Discrimination and Harassment in the Workplace:

A Study of the Employer's Powers and Obligations

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Summary

Discrimination, harassment and bullying are some of the fastest growing problems that an employer faces when dealing with the workplace environment. Sweden was one of the first countries in the EU to regulate these matters and establish a legislation on the subject. Despite early adaption, knowledge of the employer's powers and obligations in this regard is limited. Many cases of discrimination or harassment result in issues for the victim, issues that could have been avoided if proper procedure and investigation had been made by the employer.

In 2014 an employer was sentenced for having been negligent in these proceedings and not conducting a proper investigation into the harassment and bullying that occurred in the workplace and that caused an employee to commit suicide as a result. This sentence was historically unprecedented and as such sparked the debate on where the line is drawn when it comes to the employer's obligations. The purpose of this paper has been to present the reader with a clear picture of the employer's powers and obligations within the current Swedish law and define when an employer becomes liable in regards to the work environment.

Sammanfattning

Diskriminering, trakasserier och mobbning är några av de oftast förekommande problemen som en arbetsgivare kan mötas av när arbetsmiljön ska bearbetas. Sverige var en av de första länderna inom EU att anamma lagar och regler på ämnet. Trots den tidiga anpassningen är kunskap om arbetsgivarens makt och skyldigheter begränsade inom ämnet. Många fall av diskriminering eller trakasserier resulterar i problem för offret, problem som hade kunnat undvikas om arbetsgivaren hade följt reglerna gällande tillvägagångssätt och utredning av situationen.

Under 2014 dömdes en arbetsgivare för att har underlåtit att utföra en korrekt utredning av trakasserier och mobbning på arbetsplatsen, något som resulterade i att en arbetstagare begick självmord. Denna dom var historisk i den mening att något liknande aldrig förr skett och en debatt startade om var gränsen går för arbetsgivarens skyldigheter när det kommer till arbetsmiljön. Denna uppsats har till syfte att etablera en tydlig bas för vad som är arbetsgivarens makt och skyldigheter i gällande rätt samt definiera när en arbetsgivare blir straffrättsligt skyldig i förhållande till arbetsmiljön.

Preface

Writing this thesis has been an educational and satisfactory experience, which like all projects has had it ups and downs. We would like to address some of the people who have been very helpful to us in the process of creating this work. First and foremost, we would like to thank Vincenzo Pietrogiovanni who has been our supervisor throughout this process, providing us with ideas and support. Secondly, we would like to express our gratitude to Andreas Inghammar for taking the time and helping us with his knowledge and expertise of the Swedish legal framework. Last but not least, we would like to especially thank Maria Steinberg for providing us with early access to her recently published article on workplace bullying, giving us with helpful information and sources for this project.

Abbreviations

AD	Arbetsdomstolen (Labour court)
AFS	Arbetsmiljöverkets föreskrift (Ordinance of the Swedish Work Environment Authority)
AML	Arbetsmiljölagen (Work Environment Act)
AV	Arbetsmiljöverket (Swedish Work Environment Authority)
BrB	Brottsbalken (Penal Code)
CJEU	Court of Justice of the European Union
CEO	Verkställande direktör (Chief Executive Officer)
DL	Diskrimineringslagen (Discrimination Act)
DO	Diskrimineringsombudsmannen (Discrimination Ombudsman)
LAS	Lagen om anställningsskydd (Employment Protection Act)
JämO	Jämställdhetsombudsmannen (Equality Ombudsman)
Prop.	Proposition (Government bill)
SFS	Svensk författningssamling (Swedish Code of Statues)

1. Introduction

1.1 Background

In 2014 a social worker in the town of Krokom, Sweden, committed suicide. The following investigation would show that the reason for this was a harsh and ongoing harassment in the workplace. Despite several warnings from co-workers and friends the harassment was not taken seriously by the employer; the harassment was allowed to continue to the point where the victim took his life. The court found that the employer had been negligent in his responsibilities to keep the workplace environment safe from harm in both physical and mental capacity. An investigation had been made, but it was clearly lacklustre and as such the employer and a manager at the department were sentenced to probation and fined for manslaughter through negligence. The sentence was mild because neither of the employers had previous criminal records or a violent history[1].

This type of sentence was first of its kind in Sweden and created a discussion both in media and in the law community. It was clear that the employers in the Krokum-case had been negligent and did not act in a proper way in order to secure a safe and healthy work environment. But what exactly does an employer have to do in order to not be considered negligent? How far do the employer's powers reach in order to deal with discrimination and harassment in the workplace? It was evident that defining boundaries and powers in regards to harassment and discrimination with the employer's perspective in mind had become relevant.

1.2 Purpose and research question

The purpose of the Swedish Work Environment Act is to make sure that the employee is safe and can work in a healthy environment, both mentally and physically. As part of this it is the responsibility of the employer to make sure that such an environment exists and that no harm comes to the employees. With the background in the Work Environment Act and the sentence in the Krokom-case,

1 Case B 2863-11, Östersunds tingsrätt, 2014-12-19, forwarded to the court of appeal.

the purpose of this paper will be to define which powers and obligations the employer has in dealing with discrimination, harassment and bullying in the workplace. For example, what type of preventative actions has to be put in place and what type of actions has to be taken when discrimination or harassment has already occurred? The relevance of this is not only in the wake of the recent sentence but also for any prospective employer or corporation looking to establish themselves in Sweden as knowledge of these matters might not be widespread. As part of this, the following questions will be processed in this paper:

- What are the employer's powers and obligations in dealing with discrimination, harassment and bullying in the workplace?
- Which sanctions are applicable?
- When does the employer become liable?

1.3 Limitations

The objective of this paper is to research discrimination and harassment from the perspective of the employer and, as such, define what can, should and must be done in these situations. Taking this into consideration, the paper will not review discrimination or harassment in society in general nor in schools and the like. Some social aspects will affect the workplace and these will still be mentioned however the paper is in no way considered to handle these extensively. As this is a legal research paper it will refrain from political or social standpoints when analysing and presenting text.

Basing the paper on the employer's perspective means that the text will consider what is of importance for the employer and not necessarily for the employee. Subjects such as worker's rights are handled form the aspect of what the employer is forced to do and not what the employees can claim in addition to that. The paper is also limited to discrimination, harassment and bullying and will not cover physical issues of the work environment act except for the incidental case of the law covering both parts.

The paper is centred heavily on Swedish legislation and takes a local perspective in determining and analysing what the employer can, should and must do, as such the EU law has taken a smaller role. EU law is still of great importance to the

Swedish version of the Discrimination act and the basics of which will be covered but there will not be an in-depth analysis of the EU legislation.

1.4 Method and material

In order to interpret the material, this paper will apply the Legal Research Method to find a conclusion for the posed research questions. The Legal Research Method is used in order to ascertain what is considered to be the established law on the subject, de lege lata. The classical Swedish sources of law within the Legal Research Method contain legislative text, legislative history, precedents and doctrine in the named order of importance[2]. It also takes into account the principles of interpretation while studying case law and legal texts[3]. Some use of internet-based sources will also be necessary within the paper as many relevant journals primarily publish online. With a base in the Legal Research Method and relevant articles and doctrine, a description will be made of the established law as well as an analysis of it and a discussion on whether further legislation is necessary or not.

