

Sexual Harassment In Turkish Labour Law

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I. General Overview

Nowadays all around the developed countries sexual harassment within the concept of discrimination became a very popular subject to discuss and search for remedies.

Regarding the sexual harassment, Turkish people are not as courageous as the people of western to bring the sexual harassment or sexual crimes or events at the attention of the public opinion. Nevertheless in 2000's the concept of sexual harassment became popular among academicians, and with the impact of the studies legislator stipulate mentioned provisions below about the sexual harassment in Turkish legislation.

According to Turkish Constitution in general, everyone has the right to live, to protect her/his moral and physical being and to improve it¹. The new Turkish Penal Code which is in force since June

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1 Turkish Constitution art 17/1 (07.11.1982) Rights and Duties of the Individual.
I. Personal Inviolability, Material and Spiritual Entity of the Individual (As amended on May 22, 2004)

ARTICLE 17. *Everyone has the right to life and the right to protect and develop his material and spiritual entity.*

The physical integrity of the individual shall not be violated except under medical necessity and in cases prescribed by law; and shall not be subjected to scientific or medical experiments without his or her consent.

No one shall be subjected to torture or ill-treatment; no one shall be subjected to penalties or treatment incompatible with human dignity.

1, 2005² sexual crimes take place in the section of “Crimes against humans” with the heading “crimes against sexual immunities”.

In the repealed Penal Code, the sexual crimes took place with “crimes against ³ general manners and against family life. In the new Penal Code new trends took place and contemporary provisions adopted. Also there are general provisions in the Obligations Act and in the Labour Act about sexual harassment regarding the ILO Agreement number 111 about Discrimination in Respect of Employment and Occupation,⁴ and European Union Directives, European Council’s documents and agreements on Human Rights reflected as well. Especially recommendation number 12 and 19 of the Committees of the Convention on Elimination of all Forms of Discrimination Against Women (CEDAW), and also Nairobi Declaration dated 1985⁵ Development of Women and Strategies for Future and Beijing Declaration dated 1995, the 4 th. World Conference are the international documents which influenced Turkish Legislation and approved by Turkish Government.⁶

Cases such as the act of killing in self-defence, occurrences of death as a result of the use of a weapon permitted by law as a necessary measure during apprehension, the execution of warrants of arrest, the prevention of the escape of lawfully arrested or convicted persons, the quelling of riot or insurrection, or carrying out the orders of authorized bodies during martial law or state of emergency, are outside of the scope of the provision of paragraph 1.

2 Turkish Penal Code, (26.09.2004)

3 Old Turkish Penal Code (765) (01.03.1926)

4 According to the ILO Convention, 111, although there is not any brief provision about the sexual harassment in article 1 of the convention puts the general rule about discrimination “any distinction, exclusion or preference made on the basis of race, color, sex religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

5 Nairobi Declaration, Report of the World Conference to Review and Appraise the Achievements of the UN Decade for Women: Equality, Development and Peace July 1985.

6 K.BAKIRCI, İşyerinde Cinsel taciz, İstanbul 2000, 203-218.; It should mention the international events to understand the destination and the aim of women movement regarding the sexual harassment. Prior to the 4th World Conference on Women that took place in 1995; the United Nations had previously organized three conferences on women and women’s issues. The first conference took place in Mexico City in 1975, and as a result of the conference the UN General Assembly had declared between 1975-1985 years the Decade for Women. The second conference that took place in 1980 in Copenhagen, it was decided to focus on women’s education, participation in the workforce and health during the latter half of the Decade for Women. The third conference took place in Nairobi in 1985, where the Decade for Women evaluated and the Nairobi Forward Looking Strategies for the Year 2000 were accepted unanimously for the advancement of women. Thus, a national, regional and international framework thereby established, to enable the empowerment of women and ensure the enjoyment of their human rights. In 1990 no conference was

Turkey as a member of International Labour Organization and member of United Nations and Member of European Council ratifies most of the key conventions, declarations, international documents. That is why the legal rights are based on contemporary and international rules. About sexual harassment and crime where most of the victims are women and children, the issue is considered within the concept of discrimination of gender⁷. The remedies focus on discrimination which is the right perspective to begin with. In Turkey many NGO's are dealing with the question in all circumstances to avoid the unequal practice, ensure the human rights of women and female children and protect them against violation. Trying to train the male gender, to promote the values of the societies by eliminating all forms of discrimination.⁸

II. Definition Of Sexual Harassment

Sexual Harassment can be defined as either violation of traditional individual /personal rights or sex discrimination regarding to the gender. There are various definitions of the sexual harassment. Particularly in Turkish doctrine, sexual harassment is considered the discrimination of gender.

