

The Liability of the Employees who Commit Acts or Deeds of Moral Harassment at Work

Nicoleta-Elena Hegheș

*“Dimitrie Cantemir” Christian University of Bucharest, Faculty of Juridical and Administrative Sciences,
Bucharest, Romania, nicoleta.heghes@ucdc.ro*

ABSTRACT: After numerous studies and debates at European and national level, the Romanian Parliament has adopted a series of legislative amendments aimed at complementing existing legislation on discrimination in the workplace and strengthening the levers needed to prevent and combat moral harassment in the workplace. Considered by specialists to be the most harmful source of stress at work, since 2000, moral harassment at work or “mobbing” has become a phenomenon that has caught the attention of both European Union institutions and the Romanian state.

KEYWORDS: harassment, mobbing, contraventional liability, disciplinary liability, criminal liability

Introduction

In Romania, the notion of harassment was previously regulated both by Government Ordinance no. 137 of August 31, 2000, on the prevention and sanctioning of all forms of discrimination, published in the Official Gazette. no. 431 of September 2, 2000, republished in the Official Gazette of Romania, Part I, no. 166 of March 7, 2014, with subsequent amendments and completions, as well as by Law no. 202 of April 19, 2002, published in Official Gazette no. 301 of May 8, 2002, republished in the Official Gazette of Romania, Part I, no. 326 of June 5, 2013, with subsequent amendments and completions, being treated as a specific form of discrimination which “leads to the creation of an intimidating, hostile, degrading or offensive”. An essential legislative change in this matter was made in 2015, when “psychological harassment” was regulated as a form of gender discrimination. Thus, Law no. 229/2015 completed the Law no. 202/2002, defining “psychological harassment” as any inappropriate behavior that occurs over a period of time, is repetitive or systematic and involves physical behavior, oral or written language, gestures or other intentional acts that could affect personality, dignity or the physical or psychological integrity of a person.

On August 10, 2020, entered into force Law no. 167 of August 7, 2020, for the amendment and completion of the Government Ordinance no. 137/2000 regarding the prevention and sanctioning of all forms of discrimination, as well as for the completion of art. 6 of Law no. 202/2002 on equal opportunities and treatment between women and men.

Until the entry into force of this law, “moral harassment at work” was not regulated as such in Romanian law. Even if it is a common phenomenon on the Romanian labor market, an aspect highlighted especially by the practice of national courts in this matter, there is no normative act that defines the content of such an act, as well as the legal consequences of its commission. This new law introduces and defines the notion of moral harassment at work. Although in the legislation there was previously the notion of psychological harassment, the legislator made it even more particular and moral harassment at work has acquired an independent character. Therefore, the law defines the concept of “moral harassment at work”, expressly indicates the ways in which this phenomenon can manifest itself, as well as the establishment of the appropriate probative and sanctioning framework.

Defining the concept of “moral harassment at work”

Defining the concept of “moral harassment at work” has a special significance, as it defines a series of key aspects that characterize the phenomenon and in relation to which it can be

identified. Thus, Law no. 167/2020 defines moral harassment in the workplace as any conduct exercised in relation to an employee by another employee who is his hierarchical superior, by a subordinate and/or by a hierarchically comparable employee, concerning employment relationships, which have as purpose or effect a deterioration of working conditions by harming the rights or dignity of the employee, by affecting his physical or mental health or by compromising his professional future, behavior manifested in any of the following forms: hostile conduct or unwanted; verbal comments; actions or gestures.

It is also moral harassment at work any behavior that, by its systematic nature, may harm the dignity, physical or mental integrity of an employee or group of employees, endangering their work or degrading the work environment.

An essential aspect to remember is that stress and physical exhaustion (burnout syndrome) are subject to moral harassment at work.

It is irrelevant the hierarchical position of the one who commits acts or deeds of moral harassment at work, being proven by studies and in practice that this phenomenon can occur both vertically - top-down - from top to bottom or bottom-up - by from subordinate to superior, as well as horizontally - between hierarchically comparable persons.

Moral harassment in the workplace can take various forms, such as (Tutulan 2020):

- Public humiliation of an employee present with other colleagues - an example would be reading the papers together with all members of the department, describing it as inappropriate;
- Constantly insulting and improperly expressing negative feedback - for example, “you are good for nothing”, “you are incompetent”, “we hold you for alms” etc.;
- Systematic allocation of tasks impossible to accomplish within the time horizon provided;
- Contacting the employee constantly outside of working hours or during leave;
- The employee’s lack of key information necessary to perform the tasks, followed by his sanction;
- Constant refusal to grant rest leave etc.

