

SEXUAL AND GENDER HARASSMENT IN THE WORKPLACE IN SPAIN

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Abstract

The Spanish Organic Law 3/2007 for the Effective Equality between Women and Men has introduced the concepts of sexual and gender harassment into the Spanish legal system, thus transposing EU directives on this subject into our domestic legal system. The first important consequence of this law is that these two actions are considered discriminatory, leading to the activation of anti-discriminatory legal and institutional mechanisms.

The question remains as to whether the legal sanction – including the preventive measures to be adopted by companies – and the remedial measures will suffice to achieve the desired aim, or whether there will be the need to reinforce these legal entities. The ultimate aim is to promote changes in social behavior that will enable the creation of a culture of respect for equality in the workplace.

The present paper aims to propose a reflection on the above-mentioned two legal entities in the Spanish legal system from three approaches, which are necessary and complementary: gender perspective, mainstreaming and a comprehensive approach. The combination of these approaches accounts for a new approach, which is important, as it reinforces the action against the social norms on which gender discrimination is based.

Keywords: Equality, sexual and gender harassment, gender perspective

Introduction. Gender Equality as a mainstreaming legal category

The integration of a gender perspective and the fight against gender discrimination have recently inspired some new important legal changes in Spain aimed at introducing a range of equality policies in order to end gender discrimination and inequality, by implementing positive action measures.

Despite the important activism carried out by feminist movements and the ongoing development of feminist theories from the 70s (which aimed to give visibility to the relationship between inequality and violence in relationships of affection), it was not until very recently that the concept of gender was assumed and integrated into our legal system, although not always fully and coherently.

One would believe that reaching an agreement on this subject is straightforward, especially on issues related to the cornerstones of the social and democratic rule of law, such as the commitment to freedom, safety and equality among different individuals and social groups within our society. Nonetheless, such issues fully reveal the severe conflicts that hide behind the relationship between women and men. As a consequence, the implementation of policies aimed at ending the social and economic inequalities that women still suffer from, represents a technically complex and difficult problem to solve.

The two former socialist governments in Spain undertook an important legal initiative, which aimed at creating legal instruments in order to guarantee the principle of Gender Equality and the prohibition of any form of pay discrimination based on sex. This was achieved through the approval of two important complementary laws: LO 1/2004 on Comprehensive Protection Measures Against Gender-Based Violence (hereinafter LOIVG) and LO 3/2007 on Effective Equality for Women and Men (hereinafter LOI).

Both these norms have been deeply inspired by European Directives, which aimed at activating public policies on gender equality. At the same time, they reflected the particular sensitivity of the former Spanish government regarding this topic. It is worth remembering here that the Spanish legislation on gender equality is, in many aspects, among the most advanced in the world, and even goes further than the European legal framework in issues such as the protection of victims of gender-based violence.

Introducing a gender perspective in equality policies entails the adoption of all legal instruments belonging to the gender approach. The gender perspective will become especially relevant in the prevention and fight against violence and harassment at the workplace, which is regarded as one of the main emerging psychosocial risks related to occupational safety and health¹. Thus the principle of mainstreaming implies that the gender perspective is adopted as an inspiring element in public and legal activities. Therefore, the aim of the present paper will be to analyze the aforementioned legislative measurements, giving particular emphasis to their gender dimension.

¹ European Agency for Health and Safety at Work, *Expert forecast on emerging psychosocial risk related to occupational safety and health*, Office for Official Publications of the European Communities, 2007.

A conceptual definition of gender

The main novelty arising from a gender perspective in the analysis of the phenomenon of gender discrimination is the weakening of the sex (understood as a set of biological differences between women and men) as a reference point in the analysis. The gender perspective focuses on the set of social devices by means of which different expectations and values are assigned to women and men, allowing for gradual changes in historical trends. This entails the naturalization of social constructions based on sex and sexuality. The use of the gender perspective as a conceptual instrument will allow us to understand how gender production devices work.

The link between sex and women's oppression has been used as a powerful instrument for both feminist movements and feminist legal studies, allowing for an exhaustive analysis of the way male domination of women has been conducted by means of sex. However, legal instruments against gender discrimination are proving to be inefficient in solving the deep sexual segregation of the labor market (apart from casting aside conflicts related to gender identity).

Antidiscrimination law is founded upon the idea that sex is prior to and more real than gender², that is, assuming male and female identities to be different from male and female characteristics, as the latter depends on natural biological features, whereas sex has a subordinate relationship with gender (from a gender perspective). We could therefore state that the demands related to sexual inequality and discrimination (or to sexual identity) are founded upon gender norms and regulatory roles. We need to build a legal concept of gender, which is operational enough to solve the conflicts that are increasingly emerging in our societies with regards to sex, sexual rights and gender, not only in partner relationships, but also in the economic, social and labor spheres. We must understand that gender anti-discriminatory mechanisms have developed significantly mainly because they were able to give legal safety to the social categories of sex (male and female) rather than to a strictly legal principle, as there is no legal definition of sex. This sense is marked by the principles and values of a *hetero-patriarchal*³ society, which has provided the gateway to ongoing male supremacy. Such supremacy was identified with a better appreciation of heterosexual men in the family, economic, cultural and social spheres.