A strict Legal Research Method can have shortcomings in regards to subjects not only affected by legislative texts such as the subject at hand[4]. A certain amount of leeway has been considered in order to apply knowledge of the subject from articles and other non-legal sources to better define what discrimination and harassment is. Most of the sources are however still cemented in the hierarchy of the Legal Research Method and as such, it is still the most appropriate method to be used in this paper.

The legal text presented is relevant for establishing a baseline for what the established law is on the subject. This is then complimented with legal history and legal precedents in order to examine how the law is applied. Furthermore, ordinance from government agencies defines the non-legal boundaries that limit and empower the employer in different situations, and is considered to be important in work that is being done with discrimination and harassment. Finally, case law presents important precedents that have been set in the Swedish legal

2 Sandgren, 2011, p. 36.

3 Samuelsson & Melander, 2010, p. 195.

4 Sandgren, 2011, p. 36.

system. Even though many cases are solved privately and never see court, the precedents that are set are important in order to evaluate when and how to settle a legal dispute. There are almost no cases regarding the mental health in the workplace. However, since the work environment act covers both physical and mental health, an analogical interpretation can be made from the cases at hand[5].

1.5 Disposition

After the introduction in chapter one, chapter two establishes a series of definitions and the basic knowledge of discrimination, harassment and bullying that the reader will need in order to put the rest of the paper in context. Chapter three then establishes the powers and obligations that an employer might and will face during the process of handling a discriminatory situation in his or her workplace. Starting with what is considered obligatory for the employer in order not to be considered negligent, and then defining the powers with which the employer can act in order to discipline the harasser. Chapter four defines the sanctions that can be made relevant against an employer that has been found negligent but also the public sanctions that can be made against the harassing employee. The chapter also looks into when and how the employer becomes liable in a situation of discrimination or harassment and what the employer needs to ensure in order to not to be legally liable. Finally, chapter five contains an analysis of what has been brought up in the previous chapters and attempts to find a balance between the rights of the workers, and the powers and obligations of the employer. It also analyses the side effects of different sanctions and if, with the previous chapters in mind, there is a need for new legislation on the subject.

5 Prop. 1976/77:149 p. 2.

2. The different forms of discrimination

2.1 Introduction

The current Discrimination Act (DL), SFS 2008:567, was formed when several of the previously separated discrimination acts united into one common act. This was done mostly as a response to changes made by the EU but also to make the law itself more accessible for individuals in need of guidance. As part of this, some of the older precursors to the previous individual discrimination acts can still be made relevant today even though they no longer exist in their original form[6] [7]. The law defines a discriminatory act as when a physical person is disadvantaged in some way because of his or her association to a specific group[8]. This can be a loss in some way, for example the loss of a job opportunity or promotion, discomfort in the form of comments or action or similar situations. Of note is that the law does not cover corporations or legal entities, only physical individuals[9].

The specific groups that can be discriminated against, according to Swedish law, can be found in the 1st chapter 1st § DL and 1st chapter 5th § DL. These are as follows: gender, transgender identity, ethnicity, religious affiliation, handicap, sexual preference and age. These groups have been specified to help and support individuals in society that might require a stronger protection[10]. The application of the law is not limited to the workplace; it has a broad application that covers elements such as education, healthcare, social services, unemployment etc., as well[11]. The employer has the general responsibility to handle discriminatory behaviour in the workplace; this comes as a part of the law regarding the

6 Prop. 2007/08:95.

7 Göransson, Et al, 2013, p. 24.

8 Källström & Malmberg, 2013, p. 87.

9 Prop. 2007/08:95.

10 Göransson, Et al, 2013, p. 30.

11 Glavå, 2011, P. 332.

workplace environment[12]. The employer has to act on reports and suspicions of discrimination and failure to act can even lead to legal repercussions[13].

The Swedish Discrimination act defines five different types of discrimination[14]. These are as follows: Direct discrimination, indirect discrimination, harassment, sexual harassment and instructions to discriminate.

2.2 The effect of the European Union

2.2.1 EU-legislation

The framework for the cooperation among the Membership States in the European Union were based on treaties and agreements which determined the issues the EU should work with and how the Union should carry out the work. The treaties serve as the sources for the EU laws issued to the Member States through regulations and directives. The Treaty on the Functioning of the European Union, article 8 states the Union's intentions to eliminate inequalities between men and women and with the treaty as its foundation, regulations and directives can be created through in accordance to the treaties' authority[15].

Since January 1st 1995, Sweden has been a member of the European Union and, as a result, the country has become subject to the treaties and agreements previously agreed upon by the other Member States. The most relevant treaties to promote equality between men and women regardless of ethnicity or cultural heritage are the Treaty of Amsterdam, in which creating guarantees for fundamental human rights was one of the main focal points, and the Treaty of Lisbon, which gave the Charter of Fundamental Rights of the European Union the same status as an EU regulation[16] [17]. The EU laws influence the national laws of the member states through its regulations and directives. The regulations of the EU are directly enforceable as law in all Member States for individuals as well as corporations[18]. The regulations also have primacy over contradictory national law

12 3rd chapter 2nd § AML.

13 Zeteo Online, commentary to 1st chapter 4th § DL.

14 1st chapter 4th § DL.

15 Nyström, 2011, p.33.

16 Nyström, 2011, p. 52.

17 Nyström, 2011, p. 56.

18 Nyström, 2011, p. 39.

without the need of being implemented into the national legal framework, while the directives need to be implemented into the Member States' national laws within a prescribed window of time.

The Discrimination Act in Sweden is one of the acts that have been heavily affected by the issuances of EU law, and also by two legal cases that were decided in the Court of Justice of European Union: Abrahamsson & Anderson v Fogelqvist[19] and also The Midwife case, Jämställdhetsombudsmannen v Örebro läns landsting[20].

There are EU regulations and directives that are useful for an employer to be familiar with when dealing with discrimination and harassment at the workplace.
Article 151 of the Treaty of the Functioning of the European Union lays the groundwork for workers' fundamental social rights by following the objectives of The European Social Charter and Community Charter of the Fundamental Social Rights of Workers, which prioritizes combating of exclusion, dialogue between management and labour, as well as improved living and working conditions, among other things. Article 151 is in itself an objective provision that cannot on its own be used as a reference for any secondary community law[21].
The EU Charter on Fundamental Rights is a directly enforceable regulation that in Article 21 forbids all forms of discrimination in terms of ethnicity, nationality and background, while article 23 provides gender equality and does not prevent affirmative action between the sexes. Additional support for equality can be found in section 1 of Article 31 where the following is stated: *Every worker has the right to working conditions which respect his or her ... dignity.*

2.2.2 Swedish cases referred to the CJEU

There have been two cases from Sweden regarding unfairness in gender equality, with one concerning differences in salary[22] and the other concerning affirmative action for the benefit of women[23]. The latter revolved around the employment policies of Gothenburg University, which practiced affirmative action when considering employments. There was a lack of female employees at the workplace

19 C-407/98.

20 C-236/98.

21 Nyström, 2011, p. 36-37.

22 Jämställdhetsombudsmannen v Örebro läns landsting, C-236/98.

23 Abrahamsson & Anderson v Fogelqvist, C-407/98.

during the recruitment. Three women were considered for the employment as university professor to the disadvantage of Mr. Anderson, a man who had the best merits for the employment. The Court of Justice of the European Union stated in the primary ruling that such affirmative action was not lawful since it did not consider the individual's merits. The affirmative action would have been lawful if the applicants had equal or close to equal merits[24].