Labour Act. No. 4857 expresses the principle of equality and equal treatment between the sexes, elimination of inequality for women arising from biological or physiological differences in working life and granting equal opportunities to men and women in the working life.

organized; According to the evaluation of UN Division for the Advancement of Women stated that there is a high sensitivity to the issue to work on because it is necessary to take the interest of women on their rights and the awareness should remove from the society. Especially in Turkey some how after the decade for women could be say there is visible relaxation. But with the implementation of the Nairobi Strategies, the Fourth World Conference on Women organized with the aim of both re-vitalizing the interest towards women's issues, as well as to take up issues that had made their way according to the international agenda such as violence against women, including sexual abuse, sexual harassment.

7 BAKIRCI, 22 vd.; M.ONARAN YÜKSEL, Karşılaştırmalı Hukuk Işığında Türk İş Hukukunda Kadın-Erkek Eşitliği, İstanbul 2000, 273-276; E. ÖZDEMİR, İşyerinde Cinsel Taciz, Çalışma ve Toplum, 2006/4, S.11, 87

8 Turkey is a country where great importance are given to the international documents, such as Declaration on Elimination of Violence Against Women which accepted in the General Assembly of UN dated 1993, 48/104 is a model of practice. Nevertheless although at meetings delegates sign and promise to obey the accepted rules during the conferences, it is not that easy to apply the rules even if legislation has the provisions relating to the issue. This happens because of government policy and lack of information, and politician's attitude.

According to article no.5 of the Labour Act; “no discrimination based on language, race, sex, political opinion, philosophical belief, religion and similar reason is permissible in the employment relationship” (5/1).

Provisions of the article deal with various aspects in line with international regulations pertaining to sex discrimination. These include; the banning of discrimination on grounds of gender and pregnancy in the “*conclusion, establishment (execution of) conditions and termination of the employment contract*”. Another important aspect of the regulations is that direct discrimination as well as the indirect discrimination has been banned.

The American Equal Employment Opportunities Commission defined sexual harassment as being of two main kinds: first unwelcome sexual advances and other verbal or physical conduct of a sexual nature where submission or rejection of the conduct would affect the recipient’s employment; and secondly, conduct having either the purpose or effect of creating an intimidating, hostile or offensive working environment⁹.

Although there is not a brief definition in the Turkish labour legislation¹⁰, it is possible to define or interpret it from the provisions about sexual harassment as; “unwanted conduct having a sexual connotation, expressed in physical, verbal or non verbal form, with the purpose or effect of violating the dignity of a worker and of creating an intimidating, hostile, degrading, humiliating or offensive environment”.

As a very plain definition, sexual harassment is violation of individual or personal rights protected by laws or in other ways.

In Turkish legal system, it is provided that sexual harassment is a prohibited behavior and according to the provisions of the Constitution, Penal Code, Code of Obligations, and Civil Code, and Labour Act, individuals are protected by laws against harassment.

III. Provisions In Turkish Labour Code

Before the new Labour Act, to forward the sexual harassment as the direct subject of the labour disputes was not an easy task. In some of the cases although the real reason of the termination of the employment contract either by employee or by employer, was

9 G. PITT, Employment Law, 6. Edition, London 2007, 51

10 For the different definitions of the context; BAKIRCI, 101 -102; ÖZDEMİR, 86

sexual harassment, employee's compensation claims were depending on unfair practice or dismissal.

Labour Act which came into force on the year 2003 has new provisions about sexual harassment, comparing with the previous Act. In Turkish legislation system harassment in labour relations are introduced with quite contemporary provisions.

Sexual harassment may occur everywhere and by anybody, but sexual harassment in workplace should be considered differently rather than outside the workplace. Harassment by employers or supervisors is the abuse of power and violation of trust.

In the event of sexual harassment the general rules, such as the provisions of the Penal Code are applicable but if the occurrence is within the employment relation than the provisions of Labour Act also apply to protect the victim in all sense. This protection could be for the employer or the employee as well. Both sides of the employment relationship have obligations and duties to each other within the context of employment contract and the Obligations Act.

1. Right of Employee in case of Sexual Harassment According to the Labour Act.

In Turkish Labour Act there are several ways and reasons to terminate the employment contract. One of them is to terminate the contract for just cause without giving a notice. It is called immediate termination

The Article 24 of Labour Act which is about the right of the employee to terminate the employment contract immediately for just cause, has the heading, (Art 24/II) "immoral, dishonourable or malicious conduct or other similar behaviours".

