Revue de droit comparé du travail et de la sécurité sociale

4 | 2018
English Electronic Edition

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Electronic version

URL: <https://journals.openedition.org/rdctss/1805>

DOI: 10.4000/rdctss.1805

ISSN: 2262-9815

Publisher

Centre de droit comparé du travail et de la sécurité sociale

Printed version

Date of publication: 1 December 2018

Number of pages: 134-147

ISSN: 2117-4350

Electronic reference

Allison Fiorentino, "Comparative approach of the case law on bullying at work", *Revue de droit comparé du travail et de la sécurité sociale* [Online], 4 | 2018, Online since 01 November 2021, connection on 15 November 2021. URL: <http://journals.openedition.org/rdctss/1805> ; DOI: <https://doi.org/10.4000/rdctss.1805>

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COMPARATIVE APPROACH OF THE CASE LAW ON BULLYING AT WORK

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Moral harassment is a violation to the rights and the dignity of the person, which also puts his physical and mental health at risk or jeopardizes his/her professional future. Workers who are victims no longer feel safe at work. As evidenced by the EUROFOUND report «Violence and harassment in European workplaces: Extent, impacts and policies»¹, harassment situations generate a high absenteeism rate leading to inability to work.

This study presents the magnitude of the violence and harassment at work in the 28 countries of the European Union and in Norway. It is based on national surveys conducted between 2009 and 2013, as well as on the results of the fifth European working conditions survey to EUROFOUND². It analyzes the links between working conditions and harassment in the workplace, indicates the impact on workers and businesses and compares policies developed by Governments and the social partners to resolve this issue.

The data showed divergent trends over time: physical violence is down, but other forms of harassment not only do not regress, but increase. Overall, 14 percent of workers in 2010 reported being subjected to at least a form of harassment. In addition the perpetrators diversify because there is a progression

1 M. Giaccone, D. Di Nunzio, A. Fromm, O. Vargas, *Violence and harassment in European workplaces: Extent, impacts and policies*, European Foundation for the Improvement of Living and Working Conditions, 2015, <https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/violence-and-harassment-in-european-workplaces-extent-impacts-and-policies>

2 EUROFOUND, *Fifth European Working Conditions Survey*, Publications Office of the European Union, 2012, https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1182en.pdf

of psychological violence on the part of third parties. This is a result of the change in working conditions that expose more employees in contact with external stakeholders (customers, employees of other companies, trainers, service sector of the economy...). Working conditions have also changed due to a greater intensity of work, more important psychological and physical requirements, growing insecurity concerning employment, conflicts in the workplace and bad managerial practices.

In addition, the results indicate that women say they usually have suffered more violence and harassment than men. Some business sectors are also more exposed than others. This is the case of the medico-social sector, transport and catering industry. The report also notes that in many countries, agency workers and apprentices are more likely to experience them than workers on indefinite-term contracts.

The magnitude of exposure to moral harassment in the workplace varies across Europe. Workers in countries of the South of Europe are thus less likely to report harassment than those in the North. Since 2000, the latter, which have relatively high proportions of workers who report having been victims of violence and harassment³ at least once in their working lives, have developed various policies emanating from the law or standards drafted by the authorities responsible for the working environment to combat them.

The legal standards adopted to combat harassment and their nature vary in Europe, reflecting both the cultural and the different peculiarities of the different labor law systems. The task of the «comparatist» is put to the test of the wide divergence of approaches between the different legal systems as the moral harassment is not the object of a single definition or even of a unified terminology. Precision work on the notion of workplace bullying using a comparative approach (I) is a prerequisite before delving deeper into the study of case law concerning harassment which will highlight the judge's attitude (II). Depending on the country and the legal culture, it has used the legal means at its disposal to improve the protection of the harassed employee.

I - MORAL HARASSMENT IN COMPARATIVE LAW: A PROTEAN CONCEPT

Far from a simple notion to identify bullying is characterized first by differences concerning the terminology used and the content of this notion (A). Such differences are based on cultural, geographical and political factors (B)

A - THE FINDING OF DIVERGENCE

From the first moment the work of the researcher in comparative law comes up against the difficulty related to the different conceptions of moral harassment at work according to the legal system studied. It is thus necessary to dwell on the different ways of approaching

3 On this issue, see L. Lerouge, *Les pays de l'Europe du Nord face à la prévention des risques psychosociaux au travail : droit, politique de prévention, dialogue social (Belgique, Norvège, Pays-Bas, Suède)*, synthesis of the international study days organized at Bordeaux 3-4 March 2011, COMPTRASEC, University Bordeaux, <https://halshs.archives-ouvertes.fr/halshs-00705217/document>

the «moral harassment at work» according to different countries. The initial stage of this work is terminological. While in France the concept of moral harassment corresponds to a legal category, on the other hand, in many foreign systems, the researcher who wishes to know the legal or jurisprudential answer given to the harassment is confronted with different denominations. To give a brief overview of this problem, English will be used mainly as a foreign language. A literal translation of the French term «moral harassment» will not be understood by a majority of foreign jurists and will not be used in their country of origin.

