



Sexual Harassment: Here, There, and Everywhere Part 1: English-Speaking Countries

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In my July 2004 column, I used the (then) anticipated Supreme Court ruling in *Pennsylvania State Police v. Suders* (2004) as an occasion for summarizing sexual harassment (SH) case law up to that time. I then covered the actual ruling in *Suders* in the October 2004 issue (concluding the perspective on constructive discharge is ambiguous) and a prior Supreme Court ruling in *Oncale v. Sundowner* (1998) in the January 2005 issue (citing loopholes relating to same-sex harassment). So why more on SH? Last Spring, **Laura Koppes**, our (then) incoming editor, requested articles on international topics. I offered to cover SH elsewhere on the planet. To date, I've gathered about 1,000 pages of material. I was going to write my piece for the October 2004 issue, but the hurricanes got in the way (see Hays-Thomas & Gutman in the January 2005 issue). Indeed, as I write this, 30% of my house is still uninhabitable. On the positive side, I've had more time to ponder international issues and find a sensible approach to delivering on my promise to my editor. I view this column as a starting point. I hope that readers with expertise on international issues will be motivated to jump in.

The one thing the extra time provided me is too much material to cover in one article. There are interesting developments in every English-speaking country, the European Union (EU), and the rest of the world. The English-speaking countries follow most of our precedents. That includes the United Kingdom (UK) and Ireland, both of which are also EU members. The EU Council issued a directive in 2002 forcing its member states (now numbering 25) to develop SH laws by October 5, 2005. The UK and Ireland are well prepared for this development, but other EU states are in varying stages of preparation, with some trying to incorporate SH laws into existing statutes (e.g., France, Germany, Italy, and Sweden) and others starting basically from scratch (e.g., Bulgaria, the Czech Republic, and Poland). As for the rest of the world, some countries have written western-like laws (e.g., South Africa) and others are trying to follow suit (e.g., Malaysia). An interesting development is occurring in foreign-based U.S. companies where native employees are using our courts to sue those companies. Such countries (e.g., Mexico and India) have weak SH laws, but will likely consider stronger laws as a

result of these developments. Finally, we hold foreign companies doing business in the US to our standards, and this is also raising awareness in other countries. For example, the impact of the well-publicized SH claims made against Japan’s Mitsubishi Motors in the mid to late 1990s has raised awareness of SH issues there as well as here.

In short, to do justice to this topic (excuse the pun), I will need two installments (or parts). Part I (below) covers English-speaking countries. I will begin with a brief summary of U.S. case law on SH, followed by a summary of case law in the UK. I will then selectively sample from case law, statutory law, and/or regulatory law in Canada, Australia, New Zealand, and Ireland. I will save for Part II the recent developments in the EU and the rest of the world, including the fate of U.S. companies doing business there and foreign companies doing business here.

Overview Of U.S. Case Law

The major law covering SH in the US is Title VII of the Civil Rights Act of 1964, as amended. SH is not explicitly outlawed in Title VII. Rather, its coverage is based on 30 or so years of Title VII case law combined with policy guidance by the Equal Employment Opportunity Commission (EEOC). Most proscriptions for the lower courts (and employers) come from a combination of six major Supreme Court rulings and EEOC policy guidance associated with those rulings. Because I discussed these issues in three prior columns, the presentation below is abbreviated.

There are two types of SH (see Table 1). The quid pro quo (QPQ) violation is the easier one to interpret. It connects SH to a tangible employment consequence, meaning virtually any term, condition, or privilege of employment (e.g., termination or failure to promote for failure to grant sexual favors). Every court that has seen QPQ since the late 1970s, including the Supreme Court, has found employers strictly liable (i.e., with no affirmative defense) for this violation. Therefore, the Supreme Court has focused more so on hostile sexual harassment (HSH), defined as severe or pervasive unwelcome sex-based abuse, but with no associated tangible employment consequence. Of course, victims of severe HSH have been known to quit their jobs because they cannot take the abuse any longer, a scenario termed “constructive discharge.”

