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NATIONAL REPORTS
Sex discrimination cases in labour courts

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Australia

National reporter: The Honourable Les Kaufman, Senior Deputy President, Fair Work Australia

Introductory comment

To understand some of these answers it should be noted that Australia has a Commonwealth (Federal Government) and six state governments.

The Constitution created a federal system of government, where powers are divided between a central government (Federal Government) and the six individual states (State Governments).

In addition to the six states, there are two territories.

Finally, there are also local governments, established by the state and territory governments to take responsibility for a number of community services. Their powers are defined by the state or territory government which establish them.

In this questionnaire we concentrate primarily on legislation of the Commonwealth (Federal) Parliament and facts/information about federal courts, tribunals and government departments.

The answers in this questionnaire relate principally to the Federal legislation and jurisdiction, and are in board terms. Fair Work Australia (FWA) deals with sexual discrimination in a limited capacity (e.g. related employment disputes) and the main federal legislation, the Sex Discrimination Act 1984, is administered by the Australian Human Rights Commission, the Federal Magistrates Court and the Federal Court of Australia.

1. There are a number of Commonwealth and State laws that deal with sex discrimination:

- *Sex Discrimination Act 1984*
- *Australian Capital Territory Discrimination Act 1991 (ACT)*
- *New South Wales Anti-Discrimination Act 1977 (NSW)*
- *Northern Territory Anti-Discrimination Act 1996 (NT)*
- *Queensland Anti-Discrimination Act 1991 (QLD)*
- *South Australia Equal Opportunity Act 1984 (SA)*
- *Tasmania Anti-Discrimination Act 1998 (TAS)*
- *Victoria Equal Opportunity Act 1995 (VIC)*
- *Western Australia Equal Opportunity Act 1984 (WA)*

2. Fair Work Australia deals with sexual discrimination only in a very limited capacity, under s.351 of the *Fair Work Act 2009*:

351 Discrimination

(1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) However, subsection (1) does not apply to action that is:

(a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or

(b) taken because of the inherent requirements of the particular position concerned; or

(c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed—taken:

(i) in good faith; and

(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

According to the Fair Work Australia quarterly report for Jan - March 2011, 626 disputes were lodged under s.365 of the *Fair Work Act 2009*, however, this includes all applications under this Part of the Act and does not break down the numbers to show how many cases are specific to sex discrimination.

http://www.fwa.gov.au/documents/legislation/fw_act/FW_Act-02.htm#P5022_474044

- 3&4. In the financial year, July 2009 - June 2010, a total of 532 complaints were filed under the *Sex Discrimination Act 1984* with the Australian Human Rights Commission.

Table 19: Sex Discrimination Act — complaints received by sex of complainant

Sex Discrimination Act	Total	%
Female	418	79
Male	101	19
Other category*	13	2
Total	532	100

* Includes intersex, sex not specified, joint/multiple and individual/organisation on behalf of other

These are broken down to sexual discrimination, sexual harassment, marital status, parental status/family responsibilities, pregnancy, victimisation, and aids, permits, instructs.

Table 20: Sex Discrimination Act — complaints received by ground

Sex Discrimination Act	Total	%
Sex discrimination	434	45
Marital status	30	3
Pregnancy	202	21
Sexual harassment	201	21
Parental status/ family responsibility	62	6
Victimisation	37	4
Aids, permits, instructs	2	—
Total*	968	100

* One complaint may have multiple grounds.

These statistics also break down which areas the complaints have been received in.

Table 21: Sex Discrimination Act — complaints received by area

Sex Discrimination Act	Total	%
Employment	854	88
Goods, services and facilities	70	7
Land	—	—
Accommodation	—	—
Superannuation, insurance	2	—
Education	24	3
Clubs	1	—
Administration of Commonwealth laws and programs	16	2
Application forms etc	—	—
Trade unions, accrediting bodies	1	—
Total*	968	100

* An area is recorded for each ground, so one complaint may have multiple and different areas

Source: Australian Human Rights Commission Annual Report 2009-2010, pg81

5. According to the Australian Human Rights Commission Annual Report 2009-2010 (pg77), there has been an increase of 185 complaints, made under the Sex Discrimination Act 1984, in the last 5 years. That is an increase of 53% complaints, over the past 5 years.
6. Sexual Harassment is defined under section 28A of the *Sex Discrimination Act 1984*

Meaning of sexual harassment

*(1) For the purposes of this Division, a person sexually harasses another person (the **person harassed**) if:*

(a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or

(b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

(1A) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:

(a) the sex, age, marital status, sexual preference, religious belief, race, colour, or national or ethnic origin, of the person harassed;

(b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;

(c) any disability of the person harassed;

(d) any other relevant circumstance.

(2) In this section:

*"**conduct of a sexual nature**" includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.*

7. As previously mentioned FWA deals with sex discrimination in a limited capacity. However below is a link to a termination of employment case, involving sexual harassment:

[2010] FWA 8544 Ms Tamicka Louise Dover-Ray v Real Insurance Pty Ltd
<http://www.fwa.gov.au/FWAISYS/isysquery/fcd9aa-5dd0-4741-a37e-5517822bbd1c/13/doc/>

Below is a link to a Federal Court case involving discrimination on the grounds of sex and pregnancy:

Thomson v Orica Australia Pty Ltd [2002] FCA 939

[http://www.austlii.edu.au/cgi-](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2002/939.html?stem=0&synonyms=0&query=sex%20discrimination)

[bin/sinodisp/au/cases/cth/FCA/2002/939.html?stem=0&synonyms=0&query=sex%20discrimination](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2002/939.html?stem=0&synonyms=0&query=sex%20discrimination)

8. The main channel to deal with sex discrimination and sexual harassment cases is the Australian Human Rights Commission. They are initiated under a combination of the Sex Discrimination Act 1984 and the Australian Human Rights Commission Act 1986. Having said that, the role of the Australian Human Rights Commission is limited. Its function is confined to investigation and conciliation only. If the complaint is unable to be resolved in that manner, it may go to the Federal Magistrates Court or the Federal Court of Australia.

According to the Australian Human Rights Commission Annual Report 2009-10; 52% of complaints lodged with the Australian Human Rights Commission were resolved through conciliation; 25% are terminated with no reasonable prospect of conciliation. It is not known of this number how many proceed to the courts. However, the Federal Court of Australia Annual Report 2009-10 indicates that there are currently 46 human rights cases before them, this figure is not broken down and the exact number of sex discrimination cases is difficult to determine.

9. As above.
10. Yes, section 7C of the Sex Discrimination Act 1984 provides that ‘in a proceeding under this Act, the burden of proving that an act does not constitute discrimination because of section 7B lies on the person who did the act.’
11. n/a
12. “Under federal anti-discrimination law an employers, regardless of their size, may be directly and/or vicariously liable for discrimination and harassment which occurs in the workplace or in connection with a person’s employment unless it can be shown that ‘**all reasonable steps**’ have been taken to reduce this liability.

‘All reasonable steps’ is not defined in the legislation because what is reasonable for a large corporation may not be reasonable for a small business. Rather it is worked out on a case-by-case basis. However, it does mean that employers must actively implement precautionary measures to minimise the risk of discrimination and harassment occurring.”

(Source: Australian Human Rights Commission, Information for employers)

13. Measures taken by the employer to deal with sexual harassment in the workplace vary from workplace to workplace. What are ‘reasonable steps’ taken by one employer may not be reasonable for another. However, the policies and procedures of the workplace are not regulated by legislation. Employers are obliged to ensure that they provide a safe and harassment free workplace but how that is done is at the employer’s discretion.

The Australian Human Rights Commission recommends that employers:

- Prepare and promote a written policy on workplace discrimination and harassment
- Train staff to identify and prevent workplace discrimination and harassment
- Establish an effective internal complaints procedure
- Appoint trained harassment contact officers
- Treat all complaints seriously and investigate them promptly
- Ensure that appropriate action is taken to address and resolve complaints

- Monitor the workplace environment and culture, such as holding staff surveys or reviewing recruitment practices.

14. Section 46PO(4) of the *Australian Human Rights Commission Act 1986* (Cth) provides:

If the court concerned is satisfied that there has been unlawful discrimination by any respondent, the court may make such orders (including a declaration of right) as it thinks fit, including any of the following orders or any order to a similar effect:

- (a) an order declaring that the respondent has committed unlawful discrimination and directing the respondent not to repeat or continue such unlawful discrimination;*
- (b) an order requiring a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by an applicant;*
- (c) an order requiring a respondent to employ or re-employ an applicant;*
- (d) an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent;*
- (e) an order requiring a respondent to vary the termination of a contract or agreement to redress any loss or damage suffered by an applicant;*
- (f) an order declaring that it would be inappropriate for any further action to be taken in the matter.*

The Australian Human Rights Commission discusses the general approach to damages awarded in the courts.

http://www.humanrights.gov.au/legal/FDL/fed_discrimination_law_05/fdl2005chap07.html#a7.1

Below are a few examples of damages awarded in sexual harassment claims in the Federal Court:

Date	Name and citation	Total Damages (Economic Loss and General Damages)
23 June 2009	<i>Poniatowska v Hickinbotham</i> [2009] FCA 680	• General damages: \$90,000.00 • Past loss of income: \$200,000.00 • Future loss: \$140,000.00 (Total: \$466,000.00)
15 July 2005	<i>South Pacific Resort Hotels Pty Ltd v Trainor</i> (2005) 144 FCR 402	• General damages: \$5,000.00 • Past loss of income: \$5,000.00 • Future economic loss: \$2,500.00 (Total: \$17,536.80)
4 February 2002	<i>Leslie v Graham</i> [2002] FCA 32	• \$16,000 (general damages)

15. Employees are protected under ss.340-342 of the *Fair Work Act 2009*. Furthermore, under section 36A of the *Crimes Act 1914*, it is an offence to threaten, intimidate, restrain another

person, or use violence or inflict injury on another person because that person has or is about to appear as a witness in a judicial proceeding.

17. Under the *Fair Work Act 2009*, it is unlawful to discriminate against a person in employment on the ground of sexual preference.

In other federal legislation there is little that deals with discrimination on the grounds of sexual orientation (it is to be noted that some state legislation exists which prohibits discrimination on the grounds of sexual orientation). However, the Australian Human Rights Commission in 2010 published a final consultation report titled “2011 Addressing Sexual Orientation”, calling for protection at a federal level.

18. Mobbing is known as bullying in Australia, and it is not defined in the federal legal system. However, the employer has a legal responsibility under Occupational Health and Safety and anti-discrimination law to provide a safe workplace.
19. “Many people refer to bullying as harassment or discrimination. However, while the effects are essentially the same, bullying may not be unlawful under federal and state anti-discrimination legislation unless the bullying is linked to or based on, one of the attributes covered by various federal anti-discrimination legislation (age, sex, race, disability, etc).”

(Source: Australian Human Rights Commission)

Belgium

National reporter: Judge Koen Mestdagh, Member of the Labour Chamber of the Court of Cassation

1. What is the **main source of regulation on sex discrimination at work** in your country – Labour Code, law on gender equality, law on equality, collective agreements, codes of practice or other?

Currently¹, the **main source of regulation** on sex-discrimination at work is twofold: on the one hand, we have the 10 May 2007 Act fighting gender discrimination (BS 31 May 1997; hereafter the 2007 Gender Discrimination Act) and on the other hand, we have the 4 August 1996 Act on the well-being of workers during the execution of their work (BS 18 September 1996; hereafter the Well-being Act).

The *Gender Discrimination Act* is *inter alia* applicable to labour relations in general, whereby labour relations is defined as follows: the relations that include, among others, the employment, the conditions for access to work, the labour conditions and the redundancy regulations, and this:

- i. in the public sector as well as in the private sector;
- ii. for labour in employment relationships, unpaid labour, trainees, learning agreements, work immersing agreements, first-job agreements or independent labour;
- iii. for all levels of the professional hierarchy and all sectors of activity;
- iv. regardless of the statutory or contractual nature of the relationship of the person performing the job;

¹ Note that the first workplace related gender discrimination legislation in Belgium dates back to the 1970's (implementing European gender discrimination directives) with on the one hand the National Council's 15 October 1975 Collective Labour Agreement concerning equal pay (implementing Directive 75/117/EEC) and title V on equal treatment of women and men of the 4 August 1978 Act on the economic reorientation (BS 17 August 1978) (implementing Directive 76/207/EEC).

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- v. excluding however the labour relations entered into with the organs and institutions indicated in article 9 and 87 of the 8 August 1980 Special Act on the reorganisation of the Institutions and the labour relations in education in terms of article 127, §1, 2°, of the Constitution (see *infra* the remarks on the other sources of regulation on sex-discrimination at work).

The 2007 *Gender Discrimination Act*'s aim is to provide a general frame for fighting against gender discrimination.

The *Well-being Act* is generally applicable to employers and employees. For the purpose of the Act, "workers" are deemed to include (i) the persons who, other than pursuant to a contract of employment, work under the authority of another person (e.g. civil servants in a statutory relationship, volunteers), (ii) the persons undergoing vocational training whose study programme provides for a form of work whether or not within the training institutions, (iii) the persons bound by a learning agreement, (iv) the trainees and (v) the pupils and students who are enrolled in a study direction of which the training programme provides for a form of labour which is carried out within the educational institution. The government can provide that the provisions of the *Well-being Act* and its implementing decrees apply, in whole or in part to other persons located on the workplaces referred to in the Act and its implementing decrees.

The *Well-Being Act* is relevant for this report as it contains a chapter *Vbis* on violence, moral harassment and unwanted sexual behaviour at work.

Besides these two Acts, there are numerous **other sources of regulation on sex-discrimination at work**.

This has *historical reasons* as well as *constitutional reasons*.

As far as the constitutional reasons are concerned: Belgium is a federal state (art. 1 of the 1994 Constitution), that consists of communities and regions. The regulation of fundamental rights is not exclusively allocated to the federal state, nor to the communities or regions. Instead, any of the entities can regulate fundamental rights within its own material and territorial competences, which are as a rule exclusive, notwithstanding certain exceptions.

The consequence is that we have various community or regional statutes on sex discrimination in labour relations, and the applicable legislation depends on the legal relationship concerned.

Thus, besides the two federal acts mentioned before, there are also, among others, the Flemish Decree of 8 May 2002 on proportionate participation in the labour market (BS 26 July 2002), the Flemish Decree of 10 July 2008 laying down a framework for the Flemish equal opportunities-and equal treatment policy (BS 23 September 2008) and the Decree of the Walloon region of 6 november 2008 on fighting certain forms of discrimination (BS 19 December 2008).

As far as the historical reasons are concerned: Due to historical developments, on which it would take too far to elaborate in this report, there are also some collective labour agreements that regulate sex discrimination at work, such as the National Labour Council's Collective Labour Agreement nr. 25 of 15 October 1975 on equal pay for male and female workers and the National Labour Council's Collective Labour Agreement nr. 95 of 10 October 2008 on equal treatment at all stages of the employment relationship.

However, given the hierarchy of norms, laid down in the 1968 Act on Collective Labour Agreements and Joint Industrial Committees, the practical relevance of these collective labour agreements is rather limited.

Nevertheless, for some issues, the collective labour agreements are of great relevance, *e.g.* the joint industrial committees have made great efforts on developing collective labour agreements with gender neutral function classification systems.

Please note that, since labour law is principally a federal competence and given the limited practical relevance of the aforementioned collective labour agreements, generally speaking, the federal legislation is the most relevant. Therefore, this report will focus on the federal legislation.

2. *What is the **percentage of claims on sex discrimination** in your jurisdiction?*

I have no exact statistical data, but it is fair to say the number of claims on sex discrimination is very limited.

3. *What are the **main topics of complaints related to sex discrimination** – recruitment, promotion, equal pay, maternity, redundancy, sexual harassment, other?*

From a sociological point of view, it is fair to say that the main topics of complaints would be equal pay and maternity.

In terms of litigation, the main topics of complaints relate to redundancy protection after a complaint has been filed, and to (moral and sexual) harassment. Occasionally there is a case on equal pay for equal work.

In the past, there have also been some cases on gender discrimination in social security law (mainly pensions).

4. *What categories of workers are mainly concerned by sex discrimination and sexual harassment (economic sectors, men or women)?*

I do not have sociological data on the prevalence of sex discrimination and sexual harassment, but I believe it is safe to state that mainly women are concerned.

5. *What is the **tendency** observed in your country's case law – a growing or decreasing number of cases related to sex discrimination? How do you explain such trends?*

I would say the tendency is rather stable, that is to say, that in labour law there have been rather few sex discrimination cases during the last decades (there were more cases in social security law, mainly pensions). Only regarding sexual harassment, a certain increase in the number of cases could be noted. But even that should not be exaggerated: in the period between July 2002 and June 2010, there have been 377 judicial decisions on violence, moral harassment and sexual harassment. 5 of them were on unwanted sexual behaviour at work (source: SPF EMPLOI TRAVAIL ET CONCERTATION SOCIALE, "Violence et harcèlement moral ou sexuel au travail - jurisprudence" 2011, <http://www.emploi.belgique.be/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=21270>), of which 2 actually accepted facts that indicate that the existence of unwanted sexual behaviour can be presumed (on the reversal of the burden of proof: *infra*).

The fact that the number of cases on sex-discrimination is very limited can be explained by several factors.

Of course it may be explained by the fact that there is little sex discrimination in Belgium. From this point of view there might be some sort of sociological, historical or psychological gender "discrimination" in that, on average, women attach more importance to meso-values such as family values, whereas men tend to attach more importance to more individualistic (micro) or societal (macro) values and therefore invest more in a career in the private or public sector. But this non-legal "discrimination" doesn't imply that there is gender discrimination in the legal sense of the concept. However, this ideologically charged possible explanation for the absence of a vast body of sex discrimination jurisprudence is very hard to argue for or against.

Therefore, if we assume there is more (legal) sex discrimination than litigation on sex discrimination, how could that be explained?

Firstly, there is no tradition of (discrimination) litigation in the field of labour relations. Belgium has a longstanding and strong tradition of solving conflicts in the workplace without taking resort to the courts. Belgium has strong social-partners and a well-developed social dialogue at the national and sectoral level on the one hand and at the level of the enterprise on the other hand.

Therefore, if an issue concerning sex discrimination is raised, it is likely to be solved either through social dialogue within the committee on the protection of the well-being of workers at the workplace, through the shop steward or through another informal way. If the problem can not be solved at the enterprise level, it is likely for the joint industrial committee to intervene (cf. the work on gender neutral function classification systems within the joint industrial committees that this report referred to supra under question nr. 1) and if the problem actually leads to an open industrial conflict, negotiators of the Ministry of Work and Social Dialogue can be called in to solve the problem.

Secondly, victims of sex discrimination maybe consider themselves (partly) responsible for the existence of the sex discrimination, or maybe they fear the public reaction and therefore never even consider bringing an action on sex discrimination to a court.

Thirdly, even if a victim of sex discrimination considers bringing an action to court, very often little is to be expected from it. Even given the reversal of the burden of proof (see *infra*), it is not always easy to get a conviction (in the few cases on sex discrimination in labour law matters, sex discrimination was very often not accepted, *e.g.* in equal pay for equal work cases (see for instance Arbh. Brussels, nr. 41.317, 4 January 2005, *Soc.Kron.* 2005, afl. 8, 451, noot J. JACQMAIN).

And if a conviction is obtained, the result may be quite disappointing for the victim. First of all, *e.g.* in case of sex discrimination in hiring, promoting or firing, it is not possible for labour tribunals and courts to oblige the employer to (re)hire or promote the employee(s) he sexually discriminated against. This is due to the fact that Belgian labour courts interpret the legislation on labour contracts in such a way that the employer has the absolute power to hire and fire how- and whoever he wants. (see *inter alia* Cass. 20 juni 1988, *Arr.Cass.* 1987-88, 1368 en *RW* 1988-89, 678). Unlawful conduct of the employer is only financially sanctioned.

Second of all, the gender discrimination law didn't until recently provide any fixed damages for a victim of sex discrimination as such (that is to say, there were fixed damages for a person who was fired after filing a sex discrimination claim (principally regardless of whether or not there actually was sex discrimination), however there were no fixed damages for a victim of sex discrimination (see more *infra*). Thus, the victim of discrimination principally had to prove the damages he suffered, and the causal relationship between the damages and the sex discrimination. This was a heavy burden of proof, that was only mitigated for blue-collar workers with a labour contract for an indeterminate period, who could be rewarded fixed damages (6 months of pay) if the judge accepted arbitrary dismissal under article 63 of the 3 July 1978 Act on labour contracts (hereafter the 1978 Labour Contracts Act).

In conclusion, the costs of a trial on sexual discrimination often outweigh the expected benefits.

6. *What is the **legal definition of sexual harassment**? Are there any problems (lacks, confusion) to use it in the judicial practice?*

The Belgian legislation explicitly contains the concept of and a legal definition of sexual harassment since 1992. It was the 18 September 1992 Royal Decree on the protection of workers against sexual harassment that introduced the definition in the Belgian legal order.

Article 1, *in fine*, of the Decree defined *unwanted sexual behaviour at work* ("sexual harassment") as any form of verbal, non-verbal or physical behaviour of a sexual nature of

which the person who is guilty of it knows or should know that it is harmful to the dignity of women and men at work.

The 1992 definition has principally been upheld in later legislation.

The definition was included in the 7 May 1999 Act on the equal treatment of women and men in the field of labour conditions, access to work, promotion, access to independent labour and the complementary social security schemes (hereafter the 1999 Gender Discrimination Act). Moreover, the 1999 *Gender Discrimination Act* added the presumption that unwanted sexual behaviour at work is suspected to be a form of gender discrimination (article 5).

The 2002 Well-being Act contained the 1992 definition of unwanted sexual behaviour at work without reference to gender discrimination (art. 32^{ter}, 3°).

The 25 February 2003 Act fighting discrimination and modifying the 15 February 1993 Act establishing a Centre for Equal Opportunities and Opposition to Racism (hereafter the 2003 Discrimination Act) contained a general definition of harassment (article 2, §6), that can be considered to have been inspired by the European Directives 2000/43 and 2000/78, but also a provision that stated that cases of gender discrimination in labour relation would principally not be ruled under the 2003 Discrimination Act, but under the 1999 Gender Discrimination Act, with the exception of some penal provisions and a provision on the use of statistical data and practice tests (article 5).

That last provision could not impede that certain questions still arose as to whether sexual harassment cases were exclusively ruled by the 2002 Well-being Act, or whether they could be brought to court under the 1999 Gender Discrimination Act as well.

In 2007, the legislator modified the discrimination legislation as well as the *Well-Being Act*.

The 2007 Gender Discrimination Act did not only lift the 1999 Gender Discrimination Act, but it also contains a provision stating that its provisions are not applicable in cases of harassment or sexual harassment in labour relations vis-à-vis persons to whom the 2002 Well-Being Act is applicable (cf. *supra* question 1) (article 7).

The Well-Being Act was modified by the 10 January 2007 Act modifying several provisions of the Well-Being Act, including those on the protection against violence, moral harassment and unwanted sexual behaviour at work (BS 6 June 2007). The 10 January 2007 Act modified the definition of unwanted sexual behaviour, inspired by the harassment definitions in the European Discrimination Directives (at the time Directive 2000/43 and Directive 2000/78; later on also Directive 76/207 as amended by Directive 2002/73 (see currently Directive 2006/54)).

Thus, the current definition of unwanted sexual behaviour at work is: any form of verbal, non-verbal or physical behaviour of a sexual nature with the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

To my knowledge, the aforementioned definition of unwanted sexual behaviour at work doesn't come with any conceptual problems in judicial practice. Under the 1992 definition, some commentators upheld that only intended sexual harassment could be brought under the definition, although the definition suggested otherwise, since it stated "knows or should know". In the 2007 definition, the legislator cast away any possible doubt in explicitly stating that any behaviour with the purpose or effecting to the undesirable consequences, falls within the conceptual scope of unwanted sexual behaviour at work.

7. Please provide **any examples of cases on sexual harassment at work** (short summary, judgment text?)
 - (i) Under the aforementioned 1992 Royal Decree, a labour tribunal (Arbrb. Bergen 27 November 1998, AR nr. 35.821, R.M. t/ s.c.s. Madibel, Soc.Kron. 1999, 510, noot J. JACQMAIN), who had to evaluate the existence of a serious ground justifying the immediate rupture of the labour contract by the employer, considered (extract):

“[...] During [the investigations], it appeared from the hearings collected under oath that Mr. M. related everything back to sex; that he asked the female staff to scrub copper bars intended to hang clothing and then made sexual comments; that he had one day invited one of his friends on the premises of the company, had brought together the female staff and introduced it to the friend, giving the workers the impression that they were a harem. Moreover, the youngest employee indicated that Mr. M. harassed her and that one day, he had returned to the store, intoxicated, and pursued her making sexual comments. She had to be protected by an older fearless colleague. She also described how the Manager had proposed to take her home on a rainy and cold night. He drove the car in a dark corner, locked it and tried to kiss and feel her up, but she had managed to escape. The employee was during the testimony clearly still emotionally affected by the fearful experience she had undergone. None of the testimonies was questioned. Evidence to the contrary has not been reported. The tribunal considers the serious ground for dismissal established. [...] Given the manager’s behaviour, the employer could rightly fire this employee under article 35 of the Labour Contracts Act (dismissal for serious cause)².

Indeed, the behaviour of mister M. was inadmissible, it deteriorated the professional climate and harmed the workers and the reputation of the enterprise, some of the facts happening in front of the clients.”

- (ii) In another case, also applying the 1992 Royal Decree and under the application of the 1978 Gender Discrimination Act³, but the court ruling after the entry into force of the 1999 Gender Discrimination Act, a labour tribunal (Arbrb. Charleroi 24 januari 2000, Soc.Kron. 2001, 479, noot J. JACQMAIN) held (summary):

“The employer has dismissed a worker during a long period of incapacity with notice investment fee. It turns out that the person concerned had lodged a complaint of sexual harassment in the hands of the occupational physician against her boss and another employee. The procedure for treatment of the complaint, applied in accordance with the 1992 Royal Decree, had obliged the employer to take some decisions to restructure the service and to send a reprimand to the chief of the worker. The complaint for unwanted sexual behaviour can be regarded as a complaint regarding sexual discrimination, as referred to by article 136 of the 1978 Gender Discrimination Act. The employer does prove that the dismissal was not given as a retaliation, and since the employee had followed the procedure established by this provision the protection fee is awarded. In addition, the employer doesn’t establish that the only reason of the dismissal was that the service was affected by the long absence of the worker. In particular, the Director General of the institution, from the start of the procedure relating to the unwanted sexual behaviour, expressed the opinion that the employee should be dismissed for just cause under article 35 of the 1978 Labour Contracts Act. The fixed damages of article 63 is due; It may be cumulated with those of article 136 of the 1978 Discrimination Act. »

- (iii) In a case applying the Well-Being Act, the Labour Tribunal of Tournai held on 11 August 2008 (AR nr. 28.6111) , (summary, reported in SPF EMPLOI TRAVAIL ET CONCERTATION SOCIALE, "Violence et harcèlement moral ou sexuel au travail - jurisprudence" 2011:

<http://www.emploi.belgique.be/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=21270>, p. 50):

² Article 35 of the 1978 Labour Contracts Act provides: « Each party may terminate the contract without notice or before the expiry of the period for an urgent reason which is left at the discretion of the judge and without prejudice to any compensation. Urgent reason means the serious shortcoming which renders any professional cooperation between the employer and the employee immediately and definitively impossible. [...] »

³ See footnote 1. The 1978 Gender Discrimination Act didn’t explicitly contain the concept of sexual harassment (cf. the answer to question 6).

The following facts allow the existence of unwanted sexual behaviour to be presumed: proposal of a sum in return for sexual relations, asking questions in connection with the lingerie that one wears, making repeated remarks with a sexual connotations ("I would like to have you", "I have to pay your salary, but what are you doing?"), encouraging the employee to wear sexy clothes in order to lure the customers, making remarks towards workmen of a neighbouring company about ones female workers, inviting the workers to view sexual oriented sites.

The court considers that this behaviour is an intrusion of the intimacy of the worker and affects her dignity. Medical certificates bear witness of the influence of these working conditions on the health of the worker. The criminal file that has been shelved because of "disproportionate impact of the criminal prosecution" and that contained numerous testimonies, was recorded in the file of the proceedings.

- (iv) In a judgment of 19 March 2010, the Labour Tribunal of Mouscron did NOT accept the existence of unwanted sexual behaviour at work (AR 00/281217/A, reported in SPF EMPLOI TRAVAIL ET CONCERTATION SOCIALE, "Violence et harcèlement moral ou sexuel au travail - jurisprudence" 2011:

<http://www.emploi.belgique.be/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=21270>, p. 51)

The only evidence that was presented to the Tribunal, is a letter from the son of the Manager who declares his love to the female worker in clumsy wording, gives her compliments on her "sexy" schoolgirl look, on her beauty, her smile, her way of dressing, her hairstyle, indicating that he feels like giving her "a big hug", ... The Court considers this is not unwanted sexual behaviour. Having regard to the document, it's difficult for the Tribunal to decide that the employee can have felt sexually harassed by these clumsy, naive and misplaced words. It is hard to imagine that with this letter, which is not aggressive or threatening, and which ends with "thank you", the worker has been able to hurt the female worker or demean her dignity as a woman. The employee could not demonstrate that the son of the Manager sent her text messages with an embarrassing content, or that he would have cried on the phone, in such a way that the female worker would have felt insecure at the workplace.

8. *What is the **main channel (machinery) to deal with sex discrimination and sexual harassment cases** (equality specialised body, enterprise committee, labour inspection, labour courts, etc)?*

A distinction should be made between sex discrimination and sexual harassment.

As sexual harassment at work is principally governed by the Well-Being Act (cf. supra), the procedures differ from the procedures from the procedures in cases of sex discrimination, although there are also certain similarities.

I will first discuss the main machinery for sexual harassment cases. Next, I will discuss the main machinery for sex discrimination cases in general.

Sexual harassment cases

Currently, the main channel to deal with sexual harassment cases is through procedures within the enterprise. However, it is also possible to file a complaint with the labour inspection or initiate legal proceedings before the court. The procedures will be explained in a more detailed way answering the next question. Hereafter, I will concisely explain how the relevance of these procedures has evolved over the last couple of years.

The channels to deal with sexual harassment cases have somewhat changed since the entry into force of chapter Vbis of the Well-Being Act in 2002. At least two important differences should be pointed out.

Firstly, in 2002, some employees tended to initiate procedures before the labour courts rather quickly, even though the legislator had clearly indicated that he thought procedures within the

enterprise to be of greater importance (the legislator did not write this in the Act because he didn't want to limit the access to a judge in the light of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms). However, since it turned out to be difficult to prove the existence of (sexual) harassment on the one hand, and because some judges clearly indicated that it was of great importance to first try to solve the situation at the level of the firm (some judgements even condemned the employee because of excruciatingly and reckless proceedings [often the decisions were reformed in appeal]), the legislator has now given the labour judges the possibility to suspend the proceedings until the procedure at the level of the enterprise has been followed (cf. *infra*).

Secondly, initially, a complaint could be filed with the labour inspection for sexual harassment as such, whereby the labour inspection would have to investigate the claim. However, the labour inspections clearly indicated that they did not have competent personnel to investigate the claim on its merits. Therefore, currently, the labour inspection basically only investigates whether the employer has correctly put the legislation into practice, *i.e.* whether he has appointed a Prevention Advisor on Psychosocial Aspects and whether he has developed the necessary procedures and prevention measures at the level of the enterprise.

Sex discrimination cases in general

As far as sex discrimination is concerned, there are less developed procedures at the level of the enterprise compared to the procedures for sexual harassment.

Therefore, it is more likely to start a legal proceeding before the court in case of sex discrimination.