² K. M. Franke, *The central mistake of sex discrimination law: the disaggregation of sex from gender*, University of Pennsylvania Law Review, 1995, Vol. 144 no. 1, November.

³ F. Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 1996, 8 YALE J.L. & HUMAN, 161-170.

Because of the above, gender analysis proves to be an important advantage, as it is useful to analyze the set of cultural laws that determine and regulate not only the shape and significance of sexuality and sexual identity⁴, but also the set of regulatory practices that produce the rules determining gender relationships.

However, this may pose some issues. Firstly, and in relation to identifying the individual to be protected, the most important gender conflicts taking place nowadays in the field of labor relations have to do with the rapture of traditionally-assigned roles regarding reproduction and family care, co-responsibility of family loads and paternity rights. It is evident that the reason why a paternity leave is denied is because childcare has been socially understood as a job to be mainly performed by women. The affected legal interest in this case is gender equality, regardless of whether it is men or women activating the protection mechanisms. Likewise, issues related to transgender and gender identity call into question the core of the subject.

Secondly, keeping the final conclusion in mind, if we look at legal arguments suggested by a part of Spanish jurisprudence, which intend to deprive protective regulations against gender-based violence of their significance, we will see how the application of such regulations depends on whether the facts at trial are an “expression of the discrimination, inequality situation and power relationship of men over women”⁵. In practical terms, this view (although rather minoritarian) means that the application of the regulation will not depend on an objective fact – such as a man’s aggression against a woman – but rather on a subjective element, which is alien and different to what the regulation requires; that is, for the aggression (either verbal, physical or psychological) to be based on an unequal relation of power or to be an expression of women’s relation of subordination to men. This will inevitably cause regulations to become unnatural and evidences to appear less important.

However, the above can be overcome by integrating a gender perspective into anti-discriminatory measures. Understanding gender-based violence or gender inequality as gender discrimination will enable us to activate mechanisms and legal guarantees to allow for a differentiated treatment favoring women, with the purpose of correcting gender-based

⁴ J. Butler, *Gender Trouble: Feminism and the Subversion of Identity*, Routledge, New York, 1990.

⁵ STSJ Murcia 126/2011 17 June 2011. It is here worth remembering that Article 1 of the LOIVG establishes the aim of this law to be acting against *violence against women as an expression of discrimination, inequality and abuse of power of men over women, infringed by those who are or have been their partners or who are or have been somehow linked to them through relationships of affection, regardless of whether they have lived together or not*. The aim of the law is certainly to stress the discriminatory nature of such actions, and therefore establish an obligation for public authorities to avoid them.

structural inequalities or disadvantages⁶. Public authorities would then be forced to implement measures aimed at ending inequalities in an efficient way.

Gender perspective mainstreaming

The gender perspective has slowly been integrated more or less precisely into both national and international regulations, leading to a set of legal strategies.

The Fourth World Conference on Women, held in Beijing in 1995, coined the expression “gender” for the first time in a legal text, defining it as the expression of historical power relations that have traditionally existed and still exist between men and women, and which derive basically from cultural patterns and social pressure. Hence, it was finally admitted that we are facing a structural problem that calls for complex, multidisciplinary and mainstreaming measures, which have to ultimately be adopted by the states⁷.

As a consequence, the gender perspective is now reinforced by the principle of mainstreaming, which is subsequently integrated into a number of relevant legal regulations. The Treaty Establishing the European Community (hereinafter TEC) states that the aim of the European Community is to promote *gender equality*, and incorporate the *mainstreaming* strategy, keeping in mind that the European Union’s objective is to eliminate inequalities and promote equality between women and men in *all common actions or policies* of its member states.

In addition to mainstreaming, in order to achieve effective equality it is also necessary to undertake positive action measures. Likewise, the same principle of Equal Opportunities is gathered in the Treaty on the Functioning of the European Union (hereinafter TFEU). This principle is reinforced in the field of labor relations by means of the renewed Article 141.1 TEC, which establishes that “with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any member state from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to compensate for disadvantages in professional careers”.

Thus, in order to enable effective equality between women and men at the workplace, the precept not only recognizes the need to implement the principle of equal opportunities, but also makes community law comply with positive action legal policies in the member

⁶ S. Peran Quesada, *Artículo 22 bis. Discriminación en el acceso al empleo*, in J.L. Monereo Perez, M^a.N. Moreno Vida, J.A. Fernández Aviles, (Eds.) *El derecho del empleo. El estatuto jurídico del empleo*, Comares, Granada, 2011.