The legislator, judge and doctrine refer, depending on the country, to different denominations. It is possible to identify, among other things, the expression of «*bullying*»⁴, «*emotional abuse*»⁵, «*psychological harassment*»⁶, «*mobbing*»⁷ or even «*Power Harassment*»⁸. Several authors who are already dealt with this notion point out the ambiguity generated by this diversity. The terms are sometimes used as synonyms; sometimes refer specifically to particular behaviors⁹. Some scholars have tried to identify commonalities. For example In 2008, Professor Branch considered that each national definition referred to inappropriate

- 4 S. Einarsen, «The Nature and Causes of Bullying at Work», *International Journal of Manpower*, vol. 20, n° 1/2, 1999, pp.16-27; S. Harthill, «Workplace Bullying as an Occupational Safety and Health Matter: A Comparative Analysis», *Hastings International and Comparative Law Review*, vol. 34, 2011, p. 253-302; K. Lippel, «The Law of Workplace Bullying: An International Overview», *Comparative Labor Law & Policy Journal*, vol. 32, n° 1, 2010, p. 1-13; A. O'Connell, «Bullying in the Workplace: A Gap in Irish Legislation?», *Employment & Industrial Relations Law*, vol. 23, n° 2, 2013, p. 13-16 ; D. Yamada, «The Phenomenon of 'Workplace Bullying' and the Need for Status-Blind Hostile Work Environment Protection», *Georgetown Law Journal*, vol. 88, 2000, p. 475-536.
- 5 L. Keashly, «Emotional Abuse in the Workplace: Conceptual and empirical issues», *Journal of Emotional Abuse*, 1998, p. 85-117; P. Lutgen-Sandvik, «The communicative cycle of employee emotional abuse. generation and regeneration of workplace mistreatment», *Management Communication Quarterly*, vol. 16, n° 4, 2003, p. 471 - 501 ; S. Harvey, L. Keashly, «Emotional abuse: how the concept sheds light on the understanding of psychological harassment (in Quebec)», *Perspectives interdisciplinaires sur le travail et la santé* [En ligne], n° 7-3, 2005, <http://pistes.revues.org/3193>
- 6 R. Cox, «Psychological Harassment Legislation in Québec: The First Five Years», *International Comparative Labor Law and Policy Journal*, vol. 32, n° 1, 2010, p. 55-89; C. Gonçalves Gouveia, «From Laissez-Faire to Fair Play: Workplace Violence & Psychological Harassment», *University of Toronto Faculty of Law Review*, vol. 65, 2007, p. 137- 166.
- 7 P. Fischinger, «Mobbing: The German Law of Bullying», *Comparative Labor Law & Policy Journal*, vol. 32, n° 1, 2010, p. 153-184 ; N. Davenport, R. Schwartz et G. Elliott, *Mobbing: Emotional Abuse in the American Workplace*, Civil Society Publishing, 1999.
- 8 L. Lerouge, S. Naito, «Bullying and Law in Japan» in Lerouge L. (ed.), *Psychosocial Risks in Labour and Social Security Law: a Comparative Legal Overview*, Springer, Serie: Aligning Perspectives on Health, Safety and Well-Being, 2017, p. 243-252.
- 9 S. Branch, «You Say Tomatoe and I say Tomato: Can we Differentiate Between Workplace Bullying and Other Counterproductive Behaviours?», *International Journal of Organisational Behaviour*, vol. 13, n° 2, 2008, p. 4-17, spéc. p. 4; L. Crawshaw, «Workplace Bullying? Mobbing? Harassment? Distraction by a Thousand Definitions», *Consulting Psychology Journal: Practice and Research*, 2009, vol. 61, n° 3, p. 263-267, spéc. p. 264; D. Yamada, «The Phenomenon of 'Workplace Bullying' and the Need for Status-Blind Hostile Work Environment Protection», *op.cit.*, spéc. p. 480.

or unreasonable actions or words¹⁰ such as ridiculing the employee in public, constantly monitoring him, questioning his skills, threatening him or spreading false rumors about him¹¹.

However, this consensus seems meager in view of the differences concerning the legal qualification of workplace bullying. For example, does its recognition by the judge require a repetition of acts or is a single act sufficient? To be recognized, is moral harassment at work only downward or can it be as ascending or lateral? Can workplace bullying be characterized in the absence of malicious intent of the perpetrator?

All these questions suggest the difficulty of conceptualizing the harassment that seems by nature protean. Another distinction related to both the terminology and the conception of harassment is between the legal systems based on the Common Law and those of Roman-Germanic inspiration. It seems that these first encompass the concept of harassment in the wider one of discrimination. Thus harassment in these countries is only a form of discrimination based for example on sex or ethnicity. Moreover, harassment is a concept that is used more often in the context of sexual harassment, which has been the subject of numerous prevention campaigns¹². On the other hand the term of «bullying» refers to this form of psychological pressure totally detached from discrimination¹³ but not necessarily taken into account by the legislator. This is the case for example in Australia or the United States. However, some Anglo-Saxon provinces make the difference and the concept of «workplace harassment» is totally different from that of discrimination and is the subject of a specific regulation. For example, the legislation of the province of Saskatchewan in Canada contains two definitions that clearly refer to these two forms of harassment.

«Harassment” means any conduct, comment, attitude, action or gesture of a person:

(i) that: (a) is based on the race, belief, religion, color, sex, sexual orientation, marital status, family status, disability, size or weight, age, nationality, ancestry or place of origin; or (b) subject to subsections (3) and (4) adversely affects the psychological or physical workers well-being and that the author knows or should reasonably know that would humiliate or intimidated workers and

“(ii) who is a threat to the health or safety of the worker”¹⁴.

10 S. Branch, «You Say Tomatoe and I say Tomato: Can we Differentiate Between Workplace Bullying and Other Counterproductive Behaviours?», *op. cit.*, spéc. p. 5; S. Branch, S. Ramsay, M. Barker, «Workplace bullying, mobbing and general harassment: a review», *International Journal of Management Reviews*, vol. 15, 2013, p. 280-299.

11 Professor Branch builds on previous work, including E. Bassman, *Abuse in the workplace*, Westport, CT: Quorum Books, 1992; C. Rayner, H. Hoel, «A summary review of literature relating to workplace bullying», *Journal of Community & Applied Social Psychology*, vol. 7, n° 3, 1997, p. 181-191; D. Zapf, S. Einarsen, «Bullying in the workplace: Recent trends in research and practice—an introduction», *European Journal of Work and Organizational Psychology*, vol. 10, n° 4, 2001, p. 369-373.

