



ABSTRACT
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THE MOBBING AND THE DAMAGE TO THE PERSON

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The Applicative Practice On The Phenomenon Of Mobbing

With the help of this extract, it is possible to define the "boundaries" of this institutionalized phenomenon of almost entirely jurisprudence nature and, thus, its current application feature.

From this point of view, the major part of the doctrine on the subject, peacefully approves the observations and considerations aiming to prevent the risk of an uncontrolled expansion of *mobbing*. Indeed, we can't consider any disagreement, discourtesy or rudeness as a source of responsibility for damages, but it is appropriate to reserve the evaluation of illegality and the consequent protection to more serious situations of harassment and bullying in the workplace.

Conversely, we can't come to the opposite extreme of the indiscriminate reductionism phenomenon, adhering to positions which aim to marginalize *mobbing* because of the absence of a "right to happiness" in the employment relationship, demanded by the workers.

The authoritative doctrine has generated a fundamental principle that should guide legal practitioners, whenever they are confronted with cases of suspected *mobbing* so that they make a correct evaluation to a situation still uncertain in its application boundaries: "not all forms of psychological pressure can be considered as *mobbing*, but only the one that is actually and objectively able to injure the moral and psychophysical dignity of the employee, because of its intrinsic offensiveness, because of the ways in which it is exercised or because of the personal condition and the position held; or which, though it may exclude willful misconduct, has caused damage to the personality the worker.

As a result, in case of dispute, the "ex post" issues of the case are to be evaluated in order to avoid that whatever conduct be defined *mobbing* whilst, instead, we are dealing with simple harassment. It was said, then,

that the importance of *mobbing* in the legal field is particularly appreciated on a factual level; it is, therefore, considered appropriate that the action of the worker must be evaluated not only for the *mobbing* establishment or of its phases, but also for proving the violation of the legal rules which implies an imputable responsibility on one hand and, on the other, the injury to the person.

In other words, *mobbing* is not, and should not be, the title of the judicial action (*Causa poeendi*), but the factual framework within which it is inserted an illegitimate misconduct and whose proven existence can provide useful, if not decisive, elements as for the dynamics of the facts and responsibilities analysis, for the causal link between the conduct and the consequences, for the examination of the predictability of the adverse events, and for the quantification and compensation of damages. The title of the action will be rather the infringement of the moral personality and of the physical integrity of the worker. This is the cause of the enormous difficulty of the interpreter called to identify this phenomenon. It is, certainly, useful to the interpreter, recognizing the *mobbing* conduct through a series of phases or models that delineate the precise contours of the *mobbing* phenomenon, as identified by the researcher Harald Ege.

The Identification of Mobbing in very Precise Phases

A single act does not constitute a case of *mobbing*, which is, instead, a process in evolution, a "trickle" of actions (or omissions) which, taken individually, may even seem completely insignificant. In addition, the motivations that move the *mobber* and the goals that he pursues can be varied.

Psychologists and experts who thoroughly studied the phenomenon have, therefore, sought to define the different stages or phases of *mobbing*, in order to understand the consequences on the victim.

Leymann has proposed a model structured in four phases (Leymann 1996). Briefly, the first phase consists of the daily conflict in the workplace

(attacks, jokes, pettiness); it then switches from conflict to *mobbing*: the victim assumes an exclusively defensive position getting progressively more and more isolated; at this point, the first signs of stress and psychosomatic illness emerge. The third phase is the hostility of the personnel department, which necessarily must intervene at some point, at least because there will be the perception of something abnormal and the existence of a problem (repeated absences, complaints, etc.): during this phase the victim inevitably takes the position of the accused. The rights of the victim are, thus, compromised, and this happens because of the determination, or at least as a cause of the acquiescence or the lack of knowledge of the facts by their superiors or personnel managers. Leymann notes that from the first phase we can go directly to the third, especially when we have vertical *mobbing*. The last phase is the exclusion from the labor market in different possible ways (total isolation, transfer, dismissal, long-term illness, disability pension, etc.).

