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Sexual Harassment in the Workplace and Legal Methods to Protect Employees

Acoso sexual en el lugar de trabajo y métodos legales para proteger a los empleados

LARISA SERGEEVNA KIRILLOVA

<https://orcid.org/0000-0002-1123-8546>

larisakira@bk.ru

Kazan Federal University. Russia

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ABSTRACT

The article suggests legal ways to protect employees from sexual harassment in the workplace. The authors note that the vector of development of labor law is turning towards personal non-property labor rights; psychological comfort in the workplace is also important for employees. Meanwhile, the ongoing processes in society (first of all, the #MeToo movement) indicate the need to introduce methods to protect employees from harassment into Russian legislation.

Keywords: Employees, moral rights, sexual harassment.

RESUMEN

El artículo sugiere formas legales de proteger a los empleados del acoso sexual en el lugar de trabajo. Los autores señalan que el vector de desarrollo de la legislación laboral se está orientando hacia los derechos laborales personales no patrimoniales; la comodidad psicológica en el lugar de trabajo también es importante para los empleados. Mientras tanto, los procesos en curso en la sociedad (en primer lugar, el movimiento #MeToo) indican la necesidad de introducir métodos para proteger a los empleados del acoso en la legislación rusa.

Palabras clave: Acoso sexual, derechos morales, empleados.

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INTRODUCTION

In recent years, the development of labor rights in Russia has undergone certain changes. Labor rights of an employee of the XX century are rights that were formed in an industrial and partly in a post-industrial society (Lushnikov&Lushnikova: 2015). Therefore, the main emphasis was placed on their "material" component. The property rights of employees were of the greatest value (the right to wages, the right to compensation, compensation for material damage, etc.) and received proper legislative protection (Carlson: 2018, pp.163-174).

In the XXI century, society has entered a new stage of development, which scientists call "postindustrial society" or "information society". This transition marked not only a change in the means of production (information becomes the main resource), but also a change in values, including in labor relations. In the age of computers, the Internet, social networks, the personal life of employees can easily become the public domain, and the gradual transition to digital workflow threatens the safety of personal data of employees. Researchers even write about a possible "digital concentration camp", and for workers - a "digital aquarium", when all information about the employee will be available, which opens the way for pressure and manipulation (Kirillova et al.: 2019, pp.22). The change of generations of workers is also becoming an important factor: the younger generation does not make wages a priority in employment; no less important is creative self-fulfillment, innovation and self-search (Kirillova: 2019).

These facts demonstrate that the vector of development of labor law in the informational XXI century is turning towards personal non-property labor rights. A stable salary is not enough for employees; they want respect and attention to their personal interests, psychological comfort in the workplace. Special studies note that the decisive influence on productivity growth is exerted not by material, but mainly by psychological and social factors, and that the conflict between a person and an organization can be completely eliminated if the social and psychological needs of workers are met (Ashchupov&Kovalev: 2019).

Labor rights, with a personal dominant as the core, include the right to equal treatment and protection from discrimination, the right to protection of personal data and privacy, the right to complete and reliable information, the rights to the protection of honor, dignity and business reputation (Lushnikov&Lushnikova: 2009).

At the same time, the current labor legislation lacks legal mechanisms and structures that would allow an employee to effectively protect these rights. In the absence of regulatory limits, an employee's dignity, honor and privacy are often subject to vertical (by management) and horizontal (by colleagues) bullying and harassment. One of the most dangerous is the problem of sexual harassment in the workplace. The specifics of labor relations associated with the dependent position of the employee only exacerbates the situation, forcing employees to keep silent about such facts (Pillinger: 2017).

International legal and foreign experience in regulating this problem indicate the need to introduce ways to protect workers from harassment in Russian labor legislation. This article has attempted to suggest some protective mechanisms to protect an employee from bullying and harassment in the workplace (Hardies: 2019).

METHODOLOGY

The method of analysis and synthesis allowed us to consider various manifestations of harassment in modern conditions and, on the basis of this, formulate general conclusions and recommendations.

The sociological method was used to identify the negative consequences of sexual harassment for public relations.

The formal legal method was used to analyze the current international and Russian legislation in countering harassment.

RESULTS

"The notion of "harassment" appeared relatively late in the European national legislation applicable to workplace relationships" (Sâmboan: 2018, pp.57).

One of the first references to harassment can be found in the revised European Social Charter 1996 (Harris: 2001). Article 26 establishes the right of workers to protect their dignity while working and obliges states to take all necessary measures to protect workers from bullying, clearly hostile or offensive behavior in the workplace or in connection with work. The Russian Federation did not undertake an obligation to comply with Article 26 when ratified this document.

Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment for men and women in employment and access to work (Directive: 1976, pp.40-42) defines sexual harassment as any form of unwanted verbal, non-verbal or physical sexual conduct that aims at or results in an offense to a person's dignity, in particular by creating a threatening, hostile, degrading, or offensive environment.

In 2019, a special ILO Convention No. 190 "On the Elimination of Violence and Harassment in the World of Work" (Beqiraj: 2019, pp.1167-1176) was adopted, according to which the term "violence and harassment" in the world of work denotes a number of unacceptable forms of behavior and practice, or a threat of such - be it a single or repeated incident - the purpose, result or possible consequence of which is the infliction of physical, psychological, sexual or economic harm, including gender-based violence and harassment.

The definition of sexual harassment mainly occurs by defining the range of acts that fall under this illegal behavior. Moreover, the list of forms of such behavior is extremely extensive: it can be unwanted touches, hugs or kisses; looking or looking around; suggestive comments or jokes; sexually explicit pictures, screensavers or posters; unwanted invitations to go on a date or have sex; obsessive questions about an employee's personal life or body, etc. (Kharitonov: 2019, pp.57-58).

However, these forms have common features:

1) Such behavior has sexual overtones and is offensive and degrading to the victim's dignity.

It is noted that "irrelevant whether or not the author has pursued a specific objective with the harassment, or whether or not the author understood the effect it has on the victim" (Sâmboan: 2018, pp.62). In this regard, the abuser does not aim to change the victim's position, for example, to demote or force the victim to leave. Other reasons may also underlie such behavior (revenge, envy, cowardice, personal dissatisfaction, etc.).

The emphasis on the aim of such behavior and the underlying causes is very important. The fact is that European directives often treat harassment as a form of discrimination. But often the basis of such behavior is not the desire to oppress a person based on gender / race / skin color and other reasons, but rather subjective antipathy, revenge, anger, etc.

2) Such behavior is aimed at creating an undesirable, hostile environment.

"The presence of a "hostile environment" is established when an employee is forced to work under conditions of intimidation, ridicule or insults due to his/her gender and sexual characteristics" (Kharitonov: 2019, pp.60).

DISCUSSION

Bethany Hastie, having analyzed the practice of complaints of sexual harassment at the BC Human Rights Tribunal from 2010 to 2016, points out that «tribunals and courts have come to understand the legal «test» for determining whether conduct is “unwelcome” as: “[T]aking into account all the circumstances, would a reasonable person know that the conduct in question was not welcomed by the complainant?” (Hastie: 2020, pp.66).

Thus, it is not necessary to establish that the undesirable behavior was intentional; a careless form of guilt is also quite possible, when the abuser “should have known” that his/her behavior was unpleasant for the victim.

The complexity of developing legal mechanisms for countering harassment in the workplace is associated with the latency of this phenomenon and the unwillingness of victims to talk about such a phenomenon. Gender discourse in Russia is a combination of modernization and traditional, even archaic layers. Particular attention is drawn to the elements of the archaic, the inseparability of the family, sexual in labor relations (Stuchevskaia: 2008, pp.49). Protecting victims of harassment should take these considerations into account.

We present our suggestions for possible changes in labor legislation in order to protect workers from sexual harassment in the workplace.

The labor protection institute should provide for the protection of both the physical and mental health of workers

The World Labor Organization estimates that harassment and bullying are common problems that can have a serious negative impact on the mental health of workers, and the declines in productivity associated with depression and anxiety disorders cost the global economy \$1 trillion annually.

Recognizing the right of workers to not only physical but also mental health will place an obligation on the employer to provide adequate working conditions, which, in the context of sexual harassment, may involve taking measures to prevent a hostile environment.

Also, such a measure will ensure a proper investigation of the facts of harassment, similar to the investigation of accidents at work. A company needs to investigate when there is a credible report of some kind of misconduct. A credible report is not limited to a personal complaint, but includes an anonymous tip on a hotline, the observations of a manager/supervisor, or even an outsider’s report of an issue to the company. Whatever the reason for an investigation or the level of individuals involved, the ultimate goal is to conduct an effective investigation (Trotter&Zacur: 2012, pp.28).