The other case between JämO and Örebro läns landsting was a question of equal payment between two midwives and a clinical technician who, according to Jämställdhetsombudsmannen, performed work of equal value during varying and sometimes inconvenient shifts, yet they did not receive the same salary. The Landsting (employer) argued against that claim (section 23), saying that the midwives enjoyed reduced working time (section 26) and had Article 119 of the Council Directive 75/117/EEC as their main source for justifying the imbalanced salaries. The Labour Court asked for a preliminary ruling by the CJEU to settle how the regulations and directives were to be interpreted in order to give a fair sentence in accordance with the EU statutes, particularly the weight of importance of inconvenient working hours when determining the equal value of the work contributed by the workers. After the investigation, the CJEU responded that the national court had to determine if the work could be deemed of equal value, if the agreement regulating collective employment unjustly affected a considerably higher amount of women than men (section 51), and if the nature of the work done justified the differences in payment (section 52). The inconvenient hours as well as the reduction in working time were not to be taken into account when comparing the salaries in accordance with the purposes in Article 119 of the Council Directive 75/117/EEC[25].

2.3 Swedish Legislation

2.3.1 Direct discrimination

Direct discrimination is based on three objective criteria: someone being disadvantaged, a comparable situation and causation[26]. All three of these need to be fulfilled in order for direct discrimination to have occurred according to the

24 Nyström, 2011, p. 189.

25 Case C-236/98.

26 Zeteo Online, commentary to 1st chapter 4th § DL.

law. The most basic example of direct discrimination is when an individual is disadvantaged with regards to one of the grounds for discrimination and as such is treated worse than another individual in a comparable situation. For example, not getting a certain job, not being welcome in a restaurant, not getting a certain education or not being called in to an interview[27]. The comparison can be done in regards to how an individual had been treated previously but it can also be a hypothetical individual, no actual individual is needed for the comparison to be done[28]. The hypothetical or real individual that is compared with is often of the separate ethnicity, age or sex in order to secure that it was that specific criteria of discrimination[29]. The comparison should however come naturally in order to secure a reasonable comparison and not skew it too much in either party's favour[30].

Causation comes from a link between the disadvantage and one of the discrimination grounds. The link does not have to be direct but it needs to be clear and present. For example, an individual cannot be considered to have discriminated another individual on grounds that are unknown to that individual, such as sexual preference or religious affiliation that can be harder to identify. It is not sufficient that one probably should have been aware of it, it has to be known specifically in order to be considered direct discrimination[31]. The evidence rule in 6th chapter 3rd § DL means that an individual who considers himself a victim of discrimination needs to provide evidence of circumstances which indicate that it might have occurred. The burden of proof is then transferred over to the accused who now has to prove that discrimination has not occurred by giving other reasons or explanations for the situation[32].

2.3.2 Indirect discrimination

Differing from direct discrimination, indirect discrimination is based on a rule or custom that seems neutral on the surface but, disadvantages certain groups of individuals. Indirect discrimination is also based on three criteria; the

27 Zeteo Online, commentary to 1st chapter 4th § DL.

28 Fransson & Stüber, 2010, p. 157.
29 Prop. 2007/08:95 s. 487.
30 Prop. 2007/08:95 s. 97.
31 Prop. 2005/06:38 s. 143.

32 Prop. 2007/08:95 s. 97.

disadvantage, the comparison and the weighing of interests. In opposition to direct discrimination there is no direct link between the action and the disadvantage for the individual, but rather a constant effect on all individuals from that group[33]. However, the link to a ground for discrimination does still have to be present. When an individual feels disadvantaged by a rule or a custom, a comparison needs to be made between the disadvantaged group and the advantaged group. Differing from direct discrimination, no hypothetical group of individuals can be used during the comparison. It needs to be a group that is advantaged and one that is disadvantaged by the rule in order for indirect discrimination to have occurred[34].

For the rule or custom to be considered valid, even though it might be considered discriminatory against certain groups of individuals, it has to have a valid purpose. This is when the weighing of interests becomes relevant. The rule also needs to be relevant and necessary in order to accomplish the goal set by its purpose, there might be other alternatives that can be made relevant in order to change or completely remove the discriminatory parts of the specific rule. This weighing of interests is done according to the proportionality principle that serves as a check to ensure that rules of this sort stay within a proportion of what it is trying to accomplish. The burden of proof is the same as in cases with direct discrimination[35]. A good example of this is the case AD 2005 nr 87, where a manufacturer had restricted the height of the individuals they hired to be at least 163 cm tall. This was found to be discriminatory against women since the majority of women were not tall enough[36].

2.3.3 Lack of accessibility

Taking effect on the first of January 2015, Sweden will implement a law regarding the accessibility of societal functions, businesses and public institutions for the disabled[37]. This comes as part of the ratification of the UN Convention on the Rights of Persons with Disabilities (UNCRPD) and the EU Convention on Human Rights (EUCHR). These Conventions as well as the new Swedish law define

33 Fransson and Stüber, 2010, p. 82.

34 Zeteo Online, commentary to 1st chapter 4th § DL.

35 Göransson, Et al., 2013, p. 28.

36 AD 2005 nr 87.

37 SFS 2014:958.

being able to access facilities of this kind, hospitals as an example, as a basic human right[38]. Lack of accessibility means that a disabled person is being disadvantaged in comparison to a non-disabled person since no effort has been made to reach equality in regards to access[39]. The effort in itself has to be reasonable and an assessment of the demands of the law, the economical and practical background has to be made in order to determine if the effort made is enough or even if any effort has to be made at all[40]. As an example smaller businesses might not have the means to facilitate such a change. Lack of accessibility has been considered an individual part of the Discrimination act in order for it not to have a connection to direct or indirect discrimination, this helps with prosecution and management of a case that might stem from the new law. As an example there is no need for a connection between the disability and the disadvantage in itself. As long as an individual with a disability could be disadvantaged by the fact that no effort to improve accessibility has been made, the law can take effect[41].

2.3.4 Harassment

Harassment can be both physical and verbal in its nature and aimed at degrading a targeted individual with regards to one of the seven discriminatory grounds[42]. However, the purpose of degrading someone does not have to be relevant for harassment to have occurred, the core is in the effect of the action, that a discriminatory effect has occurred and that the individual feels discriminated or harassed. Examples of this might be comments on behaviour or appearance, ridicule, degradation and degrading gestures[43]. Another requisite of harassment is that the behaviour has to be unwanted. This has to be conveyed to the individual or individuals that are engaging in the harassment itself. In other words it is up to the harassed individual to decide whether harassment has occurred or if the behaviour is acceptable[44].

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38 Prop. 2013/14:198 p. 51.

39 http://www.do.se/sv/Press/Pressmeddelanden-och-aktuellt/2014/Bristande-tillganglighet-blir-en-form-av-diskriminering/.

40 Prop. 2013/14:198 p. 58.

41 Prop. 2013/14:198 p. 59.

42 Prop. 2007/08:95 p. 492.

43 Zeteo Online, commentary to 1st chapter 4th § DL.

44 Fransson & Stüber, 2013, p. 209.

In a workplace environment harassment can take the form of administrative sanctions such as unexplained reassignments, ordered overtime, removal from certain tasks or workspaces and denied holiday leave[45]. In order to prevent these types of harassment and harassment between employees it is employer's responsibility to start an investigation into the matter and take the appropriate action as soon as the employer gets knowledge of the harassment[46]. A type of "emergency action plan" should be in place in order to specify how a harassment situation should be handled and a policy should also be active in the workplace, stating that harassment is forbidden and could lead to consequences for the harassing individuals, such as reassignment or even termination of employment[47].

