ACTIONS BY THE LABOR AND SOCIAL SECURITY ADMINISTRATIONS WHEN FACING WORK HARASSMENT WITHIN THE ENTERPRISE

Basque Observatory on Mobbing at Work
Bilbao

INTRODUCTION

The Basque Observatory on Mobbing at Work has been constituted in Bilbao in 2003 and is composed of lawyers, public prosecutors, judges, doctors, labor inspectors and labor psychologists who are sharing their knowledge and experience in this area and are promoting diverse activities.

This document deals with experiences that have taken place in our environment in reference to measures of prevention, intervention and protection when facing bullying (or "mobbing") in the work place before the affected people resort to the courts.

Those measures could take place in two spheres:

- Firstly, within the company, with the intervention of management, worker representatives and occupational health and safety services.

- Secondly, in the domain of interventions which are carried out by the public administrations of labor, health and social security in every country. These interventions should be addressed to effectively implement the measures within the company.

As we know, in each country the legislation could condition the different types of measures. We are only going to refer to those which, according to our opinion, could have a transnational relevance.

The first sphere where we should deal with the problems derived from the behaviors of bullying is, logically, within the enterprise or the company. The actions that can be undertaken when facing harassment can be classified according to three types. These can be:

- Preventive actions against harassment, when it has not occurred.
- Intervention actions against harassment, when it is notified.
- Actions of protection towards those workers affected.

In respect to these three types of actions, the administrative bodies can intervene in different ways:

- In respect to preventive actions, they can intervene promoting good practices and enforcing the prevention obligations of the employer.
- In respect to intervention actions, they can mediate or enforce the law.
- In respect to protection actions, they can offer social security benefits and enforcement of the protection to the affected workers.

In the following we are going to analyze the three kinds of actions within each sphere.

MEASURES:	**PREVENTION**	**INTERVENTION**	**PROTECTION**
WITHIN THE COMPANY	ASSESSMENT OF RISKS FACTORS OTHER MEASURES	INTERNAL PROCEDURES FOR DISPUTES INVESTIGATIONOF ILL-HEALTH	REHABILITATION MEASURES
GOVERNMENT ACTIONS	COUNSELING ENFORCEMENT	MEDIATION ENFORCEMENT	SOCIAL SECURITY BENEFITS ENFORCEMENT

1. PREVENTIVE ACTIONS AGAINST HARASSMENT

1.1. ACTIONS WITHIN THE COMPANY

Preventive actions against harassment are those which should be adopted before the bullying becomes manifest and they can be very varied. Those that are used most within our European environment basically are:

- The evaluation of psycho-social risks,
- The training of workers,
- The means of a suitable selection of the management of an enterprise
- The solemn statements by the employer aimed at making the workers aware of their rejection of these practices and to provide warnings to those who infringe the norms of coexistence.

Of all these measures, **the evaluation of psychosocial risks** is that with the greatest backing from the regulations of the European Community and from the national legislations on Occupational Health and Safety.

The remainder of the other stated measures could be executed as a consequence or as a result of the aforementioned evaluation. For that reason, we also consider the assessment of psychosocial risks as the most complete instrument to prevent stress and violence at work and thus we are going to analyze it next.

This process of evaluation or of "identification" (as the term chosen by the European Framework on work-related stress, which we deem as an equivalent term for purposes of Framework Directive 89/391/EEC), of the factors of psycho-social risk is already taking place in many European enterprises and also in those within our country.

This evaluation consists in the analysis of the organizational factors (or factors of psychosocial risk) which can be the source and origin of acts of bullying (or mobbing), in such a way that by reducing these factors we are taking a step further and making the appearance of conflict situations more difficult.

However, the putting into practice of this evaluation is giving rise to the appearance of some problems which we deem very fitting to comment on:

- First is that of guaranteeing the **confidentiality of the data and information** that is compiled from the workers in the process of evaluation.

  In order to try to guarantee this principle, many of the surveys and questionnaires which are used to initiate an evaluation are anonymous. However, the end purpose of the evaluation is to find out where there are problems and risk factors in order to make them known to the enterprise and to try to eliminate or reduce them.

The evaluator must play a delicate game of balance in order not to harm the privacy of the workers at the same time that he must try to assure that his preventive action is efficient.

- The second aspect is that of the guarantee of the **technical independence of the evaluator**. The evaluator must not be a member of the management of the enterprise but rather of its services of prevention, whether in-house or outsourced.

  This is a factor which differentiates the evaluations of a psychosocial risk from the surveys of satisfaction or of working environment that are undertaken within the framework of quality management within the enterprises.