12 K. Lippel, «The Law of Workplace Bullying: An International Overview», *op. cit.*, p. 5.

13 C. Caponecchia, A. Wyatt, «Distinguishing between workplace bullying, harassment and violence: a risk management approach», *Journal of Occupational Health and Safety, Australia and New Zealand*, vol.25, n° 6, 2009, pp.439-449.

14 Art. 3(1)(b) du Occupational Health and Safety (Harassment Prevention) Amendment Act, 2007, S.S. ch. 34;
<http://www.publications.gov.sk.ca/freelaw/documents/english/Chapters/2007/Chap-34.pdf>

Even if researchers evoke a recurrence of certain criteria¹⁵ including:

- a wide variety of negative actions that can cause psychological damage,
- the existence of direct and indirect behaviors,
- the exclusion of the worker,
- the repeated nature of acts,
- their duration in time,
- the difficulty to defend oneself,

The definition of moral harassment differs from state to state. Some have not adopted a strict definition leaving some freedom to the judge. This is the case, for example, of the United Kingdom, whose Article 1 of the Protection from Harassment Act states: "A person must not pursue a course of conduct—(a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other"¹⁶. Similarly, in Finland, article 28 of the *Occupational Safety and Health Act* states: "If harassment or other inappropriate treatment of an employee occurs at work and causes hazards or risks to the employee's health, the employer, after becoming aware of the matter, shall by available means take measures for remedying this situation"¹⁷. This inaccuracy can be contrasted with the wording of Article L 1152-1 of the French Labor Code, according to which: «no employee shall be subjected to repeated acts of moral harassment which have as their object or effect a deterioration of the conditions of employment that may affect his rights and dignity, impair his physical or mental health or jeopardize his professional future».

B - DIVERGENCE FACTORS

The differences previously observed can hardly be mitigated because they are explained first of all by the diversity of the sources of inspiration of the legislator or judge or geographical areas. Thus, Professor Lippel¹⁸ makes a distinction between two main areas of influence: Anglo-Saxon law (United States¹⁹, United Kingdom²⁰ and Australia²¹) which favors the designation of «workplace bullying» and the rather French or Latin countries that were influenced by the work of psychiatrist Marie-France Hirigoyen²² who conceptualized workplace bullying in 1998. In the latter case, the terminology used is either «moral

15 M. Vartia-Väänänen, «Workplace Bullying and Harassment in the EU and Finland» in *Workplace Bullying and Harassment, 2013 JILPT Seminar on Workplace Bullying and Harassment*, op. cit., spéc. p. 2.

16 Protection from Harassment Act 21st March 1997, <https://www.legislation.gov.uk/ukpga/1997/40>

17 English translation: Occupational Safety and Health Act, n° 738/2002, <http://www.finlex.fi/fi/laki/kaannokset/2002/en20020738.pdf>

18 K. Lippel, «The Law of Workplace Bullying: An International Overview», *The Comparative Labour Law & Policy Journal*, vol. 32, n° 1, 2010, p. 1-13, spéc. p.1.

19 D. Yamada, «The Phenomenon of 'Workplace Bullying' and the Need for Status-Blind Hostile Work Environment Protection», op.cit.

20 H. Hoel, «Workplace Bullying in United Kingdom », in *Workplace Bullying and Harassment, JILPT Report n° 12/2013 - JILPT Seminar on Workplace Bullying and Harassment*, 2013, p. 61-76, <http://www.jil.go.jp/english/reports/documents/jilpt-reports/no.12.pdf>

21 B. French, M. Boyle, O. Muurlink, «Workplace Bullying in Australia: The Fair Work Act and its Impact», *New Zealand Journal of Human Resources Management*, vol. 14, n° 2, 2014, p. 69-81.

22 M.-F. Hirigoyen, *Le harcèlement moral. La violence perverse au quotidien*, Pocket, 1998, 252 p.

harassment» as in France, Belgium²³ or the Spanish-speaking countries²⁴ or «psychological harassment» in Quebec²⁵.

A third area of influence includes the Scandinavian countries²⁶ and Germany²⁷ marked by the research of German-born professor Heinz Leymann²⁸, who readily uses the term «mobbing». Finally, some countries use their own notions. In Japan, for example, there is a specific reference to «power harassment»²⁹.

These differences can also be explained by the context of the adoption of the legal provisions. Thus some countries were influenced by the work of researchers, pioneers in the field, including Heinz Leymann, Christophe Dejours, and practitioners like Dr. Marie-France Hirigoyen³⁰.

It should also be mentioned that there were other earlier texts relating to the protection of the mental health of the employee that were the starting point, in other countries, of the emergence of a regulation on harassment. In this respect, we can mention Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work³¹. The Community text had a significant impact