Table 1
Quid Pro Quo Versus Hostile Environment Harassment

Quid Pro Quo	Sexual favors are demanded under the threat of negative tangible employment consequence (e.g., demotion or discharge).
Hostile Environment	Sexual or gender-stereotypical abuse that interferes with ability to work. Tangible employment consequences are not necessary.

The six major Supreme Court SH rulings are depicted in Table 2. HSH was defined in *Meritor*, but this ruling failed to provide a clear prescription for employer liability, especially for HSH by supervisors. *Forklift* clarified that victims of HSH need not suffer concrete psychological harm to satisfy the definition from *Meritor*. *Forklift* also endorsed the reasonable person (rather than reasonable victim) perspective for judges and jurors to assess HSH (as did subsequent rulings). *Oncale* and *Suders* featured same-sex SH and constructive discharge, respectively. In between, *Ellerth* and *Faragher* cleared up the confusion from *Meritor* on employer liability, proclaiming that employers are vicariously liable for HSH by supervisors, but with an affirmative defense (proof that “reasonable care” was taken to prevent and quickly correct HSH violations that victims “unreasonably” failed to take advantage of). At the same time, the Supreme Court endorsed prior lower court rulings that HSH by coworkers requires proof of reckless disregard by the employer (that the employer knew or should have known and did not act). As we will witness below, several of our English-speaking counterparts have gone further in this domain, holding employers with weak preventative policies liable, even in cases involving coworker HSH.

Table 2
Major Supreme Court Rulings

<i>Meritor v. Vinson</i> 1986 477 US 57	Defines HSH as severe or pervasive unwelcome sex-based behavior, but the ruling is vague on employer liability.
<i>Harris v. Forklift</i> 1993 510 US 17	HSH does not require concrete psychological harm. Reasonable person view endorsed here and in later rulings.
<i>Oracle v. Sundowner</i> 1998 523 US 75	Outlaws same-sex harassment, but leaves room for same-sex abuse that is defensible on grounds that it is not related to sex.
<i>Burlington v. Ellerth</i> 1998 524 U.S. 742	Vicarious liability for HSH by supervisors in private entities. Affirmative defense for employers taking reasonable care to prevent and correct HSH.
<i>Faragher v. Boca Raton</i> 1998 524 U.S. 775	Vicarious liability for SHS by supervisors in public entities. Affirmative defense for employers taking reasonable care to prevent and correct HSH.
<i>Penn State Police v. Suders</i> 2004 No. 03-95 (June 14)	Constructive discharge is a tangible employment action if it follows from an official company act.

A major feature of our system is that key principles from case law are only occasionally written into statutes, usually after a major amendment by Congress (see for example the Pregnancy Discrimination Act of 1978 and language in the Civil Rights Act of 1991 on adverse impact). As a result, there is no Title VII statutory language on SH. The UK follows similar traditions. However, many other countries have incorporated key principles from U.S. and UK case law and regulatory law (on SH and other EEO issues) directly into their statutes. This is not a deficiency in our system (or in the UK). The role of interpreting major court rulings falls to the EEOC (and other federal agencies). In general, in our system, complaints are made to the EEOC, which then investigates, mediates, and attempts to conciliate. Cases then proceed to a district court (a trial court) and may be appealed to a regional circuit court and the Supreme Court. Some version of this general arrangement is common among English-speaking countries, and other countries are attempting to develop similar traditions.

Overview of UK Case Law¹ (England, Northern Ireland, Scotland & Wales)

The UK has traditions similar to ours. Their major statute relating to SH is the Sexual Discrimination Act of 1975 (SDA-75), and there is an Equal Opportunity Commission (EOC) that parallels the EEOC. Like Title VII, there is no explicit language on SH, but there is a general provision that employers must take “reasonably practicable steps” to prevent any form of sex discrimination. There are regional variations within the UK (just as there is among our states). The trial court is called the Employment Tribunal (ET), the first major appeals court is the Employment Appeals Tribunal (EAT), and there are appeals courts beyond the EAT. Because of its connection to the EU, the ultimate appeals court is the Court of Justice of the European Communities.

