SEXUAL HARASSMENT IN THE PANAMA WORKPLACE

INTRODUCTION

In Panama, sexual harassment (*acoso sexual*), as a reason for the termination of the labor relationship, was adopted by means of Law No. 44 of 1995.

Our Labor Code does not define harassment, neither does it make any differentiation regarding sex, and consequently the purpose of this paper is to identify those elements that characterize sexual harassment in our country, in lieu of established parameters in the Labor Code.

BACKGROUND

The phrase sexual harrassment first appeared approximately twenty years ago in the United States.

According to Doctor Peter Rutter, in his 1998 book *Sexual Shakedown,* Lin Farley describes how she and her colleagues introduced the term for a course she was giving in the Autumn of 1974 at Cornell University. The author also explained that the first time he became aware of the phrase in the communications media was in a New York Times article in 1975, with the title "Women begin to speak out against sexual harassment in the workplace", written by Enid Nemy.

I. CONCEPTS

1. Grammatical Concept

The Royal Academy's Dictionary of the Spanish Language defines harassment as "to pursue an animal or an individual, without respite or rest." The notion implies persecution of a sexual nature, or sexual connotation; therefore harassment has been defined as pestering, harassment, censure and sexual siege.

2. Technical Concept

The first technical definition regarding the subject appeared in the United States in 1980. This definition was created by Eleanor Holmes Norton, of the U.S. Equal Employment Opportunity Commission (EEOC). Within the policies of this Commission, sexual harassment is defined, as "advances and requests of unsolicited sexual favors, and other verbal and physical conduct of a sexual nature, constitute sexual harassment when (1) the acceptance of such conduct is converted, implicitly or explicitly, into a term or condition of the affected person's work relationship; (2) when the acceptance or rejection of said conduct affects decisions with reference to the employment of the same; (3) when the conduct has the objective or effect of unjustly interfering with the individual's performance in his/her work or results in the creation of an intimidating work environment which is hostile or offensive to the individual."

It should be emphasized that the principal terminology established in the above definition underlines that it covers unsolicited conduct which obliges the victim to take action to conserve his/her work.

3. Legal Concept

In Panama there is no legal definition of the term. The Labor Code, in its number 15, literal A, article 213, which was reformed by Law 44 of 1995, includes the worker's *acoso sexual* during the provision of service as a legitimate reason for dismissal.

The Labor Code only mentions the phrase sexual harrasment without establishing a concept or a definition, nor the elements or characteristics that typify sexual harrasment.

II. CHARACTERISTIC ELEMENTS OF SEXUAL HARASSMENT

1. Conduct, Actions or Manifestations of a Sexual Nature

The first element is the existence of an action or conduct of sexual content, originating with a person who is linked to another by reason of a work relationship. These conducts or manifestations can vary and, by way of example, we can make mention the following: sexual gestures or looks; verbal abuse or sexual comments about the appearance of the person; offensive or double-meaning phrases; forced kisses; pulling of clothes; blocking the right of way or cornering in a sexual way; also rude, humiliating or vulgar remarks; separation of the person from the usual work space so that the conversation is more intimate; unwelcome and offensive sexual insinuations; request for intimate relations even if this does not include actual contact; or other types of conduct of a sexual nature, by means of promises of benefits or compensation; demands for sexual favors under threats related to employment, display of pornographic material, such as magazines, calendars, playing cards, photographs or objects, as well as the placement of images of this nature on the walls of the workplace; touching, contact or deliberate pinching; stroking or patting the buttocks, whistling or exaggerated gestures; watching people changing clothes in the bathroom; and in general all types of physical and verbal violence.

New standards consider certain actions that create a hostile work environment to be sexual harassment, even though they are not directed at individuals directly but at third parties who do not directly participate in the amorous relationship. This was the case in Mirjanovic versus Doe & Roe Firm, Cal., Sacramento County Super. Ct. No. 95AS00023, May 22, 1997, in which the plaintiff was a secretary in a law firm who had to lie to cover up a relationship between an attorney and the receptionist. She was required to lie about the relationship and was also forced to accompany the pair to apparent "work" meetings. The secretary filed suit for sexual harassment because she was forced to cover up the relationship, which created a hostile working environment.