⁷ P. Romero Pardo, *La protección de las víctimas de violencia de género en el ordenamiento jurídico internacional*, in R. Quesada Segura, (Ed.), S. Peran Quesada, (Coord.): *La perspectiva laboral de la protección integral de las mujeres víctimas de violencia de género*, Comares, Granada, 2009.

states. In fact, these positive actions were questioned by the Court of Justice of the European Union (CJEU)⁸, by not imposing binding targets to the member states nor by forcing community institutions to adopt positive measures. Despite these limitations, the introduction of the principle of Equal Opportunities into the Treaty (in a formula that “allows” for positive action measures without imposing them) clearly reinforces the legitimacy of national policies⁹.

The integration of the above-mentioned dual strategy (positive actions and *gender mainstreaming*) will allow for a new generation of equality regulations that will reinforce the operational instruments for gender equality. Thus, protection against gender discrimination becomes a new focal point in the Spanish legal system.

Whereas we certainly counted on an established constitutional jurisprudence around these principles, the standardization of these principles in our legal system accounts for a fundamental change and a strong drive to achieve effective equality.

Within the Spanish legal system, the LOI incorporates the principle of equal treatment and equal opportunities for women and men as a *guiding principle*, which means that it will have to be integrated and observed with regards to its interpretation and application in legal regulations.

This entails the activation of anti-discriminatory instruments, as the principle of equal treatment for women and men ultimately involves *the absence of any direct or indirect discrimination based on sex*. As a consequence, all legal business acts and clauses causing gender discrimination will be considered *null and void*, hence employers will be held responsible for granting real and effective compensations proportional to the damage. In order to be effective and dissuasive, this penalty system shall be completed by a judicial system that protects against discriminatory behaviors.

With regards to the subject that concerns us, these principles will provide a new legal framework against sexual harassment and harassment based on sex, with a very important legal consequence in Spain the fact that it is now regarded as gender discrimination.

⁸ Judgment of CJEU (hereinafter JCJEU) of 17 October, 1995, Case Kalanke.

⁹ Equally important is the inclusion, in Article 13 TEC, of a general principle of non-discrimination, which is much broader than the one previously established. The article urges the Council to implement actions that combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. These account for new reasons for discrimination, that are banned and further reflected in Directive 2000/43/EC on implementing the principle of equal treatment between persons, irrespective of their racial or ethnic origin, and Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. Although the latter has a rather general title, it refers to specific discrimination practices, which are banned, namely discrimination based on religion or belief, disability, age and sexual orientation.

Sexual and gender harassment in the Spanish legal system

The LOI integrates Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC into the Spanish legal system. The directive covers the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (hereinafter D. 2002/73/EC). Together with this directive, the LOI also integrates the concept of sexual and gender harassment, which accounts for a very important landmark regarding the protection and prevention of harassment, as these situations were previously contemplated either in the field of collective agreement (as a reason for penalty or for a lawful dismissal of the harassing worker) or in the field of breach of contract and good faith.

In relation to the above, the following measures are crucial:

- The legal definition of both concepts, as the legal indeterminacy makes it not always possible to prevent and penalize them.
- The fact that is considered as gender discrimination, which allows for the use of the appropriate instruments to best eradicate it.
- The strengthening of the employers' duty to protect employees, which involves the introduction of directly enforceable legal obligations for employers.

The discriminatory nature of these behaviors affects mainly women as a result of the historical conditions of inferiority and weakness, and lies in the fact that the offended woman perceives the offense as being a consequence of the aggressor having underestimated the female sex. Thus, such discrimination would represent the price women pay for trying to break with their socially assigned role in a clear and unilateral way, by means of achieving a work-life balance and entering the public labor market¹⁰.

However, this declaration has been necessary in order for the entire system of guarantees established for the guardianship of the discriminatory act¹¹ to work, as already seen in the Spanish legal system regarding all aspects of maternity.

According to Article 10 LOI, all legal business acts and clauses causing gender discrimination will be considered null and void, hence employers will be held responsible for granting real and effective compensation proportional to the damage, as well as submitting to an effective and dissuasive penalty system that will prevent discriminatory behaviors.

¹⁰ T. Pérez del Río, *La violencia de género en el trabajo: el acoso sexual y el acoso moral por razón de género*, 2007, Revista Temas Laborales, no. 91.

¹¹ R. Quesada Segura, *La protección extrajudicial frente al acoso sexual en el trabajo*, 2007, Revista Temas laborales, no. 92.

Together with this system, Article 9 LOI establishes the guarantee to indemnity in case of reprisals that might result from lodging a complaint, a claim, a lawsuit or an appeal of any kind and with the purpose of putting a halt to discrimination and demanding the effective compliance with the principle of equal treatment between women and men.

