Proskauer

newsletter

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in this issue

A monthly "best practices" alert for multinationals confronting the challenges of the global workplace.

This Month's Challenge

Workplace bullying is becoming a more common basis for legal actions around the world.

Best Practices Tip of the Month

To protect themselves, multinational employers need to develop, implement, and enforce policies to prevent and respond to workplace bullying.

Tip of the Month

Abusive Workplace Claims: The Experience of French and English Employers

Earlier this year, the New York State Senate passed a bill to outlaw "abusive work environments" in New York by creating a civil cause of action against employers who fail to prevent "abusive conduct" against their employees. The bill died in the Assembly, but supporters have vowed to bring it back next year.

Employers cannot help but see this as the "full-employment-for-lawyers" law. Although the legislative findings at the front of the bill state that a mere 16 to 21 percent of the workforce have experienced an abusive work environment that would come within the act's prohibitions, conventional wisdom suggests that the number of employees in the State who do not feel they have been abused at work at some time in their careers can probably be counted in the low single digits. Even if the number of persons who could actually prove that their experience was sufficiently abusive to meet the statutory definition of actionable conduct is much less, employers fear the cost of defending the nonmeritorious claims even more than the damages that will be assessed in the meritorious ones.

The concept of civil damages for an abusive work environment – still unknown in U.S. law – is an accepted part of the European legal landscape. A look across the ocean may give U.S. employers some idea of what to expect.

Moral Harassment under French Law

In 2002, France introduced legislation to prevent and sanction bullying and other kinds of behaviors that threaten the dignity of individuals at work. The enactment of this law was motivated by the groundwork of international institutions, especially the International Labor Office's 1999 studies on the prevalence of harassment and the Revised European Social Charter of May 3, 1996, which provided this definition of bullying: "recurrent reprehensible or distinctly negative and offensive actions directed against individual workers in the workplace or in relation to work."

Under French law, bullying and other kinds of behaviors that violate the dignity of an individual at the workplace fall under the general term of "moral harassment." In legal terms, moral harassment is defined by a prohibition: no employee shall suffer repeated acts of moral harassment that are aimed at, or may result in, a degradation of his or her working condition and are likely to harm his or her individual rights and dignity, or affect

his or her health or career. This definition based on the intent and outcome of acts sets the scope for a wide range of possibilities and has given rise to an extensive body of case law.

Moral harassment can manifest in physical, psychological and sexual forms and varies from cold-shoulder treatment to cold-blooded violence. The most recent phenomenon recognized by the courts, and perhaps most concerning to companies, is "institutional harassment," a degradation of working conditions due to harmful policies or management practices.

In addition to generally prohibiting moral harassment, the French Labor Code also includes a positive duty for employers, who must take all appropriate (reasonable and responsible) measures to prevent such acts. To enforce these rules, the French Supreme Court has declared that the duty to prevent moral harassment is linked with a broader obligation to protect the health and safety of employees. This responsibility entails the strict liability of employers. In other words, companies may be held liable for acts of moral harassment committed against their employees irrespective of the fact that they are not authors of the harassment and took proactive measures to prevent it.

Regarding sanctions, employers risk a variety of penalties in cases where a claim of moral harassment has been substantiated, including:

- Damages for wrongful breach of the employment contract, whereby the employee victim can claim that the harassment is a contractual violation, which in turn generates a claim of wrongful termination and as a result the right to damages;
- Compensation for injuries (physical and psychological) suffered as a result of the harassment;
- Reinstatement (or cancellation of the termination) of the victim of harassment or of any individual who was dismissed or quit because he or she refused to be subject to such harassment; and
- Penal sanctions, including a fine of €15,000, and imprisonment up to one year for individuals, and a fine of €75,000 for companies and other legal entities

Moral harassment represents a considerable risk for employers because, in addition to these heavy sanctions, the standard of proof is eased for alleged victims. Specifically, the employee need not demonstrate the existence of moral harassment. Instead, he or she must establish facts that allow a *presumption* of harassment. Thereafter, the burden shifts to the employer to demonstrate that the evidence presented does not actually establish moral harassment and that this conclusion is justified based on objective and legitimate reasons. Claims of moral harassment require considerable expenditure of time and money to resolve.

