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Discrimination Law

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Addiction to alcohol or drugs discrimination claims: comparative analysis – Argentina and the United States*

Introduction

Through a case study, this article will address the position that all individuals have a fundamental right not to be discriminated against due to their gender, sexual orientation, race, colour, religion, thoughts, etc, and it will analyse how this right is combined with certain illnesses when dismissal occurs.

Further, it will focus on how the employer's duty of safety has been expanded through case law and jurisprudence to protect employees from any physical or mental damage caused by exposure to hostile situations in the workplace.

The case study will show how addiction to drugs and alcohol are no longer valid causes for either dismissal with cause or the imposition of disciplinary measures. Addictions must be treated as an illness and therefore, the employer must provide the employee with the same protections granted for all illnesses under local law. Further, if the employer has provided the employee with the requisite level of protection to an employee who has gone through an alcohol rehabilitation treatment, but has nonetheless dismissed the employee without cause – paying mandatory severance compensation – he/she could still successfully claim for compensation based on discrimination.

Based on the court's decision in this case, this article will go through current local case law, legislation and advisable measures for employers to take in order to minimise liability. In addition, it will provide a general overview on how addictions such as the one dealt with in the case are treated in common law countries such as the US.

Case study

In the case *VOA v Société Air France SA s/dismissal*, decided in the first instance by Labour Court No 20, the situation where a worker returned to work after an alcoholism rehabilitation treatment and was dismissed without cause was considered.

The facts of the case were a cargo employee (VOA) of Air France SA (the company), who had worked for that company since 1987, suffered from an alcoholic addiction during the labour relationship. He started a rehabilitation treatment, taking paid leave for that purpose. According to local law, non-related work illnesses are subject to paid leave (from three to 12 months depending on the seniority of the employee and if he/she has family under his/her care).

At the end of his rehabilitation treatment, he was reinstated to his position. A short time later, the company dismissed him without cause, paying the corresponding severance compensation under the applicable law.

Two years later, the employee filed a claim arguing that the dismissal was discriminatory. In his claim, the employee requested compensation for damages and emotional distress suffered due to the employer's discriminatory dismissal. The plaintiff argued that his former addiction was the real cause of the dismissal.

The employer denied the dismissal was based on alcoholic addiction or the rehabilitation process and argued that the dismissal was decided due to an internal restructure of the company determined by the company's head office.

Decision

The Court decided the dismissal was based on VOA's alcoholism, which it determined to be discriminatory. In this regard, the judge ordered the company to pay the employee

the amount of ARS39,000 (approximately US\$7,800) for pain and suffering.

This decision was confirmed by the National Labour Court of Appeal (Courtroom VI) stating that the dismissal at the end of an alcohol rehabilitation treatment is enough evidence to consider that termination was a discriminatory act by the employer.

Judgment was based on the following reasoning:

- Arbitrary discrimination is regulated by the National Constitution and international agreements, which prohibit discrimination based on race, gender, colour, sex, language, religion, political or other opinion, national or social origin, property or any other status.
- The general principle related with burden of proof states that the party who alleges a fact must prove it.
- However, considerable case law, applied exceptionally, in certain labour cases applies the 'dynamic burden of proof'. Cases that involved the application of this principle are based on individual conflicts caused by discrimination. The principle states that the party who holds a better position to produce evidence due to its professional, technical or material possibilities must bear the burden of proof.¹ Due to the application of this principle, case law supports the position that in situations when an employee suffers a discriminatory act, the burden of proof shifts to the employer who is in a better position to produce evidence. Additionally, the employee is considered the weaker party of the relationship and the victim of the alleged discrimination. This line of thought means that in the case being analysed, the employer had to prove that no discriminatory action occurred during the term of the labour relationship, especially after the employee was reinstated to his position after recovering from his alcohol addiction. For this principle to apply, the victim (employee) must be able to evidence at least a *prima facie* case of discrimination.
- The employer failed to prove that the restructure process constituted a defence in its reply to the claim. The accounting expert report stated that the employer failed to provide documentation and information related to the restructure it had argued. In addition, this argument was confirmed by the testimony of a human resources employee who stated that the plaintiff was the only person dismissed in the cargo area.

