

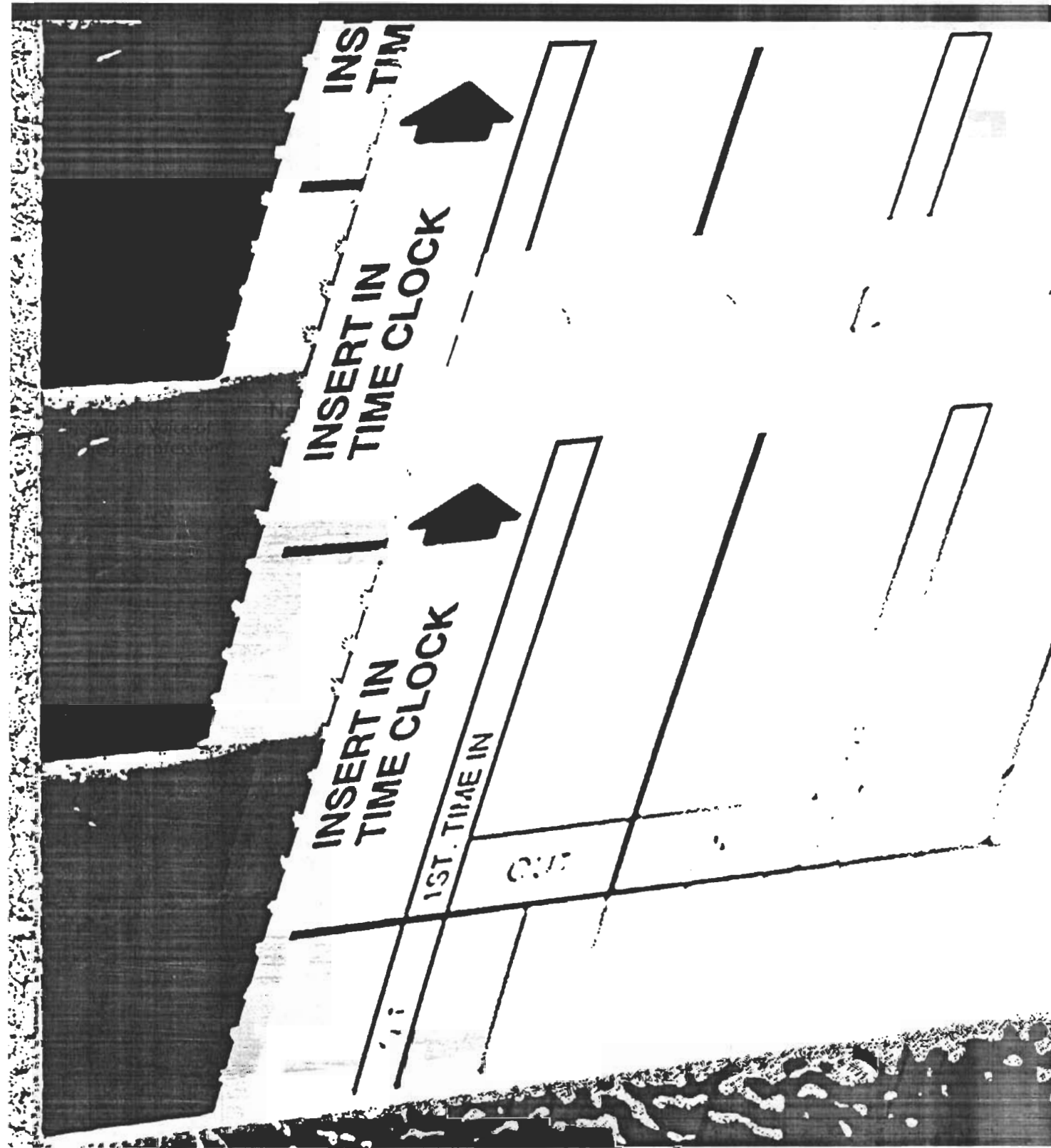


the global voice of
the legal profession*

Employment & Industrial Relations Law

Newsletter of the International Bar Association Legal Practice Division

VOL 22 NO 1 MARCH 2012



In this issue

From the Co-Chairs	4
From the Co-Editors	5
Committee officers	7
Update on whistleblowing in France	8
Corporate whistleblowing in the US	11
New US decision limiting extraterritorial scope of 'whistleblowing' provides welcome clarification to US multinationals	15
Cross-border investigations, discovery and the attorney-client privilege	18
Update on whistleblowing in Quebec and Canada	21
Update on whistleblowing in Mexico	25
A new focus on bribery and corruption in France	29
Executive compensation: potential employment issues companies may face when granting equity based compensation to their employees worldwide	32
Executive compensation: new regulation for Brazilian financial institutions	36
Remuneration policies: a tool expressing the increasing global scrutiny in the financial services sector	38
Global update: monitoring your employees' use of technology	41
The changing world of social media: challenges for employers	44
The Indian legal position on employee data protection and employee privacy	47
Discriminatory dismissal in Argentina	50
Discrimination and harassment in Argentina: an overview	52

Newsletter Editors

Selvamalar Alagaratnam
Skrine, Kuala Lumpur
sa@skrine.com

Paula Hogéus
Advokatfirman Delpini, Stockholm
paula.hogeus@delphi.se

Juan Carlos Pró-Risquez
Norton Rose, Caracas
jc.pro@nortonrose.com

International Bar Association

Tel: +44 (0)20 7842 0090 www.ibanet.org

© International Bar Association 2012.

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, or stored in any retrieval system of any nature without the prior permission of the copyright holder. Application for permission should be made to the Head of Editorial Content at the IBA address.

Terms and Conditions for submission of articles

- Articles for inclusion in the newsletter should be sent to the Newsletter Editor.
- The article must be the original work of the author, must not have been previously published, and must not currently be under consideration by another journal. If it contains material which is someone else's copyright, the unrestricted permission of the copyright owner must be obtained and evidence of this submitted with the article and the material should be clearly identified and acknowledged within the text. The article shall not, to the best of the author's knowledge, contain anything which is libellous, illegal, or infringes anyone's copyright or other rights.