Full protection is offered here, based on Article 2.3 of D. 2002/73/EC, which states that “a person’s rejection of, or submission to any harassment or sexual harassment may not be used as a basis for a decision affecting that person.” This means that, in the event of gender discriminatory conduct, victims shall receive comprehensive protection, as all reprisals or actions affected by discriminatory conduct shall be overridden. Furthermore, the eradication of the “undesired nature of these behaviors” implies that the company must not tolerate situations that constitute gender discrimination at the workplace, despite the victim’s estimation.

In short, the LOI now establishes, as the LOIVG previously did, a system of protection against the discriminatory act, which protects women even against their own decisions¹².

Complementarily, the essential values of human equality and dignity, underpinned by fundamental rights and public liberties, will prevail in the everyday performance of work¹³. This fact goes beyond labor relations and is addressed in Article 4.2 of the Spanish Statute of Workers (hereinafter ET), which recognizes that “workers must be treated with dignity, consideration and respect at all times (...) including protection against sexual harassment and harassment based on sex” as a basic labor right.

In other words, workers’ protection against such discriminatory actions is established as a genuine subjective right to be demanded from employers, *i.e.* the main guarantors. Therefore, this right “opens the gates to employers’ responsibility for any harassment taking place within their company,” as established and recognized by Article 8.13 of the Law on Social Infractions and Sanctions (hereinafter LISOS), when considering as “a very serious infraction (...) sexual harassment taking place within the area of management, irrespective of the active subject”. Additionally, employers’ general duty of protection against safety and health risks at the workplace, established in Article 14 of the Law on Prevention of

¹² S. Peran Quesada, *La aplicación de la LO 3/2007 a un supuesto de acoso sexual en la empresa*, 2008, Aranzadi Social, no. 12-08.

¹³ J.L. Monereo Perez, L.A. Triguero Martínez, *La protección socio-jurídica de la víctima de violencia de género*, in R. Quesada Segura (Ed.) S. Peran Quesada (Coord.) *La perspectiva laboral de la protección integral de las mujeres víctimas de violencia de género*, Comares, Granada, 2009.

Occupational Risks (hereinafter LPRL), covers for health problems derived from a situation of sexual harassment.

What is more, business activity in this field cannot be conceived as the simple compliance with duties through isolated actions, let alone through passivity or inhibition¹⁴. The present law urges businesses to carry out policies aimed at guaranteeing a workplace that is free of unwanted behaviors, as harassment is considered an instrument of discrimination and an attack on workers' dignity.

As a consequence, based on a body of settled Community case-law¹⁵, the legislator addresses social agents in order to urge them to put an end to this behavior in the workplace, through control measures and effective procedures, especially aimed at preventing. This is why Article 48 LOI - in Chapter 3 on equality plans for companies and further measures to promote equality - contemplates specific measures to prevent sexual harassment and harassment based on sex at the workplace, not as a proposal to be included in equality plans, but rather as a genuine, preventive measure to be implemented against harassment, therefore forcing all companies to adopt it regardless of their size.

Furthermore, the chapter establishes that “companies must promote working conditions to avoid sexual harassment and harassment based on sex, implement specific procedures to prevent them, and process all complaints and claims lodged by affected workers.” Employers must therefore be committed to this problem, by means of two actions: (1) establishing preventive measures (for the purpose of which the law suggests employers negotiate measures with the workers' representatives, such as codes of good practice, informative campaigns or training actions); and (2) implementing effective procedures to report such conduct, guaranteeing the affected worker's intimacy and compensation for the damage.

Sexual harassment

The LOI defines sexual harassment as “any verbal or physical behavior of a sexual nature.” That is to say that harassment can be expressed through any behavior of a sexual nature that appears offensive to the recipient, regardless of the means, actions, gestures, insinuations, words, written text, drawings, *etc.*

While gender harassment differs from sexual harassment, both are included in Article 7.3 LOI as gender-based discrimination. In the former type, (gender harassment), the

¹⁴ M.A. Burgos Giner, *El acoso sexual en el trabajo por un trabajador ajeno a la plantilla de la empresa*, 2008, Revista Tribuna Social, Junio.

¹⁵ R. Quesada Segura, *La protección extrajudicial frente al acoso sexual en el trabajo*, 2007, Revista Temas Laborales, No. 92.

mistreatment or offense is inflicted upon women for the mere fact of being a woman, *i.e.* belonging to the female group. This attitude is caused by the victim's underestimation and the aggressor's arrogance. The goal is to undervalue women for the mere fact of being a woman in their work performance. In the latter type (sexual harassment), women are also undervalued; however in this case the offensive conduct is related to the individual's sexuality, as it targets the individual's dignity and intimacy and affects individual sexual freedom.