Labour discrimination

In view of the case analysed, what follows is an analysis of the local legislation and case law in order to accord the decision with the applicable legal framework.

Key norms

Argentina's Constitution provides that '...[a]ll inhabitants are equal before the law, and entitled to employment without any other requirement than their ability ...' (section 16). It also establishes the principle of equal pay for equal work (section 14).

The Constitution also incorporates the following international agreements, all of which prohibit discrimination based on race, gender, colour, sex, language, religion, political or other opinion, national or social origin, property or any other status:

- Universal Declaration of Human Rights, section 2;
- International Covenant on Civil and Political Rights, section 26;
- American Convention on Human Rights (Pact of San José de Costa Rica), section 1;
- International Convention on the Elimination of All Forms of Racial Discrimination;
- Convention on the Elimination of All Forms of Discrimination Against Women; and
- Convention No 111, section 1(1) of The International Labor Organization (ILO) prohibits 'any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in the employment or occupation'.

National laws have followed the constitution in supporting the right to non-discrimination:

- Law No 23,592/2008 established that anyone who arbitrarily impedes, obstructs, restricts or in any way impairs the full enjoyment on an equal basis of fundamental rights and guarantees recognised in the Constitution, shall be liable, at the request of the victim, to revoke the discriminatory act or to cease the conduct and repair the moral and material damage caused.
- Law No 26,485/2009 on the Integral Protection of Women establishes concepts of domestic violence, institutional violence, labour violence, violence against reproductive freedom and mass media violence, all of which may be performed against women.

These national protections are supplemented by the following labour laws:

- Labour Federal Pact No 25,212 established that employer's decisions involving any type of discrimination in employment on the grounds of race, colour, national origin, religion, sex, age, political opinion, social origin, union, or residence or family responsibilities as serious infringements.
- Labour Contract Law No 20,744 (LCL) section 17, forbids any kind of discrimination between workers on the grounds of sex, race, nationality, religion, political opinion, union or age. It also requires equal treatment in the same situations for every worker and includes the possibility of different treatment of employees in equal situation grounded in principles of general welfare like efficiency and laboriousness.

Accordingly, if an employer performs a discriminatory act, it could be considered a serious transgression and the employee who has been discriminated against could consider him/herself dismissed due to the fault of the employer and claim the complete severance payment plus damages.

- Non Discrimination Law No 23,592 imposes sanctions on any discriminatory conduct based on race, religion, nationality, ideology, political opinion, union membership, sex, financial or social condition or physical features. Any person who commits a discriminatory act could be obliged to annul or cease such behaviour and pay applicable damages.
- The Protection of Women Law relevantly prohibits labour violence, which it defines as including discriminatory acts and psychological harassment against women in the workplace.²

Discrimination based on addiction

Discrimination is mainly based on: race, age, colour, language, religion, nationality, ethnic origin, ideology, political opinion, union membership, sex, financial or social condition or physical features.

However, the grounds of discrimination are not restrictive and have been extended by case law to alcohol and drug addiction in the workplace, among other things.

Alcoholism is defined in the ILO *Encyclopedia of Occupational Health and Safety* (fourth edition, Geneva) as a primary, chronic disease with genetic, psychosocial and environmental factors influencing its development and manifestation.

The ILO Code of Practice *Management of alcohol and drug-related issues in the workplace* (1998, Geneva) defines alcohol and drug-related problems as health problems and establishes the need to treat it as an illness.³

In light of this, before a case where an employee suffers from an addiction to drugs or alcohol, an employer has the obligation to treat the case as if it was any other disease and follow the rules determined by the local labour law to regulate paid leave due to the employee's illness.

Duty of safety

In Argentina, the employer has a 'duty of safety' – a set of obligations that the employer must comply with as part of the labour contract to protect workers' mental and physical health. This duty also has a preventive focus aimed at preventing labour accidents and illnesses.

