Workplace Bullying in Italy. Malicious Intent and Role of EU Anti-discrimination Law*

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1. Introduction.

Over the last two decades of the 20th century, bullying in the workplace, including both mobbing and harassment, has been the subject of much attention from Italian labour lawyers[591] and courts. As Italian law has no special rules dealing with mobbing and lacks a statutory definition of the phenomenon[592], courts and legal scholars have been called upon to seek a precise definition for themselves and to identify the general characteristics required to constitute what we commonly define as mobbing. Several academic disciplines (such as psychology, medicine, sociology, etc.) have shown increasing interest in it[593], and there is no doubt that dialogue with these disciplines has influenced the courts' definitions and conceptualizations of mobbing to some extent. The problem is that the medical and/or sociological sciences, on the one hand, and the legal sciences, on the other, often use a different language and consider different meanings of the term "mobbing".

Heated discussion has long been ongoing among Italian labour law scholars regarding the most effective way to combat bullying in the workplace. The application of the definition of "mobbing" adopted by the courts has been strongly criticized by some academics[594] because non-legal definitions developed in fields pertaining to sociology are unlikely to be applicable automatically[595]; other lawyers suggest avoiding the term "mobbing" altogether, as use of this term raises more questions than it answers and can only be applied with the help of a legal filter, such as that provided by legislation on moral harassment[596]; lastly, rather than using the notions from psychology, other writers recognize that the concept has no substantive meaning but can be used as a "legal framework" and, to a certain extent, play a "cognitive" role despite providing little guidance for practitioners[597].

It is now anachronistic to propose a statutory solution to end "bullying in the workplace". It should be stressed that in recent years Italian courts have been under increasing pressure to respond to the new challenges of information technology and have addressed problems relating to the spread of "new" forms of harassment and offensive conduct[598] capable of threatening, humiliat-

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[591] There is a vast literature on the subject in Italy. Special mention may be made, for example, of Tosi, 2004; Pedrazzoli, 2007; Scarponi, 2009.

[592] On this topic a regional Law for Lazio (no. 16 of 11 July 2002) attempted to introduce an organic regulation but this attempt failed as the Constitutional Court held the norm to be unconstitutional (ruling no. 359 of 19 December 2003): see, for example, Lassandari, 2007, p. 40.

[593] For early studies on this topic see Leymann, 1993; Id., 1996; Ege, 1997; Id., 2019.

[594] See Proia 2005, p. 827; Boscati, 2001; Gragnoli, 2003.

[595] Del Punta, 2003, p. 539; Viscomi, 2002, p. 47, Tullini, 2000, p. 251; Luciani, 2007, p. 146.

[596] The term "moral harassment" was first adopted to define the phenomenon by Hirigoyen 2000; see also Lerouge 2010 p. 109; *Contra* Ege 2019, p. 44.

[597] Pedrazzoli, 2009, p. 5

[598] One commentator attributes the increasing frequency of workplace bullying in America to "the growth of the service-sector economy, the global profit squeeze, the decline of unionization, the diversification of the workforce, and increased reliance on contingent workers": Yamada 2000. On the broad variety of legal strategies used to protect workers from bullying in some countries, see Lippel 2010.

ing or infringing the dignity of the person; and they have therefore attempted to assess the adequacy of the traditional judge-made notion and to develop a new, more flexible legal concept, known as "straining".

2. Mobbing: a judge-made definition. The controversial role of malicious intent.

According to the traditional judge-made definition, the term "mobbing" should be understood in a broad sense to include, on the one hand, behaviour that, taken alone, can be classified as illegal and can lead to prosecution in a criminal court (e.g., sexual harassment, discrimination, unjustified transfer, etc.). On the other hand, there is "neutral conduct" (for instance, any vexatious form of non-verbal communication) not constituting illegal behaviour but systematically connected by the intention of harassing the victim. At the same time, after identifying the provisions on which a victim of mobbing can rely, the courts and employment tribunals have interpreted very narrowly the general prerequisites that must be fulfilled in order to establish a successful claim based on mobbing, mostly borrowing the parameters developed in medical science.

