



## European network of legal experts in gender equality and non-discrimination

### NEWS REPORT

<b>Country:</b>	Italy
<b>Title:</b>	Sexual harassment and burden of proof
<b>Date:</b>	15 June 2017
<b>Expert:</b>	Simonetta Renga
<b>Update of news report:</b>	UNAR censored for its leaflet on sexual orientation (27 March 2014)
<b><u>Context</u></b>	
<b>Issue at stake:</b>	Discriminatory dismissal
<b>Ground of discrimination:</b>	Sex
<b>Source:</b>	National court decisions
<b>Field:</b>	Sexual harassment
<b>Applicable law:</b>	Decree No 198/2006, Code for Equal Opportunities between Men and Women

### **Content**

**Case:** A case of discriminatory dismissal was recently heard by the Court of Cassation, which ascertained that sexual harassment by the employer had taken place. The victims were two women employed under precarious contracts: one was dismissed and the other resigned after refusing the employer's advances.

**Decision of the Court:** The Court of Cassation's judgment No. 23286 of 15 November 2016 finally confirmed the preceding two decisions (of 8 September 2012 by the Tribunal of Pistoia, and of 24 October 2013 by the Court of Appeal of Florence) where the judges ascertained that there had been sexual harassment and ordered the employer to refund non-patrimonial damages both to the two victims and to the Regional Equality Adviser, who pursued an independent action for gender discrimination.

In particular, the claimant appealed against the enforcement of the partial reversal of the burden of proof, provided for under Article 40 of Decree No. 198/2006. The court rejected this objection and affirmed that proof of sexual harassment could be provided by the testimony of witnesses reporting similar sexual harassment by the employer at the beginning of their working relationship, as corroborated by statistical proof consisting of a high number of dismissals with no apparent reason among young female workers just after their recruitment. In fact, according to the judge, these elements of fact were a suitable basis, for a presumption of the existence of the discriminatory behaviour and, as a consequence, for considering it to be up to the defendant to demonstrate that there had been no discrimination.

**Key points of analysis:** The most interesting feature of the reasoning for this judgment is the justification of the extension of the partial reversal of the burden of proof to cases of sexual harassment, since Article 26 of Decree No 198/2006, which states that 'any less favourable treatment based on a worker's rejection of or submission to harassment

on the ground of sex or sexual harassment is regarded as discrimination', does not expressly rule on this matter.

The court confirmed this wide interpretation, stating that any case concerning the equal treatment of two groups involves a 'ternary' assessment, where a comparison is made of the equal or different treatment received by the two groups. Following EC directives and case law developments, especially referring to C303-06 *Coleman*, the court ruled that in cases of sexual harassment the comparator can be found in a negative differential treatment, that is the non-existence of male victims of sexual harassment, which has a presumptive content whereby a percentage of female workers experiences this behaviour.

**Link to internet source:**

Cass.sez.lav. n.2386 of 15 November 2016, published in Massimario di Giustizia Civile 2016, and

[http://www.wikilabour.it/\(S\(1yqr1m2f1uei4e45w043we45\)\)/GetFile.aspx?File=%2FAAA\\_Segnalazioni%2F2016%2FCassazione%2FCassazione\\_2016\\_23286.pdf](http://www.wikilabour.it/(S(1yqr1m2f1uei4e45w043we45))/GetFile.aspx?File=%2FAAA_Segnalazioni%2F2016%2FCassazione%2FCassazione_2016_23286.pdf), accessed 12 March 2017.