ASPECTS CONCERNING SEXUAL AND MORAL HARASSMENT IN THE WORKPLACE

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ABSTRACT: En partant du fait que chaque employé est traité de manière égale devant la loi et il est protégé contre la discrimination, nous ne pouvons pas oublier que parfois, au travail, il peut y avoir des actes de discrimination contre les employés. Dans notre communication, nous nous sommes proposé d’approcher des aspects concernant le harcèlement sexuel au lieu de travail par la perspective des lois européennes, ainsi que celle des lois roumaines.

Un second aspect est centré sur le harcèlement moral au lieu de travail dans le contexte où la législation roumaine, ainsi que des législations appliquées par d’autres Etats de l’Union Européenne, ne définissent pas cette notion, mais elles interdisent toute forme de discrimination, y compris le harcèlement.

KEYWORDS: discrimination, sexual harassment, moral harassment, equality between man and woman.

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The Universal Declaration of Human Rights, the conventions of the U.N. that refer to eliminating discrimination, the various acts of the International Labour Organization (ILO), the directives of the European Union all guarantee, as a principle and law, the right of all persons to be treated equally by the law and be protected against any form of discrimination.

Discrimination, terminologically and generally, means to differentiate between two or more objects or people, to differentiate in such a way as to restrict rights. Both community law and national law view discrimination as distinguishing, separating, differentiating, unequally treating rightful subjects which, being comparable, must be treated with the same measure.

It is very important to mention that there is also discrimination when two or more people are treated equally, although some have specific characteristics that differentiate them from the others and this is not taken under consideration (Muscalu, 2015, p. 1).

Discrimination must be countered as it unjustifiably generates social inequality and leads to the marginalization of people, causing them moral and material damage. It is wholly unfair to view the problem of equality in treatment as a simple motto or a purely

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theoretical principle as long as inequality in treatment between two or multiple subjects generates practical consequences with damages that require time, money and stress to repair, oftentimes without the possibility to fully compensate the losses.

Victims of discrimination can only be physical persons, as stipulated within European Council Directive 2000/43/CE and 2000/78/CE, but also within the Convention for the Protection of Human Rights and Fundamental Freedoms, documents that only specify physical persons, namely people and citizens.

In Romania, legislatively speaking, workplace non-discrimination is guaranteed within the Labor Code (art. 5 ¶ 2) and Government Ordinance no. 137/2000 concerning the prevention and sanctioning of all forms of discrimination, as well as Law no. 202/2002 centering on the equal chances and treatment for women and men.

Discrimination may be: direct, indirect and multiple.

Direct discrimination, as stated within the Romanian Labor Code, art. 5 ¶ 3, and Law no. 202/2002, art. 4 letter b, leads us to the conclusion that we face such a situation whenever someone is treated differently and being put at a disadvantage than another person in a similar situation, as a result of withdrawn criteria.

Direct discrimination actually means the exclusion of one or a group of persons from benefitting from a right because of an element of specificity that belongs to him, her or them, an exclusion which is sought purposefully (Discrimination is a category under which fall all acts and actions of exclusion, differentiation, restriction and preference founded on one or several of the criteria established in ¶ 2, in order to withhold, restrict or forbid the recognition, use or exercise of the rights guaranteed by labor legislation.

By direct discrimination, we understand the situation where a person is treated as lesser, based on criteria of sex, than another person in a comparable situation has been through or would be treated should they ever encounter it.)

As for the notion of comparable situation, the literature makes the (welcome) specification that a person “is not discriminated, necessarily, when compared to another, but depending on his / her specific characteristics. But, should they be discriminated, there also arises the situation of inequality towards the other rightful subjects in identical (or similar) situations. That is why, frequently, to verify a discriminatory act, comparisons towards other employees in identical situations to the discriminated person will be enforced.” (Ștefănescu, I. Tr., Tratat teoretic și practic de drept al muncii, 2014, p. 738).

The evaluation of a comparable situation will be undertaken considering several elements, such as the kind of labor, workplace conditions, professional qualification, etc. (Gîlcă C., Drept comunitar al muncii. Transpunerea în dreptul muncii român, 2012, p. 96).