In a 2017 case, for example, the question arose as to whether a situation in which a private civil servant had been relieved of all tasks and relegated to total inactivity for a long period of time could be qualified as "mobbing". The Court of Cassation[599] held that stringent requirements need to be satisfied for a claim of "mobbing" to be established. First of all, mobbing must be seen as a series of single actions of a persecutory nature over a long period of time, which, if taken alone would be either illegal or lawful, all systematically linked by the goal of harassing the victim. The Court therefore focuses on the continuity of the actions on the part of the perpetrator (the employer or supervisor or other employees subjected to the leadership of the former). Secondly, the behaviour in question must be such as to violate the personality, dignity, and/or physical or mental health of a worker, jeopardizing his or her future career. Thirdly, in order to establish a successful claim for mobbing, there must be some causal link between the breach of duty brought about by the described behaviour and the harm suffered; and lastly, the court stipulated that the employer has to prove that the employee acted with the clear intention of doing harm[600].

Although the courts have long played a significant role in shaping the definition of mobbing and have sought to identify the phenomenon, stating what precisely the general characteristics that constitute this concept are is still highly problematic[601].

One of the most critical aspects relating to the traditional judge-made definition concerns the role played by the malicious intent of the perpetrator of harassment. In this respect, courts and labour law scholars have adopted two specific approaches that differ little from the previous approach to antidiscrimination law. Opinions diverge on whether the causal link between harassment (mobbing) and damages is an objective or a subjective standard. In some rulings, in order to avoid introducing a sort of "objective responsibility", the Court of Cassation held that this link

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[599] Cass., January 27, 2017, no. 2142.

[600] For these preconditions, see also Tribunal of Turin 18th December 2002.

[601] The notion of workplace bullying is still a subject of controversy also in medical literature. An up-to-date notion, constructed on the Leyman definition but calibrated more towards the context of the company and legal responsibility, is that developed in *Hauptverband der gewerblichen Berufsgenossenschaften.* See Windemuth, Paridon, Kohstall, 2003, pp. 59-62.

is established only if malicious intent on the part of the perpetrator of the harassment has been proved[602]. This approach probes the mental state of the perpetrator and requires that the employer, intentionally or negligently, unlawfully injures or endangers directly (e.g., damaging or stealing private belongings) or indirectly the victim's health, right of personality, property rights, or financial interests (dolo generico or dolo specifico respectively in Italian) [603]. The subjective approach has also been endorsed by some legal scholars and is justified by the fact that mobbing must be seen as a combination of single events where the malicious intention of the perpetrator of harassment, i.e. the purpose of violating the right of personality, dignity, or health of the victim, can be considered as a "functional cohesion factor", as it systematically links the single events[604].

In other words, some forms of behaviour, consisting of acts that, taken alone, are illegal or unlawful in themselves, such as discrimination, unjustified transfer, unjustified denial of promotion, downgrading responsibilities without good reason etc., can be considered mobbing only if the victim can prove the malicious intent of the employer to bring about the social exclusion of the employee[605].

This approach has been challenged by writers who support the opposite view, the so-called theory of "objective harm", whereby mobbing exists even in the absence of malicious intent by the perpetrator of the vexatious acts. Victims of workplace bullying only have to prove that the mobber's behaviour impinges on the dignity of the person concerned: not only does the burden of proof for the harassment lie with the employee but also that regarding the causality between such acts and the harm occurred. There is no need to prove positive intention to violate the victim's right of personality. According to some scholars, this approach, which considers the effects rather than the intentions, can produce best results in terms of the effectiveness of the regulation, as proof of the state of mind or malicious intent is not necessary to give rise to a claim for workplace bullying, and therefore the burden of proof is not, from past experience, expected to be so difficult to meet.

This opinion, endorsed, albeit with some degree of ambiguity, by the Constitutional Court, has also been supported to some extent in recent rulings of the Supreme Court, which held that conduct violating the victim's health, right of personality, or property does not exonerate the employer from liability in the absence of malicious intent by the perpetrator of the vexatious acts[606]. It is probably premature to speak of a reversal of the previous case law; however, there is no doubt that the Court has decided to review its position on the distribution of the burden of proof between employees and employers in mobbing cases in an attempt to reach a compromise between the two approaches. In particular, it is recognized that, within the meaning of art. 2729 of the Italian Civil Code, evidence of intent can also be provided indirectly, as the presumption that

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[602] Cass. May 23, 2013, no. 12725; T.A.R. Liguria, Sez. II, July 21, 2010, n. 645.

[603] T.A.R. Lazio January 13, 2015, no. 439.

[604] Tullini, 2000, p. 257.

[605] Viscomi, 2002, p. 53

[606] Cass. June 20, 2018 n. 16256, cf. Nunin, 2019, p. 380

mobbing has occurred can be deduced from the general characteristics of the behaviour in question, such as the continuity between the single events[607].