- Copyright shall be assigned to the IBA and the IBA will have the exclusive right to first publication, both to reproduce and/or distribute an article (including the abstract) ourselves throughout the world in printed, electronic or any other medium, and to authorise others (including Reproduction Rights Organisations such as the Copyright Licensing Agency and the Copyright Clearance Center) to do the same. Following first publication, such publishing rights shall be non-exclusive, except that publication in another journal will require permission from and acknowledgment of the IBA. Such permission may be obtained from the Head of Editorial Content at editor@int-bar.org.
- The rights of the author will be respected, the name of the author will always be clearly associated with the article and, except for necessary editorial changes, no substantial alteration to the article will be made without consulting the author.



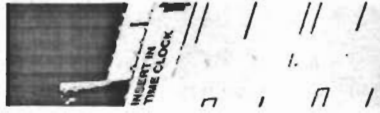
Printed in the
United Kingdom
by Hobbs the Printers Ltd
Totton, Hampshire
SO40 3WX
www.hobbs.uk.com

Advertising

Should you wish to advertise in the next issue of this newsletter please contact the IBA Advertising Department. advertising@int-bar.org

The IBA acknowledges the support of Kluwer Law International in the production of this newsletter

Wolters Kluwer Law & Business | Kluwer Law International



Discrimination and harassment in Argentina: an overview

Omar Beretta

Beretta Godoy,
Buenos Aires
beretta@berettagodoy.com

Mercedes Balado Bevilacqua

Beretta Godoy,
Buenos Aires
balado@berettagodoy.com

Introduction

All individuals have a fundamental right not to be discriminated against due to their gender, sexual orientation, race, colour, religion, thoughts, etc. This article explores how the right to non-discrimination is treated in Argentina.

Further, it focuses on the treatment that this right is given locally within the workplace. However, discrimination is not illegal if it is based on objective grounds (ie, the personal characteristics of the employee are essential to the execution of the tasks assigned or his/her objective qualifications makes him/her stand out from his/her co-workers). This paper also considers whether recent case law and jurisprudence extend discrimination actions to grounds different from those specifically acknowledged by law and how this right is currently related to the employer's duty of safety.