  At first, it would seem that this technical independence is afforded greater guarantee if the evaluator is a person who is not involved in the enterprise and that has no interests of his own in it.

  However, the outsourced expert can be subject to more pressures from the enterprise as he has a business relation with it and is therefore more precarious, while the in-house expert of the prevention services office of the enterprise can enjoy a status of greater protection and technical independence if he expresses opinions that are not favorable to the management of the enterprise. The answer to this issue also varies with each case and circumstance.

- The third aspect is that of the evaluation or identification of problems related with stress and violence at the work place that do not affect the organization as a whole but rather only to **specific individuals**.

  The detection or identification of individual problems would be possible through the use of named questionnaires (not anonymous), through individual interviews or through actions of health monitoring that are undertaken in the Prevention Services within the enterprise.

  In this last case, the monitoring of health must include the monitoring of the mental health of those persons especially sensitive or with specific pathologies (whether linked or not to work) and not only at the time of the evaluation but rather as a periodic activity. In this instance, the medical services must provide itself with those tools which will allow them to detect it for its prevention.

  Generally speaking, the problem presented in the evaluations of psycho-social risk is that they only analyze the organization of the enterprise but not the circumstance that only affects specific individuals who are part of it. In these cases, they are not capable of detecting those isolated problems of stress or violence that only affect specific people.

  However, we deem that through the use of some of these techniques, it is possible to include the individual protection within the preventive planning

of the enterprise, taking into account individual situations when necessary and establishing alarm procedures for a rapid intervention in any of these situations.

- Another problem is the **tackling of this process in small enterprises**. The process in them must be much more simple and the use of interviews is preferable and not that of questionnaires.

- The presentation of the results of the evaluation must be done through a **literary description** and not through a mere presentation of numeric amounts. It is necessary to provide a quality analysis and not one solely based on quantity.

- The **measures adopted** must not be stereotyped but rather **must be very specific** and it corresponds to the employer, after consulting with the workers, to define and adopt them.

  Some specific measures, such as training, the employer's statements or code of behavior, should be adapted to the real situation of the company as it has been previously evaluated.

- Once the process of evaluation or analysis has been finished, one must devise which are the measures most adequate to maintain an **active monitoring of the risk factors in the future**.

  The repetition of this process in very short periods is not possible and the best formula for the establishment of detection and alarm mechanisms may be through the use of similar means (such as satisfaction surveys or the processes of quality management) or of periodic surveys aimed at a representative sample of the workers.

  All this set of measures must be sufficiently coherent so as to establish a preventive policy against stress and violence at work in each enterprise.

1.2. PREVENTIVE ACTIONS BY THE PUBLIC ADMINISTRATION

1.2.1. THE TASK OF PROVIDING COUNSELING AND SUPPORT

The first function of the Public Administration should be counseling and providing technical support to the enterprises, to the occupational health and safety services and to the workers for the handling of problems related with bullying or mobbing.

In many countries these tasks are carried out by public health or labor administrations. The responsibility in our territory belongs to the Basque

Institute for Occupational Safety and Health (OSALAN "Instituto Vasco de Seguridad y Salud Laborales").

The innovative character of the establishment of preventive measures when facing stress and violence at work often requires a fostering from the administration over its correct use by the enterprises and the prevention services.

Those entities dedicated to the research, promotion and counseling of the enterprises and workers in safety and health at work, such as OSALAN within the ambit of the Basque Country, also help as an element of socialization and communication of the experiences and good practices in this matter.

OSALAN also provides coordination between the health and labor administrations and can collaborate with the Labor Inspectorate in its function of control and supervision over the current legislation or enforcement.

1.2.2. ENFORCEMENT OF PREVENTIVE MEASURES

The enforcement task corresponds to the Labor Inspectorate, in our case to the “Labor and Social Security Inspectorate”.

The role of the Labor and Social Security Inspectorate in Spain is relevant insofar as the scope of the development of a sanctioning administrative law due to non-compliance with labor and social security regulations has been greater than in other countries.

In many European countries the main problem to enforce the preventive measures lies in highlighting the legal obligations for the companies in the domain of the Occupational Health and Safety laws.

Once violence and stress are deemed as health risks for the workers which the employer must avoid or reduce, then all the obligations set out in Framework Directive 89/391/EEC go into effect.

The employer should provide guarantees for the safety and health of their workers, take measures to avoid risks and assess all the risks which cannot be avoided.

Risk assessment should be aimed, in this case, to identify the factors that may cause stress and violence (including bullying) and to take all the measures necessary to prevent them.