2.3.5 Sexual harassment

The defining characteristics of sexual harassment are the same as with harassment itself, it however needs to have a sexual nature or sexual connection of some sort[48]. Unlike other harassment or discrimination, sexual harassment is not required to have a relation to one of the seven grounds for discrimination; it is instead the act itself or the behaviour that must have a sexual association[49]. Examples of sexual harassment can be physical in the form of unwanted touching or pats, verbal in the form of words, innuendos or hints. But it can also take the form of looks, lingering eyes or gestures that infringe on the individuals integrity in the workplace[50]. As is the case with other types of harassment, sexual harassment must also be unwanted and unsolicited[51].

The employer is responsible for the prevention and investigation of sexual harassment in the workplace. The same type of laws and rules used to combat harassment are also applied in these situations. Failure to comply, perform a

45 Prop. 1997/98:55 p. 33.

46 AD 2002 nr. 102.

47 Fransson & Stüber, 2010, p. 375.

48 Zeteo Online, commentary to 1st chapter 4th § DL.

49 Prop. 2007/08:95 p.492.

50 http://www.do.se/sv/Press/Pressmeddelanden-och-aktuellt/2010/Sexuella-trakasserier-i-arbetslivet/.

51 SOU 2004:55 p. 126.

proper investigation, or take action against sexual harassment can lead to damages in the form of discriminatory compensation[52].

2.3.6 Instructions to discriminate

Instructions to discriminate are orders given to discriminate individuals in any of the above described ways. Orders have to be given to an individual who is dependent on the person giving the order. For example, this is applicable in the relationship between employee and employer or teacher and pupil. This clause covers the individual employee and thus not the intended victim of the discrimination. It also protects the employee from retaliation from the employer in case the employee refuses to act on a given order to discriminate[53]. Further protection from retaliation for the employee can be found in the 2nd chapter 18th § DL and defines that retaliation in itself is not seen as discrimination, but should be considered a compliment to the laws against it[54]. It prevents retaliation when the employee has reported illegal activity of the employer, participated in an investigation and denied the employer's harassment, sexual or otherwise. The purpose of section is to ensure that employees can take a stand against discrimination without fear of retaliation[55].

2.3.7 Bullying

Bullying is the act of knowingly, with intent, breaking down the self-worth and confidence of a person in a systematic and recurring manner[56]. Studies show that workplace bullying and bullying in general lead to declines in mental health such as anxiety, stress and depression which in turn increase suicidal thoughts by six times the percentage of the non-bullied population[57]. It also results in a decline of one's physical health. Examples of physical distress due to the mental strains of workplace bullying include less tolerance for pain in the back and neck, headaches, and muscle contractions. The effects of these strains include increased absence from work due to reporting sickness and there have also been cases where victims have shown symptoms of post-traumatic stress disorder normally found in

52 Fransson & Stüber, 2010, p. 240.

53 1st chapter 4th § DL.

54 Zeteo Online, commentary to 1st chapter 4th § DL.

55 Prop. 2007/08:95 p. 83.

56 Einarsen, Et al., 1998, p. 17-20.

57 Einarsen, Et al., 1998, p. 89.

war veterans[58]. All of these problems subsequently turn into unnecessary expenses for the employer and the company which could have been avoided if bullying had been successfully prevented in the first place.

Examining bullying is an important point of this thesis as it represents the crossing of the border into legal limbo, the grey area in which the law is somewhat powerless to act due to the difficulty of dissecting and interpreting social situations that have gone awry, which could result in a victim's sense of self-worth being lowered due to workplace bullying. A person being slandered for his weight or body odour has a much lower chance of gaining redress than a person that has been slandered for his ethnicity or sexual orientation as it is protected by law[59].

Potential explanations for this is could be that society considers obesity to be an individual's fault or that hate crimes related to the verbal and physical abuse of homosexuals and immigrants are more prevalent than those related to obese persons.

The different requisites of bullying can be digested into the victim's and the perpetrator's objective and subjective perception of the unfolding events[60]. The objective perception refers to the general impression made by an observing public watching events of bullying unfold before them, and the subjective perception is how the victim experiences the situation. Experts have also examined the nature of bullying itself, and as a result it has been divided into two groups: direct and indirect[61]. Examples of direct bullying include open, more confronting types of taunting, whereas indirect bullying is more of an inconspicuous kind, such as ostracising and social isolation of the victim. The latter part is by its mere nature far more difficult to prove and also poses a great challenge for the employer, who believes that the psychosocial balance is in perfect order at the workplace[62].

58 Einarsen, Et al., 1998, p. 86.

59 1st chapter 1st § DL.

60 Einarsen,, Et al., 1998, p. 55.

61 Einarsen, Et al., 1998, p. 67.

62 Bang, 1999, p. 67.

2.3.8 Jargon

What is generally considered acceptable behaviour in the workplace will decide what can and cannot be regarded as bullying by the supposed perpetrators. The subjective view of what can and cannot be considered bullying accompanied with tolerance and culture in the workplace also plays a significant role in nurturing bullying. In a workplace where harsh but playful banter exists, the intent among the co-workers is not to be evil, but rather to help relieve tension and lighten up the formalities that may cause a group to feel stiff and overly formal. It is a part of everyday life, especially in male-dominated industries where crass humour is a recurring theme[63].

Even the most tolerant idealists will eventually run into a person who possesses well-below average social competence and becomes a burden to his colleagues whenever that person is outside of his or her office or cubicle. An all too blatant breaking of the ice or an inability to grasp a pivotal social situation will understandably create friction and emotional distance between the recently hired employer or employee and the other colleagues who perceive themselves to be victims of social burden by merely being in that person's vicinity[64].

2.3.9 Victimization

In one of the most recent legal cases of workplace bullying in Sweden, a social secretary was subjected to victimization by his employers to the extent that he decided to commit suicide. This was due to a depression resulting from his employer's negligence and unwillingness to conduct a proper investigation of his reports of being victimized at his workplace[65]. Nearly all of the social secretary's colleagues testified to clearly noticing a difference in his behaviour as the victimization escalated, reporting that he was not feeling well. Death is considered the most serious form of workplace injury, which leaves no doubt that a grave violation has occurred. Suicide as a result of working conditions is no exception, as the district court of Östersund concluded. Other results of bullying include everything from less tolerance to stress, reduced sense of self-worth, lack of sleep, change in behaviour and more. Some victims of bullying even show signs of post-

63 Wig, 2014, p. 31.

64 Einarsen, Et al., 1998, p. 97.

65 Case B 2863-11, Östersunds tingsrätt, 2014-12-19, forwarded to the court of appeal.

traumatic stress disorder that are normally found in war veterans[66]. The AFS 1993:17 ordinance, which has inspired countries such as The Netherlands, France and Belgium to create their own, albeit more authoritative legislation[67]. Has not prevented an increase in reported bullying according to the Swedish Work Environment Authority[68].

The most detailed regulation designed to counter workplace bullying can be found in The Statute Book of the National Occupational Safety and Health Ordinance AFS 1993:17 against victimization at work where the description of the term victimization can be found in section 1 which states the following:

Section 1:
These Provisions apply to all activities in which employees can be subjected to victimization. By victimization is meant 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.