Investigations of harassment should be based on the following principles:

- 1) Planning and Professionalism
- 2) Confidentiality
- 3) Timeliness
- 4) Thoroughness
- 5) Objectivity, Independence, and Tenacity

The investigation procedure may include the following steps:

- 1) Selection of the investigator. Moreover, in addition to professional qualities, such a person should have interpersonal communication skills, empathy, be a good listener and be able to create a comfortable psychological environment so that the victim is comfortable talking about unpleasant facts.

2) Interviewing persons aware of the facts of persecution. These are the victim, witnesses, the victim's immediate supervisor. Care must be taken in the selection of interviewees to maintain maximum confidentiality.

3) Collection and examination of documentary evidence. Documents also play an important role in the investigation, as they can both accuse and vice versa justify the behavior of a possible persecutor.

4) Conclusion. The investigator should answer the questions of what happened and when, what the extent of guilt the alleged abuser has, and how badly the victim was hurt. Of course, all conclusions must be based on objective and supported facts obtained from interviews with witnesses and documents.

The employer's personnel policy should include measures to create a favorable psychological environment in the workplace

To reduce the incidence of harassment, it is important to improve the organizational culture of employees and managers. For this, the employer is recommended to conduct special trainings dedicated to the protection of employees from harassment. Such events will show that the employer strives to create a comfortable and safe psychological environment.

Also,

The anti-harassment policy should provide multiple avenues of complaint, ideally including your company's human resources department, a toll-free telephone number, and the ability to submit complaints online. Do not require that employees put their complaints in writing, as this mandate can deter complaints. Regardless of the avenues provided, giving employees the ability to make complaints anonymously can limit the ability of claimants to later argue they failed to complain out of a fear of retaliation (Bess et al.: 2017, pp.30).

Inclusion of special provisions on the prohibition of harassment in local acts

This is a measure that does not require changes to labor legislation. Article 8 of the Labor Code of the Russian Federation (Volkova et al.: 2018, pp.1891-1898) allows the employer to adopt local regulations in pursuance of the principle that enshrines the right of workers to protect their dignity during their employment. The advantage of this approach is that it will allow the employer to bring employees to disciplinary responsibility with the possibility of subsequent dismissal under p.5, part 1, Article 81 of the Labor Code of the Russian Federation.

Equally, similar rules can be enshrined in acts of social partnership.

The need for collective solidarity as a way to protect and support victims of harassment

The mentality of Russian society leads to the fact that victims of harassment are often left alone with their problem and, fearing public condemnation, are silent about what happened. In this regard, the first priority is to help victims feel the support and solidarity of the community.

A possible way out of the problem could be empowering the representative bodies of workers (primarily trade unions) with the authority to consider relevant complaints and initiate investigations into the facts of harassment. It is also possible to recommend the creation of special commissions within the trade unions, the purpose of which would be to raise awareness about the fight against harassment and harassment in the workplace, as well as provide psychological assistance, including anonymous one, and support victims of harassment.

Protection of the right to self-protection

It appears that the employee should have the right to suspend work if there is valid reason to believe that a hostile environment exists. In the event of a suspension of work in self-defense, the employee must retain his wages. To avoid an unreasonable decision, it is possible to propose the following mechanism. An

employee who believes he is being harassed should file a complaint with the employer (in person or through a union), and the employer must decide within two calendar days whether there are indeed signs of harassment and, if any, grant the employee the right to suspend work with retention of his/her average earnings. Further, the employer begins a more thorough investigation.

If the facts of harassment take place, but the employer does not recognize them, and the employee continues to be harassed, the employer will bear appropriate responsibility (primarily, financial).

CONCLUSION

Sexual harassment in the workplace is one of the growing threats in modern society, which creates a situation of social stress, discomfort and negatively affects the psyche of workers. The latent facts of harassment undoubtedly have taken place previously, but the ongoing processes in society (first of all, the #MeToo movement) and the change of reference points in the issues of workers' rights bring such cases out of the shadows and require the development of adequate response measures. Patriarchal foundations and "family" labor relations will soon become obsolete, and labor legislation must meet new social relations, having mechanisms that protect, among other things, the honor and dignity of workers.

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BIODATA

L.S KIRILLOVA: Born in 1988. 2011 – graduated from the Faculty of Law of the Kazan (Volga Region) Federal University with a degree in Jurisprudence. 2016 – defended her Candidate thesis on the topic "The limits of the exercise of rights by the parties to an employment relationship". Associate professor at the Department of Environmental, Labor Law and Civil Process of the Faculty of Law; head of the magistracy. Research interests: labor law, guarantees of labor rights, digitalization of labor relations.