Reaching this conclusion is not so difficult or risky, as we already have plenty of examples of physical and psychological illnesses whose origin can be found in situations of stress and violence at the workplace.

And as we shall see in the following, in our public system of social security, as well as in others, many of these ailments are recognized as work-related accidents once that relation of causation between work and illness can be demonstrated.

However, the public authorities of European States that control the application of preventive regulations still find difficulty in admitting in a clear and open manner the obligation to evaluate or identify the psycho-social risks in a proactive manner, in the same way as other kinds of risks. This ambiguity is also manifest in the Collective Agreements entered by the European social agents.

In this manner, the European Framework Agreement on Work-related Stress that was signed in 2004 only establishes the obligation for the employer to intervene after they have identified a problem related with work-related stress.

But it does not clearly state the obligation of the employer to undertake a proactive action of identification or analysis of the problems associated with work-related stress within their enterprise before the problem is clearly reported or identified. The employer's obligation is reactive but not preventive or proactive.

The Agreement also establishes a choice for facing work-related stress problems between the daily management of work-related risks, the establishment of a differentiated stress policy in each enterprise and the adoption of a specific measure in order to alleviate the problem.

However, these three options are not equal in content and value. The establishment of an anti-stress policy or the adoption of specific measures can take place correctly if it is preceded by an analysis or an evaluation of the stress risk factors in the workplace.

On the other hand, an evaluation or analysis of the risks can not have real effectiveness if we don't adopt a set of measures that compose a coherent preventive policy derived from that evaluation.

In fact, the use of these options always requires the same method, based on a previous analysis or evaluation of every situation (and that would require more or less depth) and the latter adoption of a measure or set of measures (or policy) that should be consistent with it.

What in fact could be understood is that two paths could be followed:

- That of the same treatment for all work-related risks within the company through the services and representatives of the enterprise and of those workers specialized in that field.

- Or a special and specific path in order to handle these matters in which the management of the enterprise and the ordinary representatives of the workers or other people intervene directly.

On its part, the recent European Agreement on Harassment and Violence at Work signed on April 2007 doesn't even mention the obligation to develop this preventive and proactive action of evaluation or identification of psycho-social risks but rather, as its main measure along these lines, establishes the implantation within enterprises of internal systems of mediation and arbitration for the solution of disputes related with harassment.

However, the introduction of these systems is not a measure that as such can be considered as preventive as it only is activated in those cases where the conflict has had a clear manifestation. Therefore, this is a measure of intervention and not a measure of prevention.

In order to combat this situation of silence and ambiguity, it would be very convenient for the administrative authorities of the European states or the European Commission to clearly state itself in favor of the need to undertake an evaluation of the psycho-social risks in all workshops in accordance with that provided in Article 6 of the Framework Directive and even embody that willingness in a solemn statement or declaration.

In Spain the lack of evaluation of psycho-social risks is considered an administrative offence which entails a fine ranging from € 1.500 to € 40.000.

2. THE INTERVENTION WHEN FACING HARASSMENT

2.1. WITHIN THE COMPANY

2.1.1. THE PROCEDURES OF INTERNAL MANAGEMENT OF DISPUTES

As we have already mentioned, the most generally accepted means of intervention when facing harassment in the workplace is that of the establishing of procedures of internal management of these types of disputes.

These procedures, as already partially included in the aforementioned European Agreement, must guarantee the confidentiality of the claims and that the acts are thoroughly investigated.

But in our opinion, the resolution should not be only limited to agreeing with one side or another, but rather also to implement preventive and protective measures for the health of all those affected.

Otherwise, these procedures become a mere copy of that corresponding to the imposition of disciplinary sanctions and would only contribute to an individualization of the problems (obviating the organizational problems which underlie in each case) and the potential danger that these problems could reproduce in the future.

Another additional guarantee that we think should be included in these procedures, and that is not provided in the European Agreement, is that of assuring the neutrality of the person who is going to mediate in the dispute or to issue a resolution in it. This person must not have any implication in the matter that he is to handle and he should also be protected in respect to future potential reprisals from the company management.

Some public administrations and enterprises in our surroundings, such as the Basque Government and the University of the Basque Country have already decided to implement this type of system through internal regulations or collective agreements.

However, the problem that is raised is the difficulty of its expansion to small enterprises as in most cases the resolution by the employer doesn't meet the minimum guarantees of objectivity and impartiality. Because of this, having the possibility that these problems could be managed in a sphere higher to that of the enterprise would be deemed advisable.

This is only possible if the legislation requires the implementation of these systems, either by following the Belgian example of the intervention of a work psychology expert in the external prevention services of the enterprise or through public or collective mediation systems as we shall see in the following.