This view can be endorsed as it is in line with the basic canons of fairness and justice, insofar as it identifies the victim of mobbing as a "weaker party" with regard to the availability of suitable means to prove malicious intent. However, it should be noted that these requirements could be better fulfilled by using remedies in anti-discrimination law, which has changed the burden of proof in discrimination cases, in view of the fact that the defendant has much better knowledge of what occurred than the claimant[608]. This means that if the complainant proves facts from which a court could conclude, in the absence of adequate explanation, that the respondent committed an act of discrimination against him or her, the judge will find for the complaint, unless the respondent proves that (s)he did not commit the act.

The crucial question therefore arises of whether, and to what extent, the concept of harassment, as identified in the legislative decrees on discrimination, can include mobbing (Art. 2, para. 3, of Legislative Decree No. 215/2003; Art. 2, para. 3, of Legislative Decree No. 216/2003) provided that discrimination and mobbing have, as will be seen below, some key characteristics in common, especially in terms of consequences.

3. Mobbing and harassment. The broad use of the term "harassment".

Among labour law scholars, the concept of harassment and the notion of mobbing are often used interchangeably in view of the fact that the personality, dignity or physical and/or psychological integrity of an employee can be violated both when moral or sexual harassment based on protected factors, actually takes place, and when the victim's health, right of personality, and property rights are endangered, as typically occurs in cases of workplace bullying[609].

The Italian legislator confirmed the view supported by a number of legal scholars before the amendments were introduced[610] and included harassment within the concept of discrimination, extending the definition of moral harassment to include that related to an employee's race, colour, or nationality, so that unlawful harassment can now refer to any of the protected characteristics, other than pregnancy, maternity, marriage and civil partnership (according to art. 2 Legislative Decree 215 and 216 of 2003: "Harassment is considered discrimination", or in the original text "sono considerate discriminazioni le molestie"). Not very surprisingly, in an initial definition of sexual harassment, one of the conditions necessary to meet the definition of harassment is constituted by a typical element of the notion of bullying in the workplace developed in case law and by legal scholars, despite its absence in the European definition, i.e. continuity between the single events.

There is no doubt that the links between sexual harassment and mobbing are so close, starting from the factual level, that it is difficult to draw a sharp distinction. Harassment often constitutes

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[607] Aloisi, 2018; Lazzari, 2018.

[608] In many cases, Italian Courts have used the means provided by antidiscrimination law to establish some alleviations of the standard of proof. See Cass. 5 November 2012 no. 18927; Cass.15 November 2016, no. 23286, in *temilavoro.it*, 2017, with a comment by Venditti. For the opposite view in the German system, see Bag 25 October 2007. See also Fischinger 2010, p. 180.

[609] Malzani, 2014, p. 331.

[610] De Simone, 2019, p. 32; Lazzeroni, 2007, p. 379.

the preamble to, or becomes a component part of, a mobbing strategy: this happens whenever an offender initially confines himself to sexual harassment and subsequently (perhaps as a result of refusal by the victim) becomes a mobber, being convinced that the person who rejected him must be punished. Ultimately, the demarcation line is not clear as there is sometimes an overlap between the two forms of behaviour, and it cannot be ***ruled out that*** harassment actually becomes a means of mobbing whenever the mobber decides to harm the victim through unwanted sexual acts in addition to comments of a sexual nature. In view of this factual link, it is not surprising that, since the earliest EU legislation, sexual harassment has generally been considered in concomitance with mobbing[611].

As the workers' protected interests in cases of moral harassment and mobbing are similar, it is important to clarify whether, and how far, the answer to the question concerning the necessarily intentional nature of actions constituting mobbing may be found in anti-discrimination law.

It is widely known that this fundamental aspect of the concept of discrimination has been subjected to close scrutiny in case law on sex discrimination. The ECJ holds that the causal link between the protected interests and the adverse treatment received by the victim is established when the treatment is based on, or caused by, some prohibited classification, regardless of any malicious intent by the perpetrator of the vexatious acts [612]. In other words, the existence of some subjective mental state cannot be considered as a precondition for establishing direct discrimination[613].