Finally, it will address relevant legal considerations covering moral and sexual harassment.

Labour discrimination

Key norms

The Argentina Constitution states '... All its inhabitants are equal before the law, and admissible to employment without any other requirement than their ability ...' (section 16) and establishes the principle of equal pay for equal work (section 14 bis).

The Constitution also includes international agreements, all of which prohibit discrimination based on race, gender, colour, sex, language, religion, political or other opinion, national or social origin, property or any other status, and these are outlined in the following:

- Universal Declaration of Human Rights, section 2;
- International Covenant on Civil and Political Rights, section 26;
- American Convention on Human Rights (Pact of San José de Costa Rica), section 1;
- International Convention on the

Elimination of All Forms of Racial Discrimination;

- Convention on the Elimination of All Forms of Discrimination Against Women;
- Convention No 111, section 1(1) of The International Labour Organization ('ILO') prohibits 'any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in the employment or occupation'.

Such constitutional hierarchy supporting the right to non-discrimination has been followed by national laws:

- Law No 23,592/2008 establishes that anyone who arbitrarily impedes, obstructs, restricts or in any way impairs the full enjoyment on an equal basis of fundamental rights and guarantees recognised in the Constitution, shall be liable, at the request of the victim, to revoke the discriminatory act or to cease the conduct and repair the moral and material damage caused; and
- Law No 26,485/2009 on the 'Integral Protection of Women' establishes concepts of domestic violence, institutional violence, labour violence, right to reproductive freedom, and discrimination by the mass media, all of them performed against women.

This national protection has been supplemented at a labour law level by:

- Labour Federal Pact No 25,212 establishes that employer's decisions involving any type of discrimination in employment on the grounds of race, colour, national origin, religion, sex, age, political opinion, social origin, union, or residence or family responsibilities will be considered a serious infringement.
- Labour Contract Law No 20,744 ('LCL'), section 17, forbids any kind of discrimination among workers on the grounds of sex, race, nationality, religion, political opinion, union or age. It also requires equal treatment in the same situations for every worker and includes the possibility of different treatment of

employees in equal situation grounded in principles of general welfare like efficiency and labouriousness.

- Accordingly, if an employer performs a discriminatory act, it could be considered a serious transgression and the employee who has suffered such discrimination could consider him/herself dismissed due to the employer's fault and claim the complete severance payment plus damages.
- Non Discrimination Law No 23,592 imposes sanctions on any discriminatory conduct based on race, religion, nationality, ideology, political opinion, union membership, sex, financial or social condition or physical features. Any person who commits a discriminatory act could be **obliged to annul or cease** such behaviour **and pay applicable damages.**
- **Protection of Women Law** relevantly **prohibits labour violence**, which it defines as including the prohibition of discriminatory acts and psychological harassment against women in the workplace.

Different grounds of discrimination

Discrimination can be mainly based on: race, age, colour, language, religion, nationality, ethnic origin, ideology, political opinion, union membership, sex, financial or social condition, or physical features.

However, the grounds of discrimination are not restrictive and can be extended by case law. Accordingly, this section considers a new extension of discrimination based on unequal treatment grounded on the consideration of certain illnesses as a cause for dismissal or imposition of disciplinary measures.

ALCOHOL AND DRUGS IN THE WORKPLACE

Alcoholism is defined in the *ILO Encyclopedia of Occupational Health and Safety* (4th edition, Geneva) as a primary, chronic disease with genetic, psychosocial, and environmental factors influencing its development and manifestations.

The ILO Code of Practice *Management of alcohol and drug-related issues in the workplace* (1998, Geneva) defines alcohol and drug-related problems as health problems and establishes the need to deal with them, without any discrimination, like any other health problem at work.

Taking these definitions into account, alcoholism and drug addiction are considered as illnesses and should be treated as such by employers.

