



Blowing the whistle on workplace sexual harassment: an Italian labour law perspective

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📁 EMPLOYMENT AND PENSIONS

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The #MeToo movement and the judicial cases that have recently involved powerful men in the American film industry have brought the problem of sexual harassment in the workplace into sharp focus. Surveys and statistics show that the phenomenon is also alarmingly widespread outside the world of show business. With regard to Italy, the National Statistical Institute ¹ (ISTAT) revealed that, between 2015 and 2017, around 3,177,000 women have been victims of sexual harassment at the workplace and around 167,000 women have been sexually blackmailed to get or maintain their job, or to gain progress in their career. The phenomenon also

affects male employees, albeit to a smaller percentage. Although the majority of the victims (69.6 per cent) perceived their harassment as very or quite serious, in 80.9 per cent of the cases they did not report the fact.

In order to better interpret the above figures, the issue of sexual harassment at work should be addressed under a twofold profile. From a definitional point of view, it is important to understand what falls within the concept of sexual harassment. Equally, in order to bring to the surface what the above figures suggest is a 'submerged' problem, it is important to identify what means are

¹ "Le Molestie e i Ricatti Sessuali sul Lavoro", ISTAT Report, available at: <https://www.istat.it/it/files/2018/02/statistica-report-MOLESTIE-SESSUALI-13-02-2018.pdf>



available under the law, in order for the victims to report the above conduct.

The definition of sexual harassment under the so-called *Code for Equal Opportunities for Men and Women*

In Italy, the concept of sexual harassment is relevant from an anti-discrimination law perspective. In 2006, driven by European Union Directives as well as by the recommendations of the EU Parliament, Italy adopted the so-called *Code for Equal Opportunities for Men and Women* (Legislative Decree No 198/2006), which contains a definition of sexual harassment as 'unwanted conduct of a sexual nature, expressed in physical, verbal or non-verbal form, with the purpose or effect of violating the dignity of a worker and creating an intimidating, hostile, degrading, humiliating and offensive environment'. Under such legislation, sexual harassment constitutes a form of discrimination, as well as any 'less favorable treatment' (such as: dismissal, demotion or transfer to another office) suffered by an employee, either for refusing the above conduct or for submitting to it.

The status quo of the Italian legal framework regarding whistleblowing

Despite some cultural mistrust, Italy has been one of the first European countries to introduce specific protections for whistleblowers, albeit limited to certain sectors. In 2012, the Italian legislator prohibited any retaliatory measures against public employees reporting misconduct within the public administration. Some years later, the phenomenon was regulated, respectively, with reference to the banking, insurance and anti-money laundering sectors. Eventually, in 2017, the Italian Parliament approved Law No 179/2017, which introduced an obligation to provide specific whistleblowing

procedures as well as protections for whistleblowers (including confidentiality of the whistleblower's identity). This applied only to certain companies in the private sector: specifically, those which decided to implement the organisational model contemplated by Legislative Decree No 231/2001, aimed at preventing certain criminal liabilities expressly listed in the same piece of legislation.

In principle, under Italian law, sexual harassment does not amount to criminal conduct. However, a very recent ruling² maintained that repeated conduct of a persecutory nature, committed against an employee by her/his colleagues or hierarchical superiors may amount, subject to certain conditions, to a 'serious' or 'very serious injury', which is one of the criminal offences expressly contemplated by Legislative Decree No 231/2001. In other words, should sexual harassment trespass into bullying, then Law No 179/2017 would apply. It is clear, however, that the protections and guarantees contemplated by Law No 179/2017 only apply to the employees of a limited number of companies and only when sexual harassment has certain characteristics.

Although progress has been made, the Italian legal framework on whistleblowing is still rather fragmented and mainly focused on misconduct of an economic nature. However, such regulatory framework is about to change. By December 2021, Italy must implement EU Directive No 2019/1937 'on the protection of persons who report breaches of Union law'. The impact of the EU Directive will be significant: the range of the beneficiaries of the whistleblowing protections will be extended to self-employed workers, shareholders and many other categories of individuals, as well as to reportable breaches. This includes the areas of: public procurement, product safety and conformity, environmental protection and public health. However, neither EU

² Tribunal of Busto Arsizio, Decision No 68 of February 23rd, 2018

Directive makes reference to sexual harassment complaints.

