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**Dignity in Employment – the
Protection of a Fundamental Right**

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Abstract: The new Criminal Code brought a series of important changes also in respect to those offences that can be committed by employees. Both at the European and at the national level, the concept of dignity in employment suffered transformations. This change of perspective at the national level makes the object of this article. The regulation of sexual harassment in the work place was first introduced in the domestic legislation in 2001, undergoing, since then, a series of modifications which we shall analyze in depth. Sexual harassment in the work place is one of the most difficult problems to solve, at the European level because in the majority of situations there is a subordination relation between the two parties – the employer having the upper hand over the employee who is, in many cases, afraid of endangering his/her job by reporting the harassment offence. We think this article is an important step in the disclosure of the problem erased by the sexual harassment concept.

Keywords: sexual advances; performance; intimidation; hostile; dignity

1. European Regulations Concerning Harassment

At the European level, *Directive no. 2000/78/EC regarding the establishment of a general framework for equal treatment in employment and the occupation of the workforce on the criterion of religion or belief, disability, age or sexual orientation* (Published in JO L 303, 2 December 2000) defined **harassment** as being a form of discrimination when there is an unwanted conduct related to the sexual orientation, religion, beliefs, handicap or age, which has as aim or effect the violating the dignity of a person or the creation of an intimidating, hostile, degrading, humiliating or offensive environment (Popescu, 2013, p.215).

Subsequently, through the *Framework Directive no. 2006/54/EC on the implementation of the principle of equal opportunities of men and women in matters of employment and work conditions*, the notions were redefined, as follows:

- by *harassment* is understood that 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;
- by *sexual harassment* is understood that situation in which an unwanted conduct has a sexual nature and manifests physically, verbally or nonverbally, having as effect or aim the violating the dignity of a person and the creation of an intimidating, hostile, degrading, humiliating or offensive environment.

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In domestic law, the concept was first introduced in the Criminal Code in year 2001, the act being regulated through art. 203¹ which established that the *harassment of a person by threats or constraint, for the purpose of obtaining satisfaction of a sexual nature, by a person abusing the authority or influence conferred by the position held at the work place is punished with imprisonment between 3 months and 2 years or with a fine.*

2. Definitions and Scope

The same notion can be found defined in art. 4 letter c of Law no. 202/2002 regarding the equality of opportunities between women and men (Republished in the Official Gazette of Romania no. 326 of 5 June 2013. In this sense, broader, there is a definition of harassment also in Directive 2000/78/EC regarding the general framework for the equality of treatment in matters of occupation and employment), which states that by *sexual harassment* is understood any *unwanted conducts – verbal, nonverbal or physical – of a sexual nature which has as aim or effect the violating the dignity of a person or the creation of an intimidating, hostile, degrading, humiliating or offensive environment.*

Thus, we must note the fact that harassment represents, on the one hand, a form of discriminating the person and, on the other hand, a modality for violating a fundamental right of the person – the right to human dignity, respectively the right to dignity in employment.

Law no. 286/2009 regarding the Criminal Code (brought a series of material modifications in this matter, changing the perspective on certain crimes regulated in the old Criminal Code. (adopted through Law no. 15/1968, published in the Official Gazette of Romania no.79-79bis of 21 June 1968)

According to art. 223 of the new Criminal Code, sexual harassment represents the *repeated request of favors of a sexual nature within an employment or a similar relationship, if, through this act, the victim was intimidated or placed in a humiliating situation, and it is punished by imprisonment between 3 months and 1 year or with a fine.*

3. Solution Approach

Hereinafter we shall analyze, point by point, the changes occurred in the substance of this offence, both from the perspective of criminal law and from the point of view of labor law.

a. The crime of sexual harassment is found in chapter VIII, called *Crimes against sexual liberty and integrity*; previously, it was found in the chapter called Crimes regarding the sexual life. Through the changing of the name under which are reunited the crimes targeting the sexual life of the individual can be seen the fact that the lawmaker aimed to broaden the specter of protected social values, respectively: sexual freedom, the respect for the individual's sexual integrity, the respect for the person's dignity, the protection of the minor child's physical and psychological development.

b. Through the act of sexual harassment a violation is made against the dignity of the person in an employment or similar relationship. In all cases, the act *has no material object*; hence it will be more difficult to prove its existence. In certain situations, in reality, the crime of sexual harassment is joined in the constitutive content of other crimes, respectively *rape*, when the request of favors of a sexual nature is followed by sexual relations against the wish of the individual, or *striking or other violence*, when the act is performed through acts of threat or constraint, followed by striking or other acts of physical violence against the individual.

c. In the form in which it is regulated, the *active subject* is, usually, qualified, being part of the employment legal relation, respectively, both the employee and the employer.

