluative standard than typically is applied to the review of sexual harassment claims.

In response to calls for more appropriate relief in sex discrimination cases, Congress passed the Civil Rights Act Amendments of 1991 (amendments). The amendments allow courts to award additional discovery of this type of evidence. The Code states: "any party seeking discovery concerning the plaintiff's sexual conduct with individuals other than the alleged perpetrator is required to establish specific facts showing good cause for that discovery . . . and reasonably calculated to lead to a discovery of admissible evidence."); see also Mendez v. Superior Court, 206 Cal. App. 3d 557, 253 Cal. Rptr. 731 (1988) (denying employer's request for discovery of evidence about the plaintiff's romantic involvements with other people at her place of employment).

67 Id.
69 Id.
70 See Jackson v. Kimel; AT&T Technologies, Inc., No. 93-2396, 1993 U.S. App. LEXIS 10001, at *1, *18 (4th Cir. Apr. 30, 1993) (plaintiff sued her employer for sexual harassment and intentional infliction of emotional distress. The court stated that the test for an emotional distress claim was "whether the conduct complained of is sufficiently extreme and outrageous and [whether it was] intended to cause emotional distress."). For a discussion of the standard that is applied to constructive discharge claims, see Yates v. Avco, 819 F.2d 630, 637 (6th Cir. 1987) ("proof of discrimination alone is not a sufficient predicate for a finding of constructive discharge; there must be other 'aggravating factors.' We have also required some inquiry into the employer's intent. . . . ") (quoting Geisler v. Folsom, 735 F.2d 991, 996 (6th Cir. 1984); Clark v. Marsh, 665 F.2d 1168, 1173-74 (D.C. Cir. 1981)); Cf. Meritor, 477 U.S. at 57 (the test for sexual harassment is whether the conduct complained of is "sufficiently severe or pervasive to alter the conditions of [the victim'] employment and create an abusive working environment.") (quoting Henson v. Dundee, 682 F.2d 897, 904 (1982)).
compensatory damages "for future pecuniary losses, emotional pain, suffering, inconvenience . . . and other nonpecuniary losses" to victims of intentional discrimination.\(^\text{72}\) The amendments also allow courts to award punitive damages to these victims.\(^\text{73}\) Damage awards, however, are subject to statutory limits, which range from $50,000 for employers with fifteen to one hundred employees to $300,000 for employers with five hundred employees.\(^\text{74}\) The amount of back pay, and other traditional types of Title VII make-whole relief, are not limited by the new statutory caps.\(^\text{75}\)

Plaintiffs in race and national origin discrimination cases also are entitled to sue in the alternative for unlimited compensatory and punitive damages under Section 1981 of the Civil Rights Act of 1866.\(^\text{76}\) These plaintiffs can recover for damages only once, under either Section 1981 or Title VII.\(^\text{77}\) Sex discrimination plaintiffs, however, are not entitled to sue for damages under Section 1981. Recent proposals from Senator Edward Kennedy's office have been made to revise the 1991 amendments to lift the current limits on damage awards, allowing sex discrimination plaintiffs the same type of relief that race and national origin plaintiffs now are entitled to under Section 1981.\(^\text{78}\)

Although some fear that the 1991 amendments will cause a host of unsubstantiated claims to be filed by employees seeking high monetary awards, statistics on rulings in race discrimination lawsuits over the last ten years indicate that such fears are without merit. Even though the plaintiffs in these cases are entitled to an unlimited amount of compensatory and punitive damages under Section 1981, fewer than one percent of the lawsuits resulted in damage awards higher than $100,000.\(^\text{79}\) Furthermore, given the high number of new harassment claims that recently have been filed with the USEEOC,\(^\text{80}\)

\(^{72}\) Id. §§ 1981a-(b)(2), (b)(3).

\(^{73}\) Id. § 1981a-(b)(1).

\(^{74}\) Id. § 1981a-b(3).

\(^{75}\) Id.


\(^{77}\) Id. § 1981a-(a)(1) (1993).

\(^{78}\) See A Bill To Amend Section 1977A of the Revised Statutes to Equalize Remedies Available To All Victims Of Intentional Employment Discrimination, And For Other Purposes, S. 17, 103d Cong., 1st Sess. (Jan. 21, 1993) [hereinafter Kennedy Bill].


\(^{80}\) In the 15 months following the Clarence Thomas Supreme Court nomination hearings, there was a 69% increase in the number of sexual harassment claims filed with the USEEOC. LAW UPDATE MANUAL, supra note 65, § 3, at 1.
prior forms of remedial relief obviously did not motivate recalcitrant employers adequately, or else fewer claimants would now be filing harassment claims with the USEEOC. Hopefully, the 1991 amendments will cause employers to take a more proactive approach to the problem of workplace sexual harassment.

F. Employer Liability Under U.S. Law

1. Traditional Agency Law Theory

Under the agency law doctrine of respondeat superior, employers usually are held liable for torts committed by employees within the scope of their employment. U.S. courts generally believe that employers should be liable vicariously for tortious acts committed by their employees if at least two of the following factors are present: (1) the acts were the kind of acts that the employee was hired to perform or which can be regarded as minor deviations in the employee's job responsibilities, and (2) the acts were partly motivated by the employee's desire to serve the employer. 81 For example, one state court held that an employee's smoking was a minor deviation from his work-related duties, which required him to travel away on business and fill out company expense reimbursement forms. The court ruled that the company vicariously was liable for a fire caused by the employee's lit cigarette. At the time, the employee was smoking while filling out expense forms that ultimately enabled the employer to deduct travel expenses on his tax returns. 82

Most courts in the United States believe that employers always should be liable for quid pro quo harassment because this type of harassment directly relates to a supervisor's ability to give or take away job benefits. As such, quid pro quo harassment falls within the scope of responsibilities that employers delegate to supervisors. Courts are reluctant, however, to view supervisor hostile environment harassment in the same manner. Many judges find that employers should not be liable for supervisor hostile environment harassment because there is no overt connection between this type of harassment and the ability of a supervisor to take away or give job benefits. Thus, while a fire caused by a supervisor's smoking might lead to a company's respondeat superior liability, the supervisor's

82 Id. at 806 (discussing Edgewater Motels, Inc. v. Gatzke, 277 N.W.2d 11 (Minn. Sup. Ct. 1979)).
harassment of a female employee may not lead necessarily to the same result. Since hostile environment harassment is probably just as, if not more, pervasive in the workplace today than smoking is, the distinction seems illogical. One writer accused judges who hold this view of attempting to treat sexual harassment as a private personal matter best left outside the reach of the law.83

2. The Importance of Establishing Grievance Procedures and Taking Appropriate Remedial Actions Against Harassers Under U.S. Law

In the Meritor case, the USEEOC suggested that employers should be held strictly liable for quid pro quo harassment.84 It also suggested that employers should be liable only for supervisor or co-worker hostile environment harassment, if they fail to establish grievance procedures specifically designed to deal with complaints about harassment.85 The USEEOC argued that if such procedures are in place and harassed employees fail to rely on them, then employers should be shielded completely from liability.86 The USEEOC maintained that companies should be protected in this manner unless it can be shown that they knew about the harassment before any outside claims were filed.87