It should not be forgotten that to determine whether or not an action constitutes sexual harassment will depend on each individual case since it is a subjective question insofar as the customs and idiosyncrasies of the place prevail. In this respect, we have to admit that Latin American customs are different than those in North America since in our environment, where the people are warmer and more expressive, certain actions should not be considered as acts of sexual harassment. In this context, we should mention welcome kisses on the cheeks, certain innocent greetings, as well as jokes, expressions and non- malicious flirtatious remarks or compliments, which are not especially directed at one specific person.

Additionally, there are certain special cases in which we have to review if there is or is not a relapse in conduct or actions and whether this is or is not related to another element, such as if was solicited or not, or whether it was caused by provocation.

Recently, in the United States of America, a distinction has also been made about the type of action, and if this could or could not affect a normal individual. With this subtlety the victim's demands could be called into question if the majority

of people have not been affected by the type of action suffered by the victim, without considering the suffering and distress actually experienced by the victim, independent of whether or not other individuals were affected.

We definitely identify with the position that a plural number of actions is not required for sexual harassment to have occurred, since there is not the slightest doubt that a victim subjected to just one act of harassment can suffer the consequences for the rest of his/her life, independent of the severity of the act; additionally, without regard to whether or not the action is serious, it should be understood that the legal regulation tends to protect the victim, which means that it is unproductive to require various manifestations of harassment for which the victim is seeking indemnity. In any case, it is also unnecessary that consummation of a sexual relationship occurred, neither a libidinous act, for sexual harassment to exist; the sexual intention of the subject is enough, independently from the result. More important than the outcome pursued by he/she who harasses will be that the conduct was distressing or was not solicited by the victim.

The existence of an occurrence obliges us to refer to the active individual, the harasser who, linked by a work relationship, commits actions or acts of harassment to the detriment of the victim, who generally will be an individual with whom there has been some sort of relationship or treatment connected with work, whether it be as a colleague or a manager.

The fact is that number 12 of article 127 of the Labor Code establishes the prohibition that the worker engages in acts of sexual harassment. Number 15 of article 138 of the Labor Code also prohibits employers from committing acts of sexual harassment. Additionally, number 28 of article 128 of the Labor Code requires the employer to "establish an equitable procedure, which is reliable and practical, to investigate claims made in relation to sexual harassment and provides the application of corresponding sanctions." Also, number 24 of the same article provides that the employer has the obligation to give material protection to the person and property of the employee, all of which indicates to us that the employer should take every measure necessary to avoid the occurrence of sexual harassment in the workplace. Moreover he/she should take measures with the purpose of ensuring that employees do not commit acts of sexual harassment to the detriment of third parties (visitors, clients, suppliers, agents, etc.) since the employees' acts could involve the responsibility of the employer for damages incurred by his/her dependants in the service for which they act as employees, or by reason of their functions (Articles 1644A and 1645 of the Civil Code).

The employer has the obligation to guarantee an environment where individuals are not exposed to sexual harassment. This applies to the workers and also the individuals who visit the workplace.

The well known writer of treatises, José Fernando Lousada Arochena, maintains that individuals involved in harassment could also be "suppliers, clients or other individuals having relations with the company, provided that the harassment occurs within the work environment." We can therefore conclude that the employer should take measures to ensure that his/her workers, or individuals who visit the workplace, are not subjected to situations that could provoke acts of sexual harassment.

2. Action or Conduct Unsolicited by the Victim

According to Elpidio González, "the principal characteristic of sexual harassment is that it is not wanted on the part of the person who is the object of the same." The author Julio Martínez Vivot also states that "it is unsolicited and, on the contrary, is rejected by the person at whom it is directed."

Even though there is no definition of sexual harassment in the workplace, there is no consent or acceptance on the part of the victim and one of the principal characteristics of harassment is precisely the victim's opposition to be subjected to unsolicited actions.