Additionally, the behavior is deliberate, "with the purpose or effect of violating the dignity of a person." As this is a punishable fact, the aggressor must be aware of the fact that he is intruding on the privacy of the offended person. Both the intention and the offensive purpose of this action represent two essential elements that define the behavior as such.

The conduct is also serious, as it creates an "intimidating, degrading or offensive" environment, and need not be repetitive, as it only takes one action. The legislator has left out two essential references to define this concept in the final drafting of the precept, although they are nonetheless included in D. 2002/73/EC: the terms "hostile and humiliating." While these terms define the penal type, they are not required to determine the administrative or disciplinary sanction.

Finally, the definition leaves out an essential element in the traditional conceptualization of this behavior: it is unwanted by the recipient. This subjective element – which has clearly been the most discussed, was required due to the effects caused by the sanctions applied to aggressors and to the employers' potential responsibility on the issue. The fact that the behaviour is unwanted by the victim would become an essential element to make it illegal. However, the issue focused rather on the victim's reaction to the unwanted conduct, taking into account the dependency, job insecurity and even defenselessness, which are constraints the victim usually suffers from in relation to the aggressor. Finally, jurisprudence has been stating for some time now that – for similar reasons - the direct and repetitive rejection of any act of this nature is not a necessary condition for declaring such conduct. Instead, expressing discomfort towards such a situation, either directly or by means of other individuals or even by means of their own behavior is considered enough.

What we need to clarify at this point is whether this new definition brought up by the LOI improves legal safety or if, on the contrary, it would have been more convenient to keep the former concept of sexual harassment gathered in community directives, which was accepted by constitutional law, as these conducts are not always easy to deal with without the subjective element of undesirability.

However, this seems to have been the best possible option and the most coherent one, considering the new philosophy enacted by this law. We must also bear in mind that this law defines itself as preventive and aims at promoting effective equality between women and men, which means that it is not only a sanctioning law but also and mainly a law that actively and positively fights against these conducts and behaviors at the workplace. This is why the focus of the law is on the objective element rather than on the subjective one (where the conduct is perceived as unwanted by the recipient). Elements introduced here are measurable in objective terms, and can determine the conduct as harassment if such conduct occurs outside standard behavior and is offensive to the woman's dignity.

Gender harassment

The *discriminatory harassment based on gender*¹⁶ has been fully recognized for the first time in the Spanish legal system since the implementation of the LOI, although the LOI refers to it as harassment based on sex, and defines it as any conduct based on a person's gender with the purpose of violating her/his dignity or creating an offensive, degrading and intimidating environment.

It is worth stressing that the concept of gender harassment is not alien to the classic elements of the *hostile environment sexual harassment*, described by the U.S. Supreme Court jurisprudence, and which allowed for a first definition of this concept. The main idea was that this kind of harassment involves any kind of behavior – serious and persistent enough¹⁷- which is carried out based on a person's gender¹⁸ and which affects employment conditions and creates a hostile and abusive work environment¹⁹, as an expression of discrimination between women and men²⁰.

Gender harassment is clearly a genuine discriminatory act based on gender, and, as previously highlighted, it has differentiating features from sexual harassment.

This means that the law is explicitly referring to any behavior – in the broad sense of the word, according to the LOI – which violates the dignity and equality of women as human beings, based on women's social consideration within the work context.

¹⁶ J.L. Monereo Perez, L.A. Triguero Martínez, *La protección socio-jurídica de la víctima de violencia de género*, in R. Quesada Segura (Ed.), S. Peran quesada, (Coord.) *La perspectiva laboral de la protección integral de las mujeres víctimas de violencia de género*, Comares, Granada, 2009, p. 58.

¹⁷ Harris v. Forklift Sys., 510 U.S. Supreme Court 17 ,1993.

¹⁸ K.S. Anderson, *Employer Liability Under Title VII for Sexual Harassment Alter Meritor Saving Bank v. Vinsor*, 1987, Columbia Law Review, vol. 87, No. 6, October.

¹⁹ Meritor Savings Bank, FSB v. Mechelle Vinson, et al., 477 U.S. Supreme Court 57, 1986.

²⁰ C. A. Mackinnon, *Sexual harassment of working women: a case of sex discrimination*, 1979, Yale University Press.

Therefore, gender harassment in the workplace accounts for those practices aimed at disciplining the set of individuals involved in a work activity – mainly women but also men – around “hetero-patriarchal gender rules”²¹.

Therefore, a link is built between (1) a set of actions of an arbitrary nature, which intends to hinder the employee’s professional and/or private life and (2) a negative result from carrying out a different assessment based on gender. Thus, the aim is to act against those processes – *i.e.* a set of events that show certain prevalence and intensity over time and that determine the lower position of the offended person, who undergoes systematic and negative social behaviors.