As far as harassment is concerned, the definitions refer to "unwanted conduct" that takes places with the "purpose or effect" of violating the dignity of the person concerned, in particular where it creates an intimidating, hostile, degrading, humiliating or offensive environment (art. 26 Decree no. 198 of 2006). The broad definition is similar to that of mobbing, as it does not focus on the objective characteristics of the forbidden behaviour, but on its ability to create an intimidating, hostile (etc.) environment and to affect the dignity of the person concerned. The legislator not only adopts a "teleological" criterion, but in referring to the "unwanted" aspect of the act, clarifies that harassment must also be assessed subjectively, considering the perception of the complainant. Unlike mobbing, the concept of harassment under antidiscrimination legislation requires neither continuity between the single events nor evidence of the intention of the perpetrator of the harassment.

The wording is vague as Italian legislation requires the unwanted conduct to be "based on" the relevant protected characteristic ("per ragioni connesse al sesso" ["for reasons connected with sex"]): therefore it could be interpreted as referring to the intention of the perpetrator of the harassment. However, such an interpretation would conflict with European law, where there is

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[611] See in particular the European Parliament *Resolution* on harassment in the workplace (*2001*/2339(INI)). AS-0283-2001 and, more recently, Resolution no. 2055 of 11.9.2018 on measures to prevent and combat mobbing and sexual harassment in the workplace, in public spaces, and political life in the EU (A8-0265/2018).

[612] Case C-127/92 [1993] ECR I-5535.

[613] The USA is the only jurisdiction where a subjective approach has been endorsed by the Courts. See Kaithan, 2015, p. 71. On the concept of discrimination and the role of the intent in UK jurisprudence see, recently, Santagata de Castro, 2019, p. 229.

nothing to allow emphasis of the importance of intention[614]. EU antidiscrimination legislation makes it clear that the behaviour (and not the reason for it) is related to sex.

Although the definition refers to an action that requires "the aim" of violating the complainant's dignity as well as creating an intimidating, hostile, etc, enviroment, it should be be pointed out that this approach also focuses on the "effect" of the undesired behaviour (Dir. nos. 43 and 78 of 2000 and no. 73 of 2002). Moreover, it would be difficult to deny that the subjective approach, as in discrimination law, might create problems regarding the effectiveness of anti-discrimination protection: the burden of proof, lying with the victim of harassment, is often hard to fulfill in practice. The complainant is obliged to present evidence to support the presumption that moral harassment has occurred and, in particular, has to prove that the acts of harassment took place as well as the causality between these acts and the harm that occurred. However, a claimant seeking to establish a prima facie case is likely to encounter some difficulties proving the facts in the event of ambiguous behaviour (ambiguous comments or apparently chance groping). Moreover, in most cases, the offender deliberately tries to avoid acting in the presence of witnesses.

The case of mobbing differs insomuch, as we have seen, that the employee is protected against actions liable to infringe the dignity of the person or his/her legal interests regardless of whether there is a protected characteristic (sex, race, sexual orientation), and can invoke strong remedies to successfully establish a contractual claim against the employer (art. 2087 ICC). On the other hand, the typical elements of the notion of bullying in the workplace that have developed in case law are 'continuity' and 'reiteration'. Yet, these different characteristic elements do not seem to be significant enough to differentiate mobbing from harassment in terms of the applicability of antidiscrimination legislation. This may mean that in the case of workplace bullying it ought to be unnecessary to prove any particular motive or intention to cause harm on the part of the employer.

Emphasis on the common ground between mobbing and harassment can be derived from two important changes to the legal framework. The first concerns the most recent Corte di Cassazione case law on mobbing. The Court has shown a tendency to reduce the scope of reiteration, which had been the main (and characteristic) aspect and has led to a new model of bullying in the workplace, known as straining, discussed in § 4 below.

The second important change regards the scope of antidiscrimination law: the acts prohibited by anti-discrimination law have been significantly broadened in more recent legislation, and now also cover some forms of unlawful harassment. The point to be made is that in the light of this tendency, the concept of bullying in the workplace appears closer to that of harassment/discrimination under EU and Italian legislation. Both prohibited forms of behaviour focus on the violation of dignity. In our opinion, harassment cannot be considered a new form of discrimination as the Italian legislator has not altered the scope of the concept of "discrimination" by implementing the European definition of the concept[615], which still requires a comparison. However, it did extend the various remedies available to targets of discrimination also to the victims of harassment.

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[614] In German legal scholarship, see Bauer, Krieger, 2015, § 3 Rn. 54, and lastly, very clearly, Schäfer, 2018, p. 60, who, referring to the formulation of the directives, states: "*Für die Richtlinien ist „jede Form von […] Verhalten sexueller Natur" in Betracht zu ziehen. Die subjektive Komponente, die in der nationalen Formulierung angelegt ist, findet hier keinen Eingang*".

