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Semi-plenary #6

WORKPLACE VIOLENCE

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The number of lawsuits filed at Labor Courts seeking compensation for workers who were workplace violence victims increased dramatically in recent years. Violence is the primary reason underlying claims related to sexual or moral harassment, discrimination, unreasonable goals, exhausting working hours, invasion of privacy, slave labor, child labor and so forth.

Various types of violent behaviors spread across the labor relations, with implications for the health of workers, the organizational climate, the Social Security Administration and productivity, and direct impact on the fundamental principle of the dignity of labor.

Given this scenario, the Labor Justice Court National Safe Work Committee chose to focus on workplace violence in 2018 and 2019. Not to restrict our work to mere diagnosis, we decided to move forward and look for ways to confront this problem and formulate policies to overcome it. Therefore, the topic was labeled "Confronting and Overcoming Workplace Violence."

Since employers are responsible for workplace hazards, in return, they have executive prerogatives and thus are entitled to organize, control and oversee service delivery. Having also disciplinary power, they may eventually punish whoever fails to obey legitimate orders or instructions. Indeed, the Labor Laws Consolidation (LLC) article 482 enables termination for cause in case of carelessness, indiscipline or insubordination.

Yet, the executive prerogatives of employers face several restrictions and limits, as they only apply to the company's goals and cannot fall into abuse, excess or deviations. As emphasized by Delio Maranhão and Luiz Inácio Carvalho:

> "... employee subordination is legal, because it results from a contract, which provides its foundations and limits. The content of this element that characterizes employment contracts cannot be assimilated to its predominant meaning in the Middle Ages: employees are not serfs and the employer is not their master. The point of departure is the assumption of individual freedom and the dignity of the worker as a person."[1]

As per the employment relationship, workers are subjected to the employer's orders and instructions, however, they might refuse to comply when orders are illegal, unreasonable, contrary to good morals or outside the scope of the employment contract, as indicated in LLC article 483.a. This right notwithstanding, most employees tend to comply always with the employer's determinations, even when overreaching, disrespectful or humiliating, for fear of retaliation or of losing the job. Such compelling circumstances lead employees to submit to such distorted power to the very limit of bearability. As the old and perverse popular saying states, "When force comes on the scene, right goes packing." Actual application of their executive power into practice often brings the character flaws of employers, or their agents, to light, especially because they are aware of the little power of reaction of employees as a function of their dependent condition.

A global stronger position against workplace violence emerged in recent years, concerning both physical aggression and subtler forms, as e.g. psychological abuse. Fierce corporate competition, a revolution in productivity and frenzied focus on outcomes increase the level of tension in the workplace and create more openings to abuse or disrespect from managers or even coworkers.

Violence might be overt, as e.g. physical aggression, but also covert, as is the case of moral or sexual harassment. In attunement to the principle of human dignity, these forms of psychological abuse are increasingly rejected by society.

Among the various types of workplace violence, moral harassment, a form of emotional abuse also known as psychological terror at the workplace, is currently awakening much interest. The effervescence around this issue in the beginning of the 21st century gave rise to, and still feeds, an intense doctrinal debate with immediate implications for jurisprudence.

There is no doubt that employers are entitled to manage their companies and that employees should obey their orders. However, up to what point the employers' executive prerogatives might be rated as being within the admissible range and when do they become abusive? There are no precise limits or stable cut-off points. Indeed, one might assert there is a gray zone between the extremes characterized by excessive — even impolite — demands which, however, do not amount to harassment, hostility or bullying. Together with the advancement of civilization, the frontiers of this gray zone are moving toward greater respect for the workers' dignity. As a result, behaviors formerly held to be normal are now seen as moral harassment.

Similarly, management attitudes now considered merely uncomfortable or indelicate might be rated intolerable in the near future, thus broadening the scope of moral harassment.

In fact, the notion of moral harassment is still under construction or close to be definitely established. While it has already been well characterized and the term has consolidated, the limits of its scope still need to be definitely set and its difference relative to other forms of psychological abuse in the workplace clearly defined.

The Labor Code of Portugal includes an explicit description of moral harassment:

"Harassment is any undesirable behavior, particularly those based on discrimination, at the time of hiring, in the job or professional training to unnerve or embarrass someone, interfere with their dignity or create an intimidating, hostile, degrading, humiliating or destabilizing environment for them."[2]

Therefore, moral harassment is any behavior of employers, their agents or coworkers that exposes workers to recurring embarrassing, humiliating or abusive situations outside the scope of the executive prerogatives in force, which degrade the working environment, demean the human dignity or cause occupational illnesses.

It should be observed that actual damage or disease is not necessary to characterize moral harassment. What is punished is behavior as such, i.e. the abusive behavior, just as the Brazilian penal law distinguishes between formal (actual) crimes and the so-called "mere behavior crimes," i.e. without actual results, but the perpetrator's behavior as such is considered a crime. The legally protected interest is the right to a healthy work environment. In other words, workers should be assured they will be able to work with full respect for their dignity, physical, mental and social well-being. Therefore, it suffices to prove deviation or abuse in the abuser's behavior to characterize moral harassment, independently whether it results or not in consequences for the victim's health.

It might happen that long-lasting moral harassment ends by destabilizing the victim and causing serious mental disorders, eventually leading to suicide. In such case, compensation is granted for the occupational disease, which was equated to a work accident by Law no. 8,213/1991[3], moral harassment being rated as a causal or concausal factor.

Collective moral harassment occurs when the employer's abusive attitude is general, i.e. it becomes institutional behavior and seriously interferes with the right to a healthy work environment. Excessive or disrespectful pressures make the environment become tense, cause absenteeism and further illness, with negative implications for the company's operational outcomes.

According to the Civil Code articles 932 and 933[4], employers responsible for ensuring a healthy work environment are vicariously liable for their agents' actions[4]. In such cases, employers might demand the due compensation from the perpetrator and/or discharge them with cause.

Since these are currently considered to be serious occupational health problems, the International Labor Organization decided to confront them. Resolution no. 1,421, from 8 June 2018, included this subject in its 2019 conference agenda, under the heading "Violence and harassment in the world of work." An international convention will be possibly agreed still this year to regulate rights, approaches and employers' obligations relative to the various types of violence in the workplace.

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