The objective is to influence the set of regulatory practices that make individuals comply with different expectations and roles assigned to them based on their sex. This protective clause is reinforced by the integration of the principle of Equality as a principle that informs the legal system, gathered in Article 4 LOI. This represents a key element of the right to gender equality. What is discussed here is not so much the classic issue of correcting inequality but rather the symbolic (and legal) recognition of difference, of uniqueness. A new and broader interpretation must therefore emerge in the light of the new legal grounds resulting from the LOI. The consolidation of this new area of protection against gender discrimination will address the issues that the invisibility of the female difference poses in daily practice.

Case-law is certainly varied, as are the consequences for victims, which are linked to the development of a hostile and aggressive work environment. This is reached through different ways: (1) through threats, shouts or persistent insults, (2) by ridiculing their work, ideas or obtained results in front of other workers, (3) through severe punishments, (4) by avoiding any sort of decision-making or personal initiative in the context of their responsibilities and powers, (5) by weakening their independence, discriminating or isolating them from other co-workers, (6) through measures such as removing areas of responsibility or assigning them daily tasks, tasks without interest or even no tasks at all, (7) by arbitrarily changing their powers or responsibilities, (8) through differentiated or discriminatory treatments, such as using unique measures against them, assigning targets or deadlines that are unreachable or impossible to meet, or tasks that are clearly endless within a limited time, overloading them with hard work, ignoring or excluding them, (9) by preventing the

²¹ K. M. Franke, *Gender, Sex, Agency and Discrimination: A Reply to Professor Abrams*, 1998, 83 Cornell L.Rev. 1245.

development of their professional career by limiting, delaying or hindering their access to promotions, courses or training seminars, *etc.*

Protection instruments against sexual and gender harassment in the Spanish legal system

The fact that both sexual and gender harassment are considered as actions of a discriminatory nature has allowed for the development of an entire institutional system of administrative, labor and criminal protection. Furthermore, both types of harassment have traditionally been deemed a failure to comply with employment contracts, and this is going to have important repercussions not only on labor practices, but also on criminal and administrative areas.

Indeed, the first repercussion will be the possibility to terminate the employment contract due to damage to the employee's right to dignity, and as a consequence of the employer's serious breach of the obligation of non-discrimination in the workplace (upon the request of the affected employee). Furthermore, a wide range of responsibilities in different areas must be added.

The employee's right to protection against sexual harassment should entail the use of the employer's disciplinary power through a series of sanctions against the actors in such conduct. Thus, the Statute of Workers (ET) will establish a general framework by virtue of which serious actions of sexual harassment and harassment based on sex carried out by another employee will be eligible to be penalized as a disciplinary dismissal (Art. 54.2 g – ET). In a complementary manner, collective bargaining, and especially those instruments, which aim to prevent sexual harassment and harassment based on sex and to promote equality (such as companies' equality plans, protocols to prevent harassment in the workplace or specific clauses within collective bargaining agreements), will implement punitive measures and action protocols in these situations²².

However, the area of responsibility, which has been reinforced the most, falls within the employer's scope. As mentioned above, Art.18.3 LISOS deems that sexual harassment or harassment based on sex taking place within the scope of management, is a very serious infraction on behalf of the employer, irrespective of the actor.

This implies the recognition of an employer's responsibility for actions carried out by employees in all areas of disciplinary authority. Sexual harassment will be sanctioned

²² S. Perán Quesada, *El acoso sexual desde una perspectiva preventiva. Planes de Igualdad, Códigos de Prevención y Protocolos de Actuación*, Gestión Práctica de Riesgos Laborales, Wolters Kluwer, no. 75, October, pp. 48-54. 2010.

regardless of whether there is an employment relationship between employer and the victim (e.g. cases of temporary work agency employees).

Another important area of protection refers to the consequences of such aggressions, i.e., the consequences for the employees' health. Indeed, these aggressions represent what experts call an *emerging* risk to health at work, and the persistence of these hazards represents a major problem in the area of prevention of occupational risks²³.

In this line of thought, Art.14 LPRL establishes the employers' general duty of protection against safety and health risks at the workplace. This article also covers health problems derived from a situation of sexual harassment and defines them in the light of a judgment²⁴, such as "risk at the workplace".

This represents an important reinforcement to eradicate these situations, which, until the LOI, did not have their own preventive laws²⁵. On the contrary, these entities have been traditionally characterized by their extremely scarce legal treatment, mainly reflected in judgments of Social Courts²⁶, and, in a very partial way (with an almost exclusively disciplinary treatment) in collective bargaining.