Secondly, the Institute for the Equality of Women and Men (instituted by the 16 December 2002 (BS 31 December 2002)) is more likely to be contacted in case of sex discrimination in general than in case of sexual harassment, although the Institute may initiate legal proceedings both in case of sexual harassment and in case of sex discrimination in general.

9. *What is **the complaint procedure** to follow in case of sexual harassment?*

There are several possibilities.

The most typical procedure is:

- (a) The employee starts off with an informal complaint in the hands of the Confidant or the Prevention Advisor on Psychosocial Aspects (PAPA) at the level of the undertaking (cf. footnote nr. 7).

The Confidant or PAPA informs the employee about the possibility of an informal solution with the hierarchical supervisors or through conciliation.

The Confidant or PAPA may only contact the perpetrator or other persons with the consent of the victim/plaintiff.

If the victim does not want an informal procedure, if he wants to terminate the informal procedure or if there is no solution through the informal procedure, he can express the wish to file a reasoned complaint.

- (b) The filing of the reasoned complaint is the starting point of the formal procedure. This starting point is *inter alia* relevant because it sets the beginning of the protection against dismissal.

The reasoned complaint is a document signed and dated by the employee that requests the employer to take the necessary measures and contains a detailed description of the facts that constitute sexual harassment according to the employee, the time and the place on which each of the facts occurred and the identity of the perpetrator.

The PAPA or Confidant signs a copy of the reasoned complaint and hands it over to the employee. The Confidant hands over the reasoned complaint to the PAPA, the PAPA sends it to the employer.

The PAPA investigates the complaint unbiased. He informs the perpetrator of the alleged facts and hears witnesses and other useful persons.

At the end of the investigation, principally within three months, but the period can be extended to a maximum of twelve months, the PAPA hands over a written advise to the employer. This document summarizes the facts and the procedure so far. It contains the PAPA's opinion on whether or not the facts constitute sexual harassment. It analyses the causes and suggests individual measures to solve the issue and more general prevention measures.

The employer informs the plaintiff and the indicted of the individual measures he intends to take. A change of the working conditions may only be decided on after the employee has been heard and the case being, the employee receives an extract of the advise of the PAPA.

- (c) If the sexual harassment continues after the foregoing procedures, or if the employer refuses to take the necessary measures, the PAPA may inform the labour inspection, with the consent of the employee. (cf. art. 32^{septies} of the Well-Being Act and art. 21-29 of the 17 May 2007 Royal Decree on the prevention of psychosocial strain caused by the work, including violence, harassment and unwanted sexual behaviour at work (BS 6 June 2007)).

Of course, if the employer has not appointed a Confidant or PAPA, the foregoing procedure can not be followed. In this case, it may be useful for the employee to file a complaint with the labour inspection. The labour inspection will then investigate whether the employer has correctly put the provisions of the Well-Being Act into practice. (art. 32^{nonies} of the Well-Being Act).

Finally, the employee may also initiate a legal procedure before the courts. In case the employee has already gone through the internal (formal) procedure at the level of the enterprise, the employee is entitled to a transcript of the aforementioned advise of the PAPA. If the employee goes to court before initiating a procedure at the level of the enterprise, the court can order the employee to follow the internal procedure and suspend the trial until the internal procedure has ended. This possibility is subject to the conditions that the employer has developed an internal formal procedure and that this procedure can be legally applied. (art. 32^{decies} of the Well-Being Act).

There are two specific procedures a victim can initiate before the labour courts. On the one hand there is the procedure embodying an order to cease the sexual harassment. In this kind of procedure the court can investigate the existence of sexual harassment and, the case being, issue an order to cease the sexual harassment. The court can also order the displaying or the publication of the judgment.

On the other hand, it is possible that provisional measures be imposed on the employer with the aim of having him respect the provisions of the Well-Being Act. Those provisional measures could in particular concern (i) the application of prevention measures and (ii) measures to ensure that there is actually an end put to the unwanted sexual behaviour at work. (Art. 32^{decies} Well-Being Act).

10. *Does your law provide for the reversal of the burden of proof in discrimination cases?*

Yes it does.

The 2007 Gender Discrimination Act provides that the defendant must prove that there has been no discrimination when a person who is a victim of discrimination, or a person acting on his behalf, has established facts that indicate that the existence of discrimination on grounds of sex may be presumed.

Facts that the existence of a direct discrimination on grounds of sex can be presumed, include, but are not limited to: (a) data from which a particular pattern of unfavourable treatment shows towards persons of the same sex, *e.g.* different, unconnected claims filed at the Institute for Equality of Women and Men or at interest groups and (b) information that indicates that the situation of the victim of less favourable treatment is similar to the situation of the reference person.

Facts that the existence of an indirect discrimination on grounds of sex can be presumed, include, but are not limited to: (a) general statistics on the situation of the group to which the victim of discrimination belongs or facts of general awareness, (b) the use of an intrinsically suspicious criterion of distinction or (c) elementary statistical material which shows an unfavourable treatment (article 33).

The Well-Being Act provides that the defendant must prove that there has been no sexual harassment when a person with a legal interest establishes facts that indicate that the existence of sexual harassment can be presumed (article 32*undecies*).

The reversal of the burden of proof naturally is not applicable in criminal proceedings, given the presumption of innocence, the rights of defence and the right to a fair trial in general.

11. Please provide any **examples of evidence** brought to the court in sex discrimination and sexual harassment cases?

Evidence in sex discrimination cases will typically consist of statistical data or testimonies.

In sexual harassment cases, usually the report drawn up by the Prevention Advisor on Psychosocial Aspects (PAPA) in the course of the investigation of a complaint at the level of the enterprise, is used as evidence, be it that the courts don't particularly value the personal opinion of the PAPA. The reports are mainly used to establish the facts.

12. What is the **responsibility of the employer** in preventing sexual harassment?

As sexual harassment is incorporated into the Well-Being Act, which is the Belgian act that implements the Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, the employer has a **general duty of care for preventing sexual harassment at work** (thus, there is no no-fault liability for the employer; the European directive doesn't oblige to develop a no-fault liability (cf. HvJ C-127/05, *Commission vs. UK*, nr. 42); the Belgian legislator has adopted fault liability).

Hereafter, the **more concrete responsibilities of the employer** in preventing sexual harassment will be concisely summarized. However, it should be pointed out that, following Directive 89/391/EEC, the fact that an employer has enlisted competent external services or persons doesn't discharge him from his responsibilities. Nor do the workers' obligations⁴ in the field affect the principle of the responsibility of the employer.

According to article 4, §1, of the Well-Being Act, the well-being is pursued by measures which relate to: 1° labour safety, 2° health protection at work,

3° *psychosocial strain caused by work, including in particular violence, harassment and unwanted sexual behaviour at work*, 4° ergonomics,

5° occupational hygiene, 6° beautification of the jobs and 7° measures of the company on the environment, as regards their impact on the provisions of items 1° to 6°.

⁴ Article 32*bis* of the Well-Being Act states that employers and employees, all persons that are deemed to be employers and employees for the purpose of the Act, and all persons that come into contact with employees during the execution of their work should abstain from any act of violence, moral harassment of unwanted sexual behaviour at work.

In the application of the general principals of prevention (primary, secondary and tertiary prevention; cf. article 5 of the Well-Being Act), *the employer has to determine the measures that have to be taken to prevent violence, harassment or unwanted sexual behaviour at work.*

He determines these prevention measures within the framework of the dynamic risk controlling system⁵, on the basis of a risk analysis that takes the nature of the activities and the size of the firm into account. There is a specific risk analysis for employers whose employees come into contact with persons that do not fall within the general scope of the Well-Being Act (clients, suppliers, ...). Moreover, there is a specific risk analysis for recurring incidents or for incidents on which the prevention advisor for psychosocial aspects (infra) has written an advice⁶.

The prevention measures include at least:

- the material and organisational measures that help to prevent violence, harassment and unwanted sexual behaviour at work;
- the procedures that are applicable when a notification of facts occurs and that particularly relate to: (a) the reception and counselling services to the persons who declare to be the subject of violence, harassment or unwanted sexual behaviour in the workplace; (b) the detailed rules according to which such persons may have recourse to the prevention Advisor and confidant⁷, designated for the acts of violence, harassment and unwanted sexual behaviour in the workplace; (c) the quick and completely impartial intervention of the confidant and the prevention consultant; (d) the re-employment of workers who have stated that the subject of violence, harassment or unwanted sexual behaviour at work and the guidance of these individuals following their re-employment;

⁵ The principles of the Dynamic Risk Controlling System (DRCS) are set out in the 27 March 1998 Royal Decree on the policy concerning the well-being of workers in the execution of their work (BS 31 maart 1998). This Royal Decree is one of the Royal Decrees that executes the Well-Being Act. They can be concisely summarized as follows: the DRCS covers the domains for which the employer has to take the necessary measures (cf. the seven domains in art. 4, §1 of the Well-Being Act, mentioned in the body of this text. The goal of the DRCS is to allow employers to plan the prevention and to execute the policy. It therefore contains the following elements: (i) the elaboration of the policy, (ii) the programming of the policy, (iii) the implementation of the policy and (iv) the evaluation of the policy. Risk analysis is used for the elaboration of the policy. Prevention measures are established on the basis of the risk analysis. In consultation with the members of the hierarchical line and the services for prevention and protection at work, the employer drafts a global prevention plan (GPP) and annual action plan (AAP). He also consults the Committee for the Prevention and Protection at work (cf footnotes 7 and 8).

The GPP is drawn up in writing for a term of 5 years. It programs the prevention activities that are to be developed and implemented. The AAP is based upon the GPP and determines the most urgent prevention goals in the next financial year, and the methods and means to achieve those goals.

There is a regular evaluation of the well-being policy. Taking this evaluation into account, a new GPP is drawn up at least once every 5 years.

⁶ See for more detailed provisions art. 3 and following of the 17 May 2007 Royal Decree on the prevention of psychosocial strain caused by the work, including violence, harassment and unwanted sexual behaviour at work (BS 6 June 2007).

⁷ Every employer has to appoint a Prevention advisor, specialized in the Psychosocial Aspects of work (PAPA). The PAPA may be an employee of the enterprise. The PAPA is then a member of the Internal Service for Prevention and Protection at Work. If the PAPA is external to the firm, the PAPA belongs to an External Service for the Prevention and Protection at Work. There are specific provisions on the required training for the PAPAS.

Moreover, any employer can, with the agreement of the CPPW, appoint a Confidant. (art. 32sexies Well-Being Act).

The rights and obligations of the PAPA and the Confidant are determined in section IV of the 17 May 2007 Royal Decree on the prevention of psychosocial strain caused by the work, including violence, harassment and unwanted sexual behaviour at work (BS 6 June 2007).

- the specific measures for the protection of the workers who come into contact with persons that do not fall under the general personal scope of the Well-Being Act;
- the obligations of the hierarchical line in the prevention of acts of violence, harassment and unwanted sexual behaviour in the workplace;
- the information and the training of workers;
- the information of the Committee on the Prevention and Protection at Work (CPPW)⁸.

The aforementioned measures have to be taken after obtaining the opinion of the CPPW. Moreover, the applicable procedures require the CPPW's agreement. (article 32^{quater}).

13. *What **measures** may be taken by the **employer** to punish sexual harassment?*

The employer could take disciplinary measures. According to Belgian law, an employer can only take the disciplinary sanctions that are mentioned in the labour regulations (article 16 of the 8 April 1965 Act instituting labour regulations (BS 5 May 1965)).

Typical disciplinary sanctions include a verbal reprimand, a financial fine, or a suspension of the labour contract.

In serious cases, the employer could fire the employee for serious cause in terms of article 35 of the Labour Contracts Act.

14. *What **damages are available for victims** in case sex discrimination and sexual harassment? Please provide any examples of financial compensation to the victim (calculation scheme, average amounts).*

In determining the available damages, two distinctions should be drawn.

First, one should distinguish between the *specific damages* available for victims in case of sex discrimination and sexual harassment, and the *general damages* available to employees.

As far as the general damages are concerned, there is the possibility for blue-collar workers who have a labour contract with an indefinite period, to have a fixed damage of 6 months pay in case of an arbitrary dismissal within the meaning of article 63 of the Labour Contracts Act.

In all other cases, any employee can claim that he has been the victim of the abuse of a subjective right by his employer or that he has suffered damages due to the unlawful behaviour of the person who sexually harassed him or who has sexually discriminated against him.

In any of those cases the employee has to prove the abuse of law or the fault, the damages and the causal relationship between the abuse/the fault and the damages, which is in accordance with the general principles of civil law.

If the employee succeeds, damages will be awarded.

Since the number of cases on sex discrimination and sexual harassment are limited, it is hard to give a scheme of average amounts granted. In the case judged by the Labour Tribunal of Doornik (11 August 2008), the tribunal awarded damages of € 5.595,60 because of sexual harassment at work (case mentioned supra question nr. 7). Generally, it is reasonable to say that the amounts granted can be expected to be similar to the amounts granted for moral harassment. The amounts in those cases vary between € 2.500 and € 24.000 (source: SPF EMPLOI TRAVAIL ET CONCERTATION SOCIALE, "Violence et harcèlement moral ou sexuel au travail - jurisprudence" 2011 :

⁸ The CPPW has to be instituted in enterprises with at least 50 employees. The CPPW consists of employer representatives and employee representatives. There should not be less employee representatives than employer representatives.

In enterprises where no CPPW has been instituted, the CPPW's competences are exercised by the shop steward. If there is no shop steward, the employees directly participate in the employers well-being policy (see art. 49, 52 and 53 of the Well-Being Act).

<http://www.emploi.belgique.be/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=21270>, p. 14).

However, in some cases, there may be limited civil responsibility. This can so if the wrongful act was made by an employee⁹. This will also be the case if the situation is to be considered as an accident at work within the meaning of the 10 April 1971 Act on Accidents at Work (BS 24 April 1971), as this act institutes a certain civil immunity in cases of accidents at work¹⁰.

Secondly, within the category of the specific damages, one should distinguish between the damages available to employees who have filed a complaint on the basis of sex discrimination or sexual harassment and have therefore been victim of an adverse treatment by the employer as a reaction to the complaint (dismissal, change of working condition, refusal to renew a contract, ...) on the one hand, and the specific damages available to victims of sex discrimination or sexual harassment as such.

As far as the first type of damages are concerned: generally speaking, an employee that has filed a complaint or for whom a complaint is filed based on sex discrimination or sexual harassment, is protected (article 22 of the 2007 Gender Discrimination Act and art. 32*tredecies* of the Well-Being Act).

To file a complaint means either file a reasoned complaint¹¹ at the level of the enterprise, or file a complaint with the labour inspection or initiate legal proceedings before the court.

What does the protection consist of?

In terms of the Well-Being Act, except for reasons alien to the complaint or the legal proceedings, the employer can not terminate the employment relationship or unilaterally amend the working conditions of the protected workers. In terms of the 2007 Gender Discrimination Act, the employer can not take adverse measures vis-à-vis the protected workers, except for reasons alien to the complaint.

The burden of proof rests with the employer when the employee is fired or his working conditions are changed (sexual harassment) or when negative measures have been taken (sex discrimination) within 12 months following submission of the complaint or, in case an action was brought before the court, until three months following the date of entry into force of *res judicata* of the judgment.

In terms of the Well-Being Act, an employee is entitled to either a lump sum corresponding to the gross salary for six months, or to the real damage suffered, when the employer has fired the employee or changed the working conditions unlawfully for reasons that have to do with the filed complaint. In the latter case, the employee must prove the extent of his damage. An alternative is that the employee asks to be re-instated in the enterprise, or under the previous working conditions. If the employer grants the request, he has to pay the lost wage to the employee.

In terms of the 2007 Gender Discrimination Act, similar rules apply. However, if the employee has not requested to be re-instated, the lump sum damages should only be paid in three cases:

⁹ According to article 18 of the Labour Contracts Act, an employee is only liable for his deception and his serious fault. For light fault he is only liable if the light fault occurs rather usually than by chance. It is likely for sexual harassment cases to be considered as serious fault. In any event, the employer can be held responsible *qualitate qua* according to article 1384 of the Civil Code.

¹⁰ For details, see art. 46 and following of the Accidents at Work Act.

¹¹ A reasoned complaint is essentially a dated and signed document that contains the grievances with regard to the perpetrator and is addressed to a competent person (sexual harassment: the Prevention Advisor on Psychosocial Aspects or the Confidant; sex discrimination: the competent person according to the procedures at the level of the undertaking) (cf. art. 27 of the 17 May 2007 Royal Decree on the prevention of psychosocial strain caused by the work, including violence, harassment and unwanted sexual behaviour at work (BS 6 June 2007) and art. 22 of the 2007 Gender Discrimination Act).

1° when the competent court considers the facts of discrimination, which were the subject of the complaint, proven;

2° if the person concerned terminates the employment relationship, because the behaviour of the employer violates the provisions of protection, which, according to the employee is a reason to terminate the employment relationship without notice or before the expiry date of the break;

3° when the employer has terminated the employment relationship, for serious reasons, on condition that the competent judicial body has considered this termination unfounded and contrary to the provisions of the protection against negative measures.

As far as the specific damages available to victims of sex discrimination or sexual harassment *per se* is concerned: the Well-Being Act currently does not provide any fixed damages for a sexual harassment victim. The 2007 Gender Discrimination Act however, does provide fixed damages for a sex discrimination victim. The Constitutional Court could consider this unequal treatment unconstitutional, but it has not had the opportunity to rule on the matter yet. Moreover, the legislator has announced he may also develop fixed damages for (sexual) harassment victims.

What fixed damages are there for sex discrimination victims?

The fixed damages for material and moral damages equal to the gross pay for six months, unless the employer demonstrates that the disputed unfavourable or adverse treatment would also have been taken on non-discriminatory grounds. In the latter case, the compensation for material and moral damages is limited to three months' gross pay. When however the material damage resulting from the discrimination can be restored through the annulment of the discriminatory provisions, the fixed damages are limited to € 650, or € 1.300 if the offender cannot demonstrate that the disputed unfavourable or adverse treatment would also have been taken on non-discriminatory grounds or because of other circumstances, such as the particular seriousness of the suffered moral damage.

15. *What is the legal protection for people who provide evidence in sexual harassment cases (whistle-blowers)?*

In principle, they have the same protection against dismissal or unilateral unlawful modification of the working conditions as the employees who filed a complaint (article 32*tredecies* Well-Being Act).

The following people are considered to be witnesses and benefit from the protection against dismissal or adverse treatment:

- the person who, in the framework of the examination of the reasoned complaint, brings to the attention of the prevention advisor in a signed and dated document, the facts which he himself has seen or heard and which relate to the situation which is the subject of the reasoned complaint;
- the person who is acting as a witness in court.

16. *Does the law foresee situations when the **victim or the harasser are external to the enterprise** (client, user enterprise in relation with a temporary work agency)?*

Yes.

On the one hand, the employer has to keep a special registry where employees can declare the sexual harassment they suffered from harassers that are external to the enterprise (cf. article 12 of the 17 May 2007 Royal Decree on the prevention of psychosocial strain caused by the work, including violence, harassment and unwanted sexual behaviour at work (BS 6 June 2007)).

On the other hand, as far as temporary agency workers are concerned, article 19 of the 24 July 1987 Act concerning temporary work, temporary agency work and the posting of workers to the benefit of users (BS August 1987) provides that the user has to assure the application of the provisions of the law on the protection of labour which are in force in the place of work during

the period in which the temporary worker works for the user. For the application of this provision, the provisions concerning the well-being of the workers (health and safety) are considered to be provisions that apply at the place of work.

Moreover, the employee of a company from outside who believes to be the subject of (violence, harassment or) unwanted sexual behaviour at work by an employee of the employer in whose establishment he permanently works can appeal to the internal procedure of the employer for whom the work is performed.

When individual prevention measures must be taken in respect with an employee of a company from outside, the employer in whose establishment permanent work is performed makes the necessary arrangements with the employer of the company from the outside, so that these measures could actually be put into practice. (cf. article 12 of the 17 May 2007 Royal Decree on the prevention of psychosocial strain caused by work, including violence, harassment and unwanted sexual behaviour at work (BS 6 June 2007)).

Finally, there are some more general obligations for employers in whose establishment employees from (sub)contractors or independent workers come to work: the employer should provide the (sub)contractors with the necessary information as far as well-being is concerned, coordinate the work of the (sub)contractors, assure a good cooperation and make sure that the subcontractors act according to their obligations concerning the well-being of the workers proper to his establishment. The employer should refuse to do business with any contractor of whom he knows or experiences that he violates his obligations under the Well-Being Act and the Royal Decrees that execute the Well-Being Act. And the employer should make an agreement with the contractor in which the latter undertakes to fulfil his obligations concerning the well-being of the workers at the execution of their work inherent in the establishment where he comes to work, and in which it is foreseen that if the contractor doesn't comply to those obligations, the employer in whose establishment the work will be carried out, may himself take the necessary measures, in the cases provided for in the agreement, at the expense of the contractor (article 9 Well-Being Act).

17. *Do you have any statutory provisions on discrimination on the basis of **sexual orientation**? Do you have any cases in judicial practice on this topic?*

Yes, we do. There is not only the 2007 Gender Discrimination Act, but also the 10 May 2007 Act fighting various forms of discrimination (BS 30 May 2007) (hereafter the 2007 General Discrimination Act).

The 2007 General Discrimination Act is, like the 2007 Gender Discrimination Act, applicable to all labour relation issues and principally offers the same protection as the 2007 Gender Discrimination Act, be it to victims of other types of discrimination than the 2007 Gender Discrimination Act, in particular discrimination on the basis of age, *sexual orientation*, marital status, birth, wealth, religion or belief, political belief, labour union conviction, language, present or future health condition, disability, physical or genetic property or social origin.¹² (see article 3-6 of the 2007 General Discrimination Act).

To my knowledge, there are no cases in judicial practice on discrimination on the basis of sexual orientation in labour relations.

It is useful to add that the 2007 Gender Discrimination Act contains a provision according to which any direct distinction based on sex change is equivalent to a direct distinction based on sex (article 4, §2).

18. *How **moral harassment (mobbing)** is defined in your legal system?*

¹² Note that discrimination on the basis of nationality, a so called race, skin colour, origin or ethnic descent is governed by the 30 July 1981 Act on the punishment of certain racist or xenophobic motivated deeds (BS 8 August 1981 ; the act was substantially amended by the 10 May 2007 Act modifying the 30 July 1981 Act on the punishment of certain racist or xenophobic motivated deeds, BS 30 May 2007).

The well-being act makes a distinction between violence and moral harassment *sensu stricto*, which can be regarded as moral harassment *sensu lato* as defined in the European Directives (the most relevant for gender discrimination currently being Directive 2006/54).

The current definitions (as amended in 2007) are:

- Violence at work: any factuality that psychologically or physically threatens or attacks an employee or another person to which this chapter [of the Well-Being Act] applies in the execution of the work;
- Harassment at the workplace: multiple similar or different wrongful acts, outside or within the enterprise or institution, which take place during a certain time, which have the purpose or effect that the personality, dignity or the physical or psychological integrity of an employee or another person to which this chapter [of the Well-Being Act] applies in the execution of his work is affected, that his labour relation is endangered or that an intimidating, hostile, degrading, humiliating or offensive environment is created and which are in particular expressed in words, threats, practices, gestures or unilateral writings. These acts could in particular relate to religion or belief, disability, age, sexual orientation, gender, racial or ethnic origin. (Article 32^{ter}, 1° and 2°)

As the definitions indicate, the concept of violence is used to refer to instantaneous wrongful conduct, whereas the concept of harassment *sensu stricto* is used to refer to chronic and enduring forms of wrongful conduct.

Please note that the 2007 Gender Discrimination Act also contains a definition of moral harassment. The notion does not make a distinction between instantaneous and lasting wrongful conduct. Moral harassment is defined as unwanted conduct that is related to the sex and has the purpose or the effect that the dignity of a person is affected, in particular when an intimidating, hostile, insulting, degrading or offensive environment is created. (article 5, 9°). However, as mentioned above, the 2007 Gender Discrimination Act is not applicable to moral harassment in legal relations that fall within the scope of the 2002 Well-Being Act.

19. Does **any legal parallel exist between moral and sexual harassment** (similar or same definitions and procedures)?

Yes, the procedures, awards and applicable provisions are identical.

Denmark

National reporter: Judge Niels Waage, Justice, Municipal Court

1. What is the **main source of regulation on sex discrimination at work** in your country – Labour Code, law on gender equality, law on equality, collective agreements, codes of practice or other?
 - a. The Act on Equal Treatment (Consolidated Act no. 645 of 8 June 2011 on the equal treatment of men and women in employment etc.)
 - b. The Act on Equal Rights (Consolidated Act no. 1095 of 19 September 2007 on the equal rights of women and men)
 - c. Act no. 387 of 27 May 2008 on the Board of Equal Treatment

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2. What is the **percentage of claims on sex discrimination** in your jurisdiction?

In general, the Labour Court does not deal with sex discrimination cases as the jurisdiction of the Court is limited to breaches of collective agreements. Cases regarding sex discrimination are heard in the Board of Equal Treatment and the ordinary courts of law.

3. What are the **main topics of complaints related to sex discrimination** – recruitment, promotion, equal pay, maternity, redundancy, sexual harassment, other?

Dismissals because of pregnancy or wishes/claims for maternity/paternity leave, employment, including vacancy announcements with gender specifications, differentiated prices.

4. What categories of workers are mainly concerned by sex discrimination and sexual harassment (economic sectors, men or women)?

This question will, if possible, be answered at the meeting in Sevilla

5. What is the **tendency** observed in your country's case law – a growing or decreasing number of cases related to sex discrimination? How do you explain such trends?

This question will, if possible, be answered at the meeting in Sevilla

6. What is the **legal definition of sexual harassment**? Are there any problems (lacks, confusion) to use it in the judicial practice?

Section 2a, subsection 3 of the Act on Equal Rights and section 1, and subsection 6 of the Act on Equal Treatment:

“Sexual harassment exists where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs in relation to the gender of a person with the purpose or effect of violating this person's dignity, in particular by creating an intimidating, hostile, humiliating or offensive environment.”

These provisions are in strict compliance with EU Directive 113/2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, article 2 (d).

To the best of my knowledge, this definition has not given rise to any particular difficulties.

7. Please provide **any examples of cases on sexual harassment** at work (short summary, judgment text?)

Judgment passed on 2 April 2009 by the Danish Western High Court

A dental nurse F sued her previous employer, dentist T, claiming, among other things, compensation for violation of the act on equal treatment because of sexual harassment. Following comprehensive submission of evidence and the basis of F's explanation and the explanations of other employees at the workplace it was proved that F had been sexually

harassed by T in the form of e.g. improper touching and questions, and that T could not have been in doubt that F had rejected his passes. Taking into account the scope and nature of the harassment, F was awarded an estimated compensation of DKK 40,000 (approx. EUR 5,000).

Judgment passed on 19 February 2009 by the Danish Western High Court

F had been hired as a flower decorator apprentice in a florist's shop where the 80 year-old M helped bring out flowers. One day, F left the shop during the lunch break and called in sick after an episode where M had sexually harassed her by touching her. F sued M claiming compensation of DKK 100,000 in pursuance of section 26 of the liability in damages act asserting that the claim was to be assessed in pursuance of section 16a of the act on equal treatment on the shared burden of proof. M contested having sexually harassed or otherwise wrongfully invaded F's rights which could lead to damages/compensation. After the submission of evidence it was proved that F had been sexually harassed. F therefore had a claim for compensation under section 26 of the liability in damages act. This compensation was not to be assessed according to the principles of the act on equal treatment, but on the basis of the level of compensation under section 26 of the liability in damages act. F was awarded a compensation of DKK 5,000 (approx. EUR 700).

8. What is the **main channel (machinery) to deal with sex discrimination and sexual harassment cases** (equality specialised body, enterprise committee, labour inspection, labour courts, etc)?

Complaints to the Board of Equal Treatment and the ordinary courts of law.

9. What is **the complaint procedure** to follow in case of sexual harassment?

Complaints to the Board of Equal Treatment:

1. The complaint shall be submitted to the Board in writing. Consideration by the Board of the complaint is free of charge.
2. The complaint shall provide information on the name and address etc. of the complainant, the defendant's name and an account of the facts of the case stating the reasons for the complaint. Furthermore, the complaint shall indicate the objective of the claim, e.g. compensation.
3. The Board secretariat shall handle the preliminary case handling and shall collect the necessary information.
4. The Board cannot process cases pending before the courts of law.
5. The case is processed in compliance with general administrative law, including the rules on examination of the parties involved.
6. The secretariat can request the parties to the case to contribute to clarifying the matter.
7. The Board cannot process cases on breach of collective agreements on discriminatory treatment that can be processed in the employment law system, if the union wishes to submit the case to an industrial procedure.
8. As to decisions and settlements made before the Board not complied with, the Board shall at the request of the complainant and on the latter's behalf bring the case before the courts of law.
9. The cases are settled at a meeting in the Board on the basis of the written information in the cases.
10. The complainant or his/her representative cannot be present during the meeting.

11. The meetings of the Board are not open to the public.

Legal proceedings before the courts of law: the procedure is the same as in other court cases.

10. Does your law provide for the **reversal of the burden of proof in discrimination cases**?

In the event that dismissal is made during pregnancy or absence due to childcare leave it rests with the employer to prove that the dismissal was not caused by these circumstances (reversed burden of proof).

In other cases on gender discrimination the principle of shared burden of proof applies. This implies that the person who deems that he/she has been discriminated against shall (only) demonstrate that there exist actual circumstances that give rise to the assumption that discrimination has taken place. If this is demonstrated by the complainant, it rests with the defendant, who is accused of acting with discriminatory intent, to prove that no discrimination took place. Thus, in equal rights cases between the complainant and the defendant, the burden of proof is shared between the two. The rule on shared burden of proof in equal rights cases in Danish law is taken from EU law, first in the form of EU case law and since 1997 through EU legislation.

11. Please provide any **examples of evidence** brought to the court in sex discrimination and sexual harassment cases?

Decision by the Board of Equal Treatment of 24 June 2011:

A woman complained to the Board of Equal Treatment that she was not called in during her maternity leave for an interview to discuss her salary.

The Board stated among other things:

“If a person who considers himself/herself offended demonstrates actual circumstances that give rise to the assumption that direct or indirect differential treatment has taken place, it rests with the other party to prove that the principle of equal treatment has not been violated.

The Board finds that the complainant has demonstrated actual circumstances that give rise to the assumption that the complainant has been exposed to direct differential treatment.

In its evaluation, the Board emphasised that the employer did not call in the complainant to a meeting to discuss her salary, nor did the employer inform her of her possibility to ask for such a meeting to discuss her salary.

The defendant did not meet the burden of proof that the failure to call in the complainant to the meeting was not caused by her absence due to maternity leave. It is taken into account that in the years prior to the complainant’s maternity leave annual salary discussion meetings were held. The Board finds that it rested with the defendant to ensure that the complainant during her maternity leave was informed of her possibility to ask for a meeting to discuss her salary notwithstanding that the defendant assessed that the company could not afford salary increases.

The Board therefore finds that the defendant acted contrary to the act on equal treatment.”

The Board awarded the complainant compensation in the amount of DKK 5,000 (approx. EUR 700).

12. What is the **responsibility of the employer** in preventing sexual harassment?

The employer is under an obligation to ensure that no sexual harassment takes place at the workplace and can be ordered to pay compensation to employees who are subjected to sexual harassment by e.g. other employees. See the judgment given by the Danish Eastern High Court in 1994, in which case, however, judgment was given in favour of the employer.

