

## **Bullying, Harassment and Stress in the Workplace —A European Perspective**

### **INTRODUCTION**

#### **The legal origins of workplace anti-bullying legislation**

In 1993, Sweden was the first country to implement legislation specifically outlawing bullying at work. This ground-breaking legislation:

- outlawed “*recurrent reprehensible or distinctly negative actions which are directed against individual employees in an offensive manner and can result in those employees being placed outside the workplace community*”;
- created a duty for employers to swiftly investigate, mediate and counter any instances of bullying as well as implement preventative organizational measures against workplace bullying; and
- took a “non-punitive” approach to bullying by aiming to resolve the problem through dialogue and consensus rather than through sanctioning employers.

Building on the Swedish experience, many European countries followed suit and implemented their own laws prohibiting bullying at work. In Europe today, there is a comprehensive network of overlapping European and national laws that address the growing problem of bullying and stress in the workplace. These laws arise out of a combination of European Union and national laws prohibiting discrimination, ensuring that employers look after the health and safety of their employees as well as (in some jurisdictions) specific prohibitions against bullying.

Today, bullying and stress at work are widespread and costly problems for employers and employees. As an example, a 2005 survey for the European Agency for Health & Safety at Work found that:

- stress is the second most reported work-related health problem, affecting 22% of workers;
- one in twenty of the workforce have suffered from workplace bullying;
- stress is a factor accounting for 50-60% of all lost working days; and
- in 2002 (when the EU only consisted of 15 member states rather than the 27 current member states) the cost to businesses of stress-related absence was estimated to be in the region of €20 billion.

**Bullying – a challenge by any name**

Around the world, bullying is known by a number of names in legal terms. The table below sets these out. In this note we use the term “bullying” to refer to the general concept of bullying and harassment at work, but where bullying is based on a protected characteristic derived from anti-discrimination legislation, we refer to it as “discriminatory harassment”.

GLOBAL TERMINOLOGY	
COUNTRY	TERM
Australia	workplace bullying
Belgium	<i>harcèlement moral</i> / moral harassment
Canada (Québec)	<i>harcèlement psychologique</i> / psychological harassment
Denmark	mobbing
France	<i>harcèlement moral</i> / moral harassment
Germany	mobbing / psychoterror
Italy	mobbing
Norway	mobbing
Spain	<i>acoso moral</i> / moral harassment
Sweden	victimization / mobbing
UK	workplace bullying
US	workplace bullying

## QUESTION 1

### WHAT IS THE LEGAL FRAMEWORK FOR OUTLAWING BULLYING - IS THERE A DISTINCTION BETWEEN GENERAL BULLYING AND BULLYING/HARASSMENT ON SPECIFIC PROHIBITED GROUNDS (I.E BASED ON DISCRIMINATION LEGISLATION)?

#### The European Union Legal Framework

At the European level, the legal framework relating to bullying and stress derives from an overriding obligation to protect the health, safety and dignity of workers, key components of which include:

- Article 19 of the EU Charter on Social Fundamental Rights of Workers which states: “*Any employee must benefit, in his working environment, from satisfactory conditions in order to protect his health and safety (...)*”;
- Article 31 of the EU Charter on Fundamental Rights providing that: “*Any worker has the right to benefit from working conditions respective of his health, security and dignity*”;
- the EU Health and Safety Framework Directive (89/391/EEC) under which employers must “*ensure the safety and health of workers in every aspect related to work*” including obligations to avoid workplace risks, combat them at source and carry out workplace risk assessments; and
- Directives 2000/43 and 2000/78 on Equality of Treatment (broadly anti-discrimination provisions), which treat harassment as a form of discrimination, when the unwanted conduct relates to any protected characteristics and takes place with the “*purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment*”. In this context, the protected characteristics are: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation (the “**Protected Characteristics**”).

#### France

France has specific laws prohibiting workplace bullying which were adopted before the implementation of the EU Directives. Specifically:

- bullying, which is called “*moral harassment*”, is prohibited under Article L. 1152-1 of the French Labor Code. The Labor Code defines moral harassment as “*repeated acts leading to a deterioration of the working conditions and that are likely to harm the dignity, the physical or psychological health of the victim or his professional career*”;
- discriminatory harassment is prohibited if it relates to any Protected Characteristic; and
- A “*national agreement*” on harassment and violence at work concluded on 26 March 2010 aims to identify and prevent acts of bullying and violence at work.

As set out above, moral harassment under the French Labor Code is defined by reference to a number of separate elements which are relatively open-ended. This has meant that the specific meaning of bullying evolves through case law. This has resulted in a broad definition of bullying and raised particular questions as to when bullying can be said to have occurred. The various element of this definition have been interpreted as follows:

- “*Repeated acts*”: There must be multiple acts. This means that a single act cannot constitute bullying (Cass. Soc. March 31, 2010). However, bullying may take place over a short period of

time, i.e. a few weeks (Cass. Soc. March 26, 2010) or acts of bullying can be separate by a long period of time, i.e. two years (Cass. Soc. September 25, 2012).