Having said that, the legal configuration of employers' obligation regarding the prevention of sexual harassment in the workplace has been specified in Art.48 LOI. This article specifies employers' obligations regarding this subject, such as reporting the development of psychosocial risks (Art.16.1 and 2 LPRL), researching on damage to health (Art.16.3 LPRL), training (Art.18.1 LPRL), employees' allocation to jobs that are compatible with their personal circumstances (Art.25.1 LPRL), *etc.*

Art.48 LOI establishes that "*companies must promote working conditions to avoid sexual and gender harassment, implement specific measures to prevent them, and process all complaints and claims lodged by affected workers.*"

²³ A. Parent- Thirion, E. Fernández Macías, J. Hurley, G. Vermeylen, *Fourth European Working Conditions Survey*, Eurofound, 2007.

²⁴ JCJEU of 30 April, 2002, Basque Country: "(...) *it remains clear that compensation is awarded as a result of work, therefore the granting of benefits results from work accidents*"; JCJEU of 1 September, 2004, Madrid: "(...) *employers' legal obligation to guarantee the safety and health of their employees forces companies to adopt clear measures against situations of sexual harassment at the workplace, including, for instance, a public statement on behalf of the company expressing that they will not accept harassment and that they will sanction it severely*".

²⁵ Technical Criterion (TC) 34/2003 of the General Direction of the Social Security and Labour Inspection. In relation to this, see critique by C. Molina Navarrete .-"*Del "silencio de la ley" a la "ley del silencio", ¿quién teme a la lucha de la inspección de trabajo contra el acoso moral en las administraciones públicas?: Argumentos normativos para la ilegalidad y no vincularidad del pretendido criterio técnico sobre el mobbing de la Dirección General del ITSS*", 2003, RTSS. CEF, no. 242, pp. 3-28.

²⁶ "*In safeguarding this (Art.18 EC) (...) sexual harassment is therefore prohibited because it creates an unpleasant, degrading, intimidating, hostile, offensive or humiliating work environment*"—Judgment of the Spanish Constitutional Court (hereinafter STC) 224/1999 of February.

Employers must therefore be committed to this problem, by means of two actions: (1) establishing preventive measures (for the purpose of which the law suggests employers to negotiate with the workers' representatives, such as codes of good practice, informative campaigns or training actions); and (2) implementing effective procedures to report such conduct, thus guaranteeing the affected worker's intimacy and compensation for the damage.

This precept represents an important change regarding the treatment of sexual harassment – and gender harassment, too – from a preventive approach. This is because the obligation of introducing the above procedures can either fit into the working area or the area of prevention of occupational risks, based on the extensive nature of the regulation on prevention of occupational risks established in Art.1 LPRL. Therefore, failure to comply with these preventive obligations may constitute a labor breach of the social order as well as a breach of the law on prevention of occupational risks.

This new legal regulation directly affects the new competencies that were assigned to the Labor Inspection as a particularly relevant institution in this field. This can be observed in the 2008-2010 Action Plan for the Social Security and Labor Inspection, regarding the surveillance of effective equality between women and men in companies²⁷. All in all, the Action Plan will put special emphasis on a set of obligations and rights established by a number of legal regulations such as the Equality Law, the Statute of Workers, the Law on Prevention of Occupational Risks and the General Social Security Law. Additionally, Action Plans tend to ensure compliance with specific duties, such as the existence of Equality Plans in companies, control of the prohibition of discrimination in access to employment, working conditions, rules to prevent sexual harassment, control of the discriminatory clauses of collective bargaining agreements, work-life balance rights, and protection of maternity, paternity, pregnancy and breastfeeding.

Additionally, the 69/2009 Technical Criterion of 19 February 2009 and the Good Practice Guide (which detects and assesses behaviors in the area of harassment and violence at the workplace) are two important measures that reinforce the Social Security and Labor Inspection (hereinafter ITSS) in relation to harassment and violence at the workplace, and which have represented a very significant change of criteria due to their impact in the penalties to be imposed.

²⁷ Approved on May 5, 2008 by the General Direction of the Social Security and Labour Inspection, following the proposal by the General Sub-directorate for the Prevention of Occupational Risks and Equality Policies.

Indeed, the penalty system on this subject will undergo significant changes. The lack of intervention when identifying a psychosocial risk or the non-reaction to it may constitute an infraction as regards the prevention of occupational risks. Thus, depending on the risk to the employee's health, infractions can be classified as follows:

- Slight infraction, which will be sanctioned with a 40€ to 2,045€ penalty, according to Art.11.4 LISOS.

- Serious infraction, which will be sanctioned with a 2,046€ to 40,985€ penalty, according to Art.12.16 LISOS.

- Very serious infraction, which will be sanctioned with a 40,986€ to 819,780€ penalty, according to Art.13.10 LISOS.