It was proved that the female flower arranger A during her work had been sexually harassed by the husband of her female employer S who assisted in the shop. As S had no knowledge of the treatment to which A was exposed and as it had not been rendered probable that S had any possibility of foreseeing or cause to take measures to discourage the course of events that took place, there was no basis for establishing that S had violated the rules on equal treatment, for which reason the complainant’s claim for compensation was rejected.

13. What **measures** may be taken by the **employer** to punish sexual harassment?

As it appears, by implication, of the judgment mentioned in question 12, the employer shall take measures to prevent sexual harassment, and it will, undoubtedly, be deemed lawful if an employee who has sexually harassed another is dismissed.

14. What **damages are available for victims** in case sex discrimination and sexual harassment? Please provide any examples of financial compensation to the victim (calculation scheme, average amounts).

Typically, a pregnant woman who is unlawfully dismissed will be given a compensation of 9-12 months’ salary, depending on the length of her employment. The compensation for other violations of the equal treatment principle varies according to the nature of the offence. These are examples taken from the Board of Equal Treatment from 2010:

1. It was contrary to the act on equal treatment that a complainant was dismissed two days after she had returned to work after having been absent due to pregnancy related illness. The complainant was awarded compensation of DKK 430,000 (approx. EUR 60,000) equalling around 9 months’ salary.
2. A woman was dismissed from her position as auditor 3 weeks after she returned from her childcare leave. The Board found that the woman had been subjected to discriminatory treatment. She was awarded compensation of DKK 250,000 (approx. EUR 35,000) equalling 9 months’ salary.
3. It was contrary to the act on equal rights for a bar to charge different entrance fees for women and men. The complainant was awarded compensation of DKK 130 corresponding to the difference between the entrance fees.
4. It was contrary to the act on equal treatment when a complainant was dismissed from her position as teacher during her childcare leave/immediately after the childcare leave. The defendant had employed the temp working in the complainant’s position while she was on

maternity leave on a permanent basis. The complainant was awarded compensation amounting to DKK 265,000 (approx. EUR 35,000) equalling 9 months' salary.

5. Equal pay case: The Board found that a woman had not received the same salary as her male colleagues. The employer was ordered to pay DKK 100,000 (approx. EUR 15,000) to the woman corresponding to the difference in wages for 5 years from the submission to the Board.

15. What is the legal protection for people who provide evidence in sexual harassment cases (**whistle-blowers**)?

There are no specific rules to this effect, but if a whistle-blower is dismissed, this could be deemed non-objective dismissal entailing the right to compensation according to the usual principles.

16. Does the law foresee situations when the **victim or the harasser are external to the enterprise** (client, user enterprise in relation with a temporary work agency)?

Yes, see answers to questions 12 and 13.

17. Do you have any statutory provisions on discrimination on the basis of **sexual orientation**? Do you have any cases in judicial practice on this topic?

Yes, Consolidated Act no. 1349 of 16 December 2008 on the prohibition against discriminatory treatment in the employment market etc., which prohibits discrimination against homosexuals, among others.

Example from case law:

Judgment given by the Danish Western High Court on 22 February 2008

Baker's assistant A was employed by baker B in 1999. In 2005, A told his boss and colleagues that he was homosexual. Six months later A was told that B had shown another employee a photo of two boys who had been hung in Iran because they were homosexual and that he had said: "this is what they deserve". A felt so bad when he heard about it that he called in sick and later resigned. A sued B claiming compensation under the act on discriminatory treatment as B had violated the law by expressing humiliating and degrading comments. B contested having expressed the coarse statements, but following the submission of evidence it was demonstrated that B was guilty of malicious discriminatory treatment and had violated section 2, subsection 1 of the act on discriminatory treatment. A was awarded compensation of DKK 100,000 (approx. EUR 15,000). Emphasis was given on the one hand to A's seniority and the coarseness of B's conduct and on the other hand to the limited consequences the comments had for A.

18. How **moral harassment (mobbing) is defined** in your legal system?

Section 1, subsection 5 of the Act on Equal Treatment states:

“Harassment exists where any form of unwanted verbal, non-verbal or physical conduct occurs in relation to the gender of a person with the purpose or effect of violating this person’s dignity and by creating an intimidating, hostile, degrading, humiliating or offensive environment.”

19. Does **any legal parallel exist between moral and sexual harassment** (similar or same definitions and procedures)?

Yes. According to section 1, subsection 4, of the act on equal treatment, both harassment as defined in section 5 and sexual harassment as defined in section 6 are considered discriminatory treatment due to gender and are therefore prohibited. A person’s rejection or accept of such conduct cannot be used as reasoning for a decision that relates to the person in question.

Finland

National reporter: Jorma Saloheimo, President of the Labour Court

1. What is the **main source of regulation on sex discrimination at work** in your country – Labour Code, law on gender equality, law on equality, collective agreements, codes of practice or other?

The main source of regulation on sex discrimination in Finland is the Act on Equality between Women and Men (609/1986, hereinafter the Equality Act). Sex discrimination may also be treated as a violation of the employer’s contractual duties under the Employment Contracts Act, 55/2001, or as a punishable offence called discrimination at work (Sec. 3, Chapter 47, 302/2004, of the Penal Code) or labour safety crime (Sec. 1, Chapter 47 of the Penal Code).

Collective agreements seldom contain clauses prohibiting discrimination. Instead, the Labour Court, which has the competence to handle collective labour law cases, may have to examine if other provisions in a collective agreement, or their application, constitute discrimination. The majority of discrimination cases are heard and tried in general courts on the basis of the Equality Act.

2. What is the **percentage of claims on sex discrimination** in your jurisdiction?

There are no such statistics available. In the Labour Court there are only a couple of sex discrimination cases per year. In general courts some more, but the cases are clearly a minority of all labour law cases.

3. What are the **main topics of complaints related to sex discrimination** – recruitment, promotion, equal pay, maternity, redundancy, sexual harassment, other?

The main topic is equal pay. Other topics are

- pregnancy in combination with fixed term job contracts*
- recruitment and job announcements*
- sexual harassment*

4. What categories of workers are mainly concerned by sex discrimination and sexual harassment (economic sectors, men or women)?

This is difficult to say in the absence of statistical data on the subject. It is, however, obvious that both sex discrimination and sexual harassment concern mainly women.

5. What is the **tendency** observed in your country’s case law – a growing or decreasing number of cases related to sex discrimination? How do you explain such trends?

The number of sex discrimination cases, as well as all equal treatment cases, is absolutely increasing. This is the experience of several practicing lawyers also.

Finland has for a long time been a country where in general awareness of equality has prevailed. Perhaps times are now changing so that this awareness is taking the shape of legal proceedings as well.

6. What is the **legal definition of sexual harassment**? Are there any problems (lacks, confusion) to use it in the judicial practice?

Sec 7(5) of the Equality Act reads as follows: Sexual harassment means unwanted verbal, non-verbal or physical conduct of a sexual nature that has the purpose or effect of violating a person's dignity or creating an intimidating, hostile degrading, humiliating or offensive environment.

Sec 7(6) of Equality Act contains a separate definition of harassment on the basis of gender. According to the provision, such harassment means unwanted conduct that is based on a person's gender but is not of sexual nature and has the purpose or effect of violating that person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

7. Please provide **any examples of cases on sexual harassment** at work (short summary, judgment text?)

There is little case law on harassment. It seems that only the most serious cases are taken to court, and criminal charges are then presented. Two judgements of the Court of Appeal from 2004 deal with cases, in which directors of small or medium size firms (hair salon and a design firm) had harassed their female workers. In the first case the offence involved direct sexual interference (touching the worker's breasts etc.). As a result of the harassment the woman had had to leave her job, move to another town and go to therapy. The punishment for the director was a large fine, and the compensation awarded to the victim was 4,300 EUR. In the second case the managing director of the design firm had repeatedly addressed his female workers in a hostile, humiliating an oppressive manner. The punishment for the labour safety crime committed was a fine.

There is one judgement of the Supreme Court (2010:1), in which a male managing director of a firm had at work harassed four young female workers, who were considered to have a subordinate status. The manager had gone to the rest room of the firm, where the employees used to rest under pauses, taking off the blanket and touching the workers on and under the clothes. The employer had not, after becoming aware of the matter, by available means taken measures to remedy the situation. The punishment for sexual abuse, labour safety crime and discrimination at work was a suspended sentence for eight (8) months' imprisonment and a supplementary fine.

8. What is the **main channel (machinery) to deal with sex discrimination and sexual harassment cases** (equality specialised body, enterprise committee, labour inspection, labour courts, etc)?

The main channel is general courts.

The Ombudsman for Equality may assist a person who has been subjected to discrimination or sexual harassment in the protection of his or her rights. Both authorities give advice and instructions. The Ombudsman may issue an opinion to a court, which is dealing with a case concerning a breach of the Equality Act. In 2010 the Equality Ombudsman received 454 letters and 408 queries over the telephone. Only a small percentage of these deal with sexual harassment.

9. What is **the complaint procedure** to follow in case of sexual harassment?

The alternatives are

- lawsuit based on the Equality Act, including a claim for compensation as a remedy for the harassment,

and

- criminal proceedings pursuing the conviction of the harasser for the punishable offence of discrimination at work or, alternatively, labour safety crime.

Both kind of cases are tried and heard in general courts of law, and the civil and criminal matters can also be combined to be treated in the same proceedings.

10. Does your law provide for the **reversal of the burden of proof in discrimination cases**?

Yes, there is a provision on the burden of proof in Sec. 9a of the Equality Act. The provision is designed to implement the relevant Article of the European Directive and reads as follows:

If a person considers that she/he has been a victim of discrimination under the provisions of this Act and presents a matter referred to in the Act to a court of law or to a competent authority and the facts give cause to believe that the matter is one of gender discrimination, the defendant must prove that there has been no violation of the equality between women and men but that the action was for an acceptable reason and not due to gender.

This provision does not apply to the consideration of criminal cases.

11. Please provide any **examples of evidence** brought to the court in sex discrimination and sexual harassment cases?

Litigants' own statements, witness statements, other documentary evidence, including medical reports especially in harassment cases.

12. What is the **responsibility of the employer** in preventing sexual harassment?

The employer's duties in this respect are provided for in Sec. 8d of Equality Act (Harassment in the workplace):

The action of an employer shall be deemed to constitute discrimination prohibited under this Act if, upon receiving information that an employee has been a victim of sexual or other gender-based harassment in the workplace, the employer neglects to take the steps available to eliminate the harassment.

13. What **measures** may be taken by the **employer** to punish sexual harassment?

The employee who harasses others can be warned and, in case of severe or repeated harassment, the employment contract can be terminated or cancelled. The employer can also take other measures under his managerial prerogative, such as transfer of the harasser to another work etc.

In addition, large companies and public institutions typically have internal codes of practice on the subject. If such codes are violated it is clear that the employee is violating employer's instructions and the employee violating the code can be warned and, the employment contract can be terminated or cancelled.

14. What **damages are available for victims** in case sex discrimination and sexual harassment? Please provide any examples of financial compensation to the victim (calculation scheme, average amounts).

The general remedy for all types of sex discrimination, including sexual harassment, is monetary compensation according to Sec. 11 of the Equality Act. The amount of the compensation depends on the nature and severity of the infringement and other circumstances of the case. The minimum compensation payable is 3.240 euros.

The compensation regulated in the Equality Act is intended to make good the suffering and other immaterial damage incurred to the victim. Payment of compensation does not prevent the injured party from claiming further compensation for financial loss under the Tort Liability Act or any other legislation, such as the Employment Contracts Act (55/2001). For instance, in a case of discriminatory dismissal the employee in question can claim for compensation for the

discrimination as well as damages to be paid for the loss of income resulting from the unemployment caused by the dismissal.

15. What is the legal protection for people who provide evidence in sexual harassment cases (**whistle-blowers**)?

Sec. 8 a of the Equality Act contains a provision on countermeasures by the employer. The provision is intended to protect victims of discrimination, who have appealed to their rights under the Act, and also other employees, who have assisted in investigating a matter concerning discrimination. If the employer gives notice to an employee on such grounds or otherwise treats him or her unfavourably, the action is deemed to constitute sex discrimination prohibited in the Act.

16. Does the law foresee situations when the **victim or the harasser are external to the enterprise** (client, user enterprise in relation with a temporary work agency)?

Yes. Sec. 28 of the Occupational Safety and Health Act (738/2002) contains a provision, which covers also a situation involving harassment by an external person. The wording of the provision is as follows:

If harassment or other inappropriate treatment of an employee occurs at work and causes hazards or risks to the employee's health, the employer, after becoming aware of the matter, shall by available means take measures for remedying this situation.

The omission of the employer to discharge this duty, as well as other duties set forth in the Occupational Safety and Health Act, may be punished as a labour safety crime under Sec. 1, Chapter 47 of the Penal Code.

17. Do you have any statutory provisions on discrimination on the basis of **sexual orientation**? Do you have any cases in judicial practice on this topic?

Yes. Sexual orientation is one of the discrimination grounds expressly mentioned and prohibited in the Employment Contracts Act (Sec. 2.1, Chapter 2) and in Sec. 6 of the Non-Discrimination Act (21/2004) which is a statute that contains more detailed rules on the definition of discrimination, burden of proof etc. in cases concerning discrimination on grounds other than sex.

Also Sec. 3 chapter 47 of the Penal Code prohibits discrimination at work on the ground of sexual orientation.

The judgement 2010:6 of the Helsinki Court of Appeal deals with a case, in which the employment contract of a chief editor of a newspaper had been cancelled even before she had begun working. The cancellation had happened unexpectedly when the employer had been informed of the employee's spouse's gender. The Court of Appeal considered that the employer had cancelled the employment contract on the ground of sexual orientation, and thus for an improper ground. The compensation for the discrimination, awarded to the employee by virtue of Sec. 11 of the Non-Discrimination Act, was 5.000 euro. In addition, the employee was awarded a compensation of 34.656 euro.

18. How is **moral harassment (mobbing)** defined in your legal system?

See reply 14 above.

19. Does **any legal parallel exist between moral and sexual harassment** (similar or same definitions and procedures)?

Yes. The provision on the employer's duty to prevent harassment, laid down in Sec. 28 of the Occupational Safety and Health Act (quoted in reply 14) covers both kinds of harassment. Regarding sexual harassment, the provision is overlapping with the one included in Sec. 8d of the Equality Act (see reply 12).

The practical consequence of sexual harassment being defined as a working environment issue is that the prevention of such harassment falls within the competence of the Labour

Inspectorate. This may be important, because the Equality Ombudsman has little resources and, for instance, no district organization as the Labour Inspectorate has.

For the English text of the Equality Act, see www.tasa-arvo.fi/en/legislation

Germany

National reporter: Regine Winter, Richterin am Bundesarbeitsgericht, Federal Labour Court

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| 1. What is the main source of regulation on sex discrimination at work in your country – Labour Code, law on gender equality, law on equality, collective agreements, codes of practice or other? |
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The major sources of regulation on sex discrimination at work in Germany are:

- The General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*, abbreviation: AGG, in force since 18 August 2006).

http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/agg_in_englischer_Sprache.pdf?__blob=publicationFile, (see annex)

- o It incorporates four Anti-Discrimination Directives of the EU into German law (Directives 2000/43/EC, 2000/78/EC, 2002/73/EC and 2004/113/EC), after many years of intense debate including considerable resistance in the public and legal spheres.
 - o The purpose of this Act is to prevent or to stop discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation. (Section 1 of this Act).
 - o The AGG governs the claims and legal consequences in the case of discrimination, both in the field of work and also for the sphere of civil law.
- Equality of women and men is recognised by the Basic Law for the Federal Republic of Germany (constitutional law; *Grundgesetz*, abbreviation: GG, in force since May 1949).
<https://www.btg-bestellservice.de/pdf/80201000.pdf>
 - o Article 3 (2) GG: Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist. (second sentence in force since 1994)
 - o Article 3 (3) GG: No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability.
 - Article 157 TFEU (Principle of equal pay for men and women)

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| 2. What is the percentage of claims on sex discrimination in your jurisdiction? |
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- No nationwide and systematic statistics available -

My perception is that sex discrimination cases are still exceptions in German labour courts. Even in the metropolis of Berlin, discrimination (on all grounds) has been a topic in less than one percent out of about 21.000 Labour Court cases in 2010 (*the Labour Court Berlin and the Land Labour Court Berlin-Brandenburg, first- and second-instance, are collecting relevant data about claims on discrimination*). The Land Labour Court Baden-Württemberg did collect relevant data at least for the period 18 August 2006 until 18 April 2007 and found for the cases submitted (to the first-instance courts) that 0,3 percent of them have been related to discrimination, and 28 percent of these 0,3 percent to sex/gender (<http://www.lag-baden-wuerttemberg.de/servlet/PB/show/1208853/Pressemitteilung27.06.07.pdf>).

A possible explanation for the low frequency of these claims may be:

- among others (e.g.: the general problems in bringing a legal dispute against the employer; only slowly growing public awareness and understanding of issues related to gender equality) –

that Germany does not provide

- collective mechanisms of legal protection (e.g.: no entitlement of associations to initiate such proceedings; no right to class-action lawsuits)
- pro-active measures for achieving Pay Equity (e.g. no act that requires employers and social partners in collective bargaining to take positive steps to identify pay gaps where “women’s work” is paid less than “men’s work” because of systemic discrimination in traditional wage-setting policies).

3. What are the main topics of complaints related to sex discrimination – recruitment, promotion, equal pay, maternity, redundancy, sexual harassment, other?
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Given the relative lack of sex discrimination lawsuit in Germany, labour courts do only provide a few judgments on the issue which possibly do not reflect the whole scope of the situation.

According to the Federal Anti-Discrimination Agency “ADS” (*Antidiskriminierungsstelle des Bundes*, abbreviation: ADS, equality specialised body, cf. question 8), the most important counselling topics concerning sex discrimination are at present:

- Women of child-bearing age (with or without children) face ongoing discrimination by employers in recruitment;
- Discrimination in promotions, training programs or other employment opportunities against female workers who work part-time;
- Pay/wage discrimination;
- Discrimination against women based on more than one ground - multiple and intersectional discrimination.

4. What categories of workers are mainly concerned by sex discrimination and sexual harassment (economic sectors, men or women)?
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- No statistics available -

My perception is that sex discrimination affects mainly women, in all economic sectors and across all hierarchical levels.

According to the representative survey “Lebenssituation, Sicherheit und Gesundheit von Frauen in Deutschland” (*Life situation, Safety and Health of Women in Germany, Federal Ministry for Family Affairs, Senior Citizens, Women and Youth*), sexual harassment of women in the workplace more frequently takes place against women without professional qualifications or training, during probationary period and against women who have not been with the company for a long time. In most cases, a large imbalance in power between offenders and victims can be observed.

5. What is the tendency observed in your country’s case law – a growing or decreasing number of cases related to sex discrimination? How do you explain such trends?

- No statistics available -

My perception is that the number of sex discrimination cases is more or less constant throughout the years, although some have recently increased public attention because of claims for higher damages than in the past.

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6. What is the **legal definition of sexual harassment**? Are there any problems (lacks, confusion) to use it in the judicial practice?

In section 3 (4) AGG Sexual harassment is defined as unwanted conduct of a sexual nature, including unwanted sexual acts and requests to carry out sexual acts, physical contact of a sexual nature, comments of a sexual nature, as well as the unwanted showing or public exhibition of pornographic images, takes place with the purpose or effect of violating the dignity of the person concerned, in particular where it creates an intimidating, hostile, degrading, humiliating or offensive environment.

There is no possibility for justification of sexual harassment.

Until now, there is too little judicial practice to show lacks or confusion of the legal definition in practice.

7. Please provide any examples of cases on sexual harassment at work (short summary, judgment text).

Up to now, procedures set in motion by the harasser are the most common constellation. Cases on sexual harassment at work concerned so far mainly the termination of employment of male staff members on grounds of sexual harassment. In this respect, the dismissal is in the foreground rather than the protection of victims of harassment. Until now, there has been no case decided under the AGG by the Federal Labour Court (*Bundesarbeitsgericht*, abbreviation: BAG), but some by second-instance Land Labour Courts. These cases have concerned sexual harassment of female colleagues, female temporary agency workers and a female employee of a customer/client (lewd comments; displaying sexually suggestive objects and pictures; to take photographs from the buttock; to grab at a construction site in a dark corridor at the clothes).

In one of these procedures set in motion by the harasser, a second-instance Land Labour Court found: Sexual harassment of a female employee in the workplace - also of employees of a customer or client of the employer - can be an important reason for the extraordinary termination of employment. Sexual harassment in the workplace violates employment contract obligations. Whether sexual harassment entitles to extraordinary termination depends on the intensity and other circumstances of each case. (*Hessisches Landesarbeitsgericht 17 November 2010 -6 Sa 640/10 -*)

8. What is the **main channel (machinery) to deal with sex discrimination and sexual harassment cases** (equality specialised body, enterprise committee, labour inspection, labour courts, etc)?

- It is only five years since Germany established the Federal Anti-Discrimination Agency “ADS” as equality specialised body who is primarily responsible for counselling people who feel that they have been subject to discrimination. Its mandate covers all grounds listed in the law, notwithstanding, however, the competencies of specialised governmental agencies dealing with related subject matters. The body is organisationally associated with the Ministry of Family, Senior Citizens, Women and Youth. The head of the agency is appointed by the Minister of Family, Senior Citizens, Women and Youth after a proposal by the Government. The head is independent and only subject to the law. The tenure of the head of the agency is the same as the legislative period of the German Bundestag.

http://www.antidiskriminierungsstelle.de/EN/Home/home_node.html (English)

- The counselling is not subject to any prior conditions, fees, or time limits. People affected by discrimination can contact the agency by telephone, e-mail, electronic contact form, letter or fax. It is also possible to arrange a personal meeting with counsellors.
- Counsellors can provide information on the legal situation, possible claims, and time limits.
- If the parties involved in a conflict seek an amicable settlement, the ADS can attempt, with the consent of the person affected, to contact the other party in order to outline

mediation options. The Federal Anti-Discrimination Agency can also make referrals to specialised local counselling services when needed.

- Specialised local counselling services (public or private, e.g. non-profit and charitable organizations, associations and initiatives)
- Employer and enterprise committee:
 - Section 75 (1) of the German Works Constitution Act (*Betriebsverfassungsgesetz*, abbreviation: *BetrVG*): The employer and the works council shall ensure that every person employed in the establishment is treated in accordance with the principles of law and equity and in particular that there is no discrimination against persons on account of (...) their gender or sexual identity.
 - Section 17 (1) AGG: The parties to collective bargaining agreements, employers, employees and their representatives shall be required to become actively involved in achieving the goal set out in Section 1 (to prevent or to stop discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation) within the context of their duties and scope of action.
 - Where the employer commits a gross violation of the provisions of the AGG or the BetrVG, e.g. of section 75 (1) BetrVG, the Works Council or a trade union represented in the enterprise may apply to the labour court for an order to the employer enjoining him to cease and desist from an act, allow an act to be performed or perform an act (*section 17 [2] AGG and section 23 [3] BetrVG, both so far without significant application in cases of discrimination*). (No claims of the person suffering discrimination shall be asserted in the application.)
- Labour Courts
 - Claims only as individual action (no class action or right of collective action).
 - In situations of sex discrimination and sexual harassment, Works Councils or trade unions may take action in labour courts only in case of “gross violation” (*cf. above: section 17 [2] AGG and section 23 [3] BetrVG*)
 - In cases of pay/wage discrimination in conjunction with salary classification in collective agreements there are additional possibilities for Works Councils to take action (*cases decided by court order/Beschlussverfahren*)
 - Anti-discrimination organisations shall be authorised, under the terms of their statutes to act as legal advisor to a disadvantaged person in the court hearings (*section 23 [2] AGG*).

9. What is the complaint procedure to follow in case of sexual harassment?

When employees are subject to unjustified differences of treatment in their working lives including sexual harassment, they are entitled to lodge a complaint with the responsible board within the company (*section 13 [1] AGG*), with the works council (*section 85 BetrVG*), or with the authorities, especially the ADS. Employers are obliged to establish complaints boards. If, in cases of harassment or sexual harassment, the employer fails to adopt appropriate measures to remedy the situation, then the employee has the right to refuse performance for her or his own protection without loss of pay. Employers can stop discrimination by making use of measures such as reprimands, reassignments, transfers or dismissal. Victims of unjustified differences of treatment and victims of harassment on the grounds of the AGG, including sexual harassment, in the field of employment and occupation are entitled to make claims for damages and compensation (*section 15 [1 and 2] AGG*). Claims must be submitted in writing within two months, collective agreements may provide a different deadline (*section 15 [4] AGG*).

In case of exceptional circumstances, the victim has under the Civil Code the possibility of a claim for damages against the employer after resignation (*sections 626, 628 [2] BGB*).

Depending on the form, context and extent, sexual harassment may also be considered a prosecutable offence.

10. Does your law provide for the **reversal of the burden of proof in discrimination cases**?

The person affected by discrimination is obliged to provide proof of the fact that an act of discrimination as defined by the AGG has taken place. But initially it is sufficient to cite evidence indicating that discrimination has taken place. The other party is then obliged to prove that there was no difference of treatment or that there was a justifiable reason for it in this specific case.

(Section 22 AGG [Burden of Proof]: Where, in case of conflict, one of the parties is able to establish facts from which it may be presumed that there has been discrimination on one of the grounds referred to in Section 1 [... gender ...], it shall be for the other party to prove that there has been no breach of the provisions prohibiting discrimination.)

Sufficient for the shift of the burden of proof is if in “general everyday experience” there is substantial (=majority) likelihood of the existence of discrimination (*Federal Labour Court – BAG 17 December 2009, 8 AZR 670/08*).

Regarding the question of a reversal of the burden of proof in discrimination cases, the Federal Labour Court did refer a reference for a preliminary ruling to the Court of Justice of the European Union on 20 August 2010 (*Case C-415/10, Galina Meister v Speech Design Carrier Systems GmbH*):

1. Are Article 19(1) of Directive 2006/54/EC, Article 8(1) of Directive 2000/43/EC and Article 10(1) of Directive 2000/78/EC to be interpreted as meaning that, where a worker shows that he meets the requirements for a post advertised by an employer, he has a right vis-à-vis that employer, if he does not obtain the post, to information as to whether the employer has engaged another applicant and, if so, as to the criteria on the basis of which that appointment has been made?

2. If the answer to the first question is affirmative:

Where the employer does not disclose the requested information, does that fact give rise to a presumption that the discrimination alleged by the worker exists?

(Note in this context the recent judgement of the Court of Justice of the European Union, Second Chamber, *Kelly v National University of Ireland*, Case C-104/10, 21 July 2011 - Access to vocational training – Equal treatment for men and women – Rejection of candidature – Access of an applicant for vocational training to information on the qualifications of the other applicants)

11. Please provide any **examples of evidence** brought to the court in sex discrimination and sexual harassment cases.

The role of statistical evidence is under enduring discussion in Germany. Currently, the question whether general workforce statistics about women in top management (women in top management are still the exception rather than the rule in Germany) and calculation of probabilities are able to indicate discrimination in court cases is subject to contradictory debate. Last year the Federal Labour Court took the view that as a matter of principle, statistical evidence can indicate sex discrimination, but only if the statistical data relates to the particular employer and this significantly meaningful in terms of his/her conduct (*BAG 22 July 2010, 8 AZR 1012/08*). In another case some years ago the Federal Labour Court did find that the fact that a pregnant employee is not promoted to a higher position in her employment does not indicate discrimination on ground of gender without further evidence (*BAG 24 April 2008, 8 AZR 257/07*).

12. What is the **responsibility of the employer** in preventing sexual harassment?

Employers have legally mandated organisational obligations. This includes their being required to take necessary measures in order to provide protection against discrimination. Furthermore, the employees of a company must be made aware of the fact that discrimination and harassment are prohibited and, when necessary, provided with training aimed at preventing discrimination. Employees must also be protected against discrimination by third parties, such as customers.

13. What **measures** may be taken by the **employer** to punish sexual harassment?

Employers can stop discrimination by making use of measures such as reprimands, reassignments, transfers or dismissal.

14. What **damages are available for victims** in case sex discrimination and sexual harassment? Please provide any examples of financial compensation to the victim (calculation scheme, average amounts).

Section 15 (1 to 3) AGG:

(1) In the event of a violation of the prohibition of discrimination, the employer shall be under the obligation to compensate the damage arising therefrom. This shall not apply where the employer is not responsible for the breach of duty.

(2) Where the damage arising does not constitute economic loss, the employee may demand appropriate compensation in money. This compensation shall not exceed three monthly salaries in the event of non-recruitment, if the employee would not have been recruited if the selection had been made without unequal treatment.

(3) The employer shall only be under the obligation to pay compensation where collective bargaining agreements have been entered into when he or she acted with intent or with gross negligence.

Under application of the AGG “shall not exceed three monthly salaries in the event of non-recruitment” (section 15 [2]) is the only provision that gives some guidance for the calculation of damages. Whether this and other limitations (e.g. “where the employer is not responsible for the breach of duty” and the limitation in section 15 [3] in the context of application of collective bargaining agreements) are compatible with European Union law is still unknown.

As far as the amount of compensation in application of section 15 (2) AGG is concerned, no calculation scheme is available. The courts have, according to case law, a margin of appreciation in order to take into account the specifics of each case in determining the appropriateness of the compensation. Some examples:

- In a case of age discrimination concerning assignment to a job pool the complainant had demanded 4.000 Euro compensation, the Land Labour Court awarded 1.000 Euro, approved by the Federal Labour Court [*BAG 22 January 2009 - 8 AZR 906/07 -*];
- in a case concerning gender discrimination in job promotion, the complainant had demanded as minimal amount 17.062,50 Euro, which the first-instance Labour Court awarded [*case not yet finalized, still pending, latest decision: BAG 27 January 2011 - 8 AZR 483/09*];
- a second-instance Land Labour Court awarded about 48.000 Euro plus 1.400 Euro per month concerning gender discrimination in job promotion [*case not yet finalized, still pending, latest decision: BAG 22 July 2010, 8 AZR 1012/08*].

15. What is the legal protection for people who provide evidence in sexual harassment cases (**whistle-blowers**)?

Apart from specific legislation with respect to civil servants exposing suspected cases of corruption, German law does not contain any provision governing the disclosure of deficiencies in enterprises or institutions, such as illegal conduct on the part of the employer, by an employee (so-called whistle-blowing) and discussions on related draft legislation have for the time being not produced any results.

In the absence of such legislation, an extraordinary dismissal of an employee for having lodged a complaint against his or her employer may be based on Article 626 (1) of the Civil Code, which provides that an employment relationship may be terminated by either party to the contract without complying with a notice period for a “compelling reason” (“wichtiger Grund”).

In a decision of 2 July 2001 (1 BvR 2049/00), the Federal Constitutional Court dealt with a case where an employee, at the request of the public prosecutor, had given evidence and handed over documents in preliminary criminal investigations that had been instituted ex officio against his employer. In this

case the Federal Constitutional Court pointed out in an obiter dictum that even in the event that an employee reported the employer to the public prosecution authorities on his or her own initiative, the rule of law required that such exercise of a citizen's right could, as a rule, not justify a dismissal without notice from an employment relationship, unless the employee had knowingly or frivolously reported incorrect information.

In the light of the Federal Constitutional Court's case-law, the Federal Labour Court, in a judgment of 3 July 2003 (2 AZR 235/02), further elaborated on the relation between an employee's duty of loyalty towards the employer and the exercise of his or her constitutionally guaranteed rights. It reiterated that in reporting a criminal offence an employee had recourse to a means to implement the law that was not only sanctioned by the legal order but also called for under the Constitution. An employee who exercised that right in good faith could therefore not sustain disadvantages in the event that the underlying allegations proved wrong or could not be clarified in the course of the ensuing proceedings. It held that, however, taking into consideration the employee's duty of loyalty, a [criminal] complaint lodged by an employee must not constitute a disproportionate reaction in response to the employer's conduct. Indications of a disproportionate reaction by the complainant employee could be the justification of the complaint, the motivation of the person filing the complaint or the failure to previously point out the deficiencies complained of internally within the enterprise.