In general terms, section 75 of the LCL establishes a general guideline for an employer's duty of safety. It focuses on:

- compliance with the laws on health and safety in the workplace, and observing the rules of working hours and breaks; and
- damages resulting from a violation of the duty of safety, which are governed by the occupational accidents and occupational diseases legislation.

Case law and jurisprudence have widened the scope of the duty of safety regulated by the LCL and incorporate the employer's obligations to provide employees with a healthy working environment with no harassment and/or discriminatory behaviour. Compliance with the duty requires employers' compliance with all necessary actions aimed at preventing negative results on their employees' health.

ALCOHOLISM AND DRUG USE UNDER THE SCOPE OF THE DUTY OF SAFETY

The duty of safety concerns the employer's duty to take all measures and precautions in order to avoid accidents and illnesses related to work. As stated, case law and jurisprudence have extended such duty and determined the employer's obligation to provide measures to take care of employees' health.

Furthermore, in this regard, a new bill was introduced to Congress in March 2010 (Law Bill No 0245-S-10 – the 'Bill') and renewed recently, as Argentine bills expire if not passed within two years of being introduced to Congress. The important aspects of the Bill are:

- employees with problems of alcohol or drug abuse have the following rights: to have their addiction treated as an illness; non-discrimination; confidentiality; equal opportunities for promotion and transfer opportunities;
- employers should draft a written policy and communicate it properly to their employees; and
- the treatment and rehabilitation process will be covered by the worker's health service so no cost is incurred by the employee.

The most relevant cases discussing the matter are:

- *LJA v Chai Néida y Otros s/accident*, National Labour Court of Appeal (NCLA), Courtroom VII, 31 March 2011: a worker suffered an accident at the workplace, a witnesses declared the worker was intoxicated. There was also evidence that he was constantly intoxicated. The Court ruled in favour of the worker because it determined that the employer failed to comply with its duty of safety since it did not provide the appropriate controls that would have avoided the employee's intoxication, which was the cause of the accident. Thus, the Court ordered the employer to pay the employee a compensation for moral, material damages and loss of opportunity.
- *BLA v Securus SA s/dismissal*, NLCA, Courtroom I, 28 October 2009: the worker was serving as a private security agent and was drunk at the workplace. The employer proved that the worker was just drunk and not suffering from alcoholism. Thus, the Court ruled the dismissal by the employer was justified and the employer did not fail to comply with its duty of safety.

From the analysed case law and the Bill, it can be concluded that dealing effectively with addictions in the workplace requires the broadening of the employers' duty of safety and consideration of addictions as diseases.

The employer should provide not only paid leave, which is granted by the law, but also support the employee's recovery and rehabilitation.

Disciplinary measures or dismissal based on such addictions will not be considered valid before a court of law, unless the employer proves that the employee's state of intoxication is not the consequence of an addiction.

Nonetheless, in cases where an employee commits a misdeed due to his/her state of intoxication, but this is not an addiction and the employee has deliberately consumed alcohol or drugs knowing that he/she has to comply with his/her duties, disciplinary

measures – including dismissal with just cause – can be considered valid. When looking at its legitimacy, the court will also consider an employee's behaviour record, length of employment and responsibilities.

In order to limit exposure to discriminatory claims based on the employer's lack of compliance with its duty of safety, it is advisable to:

- implement a human resources policy related to the handle of these addictions in the workplace, which will determine – in general terms – the steps to be followed in the case of facing a situation where an employee is found to be intoxicated, measures that both employer and intoxicated employee must follow, situations where a co-worker is aware of an intoxicated employee, etc;
- emphasise the employer's non-discriminatory intentions and conducts towards these situations; and
- notify all employees of the policy and ensure the policy is in line with guidelines determined by case law, jurisprudence and the Bill.

Overview of addictions under US labour laws

Employment laws regarding the situations under which an employee can be dismissed may vary from state to state. At the federal level, laws such as the Civil Rights Act (CRA) and the Americans with Disabilities Act (ADA) make it wrong to dismiss a worker for an ulterior motive.