In the paragraph of Art 24/II-d it is stipulated as:-

In cases where the employee sexually harassed by another employee or by third persons in the establishment, if adequate measures were not taken although the employer was informed of such conduct.

employee has the right to terminate the contract immediately, which means no notice period should be given to the employer.

The employee may also demand a severance pay and compensation for material and moral damages (Art.26/II).

According to the Obligations Act, Art 344, either employee or employer has right to terminate the employment contract for

just cause and any time without giving a notice. Any circumstance which is against the ethic values or against the good faith is considered just cause. Therefore according to the Obligations Act sexual harassment can be regarded a just cause as well.

The legal liability of the employer, according to the Constitution¹¹, Obligations Act (Art. 332)¹² and Labour Act,¹³ is to respect and protect employee's right of personality or dignity and guarantee safe working conditions to protect the employee's health and life. The employer must behave with good faith and protect employees from unlawful conduct in the workplace. If the employer fails to take proper measures to stop any act of sexual harassment he would be liable according to the provisions stipulated in Turkish legislation. If the employer knew or ought to know the unfair behavior of the other worker's or third party and failed to eliminate it and does not take proper measures should be liable for the consequences. Employer has duties and obligations against his/her employees, if he neglects to behave in good faith and sexually harass the employee, then within the context of legal arrangements he has criminal and contractual liability.

The employer is directly responsible for all transactions and obligations performed by his representatives' acts related to the employees. Therefore acts of sexual harassment in the workplace by supervisors, other employees or third persons would be in the liability of the employer regardless of whether the employer knew or should have known of their occurrence.

2. Rights of Employer in Case of Sexual Harassment Happens in the Workplace.

This should explain the duties, liabilities and the obligations of the employer to the employee according to the Turkish legislation. As it is mentioned above, employer's has a vast liability. The duties and the liabilities are stated in the Obligations Act and in the some provisions of Labour Act.

In general: employer must protect the employee's dignity and personality and must guarantee safe working conditions in all perspectives. The employer must protect employee's health and life by

11 Turkish Constitution art, 10,48,49,50.

12 Code of Obligations, Art. 332, stipulates that, employer should supply appropriate working conditions and to take all measurements available to protect employee.

13 Labour Act Art 24/II-d

taking all kinds of measures and must obey the imperative rules carefully.

Turkish Labour Act stipulates the right of the employer to terminate the employment contract of the employee for just cause. Sexual harassment is one of the just causes to terminate the employment contract. If in the establishment an employee performs sexual harassment against other-employees or towards the employer this would be the just cause.

Article 25 of the Labour Act with the heading of:- "*Employer's Right of Immediate Termination for Justified Grounds*", stipulates the employer's right to terminate the employment contract immediately for just cause.

The heading of Art 25/II is: "*Immoral, dishonourable or malicious conduct or similar behaviours*". This Article entitles the employer to terminate the employment contract without giving notice period due to the just cause.

According to 25/II-c: "*If the employee sexually harasses another employee of the employer*" generates a just cause to terminate the contract.

In most of the disputes either the dismissed victims (employee) could be the subject of the sexual harassment, or could be the subject because of being the refused one of the sexual harassment, either offended by the employer, representative or supervisor or other-employees or dismissed employee would be the reporter of the sexual harassment to the management or the employee being or involved in sexual harassment with his/her acts and having inappropriate actions or dismiss because of being witness or help to occur the sexual harassment in the work place. These or similar events may suffice to dismiss the employee. Some may not be considered a just cause, but it is necessary to distinguish all events in their own circumstances to find the right decision.

IV. Burden Of Proof And Remedies

In Article 5 there is a special rule concerning the burden of proof for discrimination cases. While the provisions of article 20 are reserved (on termination), the burden of proof with regard to the employer's violation rests on the employee (5/VII). However if the employee shows strong likelihood of such a violation, the burden of proof that the alleged violation has not materialized shall rest on the employer (5/VIII).

Paragraph no 6 of article no 5 which sets forth the equal treatment principle also stipulates sanctions to be applied in case of violation. Accordingly; “if the employer violates the provisions above in the execution or termination of the employment relationship, the employee can demand compensation up to four month’s wages plus other claims of which he has been deprived”. Beside the legal sanctions, article 99 also regulates criminal sanctions, and article 5 imposes an administrative fine on the employer or employer’s representatives for violating principles and obligations as set forth in the article.