

AN EXPLORATORY STUDY OF SEXUAL HARASSMENT COMPLAINTS IN CHILE

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Sexual harassment has been treated as a manifestation of inequality and discrimination against women. Specific legislation was not meant to steer away from that theoretical framework. Nonetheless, the existing remedies on discrimination in Chilean legislation fell short to capture and penalize harassment.

The introduction of sexual harassment in employment legislation is a relatively recent change (2005).¹ Since 1991, there were several legislative proposals whose purpose was to punish harassment at work. The processing was painfully slow with clear overtones of resistance to penalize one of the most common forms of violence in the workplace for women². The reluctance found many obstacles in cultural, political, and judicial-legal culture. An outspoken fear was the amendment run contrary to idiosyncratic behavior of "Latin American gallantry",³ the signs of attraction, flirtations and compliments taking for granted the gender bias involved.⁴ Other opposing reasons relied on the existing legal remedies such as firing for unbecoming behaviour, constructive dismissal provisions and discrimination claims in the Labour Code. I agreed this wide range of remedies could have responded adequately to sexual harassment cases but judicial practice told a difference story. Prior to 2005 there were isolated reported cases with meager results for affected women. There is one single case where a claimant at the Supreme Court was able to win a battle for constructive dismissal. Although the Court did not recognise the harassment because the letters the woman received from her boss shown *affectionate feelings*, it declared the employer had failed to investigate her claims and provide a healthy work environment for the woman.⁵

From 1997 the Labour Board - Inspección del Trabajo- began using the administrative powers to inquire into sexual harassment complaints. The model was later adopted in the law that provided the claims could be investigated by either the Ministry of Labour -inspection offices- or the employer. In the latter, employers are obliged to send their reports to Ministry of Labour informing the type of measures that were adopted for the protection of the claimants and/or the penalties imposed to the culprit. This paper outlines the main results from a research assessing the complaints dealt by the inspection office in Santiago (Chile) and the path courts have taken on the new legislation.⁶

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¹ Law 20.005, Official Gazette, March 18th 2005.

² Former member of Congress and union leader states this was a revenge bill that would only get in the way of normal labour relations. Biblioteca del Congreso, Historia de la Ley 20005, p. 54. At: <<http://www.bcn.cl/histley/lfs/hdl-20005/HL20005.pdf>> Accessed November 23 2009.

³ Cecilia Yáñez, Acoso Sexual. Un problema de poder ... tomarlo en serio, La Nación, August 18th 2003. At: <http://www.lanacion.cl/p4_lanacion/antialone.html?page=http://www.lanacion.cl/prontus_noticias/site/artic/20030817/pags/20030817204917.html>.

⁴ Catherine MacKinnon, Sexual Harassment of Working Women, Yale University Press, New Haven, 1979, p. 25.

⁵ Corte Suprema, "Riveri Cerón con Fundación Comunicaciones Cultura Capacitación del Agro", rol 2704-02, April 9th 2003.

⁶ A full report of this paper was presented at the seminar on "Psycho-social hazards and the role of labour inspector and workers representative in their prevention: reflections from a gender lens", Santiago, January 11-13 2010.

I. The Law

The wording of the Chilean law is gender neutral and the prohibition of sexual harassment stems from understanding sexual harassment as an issue of gender discrimination. Case processing proves the majority of complainants are women.⁷ The legislation condemns any unsolicited sexual requirements or any acts that threatens or harm the employment status or the employment opportunities.⁸ The inclusion of harassment in the Labor Code differentiating from attacks against human dignity has caused some doctrinal confusion.

Some scholars preferred the specificity of the law and distinct treatment from discrimination analysis which is found to be too ambiguous.⁹ A minority doctrine opines the only hypothesis of sexual harassment banned is *quid pro quo* because an employer could take away opportunities or benefits leaving out poisoned or hostile working environment.¹⁰ Such doctrine is isolated given the ample scope interpretation done by the Ministry of Labour Board.¹¹ Its assessment is the Code involves the employer's obligation to ensure a dignified work environment of mutual respect between the workers that is free from sexual harassment.

Whether sexual harassment is related or not to discrimination is a question that also offers some trouble since remedies and procedures are different. For a discrimination case, a claimant must prove the impugned action violates fundamental rights such as to right to physical or psychological integrity, privacy or personal reputation. So far, little case law has emerged from labour courts on the issue of harassment. The bulk of case work has been at the labour inspection offices to carry the inquiries. The law provides opportunities to make the intersectionality between discrimination and harassment, if treated distinct and separate may in fact not grapple of the harms involved; harassment is a form on attack on human dignity.¹²

II. Inquiries on Sexual Harassment by the Labour Inspection Office

Our research sample constituted 113 cases of sexual harassments complaints in the Metropolitan Region of Santiago. This represents 62.7 percent of all complaints received in 2006. The cases involved at times more than one complainant. The names of the parties involved remained in privacy likewise the identities of companies.¹³ All the relevant information was erased from the original files, creating some difficulties in processing the information. In addition, some files had scanty data because the investigation was conducted by the employer and there were no detailed records of the complaint.