Harald Ege, the researcher who has most studied *mobbing* in the Italian reality, noted that the model above described, the result of studies in the Scandinavian and Germany area doesn't perfectly adhere to the Italian society, which appears to be more complex and it is characterized by a widespread and physiological conflict situation within the company, for the particular role assumed by the family (more present and more "protective" compared to other countries) and for the difficulty of finding a different employment.

Ege has, therefore, extended the Leymann model in order to make it more responsive to the Italian reality and he proposed a model composed of six stages, plus a pre-stage called "zero condition", which represents an initial situation - unknown to northern European culture - consisting of an accepted and normal physiological conflict, typical of companies (trivial quarrels, accusations or small resentments), which is not *mobbing*, but it is fertile ground for its development, and which is not a sign of a desire to destroy or prevaricate, but only to rise over the others.

The phases of the Ege model are the following:

Phase I: The focused conflict

It 's the first phase of *mobbing* in which a victim is individuated and the general conflict situation is being directed towards this victim. The basic physiological conflict takes then a turn, it is no longer a stagnant situation, but it is channeled towards a particular direction: at this time the goal is not only to emerge, but to destroy the enemy. Moreover, the conflict is no longer objective and limited to work, but it now moves more and more to private matters. (...).

Phase II: The Beginning of Mobbing

The attacks from the *mobber* don't cause yet psycho-somatic symptoms or diseases to the victim, but they, however, arouse a sense of unease and discomfort. He feels a tightening of the relations with the colleagues and he questions himself regarding such changes. (...).

Phase III: The First Psychosomatic Symptoms

The victim begins to manifest health problems and this situation can even last for a long time. These early symptoms usually involve a sense of insecurity, the occurrence of insomnia and digestive problems. (...).

Phase IV: Errors and Abuses of from Personnel Management

The case of *mobbing* becomes public and it is often favored by the evaluations errors made by the Office of Personnel Management. The previous phase, which leads to the victim's illness, is the preparation of this stage, as there are usually the more and more frequent absences due to illness that grow suspicious the personnel administration. (...).

Phase V: Serious Deterioration of Mental and Physical Health of the Victim

In this phase, the *mobbed* person enters into a situation of true despair. He usually suffers of more or less severe forms of depression and his cures consist in psychotropic drugs and therapies, which have only a palliative effect as the work problem not only persists, but it tends to get worse. In fact, the errors made by the administration are usually due to lack of knowledge of the phenomenon of *mobbing* and of its features. Consequently, the measures taken are not only inappropriate, but also very dangerous for the victim. He ends up convinced that he is himself the cause of all or that he lives in a world of injustice against which no one can do nothing, falling deeper into depression. (...).

Phase VI: Exclusion from Work

This implies the final outcome of *mobbing*, that is the output of the victim from work, through voluntary resignation, dismissal, appeal to the pre-retirement or even traumatic endings such as suicide, the development of obsessive manias, murder or revenge on the *mobber*. This phase is equally prepared by the previous one: depression leads the victim to look for the exit through the resignation or dismissal, a more severe form can lead to early retirement or at the request of the invalidity pension. The most serious cases of desperation end unfortunately in extreme acts. (...) ".

The models above described relate to cases of *mobbing* between colleagues or between superiors and subordinates; however, they don't perfectly describe the cases of *bossing* (*mobbing* planned by top management), that follow different dynamics (see the "Confinement Departments "), especially with regard to the initial stages. In any case, the practice of *bossing* is also fully included in the *mobbing*, being substantially identical both for way of aggression point of view (which, in fact, can be even more subtle), and for the consequences for the victim.

Of course, the process described above can also be completed in the early stages and the final outcome is probably restricted to a limited number of cases; actually, it may be that the victim knows how to react and to obtain

the respect of his own reasons, or that he just asks and obtains a transfer or that he voluntarily finds a different occupation, or maybe an effective intervention from the staff administration occurs.