The Supreme Court focused on the relationship between employer liability and four issues raised by the USEEOC recommendations. Those four issues are: (1) whether or not employers should be liable for supervisor harassment; (2) whether or not the existence of company grievance procedures designed to deal with sexual harassment should shield companies from liability; (3) whether the plaintiff's use (or failure to use) those procedures to complain about harassment should shield companies from liability; and (4) whether a company's lack of knowledge about the harassment should protect it from liability.88

The Court first stated that employers are not liable automatically for supervisor harassment. It also stated that company grievance procedures do not protect employers automatically from liability under Title VII, although the existence of such procedures could

83 See Lipper, supra note 79, at 334.
84 477 U.S. at 70–71.
85 Id. at 71.
86 Id.
87 Id.; see also the U.S. Guidelines, 29 CFR § 1604.11 (c)–(d).
88 Meritor, 477 U.S. at 67–69.
protect companies from liability if harassed employees failed to use those procedures. 89 The Court further explained that employers were not shielded automatically from liability simply because they lacked notice about the harassment. 90 Finally, the Court suggested that lower courts rely on traditional agency law principles to make this determination. 91 The Court discussed these four factors in an open-ended manner. Consequently, the Court ultimately failed to issue a definitive rule about employer liability. In their attempts to follow the Supreme Court’s guidance in Mentor, lower courts have approached the issue of employer liability somewhat conservatively. Many courts choose to follow the USEEOC’s recommendations and hold employers strictly liable for supervisor quid pro quo harassment, but not for supervisor or co-worker hostile environment harassment. Typically, courts only find employers liable for hostile environment harassment when employers fail to take remedial actions that are designed to stop harassment once they have been put on notice that the harassment is taking place. 92

For example, in Kaufmann v. Allied Signal, Inc., 93 the court of appeals evaluated the alleged supervisor-harasser’s conduct as hostile environment harassment. 94 The court found the combined presence of a company grievance procedure, and the fact that the company fired the supervisor-harasser once it learned of the harassment sufficient to defeat the plaintiff’s claims. 95 The court made this determination despite the fact that the company grievance procedure was not designed to address sexual harassment specifically. 96

The court in Kaufmann also stated that the employer would have been strictly liable had the supervisor’s conduct constituted quid pro quo harassment. 97 Judging from his concurring opinion in the Mentor case, the late Justice Thurgood Marshall would not have made

89 Id. at 72–73.
90 Id.
91 Id. at 71.
93 Id.
94 Id. at 182.
95 Id.; see Hall v. Gus Construction Co., 842 F.2d 1010, 1015–16 (8th Cir. 1988) (because company foreman was aware that male workers were touching female colleagues inappropriately—touching one woman’s breasts and making obscene comments—nicknaming one woman “herpes,” the company had enough notice to warrant its taking corrective measures to stop the harassment).
96 Kaufmann, 970 F.2d at 184–85.
97 Id. at 185–86 (quoting Highlander v. E.F.C. Nat’l Management Co., 805 F.2d 644, 648 (6th Cir. 1986)).
the same distinction between supervisor quid pro quo and hostile environment harassment that the court made in the *Kaufmann* case. Marshall stated, "it is the authority vested in the supervisor by the employer that enables him to commit the wrong in the first place." 98 He believed that courts should treat sexual harassment victims in the same manner that courts treat victims of racial harassment (i.e., that employers should be held strictly liable for all wrongful discriminatory acts committed by supervisors). Marshall thus would have found the employer in *Kaufmann* strictly liable, despite the fact it later fired the supervisor.

In *Intlekofer v. Turnage*, 99 a case decided by the same court of appeals that decided the *Ellison* case, the court addressed the issue of employer liability for co-worker harassment. 100 The court did not propose that a strict liability test be used in these cases.101 It instead focused on the extent to which companies took appropriate remedial measures to stop harassment.102 If such measures are commensurate with the level of severity of the conduct under review, the court implied that the employers should be shielded from liability for co-worker harassment.103

In *Intlekofer*, the plaintiff repeatedly complained to her employer that she was being subjected to unwanted touching and pressure to enter into a romantic relationship with a co-worker.104 During several counseling sessions, the company verbally warned the harasser to stop. The company never, however, took any formal disciplinary measures against the co-worker.105

Criticizing the company for failing to take more appropriate remedial actions against the co-worker, the court explained:

> at the first sign of sexual harassment, an oral warning in the context of a counseling session may be an appropriate disciplinary measure if . . . the harassing conduct is not extremely serious . . . [but a counseling session] is sufficient only as a first resort. If the harassment continues, limiting discipline to further counseling is inappropriate.
Instead, the employer must impose more severe measures in order to ensure that the behavior terminates.\textsuperscript{106}

In this case, the court implied that the company first should have issued a formal reprimand and then fired the co-worker once he continued to harass the plaintiff even after receiving an informal warning to stop.\textsuperscript{107}

The Court in \textit{Kaufmann} emphasizes to a greater degree than in \textit{Intlekofer} that companies should take affirmative steps designed to stop harassment.\textsuperscript{108} Furthermore, the existence of a company grievance procedure, on its own, is not enough to protect companies from liability. Indeed, poorly designed procedures, which fail to provide victims with an adequate means of reporting harassment,\textsuperscript{109} or fail to ensure that employee complaints are investigated in a fair and thorough manner,\textsuperscript{110} generally should not protect companies from liability.

\section*{III. U.K. Statutory and Administrative Definitions of Sexual Harassment}

The U.K. Sex Discrimination Act of 1975 (SDA) does not refer specifically to sexual harassment. The SDA provides that it is unlawful for an employer to treat women less favorably than men with respect to their employment conditions. The SDA states that it is unlawful for an employer to discriminate against a woman \"(a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits ... or (b) by dismissing her, or subjecting her to \textit{any other detriment.}\"\textsuperscript{111}

The SDA also created the Equal Opportunities Commission (UKEOC), and charged it with the responsibility for promoting gender equality and encouraging the elimination of discrimination

\textsuperscript{106} \textit{Id.} at *20.
\textsuperscript{107} \textit{Id.} at *22–23.
\textsuperscript{108} See also \textit{Waltman v. Int'l Paper Co.}, 875 F.2d 468, 479 (5th Cir. 1989).
\textsuperscript{109} See \textit{Meritor}, 477 U.S. at 73 (Supreme Court criticizing the inadequacy of the Bank's grievance procedure, which required the plaintiff to report her harassment to the very person that was harassing her—her supervisor. Had this not been the case, the Court implied that the Bank might have had a stronger case.).
\textsuperscript{110} See \textit{Waltman}, 875 F.2d at 479–80 (criticizing company manager for not formally warning her alleged harasser and for transferring the plaintiff to another shift after she complained about being harassed).
\textsuperscript{111} Sex Discrimination Act of 1975, Ch. 65, § 6(2)(a)–(b) (1975) (Eng.) [hereinafter SDA]. Theoretically, the SDA also entitles men to the same equal treatment. Most U.K. sexual harassment claims, however, are brought by women.
by issuing guidelines to eliminate sex discrimination in employment. Unlike the USEEOC, which is responsible for race, religious, national origin, and sex discrimination in employment, the UKEOC is only responsible for handling sex discrimination problems. U.K. courts, like their U.S. counterparts, also sometimes rely on the U.K. Guidelines when it comes to rendering decisions in harassment cases, notwithstanding the fact that the U.K. Guidelines do not carry the force of law.