(http://www.non-discrimination.net/content/media/2009-DE-Country%20Report%20LN_final.pdf)

Please note additionally the Chamber judgment in the case *Heinisch v. Germany* of the European Court of Human Rights (21 July 2011, application no. 28274/08, judgement so far not final), in which the Court held, that there had been a violation of Article 10 (freedom of expression) of the European Convention on Human Rights in a case concerning the dismissal of a geriatric nurse after having brought a criminal complaint against her employer alleging deficiencies in the care provided (<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=28274/08&sessionid=76293552&skin=hudoc-en>).

16. Does the law foresee situations when the victim or the harasser are external to the enterprise (client, user enterprise in relation with a temporary work agency)?

Cf. questions 7 and 12.

17. Do you have any statutory provisions on discrimination on the basis of sexual orientation ? Do you have any cases in judicial practice on this topic?
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The AGG covers cases of discrimination because of sexual orientation, cf. question 1.

Some judicial practice on this topic exists, for example in the field of promotion (*first-instance Labour Court Berlin*, 55 Ca 9120/09) and occupational pensions/pensions for surviving dependants (*latest decision BAG 15 September 2009*, 3 AZR 294/09, see under *EU-law Court of Justice of the European Union 1 April 2008*, C-267/06 [Maruko]).

18. How moral harassment (mobbing) is defined in your legal system?
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The written law provides, so far, no general definition for moral harassment (mobbing).

Under section 3 (3) AGG harassment on grounds of any of the characteristics cited in the AGG is not admissible. The following conditions must be met for actions to be classified as harassment under section 3 (3) AGG:

1. Unwanted conduct with the effect or purpose of violating the dignity of the person concerned.
2. An intimidating, hostile, degrading, humiliating, or offensive environment is created in the wake of harassment.

According to the Federal Labour Court, such an "environment" is generally not created by singular but only by continuous behaviour of certain severity. The Court considers whether the overall picture of the individual actions or behaviours reveals them as leading intentionally and systematically to an

impairment of a protected right of the employee (*BAG 24 April 2008 – 8 AZR 347/07; 28 October 2010, 8 AZR 546/09*).

19. Does any legal parallel exist between moral and sexual harassment (similar or same definitions and procedures)?
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As indicated under questions 6 and 18 above, the definitions in case of sexual harassment and harassment on grounds of any of the characteristics cited in the AGG (*section 3 [3 and 4]*) are partly identical, but partly different:

- (3) Harassment shall be deemed to be discrimination when an unwanted conduct in connection with any of the grounds referred to under Section 1 takes place with the purpose or effect of violating the dignity of the person concerned and of creating an intimidating, hostile, degrading, humiliating or offensive environment.
- (4) Sexual harassment shall be deemed to be discrimination in relation to Section 2(1) Nos 1 to 4 AGG, when an unwanted conduct of a sexual nature, including unwanted sexual acts and requests to carry out sexual acts, physical contact of a sexual nature, comments of a sexual nature, as well as the unwanted showing or public exhibition of pornographic images, takes place with the purpose or effect of violating the dignity of the person concerned, in particular where it creates an intimidating, hostile, degrading, humiliating or offensive environment.

Main sources and additional information (English language):

- The General Act on Equal Treatment (AGG):
http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/agg_in_englischer_Sprache.pdf?__blob=publicationFile,
- Federal Anti-Discrimination Agency (ADS):
http://www.antidiskriminierungsstelle.de/EN/Home/home_node.html
- Guide to the General Equal Treatment Act – Explanations and Examples (November 2010)
http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/agg_wegweiser_engl_guide_to_the_general_equal_treatment_act.pdf?__blob=publicationFile
- European network of legal experts in the non-discrimination field - Germany
<http://www.non-discrimination.net/countries/germany>
- Report on Measures to Combat Discrimination, Directives 2000/43/EC and 2000/78/EC, European network of legal experts in the non-discrimination field - Country Report 2009 - GERMANY (Prof. Dr. Matthias Mahlmann), http://www.non-discrimination.net/content/media/2009-DE-Country%20Report%20LN_final.pdf

Hungary

1. What is the **main source of regulation on sex discrimination at work** in your country – Labour Code, law on gender equality, law on equality, collective agreements, codes of practice or other?

The main sources are the Constitution, the Labour Code and the Equal Treatment Act.

2. What is the **percentage of claims on sex discrimination** in your jurisdiction?

There are no statistics related this, but the cases are few. However there is a tendency that sex discrimination appears as a second argument in the disputes. For example the main legal

ground that the reason of the dismissal was invalid and secondly that it injured the equal treatment.

3. What are the **main topics of complaints related to sex discrimination** – recruitment, promotion, equal pay, maternity, redundancy, sexual harassment, other?

The main topics are maternity, redundancy and equal pay.

4. What categories of workers are mainly concerned by sex discrimination and sexual harassment (economic sectors, men or women)?

Mainly women and almost in every sectors however the equal pay court cases are mainly coming from bank sectors and higher educated professionals (lawyers, managers)

5. What is the **tendency** observed in your country's case law – a growing or decreasing number of cases related to sex discrimination? How do you explain such trends?

Growing number of cases related to sex discrimination however at the equal pay cases the plaintiffs are mostly higher educated professionals (managers, lawyers).

The reason is that the discrimination cases are became well-known and there are lots if organizations that help the victims. .

6. What is the **legal definition of sexual harassment**? Are there any problems (lacks, confusion) to use it in the judicial practice?

The sexual harassment has the same definition as harassment what is the following: harassment is a conduct of sexual or other nature violating human dignity related to the relevant person's characteristics defined in Article 8 (sex, origin, colour, religious or ideological conviction, sexual identity or orintetation etc.) with the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment around the particular person.

We do not have any case that directly related to sexual harassment.

7. Please provide **any examples of cases on sexual harassment** at work (short summary, judgment text?)

We do not have such cases.

8. What is the **main channel (machinery) to deal with sex discrimination and sexual harassment cases** (equality specialised body, entreprise committee, labour inspection, labour courts, etc)?

There are three different authorities dealing with sex discrimination and sexual harassment cases with different legal procedures and possibilities.:

- a. the Equal Treatment Authority,**
- b. the National Labour Inspectorate**
- c. the courts.**

The victim can choose between the different authorities and the different procedures.

The parallel procedures can not be continued. If a procedure has been instigate at any public

administration body, then in the same matter other public administration bodies

a) shall not conduct any procedure in the case of a violation of law committed against the same person,

b) shall suspend their procedure instigated in the case of a violation of law committed against another person until a binding judgement is made in the matter.

9. What is **the complaint procedure** to follow in case of sexual harassment?

The Equal Treatment Authority shall at request conduct investigations to establish whether the obligations of equal treatment have been violated.

10. Does your law provide for the **reversal of the burden of proof in discrimination cases?**

Yes.

In procedures instigated because of a violation of the principle of equal treatment, the injured party or the party entitled to an *actio popularis* must render it probable that

a) the injured person or group has suffered a disadvantage, or in the case of an *action popularis*, there is a direct danger of such a disadvantage, and

b) the injured party or group - actually or as assumed by the offending party - possessed any of the characteristics defined in the Act at the time of the violation of law

If the case described in Paragraph (1) has been rendered probable, the other party shall prove that

a) the circumstances rendered probable by the injured party or by the entity entitled to an *actio popularis* did not prevail, or

b) he/she/it did observe the principle of equal treatment, or that he/she/it was not obliged to observe the principle of equal treatment in respect of the relevant relationship.

11. Please provide any **examples of evidence** brought to the court in sex discrimination and sexual harassment cases?

Witnesses who give testimony about what was the basis of the decision (in a redundancy case the reason for the termination was the worker's bad quality of work and not that she is a woman), statistics of the rate of workers.

12. What is the **responsibility of the employer** in preventing sexual harassment?

The employer is fully responsible in preventing sexual harassment.

Employers shall be subject to full liability for damages caused to employees in connection with their employment including sexual harassment, regardless of accountability. An employer shall be relieved from liability if able to prove that the damage was caused aside from its operation and by an unavoidable event. According to the strict case law the clients' behaviour belongs to the employer's operation.

13. What **measures** may be taken by the **employer** to punish sexual harassment?

The employer can apply:

- **sanctions established by the collective agreement**

- disciplinary action,
- dismissal,
- extraordinary dismissal
- compensation caused damages and paid by the employer to the victim.

14. What **damages are available for victims** in case sex discrimination and sexual harassment? Please provide any examples of financial compensation to the victim (calculation scheme, average amounts).

The victims can claim for the compensation of material and non material damages. - In case of discriminative redundancy he/she can request the continuation to be employed in his original position, the employee shall be reimbursed for lost wages (and other emoluments) and compensated for any damages arising from such loss.

- **Employees** shall also be compensated for damages which are not of financial nature. The amount depends on the change of the everyday life of the victim, the duration of the damage etc.

15. What is the legal protection for people who provide evidence in sexual harassment cases (**whistle-blowers**)?

The Equal Treatment Act prohibits retribution. Retribution is a conduct that causes infringement, is aimed at infringement, or threatens with infringement, against the person making a complaint or initiating procedures because of a violation of the principle of equal treatment, or against a person assisting in such a procedure, in relation to these acts.

The law regulates that the Authority shall immediately delete all personal and special data, the management of which is not absolutely indispensable for exercising its powers.

16. Does the law foresee situations when the **victim or the harasser are external to the enterprise** (client, user enterprise in relation with a temporary work agency)?

- **Yes, according to the damages the employer is responsible for the behaviour of the clients, and other contractual partners.**

- **In case of hiring out of workers the user enterprise shall observe the principle of equal treatment according to the Equal Treatment Act and the Labour Code. The provision explicitly states that persons entitled to give instructions in respect of other relationships aimed at work and relationships directly related thereto shall observe the principle of equal treatment. However for any damages caused to the employee during employment the user enterprise and the placement agency shall be subject to joint and several liability.**

17. Do you have any statutory provisions on discrimination on the basis of **sexual orientation**? Do you have any cases in judicial practice on this topic?

Yes, the law explicitly prohibits discrimination on the ground of sexual orientation. We do have knowledge of one ongoing case.

18. How **moral harassment (mobbing)** is defined in your legal system?

There is no legal definition for mobbing just a medical one. The Equal Treatment Act defines the concept of harassment that includes the moral harassment also. Its definition is the following: harassment is a conduct of sexual or other nature violating human dignity

related to the relevant person's characteristics defined in Article 8 (sex, origin, colour, religious or ideological conviction, sexual identity or orientation etc.) with the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment around the particular person.

19. Does **any legal parallel exist between moral and sexual harassment** (similar or same definitions and procedures)?

The definition and the procedures are the same.

Ireland

National reporter: Kevin Duffy, Chairman, The Labour Court

1. What is the **main source of regulation on sex discrimination at work** in your country – Labour Code, law on gender equality, law on equality, collective agreements, codes of practice or other?

Employment equality law in Ireland is based on statute

2. What is the **percentage of claims on sex discrimination** in your jurisdiction?

Approximately 800 claims per year alleging discrimination are referred to the courts. Of these approximately 40% are on gender grounds. The total number of employment related claims per year is approximately 15,000

3. What are the **main topics of complaints related to sex discrimination** – recruitment, promotion, equal pay, maternity, redundancy, sexual harassment, other?

Mainly maternity protection, access to employment, dismissal and harassment

4. What categories of workers are mainly concerned by sex discrimination and sexual harassment (economic sectors, men or women)?

Mostly women. Issues arise across all sectors although the majority of claims arise in the Public sector

5. What is the **tendency** observed in your country's case law – a growing or decreasing number of cases related to sex discrimination? How do you explain such trends?

The number has remained relatively steady in recent years.

6. What is the **legal definition of sexual harassment**? Are there any problems (lacks, confusion) to use it in the judicial practice?

Section 14 of the Employment Equality Act 1998-2004 defines harassment and sexual harassments as follows: -

(i) references to harassment are to any form of unwanted conduct related to any of the discriminatory grounds, and

(ii) references to sexual harassment are to any form of unwanted verbal, non-verbal or physical conduct of a sexual nature,

(b) being conduct which in either case has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.

(c) Without prejudice to the generality of paragraph (a) , such unwanted conduct may consist of acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.]

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7. Please provide **any examples of cases on sexual harassment** at work (short summary, judgment text)?

See appendix 1- This is a full judgment in a case involving sexual harassment. This is a somewhat unusual case in that it involved the harassment of a teacher by students at a secondary school. The employer (the school) was held liable because it failed to take adequate steps to prevent the harassment.

8. What is the **main channel (machinery) to deal with sex discrimination and sexual harassment cases** (equality specialised body, enterprise committee, labour inspection, labour courts, etc)?

There is a tribunal of first instance known as the Equality Tribunal which adjudicates on cases alleging discrimination. There is then an appeal to the Labour Court

9. What is **the complaint procedure** to follow in case of sexual harassment?

The aggrieved party simply makes a complaint to the Equality Tribunal using an official form

10. Does your law provide for the **reversal of the burden of proof in discrimination cases**?

Yes- In line with the Burden of Proof Directive

11. Please provide any **examples of evidence** brought to the court in sex discrimination and sexual harassment cases?

The type of evidence adduced varies considerably depending on the type of discrimination alleged. Generally it is for the Complainant to establish on evidence the primary facts on which they rely in alleging that they were the victim of discrimination. By way of example, if the discrimination alleged relates to the filling of a job or a promotion, the Complainant may proffer evidence that he or she was better qualified than the successful candidate. The Court may then draw an inference that the reason for not appointing the Complainant was that of gender. This reverses the burden of proof on to the Respondent to show that the failure to appoint the Complainant was not tainted with discrimination.

Parties frequently rely on statistics, particularly in cases alleging indirect discrimination, to show that a provision criterion or practice in relation to employment operates to the disadvantage of either men or women.

12. What is the **responsibility of the employer** in preventing sexual harassment?

In Irish law there is a positive duty on employers to take all practical measures to prevent sexual harassment at work. Under Irish law if an employee is harassed at work by a fellow employee of the employer or a customer of the employer or any person conducting business at the workplace (including agency workers and employees of other employers), the employer is liable for the harassment. However, the employer can have a full defence to a claim by the victim if the employer can show that all practical steps were taken to prevent the harassment. In general this means that the employer must have had a policy in place on the prevention of harassment in the workplace and that this policy was brought to the attention of all workers in the workplace. The employer must also show that where a complaint of harassment was made speedy and effective measures were taken to deal with the complaint.

13. What **measures** may be taken by the **employer** to punish sexual harassment?

This would be determined by the disciplinary code in the employment. Generally it would be regarded as serious misconduct warranting disciplinary action up to and including dismissal.

14. What **damages are available for victims** in case sex discrimination and sexual harassment? Please provide any examples of financial compensation to the victim (calculation scheme, average amounts).

Where the case is brought before the Equality Tribunal (and the Labour Court on appeal) the maximum damages that can be awarded is an amount equal to two years salary. However a

Complainant can bypass the Equality Tribunal (and the Labour Court) and present the claim to the Circuit Court where there are unlimited damages available. However, the procedures in the Circuit Court are more formal and expensive than in the specialist courts.

15. What is the legal protection for people who provide evidence in sexual harassment cases (**whistle-blowers**)?

The Employment Equality Act provides full protection for those who provide evidence of discrimination or report cases of discrimination. A person who is victimised in contravention of the Act can receive up to two years salary in compensation. In the case of dismissal that can, in addition, be reinstated in their former role.

16. Does the law foresee situations when the **victim or the harasser are external to the enterprise** (client, user enterprise in relation with a temporary work agency)?

Yes. See answer to question 12.

17. Do you have any statutory provisions on discrimination on the basis of **sexual orientation**? Do you have any cases in judicial practice on this topic?

Yes. Since 1998 discrimination on sexual orientation is unlawful in the same way as a discrimination on gender grounds.

18. How **moral harassment (mobbing) is defined** in your legal system?

Mobbing (or bullying as it is referred to in this jurisdiction) is defined in similar terms to harassment, except that it refers to persistent acts which have the effect of creating a humiliating or intimidating atmosphere. Hence, a single act cannot be regarded as bullying whereas a single act can amount to sexual harassment.

19. Does **any legal parallel exist between moral and sexual harassment** (similar or same definitions and procedures)?

The procedures for dealing with bullying are different to those available for dealing with sexual harassment. In the case of sexual harassment clear procedures are laid down in the Employment Equality Act for dealing with complaints and obtaining redress. In the case of bullying, the process is less straightforward. In legal terms bullying can constitute a breach of health and safety legislation and an employee who suffers stress or other consequences of bullying has a cause of action against his or her employer for failure to provide him or her with a safe place of work. Such claims are pursued before the ordinary courts rather than before the specialist labour courts. They are normally in the nature of a claim at common law for personal injury in which the tort of breach of statutory duty would be relied upon.

Israel

National reporter: Judge Nili Arad, President, National Labour Court

1. What is the **main source of regulation on sex discrimination at work** in your country – Labour Code, law on gender equality, law on equality, collective agreements, codes of practice or other?

The main sources of regulation on sex discrimination at work in Israel are laws on equality and laws on gender equality.

2. What is the **percentage of claims on sex discrimination** in your jurisdiction?

The percentage of claims on sex discrimination in my jurisdiction is around 15% (gross evaluation).

3. What are the **main topics of complaints related to sex discrimination** – recruitment, promotion, equal pay, maternity, redundancy, sexual harassment, other?

The main topics of complaints related to sex discrimination are redundancy due to pregnancy and sexual harassment.

4. What categories of workers are mainly concerned by sex discrimination and sexual harassment (economic sectors, men or women)?

The workers that are mainly concerned by sex discrimination and sexual harassment are women – from all sectors.

5. What is the **tendency** observed in your country's case law – a growing or decreasing number of cases related to sex discrimination? How do you explain such trends?

The tendency during the last years is of a growing number of cases. We believe that the main reasons are awareness and the case law of the labour courts.

6. What is the **legal definition of sexual harassment**? Are there any problems (lacks, confusion) to use it in the judicial practice?

The legal definition of sexual harassment is each of the following:

- a. Extortion, when the act demanded is of a sexual nature;
- b. Indecent assault;
- c. Repeated suggestions of a sexual nature, directed to a person showing lack of interest (when there are authority relations as in employer-employee relations – there is no need to show lack of interest);
- d. Repeated references directed to a person and focusing on his/her sexuality, when the person shows lack of interest (when there are authority relations as in employer-employee relations – there is no need to show lack of interest);
- e. A humiliating or degrading reference directed to a person in regard to his/her gender or sexuality, including sexual orientation.

7. Please provide **any examples of cases on sexual harassment** at work (short summary, judgment text?)

There are numerous cases on sexual harassment. One example is of a woman working as a worker in a factory, who accidentally ruined the dress she was working on. She came to her boss with tears begging him not to fire her and suggesting oral sex in return. He agreed, and the "relationship" between them lasted for 3 years. She won her case in the district court and the case is now pending before the national labour court in order to determine – among other things – the right amount of compensation and the legal way to calculate it.

8. What is the **main channel (machinery) to deal with sex discrimination and sexual harassment cases** (equality specialised body, enterprise committee, labour inspection, labour courts, etc)?

Regarding sexual harassment – each enterprise has a nominated supervisor to deal with sexual harassment complaints, and afterwards – labour courts;

Regarding sex discrimination complaints – it is possible to apply to an equality specialised body and also to the labour courts.

9. What is the **complaint procedure** to follow in case of sexual harassment?

Enterprise supervisor and labour courts (and the police in severe cases).

10. Does your law provide for the **reversal of the burden of proof in discrimination cases**?

Yes.

11. Please provide any **examples of evidence** brought to the court in sex discrimination and sexual harassment cases?

Recordings; letters; witnesses that saw the victim immediately after the harassment; payrolls to prove the salaries paid to other workers.

12. What is the **responsibility of the employer** in preventing sexual harassment?

To use reasonable measures in order to prevent sexual harassment and to deal with any complaint with regard to sexual harassment. In order to fulfil these obligations the employer must set an effective way to file complaints and investigate them; to effectively deal with any known case of sexual harassment; and do whatever possible to fix the damage and prevent the recurrence of the harassment. When there are more than 25 employees the employer is also obliged to determine regulations and publish them among the workers.

13. What **measures** may be taken by the **employer** to punish sexual harassment?

To distance the harasser; give instructions on proper etiquette; use disciplinary measures when there is a disciplinary code in the work place.

14. What **damages are available for victims** in case sex discrimination and sexual harassment? Please provide any examples of financial compensation to the victim (calculation scheme, average amounts).

The damages that are available for victims in cases of sex discrimination and sexual harassment are 65,000 NIS (approximately 13,000 Euros) as damages without proof;

When there is a redundancy during pregnancy without prior approval as requested in law – the total amount of salaries until the birth + 3 months after the maternity leave + related social rights.

15. What is the legal protection for people who provide evidence in sexual harassment cases (**whistle-blowers**)?

There is a specific provision of law protecting them.

16. Does the law foresee situations when the **victim or the harasser are external to the enterprise** (client, user enterprise in relation with a temporary work agency)?

Yes.

17. Do you have any statutory provisions on discrimination on the basis of **sexual orientation**? Do you have any cases in judicial practice on this topic?

Yes.

18. How **moral harassment (mobbing) is defined** in your legal system?

There is no specific definition.

19. Does **any legal parallel exist between moral and sexual harassment** (similar or same definitions and procedures)?

No.

Italy

National reporter: Judge Miani Canevari, Presidente di sezione Corte di Cassazione Roma

1. A general principle on equality is stated in the Italian Constitution; statute law n.300/1970 (Statuto dei Lavoratori) bans every sort of discrimination at work. Rules that forbid sex discrimination have been stated more recently (following EU legislation: dir. 2002/73/Ce) by decreti legislativi nn. 216/2003 and 145/2005, while a “code of equal opportunities”, coordinating the previous rules, has been enacted with decreto legislativo n.198/2006.

2/5 Sex discrimination and sexual harassment concern women workers, mainly in service industry. Claims on gender discrimination are very few, even if discrimination in promotion is quite often indicated in cases concerning job assignment. A different topic concern sexual harassment is again reported in few cases, even if is generally believed that many complaints are not made in labour courts for the difficulty to expose and prove the facts. The number of cases is so quite limited, while there is a consistent number of cases of mobbing, concerning injuries to the personal dignity not directly related to gender characteristic.

6. The above mentioned statute (d.lgs. 145/2005- art.26) says that it is considered discrimination "*the harassment, that is the undesired behaviour, performed for reasons connected to sex, with the purpose or effect to violate the dignity of a worker (man or woman) and to create an intimidating, hostile, degrading, humiliating or insulting environment*".

There are no court decisions about the enforcement of this rule; questions arise about the meaning of the word "undesired" (related to the objective undesiderability of the behaviour, or the subjective perception of it) and the prejudicial effect.

7. The Italian Supreme Court (Corte di Cassazione) affirmed (Cass.n. 7380/1997 Rivista di diritto del lavoro 1998 II 795), the decision of the Court of Appeal according which there was no sexual harassment in a case where the employer had declared his love to his secretary, trying to kiss her and giving her a ring. According to the Court of Appeal, the behaviour was only a manifestation of deep love.

In other cases, the Court recognized the justification for the dismissal of a manager guilty of harassment of a subordinate woman employee, stressing, as proof of the undesiderability of the behaviour, elements as as coarse comments on the woman's body, physical contacts etc. (Cass. 5049/2000, in Orientamenti della giurisprudenza del lavoro, 2000, 505)

On the other hand, it has ruled out the justification of the dismissal of a woman employee for her violent attack of a manager guilty of continuous harassment with sexual swear words and humiliations (Cass. 12717/1998, Rivista di diritto del lavoro 1999,II, 832).

Tribunale Pisa 3/10/2001 (Rivista giuridica del lavoro 2002,314) stated the liability for damages both of the employer and the manager guilty of harassment, noticing that the latter had not been punished with an effective disciplinary measure.

Tribunale Milano 8/6/2001 (Rivista critica di diritto del lavoro, 2001,II, 1067) judging the claim for damages of a worker dismissed for disciplinary charges, found the dismissal justified, but granted damages for harassment committed by a manager.

8. Labour courts deal with sex discrimination and sexual harassment at work. Of course, sexual harassment can also be an offence punished with criminal judgement.

9. In case of sexual harassment at work, a complaint of the worker to the labour judge can obtain, in a summary judgement, [art. 38 d.l.g.s n.198/2006) an immediate order to cease the illegal behaviour; the judge orders the removal of its effects, and states also on the claim of the worker for damages.

10. Within the rules of EU legislation, art.40 d.lgs. 198/2006 states that *when the claimant can establish facts, even with statistical data, about recruitment, wages, job assignments, promotions and dismissal, suitable to build, in precise and concordant terms, the presumption of existence of measures or behaviour discriminating for reason of sex, the respondent must prove that the discrimination does not exist.*

11. We can find in Cass. n.12318/210 (*Rivista critica di diritto del lavoro* 2010, 800) an interesting example of evidence given in a sex harassment case. The Court of Appeal found for the woman worker, claimant for damages, with charges against the manager of the firm. No evidence had been brought to the court about the specific events related to the claimant, except the allegations of the same woman, but the judges (with decision affirmed by the Supreme Court) considered the charges proven evaluating the evidence given by coworkers about similar incidents of persecution of other women employees by the same manager.

12. The employer is responsible in preventing sexual harassment at work, being his contractual duty to protect the moral personality of the employees (art. 2087 cod.civ.)

13. For this reason, disciplinary action must be taken against the employee guilty of harassment of a workmate, which is cause for dismissal.

14. Damage for the victims of sex discrimination can have economical nature, when the discrimination prevents the access to certain benefits (e.g. promotion). In these cases, financial compensation can often fixed in connection to the loss of chance, and then probability of access to the benefit, so depending from the monetary value of the same benefit.

Compensation is given for "danno non patrimoniale" (damage which can not be directly valued financially), especially in case of harassment, for damages to the basic vital rights of the worker, and injury to his dignity. The assessment of these damages, not related to financial parameters, is made by the judge on ground of equity.

15. If a worker gives evidence in case of sexual harassment of a workmate, no measure of any kind can be taken against him, for the general rule that forbids any retaliation by the employer

16. There is no special provision for this case, but if the harasser is external to the enterprise the employer can be hold equally accountable, according to his general duty of protection of the personal dignity of employees.

17. According with statute law (d.l.g.s. n.216/2003 art. 3), the general rule of equal treatment must be enforced at work without any difference due to sexual orientation. However, the same rule finds an exception when this personal trait (among other elements as sex, age, religion) concerns an essential requirement for the execution of the job. We have no cases in judicial practice, but there are doubts about the compliance of this regulation to the EU legislation (dir. 2000/78)

18. 19. Moral harassment (mobbing) is not defined by statute law, but several court decisions hold the employer responsible-for his duty to protect the personal dignity of the employee- in case of an oppressive behaviour, persistent and extended in time . There is a substantial distinction between moral and sexual harassment, because the former is not connected to the differential element of sex.

Norway

National reporter: Marit B. Frogner, Judge, Labour Court of Norway¹³

1. What is the **main source of regulation on sex discrimination at work** in your country – Labour Code, law on gender equality, law on equality, collective agreements, codes of practice or other?

Answer:

The main source of regulation is the Gender Equality Act¹⁴.

The Working Environment Act¹⁵ has general and extensive rules on working environment, including rules concerning harassment and discrimination. According to section 4-3, requirements regarding the psychosocial working environment, the work shall be arranged so as to preserve the employees' integrity and dignity, cf. subsection 1. Pursuant to subsection 3, employees shall not be subject to harassment or other improper conduct¹⁶. The general rule prohibiting harassment includes sexual harassment. With effect from 1 July 2002, sexual harassment and harassment based on gender is explicitly regulated in section 8a of the Gender Equality Act (see no. 6 below). Further, chapter 13 of the Working Environment Act has rules prohibiting discrimination based on, *inter alia*, sexual orientation, age, part-time or temporary work.

Collective agreements may contain rules that aim to enhance equality and prevent discrimination.

We will not comment on the rules of the Norwegian General Civil Penal Code or related practice.

Unless specified, we will limit our comments to labour law.

2. What is the **percentage of claims on sex discrimination** in your jurisdiction?

Answer:

In 2011, the Labour Court has so far heard one case where the plaintiff argued that there may be a breach of rules on indirect differential treatment of women. The case was solved on another basis, and the court did not consider this statement. During the fall 2011, the Labour Court is scheduled to hear one case concerning indirect differential treatment of women.

¹³ The Labour Court of Norway (in Oslo) deals with disputes concerning the interpretation, validity and existence of collective agreements, cases of breach of collective agreements and the peace obligation and cases of claims for damages arising from such breaches and unlawful industrial action, cf. the Act of 5 May 1927 No. 1 relating to Labour Disputes. The Labour Court has territorial jurisdiction over the whole country and is the highest court in its domain.

<http://www.arbeidsretten.no/index.php?&module=Pagesetter&func=viewpub&tid=4&pid=18&topic=1&tpl=for side&newlang=eng>

Individual cases are, as a general rule, heard by the ordinary courts. The Working Environment Act has some procedural rules that may apply to individual labour disputes, cf. chapter 17 of the Act. Otherwise, the rules of the Norwegian Disputes Act (2005) apply.

The Labour Court of Norway will therefore, due to the jurisdiction, rarely hear cases involving discrimination based on gender etc. However, there has been some cases, see no 2 below. Harassment, including sexual harassment, falls within the jurisdiction of the ordinary courts.

¹⁴ Act of 9 June 1978 No. 45 relating to Gender Equality

<http://www.regjeringen.no/en/doc/Laws/Acts/The-Act-relating-to-Gender-Equality-the-.html?id=454568>

¹⁵ Act of 17 June 2005 No. 62 relating to working environment, working hours and employment protection, etc.

<http://www.arbeidstilsynet.no/lov.html?tid=78120>

(The translated version is not entirely updated)

¹⁶ The provision came into force 1 February 1995.

In general, and due to the jurisdiction of the Labour Court (see comment under footnote no 1), the number of cases that may involve gender discrimination will be limited.

The Labour Court has no statistics of claims concerning sex discrimination, and we are not aware of any statistics from the ordinary courts.

Complaints may also be given to the Norwegian Equality and Anti-Discrimination Ombud, see no 8 below. According to the Annual Report for 2010 by the Ombud¹⁷, they received 301 complaints in 2010, of which 75 were related to discrimination based on gender. During the period 2006 to December 2009, the Equality and Anti-Discrimination Tribunal¹⁸ considered 112 cases. Of these were 67 related to discrimination base on gender. These cases were divided into the following: 25 related to pregnancy and parental leave, 8 to equal pay for work for women and men, 6 to the duty to provide an annual report concerning the sate of affairs as regards gender equality in the enterprise and 28 cases related to other grounds. Several cases would include more than one basis for discrimination.

3. What are the **main topics of complaints related to sex discrimination** – recruitment, promotion, equal pay, maternity, redundancy, sexual harassment, other?

Answer:

See above.

4. What categories of workers are mainly concerned by sex discrimination and sexual harassment (economic sectors, men or women)?

Answer:

Our clear impression is that the majority of cases concerning gender discrimination and sexual harassment relate to women being discriminated or harassed. We do not have any statistics in this regard, neither concerning possible differences between sectors.

5. What is the **tendency** observed in your country's case law – a growing or decreasing number of cases related to sex discrimination? How do you explain such trends?

Answer:

We do not have any statistics or information that would give us basis for comments in regard to possible tendencies.

6. What is the **legal definition of sexual harassment**? Are there any problems (lacks, confusion) to use it in the judicial practice?

