

**Ninth Meeting of European Labour Court Judges
Geneva, 3-4 December 2001**

UNITED STATES

SEXUAL HARASSMENT

Questionnaire

General Reporter: Professor Alan Neal

**Professor of Law, University of Warwick, United Kingdom
and Chairman of Employment tribunals (London Central), United Kingdom**

1 CONCEPT: THE SUBSTANTIVE NOTION OF ASEXUAL HARASSMENT

1.1 In your country is there a recognised concept of Asexual harassment?

Yes x No †

1.2 If so, since when has this existed?

Included in broad terms of 1964 Civil Rights Act , but not recognized by the Courts until late
1970-s. Equal Employment Opportunity Commission Regulation adopted in
1980

.....
.....

1.3 Is there in your country a legal definition for the notion of Asexual harassment?

Yes x No †

1.4 If so, is that definition provided by statute, and/or through case-law development, and/or by
reference to a relevant definition existing elsewhere (e.g. in a European Union or other
international instrument)?

Definition provided by case-law development and by regulation of Equal Employment Opportunity
Commission

Ninth Meeting of European Labour Court Judges

1.5 Please state what is that definition:

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

1.6 In your country is there any supplementary/complementary guidance as to what constitutes sexual harassment (e.g. A Code of Practice or other guidance on dignity at work)?

Yes x No †

1.7 If so, what is the nature of that supplementary/complementary guidance?

Case law.

.....
.....
.....
.....

1.8 Are there any circumstances where sexual harassment is (or could be) regarded as a matter falling within the regulation of health and safety at work in your country?

Injuries arising from it have formed the basis for workers compensation claims under state law.

.....
.....
.....

2. CAUSE OF ACTION AND PROCEEDINGS IN RESPECT OF SEXUAL HARASSMENT

2.1 In your country is it possible to bring proceedings before a court (a labour court or any other judicial instance) in respect of alleged employment-related sexual harassment?

Yes x No †

2.2 Do proceedings in respect of sexual harassment stand as a cause of action in its own right, or do such proceedings fall within a broader category of dispute (e.g. in the guise of sexual discrimination)?

Ninth Meeting of European Labour Court Judges

They fall under the category of sex discrimination.

.....

.....

.....

- 2.3 Does there exist in your country any Aparallel@ or comparable form of action (e.g. a cause of action in respect of Aracial harassment@)?

Yes, racial harassment is also a violation of Title VII of the 1964 Civil Rights Act and of other statutes prohibiting racial discrimination.

.....

.....

.....

.....

- 2.4 Is there any significant difference in respect of the relevant cause of action or the procedures involved if the alleged harasser is a Apublic@ body, as opposed to a private individual or body@

Yes † No x

- 2.5 If so, what will be the applicable situation in relation to each of those?

.....

.....

.....

.....

- 2.6 Against whom can an action be taken in relation to alleged employment-related Asexual harassment@?

The employer. Tort actions may be filed against the individual who did the harassing.

.....

.....

.....

Ninth Meeting of European Labour Court Judges

- 2.7 If action can be taken against the employer of an alleged harasser, please indicate in what circumstances that will be possible?

Where the harassment is *quid pro quo* that is, where sexual favors are demanded in exchange for employment benefits or to avoid employment detriments, the employer is liable if there is a tangible employment action involved. Where there is no tangible action, the employer can avoid liability if it has exercised reasonable care to prevent and correct promptly harassing behavior, and that the employee unreasonably failed to take advantage of any preventive or corrective opportunities offered by the employer or to avoid harm otherwise. For *hostile environment* harassment, the employer will be liable if it had actual or constructive knowledge of the sexually hostile working environment and took no prompt or adequate remedial action.

- 2.8 Who is formally entitled to bring such an action?

The victim of the discrimination, the Federal Equal Employment Opportunity Commission (EEOC) and, in some states, the state Human Rights Agency.

.....

.....

.....

.....

- 2.9 If a body other than an alleged victim of alleged employment-related sexual harassment (e.g. an Equality commission, an Ombudsman, or similar) is entitled to bring such an action, please indicate in what circumstances this will be permitted:

The EEOC can bring an action if it finds reasonable cause to believe that the law has been violated.

.....

.....

.....

.....

- 2.10 Is public legal aid, advice, or other assistance available to a party who wishes to bring an action in relation to alleged employment-related sexual harassment?

Yes x No †

- 2.11 If so, what is the nature of that legal aid, advice, or other assistance, and in what circumstances will it be available?

The EEOC and state agencies give advice and counsel to potential claimants, investigate claims and attempt conciliation. They may also sue on their behalf.

.....

3. DISPUTE RESOLUTION FORUM AND STRUCTURES

3.1 In what forum can an action be brought in your country relating to alleged employment-related Asexual harassment@?

Federal or state courts.