Duty of safety

In Argentina the employer has a 'safety duty' – a set of security measures and technical resources that the employer must undertake in the labour contract to protect workers' mental and physical health. This duty also has a preventive focus aimed at preventing labour accidents and illnesses.

In general terms, section 75 of the LCI establishes a general guideline for an employer's duty of safety. It focuses on:

- compliance with the laws on health and safety in the workplace, and observing the rules of working hours and breaks; and
- damages resulting from a violation of the duty of safety which are governed by the occupational accidents and occupational diseases legislation.

Case law and academic opinion have expanded the scope of the legislative safety duty to providing a healthy working environment with no harassment and/or discriminatory behaviour. Compliance with the safety duty requires that employers perform all activities in such a way as to prevent a negative result on employees' health.

ALCOHOLISM AND DRUG USAGE UNDER THE SCOPE OF THE DUTY OF SAFETY

The duty of safety involves the employer's duty to take all measures and precautions in order to avoid accidents and illnesses related to work. Case law has extended the provision of a safe working environment and employment health to alcoholism and drug usage in the workplace:

- *LJA v Chai Nélida y Otros s/ accident, National Labour Court of Appeal (NLCA), Courtroom VII, 31 March 2011*: a worker suffered an accident at the workplace, the witnesses declared the worker was intoxicated. There was also evidence that he was constantly intoxicated. The Court ruled in favour of the worker, and ordered the employer to pay moral and material damages and loss of opportunity based on the argument of lack of control and omission of the duty of safety by the employer.
- *VOA v Société Air France SA s/ dismissal, NLCA, Courtroom VI, 15 July 2011*: the Court considered the situation where a worker returned to work after an alcoholism rehabilitation treatment and was dismissed without cause. The employee filed a claim based on discrimination. The Court decided dismissal at the end of an alcohol rehabilitation treatment is enough evidence to consider the situation as a discriminatory termination of the labour contract.



DISCRIMINATION AND HARASSMENT IN ARGENTINA: AN OVERVIEW

- *BLA v Securitas SA s/ dismissal, NLCA, Courtroom I, 28 October 2009*: the worker was serving as a private security agent and was drunk at the workplace. The employer proved that the worker was just drunk and not suffering from alcoholism. The Court ruled the dismissal by the employer was justified and the employer did not fail to comply with its safety duty.

From the analysed case law, it can be concluded that employers should take care of employees who suffer from alcohol or drug addiction and comply with their safety duty by treating the employee as a sick person and avoid imposing disciplinary measures for transgressions committed due to the effects of the mentioned illness. However, in cases where the employee is not an addicted person and fails in his/her duty under the employment agreement due to his/her consumption of alcohol or drugs, the employer is entitled to impose corresponding disciplinary measures, especially if the employee is involved in rendering services related to providing safety or security to people and goods.

The bill

Due to the increasing relevance of the referred matter and the current lack of legislation, the Addictions in the Workplace, Alcohol and Drugs Consumption Prevention, Treatment and Rehabilitation Bill has been introduced to Congress.

The important aspects are:

- Employees with problems of alcohol or drug abuse have the following rights: to have their addiction treated as an illness; non-discrimination; confidentiality; and equal opportunities for promotion and transfer opportunities.
- Employers should draft a written policy and communicate it properly to their employees.
- Treatment and rehabilitation process will be covered free of expenses by the worker health service.

Moral and sexual harassment

Moral harassment

The definition of workplace violence adopted by the ILO *Code of practice on workplace violence in services sectors and measures to combat this phenomenon* (2003, Geneva) includes 'all actions, incidents or behaviour which is

beyond reason, or acceptance; by which a person is hurt, threatened, humiliated or injured by another, as a direct result of carrying out their professional activity'. The concept of harassment includes mobbing, bullying, racial and sexual harassment.

ARGENTINA: LACK OF LEGAL FRAMEWORK

There is no specific legislation related to moral harassment in Argentina. However, major case law has ruled:

- *RF v Cablevisión SA, NLCA, Courtroom II, 12 October 2007*: moral harassment constitutes 'injury' in terms of Section 245 of the LCL and enough cause for indirect dismissal.
- In *Givone, Julieta Belen v Aguas Danone SA, NLCA, Courtroom VII, 29 April 2009* it has been defined as 'any manifestation of abusive conduct, specifically behaviour, words, acts, gestures that cause a damage to the individual's personality, dignity or physical or psychic integrity'.