In a Sentence handed down on May 31, 1999, the Superior Labor Tribunal considered that: "The fact that Mr. L. forcibly obliged his work colleague V.CH to receive a kiss, constitutes an act of sexual harassment in the workplace that translates into violence against her, because of her condition as a woman, therefore the worker's action not only violated the dispositions contained in article 213, paragraph A. Number 15, but also goes against the International Conventions signed by the Republic of Panama to prevent, sanction and eradicate violence against women."

3. Persons Linked by the Work Relationship

To lend importance to harassment in the work environment, it is necessary that the individuals involved establish an identity with the workplace, which is precisely what can come under criticism, because the victim cannot escape from his/her accuser precisely because he/she cannot abandon the workplace due to the negative implications that this involves. In view of this, the harasser as well as the victim generally work in the same place, however it could be the case that, if the act occurs within the employer's premises, clients or suppliers could also be either active or passive individuals connected with the harassment.

4. Abuse of Management Position can be Involved as well as the Creation of a Hostile Environment

It is common for sexual harassment to be linked to the demands that a ranking manager makes of his/her subordinate, as a form of exchange or barter of favors to obtain benefits or preferences in employment. In reality, if it is true that this happens in some cases of sexual harassment, it would be improper to maintain that a position of authority is always involved in cases of sexual harassment, since an individual can be distressed by actions having a sexual character committed by a person of equal seniority or hierarchy, and suffers all the negative effects that the Law seeks to avoid in regulating harassment. On the other hand, in the more modern definitions of sexual harassment, all reference to the position of authority has been eliminated which indicates that it is unnecessary, unless the corresponding legislation requires this position.

In the United States of America, where harassment has experienced the most development due to the great number of precedents concerning this subject, the phenomenon that has occurred is that the majority of cases of sexual harassment do not refer to relations of power or hierarchy, but to the type of harassment, by which, without a position of hierarchy on the part of the harassed person, a hostile environment is created for the victim, which further aggravates the situation. Consequently, looking at the evolution of the matter in the country where the first regulation originally appeared, the position of authority, or of hierarchy, is not an indispensable requirement for the existence of harassment, since there are many case precedents where the victim requires protection from the

hostile environment to which they are subjected by the harasser, without him/her being on a superior level.

Despite the above, in our country, where the matter is new, everything appears to indicate that in the majority of harassment cases there does exist an imposition on the part of a manager who imposes his/her actions on the victim, so that this person obtains benefits or does not lose their job. Experience in future years will indicate which cases will prevail.

The other form of harassment is that which is called "environmental", implying the creation of a hostile environment in which work colleagues on the same level are linked or have a distant hierarchy, without invoking authority or hierarchy, but rather make pursuit of them to obtain a favor of a sexual nature for the self interest of the harasser or of third parties. In these cases, "manifestations of power" do not apply, but what is involved are incitements or inopportune sexual solicitations that are not verbal or physical sexual in nature but which have the objective or effect of limiting, without reason, the work performance of an individual or to create an offensive, hostile work environment with intimidation or abuse, in many cases designed to achieve job abandonment.

The environmental type of sexual harassment affects individuals of the female sex who are ill-treated and offended by gestures, words and actions on the part of male colleagues having the same seniority or hierarchy who, wanting to emphasize their chauvinism, guide the workplace into a negative environment with the objective that the women resign from their jobs or be so distressed that they cannot perform their functions as usual.

The Panamanian Labor Code does not make a distinction or difference, therefore both types of harassment can occur in our country.

Environmental sexual harrassment has been recognized in Panama through a sentence of the First Superior Labor Court on April 19, 2001, in which it was expressed that: "This discomfort in the workin environment may be revealed with the exhibition of pronographic material, such as magazines, photographs, e-mails, and other objects.

5. The Sex of the Victim is not Distinguished

Sexual harassment was denounced and publicized to the world principally by groups of female pressure groups. Perhaps it is for this reason that there is a tendency to identify the victim with the female sex, without initially perceiving that any individual can be a victim of harassment, and that any individual can be a harasser, independent of their sex.