It took the UKEOC ten years after the enactment of the SDA to issue the U.K. Guidelines. The U.K. Guidelines state that:

it is unlawful: to discriminate directly or indirectly on grounds of sex . . . [and] it is therefore recommended that . . . (e) all reasonably practical steps should be taken to ensure that a standard of conduct . . . is observed which prevents members of either sex from being intimidated, harassed or otherwise subjected to unfavorable treatment on the ground of their sex.

The U.K. Guidelines are similar to the U.S. Guidelines in many respects. The terms, “intimidated,” “harassed,” or “other unfavorable treatment” in the U.K. Guidelines are similar to the words, “hostile,” “intimidating,” and “offensive” in the U.S. Guidelines. References to harassment or intimidation “on the ground of sex” in the U.K. Guidelines are similar to the phrase, “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature” in the U.S. Guidelines. As mentioned, the U.K. Guidelines condemn any type of harassment, as long as it intimates or subjects someone to unequal treatment because of their sex. Although they blur the distinction between quid pro quo and hostile environment harassment, their practical effect is to prohibit both types of harassment.

---

112 Id. §§ 53(1)(b), 56A(1); see also Alice M. Leonard, Judging Inequality, The Effectiveness of the Industrial Tribunal System In Sex Discrimination and Equal Pay Cases 1 (1987) [hereinafter Judging Inequality].
113 Judging Inequality, supra note 112, at 1 n.1.
114 See id. at 5.
116 Id. § 32(e) (emphasis added).
117 The U.K.'s Employment Department also has issued guidelines for employers on sexual harassment. The guidelines describe harassment in more detail than the U.K. Guidelines. For example, the Employment Department guidelines state that examples of unacceptable con-
IV. U.K. CASE LAW DEFINITIONS OF SEXUAL HARASSMENT

A. Quid Pro Quo vs. Hostile Environment—A Variation on the U.S. Theme

Similar to the U.K. Guidelines, U.K. case law does not make the same distinction between quid pro quo harassment and hostile environment harassment as found in U.S. case law. U.K. courts instead focus on the extent to which harassment causes a victim to suffer a "detriment" under section 6 of the SDA. By taking this approach, U.K. courts prohibit both quid pro quo and hostile environment harassment, as well as conduct which does not fit quite so neatly into either of these two categories.

For example, in Strachclyde Regional Council v. Porcelli, 118 the first appellate level case to condemn sexual harassment, the plaintiff left her job because she was harassed by co-workers. The court found that the plaintiff's constructive dismissal ("unfair dismissal" in the U.K.) constituted enough of a detriment to justify the plaintiff's claims under the SDA for sexual harassment and sex discrimination. In this case, which was decided by the Scottish Court of Session, 119 a female lab technician was the object of unwanted sexually suggestive comments, leering, inappropriate invasions of personal space, and a general campaign conducted by two co-workers to thwart her ability to do her job. 120 The plaintiff ultimately obtained a transfer...
to avoid further harassment. Because co-workers perpetrated the conduct in Porcelli, U.S. law defines it as hostile environment harassment. Therefore, U.S. courts would try to determine whether or not the conduct was unreasonable or offensive, or whether it subjected the plaintiff to a hostile and abusive work environment.

The Court of Session, however, did not attempt to categorize the co-worker conduct in this manner. Rather, the Court focused on whether or not the plaintiff was treated less favorably than a man would have been in a similar situation. The Court reasoned that if the treatment was less favorable, then the plaintiff suffered a legal detriment within the meaning of the SDA. Rejecting the employer's contentions that the plaintiff was treated no differently than a disliked man in the same situation, the Court stated that "the campaign was plainly adopted against the [plaintiff] because she was a woman." The Court thus concluded that the plaintiff had been subjected to 'sexual harassment,' a particularly degrading and unacceptable form of treatment.

Since the plaintiff sought a transfer to avoid further harassment, the Porcelli decision implies that (1) a job transfer or resignation initiated by a plaintiff could be considered a tangible job loss and (2) that similar tangible job losses would have to occur before harassment victims could win in court in the future. In De Souza v. Automobile Association, a racial harassment case decided just before the Court of Session reviewed Porcelli, the Court of Appeal emphasized that harassment victims need not suffer such losses to prevail in court. The court also endorsed the use of the reasonable person test to evaluate racial harassment, and by implication, sexual harassment claims.

nude model in a magazine. On another occasion, he removed personal possessions from her desk and refused to return them while shouting obscenities at her).

121 Id. at 135.
122 See id. at 134.
123 Id. at 134-37.
124 Id. at 136.
126 Id.
127 In fact, the opinion of the Employment Appeal Tribunal, which was affirmed by the Court of Session decision in Porcelli, specifically stated that the plaintiff suffered a detriment because "she felt obliged to seek transfer . . . to another school . . . [Thus] the campaign of harassment, . . . with the objective of making the appellant apply for a transfer, had succeeded." Porcelli, [1986] I.R.L.R. 167, 169.
129 Id.
130 See id.
B. The Reasonable Person Test In U.K. Sexual Harassment Law

In Desouza, a non-white secretary overheard her supervisor make a racially derogatory comment about her.\textsuperscript{131} Unlike the plaintiff in Porcelli, the secretary did not leave her job because of what she heard.\textsuperscript{132} The Court of Appeal stated that racial harassment victims should not be barred from recovering in court just because they do not leave their jobs or obtain transfers to avoid further harassment.\textsuperscript{133}

The Court of Appeal also stated that the claims needed to be evaluated on the basis of whether or not a "putative reasonable employee could justifiably complain about his or her working conditions"\textsuperscript{134} under similar circumstances. The court thus seemed to endorse the use of a standard similar to the reasonable person test. This is the same test used by some U.S. courts to make it more difficult for hostile environment harassment victims to succeed in court.

In a seemingly contradictory statement, however, the court stated that the real test should be whether or not the secretary could show that both she "and the reasonable coloured secretary in like situations would or might [have been] . . . disadvantaged."\textsuperscript{135} Such a test, if applied, would have been a ground-breaking new approach in U.K. discrimination law—an approach which seriously took into account the victim's perspective in discrimination cases. A closer reading of the decision, however, reveals that the court never intended such a result.

The court in Desouza concluded that a reasonable colored secretary would not have been disadvantaged by what the plaintiff overheard.\textsuperscript{136} In contrast to U.S. proponents of the reasonable woman test, the court did not rely on expert testimony or statistical research to determine how people of color would generally react to the type of comments overheard by the plaintiff. The court's judges instead relied on their own personal beliefs to assess the plaintiff's claims. Many U.S. courts who use the reasonable person test have been criticized for using the same type of subjective analysis to adjudicate

\textsuperscript{131} Id. at 517.
\textsuperscript{132} Id.
\textsuperscript{134} Id. (emphasis added).
\textsuperscript{135} Id.
\textsuperscript{136} Id. at 524–25.
sexual harassment claims. Thus, the Desouza court paid lip service to the reasonable victim test without ever actually applying it.

Some may argue that it is unfair to expect the Desouza court to construct a standard of reasonableness based on more than the personal experiences and preconceptions of its individual judges. First, the type of expert testimony and statistical evidence often used in U.S. litigation to prove race or sex discrimination has never been given as much weight in the United Kingdom. Furthermore, not even the U.S. Supreme Court, which decided the Meritor case a year after Desouza was decided, referred to the type of research on harassment that courts who use the reasonable woman test rely on today. These arguments, however, should be viewed with some skepticism. As long as courts continue to substitute their own subjective analysis for available objectively-based research, the risk will remain that harassment victims will not be treated fairly in court.