Witnesses to bullying acts also are protected by harassment laws. In order to avoid retaliation, the French Labor Code provides that employees cannot be disciplined or terminated for having testified as witnesses to acts of harassment. This safeguard is vigorously enforced by French jurisdictions, and only in instances where it can be demonstrated that the employee-witness has testified in bad faith is it lawful for the employer take disciplinary action.

Given this legal environment, French-based companies are obliged to take the actions necessary to prevent harassment at the workplace and to intervene and handle situations involving bullying whenever they occur. The range of these measures is wide and includes:

- Special training of management and employees;
- Prohibition of moral harassment in the company's internal rules;
- Establishment of an alert procedure for wrongful conduct which might be characterized as harassment;
- Introduction of a mediation protocol to resolve alleged incidents of harassment;
- Creation of a procedure to handle harassment claims quickly and fairly; and
- Disciplinary measures against harassers.

Workplace Bullying under UK Law

UK law has two concepts related to workplace bullying.

The first is under the new Equality Act 2010, legislation that came in force on 1 October 2010, which has created a single statutory framework for UK discrimination law. Under the Equality Act, there is harassment where "A" engages in unwanted conduct related to a protected characteristic (or of a sexual nature) that has the purpose or effect of violating "B's" dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for "B." Whether the conduct has that effect is judged subjectively from "B's" viewpoint, subject to a test of reasonableness. The protected characteristics under the Equality Act are: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation. Employee claims under this act are brought before employment tribunals.

The second concept of workplace bullying derives from the Protection Against Harassment Act 1997. This makes it unlawful for someone to pursue a course of conduct which they know or ought to know would be harassment, which includes causing someone alarm or distress. Claims under this legislation cannot be brought before employment tribunals – rather, they must be brought before County Courts or High Court. In contrast to claims under the Equality Act, the harassment does not need to be connected to a protected characteristic. Despite this, claims under this act, particularly against employers, tend to be limited to the most severe forms of bullying, in large part for the following reasons:

- The test for harassment under this statute is a high one, as illustrated by the decision in *Majrowski v Guy's and St Thomas' NHS Trust* [2006] UKHL 34, where it was held that to fall within the meaning of the act, the conduct must be "oppressive and unacceptable," rather than "merely unattractive, unreasonable or regrettable." This is a harder test to satisfy than the test under the Equality Act.
- The Protection Against Harassment Act prohibits a course of conduct (*i.e.,* more than one incident of harassment). In contrast, a single incident can constitute unlawful harassment under the Equality Act.

Although an employer can be vicariously liable for acts of harassment by its employees under both acts, the tests for vicarious liability are different, and it is harder for an employer to be vicariously liable under the Protection Against Harassment Act than under the Equality Act. In particular, under the Protection Against Harassment Act, the correct approach is to look at the relative closeness of the connection between the nature of the employment and the particular conduct complained of and to ask whether, looking at the matter in the round, it was just and equitable to hold the employer vicariously liable.

In contrast, where there is harassment or bullying within the meaning of the Equality Act 2010, anything done by an employee "in the course of their employment" is treated as having also been done by the employer (section 109(1)), regardless of whether the

employee's acts were done with the employer's knowledge or approval (section 109(3)). However, there is a defense available to an employer under the Equality Act if it can show that it took "all reasonable steps" to prevent the employee from doing the discriminatory act or from doing anything of that description (section 109(4)).