3.2 Where relevant, in what forum can an action be brought in your country relating to alleged non-employment-related Asexual harassment@?

.....

.....

.....

.....

3.3 Who will adjudicate on a complaint relating to alleged employment-related Asexual harassment@?

Professional Judge (s)	x	How many ? One
	†	With what background? Attorneys at law
Lay (e.g. trade union Members)	†	How many?.....
	†	With what background?.....
ASpecialist Aassessor (s)@	†	How many?.....
	†	With what background?.....
Other	x	How many? Between 6 and 12
	x	Please specify Lay jurors

3.4 Is any particular experience or qualification required of those who will adjudicate on a complaint relating to alleged employment-related Asexual harassment@?

Yes x No †

3.5 If so, what is the nature of that requisite experience or qualification?

Judges must be attorneys at law. Jurors are not required to have any special experience.

.....

.....

.....

.....

3.6 Is any special training provided for those who will adjudicate on a complaint relating to alleged employment-related Asexual harassment@?

Yes † No x

3.7 If so, what is the nature of that training?

.....

.....

.....

.....

4. PROCEDURE IN RELATION TO EVIDENCE AND THE ADJUDICATION OF COMPLAINTS OF EMPLOYMENT-RELATED ASEXUAL HARASSEMENT@

4.1 In relation to the procedures which are adopted during the course of adjudicating upon a complaint of alleged employment related Asexual harassment@, are there in your country any special rules relating to:

4.1.1 Anonymity of any or all of the parties? Yes † No x
If so, what rules apply here?

.....

.....

.....

.....

4.1.2 Hearing some or all of the evidence in camera? Yes † No x

If so, what rules apply here?

.....

.....

.....

.....

4.1.3 Placing restrictions upon the freedom of the Press to report such proceedings?

Yes † No x

If so, what rules apply here?

.....

.....

.....

.....

4.1.4 The manner in which cross-examination (or questioning in general) of an alleged
 Avictim® can take place (e.g. reflecting criminal procedure rules for sexual offences)?

Yes † No x

If so, what rules apply here?

.....

.....

.....

.....

4.2 In terms of making out a case, what elements does a party who complains of employment-related
 Asexual harassment® in your country have to establish?

Unwanted sexual advances that materially affect conditions of employment. Quid pro quo is proved by showing that the harasser requested sexual activity in exchange for workplace benefits (or to avoid detriments). Hostile environment is proved by showing that the harasser created an offensive or

intimidating environment for the victim.

4.3 What is the standard of proof required in such cases (e.g. shown on a balance of probabilities, etc.)?

Preponderance of the evidence.

.....

.....

.....

4.4 What are the rules in your country concerning the burden of proof in such cases?

Victim must prove case by a preponderance of the evidence. Burden of coming forward with the evidence shifts to the employer in a quid pro quo case to make out the affirmative defense of having taken reasonable care to prevent harassment and the employee failing to take advantage of preventive or corrective opportunities.

.....

.....

.....

.....

4.5 Is this consistent with the normal rules in your country concerning the burden of proof in civil cases?

Yes x No †

If not, in what way (s) do the rules differ here?

.....

.....

.....

.....

4.6 Is there any right in your country for a witness or a party to refuse to answer a question during the course of proceedings relating to alleged employment-related sexual harassment on the ground that the answer given might be self-incriminating in respect of a criminal offence?

Yes x No †

If so, what is the basis of that right to refuse an answer?

Constitutional privilege against self-incrimination.

.....

.....

.....

4.7 Do witnesses in proceedings relating to alleged employment ~~A~~related sexual harassment~~@~~ give evidence under oath?

Yes x No †

4.8 Is this consistent with the normal situation for witnesses giving evidence in civil proceedings in your country?

Yes x No †

4.9 Will any aspect of evidence be excluded in proceedings relating to alleged employment-related ~~A~~sexual harassment~~@~~ (e.g. the sexual history of the alleged ~~A~~victim~~@~~, or instances of previous allegations made against the alleged harasser)?

Yes † No x

4.10 If so, what rules apply here?

.....

.....

.....

.....

.....

4.11 If there has been a criminal (e.g. by the police) or other investigation into the circumstances under adjudication in proceedings relating to alleged employment-related ~~A~~sexual harassment~~@~~, will statements or other evidence obtained in the course of that investigation be admissible in relation to the alleged employment-related ~~A~~sexual harassment~~@~~ proceedings?

Yes x No †

4.12 If so, under what conditions will such evidence be admitted?

To impeach witnesses, and in the absence of objections based on hearsay and other legal grounds. Generally, sworn statements (affidavits) are not admissible if the witness is available to testify.

.....

.....

.....

.....

- 4.13 Will a failure by the employer of an alleged harasser to observe any Aguidance@ or ACode of Practice@ provisions on dignity at work be taken into account during the course of adjudicating in proceedings relating to alleged employment-related Asexual harassment@?