In order to consider legally relevant a vexatious action, it is not obviously essential that it reaches the final stage, nor that it follows exactly the procedure described above, but it is necessary - and sufficient - that the conduct causes an undue damage to the person, randomly connected to the acts engaged in by *mobber*, or that it fulfills the conditions of a different form of protection attributed by the law, for example, the inhibitory or indemnity protection. Nor is it necessary that there must be a damage to health, being sufficient to enter into the field of legally relevant, that there be an infringement of the moral personality, and thus to the dignity of the worker.

The Responsibility for Mobbing

The facts of "*mobbing*" in the workplace (aggression, arguments, fights, insubordination, disqualification, forced inactivity, sexual harassment, omission behaviors and avoidance of duty, extortion and instrumental use of disciplinary power, spurious transfers, boycotts, mocking attitudes of superiors and colleagues, unjustified humiliation in career progression, observations and daily challenges, actions and behaviors of insult and defamation, etc.) are productive of very specific damage, relevant both for the civil and for criminal law.

For the civil law, we have, first of all, as a more frequent result of "*mobbing*" - the biological damage, an already settled concept in the Italian jurisprudence; then we have the professional harm, which is, also, widely recognized by both the substantive and the legitimacy jurisprudence.

The biological damage must be fully charged in a personal and direct manner to "the authors of mobbing"; this must be done each time the

conditions provided by art. 2043 of the Civil Code are complied, regardless of the bonds (important yes, but still "right of recourse") imposed on the employer, ex art. 2049 and 2087 Civil Code. Criminally speaking, it will be necessary to proceed – on "mobbed person's" complaint or even ex officio, in cases where it is possible - for all cases that may arise, including, the most common example, for the offense of injury .

But, for the professional harm, in addition to the employer who will be responsible for the usual reasons (art. 2103 but also 2087 and 1375 Civil Code), " the authors of mobbing must respond of Aquilius fault as well", in all cases where the damage is etiologically due to repeated personal behavior, intentional or unintentional (eg. unjustified misappropriation of important practices occurred for personal initiatives of certain department heads) that resulted in unjust disqualifications or marginalization of the worker.

A fortiori, authors of "mobbing" must respond of the above mentioned facts , this time for the criminal law, when these facts, as not infrequently happens, in addition to the fact that they are appreciable under civil law as professional harm, are also relevant to the criminal law at different titles (just think of a behavior that, related to artificially induced disqualifications, are relevant of insult, libel, etc., see Cass. Sect. Labour, 8/9/99, no. 9539, of which *amplius*)

The prevailing guideline (not uncontested though) classifies as "labor disputes", with all the consequences for the rite and jurisdiction, even those ones (not many), in which the personal responsibility of the colleagues is operated (or even driven); in this sense, for example, Pret. Turin 05/17/96; Cass. 2/3/94 n. 2049, Cass. 20/1/93 n. 698, Pret. Rome 7/6/89, 2/15/86 Court of Milan; Cass. 6/2/85 n. 897, Cass. 27/5/83 n. 3689, Cass. 8/8/83 n. 5293, Cass. 12/12/83 n. 7329, Cass. 19/4/82 n. 2437, Cass. 22/9/81 n. 5171.

Form the substantial point of view, it is appropriate to highlight and identify the rite to observe and the competent court to settle the dispute. The

tendency is not peaceful, as there are decisions that perhaps more appropriately, have distinguished the " causa petendi (cause of action)"; if it is constituted by the extra-contractual liability, the normal rules of jurisdiction will be applied: this happens if the action is set against the colleague (an example: 9/5/98 Court of Milan for a case of sexual harassment in the workplace) or against the employer himself (an example: Cass. 12/11/96 n. 9874 for a traffic accident occurred while the actor was on his way to work).

It is, however, undeniable that the first tendency is predominant; it appears essential in this regard, the decision of the Supreme Court, Sec. Labour, 8/9/99, n. 9539 that relates to facts in which, I am sure, many "mobbed persons" could identify themselves..

Damages Caused by Mobbing

There are three damages refundable from *mobbing*: pecuniary, moral and biological. There is also the so-called "existential damage from mobbing" that is obtainable when the mobbing conduct affect constitutionally protected interests (right to health, etc..). It is, in fact, undeniable that the person has suffered an unjust injury, an injury to a primary asset of his/her existence, which requires a repair. Therefore, the " mobbing damage " seems to find its natural place within the category of the so-called existential damage, even before the biological or moral damage.