[615] For an opposing view: Corazza, 2009, p. 106 and Barbera, 2003, p. 413 according to whom discrimination includes "harassment" (sexual and moral).

In this way, the new provisions brought no change to the genetic code of the antidiscrimination legislation, i.e. its historical aim to protect the rights of social groups (more likely to be) at risk of marginalization but laid great emphasis on the link between equality and human dignity. In this respect, it should be pointed out that the (broad) definition of harassment is very similar to that (judge-made) of mobbing, as in both cases the main legal condition for applying the specific remedies (see below) available is that the employer's behaviour in the case in point impinges on the dignity of the person[616]. In effect, there are a growing number of scholars who support the opinion that the notion of harassment could be invoked in a broad sense so that all (or almost all) cases of mobbing could fall within its scope of application.

The main advantage of invoking this notion is that of "avoiding excessive recourse by those interpreting the law to the findings of medical science and psychology"[617], making it easier to question the subjective approach in cases of mobbing and thus alleviate the victim's burden of proof[618], as the victim would therefore be able to take advantage of the more favourable provisions found in antidiscrimination Law (art. 40 of Decree no. 198/2006). However, Italian case law, unlike other jurisdictions (see below), only rarely seems to give necessary weight to the similarities between the two definitions. As Italian law lacks a statutory definition of mobbing, the courts have tended to refer to art. 2087 of the Italian Civil Code, stating the duty to protect not only employees' "physical integrity" but also their "moral personality" (a duty that can be correctly classified as an obligation to protect). The reference to "moral personality" is an important means to guarantee effective application of the basic principles laid down in the Constitution by arts 2 and 32 in relation to art. 41 of the Constitution, such as the constitutional guarantee of the dignity of the worker[619].

Art. 2087 of the Italian Civil Code therefore adopts a very dynamic method and can be considered an adequate means of ensuring that a victim of mobbing can successfully establish a claim against an employer in cases of mobbing and straining alike. According to this provision, in the management of his enterprise the employer not only has a duty to adopt all measures necessary to protect the physical integrity and moral personality of his employees but also a duty to (actively) protect the employee from the behaviour of supervisors, co-workers, and third persons over whom the employer exercises influence[620].

However, there is no doubt that (many) cases of mobbing can come under both the duty to protect the employees' health and safety and the scope of anti-discrimination law. This tends to support the view of those who argue that an action that can be defined as harassment can also fulfil further requirements so as to constitute mobbing[621]. In practice, it is also necessary to take into account that neither definition, being constructed in teleological terms, focuses on the structural

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[616] Malzani, 2014, p. 333; Corazza, 2007, p. 108

[617] Scarponi, 2009, p. 29; see also Del Punta, 2006, p. 21.

[618] Del Punta, 2013, p. 25

[619] Vallebona, 2005, p. 2.

[620] Del Punta, 2006; On the duty to provide safe conditions of work (art. 2087 c.c.) see also Zoppoli L., 2008, p. 8; Natullo, 2007.

[621] Benecke, 2003, p. 227 speaks of a «*Spezialfall*».

characteristics of the unlawful conduct but on its potential to violate personal dignity[622].

Whether or not the most sophisticated anti-discrimination protection techniques aimed at countering harassment by employers are applicable depends only on the kind of relationship in practice between mobbing and harassment. The identification of a species-to-genus relationship – in addition to the advantages mentioned above – would offer important opportunities from the perspective of protecting the worker's right of personality[623].

From this standpoint, the attempt – made in some judgments – to draw too sharp a distinction between mobbing and harassment is not at all convincing. In this regard, to quote one example, it may be worth mentioning a decision in which the Court of Como (May 22, 2001) rejected the employee's claim, making a rather arbitrary theoretical distinction. According to the court, mobbing – also in view of its ethological genesis – should be characterized by a collective dimension, aiming to force the victim to leave the company and terminate his or her contract of employment. Moreover, it would include a "set of actions, each of which is formally legitimate and apparently inoffensive". In contrast, the Court considers harassment to be an individual action aiming to humiliate or harass the victim. The censured behaviour is therefore to be regarded more as bullying than as harassment since "the action is carried out by one person", whereas mobbing involves more persons and aims to drive the victim from the company.

