

Protection against discrimination and harassment in the workplace

Introduction

All individuals have a fundamental right not to be discriminated against due to their gender, sexual orientation, race, colour, religion, thoughts, etc. This article explores how the right to non-discrimination is treated in Argentina and its application in the workplace, in light of case law developments towards an extension of the employer's duty of safety.

Discrimination in employment

Legal framework

According to the Argentine Constitution all 'inhabitants' are equal before the law and are all admissible for employment, without any other requirement, apart from their ability to do the work. The Constitution also establishes the principle of equal pay for equal work.

It also incorporates various key international conventions forbidding discrimination, thereby granting them a constitutional standing.

Protection against discrimination is also covered by national laws, such as:

Labour Federal Pact No. 25,212: forbids any type of discrimination from employer.

Labour Contract Law No. 20,744 ('LCL'): forbids any type of discrimination amongst workers. It also requires equal treatment of workers in the same situation subject to the exception that, different treatment of workers in equal situations will only be allowed when required under the general welfare principles, such as greater efficiency at work.

Non-Discrimination Law No. 23,592 imposes sanctions on any discriminatory conduct.

Protection of Women Law prohibits labour violence, including the prohibition of discriminatory acts and psychological harassment against women.

Duty of safety

The employer has a duty of safety, which includes a set of security measures and technical requirements that the employer must follow in order to protect workers' mental and physical health. This duty also has a preventive function aimed at averting work related accidents and illnesses.

Case law has expanded the scope of the legal duty of safety to include a healthy working environment without harassment, violence and/or discriminatory behaviour. Compliance with this duty requires employers to perform all activities in such a way to avoid having an adverse impact on employees' health.

Moral and sexual harassment

Moral harassment

The definition of workplace violence adopted by the ILO –'Encyclopaedia of Occupational Health and Safety' – 'Code of practice on workplace violence in services sectors and measures to combat this phenomenon' includes

'all actions, incidents or behaviour which are beyond reason, or acceptance; by which a person is hurt, threatened, humiliated or injured by another, as a direct result of carrying out their professional activity'.

The concept of harassment includes mobbing, bullying, racial and sexual harassment.

There is no specific legislation regarding moral harassment in Argentina. Accordingly, case law has ruled as follows:

In *Pavlovic, Gabriela v. Tam Líneas Aereas and Labour Insurer* the Court ruled that the plaintiff has suffered systematic moral abuse from her manager who humiliated and shouted at her. Although the employer settled the claim, the plaintiff continued an action against the labour insurer, which had to compensate the plaintiff for work incapacity suffered as a result of the abuse. The Court based its ruling on the lack of compliance with employers' preventive obligations of monitoring employees, in order to maintain a healthy working environment and take the necessary measures to deal with such situations.

In *Givone, Julieta Belen v. Aguas Danone S.A.* the Court defined moral abuse as 'any manifestation of abusive conduct, specifically behaviour, words, acts, gestures that cause a damage to the individual's personality, dignity or physical or psychic integrity'. In the absence of specific legislation, according to case law, harassment falls under the employer's 'duty of safety' obligation to provide a working environment free from violence and abuse.

Sexual harassment

Sexual harassment is defined as an 'illicit conduct, that occurs when the employer or a key employee, taking advantage of his/her position, demands from an employee in a lower position sexual favours, the fulfilment of sexual favours being an essential condition influencing the worker's employment'.

In Argentina, this is only partially regulated in the public sector by Decree No. 2,385/93. In the private sector, the case law has addressed this situation, as follows:

In *Zárate Rolando Rubén c. La Delicia Felipe Fort SA Felfort* the dismissal of a male worker was with 'just cause' following sexual harassment, when conducting his duties as an employee in charge of another.

In *P.V.D. c. A.S. S.A. y otros* a senior employee was lawfully dismissed based on behaviour incompatible with his position as a manager. His misconduct included sexual harassment towards a female worker, harassment and mistreatment of other employees he was in charge of.

Sexual harassment is considered a violent state of affairs within the workplace and the employer is responsible for preventing and managing these situations as part of its duty of safety.

'Labour violence'

In 2010, a Bill regarding 'labour violence' in the private and public sectors was introduced covering:

Labour violence is a psychological act, performed in a systematic manner over a person or group of people in the workplace, in order to destroy their reputation, interrupt the exercise of their duties or make the employee resign. This includes any action intended to intimidate and/or emotionally or intellectually disturb the victim.

Sexual harassment means any act, comment or repeated conduct with a sexual connotation, without consent by the recipient, with the explicit or implicit intention of causing harm if the victim does not agree to the harasser's conditions.

Harassment can be performed by the employer, a superior officer or another worker.

The employee, i.e. the victim, can consider him/herself constructively dismissed and will be entitled to severance pay.

Upon receipt of a complaint of harassment committed by a superior, the employer must follow the necessary procedure to verify the complaint and take steps to ensure cessation of such conduct.

No employee will suffer a modification to their working conditions or be dismissed for reporting a situation of sexual or moral harassment.

Conclusion

In the absence of specific legislation, case law has taken upon itself the role of expanding the employer's current duty of safety, in order to prevent discrimination and harassment. Employers must strengthen their human resources department to ensure that they comply with their obligations to provide a healthy working environment. As a collateral consequence, this will assist employers in reducing/preventing, as far as possible, the cost of future discrimination claims.

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