In practice, the most common cases of moral harassment: are disregarding the employee in front of colleagues, creating pressure and tension through excessive supervision, discrediting the employee’s professional skills, isolating the employee from his colleagues, burdening the employee with too many tasks (leading to his/her exhaustion), compromising the employee’s health (entrusting dangerous and harmful tasks to health, threatening physical violence etc.) (Voinea 2020).

Law no. 167 of August 7, 2020, establishes that morally harassed employees at work (a notion that includes stress and physical exhaustion) can obtain compensation in court from the employer or even money to go to therapy sessions. In practice, however, moral harassment is quite difficult to prove and the procedure is lengthy anyway.

The Liability of the Employees who Commit Acts or Deeds of Moral Harassment at Work

In a democratic society, public order includes respect for fundamental rights, which otherwise can lead to disorder (Popescu 2013, 127).

According to the amendments brought by Law no. 167 of August 7, 2020, alin. 5¹ of G.O. no. 137/2000 on the prevention and sanctioning of all forms of discrimination, “It constitutes moral harassment at work and is sanctioned disciplinary, contraventional or criminal, as the case may be, his subordinate, by a subordinate and/or by a hierarchically comparable employee, in relation to employment relationships, which has as its purpose or effect a deterioration of working conditions by infringing the rights or dignity of the employee, by affecting his physical or mental health or by compromising his professional future, behavior manifested in any of the following forms: a) hostile or unwanted conduct; b) verbal comments; c) actions or gestures”.

From the cited text of the law, it is observed that the most important amendments concern the obligation of the employer to adopt measures to prevent and combat moral harassment at work and to disciplinary sanction the guilty employees, as well as the establishment of substantial contravention sanctions, both for the employer and for the guilty employees.

Alin. 5⁴ of G.O. no. 137/2000 provides that employees who commit acts or deeds of moral harassment at work are subject to disciplinary action, in accordance with the law and the internal regulations of the employer. Disciplinary liability does not remove the employee's misdemeanor or criminal liability for those acts.

Disciplinary liability occurs in situations where an employee is guilty of a disciplinary offense. Disciplinary liability is of a contractual nature and is a form of liability independent of other forms of legal liability (Popescu 2019, 457).

The essential elements of disciplinary liability that presuppose their cumulative existence are:

- The quality of employee - resulting from the existence of an individual employment contract;
- The existence of an illicit deed - violation of the work duties assumed by individual employment contracts, internal regulations, statutes etc.;
- Committing the act with guilt;
- A harmful result;
- The causal link between the deed and the result.

The subject of the disciplinary violation can only be an employee, a quality that results from the existence of an individual employment contract. In the absence of such a contract, there is no disciplinary liability.

Disciplinary sanctions are means of coercion specific to labor law, provided by law, with a pronounced educational character, aimed at defending the disciplinary order, developing the spirit of responsibility for the conscientious fulfillment of duties and compliance with the rules of conduct, as well as the prevention of acts of indiscipline (Ghimpu and Țiclea 2001, 472-273).

The employer has the disciplinary prerogative, having the right to apply, according to the law, disciplinary sanctions to his employees whenever he finds that they have committed a disciplinary violation, according to art. 247 of the Labor Code.

Alin. 5⁵ of G.O. no. 137/2000 stipulates that the employer has the obligation to take any necessary measures in order to prevent and combat acts of moral harassment at work, including by providing in the internal regulations of the disciplinary sanctions unit for employees who commit acts or deeds of moral harassment at work.

Sanctions are expressly and limiting provided by law (Ștefănescu 1997, 106) and, gradually, from the mildest to the most severe.

The disciplinary sanctions that the employer may apply if the employee commits a disciplinary offense are:

- a) The written warning;
- b) The demotion from the position with the granting of the salary corresponding to the position in which the demotion was ordered for a duration that cannot exceed 60 days;
- c) Reduction of the basic salary for a period of 1-3 months by 5-10%;
- d) Reduction of the basic salary and/or, as the case may be, of the management allowance for a period of 1-3 months, by 5-10%;
- e) Disciplinary termination of the employment contract (See Țiclea 2014, 24-66).

The employer may not apply any sanction other than one expressly set out in the text above. Also, it cannot include in the internal regulation other sanctions than the above. It would be illegal and therefore struck by absolute nullity, the application of a sanction with demotion from office for a period longer than 60 days, reduction of salary by more than 10% or for a period longer than three months.

The disciplinary action ends with a sanctioning act - decision, order, disposition, disciplinary decision, etc. The effect of these acts, shown above, is that of the execution of the sanction by the guilty party “to apply, according to the law, disciplinary sanctions to its employees whenever it finds that they have committed a disciplinary violation” (Art. 247 para. (1) of the Labor Code).