This view could be criticized as being inadequate because it emphasizes two requirements that are, in practical terms, more or less irrelevant. The idea that mobbing is to be regarded as a collective phenomenon and cannot therefore be considered to be such whenever the hostile or persecutory behaviour in the workplace is carried out by a single person, is far from convincing.

Moreover, the aim of driving the victim from the company cannot be accepted as a helpful and valid criterion to distinguish mobbing and harassment.

As discussed above, the existence of a clear intention to do harm cannot be considered a precondition for establishing that a given conduct is indeed mobbing. The view that mobbing can take place only if the victim can prove the malicious intent of the employer to bring about the social exclusion of the employee is very questionable. Moreover, it is quite possible for someone to regard a rival colleague as an obstacle to their career advancement and therefore decides to damage his or her reputation and work conditions in order to cause their (physical, moral and psychological) isolation, without aiming for any exclusion (horizontal mobbing).

However, in a more recent ruling, instead of taking into account the possible similarities and points of overlapping between mobbing and discriminatory behaviour, the Court (Tribunale di Como, March 20, 2017, No. 36) held that the employer's behaviour was to be regarded as sexual harassment: in this case the employer made no attempt to contain his irrepressible expansiveness and had manifested this behaviour with almost daily frequency, consisting of vulgar jokes, comments of a sexual nature, allusions, and physical contact of a sexual nature: since it was not a matter of "one single act of harassment but repeated actions, systematic hostilities occurring over a long period of time (almost daily for over 5 years)", connected not by "an intent to make a sexual approach, but by the sole purpose of causing damage, offending, and humiliating the

[622] Viscomi, 2002, p. 59.
[623] Corazza, 2007, p. 112.

victim", the Court could have also defined the behaviour as mobbing, or in any case, recognized an instrumental relationship; however, this did not happen, and the court made absolutely no reference to art. 2087 of the Italian Civil Code.

Lastly, it is interesting to reflect on the different lines developed in the courts of other jurisdictions, such as that of Germany, where mobbing has also been the subject of great attention. It should be pointed out that while in Italian case law mobbing and harassment are, as a rule, understood to be alternative, if not antithetical, German case law, on the contrary, while maintaining an appropriate distinction, appears to be more inclined to endorse a broader definition of harassment, with the practical implication that this concept is increasingly being extended to various kinds of mobbing.

As in Italy, German law has no legal concept corresponding to mobbing even if case law has played a very important role in its development. According to a first definition used by the Federal Labour Court, before the General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz - AGG*) of 2006 was adopted, mobbing is to be understood as a "behaviour systematically aimed at opposing, harassing or discriminating either on the part of colleagues or by the supervisor"[624] or in "repeated and interdependent actions" ("fortgesetzte, aufeinander aufbauende oder ineinander übergreifende") with the purpose of violating the fundamental rights of personality inherent in the employment relationship, as well as other equally protected rights, such as the dignity, honour, or health of the victim[625].

The most prominent characteristic of the notion of bullying in the workplace is that this violation is deemed to be a combination of single, inherently neutral actions, systematically linked by the goal of forcing the victim to terminate the employment contract. This is not the case in the event of harassment (*Belästigung*) as specified in § 3 c. 3 of the AGG, which, while normally characterized by repeated behaviour, may well take a different form when there is only one single act. In both cases the employer's behaviour must potentially violate the victim's rights or dignity. In this perspective the Bundesarbeitsgericht ("Bag"), in more recent rulings, not only emphasizes that the definitions are conceptually very similar, but also clearly states that the definition of *Belästigung* embodies the notion of "mobbing", which is characterized by the fact that the intimidating environment to which the AGG refers is not created by a single and isolated action, but rather by a series of single actions[626].

Therefore, the general elements that constitute what is understood as mobbing and harassment are not exactly the same: also in German law, the two definitions differ in more than one element. In contrast to harassment, mobbing – which the courts have found to be in breach of a provision stating a more general duty of protection (*Rücksichtnahmepflicht*: co. 2 of § 241 BGB) (Bag February 28, 2010), as a specification of the duty of good faith referred to in § 242 BGB (*Fürsorgepflicht*) (Lag Thüringen, February 15, 2001) – requires the offender's actions to be cul-

[624] Bag, January 15, 1997, in Neue Zeitschrift für Arbeitsrecht [NZA-RR] 1997, 781,

[625] LAG Thüringen, 15 February 2001.

