

Protection of maternity upon the employer's silence



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On October 16 2012, in the case “*K.L.E. c. WAL MART ARGENTINA S.R.L. s. Despido*” (“*K.L.E. v. WAL MART ARGENTINA S.R.L. on dismissal*”), Courtroom VIII of the National Court of Appeals in Labor Matters reversed the First Instance Court decision and admitted the complaint filed by an employee for constructive dismissal due to the employer’s failure to answer the employee’s request for a fixed shift while nursing her baby.

The employee had been hired as a cashier by the supermarket chain Wal Mart and worked on rotating shifts. After her baby was born, she required the employer to work on a fixed morning shift in order to finish in the afternoon. She stated that working on rotating shifts adversely affected her baby’s breastfeeding as she arrived home at 11 pm.

The First Instance Court dismissed the Plaintiff’s complaint on the following grounds:

1. It cannot be admitted that the employer’s failure to answer a request not comprised within any of the company’s legal obligations caused damage to the Plaintiff.
2. The employee was not entitled to be considered constructively dismissed given that the employer did not incur in any breach of contract, so it follows that no damage giving rise to the termination of the employment relation was actually caused.

The employee appealed this decision and Courtroom VIII reversed the First Instance Court judgment, admitted the complaint and ordered Wal Mart Argentina to pay the statutory compensation for dismissal without cause plus the additional pay required by law because the employee was dismissed during the statutory maternity protection period.

The grounds of the Court of Appeals for reversing the First Instance Court judgment were as follows:

1. As the employer’s answer was not timely filed, the provisions of Section 57 of the Argentine Employment Contract Law (ECL) apply. This Section establishes that the employer’s failure to answer creates a presumption against it which, in turn, may be considered as an implied consent to the employee’s complaint.
2. Local laws and the International Labor Organization grant a special protection to women at one of her maternity stages and safeguard the newly born child who has a basic feeding need, which is crucial for its full development.
3. Section 179 of the ECL also authorizes the employee to take daily breaks, which involves the employer’s obligation not to hinder or prevent the exercise of such right. In this sense, the employer’s attitude amounts to a sufficiently serious damage that accounts for the constructive dismissal claimed by the employee.

In view of the above, we point out these main aspects: (a) The employer’s failure to answer a claim of an employee constitutes a presumption against the employer; therefore, the employee’s

statements are deemed true, and (b) the protection of maternity and the baby's rights, both at the local and international level, prevails over the employer's power of organization and management.

Therefore, the employer must always file an answer to any claim made by an employee within 48 hours so that the employer's silence will not constitute an admission of the employee's statements. Additionally, it should be highlighted that the protective nature of the Argentine labor law and the protection of maternity prevail over the rights of the employer.