However, the fact that the guilty employee will be held liable does not prevent the attainment of contraventional or criminal liability, if applicable, for those acts.

In the literature (Țiclea, 2015, 944; Ursuța 2008, 52), the *contravention liability* was defined as that form of legal liability which consists in sanctioning the persons (natural or legal) guilty of violating the legal provisions that provide and sanction the contraventions.

According to the same authors, the contravention liability is individual and personal, as well as the disciplinary or criminal liability, in the sense that the person guilty of committing a labor law offense is liable in his own name, which is not transferable (Popescu 2019, 498).

Judicial practice (Toplița Court, civil sentence no. 560/2014) defined the contravention as follows: “Like a crime, the contravention is the typical and illegal deed, committed with guilt and which is provided by law. The contravention has a legal object, a material object, an active subject, a passive subject, an objective side and a subjective side. As for the objective side, it consists in the action or inaction described in the rule establishing and sanctioning the contravention, in the consequence that the illegal behavior produces and in the causal relationship that must exist between the two elements, the legal text designating exactly the deed which constitutes a contravention”.

According to art. 26 alin. 1¹ and 1² of G.O. no. 137/2000, as amended by Law no. 167/2020 is a contravention of moral harassment at work committed by an employee, by violating the rights or dignity of another employee, and is punishable by a fine from 10.000 lei to 15.000 lei. It constitutes a contravention and is sanctioned with a fine: a) from 30.000 lei to 50.000 lei the non-fulfillment by the employer of the obligations provided in art. 2 alin. 5⁵; b) from 50.000 lei to 200.000 lei non-compliance by the employer with the provisions of art. 2 alin. 5⁶.

Also, as an element of novelty are the provisions introduced in art. 26 alin. 2¹-2³ which have the following content: 2¹ Whenever it finds the commission of an act of moral harassment at work, the court may, under the law: a) order the employer to take all the measures necessary to stop any acts or deeds of moral harassment at work in respect of the employee concerned; b) order the reinstatement of the employee concerned at work; c) order the employer to pay the employee compensation in an amount equal to the equivalent of the salary rights he was deprived of; d) to order the employer to pay the employee compensatory and moral damages; e) to order the employer to pay the employee the amount necessary for the psychological counseling that the employee has need, for a reasonable period established by the occupational physician, f) to order the employer to change the disciplinary records of the employee.

According to alin. 2² of the same article, it provides that whenever it finds the commission of an act of moral harassment at work, the Council applies, under the law, any of the measures provided in alin. 2¹ lit. a) and e), and according to 2³. It constitutes a contravention and it is sanctioned with a fine from 100.000 lei to 200.000 lei the failure of the employer to fulfill the measures ordered by the Council. The payment of the fine does not exonerate the employer from fulfilling the obligations provided in alin. 2¹.

In the matter of moral harassment, the competence to apply sanctions for contravention will belong to the National Council for Combating Discrimination, while the courts will be competent to resolve any claims arising from facts or acts of moral harassment or possible appeals. National Council for Combating Discrimination will be able to oblige the employer to grant some compensations (for example the amounts necessary for psychological counseling) to the employee when he finds the violation of the law.

Criminal liability in the field of labor presents some specific aspects regarding the illicit deed, the subjects, the content and the object of the legal relationship of criminal liability (Popescu 2019, 511).

The Labor Code and other specific normative acts regulate the criminal liability of the employer, who, as a rule, is a legal person. The current Criminal Code expressly criminalizes the criminal liability of the legal person.

Thus, according to art. 135 alin. (1) “The legal person, except for the state and the public authorities, is criminally liable for the crimes committed in the accomplishment of the object of activity or in the interest or in the name of the legal person”, and in art. 135 alin. (3) it is provided that “The criminal liability of the legal person does not exclude the criminal liability of the natural person who contributed to the commission of the same act”.

For the natural person the punishments are:

- *Main punishments* - life imprisonment, imprisonment, fine - art. 53, art. 56-64;
- *Accessory punishment*, which consists in the prohibition of the exercise of certain rights, including the occupation of a position involving the exercise of state authority - art. 54 and art. 65;
- *Complementary punishments*, which refer to the prohibition of the right to occupy, to exercise the profession or trade or to carry out the activity that the person in question used to commit the crime - art. 55 lit. a) and art. 66 lit. g).

Disciplinary misconduct is the sole basis of disciplinary liability, as the offense is the basis of criminal liability, and the misdemeanor is the basis of misdemeanor liability.

Article 2, alin. 5³ of G.O. no. 137/2000 stipulates that every employee has the right to a job without acts of moral harassment. No employee shall be sanctioned, dismissed or discriminated against, directly or indirectly, including in respect of pay, vocational training, promotion or extension of employment, because he has been subjected or refused to be subjected to moral harassment at work.