Answer:

Gender-based harassment and sexual harassment are defined in section 8a of the Gender Equality Act. Section 8a reads as follows:

"Section 8a. (Gender-based harassment and sexual harassment)

Gender-based harassment and sexual harassment are not permitted. Such harassment is considered to be differential treatment in contravention of section 3.

The term "gender-based harassment" shall mean unwelcome conduct that is related to a person's gender and that has the effect or purpose of offending another person's dignity. The term "sexual harassment" shall mean unwelcome sexual attention that is offensive to the object of such attention.

¹⁷ <http://www.ldo.no/no/Om-ombudet/Aarsrapporter/Arssrapporter/Arssrapport-2010/> (in Norwegian)

¹⁸ See no 5 below.

Summaries of some of the cases in English may be found on the homepage:

<http://www.diskrimineringsnemnda.no/wips/1731139312/>

The employer and management of organizations or educational institutions shall be responsible for preventing and seeking to preclude the occurrence of harassment in contravention of provisions of this Act within their sphere of responsibility.

The provisions of the Anti-Discrimination Ombud Act shall apply in connection with the enforcement of the prohibition against gender-based harassment in the first paragraph and the provision in the third paragraph.

The prohibition against sexual harassment shall be enforced by the courts of law.”

The definition is thus wide. Sexual harassment includes physical and verbal actions, however, the harassment may also be nonverbal.

Section 4-3 of the Working Environment Act¹⁹ also prohibits harassment or other improper conduct.

7. Please provide **any examples of cases on sexual harassment** at work (short summary, judgment text)?

Answer:

Allegations of sexual harassment are typically brought forward in dismissal cases where an employee is dismissed for having harassed others. Other examples are cases where the employee claims to be a “whistle-blower”²⁰ and subject to retaliation due to notifying about harassment. There have also been cases where women allege to have been sexually harassed and claim compensation on this basis.

In 2002²¹, the Norwegian Supreme Court found a summary dismissal of a professor due to sexual harassment of female colleagues and students at one of the universities valid. The Court found that there were grounds for summary dismissal according to the Civil Service Act²². The Court referred to the proposal for new rules regarding sexual harassment in the Gender Equality Act, however, section 8a had not come into force. Notwithstanding, with effect from 1995 the Working Environment Act had a prohibition against harassment²³. The court expressed that sexual harassment clearly was not within the general accepted standards for behaviour, and the provision of the Working Environment Act made clear what must be assumed to apply also before the 1995.

8. What is the **main channel (machinery) to deal with sex discrimination and sexual harassment cases** (equality specialised body, enterprise committee, labour inspection, labour courts, etc)?

Answer:

The Courts:

An employee who claims to have been subject to discrimination based on gender or sexual harassment may institute legal proceedings.

According to section 17 of the Gender Equality Act, liability for damages may be imposed regardless of fault. Section 17 reads as follows:

“Any job seeker or employee who has been subjected to treatment in contravention of provisions of this Act by an employer or a person acting on the latter’s behalf may demand compensation and redress regardless of the fault of the employer. Compensation shall be fixed at the amount that is reasonable, having regard to the

¹⁹ See no 1 above.

²⁰ See comments under question 15 below.

²¹ HR-2001-125, Rt-2002-273 (Decision of 18 March 2002)

²² Section 15 of the Act relating to Civil Servants, etc. of 4 March 1983 No. 3

²³ See note 4 above. Now, section 4-3 of the Working Environment Act.

financial loss, the situation of the employer and the employee or job seeker and all other circumstances. Redress shall be fixed at the amount that the court finds reasonable, having regard to the relationship of the parties and all other circumstances.

In all other respects, the general rules regarding liability for damages in the event of wilful or negligent contravention of the provisions of this Act shall apply.”

The Equality and Anti-Discrimination Ombud²⁴ and the Equality and Anti-Discrimination Tribunal²⁵:

The Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal shall monitor and contribute to the implementation of the Gender Equality Act, except for section 17 and the limitations set out in sections 1a and 8a, cf. the Anti-Discrimination Ombud Act.

The Equality and Anti-Discrimination Ombud make statements in connection with complaints regarding violations of, *inter alia*, the Gender Equality Act. The Ombud may be an alternative to the courts. The handling of the case is free and normally takes less time than a court case.

If the Ombud finds that there has been a breach of the law, the party responsible is obliged to rectify their conduct in accordance with the Ombud’s statement. The Ombud also encourages the party responsible for breaching the law to arrive at a voluntary solution with the complainant and to provide financial compensation. The statements are not legally binding. However, in practice, most opt to rectify their conduct.

The case may be appealed to the Equality and Anti-Discrimination Tribunal. If the Ombud’s statement is upheld by the Tribunal, the Tribunal can, for instance, issue an order that the employer must raise the employee’s wages or change a discriminatory practice. In some cases, the Tribunal may impose daily penalties on a party if the responsible party does not make adjustments in line with the Tribunal’s decision.

Compensation for breach of the prohibition on discrimination may, nevertheless, only be imposed by the ordinary courts.

The Norwegian Labour Inspection Authority²⁶

The Labour Inspection Authority shall supervise compliance with the Working Environment Act and may issue order and make the necessary individual decisions for the implementation of the provisions that falls within the area of their authority. This includes section 4-3, requirements regarding the psychosocial working environment²⁷.

Safety representatives²⁸ and working environment committee²⁹, employee representatives

Safety representatives shall be elected at all undertakings with more than 10 employees. The safety representatives have duties related to the working environment. For instance, if employees become aware of harassment or discrimination at the workplace, they shall ensure

²⁴ The Act on the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal of 10 June 2005 No. 40 (The Anti-Discrimination Ombud Act)

<http://www.regjeringen.no/en/doc/Laws/Acts/The-Act-on-the-Equality-and-Anti-Discrim.html?id=451952#>

<http://www.ldo.no/en/>

²⁵ See above under footnote 24.

<http://www.diskrimineringsnemnda.no/wips/1416077327/>

²⁶ See chapter 18 of the Working Environment Act and the homepage of the Labour Inspection Authority

<http://www.arbeidstilsynet.no/artikkel.html?tid=79289>

²⁷ See footnote 4 above

²⁸ Chapter 6 of the Working Environment Act

²⁹ Chapter 7 of the Working Environment Act

that the safety representative or the employer is notified as soon as possible, cf. section 2-3 subsection 2 b of the Working Environment Act.

Undertakings which regularly employ at least 50 employees³⁰ shall have a working environment committee. Working environment committees has duties and powers related to working environment and shall make efforts to establish a fully satisfactory working environment.

The employee may of course also contact the employees' elected representatives / shop stewards and request their assistance.

9. What is **the complaint procedure** to follow in case of sexual harassment?

Answer:

The prohibition against sexual harassment is enforced by the courts of law, cf. section 8a of the Gender Equality Act (see no. 8 above).

An employee may of course, in line with the ordinary rules for complaints related to an employment relationship and / or the working environment etc, notify the employer, the safety delegate etc. The Working Environment Act also has rules on the employee's right to notify, see 15 below.

As mentioned above under no. 8, the employees have a general duty to notify the employer or the safety representative as soon as possible if the employees become aware of harassment or discrimination at the workplace, cf. section 2-3 subsection 2 d.

10. Does your law provide for the **reversal of the burden of proof in discrimination cases**?

Answer:

Section 6 of the Gender Equality Act reads as follows:

"If there are circumstances that give reason to believe that there has been direct or indirect differential treatment in contravention of the provisions of this Act, such differential treatment shall be assumed to have taken place unless the person responsible proves on a balance of probabilities that such differential treatment nonetheless did not take place."

See also comments under question no 6 above.

Section 13-8 has rules on burden of proof in regard to the discrimination that falls within chapter 13 of the Working Environment Act³¹:

"If the employee or job applicant submits information that gives reason to believe that discrimination has taken place in contravention of the provisions of this chapter, the employer must substantiate that such discrimination or retaliations has not occurred."

Rules on burden of proof are also laid down in section 10 of the Anti-Discrimination Act³² and section 13 of the Anti Discrimination and Accessibility Act³³.

³⁰ According to section 7-1 of the Working Environment Act, working environment committees may also be required in undertakings with less than 50 employees.

³¹ Chapter 13 prohibits discrimination on the basis of political views, membership in a trade union, sexual orientation, disability or age. The rules apply correspondingly in the case of discrimination of an employee who works part-time or on a temporary basis.

³² The Act prohibits discrimination based on ethnicity, national origin, descent, skin colour, language, religion or belief

http://www.regjeringen.no/nb/dep/ad/dok/lover_regler/reglement/2005/the-anti-discrimination-act.html?id=420606#

³³ The Act prohibits discrimination based on disability.

<http://www.ub.uio.no/ujur/ulovdata/lov-20080620-042-eng.pdf>

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11. Please provide any **examples of evidence** brought to the court in sex discrimination and sexual harassment cases?

Answer:

The kind of evidence in gender / sex discrimination cases includes written documentation and statements by witnesses etc. For instance, if a woman claim to have been discriminated due to her gender when seeking a job, written evaluations, statements by the persons involved in the process etc will typically be considered as evidence. According to section 3 of the Gender Equality Act, it is not permitted to ask about pregnancy, adoption or family planning during the hiring process and this shall, irrespective of the applicant's gender, be regarded as direct differential treatment. In such cases, the issue will thus be whether such questions have been asked.

As mentioned above, section 16 of the Gender Equality Act has rules on burden of proof.

12. What is the **responsibility of the employer** in preventing sexual harassment?

Answer:

The employer has, as stated in section 8a, a responsibility in preventing sexual harassment, see no 6 above.

Further, according to the Working Environment Act, the employer has a general duty to ensure a fully satisfactory working environment, see Chapter 4 of the Working Environment Act. According to section 4-3 subsection 3, the employees shall not be subject to harassment or other improper conduct.

13. What **measures** may be taken by the **employer** to punish sexual harassment?

Answer:

As mentioned above, the employer has a responsibility to prevent sexual harassment.

If an employee is considered to sexually harass colleagues, measures may include, but is not limited to, warnings, transferral to other departments or termination of the employment relationship, including termination without notice (summary dismissal). What kind of sanctions that may be considered must be determined based on an assessment of the circumstances of the case. For instance, an employee may not be dismissed unless this is objectively justified on circumstances related to the undertaking, the employer or the employee, cf. section 15-7 of the Working Environment Act. If an employee is guilty of a gross breach of duty or other serious breach of the contract of employment, he or she may be summarily dismissed, cf. section 15-14 of the Working Environment Act. The employee may also, if it is reason to assume that the employee is guilty of an offence that may involve summary dismissal, and the needs of the undertaking so indicate, be suspended while the matter is investigated, cf. section 15-13 of the Working Environment Act.

14. What **damages are available for victims** in case sex discrimination and sexual harassment? Please provide any examples of financial compensation to the victim (calculation scheme, average amounts).

Answer:

The victim may demand compensation for economic and non-economic loss.

As an example, in 2009, the Court of Appeal found that a pregnant woman had not been employed as managing director (general manger) because she was pregnant³⁴. She was awarded compensation for economic loss³⁵, NOK 83 247 (approximately €10 750) and non-

³⁴ LH-2008-992829

³⁵ Loss of income was limited to less than 4 weeks (NOK 9 532) because she would have commenced her maternity leave had she been employed. However, the fact that she had not been employed and thus not actually

economic loss, NOK 150 000 (approximately €19 358). The plaintiff (the applicant) was also awarded legal costs.

If an employee is dismissed on grounds that will be in contravention of the Gender Equality Act, for instance due to pregnancy, this will not be considered to constitute justifiable ground for dismissal according to section 15-7 of the Working Environment Act. If the dismissal is not justified, it shall, as a general rule, be found invalid. The employee may also claim compensation for economic and non-economic loss.

15. What is the legal protection for people who provide evidence in sexual harassment cases (**whistle-blowers**)?

Answer:

As mentioned earlier, employees have a duty to notify the employer or the safety representative as soon as possible if the employees become aware of harassment or discrimination at the work place, cf. section 2-3 subsection 2 d of the Working Environment Act.

The Working Environment Act has rules on “whistle-blowing”. According to section 2-4, the employee has a right to notify concerning censurable conditions at the undertaking³⁶. This includes of course sexual harassment. Retaliation against an employee who notifies pursuant to section 2-4 is prohibited. If the employee submits information that give reason to believe that retaliation has taken place, it shall be assumed that such retaliation has taken place unless the employer substantiates otherwise, cf. section 2-5 of the Working Environment Act.

Anyone who has been subject to retaliation in breach of the provisions, may claim compensation without regard to fault of the employer, cf. section 2-5 subsection 3.

Pursuant to section 3-6, the employer is obliged to facilitate for notification.

16. Does the law foresee situations when the **victim or the harasser are external to the enterprise** (client, user enterprise in relation with a temporary work agency)?

The Gender Equality Act applies to all areas³⁷, including work as an independent contractor etc. The duty of the employer and the management in preventing and seeking to preclude the occurrence of harassment laid down in section 8a of the Gender Equality Act is not limited to employees, see 6 above.

The working environment shall be fully satisfactory when the factors in the working environment that may influence the employees’ physical and mental health and welfare are judged separately and collectively, cf. section 4-1 of the Working Environment Act. The employer may also have duties towards persons other than their employees.

According to section 2 of the regulations on posted workers³⁸, the Gender Equality Act applies to posted workers.

17. Do you have any statutory provisions on discrimination on the basis of **sexual orientation**? Do you have any cases in judicial practice on this topic?

worked these weeks, resulted in a lower parental benefit from the Norwegian National Insurance for 220 days (NOK 71 720) and holiday allowance on this amount for 12 weeks (NOK 1 995).

³⁶ According to section 2-4 subsection 2, the employee shall follow an *appropriate procedure* in connection with notification. Notwithstanding, the employee has the right to notify in accordance with the undertaking’s routines for notification. The same applies to notification to the supervisory authorities or other public authorities. The employer has the burden of proof that the notification has been made in breach with section 2-4.

³⁷ With regard to family life and purely personal matters, the Act is not enforced by the Ombud and Tribunal. Further, the King may decide that the all or part of the Act shall not apply to certain specific areas, cf. section 2 of the Act.

³⁸ Regulations on posted workers of 16 December 2005 No. 1566

Chapter 13 of the Working Environment Act has rules on protection against discrimination. According to section 13-1, subsection 1, direct and indirect discrimination on the basis of, *inter alia*, sexual orientation is prohibited.

Prohibition against discrimination on the basis of sexual orientation is also laid down in the Tenancy Act, the Housing Association Act and the Residential Building Association Act.

We are not aware of any cases concerning discrimination on the basis of sexual orientation in judicial practice from the appeals court. According to the annual report, the Equality and Anti-Discrimination Ombud did not receive any complaints on this basis for 2010.

18. How **moral harassment (mobbing) is defined** in your legal system?

Answer:

According to the Working Environment Act, the working environment shall be fully satisfactory. Requirements regarding the psychosocial working environment are regulated in section 4-3. According to section 1, the work shall be arranged so as to preserve the employees' integrity and dignity.

Section 4-3, subsection 3 states that :

“Employees shall not be subjected to harassment or other improper conduct”.

The wording is thus wide and includes a broad spectre of cases. There have been several cases where the courts have found that an employee has been harassed, and where the employee has been awarded compensation.

The general rules prohibiting discrimination in Chapter 13 of the Working Environment Act also apply correspondingly to the employer's selection and treatment of self-employed persons and contract workers. However, Chapter 13 only applies to discrimination on certain grounds, namely on the basis of political views, membership of a trade union, sexual orientation, disability or age. The rules apply correspondingly in the case of discrimination of an employee who works part-time or on a temporary basis.

In case of discrimination on the basis for ethnicity, national origin, descent, skin colour, language, religion or belief the Anti-Discrimination Act apply. The Anti Discrimination and Accessibility Act prohibits discrimination based on disability. Harassment on such grounds would fall within the scope of these acts as well.

19. Does **any legal parallel exist between moral and sexual harassment** (similar or same definitions and procedures)?

Answer:

There is a legal parallel between the broader rules prohibition harassment and improper conduct in the Working Environment Act and the more specific rules of the Gender Equality Act. The court may for instance find that an employee has been harassed, however, that it may not be considered as sexual harassment or discrimination based on gender.

Slovenia

National reporter: Judge Miran Blaha, Supreme Court of the Rep. of Slovenia

1. What is the **main source of regulation on sex discrimination at work** in your country – Labour Code, law on gender equality, law on equality, collective agreements, codes of practice or other?

In Slovenia everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political or other conviction, material standing, birth, education, social status or any other personal circumstance (Constitution of the Republic of Slovenia, § 14)

Everyone has the right to personal dignity and safety (Constitution, § 34).

The inviolability of the physical and mental integrity of every person, his privacy and personality rights shall be guaranteed (Constitution, § 35).

The main source of regulation on sex discrimination at work is Employment Relationship Act (ERA): § 6, 6.a, 45, 89, 112 (see appendix 1).

The Civil Servants Act (CSA), which applies to employees in state administration and public services, contains only a general provision on the prohibition of any physical, verbal or non-verbal conduct or behaviour by a civil servant that is based on any personal circumstance and which creates an intimidating, hostile, degrading, abusive or offensive working environment for a person and offends their dignity. However, civil servants are also subject to the provisions of the ERA. The government has also adopted a special Decree on measures to protect the dignity of employees in state administration, which sets out measures through which the state administration bodies provides a working environment which respects the dignity of all employees: a working environment in which there is no sexual and other harassment or bullying.

There are few collective agreements or employers' general acts that regulate issues relating to harassment and violence at the workplace. Collective agreement that does explicitly regulate this issue is for example the Collective Agreement for Banking and Savings Bank Activities, which stipulates that an employer is responsible for ensuring normal psychosocial conditions at work, preventing psychological, physical or sexual violence (mobbing) against employees or groups of employees, and protecting employees from such conduct.

Common bases and premises for ensuring the equal treatment of all persons in performing their duties and exercising their basic freedoms in every field of social life, including in the fields of employment and labour relations determines Act implementing the principle of equal treatment. Common grounds for the improvement of the status of women and the establishment of equal opportunities for women and men in political, economic, social, educational fields and other fields of social life determines Act on equal opportunities for women and men (both Acts: http://www.uem.gov.si/en/legislation_and_documents/).

Criminal legal protection is also guaranteed in Penal Code:

Workplace Mobbing

Article 197

(1) Whoever degrades or frightens another person at the workplace or in relation to work with sexual harassment, physical violence, ill-treatment or unequal treatment, shall be sentenced to imprisonment for not more than two years.

If the offence under the preceding paragraph results in psychological, psychosomatic or physical illness or reduction of work productivity of an employee, the perpetrator shall be sentenced to imprisonment for not more than three years.

The AIPET and ERA have transposed into Slovenian legislation the prohibition of discrimination, harassment and violence at work in accordance with the EU Directives:

- Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
- Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation
- Directive 2002/73/EC of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions
- Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work

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- Framework agreement on harassment and violence at work

One of the outstanding issues, which relates to the issue of whether European law has been fully or suitably transposed into domestic legislation, concerns the participation of non-governmental organisations in procedures in which violations of the principle of equal treatment are dealt with. The AIPET states that, in accordance with the law, they may participate in judicial and administrative procedures commenced by victims of discrimination as a result of a violation of the prohibition of discrimination. In Slovenian legislation, only those entities alleging that their rights have been damaged have procedural legitimacy (with rare exceptions, e.g. consumer disputes, minor copyright disputes). Appropriate amendments to the legislation need to be made to grant active procedural legitimacy to non-governmental organisations, and perhaps to trade unions as well, if the Directives are to be fully implemented.

2. What is the **percentage of claims on sex discrimination** in your jurisdiction?

The information is not collected separately. In addition, in most cases workers allege discrimination in other labour disputes: on termination of employment, recruitment, promotion, equal pays, maternity leave,

3. What are the **main topics of complaints related to sex discrimination** – recruitment, promotion, equal pay, maternity, redundancy, sexual harassment, other?

See answer 2

4. What categories of workers are mainly concerned by sex discrimination and sexual harassment (economic sectors, men or women)?

Women are mainly victims of verbal sexual harassment and discrimination due to pregnancy and parenthood, but also men especially if they want to take advantage of parental leave: employers are required to provide workers (men and women) with time off work due to parental leave - the father has the right to paternity leave of 90 days.

Women prevail among persons employed in services, in particular in health and social work, education, financial intermediation as well as in catering and tourism. In industry, the share of women amounts to one third of the total number of the persons in employment, with the construction sector employing the fewest women.

5. What is the **tendency** observed in your country's case law – a growing or decreasing number of cases related to sex discrimination? How do you explain such trends?

Growing. The reason lies in the fact that workers are increasingly aware of their rights in this area, and also that amended legislation in 2003 and 2007 give them an adequate legal basis for the effective exercise of rights in cases of discrimination and harassment in the workplace.

6. What is the **legal definition of sexual harassment**? Are there any problems (lacks, confusion) to use it in the judicial practice?

Sexual harassment is any form of undesired verbal, non-verbal or physical action or behaviour of a sexual nature with the effect or intent of adversely affecting the dignity of a person, especially where this involves the creation of an intimidating, hateful, degrading, shaming or insulting environment.

7. Please provide **any examples of cases on sexual harassment** at work (short summary, judgment text).

Employer (its employees, for which he is responsible) has acted unlawfully because he interfered with the personal rights of workers: by exposing them to e-mail with pornographic content and call them with inappropriate, offensive and obscene terms. The described behaviour has signs of psychological violence in the workplace when a worker is exposed to ill-treatment, which is demonstrated by a hostile and unethical communication, offensive remarks, ridicule, underestimating, unsubstantiated criticizing, shouting and insults (mobbing). Workers are for

mental pains that they suffer because of this, justified to monetary compensation. (several workers: compensation for non-pecuniary damage 4000, 8000 in 12000 €)

Often touching and hugging subordinates by superiors, obscene talk, kiss and an invitation to the sea, etc. Such actions are not legally admissible and have characteristics of sexual harassment in the workplace. Such practices have caused psychological distress to a female worker: uneasiness, fear and dishonour, resulting in seriously illness. (compensation for non-pecuniary damage 4000€)

Addressing offensive words to a subordinate worker approximately ten months and treated her ugly, insults her and spoke that she was incapable, stupid, crazy, that she lies and that he will destroy her means bullying: a worker is - usually unexpectedly and without right cause - exposed to ugly treatment, that is being showed with hostilely and unethical communication, insulting observations, ridiculing, underestimating, unsubstantiated complaining and screaming. From exposure to such behaviour and damage resulting there from worker shall be entitled to monetary compensation. (compensation for non-pecuniary damage 6000€)

Speaking in increased tones, screaming, repeatedly drawing attention on done mistakes, pejorative labels of the work and spoke that she is "sheep" and "coward" is a behaviour that is not legally permissible. Such behaviour has the signs of workplace bullying (mobbing). Because of allowing such behaviour employer is liable to provide compensation. (compensation for non-pecuniary damage 7000€)

8. What is the **main channel (machinery) to deal with sex discrimination and sexual harassment cases** (equality specialised body, enterprise committee, labour inspection, labour courts, etc)?

Employer must take appropriate steps to protect workers from sexual and other harassment or from bullying in the workplace (ERA, § 45). Employers generally adopt specific Act with rules governing the obligations and responsibilities for providing such a working environment in which none of the workers is subjected to sexual and other harassment or bullying on the part of the employer, a superior or co-workers. The provision of this Act also provides procedure within an employer in the cases of harassment or bullying.

An Advocate of the Principle of Equality function within the (Government) Office for Equal Opportunities deals with cases of suspected violation of the prohibition of discrimination which also includes cases of workplace harassment.

Monitoring of the implementation of the ERA is performed by the Labour Inspectorate of the Republic of Slovenia, which is an independent body within the Ministry of Labour, Family and Social Affairs. The Labour Inspectorate may order measures designed to remove an irregularity or violation, carry out a procedure for minor offence (impose a fine) and file a criminal information (denunciation) for criminal offence. Labour inspectors identify also violations relating to the prohibition of discrimination and harassment.

A fine of 3,000 to 20,000 euros shall be imposed on a legal person employer, sole trader or individual performing independent business activity, who places a job seeker or worker in an unequal position and who has not provided protection against sexual and other harassment or bullying.

In the event of a failure to ensure protection from sexual and other harassment or bullying the employer shall be liable to provide compensation to the worker pursuant to the general rules of civil law. Labour courts decide on disputes regarding liability for damages on the part of an employer for violating the prohibition of harassment and violence, as well as on disputes regarding the termination of contracts of employment. In cases where a contract is terminated by an employer for discriminatory reasons, the court decides on the legality of the termination and, as a rule, on the employee's return to work. In cases where an employee has extraordinarily terminated a contract of employment as a result of discrimination, harassment or violence, the subject of the dispute is exclusively the severance pay and damages, which must amount to at least the wages lost as a result of not working during the notice period.

9. What is **the complaint procedure** to follow in case of sexual harassment?

The Advocate of the Principle of Equality deals with cases of suspected violation of the prohibition of discrimination (which also includes cases of workplace harassment). The procedure begins with a written or oral initiative entered in the records. The initiative may be anonymous; however, it must contain enough information to allow investigation of the case to proceed. The initiative must be made as soon as possible, but not later than one year after the violation took place. However, the Advocate may deal with the case after this period, if he or she assesses that the case is important or serious enough to warrant continuation. Treatment of a case is informal and free of charge. A case usually proceeds in written form, where the Advocate may request that those involved provide them, by the deadline specified, with suitable clarifications and additional information necessary for an opinion to be issued. If the Advocate assesses that this will help to clarify the case, all involved parties may be invited to an interview (oral hearing). If the victim of discrimination or a person assisting the victim of discrimination have been subjected to adverse consequences as a result of measures aimed at enforcing the prohibition of discrimination, the Advocate may, during investigation of the case, call on the legal entity or other subject at which the suspected violation of the prohibition of discrimination has taken place to take appropriate measures to protect the victim of discrimination or the person assisting them from reprisals, or to rectify the consequences of these reprisals. The case is concluded with a written opinion in which the Advocate states their findings and assesses the circumstances of the case in relation to the existence or otherwise of a violation of the prohibition of discrimination. The Advocate notifies both parties of the findings. The Advocate may draw attention in the opinion to the irregularities identified, recommend ways in which they may be removed and call on the person suspected of violating the prohibition of discrimination to notify them of the measures to be taken by a specified deadline.

Should a worker think that the employer does not fulfil his obligations to protect him from sexual and other harassment or from bullying, he shall have the right to request in writing that the employer abolish the violation and/or fulfils his obligations. Should the employer not fulfil his obligation within eight working days upon the receipt of the worker's written request, the worker may request judicial protection before the competent labour court within 30 days from the expiry of the time limit stipulated for the fulfilment of obligations and/or abolishment of violation by the employer.

The filing of a request for removal of the violation is a procedural precondition for judicial protection. The deadline for the filing of an action is a preclusive time limit. Failure to meet the time limit means that the action is rejected. However, an employee may enforce a pecuniary claim from the employment relationship – in the case of compensation as well – directly before a labour court. In such a case, the court takes into account only the period of limitation for claims, which in labour disputes is five years. If in the event of a dispute a candidate or employee cites facts giving grounds for the suspicion that the prohibition of discrimination has been violated (which also applies to a suspicion of violation of the prohibition of sexual harassment, other types of harassment and violence), the employer must demonstrate that in the case in question it has not violated the principle of equal treatment or the prohibition of discrimination.

10. Does your law provide for the **reversal of the burden of proof in discrimination cases**?

Yes, if in the event of a dispute a worker cites facts giving grounds for the suspicion that the prohibition of discrimination or harassment has been violated the burden of proof shall be on the side of the employer.

11. Please provide any **examples of evidence** brought to the court in sex discrimination and sexual harassment cases?

In such proceedings the court generally heard both parties, on the employers side the person who committed the alleged offence, witnesses, and to assess the implications for the employee obtain the opinion of the court experts – in most cases psychiatrist. What evidence is

carried out depends; of course, to the fact that the employer must prove that there was no discrimination or harassment.

Discrimination, harassment and violence at the workplace are, despite the shifted burden of proof, difficult to prove.

12. What is the **responsibility of the employer** in preventing sexual harassment?

The employer must provide such a working environment in which none of the workers is subjected to sexual and other harassment or bullying on the part of the employer, a superior or co-workers. To this end the employer must take appropriate steps to protect workers from sexual and other harassment or from bullying in the workplace. If he fail to ensure protection from sexual and other harassment or bullying the employer is liable to provide compensation to the worker pursuant to the general rules of civil law.

13. What **measures** may be taken by the **employer** to punish sexual harassment?

Actions and proceedings against those who discriminate harass or tortured (co)workers an employer can lay down in its internal regulations. The law allows in such cases, in particular disciplinary measures (warnings, fines, withdrawal of benefits), and in the worst cases, the termination of employment. Termination for this reason, the Court has already upheld as lawful.

14. What **damages are available for victims** in case sex discrimination and sexual harassment? Please provide any examples of financial compensation to the victim (calculation scheme, average amounts).

In the event of a violation of the prohibition of discrimination, the employer shall be liable to provide compensation to the candidate or worker under the general rules of civil law.

Court must find if all elements prescribed by law for liability for compensation have been shown: impermissible conduct, damage, causal link and fault. The court awarded compensation for non-pecuniary damage to the employee. In calculating the compensation due, the court took account of all relevant fact. Since there is as yet no case-law relating to compensation for psychological violence at the workplace, the court used the compensation awarded in civil procedures for insult to reputation and honour in order to reach a sum.

About amount see answer 7

15. What is the legal protection for people who provide evidence in sexual harassment cases (**whistle-blowers**)?

Discriminated persons and persons who help the victims of discrimination may not be exposed to unfavourable consequences owing to actions aimed at fulfilling the prohibition of discrimination.

Whistle-blowers have in principle same protection as discriminated persons.

16. Does the law foresee situations when the **victim or the harasser are external to the enterprise** (client, user enterprise in relation with a temporary work agency)?

An employer is above all obliged to protect an employee from sexual harassment, other types of harassment and violence by the employer, superiors or colleagues. However, an employer is also liable to pay compensation for any damage caused to an employee at work or in relation to work. The conduct of third parties can also form part of this liability.

17. Do you have any statutory provisions on discrimination on the basis of **sexual orientation**? Do you have any cases in judicial practice on this topic?

Employers must ensure equal treatment irrespective of sexual orientation. There are no such cases before Labour Courts so far.

18. How **moral harassment (mobbing)** is defined in your legal system?

Harassment is any undesired behaviour associated with any personal circumstance with the effect or intent of adversely affecting the dignity of a person or of creating an intimidating, hateful, degrading, shaming or insulting environment.

Bullying at the workplace is any repetitive or systematic, reprehensible or clearly negative and insulting action or behaviour aimed at individual workers in the workplace or in connection with work.

19. Does **any legal parallel exist between moral and sexual harassment** (similar or same definitions and procedures)?

Very similar definition and same procedures. Judicial practice is obliged, taking account of the theory, to establish, on a case-by-case basis, what type of harassment or violence is involved.

Spain

National reporters: Judge Antonio Martín Valverde, Emeritus Judge of the Supreme Court, Labour Chamber; Judge Miguel Ángel Limón Luque, Labour Court, Canary Islands.

1. What is the **main source of regulation on sex discrimination at work** in your country – Labour Code, law on gender equality, law on equality, collective agreements, codes of practice or other?

a. The Act on Equal Treatment (Consolidated Act no. 645 of 8 June 2011 on the equal treatment of men and women in employment etc.)

b. The Act on Equal Rights (Consolidated Act no. 1095 of 19 September 2007 on the equal rights of women and men)

c. Act no. 387 of 27 May 2008 on the Board of Equal Treatment

2. What is the **percentage of claims on sex discrimination** in your jurisdiction?

In general, the Labour Court does not deal with sex discrimination cases as the jurisdiction of the Court is limited to breaches of collective agreements. Cases regarding sex discrimination are heard in the Board of Equal Treatment and the ordinary courts of law.

