

THE SEXUAL HARASSMENT AND EXPLOITATION IN EMPLOYMENT AS A MANIFESTATION OF DISCRIMINATION IN A WORKPLACE

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*“And she caught him by his garment,
saying: “Lie with me”
And he left his garment in her hand
and fled, and got him out.”*

*The Holy Bible: King James Version. 2000.
The First Book of Moses, Called
Genesis 39,12.*

1. The issues of sexual harassment isn't neither so new as many people think nor as complicated how it would result from the powerful mass media propaganda (radio, TV, internet, press). The section chosen for the motto above is the epigraph of the Bible which probably concerns one of the first documented cases of the sexual harassment in relation to the employment. Joseph had the beautiful figure and the appearance was employed in Potiphar's estate as the administrator. The Potiphar's wife repeatedly pestered Joseph unambiguously proposing him undergoing the sexual relationship. Joseph refrained, not wanting to commit the misdemeanour against his employer and against God. The hurt and unmet Potiphar's wife accused Joseph of the attempt of the rape. In consequence of it harassed Joseph not only lost a job but also he was thrown into prison.

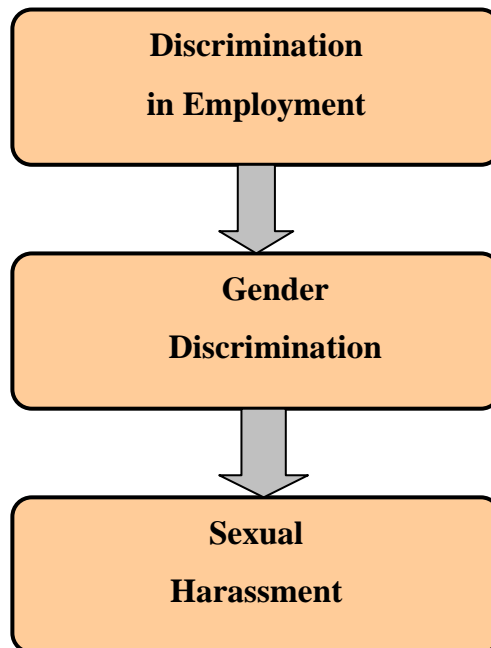
As thousands of years ago, also nowadays a sexual harassment is almost always an issue of the power or the sex (not accidentally these two factors are listed in this order). The total appearance of all these elements is leading management to such harassing which is evident pathology, which causes measurable financial losses for management entities (e.g. because of absence) and harm of victims (among others: depressions, nervous breakdowns, suicidal thoughts). Therefore it should be in a range of interesting not only jurisprudence, but also management studies, psychology, sociology and medicine (with implication of it accepting various definitions of the sexual harassment, as well as harassing, the mobbing and the sexual exploitation will be, for the purposes of these sciences).

2. At present the term “sexual harassment” becomes a key-word which is very often used in so-called public-media debate and also used for determining the most different behaviours and because of that - more is misleading and falsifies named reality than explains it and correctly categorizes. In the past in the Polish legal system there were no terms of harassment, sexual harassment, nor mobbing. It was possible to recognize all attempts of the definition, referring to accepted answers in the literature on the subject and documents of international organizations.

Nowadays those terms are legal terms in Polish system of law and only it is possible to define them differently from it in other than legal studies, whereas for lawyers remains only interpretation which is often required because of blunt notions used in regulations. The sexual harassment at the work is interpreted as sign of gender discrimination (see: The

Diagram No. 1)¹. This status of sexual harassment begun on 1st January 2004² and according to the article No. 18^{3a} § 6 of the Polish Labour Code a sexual harassment is defined as every not-accepted behaviour about sexual character or referring to the sex of an employee, of which infringing an employee's dignity or humiliating her or him is a purpose or an effect of it. The physical, verbal or going beyond verbal elements can make up the sexual harassment.