- “*Aiming at or resulting in a deterioration*”: Bullying may be intentional or unintentional. The fact that bullying can be unintentional means management practices which involuntarily lead to a deterioration of working conditions can constitute bullying (for example humiliation and excessive pressure imposed by management, Cass. Soc. October 27, 2010).
- “*Working conditions*”: Working conditions are interpreted as a combination of the “*working atmosphere*” and the general attitude of the employer with regard to the employee.
- “*That are likely to harm the rights, the dignity, the physical or psychological health of the victim or his professional career*”: In most cases, the deterioration of the physical or psychological health of the employee will have actually occurred. However, there can be bullying where the deterioration is merely “likely” to affect the health of an employee even though such deterioration has not in fact occurred (Cass. Soc. 30 April 2009).

In addition, these broad definitions mean that a wide range of acts can constitute bullying, such as: unjustified disciplinary measures; demotion; denigration; humiliating statements; and ostracization.

In addition to the definition under the French Labor Code, bullying also includes harassment on the grounds of Protected Characteristics by reason of France’s implementation on EU Equality of Treatment Directive. This definition of harassment under this legislation is different from that of bullying under the Labor Code. In particular, in contrast to the definition under the French Labor Code, repeated acts are not required to characterize discriminatory harassment.

### Germany

There is no specific legislation prohibiting bullying (commonly called “mobbing” in Germany). Rather, bullying is dealt with through a variety of legal frameworks including:

- The German Constitution – which provides protection of personality, honor, health and equal rights of individuals. This is deemed to include the outlawing of bullying.
- The German Civil Code (GCC) providing the legal foundation for contractual liability and tort claims which can be extended to claims for bullying and stress at work.
- Employment-related laws aimed at preventing workplace discrimination and ensuring health and safety for all employees including: the General Equal Treatment Act of 2006 (ETA) (*Allgemeines Gleichbehandlungsgesetz*) preventing discrimination at work, the Occupational Health and Safety Act of 1996 (*Arbeitsschutzgesetz*), implementing measures to improve the health and safety of employees and the Works Constitution Act of 2001 promoting workplace equality.

In addition many businesses treat bullying as a violation of their collective work agreements and/or have implemented internal regulations to address work-related stress and harassment.

Within this general framework, there are three categories of bullying:

- harassment that is not based on Protected Characteristics (called bullying or mobbing);
- harassment that is based on Protected Characteristics; and
- bullying as a criminal offence.

### **Workplace bullying not based on Protected Characteristics**

Although there is no statutory definition, German Federal Labor Court jurisprudence has defined bullying as “systematic hostility, harassment and discrimination with the goal of systematically harming the other with respect to his or her feeling of worth”. This definition has further evolved through case law such that the following three conditions have to be satisfied for there to be bullying:

- a combination of single events with continuity, or, “*links in a chain*” of systematic harassment;
- a violation of the target’s legal rights, namely:
  - their health (including physical harm and psychological harm of a certain “gravity”);
  - their personality (through systematic attacks against the victim’s dignity as determined by a judge);
  - their property/financial interests (such as theft, constructive dismissal or lost wages due to harassment); and
- an “unidirectional character” - which means there should be neither reciprocation nor provocation by the victim.

### **Workplace bullying based on Protected Characteristics – discriminatory harassment**

In Germany, discriminatory harassment is directly addressed by anti-discrimination laws. Specifically, Germany’s General Act on Equal Treatment prohibits adverse treatment on the basis of Protected Characteristics. Importantly, these have been held to apply equally to an employee’s *perceived* protected traits, for example, if an employee is mistreated because he is suspected to be a Muslim, but in fact he is Christian, then this treatment would still be classified as illegal discrimination in spite of the perpetrator’s mistake.

### **Criminal law**

Bullying can also be a criminal offense (in more extreme cases). Depending upon the acts committed, bullying can be prosecuted under a variety of German Criminal Code articles, including intentional or negligent bodily injury, duress, defamation and baseless insult.

### **Some illustrative examples of workplace bullying in Germany**

Dr. Heinz Leymann, a German industrial psychologist, published a list of 45 bullying activities that are an authoritative point of reference in Germany (and which in our view has application beyond Germany). The list includes the following five general categories:

- *Attacks on Communicative Ability*: where a supervisor limits a victim’s opportunity to express themselves; a victim is constantly interrupted; the supervisor avoids contact with victim through rude glances or gestures;
- *Attacks on Social Relationships*: no longer speaking to a targeted person placing a victim in a work station far away from others; treating the victim “like air”;
- *Attacks on Social Image*: spreading rumors; imitating a victim’s walk, voice or gestures as a form of ridicule; assigning work tasks that damage a victim’s self respect;
- *Attacks on Quality of Workplace Situation*: not assigning any work tasks to a victim; assigning tasks above a victim’s qualifications in order to discredit the victim; and

- *Attacks on Health*: forcing a victim to perform health-endangering tasks; use of minor acts of violence; vandalizing home or workplace of the victim.