Further comments and description can be found in the Paragraph titled *Guidance on Section 1* which gives some detailed examples of what constitutes victimization. Everything from *S*landering or maligning an employee or his/her family to Offensive penal actions is brought up in the ordinance. However, many experts agree that the ordinance is still too narrow in its efforts to create the necessary precedents for the ordinance to successfully work as a form of protection for victimized employees and/or employers[69]. However, that is the real nature of bullying in terms of being a concept of social behaviour that can be regarded by some as acceptable jargon, and by others as reprehensible behaviour.

Some of the examples such as deliberately sabotaging for the victim's performance at work or withholding work-related documents necessary to perform at work may be considered more or less easy to prove if the incident at

66 Einarsen & Hoel, 2010, p. 4.

67 Einarsen & Hoel, 2010, p. 4.

68 Einarsen & Hoel, 2010, p. 9.

69 Einarsen & Hoel, 2010, p. 20.

hand has been properly documented by an unbiased source[70]. However, these types of incidents are uncommon at a workplace in relation to ostracising and hyper-critical employers[71].

The same situations apply to evidence in the form of recordings of deliberate insults, hypercritical remarks or obviously insulting ostracising or blatant disregard for the employee directed towards the affected individual[72]. If the affected individual has made it clear to the perpetrator that the behaviour was unwelcome, while also providing the proper evidence, it should be relatively easy for the plaintiff to demand a sanction against the perpetrator.

Some of the examples of behaviour such as inspiring degradation might be especially difficult to prove, that the friendly banter in fact does contain malicious intent, even if the conversation was to be recorded[73]. What sounds like a friendly inside-joke (For example, Great party last night, huh, Mr. Private Dancer?) can become an emotionally detrimental phrase to the addressee if it is delivered with an inappropriate facial expression and/or accompanied with an extended period of uncomfortable eye contact and/or a wink.

Another problem that surfaces upon examining the ordinance is Section five, which explicitly states that counter-measures should be taken without delay.[74] The measures mentioned are more of a gentle and mild-mannered sort such as private meetings and conversations rather than legal sanctions in terms of reassignment or fines that are more common in legal cases of discrimination.

70 AFS 1993:17 p. 1-2.

71 Einarsen, Et al., 1998, p. 68.

72 AFS 1993:17 p. 3-4.

73 AFS 1993:17 p. 5.

74 AFS 1993:17 p. 9.

3. Employer's powers and obligations

3.1 Obligations regarding discrimination

The employer has the right to lead and distribute the work among the employees as well as freely employ or dismiss individuals within legal limits in the company[75]. This could involve organizational or managerial decisions like the education of personnel, vacation time, office space, and special assignments[76]. With the power to lead a company also come responsibilities. One of these is the responsibility to ensure that the workplace has a proper and safe environment. The 3rd chapter 2nd § AML describes that it is up to the employer to make sure that this is the case not only in regards to the physical environment but also the mental environment. As such, the employer should have a stable policy against discrimination and harassment in the workplace and an action plan in the case of the occurrence of harassment or bullying[77]. The employer's responsibility to handle discrimination and harassment in the workplace is far-reaching by law and failure to do so results in neglect on the employer's part which can lead to damages in the form of discriminatory compensation being charged against the employer in accordance with 5th chapter 1st § DL[78] [79].

As soon as the employer is informed that harassment and discrimination have taken place, and in some cases even if the employer only suspects it, the employer is mandated to start an investigation into the case and take appropriate action in order to prevent it from happening again[80]. Appropriate action differs from case to case but determining factors are the scope of the harassment, the size of the business and the composition of the employees. It could involve warnings, reassignment or temporary suspension but could also lead to dismissal or

75 Glavå, 2011, p. 62.

76 AD 1987 nr. 35.

77 Fransson &Stüber, 2010, p. 375.

78 Glavå, 2011, p. 715.

79 Fransson & Stüber, 2010, p. 240.

80 Fransson & Stüber, 2010, p. 240.

termination in more severe cases[81]. AFS 1993:17 contains guidelines for the employer on how to appropriately proceed in these sorts of cases and even though they are not legally binding they do offer help with regards to making the process as quick and painless as possible for all involved parties[82].

3.1.1 When harassment is discovered

It is not possible to convict corporations within the frames of the Swedish legal system; only the individuals who have been found responsible of the crime or violation at hand can be successfully convicted[83]. There is always someone who can be found responsible whether the events have taken place at a private or public workplace.

The act that obligates the employer to initiate counter measures against any form of discrimination or harassment can be found in the Discrimination act[84]. Regardless of the nature of the harassment, the employer is obligated to initiate an investigation once he or she is notified of an instance of harassment or bullying, whether it is a verbal or written report from the victim or a concerned colleague.

3.1.2 Investigation

The responsibility to start an investigation into whether or not harassment or a discriminatory act has occurred starts as soon as the employer acquires knowledge of the alleged act. This responsibility is limited to the workplace and all other activities that are work related such as a company business trip or a company party[85]. Even if the act itself occurs outside of the work environment the employer is mandated to research if it will affect the relationship of the involved individuals in the workplace[86]. This responsibility is not only limited to the employer, but also to his or her representatives in the workplace such as a foreman or a supervisor and covers not only employees but also hired personnel and interns[87]. It

81 Fransson & Stüber, 2010, p. 243.

82 Prop. 2007/08:95 p. 297.

83 Bäckman, Et al. ,2013, p. 17.

84 2nd chapter 3rd § DL.

85 Fransson & Stüber, 2010, p. 241.

86 AD 2005 nr. 22.

87 3rd chapter 12th § AML.

is however limited to one of the seven grounds for discrimination in order to take effect. The scope of the responsibility in itself varies greatly from case to case and can differ from a questioning by a supervisor to a full investigation by the employer.

The initial investigation on the employer's part according to AFS 1993:17 should be to privately speak to the involved employees confidentially and any individual that might have witnessed the alleged act in order to create a picture of what might have happened. Often it can boil down to a situation where word stands against word, and in these cases it is very important that the employer can remain impartial and objective in the investigation since it is not sufficient to conclude it in that situation. The employer must not decide who is right or wrong, just create an understanding of the situation. During the investigation the employer should be in contact with the affected parties to ensure that they are informed with the state of the investigation and its proceedings. But if the issue cannot be resolved it should be handed over to the authorities. It is then the employer's responsibility to fully comply with the investigation being done by the police and the employer's own investigation can often be used as a general starting point in a situation like this[88]. It is important that the investigation made by the employer is documented thoroughly. Even though this is not actually stated in the law itself it can become hard for the employer to prove that a proper investigation has been made without documentation[89].

If an investigation has properly and thoroughly concluded that there were no cases of harassment or discrimination in the alleged situation the employer is not forced to take any further actions. If, however, the investigation was rushed or a conclusion was made based on bad research, the employer will still be liable for prosecution. If the investigation was properly conducted, the employer is free from liability. If it is deemed obvious that no harassment has occurred, the employer is considered to have fulfilled his or her responsibility and is free from liability[90]. If the investigation has been conducted properly the employer is free from liability, even if he or she came to the wrong conclusion or misjudged the

88 Prop. 2007/08:95 p. 297.

89 Iseskog, 2013, p. 71.

90 Fransson & Stüber, 2010, p. 239.

situation. It is however of great importance that the investigation is conducted quickly to improve the work environment and minimize the suffering that a situation like this might bring[91]. In AD 2005 nr 22, it took the employer six weeks to start an investigation from being informed of potential harassment taking place, a period that proved too long.

