



Panel - Harassment in the Workplace – Unclear Boundaries of Responsibility: the Employer’s Burden

Moderated:

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Participants:

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Question 1:

In your Country, is there a Law governing harassment in the workplace, or is it dealt with in case law and Company policies?

What are the typical remedies that employees may sue for if a lawsuit is filed?

- In Israel, there is no Law which constitutes bullying or harassment as an actionable cause for a claim.
- However, Israel does have an extensive legislative framework concerning discrimination and sexual harassment in the workplace.
- The most dominant laws in this respect are the Employment (Equal Opportunities) Law from 1988 and the Prevention of Sexual Harassment Law from 1998.
- There are also laws for the promotion of equal rights for disabled people, for the promotion of equal pay for men and women and others. All these constitute actionable causes for filing civil claims.
- Some of the laws also constitute criminal offences, such as some cases of sexual harassment.
- There is also a draft of a law for the prevention of harassment in the workplace which is based on the Law for Prevention of Sexual Harassment, but which has not yet been legislated by the Knesset.
- The relevant remedies that Courts grant employees in harassment cases are damages, including for emotional distress. The laws governing sexual harassment and discrimination define the maximum sums that the Labour Court may grant plaintiffs, but in general such sums rarely exceed 100K NIS, since they are granted regardless of proof of damages.

There is a patchwork of federal, state, and local laws governing harassment in the workplace. The federal law is Title VII. Many states and cities, including New York State, New York City, and California, have laws providing protections and remedies for employees that are greater than those provided under Title VII.

Case law at the federal and state level interprets the reach of the anti-harassment statutes.

As a best practice, employers should have robust anti-harassment policies; some states, including New York, require that employers have anti-harassment policies and conduct annual anti-harassment trainings.

If a lawsuit is filed, employees may seek, among other things, back pay, compensatory damages (including emotional distress damages), punitive damages, attorneys' fees, and front pay.

Under federal law, compensatory plus punitive damages are capped based on employer size, with the maximum amount \$300,000. No such caps exist under NY law.

Moral Harassment – Sexual Harassment (L. 1152-1 & L. 1153-1 of the Labor Code)

No employee shall sustain repeated actions of moral harassment the purpose or the effect of which entails a deterioration of the employment conditions liable to impact his/her rights and dignity, alter his/her physical or mental health, or compromise his/her professional future.

No employee shall sustain (i) either sexual harassment consisting in repeated speeches or behaviors with a sexual connotation affecting his/her dignity because of their degrading or humiliating character, or creating for him/her an intimidating, hostile or offending situation or (ii) behaviors assimilated to sexual harassment consisting in any form of serious pressure, even non repetitive, exercised with the true or apparent purpose of obtaining an act of sexual nature, be it for the benefit of the perpetrator or a third party.

An obligation of result imposed on the employer (e.g., information and training).

Perpetrator may be the employer, a supervisor, a subordinate, a colleague or a third party.

Protection of victims, witnesses and whistleblowers.

Applicable rules mandatorily restated in the company's Internal Rules (*Règlement Intérieur*).

Overview

Very limited laws address harassment in the workplace. Cases not binding.

Civil law - general tort claims for infringement of rights to health, reputation, integrity and movement.

Criminal law - police rarely involved unless very serious cases.

Sexual harassment

Men against women only

Generally prohibits unwanted sex related verbal, written, graphic, electronic or physical harassment.

Employers generally obliged to take steps to prevent sexual harassment in the workplace.

Recent national and local developments - genuine or for show only?

Legal process makes it difficult to prove.

Remedies/compensation: Very limited - e.g. a few thousand RMB.

Company policies very important - legal landscape, company culture and behavior standards required by MNCs higher and very different from domestic companies. Needs to be very specific and follow certain procedures to be binding on employees.

Is there a Law governing harassment in the work place or is it dealt with case law and Company policies?

There is no harassment regulation as such but several laws deal with the topic (i.e. Constitution, Workers Statute, Equality Law, Labour Sanctions Law, Criminal Code...).

Most frequent regulations are Collective Bargaining Agreements ("CBA") and Company Policies or Codes of Conduct.

Court decisions analyze harassment on a case by case basis.

What are the typical remedies that employees may sue for if a lawsuit is filed?

Termination of employment with an statutory severance plus potential damages.

Protection of employee's fundamental rights asking for the cessation of the harassment behavior plus potential damages.

Reinstatement in previous employment conditions.

Criminal liability and administrative fines up to €187,515.

Article 2087 of the Italian Civil Code sets forth the main principle under which the employer has the obligation to adopt any measure to safeguard the physical integrity and the personal dignity of its employees. It reflects the constitutional right of each Italian citizen to have its health safeguarded.

Together with the case-law, this is the main rule protecting employees against any form of harassment in the workplace, including sexual harassment and (according to different translations and cultures) mobbing, bossing, bullying (i.e. any repeated and continuing act of mental/emotional or physical violence/abuse against an employee in the place of work, by superiors, co-workers or even subordinates).

In case of successful judicial claim, the employee can be granted with an interim injunction aimed at blocking the unlawful conduct on an urgent basis and obtain compensation for damages suffered.

Harassment can be also punished under criminal law. The person responsible is punished not the employer, as criminal liability is always personal to the author of the crime.

Question 2:

Do the Law or case law in your Country determine certain mandatory obligations on employers for the prevention of harassment (for instance: publishing a set of rules, conducting study days and appointing a person to handle the matter in the workplace)?