Title VII of the CRA of 1964 prohibits employment discrimination based on race, colour, religion, sex and national origin as follows:

'Unlawful employment practice Sec. 2000-e2 [Section 703]

(a) ...It will be unlawful employment practice for an employer

- (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.'

Broadening the scope of the CRA, the

ADA prohibits certain employers, including states, from ‘discriminating against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.’⁷⁴

To that end, the ADA requires employers to ‘make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the employer’s business.’⁷⁵

‘Disability’ is defined by the ADA so that it includes: ‘(a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) a record of such impairment; or (c) being regarded as having such impairment.’⁷⁶

A disabled individual is otherwise ‘qualified’ if he or she, ‘with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.’⁷⁷

Alcoholics, however, rarely fall within the broad scope of the ADA, even though courts have recognised that alcoholism may qualify as a disability under the ADA. Alcoholism, like all potential impairments, is not considered to be a disability, per se, under the Act. This is because courts have agreed that the ADA requires an individualised determination of each person’s impairment. Thus, while alcoholism may ‘rise to the level of a disability in some circumstances, it is insufficient for a plaintiff to merely state that he is an alcoholic.’ Likewise, a court cannot assume that all alcoholics are similarly and equally affected. Under the ADA, employers may hold alcoholics and drug users to the same job performance standards as other non-disabled employees. Accordingly, the worker bears the ‘burden of proving that his alcoholism did not affect his job and that he was performing to the same standard as other employees’.

This means that even if the alcoholism was a causal factor leading to improper behaviour or non-compliance with company standards, the alcoholic person gets no special privileges.⁸

Nevertheless, there is an even bigger problem with evaluating alcoholism as a disability for the purposes of the ADA. Although an alcoholic is recognised by the ADA as someone who may be a ‘qualified individual with a disability’, the burden that an alcoholic must meet in order to establish his/her prima facie case is far greater than that of other disabled persons because the nature of the disability itself produces symptoms which employers are allowed to discriminate against. This inconsistency arises because ADA allows employers to hold an alcoholic to the ‘same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee.’⁹

ADA determines the requirements that each plaintiff must meet in order to file a claim under such statute. The first step a plaintiff must take when bringing an action against an employer is to establish that:

- the employee is a qualified individual with a disability; and
- the employer’s adverse employment action was taken ‘because of [her] disability’.

The ADA defines a ‘qualified individual’ as one who: (i) satisfies the requisite skill, experience, education, and other job-related requirements of the employment position; and (ii) can perform the essential functions of the position, with or without reasonable accommodation.¹⁰

Direct evidence could include blatant acknowledgment of the employer’s part, such as admitting that the individual is not being hired or is being demoted because he or she is an alcoholic. If the plaintiff cannot establish his/her prima facie case through direct evidence, then they must resort to the test that was set up in *McDonnell Douglas Corp v Green* burden-shifting analysis.¹¹

According to the *McDonnell Douglass* case, there are four prongs to satisfy a plaintiff’s burden of proof:

- the plaintiff must show that he/she is disabled as the term is defined in the ADA;
- the plaintiff must demonstrate that he/she is qualified for the position, with or without reasonable accommodation;
- the plaintiff must prove that he/she was subject to an adverse employment action; and
- the plaintiff must establish that a non-discriminatory person replaced him/her, or that they were treated less favourably than non-disabled employees were.¹²

Once the plaintiff has established his/her prima facie case of discrimination against the employer, the burden of production shifts to the employer, who must then articulate a legitimate, non-discriminatory reason for taking the adverse employment action. It is important to note that the employer's burden at this time is not one of proof, but of production.