Once an investigation has been concluded it becomes the employer's responsibility to act in accordance with the findings of the investigation. If it has been concluded that harassment or discrimination has occurred, then actions must be taken. How the employer chooses to proceed differs from case to case but the baseline is that it should be in the interest of securing that the situation won't occur again. Examples of what action might be taken are talks, warnings, reassignment or suspension. In more severe cases dismissal or termination could even be considered[92]. The different types of actions will be described further below. Usually the type of discrimination, the size of the workplace and the composition of the employees are key factors in determining how to proceed. Of note however is that the point of the action should not be to punish the harassing individual but rather to find a complete stop to the harassments[93].

3.1.3 The consequences of employer's neglect

If the employer remains passive in spite of being aware of the case, the affected person can take legal actions against not only the bully, but also the employer himself. In cases of discrimination or harassment, the victim can notify the Discrimination Ombudsman for legal assistance. The Discrimination Ombudsman has the power to impose liquidated damages upon the employer in order to extract information, or as a penalty for not following the laws regarding active measures against harassments in the workplace stated in the 4th chapter 4-5th § DL. Furthermore, the Discrimination Ombudsman has the right, but is not obligated, to institute a claim and speak on behalf of the plaintiff[94].

91 Prop. 2007/08:95 p. 297.

92 Fransson & Stüber, 2010, p. 243.

93 Göransson & Karlsson, 2006, p. 62.

94 Glavå, 2011, p. 370.

If the employer neglects his duty to investigate a case of bullying and that results in the affected employee quitting, it is legally considered a provoked termination of employment by the employer, which nullifies the act[95].

In the Krokom-case, the supervisors responsible for the workplace safety were found guilty of neglecting their duties to ensure a safe workplace environment from a mental health standpoint[96]. The supervisors knowingly ignored explicit signals of psychological distress exhibited by the victim and concerns from his colleagues. Instead of taking action to help their distressed employee, the employers attempted to dismiss him from work effective immediately without notice or salary, which pushed him over the edge and caused him to commit suicide[97]. As a result, the employers were sentenced to causing another's death in accordance with the Penal Code chapter 3, sections 3-7. They were obligated to pay a day-fine of 230 Swedish kronor and 500 kronor respectively during a 100-day period. Since they had no previous legal punishments, they were also sentenced to a conditional sentence.
The crimes in 3rd chapter 7-9th § BrB, which include causing another's death, contain strict responsibility for the person who is responsible for the safety of the workplace, regardless of their level of awareness. There are no extenuating or aggravating circumstances that influence the severity of the legal punishment in relation to whether or not the person who was responsible for the safety at the workplace acted in good or bad faith.

The Employee's suicide was labelled as an occupational injury according to the then applicable Occupational Injury Insurance Act and his wife was compensated in accordance with the Social Insurance Code chapter 39 § 3[98].

3.1.4 Rehabilitation

It is the responsibility of the employer that a functioning therapy and rehabilitation program is established in the workplace for employees that need

95 Glavå, 2011, p. 725.

96 Case B 2863-11, Östersunds tingsrätt, 2014-12-19, forwarded to the court of appeal.

97 18th § LAS.

98 Socialförsäkringsbalken (2010:110).

help or resources in order to return to work after having been harassed or discriminated. If this cannot be supplied within the company, an external consultant is required with knowledge of rehabilitation in a work environment[99]. As part of the process reassignment might become necessary. Even changes in workload or position within the company is acceptable in order to fully rehabilitate an employee[100].

3.1.5 Equality plan

An equality plan is set in place to ensure that companies continually work on issues regarding gender inequality in the workplace. This involves issues with the composition of the workforce, the assignment of the work and the wages of the workforce. Other examples defined in the law is making sure employees can combine work and becoming a parent, prevent harassment in the workplace, prevent discrimination in the recruitment process, support an equal amount of men and women in the workplace by educating where needed and hire the less represented sex during recruitment[101].

The equality plan is worked out in three-year intervals and is only necessary if a company has 25 or more employees[102]. The process of creating the plan itself should start with a review of the previous plan, making an inventory of the present status of the company, deciding what goals are to be set for the next review and what measures need to be taken in order to reach those goals. Lastly, a timeline should be set in order to assure that the goals will be reached during the intended period[103].

99 3rd chapter 2nd §c AML.

1003rd chapter 2nd § AML.

101Prop. 1990/91:113 p. 106.

1023rd chapter 13th § DL.

103Prop. 1990/91:113 p. 103-104.

3.2 Employer's authority

3.2.1 Introduction

As part of the right to lead the work at the workplace, the employer has a series of powers at their disposal in order to handle different situations that might occur. This can range from smaller disciplinary actions like talks or pay cuts, to more severe sanctions like termination of employment.

3.2.2 Conversation with the employee

The initial action during the employer's investigation into whether or not harassment or discrimination has occurred in the workplace is often to have a confidential conversation with the potential victim. Having a similar conversation with the potential harasser is the natural next step and many times this can lead to a clear picture of what has occurred[104]. In the situation of a minor case, a serious talk and order for the harassment to end can resolve the issue without further troubles from the harasser.

3.2.3 Disciplinary action

A disciplinary action is a way for the employer to discipline the employee without having to take legal measures. An employer can effectively take disciplinary actions against an employee when these are defined in the collective agreement[105]. It can be considered a form of ”lighter” punishment and can often consist of talks, suspensions, pay cuts and warnings, both verbal and written. These types of warnings can be used by the employer to indicate what type of behaviour is acceptable and not in the workplace and can also be seen as a warning for the employee, whose further behaviour of this kind can lead to dismissal[106]. There are other types of actions that can be taken by the employer that are not approved by the union, such as retraction of benefits, giving almost no work assignments etc.: these types of actions border on punishments for the employee and as such are to be avoided.

104AFS 1993:17 p. 9.

105Glavå, 2011, p. 734.

106Prop. 1973:129 p. 125.

3.2.4 Reassignment

One part of the employer's legal right to lead and distribute the work in a corporation is being able to reassign an employee within the boundaries of the employment. This can become necessary in the case of an employee who has severe issues with cooperating or with employees who harass or discriminate others. This type of reassignment is not meant to dismiss the employee or to make that employee feel uncomfortable, only to make sure that the workplace is fully functional and free of harassment and discrimination[107]. The employer is also forced to research the reassigning of an employee that has neglected his or her duties in the workplace if the neglect cannot objectively be blamed on the employee. As is the case with harassment or discrimination, often neglect or problems with cooperation can be traced to specific individuals and in that case no actual research is necessary, instead dismissal might become relevant[108].

3.2.5 Dismissal

An employer may dismiss an employee, in accordance with the Swedish Employee Protection Act, only if there is a just cause[109]. This just cause can be reached through personal reasons or redundancy. In the case of harassment or discrimination, personal reasons are what the employer can claim in order to try to dismiss the individual. Just cause in this situation differs from case to case and the needs and wants of both parties have to be weighed in. Generally, the employee has to have failed or neglected to fulfil parts of their contract with the employer in order to make dismissal a relevant factor[110].

