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Criminalization of moral harassment: When subjectivity becomes presumption, How to defend employers

The recognition of “moral harassment”

1. A survey carried out by the European Foundation for the Improvement of Living and Working Conditions revealed that violence at the workplace affects a large number of workers: 3 million workers are subjected to sexual harassment, 6 million workers are subjected to physical violence and 12 million workers are subjected to intimidation and bullying. In France an IPSOS survey published in 2000 showed that 3 workers out of 10 considered that they were victims of moral harassment at their workplace.

Long ignored and kept quiet, moral harassment, according to trade-union organizations, became in the years 1999-2000 a social plague. At the March 1, 2000 demonstration, moral harassment itself was vigorously denounced, thereby forcing the parliament to take action. Consequently, in January 2002, the French parliament gave a definition of moral harassment in the workplace.

2. According to the French Labor Code (“FLC”), acts of moral harassment are defined as repeated acts that have as their object or effect, a deterioration in the workplace environment capable of harming the employee’s rights or dignity, damaging his physical or mental health, or compromising his future career prospects.

As this phenomenon was becoming a widely publicized issue with a substantial social impact, the legislator did not only content himself with defining the notion of moral harassment in the workplace. He also imposed on employers the obligation to protect employees’ mental health at every level and regardless of the sector of activity or size of the organization. This obligation must now be set forth in the companies’ general prevention principles and internal rules that must, in addition, include the legal provisions applicable to moral harassment.

3. Further, preserving the employees’ mental health has become a public policy issue since repeated acts that damage the employee’s mental health are now punished by law. The punishment is more than symbolic since such acts will be considered as a criminal misdemeanor punishable by up to one year imprisonment and/or a

15,000 Euros fine.

A criminal law framework that conflicts with the rights of the defense

While the labor aspects and implications of moral harassment have been largely defined by case law over the past seven years, the criminal aspects have not been, even though the first decision related to a moral harassment litigation dates back to October 25, 2002.

It is, therefore, difficult to assert certainties when discussing the defense of an employer or employee prosecuted for moral harassment.

1. Of course, the great founding principles of the criminal defense system must be applied, as confirmed by the Constitutional Council^[1] in its Decision n° 2001-455 DC dated January 12, 2002 that referenced the provisions set forth in Articles 8 and 9 of the 1789 Declaration of the Rights of Man and of the Citizen.

As such, in moral harassment cases - just like in any other case brought before a criminal court - the prosecuted party can be sentenced only if the following principles have been respected: the principle of legality of criminal offences and punishment, the principle of necessity of punishment, the principle of non-retroactivity of the most severe criminal legislation as well as the presumption of innocence.

2. Pursuant to these principles and based on the wording of the text that criminalizes acts of moral harassment, one must notice that the definition of moral harassment as a criminal offense has been much too inspired by the provisions set forth in the FLC, said provisions being inadequate with the enforcement of the principles of criminal defense.

Indeed, pursuant to Article 222-33-2 (created by the Law [n°2002-73 of January 17, 2002 - art. 170 JORF January 18, 2002](#)) of the French Criminal Code:

"Harassing another person by repeated conduct which is designed to or which leads to a deterioration of his conditions of work liable to harm his rights and his dignity, to damage his physical or mental health or to compromise his career prospects is punished by one year of imprisonment and a fine of 15,000 Euros."

3. Because of this lack of clarity and accuracy, the Constitutional Council, in the aforementioned decision dated January 12, 2002, further defined the notion of moral harassment under criminal law:

- The employee's "rights" that can be infringed by acts of moral harassment are the rights enjoyed by employees in the workplace, as listed in Article 1121-1 of the FLC (former Article L. 120-2), i.e. rights of individuals as well as individual and collective liberties.
- The fact that the burden of proof lies with the person accused of having committed acts of moral harassment - and who must, as a result, demonstrate that he/she has not committed such acts - is not

enforceable in criminal cases and must not in any way jeopardize the presumption of innocence.

The criminal law framework clarified by case-law

1. While the precisions brought by the Constitutional Council were absolutely appropriate, there remains, however, a nebula created by the generic terms used in the definition of moral harassment, the potential causal link between repeated acts and the violation of the victim's rights or the damage to his/her physical or mental health, both of these elements being required to establish the existence of moral harassment.

Consequently, it is necessary to look into court decisions to determine what principles should be applied to establish the existence of facts constituting moral harassment.

For the offense of moral harassment to be established, 3 elements are required.

2. First, there must be repeated "acts" that have as their object or effect a deterioration of the workplace environment:

The perception of the acts that can be considered by French courts as constituting acts of moral harassment is so subjective that it is difficult to identify what acts are likely to be sanctioned and to assess the risk associated with a claim for moral harassment.

For example:

- Knocking an employee's head with a signature book has been considered as an act of physical violence,
- Reading an email has been considered as an intrusion of one's privacy,
- Writing the mention "awful" on a work paper prepared by an employee has been considered as an insult,
- Giving repeated contradictory instructions has been considered as an act of moral harassment,
- Scheduling "debriefing" hours at the end of the day, which frequently resulted in overtime, has been considered as an act of moral harassment,
- Imposing upon an employee the obligation to keep the door of his/her office open has been considered as an act of moral harassment,
- Giving bitter criticism in the presence of other people has been considered as an act of moral harassment, etc.