Of the sample, 86% of the complaints were investigated by the labour inspections offices , 12.3% dealt by employers and in two cases the information was not provided. Our results showed a lower number of cases investigated by employers compared to the results of a

⁷ Celina Carrasco & Patricia Vega, *Acoso Sexual en el Trabajo ¿Denunciar o sufrir en el silencio? Análisis de denuncias*. Aporte al Debate Laboral N° 23. División de Estudios, Dirección del Trabajo. Santiago, agosto de 2009, p. 42.

⁸ Art. 2 Labour Code.

⁹ Eduardo Caamaño, *Acoso Sexual: Concepto, clases y bien Jurídico Protegido*. In: *El Acoso Sexual en la Empresa. Análisis de la Ley 20.005*, LexisNexis, Santiago, 2005, p. 7.

¹⁰ Claudio Palevicino, *El Nuevo Ilícito de Acoso Sexual en el Derecho del Trabajo Chileno*, *Revista de derecho (Valdivia)*, Vol. 19 N° 1, julio 2006, pp. 105-123. <En: http://www.scielo.cl/scielo.php?pid=S0718-09502006000100005&script=sci_arttext>. Visitado el 17 de diciembre de 2009.

¹¹ Dirección del Trabajo, *Dictamen N° 1133/36 Ley 20.005, sobre prevención y sanción del acoso sexual*, 21 de marzo de 2005.

¹² Luis Lizama & José Luis Ugarte. *Nueva ley de acoso sexual*, Editorial LexisNexis, Santiago. 2005, p.17.

¹³ The law requires the complaints be dealt under confidentiality.

Ministry of Labour study that found that to 20.1% of the complaints were dealt internally in 2007.¹⁴

Of the 113 cases, 122 complaints were lodged by women and there were four men. There are three cases of same-sex harassment (two males and one female). In 8.8 percent of the cases there was subcontracting. Almost two-thirds of the inquiries involved hierarchical harassment, 29 percent were horizontal and it was not possible to ascertain the remaining.

The type of harassment involved unwanted bodily contact, sexual advances, obscene language and gestures. There are nine reports of situations that may constitute a sexual assault and in half of them there was a finding of harassment.

Our study revealed that found horizontal harassment does not preclude hierarchical imbalance: gender, seniority and power became the basic ingredients among low ranking workers. The same findings were reached by a study of the Labour Board.¹⁵

In most cases the inspectors could not establish the existence of harassment (51.3%). There were two cases wrongfully dismissed. The investigating officers deemed there was no contractual relationship between the parties: one of them involved two students doing internships with an employer and another between a home care worker and the father's employer. Recent interpretation of the law by the Labour Office found the student situation was case squarely protected by the Code since the students were under the supervision of an employer.¹⁶

In the cases of investigated by the company, the results were distributed in equal outcomes. It is striking that the results for 2007 cases analyzed by the Ministry of Labour showed a smaller proportion of findings of harassment. From a total of 136 investigations only in 46 there was a finding that is 33.8%.¹⁷

In almost 31 percent of the cases the claimant was out of the job by the time the complaint was investigated. In 18.5 percent of the complainants have lost their jobs, more than 12 percent quit after lodging the complaint and 15 percent of the claimants were transferred to another employment unit. A move of the complainant to another office or unit of the employer can mean a protection measure but in practice a detriment imposed to those already victimized.

These results contrast with the measures imposed on the harassers. In the 41 cases where harassment was found, in one quarter of them - eleven cases- the employer took a disciplinary action. Four workers were fired, two of them were transferred and in another two cases the harasser quit. Only in a single case, the labour inspection imposed a fine upon the employer for not conducting a timely investigation. There was a dismissal based on sexual harassment, but it was reversed when the harasser filed a complaint with the Labour Inspection Board and he was reincorporated back to work.

¹⁴ The law provides that an employer with more than 15 workers has to establish an internal procedures to deal with complaints. The worker can choose where to take the complain.

¹⁵ Carrasco & Vega, Op. cit.

¹⁶ *Ibid.*

¹⁷ *Ibid.* p. 85.

III. Sexual harassment in Labour Courts

If the burdens of cases are dealt by the labour administrative authorities, few cases get to labour Courts. A perusal reported decisions in electronic data bases since 2005 when the law was enacted showed only nine cases.¹⁸ Two of them are peripheral to sexual related offenses. They include wrongful dismissal, constructive dismissal and claims of violation of constitutional rights for both women who lodged complaints harassers fired because of their conduct.