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- 23 L. Lerouge, «Workplace Bullying and Harassment in France and Few Comparisons with Belgium: a Legal Perspective», in *Workplace Bullying and Harassment, JILPT Report n° 12/2013*, op. cit., p. 39-59.
 - 24 In Spanish, the literal translation of moral harassment is: «*acoso moral*». A. Jurado Segovia, *Acoso moral en el trabajo: análisis jurídico-laboral*, La Ley, 2008. There is also a certain interest of the Spanish publishers for the work of Marie-France Hirigoyen. M.-F. Hirigoyen, *El acoso moral: el maltrato psicológico en la vida cotidiana*, Grupo Planeta (GBS), 1999; *El acoso moral en el trabajo: distinguir lo verdadero de lo falso*, Grupo Planeta (GBS), 2001; *El acoso moral*, Grupo Planeta Spain, 2013.
 - 25 R. Cox, «Psychological harassment legislation in Québec: the first five years», *The Comparative Labour Law & Policy Journal*, vol.32, n° 1, 2010, p. 55-89; S. Harvey, L. Keashly, «Emotional abuse: how the concept sheds light on the understanding of psychological harassment (in Quebec)», op. cit. Le professeur Gonçalves Gouveia soulignait d'ailleurs que l'ouvrage de Marie-France Hirigoyen (*Le Harcèlement Moral: La Violence Perverse au Quotidien*) avait été un best seller au Québec. C. Gonçalves Gouveia, «From Laissez-Faire to Fair Play: Workplace Violence & Psychological Harassment», op. cit., spéc. note 60.
 - 26 M. I. S. Guerrero, «The Development of Moral Harassment (or Mobbing) Law in Sweden and France as a Step Towards EU Legislation», *Boston College International and Comparative Law Review*, vol. 27, n° 2, 2004, p. 477-500.
 - 27 P. Fischinger, «'Mobbing': The German Law of Bullying», *Comparative Labor Law & Policy Journal*, op. cit.
 - 28 H. Leymann, «The content and development of mobbing at work», *European Journal of Work and Organizational Psychology*, vol. 5, n° 2, 1996, p. 165-184.
 - 29 L. Lerouge, S. Naito, «Harcèlement, "Power Harassment" et droit au Japon» in Lerouge L. (dir), *Les risques psychosociaux au travail en droit social : approche juridique comparée. France - Europe - Canada - Japon*, Dalloz, 2014, p. 211-221 ; S. Naito, «Workplace Bullying in Japan», in *Workplace Bullying and Harassment, JILPT Report n° 12/2013*, op. cit., p. 113-133.
 - 30 K. Lippel, «The Law of Workplace Bullying: An International Overview», op. cit., p. 6; H. Hoel, S. Einarsen, «The Swedish Ordinance Against Victimization at Work' A Critical Assessment», *Comparative Labor Law & Policy Journal*, 2010, vol. 32, n° 1, p. 225-250.
 - 31 S. Leka, A. Jain, S. Iavicoli, C. Di Tecco, «An Evaluation of the Policy Context on Psychosocial Risks and Mental Health in the Workplace in the European Union: Achievements, Challenges, and the Future», *BioMed Research International*, 2015, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4628767/>

and will play a role in the adoption of legal provisions in France and Belgium³² or anti-harassment codes of conduct in Spain³³.

It is also the factual circumstances that compel state authorities to adopt certain measures, as in South Korea. In 1997, when the economic crisis hit that country, the fate of the workers suddenly deteriorated. Not only did firms demand ever-increasing performance under the threat of layoff, but they also used harassment as a means of selection during staff cut-back procedures. In addition, the working atmosphere was so deleterious that some workers were persecuted by their colleagues, including through slander spread through social media, the goal being to push for resignation the competitor whose job was coveted³⁴. This situation led the Minister of Labor to adopt, for the first time, in 1999, a regulation.

II - THE ROLE OF CASE LAW: COMPARATIVE APPROACH IN FRENCH, BRITISH, JAPANESE, SPANISH AND AMERICAN LAW

Some courts have shown daring or, at the very least, a desire to protect employees. As such we can mention the French, Japanese and, to a lesser extent British (A). On the other hand, American and Spanish judges are reluctant to use their praetorian power to provide more guarantees to harassed employees (B)

A - THE AUDACITY OF THE FRENCH, BRITISH AND JAPANESE JUDGES

French law relating to moral harassment owes to the legislator as much as to the judge³⁵. If it is the law of 17 January 2002³⁶ that introduced this concept in the Labor Code, the case law had already had the opportunity to seize this problem. The judges, without resort to the terminology of harassment qualified as «fault» the attitude of the employer which consists of devaluing, humiliating, or pushing the resignation of the employee. This is the case of the employer who asserts in front of the witness that the employee is not good for anything, that she is not indispensable and who took her out of her office crying while pursuing her shouting³⁷. In addition, and even before the recognition of the obligation of security of result at the expense of the employer, the French judge made the misbehavior of certain third parties attributable to the employer. For example: when the employee has suffered a number of destabilizing actions from the spouse of the employer; or where the employer has done nothing to put an end to the hostility of the staff toward the employee

32 L. Lerouge, «Workplace Bullying and Harassment in France and Few Comparisons with Belgium: a Legal Perspective» in *Workplace Bullying and Harassment*, JILPT Report n° 12/2013, op. cit., spéc. p. 39

33 M. Velazquez, «The Spanish Code of Practice on Work-Related Bullying: Reflections on European Law and its Impact on a National Strategy For Labor Inspectors», *Comparative Labor Law & Policy Journal*, 2010, vol. 32, n° 1, p. 185-224.

34 S. Park, «Workplace Bullying and Harassment in South Korea», in *Workplace Bullying and Harassment*, JILPT Report n° 12/2013, op. cit., spéc. p. 97.

35 See also the article by Loïc Lerouge published in the issue.

36 Law n° 2002-73 of January 17, 2002 of social modernization.

37 CA Toulouse 31 mars 2000, 4^e ch. soc., SARL P. c/ R, RJS 4/01, n° 404. See also CA Toulouse 18 mai 2000, 4^e ch. soc., SNC Caisse de prévoyance et de retraite de la SNCF c/ Gelardo et CA Nancy 13 novembre 2000, ch. soc., Christophe c/ SA Vilroc, RJS 2/01, n° 163.

and, on the contrary, has encouraged that attitude³⁸. As Ms. Béatrice Lapérou noted, «the legal concept of moral harassment is slowly emerging from judicial decisions»³⁹.

If this case law was innovative, it was not revolutionary because the courts did not need to resort to a fanciful foundation to justify their decision. The protean obligation of good faith - especially in the execution of the contract of employment - was appropriate to legitimize this judicial construction.