The first known UK SH case is *Strathclyde Regional Council v. Porcelli* (1986 SC 137), decided the same year as the U.S. Supreme Court decided *Meritor*. Porcelli, a female lab technician, was abused by two male coworkers who wanted her to resign. Their actions included a combination of lewd comments and acts (e.g., looking up her skirt when she climbed the stairs). The defendants argued it was personal, and they would treat a similarly situated male in likewise fashion. Surprisingly, the ET accepted this argument and ruled against Porcelli. However, the ET was overturned by the EAT and the Scottish Court of Session. The Court of Session ruled that the specific actions by the defendants were

¹ My thanks to Dr. James Fleming (my brother-in-law), Professor of Law at Fordham University, for sending me full-text UK case law reports via Westlaw International. Summaries for the cases cited in this section are available on www.eoc-law.org.uk/ (and also, by simply inserting the name of the case or its formal citation in a Google search). Free full text summaries for the recent UK cases are also available on <http://www.ucc.ie/law/irlil/index.php> in the “Search BAILII” option.

“very different in material respect from that which would have been inflicted on a male colleague, regardless of the equality of the overall unpleasantness.”

The definition of HSH was further addressed in several subsequent EAT cases. For example, in *Bracebridge Engineering Ltd. v. Darby* (1989, IRLR 3, EAT), Darby suffered a single sexual assault by a coworker and a supervisor. Darby complained, the coworker and supervisor denied the incident, and the company took no action. The EAT found for Darby, ruling that a single incident of severe abuse constitutes HSH. In *Reed & Bull Information Systems v. Stedman* (1999, IRLR 299 EAT), Stedman resigned from her position of market manager because of a steady diet of provocative remarks and suggestive behaviors. The EAT found for Stedman even though she never complained. The ruling was that other coworkers were aware of the abuse Stedman suffered; therefore, management should have also known and taken corrective action. The EAT also endorsed the reasonable person perspective in this case. Then, in *Driskell v. Peninsula Business Services & Others* (2000 IRLR, 151, EAT), the EAT ruled that a series of unwelcome sex-based banter, taken as a whole, amounts to pervasive abuse sufficient to support an HSH claim.

There are two UK cases worth noting because of their connection to EU policies. In *Balgobin and Francis v. London Borough of Tower Hamlets* (1987, IRLR 401, EAT), the EAT endorsed a recommendation from the (then) emerging European Commission’s Code of Practice that even if a complaint is not upheld, employers should transfer or reschedule the work of one of the involved parties. In *Wadman v. Carpenter Farrer Partnership* (1993, IRLR 374, EAT), with facts similar to *Driskell*, the EAT endorsed the actual definition of sexual harassment (at that time) in the European Commission’s Code of Practice. As we will witness in the next installment (Part 2), *Balgobin* and *Wadman* are important transition cases that will likely connect UK case law with emerging case law for the remaining EU states.

There are several key cases on employer liability (including *Balgobin*). For example, in *Institu Cleaning Co Ltd. v. Head* (1994, IRLR4, EAT), a manager was guilty of a single act of HSH when he greeted Head with the remark “Hiya big tits.” Head complained and was advised to use the company’s grievance procedure. Head did not comply because she felt uncomfortable with the procedure. The EAT ruled the company should adopt a separate procedure to deal with SH complaints. In *Vent-Axia v. Wright* (1999, EAT), a department head accused of harassing four women was not permitted to learn the names of his accusers due to confidentiality issues. The EAT ruled the alleged harasser must demonstrate that this information is necessary in the context of his specific case. In *Caniffe v. East Riding of Yorkshire Council* (2000, IRLR 555, EAT), Caniffe was sexually assaulted by a coworker and the ET ruled the employer had a well-advertised policy that the victim failed to use. However, the EAT overturned the ET, stating the employer’s policy contained no “reasonably practicable” steps to prevent SH

from occurring. In other words, in a case that would require a plaintiff to prove reckless disregard by the employer under U.S. case law (that he knew or should have known about the abuse), the unwitting employer in the UK was liable for weak policies even when it did not know, or had no reason to know, that HSH had occurred.