Below, there is an analysis of one of the most relevant cases where an employee who suffered from alcoholism, upon dismissal, sued their employer under the ADA. The Fifth Circuit case, *Burch v Coca-Cola Co*, illustrates how difficult it can be for an alcoholic plaintiff to overcome the burden of proof on the first method of proving a disability under the ADA – showing that he/she has a 'substantially limiting' impairment.¹³

In *Burch*, the alcoholic plaintiff attended a company dinner meeting, became intoxicated and mouthed an obscenity to a fellow manager. Afterwards, the plaintiff voluntarily admitted himself to a ten-day inpatient programme, followed by a four-week outpatient programme. The employer fired him two days before his expected release to full-time work, citing his inappropriate behaviour at the dinner party as the reason for his termination. The trial court ruled in favour of the plaintiff, and the employer appealed the judgment.

The Fifth Circuit Court of Appeals reversed the trial court's decision, holding that:

- alcoholism is not a disability, per se; and
- the plaintiff failed to prove that his alcoholism caused him to be substantially limited in a major life activity.

The plaintiff in *Burch* alleged that when he 'drank too much', he was limited in his ability to walk, talk, think and sleep, and that the accompanying hangovers affected his memory, but the Court of Appeals characterised his symptoms as temporarily incapacitating. The Fifth Circuit argued, 'permanency, not frequency, is the touchstone of a substantially limiting impairment'. The court further noted that although the plaintiff's alcoholism may be 'permanent', he presented 'no evidence that he suffered from a substantially limiting impairment of any significant duration'.

Conclusion

Through this article, we explored how a problematic situation such as dealing with addictions in the workplace is handled in two different legal systems.

On the one hand, Argentina, a country with a civil law tradition and protective

nature to employment matters, considers that employers' duty of safety includes the protection of employees' mental and physical health. Thus, addictions must be treated as an illness and employers must provide paid leave required under the LCL together with the support to face a rehabilitation treatment. Any disciplinary measure taken by the employer based on an employees' addiction is considered discriminatory and the employee will be entitled to sue the employer based on this discriminatory treatment. The matter is specifically considered by case law, jurisprudence and the Bill.

On the other hand, the US, a country with a common law legal tradition, deals with addictions in the workplace in a less specific and protective way towards the employee. It is hard for employees who suffer from addictions to file an action under the ADA if the employee is dismissed due to misconduct, which is caused by the employee's alcoholism or drug consumption. Thus, such acts by the employer, in general terms, will not be considered as a discriminatory action against the employee.

In view of the foregoing, it can be concluded that dismissal of an employee who suffers from either alcohol or drug addiction can give rise to discriminatory legal actions and compensation in countries with protective employment laws; whereas in a common law country, dismissal will not, in general terms, be considered as a discriminatory action. Employees who consider such acts as discriminatory and seek compensation under the ADA will have to comply with more requirements and produce more evidence than an Argentine employee would have to.

Notes

- * Special thanks to Cecilia Lopez Pablos, member of Beretta Godoy's Employment Law Department, who contributed to this article devoting time and effort.
- 1 NLC, Courtroom X, in re *Muñoz Carballo, Alejandra Noelia v Casino Buenos Aires SA Cia de Inversiones en Entretenimientos SA UTE s juicio sumarísimo*, 30 April 2012.
 - 2 Omar Beretta and Mercedes Balado Bevilacqua, 'Discrimination and harassment in Argentina: an overview', *IBA Employment and Industrial Relations Law*, Volume 22, No 1, March 2012, p52.
 - 3 See note 1 above.
 - 4 42 USCA sections 12112 (a), 12111 (2), (5), (7).
 - 5 42 USCA section 12112(b) (5) (A).
 - 6 42 USCA section 12102 (2).
 - 7 42 USCA section 12111 (8).
 - 8 Carrie Thornton, 'Alcoholism and the ADA: Divergent treatment by the federal courts', *SMU Law Review*, Fall 2001, pp 2153-2155.
 - 9 *Ibid.*
 - 10 *Ibid.*
 - 11 411 US 792,802 (1973).
 - 12 Case: *McDonnell Douglas Corp v Green*, 411 US 792, 802 (1973).
 - 13 Case: *Burch v Coca-Cola Co*, 119 F.3d 305 (5th Cir 1997).