2.1.2. THE INVESTIGATION OF ILL-HEALTH PROBLEMS WITHIN THE COMPANY

Another manner of intervening in these problems, that is not mentioned in the European Agreement but that can be found in the Spanish Law for the Prevention of Work-related Risks and not so much in Article 9.d) of the European Framework Directive, is the obligation of the employer to investigate the causes which may have been harmful to the health of the workers.

For this, it is necessary that the enterprise know, either directly or indirectly, through the affected worker, the possibility that the physical or psychological ailments that she suffers are, according to her judgment, due to a situation of stress or violence at work.

The prevention services of the enterprise is responsible for undertaking this investigation on the causes and also for proposing to the enterprise,

as a result of this, the adoption of preventive and protective measures for the affected worker or workers.

2.2. ACTIONS BY THE PUBLIC ADMINISTRATION

2.2.1. MEDIATION

As previously stated, the public systems of mediation are indispensable when the internal procedures are not put in place, when the problem has been raised in small and medium size companies or when the company management is involved.

A public system of mediation is the French model of intervention which is based on the "prud´hommes", as public mediators in all kinds of labor disputes.

Another system of mediation could be established for these cases via collective bargaining with a sector or territorial scope. This system has been implemented in the Basque Country but it has not yet been implemented for bullying disputes.

A third possibility is the mediating role, which can also provide technical counseling, of Labor Inspectors in labor disputes to employers and workers. As a matter of fact, this is the type of action which is most demanded of the Labor Inspectorate.

This type of action has the benefit of reaching a quick resolution for those conflicts which, if done in another way by raising this issue before the courts, entail a long delay in time.

For that reason, this is actually the most sought solution by workers when they wish to remain in the enterprise and prefer an intermediate solution before subjecting themselves to the issuing of a ruling that can only be either of acquittal or of conviction for the aggressor and which in itself does not contribute to the improvement of her real working conditions.

2.2.2. ENFORCEMENT OF INTERVENTION MEASURES

The function of control and supervision of the labor regulation, which corresponds to the Labor Inspectors, reveals special complexities.

Labor rights and occupational health and safety rights

This is as it can make reference to:

- Administrative offences of the basic rights of the work relation (the right to a dignified treatment or dignity at work, to privacy, to equal treatment and to non-discrimination)

- As well as to offences related with the safety and health at work (the absence of protective measures when facing a serious risk and the lack of investigation of the harms for the health).

This dichotomy is common with other legislations. The legal complexity of bullying comes with this double violation of the basic labor rights as well as the rights to occupational health and safety.

We are not before a case of bullying when there is a single offence to labor rights not susceptible of causing a health impairment (such as offence against dignity, privacy or non-discrimination).

Also, we are in the presence of a case of work-related stress, not a case of bullying when there is a single offence to a worker's occupational health. We consider bullying only when there is a double violation.

One as well as the other behavior admits being treated as an administrative offence against the classical labor rights of the protection of dignity and privacy of the worker and as an offence against the rights which arise out of the duty of care and the guarantee for the health of the workers, which also corresponds to the employers. It is deemed that in any of the cases, the commission of said offences is very serious and can entail fines of up to € 90,000.

As a general rule, when there is a concurrence of these two different types of offences, then the one which must prevail is that of imposing the sanction for the administrative offence which is deemed as most serious in the legislation.

Liability of the employer by action or omission

Another related problem is the liability of the employer by action, when he is personally the actor of the aggression, or by omission, when he violates the duty of protecting the labor and health and safety rights of the workers if he knows, or should know, that this behavior is happening.

At times, one can not compile sufficient and adequate evidence of the active behavior of harassment but in turn can show a behavior of responsibility due to omission due to being passive. This can be demonstrated through a lack of preventive and protection measures towards the affected workers.

The types of behaviors

The behavior of mobbing at the work place, from a legal perspective, can be classified according to two types of actions.

- The first would be that dealing with the abusive behavior of management when facing subordinates or the "abuse of authority".

- The second would be the degrading behavior or psychological abuse aimed towards a worker of the enterprise by one or several of its workers or even those external to it (clients or users), irrespective of their condition.

The abuse of authority is that which is exercised by the higher or intermediate management of an enterprise in the carrying out of their organizational or management functions of the enterprise when their behavior is derailed from the objectives and purposes proper of the organization and of the management of the service which is under their responsibility.

The abuse of authority is a deviation of power in which the management adopts decisions which go astray from the organizational or productive logic of the enterprise.

The second behavior, which is the continued degrading treatment against an individual, can be deemed as infringing against the right to the due consideration of dignity.