## **Spain**

In Spain, the legal framework for bullying can be split into three categories:

- bullying under Spanish civil law other than in relation to Protected Characteristics;
- bullying in relation to Protected Characteristics; and
- criminal liability for bullying.

### **Workplace bullying not based on Protected Characteristics**

Spanish civil law does not specifically address bullying at work, however there are a variety of more general civil provisions which can give individuals legal redress against bullying and work-related stress, including:

- The Spanish Constitution – which guarantees “*dignity*” as an inalienable right, the “*right to life, and the physical and mental (or moral) integrity*” of every person and the right to privacy, honor, and respect of one’s image and reputation.
- The Law of the Statute of Workers gives all workers rights to their “*physical integrity*,” “*privacy*” and “*due consideration for their dignity*” including protection against abuse based on ethnic origin, religion, convictions, sickness, age or sexual orientation.
- The Law on Prevention of Occupational Risks and Rule 39/1997 on Preventative Services (RSP), and other health and safety regulations – which includes a broad duty for employers to maintain a safe workplace.

In this context, the labor administration has adopted a code of practice on violence and harassment for the labor inspectors in charge of enforcing health and safety regulations which provides for the following general definition of bullying: “*Where an unwanted conduct occurs with the purpose or the effect of violating the dignity of a person, and of creating an effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment*” (Code of Practice for the Spanish Labor Inspectors on Bullying and Violence at Work 69/2009).

The Code also establishes three basic elements constitutive of legal bullying:

- the acts must be carried out with “*the purpose or the effect*” of violating the victim’s rights (demonstrating the bully’s intent is not required). As in France, therefore, under civil law, bullying does not require the bully to have the intent of bullying. Rather, there only needs to be a causal link between the conduct and the resultant harm (Spanish Constitutional Tribunal, 89/2005);
- the behavior creates an intimidating, hostile, degrading, humiliating, or offensive environment for the victim; and
- the behavior is repetitive and capable of harming the victim’s health (Tribunal Supremo de Justicia Galicia 30 May 2005, AS 1515).

### **Workplace bullying based on Protected Characteristics (and certain other characteristics)**

Article 17 of the Workers Statute of 1980 outlaws bullying on the grounds of Protected Characteristics that affects working conditions. In addition to outlawing bullying on the grounds of Protected Characteristics, this legislation also prohibits bullying on the grounds of social status, political beliefs, membership of a trade union and language. In addition, Law 3/2007 which requires equal treatment of men and woman also outlaws harassment on the basis of gender.

### **Criminal liability for bullying**

In June 2010, bullying at work was codified as a criminal violation under Article 173.1§2 of the Spanish Penal Code. Specifically, the new law has made it an offense, punishable by imprisonment for between six months and two years for: *“those working in the private or public sector taking advantage of their superior position and performing against another person repeated hostile or humiliating acts which without constituting degrading treatment involve serious harassment of the victim”*.

The necessary elements of the criminal offense of bullying are:

- repeated acts (this requirement has been further elaborated by case law);
- hostile or humiliating;
- that do not constitute degrading treatment<sup>1</sup>, but represent a serious harm to the victim;
- must be committed by a superior towards someone lower in the hierarchy (this excludes “horizontal” harassment where coworkers or peers mistreat one another, or inverse vertical harassment where it is the supervisor who is the victim); and
- intentionality is required (negligent harassment is not punished).

However, there are questions as to the effectiveness of this new law, particularly given that criminal proceedings are very slow and generally last for a minimum of three years.

### **Some illustrative examples of workplace bullying in Spain**

Some illustrative examples of workplace bullying include the following:

- Spain’s Supreme Court ordered the municipal government of Coria to pay €4,500 in compensation to an employee who was forced to work in a basement, with neither daylight nor ventilation.
- Spain’s Supreme Court ordered a tool company to pay €14,000 for “biased psychological pressure,” and another € 30,000 in compensation for psychological damages to an employee who was forced to do work that did not fall within his job description, and was below his qualification level.
- The court rejected an employee’s claim of bullying, holding that although the person suffered occasional or isolated incidents where he was not respected and his job duties were changed, the mistreatment did not rise to the level of bullying and the changes in his responsibilities were legitimate because of a restructuring of the organization (STSJ 1 December 2009, Galicia 5295/2009).

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<sup>1</sup> Degrading treatment is a crime against moral integrity also sanctioned by the Penal Code. Generally, Spanish courts have considered that the crime against moral integrity should be related to torture and harassment should not be included in this concept.

## UK

UK law has two concepts related to workplace bullying.

### **Discriminatory harassment under the Equality Act 2010**

The Equality Act is a single statutory framework for the majority of UK discrimination law which covers all Protected Characteristics. Under the Equality Act, there is harassment where: “*A engages in unwanted conduct related to a protected characteristic (or of a sexual nature) that has the purpose or effect of violating B’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*”

Whether the conduct has that effect is judged subjectively from B’s viewpoint, subject to a test of reasonableness. Claims under this act made by employees must be made before employment tribunals (special courts that determine employment related disputes).