Indirect discrimination occurs when, through regulation, criteria or practice apparently neutral, a person is disadvantaged, with the exception of when the regulation, criteria or practice is justified through a legitimate objective and the methods to enforce it are appropriate and necessary.

Indirect discrimination refers to a behavior, an attitude through which one or several persons are treated with prejudice, their rights taken away with no justification, and are applied an unjust or degrading treatment in comparison to persons in similar situations (Muscalu, 2015, p. 1).

Multiple discrimination, according to art. 2, ¶ 6 of Government Ordinance no. 137/2000 and art. 4 letter h of Law no. 202/2002, occurs when the act of discrimination is
based on two or more distinct criteria of discrimination that amplify each other cumulatively. The existence of more than one criterium (whether they be ethnical, racial, based on religion or language, etc.) represents a circumstance that will worsen the juridical punishment.

1. SEXUAL HARASSMENT AS A FORM OF DISCRIMINATION

The legislation of the European Union and the European Council states in art. 3 of Directive 2010/41 of July 7, 2010, that harassment is: any form of unwanted verbal, non-verbal, or physical, conduct of a sexual nature [which] occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment. (Muscalu, 2015, pp. 25-26).

Other definitions and regulations over sexual harassment at work can be found in the European Union Civil Service Law, as well as Directive 2006/54/CE of July 5, 2006 and the revised European Social Charter, which specifically underline the necessity of information and prevention measures on the part of employers’ and employees’ organizations to be promoted in order to discourage such behaviors.

The European Committee of Social Rights, while interpreting the European Social Charter, agrees that the victims of sexual harassment must have the possibility to use any legal means to repair the moral and material losses suffered.

In the Romanian legislation, doctrine and legal practice, workplace harassment means the existence of a repeated, unjustified behavior consisting of intimidation, physical or psychological violence exerted upon an employee through which the victim’s dignity is traumatized and subsequently subjected to a hostile, degrading or offensive environment due to ethnicity, race, sex, sexual orientation or other such criteria that appear in art. 5 of the Labor Code.

The most obvious such manifestations are those that consist of physical or verbal aggression, but there are also more subtle and perverse methods to influence the workplace environment in order to create social isolation or morally or professionally compromise the victim.

Harassment supposes that the author has to have a repetitive behavior that attempts to traumatize the victim and create a hostile, humiliating, offensive or degrading environment.

Antisocial manifestations of harassment are penalized in Romania through the aforementioned normative documents (the Labor Code, Government Ordinance 137/2000 and Law no. 202/2002), but provisions that forbid and penalize such acts may also be added within the Internal Regulation Policies or applicable collective agreements.

The rules within the internal regulation policy must be clear and adapted to the specifics of the activity undertaken by any employer, who has the obligation to identify the situations in which indirect or even direct forms of discrimination might occur (Nenu, C., Contractul individual de muncă, p. 92). It is desirable and useful that all employees are informed about the possible acts of discrimination, how they can be averted, but also the legal possibilities to sanction the offenders.

One form of harassment is workplace sexual harassment.

Evidently, harassment and sexual harassment are considered actions that go against the principle of gender equality and they are described as discriminatory on the basis of gender. Sexual harassment is an especially severe discriminatory action also because of
the fact that it operates at the level of access to employment, promotion, fair salary, appropriate work conditions, professional preparation programs, etc.

Sexual harassment is defined within Romanian labor legislation (art. 4, letter d of Law 202/2002) as the situation in which an undesirable physical, verbal or non-verbal conduct with sexual connotations is manifested, with the purpose or effect of violating the dignity of a person and to, purposefully, create an environment of intimidation, hostility, degradation, humiliation or offense.

Thus, manifestations consisting of physical contact, words with direct or suggestive meaning, gestures, the presentation of indecent and offensive visual materials, sexual invitations, requests for sexual favors are considered actions through which sexual harassment occurs, either horizontally (both parties – the author and the victim – are on the same hierarchical level) or vertically (the two parties are in a superior-subordinate relationship).