3. What are the **main topics of complaints related to sex discrimination** – recruitment, promotion, equal pay, maternity, redundancy, sexual harassment, other?

Dismissals because of pregnancy or wishes/claims for maternity/paternity leave, employment, including vacancy announcements with gender specifications, differentiated prices.

4. What categories of workers are mainly concerned by sex discrimination and sexual harassment (economic sectors, men or women)?

This question will, if possible, be answered at the meeting in Sevilla

5. What is the **tendency** observed in your country's case law – a growing or decreasing number of cases related to sex discrimination? How do you explain such trends?

This question will, if possible, be answered at the meeting in Sevilla

6. What is the **legal definition of sexual harassment**? Are there any problems (lacks, confusion) to use it in the judicial practice?

Section 2a, subsection 3 of the Act on Equal Rights and section 1, and subsection 6 of the Act on Equal Treatment:

“Sexual harassment exists where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs in relation to the gender of a person with the purpose or effect of

violating this person's dignity, in particular by creating an intimidating, hostile, humiliating or offensive environment."

These provisions are in strict compliance with EU Directive 113/2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, article 2 (d).

To the best of my knowledge, this definition has not given rise to any particular difficulties.

7. Please provide **any examples of cases on sexual harassment** at work (short summary, judgment text?)

Judgment passed on 2 April 2009 by the Danish Western High Court

A dental nurse F sued her previous employer, dentist T, claiming, among other things, compensation for violation of the act on equal treatment because of sexual harassment. Following comprehensive submission of evidence and the basis of F's explanation and the explanations of other employees at the workplace it was proved that F had been sexually harassed by T in the form of e.g. improper touching and questions, and that T could not have been in doubt that F had rejected his passes. Taking into account the scope and nature of the harassment, F was awarded an estimated compensation of DKK 40,000 (approx. EUR 5,000).

Judgment passed on 19 February 2009 by the Danish Western High Court

F had been hired as a flower decorator apprentice in a florist's shop where the 80 year-old M helped bring out flowers. One day, F left the shop during the lunch break and called in sick after an episode where M had sexually harassed her by touching her. F sued M claiming compensation of DKK 100,000 in pursuance of section 26 of the liability in damages act asserting that the claim was to be assessed in pursuance of section 16a of the act on equal treatment on the shared burden of proof. M contested having sexually harassed or otherwise wrongfully invaded F's rights which could lead to damages/compensation. After the submission of evidence it was proved that F had been sexually harassed. F therefore had a claim for compensation under section 26 of the liability in damages act. This compensation was not to be assessed according to the principles of the act on equal treatment, but on the basis of the level of compensation under section 26 of the liability in damages act. F was awarded a compensation of DKK 5,000 (approx. EUR 700).

8. What is the **main channel (machinery) to deal with sex discrimination and sexual harassment cases** (equality specialised body, enterprise committee, labour inspection, labour courts, etc)?

Complaints to the Board of Equal Treatment and the ordinary courts of law.

9. What is **the complaint procedure** to follow in case of sexual harassment?

Complaints to the Board of Equal Treatment:

- 12. The complaint shall be submitted to the Board in writing. Consideration by the Board of the complaint is free of charge.*
- 13. The complaint shall provide information on the name and address etc. of the complainant, the defendant's name and an account of the facts of the case stating the reasons for the complaint. Furthermore, the complaint shall indicate the objective of the claim, e.g. compensation.*
- 14. The Board secretariat shall handle the preliminary case handling and shall collect the necessary information.*
- 15. The Board cannot process cases pending before the courts of law.*
- 16. The case is processed in compliance with general administrative law, including the rules on examination of the parties involved.*
- 17. The secretariat can request the parties to the case to contribute to clarifying the matter.*

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18. *The Board cannot process cases on breach of collective agreements on discriminatory treatment that can be processed in the employment law system, if the union wishes to submit the case to an industrial procedure.*
 19. *As to decisions and settlements made before the Board not complied with, the Board shall at the request of the complainant and on the latter's behalf bring the case before the courts of law.*
 20. *The cases are settled at a meeting in the Board on the basis of the written information in the cases.*
 21. *The complainant or his/her representative cannot be present during the meeting.*
 22. *The meetings of the Board are not open to the public.*

Legal proceedings before the courts of law: the procedure is the same as in other court cases.

10. Does your law provide for the **reversal of the burden of proof in discrimination cases?**

In the event that dismissal is made during pregnancy or absence due to childcare leave it rests with the employer to prove that the dismissal was not caused by these circumstances (reversed burden of proof).

In other cases on gender discrimination the principle of shared burden of proof applies. This implies that the person who deems that he/she has been discriminated against shall (only) demonstrate that there exist actual circumstances that give rise to the assumption that discrimination has taken place. If this is demonstrated by the complainant, it rests with the defendant, who is accused of acting with discriminatory intent, to prove that no discrimination took place. Thus, in equal rights cases between the complainant and the defendant, the burden of proof is shared between the two. The rule on shared burden of proof in equal rights cases in Danish law is taken from EU law, first in the form of EU case law and since 1997 through EU legislation.

11. Please provide any **examples of evidence** brought to the court in sex discrimination and sexual harassment cases?

Decision by the Board of Equal Treatment of 24 June 2011:

A woman complained to the Board of Equal Treatment that she was not called in during her maternity leave for an interview to discuss her salary.

The Board stated among other things:

"If a person who considers himself/herself offended demonstrates actual circumstances that give rise to the assumption that direct or indirect differential treatment has taken place, it rests with the other party to prove that the principle of equal treatment has not been violated.

The Board finds that the complainant has demonstrated actual circumstances that give rise to the assumption that the complainant has been exposed to direct differential treatment.

In its evaluation, the Board emphasised that the employer did not call in the complainant to a meeting to discuss her salary, nor did the employer inform her of her possibility to ask for such a meeting to discuss her salary.

The defendant did not meet the burden of proof that the failure to call in the complainant to the meeting was not caused by her absence due to maternity leave. It is taken into account that in the years prior to the complainant's maternity leave annual salary discussion meetings were held. The Board finds that it rested with the defendant to ensure that the complainant during her maternity leave was informed of her possibility to ask for a meeting to discuss her salary notwithstanding that the defendant assessed that the company could not afford salary increases.

The Board therefore finds that the defendant acted contrary to the act on equal treatment."

The Board awarded the complainant compensation in the amount of DKK 5,000 (approx. EUR 700).

12. What is the **responsibility of the employer** in preventing sexual harassment?

The employer is under an obligation to ensure that no sexual harassment takes place at the workplace and can be ordered to pay compensation to employees who are subjected to sexual harassment by e.g. other employees. See the judgment given by the Danish Eastern High Court in 1994, in which case, however, judgment was given in favour of the employer.

It was proved that the female flower arranger A during her work had been sexually harassed by the husband of her female employer S who assisted in the shop. As S had no knowledge of the treatment to which A was exposed and as it had not been rendered probable that S had any possibility of foreseeing or cause to take measures to discourage the course of events that took place, there was no basis for establishing that S had violated the rules on equal treatment, for which reason the complainant's claim for compensation was rejected.

13. What **measures** may be taken by the **employer** to punish sexual harassment?

As it appears, by implication, of the judgment mentioned in question 12, the employer shall take measures to prevent sexual harassment, and it will, undoubtedly, be deemed lawful if an employee who has sexually harassed another is dismissed.

14. What **damages are available for victims** in case sex discrimination and sexual harassment? Please provide any examples of financial compensation to the victim (calculation scheme, average amounts).

Typically, a pregnant woman who is unlawfully dismissed will be given a compensation of 9-12 months' salary, depending on the length of her employment. The compensation for other violations of the equal treatment principle varies according to the nature of the offence. These are examples taken from the Board of Equal Treatment from 2010:

- 6. It was contrary to the act on equal treatment that a complainant was dismissed two days after she had returned to work after having been absent due to pregnancy related illness. The complainant was awarded compensation of DKK 430,000 (approx. EUR 60,000) equalling around 9 months' salary.*
 - 7. A woman was dismissed from her position as auditor 3 weeks after she returned from her childcare leave. The Board found that the woman had been subjected to discriminatory treatment. She was awarded compensation of DKK 250,000 (approx. EUR 35,000) equalling 9 months' salary.*
 - 8. It was contrary to the act on equal rights for a bar to charge different entrance fees for women and men. The complainant was awarded compensation of DKK 130 corresponding to the difference between the entrance fees.*
 - 9. It was contrary to the act on equal treatment when a complainant was dismissed from her position as teacher during her childcare leave/immediately after the childcare leave. The defendant had employed the temp working in the complainant's position while she was on maternity leave on a permanent basis. The complainant was awarded compensation amounting to DKK 265,000 (approx. EUR 35,000) equalling 9 months' salary.*
 - 10. Equal pay case: The Board found that a woman had not received the same salary as her male colleagues. The employer was ordered to pay DKK 100,000 (approx. EUR 15,000) to the woman corresponding to the difference in wages for 5 years from the submission to the Board.*
15. What is the legal protection for people who provide evidence in sexual harassment cases (**whistle-blowers**)?

There are no specific rules to this effect, but if a whistle-blower is dismissed, this could be deemed non-objective dismissal entailing the right to compensation according to the usual principles.

16. Does the law foresee situations when the **victim or the harasser are external to the enterprise** (client, user enterprise in relation with a temporary work agency)?

Yes, see answers to questions 12 and 13.

17. Do you have any statutory provisions on discrimination on the basis of **sexual orientation**? Do you have any cases in judicial practice on this topic?

Yes, Consolidated Act no. 1349 of 16 December 2008 on the prohibition against discriminatory treatment in the employment market etc., which prohibits discrimination against homosexuals, among others.

Example from case law:

Judgment given by the Danish Western High Court on 22 February 2008

Baker's assistant A was employed by baker B in 1999. In 2005, A told his boss and colleagues that he was homosexual. Six months later A was told that B had shown another employee a photo of two boys who had been hung in Iran because they were homosexual and that he had said: "this is what they deserve". A felt so bad when he heard about it that he called in sick and later resigned. A sued B claiming compensation under the act on discriminatory treatment as B had violated the law by expressing humiliating and degrading comments. B contested having expressed the coarse statements, but following the submission of evidence it was demonstrated that B was guilty of malicious discriminatory treatment and had violated section 2, subsection 1 of the act on discriminatory treatment. A was awarded compensation of DKK 100,000 (approx. EUR 15,000). Emphasis was given on the one hand to A's seniority and the coarseness of B's conduct and on the other hand to the limited consequences the comments had for A.

18. How **moral harassment (mobbing) is defined** in your legal system?

Section 1, subsection 5 of the Act on Equal Treatment states:

"Harassment exists where any form of unwanted verbal, non-verbal or physical conduct occurs in relation to the gender of a person with the purpose or effect of violating this person's dignity and by creating an intimidating, hostile, degrading, humiliating or offensive environment."

19. Does **any legal parallel exist between moral and sexual harassment** (similar or same definitions and procedures)?

Yes. According to section 1, subsection 4, of the act on equal treatment, both harassment as defined in section 5 and sexual harassment as defined in section 6 are considered discriminatory treatment due to gender and are therefore prohibited. A person's rejection or accept of such conduct cannot be used as reasoning for a decision that relates to the person in question.

Sweden

National reporter: Judge Michaël Koch, President, National Labour Court

1. The main source of regulation on sex discrimination in Sweden is the 2008 Discrimination Act, which contains provisions against discrimination on various grounds, among them sex.

2. In the jurisdiction of the Labour Court (which covers around 90 per cent of the work force in Sweden) only around 1-3 % of all cases concern sex discrimination. Cases concerning discrimination on ethnical grounds are at present more frequent.

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3. The most frequent situation related to sex discrimination is recruitment. The typical situation is the one where the plaintiff has not been employed, or has not even been summoned to a recruitment interview. Around ten years ago, the most frequent cases concerned wage discrimination.
 4. It is difficult to decide which economic sector is most often concerned. The cases deal women only (so far).
 5. There have been regulations on sex discrimination in Sweden since 1980. It is not possible to distinguish a distinct trend concerning the number of cases.
 6. Sexual harassment is defined in Chapter I, section 4 of the Discrimination Act: a behaviour of sexual character which violates someone's dignity. There seems to be no great difficulties in applying this definition in judicial practice.
 7. Cases concerning sexual harassment have in several instances dealt with the employer's obligation to investigate and take measures. One example is the **Labour Court's case 2002 No.102**. In this case the employer was a casino enterprise. A young woman who had a trial period employment as assistant to the firm's security officer, an older man, complained to the employer and said that she had been sexually harassed by him (unwelcome sexual acts). According to the employee, sexual harassment of the same nature continued despite the fact that the employer had been informed about the first incident. Somewhat later, the probationary employment was terminated by the employer. The plaintiff – the young woman's trade union - held that the employer had not fulfilled his obligation to investigate and take appropriate measures due to the information given by the employee. The trade union also held that terminating the probationary employment in these circumstances was unlawful under the Employment Protection Act. The Labour Court found that the firm had not fulfilled its obligation to investigate and take appropriate measures due to the information concerning sexual harassment. The employer was for this reason compelled to pay damages (punitive damages) to the employee. However, the Labour Court found that – considering the legal reasoning of the trade union – there was no legal ground for granting similar compensation because of the termination of the employment.
 8. Cases concerning sex harassment are dealt with as labour law disputes. These disputes are decided by the Labour Court or a District Court. However, some types of behaviour of this kind may also be dealt with as criminal cases in general courts.
 9. The complaint procedure in cases of sexual harassment is the same as in other labour law disputes.
 10. Yes, in accordance with EU Law the Discrimination Act contains a rule on the burden of proof. If a person who considers that he or she has been discriminated can establish facts which give reason to assume that he or she has been discriminated or harassed, the defendant must prove that no such thing has occurred.
 11. Both written proof (letters, e-mails) and oral testimonies may be brought to the court procedure. Interestingly, the plaintiff has in some recent cases been able to prove sexual harassment or other discrimination by recordings made on mobile phones.
 12. If an employer receives information that an employee considers herself/himself harassed or sexually harassed by someone who performs work for the employer, the employer is obliged to investigate the circumstances concerning the alleged discrimination and, if necessary, take such measures as could reasonably be required in order to prevent future discrimination (the Discrimination Act, Chapter 2, Section 3). An employer who does not fulfil this responsibility may be obliged to pay damages. Furthermore, there are also general rules meaning that employers and employees (in practice the trade unions) are encouraged/compelled to take general measures to prevent future discrimination (the Discrimination Act, Chapter 3). These obligations are monitored by the Discrimination Ombudsman, who has a possibility to turn to the Discrimination Board for sanctions. The Board may order a party to take (general) measures and, if the order is not respected, compel him to pay a fine.

13. The employer may take all measures that are deemed reasonable in the circumstances and permitted according to labour law principles: warn the employee, or in the last resort terminate the employment with or without notice.

14. The victim may be entitled to compensation for economic loss (if any) and also "discrimination compensation" (a new term for punitive damages in this field). The discrimination compensation is decided by the court, and there is no "price list". However, according to the travaux préparatoires this compensation should generally be decided to be higher than damages in the labour law field in general. It remains to be seen how the courts will apply these rules.

15. This may be a complicated issue in practice, but the legal principle is simple: a whistle-blower should be protected against any disadvantage due to his/her giving evidence.

16. The Discrimination Act is applicable also in cases where the victim is in a formal sense external to the enterprise as for instance a person employed by a temporary work agency, working for a user enterprise. Harassment performed by an external client to the employer is not covered by the act.

17. Yes, the rules in the Discrimination Act against discrimination are applicable in cases of discrimination because of a person's homosexual, bisexual or heterosexual disposition (and also a person's sex-transcendental identity). So far, no cases of this kind have turned up in the Labour Court.

18. There is no definition of moral (general) harassment or mobbing. The only definitions on harassment are those given in the Discrimination Act. According to these definitions, harassment means behaviour which violates someone's dignity and has some connection with the discrimination causes covered in the Act (sex, ethnic origin etc.).

19. Harassment which has connection with discrimination (cf above) is from a legal point of view treated in the same way as sexual harassment. As for other kinds of harassment, it is somewhat difficult to make a comparison. Moral harassment may be considered as a breach of a collective bargaining agreement, or as something which is prohibited under the Employment Protection Act. If an employee is harassed by a fellow employee, the employer must (if informed) take some measures. If this is not done, and the employee "chooses" to terminate the employment this might be deemed as a termination act undertaken by the employer, contrary to the Act. In other words, the employer is probably obliged to take measures in cases of moral mobbing much in the same way as in cases of sexual harassment.

Venezuela

National reporter: Dr. Juan Rafael Perdomo, Magistrado, Tribunal Supremo de Justicia

1. What is the **main source of regulation on sex discrimination at work** in your country – Labor Code, law on gender equality, law on equality, collective agreements, codes of practice or other?

R. a) The Organic Labor Law of June 19th, 1997.

Website: <http://www.tsj.gov.ve/legislacion/legislacion/lot.html>

Article 26. All discrimination at work is forbidden, whether it is based on age, sex, race, marital status, religious beliefs, political affiliation or social condition. Offenders will be punished according to the law. Special dispositions dictated to protect maternity and family shall not be considered as discriminatory, nor those which aim to protect minors, elders and handicapped persons.

Chapter VI, Labor Protection of Maternity and Family (Articles 379 to 395)

Chapter VII Collective Labor Law, Chapter II of Union Organization, Section Six of the Union Jurisdiction (Articles 453 to 457)

b) Rules of the Organic Labor Law of April 28th, 2006.

Website:

http://www.ucv.ve/fileadmin/user_upload/asesoria_juridica/reg_organizacion_trabajo.pdf

Article 9º: *Enunciation. The bodies mentioned in the part e) of article 60 of the Organic Labor Law will be, among others and without damages to the conditions established in the labor legislation, the following:*

e) Principles of non arbitrary discrimination at work for reasons of gender or sexual preference, social condition, race, ideology, political ideology, union activity or any other type of discrimination based on criteria that is incompatible with the legal system.

This principle shall include discrimination that could arise before the work relationship is established such as, among others, imposing to abstain from union activities or to do pregnancy tests as condition to be accepted in the enterprise.

Article 12. Discrimination based on gender. Sexual harassment will be considered as an expression of arbitrary gender discrimination. Someone who demands sexual favors or responses for himself/herself or a third party or considers any kind of undesired sexual encounter, profiting from his/her superiority and expressly or tacitly threatens to affect the working conditions of the victim will be considered as sexual harasser.

Article 15. Protection (Probative regime). The worker who is a victim of work discrimination may extinguish the work relationship through a justified cause of retirement and, if desired, execute an action of constitutional protection to demand the restitution of the infringed legal situation.

Unique paragraph: The plaintiff shall support his/her claim with elements that help to deduce the alleged discrimination. Then, the defendant shall provide an objective and reasonable justification for the adopted measures and its proportionality.

Article 99. Pre-contractual discrimination. If the applicant to the job feels discriminated for being pregnant, she may pursue the legal actions mentioned in article 14 of this regulations.

Article 222. Interrogating the employer. In case of demand of rehiring or protection an employee who benefits from union privileges, pursuant to article 454 of the Organic Labor Law concerning dismissal, transference or any other antiunion discriminating measure, the Labor Inspector shall notify the employer to appear, at a determined hour of the second working day, when he/she will be interrogated in order to verify:

a) if there was a working relationship;

b) if the extinction of such working relationship depended on the will of the employer or if he/she ordered the dismissal or transference of the employee;

c) if the employee benefits from union privileges at the time of dismissal, transference or deterioration of the working conditions.

Unique paragraph (waiting time): if the employer does not appear to the interrogation at the fixed hour, he/she will be conceded with one (1) extra hour.

Article 223. lit. b. Preventive measures

For reasons of social interest and protection of the life and work conditions of the employees and their families, the Ministry of Labor shall, within the administrative procedures established in the Organic Labor Law, order preventive measures considered

as appropriate, as long as the measures fulfill the principles of opportunity and proportionality.

Moreover, the Labor Inspector of the jurisdiction, acting within the procedures to demand rehiring or payment of overdue salaries contained in articles 453 and 454 of the Organic Labor Law, may order the following preventive measures:

b) In case an employee who benefits from labor irremovability is dismissed, transferred or is a victim of antiunion discrimination, and he/she fears damages to his/her integrity or his/her family's or the union, he/she may ask the Labor Inspector, as preventive measure, to order the reincorporation or restitution of the infringed legal situation, for as long as the legal procedure lasts, as well as the entire reestablishment of the salary accrued. In such effects, the employee shall provide proof of the work relationship and the alleged labor irremovability.

The defiance of such preventive measures shall give rise to the sanctions established in article 642 of the Organic Labor Law, without detriment to the valuation of such conduct in the definitive precaution.

c) Organic Law of Women's Rights to a Life free of Violence of March 16th, 2007.

Website:

http://www.ministeriopublico.gob.ve/c/document_library/get_file?p_l_id=40493&folderId=14478&name=DLFE-320.pdf

Article 2.2. Guiding principles

2. To strengthen public policies to prevent violence against women and to eliminate gender discrimination. In order to do so, the Public Powers will be granted with efficient instruments in the education, labor, social service, health, advertisement and media spheres.

Article 2.9. Guiding principles

9. To establish and strengthen measures for security and protection, as well as preventive measures that guarantee the protected rights of the present law and the personal, physical, emotional protection, as well as working and hereditary protection of the women who are victims of violence of gender.

Article 3.6. Protected rights

6. Which are consecrated in the Constitution of the Bolivarian Republic of Venezuela and in all the concerning international agreements and treaties subscribed by the Bolivarian Republic of Venezuela, such as the Probatory Law of the convention to eliminate all kinds of discrimination against women and the Inter-American Convention to prevent, sanction and eliminate violence against women (Convention of Belém do Pará).

Article 4.8. Guarantees

8. The employee under a situation of gender violence shall have the right to have her working hours either reduced or reordered, to be transferred geographically or to change her working place. If her situation requires a suspension from work, it shall be assured with the protection order from the judge, prior to a report and demand of the Public Ministry, only by filing the evidence.

Article 4.9. Guarantees

9. The State shall develop public policies that aim to unemployed women who are victim of violence, in order to help them enter training programs, missions or projects, according to their physical and psychological conditions. If the aggressed woman is disabled and such disability impedes her to go to work, she shall receive special attention to promote her working conditions and training. In order to do so, there are programs, projects and missions. The State shall create fiscal exceptions for enterprises, cooperatives and other entities that promote employment, labor insertion in the productive market of women who have been victims of gender violence.

Article 14. Definition of violence against women

Violence against women includes all sexist act or inappropriate behavior that could cause physical, sexual, psychological, emotional damages; arbitrary coercion or privation of freedom, as well as threatens to execute such acts, both in the public or private sector.

Article 15.3. Types of violence

3. Threats: verbal announcement or acts of physical, psychological or sexual damage, as well as labor and patrimony damage, in order to intimidate a woman, both in the domestic sphere and outside.

Article 15.10. Types of violence

10. Sexual harassment: it is the demand of any act or behavior with sexual content, for a man or a third party, or any consideration of any kind of undesired sexual encounter by a man, profiting from certain labor superiority or any relationships that derive from the professional exercise, with an express or tacit threat to damage a woman with rightful expectations that the woman might have concerning that relationship.

Article 15.11. Types of violence

11. Labor violence: it is the discrimination towards women in work places, either public or private, which mean an obstacle to the access to jobs, promotions and stability, such as demanding requisites about her marital status, age or physical appearance or demanding for blood tests, which conditions the hiring, promotion or permanence of the woman in the job. Breaking the principal of equal remuneration for equal amount of work is also discrimination of gender.

Article 34. Labor rights

Female employees who are victims of violence shall have the right, according to the law, to

The female employee under a situation of gender violence shall have the right, according to the corresponding law, to have her working hours either reduced or reordered, to be transferred geographically or to change her working place, to suspend the working relationship (keeping her job) and to an extended leave of absence, within the established terms.

Unique paragraph. Total or partial absences caused by physical or psychological conditions derived from gender violence are considered as justified when determined by public or private health centers, according to the corresponding legislation.

Article 59. Obligation to correct situations

All hierarchical authority in work, education or any other kind of place, that knowing of cases of sexual harassment performed by people who are under their responsibility and that does not take the necessary measures to correct this situation and to prevent it from

happening again, shall be sanctioned with a fine from 50 to 100 applicable tax units. The specialized jurisdictional entity shall estimate the effects of the fine, the implication of the facts and the diligence to correct the situation.

Article 87. Protection and security measures

The protection and security measures are preventive, in order to protect the affected women and her physical, psychological and sexual integrity from any action that violates or threatens the right included in this Law, thus avoiding new acts of violence. Such measures shall be immediately applicable by all entities that receive complaints.

In consequence, the measures are the following:

- 1. Refer the aggressed women, if desired, to specialized centers for them to receive the appropriate orientation and attention.*
- 2. To process the insertion of the victims of violence, as well as their children, under the protection they require, as stipulated in article 32 of the law, in the cases in which staying in their domicile or residence implies an imminent threat or violation to the rights stated in this law. This protection measures shall be temporary.*
- 3. To order the expulsion of the alleged aggressor from the common residence, no matter under what conditions, if the coexistence implies a risk for the physical, psychic or sexual security of the woman. The man shall not take any belongings of the family with him. He shall be allowed to take his personal belongings, instruments or working tools. In case the man denies respecting the measure, the receiving entity shall ask the corresponding court to confirm it and execute it, with the help of public forces.*
- 4. Reinstate the domicile to the victims of violence, prior to the expulsion of the alleged aggressor, in case they share the same domicile, according to what is stated in the previous numeral.*
- 5. To prohibit or restrain the aggressor from approaching the aggressed woman. Therefore, imposing the aggressor a prohibition to approach the working, studying or residence place of the aggressed woman.*
- 6. To prohibit the alleged aggressor and third parties to persecute, intimidate or harass the aggressed woman or any of her family members.*
- 7. To demand the corresponding jurisdictional entity for a transitory arrest warrant.*
- 8. To order police presence in the residence of the aggressed woman for as long as it is considered necessary.*
- 9. To retain any sharp weapon or firearm and its corresponding permit, regardless of the profession of the aggressor. To send the firearm to the corresponding entity to practice the necessary expertise.*
- 10. To demand the entity that grants the aforementioned permit to suspend it when there is a threat on the integrity of the victim.*
- 11. To impose on the alleged aggressor the obligation to give the victim of violence the means of support to guarantee her subsistence, in case she does not have the economic means or in case there is a dependence relationship with the alleged aggressor. This obligation is different from the sustenance that corresponds to children and adolescents, which is incumbent to the Protection Court.*
- 12. To demand the judge to suspend the timetable of visits to the alleged aggressor.*
- 13. Any other measure that is necessary to protect the rights of the women who are victims of violence and their family members.*

-
2. What is the **percentage of claims on sex discrimination** in your jurisdiction?
R. Out of 38 trials for discrimination revised in the country, 14 were based on sexual harassment, meaning 36,84%.

Websites:

<http://www.google.co.ve/search?q=trabajo+%22discriminaci%C3%B3n+en+el+trabajo%22+-penal+-alejandr%C3%ADa+site%3Atsj.gov.ve&hl=es&num=10&lr=&ft=i&cr=&safe=images>

<http://www.google.co.ve/search?q=trabajo+%22acoso+sexual%22+-penal+-alejandr%C3%ADa+site%3Atsj.gov.ve&hl=es&num=10&lr=&ft=i&cr=&safe=images>

3. What are the **main topics of complaints related to sex discrimination** – recruitment, promotion, equal pay, maternity, redundancy, sexual harassment, other?
R. The main reasons of complaint are related to sexual discrimination are: payment inequality, promotions, maternity and dismissals.
4. What categories of workers are mainly concerned by sex discrimination and sexual harassment (economic sectors, men or women)?
R. In terms of gender, women are more affected, while the lower sectors of the Venezuelan society are more affected in terms of social conditions.
5. What is the **tendency** observed in your country's case law – a growing or decreasing number of cases related to sex discrimination? How do you explain such trends?
R. The tendency observed in the Venezuelan case law is growing, which can be explained by the confidence that the population has on labor courts.
6. What is the **legal definition of sexual harassment**? Are there any problems (lacks, confusion) to use it in the judicial practice?
R. a) Sexual harassment is the demand of any act or behavior with sexual content, for a man or a third party, or any consideration of any kind of undesired sexual encounter by a man, profiting from certain labor superiority or any relationships that derive from the professional exercise, with an express or tacit threat to damage a woman with rightful expectations that the woman might have concerning that relationship. (Article 15.10 of the Organic Law of Women's Rights to a Life free of Violence).
7. Please provide **any examples of cases on sexual harassment** at work (short summary, judgment text)?
R. In a compensation trial for damages derived from sexual harassment, the plaintiff (female) alleges that she was appointed as manager of a company and then was charged of the second management of another company of the group. Then, another manager (male) started to sexually and psychologically harass three female employees and her, consisting on: undesired contact, obscene languages, invitations to non-justified meetings and abusive physical contact, all this as he was a manager and personal friend of the owner of the group. The woman reported the situation to her superior, while the manager (male) began to question her capacities to handle both responsibilities and hindered her work, after which she was lowered to a secretarial job and then dismissed.

The defendant alleged that he did not have anything to contradict the pretention of compensation for sexual harassment.

To prove the accusation, witnesses were summoned, who demonstrated the facts alleged by the plaintiff. The court issued a sentence in favor of plaintiff, determining that it was an actual case of sexual harassment for six months and ordered the payment of a compensation of Bs. 15.000 (US\$3.488).

Website:

<http://cojedes.tsj.gov.ve/decisiones/2009/agosto/2278-11-VP01-L-2008-2456-109-2009.html>

8. What is the **main channel (machinery) to deal with sex discrimination and sexual harassment cases** (equality specialized body, enterprise committee, labor inspection, labor courts, etc)?

R. The main channel or machinery to deal with sex discrimination and sexual harassment cases are labor courts, which address complaints for compensation and protection of constitutional rights (Articles 29.1 and 29.3 of the Organic Labor Law of August 13th, 2022).

Website: http://www.tsj.gov.ve/legislacion/ley_organica_procesal_trabajo.htm

The employee may also turn to labor inspectors to demand rehiring or payment of overdue salaries, in case he/she has been unjustifiably dismissed or if it is a case of sexual discrimination or harassment (Articles 453 to 457 of the Organic Labor Law).

9. What is **the complaint procedure** to follow in case of sexual harassment?

R. The process is oral, regulated by the principles of orality, immediacy and concentration. Two hearings are held, one is preliminary and the other is the actual trial.

The process consists of the following steps: complaint, admission, notification, preliminary hearing; mediation, dispatch, promotion of proofs and contestation; trial hearing: allegations, incorporation of proofs, conclusions and sentence. Then, the appeals or legality control and then execution (Organic Labor Law).

10. Does your law provide for the **reversal of the burden of proof in discrimination cases**?

R. Yes, in Venezuela the reversal of the burden of proof is provided in discrimination cases. The plaintiff shall support his/her claim with elements that help to deduce the alleged discrimination. Then, the defendant shall provide an objective and reasonable justification for the adopted measures and its proportionality. (Article 15, unique paragraph, of the Rules of the Organic Labor Law).

11. Please provide any **examples of evidence** brought to the court in sex discrimination and sexual harassment cases?

R. The main evidence brought to labor courts in sex discrimination or sexual harassment cases are the declaration of the victim and witnesses.

12. What is the **responsibility of the employer** in preventing sexual harassment?

R. In Venezuela, there are no special rules that establish a special responsibility of the employer to prevent sexual harassment. The responsibility is individual.