In it, there is not an abusive use of the management powers, but rather the representative of the enterprise or other of its workers carry on behaviors that due to their reiteration or relevance entail an infringement of the right to the due consideration of dignity in accordance with the guidelines and standards of social behavior.

3. PROTECTIVE MEASURES FOR THE AFFECTED WORKERS

3.1. WITHIN THE COMPANY

Lastly, another measure that must also be tackled within the enterprise is that dealing with the protection of those workers affected by stress and harassment behaviors.

These measures can be the temporary or permanent appointment to a new post that is compatible with the psycho-physical characteristics of these workers, the change in the working conditions (schedule, place, location, shift, etc.), the preparation and training for the return to work, the assignment of support personnel both for the development of the task as well as for the taking up of relations again or medical and psychological support.

The measure most commonly adopted, either in a temporary or permanent manner, is the change of the job post of the affected.

3.2. ACTIONS BY THE PUBLIC ADMINISTRATION

3.2.1. THE AWARDING OF BENEFITS BY THE PUBLIC ENTITIES OF THE SOCIAL SECURITY SYSTEM

The function of awarding of the benefits provided in the public system of Social Security corresponds to the entities that manage them.

The public entities of Social Security also intervene in harassment conflicts as they have the responsibility to award those social benefits that are derived from a work-related accident and not from a common illness, and also may decide upon the imposing of a surcharge to the employer who has not complied with the general norms of prevention of these behaviors.

The recognition of the ailments derived from mobbing as a work-related accident depends on providing sufficient evidence by the worker of the existence of a causal connection between his or her ailment or illness and his or her labor relation. It is not necessary to demonstrate that there has been harassing behavior but only a causal connection between the illness and work.

The greatest inconvenience for this recognition is that, in general, our legislation demands that causation with the worker must be unique and that there can not be other external causal factors to the labor relation; while, in a greater part of the cases of mobbing, that relation is a multi-cause event.

Our legislation, however, also provides for the possibility of considering as a work-related accident those cases in which the illnesses or the defects suffered previously by the worker and that become more serious as a consequence of the injury which constitutes the accident.

Therefore, the case where mobbing provokes, leads to or worsens a previous psychiatric pathology that was silent or asymptomatic could also be considered as a work-related accident.

Our System of Social Security also foresees the so-called "surcharge of benefits", which is an additional indemnity that the worker receives (ranging from 30 to 50 percent of her social benefits) when her work-related accident has been caused by a breaching behavior of the employer.

In this case, we would be dealing with the breach of the legal duty of the employer to "guarantee" the safety and health of the worker under his service. This duty is breached when the employer himself or his

representative have undertaken an active behavior of harassment, or when the employer had knowledge of the harassing behavior towards one of his employees by another worker of the enterprise, or when he should have had full knowledge of it and didn't take efficient preventive or protective measures, in accordance with the aforementioned terms of an administrative offence.

The procedure of a surcharge of benefits can be initiated by the Labor Inspectorate or by the affected worker's own initiative before the Office of the Social Security.

3.2.2. ENFORCEMENT OF PROTECTIVE MEASURES

Article 25.1 of our Act on Occupational Health and Safety establishes that “the employer shall guarantee particular1y the protection of workers who, because of their personal characteristics or known biological state, including those who have a recognized condition of physical, psychical or sensorial disability, are specially sensitive to the risks derived from work. To this end, the employer shall take into account those aspects on assessing the risks and, accordingly, shall take the necessary preventive and protective measures”.

“Workers shall not be in jobs in which, because of their personal characteristics, biological state or because of their duly recognized condition of physical, psychical or sensorial disability, may be put themselves, other workers or other persons relating to the enterprise in a dangerous position or, in general, where they find themselves openly in transitional states or situations which do not respond to the psychophysical requirements of the respective jobs”.

The Labor Inspectors base their protective actions of enforcement in this article as well as in the employer’s obligation of adapting the work to the individual (Article 15.1(d) of the Act) and to provide notice to the employers to move the worker to another post or to adapt the post to her personal situation.

The problems that may be raised by this practice are, on the one hand, the clash with the rights of other workers of the enterprise who also aim to be transferred to that post. In our country, some labor agreements tackle this question establishing a preference for the worker affected to change his or her post.

And, on the other, the recognition of these situations by the prevention services when these are due to psychological disorders as there only exists a recognized and admitted practice when dealing with physical disorders.

Usually the doctors should recognize the existence of a post-traumatic stress syndrome and the convenience for the worker to go away from the focal point of the illness.

The violation by the employer of this duty could entail in our law an administrative offence fined from € 1.500 to € 40.000.