As mentioned in point 2.1(b) above, women have special protection against psychological harassment given by the 'Integral Protection of Women Law'. This law establishes the concept of labour violence against women, which includes moral harassment which may be a ground for constructive dismissal as a result of the employer's failings.

Due to the lack of appropriate legislation, harassment situations also fall under the employer's safety duty to provide a healthy working environment.

Sexual harassment

Sexual harassment can be defined as an 'illicit conduct, that occurs when the employer or a key employee, taking advantage of his/her position, demands from an employee in a lower position sexual favours, the fulfillment of sexual favours being an essential condition influencing the worker's employment'.¹

ARGENTINA: LACK OF LEGAL FRAMEWORK

In Argentina, the matter is only partly regulated and solely for the private sector by Decree No 2,385/93.² However, case law has ruled:

- *Dentone, Josefina v Seguridad y Custodia SRL, NLCA, Courtroom IV, 15 March 2001*: within the concept of sexual harassment there is an integrative element composed by undesired sexual behaviour, where the victim perceives it as a condition of continuance of employment or where

such attitude has created a hostile, uncomfortable and humiliating labour environment which is characterised by sexual insinuations, physical contact, comments of sexual connotation.

- *Zarate Rolando Rúben c/ La Delicia Felipe Fort SA Felfort s/ dismissal, NLCA, Courtroom I, 23 March 2011*: the dismissal of a male worker was with 'just cause' based on serious failure of behaviour, namely sexual harassment, in conducting his duties as an employee in charge of another.
- *PVD c/ AS SA y otros s/ dismissal, NLCA, Courtroom IV, 15 March 2011*: a senior employee was dismissed based on behaviour not compatible with his position. His misconduct included sexual harassment toward a female worker and harassment, **disqualification and mistreatment of other employees he was in charge of. The Court ruled that the acts performed by the senior employee – taking advantage of his superior position – infringed section 14 of the Constitution and international treaties with constitutional hierarchy.**

The bill

In 2010, a bill related to labour violence in the private and public sectors was introduced and is currently being discussed in the legislature.

The main aspects are:

- Labour violence is defined as psychological action in a systematic way over a person or group of people in the workplace, in order to destroy their reputations, interrupt the exercise of their duties or make the employee resign. This includes any action intended to intimidate and/or emotionally or intellectually disturb the victim.
- Sexual harassment means any act, comment or repeated conduct with a sexual connotation, without consent by the recipient, when it is made with the explicit

or implicit intention of causing harm if the victim does not agree to the requirements of the harasser.

- Harassment could be performed by the employer, a superior officer or another worker.
- The employee, who is victim of harassment, can consider him/herself dismissed due to the employer's fault, with the right to collect severance payment.
- Upon receipt of a complaint of harassment by a superior, the employer must employ the necessary procedure to verify the complaint and take steps to ensure such conduct ceases.
- No employee will suffer a modification to working conditions or will be dismissed for reporting a situation of sexual or moral harassment.

Conclusions

Throughout this article we have summarised the most relevant aspects of Argentine considerations related to discrimination and harassment, focusing on certain discrimination cases. The lack of current legislation empowered case law to rule on the extension of employer's duty of safety to prevent discrimination and harassment.

Thus, it is important that employer's strengthen their human resources area to comply with such duty aimed at providing a healthy working environment. In doing this, they will also prevent claims and economic expenses related thereto.

Notes

- 1 Ricardo Oscar Gonzalez, 'Sexual Harassment in the workplace: fiction or reality', *Impuestos Magazine*, Volume LIX, p 1479.
- 2 Federico Basile Mercedes Balado Bevilacqua, 'Right to Privacy and its infringement in the workplace in Argentina', *International Bar Association Committee P News*, Vol 12, No 1, April 2002, p 15.