13. What **measures** may be taken by the **employer** to punish sexual harassment?

R. a) Demand preventive measures before the Labor Inspector (Art. 223. lit. b. of the Rules of the Organic Labor Law)

b) Unjustified dismissal for immoral behavior at work (Art. 102 lit. a. of the Organic Labor Law)

14. What **damages are available for victims** in case sex discrimination and sexual harassment? Please provide any examples of financial compensation to the victim (calculation scheme, average amounts).

R. In Venezuela, there are no special labor rules that establish certain compensation for damages caused to employees in cases of sexual discrimination or harassment. Therefore, the civil right is applied.

The judge may, especially, establish a compensation for the victim in cases of physical aggression, attempts against his/her honor, reputation or his/her family's, his/her personal freedom, as well as in cases of violation of privacy.

The judge may also concede compensation to relatives or to the spouse for the pain caused in case of death of the victim (Art. 1196 of the Civil Code of July 26th, 1982).

Website: http://www.gobiernoenlinea.ve/docMgr/sharedfiles/Codigo_Civil.pdf

Example of compensation to an employee:

Amount: Bs. 15.000 (US\$3.488).

Criteria:

a) Violated rights: honor, reputation, work stability, progressiveness of working rights.

b) Behavior of the employer: he/she did not take any measures to correct the situation.

c) Duration: six (6) months

Website:

<http://cojedes.tsj.gov.ve/decisiones/2009/agosto/2278-11-VP01-L-2008-2456-109-2009.html>

15. What is the legal protection for people who provide evidence in sexual harassment cases (**whistle-blowers**)?

R. There is no special legal protection.

16. Does the law foresee situations when the **victim or the harasser are external to the enterprise** (client, user enterprise in relation with a temporary work agency)?

R. There is no legal prevision when the victim or the harasser are external to the enterprise.

17. Do you have any statutory provisions on discrimination on the basis of **sexual orientation**? Do you have any cases in judicial practice on this topic?

R. There is no statutory provisions in the country about discrimination based on sexual orientation. There are no cases on the legal practice.

18. How **moral harassment (mobbing) is defined** in your legal system?

R. Moral harassment (mobbing) is any moral or psychological expression of violence, as well as all behavior, active or indirect, that dishonors, discredits and undermines that value and dignity of a person, as well as humiliating treatments, constant surveillance, isolation, negligence, abandonment, jealousy, destructive comparisons, threats and acts that lead the victims to underestimate themselves, to damage or to disturb their healthy development, that lead to depression and even suicide (Art. 15.1 of the Organic Law of Women's Rights to a Life free of Violence).

19. Does **any legal parallel exist between moral and sexual harassment** (similar or same definitions and procedures)?

R. In relation to the definition aforementioned, it is important to highlight that there is no parallelism, as sexual harassment is any behavior of that a man assumes with a sexual content and benefiting from a situation of working advantage, threatening to damage the woman's working conditions (Art. 15.10 of the Organic Law of Women's Rights to a Life free of Violence); while moral or psychological harassment (mobbing) behavior to discredit, undermine, humiliate and threaten someone, which leads the victims to underestimate and damages mental health (Art. 15.1 of the Organic Law of Women's Rights to a Life free of Violence).

The same procedure applies for both cases.

Appendices

Ireland

Judgment of the Labour Court Two Teachers v A Boys Secondary School.

Text of Determination 10th January 2003.

The first named claimant is a Remedial and Irish Teacher and the second named claimant is a Teacher of Religion. The respondents are the Principal and Board of Management of a boys secondary school. It is the claimants' case that they were discriminated against in terms of Section 2 and contrary to Section 3 of the Employment Equality Act 1977 (The Act) by being subjected to sexual harassment in the course of their employment by students at the respondent's school. They claim that the respondents are vicariously liable for the harassment. In the alternative they claim that the respondents are directly liable by reason of having failed to prevent the harassment from taking place.

It is further alleged by the claimants that they were penalised by the respondents within the meaning of Section 2(d) of the Act for having sought to prevent the harassment and for having taken the proceedings herein.

The third complainant is the Equality Authority, formally the Employment Equality Agency (the Authority). The Authority referred a complaint pursuant to Section 20(a) of the Act, alleging that discrimination is being generally practiced against persons at the school.

The respondents contend that as a matter of law they cannot be vicariously liable for the alleged wrongful acts of the students. They further contend that they acted appropriately in response to any complaints made by the claimants and are not liable for any harassment suffered by them. The respondents also deny that they penalised the claimants in any way.

With regard to the Authority's complaint, the respondents deny that they allowed discrimination to be practiced. They also contend that in the circumstances of this case the Authority does not have standing to bring the complaint.

All of the complaints herein were investigated together by an Equality Officer. In his Recommendation the Equality Officer found that the respondents were not liable for the sexual harassment suffered by the claimants. He did find that the respondents had penalised the claimants for taking these proceedings and recommended that the first named claimant be paid compensation in the amount of £7,000 (€8,888.17) and the second named claimant be paid £12,000 (€1,523.86).

The Equality Officer found that the Authority's claim was not well founded

The first named claimant appealed for a declaration that the Recommendation of the Equality Officer had not been implemented. The second named claimant appealed against so much of the Equality Officers Recommendation as found that the respondents were not liable for the sexual harassment to which she was subjected. The respondents appealed against so much of the Recommendation as found them liable for penalisation. The Authority appealed against the finding that their complaint was not well founded.

The Court investigated all of the complaints in the original application de novo.

Complaint of Sexual Harassment.

The claimants contend that various incidents involving sexual harassment of teaches by students occurred from 1996 onwards. The first incident referred to involved a student being particularly abusive to the second named claimant in a sexually inappropriate fashion on a number of occasions in

September 1996. It is also alleged that the student would stand up close to the second named claimant in the corridors. She reported this to the Principal using the standard form for complaints involving serious breaches of discipline ("the blue form"). The School Principal claimed that the complaint recorded on the blue form had no sexual connotations and related only to an incident on 26th September 1996.

A further serious incident occurred on 29th September 1996, when a student gave the second named claimant a page containing sexually explicit written material. This incident was investigated and dealt with by the respondent with the result that the student in question was required to transfer to another school.

On 18th December 1996 there was a further incident. On that occasion a page containing numerous sexually offensive and explicit references was included in a Religion test answer paper given to the second named claimant. This incident was reported using the blue form. An investigation ensued but the Principal concluded that no disciplinary action should be taken since the offending student could not be positively identified.

A further incident occurred in January 1997, which appeared less serious, in which a student, alleged to have been involved in the 18th December incident, made a comment to the second named claimant in relation to what had been written in the offending document. This was again reported but no action was taken.

The problem reoccurred in the on 29th September 1997. On that date a student made a sexually offensive remark to the second named claimant. She reported this to the Principal using the blue form. This incident was investigated and dealt with by the School Principal and the student in question was required to transfer to another school.

On 8th October 1997 an incident occurred in which a sticker was attached to the first named claimant's back and on which an expression of an explicit sexual nature had been written. This was also reported on the blue form. Again the matter was investigated and a sanction imposed on the student responsible. This consisted of a period of suspension, part of which ran concurrently with the schools mid term break.

Apart from completing the blue form the first named claimant wrote to the School Principal in his capacity as Secretary of the Board of Management, by letter dated 20th October 1997, setting out a detailed account of the offending incident. At that time the Board were due to consider the question of a sanction against the students responsible and the first named claimant asked that her letter be brought to the attention of the board. The first named claimant concluded her letter in the following terms:

"I am very concerned about this matter as this form of sexual intimidation is slowly creeping into the school where female teachers are concerned. I am also aware that it is not the first incident of gross misconduct towards female members of the teaching staff"

The board did not reply to this letter but proceed to deal with the student in the manner referred to above (the imposition of a period of suspension). The manner in which the Board dealt with this matter appeared to cause some concern to the staff, and on 15th November 1997 the School Steward wrote to the Secretary of the Board expressing what she termed the staff's anger at the manner in which the Board had dealt with a serious incident of sexual harassment by a senior student. The school steward went on to request a meeting between the staff and the Board "to see if any common approach can be agreed".

On 19th November another incident occurred in which a student is alleged to have made a sexually explicit remark to a female teacher who is not party to these proceedings. This incident was reported using the blue form procedure and the matter was investigated. The Principal sent for the student's father to discuss the matter and, it is claimed, the matter was resolved as a misunderstanding on the part of the teacher.

On an unspecified date in November 1997 the second named claimant was subjected to crude remarks of a sexual nature by an unidentified student. The second named claimant again used the blue form

procedure to report this incident. It is accepted that the school's Disciplinary Committee refused to accept this complaint because the claimant was unable to identify the student who made the offending comment.

On 7th December 1997 the Board of Management replied to the letter of the School Steward of the 15th November 1997. In the first of two letters the Board of Management said that it wished to express its disappointment at the staff's dissatisfaction with the disciplinary action taken in response to the first named claimants claim of sexual harassment. They went on to say that the decision had not been taken lightly and would not be revisited.

In its second letter the Board of Management dealt with the request for a meeting between it and staff representatives to discuss matters relating to the sexual harassment of staff by students. The Board replied as follows:

"In order that the Board be in a position to fully address the issues raised in your letter, you are requested to furnish full details relating to same

When the facts are established, the Board will consider the possibility of a meeting to discuss the broad question of discipline in the school".

Following on from this correspondence the matter was referred to the teacher's Trade Union, the ASTI. The Assistant General Secretary of the Union then wrote to the School Principal advising that he would be meeting with the staff of the school to discuss the Board's response to the School Stewards letter. This meeting was held on 11th December 1997.

In the interim the first named claimant had contacted the then Employment Equality Agency for advice and this had become known to the School Principal. On that account he wrote to the ASTI advising that no further discussion should take place in relation to the incident involving the first named claimant. However the meeting of staff proceeded and discussed the experience of the first named claimant. At this meeting two other teachers, including the second named claimant, indicated that they had also experienced incidents of alleged sexual harassment by students. The School Principal attended this meeting as a member of the Union.

Following this meeting the Assistant General Secretary of the Union formally asked the Principal for a meeting with the Board to discuss the issue of sexual harassment at the school. No such meeting was arranged and on 22nd January 1998 the Assistant General Secretary again wrote to the Board requesting a meeting to discuss the issue of sexual harassment. In this letter the Union Official stated the view of some female members of staff that a culture existed amongst students of the school which resulted in numerous incidents of sexual harassment of teachers.

This letter detailed the type of behaviour complained of and went on to state as follows:

"In view of the serious nature of these incidents and the Board's responsibility to protect its employees from harassment of the nature described, I wish to formally request that the Board would meet with the School Steward and me. I will at that meeting offer more specific information on the nature of the incidents described above. The Purpose of the meeting would be to place on the record with the Board the distress being experienced by some employees of the Board because of sexual harassment they have experienced; to identify the role of the Board in regard to this matter and to explore options open to the Board and staff to ensure a safe working environment for all teachers".

The Board replied to this letter on 2nd March 1998 stating that the request for a meeting with the Board was premature since the School Steward had not provided details of the matters complained of in her letter of 15th November 1997. The Board went on to advise that the School Steward and the Union official should meet with the Principal. The Union replied on 16th March expressing its dissatisfaction at the stance adopted by the Board but agreeing to meet with the Principal.

A meeting did take place between the School Steward, the Union Official and the Principal on 24th March. This meeting was unproductive. The Principal insisted that the Union Official substantiate each of the complaints which he made on behalf of his members. For his part the Union Official

insisted that each and every complaint had been detailed and reported through the blue form procedure. The meeting apparently ended with the Principal inviting the Union Official “to put up or shut up”.

Following this meeting, by letter dated 26th March 1998, the Union again requested a meeting with the Board. On 27th March 1998 the Principal wrote to the Union Official effectively demanding that the allegations of sexual harassment made on behalf of his members be substantiated or withdrawn within seven days of that letter.

In the meantime a further incident occurred on 9th March 1998 involving a student making a sexually offensive comment to the second named claimant. This was reported through the blue book procedure and the offending student was suspended for five weeks.

On 1st April two further incidents occurred. One involved students wolf-whistling and cat calling at the second claimant. The second incident involved a student handing a sexually explicit drawing to the second named claimant. This incident was again reported on a blue form.

Following this latest incident the Union Official telephoned the Board Chairman directly on 2nd April 1998 and requested an urgent meeting. The Board Chairman agreed to meet the Union Official and the second named claimant on that night. It is accepted on behalf of the second named claimant that the Chairman listened to her presentation and responded in a kind and concerned fashion.

Following that meeting the Union again formally sought to meet with the Board of Management. On 20th April the staff were notified that a staff delegation was invited to meet with the Board on 23 April. The Union chose a delegation to meet with the Board but difficulties arose when the Principal objected to the make up of this delegation and the Board refused to meet them. A compromise was subsequently whereby a representative group of the Board met the delegation.

The matters remained unresolved and the present complaints proceeded to investigation.

Conduct Constituting Sexual Harassment..

In considering this aspect of the appeal the Court first considered if the acts complained of by the claimants constitutes sexual harassment. An accepted definition of the term is that contained in the Code of Practice annexed to Commission Recommendation 92/131/EEC of 27th November 1991 on the protection of the dignity of women and men at work. This is set out at Section 2 of the Code of Practice as follows:

“Sexual harassment means unwanted conduct of a sexual nature or other conduct based on sex affecting the dignity of women and men at work. This can include unwelcome physical, verbal or non-verbal conduct.”

Thus, the source of the unwanted conduct is irrelevant if it affects the dignity of the victim at work.

The Code of Practice goes on to State:

“The essential characteristic of sexual harassment is that it is unwanted by the recipient, that it is for each individual to determine what behaviour is acceptable to them and what they regard as offensive....”

There can be no doubt that the conduct to which the claimants were subjected by the students of the school was sexual harassment in that it was unwanted conduct based on sex which affected their dignity at work. It is also well settled that sexual harassment constitutes discrimination for the purpose of Section 2(a) of the Act.

Section 3 of the Act prohibits discrimination by an employer against an employee. Hence, in order for this aspect of their claim to succeed, the claimants must show that the respondent, as their employer, can be fixed with liability for the sexual harassment which they suffered. This could arise if could be shown that the respondent is directly liable for the discrimination suffered by the claimants by failing to take appropriate measures to prevent its occurrence. In the alternative, if the school can be held vicariously liable for the conduct of its students the discrimination complained of can be imputed to the respondent.

The Court first considered if the respondent can be held directly liable for what occurred.

Duty of an Employer.

Sexual harassment is now generally recognised as constituting an intolerable affront to the dignity of men and woman at work. Since the Determination of this Court in A Garage Proprietor v A Worker EEO2/85 it is well settled that freedom from sexual harassment is a condition of work which an employee of either sex is entitled to expect. It follows that an employer has a concomitant duty to take such steps as are reasonable practicable and necessary to ensure that every employee is provided with a place of work free of sexual harassment. Practical guidance on the steps which should be taken are set out in the European Code of Practice and its Irish counterpart (Measures to Protect the Dignity of Women and Men at Work –Department of Equality and Law Reform September 1994).

These Codes of Practice provide that employers should have in place effective measures to ensure that sexual harassment does not occur and, if it does occur, to ensure that adequate procedures are readily available to deal with the problem and prevent its reoccurrence. The Code of Practice recommends that these measures should, where appropriate, be adopted in consultation with trade union or employee representatives.

The Recommendation, of which the Code of Practice forms part, is a relevant consideration in cases involving sexual harassment. In Grimaldi v Fonds Des Maladies Professionnelles [1989] ECR 4407, the European Court of Justice pointed out that national Courts are bound to take Recommendations made pursuant to Article 249 of the EC Treaty into consideration in order to decide disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provisions of national or Community law.

Procedures to combat sexual harassment in the workplace are most frequently designed to deal with inappropriate conduct perpetrated by one employee upon another or by a person in authority upon a subordinate. Yet an employee can be subjected to sexual harassment in the course of their employment from sources other than those with whom they are in common employment.

In such cases it is often difficult to define the scope of an employers duty to protect an employee against sexual harassment or to identify the circumstances in which liability will attach to the employer if it occurs. In England the liability of an employer in such cases is now determined by the application of the test formulated by the Employment Appeals Tribunal in the case of Burton and Rhule v De Vere Hotels [1996] IRLR 596.

In this case the EAT, in a case involving racial harassment, considered the meaning of the term “subjecting him to any other detriment” contained in Section 4(2) of the Race Relations Act 1976. The wording of the relevant provisions of the Employment Equality Act are different to that in the British legislation. Nonetheless, the approach adopted by the EAT is relevant in the instant case, since an employer who subjects an employee to the detriment of sexual harassment undoubtedly treats that employee less favourably by reason of his or her sex within the meaning of sections 2 of the 1977 Act.

In Burton the claimants, who were both black, were employed as waitresses by the respondent hotel. They were required to work at a function at which an entertainer was engaged who used crude and racially offensive material. As a result the claimants suffered racial and sexual harassment by the entertainer and by the guests at the function.

The employer was held directly liable for the harassment suffered because, it was held, the manager on duty had subjected the claimants to racial harassment by failing to immediately remove them from the function hall as soon as the nature of the material being used by the entertainer became known.

In its judgment the Tribunal firstly pointed out that an employer would readily be held liable where he /she is shown to have actual knowledge that harassment of an employee is taking place and does not act reasonably to prevent it, or where the employer deliberately or recklessly closes his/her eyes to the fact that it is taking place.

Secondly, in applying a lower threshold for liability, the Tribunal took the view that an employer subjects an employee to the detriment of [racial] harassment if he causes or permits harassment

serious enough to amount to a detriment to occur in circumstances in which he can control whether it happens or not.

The Tribunal went on to say:

“In order to show that the employer subjected the employee to the detriment of racial abuse or harassment, where the actual abuser or harasser is a third party and not a servant or agent of the employer for whose actions the employer would be vicariously liable, the Tribunal should ask itself as an industrial jury, whether the event in question was something which was sufficiently under the control of the employer that he could, by the application of good employment practice, have prevented the harassment or reduced the extent of it. If such is the finding, then the employer has subjected the employee to the harassment”.

The principles in *Burton* were subsequently applied by the EAT in *Bennett v Essex County Council* EAT/1447/98.

This case involved a teacher of African-Caribbean ethnic origin who was subjected to racial harassment by students in the school in which she was employed. In 1995 the claimant was subjected to harassment by students on a number of occasions over a four month period. She reported this to the school authorities. The school authorities were held not to have taken these complaints as seriously as they should have been. Letters were prepared to the parents of the students concerned but were not subsequently sent. The response of the school was held to have been muddled and uncertain.

It was held that although the respondents were not vicariously liable for the acts of the students at the school, the applicant could succeed if she could show, adopting the principles in *Burton and Rhule*, that the racial harassment was sufficiently under the control of the respondents, that they could by the application of good educational practice have prevented the racial harassment or reduced the extent of it. On the facts of the case the employer was liable.

What emerges from these cases is that if an employer controls the situation in which harassment occurs and fails to exercise that control so as to prevent the harassment from occurring or in reducing the extent of it, he/she will be directly liable for having subjected the employee to the harassment. As the Court understands the principle, liability arises not from the existence of control but from the failure to properly exercise that control so as to protect the employee against harassment. To hold otherwise would be to confuse vicarious liability, which is strict, with direct liability, which depends on a causal link between the harassment complained of and some fault on the part of the employer.

It also appears to the Court that situations can arise in which an employer may adopt a course of action to avoid harassment of an employee but that harassment nonetheless occurs. In such cases the employer could not be fixed with liability if the action taken, although unsuccessful, was in all the circumstances, as much as the employer could reasonably have been expected to do.

The approach adopted in *Burton and Rhule* is persuasive and is adopted by the Court, in considering the instant case.

Conclusions

Applying these principles to the facts of the present case the Court has reached the following conclusions:

Turning first to the series of incidents which occurred in the period between June 1996 and January 1997, the school responded to the complaints made by the second named claimant by disciplining the offending student where they could be identified. In relation to the incident which occurred on 29th September 1996, the student involved was required to transfer to another school.

Notwithstanding the severity of the sanction in this case, it did not appear to have had the deterrent effect which might have been expected since other incidents occurred involving the same teacher. In some of these subsequent incidents the disciplinary process could not be applied because the identity

of the offender could not be definitively established. No other action was considered or taken in relation to these incidents.

It should have been apparent at that stage that the use of the imposition of disciplinary sanctions was not in itself sufficient to alleviate or control the developing culture of sexual harassment. In September / October 1997 the problem reoccurred.

It is clear from the correspondence referred to earlier that the Union were concerned that the environment in which its members were required to work had become polluted by sexual harassment. From 15th November 1997 onwards the School Steward and later the Union official sought to engage with the school authorities in seeking to jointly formulate an appropriate response to this recurring problem.

The respondents appeared to regard the representations made by the Union as an attempt to usurp the role of the Principal with respect to matters of discipline within the school. Rather than agreeing to engage constructively with the teaching staff and their union, the Principal, supported by the Board of Management, appeared to believe that some teachers and the ASTI were involved in some form of campaign directed at undermining his professional standing.

From the submissions and taking the evidence as a whole it is clear to the Court that the School Management did not fully accept the plain fact that teachers were being sexually harassed at the school. This is evident from the tone and content of the correspondence passing between the parties at the material time. Of particular significance is the principal's insistence that the Union Official "put up or shut up", and his later demand that the complaints of sexual harassment be withdrawn.

After these proceedings had commenced the school authority did move to take some measures to address the issue of sexual harassment in the school. In May 1998 the Principal consulted with the Employment Equality Agency and requested the name of a suitable person to address the staff on this topic in the following academic year. Significantly, in writing to the person nominated on 28th July 1998, the Principal referred to the incident involving the first named claimant and stated that the EEA had investigated the matter and found no cause of complaint. He went on to say that the matter had been referred to the Labour Court and that the Court saw no grounds for complaint. Both statements were incorrect. Notwithstanding the incidents of 1996, in the same letter the Principal stated that prior to October 1997 sexual harassment did not appear to have been a problem at the school. It may have been the perception of the Principal that the incidents which occurred in 1996 did not constitute sexual harassment of the claimants, but the Court cannot accept this contention.

The School Authorities should have recognised what was happening in late 1996 and taken measures to control the situation. They might have sought to involve the parents of students in trying to control their children's conduct. They should have sought to involve the staff and their trade Union in putting in place a code of practice in line with the European Code and its Irish counterpart and in line with good employment practice. The Court is satisfied as a matter of probability that had such measures been taken they could have at least have prevented the harassment which occurred from September 1997 onwards, or reduced the extent to which it occurred.

The respondents claim that they took some initiatives to address the complaints of sexual harassment in December 1997. These involved an attempt to review discipline within the school but that the staff refused to cooperate with these initiatives. Given that at that time the Board of Management and the Principal appeared not to accept that a problem of sexual harassment existed, any such initiatives would have been of little value.

Certain further unilateral efforts were made by the school to devise some policy on sexual harassment, with an involvement by staff, after the present proceedings had commenced. Regrettably, by that stage the relationship between the claimants and the Principal and between the Union Official and the Principal had become so blighted that no real progress was possible. The Court believes that had such an initiative been pursued in response to the initial series of complaints in 1996 or in response to the initial representations by the Union, these complaints might never have come before the Court.

The Court is satisfied that by December 1996 it should have been clear to the respondents that the measures being taken to prevent the sexual harassment of the teachers were insufficient. By failing to take any additional initiative the respondent failed to take control of the situation and thus failed in their duty to act reasonably so as to protect the claimants from further incidents of sexual harassment. The Court is, therefore, satisfied that the respondent is liable to the claimants for the harassment to which they were subjected from September 1997 onward.

Vicarious Liability of the Respondent.

Having found that the respondent is directly liable for the harassment to which the claimants were subjected, it is unnecessary to consider the submissions made by the parties on the applicability of the doctrine of vicarious liability in the present case

Victimisation of the Claimants.

Both claimants complain that they were penalised by the respondent within the meaning of Section 2 (d) of the Act. They rely on a number of incidents which are referred to at paragraph 6.11 of the Equality Officers Report.

It is clear from all of the evidence that the respondents were deeply aggrieved by the decision of the claimants to involve their trade union in preference to the internal procedures of the school in addressing their complaints. They were also aggrieved by the decision of the claimants to institute these proceedings. In his submission to the Equality Officer the Principal states that it is the view of the Board of Management that all internal channels should be fully explored before seeking help from outside.

The Equality Officer took this reference to mean that any referral of a complaint of unequal treatment on grounds of gender by a member of staff to the statutory bodies charged with investigating such complaints, prior to the board being satisfied that all “internal channels” have been fully explored to their satisfaction, met with management’s disapproval. The Court concurs with the Equality Officers interpretation of those comments.

With regard to the particular events relied upon in support of the claim of penalisation, one involved both claimants and a number of others involved the second named claimant. In relation to these incidents the Equality Officer was satisfied that penalisation of the claimants had occurred. The Court concurs with that conclusion.

Incident Involving Both Claimants

On the day prior to the first hearing before the Equality Officer the Principal posted a notice in the school staff room stating as follows:

“An equality officer from the Labour Court will conduct a hearing into the alleged sexual harassment claim on Tuesday 14th December 1999 at 2.30 PM. In [named] Hotel.

Since it would not be possible to provide adequate cover for all the classes, I have decided to close the School at 2.15 PM.

In my view, all members of staff should be afforded the opportunity to attend the hearing, since the decision to authorise the Union to initiate the proceedings against the Board of Management was taken by the teachers at an [named Union] meeting”

The Equality Officer found that the only purpose in posting of this notice prior to the hearing was to expose and embarrass the claimants in the eyes of their colleagues as being the female teachers who were bringing complaints of sexual harassment against the school and to add to their trauma on the day.

Alleged Penalisation of the Second Named Claimant

The second named claimant’s complaints of penalisation relate to a number of interactions with the Principal in which she claims to have been intimidated or humiliated by him. These incidents are

particularised in the Report of the Equality Office. While there is considerable conflict between the parties on the details of these encounters, the Equality Officer found that a number of incidents amounting to penalisation did occur.

Having reviewed the evidence the Court has come to the same conclusion as the Equality officer in relation to these incidents. The second named claimant was employed by the school from 1995 and appears to have performed her duties satisfactorily. However, following the commencement of these proceedings, she appears to have been singled out for special attention by the Principal and reprimanded on minor matters often within the hearing of her students. In the courts view this attitude toward the second named claimant was in consequence of her having taken these proceedings and does constitute penalisation within the meaning of section 2(d) of the Act.

Complaint Under Section 20(a) of the Act.

It was submitted by the Respondents that The Authority does not have standing to bring a claim pursuant to Section 20(a) of the Act in circumstances in which particular persons who claim to have been discriminated against have made complaints pursuant to section 19 of the Act. The Court can not accept this submission. Each of the paragraphs of Section 20 provide separate grounds on which a complaint can be referred to the Court. While paragraph (b) is limited to situations in which a particular person alleged to have suffered discrimination has not made a reference under Section 19, no such restriction applies in the case of paragraph (a).

In the instant case the Court has held that the respondent failed to exercise adequate control over the situation in which two female teachers were being subjected to sexual harassment. It follows that in failing to exercise adequate control the respondent exposed all female teachers to the possibility of discrimination involving sexual harassment. In the Courts view this comes within the scope of Section 20(a) of the Act.

The Court finds that the complaint made by the Authority is well founded.

Determination

The Court determines that the complaint herein that the respondent did discriminate against the first and second named claimants within the meaning of Section 2(a) of the Act by reason of their sex in failing to provide them with a place of work free of sexual harassment. The Court further determines that the first and second named claimants were discriminated against within the meaning of Section 2(d)(i) and (ii) in being penalised for having in good faith made a reference under Section 19 of the Act and having opposed by lawful means acts which are unlawful under the Act.

The Court is satisfied that the appropriate form of redress is a composite award of compensation to each of claimants. The Court measures the amount of compensation which is fair and reasonable in all the circumstances at €20,000 in the case of the first named claimant and €30,000 in the case of the second named claimant.

The Court determines that the complaint made by the Authority pursuant to Section 20(a) of the Act is well founded but does not propose to make any other award or recommendation pursuant to Section 22 of the Act.

Anonymous v. Anonymous

The President Steve Adler, Judge Nili Arad, Judge Varda Virt-Livne

Employees' Representative Mr. Shalom Havshush,

Employers' Representative Mr. Avi Barak

Judge Steve Adler

I have read the verdict of my friend, Judge Virt Livne, who thoroughly analyzed the judicial situation and the facts. I agree with the result she arrived at, for the reasons specified hereinafter.

Before expanding on these reasons, it should be noted that there is no place to intervene in the determination of the facts of the lower court, which preferred the respondent's version of the facts over the appellant's:

[2] The facts of the case were determined in the verdict of the lower court; the court based them on the testimonies, including those of the respondent and the appellant, which they heard. The lower court, explicitly and unambiguously, adopted the version of the respondent and rejected the version of the appellant.

The lower court summarized its impression of the appellant determining that: **"the defendant and his witnesses are without doubt more credible in our eyes than the plaintiff and her sister,"** who was the only witness on behalf of the appellant (clause 37 of the verdict). The court summarized their conclusions and determined that, **"considering the contradictions and lack of consistency that was revealed within the plaintiff's version we preferred the defendant's version which was consistent from the moment he admitted the existence of the relation, which was forbidden according to the code of ethical behavior at the company"** (clause 54 of the verdict).

The lower court noted the following about the credibility of the appellant: **"...the plaintiff's desire to contradict a document that she submitted as evidence makes her version, which was changed from time to time, less credible"** (clause 30 of the verdict). In several clauses of the verdict the lower court rejected the appellant's version, and among other things determined that the appellant was the initiator of the intimate relationship between her and the respondent, and she had insisted on having a "private meeting" with him (clause 45 of the verdict).

The lower court mentioned a contradiction in the appellant's testimony:

"The plaintiff claimed ... that on 6.2.02, on the same day of the conversation - in which she clarified to the defendant that she was not interested in having an intimate relationship with him, just a work relationship, and he agreed with that - they went to the beach and had a normal conversation between "work colleagues" - the friendly conversation.

In our opinion, it is hard to understand how the plaintiff, who nowadays claim that she was "sexually harassed" by the defendant for a year and a half before this friendly conversation, chose to go to the beach to have a friendly conversation with her "harasser". Moreover, we wonder why another conversation, outside of work and after working hours, was necessary on the same day she clarified that the relationship would be strictly a work relationship. ... We believe that this shows, even if only minimally, that the plaintiff has a 'selective memory' and as a result we prefer the defendant's description of the beginning of the relationship..." (Clause 46 of the verdict).

And so forth. Both in the statement of claim and affidavit she submitted, the appellant claimed that the respondent raped her, and she had sexual relations with him against her will ("rape"), because of fear and concern about her job. The lower court rejected the appellant's version and determined that the appellant took part in consensual sexual relations of her own volition. In the court's words: **"we are convinced that we are dealing with consensual sexual relations between adults, and that only post factum, because of the plaintiff's feelings of frustration and disappointment, [the plaintiff and her sister] attempted to name it differently"** (Clause 50 of the verdict).

[3] Generally and as a firmly established practice, this court, as a court of appeals, does not to interfere in the determination of the facts made by the lower court and based on the direct impression of credibility of the witnesses. The court that heard the witnesses has an advantage on the court of appeal, because of their chance to be impressed by the witnesses directly. For this reason, interfering in the credibility of the evidence and determination of the facts, based on the impression the witnesses made with their testimonies, is unusual and reserved for exceptional and radical circumstances.

In the case before us, the court based the factual determination on the testimonies heard, while properly explaining the preference given to the respondent's version over the appellant's version. Reviewing the evidence, justifies the lower court determination, that the appellant's testimony included significant inaccuracies and contradictions, as opposed to the respondent's testimony which was organized and trustworthy.