A recent example of a U.K. case that uses the reasonable person test in a way that unfairly disadvantages sexual harassment victims is the tribunal case, Stewart v. Cleveland Guest Engineering Ltd. In Stewart, the plaintiff claimed that she was illegally discriminated against because she worked in a job setting that displayed pornography. The pornography consisted of several calendars depicting nude females and one calendar poster that depicted a nude male. Even though the court acknowledged that the employer was a male-dominated company with a history of treating women as sex objects, the court ruled that the plaintiff was not subjected to unequal treatment on the grounds of sex because men and women would be offended similarly by the pornography in question.

The employment tribunal made no objective effort to determine whether or not pornography has a uniquely traumatic effect on women. In the 1991 U.S. case, Robinson v. Jacksonville Shipyards, the court approached this same issue quite differently. In Jacksonville Shipyards, the court ruled that “the sexualization of the workplace imposes burdens on women that are not borne by men”
because it tends to make men view their female co-workers as sex objects.\textsuperscript{145} When women are viewed in this manner, the court reasoned, they are in effect treated differently because of their sex.\textsuperscript{146} The judge in \textit{Jacksonville Shipyards} based his analysis on the testimony of an expert who cited psychological studies that demonstrated how pornography negatively affects women.\textsuperscript{147} In another U.S. case, which involved pornography that depicted both men and women, the court stated that while most pornography includes "both male and female 'references,' . . . [such references are] highly offensive to a woman who seeks to deal with her fellow employees with professional dignity and without the barrier of sexual differentiation."\textsuperscript{148}

Traditionally, it has been easier for victims of quid pro quo harassment to prevail in U.S. courts than it has for victims of hostile environment harassment. This is because U.S. courts tend to apply the more burdensome reasonable person test to evaluate hostile environment harassment claims. When read together, the \textit{Porcelli} and \textit{De Souza} decisions appear to allow U.K. courts to use the reasonable person test to evaluate all harassment claims on the same basis that hostile environment claims are evaluated in the United States.\textsuperscript{149} Consequently, sex harassment claimants presumably fare poorly in the United Kingdom. While this initially may have been the case, studies suggest that the prospects for claimants in the United Kingdom have improved over the last few years. In her extensive review of the impact of the industrial tribunal system on sex discrimination cases decided before \textit{Porcelli}, Alice Leonard, now Deputy General Counsel to the UKEOC, found the tribunal system to be heavily biased in favor of employers.\textsuperscript{150} Leonard based her findings on a variety of factors, including the fact that non-lawyer judges who lacked experience in sex discrimination law often decided tribunal hearings, the claimants chose to represent themselves at the hearings, and the judges applied the evidentiary rules in a lax manner.\textsuperscript{151} In a later study that focused exclusively on post-\textit{Porcelli} sexual harassment cases, Leonard found that the number of success-

\textsuperscript{145} \textit{Id.} at 1505.

\textsuperscript{146} \textit{Id.}

\textsuperscript{147} \textit{Id.}

\textsuperscript{148} Waltman, 875 F.2d at 477 (quoting Bennett v. Corroon & Black Corp., 845 F.2d 104, 106 (5th Cir. 1988)).


\textsuperscript{150} \textit{Judging Inequality, supra} note 112, at 132, 144.

\textsuperscript{151} \textit{Id.}
ful harassment claims increased significantly between 1986 and 1990. She attributed the increased success rate to several factors, including the fact that a high number of claimants hired qualified attorneys to represent themselves before the tribunals. Since monetary awards in discrimination cases are traditionally much lower in the United Kingdom than in the United States, the increased success rate discussed by Leonard should be viewed with some caution.

C. The Probative Value of a Victim’s Speech or Dress Under U.K. Law

Another factor which should be considered in U.K. case law on sexual harassment, is whether or not the courts are willing to admit evidence about a victim’s mode of speech or dress as a challenge to her sexual harassment claim. Unlike Meritor, neither Porcelli nor Desouza discuss the extent to which a woman’s mode of speech or dress is relevant to an inquiry about whether she welcomed her harassment. Several U.K. employment appeal tribunals, however, considered whether such evidence should be admitted to determine if a harassment victim suffered enough psychological harm (“injury to feelings” in the U.K.) to be compensated for her injuries. For example, citing evidence that the plaintiff discussed her attitudes about sex with co-workers, one appeal tribunal stated that “in order to challenge the alleged detriment and hurt to feelings . . . it is pertinent to enquire . . . whether the complainant . . . is unlikely to be very upset by the degree of familiarity with a sexual connotation.” Applying similar reasoning to the Supreme Court’s decision in Meritor, the court rejected the view that such evidence should be admitted only if similar discussions had taken place between the plaintiff and her alleged supervisor-harasser.

Another employment appeal tribunal took a different position on this issue. In Wileman v. Minilec Engineering Ltd., the court concluded that the plaintiff still had the capacity to suffer psychological harm as a result of being harassed, even though she previously had appeared as a scantily-dressed model in a national magazine. The court stated that “quite clearly, the picture itself cannot affect, in any

---

153 Id. at 1514.
156 Id. at 399–401.
158 Id.
way, the question of physical harassment. Secondly, its probative
value in relation to comments made by a director seem to us to be
almost minimal.\textsuperscript{159} Since U.K. courts appear to be divided on this
issue, the extent to which evidence about a plaintiff's speech or dress
will be considered per se admissible will depend on the particular
court where a case is heard, unless the House of Lords or the Court
of Appeal mandate that a more uniform approach be adopted. In
the event of such a mandate, information about the plaintiff's non­
contemporaneous sexually-charged statements or activities should
be shielded from review.

D. Remedies Under U.K. Law

The SDA allows courts in the United Kingdom to award damages
and to grant injunctive relief to harassment victims.\textsuperscript{160} Unlike
U.S. statutory law, however, it does not appear to allow U.K. courts to
order the type of wide-reaching relief that also can benefit other
employees in the same job setting.\textsuperscript{161} In contrast to their U.S.
counterparts, courts in the United Kingdom always have been able to
award a broad range of compensatory damages in sex discrimination
cases, including damages for pecuniary losses and for injury to
feelings.\textsuperscript{162} The damages, however, also are subject to an overall
statutory limit, which in 1993 was set at 11,000 pounds.\textsuperscript{163} The statutory
limit does not relate to the size of the employer.\textsuperscript{164} Based on a
1993 exchange rate, the 10,000 pound limit amounts to approximately $15,000.\textsuperscript{165} While this figure is somewhat similar to the
$50,000 cap on damages for small businesses, it is significantly lower
than the $300,000 amount that U.S. courts can assess against larger
U.S. companies for pain and suffering and/or punitive damages. In
addition, while back pay and other compensatory damages are in­
cluded in the U.K. cap, back pay is not included in the U.S. cap.