Where there is harassment or bullying under either act, the main remedy for an employee will be compensation. Compensation will be based primarily on the financial losses (such as loss of earnings and loss of pension) flowing from the conduct complained of. For example, where an individual resigns because of having been harassed, they will be entitled to compensation for their loss of salary and benefits until they find a new job (or the continuing losses by reason of being unable to find a job that is as well paid as their previous one — something that is increasingly common in the current economic environment). A claimant will have a duty to mitigate these losses. However, severe cases of harassment can cause serious and long-term damage to the health of claimants which means they are too unwell to seek a new job for a significant length of time. In such cases, the level of compensation for financial losses can be very high because it will be based on multiple years of lost earnings. In addition to loss of earnings, claimants also are entitled to compensation for injury to feelings. There are judicial guidelines as to the amounts payable, which are known as "Vento" guidelines — based on the case of *Vento v Chief Constable of West Yorkshire Police (No 2)* [2003] IRLR 102 — which split claims into three levels of seriousness. The guidelines recently were increased in the case *Da'Bell v NSPCC UK* EAT/0227/09, and currently are as follows: between £600 - £6,000 for less serious cases, such as a one-off incident or an isolated event; between £6,000 - £18,000 for serious cases which do not merit an award in the highest band; and between £18,000 - £30,000 for the most serious cases, such as where there has been a lengthy campaign of harassment. Awards can exceed this amount only in the most exceptional cases.

Where there is harassment under the Equality Act, claimants also are entitled to two further remedies: judicial recommendations and judicial declarations.

The power to make recommendations has been broadened under the Equality Act 2010. Prior to the act, tribunals could only make recommendations aimed at reducing the adverse effect of the discrimination on the claimant. Now, recommendations also can be made for the benefit of the wider workforce. For example, a recommendation that all employees within a particular department are provided with training to prevent harassment.

The judicial declaration is simply a declaration by a tribunal as to the rights and obligations of the claimant and the respondent in relation to the matters to which the proceedings relate – for example, a tribunal will make a declaration that an employer was vicariously liable for a particular act of harassment to which a claimant was subjected on the grounds of nationality. Clearly, it is undesirable for an employer to be the subject of such a declaration.

In practical terms, the types of practices that employers should have in place in order to successfully defend claims for bullying and harassment (including succeeding in a "reasonable steps" defense) include:

- Put in place an equal opportunities policy and an antiharassment and bullying policy, and review those policies as appropriate.
- Ensure all employees are aware of the policies and their implications – for example, through requiring employees to confirm they have read, understood, and will comply with relevant policies.

- Train managers and supervisors in equal opportunities, bullying and harassment issues.
- Take steps to deal effectively with complaints. Such steps include a proper procedure for ensuring complaints can be raised freely and taking appropriate disciplinary actions in response to well-founded complaints.
- Carry out regular reviews to assess whether there are any risks of a culture of bullying or harassment developing in the workplace.

In our experience in the UK, claims of harassment and bullying are relatively uncommon. However, where they do arise, they can often be contagious and lead to a spate of claims which are often the result of a systemic failure or a rogue manager. Moreover, when claims arise, even individual ones, they can be highly disruptive, bad for morale and time consuming for management. It is also our experience that where things go wrong, it is not because there are no policies in place. Rather, it is because there has not been enough attention given to identifying parts of the workforce where there is a particular risk of bullying and harassment, or not enough care has been given to training managers so that they know how to apply the policies effectively and ensure that they and their teams adhere to the spirit of them. Accordingly, our strong view is that the key to avoiding problems caused by bullying and harassment is for companies not only having adequate policies in place, but to ensure that managers implement them in a manner that stresses the importance of a workplace free from harassment and bullying.

Erratum: *Some sharp-eyed readers noticed an error in our Newsletter last month, when we reversed the penalties for public and private corruption under French law. The penalty for public corruption committed by a company is €750,000 (not €350,000), and the penalty for private corruption committed by a company is €350,000 (not €750,000). We apologize for the error.*

Proskauer Rose LLP's International Labor and Employment Law Practice Group counsels companies doing business globally in connection with the employment issues they face in their workplaces around the world.

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