- The subject of Sexual Harassment is very developed and the law requires any employer who has more than 25 employees to publish a set of rules regarding sexual harassment and to inform all employees and supervisors in the workplace of the obligations and prohibitions according to the law.
- Employers are required by law to appoint a person responsible for the prevention of sexual harassment.
- The Law also specifies the procedure and the timetable for conducting a review of a complaint regarding sexual harassment in the workplace.
- There is no similar legislation regarding harassment in general, although harassment as a result of sexual harassment is prohibited in the Law for Prevention of Sexual Harassment and the other laws dealing with discrimination can also constitute legal grounds for a claim.

Do the Law or case Law in your Country determine certain mandatory obligations on employers for the prevention of harassment?

Regulations on the Prevention of Occupational Risks obliges employers to protect employee's health and safety. Employer must protect employees from psychosocial risks taking prevention actions such as:

i) evaluation of the potential risks,

ii) setting a prevention plan including information, training and periodical review of work environment.

Some **CBA**s include prevention protocols including activities such as informative campaigns, training activities, formal protocols to handle claims, disciplinary regulation, protection against retaliation.

New legislation obliges companies with 50 or more employees to implement a Gender Equality Plan to prevent direct or indirect discrimination on gender basis. The plan must include measures for the prevention of gender and sexual harassment in the workplace that must be negotiated with employee's representatives such as informative campaigns, training activities, reporting channels. Employees reps. must cooperate to prevent gender and sexual harassment and must inform the employer of any related behavior.

Prevention of harassment is left to the employer's power to control and organize its business activity, as there are no specific law provisions imposing mandatory obligations for that purpose. In case of claim, the employer has the burden to prove that it has actually adopted any measure to avoid damages to the employee due to a harassment situation.

In the above framework, as a matter of good practice the following measures are of paramount importance which can be divided into three main categories:

Preventive Measures:

- Anti-harassment Policies; Code of Conducts and Code of Ethics; Disciplinary Codes; Whistleblowing Procedures; Training Courses to employees to explain the content of the above policies (the result of the course should be a statement by the employee to adhere and respect the relevant rules);

Investigation Measures:

- Once the employer is made aware of any potential misconduct which might trigger a harassment case, the reaction should be immediate through internal investigations (employees' interviews, witnesses' declarations, emails' check, document analysis).
- In case of crimes, investigations are generally carried out by criminal lawyers under the legal privilege (the result of the investigations is kept confidential and secret)

Disciplinary Measures:

- Depending on the result of the investigations, the employer is required to take action against the person responsible of the harassment. A disciplinary process must be carried out entailing the right of the accused employee to defend. The sanctions applicable as a result of the disciplinary process include the dismissal for just cause (with immediate effect and without notice).

Question 3:

To what extent is harassment in the workplace a "hot" subject dealt with by the media in your Country?

To what extent can a claim filed by a disgruntled employee who claims to have been harassed cause damage to an employers' reputation?

- In Israel, the Regional Labour Court in Jerusalem determined, back in 2016, that an employee in the Prime Ministers' Residence suffered from harassment from Mrs. Netanyahu that amounts to 'hurtful employment'. The Court awarded him with compensation of 80,000 NIS (about 22,000 USD).
- The Court also determined that an employer has a general obligation to ensure a safe and suitable environment for all employees. This judgment was naturally reviewed extensively by the media and caused much damage to Mrs. Netanyahu's already controversial reputation. The Claimant, Mr. Meni Naftali, has since become a social activist and is a well-known persona in the media, while even participating in reality shows.
- Claims regarding harassment in the workplace have since become very popular, if not even "fashionable", but the Labour Courts have determined that an employee claiming to have been harassed must be able to lift the burden of proof and that general claims will not be upheld.

Employee or unions may initiate civil and criminal actions against the employer and the perpetrator. Employment contract may be constructively terminated by the employee. Harassment can justify a dismissal for serious misconduct.

Criminal exposure: up to € 30,000 in fines and 2 years imprisonment for the perpetrator, aggravated to € 45,000 and 3 years imprisonment if perpetrated by someone with authority or abusing of the weakness of the victim. Fines may be multiplied by five for the corporate entity.

Exposure to reputational damages (externally and internally) when the management has not implemented all precautionary measures upstream, has not conducted appropriate investigations or applied necessary sanctions.

Moral harassment claims are often initiated to lift the Macron scale of damages cap, and open the grounds for a more generous outcome or settlement.

The U.S. media has intensely covered the #MeToo movement, which has led to legislative changes at the state and local level.

Employers associated with toxic harassment cultures have faced serious public relations issues, backlash from consumers, and loss of talent.

Employers are well served to take anti-harassment matters seriously



Harassment at work or business setting is one of the hottest topics - JD.com case.

In the past - there is little recourse as compensation through litigation is very limited.

Now - rise in harassment claims or threats to expose to media or public, due to awareness that this will have worse reputation impact.

Companies wanting to have global consistency in terms of harassment policies and training so holding themselves to higher standard, but 'one size fits all' policy or approach may not be feasible or appropriate

How harassment is understood as a term and as a practice varies widely (e.g. criticisms).

Consider how local legislation (and/or culture) may restrict or impact rolling out of intended policies or initiatives, or when handling harassment complaints

- Reporting and grievance mechanisms - use EA programs

- Data privacy considerations

- Investigation procedures

- Termination risks