Sexual harassment is, unfortunately, increasingly present in workplace interactions, the overwhelming majority of victims being women, most of the times solicited for sexual favors, some risking growing ill with fright, anxiety or depression (Cornilă A., Hărțuirea sexuală, in Revista Română de Dreptul Muncii, issue 4/2002). In practice, in Romania, there are relatively scarce cases that solicit the penalization of sexual harassers on several grounds: difficulty proving the offence, the fear of retaliation – especially in the case of vertical sexual harassment -, avoiding embarrassing publicity and other reasons which are strictly personal in nature.

The proof of sexual harassment being a severe antisocial action also resides in its incrimination within the Penal Code as an offence punishable by one month to one year in prison or a fine (art. 223, ¶ 1 of the Penal Code states that sexual harassment consists of the repeated request for sexual favors within workplace or similar other interactions, should through this the victim be intimidated or humiliated).

The current Romanian Penal Code, for the first time, presents three offences with differing content (Mariana Narcisa Radu, Hărțuirea sexuală în reglementarea noului Cod penal român, p. 80):
- the offence of harassment stated within art. 208 of the Penal Code;
- the offence of sexual harassment stated within art. 223 of the Penal Code;
- the offence of abuse of power and authority for sexual purposes stated within art. 299 of the Penal Code.

The doctrine states that, following a comparative analysis between the regulation comprised in the previous Penal Code and the current iteration, the Romanian legislator has replaced the term harassment with repeated request for sexual favors, done through verbal, non-verbal, physical conduct, “through direct interaction,” in written form or any other communicational methods (telephone, e-mail, etc.) (Mariana Narcisa Radu, op. cit., pp. 80-81). The action of requesting sexual favors may be done through obscene gestures, sexual innuendo, bodily contact, sexual texts, etc. (Dungan, P., Medeanu, T., Pașca, V., Manual de drept penal, p. 231).

The offence of workplace harassment, by its content, needs to take place within a workplace relation or similar relation. That means that both the harasser and the victim need to be employed within the same workplace unit, no matter if public or private, and the workplace interactions may result either from the fulfillment of an employment
contract or any other type of work relation regulated by the law (Mariana Narcisa Radu, op. cit., p. 83).

The current Romanian Penal Code, as opposed to the previous one, describes as a necessary condition for penal action to be set in motion that there be a filed complaint beforehand, as the authorities cannot commence the investigation automatically any longer.

We completely agree with the opinion expressed in the doctrine that this provision from the current Penal Code "represents a regression legislatively because, in this way, many such acts will go unpunished." (Mariana Narcisa Radu, op. cit., p. 83).

The need for a complaint will significantly reduce the number of cases that will request action from the specialized authorities either because of the victim’s unease with a possible public scandal or because of the pressure exerted by the aggressor to intimidate them.

Formally and declaratively, the Romanian legislation has provisions that are compatible with European laws in regards towards harassment and sexual harassment. Thusly, Law no. 202/2002 establishes multiple obligations that are the employer’s responsibility, for example (Gîlcă C., Drept comunitar al muncii.Transpunerea în dreptul muncii român, 2012, pp. 103-104):
- to make note of the disciplinary penalties applicable in all cases of discrimination, including sexual harassment, as stated within the internal regulation policy;
- to inform the workers about the interdiction of sexual harassment;
- to immediately alert all competent authorities to investigate such acts.

We consider that the labor legislation in our country should also make the clear mention, as is the case with the Austrian Penal Code (Gîlcă C., op. cit., pp. 103-104), that sexual harassment is punishable even if there is no employment contract in progress. As an example, any such action done within the period of time meant to test the future employee before being hired can also be punished as it could constitute a situation that alters the practices and mechanisms of employment.

2. MORAL HARASSMENT IN THE WORKPLACE

The European Foundation for the Improvement of Work Conditions started an investigation – in year 2000 – resulting in the following statistics (Gîlcă C., Noi teorii în dreptul muncii, 2012, p. 198):
- three million workers in Europe, meaning 2%, have been subjected to physical aggression in their workplace;
- three million workers, meaning 2%, have been sexually harassed in their workplace;
- thirteen million workers, meaning 9%, were made to experience moral harassment in their workplace.