The results are mixed and portray some worrisome signs. In a couple of cases lower courts decisions upheld that the harassers were unjustly fired and these judgments were reversed on appeal.¹⁹ In both cases the harassed workers gave evidence in Court about the nature of the harasser behavior. In the other case, the harassment issue is ancillary to the firing of male worker. He felt his reputation has been harmed because the employer had based the firing, *inter alia*, on sexual harassment. Since he worked in a all-male environment the employer was implying that he was gay.²⁰

A different path take is taken in two cases. In one of them, both the lower court and later on appeal the dismissal was found to be unjust. The employer stated the employee had admitted the facts of the harassment, he provided documentary and testimonial evidence. The Supreme Court ruled on appeal the employer could not prove the harassment.²¹ There was no record of an investigation by the labour board.

There is a single case of a complainant fired after she lodged the complaint and there was no finding of the harassment by the labour inspector. The employer fired the worker on reasons that the woman had slander the employer with false allegations. Supreme Court reasoned that the employer claim could not succeed otherwise it would undermine complainants to exercise a right. In the case at issue, the Supreme Court stated the woman had not made a frivolous or vexatious claim.²²

Women in constructive dismissal cases were not able to convince the court that harassment took place or that it was so serious that would entitle them to prove constructive dismissal.²³

In these cases, gender stereotype is rampant about the nature of sexual slurs or why the women complained. A trial judge stated, "While it is true that reference was made by some witnesses about certain expressions that could be construed as sexual innuendo, it is nonetheless true that these must be understood within its context and circumstances. When there is a pleasant and relaxed working environment people joke, even if those jokes are rated as "in bad taste and *double entendre*" which does not constitute harassment because that they are not directed to a particular person rather to the audience".²⁴ In the same light, the judge dismissed a witness testimony that talked about the employer looking at women breasts and buttocks and especially the defendant's. According to the judge the witness demonstrated her

¹⁸ Legal Publishing OnLine y Microjuris.com. It is possible that are more cases that go unreported in this data bases.

¹⁹ Corte de Apelaciones de Santiago, "Donoso Díaz con Banco de Santiago", rol 1729-2007, 8 de mayo de 2008 and Corte de Apelaciones de San Miguel, "Núñez Ramírez con Chile Andes Foods S.A.", rol 97-2008 LAB, 7 de julio de 2008.

²⁰ Juzgado de Letras de Valparaíso, "Llanos Carpeneto con Inmobiliaria e Inversiones Central de Abastecimiento S.A.", 9 de octubre de 2009.

²¹ Corte Suprema, "Heredia San Martín con Prosegur", rol 1354-2009, 25 de mayo de 2009.

²² Corte Suprema, "Chacón Núñez con Foto Stereo S.A.", rol 2654-09, 1 de julio de 2009, para. 10-11.

²³ Cuarto Juzgado de Letras de Santiago, "González Miranda con Rodríguez Peñaloza y Cía. Ltda", Rol 2347-2006, 20 de abril de 2007.

²⁴ *Ibid.* Para 6(a).

animosity by her comment. The judge took on the revenge theory and concluded her decision stating that she thought the complaint sued the employer because she was upset for not getting a promotion implying that it was not credible the woman had endured a whole year of harassment. On appeal the decision was reversed taking into the account the thorough inquiry done by the labour inspector and the circumstantial evidence. The Supreme Court upheld the trial court decision stating that the claimant had not verified her claim.

In another case that involved two defendants, the trial Court dismissed the constructive dismissal because the women had not used of the internal procedure.²⁵ On appeal both the Appeal Court and later the Supreme Court required the women to give detailed accounts of the alleged actions. Although it was not required by law, the judgment stated it was for judges to acquired conviction since the allegations undermine the employer's reputation. It seems that in these cases, the courts are requiring "beyond the reasonable doubt" test used in criminal court. If this were the case, few women could ever prove a harassment claim.

The examination of these cases shows that trial judges and courts in particular, are putting close attention to the investigations done labour inspection offices. They look for quality and thorough investigations, but if they are not convinced women will not have a chance if prejudice of women malicious intent is set in judges' minds.

In a second order, women complainants suffer double victimization as court proceedings initiated by harassers require their corroboration in court. If complainants do not testify in trial on behalf the employer, the dismissal for sexual harassment has negligible effect.

IV.

These results show the few complaints and when they are lodged the processing reveal some of the shortfall of the effectivity of the law. It is possible the inspectors are not yet well equipped to undertake inquiries that may lead to contradictory testimonies -the main piece of evidence, hence not being able to attain better results.

Another approach is to look at most systematic critique to Chilean labour law, that is it lives in the world of words, the law promises remedies for the harm harassment imposes upon women but it cannot live up to them. One could not talk about substantive equality unless the right remedies are in place.²⁶

²⁵ Corte Suprema, "Oyarzún Bertín y otras con Promociones Financieras Limitada y Smartcom S.A"., rol 6569-08

²⁶ José Luis Ugarte, *El Nuevo Derecho Laboral*, Editorial Universitaria, Santiago, 2005, p. 128.