

# Sexual harassment: An old, new problem



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***Time* magazine's person of the year for 2017 was "The Silence Breakers"—the women who broke the code of *omertà* surrounding sexual harassment and launched the #MeToo campaign. Should employers expect to face a wave of harassment claims? What is sexual harassment and what are the employer's obligations to counteract it?**

In October 2017 the *New Yorker* and the *New York Times* published articles describing cases of sexual harassment allegedly committed by the head of one of the major Hollywood film studios against actresses working with the studio. These publications sparked a worldwide debate. It was marked by a post on Twitter in which a victim of harassment called on other victims to stand up and be counted on social media with the hashtag #MeToo. Twelve million such posts appeared on Facebook in the next 24 hours. Similar posts began to appear in other countries, including Poland.

But if Polish judicial statistics are to be believed, the problem of sexual harassment barely exists here. In 2016 there were 15 cases pending before the district courts seeking damages for sexual harassment, and five cases before the regional courts. Considering that trials last some 12–18 months, in practice such claims represent less than one in a thousand cases before the labour courts.

This presents a stark contrast with the results of studies of sexual harassment. According to a report issued by the STER Foundation in 2016, 87.6% of women in Poland have experienced some form of sexual harassment on the job or in public places. The perpetrators include, for example, the woman's boss (15.8%), a co-worker (41.8%), or a client, customer, patient or student (19.9%). International research conducted by the European Commission in 1987–1997 found that in Europe, about 40–50% of women had experienced harassment in their work environment. And according to a pan-European study in 2014 by the EU Agency for Fundamental Rights, 75% of women employed at top managerial positions and 74% practising the free professions had experienced some form of sexual harassment in their lives. Thus the research shows that sexual harassment in the work environment is a vastly more common problem than suggested by the negligible number of lawsuits. This is consistent with the conclusions from the #MeToo campaign.

It may be wondered whether the small number of trials results from unclear regulations, slow proceedings, low damages, or problems of a social nature, such as low awareness of what constitutes harassment under the law. But it seems that following the #MeToo campaign, harassment claims may rise. So now is the time to pay attention to this problem, particularly considering that employers bear a statutory obligation to combat phenomena of this type.

Under Poland's Labour Code, sexual harassment is understood as a particular form of sex discrimination which includes any unwanted behaviour of a sexual nature or referring to the employee's gender, with the aim or effect of infringing the employee's dignity, in particular by creating an intimidating, hostile, degrading or offensive atmosphere (Labour Code Art. 18<sup>3a</sup>). Such behaviour may include physical, verbal or nonverbal elements. The legal definition of sexual harassment is therefore based largely on evaluative

terms (such as “infringement of dignity” or “degrading”). This may be one source of the difficulty in correct identification and classification of instances of harassment. Given the small number of holdings on these issues by the Polish courts, it is worthwhile to consult the rulings from courts in other countries on similar cases, as well as the views expressed in the legal literature.

In the literature, it is most often indicated that sexual harassment can take the form of sexual blackmail, also known as *quid pro quo*, or it may consist of creating a hostile environment. A hostile environment may be further broken down into unwanted sexual attention or gender harassment.

While identifying *quid pro quo* cases may often be straightforward, as it is the starkest form of interference with the employee's sexual autonomy, other forms of harassment sometimes take a subtler or coded form. Unwanted sexual attention may also take more unequivocal forms (such as coerced hugging or patting), or forms that are harder to define and thus harder to prove (although rulings from European courts confirm that stares, gestures or comments may be regarded as harassment).

Harassment based on belonging to a particular gender can be the most difficult case to identify. Such behaviour as telling jokes depicting a certain gender in a frankly sexual context, or displaying pornographic materials (such as photos on a calendar or computer wallpaper), may constitute gender harassment—even if in some environments such behaviour is viewed as an expression of a certain corporate culture or “mere” rudeness.

The case law from the US courts presents instances of sexual harassment that would be especially doubtful under the Polish regulations. This could include for example instances of questioning the qualifications of employees holding jobs culturally associated with a different gender (e.g. a women surgeon or a female taxi driver), by referring in an insulting manner to the category of gender, for example a blunt statement that a woman is incapable of properly performing certain duties. According to those rulings, such instances may constitute sexual harassment. This issue has yet to be analysed by the Polish courts. In our own view, treating such behaviour as harassment would be doubtful in Poland, even though such a situation appears to meet the conditions for harassment as set forth in Labour Code Art. 18<sup>3a</sup> §6. It may be argued that under Polish law such behaviour would rather be regarded as an infringement of the employee's personal interests rather than sexual harassment.

However, it does appear correct to classify as sexual harassment another type of gender harassment often called “horseplay.” This involves a form of bullying occurring for example among men working together on a team, which is expressly connected with sexuality and takes such forms as inappropriate remarks, name-calling and assaults. Although