The non-pecuniary damage from injury to constitutionally protected interests ensures the indemnity protection for damages against those events that are likely to affect, in a significant and sometimes permanent way, the existence of the person.

Concerning the issue of the *mobbing* damage indemnity, the existential damage is paid in an equity way, while, for the biological damage, the INAIL tables for accidents at work are valid, with regard to the psycho-physical damage, it is liquidated a percentage of the biological damage and

of the properly moral damage. The financial damage, understood as damage resulting from the professional disqualification, is paid by a percentage of the monthly pay for each month of disqualification or in equity; it must also be understood as the damage resulting from the unlawful dismissal or resignation justified on the basis of unlawful conduct the employer. There are included in this kind of damage, the damage of profit loss, caused by the reduced ability to produce income and the actual damages due to medical expenses incurred because of the disease induced by the wrongful conduct of the employer.

In any case, the main regulatory reference is always the art. 2087 Civil Code, which establishes an obligation for the employer to ensure the implementation of practices and measures aiming to protect the physical and moral integrity of the worker, as a transposition of the constitutional values referred to in art. 32 and 41 of the Constitution but also the prohibition of conducts that are prejudicial to the psycho-physical integrity (source of the contractual liability) and the contractual liability for the violation of the principles of good faith and fairness, ex Articles 1175 and 1375.

The legal cause of harassment, under the opinion of the Supreme Court of Cassation, the United Civil Sections, sentence no. 8438 of the 4th of May 2004, consists in the violation of the contractual obligations arising from the employment relationship, particularly in those acts of employer power, which violate the principle of protection of the working conditions and the protection of the professionalism as provided by art. 2103 c.c., regardless of the lasting of the behaviors and their effects.

The Protection of the Person from the Mobbing

The protection that the law contemplates to prevent and punish the assumptions of *mobbing* takes place on different areas of law and refers to

various sources that are analytically listed, for completeness, in the following manner:

A. CONSTITUTION

Apart from the general rules for the protection of the person (Articles 2 and 3), there are various other rules in the Constitution to guarantee the individual, in the working reality:

- a. **Article 32**, which recognizes health protection as a fundamental human right;
- b. **Article 35**, which contemplates the protection of labor in all its forms;
- c. **Article 41**, which prohibits the execution of private economic activity if exercised contrary to the social use and good or if it causes harm to the safety, freedom and human dignity.

2. The Civil Code And Of Civil Procedure

a. **Article 2043**, which contemplates the obligation of paying indemnity for those who cause an unjust damage to the others. It should be noted, in particular, the importance given to this rule in the judgment of the Court of Cassation no. 411, January 24, 1990, in which it is stated that "*the health is a good, object of an autonomous primary right and therefore the compensation for his injury can't be limited only to the consequences that affect the subject's capability to produce income, that is to the pecuniary damage understood as a decrease in income for payments of money (cure and/or medical treatment or purchase of pharmaceutical products) so-called emergent damage, or to the possibility of loss of earnings due to the conduct of the offender (lost profits), but it must be extended to the biological damage understood as an inflicted injury to the good of the psychic integrity itself.*"

b. **Article 2087**, which provides that *"the employer is required to adopt, within his company's organization, the measures that, according to the particularity of the work, the experience and the technology, are necessary to protect the physical integrity and moral personality of the workers/employees."* It is not, therefore, a rule of negative content, but it rather imposes an obligation for the entrepreneur to activate an implementation in order to prevent the occurrence of *mobbing* hypotheses. Thus, the jurisprudence has recognized the legitimacy of the dismissal of workers who have put in place serious actions against other employees (horizontal mobbing). Similarly, it was agreed that *"the denial or the prevention from the performance of duties violates the fundamental right to free development of the personality of the worker"* (Cass. 05/10/2001).

c. **Article 700** Code of Civil Procedure, which contemplates protection as a precautionary measure in case of prejudicial or discriminatory behaviors that put in serious jeopardy the worker.

d. **OTHER RULES**

e. **law of the 20th of May 1970, n. 300 (Workers' Statute)**, and in particular art. 7, which provides for a specific disciplinary proceeding against the abuses of the employer, the art. 13 to protect the worker from the behavior of professional disqualification and art. 15, which sanctions with the nullity, the acts that have discriminatory purpose to the detriment of the employee.

f. **Legislative Decree 626/94**, which established the principle that the right to health must be understood not only as the absence of disease, but also as the absence of discomfort.

