

Criteria for Determining Whether Workplace Harassment Has Occurred

I. Introduction

The Workplace Anti-Bullying Act was enacted in January 2019 and came into effect in July of the same year. Three incidents contributed to enactment of this law. The first case is known as the “nut rage” incident involving an executive of Korean Air in 2014. Vice President Cho 00, a daughter of Korean Air’s owners, exploded in rage that her Macadamia nuts were served in a bag, not on a plate, verbally abusing the flight attendant and the chief flight attendant and forcing both to kneel and apologize to her. Ms. Cho then ordered the plane—heading for a runway at New York’s John F. Kennedy Airport to fly to Seoul—to return to the boarding gate where she ordered the chief flight attendant to get out. Then the plane departed.¹ In 2019, Korean Air was ordered by the court to pay 70 million won to former chief flight attendant Park 00, for the personnel disadvantages received as a result of the incident.² The second case involves a nurse who killed herself, leaving a suicide note that said, “Workplace harassment makes it difficult to work.” In March 2019, the Labor Welfare Corporation’s Disease Judgment Committee recognized the incident as an industrial accident caused by workplace harassment. In the third case, at the end of 2018, a video surfaced of Yang 00, chairman of WeDisk, a start-up IT company, calling in an ex-employee and brutally assaulting in the office. Yang is currently in prison for this and illegal business activities.³

Until recently, investigation and treatment of workplace harassment has been entirely up to companies.⁴ There were only two related rules when the Workplace Anti-Bullying Act was enacted. First, rules of employment had to include procedures for dealing with workplace harassment and for remedy. Second, employers were to be punished if they disadvantage those who report harassment in the workplace. The procedures for handling reports of bullying were entirely up to the employer, which did little to actually resolve the problem. Accordingly, in April 2021, the following five employer obligations were added in amendments to the relevant laws. Employers are now obligated to: 1) Prohibit bullying in the workplace, 2) Conduct objective investigations of reported bullying incidents in the workplace, 3) Take appropriate actions to protect alleged victims, 4) Establish and carry out disciplinary action in response to bullying in the workplace, and 5) Comply with confidentiality requirements related to harassment investigations in the workplace, with fines levied for negligence.

When determining whether bullying has occurred in the workplace, the criteria are somewhat complex given the blur between the employer’s discretionary personnel rights and the employee’s personal rights. I will take a look at the related details and criteria for judgement herein.

II. Factors in Determining Whether Workplace Harassment Has Occurred

¹ Moon, Kangboon, “Is this workplace harassment?” 2020. Gadian, p. 34.

² Seoul High Court ruling on Nov. 5, 2019.

³ Moon, Kangboon, “Is this workplace harassment?” 2020. Gadian, pp. 35-36.

⁴ Shin, Kwunchul, “Legal Concepts and Criteria for Determining the Occurrence of Bullying in the Workplace,” Labor Law (69), Korean Labor Law Association, Mar. 2019, p. 228.

1. Concept of workplace harassment

The Labor Standards Act (Article 76-2) prohibits harassment in the workplace, which is defined as “an act of inflicting physical or mental pain on other workers or worsening the working environment through an abuse of the superior position of the employer or relationships in the workplace.” There are four components to workplace harassment: (i) Defined target: employer or employee, (ii) Abuse of position: Using position or work relationship against the target, (iii) Repeated actions towards the target, or assigning of tasks, unnecessary for performance of contracted work: Actions beyond the appropriate scope of work, (iv) Infringements of human rights and/or degradation of the working environment: Any action that causes physical or mental pain or worsens the working environment. All four factors above must be met for an incident to qualify as workplace harassment.

2. Explanation of the factors in harassment⁵

(1) Defined target: Employer or employee

The Labor Standards Act (Article 2 (2)), defines an employer as someone in charge of managing the business, or a person who acts on behalf of the employer with respect to matters related to workers. Someone in charge of managing the business does not have to be the business owner but is in charge of general business management, and refers to someone who represents a business externally after comprehensive delegation from the business owner for all or part of the business management. Anyone who acts on matters related to workers for the business owner is delegated authority from the business owner or the person in charge of business management and is involved in making personnel decisions, such as hiring and dismissal of those within their own realm of responsibility, and directing and supervising the workers on the job, and working conditions. It also refers to someone who can decide and execute matters related to working conditions. Relatives of the employer are included in the scope of “employer” with revision of the Labor Standards Act in 2021 (Article 116). “Employer” includes those with an advantage over other workers, such as via position or work relationship.