Harassment under the Equality Act also covers “associative” and “perceptive” harassment.

Associative harassment is where someone harasses an individual by reason of a Protected Characteristic because a third party associated with that individual possesses that characteristic – for example it would cover homophobic remarks made because someone is friends with someone who is gay.

Perceptive harassment is where someone is harassed because they are perceived to possess a Protected Characteristic even though as a matter of fact they do not (such as islamophobic remarks made to an individual who is not in fact a Muslim).

### **Bullying not based on Protected Characteristics**

The second concept of workplace bullying derives from the Protection Against Harassment Act 1997. This makes it unlawful for someone to pursue a course of conduct which they know or ought to know would be harassment, which includes causing someone alarm or distress. Claims under this legislation cannot be brought before employment tribunals – rather, they must be brought before County Courts or High Court. In contrast to claims under the Equality Act, the harassment does not need to be connected to a Protected Characteristic. Despite this wider scope, claims under this act, particularly against employers, tend to be limited to the most severe forms of bullying, in large part for the following reasons:

- The test for harassment under this statute is a high one as illustrated by the decision in *Majrowski v Guy’s and St Thomas’ NHS Trust* where it was held that to fall within the meaning of the act, the conduct must be “*oppressive and unacceptable*”, rather than “*merely unattractive, unreasonable or regrettable*”. This is a harder test to satisfy than the test under the Equality Act.
- The Protection Against Harassment Act requires there to be a course of conduct, (i.e. more than one incident of harassment). In contrast, a single incident can constitute unlawful harassment under the Equality Act.

## **QUESTION 2**

### **WHAT IS THE LEGAL FRAMEWORK ON THE PREVENTION OF STRESS IN THE WORKPLACE?**

#### **The European Union Legal Framework**

In addition to general principles regarding the dignity, health and security of employees, there is a European agreement that specifically addresses workplace stress which:

- provides “*employers and workers with a framework to prevent or manage problems of work-related stress*”; and
- increases “*the awareness and understanding of employers, workers and their representatives of work-related stress*”.

#### **France**

The mandatory provisions of the French Labor Code do not specifically address stress in the workplace, however, stress prevention is encompassed in the general obligation to prevent unhealthy working conditions.

The subject of stress has been addressed by the inter-professional social partners (employer and employee representatives) in a nation-wide collective bargaining agreement concluded on July 2, 2008. This defines stress and examines work organizations, employee privacy, the quality of working life and liability of employers.

Following waves of suicides in several major French companies that employees attributed to high stress levels at work, many large companies are currently in negotiations with unions to establish agreements on work-related stress. The aim of these agreements is to define stress, to identify stressful working situations and the implementation of preventative measures.

#### **Germany**

The Occupational Health and Safety Act requires employers of ten or more workers to assess the health and safety risks of their employees and to implement measures to reduce these risks.

Such risk assessments must include testing the level of mental stress present in the workplace. The law does not proscribe a particular method that must be used. However the Federal Institute for Occupational Safety and Health recommends:

- the use of clear, simple employee questionnaires;
- the creation of workplace “health circles” as forum to discuss stress-related issues; and on-site inspections to identify possible stress factors.

#### **Spain**

The Prevention of Occupational Hazards Act requires employers to inform employees about all work-related risks to their health and safety, including risks to their psychological health such as stress.

In addition, Royal Decree on the Prevention of Occupational Hazards 39/1997 requires that employers assess stress as a work-related health risk and furthermore take actions to mitigate such risks.

The 2005 Collective Bargaining Agreement included the European Framework Agreement on Stress at Work as an annex with the purpose of generating “*a greater understanding and awareness concerning work-related stress and its prevention, elimination and reduction*”.

## UK

The UK Health & Safety Executive defines stress as the “*adverse reaction people experience when excessive pressures or types of demand are placed on them*”. The main framework for bringing stress-related claims (as opposed to claims for bullying) are:

- **Health and safety legislation:** Under the Health and Safety at Work etc Act 1974 and related statutory instruments, employers have a duty to undertake risk assessments and manage activities to reduce the incidence of stress at work. Under these requirements, businesses are expected to carry out a suitable and sufficient risk assessment for stress, and to take action to tackle any problems identified as a result of the risk assessment. In its guidance to employers on tackling workplace stress, the UK Health & Safety Executive recognizes that undertaking this type of assessment is more complicated than an assessment which involves physical hazards.
- **Personal injury claims:** Employees can bring claims for work-related stress under the law of negligence, whereby employees allege their stress is a result of their employer breaching the common law duty of care they owe to employees. To succeed in a claim, an employee will have to show:
  - that an employer has breached the duty of care owed to the employee;
  - that it was reasonably foreseeable that an injury would result from the breach; and
  - that a loss, in the form of personal injury, has actually occurred.