[626] Bag, October 25, 2007, in *Neue Zeitschrift für Arbeitsrecht* [NZA-RR], 2011, 378 [379]. See also Fuchs, Baumgärtner, 2019.

pable, namely either intentional or negligent (*Verschulden*) (Bag October 25, 2007, cit.). Moreover, even in the presence of this element, harassment ("diskriminierendes Mobbing") occurs only when the conduct is related to a protected characteristic the victim has or is thought to have (race, sex, religion etc.) given that the AGG cannot be considered an anti-mobbing regulation[627], so that only in this case will the mobbed worker be able to denounce the double unlawfulness of the conduct and take advantage of the privileged protection provided by § 15, c. 1-2 of the AGG[628].

4. The fragility of the definition of mobbing and the problematic use of the new concept of straining.

Intent is not the only problematic element characterizing the judge-made definition of mobbing, which has been borrowed from the medical and/or sociological sciences. This definition is also challenged on other grounds. It is crucial to note that the spread of "new" forms of harassment and aggression to the emotional sphere – through the development of information technology, the greater role of highly specialized tasks and the increasing mobility and flexibility of labour policies associated with the excessive stimulation of production, productivity, and efficiency[629] – gives rise to a growing gap between the legal model, developed through "praetorian" law, and social phenomena, which takes more and more different forms. In such a situation there is a growing need for the concept of mobbing to adapt and extend in scope.

In particular, courts seek to argue that alleged mobbing actually took place even in situations that could not be considered such because there was no continuity between the single events; but they frequently also adopt a narrow definition of mobbing and argue that the definition cannot be used in cases where this important element is lacking, thus depriving the employee of adequate protection. An important case – in a judgment handed down before the term "straining" appeared in any of the Court's decisions – is that of a municipal employee who suffered serious prejudice as a result of removal from a management role in a prestigious operating sector, at the same time having to accept relegation to a task of equal, albeit clearly less important, rank in addition to being transferred to a poorly equipped office, lacking personnel and material resources.

Even if in this case there were no repeated or systematic attacks on the target(s) because there was only one action, the Court doubted that an act of mobbing might be attributed to the employer since "the employee suddenly found himself deprived of decision-making, managerial, and operative power"[630]. In another case, the Court argues that bullying may occur (and therefore the employer can be considered liable for the legal consequences) in a situation where the employer, after inviting a female worker to resign, gives her an excessive workload, not only from the quantitative but also from the qualitative point of view: in the case at hand, the employer changed the range of tasks that the employee had been used to working on and assigned her multiple activities, some of which were impossible to perform due to her lack of adequate professional skills[631].

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[627] Latzel, 2012, p. 100

[628] Benecke, 2008, p. 363

[629] Ichino, 2007.

[630] Trib. Lanciano, February 1, 2001

[631] Trib. Milano, February 28, 2003; on compensation for "overwork" Cass. June 7, 2007, n. 13309; Cass. September 1, 1997, n. 8267; Cass. September 2, 2015, n. 17438.

The Court decided that "although these are activities which, taken individually, are relatively simple, it is clear that performing them simultaneously could justify shortcomings without any real disciplinary content or actual inertia from the point of view of the obligation of diligence, (...) provided that, for the company, normal diligence was perfection, and any imperfection a lack of diligence". In neither of these cases are the arguments minimally convincing, since the use of the definition of mobbing in situations where there is only one action is in obvious contradiction to the established case law, according to which the rules regulating the topic are applicable only if mobbing can be seen as a combination of single events, irrespective of whether the psychiatric illness suffered by the employee can be considered as the result of being overworked. Hence it is necessary to fine-tune the case law on mobbing in order to render the concept more inclusive and adapt its traditional structure to an ever changing reality and a wider variety of concrete cases.

It is interesting to note that two alternative solutions can be offered: the first option is to continue to leave the problems of interpretation to the labour courts, which could choose to extend the notion of mobbing, interpreting it in a way that is compatible with the Constitution, in order to widen the series of events that may entitle the victim to claim damages. The second option is to introduce a new and distinct legal category in order to bring the hitherto excluded cases of harassment back into the scope of protection.

Italian case law signals a preference for the second solution: adopting the term "straining", coined by Harald Ege: it expands on the concept of mobbing and uses a completely new category, similar to bullying but characterized by the fact that it can be inferred from one single action, although its effects last over time, subjecting the victim to a particular condition of stress far greater than that normally arising from the job.

