

Discrimination versus dignity: Harassment related to Sex and Sexual Harassment Law in European Countries and in the EU

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POLSKIE TOWARZYSTWO
PRAWA ANTYDYSKRYMINACYJNEGO

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- International standards of protection
 - European legal context
 - National legal contexts
 - Harassment on the ground of sex and sexual harassment as legal concepts
 - Different approaches of perceiving (and combating) harassment and sexual harassment
 - Difficulties with understanding and applying legal instruments

International standards

CEDAW General Recommendation No. 19 on violence against women (1992)

- Equality in employment can be seriously impaired when women are subjected to **gender-specific violence**, such as sexual harassment in the workplace.
- Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.

International standards

European Committee of Social Rights Conclusions (Turkey, 2010) on Art. 26 of the European Social Charter (revised). Dignity at the workplace.

- It must be possible for employers to be held liable towards persons employed or not employed by them who have suffered sexual harassment from employees under their responsibility or, on premises under their responsibility, from persons not employed by them, such as independent contractors, self-employed workers, visitors, clients, etc.
- Victims of sexual harassment must have effective judicial remedies to seek reparation for pecuniary and non-pecuniary damage. These remedies must, in particular, allow for appropriate compensation of a sufficient amount to make good the victim's pecuniary and non-pecuniary damage and act as a deterrent to the employer.

International standards

International Labour Organisation guide

- Any physical, verbal or non-verbal conduct of a sexual nature and other conduct based on sex affecting the dignity of women and men, which is unwelcome, unreasonable and offensive to the recipient.
- Where a person's rejection of, or submission to, such conduct is used explicitly or implicitly as a basis for a decision which affects that person's job.
- Conduct that creates an intimidating, hostile or humiliating working environment for the recipient.

European standards

Council Resolution of 29 May 1990 on the protection of the dignity of women and men at work

- serious problem for many working women in the European Community and is an obstacle to the proper integration of women into the labour market
- such conduct is unwanted, unreasonable and offensive to the recipient
- a person's rejection of, or submission to, such conduct on the part of employers or workers (including superiors or colleagues) is used explicitly or implicitly as a basis for a decision which affects that person's access to vocational training, access to employment, continued employment, promotion, salary or any other employment decisions;
- such conduct creates an intimidating, hostile or humiliating work environment for the recipient.

European standards

Comm. Recom. of 27 November 1991 on the protection of the dignity of women and men at work

·Member States take action to promote awareness that conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work, including conduct of superiors and colleagues, is unacceptable if:

(a) such conduct is unwanted, unreasonable and offensive to the recipient;

(b) a person's rejection of, or submission to, such conduct on the part of employers or workers (including superiors or colleagues) is used explicitly or implicitly as a basis for a decision which affects that person's access to vocational training, access to employment, continued employment, promotion, salary or any other employment decisions; and/or

(c) such conduct creates an intimidating, hostile or humiliating work environment for the recipient;

European standards

Recast Directive 2006/54/EC (after 2002/73/EC Directive):

Preamble : Harassment and sexual harassment are contrary to the principle of equal treatment between men and women and constitute discrimination on grounds of sex for the purposes of this Directive. These forms of discrimination occur not only in the workplace, but also in the context of access to employment, vocational training and promotion. They should therefore be prohibited and should be subject to effective, proportionate and dissuasive penalties.

Art. 2.1 a: Discrimination includes harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection of or submission to such conduct.

European standards

Recast Directive 2006/54/EC (after 2002/73/EC Directive):

Art. 2.1 c: 'harassment': where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

Art.2.1.d 'sexual harassment': where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature 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;

European standards

Goods and Services Directive 2004/113/EC

Preamble: Discrimination based on sex, including harassment and sexual harassment, also takes place in areas outside of the labour market. Such discrimination can be equally damaging, acting as a **barrier** to the full and successful integration of men and women into economic and social life.

Harassment and sexual harassment definitions similar to the Recast Directive

European standards

Key elements of the concepts of harassment and sexual harassment

- double approach – systematic discrimination (exclusion from the labour market and systematic obstacle in participation in economic life) and discrimination of individuals
- no need to prove the intention
- examination of purpose or effect only (from the perspective of individual person/victim of discrimination)
- no need for a comparator
- no need for a 'reasonable person test
- sexual harassment forms: quid pro quo (abuse of power) and/or hostile environment

Diversity among perspectives

- Dignity (historically based, firmly rooted in the legal traditions, lack of antidiscriminatory legal instrumentarium if it is placed outside the equality context)
- Human rights
- Gender-based violence (usually criminal offence, risk of lack of adequate compensation)
- Health and safety (usually administrative penalties, lack of compensation for the victim)
- Discrimination

Discrimination versus dignity

- Conflict of approaches *versus* complementary approach?
- Charter of Fundamental Rights' dignity paradigm (*Preamble, Chapter I „Dignity”, Art. 31.1. Fair and just working conditions: Every worker has the right to working conditions which respect his or her health, safety and dignity*)
- Dignity issue as part of legal discourse on discrimination (*Polish Supreme Court ruling, I PK 69/05: „discrimination is inevitably associated with the violation of human dignity. Respect for the dignity is not only an imperative of legal nature but also has its moral dimension”*)

Different perspectives

- The EU law includes double perspective – dignity and discrimination.
- All perspectives are fine provided they bring justice, assure effective procedures of claiming rights and compensate harm
- However, antidiscrimination approach should be introduced, since both concepts are related to the ground protected by the EU law explicitly (harassment) or by placing it in the context of sex equality law (sexual harassment)

The antidiscrimination law provides also with unique legal instruments (burden of proof, no upper limits of compensation, sanctions)

Uncertainties around the concepts

- no relevant CJEU judgments so far (*Coleman case – disability harassment*), very small number of national case law on sexual harassment and even less with regard to harassment on the ground of sex
- questions around the issue of getting benefits as a result of submission to the sexual harassment (*Polish case and debate in Poland*). Does it justify the conduct? Is it always abuse of power (love affairs in the workplace)?
- „unwanted conduct” – what kind of objection needs to be expressed and how clear it should be for the perpetrator in order to describe his/her conduct as „unwanted”?
- what are the preventive measures that should be taken by employers (preamble of the Directive)? What are the limits of employer’s liability? Is an internal anti-harassment policy enough to avoid the responsibility? *ACCEPT case*

Uncertainties around the concepts

- how far the standard of individual perspective of the victim goes? Can conduct that creates „an intimidating, hostile, degrading, humiliating or offensive environment” be perceived and assessed through the general standards of „reasonableness”?
- can sexual harassment relate to the grounds other than sex (race, ethnicity, disability)? If yes, what is the actual ground of discrimination and what is the form of discrimination? Is it a multiple discrimination?
- moral harassment/bullying/mobbing v. harassment

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Thank you for your attention!