Initially, U.K. courts granted monetary awards that fell well below
statutory limits. For example, in a 1987 case, a court awarded a

\textsuperscript{159} Id.
\textsuperscript{160} SDA, supra note 111, § 65(1)(a)–(c).
\textsuperscript{161} Id. § 65(1)(c) (this subsection states that tribunals can recommend that employers take
actions that are designed to reduce the adverse effects of discrimination on plaintiffs).
\textsuperscript{162} Id. §§ 65(1)(b), 66(4).
\textsuperscript{163} Brian Napier, Community Law and Awards for Discrimination, 143 NEW L. J. 1184 (Aug.
13, 1993).
\textsuperscript{164} Id.
\textsuperscript{165} This is based on a exchange rate of $1.50 to 1 British pound sterling. Foreign Currency
plaintiff 200 pounds for injury to her feelings. The employer dismissed the plaintiff because she objected to being harassed. In a 1988 case, *Cooper v. Tibbett and Britten*, another plaintiff was awarded only 400 pounds for injury to feelings, even though she successfully proved that her harasser subjected her to demands for sex. Recent studies suggest, however, that the courts are beginning to award higher damage amounts for injury to feelings.\textsuperscript{166}

Despite these recent instances of unusually larger monetary awards, the amount of compensation available to harassment victims is drastically lower than what is available for victims in the United States. For example, in the United States, a harassment victim can recover for back pay and up to $300,000 for punitive damages and pain and suffering, depending on the size of the employer. In the United Kingdom, that same plaintiff can recover only the equivalent of $15,000 for both back pay and injury to feelings, notwithstanding the size of the employer. In this sense, the plight of women in the United Kingdom is similar to the plight of women in the United States before the U.S. Congress passed the 1991 amendments to the Civil Rights Act.

Harassment victims can rely on alternative legal theories in order to seek more appropriate relief in the United Kingdom. For instance, if a plaintiff leaves her job to avoid continued harassment, she could argue that she was dismissed unfairly under Section 55 of the Employment Protection Consolidation Act of 1978.\textsuperscript{168} A plaintiff also could argue that her employer breached an implied contract of mutual trust and support.\textsuperscript{169} Plaintiffs are not limited by the amount of damages that they can recover in these types of cases.\textsuperscript{170} It usually takes more time and more money, however, to litigate these cases than it does to litigate cases under the SDA.\textsuperscript{171}

\textsuperscript{166} Leonard, *supra* note 152, at 1515.

\textsuperscript{167} Id. at 1514–15. Leonard cites several post-1989 cases in which harassment victims were awarded between 1000 and 3000 pounds for injury to feelings. In two of those cases, the plaintiffs were able to show that they had become ill and/or required counseling because of the harassment. Id.

\textsuperscript{168} 16 HAlBURY’S LAWS OF ENGLAND (Fourth Ed.) ¶ 381. The act protects employees from being unfairly dismissed if they have worked for their employers for at least two years.

\textsuperscript{169} See id.

\textsuperscript{170} See Bracebridge Engineering Ltd v. Darby, [1991] I.R.L.R. 3–6. The employment tribunal upheld a lower court finding that the plaintiff was discriminated against because she had to quit her job after she was assaulted and touched in a sexual manner by her supervisor and a company manager. The plaintiff was awarded 2,900 pounds in compensatory damages for being unfairly dismissed and 150 pounds for being sexually harassed. Id.

\textsuperscript{171} PREVENTING SEXUAL HARASSMENT, *supra* note 20, at 18.
E. Employer Liability Under U.K. Law

Unlike U.S. case law, U.K. law does not distinguish between quid pro quo and hostile environment harassment to assess employer liability. The SDA provides that employers should be held strictly liable for any discriminatory acts "done by a person in the course of his employment."172 Employers are protected from liability, however, if they can show that they "took such steps as were reasonably practicable to prevent the employee from [committing the harassing conduct]."173 The SDA also states that lack of knowledge about harassment does not shield employers from liability.174

Because no distinction is made between quid pro quo and hostile environment harassment, this strict liability test applies to all forms of harassment. It can not be assumed, however, that employers are held to a higher standard of liability in the United Kingdom than in the United States. In the United States, courts generally rule that an employer will not be liable for hostile environment harassment if it can show that appropriate corrective actions were taken once it became aware that harassment occurred. Such action will not usually release a company from liability for quid pro quo harassment. Such a showing, however, will release U.K. employers from liability for the equivalent of both quid pro quo and hostile environment harassment.

F. The Importance of Establishing Grievance Procedures and Taking Appropriate Remedial Actions Against Harassers Under U.K. Law

Like courts in the United States, U.K. courts tend to focus on the type of corrective actions that companies need to take to protect themselves from liability. This focus is consistent with the SDA which states that companies should take reasonable steps that are designed to prevent harassment. There is some dispute, however, as to whether employers should adopt training programs and grievance procedures that address the problem in advance, or whether punishment after the harassment will suffice.

In a 1987 employment appeal tribunal case, Balgobin and Francis v. London Borough of Tower Hamlets,175 the court took the latter

---

172 SDA, supra note 111, § 41(1). It also is possible for a plaintiff to bring a tort action against her harasser, or for the government to bring criminal actions against him for assault as well.
173 Id. § 41(3).
174 Id.
approach.\textsuperscript{176} In \textit{Balgobin}, a co-worker harassed two female employees.\textsuperscript{177} The company had a discrimination policy, but it was not communicated effectively to its employees.\textsuperscript{178} The company also did not have a grievance procedure in place that would enable employees to air their complaints.\textsuperscript{179}

The court held that the employer still could protect itself from liability by using the excuse that it did not know that the women were being harassed.\textsuperscript{180} The court stated, "it is very difficult to see what steps in practical terms the employers could reasonably have taken to prevent that which occurred from occurring."\textsuperscript{181} Although it seems obvious that a grievance procedure and clearly communicated company policy condemning harassment might have prevented the harassment, the court ignored this possibility.

In \textit{Bracebridge Engineering Ltd v. Darby},\textsuperscript{182} a 1990 case decided by another employment appeal tribunal, the court instead focused on the importance of having a fair and effective grievance procedure in place before harassment occurs.\textsuperscript{183} In \textit{Bracebridge}, a supervisor and a company manager assaulted and sexually touched the plaintiff.\textsuperscript{184} The company grievance procedure, however, required her first to lodge a complaint with the very people who harassed her.\textsuperscript{185} When the plaintiff sidestepped her harassers and complained to the next company manager up the hierarchal chain of command, her complaints were not taken seriously.\textsuperscript{186} Since the only other person that the plaintiff could have complained to—the company president—was out of town, the plaintiff decided to quit her job in order to avoid continued harassment.\textsuperscript{187}

Responding to the argument that the plaintiff should have waited and complained to the company president instead of quitting, the court stated, "in our judgement there was no failure even if she was under a duty, which we doubt, to go through the grievance procedure

\textsuperscript{176} See id.
\textsuperscript{177} Id.
\textsuperscript{178} Id.
\textsuperscript{179} Id.
\textsuperscript{181} Id. at 401–03.
\textsuperscript{183} Id.
\textsuperscript{184} Id.
\textsuperscript{185} Id.
\textsuperscript{186} Id.
in light of what happened in stage one." The court thus implied that while the existence of a company grievance procedure is important, such a procedure has no value if (1) it does not provide complainants with a fair and impartial avenue of redress and (2) it is not implemented in a manner that is designed to stop harassment once it occurs.