Yes † No x

- 4.14 If so, in what way will this come about, and what might be the consequences of such non-observance?

.....

.....

.....

.....

5. ADJUDICATION, REMEDIES AND CONSEQUENTIAL MATTERS

- 5.1 In your country will the judgement/decision in relation to proceedings concerning alleged employment-related Asexual harassment@ be given with a full statement of the reasons underlying the outcome of those proceedings?

Yes
x
No
†

- 5.2 Is this consistent with the normal situation for judgments/decisions in civil proceedings in your country?

Yes
x
No
†

- 5.3 In your country will the judgement/decision in relation to proceedings concerning alleged employment-related Asexual harassment@ be made public?

Yes
x
No
†

5.4 If so, will the whole of the judgment/decision be made public, or may portions of it not be made available (e.g. the names of parties)?

The whole of it.

.....

.....

.....

.....

5.5 What remedies are available to a successful party who has complained of employment-related Asexual harassment@?

Money damages, reinstatement.

.....

.....

.....

.....

5.6 In addition to Adirect@ remedies for a successful party in such proceedings, is it possible for the adjudicating body to make Arecommendations@ or similar (e.g. to bring about an investigation into, or monitoring of, an employer=s practices)?

Yes
†
No
x

5.7 If so, what is the potential scope of any such Arecommendations@ (or the like)?

.....

.....

.....

.....

.....

5.8 Is there a recognized cause of action in your country for Avictimization@ in relation to a person who has brought a complaint concerning, assisted a person who has made a complaint, or been involved with proceedings concerning alleged employment-related Asexual harassment@?

Yes
x
No
†

5.9 If so, what conditions must be satisfied in order to succeed in a claim alleging such Avictimization@?

Proof by a preponderance of the evidence that this has occurred.

.....

.....

.....

.....

5.10 What remedies are available to a successful party who has complained of Avictimization@ relating to alleged employment-related Asexual harassment@?

Money damages, reinstatement.

.....

.....

.....

.....

5.11 Is it possible in your country to appeal against a judgment/decision in proceedings relating to alleged employment-related Asexual harassment@ or alleged Avictimization@ arising out of any such allegation?

Yes
x

No
†

5.12 If so, to whom does any such appeal lie, and on what grounds can such an appeal be made?

To higher courts, generally on grounds of an error of law.

.....

.....

.....

.....

5.13 Is it possible in your country for a party who has brought proceedings relating to alleged employment-related Asexual harassment@ or alleged Avictimization@ to be open to litigation in respect of (e.g.) defamation, perjury, or the like?

Yes
x
No
†

5.14 If so, in what circumstances might this arise?

Perjury or false swearing in any civil action is a criminal offense. A defamation suit might also be Possible suit for defamation by individual accused of harassing behavior.

.....

.....

.....

.....

6. SUPPLEMENTARY

6.1 Please indicate your (personal) impression of the extent to which the notion of Asexual harassment@ in your country depends upon the subjective response of the alleged Avictim@ and to what extent it has proved possible in your country to develop objective criteria for identifying action of circumstances which can be said to amount to Asexual harassment@

In my opinion the subjective response is judged against a standard of what a reasonable victim would perceive to be intolerable. I believe that the case law has developed a relatively clear set of objective standards for deciding these cases.

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

6.2 Please provide any available data relating to statistics for cases involving allegations of employment-related Asexual harassment@ in your country.

There have been numerous surveys that support the proposition that it is fairly common in the United States. These have showed that perhaps as many as 40 per cent of working women have experienced sexual harassment.

.....

.....

6.3 Please furnish a copy of any legislative provisions in your country which deal specifically with the phenomenon of Asexual harassment@.

6.4 Please furnish a copy of any Aguidance@ or ACode of Practice@ in relation to dignity at work which touch upon the phenomenon of Asexual harassment@.

- 6.5 Is there in your country any experience in the use of Aalternative dispute resolution@ mechanisms in relation to circumstance in which allegations of employment-related Asexual harassment@ have been made?

Yes
x
No
†

- 6.6 If so, please indicate the nature of the Aalternative dispute resolution@ mechanism(s) and give a brief description of its (their) operation:

The phenomenon known as Aemployment arbitration@ on which I and my colleagues are doing research is becoming an important alternative to litigation with respect to all sorts of statutory claims of discrimination. Employers may require agreement to arbitration as a condition of employment.

.....
.....

- 6.7 Have there been developments in your country in the direction of applying any of the provisions dealt with in this questionnaire to alleged Asame sex@ harassment?

Yes
x
No
†

- 1.8 If so, please indicate how these developments have progressed to date:

By case law, same sex sexual harassment is covered under Title VII of the 1964 Civil Rights Act.