

Mobbing: Occupational Risks Insurer (ART) required to pay compensation under Civil Law regulations



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In September 2012, in the case *"Pavlovic Gabriela Marisa c/ Tam Linhas Aéreas S.A. y Otro S/ Despido"* (*"Pavlovic Gabriela Marisa v. Tam Linhas Aéreas S.A. et. al. on dismissal"*), the Plaintiff filed a complaint for dismissal against Tam Líneas Aéreas and the Occupational Risks Insurer (ART) Berkley Internacional S.A. for the suffering that resulted from the abuse committed by the company's general manager.

Emotional abuse, or broadly speaking, "mobbing", can be defined as any action, failure to act or behavior intended to cause, whether directly or indirectly, physical, psychological or emotional damage to an employee, in the form of a threat or actual action, committed by people in a higher, equal or lower position.

Even though the Plaintiff reached a conciliation agreement with Tam Líneas Aéreas S.A. in relation to the dismissal, she pursued her claim against the ART. The First Instance Court dismissed the Plaintiff's action on the following grounds:

- a) Mobbing/emotional abuse is not included in the list of occupational diseases established in the Occupational Risks Law (ORL), and,
- b) The circumstance claimed is not considered a risk agent related either to the employee's working conditions, methodology or environment or the hazardous operation of the machines used in the employer's business.

The Plaintiff appealed the First Instance Court decision and Courtroom VIII of the National Court of Appeals in Labor Matters reversed it, admitted the Plaintiff's complaint and ordered the ART to pay ARS 100,000 plus interest as compensation for the incapacity that resulted from the emotional abuse committed by the company's general manager.

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

1. In the "Silva" case (Argentine Supreme Court, December 18 2007, Motion to Challenge (*Recurso de Hecho*), "Silva, Facundo Jesús v. Unilever de Argentina S.A."), the Argentine Supreme Court ruled that "even though an occupational disease is not included in the list of occupational diseases established in the Occupational Risks Law of the Argentine Executive, but it is evidenced that such disease is causally related to the victim's work, compensation must be paid under Civil Law". In other words, the diseases not included in the limited list set forth in Section 6 of the ORL must be compensated not under the provisions of the Occupational Risks Law but on the basis of Civil Law, provided that a causal relation between the damage suffered and the work performed for the employer is properly evidenced".

2. Even though ARTs cannot be held liable for mobbing, they can be considered jointly and severally liable if, upon becoming aware of the abuse, fail to take action to reverse it.

Furthermore, ARTs can be held jointly and severally liable if, in cases of professional diseases and accidents at work, fail to comply with the obligations set forth in the ORL and Section 1074 of the Argentine Civil Code. In the case under analysis, the ART failed to take any measures whatsoever because, as stated in the case, “it is impossible for the ART to provide training on preventing mobbing because training people not to abuse or being abused would be an absolute fallacy”. Upon becoming aware of the mobbing situation, the ART should have advised the employer to enhance the working conditions and the labor environment as well as to reduce the psychological and social risk factors.

3. New methods of dispute diagnosis, mediation and resolution are available. Therefore, the ART should have sent to its affiliate the pertinent information related to the handling of interpersonal relationships at the workplace, also by means of staff training, with particular focus on higher ranking officers. The ART was not able to provide evidence of its compliance with such requirements, which led to the decision of the Court of Appeals.

In view of the above, and for the purpose of limiting the employer’s liability in cases of emotional abuse/mobbing, it is essential:

- To put in place preventive policies and training measures for all employees of the company.
- To establish control and management policies tending to prevent abuse; however, if it actually occurs, it is essential to implement the measures set forth by labor laws and those established in the above-mentioned human resources policies.
- In case of abuse, action must be taken immediately; otherwise, the risk could become double: The potential worsening of the health of the alleged victim of the abuse and the employer’s increasing liability for emotional distress.

The decision under analysis in this article evidences the new case law trends tending to extend the employer's duty of care to the psychological and physical health of the employee in cases of emotional abuse; therefore, it is important that the companies' human resources area should implement the pertinent preventive measures tending to reduce the employer’s liability and exposure.