From my colleague's, Judge Virt Livne, opinion it could be understood that she has doubts about the lower court's explicit rejection of the appellant's version of the facts. It should be emphasized, that the lower court rejected the appellant's version of the "rape" that occurred in the shelter at their workplace. It was determined that the respondent did not use any force in order to take the appellant to the shelter, and that in point of fact it was the appellant who wanted to close the door. That the appellant asked to close the shelter's door is insignificant for understanding the events. Rather, the events that took place in the shelter should be understood by taking into account the whole circumstances: including the private conversation initiated by the appellant; the appellant and the respondent going together to the shelter; their trip together to the beach; their continuous eight month relationship; the submitting of the statement of claim against the respondent only after the respondent and his partner submitted a complaint against the appellant; and so forth.

More than that, the appellant based her version of the facts on the testimony of her sister. The sister's testimony was hearsay evidence regarding the claimed rape, and a direct testimony regarding the appellant's psychological condition gathered from the conversation that took place after the [first] incident in the shelter. The lower court determined that, **"the plaintiff's claims are a result of her subjective view of reality which is influenced by her and her sister's prejudice, resulting from hard past experiences with male-female relations..."**. It also determined that **"on the whole – the defendant and his witnesses are, without doubt, in our eyes more credible than the plaintiff and her sister"**.

After a complete review of the materials in the lower court case, including all the affidavits and the hearing transcripts, I have not found in the appellant's claims any juridical or other reason that would justify our intervention, as a court of appeal, in the lower court's determination of facts. I reject the appellant's efforts to convince us to do so. My conclusion, therefore, is that our ruling in this appeal should be based on the acceptance of the respondent's version of the facts over the appellant's version.

A summary of the facts of the case:

[4] The facts of the case were described in full by my colleague, Judge Virt Livne, and it is unnecessary to describe them again in their entirety. I will, nonetheless, summarize some of the facts upon which I am basing my judicial ruling.

The appellant and the respondent work at the same factory and in the same department. During the relevant period, the respondent held a higher position than the appellant, within the hierarchy of the organization. Although he was not the appellant's direct supervisor, he was responsible for a few teams, including the team she worked on. Half a year after the end of relations between them, the respondent was promoted to be head engineer of the company.

The appellant and the respondent had intimate relations for eight months and, according to the respondent's version, they consisted mainly of occasional sexual relations.

The appellant initiated the intimate relations.

The relations were consensual during the eight months they took place. During the entire period the respondent did not apply any force, constraint, or pressure. In addition, neither during the time period when the relations occurred nor afterwards was there a hostile atmosphere caused by the respondent in the workplace.

It was not proved that the appellant's position in the workplace was influenced in one way or another because of her relations with the respondent.

No evidence brought to show that the respondent took advantage of his authority regarding the appellant. Referring to this issue, the lower court noted, "**...The respondent did not take advantage of the plaintiff...It was not proven that he abused his authority in order to "sexually harass" the plaintiff**" (Clause 61-62 of the verdict).

The respondent violated the company's code of behavior by not informing his supervisors of his relations with the appellant.

For a long period of time after the conclusion of the relationship, the appellant did not submit any formal complaint against the respondent, neither to the correct individual at work nor to the police. She did not complain during the relationship nor for a long period of time after. She complained only after the respondent had relations with another co-worker which eventually resulted in the respondent and this new partner living together and having a son. The relationship between the new partner and the respondent hurt the appellant. This can be concluded from the incident which took place between the appellant and the new partner four months after the end of the relationship between the respondent and the appellant as well as from the way the appellant acted towards the new partner, which according to the respondent was full of harassment. In response to this harassment the respondent and his new partner submitted a complaint to the company against the appellant. The statement of claim that is before us was submitted against the respondent only after the respondent and his new partner submitted their claim against the appellant.

The Questions for discussion

[5] There are two judicial questions that arise in this appeal.

The first question: Whether an intimate relationship between two co-workers in the same department and at the same workplace, one holding the status of a supervisor over the other, is sufficient to determine that the supervisor took advantage of his authority and that, thus, this should be considered a "sexual harassment" as in the **law for the prevention of sexual harassment**?

The second question: Whether in order to overcome the presumption of the abuse of the authority relations, it is enough for the supervisor to meet the burden of proof and show that within the relationship there was no advantage he gained from the authority relations? Or whether, in addition, he should prove that at the initiative phases of the relationship he clearly and actively made an effort to put an end to the unequal and authoritative differences embedded within the supervisory status?

The human issue before us is not a new one

[6] The issue of sexual harassment accompanies civilization for a long time and was even discussed in Jewish literary sources in The Book of Genesis. Joseph served Potiphar and was in charge of the entire house and business of his master:

"Now Joseph was well-built and handsome, and after a while his master's wife took notice of Joseph and said, come to bed with me! But he refused. With me in charge, he told her, my master does not concern himself with anything in the house; everything he owns he has entrusted to my care. No-one is greater in this house than I am. My master has withheld nothing from me except you, because you are his wife. How then could I do such a wicked thing and sin against God? And though she spoke to Joseph day after day, he refused to go to bed with her or even to be with her. One day he went into the house to attend to his duties, and none of the household servants was inside. She caught him by his cloak and said, come to bed with me! But he left his cloak in her hand and ran out of the house..."

[Genesis, Joseph and Potiphar's Wife, chapter 39, phrase 6-12].

In **Tractate Sotah** Rashi gives an interpretation of the words, "**to attend to his duties**," as Joseph was about to have sexual relations with Potiphar's wife but stopped himself at the last minute when, "**the image of his father portrait appears**". In other words, Joseph, who grew up in Jacob's home and learned from him about the Jewish heritage's values and morals, passed the difficult trial. He did not lose his stature or his honor, before God or his master, who fully trusted him. Joseph resisted the temptation of Potiphar's wife and acted in the manner expected of him. Indeed, in the story described in the bible Potiphar's wife was the

harasser and the one to initiate the relations. She was also more senior than Joseph, who was the servant. It is, however, important to pay attention to the human circumstances and especially to Joseph's reaction which was to reject Potiphar's wife's offers. He was close to giving in to temptation, but finally resisted it and rejected Potiphar's wife's sexual offer.

We should also pay attention to the following: **"...she called her household servants. "Look", she said to them, "this Hebrew has been brought to us to make sport of us! He came in here to sleep with me, but I screamed. When he heard me scream for help, he left his cloak beside me and ran out of the house"..."** [Genesis, Joseph and Potiphar's Wife, chapter 39, phrase 14-15]. Potiphar's wife responded to Joseph's rejection by accusing him of attempting to rape her.

It is almost as if the story of Joseph and Potiphar's wife was written today and it can help us understand the mixed emotions in the case before us. In both situations, the woman initiated and seduced the worker (Jacob's son in the Biblical story and the respondent in our case) and in both situations he had to gather his emotional capabilities in order to resist temptation. Nonetheless, in the Biblical story the woman was more senior than the man, differing in that respect from the case before us.

On the one hand, one should comprehend the temptation that the respondent had to overcome, facing the appellant's actions and words. On the other hand, one should study the self restraint and the power to reject her demands which are expected of a senior worker in any organization.

Proving the abuse of authority

[7] The prevention of sexual harassment is a vital aspect in establishing and preserving an atmosphere of equality in the workplace. I agree that someone who has a position in a factory and is in charge of other workers, whether he is a direct or indirect supervisor, has extra responsibility for his conduct with other workers.

Clause 3(A)(4) of the law for the prevention of sexual harassment does not explicitly include a discussion of consensual sexual relations. Nonetheless, **clause 3(A)(6)(C)** of the law states that **"with regards to work relations...within the abuse of a position of authority at work"** sexual harassment takes place even if the person who was harassed did not make clear to the harasser that he/she was not interested in the harasser's offers. Taking into account this statement, **clause 3(A)(4)** should be interpreted as including consensual sexual relations.

In the case before us, it was not proven that the respondent initiated any action which would indicate that he abuse his authority relations. Nevertheless, there is a presumption, based simply on the presence of an intimate relationship between a supervisor and a subordinate, that the supervisor is taking advantage of his authority. The rationale of this presumption is that it is natural to think that the subordinate will find it difficult to refuse relations with the supervisor. The supervisor's higher position will influence her decision to have personal and even intimate relations with the supervisor. As a result, it will be very hard for her to refuse sexual offers from the supervisor because of the supervisor's higher position and because of her fear that the supervisor would influence her position as a worker.

The term "authority relations" in the workplace is not only meant to describe direct authority relations but also situations in which there is an indirect authority relation between the male and female worker in the organization. The different status of the two workers - even without actual pressure or constraint and even if the higher worker does not intend to create such pressure or constraint – provides the higher worker power and influence over the other worker and her position at the workplace.

Generally, a worker can not have intimate relations with another worker whenever they have different, hierarchical, authoritative relationship. As a result, in every situation like this, the burden of proof is on the worker with the higher position to prove in his defense that he did not take advantage of his authority over the other worker. It is possible for the worker to meet the burden of proof and overcome the presumption of the abuse of authority relations. The burden can be shifted even if the relationship is based only on occasional sexual relations.

In this case, in order to shift the burden, onto the respondent, of proving at the highest level that there was no advantage gained from authority relations, it is enough that the appellant proved that there were

authority relations between her and the respondent and that they had an intimate relationship which included, inter alia, sexual relations.

As with any other presumption even here the respondent can overcome it. The burden of proof should be to show that the eight month relationship between the respondent and the appellant, even if it was primarily based on occasional sexual relations, was not affected by the authority relations. The lower court determined this in its verdict. In my opinion, there is no reason to reject the possibility that the relationship - that was described by the respondent as both "romance" and occasional sexual relation – occurred without any abuse of the authority relations. I take this position in order to respect the free will of two adults, like we have before us.

In order to overcome the presumption of the abuse of authority relations, the worker defending against the claim of sexual harassment, which violates **clause 3(A)(6)(C) of the law**, should prove that none of the actions specified in **clauses 3(A)(1) – 3(A)(5) of the law** occurred. He should also show that there were no signs of an abuse of authority, such as offers from the supervisor to the worker to contact her in a close personal relationship; comments with sexual connotations; touching, even when it looks innocent, the workers body; any type of actual pressure; the existence of a hostile environment; influence or the intent to influence the worker's position in the workplace; etc..

Why the supervisor may overcome the presumption?

[8] **A human workplace** – Workers are human beings. As can be expected, personal relations and sometimes intimate relations, can develop at the workplace. Friendships are created and love – which from time to time even leads to marriage and family – grows. In my opinion, there is no reason to absolutely reject the possibility that intimate relations will be developed between workers in the workplace. The workplace is a human environment and personal relations contribute to the creation of a pleasant and productive atmosphere that benefits the workers and the employer. We should aspire to have a pleasant and comfortable workplace for workers of both genders. This is one of the goals of **sexual harassment law**.

Nonetheless, when there are relations between workers with different statuses in the organizational hierarchy, there are rules determined by law, which govern the development of personal and intimate relations, to prevent the abuse of authority relations. In addition many employers, such as the employer in the case before us, have created internal regulations in order to ensure that the goals of the law will be satisfied.

Moreover, even in situations that do not relate to sexual harassment the employees in the workplace should know how to set limits so that the workplace is not turned into a meeting place or a social club. The workers should set the boundary between social activities, that are acceptable in a reasonable amount during break time, and actual work time, when the workers should concentrate on their work. Behavior that differs from this formula violates the employees' duty, to invest their work time in matters relating to actual work, rather than different activities, and certainly to avoid having sex. That is, regardless of their position, status, or the authority differences between them, there is no place for a situation in which two people have sexual relations at the workplace. The workplace is designated as a place where work should be done and relations between workers are those between colleagues. More than that, irregular behavior, such as two people having sex in the workplace, can influence the social dynamics at the factory and might create feelings of discomfort and tension among other workers that are aware of the relations between the two.

In the case before us, the appellant and the respondent crossed the line of appropriate behavior in a human workplace by having their relations.

Did the respondent meet the heightened burden of proof required, showing that there was no abuse of the authority relations?

[9] In the case before us, none of the causes that are determined in **clauses 3(A)(1) - 3(A)(5) of the law** were proven, as such:

"(3) (A) (1)Extortion by threats, according to its definition in clause 428 of the penal code, when the act the person is demanded to do has sexual elements.

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- (2) Indecent assaults according to their definition in clauses 348 and 349 of the penal code.**
 - (3) Repeated proposals with sexual connotations directed toward a person who makes clear to the harasser that he/she is not interested in such proposals.**
 - (4) Repeated references to a person's sexuality when that person makes clear to the harasser that he/she is not interested in those references.**
 - (5) Humiliating or degrading comments to a person about his/her gender or sexuality including his/her sexual preferences."**

Likewise it was not proven that any damage was done to the appellant's job. The respondent convinced the lower court of the following: that the appellant initiated the relation between them; that he did not use any kind of pressure; that he did not threaten her; that he did not make any sexual or offensive comments to her and did not initiate any physical contact with her before the beginning of the intimate relationship. Likewise, the respondent convinced the lower court that he did not touch her without her consent during the intimate relations; that nothing related to work was promised to her as a result of the relations between them; that her status or her promotion at work was not affected by their relation; that there was no hostile atmosphere at the workplace before or during the duration of their relationship.

Sexual harassment is realized when the actions of the harasser against the harassed can hurt her dignity as a person, her right to work in a pleasant and comfortable place, and her right for equality in the workplace. In the case before us, we have a lack of explicit signs of sexual harassment. Despite this, my conclusion is that there was an abuse of the authority relationship, and my explanation for this follows.

The supervisor's obligations, regarding his status as manager and according to his work contract

[10] In order to understand the significance of the "abuse of authority" in the situation discussed, we have to distinguish between sexual harassment and the duties of the supervisor, with respect to the workers below him in the workplace.

A situation which is defined as "sexual harassment" is when relations with sexual connotations develop between a supervisor and a worker below him, and the relation is influenced by the status of the supervisor and the authority relation between them. Generally, sexual harassment of this kind is initiated by the supervisor.

However, even if the conduct of the supervisor does not become "sexual harassment" - meaning he does not abuse his status, his relationship with the worker below him is based on the full consent of the worker, his status does not influence the relationship - we still have to impose explicit limitations on the supervisor's behavior simply because of his senior status as supervisor in the organization.

The supervisor violates his loyalty obligations to his employer if he accepts a bribe of any kind, whether it is monetary or sexual. Any case in which a worker is offered money in order to influence his conduct at work is strictly prohibited. This is clear and true also with regard to any suggestion of intimate relations. When a worker initiates an intimate relationship with her supervisor or another worker more senior than herself at the company, it has a strong likelihood of being considered a sexual bribe. Meaning, the female worker might be motivated by her interest in establishing or promoting herself in the workplace. The supervisor's positive reaction to such suggestions might violate his obligation to his employer, to base his decisions only on relevant considerations. His relationship with the worker might unconsciously lead him to consider irrelevant considerations which emanate from the sexual relationship.

This and more, in a workplace there are behavioral norms expected from workers, including senior workers. Especially, there are behavioral norms expected from senior workers in the workplace in their relations with workers in lower status. These norms were violated by the respondent in the case before us, a violation which is markedly expressed by infringing the relevant firm's regulations, which explicitly determine rules related to such situations.

Regardless of the issue, whether the supervisor's behavior was a sexual harassment, or whether his relation with the worker constituted a sexual bribe, we expect a supervisor to reject any offer with sexual connotations coming from a worker in a lower position in the organization.

In the case before us, even if the appellant initiated the relations and did not protest against their continuation, the respondent is still expected to refuse her suggestions and stay away from going with her to the shelter in their common workplace. Rather, he is expected to place the appropriate limits on their relations in the workplace and tell her to go back to work. Alternatively, the respondent could decide that he wills developing an intimate relationship with the appellant and in that case to report his supervisors of his decision, as is required by the company's regulations. I will expand on this below.

[11] It seems important to clarify, that in the case before us it was not proven that we are dealing with the issue of a sexual bribe. It was not proven that the appellant asked to receive any benefits in return for the relationship. According to the determination of the facts, the relationship between the appellant and the respondent was based on the mutual desire to have a relationship which included having sexual relations in the workplace.

Nonetheless, the respondent did not act within the behavioral norms expected from a worker in his status when he failed to resist the temptation of the appellant, and failed to end the authority relation between him and the appellant in the workplace.

More than that, in the case before us the behavioral norms are delineated in the regulations of the company. Thus, the respondent violated the regulations of the company when he did not report his relationship with the appellant to his supervisors. The respondent knew he was more senior than the appellant in the organizational hierarchy and he knew that he was required to report his relationship with the appellant to management, as is required in the company's regulations. In spite of his acquaintance with these regulations, he deliberately chose to avoid reporting. As he testified: **"It is true that I had to report but not because I saw it as sexual harassment. I had to report this because according to the company's regulations it was not proper that I had romantic relations with someone that is hierarchically lower than me."** It should be noted that disciplinary measures, in which the general manager of the company was involved, were taken against the respondent.

Defining the limits of the presumption

[12] The issue before us is an exceptional case of sexual harassment. As stated, there it lacks some of the explicit signs of sexual harassment, such as: the use of pressure by the respondent, a hostile environment in the workplace, and others detailed above. In addition, the female worker is the one who initiated the intimate relations. For this reason, in these circumstances there is no cause to indict the respondent at the criminal level. Likewise, the appellant does not have any cause to submit a claim against the company. The company did not know about the relations between the respondent and the appellant and it was not proven that the company operated in a manner inconsistent with the law for the prevention of sexual harassment and the regulations that were legislated in accordance with that law. Rather, in the case before us, the company even set explicit behavioral regulations for situations in which a personal relationship develops between two workers in the company.

Examining the issue of sexual harassment with regards to two people who have authority relations in the workplace, we have to strictly distinguish between a case in which the male worker abuses the authority relations in order to convince the female worker to have relations with him, and a situation in which there is mutual consent to the relations and both sides sincerely want the relations to occur. In the latter situation, in order to absolutely overcome the presumption of the abuse of authority relations, the senior worker should make an effort to end the authority relation at the beginning of the relationship. Doing that will ensure a separation between the senior worker and the other worker's professional relations and their personal relations. Clearly, the action taken depends on the specific circumstances of each case.

For example: in a big company with multiple branches it is possible to transfer one of the workers to another branch; in a hospital it might be possible to transfer one of the workers to another unit; etc. There is the possibility that both of the workers will ask the employer to allow them to stay in their current positions and not transfer them to another job or division. In my opinion, the main issue is the effort to end the authority relations and not necessarily the actual dissolution thereof. This is in order to prevent any fear or doubt regarding the abuse of authority relations.

For example: in a small factory in which there is only one supervisor above few workers and there is no one to whom the supervisor can report his relationship with a worker below him, it would be very hard for the supervisor to overcome the presumption of the abuse of authority relations. Nonetheless, if he succeeds in meeting the heightened burden of proof imposed on him and convinces the court that he made an effort to

separate his professional relations from his personal relations with the female worker, that the personal relations were happening with the free will of both sides, and that the relations were not influenced by the supervisor's status, the supervisor in some cases might be able to overcome the presumption of the abuse of authority relations. There are cases in which the supervisor will appoint a "responsible person," as defined in the **prevention of sexual harassment regulations (employer obligations) 1998**, in the factory and report to this person about the relation between himself and the female worker.

An inquiry procedure into sexual harassment as a civil wrong could affect the harassed, her family, and the employer (that might be examined whether he is acting according to the law). In addition, it might damage the worker who is being charged with sexual harassment and have to defend himself in legal proceedings, which could *inter alia* affect his familial relationship.

The questions that arise in the case before us are: What would be the appropriate action to take with regard to a worker that did what he did? Whether to define his behavior as **"a severe disciplinary violation"**, defined as a civil wrong of sexual harassment? Is the respondent's mistake, of accepting the appellant's offers, is principally a mistake with regard to the company or is it principally with regard to the appellant? How to estimate the appropriate compensation, fitting a situation in which – according to the evidence – the appellant was not hurt during the "romance" but rather because of its conclusion? What would be considered a suitable compensation with regard to the respondent's actions?

In order to guarantee the equality between women and men in the workplace and as part of proper management in the factory, it is appropriate to determine explicit behavioral norms for employees as well as for supervisors. The behavioral rules of the employer in this case, which obligate the supervisors to report of intimate relations developing between them and workers in a lower position, exemplify this idea. Had the respondent acted as is expected of him, his supervisors might have been able to ensure that the relations between him and the appellant are not influenced by their respective status in the company. I am aware that this might invade the workers' privacy in the workplace. However, this demand, embodied in the regulations, is proportional and vital for preventing sexual harassment in the workplace and ensuring a pleasant and equal workplace for both genders.

[13] In the case before us, therefore, the following judicial question arises: is meeting the burden of proof enough to overcome the presumption of the abuse of authority relations? My answer is, that in addition the worker should prove that, in an earlier stage of the intimate relationship, he made an effort to put an end to the authority relations. This will ensure that the development of the relationship is not influenced by the authority relations and guarantee against any possibility of abuse.

In my opinion, it is not enough that the respondent proved that there was no abuse of the authority relations. Beyond this, he must have proven that he made an effort to end the authority relations at the beginning of the relationship, attempting, that is, to separate himself from the female worker in the workplace. Because of the difficulty in proving the nature of the relationship between workers in the workplace and because of the gravity of the wrong of sexual harassment, I suggest limiting the presumption of the abuse of authority relations. With this in mind, I would state that with the lack of a report as required by the company's regulations and lacking any other explicit action that would indicate the supervisor's attempt to end the authority relations, the presumption should be activated. Basing our decision on this presumption, the appellant's appeal may be accepted and the respondent's behavior defined as a sexual harassment.

In my opinion, the respondent's explanation for the absence of the report about his relationship with the appellant is unacceptable. As he said: "I did not want to hurt the plaintiff, the girl came and opened her heart and said that she is in love with me, I could not report that and hurt her. I do not have another explanation. That is my explanation. In retrospect I recognize that I was wrong." (Hearing transcript from day 8/8/05 line 25). Indeed he was wrong. Because of this mistake, the respondent had to defend himself in long legal proceedings against the appellant and he will have to make a payment according to the results of the appeal.

[14] The test I suggest accords the reality of workplaces in general. The respondent's testimony, where he said he recognizes that he was wrong because he did not act in accordance with the behavioral code determined in the company regulations, demonstrates the suggested test's accordance to reality. Had he acted properly, following the company's regulations, the company might have ended the authority relations between the respondent and the appellant and these proceedings would have never occurred.

In addition, the suggested test is fair and fits my conclusion, that the respondent did not abuse his authority relations and that his mistake is exclusively related to the fact that he did not make any effort to separate himself from the appellant.

Indeed, it is possible to claim that sexual harassment is a severe criminal offense and a severe civil wrong that leaves a stain on the one who committed the wrong or offense. My response, however, is that the difference is in the required burden of proof. In the **civil wrong** with which we are dealing, the appellant's burden of proof is lighter than the burden of proof at the criminal level. In order to meet the burden of proof and transfer it onto the respondent, as stated above, it is enough for the appellant to show that there were authority relations between her and the respondent and that they had an intimate relationship. In the case before us, the appellant did not show any basis for the existence of a criminal offense because she initiated the relationship, she did not bring any evidence or testimony showing that the respondent abused his status in their relationship, and it was not proven that the relationship influenced her status at work.

Therefore, before us is an explicit case in which a supervisor in the workplace mistakenly judged the situation and thus acted inappropriately, in a manner that did not fit his status. For this reason, the proper punishment for him is at the disciplinary level, by his employer, plus appropriate monetary compensation for sexual harassment.

It should be noted, that according to the facts of the case the appellant initiated the intimate relations between her and the respondent while the respondent ended the relations between them despite the appellant's wish they would continue. The appellant was offended because of the conclusion of the relations and not during them. In addition, for her, the main source of offence was the new relationship that the respondent had with another worker in the same company and which eventually developed into a family. In these circumstances, taking into consideration that the claim against the respondent was submitted only after the respondent began his new relationship with the other worker and the submission of the claim against the appellant in the company, it is difficult to evaluate the harm done to the appellant as a result of the relationship between her and the respondent. Nonetheless, in my opinion, the respondent should pay compensation to the appellant irrespective to any demand to prove damage. This is the law, inscribed by **the prevention of sexual harassment law** and aimed to intimidate and set appropriate behavioral norms in the workplace. The compensation set in **clause 6(B) of the law for the prevention of sexual harassment** is, at least partially, a panel compensation. Its purpose is similar to the purpose of **clause 10(A) (1) of the equal employment opportunity law**. Judge Elisheba Barak stated regarding this clause: **"the purposes of the compensation are twofold: compensation for real harm and penal compensation... there are those who view this clause as allowing for penal compensation rulings..."**

Even so, in conjunction with our obligation to set appropriate behavioral norms in the workplace, I regard severely the plaintiff's accusation of "rape" in the statement of claim, especially in view of the fact that the actual claim against the respondent was that he committed the wrong of sexual harassment by abusing his authority relations.

In conclusion, I will reiterate – the respondent could have totally overcome the presumption of the abuse of authority relations had he acted to end the authority relations, as is required by the company regulations, at the beginning of his relationship with the appellant. Avoiding acting in that way, the presumption of the abuse of the authority relations was not rejected and thus the appeal should be accepted.

[15] **A few comments regarding my colleague's, Judge Virt Livne, position** – in addition to what I wrote earlier I would like to add a few more comments with regard to my colleague Judge Virt Livne's position.

First, indeed, in the respondent's eyes the center of the romance between himself and the appellant were the sexual relations. This relationship, however, took place for eight months. In my opinion we should not define an intimate relation that lasts eight months as "occasional sex". We can not ignore the permissive atmosphere that exists in part of the Israeli society, which allows relationships that are based mainly on having sex.

Second, my colleague has based her opinion mainly on the criminal ruling, while the case before us is at the civil level the facts evidence show that we are dealing with a consensual relationship that the appellant initiated and that lasted for eight months.

Third, the tests I suggested in my opinion give appropriate proportion to both the human aspect of the workplace and the goals of sexual harassment law. My opinion provides protection from the abuse of authority relations as well as a restriction on the presumption of the abuse of authority relations and a norm which demands that the worker will take explicit active action in order to end the authority relations.

[16] **The final result** – taking into consideration all the circumstances of the case, including the rejection of the appellant's version of the facts, I agree with the result of my colleague, Judge Virt Livne. Accordingly, the respondent will pay the appellant 35,000 NIS as compensation. He will make this payment because of the mistake he made by not refusing sexual relations with the appellant and because he did not act, at the beginning of their relationship, to end the authority relations between them.

Slovenia

Employment Relationship Act

Article 6

(prohibition of discrimination and retaliation)

(1) Employers must ensure for job seekers (hereinafter: candidates) in gaining employment or workers during their employment relationship and in connection with the termination of employment contracts equal treatment irrespective of ethnicity, race or ethnic origin, national or social background, gender, skin colour, state of health, disability, faith or conviction, age, sexual orientation, family status, membership of unions, financial standing or other personal circumstance in accordance with this Act, the regulations governing fulfilment of the principle of equal treatment and the regulations governing equal opportunities for women and men.

(2) Employers must ensure equal treatment in respect of personal circumstances referred to in the preceding paragraph for candidates and workers especially in gaining employment, promotion, training, education, retraining, pay and other receipts from the employment relationship, working hours and cancellation of employment contracts.

(3) Direct and indirect discrimination based on any personal circumstance referred to in the first paragraph of this article are prohibited. Direct discrimination exists where owing to a certain personal circumstance a person has been, is or could be treated less favourably than another person in identical or similar situations. Indirect discrimination owing to a personal circumstance exists where owing to an apparently neutral regulation, criterion or practice a person with a certain personal circumstance has been, is or could be placed in a less favourable position than another person in identical or similar situations and conditions, unless such regulation, criterion or practice are justified by a legitimate objective and if the means for achieving that objective are appropriate and necessary. Any instructions for discrimination against a person on the basis of any personal circumstance at all are also direct or indirect discrimination.

(4) Less favourable treatment of workers in connection with pregnancy or parental leave is also deemed to be discrimination.

(5) Differing treatment based on any personal circumstance referred to in the first paragraph of this article shall not constitute discrimination if, owing to the nature of the work or circumstances in which the work is performed, a certain personal circumstance might represent a significant and decisive condition in respect of the work and such a requirement is in proportion to and justified by the legitimate objective.

(6) If in the event of a dispute a candidate or worker cites facts giving grounds for the suspicion that the prohibition of discrimination has been violated, the employer must demonstrate that in the case in question the principle of equal treatment and the prohibition of discrimination have not been violated.

(7) In the event of a violation of the prohibition of discrimination, the employer shall be liable to provide compensation to the candidate or worker under the general rules of civil law.

(8) Discriminated persons and persons who help the victims of discrimination may not be exposed to unfavourable consequences owing to actions aimed at fulfilling the prohibition of discrimination.

Article 6 (a)

(prohibition on sexual and other harassment and bullying at the workplace)

(1) Sexual and other harassment is prohibited. Sexual harassment is any form of undesired verbal, non-verbal or physical action or behaviour of a sexual nature with the effect or intent of adversely affecting the dignity of a person, especially where this involves the creation of an intimidating, hateful, degrading, shaming or insulting environment. Harassment is any undesired behaviour associated with any personal circumstance with the effect or intent of adversely affecting the dignity of a person or of creating an intimidating, hateful, degrading, shaming or insulting environment.

(2) Sexual and other harassment referred to in the preceding paragraph shall be deemed to be discrimination pursuant to the provisions of this Act.

(3) Rejection of action and behaviour referred to in the first paragraph of this article on the part of an affected candidate or worker may not serve as grounds for discrimination in employment and work.

(4) Bullying at the workplace is prohibited. Bullying at the workplace is any repetitive or systematic, reprehensible or clearly negative and insulting action or behaviour aimed at individual workers in the workplace or in connection with work.

d) Obligation to Protect the Worker's Personality

Article 44

(General)

The employer must protect and respect the worker's personality and take into account and safeguard the worker's privacy.

Article 45

(Protecting the Worker's Dignity at Work)

(1) The employer shall be bound to provide such a working environment in which none of the workers is subjected to sexual and other harassment or bullying on the part of the employer, a superior or co-workers. To this end the employer must take appropriate steps to protect workers from sexual and other harassment or from bullying in the workplace.

(2) If in the event of a dispute a worker cites facts giving grounds for the suspicion that the employer has acted counter to the preceding paragraph, the burden of proof shall be on the side of the employer.

(3) In the event of a failure to ensure protection from sexual and other harassment or bullying pursuant to the first paragraph of this article, the employer shall be liable to provide compensation to the worker pursuant to the general rules of civil law.

Article 89

(Unfounded Reasons for Termination)

The following shall be deemed as unfounded reasons for ordinary termination of an employment contract:

...

- race, ethnicity or ethnic origin, skin colour, sex, age, disability, marital status, family obligations, pregnancy, religious and political conviction, national or social origin;

...

Article 112

(Reasons on the Employer's Side)

The worker may within eight days after having previously reminded the employer of the fulfilment of obligations and informed the labour inspector about the violations in writing, extraordinarily terminate the employment contract, if:

...

- the employer offended him or behaved violently towards him or if the employer despite the worker's warnings failed to prevent such treatment by other workers,
- the employer failed to assure the worker equal treatment in accordance with Article 6 of this Act,
- the employer failed to assure the protection against sexual and other harassment or bullying at the workplace in accordance with Article 45 of this Act.

In the case of termination due to the actions referred to in the previous paragraph, the worker shall be entitled to the severance pay, stipulated for the case of ordinary termination of the employment contract for business reasons, and to the compensation amounting to no less than the level of the lost remuneration during the notice period .