The Diagram No. 1³
The sexual harassment as manifestation of gender discrimination



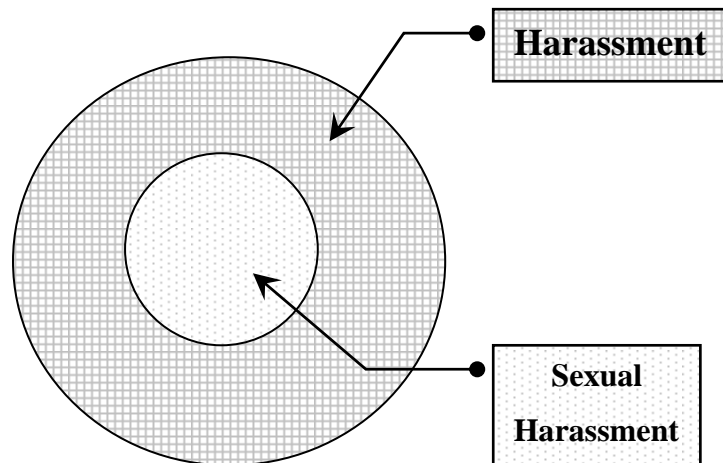
The sexual harassment is a form of harassment, which is defined in the Polish Labour Code in § 5 of the same article, as the behaviour with the purpose or effect of violating dignity or humiliation or degradation of the employee. Every sexual harassment is a harassment so (within the meaning of the Labour Code), but not every harassment is a sexual harassment. The relationship between the ranges of these names shows the Diagram No. 2.

¹ However in some legal literature books there is also said that not every type of sexual harassment in employment can be *a priori* regarded as the infringement of the principle of equal treatment in the employment, that is as the manifestation of a discrimination; D. Dorre-Nowa: *Zbieg środków ochronnych przed molestowaniem, molestowaniem seksualnym i mobbingiem*, "Praca i Zabezpieczenie Społeczne" 2004, No. 11; also D. Dobre-Nowa: *Czy na pewno każde molestowanie jest dyskryminacją?*, "Studia z zakresu prawa pracy i polityki społecznej" 2003, No. 1.

² I. Boruta: *Zakaz dyskryminacji w zatrudnieniu*, "Praca i Zabezpieczenie Społeczne" 2004, No. 2.

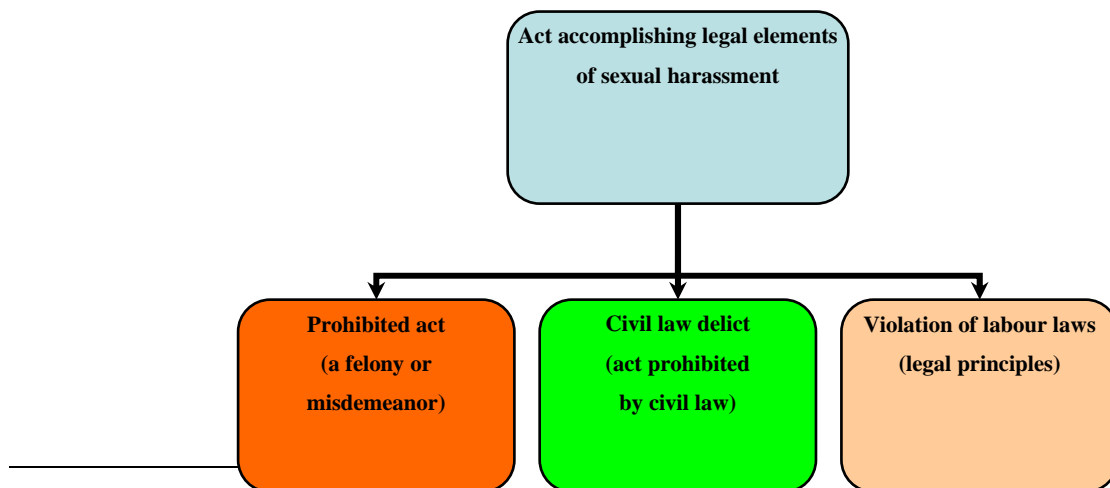
³ Own study.

The Diagram No. 2⁴



In the Polish Labour Code the harassment of an article No. 18^{3a} § 5 Pt. 2, as well as sexual harassment as referred to in § 6 of an article No. 18^{3a}, by their very definition taking into account the characteristics and laws of seats in the scheme of Labour Code's article 18^{3a}, constitute an infringement of the principle of equal treatment in employment and are manifestations of discrimination. Because pointing to the need of any additional element, designed to indicate the differentiation status of employees is a misunderstanding. Either something is sexual harassment within the meaning of the Labour Code and breach of the principle of equal treatment is a prerequisite to a compensation claim according to an article No. 18^{3d}, or it will not be sexual harassment, as defined in the Code. It will be some other type of harassment, which the author if that thesis (Mrs. D. Dorre-Nowak, 2004) will have to arbitrarily and *contra legem* (against the law) determine. Of course it could happen because what is commonly known as sexual harassment, accomplished or not accomplished legal elements of the Labour Code article 18^{3a} § 6, will be able to be classified not only as a violation of labour laws but also as a prohibited act within the meaning of criminal law or civil law delict. Sometimes the choice is a matter of three concurrent legal basis of harassment, sometimes it will be possible to identify only one or two of them (see the Diagram No. 3).

