

Labor Court decision to extend the duty of care to sexual and emotional abuse cases

What measures should be taken by companies in order to reduce the number of labor violence cases. Case law on this matter.



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Occupational health and safety is composed of a set of organizational and technical resources tending to prevent departures from the employee's health during the term of the employment relationship.

The employer must comply with the applicable health and safety regulations and give employees the statutory breaks and limit their working hours.

The law is inflexible in this regard and sets forth that the employer's failure to comply with these duties and the damages caused to the employee as a result thereof shall receive the same treatment as the damages arising from work accidents and professional diseases.

Preventing violence and harassment at the workplace is one of the employer's obligations, but how to actually do so is something that worries them.

Below we analyze the case "*F.G.E. c/ Charles Henry S.R.L. s/despido*" ("*F.G.E. v. Charles Henry S.R.L. on dismissal*") (National Court of Appeals in Labor Matters – Courtroom II – May 31 2011) where the company dismissed the employee with cause due to discriminatory treatment of certain clients who entered the shop where he worked and the emotional abuse and psychological harassment exerted on two of his co-workers.

The employee claimed that the notice of dismissal failed to comply with the requirements set forth in Section 243 of the Argentine Employment Contract Law (ECL).

However, both the First Instance Labor Court and the National Court of Appeals in Labor Matters dismissed the complaint on the following grounds:

1.-Formalities of the notice of dismissal

Section 243 sets forth that notice of dismissal with cause must:

- (i) Be in writing, and
- (ii) Express on sufficiently clear terms the grounds for terminating the employment agreement.

Mercedes Balado Bevilacqua, partner in charge of Beretta Godoy's labor law and social security area, states that this provision is based on the need of the employee to know the reasons why he was dismissed in order to exercise his defense.

“Case law is very rigid in verifying compliance with these requirements because the constitutional right of defense is at stake”, she added.

In the case under analysis, Cecilia López Pablos, associate of Beretta Godoy, added that the telegram of dismissal actually included a detail of dates, places and situations, and also a transcript of the statements allegedly made by the employee.

In light of this, the Court affirmed that “the time, manner and place on which the attitudes attributed to the employee were verified were clearly and actually explained”.

As indicated by associate López Pablos, it must be pointed out that the notice of dismissal specifically stated that the act of “harassment” was both verbal and physical and occurred on “repeated occasions...the Plaintiff was aware of the facts attributed to him to such extent that he denied having incurred in such attitudes.”

Another requirement set forth by Section 243 of the ECL –Balado Bevilacqua stated- is the impossibility of changing the cause of the dismissal, which provision was complied with by the employer given that the causes of the dismissal stated in the notice remained unchanged throughout the legal proceedings.

2.- Employer’s duty of care. This duty is set forth in Section 75 of the ECL and comprises a set of measures and technical resources that must be implemented by the employer during the employment relationship in order to protect the physical and psychological health of the employee as well as his dignity and to prevent damaging his assets.

“This obligation of the employer is related to the prevention of accidents and diseases, so it is also called duty of prevention or prevision”, López Pablos added.

In line with this, she stated that the concept of labor safety has been broadened by case law, as it has extended the scope of the duty of care to the duty of preventing injuries of the employee’s psychological and physical health. Thus, the employer is required to provide a healthy workplace and to prevent hostile situations such as emotional abuse or sexual harassment and/or mistreatment of employees.

In this sense, Balado Bevilacqua added, the Court believes that the dismissal was grounded on a fair cause since in the case under analysis it is evident that the consistent testimonies of the witnesses clearly reveal that the employee incurred in a seriously reproachable behavior, which, together with the discriminatory treatment of clients, account for the employer’s decision to terminate him.

Specially if we consider that “according to the report filed by M., Section 75 of the ECL imposed on the employer the obligation to take the necessary and proper measures to prevent employees from being exposed to aggressions such as those described in the case.”

“This decision ratifies the extension of the employer’s duty of care to sexual harassment or emotional abuse at the workplace, and the employer’s obligation to provide the necessary means to guarantee a healthy workplace tending to foster good performance and productivity”, Balado Bevilacqua stated.

In light of the above, both lawyers explained that it is necessary to take measures intended to prevent and/or solve harassment situations.

And they indicated that, according to Argentine case law, companies must implement certain measures aimed at reducing the number of labor violence cases, including:

- . Establishing procedures for employees to communicate situations of harassment they consider they are being subjected to, especially if they involve officers in higher positions.
- . Communicating to the employees a labor relations policy and the corresponding disciplinary actions for engaging in harassment.
- . Investigating reported or suspected harassment situations at the workplace and applying sanctions to any person who abuses of his work position or commits an act of harassment.

This is very important, they concluded, in light of the abundant case law on the matter -such as the decision commented in this article- which considers the action taken by the employer in response to the reports filed by employees.