Other interesting cases on employer liability include *Home Office v. Coyne* (2000, IRLR 838, Court of Appeal) and Case No. 2800061/100 (2000, ET). In *Coyne*, the Court of Appeal found for the employer even though an investigation into an allegation by a female victim took 2 years to complete. The Court ruled there was no basis for sex discrimination because the process would likely have been identical for a male victim. In comparison, in Case No. 2800061/100, an employer refused to investigate a same-sex harassment complaint by a male barman against a male bar steward because the complaint was not put in writing. Here, the ET ruled against the employer because it was deemed unlikely that a written complaint would be required in analogous circumstances involving a male harasser and a female victim.

The ruling in Case No. 2800061/100 notwithstanding, UK courts, like our courts, are still grappling with same-sex harassment. As in our case law (see *Oncale*), there are no protections related to sexual orientation. For example, in *Smith v. Gardener Merchant Ltd* (1998 IRLR 510, CA), the Court of Appeal ruled that sexual orientation is not an aspect of sex. Smith's claim was therefore denied on grounds that a similarly situated female would likely be similarly treated. In addition, in *Pearce v. The Governing Body of Mayfield Secondary School* (2000, IRLR 548, EAT), the EAT ruled against a teacher whose students fed her a steady diet of insults, calling her names like "dyke" and "lesbian" on grounds that a male homosexual would likely be similarly treated. On the other hand, plaintiffs do succeed when same-sex harassment has been proven to be sex or gender-based in both female (see *Johnson v. Gateway Food Markets Ltd*, 1900, IT) and male (see *Gates v. Security Express Guards*, 1993, IT) same-sex scenarios.

In summary, UK case law defines HSH much like we do and takes a similar approach to same-sex harassment as in *Oncale*. However, the provision in SDA-75 to take "reasonably practicable steps" to prevent sex discrimination makes it easier to implicate employers when compared to the provisions outlined in *Ellerth* and *Faragher*. As we will witness below, this feature is apparent in other English-speaking countries, particularly Ireland. Another point to note is that there are no apparent ambiguities regarding how to interpret constructive discharge (as in *Suders*) in the UK and in other English-speaking countries. In general, our English-speaking counterparts view constructive discharge as indefensible, whereas the *Suders* ruling requires proof that the constructive discharge was preceded by an "official company act."

Other English Speaking Countries² **(Canada, Australia, New Zealand, and Ireland)**

Canada's case law on SH predates case law in UK, and Australia's case law followed on the heels of case law in the UK. There is sufficient case law in both Canada and Australia to cover an entire range of SH issues as discussed above for the UK. Statutory laws relating to SH in New Zealand and Ireland are more recent developments. However, SH cases are emerging in both countries, illustrating many of the key principles discussed above for the US and UK. For purposes of exposition, the following discussion samples, without exhausting, major case law in each country.

Canada³

Not surprisingly, Canada's treatment of SH (and other forms of workplace discrimination) is closest to ours, even as compared to the other English-speaking countries. Canada has a statute like Title VII (Human Rights Act of 1976–77), and a Human Rights Commission (HRC) like the EEOC. Canadian courts also follow U.S. case law and EEOC regulations very closely, and they use similar procedures from the point of complaint through the appeals process. To illustrate, in *Robichaud v. Canadian Treasury Board*, ([1987] 2 S.C.R. 84), one of two landmark Canadian Supreme Court cases discussed below, Robichaud complained that her supervisor harassed her on many occasions. Her claim was investigated and dismissed by the HRC but overturned on appeal by the Human Rights Tribunal. The Tribunal ruling was then upheld by the Federal Court of Appeal and the Canadian Supreme Court.