### **QUESTION 3**

#### **HOW CAN BULLYING/HARASSMENT BE PROVED OR DISPROVED?**

##### **France**

###### **Proving and disproving bullying – shifting burden of proof**

An employee alleging to be the victim of bullying must establish facts which allow a presumption to be made that bullying has occurred. If the employee is able to do this, then the burden of proof shifts to the employer to demonstrate that acts complained about do not constitute bullying and were justified by objective elements that had nothing to do with bullying (Article L.1154-1 of French Labor Code).

Once a complainant has made allegations of fact, the judge then forms an opinion, and may then order steps to investigate the situation with a particular view to determining whether the facts alleged by the complainant are accurate and consistent (Cass. Soc. January 25, 2011, 09-42.766). The judge must take in consideration the facts alleged by the employee altogether and must not assess them separately (Cass. Soc. June 6, 2012, n° 10-27766). The burden of proof will shift to the employer to disprove bullying if several facts considered as a whole support the presumption that bullying has occurred (Cass. Soc. April 6, 2011, 09-72488).

###### **Protection of the victim and of the witness – no retaliation**

In order to protect the workers and to promote the reporting of bullying facts, the French Labor Code provides that employees may not be disciplined, terminated or discriminated for reporting bullying or for being or refusing to be subject to bullying measures. As a result, any measure against a worker as retaliation against a good faith report of bullying is null and void.

##### **Germany**

For general bullying claims (ie those not based on discriminatory harassment), employees must establish:

- the bullying acts, and
- the causal nexus between such acts and the harm suffered.

It is common for claimants to invoke medical expert evidence in order to establish causal links.

In practice, it can be difficult to establish bullying because of the difficulty of obtaining evidence in support of an allegation, especially given: the tendency of those who bully to do so only in the absence of witnesses; and the difficulty of proving psychological damage as well as establishing any causal link between any such damage and the acts complained of.

For discriminatory harassment claims based on a Protected Characteristic, as in France, the burden of proof shifts from requiring an employee to prove bullying to requiring an employer to disprove bullying once an employee proves the existence of circumstances that could give rise to a presumption of harassment as a result of a Protected Characteristic.

###### **Protection of the victim and of the witnesses – no retaliation**

For claims of discriminatory harassment, an employer may not retaliate against employees for asserting rights or penalize employees who act as witnesses in support of a claim for bullying.

## Spain

For discriminatory harassment, case law has established that if the employee can establish *prima facie* evidence of discriminatory bullying, the burden shifts to the employer to disprove such claim (Constitutional Court, Judgement 38/1981). This procedure is rooted in the court's understanding that any breach of the principle of equality is a type of discrimination and therefore merits a burden shift.

Where the bullying is not based on a Protected Characteristic (or the additional protected characteristics under Spanish law) there is a different regime for proving bullying. In particular, bullied employees must adduce "strong evidence" in support of their claims: only then is the burden shifted to the employer to disprove bullying.

## UK

### **Discriminatory harassment under the Equality Act and the burden of proof**

Where bullying is on the grounds of Protected Characteristics, the Equality Act provides that the burden of proving harassment (like all other forms of discrimination) can shift away from the employee such that an employer has to prove that there was no harassment. Specially, the section 136 of the Equality Act provides as follows: *"If there are facts from which a tribunal could decide, in the absence of any other explanation, that a person (A) contravened a provision of the Act, the tribunal must hold that the contravention occurred...This does not apply if A shows that A did not contravene the provision"*.

The explanatory notes to the Equality Act provide the following helpful example of how these rules work (which would apply to harassment in the same way that it applies to discrimination): *"A man of Chinese ethnic origin applies for a promotion at work but is not given an interview for the job. He finds that a number of white colleagues were given interviews despite having less experience and fewer qualifications. He brings a case for race discrimination before the employment tribunal and provides sufficient evidence to show that he had been treated less favorably because of his ethnic origin. It would then be up to his employer to prove that she had not discriminated against him in the promotion process"*.

### **Bullying under the Protection Against Harassment Act**

There is no shifting in the burden of proof under this legislation. Accordingly, it can often be difficult for employees to adduce sufficient evidence to demonstrate unlawful bullying under this statute, which only tends to be invoked in more extreme cases of bullying.

### **Protection of the victim and of the witnesses – no retaliation**

For claims of discriminatory harassment based on the Equality Act an employer may not retaliate against employees for asserting rights or penalize employees who act as witnesses in support of a claim for bullying.

**QUESTION 4**

**TO WHAT EXTENT IS AN EMPLOYER LIABLE FOR BULLYING/HARASSMENT SUFFERED BY ITS EMPLOYEES?**

**France**

In a 2006 decision, the French Court held that employers owe their employees an obligation of safety for the protection of their physical and mental health. An employer is strictly liable for incidents and actions that harm employees. Once bullying has been identified, the employer is liable, regardless of preventative measures in place or other seemingly mitigating factors. Specifically:

At work an employer is:

- liable for bullying caused by managers of the employee;
- responsible for bullying by colleagues of the employee; and
- may in certain circumstances also be liable for bullying performed by a third party with authority over employees.