Evidently, U.K. case law also is mixed on the issue of employer liability. As a practical and ethical matter, companies probably should follow the guidelines from Intlekofer and Bracebridge. Employers should try to prevent harassment by adopting grievance procedures covering sexual harassment. They should implement well-communicated policies that condemn sexual harassment, educate their employees about unacceptable workplace behavior, and establish multi-stage remedial measures that are designed to punish conduct on the basis of the severity of conduct in question.

In 1991, the EC adopted the EC Recommendation. Its adoption suggests that the best way to prevent harassment is to deal with the problem before it occurs. A Code of Conduct that defines sexual harassment and sets forth guidelines for employers to follow accompanies the EC Recommendation.

V. THE EC CODE OF CONDUCT ON SEXUAL HARASSMENT

A. The EC Definition of Sexual Harassment

EC sexual harassment law has evolved slowly over a thirty-four year period, starting with the signing of the Treaty Establishing the European Economic Community (EEC Treaty or Treaty) in 1957, and culminating in the passage of the EC Recommendation on sexual harassment in 1991. The stated purpose of the EEC Treaty is to promote the elimination of barriers to trade among member nations. To this end, article 7 of the Treaty prohibits discrimination between workers based on nationality. The Treaty, however, contains no comparable prohibition against gender discrimination.

In 1976, the EC passed the Equal Treatment Directive, which called on member nations to enact laws and regulations that guar-
antedeed the equal treatment of women and men at work.\textsuperscript{195} As is the case with Title VII and the SDA, the Directive did not refer to sexual harassment.\textsuperscript{196} In response to a major study on sexual harassment conducted for the EC,\textsuperscript{197} however, the EC Commission issued a Recommendation in November of 1991.\textsuperscript{198} The Recommendation condemns sexual harassment and urges companies to adopt a code of practice that ensures that "sexual harassment does not occur, and, if it does occur, . . . that adequate procedures are readily available to deal with the problem and prevent its recurrence."\textsuperscript{199}

The Code of Conduct (Code), which is annexed to the Recommendation, closely parallels the U.S. Guidelines. It defines harassment as "unwanted conduct of a sexual nature . . . [including] unwelcome physical, verbal or non-verbal conduct."\textsuperscript{200} It also states that such conduct is unacceptable if it "is used explicitly or implicitly as a basis for a decision which affects . . . [an employee's] job prospects or status and/or . . . creates an intimidating, hostile or humiliating working environment for the recipient."\textsuperscript{201} Thus, the Code of Conduct prohibits both quid pro quo and hostile environment harassment.

The Code of Conduct also states that conduct is unacceptable as long as it is "unwanted, unreasonable and offensive."\textsuperscript{202} These three factors are the subject of a great deal of dispute in both the United States and the United Kingdom. What standard should be applied to determine if a woman has welcomed the conduct in question? What test should be used to determine if the conduct under review is unreasonable or offensive? Like statutory law in the United States

\textsuperscript{195} EEC Treaty arts. 5(1)–(2), 9(1).
\textsuperscript{196} Since the Equal Treatment Directive was passed in 1976, there have been several other actions taken by the EC that have paved the way for sexual harassment victims. For example, in 1984 a Council Recommendation was passed, which advised Member States to adopt "a positive action policy designed to eliminate existing inequalities affecting women in working life . . . [and] to take steps to ensure that positive action includes . . . respect for the dignity of women at the workplace. . . . " Council Recommendation of 15 Dec. 1984 On The Promotion of Positive Action for Women, 1984 O.J. (L. 331) 34, 35. In 1991, a Council Resolution passed that invited Member States to adopt national equality plans to, in part, "reduce barriers to women's . . . participation in employment." Council Resolution of 21 May 1991 On The Third Medium-term Community Action Programme On Equal Opportunity For Women And Men (1991–1995), 1991 O.J. (C. 142) 1, 2. Also, in 1991, the European Parliament passed a resolution which sought to ensure the dignity of men and women at work. EEC Recommendation, supra note 6, at 2.
\textsuperscript{197} See generally DIGNITY OF WOMEN, supra note 5.
\textsuperscript{198} EEC Recommendation, supra note 6, at 3.
\textsuperscript{199} Id.
\textsuperscript{200} Id. at 4.
\textsuperscript{201} Id.
\textsuperscript{202} Id.
and the United Kingdom, the Code of Conduct fails to take a definitive stand on these issues.

On one hand, advocates for harassment victims can argue that the Code of Conduct encourages courts to use the reasonable woman/victim test. For example, the Code first states that “the essential characteristic of sexual harassment is that it is unwanted by the recipient.” Because there is no similarly placed phrase in either the U.S. Guidelines or the U.K. Guidelines, the drafters arguably used the phrase, “by the recipient,” to show that they endorsed the use of an evaluative standard that emphasizes the importance of the victim’s perspective in harassment cases. On the other hand, advocates for employers can contend that conduct only becomes harassment under the Code after the victim tells her harasser that she finds his behavior offensive. The Code states that “sexual attention becomes sexual harassment if it is persisted in once it has been made clear that it is regarded by the recipient as offensive, although one incident of harassment may constitute sexual harassment if sufficiently serious.” This language suggests that, short of outright physical assault, a woman welcomes harassment unless she makes a verbal objection directly to her harasser. Thus, employer advocates might maintain that the Code’s drafters really intended to endorse the use of the reasonable person/man test.

Although the Recommendation later states that victims also have the option of resolving their disputes through more formal and less direct channels, it strongly encourages them first to try to talk informally and directly to their harassers. This provision fails to take into account why many women remain silent when they are harassed. They fear that they will suffer reprisals or further harassment if they complain directly to their harassers, especially when those harassers are their supervisors.

There is a risk that some judges will cite this part of the Code of Conduct to support the view that a woman’s silence constitutes her acceptance of harassment. Such a view departs from fundamental common law principles that govern the formation of contracts. For example, under the general rules that govern the formation of contracts, silence generally does not constitute an acceptance of a contract offer under either U.S. or U.K. law.

203 EEC Recommendation, supra note 6, at 4.
204 Id.
205 Id. at 6.
206 For U.S. law, see Thomas Dunfee, Frank Gibson, et al., Modern Business Law 279
The Code's drafters could have taken an alternative approach and emphasized the impropriety of certain delineated types of conduct, with the presumption being that such conduct is per se offensive unless a victim overtly states that she welcomes it. This, however, was not done. As a result, there is a strong possibility that courts will use the Code of Conduct to allow employers to escape culpability for harassment by blaming women for failing to be as aggressive as their harassers.

Thus, there is a danger that courts will use the Code of Conduct to trivialize the experiences of harassment victims. Currently, there are only two U.K. sexual harassment cases that have referred to the EC Recommendation. One took a pro-employer approach and the other took a pro-victim approach.

B. Employer Liability Under the EC Recommendation

1. Possible Strict Liability for Supervisor Harassment

The EC Recommendation does not make a definitive statement about employer liability. It merely suggests that there might be a relationship between supervisor quid pro quo harassment and employer liability. The Recommendation states that "since sexual harassment often entails an abuse of power, employers may have a responsibility for the misuse of the authority they delegate." This statement is similar to the USEEOC's recommendations in the Meritor case. Because of the open-ended nature in which it is made, U.K. courts will be able to avoid its implications if they chose to do so.

2. The Importance of Taking Proactive Steps to Combat Harassment

The SDA protects employers from liability if they take steps that are reasonably designed to stop sexual harassment. There is some dispute in the United Kingdom over whether this means that companies simply need to punish harassers after the fact, or whether they need to go a step further and adopt more proactive measures.