Robichaud parallels *Meritor*. In fact, the Canadian Supreme Court used *Meritor* as a blueprint for *Robichaud*. The Court affirmed that Robichaud's supervisor engaged in repeated unwelcome HSH, and the question it resolved was whether employers are vicariously liable for supervisors. In *Meritor*, four justices (Marshall, Brennan, Blackman, & Stevens) favored vicarious liability for supervisors, but the ultimate meaning of this ruling remained ambiguous (until the *Ellerth* and *Faragher* rulings) because the other five justices believed there are circumstances in which employers are not liable. Of course, as clarified in *Ellerth* and *Faragher*, this translated into the affirmative defense employers may use to escape liability if they take "reasonable care" to prevent and quickly correct (and victims "unreasonably" fail to abide). In *Robichaud*, the Canadian Supreme Court followed the Marshall plurality opinion (quoting it verbatim) and ruled employers are vicariously

² The term "English-speaking" is used here for convenience. My apologies ahead of time to French-speaking Canadians and to citizens of the other countries who speak other languages.

³ Canadian case law is freely available from a variety of sources. For example, it is accessible on Findlaw.com by using the "Int'l" link on the face page and following the subsequent link for individual countries. The reader can also use <http://www.lexum.umontreal.ca/csc-ccc/en/index.html> to access the *Robichaud* and *Janzen* cases cited in this section.

liable for their supervisors. The Canadian Supreme Court also anticipated the solution later adopted in *Ellerth* and *Faragher*, stating:

[A]n employer who responds quickly and effectively to a complaint by instituting a scheme to remedy and prevent recurrence will not be liable to the same extent, if at all, as an employer who fails to adopt such steps.

The other landmark Canadian case is *Janzen v. Platy Enterprises Ltd.* ([1989] 1 S.C.R. 1252). *Robichaud* involved a governmental agency. The Canadian Supreme Court used *Janzen* as an occasion to harmonize case law in two different Canadian provinces (Ontario and Manitoba), thereby generalizing to all other provinces, and to generalize the principle of vicarious liability from governmental agencies to private employers. The *Janzen* ruling also cited a host of U.S. lower court rulings and quoted verbatim from the 1980 EEOC Guidelines on Sex Discrimination.

The case itself is interesting for two other reasons. First, the harasser was a coworker (a chef) who had no actual authority over the victim (a waitress), but who represented himself as having the power to influence managerial decisions. Second, the Canadian Supreme Court overturned the ruling by the Adjudication Board that the waitress, who was sexually assaulted, was not a victim of sexual discrimination because the attack was motivated by her “physical attractiveness,” not her sex. The adjudicator was “amazed” that employers can be held vicariously liable for HSH because the harasser was not “acting on behalf of the employer.” Similar (mistaken) rulings were made by U.S. district courts in early SH cases⁴ and overturned in subsequent circuit court rulings.

Australia⁵

The major statute relating to SH in Australia is the Sex Discrimination Act of 1984 (SDA-84). There is a Code of Practice for interpreting this statute written by the Human Rights and Equal Opportunity Commission (HREOC) (3rd Edition, 2004). There are also regional statutes and commissions (or EOCs). Complaints filed with the HREOC are investigated in much the same way as with the US’s EEOC and may proceed to the Federal Court of Australia or the Federal Magistrate Court. The appeals courts are regional Supreme Courts in Western Australia, South Australia, New South Wales, Victoria, Queensland, and the Northern Territory, and there is a national High Court.

As in the UK, Australia emphasizes employer policies to protect and quickly correct SH. For example, in Section 4.1 of the Code of Practice, the HREOC states:

⁴ See for example *Barnes v. Train* (D.D.C. 1974) 13 FEP Cases, *Corne v. Bausch & Lomb* (D.Ariz. 1975) 390 F.Supp 161, *Miller v. Bank of America* (N.D. Cal 1976) 418 F.Supp 233 and *Tompkins v. Public Service Electric & Gas* (D.N.J. 1976) 422 F.Supp 553.