In the specialty literature (Stefănescu, 2012, p. 810) it was considered that the employment legal relations have two forms:

- *the typical ones*, grounded on the individual employment contract, but also the employment (work) relations of public servants, military personnel, cooperative members;
- *the atypical ones*, respectively the employment relations of attorneys with wages within the profession.

The question raised is if the work performed outside employment legal relations can be seen as part of the constitutive content of this crime, respectively, the work on the basis of a volunteering contract, the work on the basis of a civil legal relation or the work within society relations. We consider the answer to be affirmative because the lawmaker did not aim, by incriminating this act, to sanction sexual harassment only within typical employment relations or as they are defined in labor law, but in all relations that presuppose an activity (a labor), regardless of the manner of legally regulating it (Ticlea, 2012, p. 941).

The gender or the sexual orientation of the perpetrator, as well as that of the victim, have no relevance with respect to noting this crime.

d. *The passive subject* can be any person in an employment or similar relationship with the active subject. Thus, the passive subject is, usually, either hierarchically subordinated, or dependent on the services of the active subject, but it is not excluded that he/she is on the same hierarchical level as the active subject or even hierarchically superior to him/her. The victim may be both a man and a woman. Also, the harassed person may have the same gender as the individual harassing him/her, the legal text making no distinction in this sense.

e. *The criminal participation* is possible in the form of instigation and complicity. Instigator or accomplice can be any person. Co-authorship is not possible because the obligation to restrain from any harassment act is an obligation with personal character (Popescu, 2008, p. 174).

f. Under the aspect of the *material element*, the crime is performed through an *action* of harassment of a person, by means of repeated requesting of favors of a sexual nature. Sexual harassment can be performed through several means:

- *verbal* – when the passive subject is exposed to comments with obscene, out-of-line character;
- *visual* – when the passive subject is shown different drawings, images with sexual allusions;
- *physical* – when advances of sexual nature are made to the passive subject.

In order to achieve the constitutive content of the crime, the following conditions must be fulfilled, cumulatively:

- there must be an action through which favors of a sexual nature to be requested; by *favors of a sexual nature* must be understood any acts of a sexual nature or connotation, especially simple physical contacts meant to fulfill certain fantasies of sexual character or to provoke or enhance physical desire;
- the action must have a repeated character; the legal text does not clarify the expression *repeatedly*, such as we consider that the act exists if the perpetrator requests at least twice, from the same person, favors of a sexual nature, regardless of the manner in which he/she acts each time;

- between the two persons there must be an employment or similar relationship;
- through the action the victim must be intimidated or placed in an embarrassing situation; in this case also, the legal text does not bring supplementary explanations regarding the terms *intimidated* or *embarrassing situation*. We believe that these terms must be interpreted according to DEX (Explanatory Dictionary of the Romanian language), as follows: to intimidate presupposes *to inspire fear, to scare, to puzzle, to confuse* and embarrassing means *which prevents, which bothers, with hinders, inopportune*. In other words, any situation with sexual connotation, through which a violation is brought to the dignity of the individual in the work place or related to employment, is punished, falling under the incidence of art. 223 of the Criminal Code. (Coeuret & Fortis, 2000, p. 347)

The immediate consequence is represented by the state of danger for the normal development of the social relations regarding the individual's inviolability and dignity.

The causal link between the action and the dangerous consequence must be proven, on a case by case scenario.

g. Under the aspect of guilt, the act of sexual harassment is performed only with *direct intent*.

h. Sexual harassment is a committing and intentional crime, being dependent on the *repeating of actions* that constitute the material element of the objective side. Hence, the crime cannot have a tentative, and the performing of the crime occurs when the socially dangerous consequence occurred (Filipaș, 2008, p. 296).

4. Conclusion

The criminal prosecution will start at the prior complaint of the injured party, by this ensuring the protection of the victim's interests, individual who does not wish to be exposed to publicity through the criminal trial. The magnitude of the punishment was changed; at present, the act is sanctioned with imprisonment between 3 months and 1 year or with a fine, thus diminishing the maximum punishment from 2 years to 1 year. We believe that, *as lex ferenda*, due to the importance of this act by means of which a violation is brought against a fundamental right – the right to dignity in employment – the criminal prosecution should start, in certain situation, *ex officio*, given the fact that between the perpetrator and the victim there is, in many cases, a hierarchical (or economic) subordination relation which, practically, prevents the victim from submitting a criminal complaint. Also, we consider that in the conditions of the present society the sexual harassment of a person should be incriminated in the same modalities and conditions as those already regulated by art. 223 of the Criminal Code, when the goal will be explicitly, *the obtaining of advantages of a sexual nature of a third party*.

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