As to incidents that take place outside of the workplace, an employer is liable for acts of bullying committed by an employee against another employee if those acts were made possible because of the working relationship between the parties (sending emails with sexually explicit content to another employee through the MSN network has been recognized as sexual harassment - Cass. Soc. October 19, 2011).

**Germany**

Under the German Civil Code §241 and the Work Constitution Act of 1972 §75, an employer owes a duty of care to its employees in respect of their rights and interests (and specifically their health, personality and property), as well as having an obligation to protect employees from bullying and to organize the company so as to reduce the risk of bullying.

As a result, the employer is liable for:

- its own acts of bullying (i.e. giving unlawful or un-executable directives or by insulting or socially excluding the employee); and
- acts by managers and members of the managing or supervisory board.

An employer may also be vicariously liable for bullying by third parties (e.g. where an employer failed to protect the employee against the behavior of supervisors, co-workers or third parties who over whom an employer exercises influence).

**Spain**

Bullying may entail employer's liability in different ways.

- an employer's own acts of bullying against employees (either actively by positive acts of psychological or physical violence, or passively by failing to take proper preventive measures against such actions); and

- where the bullying is carried out by an employee from the company, who is not acting on behalf of the company, or even a third party, the employer may be held liable for its failure to protect the victim against bullying.

## UK

An employer can be vicariously liable for acts of harassment by its employees both for general bullying under the Protection Against Harassment Act and for discriminatory harassment under the Equality Act. However, the tests for vicarious liability under both acts are different. It is harder for an employer to be vicariously liable under the Protection Against Harassment Act than under the Equality Act.

In particular, under the Protection Against Harassment Act, the correct approach is to look at the relative closeness of the connection between the nature of the employment and the particular conduct complained of and to ask whether, looking at the matter in the round, it was just and equitable to hold the employer vicariously liable.

In contrast, where there is harassment or bullying within the meaning of the Equality Act 2010, anything done by an employee “*in the course of their employment*” is treated as having also been done by the employer (section 109(1)), regardless of whether the employee’s acts were done with the employer’s knowledge or approval (section 109(3)). However, there is a defense available to an employer under the Equality Act if it can show that it took “*all reasonable steps*” to prevent the employee from doing the discriminatory act or from doing anything of that description (section 109(4)).

## **QUESTION 5**

### **WHAT FINANCIAL AND LEGAL RISKS DO EMPLOYERS FACE WHEN DEALING WITH BULLYING/HARASSMENT AND STRESS CLAIMS?**

#### **France**

##### **Nullity**

No employee can be sanctioned or terminated because they have been subjected to bullying or refused to partake in or consent to acts of bullying. In such circumstances, any termination or other sanction imposed by an employer is null and void (article L. 1152-2 of the French Labor Code). As a consequence, where an employee is dismissed in connection with bullying, they have a right to be reinstated.

##### **Damages**

Bullying is a civil wrong. Therefore, the employee can claim for damages for the prejudice suffered. The amount of damages is assessed by the judge. Depending on the seriousness of bullying, damages generally range between €2,000 and €45,000.

##### **Constructive discharge**

An employee who suffers acts of bullying can claim that their contract has been terminated by the employer's breach (*prise d'acte*) or request that the judge deem the contract terminated (*resiliation judiciaire*). In such circumstances, where an employer is found liable for bullying, an employee will be awarded damages for unfair termination in addition to damages to compensate for the damage suffered as a result of the bullying.

##### **Work accidents and professional sickness**

The recognition of workplace bullying can constitute an "*inexcusable fault*" of an employer's duty to protect the health and safety of an employee. In such cases, the employer may be held liable to indemnify the social security fund for payments made to the victim employee (loss of wages, pain and suffering).

##### **Criminal sanctions**

Bullying is punishable by a fine of €15,000 and up to one year of imprisonment for individuals and up to €75,000 for companies.

#### **Germany**

##### **Complaints based on bullying**

The Works Constitution Act of 1972 (*Betriebsverfassungsgesetz*) gives employees various rights in respect of complaints of bullying. Specifically:

- an employee may file a complaint to the employer and may call for the assistance of the Works Council, if he feels that he has been the victim of discriminatory bullying. If justified, the employer must correct such grievance, and if no action is taken the employee may sue for compliance (§84); and
- an employee may file a complaint with the company works council, if the works council deems the complaint as justified, it will seek redress from the employer (§85).

Reprisals against employees who bring complaints under this Act are prohibited.

### **Injunctive and specific remedies**

There are a range of options open to employees including:

- an employee may seek an injunction to restrain an employer committing further acts of mobbing (GER Civil Code §§611, 241);
- an employee may refuse to work - albeit that this option is reserved for serious situations where such action is necessary to avoid continued harm (Right of Retention GCC §273);
- an employee has the right to demand their own transfer within the company (to an existing job) (GCC §241)
- a victim may terminate their employment without notice (GCC§ 626) - this action must be in response to a serious situation and it must be made within two weeks of the inciting incident. It gives an employee rights to damages including for the loss of their job.