Moreover, in alin. 5⁶ of the same article stipulates that it is forbidden for the employer to establish, in any form, internal rules or measures that oblige, determine or urge employees to commit acts or acts of moral harassment at work.

In alin. 5⁷ stipulates that the employee, victim of moral harassment at work, must prove the factual elements of moral harassment, the burden of proof falling on the employer, in accordance with the law. The intention to harm through acts or deeds of moral harassment in the workplace must not be proved.

Conclusions

Moral harassment has grown in all its forms. An employee or an employer can destroy a colleague or a subordinate or even a boss only through words, looks, insinuations, but also through criticism and devaluation. This is the moral harassment. We should no longer consider that this is something trivial, the process of destroying a person can be encountered not only in the couple, in the family but also at work, the victims being involved in a depressive spiral, sometimes even suicidal. We should not remain indifferent to this issue with extreme consequences at the societal level.

The purpose pursued by Law no. 167 of August 7, 2020, for the amendment and completion of the Government Ordinance no. 137/2000 regarding the prevention and sanctioning of all forms of discrimination, as well as for the completion of art. 6 of Law no. 202/2002 on equal opportunities and treatment between women and men is to ensure the necessary and adequate legal protection of employees at work, by combating moral harassment at work.

References

- Ciochină-Barbu, I.; Popescu A. 2019. *Dreptul muncii (Labor Law)*. 3rd ed. Bucharest: C.H. Beck Publishing House.
- Ghimpu, S., and Țiclea, A. 2001. *Dreptul muncii (Labor Law)*. 2nd ed. Bucharest: All Beck Publishing House.
- Government Ordinance no. 137 of August 31, 2000 on the prevention and sanctioning of all forms of discrimination, published in the Official Gazette. no. 431 of September 2, 2000, republished in the Official Gazette of Romania, Part I, no. 166 of March 7, 2014, with subsequent amendments and completions, as well as by Law no. 202 of April 19, 2002, published in Official Gazette no. 301 of May 8, 2002, republished in the Official Gazette of Romania, Part I, no. 326 of June 5, 2013.
- Judecătoria Toplița, sentința civilă nr. 560/2014 (Toplița Court, civil sentence no. 560/2014). www.mcp-avocati.ro.
- Law no. 167 of August 7, 2020 for the amendment and completion of the Government Ordinance no. 137/2000 regarding the prevention and sanctioning of all forms of discrimination, as well as for the completion of art. 6 of Law no. 202/2002 on equal opportunities and treatment between women and men.
- Popoescu, A.M. 2013. *Drept administrativ general. Manual de studiu individual (General Administrative Law. Individual Study Manual)*. Bucharest: Pro Universitaria Publishing House.
- Ștefănescu, I.T. 1997. “Notă la decizia Curții de Apel București nr. 594/1996, Secția a IV-a civilă” (Note to the decision of the Bucharest Court of Appeal no. 594/1996, Civil Section IV). In *Dreptul* no. 8.
- Ștefănescu, I.T. 2014. *Tratat teoretic și practic de drept al muncii (Theoretical and Practical Treaty of Labor Law)*. 3rd ed. Bucharest: Universul Juridic Publishing House.
- Țiclea, A. 2014. *Concedierea. Teorie și jurisprudență (Dismissal. Theory and jurisprudence)*. 2nd ed. Bucharest: Universul Juridic Publishing House: 24-66.
- Țiclea, A. 2015. *Tratat de dreptul muncii. Legislație. Doctrină. Jurisprudență (Labor Law Treaty. Legislation. Doctrine. Jurisprudence)*. 9th ed. Bucharest: Universul Juridic Publishing House.
- Tutulan, Andreea. 2020. “Cum poate dovedi un salariat hărțuirea morală la locul de muncă?” (“How can an employee prove moral harassment at work?”) In *Salarizare, taxare & relația cu statul*, August 18, https://www.avocatnet.ro/articol_55585/Cum-poate-dovedi-un-salariat-h%C4%83r%C8%9Buirea-moral%C4%83-la-locul-de-munc%C4%83.html.
- Ursuța, M. 2008. *Procedura contravențională (Contravention procedure)*. Bucharest: Universul Juridic Publishing House.
- Voinea, O. 2020. “Ce drepturi ai și cum combați hărțuirea morală la locul de muncă” (What rights do you have and how do you combat moral harassment at work?). *Revista Biz*, 20 august, <https://www.revistabiz.ro/ce-drepturi-ai-si-cum-combati-hartuirea-morala-la-locul-de-munca>.