The just cause is judged by how appropriate it would be to keep the employee after the incident has occurred. The incident can also be so severe that it in itself is sufficient to prove that the employee is not appropriate for the job. Examples of this could be stealing from the employer or committing crimes in the role as an employee. Not complying with the rules of the workplace in regards to worker safety is not automatically considered just cause for dismissal, however repeated

107 Glavå, 2011, p. 311.

108 Iseskog, 2013, p. 183.

109 7th § LAS.

110 Sigeman, 2013, p. 204.

violations may change that[111]. An employee can also be subjected to just cause by misbehaving in the workplace by for example harassment, sexual harassment, insulting or bullying and non-cooperative behaviour. Judgement in these cases should be aimed at how appropriate it is to continue individual's employment and not on the incident itself. This means that often a single incident is not enough to create a just cause unless the incident was so severe that the employee can clearly be considered unfit for employment. In the process, thought has to be given to the employee's past such as time of employment, previous behaviour and if current behaviour appears to be temporary[112].

When dismissing an employee for personal reasons, the just cause for the dismissal cannot have occurred within two months time or two months before the notice of dismissal is delivered[113]. This time period may however be extended if the employer is conducting an investigation into the situation that might lead to dismissal[114]. It can also be extended if the employer and employee both agree on an extension or in the case of extraordinary reasons that might occur[115].

During a dismissal, the employee has a period of notice calculated by their time at the company and still receive benefits related to the employment[116]. It is common for employees to be relieved of duty during this time in order to be able to find a new job and not spread negativity in the workplace.

3.2.6 Termination of employment

Termination is a stronger form of dismissal that requires the employee to leave the workplace instantly without any period of notice or retained benefits. This can only be used in severe cases of neglect, criminal activity or intentionally damaging the employer and it has to be considered reasonable for the employee to leave the workplace immediately[117]. Examples might be acts of violence, stealing

111 Prop. 1976/77:149 p. 259.

112 Prop. 1973:129 p. 124.

113 7th § LAS.

114 Sigeman, 2013, p. 206.

115 Lunning & Toijer, 2010, p. 407.

116 11Th § LAS.

117 Källström & Malmberg, 2013, p. 156.

from the employer or running a competing business. Failure or trouble to cooperate in the workplace is however not considered to be a just cause for termination of an employee[118]. When judging whether termination is applicable or not, factors such as the employees position within the company and the situation caused by the individual become relevant[119]. Employees in higher positions are considered to involve a larger amount of trust and as such they are subject to a higher standard than lower level employees for example.

In the Labour court case AD 2011 nr 84, a supervisor had sexually harassed three women in the workplace and, after an investigation by the employer, had his employment terminated. Generally, harassment of this kind is not just cause for termination in itself but rather reassignment or dismissal. The court however agreed that the termination was just, because the supervisor had lost all trust or confidence of the employer and found the individual unfit as a supervisor.

3.2.7 Buyout

An alternative route to dismissal or termination is to work out a contract where the employee resigns of free will and is released from duty in exchange for monetary compensation. This type of contract generally can lead to a substantial amount for both parties and has been described as up to 2,5 years' worth of salary. However, the contract mostly settles at around one year's worth of salary for the employee[120]. Often, this is more than the amount offered during a period of notice but many employers deem it worth the price in order to avoid the complications of court, negotiations, drawn out investigations and a negative atmosphere in the workplace. This can also be used after a court case has ruled a dismissal or termination to be unjust. The employer can then pay damages to the employee in accordance with 39 § LAS, ranging from a few months' salary up to 48 months' depending on the employee's time at the company.

118 Lunning & Toijer, 2010, p. 360.

119 Källström & Malmberg, 2013, p. 156.

120 Svenskt Näringsliv, p. 19.

4. Public sanctions against the employer and employee

4.1 Public sanctions against the employer

There are many different approaches to subject one to discrimination or bullying, and also different settings or environments where it can take place, be it during an interview for an application for work or in the cafeteria. Fortunately, there are also many different ways for the employer or any other designated authority to counter harassment and discrimination with the help of a set of laws designed to protect the people's integrity. However, the legal framework for dealing with cases of victimization and bullying is considerably weaker to enforce in practice.

The Work Environment Act is an often-referenced law that regulates the legal relationship between the employer and employee, and if the employer violates the act, the Swedish Work Environment Authority, which is a regulatory authority, can issue injunctions, prohibitions, and also impose fines upon the employer. However, the employer and mainly the safety representative can appeal against the ruling and take the case to an administrative court in accordance to chapter 9, § 3 of the Work Environment Act[121].

It is also important to keep in mind that the Work Environment Authority itself claims they do not get involved in individual cases, and the overall impression is that the authority rarely issues demands and requires proof of the employer's documented attempts to ensure safety and prevent potential harm to the employees[122].

121 Steinberg, 2014, p. 5.

122 Steinberg, 2014, p. 19.

4.1.1 Employer's liability

In Swedish law there are two criteria that need to be met in order for the employer to become legally liable for any discrimination or harassment in the workplace[123]. The first of these is the "damage" criteria. Someone needs to have been hurt either by death, bodily injury, sickness, mentally or any of the above. The second criterion is that this sort of injury must have occurred as an effect of the employer's neglect or failure to act either on purpose or by carelessness. This means that there has to be causation between the employer's neglect and the effect that it has on the employee. Without this type of causation, the employer will not be liable[124]. Judging whether an employer has been negligent or not is based on the individual case itself and has to be objectively reasonable. However, the employer has a wide range of demands to fill in order to completely be free of liability[125].

The responsibility for the environment in the workplace and thus the liability if something goes wrong is placed on the highest ranking executive in the company[126]. Normally, this will be the employer or CEO in the case of a stock company. The reasoning behind this is that these are often the individuals with the biggest influence on how the business evolves and thus has the most power over the environment in the workplace. When a company has several different units divided in different areas, the responsibility the falls to the person in charge of the designated unit[127]. The responsibility for the workplace environment can also be delegated to lower level managers or heads of departments. However, this has to be done clearly and preferably in written form in order to fully pass on the responsibility[128]. The person being delegated also has to have the power and the monetary funds to change the environment in the workplace if necessary[129]. The lower this sort of delegation is made in the chain of command, the stricter the rules for the delegation becomes and in the case of an unclear or vague delegation

123 Chapter 8 AML.

124 Zeteo online, commentary to 3rd chapter 10th § BrB.

125 Zeteo online, commentary to 3rd chapter 10th § BrB.

126 Prop. 1976/77:149 p. 373.

127 Case RH 1989:5.

128 Prop. 1976/77:149 p. 373.

129 NJA 1993 p. 245.

the responsibility and liability automatically moves up a level to the next possible manager or executive officer[130].

4.1.2 Prohibition

If the workplace is deemed too unsafe for workers to fulfil their work, the Swedish Work Environment authority can issue a prohibition to the employer, which forbids all work-related activities to protect the workers from harm[131].

An example of the Swedish Work Environment Authority issuing a prohibition and also a fine can be seen in the Authorities' archives, case IRÖ 2014/351661.

4.1.3 Penalty fine

A fine is almost always issued in tandem with a prohibition to emphasize the preventative effect against future similar cases. If the employer still does not take the necessary measures to ensure the safety of the workplace, additional fines can be issued against the corporation until the problem is fixed[132].