### **Contractual and tortious remedies**

These include:

- damages for loss of job (GCG §824);
- pain and suffering damages for injury to health and for harm to right of personality can be recovered (GCG §253);
- 100% sick pay for up to six weeks paid by employer; and
- reimbursement for the gap between German Social Security sickness allowance and pay (for the period after six weeks when the employee will be paid up to 70% of salary by the State).

### **Remedies for discriminatory harassment (brought under the ETA)**

These include:

- compensation for financial loss and for pain and suffering (ETA § 15 (1) and (2));
- if an employer takes no measures, or takes unsuitable measures to stop harassment measures, an employee is entitled to stop working without loss of pay if this is necessary for an employee's protection (ETA § 14). However, if an employee stops working where these conditions are not satisfied, an employer is entitled to dismiss an employee for not attending work (GCG § 273);
- the works council, if one exists, can file for injunctive relief if the employer commits an act of harassment which is a gross violation of the ETA (ETA § 17); and
- the nullification of any dismissal in breach of the ETA and an order of reinstatement. This option is rarely chosen by employees and in most cases a settlement is reached whereby the termination of employment is confirmed and the employee receives an indemnification.

## Spain

Criminal sanctions specific to bullying include six months' to two years' imprisonment.

From the civil standpoint, in addition to damages the following remedies are available:

- claims analogous to constructive discharge; and
- an order to nullify any termination or other measures taken on discriminatory grounds.

In addition to actions brought by bullied employees, employers run the risk of being sanctioned by the Spanish Administration itself where Labor Inspectors find that a worker's dignity has been violated, including through acts of bullying. This may lead to significant fines ranging from €6,251 to €187,515 for violations of labor law and from €2,046 to €819,780 for infringement of health and safety regulations. Labor Inspectors may also initiate proceedings to impose a 30-50% surcharge of a bullied employee's Social Security charges if the harm suffered was caused "exclusively" by the performance of work. (Spanish Social Security Act, Article 115.2.e).

Finally, bullying can lead to additional Social Security liability. An employer guilty of bullying is liable to be charged between 30-50% of an injured employee's total disability subsidy for work-related injuries that are due to the employer's failure to properly mitigate risk.

## UK

Where there is harassment or bullying whether under the Protection Against Harassment Act or the Equality Act, the main remedy for an employee is compensation. Compensation will primarily be based on the financial losses (such as loss of earnings and loss of pension) flowing from the conduct complained of. For example, where an individual resigns because of having been harassed, they will be entitled to compensation for their loss of salary and benefits until they find a new job (or the continuing losses by reason of being able to find a job that is as well paid as their previous one – something that is increasingly common in the current economic environment). A claimant will have a duty to mitigate these losses.

Severe cases of harassment can cause serious and long-term damage to the health of claimants which may mean that they are too unwell to seek a new job for a significant length of time. In such cases, the level of compensation for financial losses can be very high because it will be based on multiple years of lost earnings. In addition to loss of earnings, claimants are also entitled to compensation for injury to feelings. There are judicial guidelines as to the amounts payable, which are known as "*Vento*" guidelines. The guidelines were recently increased and are currently as follows:

- between £600 - £6,000 for less serious cases, such as a one-off incident or an isolated event;
- between £6,000 - £18,000 for serious cases which do not merit an award in the highest band; and
- between £18,000 - £30,000 for the most serious cases, such as where there has been a lengthy campaign of harassment.

Awards can exceed this only in the most exceptional cases.

Where there is harassment under the Equality Act, claimants are also entitled to two further remedies: judicial recommendations and judicial declarations.

Judicial recommendations can also be made for the benefit of the wider workforce. For example, a recommendation that all employees within a particular department are provided with training to prevent harassment.

The power to make a judicial declaration is simply a declaration by a tribunal as to the rights and obligations of the claimant and the respondent in relation to the matters to which the proceedings relate – for example, a tribunal will make a declaration that an employer was vicariously liable for a particular act of harassment to which a claimant was subjected on the grounds of nationality.

In addition, employees can claim the equivalent of constructive discharge if they are bullied at work. In some cases bullying which can justify a claim for constructive discharge would not constitute bullying under the Equality Act or the Protection Against Harassment Act. In these circumstances, the damages to which an employee is entitled will be based upon:

- a claim for the remuneration to which they would have been entitled during their notice period (in the UK employment contracts are not “at will” and an employer must give an employee notice which is the greater of the about set out in the contract of employment and one week’s pay per completed year of service); and
- damages for “unfair dismissal” – which is largely based on an employee’s loss of earnings until they are able to find a new job subject to (in most cases) a cap of around £70,000.