The Diagram No. 3⁵



⁴ Own study.

⁵ Own study.

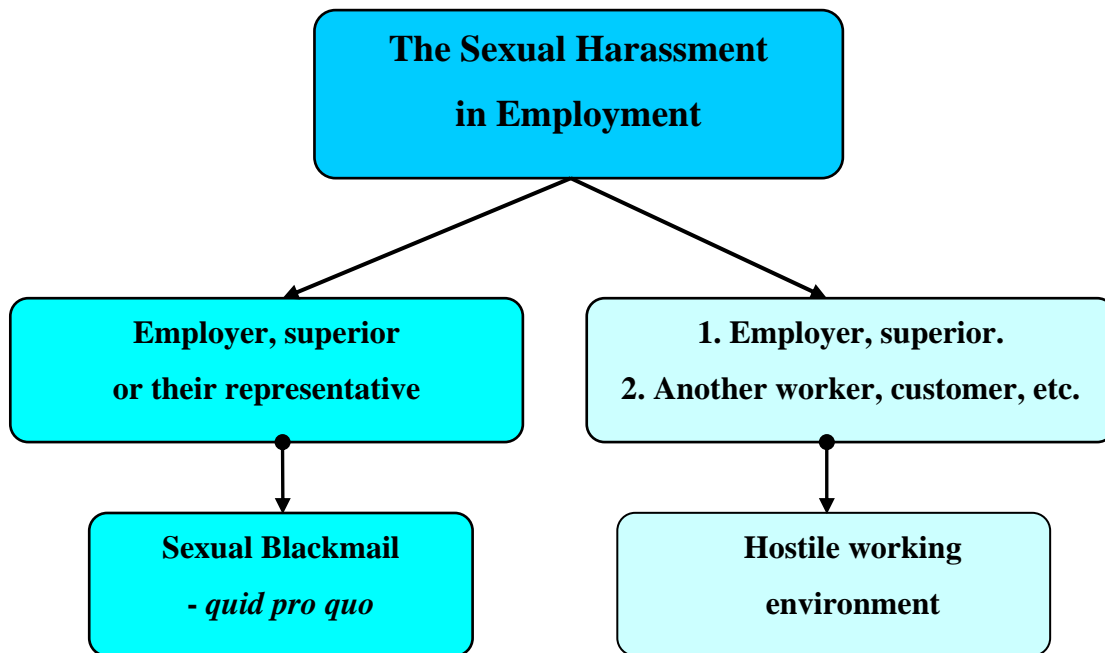
The Sexual harassment (article No. 18^{3a} § 6 LC) may be a single behavior may also occur as a sequence of behavior (only the human as an individual, which does not exclude the liability of the collective entity for the conduct of such person). This must be the unacceptable behaviour by a particular victim (not by reference to a standard employee, and generally prevailing standards). Acceptance is a confirmation of something or otherwise consent. For the purposes of the article No. 18^{3a} § 6 LC therefore it can only mean the lack of consent (a lack of acceptance of such behaviour).

Although the Labour Code laws do not speak directly about the need for the opposition, but the lack of consent must be expressed in some way on the outside by verbal opposition (it's enough to just say: no) or demonstrated that opposition (for not accepted behaviour) in other ways, such as pushing back the perpetrator. I am convinced that the mere glance expressing disapproval of the offender behavior is inadequate.

Behavior of the offender must be deliberate and intentional because he or she wants to act that way with the necessary effect of it in the form of violation of dignity or degrading or humiliating the employee. The effect as that does not necessarily has to occur because it is enough to just act intentional against personal interests of an employee and to create by the offender threats for those interests. Questionable is when there is only the same effect without the purposeful behavior of perpetrators as a sufficient condition of sexual harassment. The legislature used the word "or" not "and" in the phrase "purpose or effect", so requiring the conjunction of purpose and effect would therefore be unauthorized but desirable. So *de lege lata*⁶ there is a possibility of the responsibility even for the involuntary sexual harassment. With regard to Code's current definition of harassment still remains the so-called division into "sexual blackmail" (*quid pro quo* - "something for something".) and the "creation of hostile working conditions" (*creation of hostile working environment*), and the perpetrator may be in the first case only the employer, its representative agent or a person having an impact on decisions by employers, and in the second case: both those already listed above and other workers (i.e. colleagues), and even third parties such as customers (see the Diagram No. 4).