Beyond the whistleblowing legislation

In the absence of legislation regarding whistleblowing covering sexual harassment at work, it is left to the willingness of employers to implement internal procedures that allow employees to report harassment or bullying. In this respect, companies – usually multinationals – frequently implement Codes of Conduct reflecting the company's culture and core values. Often, Codes of Conduct contain specific procedures for reporting misconduct within the company, including sexual harassment. In the majority of the cases, such documents indicate the HR Manager, the Internal Audit or the Compliance departments as recipients of the relevant grievances. This is a possible weakness of these sets of rules: when it comes to sexual harassment, it is hard for a victim to decide to file a complaint with internal bodies of the company, as they may be perceived as partisan.

Although Italian legislation on whistleblowing does not include sexual harassment among the wrongdoings that may be reported within the company through the whistleblowing channels contemplated by the law, an employee reporting sexual harassment at work would not be completely without protection.

The employer's intervention

According to Section 2087 of the Italian Civil Code, the employer is under an obligation to implement all the necessary measures to protect the physical integrity and moral personality of its employees. Since sexual harassment at work affects the health of the victims, Italian Case Law has recognised an obligation of the employer to prevent sexual harassment at work and to take action whenever it is aware of any harassment towards any of its employees. Failure of the employer to do so would entitle the victim of the harassment to compensation for damages.

The prohibition of retaliatory measures following the filing of legal action before the Judicial Authority

Victims of sexual harassment at work can resort to the Judicial Authority. At the end of 2017, the Italian legislator amended the *Code for Equal Opportunities for Men and Women*. This code now provides that sanctions imposed by employers against employees who have begun legal action over a sexual harassment claim be null and void. This kind of protection, however, does not apply if the employee is found guilty of libel or defamation. Another form of protection provided by the law to those employees who decide to bring the matter before a judge, is the regulation of the burden of proof. It is enough for the claimant to submit factual elements of a precise and consistent nature, even derived from statistical data, to allow a Judge to presume the existence of sexual harassment. It will then be up to the defendant to give evidence that no discrimination took place.

The Equality Advisory Service (Consigliere di Parità)

Victims of sexual harassment at work can then resort to the Equality Adviser. The Equality Adviser is a key figure provided by the *Code for Equal Opportunities for Men and Women*, both at national and at local level, with the duty to promote and monitor equality and non-discrimination between men and women at work. The Equality Adviser — who is traditionally a woman — acts as a public servant and is in a position to assist the victims of sexual harassment in court. She can also report to the Judicial Authority any offences of which she becomes aware in the discharge of her duties.

Reporting to the Trade Unions

Since 1990, the major National Collective Bargaining Agreements (NCBAs) address the sexual harassment at work issue. They all consider any conduct of a sexual nature resulting in detriment to personal dignity to be unacceptable. However, these contain few practical

indications of what an employee should do in case she/he is a victim of sexual harassment at work. For instance, the NCBA for employees of the Trade Sector entrusts a special Joint Committee with the task of receiving this kind of complaint.

Future Perspective

On 21 June 2019, the General Conference of the International Labour Organisation (OIL) adopted Convention No 190 on Violence and Harassment at Work. This Convention not only contains a definition of sexual harassment, which is even broader than that indicated by the


Italian Code for Equal Opportunities for Men and Women, but also establishes an obligation for the states which are going to ratify the Convention to 'ensure easy access to appropriate and effective remedies'. These include 'compliant and investigation procedures, as well as, where appropriate, dispute resolution mechanism at the workplace level' for sexual harassment victims. Thereafter, a number of MPs filed a bill to ratify the OIL Convention. This could be an opportunity for Italy to reorganise the regulatory framework regarding whistleblowing and sexual harassment by introducing the procedure(s) to be implemented by employers, to enable employees to report misconduct and receive protection.



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