207 See generally EEC Recommendation, supra note 6.
208 Id.
209 Id. at 4 (emphasis added).
Some suggested measures are training programs and grievance procedures.

The Code of Conduct suggests that the proactive approach is the more effective way to combat sexual harassment. The Code states that "employers have a responsibility to take steps to minimize the risk [of sexual harassment] as they do with any other hazards." These steps include the development of a policy statement that makes it clear that harassment will not be tolerated, a training program that teaches employees and managers about the problem, a grievance procedure that ensures that complaints will be resolved in a fair and effective manner, and a disciplinary procedure that covers a range of potential penalties against harassers. While it is not mandatory that Member States "harmonize" the EC Recommendation by passing it into law, there is a presumption that U.K. judges will rely on it in the same manner that U.S. judges rely on the U.S. Guidelines and U.K. judges rely on the U.K. Guidelines.

C. Recent U.K. Case Law References to the EC Recommendation

The first two U.K. cases that refer to the EC Code of Conduct are Tofield v. Pollicino t/a Donnabella Hair Design and Donnelly v. Watson Grange Ltd. In Tofield, the plaintiff said that she was forced to quit her job after the company owner made masturbatory gestures in front of her and talked to her about personal sexual matters. He also suggested that she appear nude in the newspaper. At the industrial tribunal hearing, the owner belittled the plaintiff's complaints, said that she was untrustworthy, and accused her of stealing company products. The owner never, however, reported any of his concerns to anyone before she filed her lawsuit. Concluding that the plaintiff was more credible than the defendant,
the court cited both the SDA and the Code of Conduct and ruled that the circumstances alleged by the plaintiff constituted illegal sexual harassment.220

In *Donnelly v. Watson Grange Ltd.*, however, the industrial tribunal took a decidedly more anti-victim approach.221 It concluded that because the plaintiff had not objected sufficiently to being harassed, she was not entitled to any relief under either the SDA or the Code of Conduct.222 The plaintiff worked for a company as an export sales manager.223 She alleged that during her employment, her supervisor, a marketing manager, subjected her to a constant barrage of personalized and generalized comments of a sexual nature.224 She also said that he propositioned her and invited her to strip tease parties while they were traveling away on business.225

The plaintiff initially only responded by remaining silent or saying "for goodness sakes."226 She did tell her parents about the problem, but said that she did not feel comfortable confiding about the problem to anyone at work.227 Finally, approximately eighteen months after the alleged harassment began, she said that she told her supervisor that she wanted his behavior to stop, but he continued to harass her.228 Six months later, he asked her to resign.229

The industrial tribunal cited the Code of Conduct to support its view that a victim’s silence constitutes her acceptance of harassment.230 The court said that:

> remarks of the type which have been listed reasonably could be totally unacceptable to a female employee, . . . *if she made the fact that it was unacceptable clear* . . . even if the applicant’s evidence had been accepted as entirely credible, it was not clear that she had made the fact that the

220 *Id.* at 6.
222 *Id.*
223 *Id.*
224 *Id.* at 3. The plaintiff claimed that, among other things, her supervisor commented on his sexual prowess, her being a big girl, women being bits of crumpets, and how he would buy her a low-cut blouse. *Id.*
226 *Id.* at 4.
227 *Id.* at 4–6.
228 *Id.* at 5.
229 *Id.* at 6.
230 Indus. Trib. (Case No. S/119) at 18 (emphasis added).
behavior was unwanted clear . . . [It appears that she had]
freely and willingly taken part in the conversations.\textsuperscript{231}

The tribunal made this last statement without any reference to the
fact that the plaintiff said that she did tell her supervisor to stop on
one occasion.\textsuperscript{232} In addition, the tribunal failed to take into account
the fact that no evidence was submitted to show that the company
had a grievance procedure designed to deal with sexual harass­
ment.\textsuperscript{233} The tribunal also failed to acknowledge the unequal power
relationship that existed between the plaintiff and her supervisor.\textsuperscript{234}
In such relationships, the supervisor places his subordinate in the
untenable position of having to choose between risking further
harassment if she does not object, or risking retaliation if she does.

Evidently, there is a chance that some U.K. judges will use the EC
Code of Conduct to belittle the experiences of harassment victims.
As has been the case with many of these issues, unless the Court of
Appeal, Parliament, or the EC mandate that courts take the plight
of harassment victims more seriously, the movement to combat sex­
ual harassment will remain in jeopardy.

VI. REFORMING SEXUAL HARASSMENT LAW IN THE UNITED STATES
AND THE UNITED KINGDOM

In order to combat sexual harassment more effectively, current
legislation in the United States and the United Kingdom needs to
be revised. This can be done if new legislation: (1) mandates that
courts apply an evaluative standard that gives greater weight to
victims’ perspectives in order to determine whether conduct is wel­
comed, offensive, or unreasonable, (2) shields evidence about a
plaintiff’s non-contemporaneous sexually-charged speech or con­
duct from being admitted into evidence, (3) eliminates caps on the
amount of damages that can be awarded to successful harassment
complainants, (4) makes employers strictly liable for all supervisor
harassment, and (5) requires companies to adopt training and griev­
ance procedures that are designed to inform employees about the
nature of harassment and to prevent it from occurring. Explanations
for the proposed reforms appear below.

\textsuperscript{231} Id.
\textsuperscript{232} See id.
\textsuperscript{233} See id.
\textsuperscript{234} See id.
A. The Reasonable Woman/Victim Test Should Be Used To Evaluate Harassment Claims

Much work has been done in the United States to document how workplace sexual harassment negatively affects women. Women tend to find conduct offensive that men find inoffensive. Women also often fear that they will be retaliated against or that the harassment will escalate if they tell their harassers to stop or complain to their superiors about it. Since women are by far the most common victims of sexual harassment, legislation needs to be passed that requires courts to use an evaluative standard that gives greater weight to the perspectives of women in harassment cases.

The standard, among other things, would focus on the impropriety of certain types of conduct. It also would acknowledge that a woman's silence does not constitute her acceptance of the conduct in question. The presumption would be that the conduct is per se offensive unless she expressly says that she welcomes it.

By logical extension, such a standard could be used to determine the general perspective of any group that is victimized by harassment. Thus, for example, a “reasonable victim test” could be similarly applied to determine whether conduct is offensive to heterosexual men, gay men, or lesbians who report harassment. For such a test to be effective, however, governments in the United States and the United Kingdom need to sponsor objectively-based statistical research that seeks to ascertain how sexual harassment affects different groups.

Legislation in the United Kingdom also should require courts to rely more heavily on the results of such research. The research would continue and expand on the work pioneered by the sponsors of the 1981 Merit Report and the 1988 Merit Report. It also would have to be updated on a periodic basis.

Some may object to the use of the new evaluative standard on the grounds that it too can be used to trivialize individual experiences that fall outside the range of experiences common to most harassment victims. Others may criticize it because they may feel that its insistence on viewing men and women differently runs counter to the law, which states that men and women should be treated equally. Unfortunately, there is always the chance that the individual's needs will be subsumed by the needs of the group whenever conceptualized notions of objectivity are used in the law. This, however, is one of the inherent risks associated with the rule of law.
Furthermore, it is also important that the underlying purpose of discrimination law not be forgotten—that attitudes and patterns of behavior that traditionally have kept certain groups from being treated equally must be addressed before full equality can be achieved. Thus, given the fact that a significant number of harassment victims will benefit from the proposed standard, its use at least will move current dialogue about workplace equality in the right direction.