In the worker dispatch relationship, according to the Act on the Protection, etc., of Dispatched Workers, a bullying agent in the workplace can also include an employer who directly supervises and directs the work of a dispatched worker.

(2) Abuse of position: Using position or work relationship, etc., against the target

Harassment in the workplace mainly occurs in places where there is a strong organizational culture or authoritarian hierarchy. It occurs mainly in the form of actions by people with superior social or economic status using their power and superior status against those less socially privileged.⁶

A superior relationship refers to one in which it is likely to be difficult for those in lower positions to resist any bullying behavior. An abuse of position refers to an offender using their superiority against someone in a command-and-control relationship, or even if it is not a direct command-order relationship, it is to use the higher

⁵ Ministry of Employment and Labor, “Manual for Judgment and Prevention of Harassment in the Workplace,” 2019, pp. 24-27.

⁶ Lee, Soo-Yeon, “The Concept of Workplace Harassment and Judgment Criteria”, Ewha Gender Law 10(2), Ewha Womans University Gender Law Research Institute, Aug. 2018, p. 119.

position or rank system. Workplace harassment does not occur unless it involves the abuse of superiority in position or relationship.

(3) Repeated actions towards the target, or assigning of tasks, unnecessary for performance of contracted work: Actions beyond the appropriate scope of work

Actions that are inappropriate and recognized as exceeding the scope of work can be classified into the following seven categories.

1) Violence and intimidation: Actions that involve direct physical force or the threat of physical force, such as directly or indirectly inflicting violence on an object.

2) Verbal behavior, such as violent, abusive language or gossip: If it is determined that gossip is spread to a third party, such as in an open place, to damage the victim's reputation, it is beyond the appropriate scope for work. In particular, continuous and repetitive verbal abuse or abusive language can seriously harm the victim's personal rights and cause mental pain, so engaging in it constitutes an act beyond the appropriate scope for work.

3) Orders to perform tasks related to assistance with non-work affairs: These are orders that exceed the appropriate scope of work and beyond what is considered normally acceptable in human relations. Examples include continuous and repetitive instructions to run personal errands related to daily life.

4) Bullying and exclusion: Intentional disregard and exclusion in the process of performing work are acts that are beyond the appropriate scope of work and beyond the social norm. Examples include intentionally not providing important information related to work or excluding someone entitled to participation in the decision-making process without justifiable reason, forcing someone to move or leave the department without good reason, discriminating against someone in training, promotion, rewards, or routine benefits without good reason, etc.

5) Repetitive instructions for work unrelated to the employment contract: If instructions are given to an employee repeatedly to do work that is unrelated to that specified at the time the labor contract was signed, and if a justifiable reason is not recognized, it amounts to an act beyond the appropriate scope for work. Examples including menial tasks only when an employee was hired for specific other tasks, or giving the employee little work without justifiable reason.

6) Assigning an excessive amount of work: If the action is judged to be inappropriate, such as not allowing even the minimum amount of time physically necessary for the task, without unavoidable reasons, it is beyond the appropriate scope of work.

7) Interfering with smooth business performance: Actions that interfere with smooth business performance, such as not providing essential equipment (computers, telephones, etc.) necessary for business, or blocking access to the Internet or company intranet, are beyond social norms and inappropriate for business.

(4) Infringements of human rights and/or degradation of the working environment

This refers to actions of an employer or a worker that inflict physical or mental pain on another worker through harassment in the workplace or worsening the working environment. It can be said that the working environment has been degraded if an employer intentionally moves certain workers to work in front of the washroom, embarrassing them or creating an environment in which workers cannot perform their duties properly. Intention

of the offender is not a prerequisite to determining that actions directly cause physical or mental pain or worsen the working environment.

III. Criteria for Determining Workplace Harassment

1. Conflict between the employer's right to order work and the employee's personal rights

In determining whether or not bullying has occurred in the workplace, there are cases in which the employer's right to order work and the employee's personal rights are in conflict. In labor disputes, an employer's exercise of personnel rights in a way that violates the employee's personal rights is often viewed as illegal under the Civil Act.