These numbers are conclusive in what concerns the severity of the method of discrimination used, both by the increased number of victims and the perverse means used to intimidate the employees.

The notion of moral harassment, although not specified legislatively in all European Union states (including Romania), cannot be ignored due to its consequences and neither should the absence of such regulations within European legislation.
In the Romanian specialized terminology, the term *moral harassment* is borrowed from French (*harcèlement moral*), but its most usual linguistic form is *mobbing* (L. Filip, L. Pavel, *Noțiunea de hărțuire morală la locul de muncă*, in Revista Română de Dreptul Muncii no. 4/2005; C. Bogaru, A. Jegan, *Evoluția noțiunii de mobbing în legislația și practica statelor europene și a spațiului comunitar*, in Revista Română de Dreptul Muncii no. 5/2013).

The term *mobbing* is borrowed from psychology, as Swedish psychologist Heinz Leymann was the first who gave the following definition to moral harassment: *moral harassment* (the mobbing) consists in a workplace conflict, which may occur between colleagues (horizontally, emphasis ours) and between superiors and subordinates (vertically, emphasis ours). The harassed person – the victim – is aggressively repeatedly for at least six months with the purpose of being excluded (Leymann H., *Mobbing, la persécution au travail*, Ed. Seuil, 1996, p. 79 (apud Gâlcă C., *op.cit.*, p. 199).

Heinz Leymann claims that workplace moral harassment is a long-term abusive conduct that does not include temporary conflict. Conflict is a disagreement, contradictory feelings, opposing opinions coming from both sides and settled through discussion, negotiation or mediation, when moral harassment (mobbing) consists of an abusive, irrational, repeated conduct directed towards one or several workers and may come from an individual or a group of individuals that, many times, also involves an abuse of power. Moral harassment is extremely harmful in that it significantly affects the victim – by creating stress, phobias, self-blame, inferiority complexes, depression, etc. – and the environment, the atmosphere in the workplace inevitably leading to a lowered professional output and, ultimately, to unemployment.

Psychologists and sociologists specializing in the workplace domain have underlined the negative consequences of moral harassment, legal action being imperative in preventing and punishing such acts.

The French literature (Hirigoyen M. F., *Le harcèlement morale, la violence perverse au quotidien*, p. 53) states that moral harassment may take as many forms as possible within the human imagination, starting from lighter acts – but still noxious to the victim – consisting of eliminating any responsibilities from the attributions of the victim (put differently, *professionally stranding* or leaving the employee, with certified professional capabilities purposefully neglected in a *dead end*) to others of a more acute perversity, as is the case with the employer who forces his secretary to wax the floor with a toothbrush or glue stamps 4 mm away from the edge of the envelope (Gâlcă C., *op.cit.*, p. 198).

In general, workplace moral harassment affects the professional life of the victim through systematic, repeated and long-term marginalization. Such attitudes stand in the way of natural and efficient communication between the harasser(s) and the victim, resulting in conflictual relationships that create a hostile, degrading, humiliating and / or offensive environment at work. Moral harassment can be horizontal or vertical and consists practically of words, gestures, actions, documents, all with the purpose of harming the personality, dignity or psychological or physical integrity of the victim (Leymann H., *op.cit.*, p. 79). The Romanian literature underlines that, schematically, moral harassment, if compiled and repeated in an abnormal order, has the following iterations: unfounded accusations (direct or suggested); isolation of the victim by lack of communication; the so-called “professional dead end”; insults, slander, threats or coercion; the refusal, deprecation or minimization of certain, positive professional results;
undertaking repeated and excessive inspections, unfounded accusations; excessive and abusive work attributions; offensive remarks aimed at sexual, political or religious leanings or towards ethnicity or body type (Gâlcă C., op.cit., p. 200; Muscalu L.M. op.cit., pp. 40-41).