Moreover, the failure to prevent psychosocial risks may also constitute a serious infraction in the area of prevention of occupational risks, regardless of whether it was caused by a lack of assessment or identification, a lack of supervision, a lack of training and information on psychosocial risks, or not carrying out the appropriate measures in risk assessment or health surveillance. This infraction can be sanctioned with a 2,046€ to 40,985€ penalty, according to Art.12.16 LISOS. Likewise, the lack of planning may also constitute a serious infraction according to Art.12.6 LISOS, potentially sanctioned with a 2,046€ to 40,985€ penalty. This penalty system may be completed with potential infractions in the social order²⁸.

The above penalty system must also be completed with its necessary impact in the area of Social Security. Thus, sexual and gender harassment will be eligible to lead to psychological effects and, in particular, to depressive syndromes, which can be classified as occupational accidents²⁹.

Brief final reflection

Virginia Woolf used to say that, “when a subject is highly controversial – and any question about sex is that – one cannot hope to tell the truth. One can only show how one came to hold whatever opinion one does hold”³⁰. Indeed, there is no other human dimension to have been subjected to a higher number of standardizing devices than sexuality, gender relations and gender itself.

²⁸ There might be two potential situations here: (1) When the persistence of very serious labour infractions - Art.8.11, 8.13 and 8.13 *bis* LISOS – coincides with serious preventive infractions. (2) When the persistence of very serious preventive infractions coincides with very serious labour infractions, according to aspects covered by Art.13.4 and 13.7 LISOS. As a general rule, the penalisation for serious preventive infractions will be given priority over that for serious labour infractions, as the penalty derived from the latter is generally more costly– Art.4.4. RD 1398/1993 -. TC 69/2009.

²⁹ Judgment of the Spanish High Court (hereinafter STSJ) of 24 January, 2000, Galicia.

³⁰ V. Woolf, *A Room of One's Own*. 1929.

It is worth stressing that, the term “gender” here means the set of attributes, attitudes and behaviors that define the social role of each individual according to their sex. The role attributed to women in all spheres has been valued differently in our society, a fact that has determined their inferior position, as they were subjected to men in all aspects of public and economic life.

Gender is therefore a qualifying social and cultural concept, a social construction, built upon a set of social mechanisms that shape the personality, behavior, attitude and social role of that which has culturally and historically been determined as masculinity and femininity.

Thus, the problem does not have an exclusively symbolic nature, but lies rather in the set of production practices of social relationships, which allows for a world dominated by masculine subjectivity, following patterns of inequality, and on the basis of certain ideologies of power that naturalize and reproduce inequality. Such ideologies are perpetuated through “the consent that the dominated cannot fail to give to the dominator, because their understanding of the situation and relation can only use instruments of knowledge that they have in common with the dominator, which, being merely an incorporated form of the structure of the relation of domination, make this relationship seem natural”³¹.

Following on from the above argument, women’s role in the social structure has been systematically accepted as a given phenomenon, inherent to human nature, and based on the assimilation of social classifications responsible for social reality.

Thus, the understanding of the principle of equality and non-discrimination as a guiding legal principle in our legal system provides an opportunity to consolidate legal guarantees against gender inequality. The fact that both the LOIVG and the LOI shape the principle of Gender Equality is a starting point for its full development³².

In this light, it is worth highlighting the content of the Spanish LOI concerning the prevention and fight against sexual and gender harassment, for three main reasons: firstly, because it incorporates both definitions of the Spanish legal system, which provides legal security, protection and relevance to these legal entities; secondly, because it completes and improves the legal treatment given by European Directives to this matter; and thirdly, because the assumption that Art.4 LOI incorporates *discriminatory harassment based on*

³¹ P. Bourdieu, *La dominación masculina*, Anagrama, Barcelona, pp. 50. 2000.

³² S. Perán, *Gender-Based Violence and Work. Evidence from Spain*, in R. Quesada, R. Bortone, S. Perán, (Eds.) *Gender Equality in the European Union. Comparative Study of Spain and Italy*, Aranzadi Thomson-Reuters, Cizur Menor, 2012.

gender into the Spanish legal system translates into the recognition that *gender* social norms can create a hostile, aggressive and negative work environment, and as such, this legal entity clearly differs from moral harassment at the workplace.

It is important to understand that both sex harassment and harassment based on gender are discriminatory actions, therefore not only they fall within the scope of prohibitions (hence legally treated as null and void), but employers will also carry the burden of having to take all the necessary measures to avoid harassment. Such obligation does not only contribute to the employer-employee labour relationship in the area of contractual obligations and obligations regarding the prevention of occupational risks; but it also constitutes an obligation for public authorities to adopt all the necessary measures to remove these acts.

The above idea involves not only the need to implement a range of different protective measures, but also the need for a new culture of gender equality in the workplace. The integration of the gender mainstreaming perspective into labor relations involves an assessment of the social context of work and identifies attitudes aimed at undermining women and their work, or at deteriorating victims' confidence in their professional skills.

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