The intervention of the legislator in 2002 did not, however, dampen the inventiveness of the case law when it comes to protecting the harassed employee. The obligation of security of result, opportunely discovered in 2002⁴⁰, had a significant impact on harassment because it led the judge to admit in 2010 the responsibility of the employer when an employee is harassed «even if he had taken measures to put an end to these acts»⁴¹. While this case law has evolved more recently, the judge is always strict with the employer since he is exonerated from his responsibility only if he has taken all the immediate measures necessary to put an end to the moral harassment and that it actually stopped. It is also important that he has taken all the preventive measures referred to in Articles L. 4121-1 and L. 4121-2 of the Labor Code, and in particular that he has previously implemented information and training measures to prevent the occurrence of moral harassment⁴².

The French judge is not the only one to have made up for the legal deficiencies. The British judge can also be cited as an example. Interestingly, it should be noted that the British magistrates pursued a legal evolution that the legislator had abandoned, perhaps for lack of political courage. The coming to power of the New Labor Party and its charismatic leader Tony Blair sparked a wave of hope among unions who deplored the deteriorating working conditions and initiated a campaign for dignity at work⁴³. A bill entitled «Dignity at Work» was introduced shortly before the Labor Party victory. However, and despite the hopes of the unions, this text was never adopted⁴⁴.

38 CA Poitiers 30 mai 2000, ch. soc., Chaigneau c/ Morisset and CA Bordeaux 3 mars 2000, ch. soc. B, SA marbot et Cie c/ Durepaire; *RJS* 12/00 n° 1218.

39 B. Laperou-Schneider, «La notion de harcèlement moral dans les relations de travail», *RJS* 6/00, p. 423-433.

40 Cass. soc. 28 février 2002, *Bull.*, V, n° 81, p. 84 ; Babin M., Pichon N., «Obligation de sécurité et faute inexcusable de l'employeur», *Dr. soc.*, sept.-oct. 2002, p. 828 ; Lyon-Caen A., «Une révolution dans le droit des accidents du travail», *Dr. soc.*, avr. 2002, p. 445.

41 Cass. soc. 3 février 2010, n° 08-40.144 ; J. Mouly, «Obligation de sécurité de l'employeur et harcèlement «horizontal» : vers une obligation de résultat absolue ?», *JCP G* 2010, n° 12, 321 ; S. Tournaux, «La vigueur retrouvée de l'obligation de sécurité de résultat», *Lexbase Hebdo - Edition Sociale* 18/02/2010, n° 383.

42 Cass. soc., 1er juin 2016, n° 14-19.702 ; See B. Geniaut, «Le harcèlement moral dans la jurisprudence sur l'obligation de sécurité», *RD* 2016, n° 11, p. 709-711 ; G. Loiseau, «Le renouveau de l'obligation de sécurité», *JCP S* 2016, n° 24, p. 27-30 ; C. Rade, «Feue la responsabilité de plein droit de l'employeur en matière de harcèlement : le mieux, ennemi du bien», *Lexbase Hebdo - Edition Sociale*, 16/06/2016, n° 659.

43 S. Harthill, «Bullying in the Workplace: Lessons from the United Kingdom», *Minnesota Journal of International Law*, vol. 17, 2008, p. 247-302, spéc. p. 252.

44 The Dignity at Work Bill (HL Bill 31.53 / 1) was introduced by Lord Monks in the House of Lords in December 1996 but was blocked by the Conservative government of John Major in February 1997. It was reintroduced unsuccessfully before the House of Lords in December 2001.
<https://publications.parliament.uk/pa/ld200102/ldbills/031/2002031.htm>

On the other hand, the legislator adopted a more general text: the Protection from Harassment Act in 1997⁴⁵. This law was promulgated to allow a criminal and civil compensation to the victim of harassment. The parliamentary debates establish that the form of discrimination envisaged was the classic one of an obsessed individual who uses all kinds of means to continue his attentions to his victim. Nevertheless, several members of Parliament pointed out that the terminology used in the legal text had a scope so wide that it could be applied in labor law. The courts quickly proved them right not only by recognizing the responsibility of the harasser on this basis but also, more interestingly, by receiving claims for damages against the employer as vicarious liability even though this possibility was not envisaged by the law. The first decision in this area goes back to 2005.

In *Majrowski*⁴⁶, the Court of Appeal held that the UK Social Security was vicariously liable because of the harassment suffered by William Majrowski by his head of department. The employer was ordered to pay damages even though he had not taken part in the persecution suffered by the employee. Later case law upheld the *Majrowski* rule. Special attention can be paid to a judgment of August 2006, which awarded an employee £ 800,000 in damages⁴⁷. The plaintiff did not deem it appropriate to sue the perpetrators of the acts but committed the responsibility of her employer. The employee was hired by Deutsche Bank Group Services as Assistant Secretary. Upon her recruitment, she was subjected to a harassment campaign by four of her colleagues. The acts of intimidation consisted of a multitude of petty attempts to devalue her: moving her papers, laughing when she passed them, making rough and obscene remarks, hiding her mail, removing her from the mailing lists, or further increase her workload unreasonably to put her in a situation of failure.

Producing the testimonies of other employees, the applicant won the conviction of the judges who granted her this very important sum. In that same decision, the judge clarified the notion of harassment. The court found that the harassment: a) occurs at least twice, (b) targets the plaintiff, (c) is objectively intended to cause the victim's ill-being, and (d) is objectively oppressive and unreasonable.

This case law was maintained and the compensation awarded on this basis can be ruinous for employers. A record was broken when a lawyer got £ 1.3 million for being harassed⁴⁸. Not only did the UK courts hold the employer liable with a severity comparable to that shown by the French judges when they relied on the obligation of security, but another comparison can be made between these two national case law.