European legislation has, along time, adopted several laws to protect workers from moral harassment, such as:

- Framework directive no, 89/391 of June 12, 1989, regarding the measures to improve security and health in the workplace, which states that the employer has the responsibility to prevent professional illnesses, of which one is moral harassment. Employers must prevent moral harassment, evaluate its risks and adopt the necessary measures to counter its negative effects. The National Consultative Commission on Human Rights from France, in a year 2000 report, identified four methods or “techniques” of moral harassment (C. Gâlcă, op.cit., pp. 200-201):

  1. *Individual harassment*. It can be horizontal or vertical and is exercised by a person who is psychologically paranoid, obsessive or narcissistic and whose repression is projected, ultimately, on a colleague or subordinate, who becomes a victim as a result of this form of discrimination;

  2. *Strategic harassment*. It is a very dangerous form of harassment specific to businesses. Its roots are in the consequences stemming from business fusions, management changes, the pressure exerted by stakeholders to reduce production costs, all of them aiming to reduce personnel by dismissing certain employees considered inappropriate for the new structures. Because legal dismissals are, usually, costly in time and money, an attempt is made for removing these employees through harassment, with sophisticated tactics put in practice by other employees (called cost-killers) specialized in human psychology;

  3. *Institutional harassment* occurs within work organization. Institutional harassment is defined by intentionally assigning a worker performance standards and goals that are impossible or extremely difficult to meet. Not accomplishing these performances gives the person responsible for the discrimination plan, as well as to the people who put it in practice, the “right” to place blame on the victim, who either caves under the pressure and quits or is fired due to poor work performance;

  4. *Transversal harassment* is done by a group of workers, a team, whose target is a member of the team who must be permanently accused in order to isolate and remove him or her.

- Resolution 2001/2339 of the European Parliament on workplace moral harassment requests that all member states fight against sexual and moral harassment in the workplace, recommending, at the same time, to oblige employers and social partners to adopt efficient prevention policies and identify the necessary procedures to solve workplace harassment issues;

- The European Union Civil Service Law defines moral harassment as “any abusive, long-term, repeated or systematic conduct, manifested through behavior, language, actions, gestures and documents that are intentional and produce harm upon the personality, dignity or physical or psychological integrity of a person.”

A ruling by the European Union Civil Service Tribunal on May 19, 2009 states that a conduct that fits the notion of moral harassment needs not be done with the intention to harm the dignity or physical or psychological integrity of a person. Moral harassment can
be done without the author’s wish to harm the victim, yet his or her actions, carried through intentionally, may lead to that effect (Muscalu, L. M., *op.cit.*, pp. 42-43).

The revised European Social Charter also defines moral harassment (art. 26, point 2) and guarantees the right to the protection of human dignity against harassment, with a perspective that includes hypotheses of moral harassment or deliberate intimidation.

Unfortunately, Romanian law does not define or expressly regulate against workplace moral harassment, settling only on forbidding all forms of discrimination, including harassment.

It would be completely false to try explaining this attitude as tied to the inexistence of acts that create the content of moral harassment. Sadly, the phenomenon of moral harassment is present, as much as in any other country where more developed regulations exist on the matter, in the daily workplace practice. It is unsurprising that some authors find it unusual for even social partners not to try to add within the collective and negotiated sources dealing with work relations a number of norms to address moral harassment in the workplace (Muscalu L.M., *op.cit.*, pp. 40-41).

We also consider it necessary for, firstly, the Labor Code to create a clear definition of moral harassment and, at the same time, incriminate it, obligating the employer to take measures in order to prevent it.

Moral and sexual harassment should be considered severe infringements and should determine the launch of disciplinary procedures with the possibility of applying even the most severe penalty, which is disciplinary dismissal.

We consider it justified to take the example of the French Labor Code, which states that any person morally harassing another is punishable disciplinarily. In order to ease the victim’s situation, we consider a provision to be made that the burden of proof must be placed on the defendant, while the plaintiff must only be responsible for presenting, in case of litigation, the state of things which include the elements of harassment.

**REFERENCES**


L. Filip, L. Pavel, *Noțiunea de hărțuire morală la locul de muncă*, în Revista Română de Dreptul Muncii nr. 4/2005


Muscalu L-M, *Discriminarea în relațiile de muncă*, Ed. Hamangiu, București, 2015;