The employer's right to command work is one of the personnel rights, which is an authority unique to the employer and necessary to maintain and establish corporate order. The courts have ruled that employers have considerable discretion in determining the extent of personnel management necessary for business, as they are responsible for personnel.⁷ In contrast, the Constitutional Court argues that the right to work includes not only the "right to a place to work" but also "the right to a reasonable environment in which to work," with the latter a basic right to protect against infringement on human dignity. It has ruled that this right includes the right to demand a healthy working environment, fair compensation for work, and guarantee of reasonable working conditions.⁸

Here, in determining the appropriate scope of work, it is necessary to determine whether the employer's right to order the work or the worker's personal rights should take precedence. In this case, it is necessary to determine whether or not it is illegal to determine certain work as falling within the appropriate scope for a job through an "evaluation of conflicting fundamental rights."⁹ Of the requirements for determining whether an action constitutes workplace harassment, whether or not it departs from the appropriate scope of work needs to be determined so that conflicts over the basic rights of the employer and employee can be harmoniously resolved.¹⁰ This is determined in the light of sound common sense and practices of the social community, and whether there is rationality or substantiality in common social concepts, etc., which shall be judged individually and in relationship to each other.¹¹ However, since the problem of workplace harassment arises on the premise of an imbalance of power and infringes on the personal rights of workers, an evaluation of conflicting fundamental rights is required from the perspective of the victim, and should focus more on the protection of personal rights.¹²

2. Criteria for determining whether workplace harassment has occurred

⁷ Supreme Court ruling on July 22, 2003: 2002do7225, and many similar rulings.

⁸ Constitutional Court decision on Nov. 28, 2002: 2001hunba50; Constitution Court decision on Aug. 30, 2007: 2004hunma670.

⁹ Naver Korean dictionary: An evaluation to compare and judge the legal interests of conflicting fundamental rights.

¹⁰ Lee, Sang-Gon, "A Study on Improvement of the Law on Bullying in the Workplace," PhD Thesis, [Graduate School of Ajou University](#), Aug 2020, pp. 163-164.

¹¹ Supreme Court ruling on Feb. 10, 1998: 95da39533: Whether the employer is liable for compensation for harassment in the workplace.

¹² Lee, Sang-Gon, "A Study on Improvement of the Law on Bullying in the Workplace," PhD Thesis, [Graduate School of Ajou University](#), Aug. 2020, p. 165.

The factors and criteria suggested by the court can be used to determine whether workplace harassment has occurred. This shall be decided by considering and evaluating the following collectively: “① the relationship between the offender and victim, ② the motive and intention of the act, ③ the timing, place, and situation, ④ the details of the victim's explicit or presumed reaction, ⑤ the content and extent of the act, and ⑥ the repetition or continuity of the act.”¹³ Simply put, it is possible for an employer to infringe on human and personal rights or worsen the employment environment with position (power relations), related work (work relations), or other actions unwanted by the receiving party that are outside the scope of the relevant work (harassment, abusive language, etc.).¹⁴

The employer is the exerciser of authority, while the employee has voluntarily consented to perform subordinate duties. Therefore, it is not easy to distinguish if harassment has occurred or if the employee is simply unhappy with work duties.¹⁵ Nevertheless, if the above criteria are individually reviewed and judged comprehensively, it is believed that clarity will emerge in each individual case as to whether or not workplace harassment has occurred.

IV. Conclusion

The Workplace Anti-Bullying Act, introduced in July 2019, is a major influence on reducing the existing patriarchal authoritarian culture in the workplace and guaranteeing the personal rights of workers. Nevertheless, if resolving workplace harassment is left up to companies, there will be no effective results any time an employer deals with bullying half-heartedly. Amendment to the Workplace Anti-Bullying Act in April 2021 includes provisions to punish employers for engaging in or failing to take the appropriate action for workplace harassment, and obligate employers to conduct an objective investigation if they become aware of workplace harassment. This amendment is particularly helpful to workers. In the future, when harassment occurs in the workplace, the Ministry of Employment and Labor will thoroughly review the incident and actively intervene and punish any employers who fail to take appropriate action, which will work to drastically reduce recurrence. Actions to prevent workplace harassment and provide practical remedies when it does happen can be expected to occur at the same time.

¹³ Supreme Court ruling on Feb. 10, 1998: 95da39533.

¹⁴ Kim, Elim, “Gender Equality and Law,” Korea National Open University Press and Culture Center, 2013, p. 242.

¹⁵ Shin, Kwonchul, “Legal Concepts and Criteria for Determining the Occurrence of Bullying in the Workplace,” p. 243.