Just as the French judge has used the obligation of good faith, the British case law has relied on the common law of obligations to recognize, for the benefit of the employee, protection against the harasser. First of all, in the 1990s and regardless of any legal provision, the magistrates admitted that harassment could constitute a civil offense⁴⁹. In labor law, this tort was recognized in a particular context, for the first time in the mid-1990s

45 *Op. cit.*

46 *Majrowski v. Guy's & St. Thomas's NHS Trust*, [2005] EWCA Civ 251

47 *Green v. DB Group Services (UK) Ltd*, [2006] EWHC 1898 (Q.B.).

48 S. Harthill, «Bullying in the Workplace: Lessons from the United Kingdom», *op. cit.*, p. 284, note 198.

49 *Burris v. Azadani*, (1995) 1 WLR 1372. This decision concerned the harassment of a woman and her child. The context was not labor law but the recognition of this new tort was susceptible of applications in this area.

in the Walker decision⁵⁰. Without referring to the moral harassment, the judge admitted the responsibility of the harassing employer when the employee is the victim of a serious psychological prejudice. More precisely, the judge considered that this could characterize the civil tort of negligence⁵¹ which imposes, under its conditions of practice, the proof of a specific duty of care of which the defendant would be debtor (and which, by hypothesis, would not have respected). In this case, this duty of care that the employer ignored is the duty of every employer to provide his employees with a suitable working environment⁵².

In Walker, the plaintiff suffered a nervous breakdown in 1986 and had four months' leave. However, his employer had refused to provide additional help by relieving him of part of his work when this measure was possible. On the contrary, the workload becomes heavier, resulting in a second depression with very severe effects that led to the employee's dismissal. He sought and obtained damages from his employer. The judge considered that the employer was responsible for the nervous breakdown induced by stress at work. The court pointed out that in such a situation the plaintiff, in order to succeed, had to establish that the measures required of the employer were reasonable, that the risks to the employee were significant and foreseeable. These conditions were satisfied in this case.

This case-law, useful for the benefit of the employee, unfortunately has a rather limited scope of application since it concerns only the psychological damage resulting from work stress and not moral harassment as such⁵³.

Another foundation was also admitted by the judge: the Employment Rights Act 1996⁵⁴. This law states that employees cannot be unfairly dismissed. In addition, the law includes in the notion of dismissal, that of «constructive dismissal»⁵⁵ which refers to situations in which an employee is forced to leave his work against his will because of the conduct of his employer (a parallel can be made with the French notion of «prise d'acte»). In respect of the employer's misconduct justifying a breach of which he will be responsible, mention may be made of the breach of the duty of mutual trust. This implicit duty, which is present in every employment contract, has been described as «occupying a central place in the law of the employment contract»⁵⁶, «undoubtedly the most powerful means of movement

50 *Walker v Northumberland County Council* de la Queen's Bench Division; [1995] 1 All ER 737; [1995] ICR 702; [1995] IRLR 35 ; V. R. Walden, «Employer Responsibility for the Psychosocial and Psychiatric Well-Being of Employees in the Workplace: A View from the United Kingdom» in L. Lerouge (ed.), *Psychosocial Risks in Labour and Social Security Law: a Comparative Legal Overview*, Springer, Serie: Aligning Perspectives on Health, Safety and Well-Being, 2017, p. 79-104.

51 The tort of negligence is characterized in the presence of a wrongful omission to exercise appropriate care in specific circumstances. The law in this area results from the already ancient judgment *Donoghue v. Stevenson* [1932] AC 562. This head of claim requires several conditions including evidence that the defendant was under a specific duty of care.

52 *Wilsons and Clyde Coal Co Ltd v English* [1938] AC 57.

53 D. Leckie, J. McWilliams, «Stress at work. The implications for employers», *Employment Law Bulletin* 2001, n° 44, p. 6-8 ; V. Craig, «Civil liability for health and safety», *Employment Law Bulletin* 2002, n° 48, p. 5-8 ; B. Barrett, «Employers' liability for stress at the work place : neither tort nor breach of contract», *Industrial Law Journal* 2004, vol. 33, p. 343-349.

54 *Employment Rights Act 1996*, <https://www.legislation.gov.uk/ukpga/1996/18/contents>

55 The doctrine refers to this resignation requalified as dismissal using the expression: «constructive dismissal». *Employment rights Act 1996*, s. 95.

56 D. BRODIE, «Mutual Trust and the Values of the Employment Contract», *Industrial Law Journal* 2001, vol. 30, n° 1, p. 84-100, spéc. p. 86.

of the modern law of employment contracts»⁵⁷ or «the cornerstone the legal construction of the employment contract»⁵⁸. The important doctrine⁵⁹ on this subject reflects the judicial interest in the duty of mutual trust that requires the employer to act with a certain loyalty.

The case law has used this implicit duty to punish the harassing employer when his attitude leads an employee to leave the company to put an end to an intolerable situation⁶⁰.

Independently of the intervention of the legislator, the judge has been able to adapt the case law to the evolution of the world of work, which puts more emphasis on the devastating effects of harassment.