In this list, there are the primary law sources to which the *mobbed* subject may invoke protection, of course, in due judicial offices.

There are other special cases of protection from the *mobbing* phenomenon and these are: anti-discrimination, collective, labor Union, indemnity protection.

It was specifically examined only one of them, in particular the protection from discrimination, which is governed by Art. 4 of Legislative Decree providing that such protection is carried out in the manner prescribed by art. 44, paragraphs 1 to 6, 8 and 11 of Legislative Decree 25 July 1998, n. 286 (governing immigration and the status of foreigners). The same Article 4 states then – repeating, in part, what is already provided for in that Article 44 - that the court may order the cessation of the discriminatory act or conduct, as well as the removal of their effects and can also establish a plan for the removal of established discrimination, within a specified period.

Paragraph 8 of Article 44, Legislative Decree no. 286/1998, which is expressly mentioned, provides for a criminal penalty for anyone who circumvents the court orders. Paragraph 11 of the same Article also provides for the decay of any enjoyed public benefits and the exclusion from government contracts for companies found guilty of discrimination.

Article 4 of Legislative Decree 216/2003 provides, also, expressly, for the indemnity of the non-pecuniary damage, and the possibility of ordering the publication of the sentence at the expense of the defendant.

It is equally contemplated that the court can evaluate the evidence submitted by the applicant pursuant to art. 2979, first paragraph, of the Civil Code (!). This simple (and useless) call does not arise, however, perfectly in line with art. 10 of the European Directive, which decided instead that Member States must assure that, in the case where the person believed discriminated expose "facts from which it may assume a direct or indirect discrimination", is the responsibility of the defendant "to prove that there hasn't been a violation of the principle of equal treatment. "

It follows that the above mentioned legislation doesn't introduce particularly significant innovations with respect to the means of protection already legislated.

As prevention, an important role could be played by the collective protection, contemplated by article 9 of the Workers' Statute, which provides for the right of the workers themselves, through their

representatives, not only to control, but also to promote the application of all the appropriate measures in order to safeguard against accidents and occupational diseases.

The CCNL Ministries 2002/2005 has considered *mobbing* by disposing, on one hand the establishment of a Bipartite Committee (Article 6), and, on the other, by providing for the applicability of a disciplinary sanction for the *mobber* (art. 13, paragraph. 4, letter. e).

From a different perspective, it is possible a compensatory protection by INAIL. The reform introduced by Legislative Decree no. 38/2000, expanded, in fact, the protection offered by this Institute, evolving from a system of indemnity for diseases only, identified by Law (strictly occupational diseases) to a system that consists of granting indemnity for all diseases for which there is evident and proved correlation with work (Gambacciani 2003, 323). *Mobbing* - it is clear - it is not a disease, but it can cause certain diseases. Therefore, in case its effects are such as to cause a disease in the strict sense (biological damage), this can be considered as a damage compensable pursuant to art. 13 Legislative Decree no. 38/2000. The circular letter of INAIL n. 71 of 17.12.2003, concerning mental disorders from compulsive organizational work, brought the necessary details about it; that circular letter, however, was subsequently annulled by the Lazio Regional Administrative Court of 07.04.2005, n. 5454 (in dirittolavoro.altervista.org/link3.html).

Finally, only for "the record", we mention the Lazio Region law 11.7.2002, n. 16, which contained provisions to prevent and combat *mobbing* and which was declared invalid by the Constitutional Court, on appeal by the Government, by judgment of 19.12.2003, n. 359, (www.altalex.it), on the main ground, that legislation would have affected the civil law on labor relations.