Consideration of the sex of the victim or of the harasser is not determined in identifying actions such as sexual harassment, since any individual of whatever sex can suffer the distress of harassment.

What is certain is that generally, in the majority of cases, it is the woman who suffers from the acts of sexual harassment. "If it is not possible to establish a precise account of the preferences of those who censure sexually, studies in different countries demonstrate that those most affected are, in the first place, young females, as a consequence of their vulnerability due to their inexperience, lack of legal knowledge and shyness, among other factors.

Martínez Vivot stated that "If it is true that the usual target of sexual harassment is a woman, then there could be a man involved in such circumstances." And Pose also recognizes that both sexes can be involved and be harassment victims, adding that "Individuals active in illicit conduct can be the employer, a subordinate with management powers or concrete control of the worker, or the affected worker. In this case, it should be pointed out that it is not only the male who is in the condition to be the active individual but also the female; the possibility of a young man's sexual harassment should not be ruled out. On the other hand, the action could also occur between homosexuals."

In Panama, in the manner that sexual harassment is regulated by the Labor Code, no sanction exists for the employer who harasses the employee, neither can the employee invoke such conduct as a reason for justified resignation, with the right to indemnification.

There is also no differentiation under the law between the sexes as harassment can occur between individuals of the same sex.

In the United Sates, in the case of Joseph Oncale Vs. Sundowner Offshore Services Incorporated, dated March 4, 1998, a unanimous verdict claiming sexual harassment was handed down when a worker on an oil rig in Louisiana, where only males worked, alleged that he was harassed by other workers with the acquiescence of their superiors. In this country there is no difference in the laws when it comes to the sex of the worker.

6. Conduct Negatively Influences the Work Environment

Within the framework of the term sexual harassment, we should observe the negative effects that this conduct has on the work environment, as the author Martínez Vivot defines it by stating that "it puts in danger, or affects, human rights, dignity, health, intimacy, security, comfort, well-being or any other right acquired or expected by the receiver; that offends or humiliates and, in the work environment specifically, which alters or puts in danger whatever elements that comprise the work relationship."

It should be mentioned that there also exists, within the framework of the violation of human rights, that if there are legal proceedings "this does not solve the victim's conflict because he/she wants the siege to end, but also needs to preserve the previous situation undamaged. This is what occurs in the work context, where the affected person protects his/her source of work which is the principal means for family support.

7. Psychological Damage is not Required

In 1993, the United States Supreme Court reaffirmed the theory of "hostile environment" in the case of Harris Vs. Forklift Systems, sustaining that for sexual harassment to exist the victim does not have to demonstrate that he/she has suffered psychological damage, but only that the action occurred, that the same was unsolicited, and that it would have been offensive for a normal person.

In view of this, there is no need to demonstrate that psychological damage has been suffered, only that there is proof that harassment occurred.

8. Workplace Sexual Harassment as a Work Accident

José Fernando Lousada Arochena states "One defining element of sexual harassment in the work relationship, insofar as it concerns allowing sexual harassment to modify

the workplace, is its connection with work, which, as well as defining workplace sexual harassment, allows us to argue that if the harassment results in corporal wounds, whether physical or psychological, these should be considered as originating, to all effects, in the contingency of a work accident, in accord with article 115.1 of the Social Security's General Law, whose purport indicates that all corporal wounds that the worker suffers by consequence of the work executed for another's account is considered to be a work accident.

In our country, Article three of Cabinet Decree No.68 of March 31, 1970, establishes that a work accident is considered to be that which happens to a worker by the action of a third party or by the intentional action of the employer or a work colleague during the execution of work, therefore sexual harassment acts that the worker suffers during the provision of services should be considered work accidents.

While we still have a long road to travel to cover the subject of sexual harassment as grounds for dismissal, we are certain that in the next years this will be a theme that will gain importance, which will help to establish the typifying elements and define the limits of sexual harassment cases.