Another even more striking example of the judge's awareness of the need to combat moral harassment is Japanese case law⁶¹. More specifically, Japanese law has adopted a theory of tortious harassment by power (*pawâ harasumento* or *pawahara*), which protects employees against abuses by those with more power in the company⁶². This question is not new. As early as 1995, public authorities in Tokyo accepted the basic nature of claims for harassment⁶³. What is, however, more recent is the increase in the number of complaints for this reason. The Tokyo Labor Administration noted that this figure had risen from 3160 to 5960 from 2002 to 2008⁶⁴. The economic crisis that has hit Japan has only amplified this phenomenon. The victims of harassment, faced with the absence of legal provision, turned to the law of obligations in order to obtain compensation. In this matter two foundations were conceivable. Firstly, article 709 of the Japanese Civil Code which imposes on a person who intentionally or negligently infringes the rights of others to compensate for the resulting

57 M. Freedland, *The Personal Employment Contract*, Oxford University Press, 2003, p. 166.

58 H. Collins, *Employment Law*, Oxford University Press, 2003, p. 104.

59 L. Barmes, «The Continuing Conceptual Crisis in the Common Law of the Contract of Employment», *Modern Law Review* 2004, vol. 67, n° 3, p. 435-464; D. Brodie, «The Heart of the Matter: Mutual Trust and Confidence», *Industrial Law Journal* 1996, vol. 25, n° 2, p. 121-136; «Beyond Exchange: The New Contract of Employment», *Industrial Law Journal* 1998, vol. 27, n° 2, p. 79-102; «A Fair Deal at Work», *Oxford Journal of Legal Studies* 1999, vol. 19, n° 1, p. 83-98; «Mutual Trust and Confidence: Catalysts, Constraints and Commonality», *Industrial Law Journal* 2008, vol. 37, n° 4, p. 329-346; A. Brooks, «The Good and Considerate Employer: Developments in the Implied Duty of Mutual Trust and Confidence», *University of Tasmania Law Review* 2001, vol. 20, n° 1, p. 29-69; D. Cabrelli, «The Implied Duty of Mutual Trust and Confidence: An Emerging Overarching Principle?», *Industrial Law Journal* 2005, vol. 34, n° 4, p. 284-307; M. Freedland, «Constructing Fairness in Employment Contracts», *Industrial Law Journal* 2007, vol. 36, n° 1, p. 136-140; J. Lindsay, «The Implied Term of Trust and Confidence», *Industrial Law Journal* 2001, vol. 30, n° 1, p. 1-16.

60 *Abbey National Plc v Robinson* (EAT/743/99).

61 See also the article by Professor Kanta Owada published in the issue.

62 P. Hsiao, «Power Harassment: The Tort of Workplace Bullying in Japan», *Pacific Basin Law Journal*, vol. 32, n° 2, 2015, pp.181-201; L. Lerouge, S. Naito, «Harcèlement, "Power Harassment" et droit au Japon» in Lerouge L.(dir), *Les risques psychosociaux au travail en droit social : approche juridique comparée. France - Europe - Canada - Japon*, op. cit.; S. Naito, «Workplace Bullying in Japan», in *Workplace Bullying and Harassment*, 2013 JILPT Seminar on Workplace Bullying and Harassment, op. cit., p. 113-133.

63 P. Hsiao, «Power Harassment: The Tort of Workplace Bullying in Japan», op. cit., spéc. p. 183.

64 *Id.*

damage⁶⁵. It was not the chosen legal basis but rather the second one. Indeed, Japanese employers are under a general obligation to ensure that the mental and physical health of an employee is not damaged by the excessive accumulation of stress that accompanies the performance of the work⁶⁶. The wording is more restrictive than the French security requirement, but it also requires employers to be vigilant when employees are subject to a heavy workload. On the basis of this general obligation, claims for harassment have flourished in Japan.

Japanese courts have never defined power harassment, but case law in this area makes it possible to better understand this notion. It seems that judges are inclined to win the case of salaried applicants in three situations: suicide, a very stressful staff management, and outrageous conduct. For example, in 2012, a Saitama court⁶⁷ awarded damages to the parents of a deceased nurse and sentenced her colleague and employer for repeated intimidations that led to her suicide. In that case, the employer, a hospital, had a rule requiring nurses to follow any order given by senior nurses, and the head nurse had abused her authority, including:

- forcing her subordinate to work for her by washing her car and taking care of her eldest son,
- forcing her subordinate to pay money to have good relations with her superiors;
- making very harsh remarks to the employee, repeatedly telling her to shut up and suggesting that she die,
- publicly criticizing her mistakes at work

Another example: in a 2009 decision, a Tottori court awarded damages to an employee who had suffered a depression caused by stress and finally left his job after managers reprimanded him in public many times⁶⁸.

In terms of outrageous conduct generating responsibility for the harasser, or even the employer if he is complicit, we can mention all deeply humiliating attitudes that have no other purpose than psychologically destroying the employee. Thus a court awarded damages to the applicants whose boss had installed a fan to blow cold air in winter, and forced employees to write an apology and to accuse themselves of not working while receiving a salary. He had also kicked and hit some employees⁶⁹.

65 See an English translation of the code at: <http://www.moj.go.jp/content/000056024.pdf> Like the French judge who used the theory of abuse of rights to protect the employee against unfair dismissal, the Japanese judge also used this theory. K. Sono, Y. Fujioka, «The Role of the Abuse of Right Doctrine in Japan», *Louisiana Law Review*, vol. 35, n° 5, 1975, p. 1037-1057. In labor law, this was used to punish the employer who proceeded too harshly to dismissal for economic reasons without even trying to reclassify the employee. T. Suzuki, «Le pouvoir créateur du juge en matière de licenciement économique au Japon», *Revue de droit comparé du travail et de la sécurité sociale*, 2017/2, p. 62-69.

66 P. Hsiao, «Power Harassment: The Tort of Workplace Bullying in Japan», *op. cit.*, spéc. p. 183.

67 *Ibid.*, *op. cit.*, spéc. p. 188.

68 *Ibid.*, *op. cit.*, spéc. p. 190.

69 *Ibid.*, *op. cit.*, spéc. p. 193.

B. SHYNESS OF SPANISH AND AMERICAN JUDGES

In other countries, the judge has been less daring or inventive. Thus, in Spain, we can regret the relative inertia of the case law. As Professor Cristóbal Molina Navarrete⁷⁰ points out, the judge has adopted an overly narrow definition of the concept of harassment that defeats a large number of claims for compensation of employees. Constitutional law has sometimes been used to punish the most serious managerial attitudes, in particular through the violation of the fundamental right to human integrity. However, the Spanish judge is reluctant to sanction certain overflows which, according to him, relate to the normal operation of the company. Although the criminal law offers resources, there are few convictions of employers who harassed or tolerated harassment.