⁵ Full text Australian laws, regulations, and court opinions relating to sexual harassment and all other forms of workplace discrimination are freely available on <http://www.hreoc.gov.au/index.html>.

Every employer, regardless of size, must take all reasonable steps to prevent sexual harassment in the workplace. This means that employers must actively implement precautionary measures to minimise the risk of sexual harassment occurring and to respond appropriately when harassment does occur.

The HREOC also states that employers who do not take “all reasonable” preventative steps are vicariously liable for SH violations. The emphasis on employer policies is illustrated in two recent cases.

In *Shiels v. James and Lipman Pty Limited* ([2000] FMCA 2), the company had a written policy, but there was no training for employees. In addition, complainants were required to call the central office during business hours to lodge their complaints. Shiels, who worked in a regional office, was sexually harassed by a coworker. She did not lodge a complaint fearing her privacy would be compromised by calling during business hours when other employees were present. The Federal Magistrate Court found for Shiels, citing both the training and privacy issues.

In *Coyne v. P&O Ports* ([2000] VCAT 657), a male coworker (Buttigieg) at a food establishment exposed himself to a fellow coworker (Coyne) and clutched her vagina. Coyne complained and the employer investigated and recommended disciplinary action against Buttigieg. In the meantime, Coyne was harassed by other workers (because she lodged a complaint) and quit. The Victorian Civil and Administrative Tribunal deemed Coyne’s resignation a constructive discharge and found the employer vicariously liable for coworker harassment because it had not established “policies or procedures or had taken any appropriate steps that amounted to reasonable precautions such as to prevent the occurrence of the sexual harassment.” Basically, the employer’s policy consisted of only written materials, and these materials were distributed mainly to supervisors. The Tribunal offered the following advice to employers to avoid vicarious liability:

The preventive measures to be taken would ordinarily include the implementation of adequate educational programmes on sexual harassment issues and monitoring of the workplace to ensure compliance with its sexual harassment policies... Educational programmes might include the dissemination of literature and the provision of seminars. There might be re-education programmes to ensure that employees received disseminated materials and understood sexual harassment policies.

The employer’s weak policy was costly. Coyne was awarded compensatory damages of \$35,000 (Australian) for symptoms of posttraumatic stress disorder (diagnosed by a “registered psychologist”), including anxiety, depression, insomnia, and the need for psychiatric medication. She also received \$15,000 “in aggravated damages” (related to her treatment by other coworkers after she complained), and equitable relief for loss of earnings. Her total award was \$54,356 (and 3 cents).

New Zealand⁶

New Zealand still has old UK common laws on its books, and its courts closely track case law from the UK, Canada, and Australia. There are two recent statutes, both of which explicitly address SH: the Human Rights Act of 1993 (HRA-93) and the Employment Relations Act of 2000 (ERA-2000). However, there are key differences between them. In HRA-93, a complaint is made to the Human Rights Commission, and potential remedies include injunction and damages for pecuniary loss and humiliation. In ERA-2000, a complaint is first made to the employer and then to the Employment Relations Authority, and the potential remedies are reinstatement and lost wages. Either statute may be used to claim SH, but not both. To further complicate matters, SH claims may also use prior common law statutes and principles. Indeed, two of the more interesting cases I found were common law appeals from the Employment Court to the Court of Appeal of New Zealand.

In Case 1, (*Smith v. The Christchurch Press Company Limited* [2000]), Smith complained he was wrongly discharged because his mistreatment of a female coworker occurred off premises and during nonwork hours. The Court of Appeal ruled that “but for” the employment connection, there would have been no contact. Therefore, Smith’s termination was justifiable. In the second case, the Court of Appeal upheld an award to Ms. N for \$40,000 in general damages and \$9,729 in lost wages (New Zealand dollars). Ms. N was the wife of a soldier who worked on base. The judgment against the army (in the name of the Attorney General) was made because the army did not follow its own harassment policy after Ms. N complained about harassment by a staff sergeant.