According to the allusive image used by Ege himself, the phenomenon could be likened to that of a "pebble in the pond", "extending itself in concentric circles even after the first of them has now disappeared under water"[632]. In order to establish a successful claim based on straining it is necessary to prove that there is at least one single act and that it has systematic and ongoing negative effects on the personality, dignity or health of the victim; moreover, it is necessary to distinguish between two types of harassment or abuse: those involving physical or social isolation, general passivity towards the victim, and material lack of (appropriate) work ("under-activation", such as a change to a lower job position or forced inactivity) on the one hand, and those involving an excessive workload ("over-activation", "over work") on the other.

The new legal category was adopted for the first time in 2005 in a pioneering court ruling of the Court of Bergamo, which, being called upon to rule on the case of a worker forced into total inactivity for over two years, clarified that the employee was entitled to pecuniary damages for demotion and, if he or she suffered sexual harassment or if the victim's health was harmed, to damages for pain and suffering ("danni esistenziali"). The Court held that protection from harm caused by mobbers extends to that caused by a strainer. In this judgment, the Court defined straining as "a situation of forced stress in the workplace, in which the victim suffers at least one negative effect, […] which […] is also of a prolonged nature". A fundamental requirement is that there be an imbalance in power between the perpetrator and the victim. "Straining is carried out

[632] Ege, 2019.

specifically against one or more people but always in a discriminatory manner".

The new term has also become part of the lexicon used by the Supreme Court of Cassation, which, applying the dichotomous approach, has also gone far beyond the notion of mobbing in the strict sense. In a clear attempt to draw a distinction between mobbing and straining, the Court recently ruled that in the case of straining, the worker suffers "hostile actions (...) limited in number and partly spaced over time", clarifying that – the S.C. goes on to add – these actions must be such as to cause the victim "a negative, constant and permanent effect on working conditions" capable of endangering his or her health[633]. Therefore, although the requirements for mobbing are not satisfied, the hostile actions may violate, if examined separately and distinctly, the employees' fundamental constitutional rights. This means that, according to the Supreme Court, the demarcation line between mobbing and straining is to be based on "quantitative" elements consisting of a "different form of bullying characterized by the non-continuous nature of the vexatious actions"[634]. However, this approach is not at all convincing, as it can easily give rise to misunderstandings. In the scholarship, straining has been designated as a protection for the employee against one single hostile act, which, in itself unlawful, produces ongoing consequences over time and is perceived negatively by the "strained" party. Therefore, even being demoted to a lower-level position at work ("demansionamento") – which is the typical example of a single act for which legal protected is afforded under art. 2103 of the Italian Civil Code – can constitute straining when the above-mentioned preconditions are met, and if, according to some authors, there is malicious intent on the part of the perpetrator[635].

This is why it is important to distinguish between mobbing and straining and to refer the distinction to both qualitative and quantitative criteria. Otherwise, straining would lose its distinctive features and could be used in an improper and arbitrary manner. The risk of an excessive emphasis on the quantitative criteria appears to be very concrete, especially when one considers that in a recent ruling the Supreme Court even seems to argue that straining exists even in the absence of a malicious intent by the perpetrator of the act, as it states that the employer has a duty to organize his company in a way that reduces the risk of stressogenic situations and that in any case the victim may seek damages "even in the event of failure to prove a precise malicious intent"[636].

In conclusion, the view that the quantification of the damage for pain and suffering is closely and exclusively linked to the extent of abusive behaviour manifested is not convincing since, in the event of straining, as indeed in the case of mobbing, the protection provided for by antidiscrimination legislation in the case of "moral harassment" could be applicable (see above), which, as stated, is considered to be a form of discrimination [see Decrees 215 and 216 of 2003 (Article 2) and Decree 198 of 2006 (Art. 26)]. This means that the criteria for quantifying the damage must be able to ensure "real and effective compensation or reparation", which has to be determined in such a way as to be "dissuasive and proportionate to the damage suffered" (Art. 18 of Directive 2006/54/ EC). Therefore, in order to determine the amount of compensation, it is necessary to consider not only the damage suffered, but also a series of other elements, such as those relating to the role of the interests adversely affected (i.e. the dignity, health and personal integrity of the

[633] Cassation March 29, 2018, No. 7844.
[634] Cass., February 19, 2016, No. 3291.
[635] Ege, 2019, p. 113.
[636] Cass. March 29, 2018, n. 7844.

victim protected under art. 2087 ICC), and not only in terms of compensation for damage but also as a means of punishment and dissuasion. There exists therefore the possibility that an employer may have to pay a greater sum in damages for harm to the personal integrity of the worker in the case of a single action than for the harm caused by mobbing.

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