Even more extreme is the example of American law⁷¹. Title VII of the famous Civil Rights Act of 1964 enumerates the discriminatory grounds prohibited by federal law⁷². This list is completed at state level by other prohibited grounds⁷³. Most state governments prohibit not only discriminatory measures based on these grounds but also harassment caused by such reasons. Thus the employer cannot terminate an employment contract because of the employee's religion (which would be a discrimination) and cannot harass an employee for this reason⁷⁴.

However, moral harassment itself is not prohibited. The only resource available to employees who are victims of such behavior is the tort law. More specifically, two offenses are conceivable: the battery or the intentional infliction of emotional distress. The first charge can be used when the employer or a supervisor is engaging in physical abuse or inappropriate touching⁷⁵. The second can be used when the intolerable behavior of the employer or his representative makes the continuation of the employment contract unbearable.

An illustration is provided by a Texas decision⁷⁶ that admitted the employer's liability because of physical and verbal threats to some employees, the constant vulgarity of the harasser, his repeated attempts to intentionally humiliate and embarrass the employees,

70 See this author's article in the issue.

71 See also the article by Professor Camille Hebert published in the issue.

72 Discriminations based on race, color, religion, sex or national origins are prohibited. Two other federal laws must be taken into account: the Age Discrimination in Employment Act of 1967 and the Americans with Disabilities Act of 1990 prohibiting certain discriminations on the grounds of age and disability.

73 For example, Alabama also prohibits discrimination because of age; Alaska has added to this list discrimination because of family status or pregnancy. Some states even prohibited discriminatory grounds that were not considered in France. For example, California prohibits discrimination based on whether a woman breastfed or not.

74 The Equal Employment Opportunity Commission, which is responsible for ensuring compliance with federal discrimination law, provides a definition of harassment on its website. «Harassment is an unwelcome conduct that is based on race, color ... Harassment becomes unlawful when 1) the offending conduct continues to become recurrent, or 2) the conduct is sufficiently serious or pervasive to create a working environment that a reasonable person would consider intimidating, hostile or abusive. <https://www.eeoc.gov/laws/types/harassment.cfm>

75 For example, in a 2008 decision, a District Court in Columbia dismissed a claim for sexual harassment from a complainant, but allowed assault on the grounds that the supervisor repeatedly touched the employee. *Evans v. Wash. Ctr. for Internships & Academic Seminars*, 587 F. Sup. 2d 148, 149-51 (D.D.C. 2008).

76 *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 613-15 (Tex. 1999).

and that he was constantly shouting and making employees work in a climate of terror. However, what is considered intolerable conduct for the bringing of tortious liability must be extremely serious. For example, in the case previously mentioned, the Texas Supreme Court had mentioned in an obiter dictum that the behavior of an employer may be «insensitive, indiscreet, petty, unofficial, authoritarian, and vindictive» without reaching the seriousness required to justify tort liability.

As a result, situations that would constitute in France a case of moral harassment or power harassment in Japan would not have any consequences for the harasser in the United States.

American law is therefore radically opposed to the more continental law. In 2003, two researchers noted an evolution of the European model in this area⁷⁷. The United States has been a pioneer in the fight against discrimination, mainly sexual. In doing so, the notion of harassment seems inseparable from the prohibited discriminatory ground. This model has never been enthusiastically received in Europe, which has prohibited discrimination but has chosen to push further the protection of employees. This is reflected in the prohibition of moral harassment: the desire to extend to the community of workers the right not to be persecuted in the workplace for any reason whatsoever. In doing so, the European model has moved from a prohibition of discrimination to the preservation of the dignity of employees. It is this evolution that American law refuses for the moment despite the repeated calls of the doctrine⁷⁸ and some scattered judicial decisions.

Conclusion

The suicide of the Japanese Matsuri Takahashi in December 2015 went unnoticed at the international level, before gaining a notoriety a year later. This employee had ended her life because of the burnout she was experiencing. The issue of Karojisatsu (suicide caused by overwork) is close to that of moral harassment. In either case, the workplace becomes toxic to the employee.

Each country has adopted the answer it deems most appropriate. This can range from a solid legal and judicial framework (France) to a virtual absence of protection (the United States). However, this phenomenon, whatever the term under which it is designated is a constant of the modern world of work and arouses the attention of the world scientific community as evidenced by the International Conference on Workplace Bullying and Harassment which 11th edition will take place next June in Bordeaux⁷⁹.

77 G. S. Friedman, J. Q. Whitman, «The European Transformation of Harassment Law: Discrimination versus Dignity», *Columbia Journal of European Law*, vol. 9, 2003, p. 241-274.

78 In this regard, refer to the work of Professor David Yamada. D. Yamada, «The Phenomenon of 'Workplace Bullying' and the Need for Status-Blind Hostile Work Environment Protection», *op. cit.*; «Crafting a legislative response to workplace bullying», *Employee Rights and Employment Policy Journal*, 2004, Vol. 8, p. 475-521; «Human dignity and American employment law», *University of Richmond Law Review*, 2009, vol. 43, p. 523-569; «Workplace bullying and American employment law: A ten-year progress report and assessment», *Comparative Labor Law & Policy Journal*, 2010, vol. 32, n° 1, p. 251-284; «Emerging American legal responses to workplace bullying», *Temple Political & Civil Rights Law Review*, 2013, vol. 22, p. 329-354.

79 11th International Congress on Harassment at Work. Bullying 2018: «Understanding harassment at work in a changing world». June 5-8, 2018, Bordeaux
<https://bullying2018.sciencesconf.org/?forward-action=index&forward-controller=index&lang=fr>