Considering the subjectivity of such "acts" and the necessity to assess them *in concreto*, the Labor Chamber of the French Supreme Court, in a landmark decision dated October 27, 2004, considered that judges ruling on the substance of a case have a sovereign power to assess the elements produced in support of a claim for moral harassment.

Yet, it must be noted that the Labor Chamber of the French Supreme Court reversed this decision in four judgments dated September 24, 2008 and ruled that it had the power to verify itself if the alleged acts could

effectively be legally considered as acts of moral harassment.

This power to verify was obviously necessary since it must be recalled that only acts that restrict an individual's rights or individual or collective liberties and that are not justified by the nature of the job to be performed or are not proportionate to the pursued goal, can be considered as acts of moral harassment, as confirmed by the Constitutional Council.

As such, the French Supreme Court now ensures that the lower court judges have not failed to determine whether the acts in question were not justified by circumstances related to the nature of the job to be performed or to the sought goal.

The French Supreme Court even went beyond the law as it dismissed the case brought against an employer because it considered that employer's acts were justified by the company's economic situation and the need for corporate reorganization.

1. In addition, the Constitutional Council ruled that the violation of the employees' rights under French labor law could also be sanctioned under French criminal law. Consequently, decisions rendered by Labor Chambers can be used as pertinent legal precedents when dealing with the criminal aspects of moral harassment.

2. Secondly, for acts of moral harassment to be established, the employee must produce evidence that his/her rights have been infringed, that his/her dignity has been harmed, that his/her physical or mental health has been damaged or that his/her career prospects are compromised. Unfortunately for employers, such evidence is quite easy to produce in France... even though the produced evidence may be fictitious. This fact is attested to by the findings of the survey recently carried out by the French Social Security Authorities. According to this survey: 11% of sick leaves that have been subject to a control by Social Security agents in 2008 turned out to be abusive, i.e. one out of ten. Therefore, this type of "evidence" is to be considered as unavoidable since no employee will ever risk bringing a moral harassment case before the court without having a medical certificate or proof of sick leave.

3. Lastly, for acts of moral harassment to be established, there must be a causal link between the repeated acts and the damage suffered by the employee. Yet, the terms used by the legislator to describe this causal link remains ambiguous:

"Repeated acts that have as their object or effect, a deterioration in the workplace environment capable of harming the employee's rights or dignity, damaging his physical or mental health".

It would have been appropriate to set forth that the causal link be actual and proven to help define the offense and secure the rights of the defense. Instead, the legislator unfortunately used the term "capable of", thereby rendering the causal link potential. As such, pursuant to the law, it suffices that the acts could have infringed or could infringe the employee's rights.

In this respect, in a decision dated April 30, 2009, the Labor Chamber of the French Supreme Court made a literal interpretation of the law and held that for the existence of acts of moral harassment to be established,

the employee does not need to prove that acts of moral harassment have had an actual impact on his/her health.

If confirmed by the Criminal Chamber of French Supreme Court, -which can be expected, this position would be indeed in compliance with the law but would clearly be unacceptable under the presumption of innocence principle which is a cornerstone of the criminal justice system.

4. To date, few court decisions have been rendered in moral harassment cases. It does not mean that there is little or no moral harassment litigation. Simply, since judicial investigations and enquiries are often lengthy, most of the existing moral harassment cases have not yet been adjudicated by appellate courts.

This is so true that the Court of Appeals of Lyon just rendered its first decision in relation to a moral harassment case – in which our firm successfully represented the defendant – on April 28, 2009. This decision, therefore, deserves to be commented upon as it addresses an issue that has been rarely debated before French courts to date and as the Court of Appeals of Lyon dismissed the case for failure to prove a claim.

In this case, the plaintiff brought a claim of moral harassment thanks to basically only corroborating declarations of employees who had also accused the defendant. This fact demonstrates the undeniable subjectivity of the perception of the alleged acts of moral harassment and the questionable nature of the reasons behind making these declarations. However, the 4th Criminal Chamber of the Lyon Court of Appeals did not submit to the dangerous exercise of challenging whether the alleged acts actually occurred repeatedly, and instead acknowledged that they did.

In addition, when examining the case, the Court underlined the principles governing French criminal law and strived to determine whether the alleged offense had been actually committed.

The Court verified (i) whether there existed a causal link between the change in the workplace environment and the alleged acts of moral harassment, (ii) whether the restrictions placed on employees' rights were outside the scope of the defendant's management authority or duties and (iii) whether the alleged acts resulted from a cause other than malicious intent (malicious intent being essential to establish the existence of any voluntary criminal offense).

The Court replied in the negative to all three questions. It ruled that no offense had been committed and dismissed the case.

However, the Court of Appeals also tried to determine whether the alleged acts had had an impact on the employee's rights, in other words whether the effect of the alleged acts on the employee's life had been established. This is obviously contrary to the position adopted by the Labor Chamber of the French Supreme Court in its decision dated April 30, 2009.

Yet, while it is possible from a labor law perspective to admit that moral harassment exists even if there are no proven effects thereof on the employee, applying such reasoning to criminal matters clearly makes no sense.

How can a person be found guilty of certain acts if the effects thereof on the victim are not unquestionably established?

Such a punitive approach would obviously contradict the presumption of innocence principle that remains the ultimate safeguard against hastily drafted criminal laws that are more focused on preserving social and industrial peace than improving the criminal justice system.

[1] The Constitutional Council is the highest [constitutional](#) authority in [France](#). Its duty is to ensure that the principles and rules of the Constitution are upheld.

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