4.1.4 Compensation

A general compensation has no connection to any actual economic losses, but rather works as a sanction for wronging and violating the integrity of the plaintiff. This type of compensation is not to be confused with discriminatory compensation. The general compensation becomes applicable whenever the employer has failed to fulfil any of his or her obligations stated in the employment Protection Act[133]. The use of the general compensation is most common during cases of unjust termination of employment in regards to an absence of just cause for terminating the employment in accordance to § 7 of The Employment Protection Act. If the employer is found guilty of unjustly terminating the plaintiff's employment, the employer is obligated by law to pay a general compensation to the former employee. However, the employer is not obligated to

130 NJA 1991 p. 247.

131 Arbetsmiljöverket, 2012, p. 12.

132 Bäckman, Et al., 2013, p. 16.

133 LAS 38§.

re-hire the plaintiff since the working relationship is now considered dissolved from a legal standpoint[134].

If the employer refuses to comply with the legal sentence that nullifies the termination of employment, he or she will have to pay normative damages to the plaintiff in accordance with LAS § 39. The normative damage is determined by the total amount of time the employee has worked for the employer, ranging from at least six months' worth of pay for working less than or up to six months, to 32 months' worth of pay for working ten years or more for the employer[135].

4.1.5 Discriminatory compensation

Discriminatory compensation becomes applicable when one has violated the Discrimination Act[136]. Discriminatory compensation is paid directly to the victim as a sanction for violating the integrity of the victim and as such connected to any economic damages.

If a person is found guilty of discrimination, he or she is subject to the sanctions established in the 5th chapter 1st § DL, which states that the culprit must compensate the victim for the violation of the integrity that the culprit's infringement has caused. When determining the value of the compensation it is important to reinforce the idea that the law should have a strong preventative effect for potential similar cases in the future. When the government issued prop. 2007/08:95 390, it declared: "Discrimination should be costly[137]" in the headline.

One example of a case where the employer had to pay a compensation of this kind is AD 2013:71, where a woman who was not a member of a union still received help from the DO and successfully filed for sexual harassment against her employer.

134 LAS 39§.

135 LAS 11§.

136 SFS 2008:567.

137 Glavå, 2011, p. 371.

4.1.6 Incarceration

Incarceration may be a valid option if the employer has caused major damages in regards to person and/or property. However, an important note is that there are no records of a Swedish employer being sentenced to jail for neglecting the duties that were part of his or her responsibilities[138].

4.2 Public sanctions against the employee

4.2.1 Introduction

If an employee commits crimes of a more serious nature, such as acts of violence or sexual assault for example, the employer's sanctions will likely not be the only form of punishment applicable. In addition to the employment being terminated, public sanctions will likely be set in motion with the risk of the sentenced worker possibly being sentenced to jail by a court of law.

4.2.2 Incarceration

In more severe cases of criminal activity, from contractual crimes such as embezzling and revealing company secrets, to crimes of civil sort, incarceration will in all probability become the most likely sanction. The closer the criminal activity relates to the workplace, the more likely just cause for termination of employment is eligible. In cases of harassment, discrimination and bullying as well as violence in the workplace, just cause for dismissal is especially prevalent[139].

138 Bäckman, Et al, 2013, p. 18.

139 Glavå, 2014, p. 505

5. Analysis

5.1 Introduction

When it comes to dealing with discrimination, harassment and bullying in the workplace, the employer has a rather large array of utilities to deploy. Some, such as talks and disciplinary actions, are however more effective than others and require less time and effort from the employer's side. While others, like dismissal or termination, forces the employer to negotiate with unions and support their decision with facts about what the employee has done in order to deserve it. Sanctions against the employer are often based on negligence or the failure to act of the employer and as such it is imperative to be both proactive and reactive in order to avoid legal ramifications. With this in mind, the employer has a lot of responsibility for making sure that the workplace environment both physically and mentally remains safe and that no discrimination or harassment occurs. Failure to act even on suspicions of harassment or to have a ready action plan in case of discrimination can lead to sanctions being made applicable against the employer. Making sure that the workplace environment maintains a high standard of safety should be a high priority for most employers.

5.2 The balance between worker's rights and employer's powers

When discrimination or harassment is discovered in the workplace, it is the employer’s responsibility to take action in order to stop it and prevent further harassment from happening. Taking action does however not always come easily, as there are many different interests to take into account in a situation like that. For example, not only the harasser, the victim and the employer are affected. Most of the time, the union becomes involved and needs to side with and assist the victim as well as the harasser in the process, since both are under the protection of the union. The employer’s powers then becomes subject to negotiation and even though the employer has the last word in the deciding process, the union still has a large influence on the decision since most employers want to keep a friendly connection to the union itself. The dilemma created here is that the victim of the

discrimination or harassment can end up less prioritized and as such not feel redeemed by the actions that the employer ends up taking. Mostly, this dilemma is based on the unions themselves. However, it is important for the employer to recognize and act on both the harasser and the victim, since they are what will affect the workplace going forward in form of moral and the psychological workplace environment.

The Employment Protection Act in Sweden also contributes to a harder environment for the employer to navigate in. An action like a dismissal, for example, requires time and effort in the form of information and talks with the affected employee, as well as negotiation with the union that represents the employee. This has led to the fact that employers, in increasing numbers, have started to buy out the workers instead. It often results in a slightly higher cost for the employer but time is saved and the moral in the workplace is kept at a high level since the situation only gets to have a minimal effect. This leads to only a small amount of cases reaching the actual courts since both parties often value free time and efficiency more than what might be correct action according to the law.

5.3 Is there a need for additional legislation?

The current set of laws in Sweden regarding discrimination and harassment in the workplace gives a good amount of coverage regarding what is and is not considered harassment, and what sanctions might become relevant in a case of discrimination or harassment. The employer’s ability to act in these situations is however not very well defined in the legal texts and is mostly described as an obligation not to be negligent. Most of the responsibilities and the order in which to act for the employer are defined in non-legislative texts such as ordinances from government bodies. These ordinances then become what the employer has to follow in order to not be considered negligent in a legal sense. This constitutes a sort of guideline for both the employer and the court itself.

There are arguments to be made both for and against additional laws. The positive side to additional laws, which define more clearly what the employer's powers and obligations are, is that they are easier to locate and help smaller employers find

and navigate a situation that might otherwise be rather complicated. It also reduces the time and energy that employers have to dedicate to negotiation and information with regards to the unions, as well as letting employers have a more stable ground to stand on in cases of discrimination or harassment in the workplace. An example of the negative aspects of a higher rate of legislation is that the workplace might become stale and the ability for the employer to act freely in the form of buy outs might become diminished. Legal texts in general are also slow moving and take time in order to change and adapt to a specific situation. The labour market is often in need of a solution that is able to keep up with an ever-changing climate, and as such legislation might do more harm than good.

As of right now, additional legislation does appear to be unnecessary since even though the rules and regulations regarding how and when the employer is to act might be scattered and harder to find, the ability to freely decide on whether to act in a certain way or resort to a buy out is more important. Even though this might lead to a larger amount of negotiations with the union, the parties of the labour market generally have always favoured less legislation.

5.4 Additional tools for the employer.

One of the problems mentioned in dealing with conflicts in a workplace was the inadvertent choosing of sides for the employer and workers' union in relation to the “victim” and “suspect”. To combat the risk of biased opinions and choosing sides, Steinberg recommends using impartial mediators or investigators who have no connection to the conflict or the corporation itself, which will produce the most balanced outcome for all parties involved and assist the employer with knowledge and know-how, which was the biggest absence during the Krokom-case[140].

140 Steinberg, 2014, p. 3 & 21.

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