The court structure is similar to the other English-speaking countries, but the names are tricky. The highest court is the Judicial Committee of the Privy Council, (also known as Her Majesty the Queen in Council) and the lower courts include (but are not limited to) the Court of Appeal, the High Court, and district courts (also termed Employment Tribunals). I found two interesting cases under HRA-93. In *A v. Regency Duty Free Stores Ltd*, (1999), the harasser made repeated “bawdy and suggestive comments” to Ms. A. Ms. A complained, but the employer did not investigate the complaint and, instead, wrote her a letter complaining about her performance. The Employment Tribunal ruled that the letter was an attempt to intimidate Ms. A and discourage legal action and awarded her \$15,000. In *Read v. Mitchell & Another* ([2000] 1NZLR 470), the Employment Tribunal awarded \$50,000 in damages to Ms.

⁶ Full text case reports for New Zealand are freely available on <http://www.brookers.co.nz/legal/judgments/>. For example, the *Smith* and *Ms. N* cases cited in this section are among 13 cases listed by typing sexual harassment into the search link. *Employment Tribunal* rulings (such as the *Regency Duty Free* and *Mitchell and Another* cases cited in this section) are not easily obtained (without fee). However these cases are summarized in various sites, my two favorite sites being <http://www.hrc.co.nz/> and the law firm of Bell Gully at http://www.bellgully.com/resources/resource_00347.asp.

Read after a coworker fed her a steady diet of offensive jokes and sex-based stories. The coworker also repeatedly massaged Ms. Read's shoulders, touched her "bottom," and simulated sexual intercourse.

*Ireland*⁷

As in New Zealand, Ireland has a recent statute (the Employment Equity Act of 1998, or EEA-98) as well as common law traditions to combat SH (and other EEO violations). For example, in a non-EEA-98 Irish common law case with facts similar to New Zealand's *Smith v. The Christchurch Press Company Limited* (*Cassidy v. Shannon Castle Banquets*, [1999] IEHC 245), Cassidy was accused of sexually harassing a female coworker off premises and after hours and was terminated. The High Court of Ireland upheld the termination, but otherwise, had little to say on issues directly related to SH.

EEA-98 covers many classifications (i.e., race, sex, religion, age, disability, etc.). Within this broad coverage, Section 15(1) of the Act makes employers vicariously liable for all employees, Section 15(3) has an affirmative defense for taking "reasonably practicable" steps to prevent violations, and Section 23(1) outlines specific duties for employers in relation to SH. Interestingly, as written in Section 23(5) of the Act, the burden in SH claims is more so on the employer to prove "reasonable practicability" than on the plaintiff to prove "breach of duty." This is consistent with a parallel EU directive. Furthermore, as written, the "reasonable practicability" burden is heavier than the burden of "reasonable care", which is the standard for the affirmative defense to HSH in *Ellerth* and *Faragher*. Indeed, as written, the "reasonable practicability standard" reads like a midpoint between the standard of ordinary negligence used in common law cases around the world and the standard of strict liability used in QPQ cases in the US.

The complaint process and court structure parallels other English-speaking countries. The employee first appeals to the employer. The next step is a formal complaint with the Equality Authority for investigation, mediation, and possible conciliation, and then the Equality Tribunal, which has the power to mediate and try cases. Cases may then proceed the Labour Court, the High Court, and the European Court of Justice. SH cases in Ireland have mushroomed since the statute was enacted. The following discussion samples some of the more interesting rulings.