⁶ Latin Phrase which means - what the law is (as opposed to what the law ought to be).

The Diagram No. 4⁷



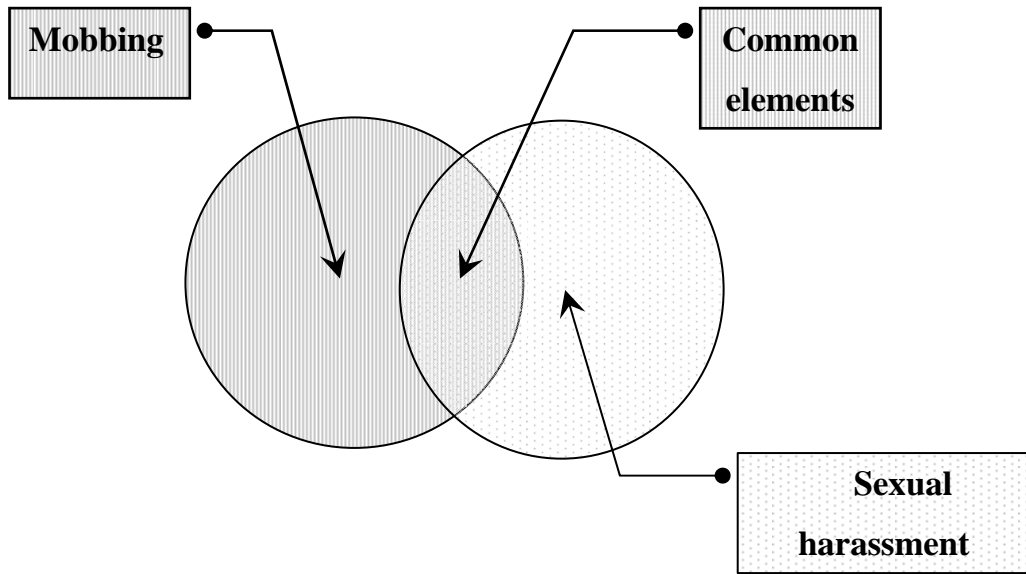
The sexual harassment can include physical, verbal or non-verbal elements. Specific harassment can consist of all of these elements, or one or two of them. It can not provide an exhaustive (closed) list of typical behaviors for each element, but we can however indicate some number of their examples. Physical harassment may take the form of touching, hugging, stroking, patting, pinching, kissing, etc. Occurrence of a physical element is reduced to the requirement for direct physical contact with the body of a harassed person. Verbal harassment is any verbal expression - an attention to sexual connotation, comments (e.g. about the appearance, marital status), jokes, vulgar names (e.g. about woman - "hot chick", "fresh meat"). Non-verbal harassment may take the form of whistles, presentation of the content of an obscene (pornographic) - hanging on the wall pornographic pictures, placing on a desk, sending e-mail, lecherous gaze or gestures which imitate sexual intercourse or have another sexual meaning.

A sequence of behaviour (several activities) which accomplish characteristics of sexual harassment and in addition realize the condition of permanence and durability (e.g. within a few months) can sometimes also fulfill the characteristics of mobbing⁸ which is defined in the article No. 94³ § 2 of the Polish Labour Code. Between mobbing and sexual harassment there is the ratio of an intersection (see the Diagram No. 5).

⁷ Own study based on the concept proposed by L. F. Fitzgerald (L. F. Fitzgerald, M. J. Gelfand, F. Dasgow: *Measuring Sexual harassment: Theoretical and Psychometric Advances*, Basic and Applied Social Psychology 1995, vol. 17, No. 4; L. F. Fitzgerald: *Sexual harassment: Violence against women in the workplace*, American Psychologist 1993, No. 48).

⁸ See an article: W. Cieślak, J. Stelina: *Prawne aspekty mobbingu*, "Prokuratura i Prawo" 2003, No. 10; *Mobbing (prześladowanie) – próba definicji i wybrane zagadnienia prawne*, "Palestra" 2003, No. 9-10.

The Diagram No. 5⁹



⁹ Own study.