B. A Plaintiff's Non-Contemporaneous Sexually-Charged Speech Or Conduct Should Not Be Used To Challenge Her Sexual Harassment Claim

Evidence about a woman's non-contemporaneous sexually-charged speech or conduct often is used to challenge her when she claims that she did not welcome such conduct, and that she found the conduct to be offensive. The relevancy of such speech or conduct is questionable, especially when it is not directed at the alleged harasser, or when it does not take place in his presence. The use of such evidence usually results in the victim being blamed in the same manner that a sexually-active rape victim is often blamed during the course of a rape trial. Legislation should be passed that prevents courts from using this kind of evidence in this manner. Such legislation could be modeled on California's sexual harassment shield law.

C. Damage Awards Should Not Be Subject To Statutory Limits

Given the small amount of compensation that harassment victims are entitled to receive in the United Kingdom, the SDA's limits on damages should be lifted. Except for punitive damages, a victim should be entitled to receive a level of monetary relief that is equal to the degree of harm that she has suffered. Furthermore, the possibility of larger damage awards will motivate employers to take the problem of sexual harassment more seriously. Finally, since there are no limits placed on the amount of money damages that victims of racial and religious discrimination can receive in the United States, the Kennedy Bill's proposal to eliminate statutory caps on damages for victims of sex discrimination should be enacted.

235 See Reasonable Woman Test, supra note 29, at 237 n.59.
Outside forces may compel U.K. legislators to eliminate their statutory limits on money damages, notwithstanding their traditional reluctance to do so. In a recent ruling by the European Court of Justice, the Court made it clear that such limitations run contrary to the Equal Treatment Directive when those limitations are applied to awards won by public sector employees. In *Marshall v. Southampton Area Health Authority*, the European Court of Justice stated that such awards must be "'adequate, in that [they] must enable the loss or damage sustained . . . to be made good in full.'" Hopefully, U.K. legislators will seize the opportunity afforded them by the *Southampton* ruling and revise the SDA so that it eliminates statutory caps on awards for both public and private sector employees, as well as for sex and race discrimination cases.

D. *Employers Should Be Strictly Liable For All Forms Of Supervisor Harassment*

Employers should be held to the highest standard of liability when supervisors engage in workplace sexual harassment. Because of the duties that employers delegate to supervisors, supervisors occupy a unique position of authority over lower level employees. They often have the power to hire and fire, and to promote and demote employees. Supervisors also have the power to affect the future employment prospects of employees because they are a traditional source of job references.

When a supervisor makes lewd gestures or obscene remarks to a female employee, it is likely that her emotional well-being will be affected negatively. She may ask to take sick leave, seek an in-house job transfer or even look for a new job. Clearly, the impact of supervisor hostile environment harassment is just as "tangible" as any hiring, firing, or promotion decision would be. In the United States, legislation should be adopted that requires courts to hold employers strictly liable for supervisor quid pro quo and hostile environment harassment. Because U.K. law currently does not distinguish between these two forms of harassment, U.K. legislation

---

237 Id.
238 Although technically, EC law mandates that the principles articulated by the Court of Justice in decisions like *Southampton* must be enacted into U.K. law, the principle of "direct effect" would enable U.K. citizens to rely on the Court of Justice ruling in U.K. courts immediately. Napier, *supra* note 163, at 1185.
simply needs to mandate that courts hold employers strictly liable for all supervisor harassment.

E. Employers Should Be Liable For Co-worker Hostile Environment Harassment When Employers Fail To Take Prompt And Effective Remedial Actions Against Co-worker-Harassers

Since co-workers do not occupy the same position of power that supervisors occupy, the strict liability test should not apply to co-worker harassment. Studies show that co-worker harassment is pervasive and occurs more frequently than supervisor harassment. Co-worker harassment thus is the form of harassment that needs to be addressed by employers immediately. Legislation should require employers to take prompt and effective remedial actions against co-workers as soon as they know or should know that co-workers are engaging in sexual harassment. These actions should be commensurate with the level of severity of the harassment in question.

More importantly, the legislation should state that the overall purpose of any remedial measure should be to stop harassment from continuing. The employer should not try to protect harassers by warning them informally when more serious measures would be more appropriate. Assuming that a company properly informs its employees that sexual harassment will not be tolerated, and implements a grievance process that enables employees to report harassment, the company should not hesitate to penalize employees for engaging in prohibited conduct.

As previously mentioned, companies should be held strictly liable for supervisor harassment. It also is recommended that they take prompt and appropriate remedial actions against supervisor-harassers. Of course, given the more serious nature of supervisor harassment, harsher penalties should be assessed against supervisor-harassers.

F. Employers Should Be Required To Establish Grievance Procedures And Training Programs That Are Designed To Prevent And Stop Harassment

Both U.S. and U.K. law require companies to take steps designed to prevent sexual harassment. Statutory law in neither country, how-

---

299 1988 Merit Report, supra note 1, at 3, 12 (69% of the women surveyed reported that they had been harassed by a co-worker).
ever, specifically delineates what type of “steps” should be taken. As mentioned previously, case law in both countries is mixed with respect to this issue. Uniform national legislation should be adopted that acknowledges that the most effective way for a company to prevent sexual harassment is for it to establish grievance procedures and to educate employees about harassment. In the United States, proposed legislation already has been introduced in some states that would require companies to do this.\textsuperscript{240} Even if new legislation is not enacted, from an ethical perspective, multinational companies who do business in the United States and the United Kingdom should consider following the proposals recommended in this Section.

Training programs should teach employees about the nature and effects of sexual harassment, the type of conduct that is prohibited, and the range of penalties that will be assessed against those who engage in harassing conduct. Such programs do not have to be costly to be effective. For small businesses, and those companies who lack sizable revenues, there are a host of small consulting firms and videotapes on the market that can be used to educate employees at an affordable price.

Training on sexual harassment also will be more effective if it is included as part of a company’s overall diversity education program. These programs should be conducted on a periodic basis. In addition, an employee’s success or failure in meeting a company’s sexual harassment policy goals should be discussed during that employee’s semi-annual review.

Perhaps most importantly, a company should work to make its employees feel that their concerns will be addressed in a fair and efficient manner. If employees know that grievance procedures are in place with these attributes, it is likely that disputes will be resolved in-house. Company grievance procedures, thus, should address the concerns of harassment victims. If a supervisor is the first person to review a harassment complaint, the employer should provide an alternate person to receive employee complaints concerning supervisor harassment. Companies also should investigate complaints in a professional and confidential manner.

CONCLUSION

Much has been done in the United States, the United Kingdom, and the EC to create a legal environment that encourages employers to protect the dignity of women at work by combatting sexual harassment. There is a danger, however, that progress in this direction will be thwarted both by legislators who are unwilling to pass laws that adequately address the concerns of harassment victims, and by judges who interpret those laws in a manner that trivializes the experiences of sexual harassment victims. If statutory reforms are enacted and employers take the appropriate steps to prevent harassment, the momentum towards eliminating sexual harassment will be regained and women will have a real chance of achieving full equality in the workplace.