**QUESTION 6**

**WHAT SHOULD EMPLOYERS AND OTHER ACTORS BE DOING TO PREVENT BULLYING/HARASSMENT AND WRONGFUL STRESS AND TO MINIMIZE EXPOSURE TO LIABILITY?**

Despite the variety of statutory frameworks relating to bullying, harassment and stress, there is a high degree of uniformity around Europe as to best practices that employers should implement to minimize their exposure to liability. Some suggestions include:

- **Clear company statements making express that harassment and violence will not be tolerated:** Under French law, the internal rules of a company must state that bullying is prohibited. In any event, in France and other jurisdiction, this could be achieved through introducing clear policies and prevention plans in a company that prohibit any form of bullying which include descriptions of bullying and stress and the types of behavior that constitute bullying of lead to unfair stress; and
- **Implement procedures and policies:** These could include:
  - adopting a procedure for ensuring complaints can be freely raised and taking appropriate disciplinary actions in response to well-founded complaints;
  - implementing equal opportunities policy, an anti-harassment and bullying policy, and review those policies as is appropriate (and ensure that they cover social media);
  - a procedure for being alerted to wrongful conduct which might be characterized as bullying or stress;
  - an investigatory procedure to handle bullying claims quickly and fairly. Confidentiality of the procedure and the right of defense of the victim and the alleged bully should be ensured; and
  - a mediation protocol to resolve alleged incidents of bullying.
- **Raising awareness and appropriate training of managers and employees:** This can be achieved through the following:
  - providing the employees with processes and guidance for avoiding situations likely to lead to bullying and stress;
  - conducting audits and regular reviews to identify situations where there is a particular risk of bullying or stress; and
  - training managers and other supervisors to prevent and detect bullying, stress and harassment.

In France, the need for adequate training is emphasized by collective bargaining agreements. Training requirements also exist in Germany and the UK in order to prevent discrimination. In addition, in the UK as part of the general requirements to maintain a safe place of work, company's should carry out audits to identify situations where there are particular risks of bullying or stress.

**QUESTION 7**

**WHAT TRENDS ARE WE SEEING AND WHAT CAN WE EXPECT (E.G AN INCREASE IN CLAIMS, NEW LAW, ARE TREND FOR MULTI-NATIONALS TO ADOPT GLOBAL POLICIES)?**

One trend that we are witnessing globally is the ability for social media to be used as a means of bullying and harassing employees. The number of cases of “Facebook” harassment between work colleagues is on the rise everywhere. In this regard, we consider that any social media policy (and we recommend companies adopt these) contain specific prohibitions against misusing social media (whether inside or out of work) to bully or harass colleagues. At the very least any anti-harassment and bullying policies should expressly cover the risks of social media and cyberbullying.

**France**

Mobbing claims are on the increase. This phenomenon can be explained by various reasons:

- the rules on the burden of proof help employees show the existence of harassment;
- French courts have adopted a very wide concept of workplace harassment; and
- sanctions for harassment offer a very strong tool to employees in their negotiations with employers.

The issue of stress is also a growing concern which is frequently used by personnel representatives in collective bargaining with employers. The prevention of stress and necessity of protecting the health and safety of the workforce are now very systematically raised in the information and consultation proceedings in matters that affect the working conditions of the employees (e.g. implementation of professional assessment tools, change in the working organization, implementation of a management by objective system and creation of open space offices).

**Germany**

Despite an increase in the number of actions alleging workplace mobbing (based on unprotected grounds), there have been only a few cases where employees have succeeded in actions for mobbing.

Nonetheless, mobbing has become a common topic in negotiations between employee representatives and employers, albeit that it is most often discussed in connection with individual employee grievances and not general workplace policies. The expectation is that bullying and stress will become increasingly significant issues in Germany.

**Spain**

Bullying claims are on the increase in Spain. The perception is that this increase is mainly due to the high level of protection now afforded to employees in these situations together with the scope for significant compensation and other remedies. Note however that punitive damages are not awarded in Spain.

The law of bullying is developing through the growing body of case-law that has developed over the past six to eight years. The prospects of an employee succeeding in a claim for bullying are very fact specific. However, in order to establish bullying, an employee needs to present robust evidence of a situation that prevents them from properly carrying out their duties in a professional way (i.e. demotion of job title, change of office or seats or humiliating comments). The case-law also makes clear that mere personality clashes or differences of opinion will not constitute bullying.

The 2007 law on Gender Equality requires company's to adopt anti-harassment provisions, particularly on the basis of gender and sexual orientation. As a result anti-harassment policies have been widely applied through collective bargaining agreements and company policies to prevent bullying and to protect the company from damages and administrative fines.

### UK

In the UK, there has been an awareness of the problems and risks associated with workplace bullying, harassment and stress at work going back to around the late 1990's. This has been accompanied by an acceptance amongst employers that these are issues that they need to directly address through policies, processes and in their overall conduct.

Nonetheless, claims for bullying and stress are on the increase, especially in the context of social media and cyberbullying. In the main, these claims are brought through: actions for negligence for stress; claims under the Equality Act (in relation to Protected Characteristics); and claims for constructive discharge. There have been very few work-related claims successfully brought under the Protection Against Harassment Act.