To begin with, in harmony with EU directives, EEA-98 features sexual orientation as a protected classification. Consistent with this proscription, an Equality Authority officer ruled in favor of Gabriele Piazza, a male restaurant employee who was the subject of degrading e-mails by a manager relating to his sexual orientation (*Piazza v. The Clarian Hotel* [2003] Decision

⁷ Full text case reports for Ireland can be found on <http://www.ucc.ie/law/irlii/index.php> in the Search BAILII option. Another good site is <http://www.ucc.ie/law/irishlaw/cases/>. All cases cited in this section are from these two sites.

E2004-033). Piazza was awarded €10,000 for “harassment, distress, and breach of rights.” Such rulings have implications for the UK, which as noted earlier, is also an EU member subject to judgments by the European Court of Justice. Recall from the earlier discussion the UK Court of Appeal’s ruling that sexual orientation is not an aspect of sex (*Smith v Gardener*, 1998) and the UK EAT ruling against a teacher (called names such as “dyke” and “lesbian”) that male homosexuals would likely be treated in kind (*Pearce v. Mayfield Secondary School*, 2000). Obviously, the UK will have to harmonize such decisions with EU directives.

Another interesting case is *Ms. O’N v. An Insurance Company* ([2004] Decision E2004-052), where an Equality Authority officer decided a case with features similar to *Cassidy v. Shannon Castle Banquets* (1999) but with a different outcome. Ms. O’N claimed she was sexually harassed by a coworker during a night out at a sports club. She argued there was an employment connection because membership in the club is endorsed (or “heavily sponsored”) by the employer. Recall that Cassidy was terminated for harassing a female coworker after hours, and his termination was upheld under common law principles. In the present case, the Equal Authority officer agreed that Ms. O’N was sexually harassed and that the employer had a poor SH policy. However, she ruled that the harassment did not occur in the context of employment.

Two other cases are worth noting, both on employer liability. In a case cited as Determination No. EED035 (2002), a female stud hand claimed she was harassed by an immediate supervisor and complained to the office manager. At a later time, she phoned in stating she would not be in to work due to illness. At the same time, she complained of further incidents of harassment by the supervisor. She was then terminated. The Labour Court ruled that the termination was retaliation for making a complaint and awarded the stud hand €15,000 for loss of wages and distress. In comparison, in *A Complainant v. A Hospital* ([20020 DEC-E2002-009], a woman complained of verbal and physical sexual abuse by a coworker. The complaint was fully investigated and the harasser was terminated. The Employment Authority officer examined the policy and found for the employer. The officer reasoned that the policy contained a good grievance procedure, a good disciplinary procedure, that all employees were trained on how to use the policy, and that the policy had been properly exercised.

In summary, although the four countries in this section draw heavily from traditions in the US and/or the UK, none of them are clones. For example, the Canadian Supreme Court had a better understanding of *Meritor* than the lower U.S. courts. Ireland proscribes discrimination based on sexual orientation even though the US and UK do not (although the UK will have to). It is easier to implicate employers for HSH outside of North America because of the “reasonably practicable” standard applied in the UK, Australia, New

Zealand, and Ireland. Ireland, in keeping with EU policies, places a heavier burden on employers than anywhere else, although the UK will have to follow this lead as well. Perhaps most interestingly, U.S. courts tend to read only U.S. case law, whereas their English-speaking counterparts are more flexible.

Conclusions and Preview (of Part II)

SH is a universal phenomenon. I could have cited at least 50 published surveys revealing that between 40% and 70% of women in various parts of the world believe they are or have been sexually harassed in the workplace. More importantly, in many of these places, women believe they have no recourse. This is changing, and this change is likely to continue as strong messages from the English-speaking countries are transmitted around the world, particularly over the Internet. Looking forward, my next installment (Part II) will, as noted earlier, feature the EU and non-English-speaking countries outside the EU. As we will witness, the EU has already taken a strong stance against SH, and its messages are beginning to be heard in other places (e.g., Ireland). In closing, I have two wishes. First, I wish that what is written above (and is forecasted to follow) illustrates the importance of going beyond our own boundaries. Second, I hope the next time you hear from me, my house is 100% habitable!

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